

Review Essay

UNCOVERING *COVERING*

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COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS by
Kenji Yoshino (Random House, New York 2006)

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I. INTRODUCTION

I can clearly recall the first time I read Kenji Yoshino’s article entitled *Covering* in the *Yale Law Journal*.¹ It was as if a light bulb was turning on in my head as Yoshino unveiled his theory of covering as a new form of discrimination. His theory helped me understand the deep-seated but hard-to-articulate feelings of dissatisfaction that lingered long after I had come out of the closet about my sexual orientation. The conventional wisdom on coming out is that it is supposed to be a brand new day in one’s life or perhaps even the beginning of a whole new life.² It didn’t feel that way for me:

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¹ Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

² As Yoshino says, “Nothing has convinced me of the power of words as much as the experience of coming out the first few times—one ends the sentence a different person.” KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 13 (2006) [hereinafter *COVERING*].

Even though everyone in my life finally knew that I was homosexual, some of my closest relationships remained stunted and repressed, instead of becoming liberated.³ My frustration surfaced regularly in conversations with my parents because I did not feel free to share with them the gay-related aspects of my life. Thus, they did not hear how I fell in love for the first time, how my partner was planning to move to Los Angeles to be with me, or how ultimately the relationship ended in sorrow. These events elicited in me bone-deep emotions. In the words of Justice Kennedy in his opinion in *Lawrence v. Texas*, they concerned “the most intimate and personal choices a person may make in a lifetime.”⁴ As important as these life events were to me, I feared that sharing them with my parents would remind them of my orientation, make them uncomfortable, and at best draw an ambivalent response, rather than the compassion and empathy I sorely needed. As a result, my reflexive and unexamined instinct was to self-censor, to strip my conversations of anything “gay,” which denied my family the opportunity to hurt me—or to prove me wrong.

Yoshino’s scholarship identifies and explains this phenomenon as “covering.” Drawing on influential work by Erving Goffman on social stigma,⁵ Yoshino defines “covering” as “ton[ing] down a disfavored identity to fit into the mainstream.”⁶ Yoshino contrasts covering with two better understood forms of discrimination that gays⁷ have faced: conversion and passing. The book explores conversion, including the ugly history of various medical and psychological efforts to transform gays into straights.⁸ It also documents policies that stopped short of trying to annihilate gay people but pressured them to pass as straight.⁹ In this regard, Yoshino emphasizes the military’s “Don’t ask, don’t tell” policy.¹⁰ Yoshino argues that even as social “demands”¹¹ to convert or to pass have eroded in recent years, society still expects gay people to “cover” their identities. The upshot of covering

³ Yoshino also quickly learned that the celebration of coming out was “premature” as “even individuals who knew [he] was gay imposed a fresh set of demands for straight conformity.” *Id.* at 16–17.

⁴ 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

⁵ See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 102–04 (1963). As Yoshino acknowledges, Goffman used the term “covering.” See COVERING, *supra* note 2, at 18. Yoshino, however, gives the term greater prominence and elaborates on its contemporary meaning.

⁶ COVERING, *supra* note 2, at ix.

⁷ In describing COVERING, I follow Yoshino’s use of “gay” to mean “LGBT,” or lesbian, gay, bisexual and transgendered. I nonetheless find the term “gay” troubling in that it reflects the tendency to assume that (typically white) gay men can represent or stand in for other queer people. For that reason, I also use the more inclusive term “queer” to refer to all non-heterosexuals. When I use the term “gay” and do not cite to Yoshino, I refer solely to gay men.

⁸ See COVERING, *supra* note 2, at 31–49.

⁹ See *id.* at 50–73.

¹⁰ See *id.* at 69–70.

¹¹ I put the word “demand” in quotes throughout this Essay because I am critical of Yoshino’s use of it, as I explain in Part III, *infra*.

is a social instruction that “we know you’re gay, but please don’t flaunt it.” In illustrating the meaning of covering, Yoshino cites debates between gays who identify as similar to heterosexuals versus those who stress the ways in which their identities diverge from heterosexuality.¹² He argues that society distinguishes between the “good” and “bad” gays based on the extent to which they have assimilated to heterosexist norms.¹³ He catalogues four ways in which people may cover: (1) appearance, including gender performance or being a so-called straight-acting gay;¹⁴ (2) affiliation, avoiding gay social settings like Fire Island in New York, and gay culture more generally;¹⁵ (3) activism, eschewing the stereotype of the “gay activist”;¹⁶ and (4) association, including avoiding public displays of affection.¹⁷

Yoshino argues that these methods of covering are not practiced only by gays. Although society has never expected all people of color to become or pass as white or all women to become or pass as men, it does expect these groups, like gays, to cover their identities.¹⁸ Yoshino asserts examples of several famous people from various groups who have covered, including Margaret Thatcher, who took voice lessons to lower the pitch of her voice, and Rosie O’Donnell, who, even after she came out of the closet, did not make public appearances with her female partner.¹⁹ Several actors cover their racial or religious identities in order to secure mainstream acceptance: Martin Sheen was born Ramón Estévez; Kirk Douglas’s given name is Issur Danielovitch Demsky.²⁰ These people do not deny their identities, some of which are obvious (no one is likely to forget that Thatcher is female), but instead have made efforts to mute or deflect stigmatized identities.

After explicating gay covering, Yoshino turns to racial covering. He illuminates this with his own experiences growing up in America while spending summers in Japan, and with the story of Lawrence Mungin, a Harvard-trained African-American lawyer who consistently assimilated to white norms, yet ended up suing his law firm for racial discrimination.²¹ Yoshino’s chapter on sex-based covering centers on Ann Hopkins, the plaintiff in a key Supreme Court gender stereotyping case.²² Hopkins, like

¹² See COVERING, *supra* note 2, at 76–79.

¹³ See *id.* at 78.

¹⁴ See *id.* at 79–82.

¹⁵ See *id.* at 82–85.

¹⁶ See *id.* at 87–88.

¹⁷ See *id.* at 89–91.

¹⁸ This is not to deny that some people of color have passed as white, *see, e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1710–14 (1993), but phenotypic constraints foreclose this as an option for most.

¹⁹ COVERING, *supra* note 2, at ix–x.

²⁰ *Id.*

²¹ See *id.* at 111–41.

²² See *id.* at 154–58 (describing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). Yoshino also discusses a more recent related case brought by Darlene Jespersen, a bartender who, after being fired for

many women, was caught in a catch-22. Her accounting firm required her to be masculine in order to demonstrate the traits of a successful partner, such as strength and aggressiveness, but also to preserve her femininity through the display of traits conventionally associated with women, such as wearing makeup and styling her hair. When she failed to walk this gendered tightrope successfully, she was denied partnership. Throughout these chapters, Yoshino depicts these individuals and—quite bravely—himself at times, caving to social pressure to fade into the mainstream. He describes this phenomenon as a “hidden assault on our civil rights.”²³ Covering, which affects not just gays, but people of color and women too, is the “civil rights issue of our time.”²⁴

Although Yoshino’s conceptualization of covering springs from “outsider” experiences,²⁵ Yoshino emphasizes that “[e]veryone covers.”²⁶ “[A]ll of us are outside the mainstream in some way.”²⁷ Therefore, when Yoshino is regularly challenged by an “angry straight white man” who feels excluded from Yoshino’s project, he reassures the man that his “struggle for an authentic self” matters no less.²⁸ Social pressure that this “angry straight white man” cover his “alcoholism,” “working-class background,” or “anomie,” or pursue a legal career instead of his passion to be a playwright, is illegitimate as well.²⁹ Yoshino concludes that the traditional civil rights model has stalled in part because of a failure to include straight white men and their desire for “authenticity.”³⁰ Society has tired of identity group-based claims for rights.³¹ This failure leads Yoshino to conclude that “[c]ivil rights must rise into a new, more inclusive register.”³² Civil rights should be understood as “a sliver of a universal project of human flourishing.”³³ In order to accomplish this new objective, “this generation of civil

refusing to wear makeup, lost her legal challenge in the Ninth Circuit. *Id.* at 159–60; *see* Jespersen v. Harrah’s Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc).

²³ COVERING, *supra* note 2, at xi.

²⁴ *Id.* at 23. Yoshino also briefly discusses people with disabilities and religious minorities. *See id.* at 168–83.

²⁵ I use the term “outsider” to refer to disadvantaged and subordinated social groups, including queer people, people of color, and women. I use “insider” to refer to relatively advantaged and powerful groups, including heterosexuals, white people, and men. Of course, a person may be an insider vis-à-vis one trait and an outsider vis-à-vis another.

²⁶ COVERING, *supra* note 2, at ix.

²⁷ *Id.*

²⁸ *Id.* at 24–25.

²⁹ *Id.* at 24–25, 186.

³⁰ *Id.* at 25.

³¹ *See id.* at 183 (“Americans are already sick to death of identity politics; the courts are merely following suit.”).

³² *Id.* at 25.

³³ *Id.*

rights must move far beyond the law [O]ur culture must do [more] work.”³⁴

Even as Yoshino describes covering as the foremost civil rights issue, he recognizes that some assimilation is valuable.³⁵ In the end, his plea is directed against “coerced assimilation not supported by reasons—against a reflexive conformity that takes itself as its own rationale.”³⁶ Rather than arguing for a particular conception of reasons that should suffice, Yoshino is “for the most part encouraging us to have th[e] conversation” about the legitimacy of assimilationist norms.³⁷ His “new civil rights paradigm . . . moves away from group-based equality rights toward universal liberty rights, and away from legal solutions toward social solutions.”³⁸

Much of COVERING reiterates important points from Yoshino’s *Covering* article. The primary additions include Yoshino’s use of personal narrative and a discussion that appears to broaden and recast the covering theory. Yoshino’s incorporation of memoir is powerful. The passages that reveal his personal struggles with covering are bracingly honest, moving, and beautifully written.³⁹ These personal illustrations bring the covering theory to life in a way that the more legal-historical focus of the law review article does not. Although Yoshino does not specifically align himself with Critical Race Theory, his use of narrative brings to mind critical race scholarship that has effectively employed narrative as a tool of legal analysis. Recognizing the power of narrative, if properly employed, I attempt in this Essay and elsewhere to extend Yoshino’s approach of using narrative to enlighten legal analysis.⁴⁰

In addition to adding narrative, COVERING reframes Yoshino’s theory in a way that seems simultaneously to expand and to undermine the central idea of the *Covering* article. Apparently inspired by Justice Kennedy’s opinion in *Lawrence v. Texas*, Yoshino moves the normative justification for the concept of covering away from equality to individual liberty. This move, the book suggests, enables Yoshino’s theory to embrace all readers, including, most strikingly, the “angry straight white men” who had challenged his focus on outsiders in previous presentations.⁴¹ The expansion of the covering theory accompanies Yoshino’s move away from the law to-

³⁴ *Id.* at 26.

³⁵ *See id.* (“I do not argue categorically against assimilation.”).

³⁶ *Id.*

³⁷ *Id.* at 26–27. Yoshino does make clear that one reason—animus—is never a legitimate reason to require assimilation. *See id.* at 27.

³⁸ *Id.* at 27.

³⁹ *See, e.g., id.* at 55–61 (describing how Yoshino came out to his parents). After coming out, Yoshino says, “I felt cameras shifting, as if I were no longer the bit player in someone else’s story, but finally the hero of my own.” *Id.* at 60.

⁴⁰ *See* Russell K. Robinson, *Perceptual Segregation*, COLUM. L. REV. (forthcoming Spring 2008).

⁴¹ COVERING, *supra* note 2, at 24.

ward a cultural solution to covering.⁴² Yet as Yoshino expands “civil rights” beyond the traditional conception,⁴³ he seems to drain them of discernable content. He fails to define the contours of a cultural solution to discrimination, or to tell the reader how he would foster this solution or what its end result might be. Further, his aim is too narrow—he takes a firm stand only against (1) “simple animus,”⁴⁴ and (2) “coerced assimilation not supported by reasons.”⁴⁵ Much covering is not driven by animus and rests instead on some type of reasoning, such as an employer’s interest in requiring its employees to appear “professional,” the legitimacy of which is open to argument.⁴⁶ But Yoshino largely sidesteps the debate that would seem to lie at the heart of his project: When should parents, employers, and communities be disabled from enforcing norms that may infringe on individual liberty, and when are such restrictions legitimate? Yoshino’s expansion of covering seemingly required him to dilute the concept, at least as applied to legally enforceable rights.

In Part II, I attempt to show that when the book is scrutinized closely, Yoshino’s shift is not as radical as it may seem. The new version of the covering theory can be read to contain two parts: (1) the same legal argument from the *Covering* article, which focuses on broadening legal protections for gays, people of color and women;⁴⁷ and (2) a gloss, which appears to expand the theory rather dramatically, but in the end, is largely rhetorical in that it relies entirely upon an undefined cultural solution. The latter part can be read as “covering” the old theory to attract audiences beyond traditional civil rights constituencies. Whether Yoshino intended it or not, the inclusive language of the gloss may help insiders, particularly those who were put off by the *Covering* article, “disattend” or overlook the theory’s preoccupation with the legal rights of outsiders.

My interpretation of COVERING as a potential act of covering draws support from Yoshino’s elaborate analysis of covering “demands” placed on outsiders, and the conspicuous omission of an examination of covering that burdens insiders. Yoshino appears to have little interest in exploring the covering of the “angry straight white man.” Moreover, not only does Yoshino focus on outsiders, but he also emphasizes covering “demands”

⁴² *Id.* (“Law is also an inadequate remedy because the covering demand extends beyond traditional civil rights groups.”).

