MARRIAGE, BIOLOGY, AND PATERNITY: THE CASE FOR REVITALIZING THE MARITAL PRESUMPTION

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One of the most striking developments in family law over the past three decades has been the increasing dissociation of marriage and legal parenthood. In many ways, this dissociation has been both a necessary and a good thing. It has been good for the now more than one-third of American children who are born outside of marriage, in that it has facilitated their connection to—and allowed them to access the resources and social capital of—two biologically related adults.[1] It has also provided some protection to the many lesbian and gay couples who are still (in forty-nine states at least) excluded from marriage but who have made a commitment to nurturing and rearing children together.[2] And it has enhanced the financial resources available to many single parents (still overwhelmingly, but not exclusively, mothers) who do the vital day-to-day work of simultaneously nurturing and providing economically for their children.[3]

But the dissociation of marriage and parenthood has had some negative—perhaps unanticipated—consequences as well. One of those consequences has been the erosion of the marital presumption of paternity as a substantive basis for ascribing parental rights and responsibilities. Traditionally, the marital presumption assigned legal

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1. According to the Centers for Disease Control and Prevention, 34% of all births in the United States in 2002 were to unmarried women, up from 33.5% the previous year. JOYCE A. MARTIN ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., BIRTHS: FINAL DATA FOR 2002, 52 NATIONAL VITAL STATISTICS REPORTS NO. 10, at 8-10 (2003), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_10.pdf.

2. Massachusetts is the only state that currently recognizes same-sex marriage. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). According to the 2000 census, more than 590,000 households self-identified as same-sex unmarried partners, representing nearly 1.2 million adults. JUDITH BRADFORD ET AL., NAT'L GAY & LESBIAN TASK FORCE POLICY INST., THE 2000 CENSUS AND SAME-SEX HOUSEHOLDS: A USER'S GUIDE 1 (2002), *available at* http://www.thetaskforce.org/downloads/census/CensusFull.pdf. Demographers estimate that between 22% and 28% of lesbian households and between 5% and 14% of gay male households include children. *Id.* at 10; Dan Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources*, 37 DEMOGRAPHY 139, 150 (2000).

3. In 2002, approximately 16.5 million children were living with a single mother, while 3.3 million children were living with a single father. JASON FIELDS, U.S. CENSUS BUREAU, CHILDREN'S LIVING ARRANGEMENTS AND CHARACTERISTICS: MARCH 2002, at 2 tbl.1 (2003), *available at* http://www.census.gov/prod/2003pubs/p20-547.pdf.

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fatherhood of a child born during marriage to the husband of the birth mother.[4] In an increasing number of cases, however, presumed fathers (and sometimes mothers) have challenged the marital presumption and have urged courts to "disestablish" the paternity of children born during marriage.[5] Courts have struggled to respond to these challenges and have invoked a variety of equitable doctrines to balance the competing interests of fathers, mothers, and children.[6] Increasingly, courts and legislatures have jettisoned the presumption and have allowed marital fathers to disestablish paternity based on the results of genetic testing.[7] The result in many cases has been to exacerbate the trauma associated with divorce and to deprive children of needed economic and emotional support.[8] Jurisprudentially, these decisions have contributed to a narrow and cramped understanding of fatherhood, based exclusively on biological ties.

This Article critiques the disestablishment trend and defends the marital presumption as a substantive rule of law. It argues that, although the original rationale for the presumption has attenuated, its underlying policy goals remain valid. Marriage matters—and should continue to matter—in allocating parental rights and responsibilities. Indeed, the marital presumption may be particularly important in an age of no-fault divorce, where spousal anger and resentment over the break-up of a marriage are rendered largely irrelevant to the legal outcome and often displaced onto disputes over children. The Article concludes that marriage should generally be a sufficient (albeit not an exclusive) basis for ascribing legal fatherhood and that the ability of spouses and former spouses to rebut the marital presumption should be sharply limited. Additionally, the Article endorses the notion of dual fatherhood as an option for cases in which a child has both a marital and an involved genetic father.

Part I of the Article describes the marital presumption and chronicles the social, legal, and scientific developments that have contributed to its erosion. In particular, it links the erosion of the marital presumption to the increasingly vigorous efforts of federal and state governments to identify and collect financial support from biological fathers of children born outside of marriage. Part II describes recent disestablishment cases involving children born during marriage and

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4. *See infra* Part I.

5. *See* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 571-85 (2000).

6. *Id.* at 551.

7. *Id.* at 550.

8. *Id.* at 562.

examines the procedural and equitable doctrines that some courts have used to bolster the marital presumption in the face of competing biological evidence. It concludes that none of these doctrines offers a persuasive counterweight to the lure of biological determinism. Part III considers two possible responses to the problem of marital "disestablishment"—the mandatory paternity testing of all children at birth or a revitalized marital presumption. It concludes that a revitalized marital presumption better serves the interests of children and is more consistent with society's stake in valuing marriage.

