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PUSHING THE LAW TO ENCOMPASS THE REALITY OF OUR FAMILIES: PROTECTING LESBIAN AND GAY FAMILIES FROM EVICTION FROM THEIR HOMES — BRASCHI'S FUNCTIONAL DEFINITION OF "FAMILY" AND BEYOND

*Paris R. Baldacci**

I. Introduction

In the early days of gay liberation, many were weaned on the milk of the "polymorphous perverse," i.e., the notion that the sexual/erotic realities of one's life would effect a radical restructuring of the personal, social, economic and political structures that constitute the social order in which we live.¹ Thus, it is a strange notion, indeed, that "pushing the law to encompass the reality of our families" might be at the center of a lesbian and gay legal agenda. Stranger yet is the fact that this struggle initially worked itself out, not in the "higher" ethers of federal or even state constitution-based civil rights litigation, but in the "lower" realms of landlord-tenant law.² Nevertheless, such amazement notwithstanding, lesbian and gay self-definition as "family" and, therefore, the entitlement of lesbian and gay families to family anti-eviction protection, is the context in which one of the most significant legal victories for lesbian and gay equality in New York State was achieved.³ Indeed, it continues to be a forum in which lesbian and gay men not only radically challenge the traditional heterosexual definition of "family" based exclusively on blood and marriage, but also a forum in which lesbians and gay men redefine and re-educate straight society regarding the very values that constitute "family."

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1. HERBERT MARCUSE, *EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FREUD* 44-46 (1962); DENNIS ALTMAN, *HOMOSEXUAL OPPRESSION AND LIBERATION* 77-80, 92-107 (1971).

2. *See infra* Section II.

3. *Braschi v. Stahl Associates*, 543 N.E.2d 49 (N.Y. 1989).

Because of this significance, I propose in this essay to review the origin and application of the functional definition of "family" adopted in that struggle. Part II will discuss the definition of family that was adopted in *Braschi v. Stahl Associates* and that has since been codified in New York State's family anti-eviction regulations.⁴ Part III A will survey the inclusive and flexible way in which this definition has been applied by the trial courts. Part III B will discuss two areas in which a rigid application of the *Braschi* functional definition of family can actually work to exclude some lesbian and gay families and to reassert a more traditional notion of family based on hierarchy and prescribed formal and legal agreements. This essay will conclude by considering some alternatives and proposals for meeting these challenges and problems.

II. *Braschi v. Stahl Associates*

The landscape of family anti-eviction protection⁵ in New York State was significantly altered by the Court of Appeals' landmark decision in *Braschi v. Stahl Associates*, which adopted a definition of "family" that includes lesbian, gay and other families, which have been traditionally denied social and legal recognition.⁶

4. Accordingly, my comments regarding the validity and utility of a functional definition of "family" are limited by my focus on the development of a functional definition within a particular legal context, i.e., New York State's family anti-eviction laws. Thus, I will not address the applicability of such a functional definition in other areas of law. However, I believe that a critical analysis of how a functional definition of "family" has been applied in this area will provide insights into its possible use in other legal contexts. Additionally, since the definitional development traced here occurred in a series of cases and enactments whose focus was on a statutory interpretation of the term "family," I will not address the constitutional issues which are also at the core of lesbian and gay attempts to "push the law to encompass the reality of our families."

5. Although the term "succession rights" is frequently used to describe the rights won in *Braschi*, it should be noted that the more appropriate rubric is "family anti-eviction protection." The right litigated and determined in *Braschi* was Miguel Braschi's right to be protected from eviction under New York City Rent and Eviction Regulations, 9 N.Y.C.R.R. § 2204.6(d)(1962). The *Braschi* court held, "the manifest intent of this section is to restrict the landowner's ability to evict a narrow class of occupants other than the tenant of record." 543 N.E.2d at 52 (emphasis added). Similarly, the Court of Appeals upheld the validity of amended regulations codifying the *Braschi* definition of "family" precisely because these regulations were a reasonable and equitable means of protecting families from the trauma of dislocation from their homes. *Rent Stabilization Association v. Higgins*, 630 N.E.2d 626, 634 (N.Y. 1993), cert. denied, 114 S.Ct. 2693, (1994).

6. See WILLIAM B. RUBENSTEIN, LESBIANS, GAY MEN AND THE LAW 377-474 (1993); Barbara Cox, *Love Makes a Family — Nothing More, Nothing Less: How the Judicial System Has Refused to Protect Nonlegal Parents in Alternative Families*, 8 JOURNAL OF LAW AND POLITICS 5 (1991).

Within four months of the *Braschi* decision, the New York State Division of Housing and Community Renewal ("D.H.C.R.") promulgated regulations, which codify and amplify the *Braschi* definition of "family" and which apply to over one million rent-regulated apartments in New York State.⁷

A. The Decision and Its Antecedents⁸

The issue before the Court of Appeals in *Braschi* was whether Miguel Braschi, the surviving gay life partner of Leslie Blanchard, a rent-controlled tenant who had died of AIDS, was entitled to seek protection from eviction under the New York City Rent and

7. 9 N.Y.C.R.R. § 2104.6 (1990) (State Rent and Eviction Regulations [rent-controlled apartments outside New York City]); § 2204.6 (1990) (New York City Rent and Eviction Regulations [rent controlled-apartments in New York City]); § 2500.2 and § 2503.5 (1990) (Emergency Tenant Protection Regulations [rent-stabilized apartments outside New York City]); § 2520.6 & § 2523.5 (1990) (Rent Stabilization Code [rent-stabilized apartments in New York City]). For simplicity of reference, future citations to the regulations will only cite New York City Rent and Eviction Regulations and the Rent Stabilization Code ("R.S.C."). In their wake, similar regulations have been promulgated by D.H.C.R. governing state-regulated Mitchell-Lama cooperatives and apartments, 9 N.Y.C.R.R. § 1727-8, and by the New York City Department of Housing Preservation and Development ("H.P.D.") covering New York City-regulated Mitchell-Lama tenancies, Title 28 RULES OF THE CITY OF NEW YORK, Ch. 3, § 3-02(p), and *in rem* centrally managed properties and properties managed by the City's Division of Homeless Housing Development. Title 28 RULES OF THE CITY OF NEW YORK, Ch. 24, § 24-01. In addition, the New York City Human Rights Commission, adopting the *Braschi* definition of "family," has found that denying surviving life partners the same anti-eviction or succession rights afforded married couples violates New York City's prohibition against discrimination based on marital-status. ADM. CODE OF THE CITY OF N.Y. § 8-107(5); see *Velasquez v. Salinas Realty Corp.*, Complaint No. GA00299061190-H (April 8, 1992) (refusal to transfer rent-stabilized lease); see also *Kirkpatrick v. 60 Sutton Corp.*, N.Y.L.J., October 22, 1991, p. 24 col. 4 (Sup. Ct. N.Y. County) (preliminary injunction permitting life-partner to occupy cooperative apartment pending the Human Rights Commission's determination); cf. *Chatham Towers v. Tom*, N.Y.L.J., January 5, 1994, p. 22 col. 4 (Sup. Ct. N.Y. County) (unmarried heterosexual life-partner succeeds to cooperative shares as "spouse").

