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UNCOVERING IDENTITY

Paul Horwitz*

COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS. By Kenji Yoshino. New York: Random House. 2006. Pp. xii, 282. \$24.95.

INTRODUCTION: ON BEING "CHARLIE SHEEN"

Kenji Yoshino¹ begins his thoughtful, often beautiful book with a series of examples of "covering"—"ton[ing] down a disfavored identity to fit into the mainstream" (p. ix). In his opening example, he notes that "Ramón Estévez covered his ethnicity when he changed his name to Martin Sheen" (p. ix). Sheen regrets his choice, and "exhorted his sons—Emilio and Charlie—to use the family name. One of them has not done so, signaling the enduring force of the covering demand."²

That is one way to explain Charlie's decision. But one could interpret it in other ways. Perhaps, rather than seeking to cover his ethnic identity, the younger Sheen, bursting with filial pride, chose the last name that would most closely identify him with his father in the eyes of the world. Maybe Sheen was acting less out of a desire to conceal his Hispanic heritage than out of a willingness to trade on his father's stage name. Maybe he flipped a coin. After all, to quote Charlie Sheen, "What's in a name?"³

All of this might mean little more than that no good can come from opening a book (or a book review—or a movie) with the name "Charlie Sheen." Certainly it all seems a little far afield from the contested identities—sexual orientation, gender, race, religion, disability—that are the primary subject of Yoshino's book, *Covering: The Hidden Assault on Our Civil Rights*.

But there is a serious point to be made here. For the subject of this book is the defense of the "True Self" against society's demands that we act and present ourselves as something other than what we truly are (p. 185). We are

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1. Guido Calabresi Professor of Law, Yale Law School.

2. P. x (citing Reese Erlich, *A Star's Activism, On Screen and Off*, CHRISTIAN SCI. MONITOR, Dec. 28, 1990, at 14).

3. Jim Slotek, *You Could Always Count on Charlie*, TORONTO SUN, Apr. 21, 1996, at S8 ("My brother said I was flipped. He's so hung up on making it entirely without my father's help. My reaction was, 'What's in a name?'"'). As this quote suggests, we could similarly reinterpret Emilio Estevez's use of his given name rather than his father's stage name not as an assertion of his ethnic identity, but as an effort to downplay, if not conceal, his relationship to his famous father in order to make it in the business independently. In Yoshino's terms, Estevez may have been both covering and passing with respect to his identity as a famous man's son.

all engaged in an act of “self-elaboration:” a “search for authenticity” that “each of us must do for ourselves,” and that “is the most important work we can do” (p. 184). And it is this account of the human project that is called into question by the parable of Charlie Sheen. Sheen’s story nicely illustrates that concepts like “self,” “identity,” and “authenticity” are deeply contested. We would be hard pressed to identify the “real” Charlie Sheen. He may be a Hispanic man trying to pass as Anglo; an actor trying to flaunt his business connections; or a denizen of Hollywood who, no matter what his birth name, identifies as a dynastic heir. And so it is, in more or less significant ways, with each of us.

This Review raises several questions about Yoshino’s treatment of identity, authenticity, and the “true self” in *Covering*. Part I summarizes Yoshino’s book and offers some practical criticisms. Section II.A argues that Yoshino’s treatment of authenticity and identity leaves much to be desired. It is not clear that the search for authenticity is “the most important work we can do” as human beings (p. 184). But even if it were, such a project cannot depend only on acts of “self-elaboration,” as if the true self were a nugget of gold to be excavated from the layers of the “false” social self. Our truest, most authentic selves are often those we forge precisely in moments of dialogue and interaction with others. Yoshino’s focus on “self-elaboration” may be the result of his placement of the gay experience at the center of his book. Whether and how that experience generalizes to the broader spectrum of identity groups, however, is a complicated question.

Section II.B argues that Yoshino’s focus on covering as an act of coerced assimilation fails to fully capture the extent to which one’s identity, and one’s *uses* of identity, may be fluid and deliberate. Charlie Sheen’s name may have less to do with the enduring force of the covering demand than it does with the enduring ways in which we foreground different aspects of our identities on different occasions—sometimes out of fear or coercion, and sometimes out of calculation.

Section II.C focuses on another identity trait that runs through Yoshino’s book, always present but never remarked upon: those aspects of identity and covering that involve wealth, privilege, and social status. These traits, which are so often central to our identities and our self-presentation, are constant undercurrents in *Covering*, but are rarely if ever openly acknowledged and examined.

Notwithstanding these concerns, this is not an attack on Yoshino’s book. *Covering* offers a valuable typology of the stages of civil rights, and brightly and movingly illuminates the many formal and informal claims that our society makes upon our selves. Nevertheless, Yoshino does not do full justice to the fluidity, the complexity, and the irreducibly social nature of the “self” that lies at the heart of this literally self-centered project. Parts III and IV conclude by suggesting that this failure to fully account for the complexity of the self may have a number of important implications for the project Yoshino has undertaken.

I. YOSHINO'S PROJECT

A. *Conversion, Passing, and Covering*

In *Covering*, Yoshino sets out a typology that retells the history of civil rights as a shifting series of demands encapsulated in the terms "conversion," "passing," and "covering." Although he shows that these demands have been applied to a number of groups that traditionally have been special subjects of our civil rights laws (pp. 21–22), he tells this story most strikingly as a story about the "phases of gay history" (p. 19), and thus of gay civil rights.

Conversion, in the gay context, is quite simply the demand that gays and lesbians convert to heterosexuality (p. 27). In American history, this story is the tale of efforts to treat homosexuality as a medical or psychological pathology and heterosexuality as "health." These demands required gays to engage in a form of self-murder as the price of entry into the broader society.⁴ Ultimately, shifting views within the psychiatric community, and the growing assertiveness of the gay community itself, led to the substantial demise of the conversion demand (pp. 38–41). Despite some continuing efforts to preserve it (p. 41), the conversion demand has largely been consigned to the darker quarters of gay history.