I. THE MARITAL PRESUMPTION

The marital presumption of paternity is the legal rule that identifies the husband of a married woman as the legal father of any child born during that marriage. At one time, this presumption was nearly irrebuttable.[9] It could be overcome only by strong evidence that the husband was sterile or did not have access to his wife during the crucial period of conception.[10] Moreover, the types of evidence that a court could consider in overcoming the presumption were extremely limited. In particular, under what became known as Lord Mansfield's rule, the husband and wife themselves could not testify regarding the husband's lack of access.[11] Lord Mansfield explained the reason for this restriction: "[I]t is a rule, founded in decency, morality, and policy, that they shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious . . . ."[12]

The marital presumption of paternity traditionally served a number of overlapping goals. First, because biological paternity was difficult to establish, the marital presumption provided legal certainty for

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9. Paula Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, 35 FAM. L.Q. 41, 44 (2001). Indeed, "[f]or centuries, a child born during a marriage was conclusively presumed to be the child of that marriage." *Id.*; *see also* HARRY D. KRAUSE, ILLEGITIMACY 15-17 (1971) (detailing the history of the marital presumption).

10. Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (plurality opinion). Traditionally, the presumption of legitimacy could be rebutted "only by proof that a husband was incapable of procreation or had had no access to his wife during the relevant period." *Id.* According to Blackstone, nonaccess could be proved only "if the husband be out of the kingdom of England (or, as the law somewhat loosely phrases it, *extra quatuor maria*) for above nine months . . . ." WILLIAM BLACKSTONE, 1 COMMENTARIES *457.

11. Mary Louise Fellows, *A Feminist Interpretation of the Law of Legitimacy*, 7 TEX. J. WOMEN & L. 195, 196 (1998).

12. Goodright v. Moss, (1777) 98 Eng. Rep. 1257, 1258 (K.B.). This restriction on spousal testimony has largely been abolished, even in states that retain some version of the marital presumption. *See, e.g.*, Serafin v. Serafin, *258 N.W.2d 461, 463 (Mich. 1977) (holding that a husband and wife may testify about nonaccess, even though there is still a rebuttable presumption of legitimacy).*

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purposes such as inheritance and succession.[13] Second, the presumption preserved the integrity of marriage, at least where both parties to the marriage so desired.[14] Third, the strong version of the presumption promoted the welfare of children, because, if the marital presumption were rebutted, the consequences for the child were devastating: The child was declared a bastard, or *fillius nullius*—literally the "son of nobody"—and was no longer entitled to support or inheritance from either parent.[15] The social consequences were devastating as well, for both the child and the mother.[16]

A series of social, economic, and scientific developments has contributed to the erosion of the marital presumption over the past thirty-five years. Of particular importance has been the sharp increase in childbearing outside of marriage and the accompanying efforts of federal and state authorities to secure financial support for nonmarital children from their biological fathers.[17] As the percentage of children born outside of marriage has climbed, paternity establishment and child support enforcement have become key components of na-

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13. *See* Joseph Cullen Ayer, Jr., *Legitimacy and Marriage*, 16 HARV. L. REV. 22, 23 (1902) ("[S]ince it is necessary that the heir should be one whose right could be ascertained, therefore marriage, an act capable of proof, could be relied upon as determining the heir."); Laurence C. Nolan, *"Unwed Children" and Their Parents Before the United States Supreme Court from* Levy *to* Michael H.*: Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1, 7 (1999) ("Marriage provided certainty in the law as it pertained to paternity, avoided fraudulent claims to paternity, and facilitated the administration of decedents' estates.").

14. *Michael H.*, 491 U.S. at 125 ("A secondary policy concern was the interest in promoting the 'peace and tranquility of States and families,' a goal that is obviously impaired by facilitating suits against husband and wife asserting that their children are illegitimate." (citation omitted)); *see* Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55, 56 (2003) (noting that the presumption "protects the sanctity of marriages by assuming the husband and wife have both remained true to their marriage vows").

15. BLACKSTONE, *supra* note 10, at *459; *see also* Davis v. Houston, 2 Yeates 289, 290 (Pa. 1798) (observing that a child born out of wedlock could not inherit or legally convey a title for inherited land); MICHAEL GROSSBERG, GOVERNING THE HEARTH 197 (1985) (explaining the legal discrimination against illegitimate children).

16. *See* John M. v. Paula T., 571 A.2d 1380, 1383 n.2 (Pa. 1990) ("[T]he status 'illegimate' historically subjected a child so labelled to significant legal and social discrimination.").

17. *See* Glennon, *supra* note 5, at 550 ("State laws targeted at identifying and collecting child support from unwed fathers have had the collateral effect of widening the circumstances in which the marital presumption of paternity can be challenged."); *see also* Ira Mark Ellman, *Thinking About Custody and Support in Ambiguous-Father Families*, 36 FAM. L.Q. 49, 51 (2002) (attributing the problem of paternal ambiguity to three social and scientific developments: "the increasing proportion of children born out of wedlock, . . . the increasing determination of policymakers to collect support from absent fathers," and "the ability to establish biological paternity through genetic tests").

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tional welfare policy.[18] Indeed, the enforcement of child support obligations is one of the few antipoverty strategies on which conservatives and liberals generally agree.[19] As a result, "making fathers pay at various stages of the life cycle" has provided the most consistent theme in federal efforts to reform the welfare system.[20]

The federal government has played a leading role in identifying and obligating biological fathers.[21] For example, over the past two decades, Congress has used its spending power to require states to enact specific and detailed procedures for establishing paternity and collecting child support from unmarried men identified as fathers.[22] These federally mandated procedures include in-hospital paternity establishment programs, presumptive child support guidelines, automatic wage withholding, and a parent-locator service that uses "all sources of information and available records" to track down noncustodial parents.[23] Federal law also requires states to extend the statute of limitations for paternity actions until the child's eighteenth birthday[24] and to eliminate jury trials in paternity cases.[25]

Early and expedited procedures for voluntary acknowledgement of paternity are an important component of the federal scheme.

