

ORIGINAL ARTICLE

Understanding the State Regulation of Fatherhood in Latin America: Complementary versus Co-responsible

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Abstract

Fatherhood is a key but missing component of research on welfare regimes. What do states formally demand from fatherhood across Latin America? Using a novel data set of coded legal and policy provisions for 19 Latin American countries, this article offers a conceptual framework to examine state interventions targeting biological, caregiving and breadwinning dimensions of fatherhood. My findings show that, regardless of how robust their social policies are, most countries presume fatherhood to be complementary rather than co-responsible to motherhood. By making a conceptual, empirical and practical contribution to studying the state regulation of fatherhood, this article contributes to a more comprehensive view of welfare regimes.

Keywords: welfare policy; family policy; fatherhood; gender; Latin America

Introduction

References to fathers and fatherhood pervade Latin American mainstream and social media with stories about child support battles, custody wars, ‘deadbeat’ dads and ‘free-loading’ mums. Permeating these narratives are embedded societal norms and expectations regarding paternal responsibilities. What do states in Latin America currently demand from fathers and fatherhood in terms of allocations of time and money? How do family policy and family law regulate parental roles and their interactions with states and markets? What are the most relevant variations across the region?

More than 70 per cent of children in seven otherwise heterogeneous Latin American countries (Chile, Colombia, the Dominican Republic, Nicaragua, Panama, Paraguay and Peru) are currently born to unmarried mothers, suggesting a sharp disconnect between reproduction and marriage.¹ At the same time, the enormous proportion of children in Latin America for whom paternal duties and rights are

¹Nara Milanich, ‘Daddy Issues: “Responsible Paternity” as Public Policy in Latin America’, *World Policy Journal*, 34: 3 (2017), pp. 8–14.

disengaged from partnerships makes the region an ideal place to explore fatherhood in the presence and in the absence of legal and informal conjugal relations.

Statecraft around fatherhood remains largely unexplored – particularly in the context of welfare regimes, and in comparison with the ample literature on policies targeting mothers/motherhood and the politics of maternalism.² Globally, the scant knowledge on fatherhood regulations that has been integrated into the literature on welfare regimes is based on family policy, yet it has left aside family law, where much of the regulation of fatherhood is codified.³

This article makes a conceptual, empirical and practical contribution to studying the state regulation of fatherhood. Drawing from an interdisciplinary literature, I bring together the biological, caregiving and breadwinning dimensions of fatherhood as established in family policy and family law. My findings show that, regardless of the robustness of social policies, most countries presume fatherhood to be complementary rather than co-responsible to motherhood, and enforce these dimensions accordingly.

Below, I highlight the current voids found in the literature on how welfare regimes address fatherhood in Latin America. I then propose a conceptual framework to explore this statecraft regardless of the specific laws and policies deployed. Next, I move through an explanation of the methodology and on to findings. I conclude with policy implications and challenges ahead.

Disjointed Parts: Welfare Regimes, Fatherhood and Family Law

Welfare regimes address the organisation of wellbeing at the intersection of markets, states and families.⁴ Each sphere relies on a distinct rationale: monetary exchanges in the case of markets; the collective social protection of people in the case of states; and authority, reciprocity and parental bonds in the case of families.⁵ By enacting policies and laws with mandatory compliance, states regulate the respective roles of markets and families, as well as their own provision of social protection.⁶

²Seth Koven and Sonya Michel (eds.), *Mothers of a New World: Maternalist Politics and the Origins of Welfare States* (New York: Routledge, 1993); Maxine Molineux, 'Mothers at the Service of the New Poverty Agenda: Progres/Oportunidades, Mexico's Conditional Transfer Programme', *Social Policy and Administration*, 40: 4 (2006), pp. 425–49; Ann Shola Orloff, 'From Maternalism to "Employment for All": State Policies to Promote Women's Employment across the Affluent Democracies', in Jonah Levy (ed.), *The State after Statism: New State Activities in the Age of Liberalization* (Cambridge, MA: Harvard University Press, 2006), pp. 30–68.

³Guðný Björk Eydal and Tine Rostgaard (eds.), *Fatherhood in the Nordic Welfare States: Comparing Care Policies and Practice* (Bristol: Policy, 2015), pp. 2–10.

⁴Gosta Esping-Andersen, *Social Foundations of Postindustrial Economies* (Oxford: Oxford University Press, 1999); Janet Lewis, 'Gender and the Development of Welfare Regimes', *Journal of European Social Policy*, 2: 3 (1992), pp. 159–73; Julia S. O'Connor, Ann Shola Orloff and Sheila Shaver, *States, Markets, Families: Gender, Liberalism and Social Policy in Australia, Canada, Great Britain and the United States* (Cambridge: Cambridge University Press, 1999); Ann Shola Orloff, 'Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States', *American Sociological Review*, 58: 3 (1993), pp. 303–28.

⁵Fernando Filgueira, *Cohesión, riesgo y arquitectura de protección social en América Latina* (Santiago: CEPAL, 2007); Juliana Martínez Franzoni, *Domesticar la incertidumbre en América Latina: Mercados laborales, política social y familias* (San José: Universidad de Costa Rica, 2008).

⁶*Ibid.*

Addressing the dimensions of fatherhood beyond paternity leave is critical to a more comprehensive approach to welfare regimes. Overall, the body of research outlined below demonstrates the relevance that notions of fatherhood have historically had and currently have for welfare regimes. Second, it shows that, in order to address the role of state policy in organising welfare regimes, there is a clear need to consider not only family policy but also family law.

Along with welfare and labour policies, family law and family policies regulate how families interact with states and markets. *Family law* is about the formation, maintenance and dissolution of personal relations, including rules concerning maternal and paternal responsibilities.⁷ It focuses on the public regulation of *private* transfers and services. *Family policy* is about the monetary transfers and social services established by states to mothers and fathers to look after care-dependent family members.⁸ It is concerned with public transfers and services.⁹ Birth leave is one example.

Two recent and otherwise comprehensive handbooks, on family and on gender and social policy respectively, leave family law (e.g. private transfers) out of their scope entirely, potentially ignoring the tight interplay between state regulation of both private and public transfers and services.¹⁰

Family law has effects beyond shaping private conduct; it is a building block in the organisation of welfare regimes.¹¹ Unemployment insurance, for example, can safeguard the continuity of alimonies and child support, and a universal basic income for children can give mothers some degree of economic autonomy from abusive former partners. Nara Milanich showed that the enactment of family wages, allowances and old-age pensions in the twentieth century contributed to reducing the proportion of children born out of wedlock. At a time when these benefits were not available to unmarried couples, entering into a legally recognised family gave access to these rights. Family law, as well as its interactions (or lack thereof) with welfare policy, are, therefore, quite relevant as intentional or unintentional *organisers* of welfare regimes.¹²

As welfare regimes concern the most vulnerable segments of society, family law has an essential influence on their needs. This is especially true for children, who depend on adults to access resources. Children need food, shelter, affection and physical presence, which require that adults allocate money and time, and manage their access to transfers and services. Parental responsibilities are therefore fundamental to the operation of welfare regimes. Often, this allocation of resources takes

⁷Mala Htun and S. Laurel Weldon, 'State Power, Religion, and Women's Rights: A Comparative Analysis of Family Law', *Indiana Journal of Global Legal Studies*, 18: 1 (2011), pp. 145–65.

⁸Eydal and Rostgaard (eds.), *Fatherhood*, pp. 2–10; Anne Gauthier and Judith Koops, 'The History of Family Policy Research', in Guðný Björk Eydal and Tine Rostgaard (eds.), *Handbook of Family Policy* (Cheltenham: Edward Elgar, 2018), pp. 11–23.

⁹Eydal and Rostgaard (eds.), *Fatherhood*, pp. 2–10; Sheila Shaver (ed.), *Handbook on Gender and Social Policy* (Cheltenham: Edward Elgar, 2018).

¹⁰Eydal and Rostgaard (eds.), *Handbook of Family Policy*; Shaver (ed.), *Handbook on Gender and Social Policy*.

¹¹Hrefna Friðriksdóttir, 'Nordic Family Law', in Eydal and Rostgaard (eds.), *Fatherhood*, pp. 53–78.

