NEW FRONTIERS IN FAMILY LAW: INTRODUCTION

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A new discussion about families and care is unfolding in family law. Reproductive technologies, globalization, and left-of-center critiques of same-sex marriage offer an especially fertile environment for imagining sex, intimacy, care, and reproduction outside marriage and the nuclear family. These reconceptualizations continue the revisioning enabled by reproductive freedom, no-fault divorce, and women’s entrance and integration into the workforce. The implications of these trends are significant. What happens to family law when a range of relationships and intimate practices displace heterosexual marriage from the epicenter of thinking about the family? Although the full effects of this diffusion are not yet clear, certain trends are emerging.

First, discussion has shifted from divorce and inequalities inside the marital family to inequality among families. Family law scholarship and advocacy in the 1970s and 1980s often focused on remedying the economic destitution of women caused by divorce, as well as problems related to the domination of husbands over wives, such as domestic violence. In current scholarly discussions of the family, alternatives to marriage are as important as reforming marriage. A natural consequence of this shift in priorities is attention on the state, particularly its role in privileging certain families over others. The declining focus on heterosexual marriage has also introduced more antinessentialist analysis into family law scholarship. Because marriage is less prevalent among low-income individuals, people of color, and sexual minorities, a family law that is less marriage-centric is more likely to consider the life experiences of diverse individuals. Finally, with less investment in heterosexual marriage as a dominant focus, a perceptible shift in the disciplinary boundaries of family law is occurring. Today, constitutional law, tax law, immigration law, criminal law, and employment law—indeed, a host of areas providing background rules for families, but not historically considered part of family law—are as likely to be sites of inquiry on families as the law of marriage, divorce, and child custody.

One helpful metaphor that may help us understand these developments is “the frontier.” A frontier is a region that forms the margin of settled or developed territory or a fertile area for explorative or developmental activity.¹ This metaphor aptly describes the recent proliferation of family law scholarship exploring sexual

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and intimate practices outside the settled territory of the marital family. Salient examples include multiple parenthood,2 networked families,3 polygamy,4 polyamory,5 unmarried fathers,6 queer culture and intimacy,7 and friendship.8 This work recognizes that law provides the context that can facilitate or hinder unconventional intimate configurations. Some commentators therefore seek to disentangle law from sexual and intimate life.9 Others seek legal recognition (and regulation) of a wider range of intimate affiliations.10

The frontier thus provides a new metaphor, replacing older frameworks such as the “channeling” function of family law.11 According to the channeling story, family law exists to channel sex and reproduction into marriage, the institution deemed most appropriate for those activities. In the new frontiers of family law, marriage holds a less central, even disfavored, position.

The New Frontiers in Family Law symposium explored this new territory. Some of our questions were: (1) Is the notion of “the family” more limiting than helpful? After all, the history of the family in law is largely about oppression.

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9 Michael Warner, Beyond Gay Marriage, in LEFT LEGALISM/LEFT CRITIQUE 259, 263–66 (Wendy Brown & Janet Halley eds., 2002); Franke, Domesticated Liberty, supra note 7, at 1400; Franke, Loving, supra note 7, at 2688.
10 See, e.g., Martha M. Ertman, Marriage as a Trade: Bridging the Private/Private Distinction, 36 HARV. C.R.-C.L. L. REV. 79 passim (2001).
What is gained by using the family as frame of analysis, and what is obscured?; (2) If our goal is to allow a diverse range of sexual and intimate affiliations to flourish, is law the best tool? After all, culture, social practices, and non-legal institutions order social and sexual life as well as formal law. Moreover, legal recognition for “nontraditional” families and intimate configurations often comes with costs, among them, assimilation of those recognized and further marginalization of those not; (3) Finally, what is the appropriate balance of equality and freedom in our theorizing and advocacy about families? Freedom and equality often inform and enable each other in law and politics, but sometimes they are in tension, particularly in the intimate sphere where substantial dependencies exist.