⁴³ For instance, Yoshino has “relatively little interest in the law.” Martha C. Nussbaum, *The Prohibition Era*, NEW REPUBLIC, Mar. 20 & 27, 2006, at 21, 26.

⁴⁴ Yoshino defines “simple animus” as a belief that “one group is considered less worthy than another.” COVERING, *supra* note 2, at 27.

⁴⁵ *Id.* at 26.

⁴⁶ See Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 390, 409–10 (2006) (suggesting that employers might attempt to invoke professionalism to justify excluding applicants wearing cornrows or blue hair).

⁴⁷ See, e.g., COVERING, *supra* note 2, at 24 (“American equality law must be reformed to protect individuals against covering demands.”).

imposed by majorities and tends to overlook prevalent covering norms imposed by minority groups on their own members. In providing a fuller description of these norms, I underscore a second source of covering: minority-imposed covering.

Part III extends Part II by revealing a third source of covering: self-imposed covering. In this part, I examine two under-analyzed psychological dimensions of covering. First, I examine how Yoshino's framework, which relies on individualized, subjective definitions of "authenticity" in order to avoid the charge of essentializing or stereotyping identity, creates another problem.⁴⁸ Majority norms can be so ubiquitous that they structure the preferences of an individual without the person even being conscious of this impact. Relying on individual professions of "authenticity" in such circumstances risks reinscribing the very majority norms that Yoshino opposes.

Second, Yoshino oversimplifies covering by repeatedly describing social norms as "demands" and implying that the target has little choice but to comply. He fails to acknowledge the porous nature of many covering norms. They are often not articulated verbally or in writing—they are merely "in the air." Therefore, from an objective perspective, it may be difficult to identify the content and strength of a particular norm. Moreover, in many cases people will disagree on the extent to which an individual lacks agency to resist the pressure to assimilate. Imagine workplaces where some women wear short skirts but others decline to do so because they fear career harm; some African-Americans wear their hair in dreadlocks, but others think they would be viewed as "unprofessional" if they did; and some queer people are out, while others remain closeted. A more nuanced study of covering would disaggregate individual perceptions of and reactions to a covering norm—which may or may not be reasonable—from the norm itself.

Parts II and III, in combination, provide a fuller account of covering. Whereas Yoshino emphasizes *majority*-imposed covering and largely overlooks other sources of covering, individuals also struggle with covering norms that emanate from the *minority* groups with which they identify, and the *self*. Although I suggest that there are three sources or types of covering, the types often overlap in intricate ways. For instance, many of the norms imposed by majorities permeate minority communities and the psyches of minorities, which creates interlocking pressure on an individual who wants to resist the norm. For instance, not only does white society expect beautiful women to have long, straight hair, many African-Americans, having acquiesced to the white norm, hold this same belief. Other minority-imposed norms may be largely independent from majority norms, and in

⁴⁸ See *infra* text accompanying notes 205–07 (discussing difficulty of determining what is "authentically black").

fact most majority members might be wholly unaware of some such norms.⁴⁹ Virtually all instances of covering, however, operate through the individual psyche. Therefore, in a sense, all covering is self-imposed. The majority, or the minority, may create a norm with its attendant coercion, but ultimately the individual decides whether he or she will go along with that norm. Importantly, in some instances, covering may be wholly or largely self-imposed. An individual might misperceive a norm, or misperceive the rigidity of a norm. Under these circumstances, it is the individual's misapprehension of social norms that confines the individual, rather than any genuine social prohibition.

In Part IV, I compare Yoshino's expanded covering theory with Devon W. Carbado and Mitu Gulati's *Working Identity* article and its progeny,⁵⁰ and Yoshino's earlier *Covering* article. Whereas Yoshino's book and article attempt to explain covering throughout society, Carbado and Gulati home in on the workplace and the stereotype-negating performances that outsiders put on in this critical context. Yoshino's *Covering* article was criticized by some for stretching antidiscrimination protections to a point that might jeopardize existing civil rights protections and generate other harmful effects for outsiders.⁵¹ The COVERING book—rather than retreating or providing new grounds for Yoshino's original position—suggests expanding antidiscrimination theory more dramatically. The most surprising aspect of this expansion is Yoshino's inclusion of the “angry straight white man”—the paradigmatic insider often assumed to be the perpetrator of civil rights violations. Although I applaud the impulse toward inclusion,⁵² Yoshino ties these concerns together awkwardly, and in so doing, further strains the definition of civil rights. Carbado and Gulati's scholarship also suggests that their theories could apply to insiders, but much more narrowly than Yoshino suggests. Carbado and Gulati provide a more coherent justification for treating covering, or what they call “identity work,” as discrimination, even in the rare case where a straight white man is disadvantaged.

⁴⁹ See *infra* Part II (describing norms of masculinity in gay male communities, norms which might not be known by many straight people).

⁵⁰ See, e.g., Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

⁵¹ See RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE 98–101 (2005) (critiquing *Covering* article). See also Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803, 1810 (2000) (warning of the possibility that “widespread rejection of the idea of legal protection for traits and behavior will poison the delicate but real consensus in favor of legal guarantees against overt status discrimination”).

⁵² For instance, Yoshino's effort to “press us toward thinking of civil rights less in terms of groups than in terms of our common humanity” strikes me as a sound goal. COVERING, *supra* note 2, at 187.

II. UNCOVERING *COVERING*

The structure and emphasis of *COVERING*, as well as the ambiguity as to whether insiders obtain any discernable rights under Yoshino's reframing, provide reasons to doubt that Yoshino really means what he says when he reconstructs the covering theory to include virtually everybody. Yoshino's argument for a "new civil rights" paradigm that reaches beyond traditionally protected groups appears rather late in the book, departs inexplicably from his earlier scholarship, and emerges in a rather cursory fashion. As a result, it seems like a gloss that has not been fully worked out and creates tension with the reasoning at the core of the book.

A. *The Focus on Outsiders*

The bulk of *COVERING* is clearly devoted to outsider group-related aspects of covering. Hence, in Part I of the book, Yoshino walks us through chapters on "gay conversion," "gay passing," and "gay covering," and in Part II, "racial covering" and "sex-based" covering. As their titles confess, these first two parts are devoted to the identity-group-related burdens suffered by queer people, people of color, and women. Even though some of these titles may seem potentially inclusive (i.e., "racial covering" could theoretically include whites), Yoshino says virtually nothing about how white people cover racially or straight people cover their heterosexual orientation. It must be that whites, straights, or men do not cover their race, sexual orientation, or gender respectively, or that to the extent they do cover these particular identities, Yoshino is not concerned with this type of covering.

Further, Yoshino's descriptions of covering inevitably gravitate toward outsider experiences. Despite noting that straight white men also cover, Yoshino's in-depth case studies, such as the discussions of Ann Hopkins and Lawrence Mungin, all focus on traditional civil rights groups. The paradigmatic examples of covering that Yoshino cites at the outset are all done by members of established civil rights constituencies.⁵³ He tells us that "[t]his new form of discrimination targets minority cultures rather than minority persons. Outsiders are included, but only if we behave like insiders—that is, only if we cover."⁵⁴ Embedded in this conception of covering is the understanding that it is something majorities do to minority cultures. In these chapters, according to Yoshino, the whites, straights, and men are

⁵³ See *id.* at ix–x (citing Martin Sheen, Ben Kingsley, Rosie O'Donnell, Mary Cheney, Margaret Thatcher, Kirk Douglas, Jerry Lewis, and President Franklin Delano Roosevelt as examples of people who have covered aspects of their identities).

⁵⁴ *Id.* at 22; see also *id.* at 27 ("In America today, all outsider groups are systematically asked to assimilate to mainstream norms in ways that burden our equality.").

demanding the covering, not bending to covering “demands” themselves.⁵⁵ Yoshino’s statement that covering stems from “white supremacy,” “patriarchy,” and “heteronormativity”⁵⁶ would seem to preclude applying the covering concept to whites, males, and straights; these are not socially subordinated groups, and there is no widespread social degradation of white, male, and straight cultures.

Nonetheless, Yoshino, after 183 pages devoted to outsiders and the subordinating nature of covering norms,⁵⁷ returns to the thought that begins the book: “Everyone covers.”⁵⁸ Yoshino tells us that the “same themes” connect “the woman who left a career in law to write plays” and “the man who left his fiancée at the altar to pursue his first childhood love” to “traditional civil rights cases.”⁵⁹ What threads them together, he argues, is the intuition that “an existence lived outside [the] imperative [for authenticity] would be a substitute for life.”⁶⁰ Since “authenticity” lies at the core of this new form of “civil rights,” one might reasonably expect Yoshino to define the term. He does not. He states: “My ultimate commitment is to autonomy as a means of achieving authenticity, rather than to a fixed conception of what authenticity might be [T]he True Self is not susceptible to specific definition, as its nature differs for each of us.”⁶¹ This is autonomy with a capital A. Each individual gets to decide what he or she must do in order to feel “authentic,” and anyone resisting or challenging the individual’s conception of personal authenticity may be accused of “demanding” covering.

Although “everyone covers,” Yoshino reveals his allegiances in his almost exclusive focus on covering “demands” made by majorities and neglect of those imposed by minorities. He admits that people of color and queer people are occasionally required to “reverse cover” or act more stereotypical, and he says he is equally opposed to reverse covering.⁶² But he thinks these “demands” are rarely made.⁶³ He might be right that whites

⁵⁵ See, e.g., *id.* at 177 (“Covering demands are the modern form of . . . subordination: racial minorities must ‘act white’ because of white supremacy, women must hide parenting responsibilities at work because of patriarchy, gays must hide displays of same-sex affection because of heteronormativity”); *id.* at 23 (“This covering demand is the civil rights issue of our time. It hurts not only our most vulnerable citizens but our most valuable commitments . . . [including our] commitment against racism . . .”).

⁵⁶ *Id.* at 177.

⁵⁷ The first 164 pages largely address queer people, people of color, and women. Pages 167 to 183 then briefly address people with disabilities and religious minorities.

⁵⁸ COVERING, *supra* note 2, at ix.

⁵⁹ *Id.* at 186.

⁶⁰ *Id.*

⁶¹ *Id.* at 190; see also *id.* at 23 (“My commitment here is to authenticity, as experienced by the individual . . .”).

⁶² *Id.* at 190–91.

⁶³ See *id.* at 146–47.

rarely require people of color to act more stereotypically,⁶⁴ and straights rarely expect gays to act more flamboyantly,⁶⁵ but in fixating on—and condemning—“demands” made by majorities, Yoshino privileges certain types of covering and misses an important part of the covering equation.

B. *Minority-imposed Covering*

Although Yoshino focuses on outsiders to the extent that they struggle with majority-imposed norms, he mostly ignores covering “demands” made by minority communities. This focus is revealed by his conclusion that women are different from other outsiders in that they have to be both “feminine” and “masculine” depending on the context. If Yoshino fully considered minority group pressures on individual minorities, he would see that many blacks also expect other blacks to be “black enough” but not “too black.” Queer people must conform to queer norms but not be “too gay.” Yoshino consistently criticizes majorities but mostly lets minorities off the hook when they infringe on individual autonomy. This suggests that Yoshino’s commitment is not to autonomy as such, but rather autonomy to resist majoritarian pressure to assimilate.

Yoshino’s omission of minority-imposed covering is significant because, as compared to majority-imposed covering, minority-imposed covering may generate an additional harm. Efforts by minorities to crush the diversity of others within the group and require conformity to prevailing stereotypes infringe personal autonomy like majority-imposed covering. But minority-imposed covering inflicts a distinct, additional harm—it fuels stereotyping by the majority. For instance, if some in the black community require black men to act thuggish and speak “Ebonics” in order to be accepted as “authentically” black, not only will some black men suffer a loss of individual autonomy and agency, but these men will also likely experience more discrimination and contribute to the spread of a caricature of black masculinity. Pressure to assimilate to majority norms does not feed stereotyping in this way, although of course it is harmful in its own right.

In this section, I explain what a fuller account of covering—majority-imposed and minority-imposed—would look like. In discussing identity pressures in minority communities, a topic mostly overlooked in *COVERING*, I focus on the black community, gay community, and black gay

⁶⁴ Having said that, growing up in Ohio, I was repeatedly expected by white peers to rap and play basketball. I doubt that my experience is wholly atypical.

⁶⁵ Again, there is room for doubt here. The proliferation of media images highlighting flamboyant men, drag queens, and other stereotypical images—and the almost complete absence of masculine gay male characters—seems to reflect and cultivate (straight) public demand for certain stereotypical queer performances. Similarly, although lesbians are often stereotyped as either “lipstick” or “butch,” the “lipstick” stereotype appears to predominate in media representations, such as *The L Word*, since it appeals to heterosexual male viewers.

community because I know them best.⁶⁶ I have found that blacks often expect other blacks to be “less black” or “more black.” For instance, middle- and upper-class black people often turn up their noses at blacks who blast loud hip-hop music or “pimp their rides” (dress up their cars in an ostentatious manner) because these behaviors are deemed to be “ghetto.”⁶⁷ These pressures stem at least in part from the fear that whites will see some blacks acting “ghetto” and think all blacks are “ghetto.” Black women routinely face pressure from black people (including their own husbands, mothers, and grandmothers) to chemically process, straighten, and extend their hair. Women who resist this pressure and wear short, natural Afro styles are derided by some as being unattractive, manly, and perhaps lesbians (which is often viewed as anti-black). Natural hair styles such as dreadlocks are avoided by some African-Americans who think they are “dirty” or brand those who wear them as “militants.”⁶⁸

Pressure to appear “more black” is also common in the black community. Physical appearance can put some black people, including those who are light-skinned, multiracial, or appear multiracial, at an authenticity deficit.⁶⁹ To the extent that they care about such impressions, these black people may have to work harder to prove that they do not want to be white or think they are better than other black people. For instance, a light-skinned black male friend told me how he frequented tanning salons when he was younger after being called “white boy.” Irrespective of skin color, differences in education and social class give rise to beliefs that some black people are more authentic than others. Thus, in some sectors, black people who speak very proper English, like a cousin of mine who grew up in a remote Midwest suburb, are told by other blacks that they “talk white.” Even musical tastes can give rise to pressure for in-group conformity. As a child of early MTV, the majority of the music I buy is rock or pop, and many of these artists are white. Growing up, my own brothers harassed me (I’m sure they would call it “teasing”) for my musical preferences because, they said, I liked “white music.” I have lost count of the times that I have told a black person that I went to a concert by Coldplay or Fiona Apple and that person scrunched up her face in disgust.

