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BOOK REVIEWS


Reviewed by Raymond C. O'Brien*

I. INTRODUCTION

Nineteen ninety-two was a good year for politics and planning within the American gay and lesbian community. Politics brought the Clintons to presidential office with promises of acceptance of gays and lesbians into prominent governmental offices and rejection of the fifty-year-old ban excluding homosexuals from the military. Planning brought a boycott in Colorado, rejuvenation in the message of Malcolm X,1 a March on Washington, money from the Ryan White CARE legislation, legal victories and losses by Lambda Legal Defense and Educational Fund,2 documentaries aired on PBS3 and countless meeting of Gay Men's Health Crisis, AIDS projects, and the National Center for Lesbian Rights.4 There was a connection among the

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1. Gay and lesbian planners, and particularly such groups as ACT UP and Queer Nation, have always regarded the government with skepticism. This skepticism prompted many caustic acts of civil disobedience such as disruption of liturgy at St. Patrick's Cathedral in New York, and adoption of a credo announced by Malcolm X: "By any means necessary." Robert M. Wachter, AIDS, Activism, and the Politics of Health, 326 NEW ENG. L. MED. 128 (1992). See also Robert M. Wachter, The Fragile Coalition (1991); For examples of violent skepticism of government by gay and lesbian persons, see Lawrence O. Gostin, AIDS and the Health Care System (1990); Bruce Nussbaum, Good Intentions (1990); Larry Kramer, Reports from the Holocaust (1989).

2. In its Spring 1992 newsletter, Lambda or attorneys working with the gay and lesbian organization, describe a docket update that includes litigation or lobbying on employment, housing, health care, insurance, public accommodations, civil rights, domestic partnerships, police brutality and reproductive rights. LAMBDA LEGAL DEFENSE AND EDUCATION FUND, 9 LAMBDA UPDATE 11-21 (1992).

3. "Stop the Church" was a documentary about ACT UP's disruption of an Easter Mass at St. Patrick's Cathedral; "Tongues United" described what it is like to be a black male in a gay community that is white-oriented and a gay man in a black culture that ignores gay persons.

4. There are many other organizations that seek to promote awareness, respect, and recognition of gay and lesbian persons. See e.g. National Center for Lesbian Rights (NCLR), 1663
factors of politics, legalization of non-marital relationships that include homosexuals, and a growing amount of published articles and books demanding attention and serious consideration for persons and communities. The connection was the developing sense of a cultural community within what could heretofore simply be called the gay and lesbian lifestyle.

Eric Marcus describes the struggles of the gay and lesbian community for equal rights in *Making History.* Darrell Yates Rist, in *Heartlands,* describes his own odyssey across America to discover and speak to gay and lesbian persons from different backgrounds but similar in sexual orientation. Two men, on the opposite ends of the age spectrum, but nonetheless professional and proficient in what each was doing, “came out” in an effort to join part in a burgeoning gay community. One was the Naval Academy Midshipman, Joe Steffan, excluded from the Academy weeks before graduation when he disclosed he was homosexual to a friend. The other, a founder of the American conservative movement, friend to William F. Buckley, Jr., and convert to the Roman Catholic Church, Marvin Liebman. All four books are important because they address a unique question confronting many Americans for the first time. The question is this: Is a culture that has too often been identified with sexual excess, orgiastic prowess, effeminacy, timidity, or whatever you think of when someone yells “faggot”, able to form a

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5. ERIC MARCUS, *MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS, 1945-90* (1992). The book centers on struggle, arrests, loss of jobs and housing, violence and rejection, and eventually the battles sparked by AIDS. It describes the revolutionary times, before anyone considered the possibility of forming a culture that was “open,” let alone legal. “Looking back to this time, when exposure of homosexuality could mean the loss of jobs, friends, family, and home, it seems remarkable that these first gay and lesbian organizations survived long enough to take root. But they not only survived, they established a foundation, however shaky, on which the gay rights struggle was built.” *Id.* at 3.


8. MARVIN LIEBMAN, *COMING OUT CONSERVATIVE* (1992). An indication of why Mr. Liebman revealed his homosexuality can be found in his awareness that a community was forming among homosexuals. He writes:

My first television appearance after coming out was on a San Francisco TV talk show, “People Are Talking”, with the Rev. Lou Sheldon, founder and head of the Traditional Values Coalition in California. Reverend Sheldon believes that homosexuality is some kind of disease, that is learned, that it can be cured, that homosexual “preference” is just that.