As conversion demands gave way, society continued to demand that gays and lesbians "pass"—that is, that they conceal their identity as gays and lesbians. In Yoshino's words, a passing demand "accept[s] silence in lieu of transformation" (p. 69). A paradigmatic example is the military's "don't ask, don't tell" policy, in which the fact of one's gay identity alone will not disqualify a member of the armed forces from service, as it would under a conversion regime, but one's visibility as a gay man or lesbian *will* disqualify that individual (pp. 69–70).

The response to the passing demand is the assertion of the right to "self-identify[] as gay" (p. 70). The classic trope of gay self-identification is the coming out story, one of which, richly recounted here, is Yoshino's own (pp. 58–60). Yoshino argues that the best response to the passing demand is the First Amendment, which should protect the right to announce one's status (pp. 70–71).

The third and final phase of gay civil rights history that Yoshino describes is also the book's central contribution: the demand to cover. Covering, a form of coerced assimilation, is not a demand that one negate one's homosexuality (conversion), or hide it (passing). Rather, it accepts that the subject of the demand is gay, while requiring him to "act straight" (p. 77). For example, an employer might be willing to hire a gay man, but expect him to present himself largely in ways typical of a straight man: to "answer an interview question about hobbies by discussing football," not

4. P. 35 ("Anxious to join the human race, even questioning radicals sought to kill their gay selves.").

“by discussing [his] antique lamp collection.”⁵ Covering says that you can be whatever you want—as long as you don’t flaunt it.

Yoshino argues that covering is not limited to gay identity: it is equally present for many groups, including members of racial and ethnic minorities and women, each of whom are asked to assimilate to the mainstream majority rather than accentuate their differences (pp. 111–64). More generally, although his special focus is on traditionally persecuted minorities, Yoshino suggests that we *all*, at different times, mute some aspect of our identity. To quote the first sentence of his book, “[e]veryone covers” (p. ix).

To this necessarily brief précis must be added some qualifications. First, covering has its converse, reverse-covering: demands that one flaunt, rather than downplay, one’s identity. Although this demand may be less common for gays and lesbians, it is often faced by members of other groups. Thus, women in the workplace may be asked to cover their feminine identities by acting “masculine,” while being simultaneously punished for their failure to reverse-cover if they do not “[w]alk more femininely, talk more femininely, . . . [and] wear make-up and jewelry”⁶ The Supreme Court confronted this classic “catch 22” for professional women in *Price Waterhouse v. Hopkins*.⁷

Second, covering is a fluid category. It may be unclear whether a particular demand involves passing or covering. Nor is it always clear whether a particular act consists of covering or flaunting one’s identity; depending on one’s perspective, same-sex marriage can be seen as an act of assimilation to straight cultural norms, and thus an act of covering, or as a flaunting of one’s asserted right to publicly love someone of the same sex (p. 91).

Third, Yoshino does not oppose all forms of covering, or all covering demands. Not all demands that we conform ourselves to the expectations of others are necessarily wrong (p. 26). No paeon to self-expression will rescue the person who feels the need to spit on the floor at the opera house, or (worse still) to wear a Yankees jersey at Fenway Park. He takes aim only at covering demands that are both coerced and unreasoned—“against a reflexive conformity that takes itself as its own rationale” (p. 26).

B. *The Remedy: Reason-Forcing Conversations*

To that end, Yoshino advocates requiring employers or the state to engage in a “reason-forcing conversation”—that is, to supply a reasoned basis for their conformity demands (p. 178). If an authority can supply a reason for asking someone to modify or downplay the presentation of her identity, it can maintain the demand. For example, the state reasonably requires that a person be fully visible in her driver’s license photo even if that means forc-

5. Gowri Ramachandran, *Intersectionality as “Catch 22”: Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 306 (2005).

6. P. 155 (quoting ANN BRANIGAR HOPKINS, *SO ORDERED: MAKING PARTNER THE HARD WAY* 148 (1996)).

7. 490 U.S. 228, 251 (1989).

ing a Muslim woman to remove her hijab.⁸ Where the demand is supported by little more than bias, it must give way.

Yoshino describes this approach as a move away from an equality-based approach to civil rights and toward a liberty-based approach. He suggests that to analyze covering claims “in terms of group-based equality” risks essentializing certain traits, treating them as if they were fundamental to the identity of some particular group (e.g., wearing makeup is an essentially feminine trait) (p. 189). Yoshino holds no “fixed conception of what authenticity might be” for any given group.⁹ Conversely, he avoids suggesting that individuals who conform to the mainstream are somehow not truly being themselves (pp. 189–91). Accordingly, while he is unwilling to abandon completely a “group-based accommodation model for existing civil rights groups” (p. 191), he insists that a new civil rights paradigm should be founded on the “universal right[] of persons” to elaborate their own identities (p. 189).

For lawyers, this call for a reason-forcing conversation may be unsatisfying. Despite his discussion of some scattered cases, Yoshino offers little guidance on the question of what constitutes a good “reason” for demanding that a worker, for example, conform to workplace norms. To develop this point, suppose that a casino requires its bartenders to adopt a “comprehensive uniform” that requires women to wear makeup.¹⁰ A female worker, complaining that this demand requires her literally to cover the “face [she] presents to the world”¹¹—or, conversely, that it requires her to reverse-cover by presenting as “feminine”—sues.

Leaving aside the complexities of Title VII jurisprudence, it is not clear what should constitute a sufficient “reason” to back the casino’s demand. Is the casino merely forcing its workers “to conform to [its] quaint notion of what a ‘real woman’ looks like”?¹² Or is it quite reasonably acting on its employees’ bodies to present a particular face of its own, one characterized by a widely held view of what constitutes a neat and attractive appearance? Most people would agree that it is not unreasonable for workplaces to demand at least *some* level of conformity to a particular standard of appearance, even if those standards are influenced by the broader culture’s own assumptions about gender.¹³

8. P. 178 (discussing *Freeman v. State*, No. 2002-CA-2828, 2003 WL 21338619 (Fla. Cir. Ct. June 6, 2003)).

9. P. 190; *see also* pp. 22–23 (opposing reverse-covering demands, in which individuals are compelled to “act according to the stereotypes associated with their group”).