8. Many commentators have written about the *Braschi* decision. See Scott Turner, *Braschi v. Stahl Associates: In Praise of Family*, 25 NEW ENG. L. REV. 1295 (1991); William B. Rubenstein, *We are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships*, 8 J. OF L. AND POL. 89 (1991); Note, *Braschi v. Stahl: Family Redefined*, 8 N.Y.L. SCH. J. HUM. RTS. 289 (1990); Note, *Braschi v. Stahl Associates: Much Ado About Nothing?*, 35 VILL. L. REV. 361 (1990); Note, *Family Law — Braschi v. Stahl Associates Co.: Expansion of the Term 'Family' to Include Nontraditional Relationships*, 20 MEM. ST. U. L. REV. 135 (1989); Note, *Family Ties: A Comparison of the Changing Legal Definition of Family in Succession Rights to Rent-Regulated Housing in the United States and Great Britain*, 17 BROOK. J. INT'L L. 123 (1991); Note, *Redefining the Family*, 25 HARV. C.R.-C.L. L. REV. 183 (1990); Note, *The Broadening of Succession Rights: Braschi v. Stahl Associates*, 3 HOFSTRA PROP. L. J. 33 (1989).

Eviction Regulations.⁹ That regulation provided that a landlord could not evict "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant."¹⁰ Reversing the Appellate Division, First Department, which had held that "family," as used in the regulation, included only "family members within traditional, legally recognized family relationships,"¹¹ the Court of Appeals held that

the term family, as used in 9 N.Y.C.R.R. 2204.6(d), should not be rigidly restricted to those people who have formalized their relationship The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.¹²

The court found that "the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties . . . should, in the final analysis, control."¹³ Thus, in *Braschi*, the Court of Appeals adopted a holistic and functional approach to describe the "reality of family life." The terms "dedication, caring and self-sacrifice" may be strangely ephemeral sounding words on which to litigate a claim to family anti-eviction protection in Housing Court. However, the *Braschi* Court looked to a history of trial court decisions which indicated that this standard was decipherable and workable.¹⁴ A brief look at two lines of these decisions may be helpful in understanding what the *Braschi* court intended by its adoption of this functional definition.¹⁵

In *Gelman v. Castaneda*,¹⁶ a surviving gay life partner claimed that he was part of his deceased lover's "family" and, thus, should not be evicted from the rent-controlled apartment they had shared. The housing court not only agreed that the respondent was "family," but indeed that he was "immediate family." This court was guided by a functional understanding of the term "family" in reaching its decision: "[T]he close nature of the relationship . . . [and] the fact that renewal rights are extended to [traditionally-

9. 9 N.Y.C.R.R. § 2204.6(d)(1962).

10. *Id.*

11. 531 N.Y.S.2d 562, 563 (N.Y. App Div. 1988)

12. *Braschi*, 543 N.E.2d at 53.

13. *Id.* at 55.

14. *Id.*

15. See also *supra* note 8. However, my focus in briefly revisiting this same landscape is to identify the core terms/values/functions by which "family" was described or defined in those cases.

16. N.Y.L.J., October 22, 1986, p. 13 col. 1 (Civ. Ct. N.Y. County).

recognized] family members with far more distant relationships, emotionally and economically."¹⁷

The *Castaneda* Court's description of "family" as an emotionally and economically "close relationship" relied on the definition of "family" used earlier in *Two Associates v. Brown*,¹⁸ in which that court found that two gay life partners were a family since they had lived in a "loving relationship" evidenced by economic interdependence.¹⁹ Indeed, the *Brown* Court also noted that "a host of relatives who . . . are deemed to be family members" often have no such emotional or economic relationship with the tenant or among each other.²⁰ The *Brown* Court reached its conclusion that such an arrangement constituted a "family" by adopting the definition of "family" used in *In re Adult Anonymous II*: ". . . the best description of a family is a continuing relationship of love and care, and an assumption of responsibility for some other person."²¹ Accordingly, the *Brown* Court found that to exclude the type of close, loving, interdependent relationship evidenced by the two men in that case from a definition of "family," while including the "host of relatives" in the then current scheme, "would indeed be an arbitrary way to define family."²²

Thus, for the trial judges deciding this line of cases, which dealt with the anti-eviction rights of gay life partners and which presented uncontested facts regarding the close emotional and economic relationships of the couples,²³ the key issue was simply, "Are they a family?". Using a functional definition focusing on the factors of love, care and commitment, both emotional and economic, these courts consistently found that the relationships before them

17. *Id.*

18. 502 N.Y.S.2d 604 (Sup. Ct. N.Y. County 1986), *rev'd on other grounds*, 513 N.Y.S.2d 966 (N.Y. App. Div. 1987).

19. *Id.* at 607.

20. *Id.* D.H.C.R.'s December 10, 1985, EMERGENCY OPERATIONAL BULLETIN, No. 85-1, defined "family" to include husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, nephew, niece, uncle, aunt, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law. This list was codified in the pre-*Braschi* Rent Stabilization Code. 9 N.Y.C.R.R. § 2520.6(o)(1987).

21. 502 N.Y.S.2d at 607 (quoting *In re Adult Anonymous II*, 452 N.Y.S.2d 198, 201 (N.Y. App. Div. 1982)).

22. *Id.*

23. Prior to the *Braschi* decision and the regulations codifying that decision, landlords challenged the legal entitlement of gay couples to family anti-eviction protection under any circumstances, not the facts of their cases. As will be discussed more fully below, now that the legitimacy of the legal claim has been settled, the focus in litigation is generally on the factual support for such a claim.

were families. Indeed, they even articulated discomfort with being asked to make distinctions between loving, caring and committed straight families, and loving, caring and committed gay families. "[W]e do not think it productive to spend judicial time conjuring up artificial distinctions among various sexual, fraternal, and economic relationships."²⁴ This emphasis on these core functions by which to define "family" would be echoed in the *Braschi* decision.

A second line of cases relied on by the *Braschi* Court utilized a more fully articulated social science-based functional definition of family. In *2-4 Realty Associates v. Pittman*,²⁵ Jimmie Hendrix, a 48 year old black man, claimed that he had lived with Henry Pittman for over twenty-five years as son and father. Mr. Hendrix and his mother had moved into Mr. Pittman's rent-controlled apartment at first as boarders, but gradually "[t]he relationship developed into one of devoted concern, sharing, trust, loyalty, and love. . . . Jimmie found the father he had never had."²⁶ The importance of this case, in addition to the fact that it saved Mr. Hendrix's home for him, is that it set out a sociologically-based functional definition of "family," which the *Braschi* Court would borrow whole cloth.

The *Pittman* Court cited at length the testimony of respondent's expert witness, a sociologist, regarding the "criteria" used by sociologists "in determining whether a true family unit exists."²⁷ These criteria were:

- 1) the longevity of the relationship; 2) the level of commitment and support among its members . . . both material[ly] and emotional[ly]; 3) the sense in which the individuals define themselves as a family unit . . . , and also the way that neighbors and other institutions define them as a family unit; 4) the way in which members of the unit came to rely on each other to provide daily family services; 5) the shared history of the group . . . ; and 6) the high degree of religious and moral commitment.²⁸

24. 420 East 80th Co. v. Chin, 455 N.Y.S.2d 42, 44 (N.Y. App. Term 1982), *aff'd*, 468 N.Y.S.2d 9 (N.Y. App. Div. 1983) (cohabiting gay males do not violate lease provision limiting co-occupants to "immediate family").

25. 523 N.Y.S.2d 7 (Civ. Ct. N.Y. County 1987), *aff'd*, 547 N.Y.S.2d 515 (N.Y. App. Term 1989).

26. *Id.*

27. *Id.* at 9.

