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Protecting Gay and Lesbian Families From Eviction From Their Homes: The Quest for Equality for Gay and Lesbian Families in Braschi v. Stahl Associates

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COLLECTION OF ESSAYS

PROTECTING GAY AND LESBIAN FAMILIES FROM EVICTION FROM THEIR HOMES: THE QUEST FOR EQUALITY FOR GAY AND LESBIAN FAMILIES IN *BRASCHI V. STAHL ASSOCIATES*

Paris R. Baldacci†

Almost twenty years ago, in *Braschi v. Stahl Associates*,[1] New York State's Court of Appeals extended family eviction protections to gay and lesbian families in terms that many of us involved in that case[2] did not expect,[3] i.e., in glowing, almost effusive language, finding that gay,

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1. *Braschi*, 543 N.E.2d at 53–54.

2. The Author was honored, as a first-year attorney, to be one of the co-authors of the amicus brief of the Legal Aid Society in the *Braschi* case. Brief Amicus Curiae of the Legal Aid Society of New York City, Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) (No. 2194/87).

3. The Court's sweeping, positive description of gay and lesbian families was particularly unexpected since *Braschi* was decided only three years after the Supreme Court's infamous decision, *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which that Court found that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . ," *id.* at 191, and, indeed, rejected as "facetious" any claim that gay/lesbian relationships fell within this country's long history of protecting the privacy of its citizens' personal choices and relationships. *Id.* at 194; *see* Note. *Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV.2004, 2025 (2003) ("[C]ourts' [including the *Braschi* Court's] widespread adoption of functionalism in many cases involving same-sex unions is striking in that it has occurred in the shadow of the Supreme Court's disapproval of homosexuality in Hardwick."). It would take the Supreme Court fourteen years after the *Braschi* decision to reject the holding, language and tone of *Bowers* regarding gay and lesbian relationships and families. Lawrence v. Texas, 539 U.S. 558 (2003) (reversing *Bowers* because "[p]ersons in a homosexual relationship may seek autonomy for these purposes [i.e., to make intimate and personal choices], just as heterosexual persons do. The decision in *Bowers* would deny them this right. . . . Its continuance as precedent demeans the lives of homosexual persons." *Id.* at 574–75); *see* Paris R. Baldacci, *Lawrence and Garner: The Love (or at Least Sexual Attraction) That Finally Dared Speak Its Name*, 10 CARDOZO WOMEN'S L.J. 289 (2004) (comparing the holdings in *Bowers* and *Lawrence*); Laurence H. Tribe, Essay, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004) (same).

619

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lesbian, and other functional families or families of choice[4] were equal to and in some instances more family-like[5] than the married and biological heterosexual families that were already protected under the family anti-eviction regulations at issue in that case.[6] Accordingly, the Court held that gay and lesbian families (and other functional families) should also be protected from eviction from their rent-regulated family homes on the death or departure of the tenant of record. In reaching that conclusion the court found:

> [T]he term family should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection of sudden eviction should not rest on fictitious legal distinctions or genetic history, but should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of family life includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of "family" and with the expectations of individuals in those relationships.[7]

The Court reasoned that lower courts could, as they had in the past, look to certain "factors" to determine whether future cases involved "families" that should be protected from eviction. The factors articulated by the Court are: "exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties hold themselves out to society, and the reliance placed upon one another for daily family services."[8] However, the Court cautioned that although "[t]hese factors are most helpful, . . . 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

4. The Author uses the terms "functional families" and "families of choice" interchangeably in this essay. *See generally* KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP (1991); PETER M. NARDI, GAY MEN'S FRIENDSHIPS: INVINCIBLE COMMUNITIES 59–73 (1999); Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299 (1997); *see also* Paris R. Baldacci, *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*, 21 FORDHAM URB. L.J. 973, 975 n.6, 979 n.30 (1994) (and works cited there). A review of the arguments in support of and against use of a functional approach is beyond the scope of this essay. Professor Christensen's article summarizes much of the literature and arguments. *See supra*; *see also* Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 268, 276–80 (1991) (describing the limits of a functional approach); Baldacci, *supra,* at 988–95 (comparing homosexual and heterosexual "families" using *Braschi*'s functional definition of "family").

5. *Braschi*, 543 N.E.2d at 53–54.

6. N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6(d) (Westlaw through Aug. 31, 2006).

7. *Braschi*, 543 N.E.2d at 53–54.

8. *Id.* at 55.

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should, in the final analysis, control."[9] Finally, the Court noted that "Appellant's situation provides an example of how *the rule* should be applied."[10] It then went on to summarize the facts of Braschi and Blanchard's relationship, noting that they had been "life partners for more than ten years"; "regarded one another, and were regarded by friends and family, as spouses"; held themselves out as spouses and family to their biological families and visited them; formalized their relationship, e.g., by holding joint bank accounts and credit cards; and that Blanchard had designated Braschi as his attorney-in-fact and health care proxy, and as the primary legatee and executor of his estate.[11]

9. *Id.*

10. *Id.* (emphasis added).

11. *Id.* The Court made no reference to the fact that Blanchard had died of AIDS and that Braschi had cared for him during his final illness. This omission is surprising since the common wisdom has been that the *Braschi* Court was influenced in large part if not primarily by concerns about the dislocation of persons living with AIDS from their family homes on the death of their partners from AIDS. *See, e.g.*, GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 102–103 (2004) ("Braschi was only one of many unmarried partners [of persons who died from AIDS] threatened with eviction. Many of those partners were ill themselves, at a time when homelessness and discrimination were growing problems for people with AIDS. In a landmark decision that all sides believed was deeply influenced by . . . 'the painful facts of AIDS,' the New York Court of Appeals ruled that Braschi should be considered a family member for purpose of the renter's successionsrights."); Lisa M. Farabee, Comment, *Marriage, Equal Protection, and New Judicial Federalism: A View from the States*, 14 YALE L. & POL'Y REV. 237, 242 (1996) ("The Braschi decision must be interpreted within the context of the AIDS epidemic to understand the court's analysis and final result."). However, although Braschi's lawyers from the American Civil Liberties Union ("ACLU") urged that "no better indicia of the nature of the couple's relationship exists than the love and commitment appellant showed for Blanchard during his illness," Brief of Plaintiff-Appellant, pp. 7-8, they did not at any time indicate that the illness was in fact AIDS. *See* Brief of Plaintiff-Appellant at 7–8, Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) (No. 02194-87). "At Mr. Braschi's request, the papers filed with the Court [by his ACLU lawyers] are silent about the nature of his partner's illness . . . ." David L. Chambers, *Tales of Two Cities: AIDS and the Legal Recognition of Domestic Partnerships in San Francisco and New York*, 2 LAW & SEXUALITY 181, 195 (1991). Nevertheless, Chambers claims that "anyone reading the record would have inferred that his partner had died of AIDS." *Id.*; *see also* Farabee, *supra*, at 242 n.25; Joseph S. Arsenault, Comment, *"Family" But Not "Parent": Same-Sex Coupling Jurisprudence of the New York Court of Appeals*, 58 ALB. L. REV. 813, 830 n.97 (1995) (citing Victoria Slind-Flor, *At the Limits: Major AIDS Cases Have Been Teaching Old Law New Tricks*, NAT'L L.J., Aug. 27, 1990, at 1, 31, quoting attorney Peter Fowler, stating that although "'the court [in Braschi] does not address the issue of AIDS in any shape or manner . . . you don't need a two-by-four to beat on the side of someone's head to convince them this [*Braschi*] is an AIDS case.'"). In any event, it should be noted that all references to AIDS in the record occur only in *amici* briefs and the Court itself makes no reference to AIDS in its decision. This omission is in stark contrast to the Court's later decision upholding the promulgation of regulations that codified *Braschi* in Rent Stabilization Ass'n v. Higgins, 630 N.E.2d 626 (N.Y. 1993). In that case the Court summarized the "grounds" for the regulatory agency's purpose in promulgating the regulations as follows: "chronic low rental vacancy rate for affordable units, increasing homelessness and poverty, *the AIDS epidemic* and the rise in

In relatively quick succession, the *Braschi* decision led to further recognitions of and protections for gay and lesbian families in New York and beyond:[12] regulatory codification of the *Braschi* decision extended eviction protection to over one million rent-stabilized apartments, compared to rent-control's 50,000 apartments;[13] regulatory codification extending eviction protection to thousands of other city-and-state-regulated housing;[14] requiring equal treatment of gay and lesbian families in private housing;[15] authorizing second-parent adoption;[16] requiring equal treatment of gay and lesbian couples in university (marital) housing.[17] Indeed, the significance of *Braschi* has been recognized by courts outside of the United States.[18]

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nontraditional families (including same-sex couples . . .)." *Higgins*, 630 N.E.2d at 630 (emphasis added). The *Higgins* Court also quoted the agency as explaining that the regulations were "intended to clarify a non-traditional family member's right to remain in his or her home, *particularly at a time when a significant percentage of those households may be vulnerable to the AIDS epidemic.*" *Id.* (emphasis added). Accordingly, although the *Braschi* Court's awareness of the AIDS crisis and its impact on what it calls "non-traditional families" cannot be gainsaid, the extent of the impact of the AIDS crisis on the *Braschi* Court's decision remains speculative.

