The Pressure to Cover

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By KENJI YOSHINO

When I began teaching at Yale Law School in 1998, a friend spoke to me frankly. "You'll have a better chance at tenure," he said, "if you're a homosexual professional than if you're a professional homosexual." Out of the closet for six years at the time, I knew what he meant. To be a "homosexual professional" was to be a professor of constitutional law who "happened" to be gay. To be a "professional homosexual" was to be a gay professor who made gay rights his work. Others echoed the sentiment in less elegant formulations. Be gay, my world seemed to say. Be openly gay, if you want. But don't flaunt.

I didn't experience the advice as antigay. The law school is a vigorously tolerant place, embedded in a university famous for its gay student population. (As the undergraduate jingle goes: "One in four, maybe more/One in three, maybe me/One in two, maybe you.") I took my colleague's words as generic counsel to leave my personal life at home. I could see that research related to one's identity -- referred to in the academy as "mesearch" -- could raise legitimate questions about scholarly objectivity.

I also saw others playing down their outsider identities to blend into the mainstream. Female colleagues confided that they would avoid references to their children at work, lest they be seen as mothers first and scholars second. Conservative students asked for advice about how open they could be about their politics without suffering repercussions at some imagined future confirmation hearing. A religious student said he feared coming out as a believer, as he thought his intellect would be placed on a 25 percent discount. Many of us, it seemed, had to work our identities as well as our jobs.

It wasn't long before I found myself resisting the demand to conform. What bothered me was not that I had to engage in straight-acting behavior, much of which felt natural to me. What bothered me was the felt need to mute my passion for gay subjects, people, culture. At a time when the law was transforming gay rights, it seemed ludicrous not to suit up and get in the game.

"Mesearch" being what it is, I soon turned my scholarly attention to the pressure to conform. What puzzled me was that I felt that pressure so long after my emergence from the closet. When I stopped passing, I exulted that I could stop thinking about my sexuality. This proved naïve. Long after I came out, I still experienced the need to assimilate to straight norms. But I didn't have a word for this demand to tone down my known gayness.

Then I found my word, in the sociologist Erving Goffman's book "Stigma." Written in 1963, the book describes how various groups -- including the disabled, the elderly and the obese -- manage their "spoiled" identities. After discussing passing, Goffman observes that "persons who are ready to admit possession of a stigma. . .may nonetheless make a great effort to keep

the stigma from looming large." He calls this behavior covering. He distinguishes passing from covering by noting that passing pertains to the visibility of a characteristic, while covering pertains to its obtrusiveness. He relates how F.D.R. stationed himself behind a desk before his advisers came in for meetings. Roosevelt was not passing, since everyone knew he used a wheelchair. He was covering, playing down his disability so people would focus on his more conventionally presidential qualities.

As is often the case when you learn a new idea, I began to perceive covering everywhere. Leafing through a magazine, I read that Helen Keller replaced her natural eyes (one of which protruded) with brilliant blue glass ones. On the radio, I heard that Margaret Thatcher went to a voice coach to lower the pitch of her voice. Friends began to send me e-mail. Did I know that Martin Sheen was Ramon Estevez on his birth certificate, that Ben Kingsley was Krishna Bhanji, that Kirk Douglas was Issur Danielovitch Demsky and that Jon Stewart was Jonathan Leibowitz?

In those days, spotting instances of covering felt like a parlor game. It's hard to get worked up about how celebrities and politicians have to manage their public images. Jon Stewart joked that he changed his name because Leibowitz was "too Hollywood," and that seemed to get it exactly right. My own experience with covering was also not particularly difficult -- once I had the courage to write from my passions, I was immediately embraced.

It was only when I looked for instances of covering in the law that I saw how lucky I had been. Civil rights case law is peopled with plaintiffs who were severely punished for daring to be openly different. Workers were fired for lapsing into Spanish in English-only workplaces, women were fired for behaving in stereotypically "feminine" ways and gay parents lost custody of their children for engaging in displays of same-sex affection. These cases revealed that far from being a parlor game, covering was the civil rights issue of our time.