28. *Id.* See also *Zimmerman v. Burton*, 404 N.Y.S.2d 127, 129 (Civ. Ct. N.Y. County 1980) (agreement to enter into an exclusive and permanent relationship "consummated" by cohabitation for a significant period, citing sociologist David Reisman); *Athineos v. Thayer*, N.Y.L.J., March 15, 1987, p. 12 col. 4 (Civ. Ct. Kings County)(level of commitment and support exemplified by self-definition as family, citing *Pittman*) *aff'd*, 545 N.Y.S. 2d 337(N.Y. App. Div. 1989).

In sum, the court adopted the sociologist's finding that a "family" existed where there was evidence of "dedication, caring and self-sacrifice."²⁹

Thus, we are brought back full circle to the *Braschi* Court's emphasis on a holistic, functional definition of "family," i.e., on "the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties."³⁰ The *Braschi* Court also incorporated whole cloth the *Pittman* "criteria":

29. 523 N.Y.S.2d at 9. The court also noted the expert's testimony regarding the prevalence of such functional family configurations among American Blacks, particularly as developed and carried North during the migration of Southern Blacks to urban areas in the North. *Id.*; cf. NICHOLAS LEHMAN, *THE PROMISED LAND. THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1991). Finally, the court noted the use of a more functional, alternative, inclusive definition of "family" by the courts in a series of zoning cases. 523 N.Y.S.2d at 10-13.

30. 543 N.E.2d at 55. Many commentators agree that these core values/functions are essential aspects of any functional definition of family. Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 564-68 (1992) (love and intimacy); Steven H. Hobbs, *In Search of Family Value: Constructing a Framework For Jurisprudential Discourse*, 75 MARQ. L. REV. 529, 534-36 (1992) (groups of persons who socialize its members and provide the necessities of life and emotional security); Martha Minow, *All in the Family & In All Families: Membership, Loving, and Owning*, 95 W. VA. L. REV. 275, 287-88 (1992/93) (persons who share resources, responsibility for decisions, values and goals, and have a commitment to each other over time); Note, "A Family Like Any Other Family": *Alternative Methods of Defining Family Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027, 1048-49 (1990/1991) (same, but emphasizing role of self-definition in determining both levels of such values/functions in individual relationships and the variety of forms in which such values are actualized). See also Kath Weston, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* 103-136 (1991) (documenting that lesbians and gay men articulate similar values/functions as described above as central to their own self-defined family configurations); Jan Meyer, *Guess Who's Coming to Dinner This Time? A Study of Gay Intimate Relationships and the Support for Those Relationships*, *HOMOSEXUALITY AND FAMILY RELATIONS* 59 (1990) (same); for a more social-historical analysis of the complex patterns of self- and relational identification used by gay men, including the use of kinship terminology, see GEORGE CHAUNCEY, *GAY NEW YORK. GENDER, URBAN CULTURES AND THE MEANING OF THE GAY MALE WORLD* 33-127, 290-291 (1994). However, some commentators maintain that this standard is inherently discriminatory since it is based on an idealized notion of "family", rarely, if ever, achieved by legally recognized families. See Jody Freeman, *Defining the Family in Mossop v. DSS: The Challenge of Anti-essentialism and Interactive Discrimination for Human Rights* 44 U. TORONTO L.J. 41 (Winter 1994); Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1653 (1991); Note, *Redefining the Family*, *supra* note 8, at 195-96. In addition, some would argue that this standard is patriarchal and premised upon a hierarchical power arrangement. Ruthann Robson, *Resisting the Family: Repositioning Lesbians in Legal Theory*, 19 SIGNS 972 (Summer 1994) (and authors cited there); for a critique of this position as reductionist and potentially racist, see Didi Herman, *Are We Family?: Lesbian Rights and Women's Liberation*, 28 OSGOODE HALL L.J. 789, 799-804 (1990). Although the *Braschi* standard might be applied in such an idealized and

In [making an objective assessment of the relationship], the lower courts of this State have looked to a number of factors, including the exclusivity and longevity of the relationship, the level of emotional commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services.³¹

However, the *Braschi* Court specifically admonished that this functional definition should not be applied mechanistically, using the listed factors like a score card or tally sheet. "These factors are most helpful, although it should be emphasized that the presence or absence of one or more of them *is not dispositive* since it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control."³²

B. Regulatory Codification

On November 1, 1989, within four months of the *Braschi* decision, D.H.C.R. promulgated emergency regulations and noticed proposed permanent amendments to all rent control and rent stabilization regulations.³³ These regulations codify the *Braschi* functional definition of family,³⁴ set forth suggested evidentiary categories by which a person can make out a claim under the regulations, and establish a minimum cohabitation requirement.³⁵ As

patriarchal manner (*see more fully below* Part III B), such an application is not inevitable. *See more fully below* Part III A.

31. 543 N.E.2d at 54 (citing 2-4 Realty Associates v. Pittman, 523 N.Y.S.2d 7 (Civ. Ct. N.Y. County 1987)).

32. *Id.* (emphasis added).

33. *See supra* note 7. Not surprisingly, these regulations were immediately attacked by various landlord associations. However, the Court of Appeals unanimously rejected all of their claims. *Rent Stabilization Association v. Higgins*, 630 N.E.2d 626 (N.Y. 1993), *cert. denied*, 114 S.Ct. 2693 (1994). I was privileged to argue that case on behalf of numerous lesbian, gay, disabled, tenant, and poor defendant-intervenors. At oral argument on November 16, 1993, the court's primary inquiry of the plaintiffs was regarding how the challenged regulations were different from, what Chief Judge Kaye called, the "essence" or the "spirit" of *Braschi*. Of course, plaintiffs were unable to persuasively argue such a position.

34. Under the previous rent control regulations, "family" was not defined. 9 N.Y.C.R.R. § 2204.6(d)(1962). In the R.S.C., "family" was limited to a specified list of family members related by blood, marriage or adoption; *see supra* note 20.

35. The amended regulations require that the family member have co-resided with the tenant for two years, one year if the family member is disabled or elderly (9 N.Y.C.R.R. § 2204.6[d][1](1990), § 2523.5[b][1](1990); for definition of "disabled," *see* § 2204.6[d][3][iii](1990), § 2523.5[b][4](1990); for definition of elderly [62 or older], *see* § 2204.6[d][3][ii](1990), § 2520.6[p](1990)), or from the inception of the tenancy or

such, they represent a logical codification and development of the *Braschi* standard.

Most importantly, they retain the central holistic, functional approach adopted in *Braschi*. The regulations set forth the same core standard: "emotional and financial commitment, and interdependence."³⁶ The "criteria" set forth in *Pittman* and the "factors" set forth in *Braschi* that should guide an objective examination³⁷ of the relationship are replicated in the regulations, expanded by suggested evidentiary categories.³⁸ The regulations also echo the admonition in *Braschi* that "no single factor shall be solely

the commencement of the relationship if such periods are less than the two/one year standard (9 N.Y.C.R.R. § 2204.6[d][1](1990); § 2523.5[b][1](1990)). In addition, the same co-residency requirement now applies whether the tenant of record dies or voluntarily vacates the apartment. Pursuant to the terms of the prior R.S.C., on the death of the tenant, the co-residency requirement was two years, one year if elderly or disabled, or from the inception of the tenancy or the commencement of the relationship if less (§ 2523.5[b][2](1987)); however, on the voluntary departure of the tenant, the remaining family member had to have co-resided in the apartment with the tenant from the inception of the tenancy or the commencement of the relationship (§ 2523.5[b][1](1987)). The prior rent control regulations simply required that the family member have "liv[ed] with" the tenant of record. 9 N.Y.C.R.R. § 2204.6(d)(1962). That requirement did not impose any specific longevity requirement, but merely required that the "[l]iving arrangement, whatever its duration, bear[] some indicia of permanence or continuity." 829 Seventh Ave. Co v. Reider, 502 N.Y.S.2d 715, 717 (1986), *rev'g on other grounds* 491 N.Y.S.2d 160 (N.Y. App. Div. 1985). Courts had found that this requirement could be met where there was a co-residency of one year (*Herzog v. Joy*, 428 N.Y.S.2d 1 (N.Y. App. Div. 1980), *aff'd*, 439 N.Y.S.2d 922 [1981] or as brief as only five months (829 Seventh Ave.) or even five weeks (*Coleman v. Sillman*, N.Y.L.J., March 6, 1991, p. 22 col. 6 (Civ. Ct. N.Y. County)).