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18. Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 527 (1996).

19. David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2582-83 (1995). *See generally* Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 VA. L. REV. 2523 (1995) (discussing conservative and liberal approaches to providing for impoverished children). For an early critique of this perspective, see Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 1989 U. ILL. L. REV. 367, 380-92 (arguing that enforcing child support obligations is not enough to deal with the problem of child poverty).

20. Chambers, *supra* note 19, at 2582-83.

21. *See generally* Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL'Y & L. 541 (1998).

22. Under Title IV-D of the Social Security Act, the federal government provides states with sixty-six percent of the basic cost of running a child support program. 42 U.S.C. § 655(a)(2)(C) (2000). In order to qualify for this money, however, states must enact certain laws relating to paternity establishment and child support enforcement. *Id.* § 666. A state that fails to pass a required law cannot obtain approval of its state child support plan. *Id.* § 654. This means it is ineligible for federal child support funds. *Id.* § 655(a)(3)(A). In addition, in order to draw down federal Temporary Aid for Needy Families (TANF) funds, a state must be able to certify that it has an approved child support plan. *Id.* § 602(a)(2). Thus, without an approvable plan, the state is also ineligible for federal TANF funds. *Id.* "While a state could decline to take federal money and thereby be under no obligation to enact these laws, every state has taken federal funds and enacted the required state statutes." Roberts, *supra* note 9, at 42 n.1.

23. 42 U.S.C. § 654(8)(A); *see* Estin, *supra* note 21, at 581-87 (discussing the federal requirements states must meet to receive federal child support funding).

24. 42 U.S.C. § 666(a)(5)(A)(ii).

25. *Id.* § 666(a)(5)(I).

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Studies in the 1990s found that nonmarital births were often the product of established, rather than casual relationships, and that a significant percentage of unmarried fathers were present at the hospital at the time of a child's birth.[26] Researchers also found that many fathers were eager to acknowledge their connection to a child during the initial months after birth but that their involvement and interest declined rapidly as time progressed.[27] Influenced by these findings, Congress in 1993 required states to develop "a simple civil process for voluntarily acknowledging paternity."[28] This process must include a hospital-based program in which parents are asked to sign an affidavit of voluntary acknowledgement immediately before or after the child's birth.[29] Once the affidavit is signed by the mother and the alleged father, it becomes the equivalent of a legal finding of paternity,[30] subject only to a brief rescission period.[31]

No judicial or administrative proceedings are necessary to ratify an unchallenged acknowledgement of paternity,[32] and voluntary acknowledgements are entitled to full faith and credit in other states.[33] As an added incentive for voluntary acknowledgement, Congress provided that the name of an unmarried father may be included on the birth certificate only if the mother and father have signed a voluntary acknowledgement or if there has been an adjudication of paternity.[34] In light of these "tangible legal consequences," federal law requires that, prior to signing a voluntary acknowledgement, mothers and purported fathers must be clearly informed of the legal

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26. *See, e.g.*, Legler, *supra* note 18, at 529-30 (discussing a study by Esther Wattenburg that focused on the relationship of young parents at the time of "out-of-wedlock" births). According to the *Fragile Families and Child Wellbeing Study*, conducted by researchers at Princeton University, eighty-two percent of mothers and fathers who are unmarried are romantically involved at the time their child is born, and forty-four percent are living together. PRINCETON UNIV. CTR. FOR RESEARCH ON CHILD WELLBEING ET AL., FRAGILE FAMILIES RESEARCH BRIEF: DISPELLING MYTHS ABOUT UNMARRIED FATHERS 1 (2000), *available at* http://www.fragilefamilies.princeton.edu/briefs/researchbrief1.pdf [hereinafter FRAGILE FAMILIES RESEARCH BRIEF].

27. Legler, *supra* note 18, at 529-30; *see* FRAGILE FAMILIES RESEARCH BRIEF, *supra* note 26, at 2 (observing that a large percentage of the fathers interviewed visited their child in the hospital and reported that they wanted to be involved in raising their child).

28. 42 U.S.C. § 666(a)(5)(C)(i).

29. *Id.* § 666(a)(5)(C)(ii).

30. *Id.* § 666(a)(5)(E).

31. *Id.* § 666(a)(5)(D)(iii); *see* People *ex. rel.* Dep't of Pub. Aid v. Smith, 818 N.E.2d 1204, 1213 (Ill. 2004) (holding that voluntary acknowledgement created a conclusive presumption of biological paternity which could not be attacked in the absence of fraud, duress, or material mistake-of-fact).

32. 42 U.S.C. § 666(a)(5)(E).

33. *Id.* § 666(a)(5)(C)(iv).

34. *Id.* § 666(a)(5)(D)(i).

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consequences.[35] However, reports of in-hospital programs reveal that hospital staff responsible for obtaining the acknowledgements are often poorly trained and that the legal consequences are often downplayed in an effort to meet performance goals and encourage unmarried fathers to acknowledge paternity.[36]

More recently, the federal government has broadened its focus from mandating procedures to monitoring results and has enacted a series of financial penalties and incentive payments tied to state paternity establishment rates.[37] States that fail to meet federal targets for paternity establishment face financial penalties, while states that maintain high rates of paternity establishment and child support collection share in a pool of incentive bonuses.[38] These provisions send the clear message that states are responsible for identifying the biological fathers of children born outside of marriage and that biological fatherhood alone imposes enforceable support responsibilities.[39]

Central to these regulatory efforts have been scientific advances in DNA testing which can now determine, with an extremely high degree of accuracy, whether or not a particular man is genetically related to a particular child.[40] Federal law has encouraged states to

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35. *Id.* § 666(a)(5)(C)(i).

