

DEFINING FAMILIAL RELATIONS WITHIN THE LAW: NUCLEAR FAMILY VS. EXTENDED FAMILY

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I. THE LEGAL PROTECTION OF THE FAMILY

The family enjoys the recognition and protection of the leading conventions and international treaties on human rights. They usually highlight the function of the family, its role as the basic unit of the society, and, therefore, the special care it should receive from public powers. But these texts (like many documents relating to pre-legal social organizations) do not define the term *family*, nor do they determine who should be considered a member of the family.

The Universal Declaration of Human Rights states that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”² The Convention on the Rights of the Child contains the following language in its preamble:

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding

Article 8 of the same Convention states that:

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² Universal Declaration of Human Rights, art. 16(3), GAOR 217A (III), U.N. Doc. A/810 (Dec. 10, 1948), <http://www.un.org/en/documents/udhr/index.shtml> (hereinafter UDHR). It is worth noting that this is the only reference to nature remaining in the UDHR after others were deleted during its drafting. See D. Cere, *The Problem of “Nature” in Family Law*, in *THE JURISPRUDENCE OF MARRIAGE AND OTHER INTIMATE RELATIONSHIPS* 277 (S. FitzGibbon, L. Wardle & A. S. Loveless eds., 2010). Regarding the protection of the family in the UDHR, see R. J. Araujo, *Natural Law and the Rights of the Family*, 1 INT’L J. JURIS. FAM. 197, 202–208 (2010). See also International Covenant on Civil and Political Rights, art. 23-1, 999 U.N.T.S. 171 (March 23, 1976), <http://www1.umn.edu/humanrts/instreet/b3ccpr.htm>, which embodies the same idea.

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.³

Neither of these texts specifies the composition of the family. Clearly it includes parents and children, but there is nothing in either text that would preclude embracing a broader notion of family that would also comprise other relatives.

In Europe, the Convention on Human Rights considers the right to found a family as fundamental, as affirmed in Article 12:

Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right.⁴

Neither Article 12 nor Article 8, which deals with the protection of family privacy, provides a more detailed account of the composition of the family unit.⁵ However, the European Court of Human Rights has issued some judgments that develop the concept of family.⁶ It considers the nuclear family

³ Convention on the Rights of the Child, U.N. GAOR 44/25 (Sept. 2, 1990), in accordance with Article 49, <http://www2.ohchr.org/english/law/crc.htm>

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), C.E.T.S. No. 009 (Mar. 20, 1952). The legal status of the Convention and its Protocols in European countries is identified in <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>. The Charter of Fundamental Rights of the European Union (2000/C 364/01) Article 9, http://www.europarl.europa.eu/charter/pdf/text_en.pdf, endorses the same rights: "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."

⁵ Article 8 (1) provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

⁶ The Court does not ignore, of course, that it is within the powers of a state to decide on the regulation of the family. *See Sheffield and Horsham v. the United Kingdom*, no. 23390/94, Eur. Ct. H.R. (ser. V) (1998) (Van Dijk, J., dissenting). The judgments and decisions of the European Court of Human Rights can be found at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

based on marriage—the “core family,” as it is occasionally labeled⁷—the basic structure of society, but it calls also for a more functional approach to the concept, taking into account the ethical and social dimensions of the institution.⁸ In the words of Judge Kovler,

the Court has opted for the traditional concept of a family based on the conjugal covenant—that is to say, a conjugal family consisting of a father, a mother and their children below the age of majority, while adult children and grandparents are excluded from the circle. That might be correct within the strict legal meaning of the term as used by European countries in their civil legislation, but the manner in which the Court has construed Article 8 § 1 in its case-law opens up other horizons by placing the emphasis on broader family ties.⁹

European countries have adopted a similar approach to the family. Most European constitutions contain references to the significance of the family as the basis of society and to its entitlement to state protection.¹⁰ (This is not a

⁷ See, e.g., *Slivenko v. Latvia*, [GC] no. 48321/99, Eur. Ct. H.R. (ser. X) at 94 (2003) (Kovler, J., concurring in part and dissenting in part).

⁸ See *X, Y, and Z v. United Kingdom*, Eur. Ct. H.R. no. 21830/93 (1997-II) (Pettiti, J., concurring); *Cossey v. United Kingdom*, Eur. Ct. H.R. (ser. A), no. 10843/84, at 184 (1990) (Martens, J., dissenting). These opinions were delivered apropos of certain unions that were looking for the same recognition as marriage or other blood relationships, but there is nothing to prevent the application of this rationale to other sorts of families.

⁹ *Slivenko v. Latvia*, [GC] no. 48321/99, Eur. Ct. H.R. (ser. X) at 94 (2003) (Kovler, J., concurring in part and dissenting in part).

¹⁰ See, e.g., 1992 ESTONIA CONST. § 27, available at <http://www.president.ee/en/republic-of-estonia/the-constitution/index.html>: “The family, being fundamental to the preservation and growth of the nation and as the basis of society shall be protected by the state”; 1949 FRG CONST. art. 6(1) (Germany), available at <https://www.btg-bestell-service.de/pdf/80201000.pdf>: “Marriage and family are under the special protection of the state”; 1975 Syntagma [SYN] [Constitution] art. 21-1 (Greece), available at <http://www.hri.org/MFA/syntagma>: “The family, being the cornerstone of the preservation and the advancement of the Nation, as well as marriage, motherhood and childhood, shall be under the protection of the State”; 1949 A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 15 (Hungary), available at http://www.servat.unibe.ch/icl/hu00000_.html: “The Republic of Hungary shall protect the institutions of marriage and the family”; 1937 IRELAND CONST. § 41-1, available at <http://www.constitution.ie/publications/default.asp? =EN>: “1. The State recognizes the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. 2. The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State”; 1947 ITALY CONST., art. 29, available at <http://www.governo.it/governo/costituzione/costituzionerepubblicaitaliana.pdf>: “The Republic recognizes the rights of the family as a

singularity of European constitutions,¹¹ which are here specified because this paper is focused on that geographical area.) Some of these fundamental texts contain sections that establish a narrow idea of the family, limiting it to parents and minor children, but this approach is generally related to some specific function of the family; when we come to general statements, the family is not reduced to the parents-children relationship. Let us look at the Constitution of Spain as an example.¹²

Section 27-3 of the Spanish constitution guarantees the parents' right to ensure that their children receive religious and moral instruction in school in accordance with the parents' convictions.¹³ It conveys the idea of the nuclear

natural association founded on marriage"; 1992 LITHUANIA CONST. art. 38, *available at* http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_1?p_id=21892: "The family shall be the basis of society and the State"; 1997 POLAND CONST., art. 18, *available at* <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>: "Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland"; 1976 PORTUGAL CONST., art. 67-1, *available at* http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf: "As a fundamental element in society, the family shall possess the right to protection by society and the state and to the effective implementation of all the conditions needed to enable family members to achieve personal fulfillment"; 1991 SLOVENIA CONST., art. 43, *available at* <http://www.us-rs.si/en/about-the-court/legal-basis/constitution>: "The state shall protect the family, motherhood, fatherhood, children and young people and shall create the necessary conditions for such protection"; 1992 SLOVAK REPUBLIC CONST., art. 41-1, *available at* http://www.concourt.sk/en/A_ustava/ustava_a.pdf: "Matrimony, parenthood, and family shall be protected by the law." For a valuable table of constitutions, identifying each according to the sort of protection or recognition afforded family relationships, see L. Wardle, *The Jurisprudence of Parenting and the Influence of Religion on Effective Parenting*, 2 INT'L J. JURIS. FAM. 437 (2012).

