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ORIGINAL ARTICLE

Beyond "Death Do Us Part": Spousal Intestate Succession in Nineteenth-Century Hispanic America

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Abstract

In colonial Hispanic America, widows and widowers were in an unfavorable position if their spouse died without a will, only inheriting from them if the deceased left no blood relatives to the 10th degree of kinship. This article examines the extent to which the intestate position of the surviving spouse improved in the new civil codes of the sixteen republics, and how their approaches were influenced by the circulation of ideas. It finds that in all except one the spouse came to be favored over the extended family. If the deceased left children, two approaches developed with respect to the inclusion of spouses: where they obtained an unconditional right to an inheritance share equal to a child, and where their inheriting depended on their relative poverty or need. These reforms took place in concert with the rise of the centrality of the conjugal unit as the focus of affection, loyalty, and responsibilities, and prior to such reforms in Europe. The countries that went furthest in elevating the position of spouses, Venezuela and Argentina, were those most deeply influenced by the ideas and changes fostered by liberalism.

Soon after securing their independence from Spain during the first quarter of the nineteenth century, most Hispanic American republics, after promulgating new constitutions, turned to drafting new civil codes and these included inheritance norms. In 1836, in his draft code for Peru, jurist Manuel Lorenzo de Vidaurre broke with colonial legal tradition in the case the deceased did not leave a will (intestate) proposing that in the order of succession the widow or widower be placed ahead of all collateral relatives. Under colonial law, spouses inherited each other's estate only if there were no blood relatives up to the 10th degree of kinship. Vidaurre justified this improvement in the spouse's position by reasoning that "marriage generates an affection that is

even greater than towards one's children."[1] Nonetheless, in his draft code he still privileged the deceased's children or, if there were none, the parents, over the surviving spouse. His comments suggest that he would have liked to place the spouse on at least the same footing as children, but in the 1830s this may have been too radical a break with tradition; by the 1860s, in a few countries, it was not.

In this article, I analyze the intestate provisions of the new nineteenth civil codes to determine the extent to which spousal inheritance rights improved after independence compared to colonial norms, and how the circulation of ideas—both between Europe and the Americas and within Hispanic America—influenced such improvements. I find that spouses came to be favored over the extended family in the order of succession in all but one of the sixteen newly independent countries. Two countries, Venezuela and Argentina, went even further in their initial codes by giving spouses an unconditional share of the deceased's estate equal to that of a child, taking the sentiment expressed by Peruvian jurist Vidaurre to its logical conclusion.

I argue that these changes in the ordering of intestate took place in concert with the rise of the centrality of the conjugal unit as the focus of an individual's primary affection, loyalty, and responsibilities. Scholarship on Western Europe and the United States has established that significant improvements in the intestate position of spouses did not take place until *after* profound changes had already occurred in marriage, the family, and the economy.[2] The switch in loyalties and obligations from the extended to the nuclear family is generally associated with a combination of factors: the ideas of the Enlightenment and its emphasis on individual rights; industrialization, urbanization, and the loss of economic importance of the extended family; and the rise of romantic love and individual choice, rather than strategic interests, as the basis for marriage.[3]

It may seem surprising that the improvement in the intestate position of spouses occurred earlier in Hispanic America than in Western Europe. In the latter, this betterment began with the civil code reforms adopted in Italy in 1865, Spain in 1889, and Germany in 1899, and became more generalized in the first quarter of the twentieth century.[4] In Hispanic America, this improvement began in the 1830s and deepened in the Venezuelan and Argentinian codes of the 1860s when spouses were given an unconditional share in the 1st order of succession.

This elevation in the position of spouses occurred in Hispanic America prior to major structural changes in the economy, but in a context in which notions

[1] Manuel Lorenzo de Vidaurre, *Proyecto del Código Civil peruano dividido en tres partes, 3ª parte* (Lima: Imprenta del Constitucional, 1836), 46.

[2] Mary Ann Glendon, *The Transformation of Family Law. State, Law, and Family in the United States and Western Europe* (Chicago: University of Chicago Press, 1989); Stephanie Coontz, *Marriage, a History. How Love Conquered Marriage* (New York: Penguin, 2006).

[3] Ibid.; Anthony Giddens, *The Transformation of Intimacy* (Cambridge, UK: Polity Press, 1992).

[4] Kenneth Reid, Marius J. de Waal, and Reinhard Zimmermann, "Intestate Succession in Historical and Comparative Perspective," in *Comparative Succession Law*, eds. Kenneth Reid, Marius J. de Waal, and Reinhard Zimmermann, vol. 2 (Oxford, UK: Oxford University Press, 2015), 489–90.

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about individual freedom, marriage, and familial obligations were changing rapidly in tandem with the spread of liberal ideas and policies. The pursuit of individual freedom, for instance, tipped the balance in marital partner choice from parents toward children, as romantic love became more important as a motivation for marriage than strategic family alliances. The adoption of free trade policies and the development of land, labor, and capital markets precipitated a decline in the practice of dowry, changes in the relative importance of inheritance versus individual effort in the accumulation of wealth, and a loss in the economic importance of the extended family as a unit of production, among other consequences. The pace of change, however, differed across the region, as did the factors motivating specific improvements in the intestate position of spouses.

While there is an ample literature focusing on the comparative study of the Latin American civil codes and those of Europe and elsewhere,[5] less attention has been paid to inheritance or succession law, and especially its intestate provisions.[6] Argentine legal scholar Victor Tau Anzoátegui was likely the first to emphasize how the intestate position of spouses improved considerably in the nineteenth century although his comparative focus is limited to the Southern Cone.[7] Jan Peter Schmidt provides a critical, in-depth comparative analysis of intestate law in Latin America in the twentieth century, drawing attention to how these improvements in the position of spouses took place earlier than in Europe.[8] His brief analysis of nineteenth century trends, nonetheless, gives far too much credit to codifier Andrés Bello for enhancing their position in his 1855 civil code for Chile. While Bello's code was undoubtedly the most influential of the Hispanic American codes on codification efforts in other countries of the region, I show that its intestate provisions were in fact among the least, not the most, favorable to the surviving spouse.

I contribute to the history of law by providing a detailed comparative analysis of the intestate provisions of the sixteen nineteenth-century Hispanic American civil codes, going beyond the scope of Tau's and Schmidt's analyses. My most original finding is that two different approaches developed with respect to the inclusion of the spouse in the 1st order of intestate: in the most favorable, the spouse was entitled to an unconditional share, alongside the children (in the codes of jurists Julián Viso in Venezuela and Dalmacio Vélez Sarsfield in

[5] See Alejandro Guzmán Brito, *La codificación civil en Iberoamérica. Siglos XIX y XX* (Santiago: Ed. Jurídica de Chile, 2000) for a country-by-country summary of analyses of the influence of European codes on these new civil codes.

[6] For comparative analyses of nineteenth-century succession law, see Michael C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America* (Austin, TX: University of Texas Press, 2004), ch. 17, and Alejandro Guzmán Brito, "La pervivencia de instituciones sucesorias castellano-indianas en las codificaciones hispanoamericanas del siglo XIX," in *Derecho, instituciones y procesos históricos*, eds. José de la Puente Brunke and Jorge Armando Guevara Gil, vol. 3 (Lima: Fondo Ed. de la PUC del Perú, 2008), 31–88. Both focus almost exclusively on the rules governing wills.

[7] Victor Tau Anzoátegui, *Esquema histórico del derecho sucesorio del medievo castellano al siglo XIX* (Buenos Aires: La Ley, 1971).

[8] Jan Peter Schmidt, "Intestate Succession in Latin America," in *Comparative Succession Law*, eds. Kenneth Reid, Marius J. de Waal, and Reinhard Zimmermann, vol. 2 (Oxford, UK: Oxford University Press, 2015), 119–59.

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Argentina); in the least favorable, the possibility of their inheriting depended upon their relative poverty or need (in Bello's code for Chile).

This finding conforms to the commonly held view of Venezuela and Argentina as the new republics most influenced by liberalism.[9] I contribute to the history of thought by showing how the ideas on intestate held by liberal legal scholars such as English utilitarian Jeremy Bentham and Spanish jurist Florencio García Goyena were received in the region. Bentham was widely read by revolutionary leaders in the Americas, and his ideas provoked the earliest debate over the order of intestate succession, leading to the first specific legislation on the matter.[10] García Goyena was the primary author of the 1851 draft civil code for Spain and the first codifier to propose giving spouses an unconditional inheritance share in the 1st order.[11] I argue that he had the most influence in Venezuela and Argentina because social sensibilities in these countries had changed sufficiently by the 1860s so it could be assumed that an individual's primary loyalty was to their spouse and children. Moreover, the decline of the practice of dowry and the adoption of the Victorian ideal of the wife as the "queen of home," required new social provisions for widows. My analysis thus contributes to the history of the family and of gender relations by focusing on an area of family law that has not received sufficient scholarly attention.

Besides the civil codes and other relevant legislation and the commentary provided by their authors, the other primary materials upon which I draw for this analysis include the draft codes of these influential codifiers, the commentary of the commissions often set up to review these drafts, and the treatises of other nineteenth-century legal scholars.[12] For information on marriage and the family, I rely on secondary sources, which for this period are uneven across countries.

The analysis focuses only on the provisions governing intestate because, as these countries became more secularized, the writing of wills became less important than in the colonial period.[13] Also, the rules of intestate tended

[9] David Bushnell and Neill Macaulay, *The Emergence of Latin America in the Nineteenth Century* (Oxford: Oxford University Press, 1988); Tulio Halperin Donghi, "Argentina: Liberalism in a Country Born Liberal," in *Guiding the Invisible Hand. Economic Liberalism and the State in Latin American History*, eds. Joseph L. Love and Nils Jacobsen (New York: Praeger, 1988), 99–116; Reuben Zahler, *Ambitious Rebels. Remaking Honor, Law and Liberalism in Venezuela, 1780–1850* (Tucson: University of Arizona Press, 2013), 22–40.

[10] Bentham's student, Etienne Dumont, synthesized his writings as *The Principles of Morals and Legislation* and translated and published this collection in Paris in 1802; a Spanish translation of this French tome was published in Madrid in 1822. Bentham's work also reached Latin America through the monthly periodical, *El Español*, published between 1810 and 1814, which was funded by the British Foreign Office. Moreover, Bentham corresponded with many of the independence leaders. See Pedro Schwartz, "La correspondencia ibérica de Jeremy Bentham," in *Bello y Londres. Segundo Congreso del Bicentenario*, eds. Fundación La Casa de Bello and Comisión Nacional para la Celebración del Bicentenario (Caracas: Fundación La Casa de Bello, 1980), 225–64.

[11] Florencio García Goyena, *Concordancias, motivos y comentarios del Código Civil Español* (Madrid: Imp. de la Sociedad Tipográfico-Editorial, 1852), 188–90.

[12] The records on congressional debates, when available, were less useful. The congress often ceded responsibility to the executive branch for commissioning, reviewing, and promulgating these codes, usually approving the civil code without much discussion of its content.

[13] Tau Anzoátegui, *Esquema histórico*, 116.

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to be less controversial than the issue of testamentary freedom, the ability of an individual to freely bequest their full estate.[14] Moreover, intestate rules potentially affected all individuals irrespective of class, gender, or race since, in the absence of a will, these determined the disposition of a deceased person's property no matter how meager. These rules were thus quite relevant to the large segment of the population who were artisans or peasant landowners. Nonetheless, throughout the nineteenth century an important share of the adult population did not marry and lived in consensual unions, with a sizable proportion of children being illegitimate.[15] The debate over whether recognized natural children[16] should have automatic inheritance rights was intertwined with that over how much to improve the position of spouses; due to space limitations, this aspect is not developed in detail.

The next two sections set the stage by considering the position of spouses in intestate under colonial norms, followed by a discussion of the main models and thinking on intestate emerging in Europe in the first half of the nineteenth century that influenced codifiers in Hispanic America. The subsequent section presents an overview of when the initial civil codes were adopted in the region and of their intestate provisions for spouses. This is followed by a deeper analysis of how surviving spouses came to be positioned so favorably in Argentina and Venezuela, and of why these codes differed in their approach. I conclude by summarizing the findings and suggesting topics that merit further research.