¹²Nara B. Milanich, *Children of Fate: Childhood, Class, and the State in Chile, 1850–1930* (Durham, NC: Duke University Press, 2009).

place in the context of conflicting rather than cooperative relationships among adults responsible for a child's wellbeing. The greater the conflict, the more likely that family law will play a role in the allocation of private resources such as time and income.

Within families, maternal and paternal responsibilities historically reflect the sexual contract.¹³ Such a contract entails explicit or implicit rules governing gender relations, organising the rights and obligations respective to men and women to reflect the sexual division of labour.¹⁴ Through this hierarchical specialisation, law and policy enact fatherhood as much as they enact motherhood,¹⁵ each embedded in the social construction of gender.

To assist in bringing family law to the analysis of welfare regimes, a rich body of studies by historians and anthropologists documents the framing, decisions and policies that shaped and reshaped fatherhood in the region across the twentieth century. In times of rapid social opening and transformation, state policy has held men as fathers to be responsible for broader demographic, economic and social concerns – from child mortality to civil registration to poverty.

These studies show that the prevailing notion of fatherhood as optional, inherited from the colonial past,¹⁶ caused a significant number of social ills across Latin America. At first, civil codes enacted after independence from colonial rule embraced a *legal* definition of paternity that linked the marital bond and the paternal bond. In other words, husbands were assumed to be the fathers of their spouses' children, even as the number of children born outside of marital relations increased.¹⁷ Consequently, the state regulation of parental duties made a sharp distinction between children born inside marriage and those born outside of marriage.

For most of the twentieth century, these codes limited the rights of children born out of wedlock to access inheritance and other types of support unless fathers decided otherwise. The codes also restricted or even abolished children's right to legal investigations of paternal identity.¹⁸ Paternal detachment from or connection with children born outside of marriage was up to fathers, as it was also up to them to voluntarily opt into paternity by recognising and giving their surnames to

¹³Carole Pateman, *The Sexual Contract* (Stanford, CA: Stanford University Press, 1998). In political philosophy, the social contract is an actual or hypothetical agreement concerning the respective rights and obligations of the ruled and their rulers. Pateman argues that this contract is based upon a prior sexual contract.

¹⁴Nancy Folbre, *Who Pays for the Kids? Gender and the Structure of Constraints* (London and New York: Routledge, 1994); Nancy Folbre (ed.), *For Love and Money: Care Provision in the United States* (New York: Russell Sage Foundation, 2012).

¹⁵Barbara Hobson and David Morgan, 'Introduction: Making Men into Fathers', in Barbara Hobson (eds.), *Making Men into Fathers: Men, Masculinities and the Social Politics of Fatherhood* (Cambridge: Cambridge University Press, 2002), pp. 1–24.

¹⁶Susan Migden Socolow, *The Women of Colonial Times* (Cambridge: Cambridge University Press, 2015).

¹⁷*Ibid.*; Laura H. Lippman and William Bradford Wilcox, 'Family Instability and Early Child Childhood Health in the Developing World', in Child Trends, *World Family Map 2014: Mapping Family Change and Child Well-Being Outcomes*, available at <https://ifstudies.org/ifs-admin/resources/reports/wfm-2014-final-forweb.pdf> (last accessed 27 Feb. 2021).

¹⁸Nara Milanich, 'To Make All Children Equal is a Change in the Power Structures of Society: The Politics of Family Law in Twentieth Century Chile and Latin America', *Law and History Review*, 33: 4 (2015), pp. 767–802.

children born outside of marriage.¹⁹ In this way, the ‘natal rights’ codified in family law defined children’s access to material resources and parental time, both part and parcel of welfare regimes.

As the twentieth century progressed, paternity outside of marriage or a stable partnership was increasingly seen as the source of poverty and of other critical social problems linked to resource distribution.²⁰ The matter reflected not only gender disputes but the class divide: low-income and poor children born outside of marriage threatened the inheritance and patrimonial rights of ‘legitimate’ children and their mothers.²¹ Between 1934 (Uruguay) and 1999 (Chile), all Latin American countries equalised the right to identity, income maintenance and inheritance for children born out of wedlock following different degrees of mobilisation and resistance to state action.²² As the distinction between legitimate and illegitimate children was eroded, the importance of confirmed paternity for any child increased. The biological definition grew increasingly important *vis-à-vis* its legal definition.²³

As decades passed, the biological definition of fatherhood displaced the legal definition to establish paternal economic responsibility towards children. Access to DNA testing in approximately a dozen of the region’s countries handed the courts a simple, accessible and conclusive test to establish or deny biological bonds between men and children. DNA testing challenged men’s capacity to opt out of fatherhood, and enforced certain duties – both financial and emotional – to all their children.²⁴ The degree to which DNA testing became effective in establishing biological fatherhood, however, largely depended upon whether the burden of proof was maternal or paternal. When such proof was placed on mothers, its demonstration entailed high monetary costs and lengthy judicial procedures.

In 2001, a study sponsored by the Economic Commission for Latin America and the Caribbean (ECLAC) showed a ten-point increase in the proportion of children without a reported father in a single decade: from 21 per cent in 1990 to 30 per cent in 2001.²⁵ This rise spurred a conservative Costa Rican president to sponsor pivotal reform, allowing mothers to identify the presumed father through a simple administrative procedure, making *him* responsible for demonstrating otherwise.²⁶ Partly

¹⁹Milanich, ‘Daddy Issues’.

²⁰Katherine Bliss, ‘Paternity Tests: Fatherhood on Trial in Mexico’s Revolution of the Family’, *Journal of Family History*, 24: 3 (1999), pp. 330–50.

²¹Nara B. Milanich, *Paternity: The Elusive Quest for the Father* (Cambridge, MA: Harvard University Press, 2019).

²²Uruguay: Anne-Emanuelle Birn, ‘Uruguay’s Child Rights Approach to Health: What Role for Civil Registration?’, in Keith Breckenridge and Simon Szreter (eds.), *Registration and Recognition: Documenting the Person in World History* (Oxford: British Academy, 2012), Chapter 16; Chile: Milanich, ‘To Make All Children Equal’.

²³Sueann Caulfield and Alexandra Minna Stern, ‘Shadows of Doubt: The Uneasy Incorporation of Identification Science into Legal Determination of Paternity in Brazil’, *Cadernos de Saúde Pública*, 33: 1 (2012), pp. 1–14.

²⁴Merike Blofield and Fernando Filgueira, ‘Paternity Recognition’, unpublished manuscript, May 2019; Milanich, ‘Daddy Issues’.

²⁵Luis Armando Lázaro and María Elena Rodríguez Cortés, *La paternidad responsable en Costa Rica: una tarea pendiente*, doc. LC/MEX/L.480 (CEPAL, UN, 2001).

²⁶Asamblea Legislativa de Costa Rica, *Ley de Paternidad Responsable* (Responsible Paternity Law), no. 8101, 27 April 2001.

as a result of ECLAC's active role in policy-making, Panama, Guatemala and Honduras followed suit.²⁷ The call for 'responsible paternity' appealed to feminist aspirations because it addressed the economic burden of childrearing and long-term discrimination against unmarried women and their children, and also to the neoliberal advocacy of family reliance and state intervention only following family failure to take care of children's material needs.²⁸

A more recent and less studied legal definition of fatherhood stresses *socioaffective bonds*, where the family tie stems from the relationship rather than biology. Leading Brazilian jurists, for example, argued that families must demonstrate love and affection prior to receiving state protection.²⁹ A 'family' in this definition need not be based on marriage or biological bonds.³⁰ In February 2020, an Argentine judge gave parental responsibility over a nine-year-old girl, neither adopted nor conceived by artificial insemination, to two fathers and one mother who then became equally responsible for the girl's emotional, physical and economic wellbeing.³¹ By stressing the emotional attachment, this socioaffective definition of fatherhood expanded the already broad and contested field of what it meant to be a father in Latin America in 2020. As the diversification of families and changing gender relations expanded, however, so did conflicts.