12. *See, e.g.*, Baldacci, *supra* note 4, at 982–95 (evaluating application of *Braschi* indicia by courts in first five years after *Braschi* decision); PARIS R. BALDACCI, LITIGATING SUCCESSION RIGHTS CASES IN NEW YORK CITY AND STATE (2007) (analyzing all reported *Braschi* succession cases from 1989 to date; updated annually; available from author). The significance of the *Braschi* decision has been noted by many commentators. *See,* Baldacci, *supra* note 4, at 975 & n.8; Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107, 136 (1996); Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867, 907–08 (2000). *But see* Mary F. Gardner, Note, Braschi v. Stahl Associates Co.*: Much Ado About Nothing?*, 35 VILL. L. REV. 361, 381 (1990) ("Although Braschi has been hailed as a significant legal victory for same-sex couples, this Note suggests that the case is likely to have limited and unpredictable precedential effect, both in New York courts and nationally.").

13. Baldacci, *supra* note 4, at 975; BALDACCI, *supra* note 12, at 4–14 (describing regulatory codification and extension of *Braschi*).

14. Baldacci, *supra* note 4, at 975 n.7 (describing extension of *Braschi* to other New York City—and State—regulated housing); BALDACCI, *supra* note 12, at 66–82 (same, with analysis of all reported succession cases under those regulations).

15. Baldacci, *supra* note 4, at 975 n.7 (describing extension of *Braschi* to private rental and cooperative housing by the New York City Human Rights Commission).

16. In the Matter of Jacob and Dana, 636 N.E.2d 715 (N.Y. 1995).

17. Levin v. Yeshiva Univ., 754 N.E.2d 1099 (N.Y. 2001).

18. *See* Fitzpatrick v. Sterling Hous. Assoc. Ltd., 3 W.L.R. 1113 (1999) (Eng.) (extending succession to some tenancies for same-sex partners, citing approvingly to *Braschi* and other cases "to show the attitudes being adopted in other jurisdictions"); National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs, Case CCT 10/99, ¶ 48 (1999) (S. Afr.) (extending immigration protections to same-sex partners, citing to *Braschi* and other cases as "giv[ing] expression to norms and values in other open and democratic societies based on human dignity, equality and freedom which, in my view, give clear expression to the growing concern for, understanding of, and sensitivity towards human diversity in general and to gays and lesbians and their relationships in particular. This is an important source from which to illuminate our understanding of the Constitution and the promotion of its informing norms").

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As indicated above, much of the Author's professional life has been involved in writing about and litigating *Braschi*-related matters. However, the theme of this Conference—how law and its practitioners affect issues of freedom, equality, and justice—has given the Author the opportunity to begin to address questions raised when the Author first watched the tape of the *Braschi* oral argument and then read the ACLU briefs, but which the Author has not had the opportunity to address since then. Those questions are: 1) What role did Braschi's lawyers play in the Court's formulation of a functional definition of family? 2) Was the *Braschi* Court fearlessly entering a brave new world of gay and lesbian equality, leading the legal system into a recognition of same-sex families, or was it playing catch-up, i.e., recognizing what had already become the social and cultural reality of functional families—gay, lesbian, and other? The Author's presentation at the conference on these questions, which is somewhat further developed here, was an attempt to begin to sketch the contours of answers to those questions.[19]

I. WHAT CONTRIBUTION DID BRASCHI'S LAWYERS MAKE TO THE *BRASCHI* COURT'S ARTICULATION OF A FUNCTIONAL DEFINITION OF FAMILY?

The first question the Author wants to address is the relationship of the litigation choices—theory of the case, legal strategy, inter-play of statutory and constitutional claims, etc.—adopted by Braschi's lawyers to the contours and content of the *Braschi* Court's functional definition of "family." As an entry point into that inquiry, the Author has reviewed once again the tape of the oral argument in *Braschi* and the briefs submitted by Braschi's lawyers.[20] What follows is a summary with quotations of what the Author takes to be key and representative moments in the oral argument that will provide a basis for the inquiry that follows.

19. Accordingly, this essay is a preliminary exploration and its conclusions should be read in that light. Also, I do not seek to place these conclusions in the context of all of the literature written regarding the *Braschi* decision, use of a functional definition of family, dynamic statutory interpretation, nor the relationship of the *Braschi* decision to the same-sex marriage debate.

20. There is no official transcript of that argument. The summary and quotations included here are my own transcription of the video tape of that argument. It should be noted further that I do not give a complete transcript here, but rather selected quotations which I believe to be representative of the exchange between the Court and Braschi's attorney. His main argument lasted about 22 minutes; his rebuttal, about four minutes. In addition, references to the briefs submitted by Braschi shall be as follows: Brief of Plaintiff Appellant, Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) (No. 02194-87) [hereinafter Braschi Brief]; Reply Brief of Plaintiff-Appellant, Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) (No. 02194-87) [hereinafter Braschi Reply Brief].

A. *The Oral Argument*

Braschi's lawyer, William Rubenstein, clearly set forth his theory of the case in his opening sentence: "This case concerns whether a functional family member must be protected from eviction from a rent controlled apartment which is his family home in the same manner that other family members are protected." However, only about one minute into the argument, Judge Hancock, who would be one of the two dissenters in *Braschi*, queried:

> I would just like to ask one preliminary question. You use the term "functional equivalent of a family" and that was the terminology I think used in [our zoning cases]. So a holding in your favor would really embrace or incorporate that [zoning] type of definition into the definition of family in the statute.

Rubenstein barely gets to respond "yes" when Judge Hancock interjects, "It's that broad?" Rubenstein again tries to respond, but is again interrupted by Judge Hancock: "Because I believe [those cases] concerned families as people living together, keeping house together, using the same kitchen, that sort of thing. That's the interpretation you're urging?" Rubenstein attempts a response: "Well, what we're urging is that the standard this Court articulated in the [zoning] line of cases, the functional and factual equivalent standard be used here, but you would have to interpret that standard with respect to the purposes of rent control."

Hancock interrupts again, clearly not satisfied with Rubenstein's response: "I realize that. I just want to . . . I assume you have a statutory construction question here first, anyway." Rubenstein: "That's correct." Judge Hancock: "And your position on the meaning of the term 'family' in the statute, what does 'family' mean? Does it extend to as broad a meaning as the courts have given it in [the zoning cases]?"

Rubenstein attempts to meet Judge Hancock's "is it that broad" concern:

> Again, we believe that the standard is the functional and factual equivalent standard articulated in that line of cases. The result would depend on a case by case analysis and the point is that you would interpret the standard in light of the purposes of rent control, so the interpretation might be different in a specific case than it would be in a zoning case. You would have to look at the purposes of rent control and whether that group functions as a family for those purposes.

Judge Hancock poses the definitional question again: "Let me ask the question in one other way: A finding for your client would mean that people living together in that sense that people lived together in the [zoning cases] would come within the meaning of the term 'family'?" Rubenstein replies: 624

> Again, your honor, the analysis that you would have to do would be whether the family, whether the group [as in a zoning case] functioned as a family for purposes of rent control. The purpose of rent control here that we are talking about . . . protects tenants when they've made the apartment their family home. So you would have to look at a group like the [zoning cases] group that was protected and say, "Is this their family home?" In other words, "Are they a family for the purposes of rent control?" So, the standard is the same but it's conceivable that a group . . . might be protected in a zoning context, but not necessarily protected if they didn't make this their family home in a rent control context.

At that point, about five minutes into the 22-minute argument, Judge Kaye intervenes with essentially the same definitional question: "Mr. Rubenstein, precisely how do you define family and where do you find that definition?" Rubenstein begins to respond by returning to his zoning case argument: "Again your honor, we find the definition in your line of cases in the zoning context, the functional and factual . . . ." However, Judge Kaye interrupts him in mid-sentence: "But we should look for the rent control context, as you suggest." Rubenstein agrees, "That's right."

He then attempts to argue that other housing statutory enactments also use a functional definition of family, but Judge Simons, who would author the dissent in *Braschi*, retorts, "What about the rent-stabilization law?" which limits the definition of family to those related by blood or by law. After a brief exchange regarding the relevance of the rent-stabilization definition of family to this rent-control case, Judge Bellacosa interjects:

> Let me interrupt at that point. If we accept your premise of functional family being the interpretation and definition given to the rent control and rent and tenant protection situation, does that transfer the control or the breadth or the sweep or the definition to the tenants, so that if two tenants wanted to come together—not in the relationship that is present in this case, I'm thinking of the rule of law that will come from this case and from your definition—if they come together of a mind to fulfill your functional family test, do they, by their coming together get the benefit of the tenant protection eviction under this regulation? . . . I'm concerned about the breadth of the interpretation and how courts and administrative agencies can determine it within some definition that is equal in its application to all.

Rubenstein acknowledges that concern, but argues that there will be judicial hearings "with regards to this functional and factual equivalent standard." But Judge Bellacosa quickly interrupts: "What do you test it against, though. In those hearings, does he [the judge] simply take the two words 'functional family,' and if the rule is, 'functional family' means anybody who wants to be protected under the

eviction protections, is that it, is it as broad as that?" Rubenstein responds:

> No. And my second point is that the standard we're asking to be employed, the functional and factual equivalent standard, a standard that this Court has articulated in the zoning cases and it has worked in the zoning context. Now, the standard itself would be functional and factual equivalent, but you could think of a number of indicia that the person claiming the protection would have to come forward and prove those indicia, would have to prove that they were a functional and factual equivalent family. And they would do so by showing certain things. For example, that they held themselves out to be a family; that they assumed the responsibilities for one another. For example that their relationship had some permanence to it . . . .