⁶⁶ Although these terms are useful heuristics, I recognize that they are artificial and reductive. I do not mean to reify the prevailing cultural notion that “black” equals “straight” and “gay” equals “white.” See Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467 (2000).

⁶⁷ For a more exhaustive list of “ghetto” behaviors, consult one of the many “You Might Be Ghetto If . . .” lists circulating on the Internet. See, e.g., *Ghetto Fabulous, You Might Be Ghetto If . . .*, <http://thrasher.www.50megs.com/ghetto.html> (last visited on Apr. 21, 2007).

⁶⁸ See Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 717–19 (2001) [hereinafter Carbado & Gulati, *The Fifth Black Woman*] (noting that black employees may trigger stereotypes of insubordination by wearing dreadlocks and other Afrocentric grooming choices).

⁶⁹ See, e.g., Heather M. Dalmage, *Interracial Couples, Multiracial People, and the Color Line in Adoption*, in *ADOPTIVE FAMILIES IN A DIVERSE SOCIETY* 210, 219 (Katarina Wegar ed., 2006).

An intersectional analysis demonstrates that black people who are also female, queer, or both are sometimes expected to make choices between their overlapping identities.⁷⁰ To emphasize one's female gender or queer sexuality is thus received as if one were putting that identity before race, rather than as recognizing that race is always intertwined with and experienced through other identities. These expectations often rest on a mythic straight conception of the "black community" that equates blackness with maleness and masculinity.⁷¹ In the latest iteration of this thinking, black men who sleep with men are widely perceived as anti-black in that they fail to assume the head of (heterosexual) household role that the "community" expects.⁷² As such, they are classified with drug users, men in prison, men who date non-black women, and the other groups of "unfit" men who shirk their supposed racial duty to marry black women and raise "strong black families." This racially inflected heterosexist norm thus puts queer black men and women, especially those who strongly identify with their race, to a cruel choice: Stay in the closet or lose your standing in the black community. These examples are just the tip of the iceberg of identity-based expectations imposed by people of color on other people of color. I have focused on my personal experiences, but surely many paragraphs could be written about similar dynamics in Latino, Asian, and Native communities.⁷³

In a similar register, gay men of all races make and respond to demands based on masculinity and femininity and other conceptions of what they think is authentically gay. A brief glance at online gay personal advertisements will reveal that many men of all races openly seek "straight-acting" lovers and "masculine" men.⁷⁴ In the black gay community, some black men seek to date only black men who have a "street" or "thug" per-

⁷⁰ See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

⁷¹ See Dwight A. McBride, *Can the Queen Speak? Racial Essentialism, Sexuality, and the Problem of Authority*, in *BLACK MEN ON RACE, GENDER AND SEXUALITY: A CRITICAL READER* 253 (Devon W. Carbado ed., 1999).

⁷² For a typical example of this view, which was promoted with the headline "Why Don't Our Black Men Want Us?", see Taigi Smith, *Deadly Deception*, *ESSENCE*, Aug. 2004, at 148. That these types of articles often use the term "our black men" is telling. They reflect a sense that the black community owns these men and has the right to exact certain duties from them, regardless of the costs to the individual.

⁷³ Even people who are classified as white may have to negotiate racialized norms. A Jewish friend told me how he was teased for having "nappy" hair as a child and learned to cut his hair short to mitigate this perception. For an enlightening discussion of covering in the Jewish community, see Nussbaum, *supra* note 43, at 22, 24.

⁷⁴ See, e.g., DWIGHT MCBRIDE, *WHY I HATE ABERCROMBIE & FITCH* 113–17 (2005) (surveying personal ads from one site); COVERING, *supra* note 2, at 81 (noting ads commanding gay men to "Be straight acting").

sona—which is thought to signify authentic black masculinity. “No punks or fems” is a popular refrain on some black gay websites.⁷⁵

Beyond gender performance, there are also norms about “appropriate” gay sexuality. Young gay men who are relationship-oriented or averse to casual, anonymous sex are sometimes told by other gay men to “loosen up” and get more “experience” before pursuing a relationship. I have been told explicitly by other gay men that I should try a sex party, a bathhouse, or hiring a prostitute. When I declined, I was told that I was repressed and not sexually liberated as a good gay man should be. Various aspects of gay male culture celebrate casual sexual encounters, disconnected from any substantive relationship, or promote “open” relationships.⁷⁶ While a number of gay men have championed such practices as liberating,⁷⁷ others find these norms oppressive.⁷⁸

In addition, race and sexual orientation intersect in the “gay marketplace of desire.”⁷⁹ Because white gay men establish the norms in gay communities like West Hollywood and Chelsea, they set the rules of engagement.⁸⁰ Not infrequently, these rules call on men of color to play up the sexualized stereotypes ascribed to their racial group. Asian men are expected to play an effeminate, passive role. By contrast, black men, who are expected to wield large penises, may play the aggressive “top.” Men of color who do not map onto these categories (because they are aggressive Asian tops, for instance) are marginalized. As a result of these categories and the preferences of white men, men of color are pressured to distort their

⁷⁵ On general norms of masculinity in personal ads, see Dan Savage, *The Other Love That Dares Not Speak Its Name*, in *This American Life: Sissies* (Public Radio International broadcast Dec. 13, 1996), available at http://www.thislife.org/Radio_Archive.aspx?year=1996.

⁷⁶ See Stephen Ellingson & Kirby Schroeder, *Race and the Construction of Same-Sex Sex Markets in Four Chicago Neighborhoods*, in *THE SEXUAL ORGANIZATION OF THE CITY* 93, 96 (Edward O. Laumann et al. eds., 2004) (“Different components of gay culture—from the social rituals of cruising and the use of clothing and mannerisms to signal availability, to definitions of masculinity (e.g., the clone of the 1970s or the muscular or ‘cut’ body of the 1990s), to a rich literature of fictional and nonfictional works on what it means to be homosexual—sanction and celebrate a transactional orientation toward sexual partnering.”).

⁷⁷ See, e.g., DAVID NIMMONS, *THE SOUL BENEATH THE SKIN: THE UNSEEN HEARTS AND HABITS OF GAY MEN* 82–90 (2002) (arguing that most gay relationships are not monogamous and are thus healthier). Yoshino indicates that he may be sympathetic to this view. See Yoshino, *supra* note 1, at 846–47 (suggesting that promiscuity is part of gay identity); cf. COVERING, *supra* note 2, at 83 (recounting a story of a gay man who took his mother to Fire Island in New York to introduce her to his “culture of sex and camp and whimsy” and “naked torsos shining with their business”).

⁷⁸ If it is true that twice as many gay men as straight men are celibate, as one study indicates, see NIMMONS, *supra* note 77, at 81, then there is a sizable chunk of the gay community (twenty-four percent, according to the study) that is clearly falling short of this hypersexual gay ideal.

⁷⁹ MCBRIDE, *supra* note 74, at 88.

⁸⁰ See *id.* at 125 (describing the central organizing rule of the dominant gay marketplace of desire as the supremacy of whiteness—“Whites know they have it, others know they will never have it, and virtually everyone wants it”); see also Ellingson & Schroeder, *supra* note 76, at 94 (finding that whiteness determines sexual opportunity in Chicago communities).

identities in order to reap the “gift” of sex with white men.⁸¹ Some men of color internalize these expectations and express or seek such stereotypical performances in romantic partners even when seeking partners of the same race.⁸² Yoshino’s failure to say anything about racial norms in the gay community is disappointing.⁸³ It seems unlikely that he has not faced racial stereotyping in gay white circles. This omission could effectively reinforce the mythic conception of the “LGBT” community as providing an equal place for all queer people—lesbian, gay, bisexual, and transgendered—and the community’s rainbow flag representing the many colors of people who constitute it. The sad reality is that, as Dwight McBride, Urvashi Vaid, and other people of color and women have written, “It’s a [Gay] White Man’s World.”⁸⁴ Because same-sex male conduct is conflated with a culture of gayness shaped primarily by privileged white men, men of color and others who fail to identify with that dominant culture may be seen as covering their “true” gay selves and in need of enlightenment.⁸⁵

I describe these harms not to equate majority and minority communities or to make any claims about relative culpability. As I see it, identity pressures by minority communities do not excuse those created by majority communities. In many important contexts, such as the workplace, majority groups such as men and whites hold more power to shape institutional norms and coerce identity assimilation. Further, many of the norms in mi-

⁸¹ See MCBRIDE, *supra* note 74, at 123 (describing the “racial pandering game—cultivating a certain affect, dressing in a certain way, talking differently when necessary”).

⁸² Cf. FORD, *supra* note 51, at 65 (“[Gay] men may well conform in order to get along in the social milieu that offers them social support in a homophobic society and the best prospects of getting laid.”).

⁸³ In general, Yoshino’s treatment of race in the book seems incomplete. When he describes covering in the gay community, it is as if race drops out of the picture. Moreover, the book’s failure to explore the massive governmental effort to coerce Native Americans to assimilate to white norms is another missed opportunity. See generally ROBERT CLINTON ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 30–36 (4th ed. 2003).

⁸⁴ MCBRIDE, *supra* note 74, at 88. The insertion of the word “Gay” is my clarification of McBride’s quote; see also URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* 274–76 (1995) (recounting the racism and sexism the author faced as head of an LGBT organization because she was not the expected “nice white man with a cute ass”).

⁸⁵ This conflation of conduct and identity tends to obscure the fact that there are many people who engage in same-sex conduct but see little value in gay culture, and there are even people who strongly identify with gay culture but lack sexual desire for people of the same sex. Moreover, among those who reject the label of “gay” are (1) men who identify as bisexual; (2) men who have relationships with women and men but keep the latter secret (if such men are black, they are said to be on the “down low;” if they are white, like the romantic leads of *Brokeback Mountain*, they are more likely to be seen as victims of the closet); and (3) men of color who openly acknowledge their relationships with men but endorse labels such as “same gender loving” because of the whiteness implied by the term “gay.” These men may be motivated by very different reasons, some of which are legitimate, but oversimplified identity narratives suggest that they are running away from their “true” identities, cf. Benedict Carey, *Straight, Gay or Lying? Bisexuality Revisited*, N.Y. TIMES, July 5, 2005, at F1 (describing a study suggesting that bisexuality in men does not exist); Yoshino, *supra* note 1, at 845 (suggesting that “straight-culture focused” gays are covering).

nority communities, such as gay male preferences for masculinity, can be traced to majority norms. My point instead is that Yoshino's failure to survey minority-imposed covering belies his stated concern with constraints on individual liberty in general.⁸⁶ Yoshino does hint at a few of these issues in passing,⁸⁷ including his experiences with covering within the Japanese-American community,⁸⁸ but he relegates "demands" by people of color, queer people, and women to the margins of his book, even though they can be just as threatening to individual autonomy, depending on the context.⁸⁹

Yoshino attempts to justify the book's focus on majority-imposed covering in the final chapter:

In talking about classic civil rights groups, I have focused on the demand to conform to the mainstream because I think for most groups (except women) these are the demands that most threaten our authenticity. But I am equally opposed to demands that individuals reverse cover, because such demands are also impositions on our autonomy, and therefore on our authenticity.⁹⁰

He fails to tell us precisely *why* pressure to conform to the norms of a majority community are more threatening than pressure to conform to the norms of a minority community. As I explained above, pressure to conform to negative stereotypes may be *more* harmful than pressure to assimilate to a majority norm.⁹¹ I do not claim that this is the only way of measuring harm. One can imagine a number of options. For example, which type of covering is more prevalent in general? Which type inflicts the greatest social harm?

But Yoshino's individualistic framework would seem to preclude his conclusion that majority-imposed covering is *per se* more threatening. The answer would seem to depend on the individual and her perceptions. If the measure is prevalence, consider that many outsiders, including people of color who reside in the inner city or immigrant communities, Native American people on reservations, and queer people who flock to neighborhoods like West Hollywood in Los Angeles, may interact primarily with people of the same race, sexual orientation, or both. These individuals may very well be subject to more identity-based pressure from people of the same race or

⁸⁶ Like Yoshino, I do not think that all pressure to assimilate is illegitimate. It is hard to imagine how coherent social groups could exist without the transmission of social norms and the disapproval of those who transgress them.

⁸⁷ See, e.g., COVERING, *supra* note 2, at 81 (discussing gay "demands" for masculinity); *id.* at 147 (discussing African-American "demands" for "acting black").

⁸⁸ Yoshino relates his experiences with racial covering and reverse covering primarily in discussing coming out to his parents and in the chapter called "Racial Covering." See *id.* at 55–61, 113–41.