In general, changes in the definition of fatherhood took place under successive expansions of the 'social question', enlisting fathers to fight against child poverty and social exclusion.³² Examples include Argentina under Juan Perón (president, 1946–55, 1973–4), Guatemala under Jacobo Árbenz (president, 1951–4) and Chile under Salvador Allende (president, 1970–3). More recent examples include state policy during Inácio Lula da Silva's presidency in Brazil (2003–11), aimed at including proof of paternity in the identification of children to ensure their access to social benefits.³³ In many cases, changes in legal codes more generally (e.g. Argentina) or constitutions (e.g. Bolivia) allowed for changes in family law and policy.³⁴

At stake in changing the understanding of fatherhood is the allocation of time and money by mothers and fathers to childrearing as mandated by family policy and family law. Family policy mainly focuses on time, funded by state policy in the form of birth leave to working mothers and fathers.³⁵ Leave might include

²⁷Bliss, 'Paternity Tests'.

²⁸Milanich, 'Daddy Issues'.

²⁹Claudia Fonseca, 'DNA and the Displacement of Certainties in Brazilian Family Law', *Sexualidad, Salud y Sociedad*, 32 (2019), pp. 4–19.

³⁰Caulfield and Stern, 'Shadows of Doubt'.

³¹Mar Centenera, 'Una juez argentina reconoce el derecho de una niña a tener dos padres y una madre', *El País* (Madrid), 18 Feb. 2020.

³²Milanich, 'Daddy Issues'.

³³Wendy Hunter and Robert Brill, "'Documents, Please": Advances in Social Protection and Birth Certification in the Developing World', *World Politics*, 68: 2 (2016), pp. 191–228.

³⁴Congreso de la Nación Argentina, Código Civil y Comercial de la Nación (National Civil and Commercial Code), no. 26.994, 7 Oct. 2014; Asamblea Constituyente de Bolivia de 2006, Constitución Política de 2009 del Estado Plurinacional de Bolivia, available at <https://observatorioplanificacion.cepal.org/es/marcos-regulatorios/constitucion-politica-de-2009-del-estado-plurinacional-de-bolivia> (last accessed 4 March 2021).

³⁵Martin Hopenhayn, María Nieves Rico and Jorge Rodríguez, *Cuidado infantil y licencias parentales* (Santiago: CEPAL, 2011); Lupica, *Corresponsabilidad*; Soledad Salvador, Corina Rodríguez Enríquez,

maternity leave (for mothers, following childbirth and, in some countries, adoption); paternity leave (in most countries only following childbirth) and parental leave (following maternity leave, available for mothers and fathers in ways established by each legislation). In the context of expansionary labour and social policy, since 2000 the number of countries in my study without any statutory, fully paid paternity leave has dropped from seven to three (Costa Rica, Cuba and Honduras). Adequacy, however, is a different matter: in ten of the 19 countries included in my study, paternity leave is five days or less, allowing fathers to assist mothers rather than act as primary caregivers. In six countries paternity leave has taken timid steps towards framing fathers as primary caregivers: Ecuador, Paraguay, Peru, Uruguay, Venezuela and Colombia (provided the mother is also on birth leave); and one country has extended paternity leave to up to fifteen days (Paraguay). Despite this progress, of these six countries only in Colombia, Uruguay and Venezuela is paternity leave fully publicly funded rather than paid for by employers.³⁶

Publicly funded parental leave following maternity leave is now available in Chile, Cuba and Uruguay. Fathers are eligible to take it either fully (Cuba and Uruguay) or partially (Chile). The design varies across countries.³⁷ Still, in all three countries paternal access to the leave is at the mother's discretion and none of the countries studied have implemented the so-called 'daddy quota', by which fathers either take leave or cause mothers to lose a portion of theirs. In the countries that have instituted this quota, this condition has encouraged fathers to take leave and prevents parental leave from becoming *de facto* extended maternity leave.³⁸

Family law largely engages with money (i.e. child support) and caregiving (i.e. physical child custody) in cases where parental rights and obligation become points of contention. Parental conflict over custody and child maintenance pervades family courts, constitutional debates and legislative agendas, all with direct consequences for how welfare regimes deal with the costs associated with childrearing. Two issues are at stake: parental responsibility for a child's physical or residential

Juliana Martínez Franzone and Camila Arza, *Maternidad en el empleo: ¿cuáles son los costos de la escasa corresponsabilidad social y cómo se distribuyen?* (Lima: ILO, 2018).

I cite three comparative pieces here; however, the literature on leave is vast and growing. This is particularly the case in countries that have experienced change (e.g., for Uruguay, Karina Batthyány, Natalia Genta, Valentina Perrotta and Sol Scavino, 'Nuevas políticas de cuidado y persistentes desigualdades de género: Análisis de las licencias por maternidad, paternidad y parentales', *El Uruguay desde la Sociología*, 16 (2018), pp. 103–20; for Chile, Carina Lupica, *Corresponsabilidad de los cuidados y autonomía económica de las mujeres: Lecciones aprendidas del Permiso Postnatal Parental en Chile* (Santiago: CEPAL, 2015)).

³⁶ILO, *Maternity and Paternity at Work: Law and Practice across the World* (Geneva: ILO, 2014), available from https://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_242615/lang-en/index.htm (last accessed 27 Feb. 2021).

³⁷In Cuba, either parent can take the leave up until the child is one year old. As of 2011, Chilean fathers can use up to six of the last twelve weeks of postnatal leave. As of 2013, Uruguayan mothers or fathers can work half-days after the eight-week maternity leave ends until the child is six months old.

³⁸Organisation for Economic Cooperation and Development (OECD), 'Parental Leaves: Where are the Fathers?' Policy brief, March 2016, available at <http://www.oecd.org/policy-briefs/bydate/7/> (last accessed 27 Feb. 2021).

custody (increasingly known as physical care) and child income support (also known as child maintenance).

Until very recently, physical child custody reflected the ‘tender years’ doctrine, which assumed mothers to be more suitable caregivers than fathers.³⁹ More recently, some countries have taken steps towards shared custody in the presence of a parental agreement and/or towards a judicial rule based on the actual childrearing arrangements prior to separation, namely the ‘approximation method’.⁴⁰ Still, time use surveys conducted across Latin America show that mothers and fathers do not take equal responsibility for the daily caregiving to children.⁴¹ Caregiving continues to be done primarily by mothers, making gender neutrality in family law an outcome advocated by organisations supporting separated fathers – a controversial policy goal because of the sharp division of labour that persists worldwide.⁴² Feminists argue that legal provisions are not effective tools for altering gender relations, given the persistent power asymmetries and conflict between mothers and fathers.⁴³ In fact, liberal and radical feminist thought appears to converge on the issue of child custody with the idea that replacing maternal preference for joint custody altogether, without further consideration or policy tools that alter the actual social organisation of child rearing, would entail a significant and damaging loss of power for those who continue to do most of this work, namely women.

Child support addresses the periodic, usually monthly, economic transfer aimed at meeting food expenses and other needs (e.g. housing, clothing, health, recreation and education) required for the livelihood and wellbeing of children.⁴⁴ This regular contribution is expected to match the financial costs of raising a child, paid for by the non-resident parent.⁴⁵ Child support can be settled via private agreement or court order. The generosity of the payment varies globally, as do expectations of

³⁹Frances Raday, *Gender Equality and Women’s Rights in the context of Child Custody and Child Maintenance: An International and Comparative Analysis, Discussion Paper* (New York: UN Women, 2019).

⁴⁰Elizabeth S. Scott, ‘Pluralism, Parental Preference, and Child Custody’, *California Law Review*, 80: 3 (1992), pp. 615–72.

⁴¹UN Women, *El progreso de las mujeres en América Latina y el Caribe 2017* (Panama City: UNW, 2017).

⁴²Raday, *Gender Equality*.

⁴³*Ibid.*; Fabiola Lathrop, ‘La corresponsabilidad parental’, in *Estudios de derecho civil. Sextas Jornadas de Derecho Civil, Olmué* (Santiago: Legal Publishing, 2009), pp. 209–13; Marisa Herrera and Fabiola Lathrop, ‘Parental Responsibility: A Comparative Study of Latin American Legislation’, *International Journal of Law, Policy and the Family*, 30: 3 (2016), pp. 274–91.

⁴⁴Morris Ploscowe, ‘Alimony’, *The Annals of the American Academy of Political and Social Science: Progress in Family Law*, 383: 1 (1969), pp. 13–22.