The symposium explored these questions and their implicit tensions, including those between political conservatives and liberals and tensions among critical left and liberal legal theorists of the family. It materialized only with the valuable contributions of my former colleague, Martha M. Ertman, who helped develop the vision for this symposium and invite the contributors; Herta Teitelbaum, who endowed this symposium in memory of her late husband, Lee E. Teitelbaum, a prolific family law scholar and the beloved former dean of our law school; my dean, Hiram Chodosh, who gave nothing but green lights for this ambitious event; Utah’s Gender Studies Program, which co-sponsored the symposium, and the support of its Director, Kathryn Stockton and Associate Director, Gerda Saunders; Shawn Anderson, Miriam Lovin, and Elizabeth Seeley, who provided tireless logistical support; my colleague Amy Wildermuth, who helped me work through the complexities of publishing a joint issue of the Utah Law Review and the Journal of Law and Family Studies; and the organizational and editorial efforts of the staff of the two journals, in particular, their respective Editors-in-Chief, Rik Wade and Pamela E. Beatse. All deserve substantial thanks.

The symposium, which took place in February 2008, was organized around three conceptions of boundaries as they relate to families: definitional boundaries, geographic boundaries, and disciplinary boundaries. In the first panel, which I moderated, Elizabeth Emens, Professor of Law at Columbia Law School, examined sex, race, and disability discrimination that occurs in the intimate domain, such as in sexual, romantic, and marital relationships. Although Emens emphasized that the legal regulation of intimate discrimination at the individual level would be woefully misguided, she argued that the state should reform its laws and policies to attend to its structural role in intimate discrimination. According to Emens, for sex, the most obvious next step is to cease restricting marriage according to sex. For disability, the state should help to encourage opportunities for intimate affiliation by attending the ways that structures of accommodation operate to help or hinder closeness among nondisabled and disabled people. For race, the state’s goal should not be to encourage race mixing in the intimate realm, but rather to lift burdens on existing relationships, such as residential segregation.

Martha Ertman, Professor of Law at the University of Maryland Law School, presented a paper tracing the roots of today’s ban on polygamy to nineteenth...
century Americans’ view that Mormons committed two types of treason. According to Ertman, antipolygamists charged Mormons with political treason by establishing a separatist theocracy in Utah. Second, they saw a social treason against the nation of white citizens when Mormons adopted a supposedly barbaric marital form, one perceived as natural for, in the Supreme Court’s phrase, “Asiatic and African” people, but so unnatural for whites as to spawn a new, degenerate race. Ertman argued that the racial foundations of American antipolygamy law require us to rethink our own often reflexive condemnation of the practice.

Katherine Franke, Professor of Law and Director of the Program in Gender and Sexuality Law at Columbia Law School, offered a different, but equally provocative vision for family law. Franke argued that efforts to secure marriage equality for same sex couples must be undertaken, at a minimum, in a way that is compatible with efforts to dislodge marriage from its normatively superior status as compared with other forms of human attachment, commitment, and desire. Resisting the normative and epistemic frame that values non-marital forms of life in direct proportion to their similarity to marriage, she argued that we must unseat marriage as the “measure of all things.” To this end, she suggested as a thought experiment substituting friendship for marriage at the center of the social field in which human connection takes place. With that new frame, “our investments in marriage and marriage’s investments in us are likely to yield in such a way that we can imagine making the argument for same sex couples’ right to marry while also imagining and cultivating different longings . . . .”

I closed the panel with a presentation of my research on multiple-parent families, what I call “community parenting.” This project seeks to understand why, at a time of increasing recognition of non-traditional families, the “more-than-two” parent family is so widely agreed to be undesirable, even while so many people practice alternatives to the two-parent nuclear family norm. I reviewed the many contexts where multiple-parent families exist, such as in gay and lesbian families, families of color, and separated and divorced families. Finally, I concluded with the suggestion that the law should recognize community parenting, because it is often highly functional and represents a welcome disruption to the gendered, nuclear family. Thus began a lively and engaging conversation.