The Colonial Legacy on Widowhood

Colonial Hispanic America was governed by the legal norms of Castille, the region of Spain that had the least generous inheritance norms with respect to spouses.[17] According to the thirteenth-century legal code, the *Siete Partidas*, if the deceased had not made out a will, the deceased's children (or their descendants, *per stirpes*, or line) inherited the estate.[18] In their absence,

[14] Under colonial law, the share of an estate that an individual could bequest to whomever they chose was one-fifth; four-fifths was restricted to the forced heirs (legitimate descendants or ascendants). On the debate over increasing this "free" share or doing away with such restrictions, see Guzmán Brito, "La pervivencia de instituciones"; Silvia Arrom, "Changes in Mexican Family Law in the Nineteenth Century: The Civil Codes of 1870 and 1884," *Journal of Family History* 10, no. 3 (1985): 305–17; and Carmen Diana Deere and Magdalena León, "Liberalism and Married Women's Property Rights in Nineteenth Century Latin America," *Hispanic American Historical Review* 85, no. 4 (2005): 627–78.

[15] Elizabeth Kuznesof and Robert Oppenheimer, "The Family and Society in Nineteenth-century Latin America: An Historiographical Introduction," *Journal of Family History* 10, no. 3 (1985): 215–34.

[16] Natural children are those born of unmarried parents who under the rules of the Catholic church faced no impediments to marry.

[17] García Goyena, *Concordancias*, Appendix 10, and Tau Anzoátegui, *Esquema histórico*.

[18] Sixth Partida, Title 13, Law 6, in Gregorio López, *Las Siete Partidas del Rey Don Alfonso El Sabio cotejadas con varios códices antiguos por la Real Academia de la Historia y Glosadas por el Lic. Gregorio López* (Paris: Librería de Rosa Bouret y Cia. 1951, orig. 1855). This section also draws on Joaquin Escriche, trans. Bethel Coopwood, *Elements of the Spanish Law*, 3rd ed. (Austin, TX: Triplett & Hutchings, 1886, orig. 1840), and José María Ots y Capdequí, "Bosquejo histórico de los derechos de la mujer en la legislación de Indias," *Revista General de Legislación y Jurisprudencia* 138 (1918): 161–82.

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in the 2nd order, parents inherited (or other ascendants, by line, with the nearest, excluding those more distant). Siblings (and their descendants) were in the 3rd order, aunts and uncles in the 4th order, and so on. Since the surviving spouse did not inherit the deceased's estate unless there were no living blood relatives up to the 10th degree of kinship, it was extremely unlikely that spouses inherited from each other.

Weak inheritance rights for spouses did not mean that widows were unprotected. If a woman married without a dowry and was poor, she could claim what was known as the *cuarta viudal*.[19] This special inheritance provision entitled them to up to one-quarter of their husband's estate up to a maximum of 100 pounds of gold, whether he had died intestate or left a will excluding her. The dowry that parents of means were required to provide a daughter also served a two-fold purpose: it was a contribution by her family to the expenses of the new household (and hence, a means of attracting a suitable groom) and was designed to support her in case of widowhood. Although the husband managed the dowry, it was the wife's property and reverted to her control once widowed. From the parents' perspective, the dowry was an advance on a daughter's inheritance; in addition, by law, sons and daughters inherited equally.[20]

Women also had relatively strong property rights in marriage. Under the colonial marital regime of partial community property (or community of accrued gains), a person's individual property consisted of what they owned prior to or brought to marriage (such as the dowry) and what they later inherited. The community property of the couple, known as the *gananciales*, consisted of the value of the gains on such assets plus any assets purchased during the marriage irrespective of the source of income. Upon dissolution of the marriage due to death or permanent separation (ecclesiastic divorce, without the right to remarry), the gananciales were divided equally between them.[21] The widow or widower thus automatically received one-half, while the estate of the deceased consisted of their half of the gananciales plus their individual property. Legal practice in the Spanish colonies generally conformed to these norms.[22]

If gananciales resulted from the marriage, it would be difficult for a woman to prove that she was poor to claim the cuarta viudal, even if she married without a dowry. This is among the reasons why legal scholars in both Spain and Hispanic America observed that the cuarta viudal was rarely practiced.[23] In contrast, there is compelling evidence that during the colonial period the practice of dowry was widespread. Nonetheless, its practice began to decline in the

[19] Sixth Partida, Title 13, Law 7 in López, *Las Siete Partidas*.

[20] Ibid., Title 13, Laws 3 and 15.

[21] Book 10, Title 4, Laws 1–5, *Novísima Recopilación de las Leyes de España*, of 1804, vol. 3 (Mexico City: Galván, Librero, 1851), and Ots y Capdequí, "Bosquejo histórico," 54–56.

[22] Edith Couturier, "Women and the Family in Eighteenth-Century Mexico: Law and Practice," *Journal of Family History* 10, no. 3 (1985): 294–304; Eugene Korth and Della M. Flusche, "Dowry and Inheritance in Colonial Spanish-America: Peninsular Law and Chilean Practice," *The Americas* 43, no. 4 (1987): 395–410.

[23] García Goyena, *Concordancias*, 360; Dalmacio Vélez Sársfield, *Proyecto de Código Civil para la República Argentina*, vol. 4 (Buenos Aires: Imprenta de Pablo Coni, 1869), 1077.

late-eighteenth century in Mexico,[24] and it virtually disappeared in countries as diverse as Argentina, Peru, and Costa Rica over the course of the nineteenth century.[25] The decline of the dowry is largely attributed to the expansion of the market economy and its resulting investment opportunities, and the increasing reluctance of parents to part with much needed capital by giving daughters this advance on their inheritance. Thus, among the reasons that nineteenth-century codifiers may have improved the position of widows in intestate was to compensate for the demise of the dowry.[26] At the same time, its disappearance led to less parental control over the marriage of children which fostered individual choice of a partner.[27]

Near the end of the colonial period there was a change in intestate succession law in Spain that likely was not implemented uniformly in the American colonies, if at all.[28] A law in the *Novísima Recopilación* of 1805 reversed course from the *Siete Partidas* by limiting the range of collateral heirs who could inherit to the 4th degree; if there were no heirs in this range, the estate passed to the Royal Treasury.[29] Surviving spouses were not mentioned in this law, so presumably the only way a widow might then inherit would be by claiming the cuarta viudal.[30] While this law, coming so close to the struggles for independence, may not have influenced the practice of intestate in Hispanic America, it contributed to a rethinking of the position of the spouse in the line of succession.

European Ideas on Intestate in the First Half of the Nineteenth Century

The codification commissions appointed to develop new civil codes after independence in Hispanic America usually turned to the Napoleonic Code of 1804 in France and, later, the 1851 draft civil code for Spain as models of modern civil codes.[31] These jurists also studied Jeremy Bentham's work on the ideal civil

[24] Asunción Lavrin and Edith Couturier, "Dowries and Wills: A View of Women's Socio-economic Role in Colonial Guadalajara and Puebla, 1640–1790," *Hispanic American Historical Review* 59, no. 2 (1979): 280–304; Couturier, "Women and the Family"; Arrom, "Changes in Mexican Family Law."

[25] María Isabel Seone, *Historia de la dote en el derecho Argentino* (Buenos Aires: Instituto de Investigación de la Historia del Derecho, 1982); Christine Hünefeldt, *Liberalism in the Bedroom: Quarreling Spouses in Nineteenth Century Peru* (University Park: Pennsylvania State University Press, 2000); Eugenia Rodríguez Sáenz, "Las esposas y sus derechos de acceso a la propiedad en Costa Rica durante el siglo XIX," in *¿Ruptura de la inequidad? Propiedad y género en la América Latina del siglo XIX*, eds. Magdalena León and Eugenia Rodríguez (Bogota: Siglo del Hombre eds., 2005), 183–232.

[26] Seone, *Historia de la dote*.

[27] Arrom, "Changes in Mexican Family Law."

[28] Mirow, *Latin American Law*, 18, suggests that the *Novísima Recopilación* was rarely applied in the colonies. For example, it does not seem to have been applied in Chile; Andrés Bello, "Sucesión intestada," of 1833, in *Obras completas de Don Andrés Bello*, ed. Consejo de Instrucción Pública, vol. 9 (Santiago: Pedro G. Ramírez, 1885), 243–62.

[29] *Novísima Recopilación*, Book 10, Title XX, Law 3.

[30] Escriche, *Elements*, 110–11, interpreted this law in such a way for Spain.

[31] Most of the new republics made multiple attempts to develop their own civil codes, with codification commissions appointed and disbanded following the frequent changes in government; Guzmán Brito, *La codificación civil*.

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code based on utilitarian principles and John Stuart Mill's ideas on testamentary freedom and followed the debates over codification in Europe.[32]

In his general law of succession, Bentham reasoned that inheritance rules must accomplish three objectives: provide for the subsistence of future generations; prevent the pain of disappointment (by lowering the standard of living of those who depended upon the deceased); and promote the equalization of fortunes.[33] He proposed that the main principle guiding the order of intestate succession should be the presumed degree of affection, and that such could be inferred from the proximity of the kinship relationship to the deceased. Invoking the principle of utility, Bentham prioritized the objective of providing for the needs of future generations. He thus proposed that, without distinction by age or sex, the 1st order of intestate include only the descending line; the 2nd order, the parents; and the 3rd order, siblings and their descendants, after which the estate would pass to the state. He excluded spouses from the order of intestate succession altogether, since in the community property marital regime that he also championed, the surviving spouse received half, with the deceased's half to be distributed among the heirs.

John Stuart Mill's main contribution to succession law was the defense of testamentary freedom, which became the emblematic liberal principle.[34] He viewed the right to bequeath one's assets to whomever one chose as intrinsic to the right to private property. On intestate, he concurred with Bentham that the law must presume what the average deceased person would have wanted, given affection and obligations. Mill favored ending the line of succession at the 2nd order, excluding all collaterals.[35] Like Bentham, he was not concerned with the inheritance rights of spouses, also assuming that they were taken care of through the community property marital regime.

The appeal of the two European codes that had the most influence on nineteenth-century codifiers, the French code of 1804 and Florencio García Goyena's 1851 draft civil code for Spain, was that they stated legal rules succinctly and systematically and, given their common roots in Roman law, shared many features with the Hispanic colonial legal tradition.[36] With respect to intestate succession, however, the position of the surviving spouse in the Napoleonic code was even more unfavorable than the Hispanic colonial

[32] On legal education, the use of Bentham in law school curriculums after independence and the controversies over his work, see Mirow, *Latin American Law*, 116–17, and Victor M. Uribe-Urán, *Honorable Lives. Lawyers, Family, and Politics in Colombia, 1780–1850* (Pittsburgh: University of Pittsburgh Press, 2000), 108–12.

[33] Jeremy Bentham, "Principles of the Civil Code" in *Theory of Legislation*, of 1802, translated from the French edition of Etienne Dumont by Richard Hildreth, vol. 2 (London: Kegan Paul, Trench, Trubner & Co., 1908), 177–79.

[34] John Stuart Mill, *Principles of Political Economywith Some of Their Applications to Social Philosophy*, of 1848, ed. W. J. (William James) Ashley (London: Longmans, Green and Co., 1909), 221–29.

[35] Mill, ibid., 223, attributed this position to Bentham which suggests that the latter may have proposed making the line of succession even more restrictive in his later writings.

[36] See Guzmán Brito, *La codificación civil*; Mirow, *Latin American Law*, 133–41; and Rogelio Pérez-Perdomo, *Latin American Lawyers. A Historical Introduction* (Stanford, CA: Stanford University Press, 2006), 61–64.

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norm. Spouses inherited the deceased's estate only in the absence of legitimate descendants, ascendants, and collateral relatives to the 12th degree and if there were no recognized natural children.[37] Thus, for those looking to improve the intestate position of spouses, the Napoleonic code did not serve as a model.