The New Discrimination

In recent decades, discrimination in America has undergone a generational shift. Discrimination was once aimed at entire groups, resulting in the exclusion of all racial minorities, women, gays, religious minorities and people with disabilities. A battery of civil rights laws -- like the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990 -- sought to combat these forms of discrimination. The triumph of American civil rights is that such categorical exclusions by the state or employers are now relatively rare.

Now a subtler form of discrimination has risen to take its place. This discrimination does not aim at groups as a whole. Rather, it aims at the subset of the group that refuses to cover, that is, to assimilate to dominant norms. And for the most part, existing civil rights laws do not protect individuals against such covering demands. The question of our time is whether we should understand this new discrimination to be a harm and, if so, whether the remedy is legal or social in nature.

Consider the following cases:

Renee Rogers, an African-American employee at American Airlines, wore cornrows to work. American had a grooming policy that prevented employees from wearing an all-braided hairstyle. When American sought to enforce this policy against Rogers, she filed suit, alleging race discrimination. In 1981, a federal district court rejected her argument. It first observed that cornrows were not distinctively associated with African-Americans, noting that Rogers had only adopted the hairstyle after it "had been popularized by a white actress in the film '10.' " As if recognizing the unpersuasiveness of what we might call the Bo Derek defense, the court further alleged that because hairstyle, unlike skin color, was a mutable characteristic, discrimination on the basis of grooming was not discrimination on the basis of race. Renee Rogers lost her case.

Lydia Mikus and Ismael Gonzalez were called for jury service in a case involving a defendant who was Latino. When the prosecutor asked them whether they could speak Spanish, they answered in the affirmative. The prosecutor struck them, and the defense attorney then brought suit on their behalf, claiming national-origin discrimination. The prosecutor responded that he had not removed the potential jurors for their ethnicity but for their ability to speak Spanish. His stated concern was that they would not defer to the court translator in listening to Spanish-language testimony. In 1991, the Supreme Court credited this argument. Lydia Mikus and Ismael Gonzalez lost their case.

Diana Piantanida had a child and took a maternity leave from her job at the Wyman Center, a charitable organization in Missouri. During her leave, she was demoted, supposedly for previously having handed in work late. The man who was then the Wyman Center's executive director, however, justified her demotion by saying the new position would be easier "for a new mom to handle." As it turned out, the new position had less responsibility and half the pay of the original one. But when Piantanida turned this position down, her successor was paid Piantanida's old salary. Piantanida brought suit, claiming she had been discharged as a "new mom." In 1997, a federal appellate court refused to analyze her claim as a sex-discrimination case, which would have led to comparing the treatment she received to the treatment of "new dads." Instead, it found that Piantanida's (admittedly vague) pleadings raised claims only under the Pregnancy Discrimination Act, which it correctly interpreted to protect women only while they are pregnant. Diana Piantanida lost her case.

Robin Shahar was a lesbian attorney who received a job offer from the Georgia Department of Law, where she had worked as a law student. The summer before she started her new job, Shahar had a religious same-sex commitment ceremony with her partner. She asked a supervisor for a late starting date because she was getting married and wanted to go on a celebratory trip to Greece. Believing Shahar was marrying a man, the supervisor offered his congratulations. Senior officials in the office soon learned, however, that Shahar's partner was a woman. This news caused a stir, reports of which reached Michael Bowers, the attorney general of Georgia who had successfully defended his state's prohibition of sodomy before the United States Supreme Court. After deliberating with his lawyers, Bowers rescinded her job offer. The staff member who informed her read from a script, concluding, "Thanks again for coming in, and have a nice day." Shahar brought suit, claiming discrimination on the basis of

sexual orientation. In court, Bowers testified that he knew Shahar was gay when he hired her, and would never have terminated her for that reason. In 1997, a federal appellate court accepted that defense, maintaining that Bowers had terminated Shahar on the basis of her conduct, not her status. Robin Shahar lost her case.