In the spirit of exploring new territory, that evening we turned to a different format to explore the conferences themes. Bringing to the West things that originated back East, we borrowed the format of Eve Ensler’s Obie Award-winning episodic play, *The Vagina Monologues*, for a first-night-of-the-conference performance. Calling the performance *Telling Tales on Families*, we solicited monologues from the University and Salt Lake communities with the aim of literally giving voice to a wide range of experiences of family, intimacy, kinship, sexuality, and relatedness. The fifteen monologues we selected from the many

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12 Franke, *Loving*, supra note 7, at 2689.
13 Id. at 2686–87.
submissions were performed by the winning authors, and, where authors preferred anonymity, by local actresses, students, and members of the wider University community. The winning authors were: Bonnie Baty, Heidi Camp, Martha Cannon, Lynette Danley, Rowenna Erickson, Martha Ertman, Kim Hackford-Peer, Ruth Hackford-Peer, Janet Kaufman, Cynthia Lane, Ashley Morgan, C. La Var Rockwood, Linda Smith, Mary Stainton, Barbara Swain, and Karen Williams. The topics addressed by the monologues were diverse, from adoption to mental illness, polygamy to end of life decision-making, domestic violence to the challenges of raising a minority child in a world of discrimination. Thirteen of the monologues are published in this issue, each accompanied by law-student-authored commentary situating the topic of the monologue within its relevant legal context.

_Telling Tales on Families_, like the academic papers, was very much a part of the new frontier idea. It involved a collaboration between the University of Utah’s College of Law and Theatre Department, two departments that have little contact in most universities. As an alternative format for exploring the themes of the symposium, the monologues performance also represented a new frontier in academic discourse. Chosen through a community-wide competition and performed for free at an off-campus public venue, the monologues also reflected cutting edge thinking about bringing the work of the university to the broader community. Finally, by having the law student staff members of the _Journal of Law and Family Studies_ comment on each monologue, the performance represents a new frontier in legal education. Our hope in setting up this format is that the rich conversation between the monologue authors and members of the legal community could be carried through into this issue.

_Telling Tales on Families_ was the subject of an editorial in the _Deseret News_. The newspaper editors described the concept of the performance in glowing terms:

We see it as a first-rate endeavor that will, undoubtedly, provide not only vital information for the legal profession, but will help preserve many real-life moments that would be blown away by time. . . . We offer a tip of the hat to the University of Utah for its willingness to explore the “brave new world” of inner-history. In time, perhaps other disciplines will also realize that because a relationship is small doesn’t mean it is insignificant. As the maxim has it, a few drops of water—when frozen—can split a boulder. A few monologues about family life also will crack open new ways of seeing, appreciating and applying the law.  

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16 Id.
There are many people who helped make *Telling Tales on Families* a success, including the committee of faculty members and students from departments across campus who selected the monologues: Brin Bon (undergraduate student), Laura Briggs (Tanner Center), Elizabeth Clement (History), Martha Ertman (Law), Deborah Feder (law student), Tina Hatch (Counseling Center), Lori McDonald (University of Utah, Dean of Students), Kaye Richards (Modern Dance), and Robin Wilks-Dunn (Theatre); playwright and director L.L. (Larry) West and actresses Karen Nielsen-Anson and Betsy West, who provided consultation on direction; M.C. Elizabeth Clement; actresses Kathryn Atwood, Susan Dolan, and Andra Harbold, University employee Leslie Giles-Smith, community member Michael Rockwood, and law student Paul Techo, who served as readers; Aaron Herd, Travis McKee, Pat Standley, and Morgan Stewart, who handled the lighting, sound, and videography; graphic designer Sandy Kerman of Kerman Designs, who designed the playbill; Kimberly Hall, Assistant Director of the University’s Women’s Resource Center, who helped advertise the performance campus-wide; law school public relations person Barry Scholl, who provided media outreach; KCPW News Director and radio host Lara Jones, who dedicated a segment of her show, *Midday Metro*, to the performance; law-student volunteers Monica Diaz Greene, Jordinn Long, Lacey Singleton, and Paul Techo, who helped with performance night logistics; and the Rose Wagner Performing Arts Center’s Black Box Theatre, which made its venue available for the performance.