⁴⁵Marisa Bucheli and Wanda Cabella, ‘El incumplimiento en el pago de las pensiones alimenticias, el bienestar de los hogares y el contexto legal vigente en Uruguay’, *Revista Latinoamericana de Población*, 3: 4–5 (2009), pp. 123–42; Laura Cuesta and Daniel R. Meyer, ‘Child Support Receipt: Does Context Matter? A Comparative Analysis of Colombia and the United States’, *Children and Youth Services Review*, 34: 9 (2012), pp. 1876–83.

The literature refers to this parent as an absent, noncustodial and/or non-resident father. The first is misleading because it conflates parents’ residence with their absence. The second relies on a legal status that may or may not be in place. The third is more descriptive of the actual situation of children and parents who do not live on a day-to-day basis under the same roof.

whether it is primarily the father or both parents who provide economic support.⁴⁶ In some European countries, the state makes available advance maintenance payments to compensate for unpaid or late payments by non-resident parents.⁴⁷ This assistance does not exist in Latin America, where states play a mainly subsidiary role in children's material wellbeing. In this context, child support refers only to private transfers. Existing data show that the proportion of children accessing paternal economic support is low, while the risk of experiencing poverty is high.⁴⁸

In short, by adopting a combined view of both family policy and family law, we can gain a more comprehensive sense of how states regulate the role of families in the context of welfare regimes. I address this more specifically in the proposed typology below.

A Typology to Reconstruct the Current Regulation of Fatherhood

A comprehensive picture of current state regulation of fatherhood adds a new element to our understanding of welfare regimes in Latin America. Below I explain how I propose to address fatherhood in a multidimensional fashion to provide information about this hitherto under-researched topic, employing an analytic device that captures the essence of the rules in place rather than their nuance or details.

From a gender perspective and at the most general level, state regulations promote fatherhood as either complementary or co-responsible to motherhood.⁴⁹ The former endorses gender norms based on the sexual division of labour regarding income provision and caregiving. The latter blurs – or begins to blur – the sexual division of labour, particularly by moving away from the notion that caregiving is exclusively a maternal rather than also a paternal responsibility.⁵⁰

To establish whether countries promote complementary or co-responsible fatherhood, I determined how law and policy regulate paternity along the dimensions of biological bonds, caregiving and breadwinning. These three dimensions are complementary as opposed to mutually exclusive: law and policy simultaneously regulate different dimensions of paternity.

⁴⁶There is not a lot of research on child support globally. Australia, the United States, the United Kingdom, certain Nordic countries and some Latin American countries are among the most studied. For a characterisation of schemes among OECD countries, see OECD Family Database, 'PF1.5: Child Support' (2010), available from <https://www.oecd.org/els/family/41920285.pdf> (last accessed 27 Feb. 2021).

⁴⁷*Ibid.*

⁴⁸Marisa Bucheli and Andrea Vigorito, 'Separation, Child-Support and Well-Being in Uruguay', *Serie Documentos de Trabajo*, Instituto de Economía, Facultad de Ciencias Económicas y Administración, Universidad de la República, Uruguay, 2017; Laura Cuesta and Daniel Meyer, 'The Role of Child Support in the Economic Wellbeing of Custodial-Mother Families in Less Developed Countries: The Case of Colombia', *International Journal of Law, Policy and the Family*, 28: 1 (2014), pp. 60–76.

⁴⁹In terms of the conceptualisation of the maternalist vs. co-responsibility policy I am drawing on previous work with Merike Blofield, but expand on this by including family law. See Merike Blofield and Juliana Martínez Franzoni, 'Maternalism, Co-responsibility, and Social Equity: A Typology of Work-Family Policies', *Social Politics*, 22: 1 (2015), pp. 38–59.

⁵⁰Note that 'co-responsibility' is a term often used in the context of neoliberal statecraft to refer to the sharing of responsibility between the individual and the state. However, in the context of childrearing, it refers to the equal sharing of responsibilities between mothers and fathers. This concept is used not only in legal frameworks (e.g. Chile), but also in care policies (e.g. Uruguay) and policy recommendations.

Table 1. State Regulation of Fatherhood: Complementary or Co-responsible to Motherhood, Based on Primary Laws and Policies Reflecting either Type, by Dimension of Fatherhood

Fatherhood as	Biological	Breadwinning	Caregiving
Complementary to motherhood	Fathers cannot opt out of breadwinning	Enforces paternal income provision	Mandates maternity leave; paternity leave is absent or aimed at supporting mothers ^a Embraces custodial maternal preference Takes men's breadwinning role for granted (often explicit in the law)
Co-responsible to motherhood	Fathers cannot opt out of breadwinning and caregiving	Drops presumed income provision as solely or primarily the father's responsibility	Mandates paternity and parental leave in addition to maternity Frames fathers as caregivers Drops presumed maternal preference

Note: ^a I discuss who finances leave at the time of birth in Table 4. For analytic purposes, the primary distinction here is the presence or absence of paternity leave.

Source: Own elaboration.

Based on how states regulate the biological, caregiving and breadwinning dimensions of fatherhood, two model situations of paternal statecraft emerge (see Table 1). As ideal types, they help us study the complex and often inconsistent set of rules addressing fatherhood found in the real world. For instance, a country might have fathers bear the burden of proof of their biological non-paternity, yet lag in paternity and parental leave. By the same token, family law might grant shared physical custody but lack any provision regarding paternal involvement in childrearing.

Fatherhood as complementary to motherhood exalts the specialisation of roles. Complementary fatherhood is about income provision. Mothers are supported, however minimally, as caregivers. Birth leave is primarily aimed at mothers as sole or primary caregivers. Paternity leave, when available, is intended for men to support their spouses after a child's birth. It is usually short and often funded by employers rather than by states and social security arrangements. Following divorce or separation, mothers are presumed to be the natural or more suitable caregivers; thus, the law establishes maternal preference. The non-resident father is expected to provide child support. The model relies on the identification of biological paternity to primarily allocate breadwinning responsibility.

Fatherhood as co-responsible to motherhood takes steps to move away from specialisation, embracing the notion that mothers and fathers equally provide income and care. Interventions are – or are beginning to be – gender neutral: both mothers and fathers become subjects of policy intervention as caregivers and breadwinners. Publicly funded birth leave applies to mothers and fathers as caregivers, despite considerable differences in length. The law makes room for parental agreement on joint rather than maternal physical custody. In the absence of

parental agreement, judicial ruling moves away from presumed maternal preference for physical child custody. Instead, court orders base their ruling on the *actual* caregiving practice of parents prior to separation or on the presumption of joint custody as the preferred parental arrangement. Similarly, the law may define economic support as inherently paternal or as a joint responsibility. The model relies on the identification of biological paternity to distribute not only breadwinning but also caregiving responsibilities.

States regulate fatherhood by way of defining who is the father and what fatherhood entails in terms of income provision and caregiving. If expectations are organised around the sexual division of labour, there is complementary fatherhood. Here, a mother is expected to primarily engage in childrearing, while the child's breadwinning father delivers a monthly payment that ensures that the mother can put food on the table. This arrangement is a direct extension of the traditional division of labour within the intact family.

If, on the contrary, expectations are organised around fathers stepping into maternal roles and vice versa, there is co-responsible fatherhood. Here, a mother and father divide their time equally between care and income provision. The specialisation is blurred to allow for both the provider and the caregiver role to be shared between the two.

Methods: Measurement, Cases and Data Sources

Empirically, this study reconstructs how law and policy define fatherhood, not why or whether they enforce it. The rationale behind focusing on legal provisions and policy design rather than their respective implementation is twofold. First, the study of enforcement presupposes a clear sense of what is established on paper. This study can, therefore, provide valuable input to studies that examine the implementation of legal and policy provisions. Second, family law doctrine and policy determine the appropriate ways in which fatherhood should be practised. It has a reality of its own and provides the basis for the practical regulation of lives – particularly when deviating from family law doctrine and policy as the legally established 'norm'.⁵¹ Last but not least, by focusing on the point in time when the empirical work was carried out (June 2019), this study opens the door to further dynamic analysis that considers trajectories and the direction of change.

Below is an overview of indicators operationalising the typology presented above, followed by an explanation of case selection, data sources and data analysis.