Now, at about ten minutes into the argument, Judge Hancock again poses his initial definitional question: "Let's assume the family unit in [one of the zoning cases], four elderly ladies living together, keeping house together, eating together, etc., let's assume that one was a tenant and she died. Would her rights under rent control be transferred to the survivors?" Rubenstein replies: "Your honor, it would depend on whether that group had the functional and factual equivalent of a family." Judge Hancock, noting they were deemed to be a functional family in the zoning case, inquires again on what basis Rubenstein could argue that they might not be entitled to eviction protection as a functional family:

> Well, I guess several members of the Court have asked the same thing. We're asking what is the definition and what would the result be under what you say the definition of family is here in this statute. We're talking about a statute and its application. How would you answer my question under the statute?

Rubenstein responds by noting that the issue to be determined would be if the group is a family and not mere roommates. However, Judge Hancock asks, almost incredulously: "How would anyone know what the statute meant if that were the answer we were to give?" Rubenstein argues that in the zoning and other contexts, a functional definition has been recognized as providing a "judicially ascertainable standard" and that the indicia mentioned earlier could be used. However, Judge Bellacosa interrupts:

> Ah, but there's the rub. You were talking about those [indicia] before. You say we would look at those indicia. What you're really asking as an advocate, and I understand that, is for us to erect, enact those indicia as part of the definition of family. Isn't that what is really necessary in order for the rule of law to have any sense in terms of its application once this case is decided, however it's decided? Is that our role?

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Rubenstein pauses, not answering yes or no to this inquiry; he then responds:

> Your honor, it's your role to interpret what's meant by the phrase here. The legislature did not give you much guidance; they said "family member." In other contexts where they've given more guidance and specifically defined "family member," and we point to about a dozen different statutes where they've done that, where they spelled out what they mean by "family member," they said this kind of relationship would be a family relationship.

Judge Bellacosa interrupts again:

> But let me press you. Do you agree that we would have to, in order to decide the case properly and come out with a rule of law that could help us decide it properly, that we would have to recite what those indicia or criteria are in terms of the effectuation of a functional family in order to distinguish, for example, the roommate situation . . . ?

Almost 15 minutes into his 22-minute argument, Rubenstein finally responds more directly to the definitional question that had been posed by three judges:

> I understand your question. In the zoning context, what you did was you gave the lower courts guidance by saying "functional and factual equivalent" and you talked about the facts in those cases to give them some guidance in doing that. You could take that approach here because I think the facts in this case are very instructive, the facts in this case are very compelling. This couple lived together and they shared their lives together for quite a long time and I think a recitation of the facts here would help lower courts understand what you meant by family in that sense. . . . You could also look to the kinds of phrases we're talking about—held themselves out to be a family; took up the responsibilities for one another; had a degree of permanence—these are ideas about family that we have.

Rubenstein then moves onto his constitutional argument for the last four minutes, but even there he is interrupted by Judge Kaye regarding the definitional question: "Mr. Rubenstein, I share the concern that my colleagues have expressed, which is to find some definition, [some] understanding of your concept of family. So long as the definition is one of blood and law, there is some objective criterion." Rubenstein repeats his argument regarding the functional standard's being an "ascertainable judicial standard."

B. *Comments on the Oral Argument*

This review of the *Braschi* oral argument suggests a few comments. First, besides Braschi's lawyer's[21] obvious avoidance of the court's repeated question: "What do you mean by family?" it is clear that his central theory of the case and litigation strategy was to urge the Court to adopt what one can call a fairly abstract, general, tautological definition of "family" borrowed primarily from the Court's zoning cases.[22] Those cases defined "family" broadly as any unitary group living together.[23] Arguing from those cases, Braschi's lawyers urged that "family" should be understood to be any grouping of people that meets the functional and factual equivalent of family standard, which should be interpreted in the context of housing, i.e., protecting them from dislocation from their family home on the death of the tenant of record, and applied on a case-by-case basis.

However, as Judge Hancock (who would be one of the two dissenters in *Braschi*) retorted: "Is it that broad?" "How would anyone know what the statute meant if that were the answer we were to give?" More forcefully, even the plurality summarily rejected in a footnote this zoning-based functional-family analysis as having "absolutely no bearing on the scope of non-eviction protections provide by" the rent control regulation at issue in *Braschi*.[24]

But why did Braschi's lawyer resist giving a definition, a specification of what he meant by "family"? Was it to avoid "essentializing"

21. Full disclosure: I first met William Rubenstein, the ACLU attorney who argued Braschi's case (now a Professor of Law at the U.C.L.A. School of Law), while I was working on the Legal Aid Society's Amicus Brief in the *Braschi* case. Indeed, the section of the brief I worked on adopted Professor Rubenstein's theory of the case, focusing exclusively on a constitutional argument predicated on the Court of Appeals' line of zoning cases. After his success in *Braschi*, I worked with him as part of a coalition urging the state agency to promulgate regulations codifying *Braschi*. I was also co-counsel with him in *Rent Stabilization Ass'n v. Higgins*, successfully fending off a landlord challenge to those regulations. When I taught "Sexual Orientation and the Law" at Cardozo Law School, I used his groundbreaking text, WILLIAM B. RUBENSTEIN, SEXUAL ORIENTATION AND THE LAW (2d ed. 1997). He generously provided me with copies of the ACLU submissions in *Braschi* for my preparation of this article. Thus, I have the highest respect for the work that Professor Rubenstein has done in advancing equality for gay and lesbian persons and families, including his pioneering work in the *Braschi* case. The critique offered here should in no way be interpreted as diminishing that respect.

22. *See generally* Group House of Port Wash., Inc. v. Bd. of Zoning & Appeals, 380 N.E.2d 207 (N.Y. 1978); McMinn v. Town of Oyster Bay, 488 N.E.2d 1240 (N.Y. 1985).

23. *See generally Group House of Port Wash.*, 380 N.E.2d at 208, 210 (two adults and seven foster children living as a "single housekeeping unit"); *McMinn*, 488 N.E.2d at 1242 (four unrelated young men sharing a residence while attending school).

24. Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 54 n.3 (N.Y. 1989) ("We note, however, that the definition of family that we adopt here for purposes of the nonevictionprotection of the rent-control laws is completely unrelated to the concept of 'functional family,' as that term has developed under this court's decisions in the context of zoning ordinances.").

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DOI: 10.37419/TWLR.V13.I2.13

gay and lesbian relationships by tying them too closely to a heteronormative couple/marriage iconography?[25] This concern about too narrowly circumscribing the concept of gay and lesbian families would be raised by Kath Weston in her seminal work on gay and lesbian families of choice two years later, expressing a concern that a focus on gay and lesbian couples or parents with children would narrow the definition of gay and lesbian families, excluding other relationships of emotional and financial support.[26] This concern was given its most famous articulation in the debate between Paula Ettelbrick and Tom Stoddard about the value of same-sex marriage, in which Ettelbrick queried, "Since When is Marriage a Path to Liberation?"[27]

Professor Arthur Leonard, in a comprehensive discussion of the history and litigation choices in the *Braschi* case, describes the ACLU lawyers' theory of the case as follows:

> [T]hey contended that the court either should adopt a broader understanding of the term "family," as had Justice Baer,[28] or alterna-

25. Concerns regarding essentialism were expressed by commentators almost immediately after the *Braschi* decision. *See, e.g.*, Baldacci, *supra* note 4, at 975 n.8, 979 n.30 (and works cited there); Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1663–66 (1993) (arguing that *Braschi* constricts gay and lesbian family choices and compels gays and lesbians to "pass" or act like conservative straight married couples). *But see* Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 1020 (2000) (demonstrating that *Braschi* was both "subversive" and "conservative" in that it allowed for a radical redefinition of "acting married," but also incorporated that redefinition into "traditional" indicia of marriage).

26. WESTON, *supra* note 5, at 209–10.

27. Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK NAT'L GAY & LESBIAN Q., (Fall 1999), and Thomas Stoddard, *Why Gay People Should Seek the Marry*, OUT/LOOK NAT'L GAY & LESBIAN Q., (Fall 1999), (reprinted in WILLIAM B. RUBENSTEIN, SEXUAL ORIENTATION AND THE LAW 716, 716–25 (2d ed. 1997)). *But see* Mary Anne Case, Lecture, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1774 (2005) (arguing in response to Ettelbrick's critique and a *Braschi* functional-family approach that "[b]ut for the lingering cloud of repressive history hanging over marriage, it would be clear that marriage today provides far more license, and has the potential to be far more flexible, liberatory and egalitarian than most available alternatives."). For a comprehensive history of how same-sex marriage has come to dominate the contemporary gay and lesbian rights movement, see CHAUNCEY, *supra* note 11.