Day two of the symposium, consisting of two additional academic panels and a tour of the Church of Jesus Christ of Latter-Day Saints Family History Library, proved as engaging as day one. The first panel, moderated by my colleague, Erika George, Professor of Law at the University of Utah, was organized around the theme of geographic boundaries. The first panelist, Kathy Abrams, Herma Hill Kay Distinguished Professor of Law at University of California-Berkeley School of Law, examined a series of federal enforcement efforts aimed at apprehending and detaining undocumented immigrants. She looked at two recent initiatives: workplace and residential sweeps aimed at apprehending undocumented immigrants, and the emergence of “family detention” facilities designed to house families as they await determination of their immigration status. She argued that, whatever else they do, these policies serve to produce immigrants as less than human—“the kind of beings whose deep connections with parents, children or spouses can be disregarded, indeed flagrantly violated, at will.”17

Penelope Andrews, Professor of Law at Valparaiso University School of Law and Chair in Law at LaTrobe University, Australia, examined the evolution of South African legislation and constitutional jurisprudence in the face of competing imperatives, for example, between equality, legal pluralism, customary law/religious law, and the recognition of polygamy. Toward that end, she explored...

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legislative attempts to regulate polygamous marriages in South Africa through the Recognition of Customary Marriages Act, a statute designed to provide for equality between the spouses and regulate all aspects of customary marriages, including their establishment, property relationships, and dissolution. She reviewed the history of compromise in the formation of South African Constitution between liberal equality principles and formal recognition of indigenous law, as well as the Constitutional Court’s role in mediating those values and pulling the constitution closer to a vision of gender equality. Andrews located the practice of polygamy within this narrative of progress, and considered the various arguments for and against recognizing polygamy from that standpoint. On the one hand, she noted legal regulation (and recognition) of polygamy may in fact provide rights, albeit limited ones, for women in polygamous marriages. On the other hand, such recognition also suggests that the South African Government is not prepared to make the hard choices that are necessary to ensure that the pursuit of gender equality is not derailed. In the end, Andrews seemed to side with the anti-polygamists, noting that polygamy does not comport with gender equality, but her broader point is that South Africa may provide “a third way” of straddling the equality conundrum that has so bedeviled feminist analyses and discourse in the past few decades.

Laura Briggs, Associate Professor of Women’s Studies at University of Arizona and then-visiting research fellow at the University of Utah’s Tanner Humanities Center, presented her research on transnational adoption. Contesting the “happy multiculturalism” story of transnational adoption, she provided a more troubling account of the practice using Guatemala as a case study. Briggs reviewed the history of various efforts to bring children to the United States since the 1930s, as well as the increasingly privatized nature of the adoption process. By the 1970s and 1980s, according to Briggs, parents were less like petitioners and more like consumers, seeking a child and paying a fee. These conditions created the context for adoption from Guatemala and other Latin American countries, which in the 1980s were engaged in “dirty” wars against leftist insurgents. According to Briggs, these civil wars involved massive human rights violations and organized disappearances of citizens, including children. She then reviewed narrative accounts of Latin American adoption, and demonstrated the tensions between what she termed left-wing solidarity accounts and right-wing “change and conversion” accounts of transnational adoption. She concluded with the following point: when we see transnational adoption as an undifferentiated, neutral anti-racist project, we miss a great deal of the political struggle that goes on under the sign of adoption.

Michael Cobb, Associate Professor of English at University of Toronto, examined the importance of enduring in our family relations past death. Using

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diverse examples from Utah, including Mormon scripture, a will, a Supreme Court probate case, and an episode of HBO’s Big Love, he argued that transfer of property helps people sustain the hope that families can endure after the death of a relative. According to Cobb, “we’re haunted by the property willed to us—by the line of succession’s solidification of social relations by the transfer of property after death.”19 Building on this insight, he examined what happens to intestate estates if there is both no will and no spouse: “a relentless . . . quest for a blood heir, no matter how distant.”20 Cobb suggested that we should be able to continue relating to people other than our legal families after death; in his case, “my boyfriend, or, ideally, my friends.”21 More broadly, he demonstrated how intestacy laws fail to sustain and protect the families “we make.”22