36. 9 N.Y.C.R.R. § 2204.6(d)(3)(i)(1990), § 2520.6(o)(2)(1990).

37. Some commentators have criticized the *Braschi* standards as being "subjective" and, thus, open to manipulation, misinterpretation or misapplication. *See, e.g.,* Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 276-84 (1991). This was the same attack mounted by plaintiff-landlords in *Rent Stabilization Association v. Higgins* against the post-*Braschi* regulations. However, this claim was resoundingly rejected by the Appellate Division, 562 N.Y.S. 2d 962, 972 (N.Y. App. Div. 1990), and by the Court of Appeals, 630 N.E.2d at 632. Indeed, I submit that the history of the application of these standards in the trial courts, *see below* Part III A, demonstrates that the factors set forth in the regulations provide objective, but not mechanistically rigid standards by which to determine the existence of a family relationship.

38. 9 N.Y.C.R.R. § 2204.6(d)(3)(i)(a) - (h)(1990); § 2520.6(o)(2)(i) - (viii)(1990):

- (i) longevity of the relationship;
- (ii) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;
- (iii) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government benefits, etc.;
- (iv) engaging in family-type activities . . . ,

determinative.”³⁹ However, as will be discussed more fully below in Part III B, this admonition is not always followed by courts looking for an easy checklist approach in determining the existence of a family relationship using the functional definition established in *Braschi* and codified in the amended regulations.

III. Application of the Functional Definition of “Family” in the Trial Courts.

A survey of the approximately twenty-five reported cases applying the *Braschi* definition of “family” demonstrates that the trial courts have generally been receptive to the challenge of exploring the multiple forms lesbian and gay families take,⁴⁰ applying the codified “factors” in a non-mechanistic way. However, the reported cases also show that some courts have been resistant to that task, rushing to force lesbian and gay relationships into preconceived “Ozzie and Harriet” notions of the ideal patriarchal family, or giving determinative weight to the absence of particular categories of evidence suggested in the regulations.⁴¹ First, I will briefly survey those cases in which the courts have been receptive to the challenge presented by the functional definition. After that analy-

(v) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills naming each other as executor and/or beneficiary, conferring upon each other a power of attorney and/or other authority to make health care decisions for each other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;

(vi) holding themselves out as family members to other family members, friends, members of the community or religious institutions, or society in general, through their words or actions;

(vii) regularly performing family functions, such as caring for each other or each other’s extended family members, and/or relying upon each other for daily family services;

(viii) engaging in any other pattern of behavior, agreement or other action that evidences the intention of creating a long-term, emotionally committed relationship.

However, “[i]n no event would evidence of a sexual relationship between such persons be required or considered.” 9 N.Y.C.R.R. § 2204.6(d)(3)(i)(1990); § 2520.6(o)(2)(1990). Nevertheless, the Appellate Term, First Department, affirmed a finding of family relationship in part on the fact that the couple had a child while co-residing. *Lepar Realty v. Griffin*, 581 N.Y.S.2d 521 (N.Y. App. Term 1991).

39. 9 N.Y.C.R.R. § 2204.6(d)(3)(i)(1990), § 2520.6(o)(2)(1990).

40. See *Weston*, *supra* note 30.

41. I do not presume that every case in which a court has found that a family relationship did not exist is an example of this latter failure. There are, indeed, both borderline cases and cases in which there is simply no evidence of the claimed relationship.

sis, I will address the problems raised by some courts' unwillingness to accept this challenge.

A. Successful Applications of *Braschi*

There are at least five reported post-*Braschi* cases in which lesbian and gay families were recognized by the courts. In *O'Malley v. Silva*,⁴² the court rejected the claim that a surviving lesbian life partner was a "friend," not a family member. The court found that "[a]rrayed against petitioner's testimony, was substantial credible testimony that Ms. Silva and Ms. Ammirati had an exclusive, intimate, loving family relationship from 1975 to the date of Ms. Ammirati's death in 1991. . . ." ⁴³ The court was willing to consider not only such formal evidence of financial interdependence as the couple's joint bank account, the surviving partner's designation as beneficiary in a small insurance policy and the decedent's will, but also the fact that "they spent holidays together; that they attended family parties, picnics, celebrations, visits with each other's relatives and children; and that ultimately they shared illness and tragedy."⁴⁴

The court also gave significant weight to testimony from witnesses, including the decedent's cousin, regarding the closeness of the relationship. The court particularly noted that "In highly charged and emotional testimony, Ms. Silva movingly related how Ms. Ammirati died in her arms."⁴⁵ Although the court would likely have reached the same decision without the more formal evidence, it is significant that the functional definition of "family" codified in the regulations provided not only a framework within which Ms. Silva could present the personal and emotional reality of her family relationship to the court, but also a framework within which the court could objectively evaluate that claim.

Similarly, in *Strassman v. Estate of Daniel Eggena*,⁴⁶ the court gave particular weight to evidence that the gay male couple "traveled together and with friends extensively. They visited each others' family together and slept together while on such visits. To family and friends, they were a 'family.'"⁴⁷ The court also noted

42. N.Y.L.J., December 15, 1993, p. 25 col. 3 (Civ. Ct. Queens County).

43. *Id.*

44. *Id.*

45. *Id.*

46. N.Y.L.J., May 23, 1990, p. 23 col. 4 (Civ. Ct. N.Y. County), *aff'd* 582 N.Y.S.2d 899 (N.Y. App. Term 1992).

47. *Id.* Once again, as in *Lepar Realty v. Griffin*, 581 N.Y.S.2d.521 (N.Y. App. Term 1991), the prohibition against considering "a sexual relationship" between the

that it was the surviving partner who had cared for Mr. Eggena in his last days.⁴⁸ The court was even open to understanding that the standard of “financial interdependence” set forth in *Braschi* and the regulations must not be applied formulaically. Thus, the court did not discount the overwhelming evidence of the couple’s relationship simply because the couple did not have a joint bank account when Mr. Eggena died or because of the fact that the decedent paid for most of the couple’s expenses and gave his life partner “expensive gifts.”⁴⁹

In *East 10th Street Associates v. Goldstein*,⁵⁰ the Appellate Division, without remand to the trial court, found that the gay male life partners in that case were a “family” under the *Braschi* test. Once again, the most significant aspect of the court’s decision in this case is the manner in which it described the facts of the couple’s relationship. It did not attempt to objectify the relationship by primary reference to formal, “objective” evidence of, for example, financial intermingling; rather, it primarily focused on the core values/functions at the heart of the *Braschi* test:

Both these individuals demonstrated a high level of emotional commitment to one another and took care of each other’s day-to-day needs. They were open about their relationship, and their devotion to one another as life partners was apparent to their family and friends, as is reflected in affidavits by Goldstein’s [the decedent] mother and son, who considered Wells [the surviving partner] to be a part of the family and have characterized the relationship of their son and father as that of spouse to Wells.⁵¹

One may shudder at the “spousal” analogy from an ideological perspective — lesbian and gay relationships should not be seen as derivative of heterosexual models — but note that the conceptualization was that of the couple’s family members. To that extent,

parties need not totally exclude facts evidencing the intimate realities of the lives of lesbians and gay men. Indeed, in the context of being out to one’s biological family, the fact that a couple “sleeps together” while visiting them is viewed by many as a significant moment in lesbian and gay self definition as “family” or “couple.” On the complexities of coming out to one’s biological family, see Weston, *supra* note 30, at 43-6.