¹¹ 2003 QATAR CONST., art. 21, *available at* <http://english.mofa.gov.qa/details.cfm?id=80>, states, "The family is the basis of the society. A Qatari family is founded on religion, ethics, and patriotism. The law shall regulate adequate means to protect the family, support its structure, strengthen its ties, and protect maternity, childhood, and old age." Regarding the issue in the United States, see Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family that Protects Children's Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509 (2010) and sources cited therein.

¹² This paper does not attempt to provide an exhaustive approach to European juridical systems. I will refer to Spanish law, but it is presented as an example of a general tendency than can be observed in most European countries, although all of them have particularities derived from history and from social, cultural, or economic circumstances.

¹³ "The public authorities guarantee the right of parents to ensure that their children receive religious and moral instruction in accordance with their own convictions." 1978 SPAIN CONST. [C.E.] § 27-3, *available at* http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf. *See generally* C.

family, although it does not expressly mention it. Nevertheless, the reason is fairly clear: that section is related to a duty that the parents cannot delegate or relinquish. Nobody but the parents can decide on the kind of education their children will receive. Another section of the constitution, which relates to mandatory testimony in criminal matters (allowing for statutory exemption of family members), is not limited to the nuclear family.¹⁴ Here, not only the nuclear family is taken into account; more relatives may be included in the definition of family. The relevant statute, in fact, considers family for this matter to include all persons with a kinship relationship within the fourth degree of consanguinity.¹⁵ Other sections of the constitution refer to the family without specifying its composition: for example, those provisions related to the protection of family privacy.¹⁶ More importantly, the section that establishes the position of the family within the general framework of the constitution mentions the family without any direct or indirect reference to its members, simply stating that “the public authorities ensure social, economic and legal protection of the family.”¹⁷

Therefore, the precise extent of the family—that is to say, who will be considered a member of the family—will be determined by the juridical system of each country. Moreover, we can affirm that the definition of the concept of the family varies from one juridical branch to another. “Family” does not have the same definition in the field of tax law as it may in the field of marriage law or in the field of constitutional law, and it may vary even within the same branch.

A surprising and unexpected example of the haziness of the definition of the family has emerged with regards to the Spanish royal family. Recently, the king’s son-in-law was sued in a case of fraud. Some scholars pointed out that the son-in-law was the king’s relative, but not a member of the royal

Garcimartín, *Education in the Secular State, Whose Right Is It?* 2 INT’L J. JURIS. FAM. 77 (2012).

¹⁴ C.E., *supra* note 13, at § 24-2: “The law shall specify the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding allegedly criminal offences.”

¹⁵ Fundamental Act 6/1985 of the Judiciary, art. 219. This article is quoted *infra* at note 34. Fundamental Acts (*leyes orgánicas*) are a special kind of law that relate to the implementation of fundamental rights and certain political matters; their enactment, amendment, or repeal requires an affirmative vote of an overall majority of the members of Congress.

¹⁶ C.E., *supra* note 13, § 18-1, 4 provides: “The right to honor, to personal and family privacy and to the own image is guaranteed. ... The law shall restrict the use of data processing in order to guarantee the honor and personal and family privacy of citizens and the full exercise of their rights.”

¹⁷ *Id.*, § 39-1.

family, and therefore did not enjoy the privileges of the royal family with regards to immunity. The question remains open and it has been suggested that legislation may be required to state the reach and duties of the extended royal family.¹⁸

We can then conclude, because international law and the State constitutions do not define the family, that not only the so-called nuclear family may enjoy the recognition and protection of the law, but, as a matter of principle, the extended family can also be recognized and protected.

II. THE RECEPTION OF THE NUCLEAR FAMILY IN JURIDICAL SYSTEMS

On a first approach, the family can be portrayed as a group of persons who are related to each other either by blood or juridical bonds and constitute a unit of coexistence. There are variations of this core idea depending on time and place. In the Roman Empire, for example, the family included all who were under the authority of the *pater familias*.¹⁹

It is a commonplace statement that the structure of the family has shifted. During some historical periods, the family was generally constructed as a unit with important economic functions, which did not necessarily imply the pattern of cohabitation we know today.²⁰ Following the important changes in social and economic patterns that came about as a result of the Industrial Revolution, the family evolved to comprise just the parents and the non-emancipated children who lived with them.²¹ The relations with other

¹⁸ J. de Esteban, *La Familia Real y la Familia del Rey*, DIARIO DEL DERECHO RI § 1054910 (Dec. 13, 2012); E. de la Nuez, *Los Negocios del Yerno del Rey*, DIARIO DEL DERECHO RI § 1054893 (Dec. 12, 2012). There is no uniform criterion to define who belongs to a European royal family; different royal houses are differently defined.

¹⁹ J. GARDNER, *FAMILY AND FAMILIA IN ROMAN LAW AND LIFE* (2004).

²⁰ The transformation of families in Europe followed the same pattern with different calendars and cultural variants from country to country: each country or region has its particular configuration and combination between old and new patterns, but as a general rule, the change in family structures can be perceived everywhere. See 1 WELLBEING OF FAMILIES IN FUTURE EUROPE: CHALLENGES FOR RESEARCH AND POLICY 123 (U. Uhlendorff, M. Rupp & M. Euteneuer eds., 2011), available at <https://eldorado.tu-dortmund.de/bitstream/2003/28905/1/Wellbeing%20of%20Families%20in%20Future%20Europe%20-%20FPB1.pdf>

²¹ As one of the committees of the European Union has put it:

[O]ver the last two centuries, economic and social change in Europe has also impacted on the family, lifestyles and value systems. Industrialization and urbanization have changed the family framework. The extended family has been reduced and new variations on family life have evolved, the bond between the generations has changed, mentalities have evolved and

relatives were difficult and the ties to them became increasingly weak. This development gave rise to the idea of the broad or extended family, a concept that included those persons who were related by blood or juridical ties but who were not involved in daily life, as compared to the nuclear family, the family *par excellence*.²²

This transformation of the structure and scope of the family has had an impact on the law. Legislation and case law depict the idea of the nuclear family and nowadays the notion of family in most regulations and judicial decisions is fairly tight. A closer examination of Spanish legislation currently in force supports this conclusion. Of course, the main field where this trend can be perceived is in family law, so let us begin with some specific regulations in this area.

A. Marriage

Legal impediments to marry based on family bonds have been notably reduced. The Spanish Civil Code forbids the marriage of ascendants and descendants and collateral relatives until the third degree.²³ The relaxation of this impediment is widespread in European juridical systems.²⁴ It has also

economic solidarity has evolved or died out. At the same time, women's growing financial independence has raised the standard of living of two-income families.

Opinion of the European Economic and Social Committee on the Family and Demographic Change (Official Journal C 161, 13/07/2007 p. 0066-0074 & C 161, 13/07/2007 p. 0019-0019), § 8-8, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007AE0423:EN:HTML> § 4-1.

²² See a description of these matters in C. TOBÍO, M. S. AGULLÓ, M. V. GÓMEZ & M. T. MARTÍN, *CARING FOR OTHERS: A CHALLENGE FOR THE 21ST CENTURY* 33 (Jed Rosenstein trans., 2010), http://obrasocial.lacaixa.es/StaticFiles/StaticFiles/7af433edaa007210VgnVCM1000000e8cf10aRCRD/es/vol28_en.pdf

²³ CÓDIGO CIVIL [C.C.] art. 47: "The following persons may also not marry each other: 1. Direct line relatives by consanguinity or adoption. 2. Collateral relatives by consanguinity up to the third degree." C.C. art. 48 provides that "The First Instance Judge may waive, with just cause and at the request of one of the parties, impediments relating to third degree collateral consanguinity and the age impediment for persons older than fourteen." (S. de Ramón-Laca Clausen, trans. 2009). <http://www.mjusticia.gob.es/cs/Satellite/es/1215198252168/DetalleInformacion.html>) When the C.C. was modified, some political parties proposed the suppression of the impediment of the third collateral degree, arguing that the impediment was pointless because the waiver was always granted. See *DIARIO DE SESIONES DE LAS CORTES GENERALES, CONGRESO DE LOS DIPUTADOS* 9482 (Mar. 18, 1981).