Simcha Goldman, an Air Force officer who was also an ordained rabbi, wore a yarmulke at all times. Wearing a yarmulke is part of the Orthodox tradition of covering one's head out of deference to an omnipresent god. Goldman's religious observance ran afoul of an Air Force regulation that prohibited wearing headgear while indoors. When he refused his commanding officer's order to remove his yarmulke, Goldman was threatened with a court martial. Fie brought a First Amendment claim, alleging discrimination on the basis of religion. In 1986, the Supreme Court rejected his claim. It stated that the Air Force had drawn a reasonable line between "religious apparel that is visible and that which is not." Simcha Goldman lost his case.

These five cases represent only a fraction of those in which courts have refused to protect plaintiffs from covering demands. In such cases, the courts routinely distinguish between immutable and mutable traits, between being a member of a legally protected group and behavior associated with that group. Under this rule, African-Americans cannot be fired for their skin color, but they could be fired for wearing cornrows. Potential jurors cannot be struck for their ethnicity but can be struck for speaking (or even for admitting proficiency in) a foreign language. Women cannot be discharged for having two X chromosomes but can be penalized (in some jurisdictions) for becoming mothers. Although the weaker protections for sexual orientation mean gays can sometimes be fired for their status alone, they will be much more vulnerable if they are perceived to "flaunt" their sexuality. Jews cannot be separated from the military for being Jewish but can be discharged for wearing yarmulkes.

This distinction between being and doing reflects a bias toward assimilation. Courts will protect traits like skin color or chromosomes because such traits cannot be changed. In contrast, the courts will not protect mutable traits, because individuals can alter them to fade into the mainstream, thereby escaping discrimination. If individuals choose not to engage in that form of self-help, they must suffer the consequences.

The judicial bias toward assimilation will seem correct and just to many Americans. Assimilation, after all, is a precondition of civilization -- wearing clothes, having manners and obeying the law are all acts of assimilation. Moreover, the tie between assimilation and American civilization may be particularly strong. At least since Flector St. John de Crèvecoeur's 1782 "Letters from an American Farmer," this country has promoted assimilation as the way Americans of different backgrounds would be "melted into a new race of men." By the time Israel Zangwill's play "The Melting Pot" made its debut in 1908, the term had acquired the burnish of an American ideal. Theodore Roosevelt, who believed hyphenations like "Polish-American" were a "moral treason," is reputed to have yelled, "That's a great play!" from his box when it was performed in Washington. (Fie was wrong -- it's no accident the title has had a longer run than the play.) And notwithstanding challenges beginning in the 1960's to move "beyond the melting pot" and to "celebrate diversity," assimilation has never lost its grip on the American imagination.

If anything, recent years have seen a revival of the melting-pot ideal. We are currently experiencing a pluralism explosion in the United States. Patterns of immigration since the late 1960's have made the United States the most religiously various country in the history of the world. Even when the demographics of a group -- like the number of individuals with disabilities -- are presumably constant, the number of individuals claiming membership in that group may grow exponentially. In 1970, there were 9 disability-related associations listed in the Encyclopedia of Associations; in 1980, there were 16; in 1990, there were 211; and in 2000, there were 799. The boom in identity politics has led many thoughtful commentators to worry that we are losing our common culture as Americans. Fearful that we are breaking apart into balkanized fiefs, even liberal lions like Arthur Schlesinger have called for a recommitment to the ethic of assimilation.

Beyond keeping pace with the culture, the judiciary has institutional reasons for encouraging assimilation. In the yarmulke case, the government argued that ruling in favor of the rabbi's yarmulke would immediately invite suits concerning the Sikh's turban, the yogi's saffron robes and the Rastafarian's dreadlocks. Because the courts must articulate principled grounds for their decisions, they are particularly ill equipped to protect some groups but not others in an increasingly diverse society. Seeking to avoid judgments about the relative worth of groups, the judiciary has decided instead to rely on the relatively uncontroversial principle of protecting immutable traits.

Viewed in this light, the judiciary's failure to protect individuals against covering demands seems eminently reasonable. Unfortunately, it also represents an abdication of its responsibility to protect civil rights.