36. *See* Anne Greenwood, Comment, *Predatory Paternity Establishment: A Critical Analysis of the Acknowledgment of Paternity Process in Texas*, 35 ST. MARY'S L.J. 421, 438-44 (2004) (discussing the shortcomings of the voluntary acknowledgement process in Texas).

37. Federal law establishes the goal of a 90% paternity establishment rate. 42 U.S.C. § 652(g)(1)(A). States that fall below this standard must increase their establishment rates by a specified percentage each year in order to remain eligible for federal funding. *Id.* § 652(g)(1)(B)-(F). A state with a paternity establishment percentage between 75% and 89% must improve its IV-D paternity establishment percentage for the next fiscal year by two percentage points; between 50% and 74%, a state must improve by three percentage points; between 45% and 49%, a state must improve by four percentage points; between 40% and 44%, a state must improve by five percentage points; and, a state with a IV-D paternity establishment percentage of less than 40% must improve by six percentage points. *Id.* Failure to meet these improvement goals results in a loss of TANF funds. *Id.* § 609(a)(5).

38. *See id.* (describing penalties); *id.* § 655 (describing the formula for incentive payments).

39. *See* Linda D. Elrod, *Child Support Reassessed: Federalization of Enforcement Nears Completion*, 1997 U. ILL. L. REV. 695, 701-02 ("As a general rule, if a man can be shown to be the biological father of a child, he has a support obligation . . . ."); Glennon, *supra* note 5, at 558 ("The child support system for children born out of wedlock is based on the assumption that biological fatherhood is a sufficient basis for legal and financial responsibility for a child.").

40. *See* Legler, *supra* note 18, at 533 (describing "up-front" genetic testing as the key to the streamlined processes for paternity establishment mandated by federal law). For a discussion of several of the social developments that have contributed to the expansion of DNA-based identity testing, see Mary R. Anderlik & Mark A. Rothstein, *DNA-Based Identity Testing and the Future of the Family: A Research Agenda*, 28 AM. J.L. & MED. 215 (2002). For a thoughtful discussion of the influence of genetic information on traditional and modern

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expand the use of DNA testing and to place primary reliance on genetic evidence in contested paternity proceedings involving nonmarital children. For example, states must authorize their child support agencies to order genetic tests administratively, without the need for judicial approval, and to obtain a signed acknowledgement of paternity based on the results of the testing.[41] States must also adopt procedures requiring parties in contested paternity proceedings to submit to genetic testing at the request of any party, subject to a limited "good cause" exception.[42] If paternity remains contested, states must also facilitate the admission of DNA evidence and must adopt either a rebuttable or a conclusive presumption of paternity based on the results of the genetic tests.[43]

Although DNA technology was envisioned as a tool to *establish* paternity without the need for judicial involvement,[44] it has been eagerly embraced by litigants who seek to *disestablish* their status as legal parents.[45] In particular, growing numbers of nonmarital fathers who previously acknowledged paternity or whose status was adjudicated in the absence of DNA evidence, have petitioned to set aside existing paternity judgments and extinguish the support obligations that flow from those judgments. These disestablishment petitions are sometimes accompanied by a request for court-ordered DNA testing; increasingly, however, petitioners come to court already armed with genetic evidence.[46] Popular media attention to the issue of paternity, along with the marketing efforts of laboratories, have contributed to this trend.[47] Indeed, two bio-ethicists recently observed that "[g]enetic testing to determine paternity has become a staple of daytime and evening soap operas."[48]

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understandings of the family, see Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523 (2000).

41. Elrod, *supra* note 39, at 704.

42. 42 U.S.C. § 666(a)(5)(B). The state must pay the costs of such testing, but may elect to recoup the costs from the alleged father, if paternity is established. *Id.*

43. *Id.* § 666(a)(5)(F)-(G).

44. Legler, *supra* note 18, at 535.

45. *See* CARMEN SOLOMON-FEARS, PATERNITY ESTABLISHMENT: CHILD SUPPORT AND BEYOND 15 (2003) (noting that "advances in genetic testing have contributed to an unanticipated increase in disestablishment actions"); Anderlik & Rothstein, *supra* note 40, at 218-19 (discussing links between DNA testing, the fathers' rights movement, and paternity disestablishment suits); *see also* Adam Pertman, *DNA Tests Emerging as Legal Weapon in Child Support Cases*, BOSTON GLOBE, July 23, 2000, at A1.

46. *See* Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35, 37 (2003).

47. *Id.* at 37-38.