⁸⁹ See FORD, *supra* note 51, at 64–65 ("External definition comes from everywhere: our families, friends, spouses and romantic partners have expectations that are as powerful and prescriptive as those of any boss or coworker.").

⁹⁰ COVERING, *supra* note 2, at 190–91; see also *id.* at 93.

⁹¹ See *supra* p. 1819.

sexual orientation than from the few majority group members with whom they meaningfully interact.

If the measure is psychological injury, one cannot assume that covering expectations from majority groups inflict more harm than those from minority groups. Most African-American parents teach their children from early childhood that their race is salient and will require them to act differently than similarly situated white people. For instance, my parents always told me I would have to work twice as hard as a white guy in order to guarantee the same level of success. They also warned me about particular racialized risks and the performances required in order to negotiate them. Most threatening to my parents was the increased risk of police brutality or other racialized violence. Thus, my parents repeatedly reminded their children (especially their three sons) that when stopped by the police, we were to cooperate fully, keep our hands in plain sight, and act especially courteous and innocuous. One need not think it is fair or just that such covering burdens fall on African-Americans and not whites in order to see that they can nonetheless become a regularized, normalized part of black consciousness. For me, imagining a world in which I could speak to a cop however I wanted is tantamount to imagining not being black. For some outsiders, these covering demands eventually fade into the background; they may cease to be viewed as discrimination—they are just life when you are black, young, and male.⁹² The power of Yoshino's theory of covering is that it makes manifest the otherwise evanescent accommodations outsiders routinely make in order to secure equal treatment. When we were boys, my brothers and I wore doo rags⁹³ at home in order to style our hair. I would never have worn a doo rag in public because of its association with "ghetto" culture. Yet when I removed a doo rag before leaving the house, I did not feel that I was catering to a white norm; it never occurred to me that this decision had anything to do with discrimination. Moreover, even now, the doo rag compromise troubles me much less than attempts by black people to police my racial identity. There may be nothing more contemptible in the black community than being a "sell-out."⁹⁴ Blacks who have questioned my racial "authenticity" (because I listen to "white music," for example, or perhaps because I refused to wear a doo rag in public) have a power to criticize me that whites lack.⁹⁵ My point is that Yoshino cannot simply assume that majority-imposed covering is more psychologically harmful than cov-

⁹² Cf. COVERING, *supra* note 2, at 17 (stating that having to engage in "'straight-acting' behavior" did not bother Yoshino because "much of [it] felt natural to [him]").

⁹³ The doo rag is a "simple piece of cloth tied at the back, used to cover the head," which was initially associated with African-American men. *Do-rag*, in WIKIPEDIA, <http://en.wikipedia.org/wiki/Durag> (last visited on Apr. 21, 2007).

⁹⁴ See RANDALL KENNEDY, SELLOUT: THE POLITICS OF RACIAL BETRAYAL (forthcoming 2008).

⁹⁵ Although whites have occasionally questioned my blackness, I have found such attacks to be easier to brush off because whites lack racial standing in this regard.

ering imposed by minority groups on their own members. Since the central concept of “authenticity” is left to the individual to define, Yoshino would seem to have to let the individual decide whether majority-imposed covering is more threatening than minority-imposed covering in his or her life.⁹⁶ Moreover, some individuals may not be conscious of certain routine ways in which they cater to a majority or minority. In sum, to emphasize just one type of covering (majority-imposed) reveals Yoshino’s own focus.

C. The “Angry Straight White Man” and the Shift to an Undefined Cultural Solution

Finally, although Yoshino would expand legal protections for outsiders pressured to cover, the “angry straight white man” apparently receives no concrete new legal protections under Yoshino’s framework. In fact, the invocation of the “angry straight white man” accompanies a shift away from law.⁹⁷ Yoshino is realistic about courts’ resistance to attempts to expand antidiscrimination law to include racial, gender, and sexual orientation covering. By extension, he seems to recognize that the courts are even less likely to grant new rights to insiders who feel they have to cover traits that do not correlate with race, gender, or sexual orientation. Consequently, Yoshino urges us to look to culture to find remedies for the problem of covering. Yet he fails to specify what a cultural solution to discrimination would look like. Yoshino appears unresolved as to when pressure to assimilate is illegitimate and when it is acceptable. His only firm commitments are that “coerced assimilation not supported by reasons” and pressure motivated by animus are illegitimate.⁹⁸ As Martha Nussbaum has cogently stated, “most of the covering demands in today’s world are motivated not by those things, but by a love of uniformity, or administrative simplicity, or even a love of country.”⁹⁹ If covering based on animus and irrationality represent the boundaries of the covering that Yoshino would prohibit, he is leaving a lot on the table.

Moreover, Yoshino admits that rather than set any concrete standard for legal or social purposes, he is “for the most part encouraging us to have th[e] conversation” about the legitimacy of assimilationist norms.¹⁰⁰ His proposal, as it applies to insiders, thus boils down to a requirement that people subject to a covering norm speak up and challenge the pressure to

⁹⁶ Because I grew up as the child of a doctor in a mostly white suburb, I might be especially sensitive to charges of “selling out,” unlike, say, a black person who grew up in the inner city. This demonstrates that even within an outsider group, people will disagree as to which norms are viewed as most oppressive.

⁹⁷ See Nussbaum, *supra* note 43, at 26 (finding it odd that “a book by a law professor . . . seems to have relatively little interest in the law”).

⁹⁸ COVERING, *supra* note 2, at 26–27.

⁹⁹ Nussbaum, *supra* note 43, at 27.

¹⁰⁰ COVERING, *supra* note 2, at 26–27.

cover. Although Yoshino's attempt to legitimize this conversation is noteworthy, it is rather meager compared to the legal rights that outsiders already enjoy under current law, and that Yoshino would expand if he had his druthers.¹⁰¹ In fact, Yoshino seems to admit that his new framework is a strategy for protecting outsiders against the identity politics backlash that he perceives,¹⁰² rather than a model he would endorse in an ideal world. He sets the stage for the chapter on the "new civil rights" by saying that he "must temper his passion with realism."¹⁰³ The cases he cites as leading the way toward his liberty-based model are also revealing. To the extent that *Lawrence v. Texas*¹⁰⁴ and *Tennessee v. Lane*¹⁰⁵ discussed liberty or universality,¹⁰⁶ their actual holdings clearly benefited outsiders, with hardly any impact on insiders.¹⁰⁷ Even where sodomy laws, which were at issue in *Lawrence*, facially implicated the sex practices of heterosexuals, they were disproportionately, and often exclusively, enforced against homosexuals. Queer people suffered additional legal and stigmatic harms from the Court's earlier legitimization of anti-sodomy laws in *Bowers v. Hardwick*.¹⁰⁸ Even when sodomy laws facially applied to heterosexuals, heterosexuals did not suffer the additional harms that fell on queer people. Similarly, although the Court stressed every person's right to access the court system in *Lane*,¹⁰⁹ people without disabilities do not face the physical barriers that necessitate the right. Whether the Court develops these liberty-based principles in future cases, the bottom line is that these cases granted new rights mainly to outsiders, with at most an incidental impact on insiders.

¹⁰¹ See *id.* at 183 ("I believe we should adopt a group-based accommodation model to protect traditional civil rights groups from covering demands. I believe with equal conviction, however, that courts are unlikely to adopt this course."); *id.* at 191 ("Group-based identity politics is not dead. As I have argued, I still believe in a group-based accommodation model for existing civil rights groups.").

¹⁰² See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–43 (1991) (discussing emergence of identity-based political organizing and the criticism that it reinforces differences rather than transcending them).

¹⁰³ COVERING, *supra* note 2, at 183.

¹⁰⁴ 539 U.S. 558 (2003).

¹⁰⁵ 541 U.S. 509 (2004).

¹⁰⁶ See, e.g., *Lawrence*, 539 U.S. at 564 ("We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.").

¹⁰⁷ At the outset of the Court's opinion, it said: "The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct." *Id.* at 562. The Texas statute applied only to a person who "engage[d] in deviate sexual intercourse with another individual of the same sex." *Id.* at 563. At the time of the decision, thirteen states criminalized sodomy, but four of those thirteen states criminalized only same-sex sodomy. See *id.* at 573. The *Lawrence* decision suggested that all of these laws are invalid.

¹⁰⁸ 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 578.

¹⁰⁹ 541 U.S. at 523.

Another reason to doubt that Yoshino is committed to the inclusion of insiders who cover is the content of his earlier scholarship. Yoshino's *Covering* article and other work accepted the distinction between discrete and insular minorities and all other groups, while attempting to expand the doctrine enough to make a home for queer people as a protected minority.¹¹⁰ In fact, in contrast to his current position, Yoshino's *Assimilationist Bias* article proposed reducing constitutional protection under the Equal Protection Clause for white men.¹¹¹ Instead of treating entire traits or "classifications" (e.g., race) as suspect, as the Supreme Court currently does, Yoshino wrote that only the subordinated groups within the classification should receive heightened constitutional scrutiny. He argued that strict scrutiny should not attach to any racial classification, such as an affirmative action policy disadvantaging whites, but only to those classifications affecting subordinated races.¹¹² Hence, the "angry straight white man" championed in *COVERING* would actually be stripped of heightened scrutiny based on race and gender under Yoshino's earlier proposal.¹¹³

In short, this hypothetical man comes off as a device, a symbol, an object rather than a subject. He appears in order for Yoshino to make his point about civil rights rising to a "new, more inclusive register" and then promptly disappears.¹¹⁴ In marked contrast to the elaborate exploration of outsider covering, Yoshino has little or no interest in examining the contours of this man's covering. Yoshino accuses the civil rights movement of "focusing solely on traditional civil rights groups, such as racial minorities, women, gays, religious minorities, and individuals with disabilities" and treating "straight white men" as "impediments."¹¹⁵ Given this failure, he says, "no wonder [straight white men] often respond to civil rights advo-

¹¹⁰ See Yoshino, *supra* note 1, at 931 (stating that his willingness to acknowledge the covering of insiders "differs according to whether I am thinking about a legal context or a broader social one"); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996). Yoshino's *Assimilationist Bias* article suggested refining the test for heightened judicial scrutiny by jettisoning the flawed and widely criticized immutability/visibility factor and homing in on the political powerlessness factor. See Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 563–68 (1998) [hereinafter Yoshino, *Assimilationist Bias*]. Yoshino rejected an unthinking "animus" toward efforts to expand judicial protection to classes beyond race and sex, but he did not commit to giving such an extension to any group other than gays. See *id.* at 568 (voicing no objection to "disenfranchised prisoners, the illiterate, or the mentally disabled" securing protected status if they can make their case under his proposed standard).

¹¹¹ See Yoshino, *Assimilationist Bias*, *supra* note 110, at 564–65.

¹¹² See *id.* at 564.

¹¹³ See *id.* ("Groups such as whites, men, and the legitimate would all be denied heightened scrutiny."). Although Yoshino warned that he had not worked out the specifics of his proposed test and "set it forth only in its broadest outlines," he indicated no ambivalence regarding his suggestion that whites and men be denied the protections of heightened scrutiny. *Id.*

¹¹⁴ *COVERING*, *supra* note 2, at 25.

¹¹⁵ *Id.*

cates with hostility.”¹¹⁶ Yet Yoshino similarly neglects straight white men in COVERING, suggesting that his interest in bringing them under the covering umbrella is simply rhetorical.

III. THE PSYCHOLOGY OF COVERING

In this section, I point out two important but under-examined aspects of the psychology of covering, and introduce a third type of covering: self-covering. Although Yoshino draws his open-ended conception of “authenticity” from psychology,¹¹⁷ he neglects two critical psychological dimensions of covering. First, the self-defined conception of “authenticity” that Yoshino adopts overlooks the social forces that may produce an individual’s preferences. Second, Yoshino’s description of majority “demands” to cover flattens the complex questions implicated in interpreting and deciding whether to resist social norms.

Rather than advocating for any fixed definition of “authenticity,” Yoshino suggests deferring to each person’s individualized conception of “authenticity.”¹¹⁸ Fundamentally suspicious of majority group pressures that shape identity, Yoshino urges that each person should be able to determine independently the liberties necessary to live an “authentic” life. If we have learned anything from recent legal scholarship on implicit bias, however, it is that what people say about race (even to themselves) often fails to track their implicit beliefs, as measured by the Implicit Association Test (IAT).¹¹⁹

¹¹⁶ *Id.* Given the continuing lack of progress on many basic civil rights issues, one could take Yoshino to task for blaming the civil rights movement for not using its sparse resources to advocate for straight white men.

¹¹⁷ *See id.* at 184–86 (citing work of D.W. Winnicott).

¹¹⁸ *See id.* at 186.

¹¹⁹ Gary Blasi, Jerry Kang, Linda Krieger, and others have made critical contributions to the legal literature. *See, e.g.*, Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); *see also* John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 1 (2004) (summarizing psychological studies on implicit bias). Charles Lawrence wrote an early influential article which drew on a different body of psychological scholarship. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Jerry Kang provides this explanation of the IAT:

The IAT examines how tightly any two concepts are associated with each other. In a typical experiment, two racial categories are compared, say “Black” and “White.” Next, two sets of stimuli (words or images) that correspond to the racial meanings (stereotypes or attitudes) associated with those categories are selected. For example, words such as “violent” and “lazy” are chosen for Blacks, and “smart” and “kind” for Whites.