Spanish Supreme Court judge Florencio García Goyena, the chair of its civil code commission, was the principal author of its 1851 draft code and the subsequent glossed edition, *Concordancias, motivos y comentarios del Código Civil Español*, which circulated widely in Latin America.[38] With respect to intestate succession, García Goyena's influence may not have been so much in terms of the specific rules proposed for Spain, but rather, because his treatise considered alternative treatments of the position of the surviving spouse. He showed the broad variation which existed in the inheritance rights of widows in different regions of Spain[39] as well as in other countries, which encouraged Hispanic American codifiers to improve their position with respect to the restrictive norms inherited from Castille.

García Goyena's intestate proposal reflected modern assumptions about marriage and the position of spouses—that most marriages were based on love and affection and that a person who died intestate would have wanted to care for their spouse before distant kin. In his words: "The legislator should and must assume compassionately in favor of the widow or the widower, that they lived and loved each other as good spouses, and that the deceased would have provided for the surviving spouse had they left a testament."[40]

According to García Goyena, when the drafting commission began its work in 1841, there was already consensus on three principles related to the position of spouses: widows and widowers should be treated equally; they should not have to prove poverty to inherit; and their position should be improved over that in Castilian law. The commission considered it "shameful" that under the *Siete Partidas* a widow must prove poverty before a judge to inherit; moreover, for this reason, the cuarta viudal was not utilized frequently.[41] Further, as the commission's work evolved, it concluded that,

[37] Barrister of the Inner Temple, *Code Napoleon or the French Civil Code*, of 1804 (Washington, DC: Beard Books, 1999), arts. 745–68. France did not improve the position of spouses until 1891, when they were given a usufruct right to one-quarter of the deceased's estate. Nicolas Boring, "France," in *Inheritance Laws in the Nineteenth and Twentieth Centuries*, ed. Law Library (Washington, DC: Library of Congress, 2014), 1–5.

[38] Guzmán Brito, *La codificación civil*, 283–92; Luis Rodríguez Ennes, "Florencio García Goyena y la codificación iberoamericana," *Anuario de Historia del Derecho Español*, 87 (2006): 703–26.

[39] For example, under the twelfth century Fuero Juzgo, the widow was in a better position than under the inheritance law which later evolved in Castile, since she was entitled to a usufruct share equal to that of a child if she did not remarry. Moreover, she stood to inherit her husband's full estate in the absence of descendants, ascendants, or collaterals to the 7th degree. Under the fueros of Navarra and Aragón she received far superior treatment, being entitled to the usufruct of all her deceased husband's assets. García Goyena considered it an error, nonetheless, to separate the usufruct and property of assets since it restricted the circulation of property. He was also concerned about children having to wait until a widow's death for them to inherit since this delayed their being able to establish themselves; García Goyena, *Concordancias*, 359–61.

[40] Ibid., 189.

[41] Ibid., 360.

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> It was politic and humane to interpret the intention of the deceased in favor of the partner in that lifetime bond which cannot be dissolved. This presumption is politic since it enhances the honor and sanctity of marriage. It is humane because it prevents the widower or widow from abruptly passing from a state of well-being to misery. It is also rational, because it would be hard to imagine that the deceased would have wanted their assets to pass to other hands, leaving the person in indigency with whom they had formed one flesh and shared joys and comforts.[42]

The innovation in the 1851 draft code was thus to include surviving spouses in the 1st order of intestate, giving them a share irrespective of whether they were poor or wealthy, and for the spouse to hold full property rights over this share. The shares assigned to the spouse, nonetheless, reflected a compromise on the commission. If there were legitimate children from the marriage, the spouse automatically received one-fifth of the estate. In the absence of descendants, the estate was divided between the deceased's ascendants and the spouse, with the latter's share being one-fourth. In the absence of both these categories, the estate fell to natural children, collateral relatives to the 10th degree, and/or the surviving spouse, with the latter in all cases receiving a one-third share. These inheritance rights depended on the surviving spouse not being the guilty party to a permanent separation (divorce).[43]

García Goyena had wanted to be even more generous to the surviving spouse, reasoning that the spouse's share would eventually pass to the children. He had proposed assigning them one-third of the estate if they inherited along with ascendants or one-half of the estate if shared only with siblings and lobbied for spouses to be given preference over recognized natural children.[44] He did not mention why he lost these debates but rather stressed how the compromise reached was more generous to spouses than the codes of other countries.[45] By giving spouses an unconditional share in the 1st order, alongside the children, the draft code ensured that under the most common scenario widows and widowers inherited from the deceased's estate.

García Goyena's draft code was never adopted in Spain; among the reasons, was that it was considered too liberal, since it included civil marriage which was strongly opposed by the Catholic church.[46] Although almost two-thirds of its articles were incorporated into the 1888 Spanish code, the version adopted was much less generous to spouses than García Goyena's intestate proposal.[47]

[42] Ibid.
[43] Ibid., 188–90.
[44] Ibid., 374.
[45] Ibid., 372–73.
[46] Ennes, "Florencio García Goyena."
[47] In the 1888 Spanish code, in intestate the surviving spouse only inherited if there were no legitimate or natural children or ascendants, and they shared the estate with the deceased's siblings, being entitled to one-half, but only in usufruct; in the absence of siblings, the spouse received the property rights to the full estate. Spain, *Código Civil* (Madrid: Imprenta del Ministerio de Gracia y Justicia, 1889), arts. 946–53.

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The historic role of this draft code, as I will show, was in its indirect influence on improving the intestate position of spouses in much of Hispanic America.

Intestate Succession in the Republican Civil Codes

The chronology of when the sixteen newly independent countries of Hispanic America enacted their first civil code and/or specialized legislation governing succession is presented in the Appendix, which allows comparison along four dimensions: whether the spouse was included in the 1st order of intestate, along with the legitimate children; if so, if there were conditions attached; the order in which the spouse stood to inherit the full estate; and how far down the line of succession extended among collateral relatives before the estate passed to the state. Each column of the table provides different information about the position of spouses relative to the conjugal and extended family: the second and third columns, on whether love and affection for the spouse was considered equal to that for children; the fourth, on loyalties to the conjugal versus extended family; and the fifth, on the range of those perceived loyalties to kin.

The spouse versus the extended family

Consider first the position of the spouse relative to extended kin (Appendix Table, columns 4 and 5). Every country except for the Dominican Republic improved the position of surviving spouses over the colonial norm as to when they could inherit the deceased's full estate. In 1845 the Dominican Republic adopted the Napoleonic code as its own, including its unfavorable rules for spouses in intestate succession.[48]

The very first code promulgated after independence, the Santa Cruz code of 1830 in Bolivia, was modeled on the Napoleonic code, but it departed from it on the rules of intestate: the spouse inherited the deceased's full estate in the absence of legitimate or natural descendants and ascendants or collaterals to the 4th degree.[49] By reducing the range of collateral relatives who could inherit from the 10th to the 4th degree, the Santa Cruz code may have taken the *Novíssima Recopilación* of 1805 as precedent. What was novel in the Bolivian code was its explicit provision, in the absence of heirs to the 4th degree, for spouses to inherit each other's full estate prior to the state—recall that the *Novíssima Recopilación* made no mention of the surviving spouse—and its timing. This improvement took place before the Spanish Cortés in 1835 adopted a similar provision for spouses.[50]

[48] The Dominican Republic had been part of the French colony of Haiti which after its independence had adopted the Napoleonic Code of 1804. Upon its separation from Haiti, the Dominican Republic adopted the revised French civil code of 1816, in French. See Guzmán Brito, *La codificación civil*, 189–97.

[49] See the sources in the Appendix for the reference to the relevant articles on intestate in the codes and other legislation analyzed herein.

[50] "Ley sobre adquisiciones a nombre del Estado," *Gaceta de Madrid*, No. 142, May 22, 1835, 565–66; García Goyena, *Concordancias*, 187, 195.

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Dissatisfaction with the colonial legacy on the position of the spouse in intestate is further shown by Uruguay's 1837 Law on Succession and in Vidaurre's 1836 draft civil code for Peru. Uruguay's law placed the surviving spouse *ahead* of all collateral relatives, including siblings.[51] Similarly, in Peru, Supreme Court justice Vidaurre proposed that in the absence of legitimate children or ascendants, the surviving spouse inherit prior to any collaterals.[52] Nonetheless, he gave spouses only usufruct rights over this inheritance, so that upon their death, these assets passed to the collateral heirs, beginning with the deceased's siblings or their issue. Discussion of Vidaurre's draft code was cut short by the Bolivian invasion of Peru in 1836, and the brief adoption by Northern and Southern Peru of the Santa Cruz code. In its final 1851 civil code, Peru ended up following the Bolivian precedent of ceding the surviving spouse the full estate in the absence of collaterals to the 4th degree.

Costa Rica in 1841 adopted as its first civil code the 1836 Northern Peruvian code almost entirely.[53] The only notable departure with respect to spouses was that rather than inheriting the full estate in the absence of collaterals to the 4th degree, as in the Santa Cruz code,[54] in Costa Rica the spouse was only entitled to one-third, with two-thirds going to the state, presumably, due to fiscal concerns. No other code in the region was to be as stingy to the surviving spouse, making them share the deceased's estate with the state.

The innovative legislation adopted to this point positioned the spouse either ahead of all collateral relatives (including siblings) or after collateral relatives to the 4th degree (aunts, uncles, and cousins). Andrés Bello, the Venezuelan-born author of Chile's 1855 code, drew the line after siblings on when spouses stood to inherit the full estate. All the countries whose first codes were adaptations of the Chilean code adopted this same provision[55]: El Salvador in 1859, Ecuador in 1860, Nicaragua in 1867, Uruguay in 1868,[56] Colombia in 1873, and Honduras in 1880 (marked BELLO in the table).[57] Mexico's 1857

[51] "Ley sobre sucesión hereditaria de 16 junio de 1837," in *Legislación vigente de la República de Uruguay*, 1494.

[52] Vidaurre, *Proyecto del Código Civil*, 145.

[53] Guzmán Brito, *La codificación civil*, 205–11.

[54] Estado Nor-Peruano, *Código Civil Santa-Cruz del Estado Nor-Peruano* (Lima: Imprenta de José Masías, 1836), arts. 169–635.

[55] See Guzmán Brito, *La codificación civil*, on the circumstances that led each of these countries to take Bello's code as its model, facilitated by the Chilean Foreign Ministry having distributed copies through its embassies. In Ecuador, for example, after many failed attempts, the legislature in 1855 charged the Supreme Court with drafting the civil code. They had already completed over 800 articles when they decided that the Bello code, which they had just accessed, was far superior in structure and content to their own effort and recommended that Ecuador adopt it with minor modifications (ibid., 251). In his tome, Guzmán Brito does not discuss the provisions on succession norms. That the listed codes copied the Chilean code with respect to intestate is based on my analysis of the respective articles listed in the references in the Appendix.

[56] Note that Uruguay's 1868 code reversed its earlier legislation which had treated spouses more favorably in the line of succession than Bello's code, suggesting that there was not yet total consensus on these issues.

[57] Several of these codes differed from Bello's code on other aspects, for example, in the absence of a spouse, on how far down the line of succession extended before the estate passed to the state,

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Law of Succession, which was part of the package of liberal reforms known as *La Reforma*, along with its 1870 code, also placed the surviving spouse after siblings in the line of succession, as did Venezuela's 1862 code.

Venezuela's 1867 and Argentina's 1869 civil codes swung the balance in a more favorable direction than the Bello code, since spouses were placed ahead of siblings in the line of succession, inheriting the full estate in the absence of descendants or ascendants. This precedent was followed by Paraguay in 1876, which adopted the Argentine code as its own; Guatemala in its 1877 code (and in its 1882 reform); the Costa Rican Law of Succession of 1881 (and in its 1887 civil code); Bolivia in its 1882 reform law; and by El Salvador in its reformed 1902 code.