The ideal typical situation under *complementary fatherhood* is one in which paternity leave is either absent or maternalistic (i.e., a maximum of five days geared toward helping mothers return home after child delivery) and is funded partially or fully by employers. Following separation, children remain with their mothers, and fathers are expected to be sole or primary income providers.

The ideal typical situation under *co-responsible fatherhood* is one in which a publicly funded paternity leave identifies fathers as caregivers, provides leave that is still insufficient but above the maternalistic floor of three to five days, and following separation allows children to remain with their mothers, their fathers, or both,

⁵¹Martha Albertson Fineman, 'The Neutered Mother', *University of Miami Law Review*, 46: 3 (1992), pp. 653–69.

depending on parental agreement or the arrangement prior to separation. In situations of separation, income provision is also expected to be a joint responsibility adjusted according to earnings and childrearing arrangements.

Both situations above require us to establish how states approach the biological, caregiving and breadwinning dimensions of fatherhood. Real-world situations can exhibit elements of both model types, as shown below.

Measurement

For the *biological dimension of fatherhood*, I classified countries around the burden of proof; more specifically, whether it is located with fathers or mothers and whether states devote public resources to establishing the presence or absence of a genetic bond with the alleged father. The burden of proof might rest with mothers, who are expected to prove a biological bond with the alleged father. A major shift takes place when the burden of proof passes to fathers, who must prove the *absence* of a biological bond. To identify the father, mothers may need to go to court or rely on administrative procedures. Administrative procedures are less time-consuming than court procedures and do not require that mothers hire a lawyer.⁵²

For the *caregiving dimension of fatherhood*, I considered two indicators. The first is leave at birth. This is a very minimalistic approach, since caregiving does not end within the first few months after childbirth, and state policy reflects a range of scenarios concerning paternal eligibility (e.g. care services for young children). Here I establish the state's commitment to ensuring that paternity leave entails full wage replacement. I consider the lack of paternity leave or two-to-five-day paternity leave that targets maternal assistance upon delivery as an indication of complementary fatherhood. I consider the presence of longer paternity leave that enables paternal bonding and caregiving to new family members as an indicator of co-responsible fatherhood.

The second indicator for the caregiving dimension of fatherhood is the presumed custody arrangement in the case of parental disagreement following divorce or separation. In most countries studied, when parents disagree about their child's or children's physical custody upon separation courts assess the situation and make decisions informed by presumptions around the ideal arrangement. Examples of such presumptions are that children are better off with their mothers (i.e. maternal preference) or that children are better off being looked after by both the mother and the father (i.e. joint custody).⁵³ Another option is for courts to make case-by-case decisions for each family based on childrearing arrangements prior to separation. A broad maternal preference exists here, in which physical child custody is presumed to be best with mothers, and is an indication of complementary fatherhood. A narrow maternal preference (newborns and toddlers) or an approximation method (namely, a case-by-case analysis of childrearing practices prior to divorce or separation) indicates co-responsible fatherhood. In the absence of parental agreement, joint custody cannot be used as an indicator for co-responsible

⁵²Blofield and Filgueira, 'Paternity Recognition'.

⁵³In either case, the law allows for exceptions (e.g. history of domestic violence) to ensure children's safety first and foremost.

Table 2. Complementary versus Co-responsible Fatherhood: Definition and Primary Legal and Policy Expectations Reflecting the two Types

Dimension of fatherhood	Indicator	Values indicate	
		Complementary fatherhood	Co-responsible fatherhood
Biological	Fathers have burden of proof		0. No 1. Yes, in court 2. Yes, in administrative processes
Breadwinning	'Intact' families: paternal duty within partnership	0. Does not say 1. Only fathers	2. Fathers and mothers
	Cases of divorce or separation: paternal duty of income provision for children following separation	1. Yes, as primarily a paternal responsibility	2. Yes, but mothers are also expected to contribute
Caregiving	'Intact' families: fully funded paternity leave	0. No 1. Yes, to assist mothers upon delivery	2. Yes, to encourage paternal bonding and caregiving
	Cases of divorce or separation: physical custody of children following separation	0. Broad maternal preference (mothers are always presumed to be better equipped)	1. Narrow maternal preference (for newborns and toddlers) and approximation method

Note: The numbers 0, 1, 2 are used to code these parameters in the database.

Source: Own elaboration.

fatherhood; most legal frameworks worldwide go as far as using the approximation method – which draws back from the presumption of maternal physical custody and opens the door for parental or even for paternal custody – but do not force joint custody as a matter of presumption.

For the *breadwinning dimension of fatherhood*, I focus on whether income provision is only a paternal expectation and whether it is the only expectation fathers must fulfil or if caregiving is also considered. I look at this matter in the context of so-called 'intact' families, marital or otherwise, and in cases of divorce or separation. I first identify whether the state mandates income provision as an exclusive paternal role, as has been the case in Costa Rica since October 2019, and/or whether states demand income provision alone rather than combined with caregiving (an indicator of co-responsible fatherhood). Table 2 summarises the list of indicators discussed above.

An example of further refinement of the above measures would require establishing if, or the extent to which, states invest resources into locating presumed fathers to carry out DNA testing. For the caregiving dimension of fatherhood, closer attention needs to be given to whether fathers are eligible to access public Early

Childhood Education and Care (ECEC) services and if such access is universal or targeted.

Cases and Data Sources

The cases used include the policy/law in place for the 18 Spanish-speaking Latin American and Caribbean countries (Argentina, Bolivia, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela), plus Brazil (19 in total), as of June 2019.

Seven countries in the region have robust social policy regimes (Argentina, Brazil, Chile, Costa Rica, Cuba, Mexico and Uruguay). These measures involve but are not restricted to coverage of cash transfers and social services and a stated GDP per capita devoted to social policy.⁵⁴ These countries also have stronger state capacity than the others in the region in areas such as law enforcement and policy. Of these countries, Chile, Costa Rica, Cuba and Uruguay are small and unitary nations, while Argentina, Brazil and Mexico are large and federal with entrenched variations between rural and urban settings.⁵⁵

Data for analysis is contained in a novel database of legal and policy measures. This database contains provisions as enacted on paper. Its construction entailed: a) identification of all relevant official sources, b) careful reading and coding of each source, and c) triangulation of sources and coding with the help of country experts.

Legislation sources relevant to reconstructing family provisions vary from country to country. These include family codes, civil codes, children and youth laws, equality laws and provisions for child maintenance. For paternity and parental leave, the main sources are International Labor Organization (ILO) databases⁵⁶ and country by country data.⁵⁷

Data analysis involved a careful country coding for each of the indicators reported in Table 2. The set of laws and policies currently shaping the meaning, activities and responsibilities of fatherhood were enacted from the early twentieth century to mid-2019.

Findings

Below I discuss the empirical findings for each dimension of fatherhood regulated by the state through legal provisions and policy design.

⁵⁴Filgueira, *Cohesión*; Evelyne Huber and John D. Stephens, *Democracy and the Left: Inequality and Social Policy in Latin America* (Chicago, IL: The University of Chicago Press, 2012); Alex Segura-Ubierto, *The Political Economy of the Welfare State in Latin America: Globalization, Democracy, and Development* (Cambridge: Cambridge University Press, 2007).

⁵⁵Fernando Filgueira, 'El nuevo modelo de prestaciones sociales en América Latina: Eficiencia, residualismo y ciudadanía estratificada', in Bryan Roberts (ed.), *Ciudadanía y política social* (San José: FLACSO, 1998), pp. 71–116.

⁵⁶Database of Labor Statistics (LABORSTA): <http://www.ilo.org/employment/Informationresources/Statistics/lang--en/index.htm>; Key Indicators of the Labour Market (KILM): https://www.ilo.org/empelm/pubs/WCMS_114060/lang--en/index.htm; ILO Legal Databases (TRAVAIL): <https://www.ilo.org/dyn/travail/travmain.home>.

⁵⁷ILO, *Maternity and Paternity*, as updated by Salvador *et al.*, *Maternidad en el empleo*.