²⁴ See, e.g., C. CIV. arts. 161–163 (France): "*En ligne directe, le mariage est prohibé entre tous les ascendants et descendants et les alliés dans la même ligne; en ligne collatérale,*

been relaxed in canon law,²⁵ which is quite significant owing to the universal enforcement of this juridical system and because of the civil efficacy of canon law marriages in some States. These changes imply that the nuclear family is regarded as the basic social entity, so that there is no sense in banning marriage between distant relatives now that extended-family cohabitation is no longer the regular pattern. As has been cleverly asserted, this relaxation was the death sentence of the extended family.²⁶

Another impediment to marriage that had its ultimate rationale in the cohabitation of the extended family is affinity: a ban on marrying a spouse's blood relative. This impediment has been removed entirely from the Spanish Civil Code, although it remains in canon law, albeit to a diminished degree.²⁷

B. Adoption and Guardianship

When the extended family was the usual pattern, if parents died, the children remained in the custody of the family, and grandparents, uncles and aunts, or other relatives continued to care for them in a natural way. Now, if children become orphans, relatives other than ascendants and siblings must go through an adoption process.²⁸ In this way, the law seems to be favoring the place-

le mariage est prohibé, entre le frère et la sœur; le mariage est encore prohibé entre l'oncle et la nièce, la tante et le neveu"; ["In the direct line, marriage is prohibited among all ascendants and descendants and their partners in the same line; in the collateral line, marriage is prohibited between brother and sister; marriage is also prohibited between uncle and niece, aunt and nephew] (<http://www.legifrance.fr>); BGB (Germany) § 1307: "A marriage may not be entered into between relatives in direct line and between brothers and sisters of the whole blood and of the half blood. This continues to apply if the relationship is extinguished as the result of adoption." (http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf); C.C. art. 87 (Italy): "*Non possono contrarre matrimonio fra loro: 1) gli ascendenti e i discendenti in linea retta, legittimi o naturali; 2) i fratelli e le sorelle germani, consanguinei o uterini; 3) lo zio e la nipote, la zia e il nipote*" [Marriage shall not be contracted between: (1) ascendants and/or descendants in the direct line, legitimate or natural; (2) brothers and sisters of the whole or half blood; (3) uncle and niece, aunt and nephew] (http://www.jus.unitn.it/cardozo/obiter_dictum/codciv/Lib1.htm).

²⁵ Code of Canon Law 1091 states that "§ 1. In the direct line of consanguinity marriage is invalid between all ancestors and descendants, both legitimate and natural. § 2. In the collateral line marriage is invalid up to and including the fourth degree." http://www.vatican.va/archive/ENG1104/___P3Y.HTM

²⁶ L. DíEZ-PICAZO, SISTEMA DE DERECHO CIVIL 85 (2006).

²⁷ Code of Canon Law 1092: "Affinity in the direct line in any degree invalidates a marriage." http://www.vatican.va/archive/ENG1104/___P3Y.HTM

²⁸ See C.C. article 175-2, *supra* note 23.

ment of children in a nuclear family, as this is considered the most appropriate environment for their upbringing.

The relevance of the nuclear family as opposed to the extended family is also evidenced in the case of the appointment of a minor's guardian. The Spanish Civil Code establishes a hierarchical order of preference to designate the person under whose care and governance a minor must be placed when a guardian is needed. This order includes the spouse, the parents, and the ascendants, descendants, and siblings. The judge may, "in a reasoned resolution," depart from the order of preference or even dispense with it entirely, but plainly the code requires the judge to take the persons listed into account. It does not require the judge to take into account other members of the extended family.²⁹

C. Support

Under the Spanish Civil Code, the obligation to provide for relatives' support applies to ascendants, descendants, and spouses. Siblings have the right to receive support only when they need the support for reasons "not attributable" to them and they are entitled only to support for their "basic living needs" and for their education.³⁰ This norm has a particular significance, in the sense that sons and daughters are supposed to have their own nuclear families when they become adults. At that point, the responsibility for their care no longer rests with their extended families but lies with their new nuclear families. This is reflected in the limited way in which the Code provides for their support: it can only be demanded in certain cases—where there is just cause—and only where siblings find themselves in precarious positions.

Apart from the specific field of family law, other areas of the juridical system reveal a tendency towards a diminution of the importance of the

²⁹ C.C. art. 234, *supra* note 23, provides:

The following persons shall be preferred to appoint a guardian: 1. The person designated by the ward himself, in accordance with the second paragraph of article 223. 2. The spouse who lives with the ward. 3. The parents. 4. The person or persons designated by the latter in their testamentary dispositions. 5. The descendant, ascendant or sibling designated by the judge. Exceptionally, the Judge, in a reasoned resolution, may alter the order of the preceding paragraph or dispense with all persons mentioned therein, if the benefit of the minor or incapacitated person should require it. Integration in the family life of the guardian shall be deemed beneficial for the minor.

³⁰ C.C. art. 143, *supra* note 23: "The following persons shall be mutually obliged to give each other support with the scope provided in the preceding article: 1. Spouses. 2. Ascendants and descendants. Siblings shall only owe one another basic living needs, when needed for any reason not attributable to the recipient of support; these shall extend, as the case may be, to the support required for their education."

extended family. If we look at inheritance law, and particularly to intestacy, we find that in some countries the dynastic family has given way to the nuclear family, with surviving spouses holding strong entitlements and close relatives afforded priority over distant ones.³¹ In Spain, there are no common dispositions regarding inheritance or intestate succession; they vary from one region to another (although if a region's law does not address the matter, the Civil Code applies by default). In the case where there is no will, the Spanish Civil Code names the heirs as the descendants, the ascendants, the spouse, and relatives to the fourth collateral degree of consanguinity, in that order. Beyond the fourth degree, the Code confers no right to intestate inheritance.³² (Under the law of some regions there is no obligation to reserve a portion of the deceased's estate for the family, or the obligation applies only for the benefit of descendants, ascendants, and spouse.³³)

The increasing relevance of the nuclear family is not reflected only in private law. Public law also offers examples of this trend. While it is not the aim of this paper to explore all of the instances in which the law emphasizes the nuclear family, it is clear that the law assumes that *family*, unless otherwise stated, refers to this model. For example, the acts related to judicial and executive procedures in Spain establish the causes for disqualification or impeachment of a witness; one of these causes is being married to the plaintiff or the defendant or being related to the plaintiff or defendant within the fourth degree of consanguinity.³⁴ In criminal law, the prohibition of incest has been limited to instances of relations between parents and their offspring and between brothers and sisters.³⁵ There are even some trends in the direction of the decriminalizing these kinds of incest.³⁶

³¹ See J. BECKERT, *INHERITED WEALTH* (T. Dunlap trans., 2008), *passim*. For example, at p. 86 the author notes "the orientation of intestacy law toward the nuclear family ... grew stronger in the course of history." This work is reviewed in A. Alstott, *Family Values and the Law of Inheritance*, 7 *SOCIOECONOMIC REV.* 145 (2009) Alstott writes:

Beckert's account of the evolution of intestacy law helps illustrate the sea change in the understanding of the family from the eighteenth century to the present. Gradually, in [Germany, France, and the United States], the dynastic family defined via primogeniture gave way to the nuclear family, with surviving spouses given strong entitlements, heirs treated equally regardless of gender, and close relatives advantaged relative to distant ones.

³² C.C. arts. 930–955, *supra* note 23.