The elevation of the position of the surviving spouse in intestate in the reforms of Guatemala, Costa Rica, and El Salvador all took place during their late-nineteenth-century liberal revolutions, the period when they also instituted testamentary freedom, the ultimate liberal principle.[58] Nonetheless, not all the countries adopting testamentary freedom at this time changed their intestate provisions. Honduras, Mexico, and Nicaragua, in their respective reforms of 1880, 1884, and 1903 which instituted testamentary freedom, maintained siblings ahead of spouses in the order of intestate succession, attesting to the weight of tradition and the non-linear pattern of these reforms.

The spouse versus children

Since most couples have children, what matters most in practice is whether the surviving spouse is included in the 1st order of intestate succession, alongside the descendants (Appendix Table, columns 2 and 3). Two patterns emerged over the nineteenth century: countries which followed or improved upon the colonial tradition whereby the possibility of spouses inheriting depended upon their relative poverty or need; and those that gave spouses an unconditional right to inherit along with descendants. In the former group are the first codes of Bolivia, Costa Rica, and Peru; the Bello code of Chile and countries which adapted it; and the Mexican legislation of 1857 and 1870. In the latter group, are all except one of Venezuela's nineteenth-century codes along with Argentina's 1869 civil code and those adopted by some of the later reformers.

The 1830 Santa Cruz and 1841 Costa Rican codes maintained the cuarta viudal, the provision of the *Siete Partidas* for poor widows. For example, the Santa Cruz code established that "if she did not have her own assets, and her husband did not leave her with the means to live well and honestly, she will inherit one-fourth of his inheritance, even when in intestate he has left legitimate descendants."[59] The Peruvian civil code of 1851 innovated by treating poor widows

with this ranging from Chile's 6th degree to the colonial tenth in Ecuador and Uruguay (Appendix Table, column 5).

[58] See Deere and León, "Liberalism," 661–73, on the package of reforms of family law undertaken by Mexico and the Central American countries in this period.

[59] Zamorano, *Código civil boliviano*, art. 620. Guzmán Brito, "La pervivencia," 74–75, errs in his interpretation of the cuarta marital—that it disappeared—in the original 1830 Bolivian code (as do Deere and León, "Liberalism," 658) likely by using an edition of the civil code published after

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and widowers similarly, although not equally. Additional conditions, besides poverty, were required for widowers to receive what was termed the *cuarta conyugal*: "...in addition to lacking what is necessary to live, he must be an invalid or habitually sick, or over 60 years of age."[60] If there were legitimate children, several additional criteria determined whether the spouse received the maximum share of one-quarter of the estate: the amount could not be greater than what each child received, and the spouse's share was capped at 8000 pesos. Moreover, if there were gananciales from the marriage, this sum was deducted so that spouse received only the difference between this amount and the 8000 pesos or each child's share.[61]

The Peruvian code was also the first Republican code that, in the absence of legitimate children, included the surviving spouse in the 2nd order of succession, along with the ascendants. In this position, there were no restrictions; the spouse no longer had to plead relative poverty and, moreover, received a one-quarter share of the estate irrespective of whether there were gananciales from the marriage. Further, they received this share even if they could support themselves through their labor or later acquired assets, but they lost this right if they engaged in scandalous behavior.

In the 1855 Chilean code, Bello explicitly expanded the Hispanic colonial norm of gender equality in inheritance beyond descendants, with neither sex nor primogeniture to be considered in any order of intestate succession.[62] It thus differed from Peru's 1851 code by treating widows and widowers equally in all orders of succession. Moreover, rather than requiring the spouse to plead poverty, Bello's *porción conyugal* was conditioned on their relative need, defined as "what is necessary for their appropriate support."[63] In the 1st order, if surviving spouses had no assets of their own, they received a share equal to that of one child. But if they owned assets or were due gananciales, these values were deducted from that share. Since *any* assets belonging to the surviving spouse (such as a dowry or other assets acquired prior to marriage or through inheritance) were deducted, it was more restrictive than the Peruvian code which was only concerned with the gananciales. The spouse, nonetheless, had the

1882. In 1882 Bolivia adopted Argentina's 1869 intestate rules; in the civil code commentaries published after that date, art. 513 stipulates the content that he cites (that spouses inherit a share equal to a child). Previously, as Rafael Canedo, *Código civil boliviano, comentado, concordado y anotado*, 2nd ed. (Cochabamba: Imp. y Lit. El Comercio, 1898), 242, confirms, the 1830 code maintained the cuarta marital in its art. 620. Guzmán Brito does not mention which edition he used.

[60] Manuel Afanacio Fuentes and Miguel Antonio de la Lama, *Código Civil de 1852*, arts. 918, 926.

[61] Guatemala's 1877 code adopted Peru's formulation of the cuarta conyugal, however, it was more generous since it did not cap the amount that the spouse could receive, nor did it require that gananciales be deducted from the spouse's share.

[62] Chile, *Código civil*, art. 982. This was also a principle of the French civil code and one recommended by Bentham, with whose works Bello was familiar, having worked on his papers during his time in London; Schwartz, "La correspondencia."

[63] Chile, *Código civil*, art. 1172. Bello developed this concept in his first draft of 1841 and maintained it in subsequent drafts, up through approval of the 1855 code. Andrés Bello, "De la sucesión por causa de muerte," of 1841–1842, in *Obras Completas*, ed. Consejo de Instrucción Pública, vol. 11a (Santiago: Pedro G. Ramírez, 1887), 96–99.

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option of renouncing their share of the gananciales if this proved to be in their interest.[64]

The Chilean code, as the Peruvian, included the spouse in the 2nd order of succession; in the absence of legitimate children, the inheritance was divided in five shares, with three-fifths going to the ascendants and one-fifth each to the natural children and the spouse. The rules were ambiguous regarding whether in the 2nd order, the spouse received one-fifth of the estate irrespective of need, or if need could be proved, up to one-quarter of the estate as the porción conyugal, but this is what is implied. Also, any spousal inheritance depended on the spouse not being the guilty party to a permanent separation. The initial codes of El Salvador, Ecuador, Nicaragua, Uruguay, Colombia, and Honduras (Appendix Table) replicated Bello's definition of the porción conyugal and its rules word for word.

The treatment of the spouse in the 1st order of intestate in Mexico's 1857 Law of Succession was similar to that in Bello's code: spouses received a share equal to that of a child if they did not own any assets, or up to this amount if they did not have sufficient assets to live "appropriate to their status."[65] It was not just poverty that was considered, but the standard of living to which the spouse was accustomed. It was also similar in that if the spouse brought a dowry to marriage, received any donation from the deceased or gananciales from the dissolution of the conjugal society, the spouse was entitled only to the difference between the value of these assets and a child's share; these could be renounced, however, if it were to their benefit. This conditionality was maintained in the other orders of succession, whether the spouse inherited alongside natural children, ascendants, and/or siblings; hence, in this aspect it was less generous than Bello's code.

The 1870 Mexican civil code is often called "the Sierra code" after Justo Sierra, the primary author of its first draft. However, the commission that finalized this code after his death rejected his recommendation on intestate succession. Sierra had followed García Goyena's draft code for Spain, giving spouses an unconditional inheritance share alongside children and including the identical spousal inheritances shares in the various orders of succession.[66] The final 1870 code reverted to the rules of Mexico's 1857 law, maintaining its same conditionality if the spouse inherited alongside descendants or ascendants, but it improved on it if the spouse inherited alongside siblings, dropping the conditionality so that the spouse's share only depended on their number.

Turning to the codes that most significantly improved the position of spouses, Venezuela's 1862 civil code, authored by legal scholar Julián Viso, was the first code to be promulgated which gave the surviving spouse an unconditional share in the 1st order of succession (Appendix Table). The

[64] It would be in the interest of the spouse to renounce their share of the gananciales if the deceased's individual property considerably exceeded that half, or if the estate were heavily indebted.

[65] Law No. 4917 of May 1857, in *Legislación mexicana*, art. 61.

[66] Justo Sierra, *Proyecto de Código Civil Mexicano* (Mexico: Imp. de Vicente Torres, 1861), arts. 784–801; see art. 797 on the spousal inheritance shares.

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legitimate children and the spouse divided the full estate by head. In the absence of descendants, half the estate went to the ascendants, while the recognized natural children and the spouse each received one-quarter; if there were no natural children, the ascendants received three-quarters and the spouse, one-quarter. This code was short-lived, being abrogated that same year, but its spousal intestate rules, while not followed in the 1867 civil code (whose rules resembled Bello's), reappeared in the country's 1873, 1880, and 1896 codes. Also, this code's precedent of giving spouses an unconditional share of the deceased's full estate (including both individual property and share of gananciales), was later followed in the liberal reforms in Honduras and El Salvador.

Dalmacio Vélez Sársfield, author of Argentina's 1869 code, also included surviving spouses in the 1st order of intestate with a share equal to that of a legitimate child, but only of the *individual* patrimony of the deceased, not of the full estate. In this way, he side-stepped the issue of needing to make deductions for the gananciales. In the 2nd order, the spouse and recognized natural children were each entitled to one-quarter of the deceased's individual patrimony, while one-half went to the ascendants; in the absence of natural children, the spouse and ascendants divided the individual patrimony by head. While only legitimate or natural children or ascendants inherited the gananciales, in their absence, the spouse inherited the full estate, including the gananciales.[67] The only restriction was that they could not be the guilty party in a permanent separation or a party to a death-bed marriage. The influence of Vélez's intestate rules outside of Argentina is evident in Paraguay, which adopted this code *en toto* in 1876,[68] and in Bolivia's reform of succession law in 1882.[69] In both countries thereafter the surviving spouse automatically inherited a share of the deceased's individual property equal to that of a legitimate child.

In sum, except for the Dominican Republic, all the nineteenth-century civil codes improved the position of spouses in the order of intestate succession compared to the colonial norm demonstrating a preference for the spouse over the extended blood lineage. By the turn of the century, most either ceded the full estate to the spouse either in the absence of descendants and ascendants, or after siblings and their issue, Peru and the Dominican Republic being the two exceptions. Those countries that gave preference to the spouse over siblings—Argentina, Paraguay, Guatemala, Bolivia, Costa Rica, and El Salvador—provide the strongest evidence that social sensibilities had changed sufficiently to assume that a married person's primary loyalty and

[67] This point had not been clear in Vélez's original 1869 draft nor in the official civil code published in 1874, *Código civil*, Book 4, Title IX, arts. 6–8, 12. For internal consistency, the congressional committee appointed to clean up errors for the 1883 official edition added that it was only if spouses concurred with descendants or ascendants that they did not inherit from the deceased's gananciales; Lisandro Segovia, *El código civil argentino anotado* (Buenos Aires: F. Lajoune, 1894), 655.

[68] According to Helen I. Clagett, *A Guide to the Law and Legal Literature of Paraguay* (Washington, DC: Library of Congress, 1947), 7–8, a copy of the Argentine code was not even published in Paraguay in this period. Later, a July 1889 decree declared the fourth edition of the Argentine code to be the official Paraguayan version.

[69] "Filiación y reconocimiento de hijos naturales, Ley de 27 de diciembre de 1882," in Salinas Mariacas, *Códigos Bolivianos*, 460–63; and Canedo, *Código civil boliviano*, 241.

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responsibility was to the conjugal unit rather than to the extended family. The most favorable treatment of spouses, nonetheless, was in those countries where in the 1st order they had an unconditional right to a share of the full estate—in Venezuela, Honduras, and El Salvador—or of the deceased's individual property—in Argentina, Paraguay, and Bolivia. The most unfavorable treatment was in Peru, Chile, Mexico, and the other countries that replicated Bello's porción conyugal.