28. Justice Harold J. Baer was the trial judge in the *Braschi* case, whose decision had been reversed by the Appellate Division. Braschi v. Stahl Assocs. Co., No. 2194/87, 1987 WL 343445 (N.Y. Sup. Ct. Mar. 27, 1987) *rev'd*, 531 N.Y.S.2d 562 (N.Y. App. Div. 1988), *rev'd*, 543 N.E.2d 49 (N.Y.1989). Baer relied primarily on the description of "family" in In re Adult Anonymous II, as "a continuing relationship of love and care, and an assumption of responsibility for some other person." 452 N.Y.S.2d 198, 201 (N.Y. App. Div. 1982) (approving adoption of same-sex "lover"), *overruled by* In re Adoption of Robert Paul P., 471 N.E.2d 424 (N.Y. 1984). Applying that standard, Justice Baer found that "Braschi and Blanchard . . . were together in a meaningful, close and loving relationship. They were economically, socially and physically a couple like any traditional couple except their relationship could not be legally consummated. . . . The present action demonstrates a nontraditional unit that had existed for over ten years and fulfills any definitional criteria of the term 'family.'" *Braschi*,

> tively that the court should rule that the equal protection clauses of the federal and state constitutions would be offended by a succession rule that excluded gay couples from its protection.[29]

To the extent that Professor Leonard accurately describes the lawyer's theory of the case, and the Author believes he is substantially correct, this still does not explain his resistance to responding more specifically to the Court's repeated inquiry: "How do you define 'family'?" Indeed, Braschi's lawyers appeared to acknowledge that some criteria or "referents" were necessary for landlords and courts to be able to distinguish between roommates and family.[30]

Thus, in the end, Braschi's lawyer had to give the Court some hint of what he meant by "family." Accordingly, more than ten minutes into his 22-minute oral argument, and then again about five minutes later, he conceded that what the Court could do was to look to the facts of the case before them or to use "indicia," what he later referred to merely as "ideas," by which the "functional and factual equivalent" of a family could be determined in the eviction context. Nevertheless, even these facts and indicia of the couple's emotional and financial commitment to each other were conceded almost grudgingly by Braschi's lawyer at oral argument (although somewhat more developed in the briefs) in response to two of Judge Bellacosa's inquiries: "Is [your definition of family] as broad as that?" And later: "Do you agree that we would have to, in order to decide the case properly and come out with a rule of law that could help us decide it properly, that we would have to recite what those indicia or criteria are in terms of the effectuation of a functional family in order to distinguish, for example, the roommate situation."

But the facts and indicia of the Braschi-Blanchard relationship were extremely traditional, dyadic, and spousal: long-term, apparent monogamy, one more dependent on the other for financial support, formal documentation (joint banking accounts, credit cards, power of

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1987 WL343445, at 2–3. However, other than his reference to the general language quoted above from *In the Matter of Adult Anonymous II,* Justice Baer did not specify any of those "definitional criteria." *See id.*

29. ARTHUR S. LEONARD, SEXUALITY AND THE LAW: AN ENCYCLOPEDIA OF MAJOR LEGAL CASES 365 (1993). However, it should be noted that the constitutional argument was relegated to only about three minutes out of Braschi's lawyer's 22-minute oral argument and was not even alluded to in the *Braschi* decision.

30. *See, e.g.*, Braschi Brief, supra note 20, at 52 n.37; Braschi Reply Brief, *supra* note 20, at 22 n.14. Accordingly, it is clear that Braschi's lawyers understood that some definition or description or criteria of family would have to be articulated whether the Court adopted their "functional and factual equivalent of family" or equal protection theories. However, reference to those "indicia" was buried in two footnotes in the briefs. In addition, at oral argument, when Judge Bellacosa put the question to Braschi's lawyer directly whether it would be necessary for the Court "to erect, enact those indicia as part of definition of family," Braschi's lawyer did not agree with that proposition, nor did he provide the Court with the terms of such indicia.

https://scholarship.law.tamu.edu/txwes-lr/vol13/iss2/14
DOI: 10.37419/TWLR.V13.I2.13

attorney, health care proxy, a will with Braschi designated as primary beneficiary and executor),[31] plus a unique class status—Blanchard was a multi-millionaire and Braschi inherited most of his estate.[32] In addition, the "indicia" or "ideas" mentioned by Braschi's attorney at oral argument were articulated in vague terms and were limited to couples, i.e., "that they held themselves out as family, that they assumed responsibilities for one another[,] . . . that their relationship had some permanence."

Thus, contrary to Braschi's lawyers' possible de-essentializing, "decoupling" goal, their approach would arguably have had a very limited application to other gay and lesbian, and other functional families had it been adopted by the Court as the norm or the indicia of "family." In fact, Judge Bellacosa suggested just such an approach in his concurrence, i.e., to limit the Court's findings to the facts of the case and conclude that, given those facts, it would be unreasonable not to include Braschi (and perhaps others "such as petitioner") within the definition of family[33]—what the two dissenters called an "ipse dixit" approach.[34] However, such an approach would have had questionable application to other cases.[35] Even in 1989 it should have been clear to

31. *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 55 (N.Y. 1989) (reciting facts of Braschi and Blanchard's relationship).

32. Braschi's lawyer omitted these facts, which of course showed that Braschi would not face homelessness or destitution if he were evicted, from the briefs and at oral argument. The landlord's advocate made passing reference to them in his brief. *See* Brief of Defendant-Respondent at 3, 11 n.9, Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) (No. 02194-87).

33. *Braschi*, 543 N.E.2d at 56–57.

34. *Id.* at 57.

35. Indeed, some commentators had argued shortly after the *Braschi* decision was handed down that the concurrence's more circumscribed approach would limit the precedential value of the *Braschi* plurality decision. *See, e.g.*, LEONARD, *supra* note 29, at 366 (". . . Bellacosa's decision describes the scope of [*Braschi's*] precedential value."); Gardner, *supra* note 12, at 382–83 (arguing that *Braschi's* limited statutory, rather than constitutional basis, and the fact that it was only a plurality decision would limit its precedential value). These dire predictions have been shown to be overblown. *See supra* notes 12–18 and accompanying text (describing impact of *Braschi* decision). In addition, Judge Bellacosa's concurrence, with its more limited view of the protections that should be afforded gay and lesbian, and other families, has become a footnote in the history of *Braschi's* influence. Rather, it is Judge Titone's plurality opinion that has guided the ensuing history of the application of *Braschi*. *See* Hon. Judith S. Kaye, *A Tribute to Law and Humanity: Judge Vito J. Titone*, 61 ALB. L. REV. 1391, 1393 n.9 (1998) (noting that, by 1998, Judge Titone's plurality opinion had been cited in 67 cases and 209 secondary sources). However, had Judge Bellacosa's approach been adopted by the Court, *Braschi* would have had a much more limited application. Indeed, in his concurrence in Rent Stabilization Ass'n. v. Higgins, which upheld the regulations that codified the *Braschi* decision and extended it to all regulated housing, Judge Bellacosa, clearly uncomfortable with the regulatory expansion of *Braschi*, urged the legislature to limit the administrative agency's authority. 630 N.E.2d 626, 635 (N.Y. 1993). "In the distribution and delegation of governmental powers, it is quite momentous that any administrative agency possess the potent public policy power to extend the durational and relational sweep of the plurality rationale of *Braschi*, including fully into the rent stabilization category and more widely

Braschi's lawyers that most functional families—gay, lesbian, and others—would have difficulty meeting the standard suggested by the facts of the Braschi- Blanchard relationship. In fact, more than fifteen years of litigation post-*Braschi* has shown that few families have such a plethora of formalized indicia of their relationship, especially the level of formalized financial intermingling found in the Braschi-Blanchard relationship.[36] Indeed, in the early days of post-*Braschi* litigation, landlords consistently compared claimants' families to the facts of *Braschi* and found them wanting—stressing Braschi and Blanchard's longevity,[37] exclusivity,[38] formalization of financial[39] and

than was allowed even in the rent control field." *Id.* (citation omitted). *But see* Judith S. Kaye, *Things Judges Do: State Statutory Interpretation*, 13 TOURO L. REV. 595, 611 n.62 (1997) (noting that the promulgation of the succession regulations, rather than reflecting an administrative agency misinterpreting the reach of the *Braschi* plurality decision, merely demonstrated that "[t]he regulators apparently agreed with us in *Braschi* . . . .").

36. *See* BALDACCI, *supra* note 12, at 26–34, 37–40 (discussing cases showing the lack of formalized financial intermingling in same-sex and other functional families); Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1654 (1991) ("Some traditionally married couples, for example, keep their legal and financial affairs separate.").

37. *See, e.g.*, Fetner *v. Fenner*, N.Y.L.J., Nov. 21, 1990, at 22 (N.Y. Sup. Ct. 1990) (distinguishing voluntary separation from Fenner after three years from lifetime relationship ended by death of partner in *Braschi*); Allerton Assoc. v. Shannon, N.Y.L.J., Feb. 26, 1993, at 26 (N.Y. Civ. Ct. Bronx Co. 1993) ("In each of the cases cited above, clearly one (1) criteria or element stands out above all, i.e., longevity of the relationship . . . .").