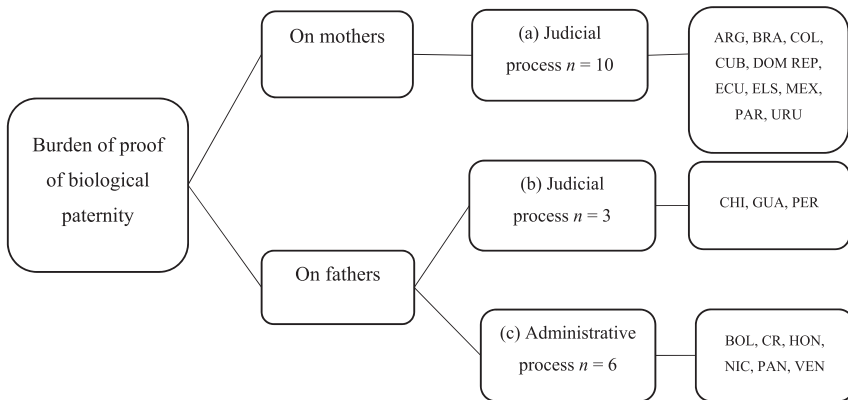


Figure 1. Biological Dimension of Fatherhood in Latin America: Burden of Proof, 19 Countries
 Source: Own elaboration, based on national legal sources and Blofield and Filgueira, 'Paternity Recognition', for the Brazilian case.

The Biological Dimension of Fatherhood

In general, family laws address biological paternity as the result of marriage/cohabitation or the voluntary recognition of out-of-wedlock children. When paternity is disputed, however, my findings display three different scenarios: first, paternity is settled in court but the mother bears the burden of proof (Figure 1a); second, the alleged father must prove in court the absence of biological ties (Figure 1b); third, the alleged father must prove the absence of biological ties with the child through a simple administrative procedure (Figure 1c). State regulation enabling fathers to opt in/out of fatherhood is least likely in the first scenario and most likely in the third.

The most compelling scenario to reduce the paternal capacity to opt out of fatherhood is found where *fathers have the burden of proof in the context of an administrative procedure easily triggered by mothers*. This has been the case in Costa Rica since 2001. Faced with data demonstrating a high number of children born outside of marriage, Costa Rican policy-makers decided to shift the burden of proof from mothers to fathers. The process of paternal identification is triggered when the child is registered at the hospital directly following birth. The birth registration form provides mothers the option to name the child's father, which enacts the 'Responsible Paternity Law'.⁵⁸

The alleged father is notified shortly thereafter of his option to contest his paternity by submitting to a DNA test at a public facility (one that is part of the national health care system) within ten days. Failure to procure the DNA test within this time frame results in the legal determination of biological fatherhood with the rights and duties – including income provision – applicable to fathers. Other countries followed Costa Rica's 2001 reform, establishing an administrative, non-court-based determination of biological paternity (see Figure 1). This is the

⁵⁸See note 26.

case in Panama (2003), Nicaragua (2007), Bolivia (2008),⁵⁹ Venezuela (2007) and Honduras (2013).

In three other countries in the region, mothers may go to court to demand DNA testing or courts may make it the judge's prerogative. One example is Chile, where a 2005 reform established a clear procedure and timeframe for presumed fathers to appear in court and either accept the paternity claim or submit to DNA testing to rule it out, all in the course of two hearings.⁶⁰ A similar procedure has been in place in Guatemala since 2008 and in Peru since 2017.⁶¹ This is not the case in Brazil or the Dominican Republic, however, where legal procedures can drag on for years – even though in Brazil the legal framework was updated as recently as 2009.⁶² Moreover, mothers are expected to produce evidence – or even have a judge order DNA testing – and numerous legal conundrums can extend the process.

Elsewhere in the region, laws address biological paternity as the result of court disputes by placing the burden of proof on mothers or demanding DNA testing from fathers – all based on the judge's prerogative.

The Breadwinning Dimension of Fatherhood

Under partnership, most countries address economic maintenance as a shared responsibility. One noteworthy exception is Costa Rica, where until 2019 the assumption that most women were stay-at-home mothers was reflected in legally compelling husbands to cover family expenses; wives were to do so only if they had their own earnings.⁶³

Still, in Latin America more broadly material support is largely framed as a shared responsibility, usually listed alongside other joint obligations related to the family's well-being. The masculine framing of provisions (i.e., the use of 'el padre' for both the father and the mother) adds to the difficulty of clearly establishing how the law approaches breadwinning. Some of these difficulties are removed when addressing income provision between separated partners.

Table 3 distinguishes between countries in which income provision is framed as a paternal responsibility (Costa Rica and Nicaragua); as the responsibility of the

⁵⁹Unlike legal reforms in other countries, the 2008 Bolivian Constitution is gender neutral regarding this matter.

⁶⁰Ministerio de Justicia (Chile), Ley no. 20.030: Modifica el código civil, en lo relativo a la exigencia de presentación de antecedentes para dar curso a la demanda de reclamación de maternidad o paternidad, y a la valoración de los medios de prueba sobre el particular, *Diario Oficial de la República de Chile*, 5 July 2005.

⁶¹Guatemala: Congreso, Decreto no. 39-2008: Reforma el Código Civil, respecto a la admisión de la prueba biológica del Ácido Desoxirribonucleico – ADN, *Diario de Centro América*, 22 Aug. 2008; Peru: Congreso de la República, Ley no. 30628: Ley que modifica el proceso de filiación judicial de paternidad extramatrimonial, *Diario Oficial del Bicentenario. El Peruano*, 3 Aug. 2017.

⁶²Brazil: Presidência da República, Casa Civil, Subchefia para Assuntos Jurídicos, Lei no. 12004: Altera a Lei no. 8.560, de 29 de dezembro de 1992, que regula a investigação de paternidade dos filhos havidos fora do casamento e dá outras providências, *Diário da Justiça*, 29 July 2009; Dominican Republic: Congreso, Ley 136-03, Código para el Sistema de Protección y los Derechos Fundamentales de Niños, Niñas y Adolescentes, Arts. 59, 179, 180, 7 Aug. 2003.

⁶³Asamblea Legislativa de Costa Rica, Reforma del artículo 35 de la Ley no. 5476, Código de Familia, de 21 de diciembre de 1973, Expediente no. 21.296 (Reform of Article 35 of Law no. 5476, Family Code, of 21 Dec. 1973, Proceedings no. 21,296), 8 Oct. 2019.

Table 3. Breadwinning Dimension of Fatherhood in Latin America: Primary Responsibility, 19 Countries

Father	Non-custodial parent	Joint
CR, NIC	URU, VEN	ARG, BOL, BRA, CHI, COL, CUB, DOM REP, ECU, ELS, GUA, HON, MEX, PAN, PAR, PER

Source: Own elaboration based on national laws.

non-custodial parent, whether the father or the mother (Uruguay and Venezuela); and as a joint responsibility of all fathers and mothers (all the other countries).

The Caregiving Dimension of Fatherhood

Table 4 reports data for caregiving within and outside partnership. When fathers are partners to their children's mothers, 11 countries make short, maternalistic paternity leave available (column (1a)). Only five countries (Ecuador, Paraguay, Peru, Uruguay and Venezuela) have paternity leave aimed at getting fathers involved in caregiving (column 1 (a)), and in only two (Uruguay and Venezuela) is there state effort to fund this leave (column (1b)). Costa Rica, Cuba and Honduras lack paternity leave. In addition to paternity leave, Chile and Uruguay have publicly funded parental leave for which fathers are eligible. Cuba lacks paternity leave (as noted above) yet has publicly funded parental leave for which fathers, in addition to other family members like grandmothers, are eligible. Note that Table 4 does not list countries with unpaid paternity leave, only those with publicly funded paternity leave (column 1(b)).

Concerning caregiving outside of partnership, only seven countries explicitly refer to joint physical care as an option equivalent to maternal physical custody, *provided parents agree*. These are Argentina, Brazil, Chile, Colombia, Cuba, Uruguay and Venezuela (column (3)). *In the absence of parental agreement* (column (4)), 14 countries explicitly embrace maternal preference while five countries establish on a case-by-case basis who has been the child's primary caregiver. These are Argentina, Colombia, Cuba, Uruguay and Venezuela. The larger group presumes children to be better off with their mothers; the smaller takes steps to establish the matter based on each family's unique situation. In the larger group, it is unlikely that fathers become the child's primary caregiver, whether or not they were involved in childrearing prior to divorce or separation. In this sense, maternalist laws can become deterrents for fathers to take on a more active role in childrearing. This is not the case in the smaller group, where issues in court are decided on a case-by-case analysis.