³³ See *id.* arts. 807–822.

³⁴ Article 28 of the Act 30/1992, of November 26, of the Juridical Procedure for Administrative Norms; Fundamental Act 6/1985, July 1, of the Judiciary, Article 219.

³⁵ Article 183 of Fundamental Act 10/1995 of November 23, of the Criminal Code.

³⁶ See M. J. Franck, *Incest and the Degradation of Our Vocabulary*, WITHERSPOON INSTITUTE, PUBLIC DISCOURSE: ETHICS, LAW AND THE COMMON GOOD (January 15, 2012),

The extended family, then, is much less pervasive than it used to be, and may even mean nothing from the juridical point of view. Let us examine what is happening outside of the juridical arena.

III. THE EXTENDED SOCIAL FAMILY

If we set aside the juridical system for the moment and turn our attention to society, we can perceive some current trends that challenge the structure of the nuclear family. Many causes of these trends are related to global changes: a decrease in marriage rates and an increase in separation or divorce and single parenthood, demographic aging and a substantial decrease in fertility, often to below-replacement levels, a failure of the social policies related to the balance of family and work life, and so on.³⁷ The analysis of these causes and the calibration of the extent of their influence on the structure of family are far beyond the scope of this paper.³⁸ I will examine how these factors are

<http://www.thepublicdiscourse.com/2011/01/2316>: “Professor Epstein, 46, has been charged with third-degree incest for carrying on a sexual relationship over a three-year period with his daughter, now 24. From what little has emerged about the case, there are no charges that the relationship antedated the daughter’s eighteenth birthday, nor has it been alleged that the sexual relations were other than consensual. (The daughter herself has not so far been charged with a crime, however.) So powerful is the contemporary opinion that “consenting adults” may engage, in private, in any acts that commit no “harm” (narrowly understood in almost purely physical terms) to the parties in question or to others, that some observers have merely shrugged indifferently at the Epstein case, while others have striven to find grounds for condemning such incestuous acts but finally confessed their failure to find them.”

An essay noting the “gradual de-emphasis of legally recognized family forms” in criminal law can be found in A. S. Burke, *When Family Matters*, 119 *Yale L.J.* 1210 (2010).

³⁷ See United Nations, *Global Issues: Family*, <http://www.un.org/en/globalissues/family/index.shtml>, which provides links to numerous relevant resources, including R. Cliquet, *Major Trends Affecting Families in the New Millennium—Western Europe and North America*, <http://www.un.org/esa/socdev/family/Publications/mtcliquet.pdf>. A comprehensive study of data in the European Union can be found in European Commission, Commission Staff Working Document, *Demography Report 2010: Older, More Numerous and Diverse Europeans*, http://www.invecchiamentoattivo.politicheperlafamiglia.it/wp-content/uploads/file/Rapporto-demografia-2010EUL14135_Demographyreport_web.pdf (March 2011).

³⁸ Moreover, greater research on this issue is still needed:

A better understanding of old and new family forms and their development over time, of why differences in family composition and structures occur and why their extent differs across EU countries was identified as an important issue for research and policy. Discussions on research gaps in this field pointed repeatedly to the following methodological problems: the lack of longitudinal and cohort data; difficulties in dealing with the

affecting the pattern of the family, taking into account another major factor: the economic crisis, the effects of which are already visible.³⁹

A. *The Renewed Role of the Traditional Extended Family*

The regular nuclear family, as commonly regarded, comprised parents and dependent offspring living together.⁴⁰ Children remained in the family home until adulthood, or to put it in more accurate terms, until they began their own nuclear families, usually at about the time they commenced professional or working life.

It is a well-known phenomenon that nowadays sons and daughters live with their parents until an older age than once was common. That is usually not because they marry and remain in the family home, as once was common.⁴¹ Now, there are single persons who live with their parents because they do not have the economic resources to maintain themselves or to establish a new nuclear family. Of course, there are other reasons that may compel someone to remain in his or her parents' home, but the point here is that the

concepts and indicators of family living arrangements, particularly those addressing the existing plurality of family life and relationships; an overly strong focus on the nuclear family model and the household unit and on aggregate national data rather than variations between different social and regional groups; problems regarding the comparability of European family databases with other databases in order to understand the influence, at the cross-national level, of welfare, labor market and educational systems.

K. Wall, M. Leitão & V. Ramos, *Critical Review of Research on Families and Family Policies in Europe*, in 1 WELLBEING OF FAMILIES IN FUTURE EUROPE: CHALLENGES FOR RESEARCH AND POLICY, *supra* note 20, at 228.

³⁹ See Anne H. Gauthier, *The Impact of the Economic Crisis on Family Policies in the European Union* (Report from the European Commission—Employment, Social Affairs and Equal Opportunities DG, April 2010), <http://ec.europa.eu/social/families/userfiles/file/Final%20revised.pdf>

⁴⁰ I will not discuss whether marriages without children or cohabitants without children can be labeled as families, because those questions are not dispositive of the issues dealt with in this article. I believe that couples without children are families as well, because family bonds can have their origins either in biological or juridical ties. See *contra*, O. Cvejić Jančić, *The Definition of Family in Modern Law and Its Legal Protection*, 1 INT'L J. JURIS. FAM. 77 (2010) (stating, at page 77: "Without a child there is no family ...").

⁴¹ It was not unusual in Spanish rural areas that one of the descendants—typically the eldest son—remained in the family home after marrying, taking care of the family business or farm. There were some juridical authorities, today no longer in use or not in force, that regulated such arrangements: The descendant who remained in the family home with the new nuclear family inherited the family property. That was the case of the "*casamiento en casa*" in Aragón (the old *Compilación de Derecho Civil de Aragón*, art. 33) or the "*mejora de labrar y poseer*" in Galicia (Civil Law of Galicia, art. 219).

traditional pattern, or the rhythm of the natural replacement of families, is changing.

Neither is it uncommon that sons and daughters who left the family home to make one of their own later return to their parents' home after a marital breakdown. When a couple splits up, usually two homes must be sustained with the same income and assets that previously sustained one, typically under an arrangement in which one spouse pays alimony or contributes to the expenses of the other spouse and the children. This may cause a shortfall for one or both spouses, and returning to the parents' home is sometimes the only means of survival. Similarly, many young adults who become unemployed and can no longer afford to continue rent or mortgage payments are forced to return to their parents' home, particularly if they do not have a partner who may be able to provide additional support. This social phenomenon is not utterly new. What is a recent development since the unfolding of the economic crisis, however, is the fact that these circumstances are affecting people at a later age.

Owing to the current deleterious circumstances, by the middle of 2012, more than 1.7 million Spanish households had all their members unemployed.⁴² A good proportion of these were young families, whose adult members are of working age, and many of them have ascendants living by themselves, usually supported by a retirement pension.⁴³ These wholly unemployed families sometimes found a way to survive by bringing home their parents (or going to live in the home of one set of their parents) and living all together with the help of parental pensions or assets.⁴⁴

Thus, one of the major changes taking place is that families are growing in size to take on a form that is more similar to the extended family model of

⁴² See Spanish National Institute for Statistics, *Notas de Prensa*, <http://www.ine.es/daco/daco42/daco4211/epa0212.pdf> (July 27, 2012).

⁴³ We should recall that two demographic trends, the extension of life and the drop in birth rates, result in "beanpole" families, with relatively many vertical ties and relatively few horizontal ones. P. A. Dykstra, *Intergenerational Family Relationships in Ageing Societies*, United Nations Economic Commission for Europe 3, http://www.unece.org/fileadmin/DAM/pau/_docs/age/2010/Intergenerational-Relationships/ECE-WG.1-11.pdf (2010).