48. See *supra* note 46.

49. *Id.*

50. 552 N.Y.S.2d 257 (N.Y. App. Div. 1990). The Appellate Division used the opportunity provided by this case to extend the *Braschi* definition to rent-stabilized tenancies prior to the effective date of the amended rent stabilization regulations.

51. *Id.*

the court was accurately reflecting the self-definition of the parties involved.

Finally, in *Lerad Realty Co. v. Reynolds*,⁵² the court gave significant weight to the fact the this gay male couple exchanged rings, shared the same bed in a small studio apartment, shared household expenses and chores, vacationed together regularly, and held themselves out as "family" to friends and business associates.⁵³ The surviving partner cared lovingly for his partner during the final days before his death from AIDS. Given significant documentary and testimonial evidence regarding these factors, the court was not swayed by the fact the couple did not have joint bank accounts or were not named as beneficiaries on each other's life insurance policies, and the fact that the decedent would give the surviving partner receipts for his share of the rent.⁵⁴ Thus, the court was open to the manner in which this couple had decided to arrange its financial affairs and did not rely on that one factor to negate the reality of their self-definition as family.

Nor was the *Reynolds* Court swayed by the fact that this couple had not held themselves out as family to their respective biological families. As noted in the three previous cases discussed above, those courts were particularly impressed by the incorporation of the gay family into their respective biological families. In *Reynolds*, focusing on the weight of the evidence described above and the fact that the couple's biological families were not close to them or accepting of their gayness, the court found that:

[t]o require that the court find a gay couple to have held themselves out openly and notoriously to their families, who might not approve of the same [and with whom the couple had minimal contact], in order to meet the *Braschi* test would be an un-

52. N.Y.L.J., August 29, 1990, p. 22 col. 5 (Civ. Ct. N.Y. County).

53. *Id.*

54. *Id.* See also *Colon v. Frias*, N.Y.L.J., July 8, 1994, p. 31 col. 4 (Civ. Ct. Kings County), in which the court found that two women had lived in a close, committed non-sexual relationship as "sisters" for thirty-four years, even though there was no formal documentary evidence of financial interdependence. In rejecting the landlord's claim that the requirement of documented financial interdependence had not been met since the decedent had not even taken out life insurance naming the remaining "sister" as beneficiary, the court found that:

Aside from the specific admonition of the Regulations that no one factor should be determinative, the court is mindful of the fact that the Respondent and [the decedent] were elderly women of limited means and did not employ any of what might be considered modern financial methods; they had no checking accounts or credit cards and they did not "invest" in anything, including life insurance. [The decedent] did what she knew; she listed Respondent as the Totten beneficiary on passbook savings account.

realistic and unfair burden upon the surviving family member. To put it another way, the absence of this factor, especially when credibly explained away such as is the case here, does not and should not defeat the existence of a committed relationship which rises to the level of family. This is especially true when as herein, the couple do in fact openly hold themselves out to society in general as a family.⁵⁵

In evaluating these facts, as well as others that might have argued against the couple's claim to be a family, the *Reynolds* Court adhered to the *Braschi* Court's admonition to view the relationship in its totality: "[O]ne must look to the totality of the facts and circumstances in determining whether these men were mere roommates" rather than family.⁵⁶

Similarly, in *Picon v. O.D.C. Assocs.*,⁵⁷ the court looked to the totality of that gay couple's relationship in order to evaluate the significance of the surviving partner's having had an affair. "The fact that [the remaining occupant] may have had an affair with another man during [the deceased tenant's] illness . . . does not necessarily mean that [he] lived with that other man at a different location. Nor does it mean that [the remaining occupant and the tenant] were not gay life partners, . . . since peccadillos of this nature seem not to be uncommon, even in the marital life of normally [sic] married couples."⁵⁸

Thus, in reviewing the claims of lesbian and gay families, the courts have been willing to consider the various forms in which a committed, caring relationship can be effected.⁵⁹ Before proceed-

55. N.Y.L.J., August 29, 1990, p. 22 col. 5.

56. *Id.*

57. Judgment No. 86-22894, (N.Y. Sup. Ct. January 28, 1991).

58. *Id.* Indeed, courts have held that the fact that one of the parties is legally married cannot, in itself, defeat a claim under *Braschi* or the regulations. "While the fact of the decedent's marriage may be a factor to consider, it is the totality of the relationship with the [tenant] . . . that is dispositive." *Estate of Smith v. Atwood*, N.Y.L.J., May 18, 1990, p. 22 col. 1 (N.Y. App. Term) (emphasis added); see also *Lepar Realty Corp.*, 581 N.Y.S.2d at 522 (same).

59. The courts have evidenced a similar openness to alternative straight families. *Colon v. Frias*, N.Y.L.J., July 8, 1994, p. 31 col. 4 (Civ. Ct. Kings County) (two women lived as "sisters"); *RSP Realty Assoc. v. Paege*, N.Y.L.J., August 14, 1992, p. 21 col. 4 (N.Y. App. Term) (second cousins lived as family: shared financial accounts, commitment to cousin's children, designated as beneficiary on will); 43-45 W. 129 Street *HDFC v. Doe*, N.Y.L.J., March 2, 1992, p. 31 col. 2 (Civ. Ct. N.Y. County) ("mother/daughter": tenant was godmother to claimant; raised her from childhood for sixteen years because biological mother was unable; provided for all emotional and financial needs with minimal assistance from biological father; provided food, clothing, shelter and education; disciplined her as a parent; common vacations and holidays; attended church together; claimant cared for tenant during cancer-related illness); *Lepar Realty*

ing to discuss examples where courts have attempted to force gay family relationships into preconceived notions of the ideal patriarchal family or have inappropriately given determinative weight to the absence of particular categories of evidence, two additional observations should be made. First, all of the cases discussed above involved the death of one of the life partners, frequently from AIDS. One might ask if these cases would have resulted in the same determination if the relationship had simply ended. This is, of course, difficult to judge. Two of the reported cases adjudicating the claims of straight families under the *Braschi* standard involved just such a scenario.⁶⁰ In those cases, the courts found that a family had existed prior to the tenant's vacatur. However, as will be discussed in the next part, contrary results in other such cases raise serious issues regarding the difficulty some courts have in acknowledging less than "ideal" families, especially after the relationship has ended.

Second, it should also be noted that all of the lesbian and gay family cases involved life partners. The cases involving straight families have successfully litigated the claims of a greater variety of family configurations, e.g., close second cousins, "sisters," "mother/daughter," and "mother/son."⁶¹ Certainly the manner in which lesbians and gay men live as families are more varied than the one model litigated in the reported cases.⁶² The willingness of the courts to take such claims seriously is evidenced by the cases discussed above.