How and Why Argentina and Venezuela Went Further

Historians concur that colonial Argentina and Venezuela shared several features that led to their greater receptivity to new ideas regarding liberty and individual freedom than other parts of the Spanish empire and which explain why the struggle for independence began in these two poles as well as these republics' adherence to the principles of liberalism.[70] Both were late bloomers under colonial rule, without a sizable wealthy elite vested in the structures of colonial rule. They only achieved a greater degree of local autonomy and more open ports to trade under the Bourbon reforms of the 1770s when Buenos Aires and Caracas grew rapidly, partly through immigration. The wars of independence lasted longer and caused more devastation in Venezuela than Argentina. Although both republics then experienced recurrent civil wars, often over the balance between centralism and federalism, their elites tended to be unified around their commitment to most of the principles of liberalism. Moreover, by the time each country developed their national civil codes, freer trade and of the circulation of ideas had brought about considerable change in social conventions regarding marriage and the family, including on the position of women. Notably, ideas on improving the position of spouses in intestate were discussed in both countries even before the circulation of García Goyena's tome. Next, I trace the trajectory of ideas on intestate that informed their respective codes and compare their solutions.

Argentina

The dissemination of the ideas of Jeremy Bentham prompted the initial discussions around the need to change the rules of intestate succession in Argentina. By the time that Vélez began drafting his civil code, there was consensus on the need to favor the spouse over all collateral relatives. Surely inspired by his study of García Goyena's tome, he took the next step, giving spouses an unconditional share of the deceased's individual patrimony in the 1st order of succession.

In 1824, Argentine jurist Pedro Somellera, an early advocate of Bentham's civil code principles, published his lectures on Bentham's work.[71] Somellera

[70] Bushnell and Macaulay, *The Emergence*; John Lynch, *The Spanish American Revolutions 1808–1826*, 2nd ed. (NY: W. W. Norton, 1986); Victor Tau Anzoátegui, *La codificación en la Argentina (1810–1870). Mentalidad social e ideas jurídicas* (Buenos Aires: Imprenta de la Universidad, 1977); Zahler, *Ambitious Rebels*, 28–29.

[71] Tau Anzoátegui, *Esquema histórico*, 105–10.

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considered that Bentham's reasoning provided a theoretical justification for the Hispanic colonial legacy on intestate.[72] But he took issue with the position of widows in Bentham's proposal (as well as in colonial law), arguing that it did not conform to the presumption of greatest affection: "Who would presume that the deceased would love a relative more, in whatever degree and whom he might not even know, than the woman with whom he has lived? ...There is no aspect of marital life that does not lead one to assume that spouses have a mutual and greater affection towards each other than towards most relatives."[73]

Somellera also thought Bentham contradicted himself with respect to one of the objectives of his rules—to prevent the pain of disappointment. Given that spouses shared their assets during the union, excluding the widow from inheriting from her husband's estate "would make a mockery of her expectations."[74] He concluded that "both the widow and widower deserve a better place in the order of succession," although he did not propose a specific alternative at that time; he only recommended that the colonial cuarta viudal be applied to poor widowers as well.

Some of Somellera's students at the law faculty of the University of Buenos Aires then took up the issue, arguing in their doctoral theses that in intestate the wife should be preferred over other relatives.[75] Among them was an 1830 thesis written by José María Costa, who made the case for why widows should inherit their husbands' estate prior to siblings or other collaterals.[76] Somellera subsequently went into exile in Uruguay, and while teaching law in Montevideo, authored the 1837 Uruguayan Law of Succession.[77] Recall that this law elevated the position of the surviving spouse in the order of succession ahead of all collateral relatives, being the first piece of legislation to do so in Hispanic America.

Feminist scholar Blanca Zeberio carefully analyzes the themes of the doctoral theses in law at the University of Buenos Aires in this period and shows how their focus changed over time.[78] In the 1830s, a main topic of concern was the dowry, a practice that protected women from the vagaries of marriage, but which was already becoming less common in the context of an expanding commercial economy. The dowry, an advance on a daughter's inheritance, was considered an impediment to economic progress, particularly by the merchants and ranchers of Buenos Aires since it tied up much needed capital. By the 1840s the focus turned toward protecting women in inheritance, such as by giving preference to the wife over other relatives, as well as on the rights of children born outside of marriage.

[72] Pedro Somellera, *Principios de derecho civil dictados en la Universidad de Buenos Aires*, vol. 1 (Buenos Aires: Imprenta de los Expósitos, 1824), 145–60.

[73] Ibid., 154.

[74] Ibid.

[75] Abel Cháneton, *Historia de Vélez Sársfield*, vol. 2, 2nd ed. (Buenos Aires: Librería y Editorial La Facultad, 1938), 57.

[76] Tau Anzoátegui, *Esquema histórico*, 119.

[77] Cháneton, *Historia de Vélez*, 54; Enrique Udaondo, *Diccionario biográfico argentino* (Buenos Aires: Imprenta y Ed. Coni, 1938), 1018–19.

[78] Blanca Zeberio, "Un código para la nación: Familia, mujeres, derechos de propiedad y herencia en Argentina durante el siglo XIX," in *¿Ruptura de la inequidad?*, eds. Magdalena León and Eugenia Rodríguez (Bogota: Siglo del Hombre, 2005), 131–81.

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Historian María Selva Senor, who studies these same 1840 theses, also notes how they uniformly questioned why, if intestate was premised on the principle of greatest affection, wives should be excluded from inheriting from their husbands.[79] The 1849 thesis by Juan Francisco Seguí went furthest in this regard, proposing that in the line of succession, a wife take precedence over parents: "If the woman is the pillar of support of the other sex, and with her characteristic sweetness and kindness she increases her husband's happiness and neutralizes or mitigates his sorrows...what is more natural at his death, if he leaves assets, and in the absence of legitimate descendants, that these belong to his wife, before ascendants and with much more reason, before collateral relatives?"[80]

An author of one of these law theses, Federico Pinedo, went on to become a deputy in the legislature of the state of Buenos Aires, and in 1855 introduced the first bill to improve the position of spouses in intestate.[81] However, his bill only went as far as including the spouse in the 3rd order, whereby if there were no descendants or ascendants, they were entitled to one-half the estate, with the remainder going to the deceased's siblings. The senate improved the position of spouses still further by excluding siblings. The 1857 Buenos Aires law[82] thus provided for spouses to inherit the full estate if there were no legitimate descendants or ascendants, which was like Uruguay's 1837 law. In 1862, the provinces of Entre Rios and Santa Fe passed similar laws.[83]

According to legal historian Abel Cháneton, these provincial laws reflected local practice whereby in testaments husbands tended to prefer wives over other relatives with the one-fifth share of their estate which they were free to will to whomever they chose.[84] Moreover, he noted how in this period "wives were gaining in respect and consideration,"[85] an indication of the growing centrality of the conjugal unit. Ample scholarship on Argentina has documented how by mid-century a shift had occurred in the choice of a marriage partner from parents to children and of acceptance of the idea that marriage should be based on romantic love rather than material considerations.[86] These

[79] María Selva Senor, "La institución de herederos en la sucesión ab-intestato: Transformaciones en la concepción de familia y herencia. Buenos Aires durante la primera mitad del Siglo XIX." *Quinto Sol* 8 (2004): 73–87.

[80] Juan Francisco Seguí, "La sucesión ab-intestato excluyendo a la mujer legítima," 1849 thesis presented to the Faculty of Law, University of Buenos Aires, quoted in Selva Senor, "La institución de herederos," 80, note 18.

[81] Jorge O. Perrino, *Derecho de las Sucesiones*, vol. 2 (Buenos Aires: Abeledo Perrot, 2011), 1432. Pinedo's 1843 thesis is listed among those studied by Zeberio, "Un código para la nación," 180. Between 1852 and 1861, Buenos Aires was briefly a state when it seceded from the Argentine Confederation.

[82] Law 128, "Sucesiones intestadas entre cónyuges," Senate and Chamber of Representatives of the State of Buenos Aires, May 27, 1857, https://normas.gba.gob.ar/ar-b/ley/1857/128/14530 (accessed June 18, 2023).

[83] Cháneton, *Historia de Vélez*, 57–58.

[84] Ibid.

[85] Ibid., 57.

[86] Mark D. Szuchman, *Order, Family and Community in Buenos Aires, 1810–1860* (Stanford: Stanford University Press, 1988); Carlos A. Mayo, *Porqué la quiero tanto. Historia del amor en la sociedad rioplatense (1750–1860)* (Buenos Aires: Ed. Biblas, 2004); Jeffrey Shumway, *The Case of the Ugly Suitor and other*

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trends were nourished by the romantic movement,[87] and were accompanied by a rise in the perceived status of wives, where they were valued for their domesticity and maternalism, and heralded as the "queen" or "angel" of the home, as was becoming the norm in Victorian England and parts of Europe.[88]

Dalmacio Vélez Sársfield, who was commissioned in 1864 by president Bartolomé Mitre to draft Argentina's first national civil code, was familiar with the debates over intestate in the Buenos Aires legislature, since between 1856 and 1858 he had served as minister of government for that state.[89] While in his proposal, in the absence of descendants or ascendants, he granted the full estate to the surviving spouse, he did not mention the provincial-level legislation as precedent. In the notes accompanying his 1869 draft,[90] he referred to these laws only in passing, as justification for his adding a restriction prohibiting a spouse from inheriting if the couple had married while the deceased was sick and had died within thirty days of the marriage; these laws apparently had led to this type of abuse.[91] Vélez referenced the cuarta viudal of the *Siete Partidas* as the basis for including spouses in the 1st order, although he noted that "the observance of this law has always been very doubtful."[92] This cuarta viudal, of course, could not be more different from what he was proposing—granting spouses an automatic share of the deceased's individual property alongside children.

Vélez, who was the youngest son of a relatively poor widow and a widower himself, [93] never published a full explanation of the rationale behind his intestate rules. In his cover note transmitting his draft code to the president, he acknowledged his intellectual debt to García Goyena and Bello as well as to Brazilian jurist Augusto Teixeira de Freitas.[94] The closest that he came to an explanation was in his reply to a critic of his draft code who asserted that,

Histories of Love, Gender and Nation in Buenos Aires, 1776–1870 (Lincoln, NE: University of Nebraska Press, 2005).

[87] This is known as the "Generation of 1837," which mirrored trends in Europe. See Mayo, *Porqué la quiero*, 63.

[88] Shumway, *The Case of the Ugly Suitor*, 139; see Szuchman, *Order, Family*, 146, on how European social trends tended to be adopted earlier in Argentina than in other parts of Hispanic America due to its greater commercial and cultural contacts.

[89] Cháneton, *Historia de Vélez*, vol. 1, 285–87, 387–88. Besides being a professor of civil law, Vélez established his credentials as a codifier by being the co-author of the 1859 commercial code for the state of Buenos Aires. He later served as senator and, when asked to draft the civil code, was serving as president Mitre's minister of finance.

[90] As he completed each of the code's four books, these were published in draft form between 1865 and 1869. Since his draft book 4 on succession law was the last to be published and the complete draft was then immediately presented to and approved by the congress, the official 1874 version and his 1869 draft on intestate are identical; Tau Anzoátegui, *La codificación*.

[91] Ibid., 1078.

[92] Sársfield, *Proyecto de Código Civil*.

[93] His father had been a widower with ten children when he married his mother, with whom he had an additional six children; he died shortly after Vélez's birth. Cháneton, *Historia de Vélez*, vol. 1, ch. 1.

[94] Argentina, *Código civil*, i–ii.