The Case Against Assimilation

The flaw in the judiciary's analysis is that it casts assimilation as an unadulterated good. Assimilation is implicitly characterized as the way in which groups can evade discrimination by fading into the mainstream -- after all, the logic goes, if a bigot cannot discriminate between two individuals, he cannot discriminate against one of them. But sometimes assimilation is not an escape from discrimination, but precisely its effect. When a Jew is forced to convert to Protestantism, for instance, we do not celebrate that as an evasion of anti-Semitism. We should not blind ourselves to the dark underbelly of the American melting pot.

Take the cornrows case. Initially, this case appears to be an easy one for the employer, as hairstyle seems like such a trivial thing. But if hair is so trivial, we might ask why American Airlines made it a condition of Renee Rogers's employment. What's frustrating about the employment discrimination jurisprudence is that courts often don't force employers to answer the critical question of why they are requiring employees to cover. If we look to other sources, the answers can be troubling.

John T. Molloy's perennially popular self-help manual "New Dress for Success" also tells racial minorities to cover. Molloy advises African-Americans to avoid "Afro hairstyles" and to wear "conservative pinstripe suits, preferably with vests, accompanied by all the establishment

symbols, including the Ivy League tie." He urges Latinos to "avoid pencil-line mustaches," "any hair tonic that tends to give a greasy or shiny look to the hair," "any articles of clothing that have Hispanic associations" and "anything that is very sharp or precise."

Molloy is equally frank about why covering is required. The "model of success," he says, is "white, Anglo-Saxon and Protestant." Those who do not possess these traits "will elicit a negative response to some degree, regardless of whether that response is conscious or subconscious." Indeed, Molloy says racial minorities must go "somewhat overboard" to compensate for immutable differences from the white mainstream. After conducting research on African-American corporate grooming, Molloy reports that "blacks had not only to dress more conservatively but also more expensively than their white counterparts if they wanted to have an equal impact."

Molloy's basic point is supported by social-science research. The economists Marianne Bertrand and Sendhil Mullainathan recently conducted a study in which they sent out resumés that were essentially identical except for the names at the top. They discovered that resumés with white-sounding names like Emily Walsh or Greg Baker drew 50 percent more callbacks than those with African-American-sounding names like Lakisha Washington or Jamal Jones. So it seems that even when Americans have collectively set our faces against racism, we still react negatively to cultural traits -- like hairstyles, clothes or names -- that we associate with historically disfavored races.

We can see a similar dynamic in the termination of Robin Shahar. Michael Bowers, the state attorney general, disavowed engaging in first-generation discrimination when he said he had no problem with gay employees. This raises the question of why he fired Shahar for having a religious same-sex commitment ceremony. Unlike American Airlines, Bowers provided some answers. He argued that retaining Shahar would compromise the department's ability to deny same-sex couples marriage licenses and to enforce sodomy statutes.

Neither argument survives scrutiny. At no point did Shahar seek to marry her partner legally, nor did she agitate for the legalization of same-sex marriage. The Georgia citizenry could not fairly have assumed that Shahar's religious ceremony would entitle the couple to a civil license. Bowers's claim that Shahar's wedding would compromise her ability to enforce sodomy statutes is also off the mark. Georgia's sodomy statute (which has since been struck down) punished cross-sex as well as same-sex sodomy, meaning that any heterosexual in the department who had ever had oral sex was as compromised as Shahar.

Stripped of these rationales, Bowers's termination of Shahar looks more sinister. When she told a supervisor she was getting married, he congratulated her. When he discovered she was marrying a woman, it wasn't long before she no longer had a job. Shahar's religious ceremony was not in itself indiscreet; cross-sex couples engage in such ceremonies all the time. If Shahar was flaunting anything, it was her belief in her own equality: her belief that she, and not the state, should determine what personal bonds are worthy of celebration.

The demand to cover is anything but trivial. It is the symbolic heartland of inequality -- what reassures one group of its superiority to another. When dominant groups ask subordinated groups to cover, they are asking them to be small in the world, to forgo prerogatives that the dominant group has and therefore to forgo equality. If courts make critical goods like employment dependent on covering, they are legitimizing second-class citizenship for the subordinated group. In doing so, they are failing to vindicate the promise of civil rights.