10. *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1105 (9th Cir. 2006) (en banc).

11. *Id.* at 1117 (Kozinski, J., dissenting).

12. *Id.* at 1118.

13. *See, e.g.*, Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2553–54 (1994) (discussing legitimate “appearance interest[s]” of employers); Roberto J. Gonzalez, Note, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2217 (2003) (“[G]rooming, dress, and language policies often serve legitimate functions.”).

In holding a “reason-forcing conversation” about workplace appearance, then, much depends on whether it is advisable, or even possible, to extricate oneself from the web of norms and expectations about appearance held by the larger society.¹⁴ Discussions about what constitutes a “reasonable” performance demand may thus have less to do with reason *tout court*, and more to do with debates over when one may intrude into the larger culture by calling some demands reasonable and others unreasonable.¹⁵

Debates over what degree of freedom individuals should enjoy in the workplace in the face of appearance and language requirements are common in the recent literature on antidiscrimination law,¹⁶ and I won’t rehearse those arguments here. My point is simply that abstract conversations about reason tell us little about what constitutes a good or bad “reason” to demand that one perform particular aspects of one’s identity in a particular way in individual cases.¹⁷ Yoshino puts his own thumb on the scales when he writes, “[m]y personal inclination is always to privilege the claims of the individual against countervailing interests like ‘neatness’ or ‘workplace harmony.’ But we should have that conversation” (p. 195). The problem is that this is not yet a reason-forcing conversation. It is still a conversation *about* that conversation, and we do not know what content should fill the universe of reasonable or unreasonable workplace demands.

Although lawyers will thus find *Covering* fairly thin gruel as a concrete proposal for any legal implementation of Yoshino’s goals, Yoshino is not naïve. He recognizes this concern, and responds that *Covering* is not only about legal reform. Many covering demands are made by private actors, including demands outside the employment sphere, and the scope of these demands is so capacious that it is difficult for the law to tailor itself to every such covering demand. Accordingly, Yoshino acknowledges that “law will be a relatively trivial part of the new civil rights” (p. 192). Rather, Yoshino proposes that reason-forcing conversations take place “outside courtrooms—in workplaces and restaurants, schools and playgrounds, chat rooms and living rooms, public squares and bars. They should occur informally and intimately, where tolerance is made and unmade” (pp. 194–95). *Cover-*

14. See Bartlett, *supra* note 13, at 2545; see also Robert C. Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, in PREJUDICIAL APPEARANCES 1, 22 (Robert C. Post ed., 2001).

15. See Post, *supra* note 14, at 30–32.

16. See, e.g., Bartlett, *supra* note 13; Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995); Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623 (2005); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994); Post, *supra* note 14; Gowri Ramachandran, *Freedom of Dress: State and Private Regulations of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. (forthcoming 2006); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004); Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365 (2006).

17. See Yuracko, *supra* note 16, at 368 (calling for a more “nuanced, context specific, and narrowly drawn” discussion about trait discrimination).

ing thus pleads for a broad social dialogue on the tension between identity and assimilation.

II. YOSHINO'S CONCEPTION OF THE SELF

A. Uncovering the "True" Self?

Despite the virtues of his general approach, Yoshino builds his project on too slender a reed. Identity and authenticity are contested concepts, and despite occasional nods to the complexity of these ideas, Yoshino gives too little attention to the ways in which one's self may be social, dialogically formed, and fluid, and the extent to which many expressions of our "true" selves are in fact very deliberate performances.

Covering builds on a foundational concern with the preservation of the authentic, autonomous self from the world's unreasonable demands. At the heart of this book is the belief that "the search for authenticity" is work that "all of us engage in as human beings," and that "it is the most important work we can do" (p. 184). He argues that we all share "the desire for authenticity, our common human wish to express ourselves without being impeded by unreasoning demands for conformity" (p. xii). Here, Yoshino draws on the psychoanalyst D.W. Winnicott's exploration of the relationship between the "True Self" and the "False Self."¹⁸ The True Self "is the self that gives an individual the feeling of being real," while the False Self serves the sole function of "mediat[ing] the relationship between the True Self and the world" (p. 185). Ideally, the False Self should be an unobtrusive guardian of the True Self, a mere "polite and mannered social attitude"¹⁹ that "make[s] it possible for the True Self to come into its own."²⁰ If, as Yoshino writes, Winnicott "does not demonize the False Self,"²¹ it is nevertheless clear that the True Self, which "embodies the importance of authenticity" (p. 186), plays the starring role.

There is reason to be skeptical of Winnicott's simple schema of the true and false selves. As another reader of *Covering* has observed, these "vague and amorphous" terms, at times defined in a way that "verg[es] on an excessive romanticism," are not much help in identifying precisely what, if anything, the True Self means.²² Winnicott's typology of the self has, unsurprisingly, been criticized from within the psychoanalytic community, along lines that are relevant to Yoshino's project. Sharone Abramowitz, for example, has written that while the concept of the False Self may "resonate[] for people who suffer from the experience of forcing themselves into a lifetime

18. P. 184 (discussing D.W. WINNICOTT, *Ego Distortion in Terms of True and False Self*, in *THE MATURATIONAL PROCESSES AND THE FACILITATING ENVIRONMENT* 140-52 (1965)).

19. P. 185 (quoting WINNICOTT, *supra* note 18, at 143).

20. *Id.* (quoting WINNICOTT, *supra* note 18, at 143).

21. *Id.*

22. Martha C. Nussbaum, *The Prohibition Era*, *THE NEW REPUBLIC*, Mar. 20, 2006, at 21, 25 (reviewing COVERING).

of contrived accommodation," it is a mistake to organize a conception of the self around "'falsity' versus 'truth.'"²³ Instead, we should organize a conception of the self around an understanding of the importance of *integrating* our divided selves, each of which is authentic in its own way.