As he spoke, I began to realize in an entirely new, more visceral way, that it was not “them” he was speaking of but “us,” “we,” *me.* Sitting there under the studio lights in front of the TV cameras, I felt for the first time that I was part of a family at last. I had finally come home.

*Id.* at 16.
community that can thrive in American life? From the men and women forming an invisible community across the heartland, to persons like Joe Steffan and Marvin Liebman seeking to belong, there is an awakening of a second stage within the homosexual network and the issue is whether that second stage can bring about a true culture.

Frank Browning has made an excellent contribution to answering the question raised. He poses the question a bit differently though: "If friendship is to generate the genuine power of family, what must it do?" And in his book, *The Culture of Desire*, he sets about the task of peering from the sexual revolution, the AIDS revolution and the "We’re here! We’re Queer! Get used to it!" revolution, into the face of a future that implies commitment, "illuminating the search for meaning and understanding." He is staking out a cultural future, and he asks the hard question: Is it possible to take a group of individuals that identify themselves as homosexual only because of desire—and that desire is lived out in the secrecy of parks, clubs, clandestine affairs and fantasies—and form a community? A culture? Can a gay and lesbian community be formed based on an immutable orientation, rather than desire perceived or actually conducted? Is it possible to transcend the heart of desire—individuality—and establish a culture based on the essence of community—commitment?

Previous books have addressed the issue of a community formed within a ghetto, such as the Castro area in San Francisco, or the closeted community of men and women who sought the company of each other prior to disco and phone dating. More recently, stirring books have been written of community and person response to people with AIDS. Many books have written about community based on the desire of sex, drugs and rock-and-roll. But Frank Browning has taken all a step further and left the particular ghetto, the particular affliction, the particular cause, and quite simply asked if this is all there is. More than the "grand human fiction" that characterizes gays and lesbians as a culture "of throbbing, thumping, thrusting boys

10. Id. at 159.
11. See e.g. Frances Fitzgerald, Cities on a Hill (1981). The Castro area is a community defined by geographical boundaries, a culture of theaters, bars, and restaurants, and its own heroes like Harvey Milk.
12. See e.g. Robert C. Reinhart, A History of Shadows (1986)
on Fire Island and along the Castro,'\textsuperscript{15} is there first a something more; and second, is it possible to decipher that something from the media that certifies what is the "sole measure of political authenticity in America."\textsuperscript{16} Is there a gay culture that is based on something more than what the media says it is to be gay? And if so, of what does that culture consist? What are the identifying elements? And are those identifying elements expanding and drawing the respect and recognition of other communities? Hard questions, but the unique characteristic of this book is that they are asked at all.

Asking good questions is the pivotal contribution of Frank Browning's book. He writes in the style of an interviewer,\textsuperscript{17} which is his actual avocation, but he also writes as a gay man who has "seen a lot" and is willing to sit back and reflect on what it all means. This is a distinct opportunity accompanying getting older. He transcends the AIDS epidemic; this is not a tale about men and women brought together by the disease which has destroyed many and devastated more. He avoids the pitfalls of political demography; this is not a tale about numbers and platforms and coalitions and rights. Again, this is a book that asks direct and subtle questions about the American gay and lesbian culture. In doing so it is particularly relevant to a burgeoning collection of laws, judicial opinions, legal formulations and written opinions.\textsuperscript{18} Are the laws that now allow domestic partnerships, or court decision that finds state sodomy statutes unconstitutional, or executive orders eliminating discriminatory bans part of a culture that is viable? And furthermore, what is involved in those laws that addresses the sharp confrontation between individual liberty and collective responsibility?

While the book presents competing questions, two are especially relevant to persons concerned over the debate as to sexual orientation versus sexual conduct first, and the sharp competition between individual liberty and community responsibility second. There is a calming naivete about the book that obscures any brittle involvement with legal formulations. This is good. But for a larger community seeking to address the place of gay and lesbian persons in a democratic society, the inside view offered by Frank Browning is prescient. In that this book addresses the possibility of a culture that had heretofore been identified by desire and now gives many indications that its

\textsuperscript{15} Id. at 211.
\textsuperscript{16} Id. at 208.
\textsuperscript{17} Frank Browning has reported for National Public Radio since 1983.
\textsuperscript{18} See e.g. \textit{Symposium}, \textit{1 LAW & SEXUALITY: A REVIEW OF LESBIAN AND GAY LEGAL ISSUES} (1991). This Journal, the first of its kind, is published and edited by students at Tulane University School of Law and contains issues of legal and sociological import to the gay and lesbian community in the United States.
true desire is forming something more, the observations of this insider-author are more than pertinent.