Participants are shown a Black or White face and told to hit as fast as possible a key on the left or right side of the keyboard. They are also shown words stereotypically associated with Blacks or Whites and again told to hit a key on the left or right side of the keyboard. In half the runs, the Black face and Black-associated word are assigned to the same side of the keyboard (schema-consistent arrangement). In the other half, they are assigned opposite sides (schema-inconsistent arrangement). The same goes for the White face/White-associated stimulus combination.

Although explicit measures, such as self-reports and other tests, tend to support the intuition of some whites that racial discrimination is abating, implicit measures complicate that intuition by suggesting that bias is prevalent. Moreover, IAT results suggest that people of color, women, and other outsiders are not immune from exhibiting implicit bias, even against their own group members.¹²⁰ A significant subset of African-Americans who describe themselves as pro-black exhibit anti-black bias, according to the IAT.¹²¹

The lesson from this pathmaking scholarship is that conscious and unconscious measures of bias with respect to race, sex, and other traits may diverge. Although scientists are still working to fully understand this dissociation, self-reported measures of attitudes may not provide an accurate or complete reflection. The IAT results of African-Americans further suggest that anti-black bias is so ubiquitous and unrelenting that a black person may exhibit anti-black bias even as that person claims to affirm black identity. Various psychologists and social scientists have found that this phenomenon, in which victims of discrimination come to justify and embrace their subordination, extends to women and queer people, among others.¹²² Professors John T. Jost and Mahzarin R. Banaji coined the term “system justification theory” to explain the psychological process whereby “losers” as well as “winners” in various social hierarchies are motivated to justify the status quo.¹²³ Although it may seem counterintuitive to lay people, this theory and numerous supporting studies show that “those who are seemingly disadvantaged by a social system [may] become its most ardent supporters.”¹²⁴ Given the choice of accepting that one lives in an unjust world or

Tasks in the schema-consistent arrangement should be easier, and so it is for most of us. How much easier—as measured by the time differential between the two arrangements—provides a measure of implicit bias.

Kang, *supra*, at 1510 (emphasis omitted; citation omitted); see generally Project Implicit, <https://implicit.harvard.edu/implicit/> (last visited Apr. 16, 2007).

¹²⁰ Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 958 (2006); see also Leslie Ashburn-Nardo et al., *Black Americans’ Implicit Racial Associations and Their Implications for Intergroup Judgment*, 21 SOC. COGNITION 61, 61 (2003).

¹²¹ See Greenwald & Krieger, *supra* note 120, at 956.

¹²² See, e.g., David J. Allen & Terry Oleson, *Shame and Internalized Homophobia in Gay Men*, 37 J. HOMOSEXUALITY 33 (1999); Edward Lafontaine, *Forms of False Consciousness Among Professional Women*, 10 HUMBOLDT J. SOC. REL. 26, 32 (1983) (finding that sixty-eight percent of ninety-five professional women who were surveyed made a response either denying or misunderstanding existence of gender discrimination); Helen A. Neville et al., *Color-Blind Racial Ideology and Psychological False Consciousness Among African Americans*, 31 J. BLACK PSYCHOL. 27, 30 (2005) (arguing that some African-Americans adopt a color-blind framework that undermines their interests).

¹²³ See Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119, 1128–29 (2006) (citing John T. Jost & Mahzarin R. Banaji, *The Role of Stereotyping in System Justification and the Production of False Consciousness*, 33 BRIT. J. SOC. PSYCHOL. 1 (1994)).

¹²⁴ See *id.*

accepting responsibility for personal failures—each of which carries serious psychological consequences¹²⁵—some outsiders embrace the latter belief, internalizing majority-created stereotypes about their particular minority group.¹²⁶ In essence, it is easier for some people to believe that they made mistakes justifying their low status rather than to believe that the overarching system is stacked against them.¹²⁷

Cass Sunstein has written about this problem as it relates to the legal system's reliance on superficial understandings of what an individual "prefers." He explains:

[A] social or legal system that has produced preferences, and has done so by limiting opportunities unjustly, can hardly justify itself by reference to existing preferences. . . . The notion of autonomy should refer instead to decisions reached with a full and vivid awareness of available opportunities, with relevant information, and without illegitimate or excessive constraints on the process of preference formation. When there is inadequate information or opportunity, decisions and even preferences should be described as unfree or nonautonomous.¹²⁸

Although scholarship calling into question personal expressions of preference may be challenged as paternalistic, Sunstein argues persuasively that freeing people from discriminatory constraints on their identities and preferences enables individual liberty.¹²⁹

This body of scholarship complicates Yoshino's effort to rely on individual conceptions of authenticity. A couple of examples should illustrate the tension between defining "authenticity" as whatever the individual deems it to be and inveighing against the pressure to assimilate. The recent FX "reality" series *Black.White* depicted a black family that was made up to look white and a white family that was made up to look black.¹³⁰ While

¹²⁵ See *id.* at 1130 ("[E]specially stark forms of inequality can create a discrepancy between the need to justify the system and the need to feel good about oneself and one's fellow group members.").

¹²⁶ See *id.* Examples of justifications by professional women who responded to one survey included declarations that discrimination no longer exists because "[i]t's against the law," that "[a] lot of women are treated unfairly because they ask for it," and that women could evade discrimination if they just became "one of the boys." Lafontaine, *supra* note 122, at 33, 34, 36.

¹²⁷ See Blasi & Jost, *supra* note 123, at 1130.

¹²⁸ Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2420 (1994) [hereinafter Sunstein, *Anticaste Principle*]; Cass R. Sunstein, *Social Norms and Social Roles*, in CHICAGO LECTURES IN LAW AND ECONOMICS 154–57 (Eric A. Posner ed., 2000); see also Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CAL. L. REV. 1, 63–64 (2007).

¹²⁹ See Sunstein, *Anticaste Principle*, *supra* note 128, at 2420; see also FORD, *supra* note 51, at 62–63 (describing the process whereby society inscribes gender roles upon people who eventually come to espouse them as natural).

¹³⁰ To learn more about the show and see photos of the racially disguised characters, see FX Networks, *Black.White.*, <http://www.fxnetworks.com/shows/originals/blackwhite/main.html> (last visited Apr. 19, 2007).

the two families experienced the world in the guise of a different race, they also lived together in a house in Southern California in order to discuss their new experiences. In the episode that originally aired March 29, 2006, the black family's teenage son Nick revealed to his white friends that he was actually black. In the ensuing discussion of race, he told them that he did not have a problem with them saying the word "nigger." The white friends then repeatedly used the N-word in his presence, although it was never directed at him as an epithet. When Nick's parents learned of this, they were outraged. They were confounded that their son did not seem to understand the harmful history behind the word, and they were embarrassed in front of the white parents and the (eventual) national television audience. After subjecting Nick to a tongue-lashing and taking him to a barbershop for a quick primer on black history, they supervised a second conversation with his white friends in which he recanted his legitimization of whites using the N-word.

How should we analyze this incident under Yoshino's covering rubric? Was Nick covering when he told his white friends they could use the N-word in his presence? Was he downplaying his blackness and their expectation that a black man would get angry at hearing the N-word in order to secure their acceptance and friendship? After all, the initial friendship was based in part on the mistaken belief that they all were white. Further, was Nick's willingness to tolerate the N-word animated by internalized shame about his blackness? Or conversely, was Nick's recantation the covering? Was his "authentic" or genuine reaction that the N-word does not offend him, and his contrary later statement a performance extracted by his parents' commitment to black pride? Can we answer these questions simply by asking Nick, as Yoshino suggests?

Moreover, what would Yoshino say about a man in a so-called *Brokeback* marriage,¹³¹ who claims that he has chosen it freely? A *New York Times* story entitled "Many Couples Must Negotiate Terms of 'Brokeback' Marriages" told of several male-female couples who stayed married despite the husband's acknowledgment of his desire for sex with men.¹³² A network of straight spouses reported that one-third of the women who seek support from the network remain married to their apparently gay husbands.¹³³ Jerry McCormack, a man interviewed in the article, stayed with his wife even after she learned that, except for their sexual relationship, "his erotic desires otherwise focus almost exclusively on men."¹³⁴ McCormack admitted being sexually involved with another married man, but he kept his

¹³¹ Such marriages are named after *Brokeback Mountain*, the Oscar-nominated 2005 film about a romance between two men who were married to women.

¹³² See Katy Butler, *Many Couples Must Negotiate Terms of 'Brokeback' Marriages*, N.Y. TIMES, Mar. 7, 2006, at F5.

¹³³ See *id.* at F7.

¹³⁴ *Id.*

marriage to his wife Paulette intact.¹³⁵ What is “authentic” in this context? Would the “authentic” choice be for Jerry to partner with his male lover and free his wife to find happiness with a man who is not sexually conflicted? No, insisted Jerry, who described his contacts with men as purely sexual and his relationship with his wife as true intimacy.¹³⁶ Former pastor Ted Haggard’s claim, after three weeks of counseling, that he is “completely heterosexual,” despite revelations that he had sex with a male prostitute over a three-year period, raises a similar question.¹³⁷

Yoshino’s framework of self-defined “authenticity” would seem to require us to accept Jerry’s explanation as well as Nick’s tolerance for the N-word. Yet heterosexism, anti-blackness, and white supremacy are so strongly present in our society that it is impossible to make sense of Jerry’s allegiance to Paulette and derision of his desire for men and of Nick’s professed indifference to the N-word without taking into account these forces. This is not to say that it is impossible for a black person to be comfortable with whites using the N-word, for example, but that we cannot simply assume that the self-reported preference was not shaped by anti-black attitudes. This much is evident from the experiences of Mungin and Hopkins, the professionals cited by Yoshino, who alleged they were discriminated against based on race and sex, respectively. Yoshino explains in the *Covering* article that for most of their careers, Mungin and Hopkins did not perceive themselves as subject to discriminatory norms. When she first met with a lawyer, Hopkins said that she could not recall any sexist comments being made at her firm.¹³⁸ Yoshino notes that “[t]his is a remarkable statement in light of the sheer volume of sexist remarks that had been made *directly to Hopkins* by that point.”¹³⁹ By the time the case went to trial, Hopkins viewed the case through an entirely different lens: “[T]he litigation proved to be such an education in gender consciousness that Hopkins was soon unable to see the case in nongendered terms.”¹⁴⁰ Similarly, “Mungin remained in denial about the effects of racism in his life until that

¹³⁵ *Id.*

¹³⁶ *See id.* Beyond sexual orientation, some interracial mating preferences may reflect social conditioning. Consider the following examples from an article on interracial dating. “I’m just not attracted to Asian guys,” says Reesa, a 32-year-old Filipin[a] American who lives in Northern California. “I don’t know why. I just never have been. I’ve just always dated white or European guys.” Tony, a Japanese-American man interviewed for the same article, says: “I’ve never been attracted to Asian women My type is a blonde-haired girl Blondes have caught my eye for some reason.” *Dating Outside the Color Lines*, AUDREY: ASIAN WOMEN’S MAGAZINE, Aug.–Sept. 2005, <http://www.audreymagazine.com/Sep2005/Features03.asp>, 2–3 (last visited Apr. 19, 2007). Although the racialization of sexuality shapes dating and mating patterns in the aggregate, it cannot be assumed that any particular interracial couple was inspired by these social forces.

¹³⁷ *See* Eric Gorski, *Haggard Says He’s Not Gay*, DENVER POST, Feb. 6, 2007, at A1.

¹³⁸ *See* Yoshino, *supra* note 1, at 911.

¹³⁹ *Id.* (emphasis added).

¹⁴⁰ *Id.* at 912.

denial became intolerable.”¹⁴¹ Many types of social processes, such as the development of gay identity and recovery from alcoholism, are widely understood to include a period of denial and repression before a person comes out as gay or admits that she has an alcohol problem.¹⁴² These examples show how unsatisfactory it would be to accept without analysis a person’s subjective conception of her identity. To credit uncritically the individual’s expressed conception of authenticity might be to embrace the very force that Yoshino rails against: majoritarian pressure to assimilate.¹⁴³

A second critical component of covering is masked by Yoshino’s repeated use of the term covering “demand.” In the preface to his book, among the list of paradigmatic coverers is the actor Martin Sheen (*The West Wing*), who was born Ramón Estévez.¹⁴⁴ Sheen came to regret changing his name in order to play white characters and urged his actor sons Charlie and Emilio to retain the Estévez name. Only Emilio did.¹⁴⁵ Yoshino derives from this story a reminder of the “enduring force of the covering demand.”¹⁴⁶ I see another lesson. Two similarly situated individuals, faced with the same social norms,¹⁴⁷ made very different choices. This suggests that no external “demand” can fully explain each brother’s covering or decision not to cover, but rather individual psychological and personality factors contributed to these disparate choices. It is also important to note that both brothers became successful film actors in the 1980s, despite their different names. Emilio’s initial success would seem to cast doubt upon Yoshino’s suggestion that covering was truly necessary, even if Charlie (but not Emilio) subjectively believed that it was. Yoshino attempts to explain covering almost exclusively by reference to external pressures to assimilate, but in citing the Sheen-Estévez anecdote, and throughout *COVERING*, he glosses over the psychological dimensions of this phenomenon. While Yoshino examines and excoriates the social sources of covering, the most he has to say about the internal dynamics that produce covering are comments

¹⁴¹ *Id.* at 911.

¹⁴² *Cf. id.* at 927 (“Gay individuals must first struggle to be gay against the demand to convert. After they accept themselves as gay, they must resist the demand to pass. Finally, even after coming out, gays must grapple with the demand to cover.”).