48. Anderlik & Rothstein, *supra* note 40, at 221. Several TV talk shows have even featured "live" paternity testing. *Id.*

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Courts and legislatures have struggled to respond to these disestablishment requests. Initially, many courts were reluctant to reopen paternity judgments, citing both finality and child-welfare concerns.[49] As DNA technology has become more widely accepted, however, the tide has turned, and nonmarital fathers in many states now enjoy a relatively unfettered right to disestablish paternity based on later-acquired DNA evidence. For example, Maryland recently amended its paternity statutes to provide that "[a] declaration of paternity may be . . . set aside . . . if a blood or genetic test done in accordance with [statutory requirements] establishes the exclusion of the individual named as the father in the order."[50] The statute contains no time limit on such disestablishment actions, and trial judges have no authority to consider the child's best interests in responding to a request for genetic testing.[51] Moreover, the Maryland Court of Appeals has held that, once a paternity judgment is set aside on the basis of a genetic test, not only are future child support obligations eliminated, but any outstanding arrearages are extinguished as well.[52] As one judicial critic has noted, this ruling gives obligors who previously acknowledged paternity but are now unhappy with their child support obligations a strong incentive to file disestablishment requests because "they have nothing to lose and everything to gain."[53]

Paternity disestablishment cases involving nonmarital fathers raise difficult questions of how best to balance concerns for finality,

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49. *See, e.g.*, Tandra S. v. Tyrone W., 336 Md. 303, 324-25, 648 A.2d 439, 449 (1994) (observing in 1994 that numerous jurisdictions gave conclusive effect to judicial findings of paternity).

50. MD. CODE ANN., FAM. LAW § 5-1038(a)(2)(i) (LexisNexis 2004). The statute was passed in response to a court of appeals decision that refused, on res judicata grounds, to reopen a pair of paternity judgments, despite the results of genetic tests, performed years after entry of the judgments, which excluded the legal fathers. *Tandra S.*, 336 Md. at 324, 648 A.2d at 449.

51. Langston v. Riffe, 359 Md. 396, 437, 754 A.2d 389, 411 (2000). *But cf.* Evans v. Wilson, 382 Md. 614, 636, 856 A.2d 679, 692 (2004) (noting that the amended statute does not apply to paternity proceedings involving a child born during a marriage).

52. Walter v. Gunter, 367 Md. 386, 788 A.2d 609 (2002). In *Walter*, the court declined to decide whether a litigant who successfully disestablishes paternity is also entitled to reimbursement (from either the child or the mother) for support moneys previously paid under the now-extinguished paternity judgment. *Id.* at 390 n.2, 788 A.2d at 611 n.2. Other courts have been more reluctant to extinguish arrearages under a vacated paternity judgment. *See, e.g.*, State *ex rel.* L.L.B. v. Hill, 682 N.W.2d 709, 713 (Neb. 2004) (holding that an adjudicated father will be liable for arrearages when his own lack of diligence led to the accumulation of such arrearages). *But cf.* Andrew S. Epstein, *The Parent Trap: Should a Man Be Allowed to Recoup Child Support Payments If He Discovers He is Not the Biological Father of the Child?*, 42 BRANDEIS L.J. 655, 669-70 (2004) (advocating a more flexible approach to child support reimbursement claims).

53. *Langston*, 359 Md. at 450 n.4, 754 A.2d at 418 n.4 (Bell, C.J., dissenting).

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fairness, and child welfare. Too often, the paternity determinations in question are the product of default judgments entered against unrepresented defendants or were based on "voluntary acknowledgements" that were considerably less than fully informed.[54] These problems are likely to persist as a result of the federal mandates described above, which encourage states to establish paternity as expeditiously and as cheaply as possible.[55] For purposes of this Article, however, the critical question is whether marriage adds anything to the analysis. If nonmarital "fathers" are permitted to disestablish paternity, based on later-acquired genetic evidence, should marital fathers enjoy a similar entitlement? Or should marriage constitute an independent basis for assigning paternal rights and responsibilities?

II. THE MARITAL PRESUMPTION IN THE COURTS

A review of recent case law suggests that the growing ability of nonmarital fathers to disestablish paternity has had a significant spillover effect on parentage disputes involving children born during marriage. Although courts are still reluctant to disrupt an ongoing relationship between a child and a marital father, the force of the marital presumption has weakened considerably, particularly where a divorced (or divorcing) husband seeks to disestablish paternity on the basis of contrary genetic evidence.

A. An Illustrative Case

The erosion of the marital presumption is starkly illustrated by the 2003 Pennsylvania case of *Doran v. Doran.*[56] *Doran* involved a petition by a divorced father to dismiss a child support order that had been entered as part of his earlier divorce.[57] Mr. Doran filed his petition more than six years after his divorce was finalized and nearly eleven and one-half years after the birth of the child in question.[58]

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54. According to the *Los Angeles Times,* over seventy percent of the paternity establishments in Los Angeles County in 1998 were by default judgments. Megan Garvey, *Net to Snag Deadbeats Also Snares Innocent; County: Mix-ups Have Cost Time, Money and Reputation of Hundreds of Men,* L.A. TIMES, Apr. 12, 1998, at B1.

55. *See generally* Greenwood, *supra* note 36, at 423-25 (describing Texas's efforts to legally bind potential fathers in an expeditious manner and the resulting danger that a father may unknowingly bind himself to support a child that is not his biological child).

56. 820 A.2d 1279 (Pa. Super. Ct. 2003).

57. *Id.* at 1281.