II. ORIENTATION VERSUS CONDUCT

_The Culture of Desire_ is a book mostly about sexual orientation, less about sexual conduct. This is an important distinction. The author admits that conduct is stereotyped and often media hyperbole. "There are stories, true stories, from the West Side docks of Manhattan, from the trails of Griffith Park in Los Angeles, from the warehouse catacombs along Folsom Street in San Francisco, of men whose journeys into sadomasochism led to suffocation, mutilation, dismemberment."\(^ {19} \) Both within and without the gay culture there is the image of gays as more promiscuous than straights. For some, what is wrong with us homosexual people is that we are always available (potentially); what threatens them is their anxiety that all men harbor a desire to be penetrated and to surrender to the universal impulse toward wildness, an impulse that if allowed to go unchecked would proliferate into a thousand jungles of desire.\(^ {20} \) Implicitly then, to community standards and civil decency, the threat "is that doctors and lawyers, people who not only look as appealing as Jeffrey Dahmer but are also power holders in the establishment, are on the same Satanic journey as the Milwaukee cannibal took."\(^ {21} \)

But the author seeks to disengage himself from the media hyperbole surrounding gay sexual omnipresence. He provides a few weak countercharges against heterosexual couples with suggestive comparisons involving which sexual orientation purchases the most sadomasochistic paraphernalia: "CBS was forced to acknowledge that more than 90 percent of the S&M shop's clientele were heterosexual."\(^ {22} \) In so doing, he posits the fact that sexual desire is common to both heterosexual and homosexual persons, that there is a common "wild, polymorphous animal force of Eros that unifies all being."\(^ {23} \) But what separates the gay sexual identity of desire from that of the heterosexual is the fact that sodomy, multiple sexual partners, availability, all reject the various sexual taboos, the routine of social contracts that pro-

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20. Id. at 100.
22. France, supra note 19, at 97.
23. Id. at 88.
tect us from chaos. Somehow, he correctly observes, gay conduct has been identified with what is wrong with a person, what is destructive about relationships, and what results in chaos and anarchy. "Homosexual desire among men presents a threat to conventional arrangements of power and identity in society." The disappointment is, having drawn this conclusion, the author does not follow through and ask why this should be.

But conduct—actual or perceived—is definitely at the heart of why America discriminates against gay and lesbian persons. When the Supreme Court of the United States was asked in 1986, "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy," the majority opinion was quite adamant in responding that any claim "that such a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." In a concurring opinion, Chief Justice Burger wrote: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western Civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards." Thus, "to hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."

Even in the 1992 Kentucky Supreme Court case, which held that the state criminal statute proscribing consensual homosexual sodomy violates privacy and equal protection guarantees of the Kentucky constitution, the court admitted the statute in question "violates traditional morality." The Ken-

24. Id. at 90.
25. Bowers v. Hardwick, 478 U.S. 186, 190 (1986). Frank Browning's book refers to the sodomy statutes and the debate over the criminalization of sodomitic acts between persons of the same and opposite sex. See Browning, supra note 9, at 219: "[A] man committing sodomy with another man became a homosexual whereas a man committing sodomy with his wife ceased functionally to be a deviant. (That sodomy laws in many states still apply to both heterosexual and homosexual activity is a reminder of nineteenth-century definitions of sodomy. Nowadays, of course, such laws are almost never applied against gay or straight people, but efforts to repeal them have been stalled by arguments that their elimination would constitute an endorsement of homosexuality.)
27. Id. at 196 (Burger, C.J., concurring).
28. Id. at 197.
29. Commonwealth v. Wasson, 842 S.W.2d 487, 499 (1992). Jeffrey Wasson was charged with soliciting an undercover Lexington policeman to engage in deviate sexual intercourse. The Kentucky statute punishes deviate sexual intercourse with another person of the same sex as a criminal act and specifies that consent of the other person shall not be a defense. Nor does it matter that the act is private and involves a caring relationship rather than a commercial one. Id. at 488. The Supreme Court of Kentucky held that the Kentucky Constitution offers "greater protection of the right of privacy than provided by the Federal Constitution as inter-
tucky court was the first to apply an equal protection guarantee and a right of privacy to persons of the same sex engaging in sexual conduct in violation of a state statute. Perhaps the decision reflects the opinion that "the conception of homosexual acts, and more generally 'the homosexual lifestyle,' as sinful is much less prevalent today." But I think not. Sin shall always be sin to those aware of the source from which it obtains its essential characteristic. But Frank Browning seems more aware of the subtle shift in public attitude when he intimates that what has developed in both the gay and lesbian community and within a bit of the media is this sense of distinction between the person and the conduct. The orientation of the person as an immutable characteristic—something beyond choice—is more the subject of focus, less the acts that have been identified with deviancy and chaos.