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among other points, he drew too much on the work of Freitas.[95] In this essay, Vélez emphasized how his code was much more favorable to women than other codes, and, specifically, how "in the conjugal society we have departed absolutely from Brazilian legislation or the civil code draft of Sr. Freitas and from all existing codes."[96]

He offered his treatment of the dowry as an example. Vélez considered the inalienability of the dowry under colonial law to be a constraint on economic growth. While in his code it lost its special privileges, being treated just like any other donation,[97] he stressed how in his formulation the dowry was considered a woman's own property which she could alienate, albeit, with her husband's permission. Vélez also highlighted how he had improved the position of widows and widowers in intestate: "We give the right of succession to husband and wife in the absence of ascendants or descendants, and even in their presence, we give each a legitimate part of the inheritance." In taking this step, he surely was inspired by García Goyena's proposal on intestate; legal scholars consider 300 articles in Vélez's code to be drawn from García Goyena's tome.[98]

Of the published comments on Vélez's draft code by contemporaries, José Francisco López was the main legal scholar to address his volume on succession.[99] He praised Vélez for "interpreting well the laws of equity and the affections of the heart," and considered his innovations to be in the interest of the family.[100] Nonetheless, later several of the jurists who wrote treatises on Argentina's 1869 code took issue with Vélez's order of intestate succession. Baltomero Llerena and José Olegario Machado both questioned why he had excluded the parents of the deceased from the 1st order.[101] They disagreed with each other on whether individuals loved children and parents equally, the basis for Llerena's critique of Vélez. For Machado, the ordering of intestate should be based on a person's obligations and social utility, rather than love and affection. He took issue with Vélez's intestate rules for being too favorable to spouses: "Argentine legislators have not been just when they have been so solicitous to the spouse, forgetting the ascendants."[102]

Neither Vélez nor his contemporaries explicitly referred to the improvement in the intestate position of spouses in the 1869 code as a form of

[95] Dalmacio Vélez Sarsfield, "El folleto del Dr. Alberti," *El Nacional* (July 1868), reproduced in *Juicios críticos sobre el proyecto de código civil argentino*, ed. Jorge Cabral Texo (Buenos Aires: Jesús Menéndez, eds., 1920), 231–56.

[96] Vélez, in Texo, *Juicios críticos*, 251.

[97] His treatment of dowry was quite like that of Andrés Bello and Julián Viso; in all three codes, parents of means were no longer required to endow daughters, as in colonial law, and the dowry lost its special treatment with respect to creditors.

[98] Cháneton, *Historia de Vélez*, vol. 2, 188.

[99] See the essays reproduced in Texo, *Juicios críticos*.

[100] José Francisco López, "El proyecto de código del Doctor Vélez Sarsfield," *La Tribuna* (November 1869), reprinted in Texo, *Juicios críticos*, 60. His main critique of Vélez's code was for not having adopted civil marriage.

[101] Baltomero Llerena, *Concordancias y comentarios del Código Civil Argentino*, vol. 6 (Buenos Aires: Imp. y Lib. de Mayo, 1889), 386; José Olegario Machado, *Exposición y comentario del Código Civil Argentino*, vol. 9 (Buenos Aires: Ed. Científica y Literaria Argentina, 1922), 300–15.

[102] Ibid., 301.

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compensation to women for the loss of the special privileges and practice of the dowry. This insight has been a contribution of more recent scholarship.[103] Other scholars have attributed this improvement to the mid-nineteenth-century expansion of the export-oriented economy and/or immigration which resulted in household wealth being more likely to result from the collective effort of husbands and wives, rather than from the inheritance of landed estates.[104] Undoubtedly, these factors contributed to the rise of the centrality of the conjugal unit and the shift in loyalties from the extended to the nuclear family that shaped the context in which Vélez was writing.

Venezuela

In Venezuela, there is little evidence that a change in succession law was on the mind of legal scholars or legislators prior to the 1850s although views of marriage and the family had begun to change. The depopulation caused by the wars of independence may have motivated an 1826 law, during the period of Gran Colombia, to encourage marriage.[105] It lowered the age at which a person could marry without parental consent (from 25 to 21 for men, and 23 to 18 for women),[106] in effect, strengthening individual over parental rights in the choice of a spouse. Social historians Arlene Díaz and Reuben Zahler also show how, beginning in the 1830s, the language and concepts of liberalism began to change views of marriage.[107] In court cases on divorce and alimony, women began to stress its contractual aspects, such as equality before the law and the mutual obligations it implied, rather than its religious dimension.

Historian Mirla Alcibíades provides a compelling analysis of the rise of centrality of the conjugal unit in the 1850–1870 period and how it was accompanied by the elevation of the status of the wife to the position of "guardian angel" of the home.[108] Among the factors she associates with this trend was the rising literacy of elite women and the growing popularity of the

[103] Seone, *Historia de la dote*, 46–47; Zeberio, "Un código para la nación."

[104] Guillermo A. Borda, *Manual de Sucesiones* (Buenos Aires: Ed. Perrot, 1959), 309–10, emphasizes how the exclusion of the surviving spouse from inheriting was a feudal concept, related to landed estates being passed down through the blood line, which was of little relevance in mid-nineteenth-century Argentina. Perrino, *Derecho de las Sucesiones*, 1435, emphasizes the role of immigration; Schmidt, "Intestate Succession," 142.

[105] On its population decline, see Victor Bulmer-Thomas, *The Economic History of Latin America since Independence* (Cambridge: Cambridge University Press), Table 1. According to Zahler, *Ambitious Rebels*, 40, the long war of independence caused more devastation in Venezuela than elsewhere.

[106] Arlene J. Díaz, *Female Citizens, Patriarchs, and the Law in Venezuela, 1786-1904* (Lincoln, NE: University of Nebraska Press, 2004), 134. This same law, nonetheless, established that if under this age, children could not sue parents for the right to marry whom they chose, a not uncommon occurrence in the late colonial period.

[107] Ibid., 150–70; Zahler, *Ambitious Rebels*, 177–85. Zahler considers that the incorporation of such liberal precepts in women's litigation took place earlier in Venezuela than in other parts of the continent.

[108] Mirla Alcibíades, *La heroica aventura de construir una república. Familia-nación en el ochocientos venezolano (1830–1865)* (Caracas: Monte Ávila Eds., 2004).

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romantic-sentimental novel as well as of manuals on good domestic management; initially these were imported from Europe or the United States but were produced in Venezuela from the 1840s on. Recurrent economic crises also contributed to social recognition of how a wife's good domestic management was linked to capital accumulation, just as elevation of her maternal role was crucial to recovery from the depopulation caused by the recurring civil wars. Moreover, by the 1870s there were concerns that efforts toward nation-building had failed. If a lasting peace and modernity were to be achieved, the nation needed to be built upon a new morality, centered on domestic tranquility and feminine sensibilities in the socialization of children. Thus, consolidation of the nation, in Alcibíades's analysis, came to fall on the primacy of conjugal unit and separate spheres in which women were the guardian angels of the home, or what Zahler terms "Republican motherhood."[109] In a pattern not unlike that of Victorian England or Europe, the construction of wives as "angels" or "queens" of the home and the emphasis on the conjugal unit were accompanied by the normalization of the view that an individual's affection for and obligation to a spouse were at least equal to that for their children.

When Julián Viso produced his first draft of a civil code in 1854, his idea to elevate the position of the spouse in intestate may have been ahead of his time, but his most novel idea, to give the spouse an unconditional share in the 1st order, which appeared in his approved 1862 code, was maintained in most of the country's subsequent codes. Shortly after completing his doctorate in law, Viso was appointed in 1853, during the presidency of José Gregorio Monagas, to draft all of Venezuela's codes.[110] He delivered his draft civil code the next year, and in his cover letter, he explained the sources upon which he drew.[111] While he principally followed the French civil code and French commentators, he also mentioned Vidaurre's draft code for Peru, but not García Goyena or Bello's drafts to which he likely had not yet had access.[112]

In his 1854 draft on intestate succession, Viso did not propose including the surviving spouse in the 1st order if the deceased left legitimate children. However, if the deceased left only recognized natural children, these substituted for the legitimate children and in this case the spouse inherited a share equal to a child, irrespective of poverty or need.[113] Placing natural

[109] Zahler, *Ambitious Rebels*, 166–67, 176, and Díaz, *Female Citizens*, 189, converge with Alcibíades on this point. Also see Luis Rincón Rubio, *Mujer y honor en Maracaibo a fines del siglo XIX (1880–1900)* (Mérida: Universidad de Zulia, 2010).

[110] Adriana Hernández, *Jurisprudencia, liberalismo, y diplomacia. La vida pública de Julián Viso (1822–1900)* (Caracas: Instituto de Altos Estudios Diplomáticos, 1999), 87–97. Viso established his credentials by co-authoring, while still a law student, a commentated code of civil procedures, published in 1851.

[111] The cover letter is reproduced in Pedro Guzmán, "Introducción. Nota Biográfica, Doctor Julián Viso," in *Proyecto de Código Civil (editado por primera vez en 1854)*, ed. Julián Viso (San Juan de los Morros: Editorial Caja de Trabajadores Penitenciarios, 1955), iii–xv.

[112] Fernando Chumaceiro Chiarelli, *Bello y Viso, Codificadores (Estudio comparado del Código Civil de Bello y el Proyecto de Julián Viso)* (Caracas, 1981), 334.

[113] Viso, *Proyecto de Código Civil*, Book II, Title VII, Law 2, art. 1. If there was a legitimate child, a recognized natural child received half their share.

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children and the spouse ahead of the deceased's parents in the line of succession was a very original idea at the time. Recall that Vidaurre's draft upon which he drew (and the 1837 Uruguayan law) went only as far as placing the surviving spouse prior to siblings. That Viso was predisposed to favoring the spouse and children born outside of marriage may be related to the fact that his own mother was a relatively poor widow with children when she married his father, that his father had several recognized natural children born prior to this marriage, and that he was quite close to his half- and stepbrothers.[114] While the Monagas administration recommended Viso's draft code favorably to the congress, the bill was never brought up for discussion since a bill on ending slavery took precedence.[115]

Several years later, General José Antonio Páez appointed Viso to chair a new codification commission and he was the main author behind Venezuela's 1862 code, the first in Hispanic America to give surviving spouses an unconditional inheritance share in the 1st order. While much of this code is based on Bello's Chilean code,[116] the influence of García Goyena's tome on Viso's intestate rules is evident in the report of the revisory commission appointed to review his draft, a commission which he chaired. This report critiqued the position of the spouse under colonial norms on similar terms to García Goyena:

> The cuarta marital that the law of the *Partidas* cedes the poor widow cannot meet the needs of justice and, moreover, it is inconvenient. Experience has shown that it only leads to scandalous lawsuits where the mother is diminished in the eyes of her children. Its rare use is the best proof of its inconvenience. The proposed code establishes a rational base: it equals the position of the surviving spouse and legitimate children...[117]

The commission also drew on García Goyena's justification for elevating the position of the surviving spouse almost word for word, arguing that it was politic, humane, and rational to do so. Moreover, "should the poor mother or father be placed in the sad position where they must depend upon their children for sustenance? And what is given to the widow or widower will it not in most cases...soon be returned to these same children?"[118]

No country had as many nineteenth-century civil codes as Venezuela, five in all.[119] The 1862 code was in force for less than a year before it was abrogated, at the conclusion of a civil war, by president General Juan Crisóstomo Falcón. In

[114] On Viso's family background, see Hernández, *Jurisprudencia*, 1–54.

[115] Ibid., 96–98.

[116] Ibid., 103–5; Guzmán Brito, *La codificación*; Anibal Dominici, *Comentarios al Código Civil Venezolano (reformado en 1896)*. vol. 1 (Caracas: Imprenta Bolivar, 1897).

[117] Comisión Revisora, "Código Civil de 1862, Informe de la Comisión Revisora," reproduced in *Revista de la Facultad de Derecho de la Universidad Católica Andres Bello*, 2 (1966), 276.

[118] Ibid.; compare this text with García Goyena, *Concordancias*, 360, cited earlier herein.

[119] Deere and León, "Liberalism," Table 1.

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1867 he appointed a new codification commission which once again included Julián Viso, but not as chair. This commission had only forty days to produce a new code which is among the reasons it adopted García Goyena's draft code for Spain with only some modifications. The congress approved the new code without much discussion, which went into effect that year.[120]

Although the 1867 code was based on García Goyena's draft, somewhat surprisingly, its intestate provisions more closely resembled those of Bello's code. While spouses were placed in the 1st order of succession and received a share equal to that of a legitimate child if they had no assets, if they owned assets, or received gananciales they were entitled only to the difference in these values, echoing the conditions of Bello's porción conyugal. Similar conditions applied in the 2nd order, when the spouse inherited along with the ascendants; however, in the latter's absence, the spouse inherited the full estate, an innovative provision. Thus, compared to Viso's 1862 code, the spouse lost the unconditional right to inherit in the 1st order, but gained in the order of succession at the expense of both siblings and recognized natural children; the latter were excluded from inheriting altogether. This trade-off in the position of the spouse was perhaps part of a bargain on the commission, which suggests that there was not yet total consensus on these issues.