¹⁴³ *See* FORD, *supra* note 51, at 64 (“[W]e can’t assume that the identity that an individual brings from home is a product of freedom; in fact we can be pretty sure that it isn’t.”).

¹⁴⁴ *See* *COVERING*, *supra* note 2, at ix.

¹⁴⁵ *See id.* at x. Of course, the brothers likely considered more than race or ethnicity in deciding whether to use the “Sheen” name. Identifying as Martin Sheen’s son may have opened doors for Charlie that were not open to Emilio.

¹⁴⁶ *Id.*

¹⁴⁷ The two brothers look similar. They are three years apart in age, and both could pass for white. They both attained mainstream success in the mid-1980s. *Compare* Charlie Sheen, Internet Movie Database, <http://imdb.com/name/nm0000221> (last visited June 23, 2007) (Charlie Sheen’s career biography), *with* Emilio Estévez, Internet Movie Database, <http://imdb.com/name/nm0000389/> (last visited June 23, 2007) (Emilio Estévez’s career biography).

such as the following: “[W]hile I am often tempted to sue myself, this is not my healthiest impulse.”¹⁴⁸

A key part of covering involves the coverer’s detection and interpretation of a norm. In my view, this is the “hidden” part of covering alluded to by Yoshino’s subtitle, but underdeveloped in the actual book.¹⁴⁹ Yoshino tells of a rare instance in which a covering “demand” was overtly expressed to him by a senior faculty member at his law school.¹⁵⁰ He also examines a few court cases in which outsiders were explicitly instructed to cover.¹⁵¹ But like many social norms, most instances of covering are not precipitated by any expressly articulated “demand.” The demand, rather, is “in the air.”¹⁵² It is perceived by the individual based on her prior experiences, interpretations of ambiguous statements, and readings of body language, silences and gestures, among other things.

Yoshino’s own central story reveals that, in some contexts, using the term “demand” may be misleading. Yoshino recounts how a colleague told him early on in his academic career not to be a “professional homosexual,” meaning not to focus his scholarship on sexual orientation.¹⁵³ Although the colleague did articulate his expectation, it would be difficult to call this an institutional “demand” without knowing how many other faculty members shared it.¹⁵⁴ A person articulating a “demand” might in fact be an outlier rather than a representative mouthpiece for a broadly shared social norm. In this case, Yoshino went on to defy the unsolicited advice, writing his major articles pre-tenure more or less about the interests of queer people. Despite his defiance of the colleague’s advice, Yoshino was granted tenure by his colleagues, and today is widely regarded as a leading legal scholar.¹⁵⁵

¹⁴⁸ COVERING, *supra* note 2, at 192–93. Late in the book, Yoshino acknowledges that covering “demands” come not just from the state, employers, and strangers but also from “my own internal censor.” *Id.*; see also *id.* at 82 (“Like many covering demands, this voice was internal—no colleague ever imposed it on me.”). Although Yoshino fleetingly acknowledges self-covering, he fails to analyze it.

¹⁴⁹ Yoshino, by contrast, uses the word “hidden” to signify that the “assault on our civil rights . . . has swaddled itself in the benign language of assimilation.” *Id.* at xi.

¹⁵⁰ See *infra* note 153 and surrounding text.

¹⁵¹ See, e.g., COVERING, *supra* note 2, at 131 (discussing *Rogers v. American Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981)).

¹⁵² I do not mean to suggest that simply because a norm is unarticulated it is not real or is not rigid. Certain norms are deeply entrenched, even as they are rarely articulated, such as the social expectation that employees wear clothes to work.

¹⁵³ *Id.* at 17 (internal quotation marks omitted).

¹⁵⁴ Yoshino notes that an unspecified number of colleagues “echoed the sentiment in less elegant formulations,” but he also describes his law school as a “vigorously progay environment.” *Id.* These statements reveal the complexity of detecting a norm when people within an organization hold very different attitudes.

¹⁵⁵ It is possible that Yoshino had a harder time securing tenure and had to engage in significant identity work because he refused to “cover” his interest in sexual orientation, but his book does not suggest this. Yoshino does not discuss any costs of not covering his true scholarly interests. In any event, I do not mean to suggest that ultimate success (e.g., obtaining tenure) necessarily implies that there was

Thus, Yoshino's refusal to yield to the colleague's "demand" may be more instructive than the "demand" itself.

Two points follow from these incidents involving Yoshino and the Estévez brothers. First, rarely does covering stem from something clear and unyielding enough to be called a "demand." Second, rarely are the consequences of resistance obvious from an *ex ante* perspective. As to the first point, reasonable people within a particular group may disagree about the content of the norm. For instance, if we randomly polled women in a particular community, respondents would likely disagree on how much pressure there is to be extremely thin. Some would say the pressure is immense, others would describe it as moderate, while others might say they feel little or no pressure to be thin. Even in workplaces, at least professional workplaces, many norms are not inscribed in an employee handbook or some other definitive form. For instance, no one has ever demanded that I not wear a doo rag to work, and if I chose to wear one, I suspect that no one (save perhaps some of my close black mentors) would ask me to remove it. But I would still feel pressure not to wear such stereotypically black headgear at work. Instead of describing such pressure as a "demand," a more accurate descriptor would be "social norm."

There is also diversity in how people within a group subject to a norm respond to it. These differences stem in part from differences in perception of the rigidity of the norm, but also from psychological differences in capacity or willingness to confront oppressive norms. Of those who feel pressure to feel thin, some ignore it, some repudiate it, some diet sensibly and some resort to crash diets. Some outsiders who perceive a social expectation to conform to white beauty standards resort to skin lighteners or surgery to alter their eyelids or noses.¹⁵⁶ They may also dye, straighten and extend their dark curly hair into long, blond locks.¹⁵⁷ Importantly, many other people of color resist this pressure. Some even openly rebel against it,

no covering "demand"—it might instead be that the outsider successfully negotiated the norm, but at significant personal cost.

¹⁵⁶ See, e.g., Jia-Rui Chong, *Beauty and the Bleach*, L.A. TIMES, July 26, 2005, at A1 (reporting that some Asian women in Southern California don umbrellas, wear "special 'UV' gloves" and "wrap-around visors that resemble welder's masks" in order to preserve pale skin complexions); *id.* at A13 (describing how one woman, Theresa Lin-Cheng, endured various cosmetic procedures to try to look as white as her "idol," Nicole Kidman); Thomas Fuller, *A Vision of Pale Beauty Carries Risks for Asia's Women*, N.Y. TIMES, May 14, 2006, at 3 (reporting authorities' concern about popularity of illegal and potentially dangerous skin bleaching agents across the Asia-Pacific region); Lisa Jervis, *My Jewish Nose*, in *BODY OUTLAWS: REWRITING THE RULES OF BEAUTY AND BODY IMAGE* 63, 64 (Ophira Edut ed., 2003) (discussing Jewish women whose families "coerced and shamed" them into having nose jobs).

¹⁵⁷ See, e.g., Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 383–84 (discussing pressure on black women to "comply with the tastes or preferences of others" in styling their hair).

wearing clothing with slogans extolling racial pride such as “Black is Beautiful” or “The Darker the Berry, the Sweeter the Juice.”¹⁵⁸

Within my family, I can see the diversity of interpreting and responding to social norms. When as teenagers, my brothers and I wore doo rags at home, I would never have answered the door with it on because I thought that would be “ghetto.” My younger brother, always the free spirit compared to his more buttoned-down brothers, not only greeted guests with his doo rag in place, he also would drive around town wearing it. His self-created rule simply required him to remove the doo rag before entering a public place. When my older brother and I urged him not to wear a doo rag while driving, he laughed it off, thinking we were silly. Even when such requests are articulated, characterizing covering norms as “demands” allows Yoshino to make them appear far more rigid, concrete and irresistible than they often are.¹⁵⁹

Yoshino’s framing occludes not only important differences in perceptions of covering norms but also individual responsibility to resist such pressure and reject it as illegitimate. Consider the example of coming out and, after one has come out, the temptation to cover. Yoshino explains that “coming out” is not a single moment but for many is a continual process. The queer person who is not obviously marked as such is constantly confronted with settings where he may be presumed heterosexual. This dynamic raises difficult questions: When should one assert his homosexual identity? Always? Only when he thinks it is relevant? If one reveals his identity only when he deems it relevant, is he “passing” or “covering” much of the time? I have struggled with these questions during daily transactions such as riding in a taxi cab while talking on my cell phone to a friend about “gay” subjects or monitoring my dress before getting my hair cut at a predominantly black, inner-city barbershop. My impulse in these situations is to assume that strangers are homophobic to some significant degree, and would react with hostility or at least discomfort if they discerned my sexual identity. It was only through reading Yoshino’s *Covering* article that I became conscious of this instinct and began to interrogate and resist it.

Covering as a strategy for avoiding discrimination is often, and perhaps by nature, crude and entails countervailing costs. First, a risk-averse queer person might overestimate the existence of hostility. How could I flatly assume that the taxi driver was homophobic when he might have had an experience, such as a queer sibling’s coming out, that made him more

¹⁵⁸ Cf. *id.* at 384 (describing the political significance of the Afro).

¹⁵⁹ Yoshino also uses the idea of a “demand” to try to escape the serious problem of essentializing or stereotyping identity. When people object that his theory will lead to scrutinizing anyone who does not “flaunt” their identity and accusing them of covering, he responds that “I am much more likely to contest a covering *demand* by a homophobe than a covering *performance* by a gay individual . . .” COVERING, *supra* note 2, at 92. Since there will rarely be something concrete enough to be called a “demand,” this approach would leave most covering uncontested.

comfortable with queer people? In fact, how could I be sure that *he* was not queer, given that many queer people are not easily identifiable? I have on occasion covered around people who I later learned, much to my surprise, were queer. Second, downplaying my orientation contributed to the erasure of black queer people. Given the prevalent cultural belief that “gay equals white,”¹⁶⁰ just by expressing my identity I could erode the assumption that all black people are straight, eventually making life easier for me and other black queer people. In short, a strategy that defaults to covering reinforces the social pressures that inspire covering in the first place. Third, in light of the prevalence of internalized homophobia among queer people,¹⁶¹ how could I be sure that my refusal to reveal my identity was primarily motivated by the stranger’s assumed homophobia and not by my own shame? Fourth, in adopting covering, despite the costs described above, I was engaging in something analogous to what Devon Carbado and Mitu Gulati have called “racial comfort.”¹⁶² Rarely did I expect that revealing my identity would expose me to violence or even overt prejudice, such as being called “faggot.” The more likely negative response would have been silence and disengagement. In employing covering, I was privileging the comfort of strangers over my own right to be myself and not shrink from public view. Many years in the closet and all the “silence, lies, and equivocation” that the closet entails instilled in me an instinctive evasiveness that was not extinguished merely by coming out.¹⁶³ The instinct simply found a new home in the practice of covering. Despite the aforementioned psychological and social harms of covering, I cannot say that it is always harmful. Under certain circumstances, failing to pass or cover could expose a person to violence or otherwise cause countervailing harm. Yoshino’s scholarship, however, helped me flip the presumption: Instead of editing myself and hiding my identity as a matter of course, I try to conduct my life openly absent a good reason for covering.

These are hard questions and very personal questions for many queer people, especially for those of color who are negatively defined by race as well. I do not mean in this space to set forth a general guide for how queer people or other outsiders should manage their identities. My goal instead is to demonstrate the complexity of the psychology of covering and that internal dynamics and decisions, conscious and unconscious, may be responsible for the phenomenon as much as any external discriminatory force. If Yoshino had fleshed out these aspects, he would have provided a more realistic and nuanced account of covering. Reading the *Covering* article helped raise my consciousness as to how I was contributing to my own repression

¹⁶⁰ See Carbado, *supra* note 66, at 1501–07.

¹⁶¹ See, e.g., Allen & Oleson, *supra* note 122, at 34 (“Internalized homophobia has been seen as the most important roadblock to the adjustment to a positive homosexual identity.”).

¹⁶² See Carbado & Gulati, *supra* note 50, at 1294.

¹⁶³ See COVERING, *supra* note 2, at 60.

through a form of instinctive self-censorship. I suspect that I am not alone in this regard. People subject to social norms must take responsibility for testing the norm and considering critically what costs would follow from flouting it.

These difficult issues would also arise if courts were more receptive to lawsuits based on covering. Imagine a workplace where one employee is open about his homosexual orientation, yet another covers his orientation for fear of discrimination. Which employee response should we treat as reasonable and normative? Should the employee who covers be treated as a victim of a homophobic workplace culture when another homosexual employee has chosen to come out and may not perceive any adverse consequences? Whether covering is ever incorporated into law or is intended simply to spark cultural transformation, Yoshino must grapple with these questions of perceptual differences and individual responsibility.

IV. EXPANDING COVERING

In this Part, I compare Yoshino's expanded theory in the *COVERING* book with related scholarship by Devon Carbado and Mitu Gulati as well as the earlier *Covering* law review article. In 2000 and 2002, respectively, Carbado and Gulati and Yoshino published influential law review articles on the identity harms caused by pressure to assimilate.¹⁶⁴ Scholars have tended to cite Carbado and Gulati's scholarship alongside Yoshino's scholarship as if there were no significant differences.¹⁶⁵ Although Carbado and Gulati and Yoshino agree on some key points, they differ substantially in terms of their emphasis and scope.