Describing the gay and lesbian community, he writes:

Having spent years standing on sidewalks in movie lines watching straight couples nuzzling and embracing, same-sex couples now refuse to deny themselves demonstrative intimacy. Bombarded with straight adolescent romance files in their own youth, they have begun to film their own romantic stories. With breadth and irony, they are creating and communicating their own queer plots. Perhaps only the "new sexual fierceness" of groups such as Queer Nation or persons such as "Sister Sadie the Rabbi Lady" can jolt the attention from a new awareness of orientation rather than conduct. But no, there is a new sense of orientation-focus. It is reflected in the law, as the repeal of the Kentucky sodomy statute indicates, and it is reflected in a new awareness of "other plots" by all, especially the young. Frank Browning describes the phenomenon as such:

Rich, raucous, passionate, sometimes self-absorbed, often petulant,
the builders of the new gay social terrain in this country have, at the very least, challenged the way Americans think about desire in ordinary life. From the deepest hollows in Appalachia to the flattest prairies of Nebraska, there is not a high school football captain or cheerleader alive who does not know that there are other human plots than the ones taught in Sunday school or sold on the paperback racks at Rexall . . . . By and by, all of us, homo and hetero, male and female, queer and conventional, are brought along onto journeys of rage and irony and sadness and revelation that neither the queer insurgents nor their pinched and prudish antagonists could have foreseen even a few years ago.  

Perhaps the media has been the initiator; perhaps a different sense of morality; perhaps AIDS, with its concomitant reminder that “Who would want to die from that?”, strips the possibility of choice from sexual orientation. But the fact remains there is a shift from conduct to orientation in the minds of Americans. What will this mean?

At present in America, gays and lesbians, who have long been society’s consummate outsiders, “have finally found themselves at the center of this nation’s deepest debates over the roles of morality and personal destiny in the quest for community.”  

The first thirty days of the Clinton administration were centered on lifting the ban on gays in the military. Companies, states and cities are debating over domestic partnerships that will benefit persons unable to enter into marriage. And state legislatures debate the rescinding of sodomy statutes as state courts hear equal protection arguments to quash prosecution of gays under these statutes. Sexual conduct is still either the explicit or implicit catalyst in all of the discussions. The Culture of Desire correctly states that homosexual conduct is threatening, but concludes that there is a shift towards orientation as the object of focus. But the author does not search out why. Is the media shifting; has AIDS precipitated a sense of pity? He loses an opportunity to explore the consequences of denial, the lack of role models, what seems to be the consequences of a mistake of fate.  

These are the subjects of interviews and books and talk shows. Perhaps the author correctly assumes that more people simply sense that the difference between a homosexual and a heterosexual is simply fate, devoid of moral choice. He writes:

36. Id. at 25.  
37. Id. at 10.  
38. For an excellent fictional account of the manner in which fates seems to play a role in sexuality, see ANTHONY BURGESS, EARTHLY POWERS (1980)(a homosexual laments the vagaries of fate that afflicted him with homosexuality), and W. SOMERSET MAUGHAM, OF HUMAN BONDAGE (1915)(a heterosexual laments the vagaries of fate that afflicted him with a cleft foot).
Few gay men who came of age in the 1970s or before escaped the enticing torment of sexual self-acknowledgement. That first intimation of aberrant desire sometimes in adolescence—whether embraced or repressed—is the beginning of a mysterious confrontation with fate. That desire may lead to contest convention, that it seems to have nothing to do with rational choice, ensures in us a measure of respect for a mystery that is beyond our control. Unlike the 90 percent of humans who apparently take their desires and biological responses to be universal and therefore find no cause to examine their own sexual orientation, the homosexual person experiences fate as a constant companion that almost inescapably provokes a profound examination of identity. Yet, just as that first intimation of fate as desire is almost always private and individual, the later acknowledgement of untimely death is collective and requires public exposure.39