58. Mr. Doran's divorce decree was entered on May 12, 1995, just before his son's fifth birthday. *Id.* The decree incorporated a child support order previously entered by the court on August 31, 1994. *Id.* Mr. Doran filed his petition to dismiss the child support order on October 26, 2001, "nearly eleven and one half years after the birth of the child for whom he pays support." *Id.*

The basis for Mr. Doran's petition was a DNA test that he had persuaded his ex-wife and child to undergo after becoming suspicious about the lack of physical resemblance between the child and himself.[59] The test confirmed the lack of a biological connection between Mr. Doran and the son that he had supported and co-parented for more than eleven years.[60] In his petition, Mr. Doran not only sought relief from future child support obligations, but he also sought reimbursement of all support amounts previously paid.[61] The mother raised a number of defenses, starting with the marital presumption of paternity.[62]

The court, however, quickly concluded that the presumption did not apply to the case.[63] It reasoned that because the policy underlying the presumption of paternity is the preservation of marriages, the presumption applies only in cases where that policy would be advanced.[64] In a case such as this one, where the parties are already divorced and there is no longer an intact marriage to preserve, the court concluded flatly that "the presumption of paternity is not applicable."[65]

In my view, this represents an unduly cramped view of the purpose of the marital presumption. It is true that one of the traditional purposes of the presumption was to preserve the sanctity of marriage.[66] But another, equally important purpose was to protect the interests of children.[67] This "child welfare" purpose was traditionally focused on protecting a child from the stigma and severe legal consequences of illegitimacy—consequences that have been significantly

59. *Id.*

60. *Id.*

61. *Id.* Mr. Doran's petition to dismiss requested "that the . . . child support order be dismissed and that he be entitled to recover all of the child support paid to his ex-wife." *Id.* (quoting trial court decision).

62. *Id.* at 1282.

63. *Id.* at 1283.

64. *Id.*

65. *Id.* Similarly, as the court in *Michael K.T. v. Tina L.T.* noted,

> In the face of a defunct or nearly defunct marriage, the need to uphold the sanctity of the traditional nuclear family fails as a justification for avoiding bastardization. Furthermore, when the issue of paternity is raised during a divorce proceeding, preserving the family no longer stands as a valid defense to bastardization.

387 S.E.2d 866, 870 (W. Va. 1989).

66. *Doran*, 820 A.2d at 1283.

67. *See* Godin v. Godin, 725 A.2d 904, 909 (Vt. 1998) ("Protecting innocent children from the social burdens of illegitimacy, ensuring their financial and emotional security, and ultimately preserving the stability of the family unit all contributed to the origins of the parental presumption, and all help to explain its enduring power today.").

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ameliorated but have not disappeared.[68] But allowing separated or divorcing parents to contest the parentage of children born during a marriage is likely to have other detrimental consequences for children. In particular, social science research has shown that children's adjustment to divorce depends significantly on their parents' behavior during and after the separation process and, more specifically, on the level of parental conflict.[69] The higher the level of parental conflict, the more negative the effects of divorce on children.[70]

This social science evidence suggests that the reasoning of the *Doran* court is precisely backward. The marital presumption of paternity is *most* valuable precisely where there is no longer an intact marriage to preserve—that is, where spouses are seeking to dissolve their partnership or perhaps where a third party is seeking to displace a marital parent. In these contexts, the presumption serves the valuable function of preventing the spouses from allowing their antagonism and disappointment with each other to infect their relationships with children born and raised during the marriage. Indeed, one can argue that the presumption is particularly important in an era of no-fault divorce, because the no-fault system renders such feelings of anger and disappointment largely irrelevant to the availability and financial consequences of divorce and often displaces them onto disputes over children.

Not all courts are as openly dismissive of the marital presumption as the *Doran* court. But even when courts acknowledge the presumption, they increasingly view it as a procedural device or a rule of evidence, which can be overcome by convincing evidence of contrary fact.[71] Scientifically accurate DNA tests present precisely this sort of convincing contrary evidence. And the increased ease and reduced cost of DNA testing means that previously married parents who seek to disestablish paternity are increasingly likely to come into court already armed with DNA evidence, rather than having to ask a court to

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68. *See* Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1448-49 (discussing the economic and social circumstances of a child born out of wedlock compared to a child born during marriage).

69. *See generally* ANNA L. DAVIS ET AL., MITIGATING THE EFFECTS OF DIVORCE ON CHILDREN THROUGH FAMILY-FOCUSED COURT REFORM 3-7 (1997); ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 27-35 (2004).

70. *See* SCHEPARD, *supra* note 69, at 31 ("Children who are exposed to more intense conflict between parents are more likely to suffer harm resulting from their parents' divorce. The lower the level of conflict between parents, the more likely those children will emerge emotionally whole.").

71. *See infra* note 81 and accompanying text (citing cases that have allowed the marital presumption to be overcome by contrary DNA evidence).

order testing.[72] In the face of such "incontrovertible" scientific evidence, the marital presumption is easily overcome.[73]

For this reason, courts that continue to restrict the ability of divorced or divorcing spouses to disestablish paternity increasingly base their decisions not on the marital presumption itself but on procedural and equitable notions of res judicata and estoppel.[74] But neither of these doctrines offers a persuasive counterweight to genetic "truth." Moreover, the use of these doctrines to shore up the marital presumption suggests that the presumption is primarily a technical legal rule rather than a substantive statement about family relationships and responsibilities. Nor does the "best interests of the child" standard invoked by some courts in disestablishment cases furnish a satisfactory alternative to a revitalized marital presumption.