First, while Yoshino attempts to explain discrimination throughout society, Carbado and Gulati focus on the special context of the workplace. As the title of their *Working Identity* article signifies, Carbado and Gulati argue that coping with a stigmatized identity or "identity work" is effectively an additional job requirement for outsiders.¹⁶⁶ Because of the prevalence of stereotypes and the structure of many workplaces, outsiders must devise and employ strategies for negating stereotypes, or at least mitigating their effect.¹⁶⁷ These stereotypes lead employers to distinguish blacks based on the individual's degree of assimilation and effectiveness in rebutting stereo-

¹⁶⁴ See Carbado & Gulati, *supra* note 50; Yoshino, *supra* note 1; see also Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103 (2000) [hereinafter Carbado & Gulati, *Conversations*]; Carbado & Gulati, *The Fifth Black Woman*, *supra* note 68.

¹⁶⁵ See, e.g., Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 625, 651 n.109, 652-53, 666 n.177 (2005); Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873, 883-85 (2006).

¹⁶⁶ They explain at the outset that "[t]he primary project of this Article is to flesh out the kinds of work outsiders often feel pressured to do because of negative assumptions about their identities." Carbado & Gulati, *supra* note 50, at 1262.

¹⁶⁷ See *id.* at 1270-71.

types—the “good black” rebuts the stereotype, while the “bad black” confirms it.¹⁶⁸ The effect of this stereotype-driven dynamic is that outsiders face an extra burden or drain on their limited time and resources.¹⁶⁹ Insiders need not spend time figuring out how to rebut multiple stereotypes; they can direct their time and energy into greater workplace productivity or leisure time at home and with loved ones.¹⁷⁰ Not only are insiders relieved of the constant identity-related burdens that outsiders bear, but the insider’s reputation at work may actually benefit from the very stereotype that vexes the outsider.¹⁷¹ For instance, while a female employee, just because she is a woman of child-bearing age, may be saddled with—and have to combat—the expectation that she is on the “mommy track,” a similarly situated heterosexual male benefits, just because he is a man, from an automatic presumption that he can focus solely on work and leave childcare to his wife. While the female has to vie for good job assignments and struggle to prove she is a hard worker, on the flip side of the gender stereotype, the male employee enjoys the plum work assignments as a birthright.

Moreover, Carbado and Gulati show, stereotype-negating strategies are complex and entail “risk costs.”¹⁷² A strategy might backfire, as when an employee successfully rebuts one stereotype, but accidentally runs afoul of another.¹⁷³ An employee who has multiple stigmatized identities with distinct sets of stereotypes attached to each identity (e.g., a woman who is Latina and lesbian) is particularly susceptible to the backfire problem.¹⁷⁴ Further, negotiating workplace norms requires the skills of a good actor as well as the judgment to know how to come off, for instance, as “black enough” but not “too black.”¹⁷⁵ In light of countervailing expectations to

¹⁶⁸ See, e.g., Carbado & Gulati, *The Fifth Black Woman*, *supra* note 68, at 725.

¹⁶⁹ Carbado & Gulati, *Conversations*, *supra* note 164, at 110–12 (discussing ways in which employers consciously and unconsciously exploit outsiders’ vulnerabilities); see, e.g., *id.* at 109 (“[A]n employee’s sense of constraint vis-à-vis her workplace conversations is likely to be a function of the stereotypes she perceives as applying to her.”).

¹⁷⁰ Outsiders may find, by contrast, that the discrimination at work follows them home. See generally Zachary A. Kramer, *After Work*, 95 CAL. L. REV. 627 (2007) (discussing spillover effects of discrimination on home life).

¹⁷¹ See Carbado & Gulati, *supra* note 50, at 1276–77.

¹⁷² *Id.* at 1277.

¹⁷³ See *id.* at 1277–78 (discussing a hypothetical Asian-American law professor who avoids commenting on sensitive racial issues, such as diversity in hiring, and in so doing is perceived as passive and timid).

¹⁷⁴ See generally Gowri Ramachandran, *Intersectionality as “Catch 22:” Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299 (2005).

¹⁷⁵ See Carbado & Gulati, *supra* note 50, at 1291 (“[T]he outsider not only has to perform, but she has to perform well.”); *id.* at 1300 (“Performing one’s outsider status in a way that satisfies requires care. As with acting, the ability to negotiate different institutional cultures takes skill.”). As the discussion in Part II suggests, outsider employees must cope with expectations from other outsiders, as well as from insiders at times, that they emphasize their outsider identities. For instance, a law firm might simultaneously expect the black associate not to lunch primarily with other blacks in the workplace and

mute their identities in some contexts and emphasize them in others, many outsiders attempt to calibrate their personas, yet they fail to pull it off.¹⁷⁶

Second, although covering and identity work are similar phenomena, Carbado and Gulati emphasize unequal workload burdens, while Yoshino stresses individualized conceptions of “authenticity.” Carbado and Gulati rely on psychological harm as a secondary rationale for treating identity work as a form of discrimination.¹⁷⁷ The stereotype-negating strategies required by identity work may lead to “compromising moments of identity performance—moments in which a person’s performance of identity contradicts some political or social image that person has of herself.”¹⁷⁸ Such moments can arise suddenly and randomly and force the outsider to make hard choices as to the appropriate response. For instance, several years ago I was told by a liberal white male coworker, in jest, that if I messed up an assignment he would “lynch” me. I was so stunned that I was frozen in place. My immediate reaction was mentally to sort through a list of all words rhyming with “lynch.” The comment was so stunning and unexpected, given our otherwise positive working relationship, that I hoped that I had misheard him. By the time I recovered from the shock, the moment had passed, and I was outside his office. For weeks, I beat myself up for not expressing my anger to him. Even so, I was acutely aware that accusing a white superior of making a racist comment would have likely ended what had been, and continued to be, a fruitful mentoring relationship. Carbado and Gulati explain that people of color often keep silent or at least mute their normal reaction to offensive statements because white people expect them to provide “racial comfort.”¹⁷⁹ In this way, people of color bear the burden of maintaining the institutional appearance of racial neutrality, even at the cost of their own integrity.¹⁸⁰

yet to mentor more junior black associates, as well as be photographed for the law firm’s promotional materials and speak at recruiting events in order to demonstrate the firm’s commitment to diversity.

¹⁷⁶ Although the famous example of such an employee is Ann Hopkins, the plaintiff in the *Price Waterhouse* gender stereotyping case, Hopkins likely represents many more outsider employees who failed to walk the tightrope of identity expectations in their workplaces. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). For an explanation of how outsiders who rise to the top of organizations are likely to be adept at negotiating these pressures, see Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645 (2004).

¹⁷⁷ See Carbado & Gulati, *supra* note 50, at 1277; see also *id.* at 1288–89 (“Beyond a certain point, an outsider’s efforts to make insiders feel comfortable can translate into a denial of the outsider’s self, or at least the outsider’s idealized sense of self.”). Carbado and Gulati distinguish between two conceptions of identity, although they recognize that the conceptions are interrelated: “[1] ‘sense of self’ identity (how we define and perceive ourselves) and [(2)] ‘attributal’ identity (how others define and perceive us).” *Id.* at 1261 n.2.

¹⁷⁸ *Id.* at 1289.

¹⁷⁹ See *id.* at 1295–96.

¹⁸⁰ See *id.* at 1290–91; *id.* at 1296 (“Racial comfort strategies make white people comfortable because the corollary of racial comfort is deracialization.”).

Although Carbado and Gulati and Yoshino rely on psychological harm, Carbado and Gulati's primary rationale appears to be the disproportionate workload burdens created by stereotypes in the workplace. Outsiders have to manage their racial, gender, and sexual identities in a way that insiders do not; and this identity work can reduce outsiders' productivity. The *COVERING* book does not significantly rely on these workload concerns for the claim that covering is a form of discrimination.¹⁸¹ While Carbado and Gulati's description of disproportionate workload burdens is concrete, Yoshino's conceptions of liberty and personalized authenticity are highly abstract. Although he highlights liberty and authenticity, a more persuasive basis for Yoshino's theory lies in his concern with majority power and equality, which played a more central role in the *Covering* article but surfaces in *COVERING* as well.¹⁸² This antistatutory justification dovetails with Carbado and Gulati's conception of identity work as a problem of discrimination.¹⁸³

Two framing choices ensure that Carbado and Gulati's project is more closely connected to antidiscrimination law than Yoshino's project is, at least as described in his book. First, Carbado and Gulati focus on the identity performances required to negate racial, gender and sexual orientation stereotypes. There are many instances Yoshino would call covering that would fall outside Carbado and Gulati's frame. For instance, a male couple that declined to display affection in public, or get married or have a commitment ceremony, might be covering because they perceive that expressing their affection and commitment would disturb straight people. But these covering performances do not necessarily counter stereotypes. Assuming that the displays of affection are modest, such as hand-holding, they would likely not trigger the stereotype of gays as promiscuous. As for marriage, making a life-long commitment—rather than avoiding one—would seem to be the stereotype-negating move, since marriage is seen as the antithesis of promiscuity. Because stereotyping figures prominently in antidiscrimination law and scholarship,¹⁸⁴ Carbado and Gulati's project seems to be a more natural extension of antidiscrimination law. An employee can

¹⁸¹ Yoshino's *Covering* article touched on the workload concerns. See Yoshino, *supra* note 1, at 885–86.

¹⁸² See, e.g., *COVERING*, *supra* note 2, at 177 (“Covering demands are the modern form of [] subordination: racial minorities must ‘act white’ because of white supremacy, women must hide parenting responsibilities at work because of patriarchy, gays must hide displays of same-sex affection because of heteronormativity . . .”).

¹⁸³ See Yoshino, *supra* note 1, at 931 (“I believe that what makes covering on the basis of race, sex, or orientation different from many other forms of covering is that Americans—as a matter of popular legislation or articulated constitutional principle or both—have enumerated or begun to enumerate these axes as being of special legal concern.”).

¹⁸⁴ See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996) (stating that government may not rely on “overbroad generalizations about the different talents, capacities, or preferences of males and females”); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1999).

prevail under Title VII if she can prove that her employer punished her for failing to conform to a stereotype of how women or blacks are supposed to act;¹⁸⁵ she cannot obtain relief because the employer violated her personal sense of authenticity. Extending Title VII to traits that correlate with race or sex and may trigger stereotypes, such as dreadlocks or femininity, is a more logical expansion of existing law than would be a revision that enabled an employee to wear blue hair or multiple piercings because it advances her sense of authenticity.

Second, Carbado and Gulati tightly frame the problem of identity work as a problem of the workplace. The workplace of course is heavily regulated, subject to antidiscrimination laws such as Title VII, the Americans with Disabilities Act, and the Family and Medical Leave Act. Most social settings, by contrast, are not regulated, which means there is no redress for discrimination that occurs in these realms. No law punishes a white person for not accepting a date with a black person or an able-bodied person for not holding open the door for someone with a disability.¹⁸⁶ Therefore, when Yoshino moves from critiquing an employer's dismissal of an attorney for having a commitment ceremony with her female partner to a same-sex couple deciding not to hold hands in public or a gay son negotiating his identity with his heterosexual parents, he is bridging distinct contexts subject to different legal rules.

We can see the significance of context by parsing a hypothetical suggested by Carbado and Gulati. They describe an end-of-summer dinner held for Debra, an African-American female summer associate who has just received a permanent job offer and knows of the firm's expectation that she accept by the end of the dinner.¹⁸⁷ There are four white male attorneys and one white female attorney present.¹⁸⁸ Carbado and Gulati tell the story as follows:

Susan, the white female associate, wants to know if Debra has seen the new *Star Wars* movie. She tells Debra that the firm has lots of tickets and continues: "It's a great movie. Quite entertaining. The effects and the characters are all amazing! Jar Jar Binks was, I thought, very funny." The other associates agree enthusiastically. And they go on at some length about how "truly great" this movie is.

Debra has, in fact, seen *Star Wars* [sic]. She does not think the movie was great. On the contrary, she found the movie to be racially problematic and several of the characters to be walking racial stereotypes. Debra does not ex-

¹⁸⁵ See, e.g., *Price Waterhouse*, 490 U.S. at 250–51.

¹⁸⁶ The fact that the law does not regulate these contexts certainly does not suggest that discriminatory acts in these contexts do not inflict harms. Society has made the judgment, in some cases, that the harms are lesser than those inflicted by discrimination that is regulated, or at least that the competing interests in privacy and liberty counterbalance the harms.

¹⁸⁷ See Carbado & Gulati, *supra* note 50, at 1289.

¹⁸⁸ See *id.*

press her “true” feelings about the movie, however. Instead, she escapes the conversation by saying: “Thanks, but I’ve seen the film already. At any rate, I’m not a huge fan of the *Star Wars* genre.”

For Debra, her reaction was a compromising moment of identity performance. To respond otherwise might have resulted in the risk that the associates would consider her racially sensitive, uncollegial, a potential troublemaker, a radical, a “Sapphire,” or a “PC-er.”¹⁸⁹

In this work-related setting, there are power dynamics that tighten the screws on Debra, increasing the pressure to cover or provide racial comfort. Debra is the only African-American, and she is surrounded by white superiors. Although it may not be obvious to some, she perceives that her job is at risk if she renders the “wrong” performance. It is unlikely that the firm would withdraw her offer if she said that she thought Jar Jar Binks was a racist invention. Her comment could nonetheless poison her relationships with potential mentors before she has even begun her first day at work. Because her comment could foster a perception of Debra as militant and a transgressor of social norms, these attorneys may actively avoid working with her or unconsciously direct their work to other new associates, which might be just as harmful. An associate without work is eventually a lawyer without a job.