Even if Yoshino is less interested in Winnicott for the merits of his psychoanalytic views than as a supplier of a "vocabulary for [the] quest for authenticity" (p. 184), there is something troubling about this account of the authentic self.²⁴ The notion of an authentic self, and of the importance of elaborating an identity based on "intimate contact with oneself"²⁵—what Rousseau called "le sentiment de l'existence"²⁶—is a fairly recent concept,²⁷ and a deeply contested one.²⁸

In critiquing that concept here, I put aside the postmodernist literature that Yoshino has invoked elsewhere.²⁹ Instead, I want to draw on Charles Taylor's valuable writings on identity and authenticity.³⁰ Taylor observes that one of the central features of modernity is a form of individualism:

[E]veryone has a right to develop their own form of life, grounded on their own sense of what is really important or of value. People are called upon to be true to themselves and to seek their own self-fulfillment. What this consists of, each must, in the last instance, determine for him- or herself.³¹

23. Sharone A. Abramowitz, *Killing the Needy Self: Women Professionals and Suicide (A Critique of Winnicott's False Self Theory)*, in *THE IMPACT OF NEW IDEAS: PROGRESS IN SELF PSYCHOLOGY* 177, 181 (Arnold Goldberg ed., 1995); see also Howard A. Bacal, *Heinz Kohut, in THEORIES OF OBJECT RELATIONS: BRIDGES TO SELF PSYCHOLOGY* 225, 240 (Howard A. Bacal & Kenneth M. Newman eds., 1990) (arguing that the self is best seen not as divided into "True" and "False," but rather as a divided entity in need of integration); Cynthia Burack, *True or False: The Stratified Self in Lesbian Feminist Theory*, 5 *FEMINISM & PSYCHOL.* 329, 336 (1995) (arguing that lesbian feminists have wrongly relied on Winnicott's "vision of the 'true' self as unified, coherent and accessible to introspection").

24. For a similar view, see Nussbaum, *supra* note 22, at 26 (observing that, absent a richer account of the self, there remains "a large hole at the heart of the book, to be filled in by whatever the reader can come up with that works better than slavish adherence to conformity").

25. CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 27 (1992).

26. *Id.* (quoting JEAN-JACQUES ROUSSEAU, *Les Rêveries du Promeneur Solitaire*, in 1 *OEUVRES COMPLÈTES* 993, 1047 (Bernard Gagnebin & Marcel Raymond eds., 1959)).

27. For a rich account of the history of authenticity as a Western concept, see LIONEL TRILLING, *SINCERITY AND AUTHENTICITY* (1972). Trilling dates the concept to the Romantics, a fact that finds its echoes in Yoshino's own statement that "I follow the Romantics . . . in their belief that if a human life is described with enough particularity, the universal will begin to speak through it." P. xii; see also TAYLOR, *supra* note 25, at 15.

28. See, e.g., Susan D. Carle, *Theorizing Agency*, 55 *AM. U. L. REV.* 307 (2005).

29. Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769 (2002). This literature is a frequent resource in discussions of queer theory, see, for example, ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* (1996), and "gaylaw," see, for example, WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999). For a thoughtful attempt to reconcile autonomy with postmodern arguments about the social construction of the self, see Carlos A. Ball, *Sexual Ethics and Postmodernism in Gay Rights Philosophy*, 80 *N.C. L. REV.* 371 (2002).

30. TAYLOR, *supra* note 25.

31. *Id.* at 14.

This view of authenticity as an outcome of what Yoshino calls “*self-elaboration*,” (p. 184; emphasis added), and what Taylor labels “the massive subjective turn of modern culture,”³² pays too little attention to the *social* nature of identity. Taylor rightly refers to the “fundamentally *dialogical* character” of human life.³³ Identity is not, and cannot be, arrived at in splendid isolation. To ask who we are requires a language with which to do so,³⁴ and we only find such a language “in exchange[s] with others.”³⁵ Identity is thus *always* defined “in dialogue with, sometimes in struggle against, the identities our significant others want to recognize in us.”³⁶ And the ranks of “significant others” include not only those in our immediate circle—family, friends, lovers—but the wider culture in which we live. “[I]dentity is always articulated through concepts (and practices) made available to you by religion, society, school, and state, mediated by family, peers, friends.”³⁷

One might respond, “even if what you say is so, Yoshino is still right. We should never be forced by society to become something other than what we are.” But this claim lacks force without some prior view of what we, individually and collectively, *value* about particular aspects of our identity. Whether an identity or identity trait is meaningful or valuable depends on some prior view about what sorts of identities matter.³⁸ Taylor writes:

Only if I exist in a world in which history, or the demands of nature, or the needs of my fellow human beings, or the duties of citizenship, or the call of God, or something else of this order *matters* crucially, can I define an identity for myself that is not trivial. Authenticity is not the enemy of demands that emanate from beyond the self; it supposes such demands.³⁹

To summarize, Yoshino puts the self at the center of his new civil rights paradigm, and specifically the “true,” authentic self. But there is no such thing as a project of pure *self-elaboration*. Just as identity is always a product built with the materials we are given and those we find in our environment, so identity-elaboration is a product of negotiation with the world outside ourselves. Both our “True Selves” and our “False Selves”

32. *Id.* at 26.

33. *Id.* at 32–33.

34. *Id.* at 33 (noting that language here means not just words, but art, gesture, love, and so forth).

35. *Id.*

36. *Id.*

37. KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* 20 (2005).

38. TAYLOR, *supra* note 25, at 38–40 (suggesting that, absent some evaluation of our “horizons of significance,” a privileging of identity based on nothing more than choice reduces to “triviality”).