The 1867 code was also short-lived, since, after another period of political instability, provisional president General Antonio Guzmán Blanco of the Liberal party rescinded it and in 1872 appointed a new codification commission. The code promulgated in 1873 was modeled on the Italian civil code of 1865, considered the most modern code of the time.[121] Nonetheless, with respect to intestate, it did not replicate the Italian code but, rather, re-incorporated important principles from Viso's 1862 civil code.[122] As in that earlier code, surviving spouses were in the 1st order, receiving an unconditional share equal to that of a child. Their position in the 2nd order was slightly improved over the 1862 code, with the spouse, ascendants, and natural children each receiving one-third of the estate, by category. In the absence of descendants and ascendants, the 1873 code reverted to that of 1862, with the spouse, natural children, and siblings sharing the estate.

The country's fourth civil code, promulgated in 1880 (now by an elected president Guzmán Blanco), contained no changes to succession law; a fifth civil code, adopted in 1896, maintained almost the same intestate provisions, only expanding the list of collateral relatives who might benefit before the estate passed to the state. Hence, legal scholar Anibal Dominici, writing at the turn of the century, credited Julián Viso for giving spouses as well as

[120] Amenodoro Rangel Lamus, "El Código Civil de 1873 y sus antecedentes legales," in *Conmemoración del Centenario del Código Civil decretado en Febrero de 1873,* ed. Congreso de la República (Caracas: Congreso de la República, 1973), xiv.

[121] Ibid. Viso did not participate in this commission.

[122] In the Italian code, the spouse was in the 1st order, receiving a share equal to that of a child but only in usufruct. Only in the 3rd order, when they concurred with siblings and natural children, did they received an inheritance share as property; if there were no collateral heirs to the 6th degree, they inherited the full estate. Alberto Aguilera y Velasco, *El Código Civil Italiano comentado, concordado y comparado* (Madrid: Librería Universal de Córdoba y Cía., 1881), arts. 736–818.

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recognized natural children inheritance rights in most of the country's nineteenth-century civil codes.[123] As he explained, this "is a particularity of the Venezuelan civil code which perfectly corresponds to reason, equity and natural sentiments."[124]

The gananciales: a property right or an inheritance?

Why Argentina limited spousal inheritance to the individual property of the deceased rather than a share of their full estate, as in Venezuela, is related to different interpretations of what the gananciales constitute in the marital regime of partial community property. The Venezuelan approach recognized the gananciales as a property right thus acknowledging that these are generated through the effort and capital of both spouses in the partnership. In this view, they are irrelevant to the issue of inheritance and, hence, there is no reason to take them into account when placing the surviving spouse in the 1st order of succession since sufficient justification is provided by the love and consideration that spouses have for each other. For this reason, Venezuelan jurist Dominici criticized those codes (such as his country's 1867 code which followed Bello's rules) which reduced the share that the spouse might inherit by deducting their portion of the gananciales.[125]

Most late-nineteenth-century Argentine jurists distinguished between the half of the gananciales that was due a surviving spouse as a "partner" in the conjugal society and the share they might receive from the individual property of the deceased as an "heir." According to Lisandro Segovia, the reason spouses should not inherit from the deceased's share of the gananciales was that these constituted "a form of inheritance."[126] He praised Vélez's approach, for if spouses shared in both the deceased's individual property and the gananciales they would take a major share of the estate to the detriment of the descendants.

Implicit in Segovia's analysis was that wives widowed more frequently than husbands,[127] and a biased view of the gender division of labor that attributed the generation of gananciales only to the husband's efforts. That is, it ignores the wife's contribution to the generation of gananciales through her domestic labor and savings. From this perspective, in which no monetary value is assigned to domestic labor, then it follows that at the dissolution of the marriage, the wife's share of the gananciales is an "inheritance" from him. This perspective also ignores that after the decline of the practice of dowry,

[123] Dominici, *Comentarios*, vol. 1, xiv.

[124] Ibid., vol. 2 (Caracas: Imprenta Bolivar, 1902), 42.

[125] Dominici, *Comentarios*, vol. 1, xiv. In determining inheritance shares, he considered it appropriate only to deduct any assets donated in life by the deceased to the spouse or a child, a rule common to most of these codes.

[126] Segovia, *El código civil*, vol. 2, 542.

[127] While the difference in male and female life expectancies was relatively small in the nineteenth century compared with the gap that would develop in the next, the age gap at marriage was large (although falling), so that it was more likely that wives would outlive their husbands. For example, in 1855 the age gap at marriage in Buenos Aires was 7.5 years, having fallen from 11.4 in 1810; Szuchman, *Order, Family and Community*, 194.

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daughters continued to inherit from their parents at their death, thus their capital—although under the husband's management—also generated gains, and moreover, that non-elite women not infrequently earned income which contributed to the gananciales.

Segovia did not feel the need to explain why the spouse should be given an automatic right to inherit a share of the deceased's individual property, suggesting that this practice was widely accepted in legal circles. The main critic, alluded to earlier, was José Olegario Machado who, while accepting Segovia's reasoning that the spouse held a double role in inheritance—as a partner and an heir—considered that as a result, too much of the deceased's patrimony went to the spouse. He argued that "it would have been convenient and just to reduce the share of the surviving spouse, giving them a choice on whether to participate as a partner or as an heir, but not as both."[128] Machado would have also preferred including siblings among the forced heirs. As other traditionalists across the region, he was concerned that if a man died without leaving children or parents and his estate went to his wife, it would eventually be divided among her family rather than the deceased's family of origin.

Those codifiers who imposed conditions for spouses to inherit in the 1st order, such as Bello or Mexico's 1870 codification commission, followed similar reasoning regarding how much a spouse might inherit when children were involved. Only if they owned no assets and there were no gananciales from the marriage might they inherit a share equal to a legitimate child. In Mexico, if the spouse owned assets or claimed gananciales, the commission wanted to assure that their share be only sufficient "to equalize the inheritance shares."[129] By requiring that this calculation include the gananciales, the commission was ignoring that the gains from marriage were due to the efforts of both husband and wife. Moreover, the inclusion in this calculation of the dowry and any other assets of the spouse, rather than equalizing inheritance shares, resulted in an equalization of the relative *wealth* of each child and the surviving spouse, much to the latter's detriment. Perhaps for this reason, a few countries departed from the Mexican or Bello's model in calculating the porción conyugal, for example, Costa Rica only deducting the spouses' share of gananciales or Guatemala only deducting their individual assets, rather than both.

This underscores why Viso's and Vélez's innovation of giving surviving spouses an unconditional inheritance right in the 1st order was pathbreaking. Viso's code clearly established that the gananciales were a property right and should not be confused with inheritance rights. Vélez's code partially sidestepped this issue by limiting the spouse's inheritance right to the deceased's individual property; nonetheless, by not conditioning this part of the inheritance on the surviving spouse's ownership of other property, he confirmed the principle that the spouse carried equal weight to the children in a person's presumed loyalties and obligations. Nonetheless, Venezuela's provisions were

[128] Ibid., 311.

[129] Mariano Yañez, José M. Lafragua, and Isidro Montiel, *Proyecto de código civil para el Distrito Federal y Territorio de la Baja-California, formado de orden del Supremo Gobierno*, vol. 4 (Mexico, D.F.: Imprenta de Ignacio Cumplido, 1870), 24.

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not only more generous, but also increased the bargaining power of the surviving spouse over children by giving them a greater degree of control over the future of the family home, farm, and/or business.

Conclusion

In this analysis of the Hispanic American civil codes, I have shown that the position of the surviving spouse in intestate succession improved notably over the course of the nineteenth century; that what most differentiated these codes is whether in the 1st order the spouse was entitled to a conditional or unconditional inheritance share; and, in the latter case, whether the unconditional share was of the full estate or only of the deceased's individual property.

In most countries, the codes reveal a shift in the perceived loyalties and obligations of individuals from the extended to the immediate family. By the end of the century, the surviving spouse inherited the full estate either in the absence of descendants and ascendants, or if the deceased also left no siblings or their issue, as in Chile and the countries that replicated Bello's rules. In most, in the 2nd order (in the absence of descendants), spouses gained an unconditional right to a share of the estate along with ascendants and recognized natural children.

Those codes that gave primacy to the conjugal unit, assuming that a person's love and affection for a spouse was at least equal to that for their children, gave the surviving spouse an absolute inheritance right in the 1st order, whether poor or wealthy. The unconditional inheritance provisions in the codes of Argentina and Venezuela made it more likely that widows and widowers could support themselves after the death of a spouse. While the spouse's share of the estate would eventually go to the children, it also strengthened their bargaining power over them, particularly, Venezuela's more generous provisions.

Bello's Chilean code improved upon colonial norms by moving away from the poverty required by the cuarta viudal or Peru's cuarta conyugal, to the porción conyugal, available on the same terms to both widows and widowers depending on their relative need. However, by including both a person's individual assets and the gananciales in determining whether and how much the spouse received, Bello reduced the possibility of their inheriting anything at all. Bello's civil code for Chile was adopted by more countries in the region than any other code. As a result, those who replicated his porción conyugal ended up placing spouses in a much inferior position compared to other countries, a feature which still differentiates some of them—such as Colombia and Ecuador—today.[130]

The differences between Viso's more generous code in Venezuela and Vélez's in Argentina is based on different interpretations of what the gananciales represent, a property right or an inheritance. I have argued that jurists who considered these as an inheritance ignored the wife's contribution to the generation of gananciales by assuming that these are due solely to the efforts and capital of the husband. In this regard, Vélez's solution—excluding spouses

[130] On the more recent reforms, see Schmidt, "Intestate Succession."

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from inheriting a share of the deceased's gananciales—did not stray too far from the rationale embodied in the codes which adopted the porción conyugal and conditioned the amount by the spouse's relative wealth.

Reviewing the circulation of ideas on intestate, I have shown that discussions in Hispanic America around improving the position of spouses began early in the Republican period, prior to the publication of García Goyena's draft code for Spain. Bentham's principle that the presumed degree of affection should guide the ordering of intestate succession certainly influenced these discussions, but in ways he did not foresee, since he ignored spouses in devising his ideal line of intestate succession. The new idea promoted by Somellera and his students in Argentina was that if the affection that existed between spouses was equal to or greater than that felt toward one's children (as Peruvian judge Vaudarre had also maintained in the 1830s, but did not act upon), this should be reflected in the order of intestate succession, placing the surviving spouse ahead of collateral kin. García Goyena's tome took this idea to its logical conclusion, that if the conjugal bond was primary, why should the spouse not inherit an unconditional share of the deceased's estate in the 1st order and that it be at least equal to that of a child?

The early attention to improving the position of spouses in the region was likely precipitated by a combination of factors that differed in importance by country: the plight of the large number of widows left by the wars of independence and recurrent civil wars; concern over the decline in the practice of dowry; and growing acceptance of the idea that marriage should be based on romantic love. I have argued that Viso and Vélez were predisposed to García Goyena's reasoning both because of their own personal histories and because their countries were more open to liberal ideas and experienced earlier some of the impacts of liberal policies. Freer trade led to the deepening of markets which disincentivized the dowry and fostered individual initiative and greater reliance on the conyugal unit over extended families. By the 1860s social sensibilities in both Argentina and Venezuela had changed sufficiently to assume the primacy of the conjugal unit, particularly, once the Victorian ideal became embedded of the wife as the queen of the home.

The impact of the decline in the practice of the dowry requires further research since over the course of the nineteenth century it disappeared throughout the region; nonetheless, only in Argentina is there evidence that it was invoked as a reason to improve the intestate position of widows. One would assume that with its demise, the support of widows became a potential problem everywhere, particularly as the rise of the cult of domesticity and motherhood meant that relatively few women of the middle and upper classes were employed outside the home and so had no independent source of income. Yet, by 1902, it was only in the six countries where spouses were unconditionally in the 1st order that women, once widowed, were potentially compensated for its disappearance. But perhaps the other more modest improvements in the position of spouses in other countries were motivated, in part, by such considerations.