Perhaps this is the consequence of fate: Who knows why there seems to be a shift towards orientation as the focus for rights and community responsibilities; who can rationalize why there was this shift? Perhaps it comes from the media’s preoccupation with bad news in all of its forms, bad news that invites the person watching to conclude that but for fate there go I. Some of that bad news concerns sex. The author writes at length about the lack of safe sex: “We forget the simplest, plainest truth: To be alive is to be at risk. Nowhere can sex be altogether safe, because sex is, for most of us, our primary, residual, atavistic connection to the realm of animal existence.”40 Likewise, in fashioning laws and connections within a cultural framework, there are no safe spaces. The uniqueness of this moment in time, and one that has been identified by Frank Browning, is that at least some—perhaps many—Americans are becoming aware of orientation as the focus, orientation that may be the result of fate, should there be such a thing, or the result of some biological “burst”,41 but regardless of the source, an orientation that has the opportunity—if not the right—to attain a culture in a democratic society.

39. BROWNING, supra note 9, at 131. The reference to death refers to AIDS and the frequent listing of the cause of death on the death certificate and the assumption that if a person were to die of this he must be homosexual.
40. Id. at 105.
41. See Marcia Barinaga, Is Homosexuality Biological?, 253 SCIENCE 956 (1991)(article presents evidence that homosexuality is at least partially biological); Thomas A. Schoenfeld, Biology and Homosexuality, Letters, 254 SCIENCE 630 (1991)(possible for homosexuals and heterosexuals to grapple with the choice of their own sexual development).
III. INDIVIDUALITY VERSUS COMMUNITY

During the heyday of the sixties, the Supreme Court of the United States discovered a right which it discerned in the "penumbras" of the first, third, fourth, fifth, and ninth amendments to the Federal Constitution. That right was privacy.\textsuperscript{42} The facts of the case allowing that right involved a married couple and the prosecution of persons distributing information about contraceptives. Privacy forbade the state from entering into the sacred precincts of the marital bedroom and thus allowed married couples to learn about contraceptives and use them in the privacy of their own bedroom.\textsuperscript{43} Two years later, the Court decided it was a denial of equal protection for the state to interfere in the choice of an individual to marry the person he or she chooses.\textsuperscript{44} Then, in 1972, the Court extended its privacy doctrine from married persons to the right of individuals to be free from governmental interference: "If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child."\textsuperscript{45} The emphasis upon the individual is important. The next year, 1973, the Court decided that the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy" through abortion.\textsuperscript{46} Again, the emphasis upon individual rights is important.

Throughout these cases a trend was taking place that Frank Browning deciphers in his own discoveries within the gay and lesbian community. That is: "Our national ideology teaches us virtually from infancy that we are the individual masters of our own destiny. As we mature, established medicine and pop psychology—even 'legitimate' psychoanalysis—tell us that

\textsuperscript{42} See Griswold v. Connecticut, 381 U.S. 479 (1965).

\textsuperscript{43} Id. at 485-86.

\textsuperscript{44} See Loving v. Virginia, 388 U.S. 1 (1967). See also, Zablocki v. Redhail, 434 U.S. 374 (1978)(invalidating statutes which prohibited a person from marrying because of poverty).

\textsuperscript{45} Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). The next logical progression should have been the Georgia sodomy case of Bowers v. Hardwick, 478 U.S. 186 (1986)(holding that the Federal Constitution did not confer on homosexuals the fundamental right to engage in sodomy). But such a progression is only found in the dissent. See id. at 205 (Blackmun, J., dissenting).

\textsuperscript{46} Roe v. Wade, 410 U.S. 113 (1972). See also Webster v. Reproductive Health Services, 492 U.S. 490, (1989)(allowing the state to regulate abortions, but retaining the right of a woman to obtain one); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983); Planned Parenthood v. Danforth, 428 U.S. 52 (1976). The Court has not abandoned its protection of the family however; see e.g. Moore v. City of East Cleveland, 431 U.S. 494 (1977)(zoning ordinance which limited occupancy of swelling units to family members was rejected based privacy grounds).
we are the authors of our own predicaments." And irregardless of whether this is true,
the footloose character of American life, combined with powerful economic and demographic pressures, has torn our families asunder. More and more, we are a scattered population of pairs and individuals dislocated from familiar geography, the memory of ancestors, the traditions of race and religion, the confidence of gender, and the predictability of class.

The trend of both the cases on privacy and the pop culture to which the author refers, is towards individuality.