39. *Id.* at 40–41. One point I lack the space to develop here, but which is implicit in Taylor’s words, is that some religious readers, even if they agree with much of Yoshino’s book, would still object to calling the self’s quest for authenticity the central human project. For those individuals, we do not love God because doing so is essential to our sense of an authentic inner self; rather, we have selves in order that we may love God.

exist in the world as much as within our selves, and neither can be said to be truer or falsier than the other without a great deal more work.⁴⁰

Yoshino is not so naïve as to imagine the self as perfectly unencumbered.⁴¹ It would be foolish to say such a thing about a book that devotes almost as much space to the question of Yoshino's Japanese identity as it does to his identity as a gay man. Still, the unmistakable image at the core of his book is that of a literally *self*-centered quest for individual authenticity. This is a shaky foundation on which to build a project.

B. *The Uses of Identity*

We can complicate Yoshino's picture of the true self still more. The self at the heart of *Covering* is something authentic and "true," buffered against the world's demands by the "False Self" and in need of the remedies against unjust performance demands that Yoshino proposes in his book. But identity, whatever its sources, is not simply a thing we *possess*; it is a thing we *use*. Just as "[e]veryone covers" from time to time (p. xi), so everyone flaunts, choosing occasions on which to strategically emphasize some aspect of his or her self.

Some examples may illustrate this point. To reprise my earlier discussion, it is far from clear that, in taking his father's stage name, Charlie Sheen was proving "the enduring force of the covering demand" (p. x). His action could be reinterpreted in any number of ways, of which the most plausible explanation is that his father's ethnicity was far less salient to him than his celebrity was. As we have seen, it is hard to discern who the "real" Charlie Sheen is.

Another example discussed by Yoshino raises a number of sensitive questions about the strategic uses of identity. Yoshino's research assistant, Tom, reveals that he is going blind, and that he regularly covers the fact of his disability in his daily dealings (p. 171). Tom's impairment affects his social interactions, since he is often unable to read others' facial cues in conversations. As Tom applies for federal clerkships, Yoshino presses him for permission to include the fact of his disability in his recommendation letters, asking "if he wanted me to include anything in my letter that might otherwise go unaddressed" (p. 171). Tom can think of nothing "besides his addiction to MTV" (p. 171). After his efforts result in interviews but no job offer, he reapplies, and Yoshino again presses him for permission to mention

40. This point is nicely made by a recent news story discussing physicians' findings that a drug used to relieve the symptoms of Parkinson's disease had the side effect in some patients of triggering compulsive reactions that were seemingly out of character for those patients. One patient, "a married churchgoer in his 50s," was tortured by the fact that he ended up spending prodigious amounts of money on "prostitutes, phone sex and pornographic films." He cries out: "Was that the monster in the closet? . . . Is that who I am really and the drug just opened the door?" Denise Gelene, *From Blessing to Curse?*, L.A. TIMES, May 23, 2006, at A1. A trite response would be that the patient indeed ended up revealing his "True Self." But his anguish speaks to the equally valid possibility that our true selves are precisely those that are the product of the restraints we impose on ourselves.

41. Cf. MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

his disability. Tom replies, “I don’t want them to hire me because they feel sorry for me But I’ll leave it to you” (p. 171). Yoshino includes the information in his recommendations, and Tom gets his clerkship offer.

Yoshino writes: “Tom’s failure to reveal his impairment to judges was a form of passing, his failure to emphasize it to me a form of covering” (p. 171). Maybe so. Again, though, we could tell a number of different stories about this incident. Maybe Tom’s refusal to disclose his disability *was* an act of covering. But should we be so blithe in depicting his apparent indifference to his disability as, in effect, a form of false consciousness? After all, if Yoshino’s depiction of the authentic self is right, Tom’s identity is *his* to shape and perform, and his evident belief that succeeding on his own terms means doing so without disclosing his disability is no more or less to be valued than if he had chosen instead to assert it. Yoshino observes that the episode has

underscored again my ambivalence toward assimilation. I admired him for refusing victimhood, and for proving himself to me on neutral ground before divulging his condition. At the same time, I was glad he trusted me to negotiate on his behalf. While he downplayed his condition, he was likely to be misunderstood. (pp. 171–72)

And so, in effect, he urges Tom to perform his disability. It is difficult to read the tale without wondering whether the “real” Tom has just been unmasked or disguised.

Of course, everyone is familiar with the many ways in which we perform our identities, and particularly the ways in which society may encourage us to flaunt even those identities that are so often the subject of covering demands. College or professional school admissions essays, for example, may call upon us to emphasize those aspects of our identity that may improve classroom diversity,⁴² whether or not we would otherwise choose to call attention to them.

These essays may well be considered “true” or essential by the people who tell them. Still, they suggest that not every act of performing one’s identity, or of refusing to perform it, is a matter of passing or covering, or of being “misunderstood” (p. 172). Sometimes we are compelled to tell our stories or to perform our identities; sometimes we choose to do so.⁴³ In performing standard scripts about our identities, we may even internalize particular aspects of our identities that we did not previously think were

42. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003) (noting that the University of Michigan Law School’s admissions essay process gives students an “opportunity to highlight their own potential diversity contributions”); Tom Hayden & Connie Rice, *California Cracks its Mortarboards*, NATION, Sept. 18, 1995, at 264, 265 (arguing that, following switch to race-blind admissions process, schools’ focus on applicants’ experiences with “disadvantage” would lead them to “parade [their] . . . dysfunctions’ in an effort to be considered for campuses they are fully qualified to attend”).

43. Carbado & Gulati, *supra* note 16, at 1270 (noting that outsiders may sometimes opt to exploit positive stereotypes about their identities in the workplace).

especially salient.⁴⁴ At other times, we deliberately submerge certain aspects of our identities in favor of others—in favor of the somewhat denatured but perfectly genuine self that we choose to present in the workplace, for instance.⁴⁵ In all of these cases, it is far from clear where the “true” self lies.