⁴⁴ In Spain, 22% of people older than 75 live with their descendants, while this proportion is 10% in Germany and the United Kingdom and 5% in Scandinavia. G. Meil, *Individualización y Solidaridad Familiar* 189, http://obrasocial.lacaixa.es/StaticFiles/StaticFiles/670e2a8ee75bf210VgnVCM1000000e8cf10aRCRD/es/vol32_resum_es.pdf (2011). See also K. Wall, M. Leitão & V. Ramos, *supra* note 38, at 195 (reporting an address by Claudine Attias-Donfut, and noting that in Europe "[e]lderly care is mainly provided by family" and that "elderly persons ... are not only care receivers, but also care-givers who provide care for their grandchildren and also make transfers of money").

old, with the inclusion of members of younger or older generations who would otherwise be living independently of each other, amplifying the traditional basic nuclear family unit.⁴⁵

The solidarity of extended families is also on the rise, owing to the economic crisis. This does not mean, of course, that families do not have conflicts. On the contrary, far from solving problems, the present situation creates more problems for families, but these problems lose importance when there is a more urgent need: survival.⁴⁶ Now that more and more people are impoverished, the family is the primary resource for living. It is worth pointing out some conclusions from a recent study based on data from the Spanish Center for Sociological Research. According to their research, the family is the main source of assistance: 13% of Spaniards received economic aid from a relative other than a parent or child in 2011. There is an important aspect to this crisis that distinguishes it from previous ones in that people over the age of 55 have lower rate of unemployment than younger people have. Therefore, they are in a better position to help younger members of the family who have lost their jobs. Furthermore, the importance of the family has risen in the hierarchy of values: in 2004, family was considered “very important” by 78.5% of Spanish citizens, while in 2011, 86% of those surveyed considered it “very important.” The family is by far the institution people would trust most in times of

⁴⁵ C. Leccardi refers to “two types of transformation within the family over the last few decades: changes in family forms (growing plurality in the ways of making a family) and changes in the identities of the several family members (young, adults, elderly).” She also identifies “four main trends emerging from developmental processes in the family”:

1. The prolonged presence of young people within their family of origin (the role played within it by: the negotiation and affection-based family; the de-standardization of the life-course; yo-yo transitions; labor market instability; the parents’ home as a shelter for fragmented transitions to adulthood).
2. Young people and parenthood—the new representations of parenthood among young people (new models of parenting, changing roles and obligations as regards gender).
3. Conjugal instability, preconditions, modalities and their social and cultural consequences for family life, gender identities, and divorced fathers and mothers.
4. The new role of grandparents (new active biographical trajectories of grandparents involving care support of younger family members).

K. Wall, M. Leitão & V. Ramos, *supra* note 38, at 128. The quoted material is a characterization of a presentation by Dr. Leccardi rather than a direct quotation from her work.

⁴⁶ There are still no clear indicators as to whether the economic crisis has had an impact on trends of divorce and marital break-up; after some years of decrease in divorce rates (2006–2009), the rate of divorce rose again slightly in 2010. (Data from the Spanish National Institute for Statistics, last rates from Sept. 19, 2011, <http://www.ine.es/prensa/np673.pdf>)

trouble (69.5%), well before friends (27.6%), religious organizations (4.6%), and the State (2.4%).⁴⁷

Of course, the closer the relative, the greater the help, but extended family plays a role wherever a nuclear family cannot survive on its own. In those regions in which the extended family is especially highly valued, intergenerational solidarity is a kind of fence that limits the negative effects of the economic failure of some of its members.⁴⁸

This situation reveals that, in a particular way, we are returning to an old pattern that disappeared after World War II. Then, the welfare state began to provide for some essential aspects of care that traditionally had been undertaken by the family.⁴⁹ The family became less necessary as a primary resource at the time the State became the principal provider for essential needs. Now that the welfare state seems to be collapsing and cannot be responsible for all the people's needs, individuals are increasingly turning to the family for support. As the State is reducing its role in people's care, the family, accordingly, is once again assuming its role as the primary source of help or solidarity.

Another important feature of the current situation is that the population is getting older. This feature, together with other factors, such as the drop in the number of children per family and the general access of women to work, poses a major challenge in regard to the care of elderly and disabled people. The family is increasingly important in protecting and supporting them, as well as other vulnerable members of society such as young children, young adults, those that face social isolation or unemployment, and the chronically ill.⁵⁰

⁴⁷ FUNDACIÓN ENCUENTRO, INFORME ESPAÑA 2011, UNA INTERPRETACIÓN DE SU REALIDAD SOCIAL 78 http://www.fund-encuentro.org/informe_espana/informe-espana.php (2011).

⁴⁸ See Cruz Vermella Española, Departamento de Intervención Social, ESTUDIO MONOGRÁFICO SOBRE LA VULNERABILIDAD SOCIAL—GALICIA 2010, <http://www.cruzvermella.org/web/descargas.php?i18n=1> (2011). Also on this matter, see V. L. Bengtson, *Beyond the Nuclear Family: The Increasing Importance of Multigenerational Bonds*, 63 J. MARRIAGE & FAM. 16 (2001). Regarding other countries, see literature cited in Meil, *supra* note 44, at 18.

⁴⁹ See Rapport Parlementaire sur la Famille 6, <http://www.herve-mariton.net/hmweblog/index.php?2011/07/13/524-rapport-parlementaire-sur-la-famille> (July 2011).

⁵⁰ A current academic debate concerns the relation between the family system and the welfare state. On one side of the debate is the substitution thesis, which states that the stronger the welfare state, the weaker the family or, to put it another way, collective solidarity substitutes for and therefore undermines family solidarity. On the other side, the complementarity thesis argues that State provisions do not substitute for but rather augment and strengthen family solidarity. See more on this topic in C. TOBÍO et al., *supra* note 22.

Grandparents are becoming an integral part of the everyday life of many families.⁵¹ In a vivid op-ed column in the *New York Times*, shortly after the 2008 victory of Barack Obama in the U.S. presidential elections, the author noted “one of the most simple and remarkable facts about the first family: for the first time in recent memory, the family in the White House is not a nuclear family,” referring to the fact that the President’s mother-in-law would be living with the Obamas to assist in the care of their two daughters.⁵²

The high percentage of women at work makes it necessary for many families to have help in the home. How best to balance work and family life is an issue still not resolved in most European countries.⁵³ With a better quality of life in old age, many grandparents are able to undertake the care of children that traditionally has been provided by mothers.⁵⁴ This has been pointedly acknowledged by the European Union Economic and Social Committee, which has stated that “families are not made up exclusively of parents and children, they also include grandparents, who often play an important role in helping and supporting the family (child-minding, material support etc.).”⁵⁵

⁵¹ See P. Galea, *Grandparenting and Extended Family Support: The Silent Generation*, 3 INT’L J. JURIS. FAM. (forthcoming, 2012), and literature cited therein.

⁵² Jodi Kantor, *The First Marriage*, NEW YORK TIMES (Nov. 1, 2009).

⁵³ See *Opinion of the European Economic and Social Committee*, *supra* note 21, at § 8-8:

In order to improve these situations and achieve equality between men and women, family policy measures must be combined with gender equality measures. By this we mean, for instance, quality childcare facilities, including company nurseries, as well as legal, fiscal and social measures to enable women, as well as men, to reconcile their parental, professional and social lives. It would also be appropriate to consider to what extent grandparents who are still working might be able to work flexible hours so that they can spend time with their grandchildren. If we do not succeed, there is a grave risk that women will continue to give up children and family life in order to focus exclusively on having a career.

⁵⁴ The percentage of grandparents who care for their grandchildren in Spain increased from 15% to 25% between 1993 and 2006. See a broad study of this trend in Meil, *supra* note 44.