38. *See, e.g.*, Arnie Realty v. Torres, N.Y.L.J., Oct. 4, 1995, at 27 (N.Y. Civ. Ct., Bronx Co. 1995), *aff'd* N.Y.L.J., June 3, 1999, at 27 (N.Y. App. Term. 1999), *aff'd* 294 A.D.2d 193 (N.Y. App. Div. 2002) ("even assuming, *arguendo*, that the respondent had a *sexual relationship* with [a woman] and fathered one or both of her children, that fact alone would not preclude his having a *gay sexual relationship* with [the decedent]. The possibility that he may have been unfaithful to [the decedent] does not make non-credible his testimony or that of [the priest who performed a "ceremony of Union'] regarding the relationship that existed between [them]." (emphasis added)). Thus, the claim of some commentators that *Braschi* protections are only possible where the court disregards the sexual nature of the couple's relationship is simply wrong. *See, e.g.*, Case, *supra* note 25, at 1659–61 (arguing that the *Braschi* Court could "bless a couple without blessing their sexual activities" because Braschi's lover was dead. *Id.* at 1660). It should also be noted that courts also eventually rejected landlord claims that an existing marriage to another person in and of itself should defeat a succession claim. *Smith v. Attwood*, N.Y.L.J., May 18, 1990, at 21 (N.Y. App. Term 1989) (reversing lower court which had held that succession protections could never extend to an extra marital relationship); Lepar Realty Corp. v. Griffin, 581 N.Y.S.2d 521 (N.Y. App. Term 1991) (per curiam) (noting that although respondent was married to another, that fact was not dispositive; instead, the court looked to emotional and financial relationship, familial interdependence, fathering child with tenant, and duration of residence to determine right of succession); *Fernbach L.L.C. v. Cash*, N.Y.L.J., April 17, 2003, at 20 (N.Y. App. Term 2002) (per curiam) (noting that Braschi's totality of the relationship, not existence of spouses, determines eviction protection).

39. BALDACCI, *supra* note 12, at 26–31, 27–40 (discussing cases where courts gave dispositive weight to paucity of formalized financial intermingling); *but see id.* at

https://scholarship.law.tamu.edu/txwes-lr/vol13/iss2/14
DOI: 10.37419/TWLR.V13.I2.13

estate matters,[40] etc.—and arguing that *Braschi* and the regulations that codified *Braschi* were limited to those facts.[41]

Further, the approach suggested by Braschi's lawyers and adopted to some extent by Judge Bellacosa is subject to the critique of Professor Suzanne Goldberg and others regarding fact-based adjudication that avoids the normative questions, which approach results not only in *ipse dixit* decision-making, but is also fraught with misreadings of the socially-constructed facts and norms themselves.[42]

Since, as seen above, the oral argument did not give the Court its more amplified, nuanced fact-specific normative narrative regarding gay and lesbian families and other families of choice, and since the brief-in-chief only alluded to such narratives as examples of functional-families[43] rather than as illustrative of normative indicia of such families, where did the Court get the content of the "rule," the indicia of family which it enunciated and held should be applied as objective criteria to the facts of this and other family eviction cases?

There were at least two sources. First, there were hints in the *Braschi* briefs. The lawyers pointed in some detail to cases that found that financially and emotionally committed persons should be considered "family."[44] However, in the flow of the Brief with its emphasis on the zoning cases, these eviction cases seem to be not much more than examples of the "functional and factual equivalent of family"[45]—no more or less family than the groups of people cooking meals together in the zoning cases or "unitary households" as defined in other statutory schemes also referred to in the Braschi brief.[46]

Thus, by the end of the oral argument, after at least three of the six judges had repeatedly asked the question, "How do you define family and where do you get that definition from?" and even after reading

22–26, 31–34 (discussing later cases where lack of formalized financial intermingling did not defeat succession claims).

40. *See, e.g.*, 390 W. End Assocs. v. Wildfoerster, 241 A.D.2d 402 (N.Y. App. Div. 1997) (rejecting succession claim primarily because of decedent's failure to execute a will, even though same-sex partner was economically dependent on him); *but see* Arnie Realty Corp. v. Torres, N.Y.L.J., June 3, 1999, at 27 (N.Y. Civ. Ct., Bronx Co. 1995) (failure of older same-sex partner to leave entire insurance policy and estate to younger man does not defeat succession claim).

41. *See supra* notes 36–40.

42. *See* Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1962 n.18 (2006) (citing Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (discussing undertheorized decisions)). I would agree that the *Braschi* concurrence avoided the normative question, but I disagree with Professor Goldberg that the *Braschi* plurality decision also avoided normative questions regarding "family." *See* Goldberg, *supra* at 1977–78 n.86.

43. *See* Braschi Brief, *supra* note 20, at 21.

44. *See id.* at 21–25.

45. *Id.* at 21 ("[These cases] are *indicative of the types of functional families* that have been protected against eviction." (emphasis added).

46. *Id.* at 28–42.

Braschi's lawyers' briefs, the Court was left with little more than the response: From your line of zoning cases in which you used the "functional and factual equivalent of family" standard, which you should interpret here in light of the purposes of the eviction statute. But, as Judge Hancock queried, "How would anyone know what the statute meant if that were the answer we were to give?"

Of course, the plurality did not adopt that approach.[47] Thus, we are still left with our original question: where did the Court get the definition, indicia, factors which it enunciated with specificity as the new "rule" to be applied in future cases? Well, the Author would suggest that they got it from two lines of cases[48] hinted at in the Braschi briefs, but almost exclusively focused on in the *amicus* briefs, particularly those of the Legal Aid Society, Gay Mens Health Crisis ("GMHC") and other AIDS groups, and Lambda Legal Defense and Education Fund ("Lambda").[49] First, the Legal Aid Society and Lambda emphasized for the Court the factual reality of same-sex couples (primarily marriage equivalents) and other families of choice.[50] The GMHC brief[51] gave brief synopses of about twenty cases in which survivors of persons who died of AIDS, many of whom themselves had AIDS, were being forced from their homes (as did the brief of the City of New York).[52] In short hand, the GMHC Brief described the love and commitment of these families in the face of illness and death.[53] The Legal Aid and Lambda briefs also described the facts of numerous cases in which gay, lesbian, poor, and disabled persons exhibited lives of mutual support and commitment.

By presenting these narratives to the Court, the *amici* enhanced the Court's awareness of the large number of functional families, the descriptive normative core of their relationships (emotional and financial commitment and interdependence; dedication, caring and self-

47. *See supra* notes 31–35 and accompanying text.

48. For a more fully developed accounting of the analysis that follows regarding these two lines of cases, see Baldacci, *supra* note 4, at 975–80.

49. *See* LEONARD, *supra* note 29, at 365–66 (describing the numerous *amici* briefs and the role they played in the litigation); Lynn M. Kelly, *Lawyering for Poor Communities on the Cusp of the Next Century*, 25 FORDHAM URB. L.J. 721, 723–24 (1998) (same); Madeleine Schachter, *The Utility of* Pro Bono *Representation of U.S.-Based* Amicus Curiae *in Non-U.S. and Multi-national Courts as a Means of Advancing the Public Interest*, 28 FORDHAM INT'L L.J. 88, 102 (2004) (describing the role of *amici* in *Braschi* as 'broaden[ing] the scope of the court's determination . . . and demonstrat[ing] the broad political support for [Braschi's] position").

50. *See generally* Brief Amicus Curiae of the Legal Aid Society of New York City, Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) (No. 2194/87).); Brief *Amicus Curiae* of Lambda Legal Defense and Education Fund in Support of Plaintiff-Appellant (hereinafter Lambda Brief).

51. *See generally* Brief Amicus Curiae of the Gay Men's Health Crisis, Inc. et al., Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) (No. 2194/87).

52. *See id.* at 23–34.

53. *See id.* at 35.

https://scholarship.law.tamu.edu/txwes-lr/vol13/iss2/14
DOI: 10.37419/TWLR.V13.I2.13

sacrifice),[54] the devastating consequences of their eviction from their family homes, and the recognition of these relationships as "family" by lower courts. *Amici's* articulation of these core functions by which to identify "family" was adopted by the *Braschi* court: "it is the *totality of the relationship* as evidence by the *dedication, caring and self-sacrifice of the parties* which should, in the final analysis, control."[55]

The Legal Aid Brief in particular highlighted and analyzed a second line of cases which was merely referred to in two footnotes in Braschi's Brief and Reply Brief.[56] That is, the Legal Aid Brief elaborated and set forth proposed "indicia distinguishing a 'family' from other household living arrangements"[57]—precisely the question the Court was asking. These "indicia" were culled from a second line of cases that utilized a more fully articulated social science-based functional definition of "family." The major case in this category put forth by the Legal Aid Society, *2-4 Realty Assocs. v. Pittman,*[58] was a Housing Court eviction case litigated by the Harlem Legal Aid Office, not an impact or law reform case. In that case, Jimmie Hendrix, a forty-eight year old African-American man, claimed that he and had lived for over twenty-five years with Mr. Pittman in Harlem as father and son. Hendrix and his mother had moved to Harlem from the south and rented a room from Pittman. But gradually "the relationship developed into one of devoted concern, sharing, trust, loyalty and love .... Jimmie found the father he had never had."[59]

54. Regarding the literature demonstrating general agreement, even among anti-essentialist scholars, regarding these core functions of family being at least accurate descriptive if not normative functions, see Baldacci, *supra* note 4, at 979 n.30; NARDI, *supra* note 4, at 59–73; Levit, *supra* note 12, at 907.

55. Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 55 (N.Y. 1989)(emphasis added).

56. Braschi Brief, *supra* note 20, at 52 n.37; Braschi Reply Brief, *supra* note 21, at 22 n.14. Indeed, the footnote in the Braschi Brief suggests that "adequate criteria exist by which to identify persons who meet the *McMinn* standard for 'functional and factual equivalent of a natural family.'" Braschi Brief, *supra* note 21, at 57 n.37; It then goes on to cite two eviction cases as suggestive of those criteria, including *2-4 Realty Assocs. v. Pittman*, 137 Misc.2d 898 (N.Y. Civ. Ct. N.Y. Co. 1987), *aff'd* [after the *Braschi* decision] at 144 Misc.2d 311 (N.Y. App. Term 1st Dep't. 1989). Braschi Brief, *supra* note 20, at 57 n.37. However, as shown above, at oral argument, Braschi's lawyer resisted putting forth those "criteria" as a functional definition of "family" for eviction purposes.