Yoshino recognizes this point, writing that he has “elaborated [his] own gay identity by covering in some ways and flaunting in others, and will doubtless change that balance over time” (p. 92). Still, his privileging of the notion of the authentic self does not just obscure the ways in which identity is fluid and dialogic. It also leads us to neglect the ways in which our performance of our identities is not simply an expression of the “true” self, but a deliberate, sometimes strategic, and potentially distorting move. We need something more definite than the distinction between the true and false self to tell us when covering and flaunting are permissible or problematic.

C. *Covering and Flaunting Along Class Dimensions*

Let us nevertheless assume the value of Yoshino’s project. From this perspective, there is yet another curious “hole at the heart” of this book.⁴⁶ This is the failure to engage seriously another aspect of our identities that is just as fundamental to whatever we might call our “true” selves, and just as connected to questions of social justice and injustice, as any of the categories that are limned so well in his book: class.

Markers of class, privilege, and social status pervade Yoshino’s book—unsurprisingly, given that so much of the book eschews the academic voice in favor of a deeply personal exploration of his own relationship to identity and to the phenomena of conversion, passing, and covering.⁴⁷ An online comment on the book observes that it takes place “almost entirely in the arcadian settings of Phillips Exeter, Harvard, Oxford, and Yale.”⁴⁸ The remark is uncharitable but true. If *Covering* is Yoshino’s own story, it is in many ways a story of privilege, as Yoshino doubtless would be the first to concede. Signposts of class and social status are everywhere within its pages.

Everywhere and yet nowhere. For of all the kinds of identity traits and identity performances that Yoshino examines, exquisitely and at length, those involving class are not among them. The failure to seriously engage class is a curious omission in a book that so carefully unpacks other aspects of our identities. And it is hardly irrelevant to his project. For example, Yo-

44. See Richard T. Ford, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics*, in *LEFT LEGALISM/LEFT CRITIQUE* 38 (Wendy Brown & Janet Halley eds., 2002). For a discussion of identity scripts, see APPIAH, *supra* note 37, at 21–22.

45. See Nussbaum, *supra* note 22, at 25. *But see* Carbado & Gulati, *supra* note 16.

46. Nussbaum, *supra* note 22, at 26.

47. P. xii (discussing his decision to write the book “in a more intimate voice” than traditional legal scholarship allows).

48. Amazon.com, *Reviews for Covering*, http://www.amazon.com/Covering-Hidden-Assault-Civil-Rights/dp/0375508201/ref=ed_oe_h/103-2265001-7323833 (follow “See all 16 customer reviews” hyperlink) (last visited Jan. 12, 2007).

shino cites a list of statements offered by Eric Liu that constitute “some of the ways you could say I am ‘white.’”⁴⁹ They include such items as “I listen to National Public Radio,” “I eat gourmet greens,” and “I subscribe to *Foreign Affairs*.”⁵⁰ Liu believes that the fact that he can sign on to the list makes him “white, by acclamation.”⁵¹ Yoshino, too, wonders if he has “covered [his] own Asian-American identity” (p. 125). But these items are at least as much markers of class privilege as they are of racial identity.

We could ask whether those class markers are themselves subtly racialized, coding as race-neutral while at the same time privileging the aesthetic values of a white majority.⁵² But whatever conclusion we draw, the role of class and privilege in the identities that Yoshino is describing surely deserves further inquiry. Theorists of intersectionality in civil rights remind us that class is one of those intersecting categories that play a central role in understanding discrimination.⁵³ That observation may be especially true for American gays and lesbians, who are often assumed to be especially affluent.⁵⁴

At a fundamental level, it is difficult to talk about identity in America without bringing in questions of social class. This is all the more true in the context of the intersecting categories, such as race, gender, and sexual orientation, that Yoshino *does* survey. Perhaps Yoshino puts class aside because it is not one of the traditionally protected identity traits that are the special concern of his book, or perhaps he considers class to be a trait that is more intractable, and less reducible to identifiable traits, than such qualities as race and gender. Whatever the reason, the invisibility of class as a topic of discussion, despite its presence in every aspect of Yoshino’s memoir, leaves an uncomfortable gap here. Using Yoshino’s own vocabulary, we might even ask whether the pervasive but unexamined presence of class in *Covering* marks the book itself as an act of covering along class dimensions, or of flaunting. It may be awkward for us, as legal academics, to confront the relevance of our own privileged positions to the work we do and the world

49. P. 124 (quoting ERIC LIU, *THE ACCIDENTAL ASIAN: NOTES OF A NATIVE SPEAKER* 33 (1998)).

50. *Id.* (quoting LIU, *supra* note 49, at 33–34.)

51. LIU, *supra* note 49, at 34. Yoshino includes this quotation in *Covering*. P. 125.

52. See generally John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283 (1997).

53. See, e.g., Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993 (1989); Ford, *supra* note 44, at 46 (discussing the effect of *Bakke* on racial identity and class); Francisco Valdes, *Introduction: Piercing Webs of Power: Identity Resistance, and Hope in LatCrit Theory and Praxis*, 33 U.C. DAVIS L. REV. 897, 914–15 (2000) (discussing the role of class in LatCrit theory).

54. For discussions of the intersection between sexual orientation and class, see, for example, Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 314–15 (2001) (challenging the assumption of gay and lesbian wealth while noting that those who are wealthy and/or white are more likely to express their sexual orientations publicly), and Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Gay and Lesbian “Victories,”* 4 L. & SEXUALITY 83, 103–06 (1994).

we see in front of us. Still, as he says, “we should have that conversation” (p. 195).

III. UNIVERSALITY, LIBERTY, EQUALITY

Covering is surely a more nuanced work than the picture I have painted here may suggest. At times, he does abandon his focus on one True Self and suggests that each of us must “integrate the many selves we hold” (p. 196). Still, it is nevertheless fair to lay the emphasis where Yoshino generally does: not with the integration of multiple selves, with all the complex questions that presents, but with the notion that there is *an* authentic self in each of us that emerges from a process of self-elaboration, and that must be protected against demands coming from outside the self.