Grandparents taking daily care of their grandchildren is not particular to Spain. Studies in different countries have shown the importance of the role of grandparents as providers of care to their grandchildren. In the United Kingdom, 30% of women from 55 to 63 years of age regularly help their adult children take care of the grandchildren. Similarly high percentages are reported for Russia and for that portion of Germany that was formerly East Germany (but not for the rest of Germany). C. TOBÍO et al., *supra* note 22. In France, almost 30% of adults surveyed reported receiving help from their parents, either in the form of service, economic aid, or moral support. Of those surveyed, 24% considered this help to be indispensable and 61% labeled it as important. *Les Français et les Nouveaux Enjeux de la Famille* 30, IFOP, http://www.ifop.fr/media/poll/1783-1-study_file.pdf (Jan. 23, 2012).

⁵⁵ *Opinion of the European Economic and Social Committee*, *supra* note 21, at § 1-2-6.

Similarly, the European Court of Human Rights understands that

family life, within the meaning of Article 8 [of the European Convention on Human Rights] includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life.

Respect for a family life so understood implies an obligation for the State to act in a manner calculated to allow these ties to develop normally ...⁵⁶

The Court, therefore, should make “a more careful distinction between the *family* in the strict legal sense of the term and the broader concept of family life,” and take into account “the sociological and human aspects of contemporary European families. The restrictive concept of a conjugal family (known as a ‘nuclear family’ in legal anthropology) is becoming obsolete in the light of the obvious changes reflected in family legislation recently enacted in a number of European States.”⁵⁷

This shift, however, does not mean that several generations are usually to be found living together in the same home. Often, cohabitation is not an option, or is not the preferred model for living on regular basis. In another arrangement, generations from the same family live near one another, in what has been called “distant intimacy,” in order to facilitate mutual assistance. Distant intimacy, therefore, can be deemed a new way for the extended family to play the old roles, or it may involve a reconfiguration of intergenerational solidarity patterns.⁵⁸

But we cannot think only in terms of the management of daily life. Apart from assisting parents in achieving work-life balance, important as it is, there

⁵⁶ *Marckx v. Belgium*, Eur. Ct. H.R. (ser. A) 21, § 45(1979). See also *Scozzari and Giunta v. Italy* [GC], Eur. Ct. H.R., nos. 39221/98 and 41963/98, § 221 (2000-VIII). In *Boyle v. United Kingdom*—a case concerning a request of an uncle for contact with his nephew, who had been taken into public care—the European Commission on Human Rights (a body abolished in 1998) considered that the uncle’s claim was admissible and that there should, under Article 8 of the European Convention on Human Rights, be a procedural safeguard allowing for an objective and meaningful review of the applicant’s requests for contact, even though the applicant was not a parent. *Boyle v. United Kingdom*, Eur. Comm’n H.R. (ser. A) no. 282-B (1994) (describing, in § 15, the Commission’s determination that the claim was admissible but dismissing the claim owing to the parties’ having entered into a settlement). See also Council of Europe, Explanatory Report of the Convention on Contact Concerning Children, May 15 2003, 192 E.T.S. art. 5 ¶ 47, <http://conventions.coe.int/treaty/en/Reports/Html/192.htm>, quoted more fully in the text at note 65, *infra*.

⁵⁷ *Slivenko v. Latvia*, [GC] no. 48321/99, Eur. Ct. H.R. (ser. X) at 94 (2003) (Kovler, J., concurring in part and dissenting in part).

⁵⁸ Meil, *supra* note 44.

are other aspects of family life in which grandparents may provide support.⁵⁹ As instability is increasing in marriages, grandparents may increasingly provide a reference point and a source of stability in grandchildren's lives, particularly when a marital crisis arises, and also in cases of separation and divorce. This assertion can be based not only on practical experience, but also on its support in the preamble of the act that deals with relations between generations in Spain.⁶⁰ After stating that family relationships are not restricted to parent-child relations, it asserts that grandparents may play a key role in the stability of their young grandchildren.

Grandparents enjoy a moral authority and a distance from the parents' problems that can aid the grandchildren to rationalize a family crisis, fostering their stability and development. While the precarious nature of conjugal relations is often exacerbated in other spheres of social and professional life, where their recognition is uncertain and their implications are up for permanent negotiation, kinship relationships, above all vertical ones, can afford an unchanging foundation.⁶¹ The negative effects and traumatic consequences of family conflicts may be diminished when the children have a secure and worry-free point of reference in their environment.⁶²

Finally, another area where the extended family is playing a certain role is in the reuniting of immigrant families in the host country. Almost 79% of the immigrants arriving in Spain have contacts there before their arrival.⁶³ The higher quality of life, including general access to health care, is sometimes reason enough to bring the extended family to the host country, even if that means living together in a small house with limited wages.⁶⁴ Undoubtedly,

⁵⁹ "Human beings are not just producers and consumers. They have a social and emotional dimension that constitutes their dignity." *Opinion of the European Economic and Social Committee*, *supra* note 21, at § 1-4-5.

⁶⁰ C.C. Act 42/2003, November 21. This act modifies the Civil Code and the Civil Procedure Act regarding relationships between grandparents and grandchildren.

⁶¹ C. TOBÍO et al., *supra* note 22.

⁶² The case law follows the same line when dealing with this matter. The Spanish Supreme Court has reminded us that relations between grandparents and their grandchildren are always enriching, and nothing prevents a marital settlement from including arrangements for the children to spend periods of time with their grandparents. *Sentencia del Tribunal Supremo no. 632/2004* (28 June 2004); *see also* *Sentencia del Tribunal Supremo no. 576/2009* (27 July 2009) and *Sentencia del Tribunal Supremo* (20 Oct. 2011) (the latter two decisions are unreported).

⁶³ *See Informe Encuesta Nacional de Inmigrantes [National Report on Immigrants]* (ENI-2007) 73 (D. Reher director, 2008) http://www.ine.es/daco/daco42/inmigrantes/informe/eni07_informe.pdf

⁶⁴ Currently, Article 17 of the Fundamental Act 4/2000 of January 11 limits the right to reunite—*reagrupamiento familiar*—to the offspring, the parents, the spouse or partner,

the family network helps to reduce the vulnerability of new immigrants in their strategy of surviving, adapting, and integrating into the host country.

B. The New Extended Family

Besides the new role assumed by the wider extended family, we can also ascertain that the idea of family is broadening in another sense.

Owing to the increasing breakdown of marriages and the constitution of new unions, many children now belong to more than one nuclear family at the same time. That is often the case for children of divorced parents who remarry. While such children only have one father and one mother, they may acquire stepparents as well as stepsiblings and even stepgrandparents. They may in fact have several extended families, stemming either from kinship or from juridical bonds. As the European Council stated:

“Family relationship” means the family relations recognised in accordance with the domestic law of the specific State which need not necessarily correspond to the genetic situation—e.g. in the event of adoption or reproductive medicine. Such a close relationship may also arise from a *de facto* family relationship; that is to say that a person has been living in the same household as the child and therefore there has been a certain period of family life (e.g. former foster parents, a parent’s spouse or former spouse who is not the child’s parent or a person who has cohabited with a parent and the child). . . . This group covers not only persons having, at present, *de facto* family ties with the child but also persons who have had *de facto* family ties with the child in the recent past (e.g. former foster parents, a spouse or former spouse of a parent, a person with whom the child has been living in the same household for a considerable period of time, a person who has cohabited with a parent and the child, a relative of the child such as an aunt or uncle).⁶⁵

Certainly, while relations with stepparents or stepgrandparents are not generally as close as they are with their biological counterparts, it is also true that the idea of nuclear family loses its clear shape as the number of different persons who can be labeled as members of the family, and possibly even members of the nuclear family, keeps growing.⁶⁶

and the spouse’s or partner’s parents or descendants. Previously, any other relative could be reunited for humanitarian reasons. The reunited may also reunite their own families. For the characteristics of Fundamental Acts, see *supra* note 15.