Paternal Statecraft: Bringing together Dimensions of Fatherhood in Counterpoint to Motherhood

What do the above findings mean for paternal statecraft in the region? Below I group countries according to whether they promote a specialisation of roles between breadwinning fathers and caregiving mothers (i.e. complementary fatherhood) or have taken steps towards a more even distribution of roles by getting fathers involved in caregiving (i.e. fatherhood framed in similar caregiving terms to motherhood, or co-responsibility).

Table 4. Caregiving Dimension of Fatherhood in Latin America, 19 Countries, According to Partnership Status

	Caregiving when in partnership					Caregiving when not in partnership		
	(1a)			(1b)	(2)	(3)	(4)	
	Type of paternity leave			Paternity leave is publicly funded	Fathers are eligible for publicly funded parental leave	Law allows separated parents to choose joint custody	Presumption re physical custody <i>in the absence of parental agreement</i>	
	None	Maternalistic	Caregiving				Maternal preference	Case by case
ARG								
BOL								
BRA								
CHI								
COL		a						
CR								
CUB								
DOM REP								
ECU								
ELS								
GUA				Partially				
HON								
MEX								
NIC								

PAN								
PAR								
PER								
URU								b
VEN								

Notes: a: In Colombia, paternity leave can last for eight days if the mother is also on birth leave.

b: The approximation method as used in Uruguay applies to children aged two years of age and above. For younger children there is a (narrow) maternal preference.

Source: Own elaboration based on national laws.

Table 5. State Regulation of Fatherhood in Latin America, 19 Countries: Summary of Findings, June 2019

Fatherhood as	Main features	Countries
Complementary	(1) Strong: Specialisation around the sexual division of labour	CR, NIC
	(2) Weak: Specialisation blurred regarding income provision, yet does not encompass caregiving	BOL, BRA, DOM REP, ECU, ELS, GUA, HON, MEX, PAN, PAR, PER
Co-responsible	(3) Strong: Steps towards promoting caregiving as a joint responsibility in family law and family policy (i.e. extended paternity leave)	URU, VEN
	(4) Weak: Steps towards promoting caregiving as a joint responsibility in family law, yet little to no state effort to gradually shape a caregiving-centred fatherhood (i.e. short or no paternity leave).	ARG, CHI, COL, CUB

Source: Own elaboration.

Table 5 summarises the clusters identified and discussed above. The table groups countries that promote fatherhood either as complementary to, or like, motherhood, differentiating in both instances between strong and weak cases.

Fatherhood as Complementary to Motherhood

Countries in this category show maternal preference: the law does not encourage parental agreement concerning joint custody. Several provisions strengthen the notion that fatherhood is not about caregiving.

Costa Rica and Nicaragua display a *strong complementary fatherhood*: fathers are consistently framed as primary income providers, while mothers are consistently framed as caregivers. Countries either lack paternity leave (Costa Rica) or have a short, maternalistic one (Nicaragua). Here, the burden of proof regarding biological fatherhood has passed from mothers to fathers and the trigger to have an alleged father involved is administrative rather than judicial.

In Costa Rica, indicators are highly consistent: fathers have the burden of proof; legal provisions identify fathers as primary or sole income providers both within and outside partnerships; mothers are framed as caregivers; and there is a clear-cut, broad maternal preference with no age limit for the physical custody of children. Nicaragua exhibits similar results, although it has state-funded, maternalistic paternity leave. When compared to the other Latin American countries with robust social policies, Costa Rica displays an extreme case of complementary fatherhood with not even maternalistic paternity leave in place, despite many congressional proposals to enact such leave over the past decade.

Another 11 countries have a *weak complementary fatherhood* (row (2)). While mothers are also consistently framed as caregivers, these provisions coexist with the framing of income provision as a *joint* responsibility between fathers and

mothers. Fatherhood is co-responsible to motherhood in terms of the duty to secure children's economic maintenance, yet not in terms of caregiving, which in turn sets severe constraints for women to devote time to paid work.

A few of these 11 countries have shifted the burden of proof from mothers to fathers. In Bolivia and Mexico, the process is triggered without a judge; in Brazil, Ecuador, El Salvador, Guatemala, Paraguay and Peru, fathers bear the burden of proof in the context of a still complex judicial process. In the Dominican Republic, Honduras and Panama, mothers continue to bear the burden of proof in indicating a child's biological father.

Fatherhood as Co-responsible to Motherhood

Countries in this category exhibit joint custody as a legally available option; parents can choose to enact it. When parents disagree regarding how to proceed with the physical custody of children, the law mandates either a narrow maternal presumption (for children up to two years old, as in Uruguay, or until seven years old, as in Venezuela) or giving up maternal preference altogether, replacing it with case-by-case decision making – i.e. an approximation method. The latter creates room for actual childrearing practices to play a role in legal custody battles. In Uruguay, the law relies on a case-by-case analysis for children older than two years of age, giving prominence to each family's childrearing practices. Argentina, Chile and Cuba too take this approach, also in the absence of parental agreement, as does Venezuela. Thus, children might largely stay with their mothers, not as an *a priori* definition, but because mothers are more likely to have devoted time to childrearing prior to separation. In this scenario, case-by-case decision-making regarding physical custody can eventually create a virtuous incentive to improve the use of paternity and, particularly, longer parental leave, inasmuch as custody battles incorporate actual childrearing practices as a prominent criterion for deciding custody arrangements.

Here again there is a difference between two sets of countries. One set shows stronger steps towards equity (row (3)) by passing into law publicly funded paternity leave. Such laws have not totally drawn back from maternal preference but combine a narrow definition of it with case-by-case decision-making. Non-custodial parents (whether father or mother) provide income. The responsibility to provide income is clearly identified rather than conflated under joint responsibility.

Uruguay has paternity leave aimed at providing fathers with time off to look after their young children. Additionally, the law embraces a narrow rather than a broad window for maternal preference (until two years of age), after which the courts are expected to establish custody on a case-by-case basis considering, for example, childrearing prior to separation. While keeping maternal preference, Uruguay approaches the approximation method established in Venezuela.

Another set of countries shows weak steps toward equity (row (4)). These have advanced in increasing paternal capacity over joint physical custody yet lack progress towards shaping fathers as caregivers. More specifically, the law has dropped maternal preference altogether but lacks a clear path towards shaping fathers as caregivers, especially when compared to the group of countries in row (3). For

example, Chile lacks publicly funded paternity leave and has five-day maternalistic paternity leave funded by employers. Chile and Cuba lack paternity leave altogether. Chile and Cuba have parental leave that mothers can partially (Chile) or totally (Cuba) pass on to fathers.

Indeed, Chile, Cuba and Uruguay have publicly funded parental leave that fathers can partially (Chile) or entirely (Cuba and Uruguay) take. Their design is heterogeneous⁶⁴ but they do share the feature that paternal take-up is optional and sharing it with partners is a maternal prerogative. Unlike the take-it-or-lose-it 'daddy quota' (see 'Disjointed Parts', above), for the time being the design of parental leave in these countries makes it *de facto* maternity leave.

Chilean and Cuban judicial decisions on physical custody are no longer based on the presumption of maternal preference. In Chile, this legal change took place in 2013 and entailed a substantive shift.⁶⁵ Before the reform, the law established an explicitly broad maternal preference: when parents were separated, mothers were granted physical custody. With the reform, not only can parents agree to share the physical custody of their children, but, if they disagree, children are to remain with the parent who was taking care of him/her prior to separation.⁶⁶

Argentine law, as reflected in the 2014 Civil and Commercial Code (Law 26.994; see [note 34](#) above), is gender neutral. In the absence of parental agreement, judges award physical custody to one of the parents without presuming that mothers are better fit than fathers for childrearing. Because, in practice, women are often more involved in caregiving than men, this provision is expected to operate like the approximation method discussed above for Uruguay and Venezuela. Unlike the latter, however, Argentina is not taking clear steps to encourage paternal involvement in childrearing in 'intact' families or, more generally, in scenarios devoid of parental conflict.