Notwithstanding my reservations about this approach, Yoshino has clearly made a valuable contribution to our thinking about gay rights in particular and civil rights in general. He usefully depicts a human urge toward the full expression of one’s self, and the dangers of deliberately stifling that urge.⁵⁵ And by considering the many ways in which law privileges social demands that one conform to the expectations of employers, the state, and others, *Covering* powerfully captures “law’s capacity to produce the alien within.”⁵⁶

We need to say far more about what, precisely, counts toward a meaningful “reason-forcing conversation” in the context of specific covering or reverse-covering demands. Yoshino would also be on stronger ground if he had fully accounted for the equally authentic nature of both our “internal” and our “social” selves, rather than arguing for the protection of the “True Self” and the reduction of the “False Self” “to the minimum necessary to regulate relations between the True Self and the world” (p. 186). But this disagreement should not be taken as a refusal to recognize that Yoshino has described a very real concern. By giving “covering” a name, he has gone a long way toward helping us see an issue that affects us all, daily and intimately.

We might, then, treat this review as a constructive attempt to ask what implications there are for Yoshino’s project if, as I have argued, his foundational account of identity and authenticity is flawed or incomplete. I think there are several implications for Yoshino’s broader work.

First, the experience of the formation of gay identity may be less applicable to other forms of identity than Yoshino suggests. Yoshino writes that the “gay critique of assimilation has implications for all civil rights groups, including racial minorities, women, religious minorities, and people with disabilities” (p. 27). This view depends in turn on his belief that “th[e] quest

55. Cf. KEVIN SEAMUS HASSON, *THE RIGHT TO BE WRONG: ENDING THE CULTURE WAR OVER RELIGION IN AMERICA* 124 (2005) (“[W]hen something quintessentially human requires freedom in order to be authentic, it’s wrong to rob it of its authenticity by robbing it of its freedom.”).

56. Audrey Macklin, *Borderline Security*, in *THE SECURITY OF FREEDOM: ESSAYS ON CANADA’S ANTI-TERRORISM BILL* 383, 398 (Ronald J. Daniels, Patrick Macklem, & Kent Roach eds., 2000).

of authenticity is universal” (p. 27)—that “the gay project of self-elaboration [is] emblematic of the search for authenticity *all* of us engage in as human beings” (p. 184; emphasis added).

It is unclear just how far this universalizing impulse can take us. Yoshino depicts gay identity in terms of voluntariness—not in the sense that one “chooses” to be gay,⁵⁷ but in the sense that gays and lesbians deliberately “articulate [their] invisible selves without the initial support of [their] immediate communities” (p. 184).⁵⁸ But many identity group members would reject the notion that their identity is so unrooted that it can be called the product of “*self-elaboration*.” Many religious individuals, for example, would argue that their identity is not an internal choice of belief, but a submission to the overwhelming external reality of God. Yoshino describes the history of Mormonism, and its rejection of polygamy under social and legal pressure, in terms that liken it to the gay civil rights experience (pp. 168–69). But Mormons themselves would describe the rejection of polygamy as an “authentic” religious choice, regardless of the social pressures that may have contributed to it.⁵⁹ Other groups, too, believing that their identities have been forged by membership in a community, whether racial or some other kind, rather than through self-elaboration, would be hesitant to sign on to any project that suggests that their identity can be summed up in the picture of an unrooted self seeking the expression of its true nature.

I do not mean to establish a false dichotomy between “rooted” and “unrooted” identity groups. It may well be that *all* identities are products of both internal searching and external influence. Thus, I do not mean to deny the possibility that the gay experience may indeed apply to other civil rights groups and to the human experience more generally. But we should be wary of making this leap too easily.

This critique of Yoshino’s depiction of identity and authenticity also calls into question one of his most important moves: his belief that we should reconfigure civil rights as a matter of *liberty* rather than equality.⁶⁰ This is one of the most striking aspects of Yoshino’s book, especially when compared to the law review article that formed much of the basis for this work. There, Yoshino described identity as fundamentally *performative*, and treated certain core aspects of identity as irreducibly part of what it means to *have* that identity; sodomy, for instance, was figured as an essential trait of

57. Although Yoshino is at pains to reject immutability as a defense of homosexuality. Pp. 46–49.

58. See, e.g., ESKRIDGE, *supra* note 29, at 11, 271–73 (discussing the gay formation of “families we choose”).

59. See, e.g., Church of Jesus Christ of Latter-Day Saints, Frequently asked questions, What is the Church’s position on polygamy?, <http://www.mormon.org/question/faq/category/answer/0,9777,1601-1-114-1,00.html> (last visited Sept. 30, 2006) (suggesting that plural marriage ceased for reasons of religious revelation and not social pressure). For more on the complex interrelationship between the state and the formation of religious doctrine, see Richard W. Garnett, *Assimilation, Toleration, and the State’s Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645 (2004).

60. Pp. 188–92. Gowri Ramachandran also argues that we should adopt a liberty-based approach to identity performance demands. See Ramachandran, *supra* note 16.

gay identity.⁶¹ That move led commentators to treat Yoshino's first cut at "covering" as an equality-oriented approach.⁶²

Treating particular identities as if they reduce to certain fundamental traits, however, can give rise to the essentialist critique: the argument that to privilege particular identity performances "inevitably privilege[s] the claims of those who behave in conformance with dominant group norms."⁶³ Yoshino agonizes over criticisms that his project turns a resistance to conformity into an extension of the stereotypes he wants to eradicate (p. 190). We might read his move away from an equality-based civil rights regime and toward a liberty-based civil rights regime as a way of avoiding the bite of this critique.