⁶⁵ Council of Europe, *supra* note 56.

⁶⁶ We set aside, in this paper, the problems that arise from assisted reproductive techniques, which multiply the number of persons who might legally share parenthood or some kind of family relationship. On this matter, see COMMISSION ON PARENTHOOD’S FUTURE & INSTITUTE FOR AMERICAN VALUES, ONE PARENT OR FIVE: A GLOBAL LOOK

Thus the nuclear family is not uniformly understood as conforming to a uniform pattern of mother, father, and children. All kind of variations are countenanced, so that members may be identified based on affection or on juridical ties that may apply even when affection is lacking. Legislators do not hesitate to broaden the concept of family in order to accommodate multiple relations that can only by a stretch of the imagination be compared in structure and function to the family as traditionally understood.

This is even more confusing if we note that there may arise situations in which a person has a familial relationship—in an affective sense—with somebody who is no longer in the family as a matter of law. This would be the case for children whose parents are twice divorced. In this circumstance, the divorced stepparent of the child would be left with no legal rights to visit the child, regardless of the possible formation of a close bond between the two. The absence of a legal bond may have implications for the future care of ailing or elderly stepparents in regard to the stepchild's obligation, or lack thereof, to a *de facto* parent who was thoroughly involved in the child's upbringing. From a legal point of view, no such obligation exists, but the question of a moral obligation is nonetheless a valid one.⁶⁷

In addition there is the question of unmarried, cohabiting partners who are regarded as a family and who look for the same protection from the law as their married counterparts.⁶⁸ In these cases, the relationship between the extended "family" and the child may be a temporary one, in the sense that the ties between the members last only as long as the relationship between the couple. In extreme cases a child may have several successive "extended families" that change with the parent's change of partner. It is abundantly clear that this scenario is not conducive to establishing a sense of stability in a child's life and may have a detrimental effect on the child's development and well-being.

AT TODAY'S NEW INTENTIONAL FAMILIES (Elizabeth Marquardt principal investigator, 2011), <http://www.familyscholars.org/assets/One-Parent-or-Five.pdf>; Naomi Cahn, *The New Kinship*, 100 GEO. L. J. 367, 367–429 (2012).

⁶⁷ On this issue, see the haunting article by Elizabeth Marquardt, *Death and Dying in an Age of Family Fragmentation: The New Alone*, WASHINGTON POST (Jan. 27, 2008).

⁶⁸ The European Court of Human Rights regards cohabitants as members of a family even when they lack juridical or blood ties: for example, heterosexual and homosexual cohabiting couples, and adults who act as parents to children who are neither genetically related to them nor adopted by them. *J. M. v. United Kingdom*, Eur. Ct. H.R. no. 37060/06 (2010); *Johnston and Others v. Ireland*, Eur. Ct. H.R. (ser. A., no. 112) no. 9697/82 (1986); *Marckx v. Belgium*, Eur. Ct. H.R. (ser. A, no. 31) no. 6833/74 (1979); *S. H. and Others v. Austria*, Eur. Ct. H.R. no. 57813/00 §§ 52, 58 (2011); *Schalk and Kopf v. Austria*, Eur. Ct. H.R. no. 30141/04, § 91-92 (2010).

Of course, the situations described above bring with them different ways of interpreting family life. Cohabitation with all the close relatives (parents and siblings) is not possible when the parents are not together any more. But if the parents share custody, the children may live in different homes at different times, and they may consider both as their family homes.

Thus we can assert that the extended family, in all its possible manifestations, is attaining a bigger role in society, although the nuclear family is still the leading pattern. It may even be the ideal or preferred pattern. How are the public authorities addressing this trend?

IV. THE RESPONSES OF THE PUBLIC AUTHORITIES

State authorities in Western countries have a challenge with regards to the issue of redefinition of extended families. They should acknowledge this social trend and, accordingly, find a way to reconcile the actual function of the extended family with the restrictive tendencies of the legislation currently in force.

The solution is not easy and there are many options to be considered. The present article does not advocate reverting to a legal model centered on the extended family, but explores other ways in which current patterns of family life can be recognized meaningfully by the law. Of course, this paper does not attempt to give a definitive answer or to cover all research relevant to family policies. Rather, I will mention only some selective ways in which European countries are dealing with this issue, in the hope that they may provide some hints on how best to solve the problems presented by the lack of clarity on this matter.

First, there is a growing sensitivity towards this issue and greater appreciation of its complexities. As noted above, the law in some places has afforded recognition to unstable or non-permanent relationships. However, it has not extended similar protection to cohabiting brothers, grandparents living with foster children, and so on. This seems unfair. Once the legislators decide to recognize the former sorts of cohabitation, it becomes difficult to articulate the reasons why the latter sorts are excluded from the protection of the law, inasmuch as they also may involve informal commitments of mutual help or may play a role in the care of aging or disabled people. It should not be surprising, then—to take an example—that when the Scotland Family Law Act of 2006 was making its way through the Scottish parliament, two groups lobbied hard to obtain greater recognition: stepparents and grandparents, as

existing law did not afford them automatic rights and duties with respect to children.⁶⁹

In a prominent case decided by the European Court of Human Rights, *Burden v. United Kingdom*,⁷⁰ the applicants, two elderly sisters, claimed to be in a similar or analogous position to cohabiting married and civil-partnership couples for the purposes of inheritance tax and therefore eligible for the same benefits. The court denied their petition, but the judgment was criticized by a number of authors who considered that the court should have taken a broader approach.⁷¹ Although the case only incidentally has to do with the topic at hand, it shows concern among legal scholars with regards to family relationships other than those of the nuclear family and its relevance in the juridical field. There are no binding agreements in kinship, but it should be acknowledged wherever it has relevance to family life.⁷²

⁶⁹ In the end, they did not achieve their goal. See E. Sutherland, *What Has a Decade of Devolution Done for Scots Family Law?* in INT'L SURVEY FAM. LAW 401 (B. Atkin ed., 2009).

⁷⁰ *Burden and Burden v. United Kingdom*, [GC], Eur. Ct. H.R. no. 13378/05 (2008).

⁷¹ See O. Doyle, *Sisterly Love: The Importance of Explicitly Assumed Commitment in the Legal Recognition of Personal Relationships*, in THE JURISPRUDENCE OF MARRIAGE AND OTHER INTIMATE RELATIONSHIPS, *supra* note 2, at 305. English Law Commission Consultation Paper no. 191, on Intestacy and Family Provision Claims on Death (2009), rejected the possibility of making changes to the law of intestacy so as to include consanguineous couples in the category of cohabitants and thereby afford them intestacy rights. The commission stated that the reasons why consanguineous couples lived together were too wide-ranging to ground any satisfactory approach: they might be based on love, convenience, or pure accident. As has been rightly pointed out, the commission failed to see that this could equally be said about any familial relationship or any informal cohabitation. It is regrettable that it did not take the opportunity to look more closely at the similarity of the problems faced by consanguine couples and cohabitants. M. Welstead, *The Family the Law Forgot*, in INT'L SURVEY FAM. LAW 113, *supra* note 69.

⁷² "I ask myself why would consanguinity be any less important than the relationship between married and civil partners? Of course, the quality of consanguinity is different from sexual relationships but this has no inherent bearing on the proximity of the persons in question." *Burden and Burden v. United Kingdom*, [GC], Eur. Ct. H.R. no. 13378/05 (2008) (Zupančič, J., dissenting). In a dissenting opinion in another case, Judge De Meyer stated, "It seems to me undeniable that the relationship which binds the three applicants together, in their own experience and as perceived by society (Y is Z's mother and X publicly assumes the roles of male partner and father), permits the finding that they enjoy real family life, which, according to the Court, 'is not confined solely to marriage-based relationships and may encompass other de facto "family" ties where the parties are living together outside of marriage'" *Keegan v. Ireland*, Eur. Ct. H.R. (ser. A, no. 290) 17, ¶ 44 (1994) (De Meyer, J., dissenting); *quoting X, Y, and Z v. United Kingdom*, Eur. Ct. H.R. no. 21830/93 (1997-II) (De Meyer, J., concurring).