The final panel, moderated by Martha Crtman, was organized around the theme of “disciplining boundaries.” Mary Anne Case, Arnold I. Shure Professor of Law at the University of Chicago Law School, explored the boundary between religious and civil marriage in a paper analyzing the claim on the part of evangelical Protestant religious conservatives that state recognition of same-sex marriages will undercut their own marriages. While asserting that she supports the legalization of same sex marriage, Case conceded that this vehement objection by evangelical Protestants is exactly right. Through a historical account of how marriage came to be regulated by the state, she explained why. Evangelical Protestants in the United States, according to Case, have abdicated the definition, formation, and dissolution of marriage to the state. That is, there is no difference in the way they understand marriage and how the state defines it. In contrast, this is not true for any other religions. For example, Case explained, Catholics famously do not recognize divorce. Along the same lines, Orthodox Jews recognize a distinct process for obtaining a divorce by which the husband must give a “get” to his wife. As these examples suggest, Catholics and Jews understand the distinction between religious and civil marriage. This disaggregation, according to Case, explains polls showing that the latter two groups are less likely than evangelical Protestants to oppose same-sex marriage. Case then traced the roots of the conflation of civil and religious marriage in the history of Anglo-American marriage law. She concluded that Protestants must suffer the loss of control over the definition of marriage, because the Equal Protection Clause of the Federal Constitution, as it relates to sex discrimination, demands it.

Brenda Cossman, Professor of Law of the University of Toronto Faculty of Law, addressed the recent media attention to the “Opt Out Revolution,”23 that is, the decision of upper middle class, professionally trained women to leave the work

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20 Id.
22 Id.
force and to stay home to care for their children. After reviewing the various feminist critiques denouncing the opt-out phenomenon, she noted that she wanted to tell a different story. Rather than simply highlighting the extent to which choice is constrained by market and familial arrangements, she explored what might happen if we took the rhetoric of choice seriously. According to Cossman, the “opt-out” revolution can be usefully understood as an instance when women are called upon to govern themselves through the choices that they make. Instead of denying the reality of choice, Cossman asserted that an effective feminist response would be to explore the nuances of how choice operates in many women’s lives, and how it is managed and negotiated, such that motherhood is being reconfigured on new “terrain.”

Melissa Murray, Assistant Professor of Law at University of California-Berkeley School of Law, explored the disciplinary boundary between criminal law and family law. Murray argued that criminal law and family law have long had a cooperative role in constructing intimate life as either licit marital behavior or illicit criminal behavior. Murray then used the 2005 statutory rape case of State v. Koso as a point of entry to move beyond the doctrinal divide that separates family law and criminal law. Koso concerned a fourteen-year-old girl who married a twenty-two year-old man with the consent of her parents. Despite their legal marriage, the man was convicted of statutory rape. Murray used the Koso case to theorize the boundaries where criminal law and family law intersect and overlap in their regulatory agendas. She argued that a more thorough understanding of the interaction of criminal law and family law in the regulation of intimate life may lead to more comprehensive and satisfying solutions to issues that frequently arise in the overlapping boundaries of the two doctrines. More broadly, she looked to the promise created by the potentially blurred line between family law and criminal law to imagine a space between marital sex and criminal sex such that we can imagine sex outside of marriage and, even possibly, outside of law.

Last but not least, Jana Singer, Professor of Law at University of Maryland School of Law, gave a presentation on one of the primary challenges posed by the expansion of family boundaries: the increase in litigation between family members. In particular, she discussed the sharp rise in intra-family litigation and explored some of the reasons that family members have increasingly turned to the judicial system to resolve disputes over their respective rights and responsibilities. Examining the principles and paradigms that courts have used to resolve these intra-family disputes—including constitutional law, contract principles, child-focused decision-making, and therapeutic jurisprudence—she concluded none of these existing dispute-resolution paradigms offers a fully satisfactory framework.

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for resolving conflicts between and among family members. According to Singer, policy makers need to think more explicitly about the potential for intra-family litigation when fashioning rules about family structure and relationships.26

Taking advantage of Utah’s unique setting for exploring the boundaries of families and family law, both in its history and geography as a frontier, the symposium concluded with a tour of the Church of Jesus Christ of Latter-Day Saints Family History Library, where we learned about the library’s substantial resources for genealogical research.