Overall, the idea of improving the intestate position of spouses in Hispanic America does not appear to have been too controversial, perhaps because this

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change was gender neutral, applying to both widows and widowers. The issue was by how much that position should be improved, and at whose expense. The inheritance rights of recognized natural children, not to mention other illegitimate children, were more contested. Moreover, sometimes it appears as if there was a trade-off in these codes between improving the rights of the spouse and those of natural children, a topic which merits further comparative research.

Finally, it would also be useful if historians of both Europe and Latin America prioritized the study of nineteenth-century wills to examine to whom the share that individuals were free to allocate was assigned. This might confirm if the various approaches to intestate adopted by the different countries conformed to local social norms and explain why Hispanic American countries improved the position of spouses earlier than those of Europe.

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Competing interest. None.

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Appendix. Intestate Position of the Surviving Spouse, Civil Codes or Specialized Legislation, Hispanic American Republics, 1830–1903

Civil Code or Law	If in 1st Order, with Legitimate Children	If Spousal Share Conditioned	When Spouse Entitled to the Full Estate of the Deceased	If No Spouse, When Defaults to the State
Bolivia 1830 (1831)[1]	Cuarta viudal, only widows	Yes, if poor	If no descendants, ascendants, or collaterals to 4th degree	After collaterals to 4th degree
Uruguay 1837 Law[2]	NA	NA	If no descendants or ascendants	NA
Costa Rica 1841[3]	Cuarta viudal, only widows	Yes, if poor	Never; spouse gets only 1/3 and shares with state if no descendants, ascendants, or collaterals to 4th degree	After collaterals to 4th degree
Dominican Republic 1845[4]	No	NA	If no descendants, ascendants, or collaterals to 12th degree	After collaterals to 12th degree
Peru 1851 (1852)[5]	Cuarta conyugal, either spouse	Yes, if poor; deducts gananciales	If no descendants, ascendants, or collaterals to 4th degree	After collaterals to 6th degree
Chile 1855 (1856)[6] BELLO	Porción conyugal, either spouse; max share = a child's	Yes, if needs; deducts assets and gananciales	If no descendants, ascendants, or siblings	After collaterals to 6th degree
Mexico 1857 Law and 1870 (1871) code[7]	Yes, either spouse; max share = a child's	Yes, if needs; deducts assets and gananciales	If no descendants, ascendants, or siblings	After collaterals to 8th degree
El Salvador 1859 (1860)[8] BELLO	Porción conyugal, either spouse; max share = a child's	Yes, if needs; deducts assets and gananciales	If no descendants, ascendants, or siblings	After collaterals to 6th degree
Ecuador 1860 (1861)[9] BELLO	Porción conyugal, either spouse; max share = a child's	Yes, if needs; deducts assets and gananciales	If no descendants, ascendants, or siblings	After collaterals to 10th degree
Venezuela 1862 (1863), 1873, 1880 (1881), and 1896[10]	Yes, either spouse; share = a child's	No	If no descendants, ascendants, or siblings	After collaterals to 6th degree
Venezuela 1867[11]	Yes, either spouse; max share = a child's	Yes, if needs; deducts assets and gananciales	If no descendants or ascendants	After collaterals to 4th degree
Nicaragua 1867 (1872)[12] BELLO	Porción conyugal, either spouse; max share = a child's	Yes, if needs; deducts assets and gananciales	If no descendants, ascendants, or siblings	After collaterals to 6th degree

(*Continued*)

(*Continued.*)

Civil Code or Law	If in 1st Order, with Legitimate Children	If Spousal Share Conditioned	When Spouse Entitled to the Full Estate of the Deceased	If No Spouse, When Defaults to the State
Uruguay 1868[13] BELLO	Porción conyugal, either spouse; max share = a child's	Yes, if needs; deducts assets and gananciales	If no descendants, ascendants, or siblings	After collaterals to 10th degree
Argentina 1869 (1871)[14]	Yes, either spouse; share = a child's	No, but restricted to individual patrimony	If no descendants or ascendants	After collaterals to 6th degree
Colombia 1873[15] BELLO	Porción conyugal, either spouse; max share = a child's	Yes, if needs; deducts assets and gananciales	If no descendants, ascendants, or siblings	After collaterals to 8th degree
Paraguay 1876[16]	Yes, either spouse; share = a child's	No; restricted to individual patrimony	If no descendants or ascendants	After collaterals to 6th degree
Guatemala 1877[17]	Cuarta conyugal, either spouse	Yes, if needs; deducts assets	If no descendants or ascendants	After collaterals to 4th degree
Honduras 1880[18] BELLO	Porción conyugal, either spouse; max share = 1/5	Yes, if needs; deducts assets and gananciales	If no descendants, ascendants, or siblings	After collaterals to 6th degree
Costa Rica 1881 Law and 1887 code[19]	Yes, either spouse and parents, by head	Yes, if needs; deducts gananciales	If no descendants or ascendants	After collaterals to 4th degree
Guatemala 1882 Law[20]	Porción alimenticia, either spouse	Yes, if needs	If no descendants or ascendants	After collaterals to 4th degree
Bolivia 1882 Law[21]	Yes, either spouse; share = a child's	No; restricted to individual patrimony	If no descendants or ascendants	After collaterals to 4th degree
Mexico 1884[22]	Yes, either spouse and parents, by head	Yes, if needs, deducts assets and gananciales	If no descendants, ascendants, or siblings	After collaterals to 8th degree
Honduras 1898[23]	Yes, either spouse; share = a child's	No	If no descendants, ascendants, or siblings	After collaterals to 6th degree
El Salvador 1902[24]	Yes, either spouse and parents, by head	No	If no descendants or parents	After collaterals to 4th degree

Nicaragua 1903 (1904)[25] BELLO	Porción conyugal, either spouse; max share = 1/4	Yes, if needs; deducts assets and gananciales	If no descendants, ascendants, or siblings	After collaterals to 6th degree

Notes: When two dates are shown, the first refers to the year the code was promulgated; the second, in parentheses, the date it went into effect, if differs. BELLO indicates that intestate generally followed the 1855 Chilean civil code.

NA = not applicable.

[1]Horacio Zamorano, *Código Civil Boliviano (1830). Nueva edición publicada con licencia del Supremo Gobierno* (Sucre: Imprenta de la Libertad, 1876), arts. 605–21.

[2]"Ley sobre sucesión hereditaria de 16 de junio de 1837," in *Legislación vigente de la República de Uruguay*, ed. Pablo V. Goyena, vol. 1 (Montevideo: Imprenta La Nación, 1888), 1494.

[3]Rafael Ramírez, *Código General de la República de Costa-Rica, emitido en 30 de julio de 1841* (NY: Wynkoop, Hallenbeck and Thomas, 1858), arts. 619–35.

[4]República Dominicana, *Código Civil de la República Dominicana arreglado por la comisión…vigente desde el año 1845 (1884)* (Santo Domingo: Imp. E. M. Casanova, 1930), arts. 731–68.

[5]Manuel Afanasio Fuentes and Miguel Antonio de la Lama, *Código Civil de 1852* (Lima: Imprenta del Estado, 1870), arts. 873–83.

[6]Chile, República de, *Código civil de la República de Chile, aprobada el 14 de diciembre de 1855* (Santiago: Imprenta Nacional, 1856), arts. 988–94, 1172–80.

[7]"Ley de Sucesiones por Testamento y Ab-Intestato," Law No. 4917 of May 2, 1857, and Law No. 4967 of August 10, 1857, in *Legislación mexicana o colección completa de las disposiciones legislativas desde la Independencia de la República ordenada por…*, eds. Manuel Dublan and José María Lozano, vol. 8, arts. 56–62 (Mexico: Imprenta del Comercio, 1877), 440–48, 548–57; *Código Civil del Distrito Federal y Territorio de la Baja-California* (Mexico: Tip. de J. M. Aguilar Ortíz, 1870), arts. 3844–910.

[8]Belarmino Suárez, *El Código Civil del año 1860 con sus modificaciones hasta el año 1911* (San Salvador: Tipología La Unión, 1911), arts. 956–70, 1142–48.

[9]Ecuador, República de, *Código Civil de la República del Ecuador* (Quito: Imprenta de los Huérfanos de Valencia, 1860), arts. 967–80, 1157–64.

[10]Venezuela, República de, Presidencia, *La Codificación de Páez (Código Civil de 1862)* (Caracas: Academia Nacional de la Historia, 1974), Book III, Title V, Law 1, arts. 3–13; *Código Civil sancionado por el General Guzmán Blanco, Presidente Provisional de la República y General en Jefe de sus ejércitos* (Caracas: Imprenta Nacional, 1873), arts. 694–702; *Código civil sancionado por el ilustre General Guzmán Blanco, Presidente de la República* (Caracas: Imprenta de Vapor de La Opinión Nacional, 1880), arts. 700–5; *Código civil sancionado por el Congreso de los Estados Unidos de Venezuela en sus sesiones ordinarias de 1896* (Caracas: Tipografía del Comercio, 1898), arts. 717–21.

[11]Venezuela, República de, *Código civil sancionado por el Congreso de los Estados Unidos de Venezuela en 1867* (Caracas: Imprenta de Jose Henríquez, 1867), arts. 705–23.

[12]Nicaragua, República de, *Código Civil de la República de Nicaragua aprobado 25 enero 1867* (Managua: Imprenta de El Centro-Americano, 1871), arts. 982–90, 1172–79.

[13]Uruguay, República de, *Código civil para el Estado Oriental del Uruguay promulgado por el Gobierno Provisorio* (Montevideo: Imprenta de la Tribuna, 1868), arts. 836–44, 987–96.

[14]Argentina, República de, *Código civil de la República Argentina redactado por Dalmacio Vélez Sársfield y sancionado como ley por el honorable congreso de la república* (Buenos Aires: P. E. Coni, 1874), Book IV, Title 9.

[15]Colombia, República de, *Código Civil Colombiano expedido por el Congreso de 1873. Adoptado por la Ley 57 de 1887* (Bogota: Imprenta Nacional, 1895), arts. 1039–50, 1230–37.

[16]Paraguay, República de, Cámara de Diputados, *Actas de las sesiones del periodo legislativo 1871–1880* (Asuncion: Tipología del Congreso, 1908), 274–77.

[17]Guatemala, República de, *Código Civil de la República de Guatemala, 1877* (Guatemala City: Imprenta El Progreso, 1877) arts. 950–90.

[18]Honduras, República de, *Código Civil de la República de Honduras 1880* (Tegucigalpa: Tipografía Nacional, 1880), arts. 1020–33.

[19]"Decreto No. L, Ley de Sucesiones" of November 14, 1881, in *Colección de Leyes y Disposiciones Legales Administrativas 1883*, Part 3 (San Jose: Imprenta Nacional, 1883), 236–60; Costa Rica, República de, *Código Civil* (San José: Imprenta Nacional, 1887), arts. 572–74.

[20]"Ley de Reformas al Código Civil, Decreto 272 de 20 de febrero de 1882," in *Leyes emitidas por el Gobierno Democrático de la República de Guatemala y por la Asamblea Nacional Lejislativa desde 1 de julio de 1881 a 30 de junio de 1883*, ed. V. Guerra (Guatemala City: Tipografía El Progreso, 1883), 131–69.

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[22]Manuel Mateos Alarcón, *Código Civil del Distrito Federal, concordado y anotado*, vol. 3 (Mexico City: Librería de la vda. De Ch. Bouret, 1906), arts. 3571–636.

[23]Honduras, República de, *Código Civil de 1898* (Tegucigalpa: Tipografía Nacional, 1898), arts. 1046–93.

[24]El Salvador, República de, "Reformas al Código Civil del 4 de agosto de 1902," arts. 1017–31, in *Diario Oficial* 53:183 (San Salvador: Imprenta del Gobierno, 1902): 1569–75.

[25]José Santos Zelaya and Fernando Abaunza, *Código Civil de la República de Nicaragua* (Managua: Tip. Nacional, 1903), arts., 1000–16, 1201–08.