Now transpose this situation to a dinner party where Debra is surrounded by white people with whom she does *not* work. Assume that Debra was invited to the party after befriending one of the members of her health club. During after-dinner drinks, one of the white people makes the same comment about the *Star Wars* movie that Susan made in the hypothetical above. Similar negative judgments might attach to Debra if she speaks up, but the white people at the party lack the power to deprive Debra of her job and her conception of herself as successful in her career. The law recognizes the importance of power, hierarchy, and context, and this understanding underlies the decision to regulate critical portals of individual advancement—employment, education, housing, etc.—but not dinner parties and other social settings. Therefore, when Yoshino extends his theory beyond traditionally regulated contexts, he is moving to the margins of civil rights, as they are commonly understood. Relatedly, in this non-workplace context, most people would place responsibility for deciding whether to speak up on Debra, given the lesser degree of coercion and the reduced consequences of failing to render racial comfort. In tying together under the same theory capitulations to majority norms that span quite different con-

¹⁸⁹ *Id.* at 1289–90 (internal citations omitted). The term “Sapphire,” which originated from a character in the *Amos ‘n’ Andy* television show, has been used to invoke a “tough, domineering, emasculating, strident, and shrill” black woman. See Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 539–40.

texts, Yoshino fails sufficiently to draw distinctions based on power differentials and variance in degrees of the individual's freedom and agency.¹⁹⁰

Yoshino and Carbado and Gulati agree that their theories potentially sweep beyond the confines of outsider groups. Yoshino says: "Everyone covers."¹⁹¹ Likewise, Carbado and Gulati note: "Fundamental to this [a]rticle is the notion that everyone works identity."¹⁹² It is telling, nonetheless, that Yoshino boldly brandishes the universality of covering, while Carbado and Gulati deal with the universality question largely in their footnotes.¹⁹³ While the authors start from the same principle, they reach different conclusions. Although it was written first, Carbado and Gulati's justification of how their theory coheres with antidiscrimination law—despite the universality of identity pressures—functions as a response to Yoshino's expansion of his theory in the *COVERING* book.

Carbado and Gulati and Yoshino confronted the same question in the same setting. Carbado and Gulati write that "[a]s we have presented the ideas in this [a]rticle at a number of workshops, one question that we have been asked: 'Isn't what you describe (the phenomenon of working identity) something that everyone does? Is the amount of identity work that outsiders do meaningfully different from the work that insiders do?'"¹⁹⁴ Yoshino writes that

[w]hen I lecture on covering, I often encounter what I think of as the "angry straight white man" reaction. A member of the audience, almost invariably a white man, almost invariably angry, denies that covering is a civil rights issue. Why shouldn't racial minorities or women or gays have to cover? . . . After all, the questioner says, *I* have to cover all the time.¹⁹⁵

"I surprise these individuals when I agree," Yoshino continues, that "[c]ontemporary civil rights has erred in focusing solely on traditional civil rights groups"¹⁹⁶ This position represents a marked shift from Yoshino's justification for focusing on outsiders in the *Covering* article.¹⁹⁷ Carbado and Gulati, in contrast, acknowledge that everyone works identity, but the impact of race and identity performance does not fall equally. Because they focus on identity work designed to negate harmful stereotypes

¹⁹⁰ I do not mean to suggest that work is the only realm where social norms can be overly coercive. Parents and spouses, for example, may exert undue influence as well. See FORD, *supra* note 51, at 64.

¹⁹¹ *COVERING*, *supra* note 2, at ix.

¹⁹² See Carbado & Gulati, *supra* note 50, at 1261 n.2; see also *id.* at 1308 n.132.

¹⁹³ See *id.* at 1261 n.2, 1308 n.132.

¹⁹⁴ *Id.* at 1308 n.132.

¹⁹⁵ *COVERING*, *supra* note 2, at 24.

¹⁹⁶ *Id.* at 25.

¹⁹⁷ See Yoshino, *supra* note 1, at 931 ("I believe that what makes covering on the basis of race, sex, or orientation different from many other forms of covering is that Americans—as a matter of popular legislation or articulated constitutional principle or both—have enumerated or begun to enumerate these axes as being of special legal concern.")

(racial, gender, and sexual orientation), the relative lack of negative stereotypes that attach to whites, men, and heterosexuals distinguishes outsiders from insiders.¹⁹⁸ A helpful analogy can be found in Title VII. Even though that law, and virtually all civil rights laws, protect people of all races, the vast majority of Title VII race discrimination claims are brought by people of color. Similarly, although there are narrow instances in which a white employee may be in the minority and have to “work” his racial identity, by and large the burden of providing racial comfort falls more heavily on people of color because they tend to be outnumbered and lack decisionmaking power in the workplace. In most, but not all, workplaces, white men are at the top of the hierarchy and control the workplace norms. Therefore, a white man may be equally unlikely to have to work his racial identity as he is to have to worry about being sexually harassed.¹⁹⁹

Carbado and Gulati’s response to critics who questioned their focus on outsiders casts doubt on the significance of Yoshino’s declaration that “everyone covers.” Yes, Carbado and Gulati might say, everyone faces pressure to cover their “alcoholism,” “working class background” and “anomie”—some of the examples cited by Yoshino.²⁰⁰ But the “angry straight white man” will rarely have to cover his race, gender, and sexual orientation. Outsiders must negotiate the same pressures that the “angry straight white man” confronts with respect to all other stigmatized traits (alcoholism, anomie, etc.), yet it is the *extra* layer of identity work—the “shadow work”²⁰¹ stemming from race, gender, and sexual orientation—that Carbado and Gulati illuminate. In the end, Carbado and Gulati employ the notion that “[e]veryone works identity” as a hook to help insiders understand the greater pressures that outsiders face.²⁰² Unlike Yoshino, they do not suggest a symmetry between outsiders and insiders.²⁰³

It appears that Carbado and Gulati would apply their theory to a white professor who works at a historically black university and regularly has to

¹⁹⁸ See Carbado & Gulati, *supra* note 50, at 1302 n.132 (“[O]ur answer is typically that the amount of extra work is likely to be a function of the type of stereotypes at play[,] . . . [and] the extra identity work that outsiders do is substantial.”).

¹⁹⁹ Cf. FORD, *supra* note 51, at 138–39 (distinguishing systemic discrimination from unjust treatment that is “sporadic, episodic or individualized”). I acknowledge that in rare cases men are faced with sexual harassment by both women and other men, see, e.g., *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), but this risk pales in comparison to the likelihood that a woman will face harassment.

²⁰⁰ COVERING, *supra* note 2, at 24–25.

²⁰¹ Carbado & Gulati, *supra* note 50, at 1307.

²⁰² See *id.* at 1308 n.132 (drawing an analogy to the “bitter complaints that are often made by insiders about the burdens and constraining effects of sexual harassment laws and ‘PC-ness’—that both overregulate and constrain their workplace interactions; both prevent them from being who they are and saying what they would like. The burdens and constraints that women and minorities face on a daily basis are akin to those, except magnified many times over.”).

²⁰³ See, e.g., Carbado & Gulati, *Conversations*, *supra* note 164, at 131–34 (distinguishing the impact of workplace dynamics on outsiders from that affecting insiders).

confront racial stereotypes. Their concerns about stereotypes inflicting extra work and identity harms would continue to be apt, although the white professor is not exactly in the same position as a black professor at a predominantly white university.²⁰⁴ They do not suggest that all burdens on identity, including the many burdens that do not correlate with race or some other outsider identity, should be treated as illegitimate discrimination. In this way, their theory is more modest and narrow than Yoshino's. The breadth of Yoshino's theory, if taken at face value, is apparent from questions raised by his use of the "angry white straight man." For instance, in response to Carbado and Gulati and others, Richard Ford argued that extending antidiscrimination protections to identity-related traits might very well jeopardize existing civil rights protections and otherwise harm outsiders.²⁰⁵ Ford notes the considerable, if not insurmountable, obstacles to incorporating the covering theory into law. This change would require mostly white male judges to define which traits are authentically "black"²⁰⁶—perhaps cornrows for women, but what about the black man (or white man, for that matter) who wants to wear a doo rag? Individual litigants may press claims of so-called black traits, such as the use of profanity or "black English" that would horrify many other black people.²⁰⁷ Further, Ford argues, the law would create a "regulatory effect" on people who fail to adhere to norms of "authentic blackness," and would test the political will to maintain civil rights laws.²⁰⁸

²⁰⁴ For instance, the content and likely the number of racial stereotypes about white men differ. Moreover, the white professor would have a much easier time leaving his employment and finding a comparable position in a predominantly white setting. The black professor's options for comparable work in a black setting would be more sharply circumscribed.

²⁰⁵ See, e.g., Ford, *supra* note 51, at 1810 (warning of possibility that "widespread rejection of the idea of legal protection for traits and behavior will poison the delicate but real consensus in favor of legal guarantees against overt status discrimination").

²⁰⁶ See *id.* at 1810–11.

²⁰⁷ See FORD, *supra* note 51, at 74–77 (critiquing Regina Austin's critique of *Chambers v. Omaha Girls Club*, 834 F.2d 697, 704 (8th Cir. 1987)). Consider, for example, Justice Brennan's disturbing, if well-intended, claim that the use of profanity is part of black culture and thus not considered obscene by black people. See *FCC v. Pacifica*, 438 U.S. 726, 776 (1978) (Brennan, J., dissenting); see also COVERING, *supra* note 2, at 83–85 (suggesting that Fire Island, New York represents authentic gay culture); Yoshino, *supra* note 1, at 845–47 (suggesting that the notion of gay identity includes promiscuity, allying with other sexual "deviants" such as pedophiles, and "gay drugs").

²⁰⁸ See Ford, *supra* note 51, at 1810–11. But see Leti Volpp, *Righting Wrongs*, 47 UCLA L. REV. 1815 (2000) (characterizing as overstated Ford's claim that protecting outsider identity-related traits creates a slippery slope, arguing instead that judges are already defining race and gender and that failing to protect traits would leave much discrimination without a remedy); Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365 (2006) (providing a doctrinal framework for redressing the harms of trait discrimination but responding to Ford's concerns). As my discussion in Part II suggests, I am sympathetic to Ford's concerns about regulating the identity of individual outsiders and requiring them to adhere to particular conceptions of "authenticity."

The COVERING book—rather than withdrawing, narrowing or providing new grounds for Yoshino’s original position—suggests expanding anti-discrimination theory (if not law) in a rather dramatic fashion. The most striking examples are the open-ended definition of “authenticity” and the inclusion of the “angry straight white man.”²⁰⁹ If we take these ideas seriously, they might mean that an “angry straight white man” who feels it is essential that he use racial epithets at work or elsewhere should not have to “cover” his “true essence.”²¹⁰ Acceding to the social and legal norms that such words are barred from the workplace would deprive him of “authenticity,” which only he can define. Surely Yoshino would resist this outcome, but his framework invites such problems through its expansiveness and ambiguity. Yoshino might reject the angry man’s argument because it is based on “animus,” which Yoshino firmly opposes.²¹¹ The man, however, might not view himself as harboring racial animus, and Yoshino’s framework suggests that society should respect such self-conceptions. If Yoshino or the judiciary is deciding whether a person will be allowed to exercise his conception of authenticity, we have departed substantially from a self-defined model of authenticity. This hypothetical demonstrates, I think, that there is something amiss in a framework capacious enough to classify the racist’s right to use racial epithets alongside the interests of people of color to work in an environment free from discrimination, at least without more explanation than Yoshino provides.²¹² Carbado and Gulati’s framework wisely avoids such problems.²¹³

V. CONCLUSION

In addition to critiquing COVERING, this Essay has attempted to identify important issues for future scholarship exploring covering and identity work. Scholars should recognize that covering and identity work may stem from three sources: (1) majority groups; (2) minority groups; and (3) the self. For instance, even in the workplace, Carbado and Gulati’s focus, out-

²⁰⁹ COVERING, *supra* note 2, at 24–25; *id.* at 190 (“[T]he True Self is not susceptible to specific definition, as its nature differs for each of us.”).

²¹⁰ *Cf.* K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, in ROBERT POST ET AL., PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 61 (2001) (“It would be a mistake to allow the centrality of a project to my individuality by itself to trump your interests in such cases: Do we want the centrality of anti-Semitic hatred to my life to entitle me to keep Jews out of my hotel, for example?”). The inclusion of racial epithets is my addition to the hypothetical. Although Yoshino states that the man is “angry” and hostile to Yoshino’s ideas, he does not expressly state that he is racist.

²¹¹ Yoshino states that animus is never a legitimate reason to require assimilation. *See* COVERING, *supra* note 2, at 27.

²¹² *Cf.* Nussbaum, *supra* note 43, at 25 (stating that Yoshino and Winnicott’s conception of the “True Self” is “vague and amorphous”).

²¹³ The “angry straight white man” could not plausibly argue that his use of racial epithets is necessary to rebut a racial stereotype.

sider employees are not concerned simply with placating white superiors or assimilating to white-oriented work cultures. They simultaneously grapple with countervailing identity expectations from members of their own minority group(s).²¹⁴ Completely assimilating to white norms may expose such an employee to charges of being a “sell out” and imperil networking and mentoring relationships with other minorities, which may be crucial lifelines. Further, scholars should pay greater attention to individual psychological differences in negotiating covering norms. Framing such issues as stemming entirely from majority coercion can mask the question of the individual’s responsibility to question or test her perceptions of a norm. The critical work of dismantling coercive social norms must emanate not only from the majority, but also from within minority groups, and ultimately from the individual.

²¹⁴ See Carbado & Gulati, *supra* note 50, at 1306 (discussing briefly “selling out” and “buying back”).