The Court's decisions formulating the right of privacy were establishing the right of the individual to be free and decisive in exercising fundamental options. True, while that right was never expressly extended to homosexuals—except recently in Kentucky—the cult of individuality has found willing and proselytizing adherents within the gay and lesbian community, and those without that community willing to extend the creed. It is the principle of individuality which is at issue, a personhood that proclaims "self-definition" through conduct and orientation. And of course, at some point that individuality, especially as it relates to conduct, invites conflicts with societal stability. This is the monumental tension within American jurisprudence; it is a tension inherent in The Culture of Desire. The tension is between the privacy inherent in the personal decision-making of the individual thus creating personhood, and the goal of a society seeking to foster the common good.

Borrowing extensively from Harvard Law School's Laurence Tribe, Jed Rubenfeld presents the personhood thesis:

... where our identity or self-definition is at stake, there the state may not interfere. The paramount analytical difficulty is one of limitation. Where is our self-definition not at stake? Virtually every action a person takes could arguably be said to be an element

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47. Browning, supra note 9, at 130-31. He is seeking to explain why heterosexual persons have a difficult time understanding why homosexual persons cannot simply "will" to change and be like everyone else. But he also identifies the nature of the powerful cult of the individual within America.

48. Id. at 138.

49. 478 U.S. at 205 (Blackmun, J., dissenting).

50. See generally Jed Rubenfeld, The Right of Privacy. 102 Harv. L. Rev. 737, 762 (1989)(Individuality, carried to the extreme, is a double-edged sword as it calls society's identity into question); J.S. Mill, On Liberty (G. Himmelfarb ed., 1985)(advocating the ability to do whatever one desires as long as it has no affect upon others or that others have consented in advance).

51. For the most recent presentation of Professor Tribes views and comments, see Laurence Tribe, American Constitutional Law (1988).
of self-definition. Decisions seemingly insignificant for constitutional purposes may well be felt by some to be central to their self-definition.\(^5\)

A balancing of interests is needed between the individual and society: “Where the importance of the proscribed conduct to an individual’s self-definition outweighs the particular harm threatened, the right to privacy would come into play to protect the individual.”\(^5\) But where to place the fulcrum? On the one hand, “[l]iberalism tends to view the individual as complete in himself, bearing an identity as an independent will or chooser of ends that precedes and underlies the particular objectives upon which he settles or relations into which he enters.”\(^5\) And then again on the other hand, Republicanism “speaks of the individual as constituted at least in part by the society in which he lives. In this view, a person’s identity is understood not as prior to but rather as defined by his intimate relations, his community, his deepest values.”\(^5\)

If the balance between individuality and community were to be placed in concrete examples, one would ask: Is it possible for the state to forbid individual homosexual conduct because of the community threat of AIDS?\(^5\) Is it possible for the federal government to ban homosexual individuals from the military because of their threat to the armed forces’ ability to defend the community?\(^5\) Or to ban homosexuals from the CIA?\(^5\) Or to restrict marriage to persons of the opposite sex?\(^5\) These are current and important is-

\(^{52}\) Rubenfeld, supra note 50, at 754-55. Homosexual activity is the major focus of the Article, but while this has not gained constitutional protection in the United States Supreme Court, marriage, contraception and childbearing has. It is the author’s position that all consensual, adult, private sexuality is fundamentally important, and more definitive of and more deeply rooted in who that person is than his neighbor’s conduct can ever be. Id. at 770.

\(^{53}\) Id. at 760.

\(^{54}\) Id. at 764.

\(^{55}\) Id.

\(^{56}\) The Supreme Court of Kentucky rejects any argument that AIDS justifies state prohibition of homosexual sodomy in Commonwealth v. Wasson, 842 S.W.2d 487, 501 (1992): “The growing number of females to whom AIDS has been transmitted is stark evidence that AIDS is not only a male homosexual disease . . . . The act of sexual contact is not implicated, per se, whether the contact is homosexual or heterosexual.”


\(^{58}\) See e.g. Mark Damian Hoermer, Note, Fire at Will: The CIA Director’s Ability to Dismiss Homosexual Employees as National Security Risks, 31 Bos. Col. L. REV. 699 (1990).

sues in society.