So the covering demand presents a conundrum. The courts are right to be leery of intervening in too brusque a manner here, as they cannot risk playing favorites among groups. Yet they also cannot ignore the fact that the covering demand is where many forms of inequality continue to have life. We need a paradigm that gives both these concerns their due, adapting the aspirations of the civil rights movement to an increasingly pluralistic society.

The New Civil Rights

The new civil rights begins with the observation that everyone covers. When 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? These groups should receive legal protection against discrimination for things they cannot help. But why should they receive protection for behaviors within their control -- wearing cornrows, acting "feminine" or flaunting their sexuality? After all, the questioner says, I have to cover all the time. I have to mute my depression, or my obesity, or my alcoholism, or my shyness, or my working-class background or my nameless anomie. I, too, am one of the mass of men leading lives of quiet desperation. Why should legally protected groups have a right to self-expression I do not? Why should my struggle for an authentic self matter less?

I surprise these individuals when I agree. Contemporary civil rights has erred in focusing solely on traditional civil rights groups -- racial minorities, women, gays, religious minorities and people with disabilities. This assumes those in the so-called mainstream -- those straight white men -- do not also cover. They are understood only as obstacles, as people who prevent others from expressing themselves, rather than as individuals who are themselves struggling for self-definition. No wonder they often respond to civil rights advocates with hostility. They experience us as asking for an entitlement they themselves have been refused -- an expression of their full humanity.

Civil rights must rise into a new, more inclusive register. That ascent makes use of the recognition that the mainstream is a myth. With respect to any particular identity, the word "mainstream" makes sense, as in the statement that straights are more mainstream than gays. Used generically, however, the word loses meaning. Because human beings hold many identities, the mainstream is a shifting coalition, and none of us are entirely within it. It is not normal to be completely normal.

This does not mean discrimination against racial minorities is the same as discrimination against poets. American civil rights law has correctly directed its concern toward certain groups and not others. But the aspiration of civil rights -- the aspiration that we be free to develop our human capacities without the impediment ofwitless conformity -- is an aspiration that extends beyond traditional civil rights groups.

To fulfill that aspiration, we must think differently both within the law and outside it. With respect to legal remedies, we must shift away from claims that demand equality for particular groups toward claims that demand liberty for us all. This is not an exhortation that we strip protections from currently recognized groups. Rather, it is a prediction that future courts will be unable to sustain a group-based vision of civil rights when faced with the broad and irreversible trend toward demographic pluralism. In an increasingly diverse society, the courts must look to what draws us together as citizens rather than to what drives us apart.

As if in recognition of that fact, the Supreme Court has moved in recent years away from extending protections on the basis of group membership and toward doing so on the basis of liberties we all possess. In 2003, the court struck down a Texas statute that prohibited same-sex sodomy. It did not, however, frame the case as one concerning the equality rights of gays. Instead, it cast the case as one concerning the interest we all -- straight, gay or otherwise -- have in controlling our intimate lives. Similarly, in 2004, the court held that a state could be required by a Congressional statute to make its courthouses wheelchair accessible. Again, the court ruled in favor of the minority group without framing its analysis in group-based equality rhetoric. Rather, it held that all people -- disabled or otherwise -- have a "right of access to the courts," which had been denied in that instance.

In these cases, the court implicitly acknowledged the national exhaustion with group-based identity politics and quieted the anxiety about pluralism that is driving us back toward the assimilative ideal. By emphasizing the interest all individuals have in our own liberty, the court focused on what unites us rather than on what divides us. While preserving the distinction between being and doing, the court decided to protect doing in its own right.