B. *Res Judicata*

Courts applying res judicata notions to prevent a marital father or mother from attempting to disavow paternity generally reason that paternity was a matter necessarily determined as part of the original divorce decree and the parties are therefore precluded from relitigating the issue.[75] For example, in *In re Marriage of Betty L.W. v. William E.W.*,[76] the West Virginia Supreme Court rejected an ex-husband's petition to terminate child support based on DNA evidence that he was not the biological father of the child in question. The court ruled that the husband's paternity had been established by his admissions

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72. Prospective litigants can easily order paternity testing kits online. Dozens of web sites advertise reasonably priced home testing kits. *See, e.g.*, DNA Paternity Testing, http://www.dnanow.com (last visited Dec. 28, 2005) (kits shipped free; fee of $205 if samples are sent back for testing); International Paternity Labs, http://www.internationalpaternity.com (last visited Dec. 28, 2005) (kit plus results for $150); Worldwide Genetics DNA Testing Center, http://www.worldwidepaternity.com (last visited Dec. 28, 2005) (home testing kit plus results for $175).

73. *See, e.g.*, Symonds v. Symonds, 432 N.E.2d 700, 703 (Mass. 1982) (reversing trial court's denial of husband's request for blood testing during divorce proceedings on grounds that "[a] married man should have no duty to support a child born to his wife during their marriage but fathered by another man, any more than a wife should have a duty to support a child fathered by her husband during their marriage but born of another woman").

74. *See* discussion *infra* Part II.B (exploring how courts have applied res judicata principles in recent disestablishment case law).

75. *E.g.*, Hotz v. Hotz, 214 Cal. Rptr. 658 (Cal. Ct. App. 1985); State *ex rel.* Daniels v. Daniels, 817 P.2d 632 (Colo. Ct. App. 1991); Harris v. Harris, 591 P.2d 1147 (Nev. 1979); Godin v. Godin, 725 A.2d 904 (Vt. 1998); Nancy Darlene M. v. James Lee M., *400 S.E.2d 882 (W. Va. 1990)*. *See also* Donald M. Zupanec, Annotation, *Effect, in Subsequent Proceedings, of Paternity Findings or Implications in Divorce or Annulment Decree or in Support or Custody Order Made Incidental Thereto*, 78 A.L.R.3d 846, 853 (1977).

76. 569 S.E.2d 77 (W. Va. 2002).

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during divorce proceedings six years earlier and by a provision in the divorce decree that three children had been born of the marriage.[77] Thus, the court found that res judicata principles barred either the husband or the wife from relitigating the issue of paternity.[78] Significantly, the majority in *Betty L.W.* noted that the husband had not alleged fraud in the procurement of the paternity finding in the divorce decree,[79] thus inviting future claimants to seek an exception to res judicata principles—an exception that the dissenting judge would apply "in every case where a wife gives birth to a child cognizant of the fact that paternity is uncertain, yet remains silent while her husband innocently assumes the care of the child."[80]

Even without the use of such allegations, the *Betty L.W.* court's reliance on res judicata principles is undermined by the reasoning of recent cases involving nonmarital fathers, where concerns for finality and repose have been trumped by appeals to scientific fact and by the perceived unfairness of requiring a man to support a child that is not biologically "his." When the issue is framed as finality versus Truth with a capital *T*, Truth has a tendency to prevail.[81] Recognizing the power of this formulation, disestablishment proponents have analogized their cause to the growing use of DNA evidence to exonerate

77. *Id.* at 80.

78. *Id.* at 85 ("In the present case, the action was brought by a party to the initial paternity finding, and consequently, the principles of *res judicata* apply to preclude this action.").

79. *Id.* at 86 n.13.

80. *Id.* at 87-88 (Maynard, J., dissenting) (quoting William L. v. Cindy E.L., 495 S.E.2d 836, 842 (W. Va. 1997)).

81. *See, e.g.*, DeRico v. Wilson, 714 So. 2d 623, 624 (Fla. Dist. Ct. App. 1998) (concluding that DNA evidence of nonpaternity justified the granting of ex-husband's petition to modify divorce decree and eliminate child support obligations, because marital father has "no legal duty to provide support for children he neither biologically fathered, adopted, nor contracted to care for"); Crowder v. Commonwealth *ex rel.* Gregory, 745 S.W.2d 149, 151 (Ky. Ct. App. 1988) (holding that the trial court abused its discretion in refusing to set aside a six-year-old paternity judgment because "[j]ustice is the court's constant destination, relentlessly pursued. It is not arrived at where a court in a paternity action adjudicates a man to be the father of a child while knowing full well that the biological relationship has been clearly disestablished."); Rafferty v. Perkins, 757 So. 2d 992, 996 (Miss. 2000) (finding, in postdivorce proceeding, that no reasonable jury could sustain marital presumption in the face of DNA evidence showing 99.94% probability that someone other than husband was the biological father); Rydberg v. Rydberg, 678 N.W.2d 534, 540 (N.D. 2004) (holding that genetic test results constitute "clear and convincing evidence" sufficient to rebut marital presumption of paternity); *see also* Anthony Miller, *Baseline, Bright-line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage*, 34 MCGEORGE L. REV. 637, 642 (2003) (advocating genetic-biological testing as the baseline for determining legal parentage).