When does the balance shift to the individual or then to the state? May the individual assert that the right of privacy, “is the fundamental freedom not to have one’s life too totally determined by a progressively more normalizing state.”60 And may the state—the community—limit that right of privacy when there is a rational basis for believing the individual may trammel the rights of the many? This balancing has long been the province of the federal and state equal protection clauses. Only recently do we see this equal protection balance shift to the individual’s right to engage in sodomy in adult, consensual circumstances. The Supreme Court of Kentucky wrote: “. . . [I]t is ‘arbitrary’ for the majority to criminalize sexual activity solely on the basis of majoritarian sexual preference, and that is denied ‘equal’ treatment under the law when there is no rational basis, as this term is used and applied in our Kentucky cases.”61 Before this point, anything would be a sufficient rational basis for the state to forbid such conduct. And to date, there is little willingness to shift towards individual rights and any personhood theory in the case of service in the military,62 employment at the CIA, or entering into marriage.

Persons on both sides of the balance between individual and community rights could advocate that the fulcrum upon which to balance should be history, or religion within the creed of Judeo-Christianity, federalism, whim, or a combination of all. Jed Rubenfeld recommends an approach implicit in Frank Browning’s book. Rubenfeld recommends that homosexual conduct should be seen within the balancing fulcrum of fundamental personhood because such conduct defines who a person is. That is, the balance shifts to the individual committing the conduct because the conduct is so fundamental that it is self-defining. The state should be barred from criminalizing any conduct that speaks to who a person is since such conduct is protected within the penumbra of privacy.63

The specific act is not the focus; instead, the focus is on conduct, “undertakings that go on for years, define roles, direct activities, operate on or even create intense emotional relations, enlist the body, inform values, and in sum substantially shape the totality of a person’s daily life and consciousness.”64 Just as marriage, childbearing and even individual heterosexual conduct is formative, so should homosexual conduct be balanced as formative. Thus, in terms of sexuality, the state would be prohibited from criminalizing homo-

60. Rubenfeld, supra note 50, at 784.
63. See Rubenfeld, supra note 50, at 799-807.
64. Id. at 801-02.
sexual conduct because the specific act of sodomy is the manner in which the homosexual exercises his or her personhood in the sexual context. Needless to say, such conduct could still be penalized if exercised with a minor, a public area, or in a non-consensual manner. In other words, the homosexual would be treated similarly to the heterosexual.

Objections have been made that homosexual conduct is so abhorrent that it is actually a denial of personhood, no fulcrum upon which conduct could be balanced seeking to address the needs of individuals and community. The argument is that if any remedy is to exist, it must exist only within the legislative process, not the judiciary. Yet, as Rubenfeld argues, centuries-long prohibitions against contraception and abortion—once extremely abhorrent—must have made it difficult for many women to discover or to assert their political will. Constitutional protection provided a boost. How much more difficult is it for gay and lesbian persons, a distinct minority in the population, to overcome centuries of disgust and discrimination and exercise any political presence.\(^{65}\) If the Constitution is to be a protector of fundamental rights, the protection would seem to result first from judicial interpretation. The use of the personhood theory to balance competing interests of individual and community is an alternative to legislative action and one that may well precede the legislative process as it seems to have done in the case of contraception and abortion. Both Rubenfeld and Browning imply that if a gay and lesbian culture is to develop it must be with the assist of judicial personhood theories to assist individuals, but once this has happened, there must be the active responsibility of gay and lesbian persons building upon the initial advances to develop a culture. Individual rights recognition is simply the beginning.

How is it that Frank Browning could have stumbled into this labyrinth of legal analysis and tar baby of contemporary politicians? One of the distinct deductions of The Culture of Desire is the absolute necessity of gay and lesbian persons to arrive at a fulcrum upon which they can balance their own perceived individual identity as persons imbued with distinctive sexual conduct that is viewed by the media, and often by themselves, as aberrant, and at the same time something that defines themselves as an orientation, a formative group, a culture, a family. Constantly the book questions if it is possible to form a culture and in so doing also acknowledges that this culture cannot be based on the sexual proclivities of individuals. But how? “If friendship is to generate the genuine power of family, what must it do?”\(^{66}\) And again, “If the intensified dialogue that has emerged during the AIDS

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65. Id. at 806.
66. BROWNING, supra note 9, at 157.
epidemic over the search for gay family and domestic partnership is to have any real meaning, it will surely have to confront these abiding American problems of individualism and commitment. Along the way, it will have to move the family of friends beyond a celebration of private happiness to an affirmation of civic participation." The balance sought between individual liberty and community responsibility implicit in the host of constitutional cases, is the same balance sought in the movement from private happiness to an affirmation of civic participation.