Corp., *supra* note 38 (heterosexual couple: six years co-residency, shared expenses, held selves out as family, had child during co-residency and lived as family unit); *Batsikas v. Ligouri*, 567 N.Y.S.2d 340 (Civ. Ct. Kings County 1991) ("mother/son": nephew and mother of paternal aunt; raised as "son" by aunt and uncle, called aunt's mother "grandmother" and lived with "grandmother" as family unit for 11 years); *Estate of Causse*, N.Y.L.J., November 28, 1990, p. 23 col. 2 (Sur. Ct. N.Y. County) ("mother-daughter": uncontested documentary evidence establishing financial and emotional relationship); *Seminole Housing Corp. v. Leone*, N.Y.L.J., May 24, 1990, p. 27 col. 3 (N.Y. App. Term) (heterosexual life partners: stipulated facts evidenced family relationship); *2-4 Realty Assocs. v. Pittman*, 523 N.Y.S.2d 7 (Civ. Ct. N.Y. County 1987), *aff'd*, 547 N.Y.S.2d 515 (N.Y. App. Term 1989) ("father/son" relationship).

60. *Lepar Realty Corp.* *supra* note 38 (heterosexual couple); *RSP Realty Assoc.*, *supra* note 60 (second cousins who lived as family).

61. *See supra* note 59.

62. *See Weston*, *supra* note 30; *Fajer*, *supra* note 30.

B. Braschi's Limitations: Some Problems in Applying a Functional Definition of Family

Although I am convinced that New York State's adopting a functional definition of family for anti-eviction purposes is a significant advance for lesbian and gay equality, it is also evident that a rigid, mechanistic and patriarchal application of this definition can result in some families being excluded from recognition and protection. This problem has been emerging in two ways:⁶³ first, by judging lesbian and gay families in relationship to an idealized image of family life characterized by a "rosy picture of long-term, exclusive devotion and emotional commitment;"⁶⁴ second, by placing dispositive weight on the absence of particular categories of evidence, especially formal evidence of financial intermingling.

"Well, what family doesn't have its ups and downs?"⁶⁵ In some instances, courts have been unable to accept this less than "ideal" reality of family life. In *Park Holding Co. v. Power*,⁶⁶ the court gave determinative weight to the gay claimant's admission that the relationship was "definitely in trouble" a couple of years before his partner moved out of the apartment. The court also found particularly "relevant" the fact that they did not in those last years jointly own property or formalize legal obligations.⁶⁷ Whatever the actual merits of this case, it demonstrates the two problems described above: equating "trouble" with the end of the family relationship and making a particular mode of financial interdependence (joint account, formal legal obligations) determinative.⁶⁸

63. There is only one reported lesbian or gay family case in which these problems have surfaced. *Park Holding Co. v. Power*, N.Y.L.J., January 17, 1992, p. 26, col. 1 (N.Y. App. Term). However, these problems have also emerged in cases involving straight families, which will be discussed in this Part.

64. Note, *Redefining the Family*, *supra* note 8, at 195.

65. *The Lion in Winter* (Embassy Pictures 1963).

66. N.Y.L.J., January 17, 1992, p. 26 col. 1 (N.Y. App. Term), *appeal after trial on remand* from 554 N.Y.S.2d 861 (N.Y. App. Div. 1990), *see supra* note 50.

67. *Id.* Additionally, there was the untoward spectacle of the former lover testifying that their relationship had ended nine years earlier.

68. This emphasis on formal financial arrangements as dispositive in demonstrating financial interdependence will make it difficult for poor families to sustain their claims, since they frequently do not have access to or need for such mechanisms. Thus, their family status may be negated even though such families would be able to demonstrate other arrangements evidencing financial interdependence. *But see, Colon*, *supra* note 59 (family relationship found even though there was no formal documentary evidence of financial interdependence); *see supra* note 54. Indeed, even middle-class families, both functional and traditionally-recognized, may arrange their financial affairs in other than the formal ways favored by some courts. Nevertheless, it is not an unreasonable application of *Braschi* or the regulations for a court to require evidence of financial interdependence appropriate to the economic status of the

Similarly, in *GSL Enterprises v. Goldstein*,⁶⁹ although the court found that this straight couple had been involved in an intimate relationship and that they had shared household expenses for two and a half years, the fact that the relationship had “soured” and that the couple did not have joint bank accounts or credit cards was determinative in the court’s rejection of the remaining party’s claim.⁷⁰ In *Eberhart v. Randall*,⁷¹ it was uncontested that this straight couple had lived together for ten years, slept in the same bed, shared household expenses and chores, held themselves out as a loving couple, and attended family functions as a couple. Nevertheless, the court, relying on *GSL Enterprises*, found:

[T]heir relationship did not rise to an in-depth commitment between them. There is no evidence of such *critical considerations* as joint bank accounts, joint credit cards, joint property ownership . . . no indicia [such] as formalization of legal obligations such as by naming each other as executor (executrix) or beneficiary of a will of the other of them . . . and there was no domestic partnership declaration.⁷²

parties. See, e.g., *Walber 72nd Street Associates v. Padro*, N.Y.L.J., August 23, 1994, p.22 col. 3 (Civ. Ct. N.Y. County) (court rejected family claim where surviving straight partner was completely unaware that decedent had \$150,000 and was not named beneficiary in her will: “The existence of separate bank accounts alone would not serve to defeat the claim of a family relationship, but the *complete separation* of financial resources [except for the sharing of routine household expenses] apparent herein is particularly damaging to [respondent’s] claim.” (emphasis added)). However, see Robson, *supra* note 30, at 985-988, for a compelling warning regarding the reductionist, objectifying and instrumentalist implication of an economic-based definition of human relationships.

69. N.Y.L.J., July 13, 1993, p. 22 col. 2 (N.Y. App. Term).

70. *Id.* Additionally, as in *Park Holding*, *supra* note 66, the claimant’s post-breakup words were used to negate the couple’s prior self-definition as family. The *GSL Enterprises* court particularly noted that the claimant said she “wasn’t going to put him as [her] beneficiary until we got married.” See *supra* note 69. There seems to have been no consideration given by the court to the possibility that one who had decided not to get married and to reserve some legal autonomy might still meet the *Braschi* standard, as evidenced by the other facts admittedly before the Court. These facts include, among others, sharing household expenses and co-habiting for two and a half years.

71. N.Y.L.J., December 1, 1993, p. 23 col. 1 (Civ. Ct. N.Y. County).

72. *Id.* (emphasis added); see also *Jorge v. Pacton*, N.Y.L.J., January 5, 1994, p. 28 col. 4 (Yonkers City Ct. Westchester County) (“The parties in this case apparently had a long relationship, residing in the subject apartment together, sleeping in the same bed, splitting household expenses, [respondent] caring for the [decedent] in his last illness. [h]owever, this evidence was insufficient to support a finding that the parties had an ‘in-depth commitment’ There was no evidence of joint bank accounts, joint credit cards, joint property ownership, no formalization of legal obligations.”). The *Eberhart* court amazingly added: “[i]n addition, respondent failed to produce [his former lover] as a witness on his behalf.” N.Y.L.J., December 1, 1993, p. 23 col. 1.

It has been suggested that the problems described above are inherent in the *Braschi* standard itself.⁷³ However, based on the analysis of *Braschi* and the regulations that codify *Braschi* set forth in Part II, and based on the successes in the cases discussed in Part III A, and further based on my own experiences litigating such cases, I remain unconvinced of that position. It seems that the distortions described above arise when the courts confuse the standard to be applied with the suggested categories or types of evidence by which one can demonstrate one's claim of meeting such a standard.⁷⁴ The standard, however articulated, centers around the core values/functions of care and commitment. I have demonstrated above in Part II that those core values/functions informed the *Braschi* Court's articulation of the standard to be applied in adjudicating family succession claims: "the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties."⁷⁵ Similarly, the factors suggested by the *Braschi* Court focus on related core values: continuity/length, level of emotional commitment, daily interaction, reliance.⁷⁶

The amended regulations also focus on the core values of "emotional and financial commitment, and interdependence."⁷⁷ The factors to be considered, set forth in greater detail and specificity than in *Braschi*, envision a wide variety of arrangements by which those core values are self-defined and incarnated in particular relationships.⁷⁸ Indeed, the final factor listed in the regulations encourages such an expansive reading: "*any other pattern* of behavior, agree-

The nuanced and fact sensitive approach of the court in *Colon*, *supra* note 54, is in stark contrast to the myopic approach of the *GSL Enterprises*, *Eberhart*, and *Jorge* courts.