But that move depends on Yoshino's willingness to universalize his project by figuring human identity as a matter of self-elaboration, and to describe human authenticity in somewhat atomistic terms. If, however, human identity is not atomistic but deeply fluid, social, and dialogically formed, then many of the identity traits we value can only be understood if they belong to wider affective communities—gay, African-American, female, and so on—that lend them meaning. And if many of our identity performances are likely to be deliberate and even strategic, rather than eruptions of the "true" self that lies within, we need a more powerful tool to distinguish those identity performances that genuinely need protection from those that are *just* performances. We need something to rescue "covering" from being so universal that it is finally banal.⁶⁴

If all of this is true, then one might reach the following conclusion: whether or not self-elaboration is all there is, we ought at least to agree that certain traits, such as race, gender, or sexual orientation, should not be treated as trivial by the world at large. Even if "[e]veryone covers" (p. ix), at least along some vital dimensions no one should be forced to cover any *more* than anyone else without a very good reason. But this places the emphasis back on *equality*, and away from liberty.

Yoshino's two-fold response to the covering demand recognizes this problem. On the one hand, he emphasizes that civil rights law should continue to especially disfavor covering demands that affect traditionally protected groups (pp. 190–91, 195). On the other, he suggests that the primary response to covering with respect to other identity traits cannot lie in law alone, but must depend instead upon a range of informal conversations (pp. 194–95).

61. See Yoshino, *supra* note 29, at 871–75.

62. See, e.g., Ramachandran, *supra* note 16, manuscript at 4 & n.6 (lumping Yoshino's article with "scholarship that theorizes [identity performance demands] in terms of equality").

63. *Id.* at 15; see also Gonzalez, *supra* note 13 (criticizing Yoshino's *Covering* article for its essentializing tendencies).

64. Cf. TAYLOR, *supra* note 25, at 68 (arguing that anthropocentrism abolishes "all horizons of significance" and "threatens us with a loss of meaning," thus leading to a trivialization of the human quest for self-identity, as there can be no "meaningful choices" without "crucial issues").

This leaves us in a decidedly awkward place. Yoshino presents us with an explicitly *liberty*-based approach to covering that effectively grants a meaningful legal remedy only to those who raise *equality*-based objections to covering demands. At the same time, because he has avoided the essentialist critique by insisting on the universality of the covering demand and the centrality of *everyone's* "True Self," he can offer us little to distinguish covering demands involving traditionally protected identity groups from the whole universe of covering demands that each of us confronts; if anything, he has helped to efface that distinction. We are left either with a civil rights regime that has no core subjects and offers far too much protection for trivial identity traits, or with a civil rights regime that sensibly protects only some groups but without any good basis for leaving out the rest of us.

CONCLUSION: ASKING FIRST QUESTIONS FIRST

In the end, it may be too early to ask whether we ought to adopt an equality-based or a liberty-based approach to the problem of covering. Too many prior questions remain to be answered before we even reach this point. In particular, before we can hold a "reason-forcing conversation" about protecting the "True Self" from the world's unreasonable demands, we must first reach some understanding of what the self is. We need to grasp whether it can ever be accurate to call our selves "true," "false," or "self-elaborated," and whether, when, or why it makes sense to protect the "True Self" against the social world that both creates and restrains it.

As Robert Post observes, we live "in a social world that springs from history and that creates identities founded on contingent facts of socialization and culture."⁶⁵ Civil rights law, whether it is equality-based or liberty-based, tends to present itself as if it were possible to escape those bounds, to be "context-free"⁶⁶—to demand a workplace, a state, a society that depends solely on "considerations of pure instrumental reason."⁶⁷ That is the "reason-forcing conversation" toward which Yoshino wants us to move.

But we cannot get there yet, if ever. Our selves are finally too embedded in the social world, too dependent for their formation on the influences that surround us, for good and for ill. We cannot escape our "horizons of significance"⁶⁸ or "the necessity of scripts, of social meanings, and of signs" that are as constitutive of our identities as they are oppressive and distortive of those identities.⁶⁹

65. Post, *supra* note 14, at 21; see also Yuracko, *supra* note 16 (noting that "[s]ocial meanings are real" and influence our understanding of the same or similar traits when displayed by women compared to men).

66. Post, *supra* note 14, at 20 (quoting Jürgen Habermas, TOWARD A RATIONAL SOCIETY: STUDENT PROTEST, SCIENCE, AND POLITICS 93 (Jeremy J. Shapiro trans., 1970)).

67. *Id.* at 18.

68. TAYLOR, *supra* note 25, at 39.

69. Bartlett, *supra* note 13, at 2582; see also APPIAH, *supra* note 37, at 156 ("Autonomy . . . is conventionally described as an ideal of self-authorship. But the metaphor should remind us that we write in a language we did not ourselves make.").

Perhaps the best we can do is to acknowledge that society sometimes employs the law to selectively and legally reshape those scripts, forbidding us from issuing covering demands in some cases while allowing us to make those demands in other cases. We can debate the occasions on which we should allow or forbid those demands.⁷⁰ But to simply appeal to autonomy, authenticity, *or* equality is to hold an empty conversation.⁷¹ Before we can hold a “reason-forcing conversation” about protecting the “True Self” from the world’s unreasonable demands, we must first reach some understanding of what the self is, whether it can ever be accurate to call it “true,” “false,” or “self-elaborated,” and whether, when, or why it makes sense to protect it against the social world that both creates and restrains it. That conversation, too, is worth having.

70. See Post, *supra* note 14, at 40–41. Martha Nussbaum, for example, argues that the underlying conversation we should hold about covering should be about the American treatment of sex, gender, and the family. Nussbaum, *supra* note 22, at 24.

71. See TAYLOR, *supra* note 25, at 52 (“There must be some substantive agreement on value, or else the formal principle of equality will be empty and a sham.”); Bartlett, *supra* note 13, at 2582 (“Autonomy is not bad, but, like equality taken by itself, it is empty.”); Roderick M. Hills, Jr., *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws*, 95 MICH. L. REV. 1588, 1592–1614 (1997) (reviewing ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* (1996)) (discussing problems with crafting an antidiscrimination project without first deciding when stigma or discrimination are “unjust” or “arbitrary”).