Just as Jed Rubenfeld proposes a fulcrum based on fundamental conduct, Frank Browning suggests that any gay and lesbian community must be based on what he borrows from Aristotelian ethics: the three demands of friendship are affection, usefulness, and shared moral commitment. And this is a deciding factor in his analysis. If there is to be future for a gay and lesbian culture, it will result from a shared moral commitment that is markedly responsible. Certainly this has not been absent from the community he studies, but he now establishes it as a criteria upon which any community or culture must be based, not simply what has been evidenced in the conduct of specific individuals.

Acknowledgement of the need for a responsible community gives both greater emphasis and focus to initiatives to expand the definition of family. The gay and lesbian community actively seeks to change laws concerning visitation rights, custody, adoption, and legislative or judicial recognition of same sex couples' ability to marry. And to date, even though domestic partnerships only emphasize rights to health insurance, housing, employment benefits and hospital visitation, the presence of the domestic partnership right invites the responsibility that must—and this is implicit in both

67. Id. at 159.
68. Id. at 158.
Browning's responsibility and Rubenfeld's fulcrum—follow. That responsibility may fashion itself into service to country, employment at the CIA, adult and consensual private sexuality, and perhaps a right to marry. For, if it is possible that the law is creating greater rights for individuals, it is possible that common necessity will bring about responsibilities necessary for the expansion of those rights. It is absolutely necessary for individuals within the gay and lesbian community to work towards this goal if the culture that Frank Browning desires is to develop.

IV. Conclusion

The Culture of Desire was written at a unique time in American history. The President of the United States was born after the Second World War, courts and legislatures are expanding the rights of individuals within the penumbra of privacy, and the gay and lesbian community finds itself at a point it never imagined: OUT! Domestic partnerships, Ryan White money, NIH and FDA accessibility, autobiographies, books and plays and television and marches, and recent victories in ending the ban on homosexuals in the military and on banning sodomy prosecution in Kentucky, make these unique times for the gay and lesbian community. Frank Browning has not written a political book, nor has he sought to assure the many competing interest within that community. What he has done is announce a watershed between desire and culture, between what was often a media-hyped world of orgastic pleasure and registering partners and national funding campaigns, between a time of individual liberty and community responsibility.

The book demands attention because it focuses on distinctions between orientation and conduct and because it illustrates the tension between the rights of the individual and those of the greater community to which the individual belongs. Such distinctions have been made before, but as a member of the community of which he writes, this book is unique in the questions it asks. Foremost among those questions is this: Is it possible to take a group of individuals that identify themselves as homosexual only because of desire—and that desire is lived out in the secrecy of parks, clubs, clandestine affairs and fantasies—and form a community? Until now, such a question could only be taken seriously in the various ghettos that reinforce a sense of homosexual majority. But it is a feature of this book that a sense of dialogue has now shifted to orientation instead of conduct. No one can deny that homosexual orientation, no matter what the cause, will attract a greater consensus than conduct. In that orientation is a subject of discussion, medical,
legal and social discourse is recognized as having occurred and anticipated as occurring in the future.

The adoption of an orientation dialogue also directs attention towards the fundamental rights of the person imbued with that orientation. Rather than speak of the individual act of the person, orientation implies a personhood that invites a consideration of those series of acts that, taken together, will form the personality, the character, the demeanor. In that *The Culture of Desire* shifts the focus from the individual to the community sought, it implicitly chooses the oriented characteristic of the many over the individual acts of the few. In so doing, the author searches for the spirit that will focus that orientation and he chooses a sense of responsibility, a moral commitment. Surely this will bring about and be fostered by the legal and social dimension analyzed by authors like Jed Rubenfeld.

Taken together, the personhood theory of Rubenfeld, and the recognition of shared responsibility advocated by Browning, a new sense of dialogue will occur. The dialogue has been and will be fruitful because of what some may call fate, but more likely the reason is a combination of AIDS, media sympathy and advocacy and education on the part of many enterprises. It is a recognition of this national dialogue that occasions the recent ascendancy of so many gay and lesbian issues. Perhaps though, as Frank Browning reports, if the dialogue is successful, it may also be unsuccessful. "To the degree that gay culture subverts and transgresses the taboos of forbidden desire, to the degree that it disturbs and rearranges society's presumptions about the very meaning or straightness, to the degree that it encourages everyone to linger a while longer on the queerness within them, it also destroys its own distinctive place and its raison d'etre."71 It is a closing testimony to this book that it warns all who enter into a dialogue concerning the possibility of a gay and lesbian culture that this is a dangerous venture. "In the culture of desire, there are no safe spaces."72

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71. BROWNING, supra note 9, at 229.
72. Id.