If the Supreme Court protects individuals against covering demands in the future, I believe it will do so by invoking the universal rights of people. I predict that if the court ever recognizes the right to speak a native language, it will protect that right as a liberty to which we are all entitled, rather than as a remedial concession granted to a particular national-origin group. If the court recognizes rights to grooming, like the right to wear cornrows, I believe it will do so under something akin to the German Constitution's right to personality rather than as a right attached to racial minorities. And I hope that if the court protects the right of gays to marry, it will do so by framing it as the right we all have to marry the person we love, rather than defending "gay marriage" as if it were a separate institution.

A liberty-based approach to civil rights, of course, brings its own complications, beginning with the question of where my liberty ends and yours begins. But the ability of liberty analysis to illuminate our common humanity should not be underestimated. This virtue persuaded both

Martin Luther King Jr. and Malcolm X to argue for the transition from civil rights to human rights at the ends of their lives. It is time for American law to follow suit.

While I have great hopes for this new legal paradigm, I also believe law will play a relatively small part in the new civil rights. A doctor friend told me that in his first year of medical school, his dean described how doctors were powerless to cure the vast majority of human ills. People would get better, or they would not, but it would not be doctors who would cure them. Part of becoming a doctor, the dean said, was to surrender a layperson's awe for medical authority. I wished then that someone would give an analogous lecture to law students and to Americans at large. My education in law has been in no small part an education in its limitations.

As an initial matter, many covering demands are made by actors the law does not -- and in my view should not -- hold accountable, like friends, family, neighbors, the "culture" or individuals themselves. When I think of the covering demands I have experienced, I can trace many of them only to my own censorious consciousness. And while I am often tempted to sue myself, I recognize this is not my healthiest impulse.

Law is also an incomplete solution to coerced assimilation because it has yet to recognize the myriad groups that are subjected to covering demands even though these groups cannot be defined by traditional classifications like race, sex, orientation, religion and disability. Whenever I speak about covering, I receive new instances of identities that can be covered. The law may someday move to protect some of these identities. But it will never protect them all.

For these and other reasons, I am troubled that Americans seem increasingly inclined to turn toward the law to do the work of civil rights precisely when they should be turning away from it. The primary solution lies in all of us as citizens, not in the tiny subset of us who are lawyers. People confronted with demands to cover should feel emboldened to seek a reason for that demand, even if the law does not reach the actors making the demand or recognize the group burdened by it. These reason-forcing conversations should happen outside courtrooms -- in public squares and prayer circles, in workplaces and on playgrounds. They should occur informally and intimately, in the everyday places where tolerance is made and unmade.

What will constitute a good-enough reason to justify assimilation will obviously be controversial. We have come to some consensus that certain reasons are illegitimate -- like racism, sexism or religious intolerance. Beyond that, we should expect conversations rather than foreordained results -- what reasons count, and for what purposes, will be for us all to decide by facing one another as citizens. My 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.

Such conversations are the best -- and perhaps the only -- way to give both assimilation and authenticity their due. They will help us alleviate conservative alarmists' fears of a balkanized America and radical multiculturalists' fears of a monocultural America. The aspiration of civil rights has always been to permit people to pursue their human flourishing without limitations based on bias. Focusing on law prevents us from seeing the revolutionary breadth ofthat

aspiration. It is only when we leave the law that civil rights suddenly stops being about particular agents of oppression and particular victimized groups and starts to become a project of human flourishing in which we all have a stake.

I don't teach classes on gay rights any more. I suspect many of my students now experience me as a homosexual professional rather than as a professional homosexual, if they think of me in such terms at all. But I don't experience myself as covering. I've just moved on to other interests, in the way scholars do. So the same behavior -- not teaching gay rights -- has changed in meaning overtime.

This just brings home to me that the only right I have wanted with any consistency is the freedom to be who I am. I'll be the first to admit that I owe much of that freedom to group-based equality movements, like the gay rights movement. But it is now time for us as a nation to shift the emphasis away from equality and toward liberty in our debates about identity politics. Only through such freedom can we live our lives as works in progress, which is to say, as the complex, changeful and contradictory creatures that we are.

Kenji Yoshino is a professor at Yale Law School. This article is adapted from his book,"Covering: The Hidden Assault on Our Civil Rights," which will be published by Random House later this month.