57. Brief Amicus Curiae of the Legal Aid Society of New York City, Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) (No. 2194/87).

58. 2-4 Realty Assocs. v. Pittman, 137 Misc.2d 898 (N.Y. Civ. Ct. N.Y. Co. 1987), *aff'd* [after the *Braschi* decision] 144 Misc.2d 311 (N.Y. App. Term 1st Dep't. 1989). As noted above, references to *Pittman* and other such cases were proffered as examples of functional families, not as sources of a normative standard that could be applied in other cases. *See* supra notes 43–45 and accompanying text. In the oral argument, Braschi's lawyer twice referred to *Pittman* and its citation in the Legal Aid Brief not as a source of a definition of family, but merely as illustrative of the fact that this case had implications for functional families beyond those of gay and lesbian couples.

59. 137 Misc.2d at 899.

By highlighting this case, the Legal Aid Society (and other *amici*) set out for the Court a sociologically-based functional definition of "family," establishing through expert testimony that such functional families were common among African-American families. The *amici* also emphasized the testimony of the expert witness, a sociologist, which had been cited at length by the *Pittman* Court, regarding "criteria" used by sociologists "in determining whether a true family unit exists."[60] These criteria are:

> (1) the longevity of the relationship;
> (2) the level of commitment and support among its members . . . both materially and emotionally;
> (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 . . .
> (6) the high degree of religious and moral commitment.[61]

Applying these criteria, the *Pittman* Court noted that the expert found that Pittman and Hendrix were a "family" as evidenced by their "dedication, caring and self-sacrifice."[62] As noted above, the *Braschi* Court adopted this exact phrase to summarize the new "rule," the standard which "should, in the final analysis, control."[63] In addition, the *Braschi* Court also adopted whole cloth *Pittman's* holistic, functional definition of "family" and the articulated functional factors, using the same or similar language, with some further amplification of individual factors.[64]

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60. *Id.* at 902.

61. *Id.*

62. *Id.*

63. Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 55 (N.Y. 1989).

64. *See id.* It is beyond the scope of this essay to survey and engage the critiques of the Court's adopting these factors. I have previously surveyed some of this literature. *See* works cited in Baldacci, *supra* note 4, at 979 n.30, 981 n.37, 993 n.96. Regarding the critique that the factors are vague and unpredictable, see Minow, *supra* note 4, at 276–84; Gardner, *supra* note 12, at 382–83; Hubert J. Barnhardt, III, Comment, *Let the Legislatures Define the Family: Why Default Statutes Should Be Used to Eliminate Potential Confusion*, 40 EMORY L.J. 571, 609. *But see* Sally F. Goldfarb, *Visitation for Nonparents After* Troxel v. Grandville*: Where Should States Draw the Line?*, 32 RUTGERS L.J. 783, 793 n.54 (2001) ("By limiting judicial discretion, *specific [functional] factors can reduce the incidence of arbitrary, biased, or unfounded decisions. Specific factors also make outcomes more uniform and predictable* and thereby encourage parties to settle their disputes out of court or, in some instances, not to file suit at all.") (emphasis added). Regarding the critique that proving one meets the factors is intrusive and discriminatory in that it does not subject legally licensed relationship to such scrutiny, see, e.g., Baldacci, *supra* note 4, at 991–93; Case, *supra* note 25, at 1664–66. It should be noted, however, that although spouses, parents, children and siblings do not need to demonstrate any emotional or financial interrelationship, they still must demonstrate the same duration of co-residency as functional families.

https://scholarship.law.tamu.edu/txwes-lr/vol13/iss2/14
DOI: 10.37419/TWLR.V13.I2.13

Would the Court have so whole heartedly accepted the reality of gay and lesbian, and other families without the contributions of *amici* described above?[65] Would it have answered the question Braschi's lawyer resisted answering in the same way? Would it have culled the same standard and indicia from the same eviction cases referred to in the *Braschi* Brief and Reply Brief without *amici's* highlighting these indicia?[66] We will never know. It is clear that the plurality and the concurrence acknowledged that it would be "unreasonable" not to include the Braschi-Blanchard relationship and other such relationships within the ordinary understanding of family, at least within the eviction context.[67] In extending the *Braschi* functional-family approach beyond rent control's 10,000 apartments to rent stabilization's over one million apartments, the Appellate Division also indicated that it would be "arbitrary and capricious" not to do so.[68] The Court of Appeals' later decisions regarding second-parent adoption[69] and non-discriminatory treatment of same-sex couples in other housing contexts[70]

See BALDACCI, *supra* note 12, at 13 n.11, 40–45 (discussing cases prohibiting inquiry into family *bona fides*, but requiring proof of co-residency).

65. On the role of *amici* in general and particularly in *Braschi*, see Schachter, *supra* note 50, at 89–92, 100–111.

66. The *Braschi* dissent would apparently answer in the affirmative. "Plaintiff maintains that the machinery for such decisions is in place and that appropriate guidelines can be constructed. He refers particularly to a formulation outlined by the court in 2-4 *Realty Assocs. v. Pittman* (137 Misc 2d 898, 902) which sets forth six different factors to be weighed. The plurality has essentially adopted his formulation." *Braschi*, 543 N.E.2d at 60 (Simons, J., dissenting). For the reasons stated above, I would disagree with the dissent's characterization of the specificity of the plaintiff's proposing the *Pittman* factors as "guidelines." As noted above, the *Pittman* factors were buried and referred to only obliquely in two footnotes in Braschi's briefs. *See supra* text accompanying footnotes 30, 56. In addition, at oral argument, the two references to *Pittman* were merely illustrative of the proposition that the case had implications beyond gay and lesbian couples, not that *Pittman* provided the Court with the functional definition that it had been inquiring after. Nevertheless, I would agree that the plurality did, in fact, adopt the *Pittman* "formulation."

67. *Id.* at 54 (plurality opinion), 55 (concurring opinion).

68. E. 10th St. Assocs. v. Estate of Goldstein, 154 A.D.2d 142, 145–146 (N.Y. App. Div. 1990).

69. *In the Matter of Jacob and Dana*, 660 N.E.2d 397 (N.Y. 1995) (interpreting "parent" to include a "de facto parent" for second parent adoption purposes). The Court—and implicitly the utility and consistency of a functional approach in family law cases—had been criticized for its not even mentioning, let alone applying *Braschi's* functional approach to an earlier child visitation case. In the Matter of Alison D., 572 N.E.2d 27 (N.Y. 1991) (rejecting lesbian partner's visitation petition, holding that "parent" for visitation purposes is limited to "biological parent"). However, in a persuasive dissent in that case, Judge Kaye reminded that majority that it had only recently recognized in *Braschi* the Court's duty and ability to recognize "modern-day realities in giving definition to statutory concepts." *Id.* at 33. A brief four years later, now Chief Judge Kaye rectified that wrong in her opinion in In the Matter of Jacob and Dana. 660 N.E.2d 397 (N.Y. 1995) (recognizing de facto parent's right to adopt jointly-raised child of same sex-partner who was biological mother of the child).

70. Levin v. Yeshiva Univ., 754 N.E.2d 1099, 1110 (N.Y. 2001) (quoting *Braschi* court plurality's conclusion that a tenant's same-sex life partner qualified as "family" under the non-eviction protection provisions of the New York City rent control law,

relied on *Braschi* and also frequently spoke of the unreasonableness of not protecting such functional families from discriminatory and unequal treatment. Thus, perhaps what the Court was most persuaded by was simply the irrationality of not protecting Braschi and, by extension, other such "families" from eviction from their family homes.

Professor Toni Massaro, almost twenty years ago in the wake of the shame of *Bowers*, urged a move from what Massaro called "thick" rights—constitutional doctrines of privacy based on fundamental rights or equal protection strict scrutiny—as bases for litigating gay rights cases to what Massaro called "thin rights," i.e., appeals to a heightened rationality argument based on compelling narratives of the lives of gay/lesbian persons.[71] By this route, Massaro argued, advocates could gradually bring not only public opinion, but also the courts to a tipping point, where the cultural/ideological supports, biases (both individual and cultural) that undermine anti-gay/lesbian discriminatory treatment are seen, or at least exposed, as "irrational."[72] Massaro's thin-rights rationality analysis is similar to Posner's call for a fact-based critique of the received sexual orthodoxies,[73] including the "hidden determinants" underlying *Bowers*—gay as the other, as contagion, as having nothing to do with family.[74]

Such a fact-based critique of gay/lesbian discriminatory treatment was eventually articulated in *Lawrence v. Texas*, with its rationality emphasis on the dignity due to the relational choices made by gays and lesbians.[75] I have described elsewhere how the fact-less, doctrine-focused approach of Hardwick's lawyers in *Bowers* failed to challenge the hidden cultural determinants, whereas the fact-rich narratives that were at the core of *Romer* fully informed the tone of respect that permeated the *Romer* decision's call for treating gays and lesbians with dignity.[76] Posner has also noted that the *Bowers* decision's "bland decorousness and formulaic generality" and its giving "short shrift to fact and policy" was reflective of the "tone and emphasis of Hardwick's brief."[77] Professor Lawrence Tribe, Hardwick's lawyer, in a

defining family to include "two adult lifetime partners whose relationship is long-term and characterized by an emotional and financial commitment and interdependence.").

71. Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45 (1996).

72. *See id.* at 92–110; *cf.* Goldberg, *supra* note 42, at 1975-84 (discussing "tipping points" that arise in fact-based adjudication that may also give rise to new normative judgments regarding outlier groups).

73. *See* RICHARD A. POSNER, SEX AND REASON 293, 346–50 (1992).

74. *See* Anne B. Goldstein, Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988).

75. Lawrence v. Texas, 539 U.S. 558, 574–75 (2003).

76. *See generally* Baldacci, *supra* note 3.

77. POSNER, *supra* note 73, at 346.

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post-*Romer* article comparing that case with *Lawrence,* seems to acknowledge the same contrast.[78]

In 1989, the facts of the "dedication, caring and self-sacrifice" of numerous gay, lesbian and other families were brought squarely before the *Braschi* Court. However, Braschi's lawyers emphasized an abstracted rule—"functional and factual equivalent of family"—by which to protect their client. They did not, however, emphasize the common facts of those relationships and help the Court cull from those narratives an articulated normative rule; nor did they demonstrate the social science, jurisprudential and public policy sources of such an articulated normative rule. Accordingly, their approach suffered from some of the same theoretical and tactical limitations noted in the preceding paragraph.

In any event, their submissions, amplified by amicus briefs, helped to make the narratives of these families so compelling that the Court enunciated a new "rule" by which myriad forms of gay, lesbian, and other functional families would be treated as "equally valid" to families based on "fictitious legal distinctions [such as marriage or adoption] and genetic history."[79] It should be emphasized that the *Braschi* decision in fact recognized a myriad of forms of gay, lesbian, and other family choices and arrangements, not limiting that recognition to spousal models.[80] Indeed, later cases applying *Braschi* and the subsequent regulations codifying *Braschi* have recognized and protected many non-spousal family arrangements that meet the indicia of family from eviction.[81] Thus, in spite of continued academic critiques of the progressive value of *Braschi,*[82] thousands of gay, lesbian, and other

78. *See* Tribe, *supra* note 3, at 1906–07. However, even in that article, Professor Tribe still defends his decision to underplay the "gay" facts of the case, even somewhat condescendingly dismissing Hardwick's desire to emphasize the similarity between the personal sexual choices of gays and lesbians, and heterosexuals. *Id.* at 1952–53.

79. Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 53 (N.Y. 1989).

80. This is a point frequently missed by those who critique *Braschi* as forcing gays and lesbians to "pass" as a "conservative model of pair bonding." Case, *supra* note 25, at 1664. *But see* Dubler, *supra* note 25, at 1020 (arguing that rather than forcing Braschi and Blanchard to conform to a spousal iconography, the Court "vindicated their desire to conform to just that normative model."). Nevertheless, Dubler also asserts that *Braschi* reinforces the marital paradigm at the expense of nontraditional domestic arrangements. *Id.* However, this is simply not a necessary correlate or result of the *Braschi* functional standard. It is clear from the plain language of *Braschi* and the regulations codifying *Braschi* that neither the standard nor the factors are cast in spousal-specific terms.

81. *See, e.g.,* Baldacci, *supra* note 4, at 986–87 (describing cases in which non-marital families were recognized, including two women in a non-romantic relationship, distant cousins, father-son relationship, mother-daughter relationship); *see* BALDACCI, *supra* note 12, at 22–35 (same). Nevertheless, it should be noted that all of these cases involved straight-identified or impliedly straight parties. I am unaware of any cases in which non-coupled gay or lesbian-identified persons have asserted a family succession claim.

82. See supra notes 4, 12, 25, 36, 38, 64, and 80.

families of choice have been protected from eviction from their homes, and those of us who litigate these cases on a regular basis can attest to the enduring importance of *Braschi's* recognition of gay and lesbian families.

II. THE *BRASCHI* COURT: CREATING A NEW WORLD OR RECOGNIZING REALITY

So, we come to the second question the Author posed at the beginning: Was the *Braschi* Court courageously announcing a brave new world of equal treatment for gay and lesbian families, or was it simply recognizing the facts on the ground, those tipping points where a fact-based inquiry exposes not only the reality of the persons before the court, but their history and struggles, and the irrationality of continued exclusion and discrimination.

Well, if we are to take the Court at its own word, it was playing catch-up and recognizing the broad contemporary reality of functional families. After all, the Court's primary factual and jurisprudential lens through which it viewed "family" anti-eviction protections was what it called "the reality of family life," i.e., the various forms of relationships of "emotional and financial commitment and interdependence" that had come into existence and which gave every indication of having achieved the status of being an "equally valid," "a more realistic view of family."[83] The Court particularly noted that such a view of family included "two adult lifetime partners,"[84] and, in the *Braschi* case, two same-sex adult life partners.[85] To further support its finding that many such families existed and could be identified, the Court cited to the decisions in a number of lower courts over the preceding three years, including two same-sex life partner cases, that documented the existence of these families, including the evidence of social science.[86]

Of course, the Court could have simply been trying to cover up what the dissent perceived as the plurality's going "well beyond" and being "inconsistent" with statutory language, legislative intent, and prior common law regarding the meaning of "family" in the housing context.[87] Thus, in one reading, the Court was simply trying to coordinate its arguably radical approach with doctrinal history.[88] Accord-

83. *Braschi*, 543 N.E.2d at 53–54.
84. *Id.* at 54.
85. *See id.* at 55.
86. *Id.*
87. *Id.* at 57.
88. For an even more condemnatory reading, see Elizabeth Fajans & Mary R. Falk, *Shooting from the Lip:* United States v. Dickerson, *Role [Im]morality, and the Ethics of Legal Rhetoric,* 23 U. HAW. L. REV. 1 (2000).

> [T]he [*Braschi*] court was not in fact prepared to accept new social configurations of family and did not give the real reasons for its decision in *Braschi*. It is interesting to speculate why. One significant omission in the *Braschi* 640

ing to this reading, the Court masks this discontinuity by simply declaring that its "view [of family] comports both with our society's traditional concept of 'family' and with the expectations of those who live in such nuclear units."[89]

However, the Author is inclined to take the Court at its word,[90] especially in light of the factual history of gay, lesbian, and other fami-

> decision is any mention of the fact the tenant of record died of AIDS and that eviction might render homeless his life partner, a man quite possibly at risk of AIDS himself. Given this possibility, one could speculate that compassion motivated the *Braschi* result rather than social policy, but that the court was uncomfortable resting its decision upon such grounds. The court's less than candid reasoning made it impossible to predict its future actions, resulting in a flood of pointless litigation and disappointed hopes. . . . When judges write "dishonest" opinions, predictability suffers, as in *Braschi*. In addition, truth suffers, as does the cohesion between court and counsel, governing and governed.

Id. at 19–20 n.91(internal citation omitted). Besides being mean-spirited, this critique gets the facts wrong. As noted above, Braschi would inherit millions and, thus, did not face homelessness—the lynchpin of Fajans and Falk's "dishonest compassion" theory. They present no other evidence that the Court was not giving its real reasons for adopting a functional definition of family. In any event, I would note Judge Kaye's encomium to Supreme Court Justice William J. Brennan Jr.: "Justice Brennan has been a tenacious opponent of those who would have us believe in the concept of 'rational certainty'—that there is 'no room for compassion in the cold calculus of judging.'" Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 2 (1995).

89. *Braschi*, 543 N.E.2d at 54.

90. Chief Judge Kaye has written about the role of courts in interpreting statutory language, as the Court of Appeals did in *Braschi*, to bring it into conformity with modern realities. *See, e.g.*, Kaye, *supra* note 35, at 609 (" . . . I have in mind the situation where though the balance of a statute remains relevant, a litigant raises a novel theory of the statute's applicability to an entire category of cases unforeseen, if not unforeseeable, by the Legislature. This, too, is not an infrequent event. It is here where judges must use the same approach they would for developing the common law, filling the gaps inevitably arising from the complex interplay between human facts and abstract laws. That is precisely what the Court of Appeals did in a much discussed statutory interpretation case several years ago called *Braschi v. Stahl Assocs. Co.*"); Kaye, *supra* note 88, at 32–33 (describing the necessary role courts play in interpreting statutes and applying them to situations not anticipated by legislators, such as in *Braschi*). *See also* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 629–30 ("This [statutory interpretation] approach [in *Braschi*] can be understood within the complementarian model. The court minimized the importance of actual legislative intent, appealed to the virtue of statutory efficacy, read the term "family" with reference to contemporary understandings, and acted as a policymaking partner by supplying criteria for assessing familial status. The court invoked as its ultimate guideposts broad notions of justice, contemporary experience, and fairness as opposed to the more narrow measure of legislative will."); Heidi A. Sorenson, Note, *A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination*, 81 GEO. L.J. 2105, 2121–22 (1993) ("*Braschi v. Stahl Associates Co.* is a classic case of dynamic statutory interpretation in which New York's highest court protected the gay life partner of a deceased tenant from eviction. . . . The court's dynamic construction of the word 'family' was legitimate according to the criteria set forth by Eskridge under his moderate approach to dynamic statutory interpretation.") (citing William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1497 (1987)); *see* WILLIAM N.ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION

lies put before it. That is, the plurality and the concurrence were convinced by the evidence—and probably by experiences in their own lives—that families of choice had existed for sometime and that they were so marked by levels of "dedication, caring and self-sacrifice" that to deny that they are families, and thus to deny them protection from eviction from their family homes, simply made no sense and could not be seen to serve any public policy.[91] Indeed, it was clear to them that such a result was contrary to the public policy of protecting families from such disruption and dislocation from their homes on the death or departure of the tenant of record.[92]

Thus, for this Court—at least for the plurality—this decision was perceived as a fairly non-controversial step. In fact, it was non-contro-

(1994) (expanding on this thesis). *But see* Scott Fruehwald, *Pragmatic Textualism and the Limits of Statutory Interpretation:* Dale v. Boy Scouts of America, 35 WAKE FOREST L. REV., 973, 984 (2000) ("The dynamic approach the court employed in this case [*Brashci*] may produce a normatively appropriate result. A person who has depended on another person in the same way that a person relies on another family member in a traditional family has been protected from eviction. The court has updated the rent control law to conform to the court's modern notion of family, even if the law's original drafters had not contemplated application of the law to such relationships. This result, however, lacks a principled legal basis. The court's interpretation ignores any meaning of family that the lawmakers could have intended at the time rent control was established.") (citations omitted).