Moreover, long-standing relationships or institutions are becoming less relevant from the point of view of rights and duties. Marriage is the best example; it has been deprived, little by little, of its main features, to the point that nowadays, for example in Spain, it can be described only as a union of two persons for at least three months, since no-fault and non-causal divorce is available for couples who have cohabited for three months or more, even couples who have made no sexual or other commitment.⁷³ But marriage is not an exception. Parental rights and duties are increasingly weakened, with controversies regarding the extent of parental autonomy on the rise.⁷⁴ Adoption, also a permanent relationship, poses problems as well: early in 2012, the regional government of Catalonia expressed its worry about the alarming number of adopted children who had been abandoned and placed under public custody, and announced that it will take action to review the requirements for couples who want to adopt a child.⁷⁵ Perhaps this situation reflects a weakening of the bonds between adoptive parents and adopted children.

Changing the laws to recognize the function of the extended family is desirable, but it is not foreseeable in the near future. It will take more time for governments to figure out how to deal with this special task. However, despite the difficulties, some Eastern European countries have put in place specific measures that take into account the role of the extended family. We might wonder whether these measures are advances towards greater involvement for the extended family or whether they merely reflect the circumstance that the countries adopting them are still in transition from social systems based on the extended family to systems based on the nuclear family. In fact, most of these measures were adopted after the collapse of the Soviet Union. Despite their growing adoption of social and political patterns from Western Europe, Eastern European countries have retained many of their traditions in regards to the role of the extended family, which is particularly strong in those countries, and which is accorded importance in many of their basic laws. For example, the Constitution of the Russian Federation provides that “Children over 18 years of age who are able to work shall provide for their parents who are unfit for work.”⁷⁶

⁷³ See C. Martínez de Aguirre, *Nuevos Modelos de Familia: La Respuesta Legal*, 64 REVISTA ESPAÑOLA DE DERECHO CANÓNICO 703 (2007).

⁷⁴ M. A. PÉREZ ÁLVAREZ, DERECHO DE FAMILIA 344 (2011).

⁷⁵ See E. ARMORA & J. TRILLO, *Cataluña revisa la selección de familias tras 77 abandonos de niños adoptados*, ABC–Spain, <http://www.abc.es/20120221/comunidad-catalunya/abcp-cataluna-revisa-seleccion-familias-20120221.html> (Feb. 21, 2012).

⁷⁶ KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 38 § 3 (1993), available at <http://www.constitution.ru/en/10003000-01.htm>

There are similar provisions in the Constitutions of Ukraine,⁷⁷ Moldova,⁷⁸ and other countries.⁷⁹ In Romania, legislation relating to children who are separated from their parents favors their placement in the extended family or with a person or family defined as being “from the child’s social network.”⁸⁰ In Bulgaria, parental leave until the child turns two may be taken by one of the grandparents, subject to the mother’s consent.⁸¹ More astonishing, perhaps, is that this last solution has been recently proposed in Germany. The Secretary for Family has issued a statement suggesting that “active aging people” be allowed to reduce their workloads or take a leave from their work for the purpose of caring for their grandchildren.⁸²

At the European Union level, social protection is approached from the standpoint of the world of work (protection of workers) rather than that of protection of the family. However, the industrial and technological changes and the resulting modernization of the way work is organized have created awareness of the need to reconcile family and working life. This objective is based on rights guaranteed under Article 33 of the Charter of Fundamental Rights of the European Union.⁸³ Efforts to achieve it at the European Union

⁷⁷ UKRAINE CONST. art. 51 (1996), available at http://static.rada.gov.ua/site/const_eng/constitution_eng.htm: “Adult children shall be obliged to care for their parents who are incapable to work.”

⁷⁸ MOLDOVA CONST. art. 48, § 4 (1994), available at http://web.parliament.go.th/parcy/sapa_db/cons_doc/constitutions/data/Moldova/Constitution%20of%20Moldova.htm: “Children have a duty to look after their parents and help them in need.”

⁷⁹ See CROATIA CONST. art. 63 (1990), available at <http://www.sabor.hr/Default.aspx?art=2405>: “Children shall be bound to take care of old and helpless parents”; ESTONIA CONST. § 27 (1992), available at <http://www.saeima.lv/en/legislation/constitution>: “The family has a duty to care for its needy members”; LITHUANIA CONST. art. 38 (1992), available at http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_1?p_id=21892: “The duty of children is to respect their parents, to take care of them in their old age, and to preserve their heritage”; SERBIA CONST. art. 29 (2006), available at <http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan019071.pdf>: “Children shall be bound to care for their parents in need of assistance.”

⁸⁰ See European Alliance for Families, Country Profiles, Romania, http://europa.eu/familyalliance/countries/romania/index_en.htm

⁸¹ See European Alliance for Families, Country Profiles, Bulgaria, http://ec.europa.eu/employment_social/emplweb/families/index.cfm?langId=en&id=4

⁸² *Le Gouvernement Allemand Réfléchit à un “Congés de Grands-Parents”* [The German Government Considers “Grandparental Leave”], LOS ANGELES TRIBUNE–FRANCE (Mar. 3, 2012) <http://www.latribune.fr/actualites/economie/union-europeenne/20120314trib000688238/le-gouvernement-allemand-reflechit-a-un-conges-de-grands-parents.html>. The proposal takes into account that German women are 51 on average when they have their first grandchild, and men are 53.

⁸³ Article 33 provides:

level mark the orientation of social policy towards its family dimension, and may contribute to the recognition of a role played in some situations by members of the extended family.⁸⁴

V. CONCLUSION

The current economic crisis, and particularly the crisis of the family, are recurring topics in the media. We should ask ourselves, however, if we are facing a real crisis or just living in a changing world. Until the twentieth century, change occurred gradually or did not happen at all for long periods. Since then, everything is on the move, and social changes occur so quickly that we often do not have time to keep up or to understand the rationale behind the moving.

At the same time, as has been rightly pointed out, legislation affecting families and the patterns of behavior in the family field are not exactly consistent.⁸⁵ Extended families are a good example of this inconsistency. While they keep increasing their voluntary or compulsory functions, the law seems to take them into account only to obtain benefits, and seldom to grant them specific advantages. As we have seen, the extended family may play a major role in the maintenance of certain persons, but it does not reap corresponding rewards, not even the sort of rewards that would result from the free will of a dispenser of largesse (as, for example, in the area of inheritance). Despite the fact that legislation recognizes the importance and the moral authority of children's grandparents, the grandparents' rights to visit the children or have the children visit them are dependent upon the determinations of parents (within certain limits, of course: parents cannot forbid all access). Neither can we find the recognition, except in a few countries, of legal obligation to care for ascendants.⁸⁶

Public powers should find ways to recognize the role that the extended family is playing in this new social reality and public resources accordingly should be provided to support that role. This is not only a requirement of justice; it is also in the interest of the State.

1. The family shall enjoy legal, economic and social protection.

2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Charter of Fundamental Rights of the European Union (2000/C 364/01), http://www.europarl.europa.eu/charter/pdf/text_en.pdf

⁸⁴ See Commission Communication of November 25, 1998, COM (98) 592.

⁸⁵ M. A. GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 5 (1996).

⁸⁶ See *supra* notes 76–79, and accompanying text.