In Colombia steps towards giving fathers more leverage in physical custody are still nascent, with clear state efforts encouraging changes in paternal childrearing practices. Legal provisions have historically established maternal preference. In 2018, the Supreme Court indicated that joint custody was an acceptable

⁶⁴In Uruguay, parents can work part time from the end of maternity leave until the child is six months old. Fathers are permitted to take parental leave: República Oriental del Uruguay, Poder Legislativo, Ley No. 19.161, Subsidios por maternidad y por paternidad para trabajadores de la actividad privada, *Diario Oficial*, no. 28844, 15 Nov. 2013. In Chile, a 2011 reform granted fathers the option to use up to half the final three months of birth leave: Ministerio de Justicia (Chile), Ley no. 20.545: Modifica las normas sobre protección a la maternidad e incorpora el permiso postnatal parental, 17 Oct. 2011, <https://www.bcn.cl/leychile/navegar?idNorma=1030936> (last accessed 9 March 2021). In Cuba, fathers or other family members (usually grandmothers or other women in the family) are eligible to take parental leave. Meanwhile, mothers can return to work while families receive both sources of income (from the mother's work and from parental leave): Cuba, Consejo de Estado, Decreto Ley No. 339. De la maternidad de la trabajadora, *Gaceta Oficial*, no. 7 Extraordinaria, 10 Feb. 2017.

⁶⁵Ministerio de Justicia (Chile), Ley no. 20.680: Introduce modificaciones al código civil y a otros cuerpos legales, con el objeto de proteger la integridad del menor en caso de que sus padres vivan separados, *Diario Oficial de la Republica de Chile*, 21 June 2013.

⁶⁶In addition, judges consider the parents' attitude towards each other: see discussion of Articles 225 and 225b in Biblioteca del Congreso Nacional de Chile, Historia de la Ley no. 20.680 (History of Law no. 20,680), 2012, available from <https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/4280/> (last accessed 27 Feb. 2021).

arrangement, which was unprecedented.⁶⁷ However, joint custody is not clearly regulated. Colombia's maternalistic, publicly funded paternity leave makes this case more closely resemble Chile although, unlike in Chile, eligibility for eight-day paternity leave instead of the usual four-day leave depends on the father being the spouse or partner of a mother who has given birth and is eligible for maternity leave.⁶⁸ Also, the lack of parental leave pushes Colombia closer to the case of Argentina.

Overall, these countries have taken steps towards increasing paternal capacity over joint physical custody rather than towards shaping fathers as caregivers. My findings show significant cross-national differences, including among the seven countries with extensive social policies (Argentina, Brazil, Chile, Costa Rica, Cuba, Mexico and Uruguay). The differences between Costa Rica and Argentina, Chile and Uruguay are a case in point. Costa Rica promotes a clear-cut case of complementary fatherhood – one that sets the country apart from any other in the region. In addition, Brazil and Mexico display weak complementary fatherhood, while Argentina, Chile, Cuba and Uruguay have each taken steps towards co-responsible fatherhood. Organisations of separated fathers have demanded and often achieved these changes.

Summary and Implications

This article proposes a framework for examining state interventions directed at the biological, caring and family-sustaining dimensions of parenthood. This includes but transcends the usual study of paternity through birth leave that is generally found in the comparative literature on welfare regimes. Empirically, the paper is grounded on a novel database of legal and policy provisions assembled for this comparative and cross-national analysis. The database provides a comprehensive snapshot of regulations regarding the key dimensions of fatherhood studied, for the first time, from a non-legal point of view. My findings show that, regardless of how robust their social policies are, most countries presume fatherhood to be complementary rather than co-responsible to motherhood and enforce these dimensions accordingly.

In practical terms, the analysis presented provides policy-makers with a clear and relevant message: state intervention in fatherhood is taking place through an array of measures that can either promote or cancel out the role of other measures in place. For example, if Costa Rica were to move from complementary to co-responsible fatherhood without removing all due protection to mothers and children, mothers would not be assumed to be the preferred parent for custody. In addition to creating paternity leave, broad maternal preference would have to yield to case-by-case court determination of physical child custody – not to joint custody. Generally, broad maternal preference in the event of separation discourages paternal involvement in childrearing that longer, non-maternalistic paternal leave aims to promote. By the same token, as long as states lack decisive efforts

⁶⁷Corte Suprema de Justicia de la República de Colombia (Colombian Supreme Court of Justice), Case no. STC 12085-2018, 18 Sep. 2018, available from [https://www.icbf.gov.co/cargues/avance/docs/csj_scc_stc12085-2018_\[2018-00188-01\]_2018.htm](https://www.icbf.gov.co/cargues/avance/docs/csj_scc_stc12085-2018_[2018-00188-01]_2018.htm) (last accessed 5 March 2021).

⁶⁸El Congreso de Colombia, Código Sustantivo del Trabajo (Substantive Labour Code), 2011, Art. 236.

to get fathers involved in childrearing in the absence of parental conflict, joint custody may resolve the grievances of organised fathers, but it will not, as the international literature demonstrates, lead to enacting caregiving fatherhoods.

Co-responsibility that is first built on a regular paternal involvement in income provision to later address the joint participation of fathers in child custody largely benefits the income security of mothers and children. Conversely, co-responsibility that is first built on joint custody risks letting fathers evade responsibility for much of their income provision without ensuring they will be consistently present in childrearing.

Neoliberal governments eager to deepen familial responsibility for children's material wellbeing, as well as left-wing governments influenced by feminist advocates, may have common grounds for more effective enforcement of paternal child support. Neither has challenged the fact that feeding children is primarily a private responsibility, a view also shared by organisations that represent separated fathers eager to claim joint custody. Further research should illuminate the role of welfare policy in encouraging fathers to continue to provide for their children as well as address current and potential links between private and public transfers – as in the case of a universal basic income.

Further research should also examine the political debates and policy processes behind current legal and policy provisions (including the role of state actors, feminists and organised fathers), as well as international trends. Such an analysis should shed light on the distinct constellations of actors and ideas and determine where current law and policy stands in each country across the three dimensions of fatherhood examined above.

By reconstructing how states regulate fatherhood in the context of highly familialist welfare regimes such as those in Latin America, there is much to learn from the political economy that shaped fatherhood statecraft in this region and in others where there is a more active intervention of social and labour policy in the parental dispute over resources, such as Europe. In turn, the study of the global North could gain insights by drawing from a comprehensive approach of state regulation like the one proposed here.

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Spanish abstract

La paternidad es un componente clave pero faltante en la investigación sobre regímenes de bienestar. ¿Qué es lo que los Estados demandan formalmente de la paternidad a lo largo de Latinoamérica? Utilizando una base de datos novedosa que codificó las distintas provisiones legales y de políticas de 19 países latinoamericanos, este artículo ofrece un marco conceptual para examinar las intervenciones estatales relacionadas con las dimensiones biológicas, de cuidado y de sostenimiento familiar de la paternidad. Mis hallazgos muestran que, independientemente de qué tan robustas son sus políticas, la mayoría de los países presume que la paternidad es complementaria en vez de corresponsable con la maternidad. Al hacer una contribución conceptual, empírica y práctica para estudiar la

regulación estatal sobre la paternidad, este artículo contribuye a una visión más exhaustiva del estado de bienestar.

Spanish keywords: política de bienestar; políticas familiares; género; paternidad; Latinoamérica

Portuguese abstract

A paternidade é um componente chave, mas ausente, das pesquisas sobre regimes de bem-estar social. O que os Estados exigem formalmente da paternidade em toda a América Latina? Usando um novo conjunto de dados de disposições legais e políticas para dezoito países latino-americanos, este artigo oferece uma estrutura conceitual para examinar as intervenções estatais voltadas para as dimensões biológicas, de cuidado e de sustento da paternidade. Os resultados mostram que, independentemente da robustez de suas políticas sociais, a maioria dos países presume que a paternidade seja complementar em vez de corresponsável pela maternidade. Ao fazer uma contribuição conceitual, empírica e prática para estudar a regulação estatal da paternidade, este artigo contribui para uma visão mais abrangente do bem-estar social.

Portuguese keywords: política de bem-estar; política familiar; gênero; paternidade; América Latina

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