73. See, e.g., Note, *Looking for a Family Resemblance*, *supra* note 30, at 1653-57; Note, *Redefining Family*, *supra* note 8, at 195-97.

74. See also, *Allerton Assoc. v. Shannon*, N.Y.L.J., February 26, 1993, p. 26 col. 6 (Civ. Ct. Bx. County) (heterosexual couple: although court held that relationship commenced when couple began living together and that couple shared household expenses and held themselves out as a couple, court gave determinative weight to fact that relationship lasted only seven months); *Fetner v. Fenner*, N.Y.L.J., November 21, 1990, p. 22 col. 4 (Sup. Ct. N.Y. County) (heterosexual life partners: although court found that relationship had begun as a committed relationship, it placed primary emphasis on what it considered to be a relatively short duration [three years] punctuated with frequent absences, ending with tenant's moving out, and no holding out or financial interdependence).

75. 543 N.E.2d at 55.

76. *Id.*

77. 9 N.Y.C.R.R. § 2204.6(d)(3)(i)(1990), § 2520.6(o)(2)(1990).

78. See *supra* note 38.

ment, or other action which evidences the *intention* of creating a long-term, emotionally committed relationship."⁷⁹

Thus, for a court to give dispositive emphasis to one factor or category of evidence is a distortion of both *Braschi* and the regulations which should be resisted both at the trial and appellate level. The final and dispositive word in this regard is from the *Braschi* Court: "These factors are most helpful, although it should be emphasized that the presence or absence of one or more of them *is not dispositive* since it is the *totality* of the relationship . . . which should, in the final analysis, control."⁸⁰

Another concern, which is admittedly inherent in the nature of the *Braschi* standard, is the inevitable invasion of privacy involved in demonstrating one's family claim at trial, especially in the dispiriting environs of New York City's Housing Court.⁸¹ In 1982, when the facts of the family relationship were generally not challenged,⁸² one judge presciently noted:

Some day, sooner or later, a landlord opposing a [tenant's] motion to dismiss is going to allege that the parties (tenants) do not maintain a "close and loving" relationship, but are merely friends or roommates. . . . and "put the parties to their proof." Here the distasteful problem arises — how do individuals prove a "quasi-marital" relationship? How does a landlord disprove it? The issue gives rise to difficulties of both an evidentiary and a constitutional nature. This court suggests that the potential problems might be solved by allowing the sworn statement of a "quasi-marital" relationship, to give rise to an *irrebuttable presumption* that such a relationship does exist. An irrebuttable presumption may be utilized where public policy demands that certain lines of inquiry be avoided.⁸³

Although the reasoning in *Braschi* and the terms of the amended regulations articulate a public policy favoring a "line of inquiry"

79. 9 N.Y.C.R.R. § 2204.6(d)(3)(i)(h)(1990), § 2520.6(o)(2)(viii)(1990) (emphasis added).

80. 544 N.Y.S.2d at 790 (emphasis added); *see also* 9 N.Y.C.R.R. § 2204.6(d)(3)(i)(1990), § 2520.6(o)(2)(1990): "no single factor shall be solely determinative."

81. Although significant changes have been made in New York City's Housing Court since 1987, it is unfortunately true that conditions are "still disgraceful and totally inadequate" and that the manner in which litigation is conducted is all too often best described as "an orchestrated zoo" or a "circus." AMERICAN CIVIL LIBERTIES UNION, JUSTICE EVICTED: AN INQUIRY INTO HOUSING COURT PROBLEMS (1987).

82. *See supra* note 23.

83. *Yorkshire House Assoc. v. Lulkin*, 450 N.Y.S.2d 962, 966 (Civ. Ct. N.Y. County 1982)(emphasis in original).

into a claimant's personal, emotional relationship with the tenant, the "distasteful problem" identified by this jurist is still present.⁸⁴

Minimally, the Disciplinary Rules and the Model Rules offer some guidance in challenging the more "distasteful" aspects of this process. Advocates must confront an adversary's deposing or cross-examining a claimant "merely to harass or maliciously injure,"⁸⁵ or asking a question "that is intended to degrade a witness or other person,"⁸⁶ or "engag[ing] in . . . discourteous behavior which is degrading to a tribunal."⁸⁷

Some have suggested that domestic partner registration may be a way of avoiding the invasion of privacy and potential bias and distortion that arise when lesbian and gay relationships are adjudicated using a functional definition.⁸⁸ I support any strategy for achieving recognition of gay relationships, including domestic partner registries. However, in their present form, domestic partner registries do not avoid the problems raised by use of a functional definition of "family" discussed above. First, unless expanded significantly beyond their current incarnations, such registries only include one form of family relationship, i.e., one modelled on a husband-wife configuration.⁸⁹ Second, most domestic partner registries do not automatically bring with them many significant benefits, such as family anti-eviction protection. For example, under the current scheme in New York, registration is merely some evidence of a family-type relationship, not an irrebuttable presumption.⁹⁰ It has been suggested that registration be made a rebuttable presumption of a family relationship.⁹¹ However, the family mem-

84. See, e.g., Note, *Looking for a Family Resemblance*, *supra* note 30, at 1653-57; Note, *Redefining Family*, *supra* note 8, at 195-97. On the more general issue of the privacy rights of lesbians and gays, see VINCENT J. SAMAR, *THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION* (1991).

85. DR 7-102(A)(1).

86. DR 7-105(c)(2).

87. DR 7-105(c)(5). See also Model Rule 4.4 ("shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person").

88. See, e.g., Note, *Looking for a Family Resemblance*, *supra* note 30, at 1657-59; Note, *Redefining the Family*, *supra* note 8, at 196-97.

89. It is beyond the scope of this article to address the implications of such a choice. See, e.g., Weston, *supra* note 30, at 205-210; Heidi Sorenson, *A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination*, 81 GEO. L.J. 2105, 2128-30 (1993). An unintended by-product of such a choice could be an image of lesbian and gay society as composed exclusively of couples, "bachelor gentlemen," "old maids" and "widows/widowers." Lesbian and gay family configurations are demonstrably more varied and rich than that. See Weston, *supra* note 30.

90. 9 N.Y.C.R.R. § 2204.6(d)(3)(i)(e)(1990), § 2520.6(o)(2)(v)(1990).

91. See Note, *Much Ado About Nothing?*, *supra* note 8, at 385-86.

ber would inevitably be compelled to demonstrate the validity of the registration by evidence similar to that now required under *Braschi*.⁹² Further, if we choose to emphasize domestic partner registration as an available and effective means of validating our relationships, courts may give dispositive weight to the absence of such registration in rejecting family claims.⁹³ Thus, those who do not, cannot or choose not to register may find their families devalued.⁹⁴

Indeed, it has been suggested that reliance on such mechanisms as domestic partnership registrations and same sex marriage⁹⁵ by which to achieve recognition for lesbian and gay families would not only force conformance to heterosexual models, but also would marginalize lesbian and gay relationships as a separate, but unequal form of quasi-marriage.⁹⁶ As I said earlier, although I support all strategies for achieving recognition for lesbian/gay relationships, it may be that by creating an expansive, functional understanding of "family" and other such relational terms, by which statutes, reg-

92. The suggestion that such scrutiny could take place in an administrative hearing, rather than in Court, would change nothing. See Note, *Much Ado About Nothing?*, *supra* note 8, at 385-86. It has been my experience, confirmed in conversations with attorneys from the Gay Men's Health Crisis, the Legal Aid Society and Legal Services who have litigated such claims before D.H.C.R. and H.P.D., that the same invasive inquiry into the nature of the relationship occurs at administrative hearings.