91. Writing for the plurality, Judge Titone concluded:

> 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.* In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. *This view comports both with our society's traditional concept of "family" and with the expectations of individuals who live in such nuclear units.* . . . Hence, it is reasonable to conclude that, in using the term "family," *the Legislature intended to extend protection to those who reside in households having all of the normal familial characteristics.*

Braschi, 543 N.E.2d at 53–54 (emphasis added; citations omitted). In his concurrence, Judge Bellacosa similarly reasoned:

> The best guidance available to the regulatory agency *for correctly applying the rule in such circumstances* is that *it would be irrational* not to include this petitioner [as a family member protected from eviction] and it is *a more reasonable reflection of the intention behind the regulation to protect a person such as petitioner as within the regulation's class of "family."* In that respect, he qualifies as a tenant in fact for purposes of the interlocking provisions and policies of the rent-control law.

Id. at 56 (emphasis added) (Bellacosa, J., concurring). Regarding the concurrence's viewpoint, Judge Titone correctly comments, "We note that the concurrer apparently agrees with our view of *the purposes of the noneviction ordinance,* and the impact this purpose should have on *the way in which this and future cases should be decided.*" *Id.* at 54 n.2 (emphasis added; citation omitted).

92. *See supra* note 91.

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versial.[93] There was no public or political backlash.[94] Within six months, functional-family eviction protections were extended by the same middle-level appellate court that had earlier rejected Braschi's claim to over one million rent-stabilized apartments.[95] Within four months, the *Braschi* factors were codified and extended by the state agency in regulations.[96] *Braschi's* holding provided the basis for further recognition of the reality of gay and lesbian families, and the protections they deserved.[97]

In the recent oral argument regarding same-sex marriage before this same Court, the fact of New York State's recognition of same-sex

93. However, an alternative reading might focus on the decision's being far more "radical" and "controversial." Professor Leonard's description of Judge Titone's plurality decision is suggestive in this regard.

> Judge Titone took a broader view in his plurality opinion [than the concurrence], employing language that provoked fascinated media attention due to its suggestion of a *major change in legal concept*. . . . Titone's opinion embraced *a broader concept of family than was necessary* to decide Braschi's petition for preliminary injunctive relief.

LEONARD, *supra* note 29, at 367 (emphasis added). Leonard then seems to criticize Titone for delaying to late in the opinion any mention of the fact that the case involved two men. *Id.* However, I would suggest that by not limiting his decision to the facts of the case – same-sex spousal-like couple, death of tenant from AIDS – Judge Titone enunciated the broadest possible functional definition of family that encompassed myriad forms of family relationships and arrangements which were not tied to sexual orientation, gender, spousal status, or death of the tenant. *See supra* notes 80–81 and accompanying text (describing myriad forms of families protected under *Braschi*); *see also supra* note 111 (describing relationship of *Braschi* case to AIDS pandemic).

94. An alarmist editorial in the New York Times, portending spying landlords and overworked courts as a result of the *Braschi* decision, had no impact. Editorial, *What's a Family?; Turning Landlords into Spies,* N.Y. TIMES, July 11, 1989, at A18. A pending Governor's Program Bill that would have extended succession rights to roommates who had co-resided with a tenant for five years, but did not extend succession rights to gay or lesbian life partners on the same terms as provided to married couples and other legally-recognized family members, went nowhere. *See* Governor's Program Bill No. 136 (1989). Early versions of regulations proposed by the state agency which only extended succession rights to functional families on the death of the tenant were abandoned within months at the urging of a coalition of gay, lesbian, AIDS, disability, tenant, and poverty advocates. *See* Kelly, *supra* note 49 (describing the advocacy of the coalition with the state agency). Accordingly, within four months of the *Braschi* decision, the state agency promulgated regulations on an emergency basis which codified and extended the *Braschi* decision. The landlord challenge to the regulations was unanimously rejected by the Court of Appeals. Rent Stabilization Ass'n v. Higgins, 630 N.E.2d 626, 629-30 (N.Y. 1993); *cert. denied* 512 U.S. 1213 (994).

95. E. 10th St. Assocs. v. Estate of Goldstein, 154 A.D.2d 142 (N.Y. App. Div. 1990) (extending eviction protection to surviving gay life partner of rent-stabilized tenant who had died from AIDS). "It would be anomalous to hold that a life partner could be a family member insofar as eviction from a rent-controlled apartment but not a valid family member insofar as eviction from a rent-stabilized apartment is concerned." *Id.* at 145; *see also* Park Holding Co. v. Power, 554 N.Y.S.2d 861 (N.Y. App. Div. 1990) (same on departure of tenant from apartment).

96. *See Higgins*, 630 N.E.2d at 629–30 (describing the promulgation and terms of the regulations).

97. *See supra* notes 12–18, 68–70 and accompanying text.

couples and its protecting of their relationships in *Braschi* and its progeny was accepted as a matter of course, and provided in part the public policy base from which the same-sex marriage question was argued.[98] As in *Braschi*, the opponents' primary argument was that this social change was a matter for the legislature. That argument was rejected in *Braschi*, in *Higgins* (upholding the codification of *Braschi* in regulations), in *Matter of Jacob and Dana* (upholding second-parent adoption), and in *Levin* (guaranteeing equal protection for same-sex couples in university housing). Unfortunately, shortly after the Conference, that legislative-deference argument won the day in *Hernandez*. However, in Judge Kaye's dissent, she rued the fact that "[s]olely because of their sexual orientation, however—that is, because of who they love—plaintiffs are denied the rights and responsibilities of civil marriage. This State has a proud tradition of affording equal rights to all New Yorkers. Sadly, the Court today retreats from that proud tradition."[99] She then opined that "I am confident that future generations will look back on today's decision as an unfortunate misstep."[100] Judge Kaye had written a similar dissent in *Alison D.*, when the Court inexplicably refused to extend the rationale of *Braschi* to recognize a *de facto* same-sex parent for purposes of child visitation.[101] Ultimately, her view prevailed.[102] It can only be hoped that a similar fate awaits the *Hernandez* decision so that gay and lesbian families, at least in their spousal configurations, are afforded full equality with heterosexual marriages, advancing in yet another way the recognition of gay and lesbian families begun in *Braschi.*

98. *See* Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006). Even prior to the Court of Appeals decision in *Hernandez*, one court relied on the Appellate Division decision in *Hernandez* (26 A.D.3d 98 (N.Y. App. Div. 1st Dep't. 2005)) in rejecting a *Braschi*-based challenge to a rent-stabilization regulation that required a landlord to add the spouse to a tenant's lease as a co-tenant, but not a life partner. Zagorsik v. N.Y. State Div. of Hous. and Comty. Renewal, 817 N.Y.S.2d 486 (N.Y. Sup. Ct. 2006).

99. *Hernandez*, 855 N.E.2d at 22. Judge Kaye did not cite to *Braschi* since *Hernandez* was a constitutional, not a statutory interpretation case. Nevertheless, the reasoning in her *Hernandez* dissent—the duty of the Court to interpret the state constitution in light of the modern reality of gay and lesbian couples living "married" lives, but being denied the right to be legally married based on out-dated exclusionary prejudices—was similar to the reasoning in *Braschi. See supra* note 90 (describing Judge Kaye's view of dynamic statutory interpretation, exemplified by interpreting the term "family" in *Braschi* in light of the "reality of family life." Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 53 (N.Y. 1989)); *see also* Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 79–82 (2003) (describing how both constitutional and statutory interpretation necessarily involve determinations regarding cultural meanings, both past and present). "Judge-made [constitutional and statutory] law is constantly interpreting ambient culture to separate the reasonable from the unreasonable, the offensive from the inoffensive, the private from the public, and so forth." *Id.* at 80.

100. *Hernandez*, 855 N.E.2d at 34.

101. *In the Matter of Alison D.*, 572 N.E.2d at 33 (Kaye, J., dissenting).

102. In the Matter of Jacob and Dana, 636 N.E.2d 715 (N.Y. 1995); *see also supra* note 69.

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