From the wealth of material presented at the live symposium, the editors are publishing seven articles and thirteen monologues—some from participants and others from those who could not appear in person—each of which, in its own way, reflects and challenges the major themes of the symposium.27 Of particular note is the addition of an article by renowned sociologist Judith Stacey, which leads the symposium issue. Judith Stacey is Professor of Social and Cultural Analysis, Professor of Sociology, and Director of Undergraduate Studies at New York University. Her paper considers the potentialities of the Mosuo people, a small ethnic-minority culture in southwest China, for offering “creative solutions to inherent contradictions between individual eros and family security.”28 According to Stacey, in contrast with Western family and kinship systems, the Mosuo live in extended, multigenerational households with their mother and her blood relatives. Together, family members “own, maintain, and inherit the family property, perform the necessary labor, rear all children born to the women of the household, and care for aged and dependent members.”29 Traditional Mosuo family values also “radically separate sexuality and romance from domesticity, parenting,

26 Two other prominent legal scholars of the family, Adrienne Davis, William M. Van Cleve Professor of Law at Washington University School of Law, and Carol Sanger, Barbara Aronstein Black Professor of Law at Columbia Law School, were unable to make it to Salt Lake City for the symposium, but were with us in spirit. The speakers acknowledged their substantial contributions to the symposium’s main questions in both their presentations and the discussions that followed.


care-taking and economic bonds.”30 Women are afforded equality and mutuality over their sexual and procreative lives, and mutual desire alone governs romantic and sexual unions “for women and men alike.”31 Adults do not normally marry or live with their lovers.32 In her article, Stacey summarizes her ethnographic tour of the Mosuo community, sketching the lives of three contemporary Mosuo families. She then describes the history of official political party oppression suffered by the Mosuo in the form of “marriage campaigns,” and the recent pendulum shift to “unbridled” market-based ethnic tourism of mainstream Chinese and global clientele, who are attracted by the Mosuo reputation for free love.33 Due to these various pressures, Stacey poignantly observes, “our world risks losing its most successful, egalitarian, and enduring species of nonmarital kinship just when the viability of modern marriage seems in gravest doubt.”34

In addition to Professor Stacey’s article, the published symposium issue includes two other papers not presented at the live symposium, one authored by Mary Anne Case and another by Laura Briggs. Mary Anne Case’s contribution argues for a theory of “feminist fundamentalism,” which would provide a counterweight to challenges to sex equality from fundamentalist religion.35 By feminist fundamentalism, Case means “an uncompromising commitment to the equality of the sexes as intense and at least as worthy of respect as, for example, a religiously or culturally based commitment to female subordination or fixed sex roles.”36 Laura Briggs’ contribution explores the history of transracial adoption in the United States, providing an alternative account of the impact of “racial matching” policies, which disfavor the adoption of African-American children by white parents.37 Briggs contests the account by some prominent scholars that racial-matching in adoption caused the explosion of minority children in the United States foster care system. Rather, she locates the problem in increasingly aggressive federal laws aimed at terminating the parental rights of poor, minority mothers—that is, in the supply side of the foster care system.

The New Frontiers in Family Law symposium is co-published by the Utah Law Review and Journal of Law and Family Studies. This joint issue represents a significant achievement of our students and our law school in building bridges within and across our law school communities. In keeping with the symposium’s

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30 Id.
31 Id. at 2009 UTAH L. REV. 287, 292; 11 J. L. & FAM. STUD. 239, 244.
33 Id. at 2009 UTAH L. REV. 287, 308; 11 J. L. & FAM. STUD. 239, 260.
34 Id. at 2009 UTAH L. REV. 287, 321; 11 J. L. & FAM. STUD. 239, 273.
36 Id. at 2009 UTAH L. REV. 381, 382; 11 J. L. & FAM. STUD. 333, 334.
commitment to breaking down existing conventions, the symposium editors wish that authors citing the works published in this issue employ a parallel citation to both the *Utah Law Review* and the *Journal of Law and Family Studies*, in a manner consistent with the footnotes in this introduction. This format is not in *The Bluebook*, but then again, the best things in life are often so for the very reason that they are not "by the book."

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