93. See, e.g., *Eberhart v. Randall*, N.Y.L.J., December 1, 1993, p. 23 col. 1 (Civ. Ct. N.Y. County) ("There is no evidence of such *critical considerations* [indicating a committed relationship] as . . . [a] domestic partnership declaration.") (emphasis added).

94. Such a result would be a strange irony. Our journey from "the term family . . . be[ing] rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order" would have brought us full circle back to a notion of family based on "fictitious legal distinctions." *Braschi*, 543 N.E.2d at 53.

95. A discussion of the debate regarding gay/lesbian marriage within the lesbian and gay community is beyond the scope of this article. See, e.g., RUBENSTEIN, *supra* note 6, at 397-406; for a more general historical investigation of same-sex marriages, see William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993); and JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE, 28-107, 199-279 (1994).

96. See Sorenson, *supra* note 89. An alternative proposal is to cease using marriage as a status by which benefits are conferred. See Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family"*, 26 GONZ. L. REV. 91 (1990/91). Others have suggested abandoning the use of even the broader category of "family" to define/describe gay, lesbian or straight relationships and to confer benefits. See, e.g., Freeman, *supra* note 30, at 67-9; Robson, *supra* note 30, at 991-93; for a more nuanced discussion of the tension and dialectic involved in a lesbian or gay appropriation of the term "family," see Brenda Cossman, *Family Inside/Out*, 44 U. TORONTO L.J. 1 (Winter 1994). However, it is unlikely and, perhaps, undesirable that society, including lesbian and gay society, would cease giving particular value and concomitant benefits to such relationships of care and commitment that effect and benefit society. See, e.g., Minow, *supra* note 37, at 276-84; Weston, *supra* note 30, at 103-136, 202-205; Herman, *supra* note 30, at 800-801.

ulations and case law are interpreted to include the various forms of caring and commitment chosen by lesbian, gay and straight persons, gay relationships are placed at the center of the legal landscape without losing their own uniqueness.⁹⁷ The significant advancement in the recognition of lesbian and gay relationships achieved in *Braschi* followed just such a model: a coalition of lesbian, gay, tenant, disabled, elderly and poor advocates collaborating first in the *Braschi* litigation, then in assisting the New York State Division of Housing and Community Renewal in drafting its amended family anti-eviction regulations, and finally in defending those regulations in the *Rent Stabilization Association v. Higgins* litigation.⁹⁸ To the extent that that model of legislative/regulatory

97. See Sorenson, *supra* note 89 for a discussion of "dynamic statutory interpretation"; see also Chief Justice Kaye's discussion of the process whereby courts "look . . . to modern-day realities in giving definition to statutory concepts." *Matter of Alison D. v. Virginia M.*, 569 N.Y.S.2d 586, 591-92 (1991) (Kaye, J., dissenting).

98. I do not idealize this success. I am fully aware that full equality was not achieved. Families defined by biology and legally-recognized bonds still do not need to present anything more than a certification of that fact in order to avoid eviction from their homes. They need not prove any emotional or financial commitment or interdependence. Indeed, any scrutiny into such aspects of their relationship is prohibited. *Z.H. Control Co. v. Sullivan*, N.Y.L.J., September 8, 1993, p. 21 col. 2 (N.Y. App. Term); *Gottlieb v. Martha A. & George B.*, N.Y.L.J., December 4, 1992, p. 22 col. 5 (Civ. Ct. N.Y. County). In addition, I am aware that some courts have been hesitant to adopt a functional interpretation of relational terms which, from their cultural or legislative histories, appear to be limited to biological-, gender-, or marital-based relationships. See, e.g., *Matter of Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) ("parent" for visitation purposes limited to "biological parent"), but see the persuasive dissent of now Chief Justice Kaye arguing for a functional interpretation guided by the petitioner's actual relationship to the child and the best interests of the child, *id.* at 30-33; *Matter of Christine*, N.Y.L.J., June 16, 1994, p. 30 col. 5 (Sur. Ct. Kings County) (lesbian partner's adoption petition denied on theory that adoption statute requires termination of biological mother's parental rights unless proposed adoptive parent is mother's legally-recognized heterosexual "spouse"), but see *In re Adoption of Evan*, 583 N.Y.S.2d 997 (Sur. Ct. N.Y. County 1992) (lesbian two-parent adoption permitted where the adoptive and biological parents function as co-parents of the child and, thus, denial of adoption would be irrational and contrary to the best interests of the child), *Adoption of B.L.V.D. & E.L.V.B.*, 628 A.2d 1271 (Vt. Sup. Ct. 1993) (same); *In re Robert Paul P.*, 471 N.E.2d 424 (N.Y. 1984) (gay lover's attempt to adopt partner denied since relationship is not one of "parent/child"), but see dissent, *id.* at 427-29 (uncoerced desire of two adults to take on the legal status of parent/child, which is not otherwise contrary to public policy, should be permitted), see also 333 E. 53 St. Assoc. v. Mann, 503 N.Y.S.2d 752 (N.Y. App. Div. 1986) (same) *aff'd* 512 N.E.2d 541, *In re Adoption of Swanson*, 623 A.2d 1095 (Del. Sup. Ct. 1993) (agreeing with and citing the dissent in *Robert Paul P.*), cf. Boswell, *supra* note 95, at 97-107, 221-29 (historical investigation of the use of collateral adoption to provide formal recognition of same-sex unions); *Matter of Cooper*, 594 N.Y.S. 2d 797 (N.Y. App. Div. 1993) (gay lover is not "spouse" for elective share purposes); *Kahn v. Pizarro*, N.Y.L.J., September 1, 1993, p. 23 col. 1. (Civ. Ct. Bronx County) ("spouse" as used in New York's Rent Stabilization Code § 2524.4(a)(2), which protects elderly or disabled

and common law reform was successful, it provides some guidance in other attempts to gain recognition for lesbian and gay families.

IV. Conclusion

The functional definition of "family" adopted in *Braschi* and codified in New York's family anti-eviction regulations has demonstrated itself to be a significant, although imperfect, means by which to effect recognition and protection for lesbian and gay families. When used in the holistic, flexible, and inclusive manner intended by the *Braschi* Court and D.H.C.R., the courts have been pushed to recognize the varied ways in which lesbians and gay men care for and commit to one another. Where courts have understood these core values/functions in a mechanistic or rigid manner, they have negated the reality of lesbian and gay families by judging them in relation to idealized, patriarchal, and formal models of the ways in which families self-define and structure their relationships. Nevertheless, the fact that over one million households in New York State are now governed by a standard which has the potential of protecting lesbian and gay families from eviction from their homes is a major advance in the ongoing struggle to "push the law to encompass the reality of our families."

tenants or their "spouses" from eviction under certain circumstances, includes only legally-recognized heterosexual "spouse" absent statutory or regulatory amendment); for a more general discussion of cases evidencing this tension, see RUBENSTEIN, *supra* note 6, at 443-74, 532-37.