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defendants wrongfully convicted of rape or murder.[82] In particular, fathers' rights advocates have argued that "just as DNA evidence has revolutionized criminal law, so should it, in roughly parallel ways, lead to a revolution in family law."[83]

Indeed, courts and legislatures in a number of states have already carved out exceptions to preclusion rules in the context of paternity disestablishment. For example, a number of states have enacted statutes that explicitly override res judicata principles to allow an adjudicated father to disestablish his paternity based on DNA evidence.[84] In enacting the Ohio disestablishment statute, the General Assembly declared that it is a man's "substantive right" to obtain judicial relief in such a situation.[85] Similarly, a number of courts have held that a husband is not precluded from challenging a paternity determination in a prior divorce decree where his wife misled him into believing that

82. *E.g.*, Steve Duin, *This DNA Test Is a Test of His Patience*, OREGONIAN, June 6, 2000, at B01 ("It's amazing to me that the same evidence that can be used to convict an individual is not readily used to exonerate an individual. You can't have it both ways. If this is the high-tech science we both know it is, the court has to deal with the results, despite the extenuating circumstances.") (quoting Brad Popovich, Director of the DNA Diagnostic Lab at Oregon Health Sciences University); *see* Melanie B. Jacobs, *When Daddy Doesn't Want to Be Daddy Anymore: an Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193, 194 (2004) (describing "grassroots movement" that likens "newly discovered evidence of nonpaternity to DNA testing that exonerates a felon"); Martin Kasindorf, *Men Wage Battle on 'Paternity Fraud'*, USA TODAY, Dec. 3, 2002, at 3A (explaining how many men are working to fight court orders that are forcing them to pay child support for children who are not their biological offspring).

83. Anderlik & Rothstein, *supra* note 40, at 220 (describing arguments made by the fathers' rights movement).

84. *See, e.g.*, ALA. CODE § 26-17A-1 (LexisNexis 1992 & Supp. 2004) (permitting an adjudicated father to reopen a paternity judgment at any time based on DNA evidence); GA. CODE ANN. § 19-7-54(a) (2004) (allowing a male ordered to pay child support to set aside a paternity determination based on after-acquired genetic evidence); OHIO REV. CODE ANN. § 3119.962 (LexisNexis 2003) (requiring courts to grant relief from paternity judgments or child support orders based on results of genetic testing); Jackson v. Newsome, 758 N.E.2d 342, 350 (Ill. App. Ct. 2001) (explaining that the 1998 amendment to the Illinois paternity statute was intended to override res judicata principles and "specifically to allow an adjudicated father to collaterally attack this previous adjudication if subsequent DNA tests established that he was not the father"); *cf. Ex parte* Jenkins v. M.A.B., 723 So. 2d 649, 655-58 (Ala. 1998) (holding that ALA. CODE § 26-17A-1 could not constitutionally be applied to paternity judgments entered before its enactment).

85. H.B. 242, 123d Leg., Reg. Sess. (Ohio 2000). Lower courts in Ohio have reached conflicting results on whether this legislative rewriting of res judicata requirements violates separation of powers. *Compare, e.g.*, Poskarbiewicz v. Poskarbiewicz, 787 N.E.2d 688, 691 (Ohio Ct. App. 2003) (finding statutes unconstitutional), *and* Van Dusen v. Van Dusen, 784 N.E.2d 750, 752 (Ohio Ct. App. 2003) (same), *with* State *ex rel.* Lloyd v. Lovelady, No. 83090, 2004 Ohio App. LEXIS 3294, at *12 (Ohio Ct. App. July 8, 2004) (finding statute constitutional).

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he was the child's biological father.[86] Other courts have questioned whether paternity was actually "at issue" in a divorce where the matter was not disputed and the children were simply assumed to have been born "of the marriage."[87]

Moreover, res judicata principles are inapplicable where a marital father (or mother) seeks to disestablish paternity at the time of initial separation or divorce because there will not have been any prior judicial determination to uphold.[88] They are also inapplicable to disestablishment actions brought by someone who was not a party to the original divorce proceedings—for example, a putative biological father.[89]

C. *Equitable Estoppel*

Where preclusion principles do not apply, a number of courts have invoked the equitable-estoppel doctrine to prevent marital fathers (and mothers) from attempting to disestablish paternity.[90] But

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86. *E.g.*, Love v. Love, 959 P.2d 523, 526 (Nev. 1998); Libro v. Walls, 746 P.2d 632, 634 (Nev. 1987); Evans v. Gunter, 366 S.E.2d 44, 46-47 (S.C. Ct. App. 1988). Husbands may also avoid the res judicata effect of a prior divorce judgment by filing a timely motion under the state's equivalent of Federal Rule 60(b), which allows for the reopening of a final judgment because of fraud, duress, or material mistake-of-fact, typically within one year of entry of the judgment. Roberts, *supra* note 14, at 61. "The rule also allows judgments to be set aside prospectively 'in the interests of justice' if the litigant acts within a 'reasonable time' to rectify the error." *Id.*

87. *See, e.g.*, Cornelius v. Cornelius, 15 P.3d 528, 531 (Okla. Civ. App. 2000) (examining whether the issue of paternity had been sufficiently presented to the trial court during a divorce proceeding); McDaniels v. Carlson, 738 P.2d 254, 259-60 (Wash. 1987) (concluding that the issue of paternity had not been litigated in a prior proceeding); *cf.* R.E. v. C.E.W., 752 So. 2d 1019, 1023 (Miss. 1999) (rejecting the application of collateral estoppel to the paternity declaration in the divorce decree on grounds that the husband's "actual paternity was not litigated in the prior [divorce] action").

88. At least one commentator has argued that the effect of applying preclusion principles to paternity determinations contained in divorce decrees will be to encourage men to contest paternity at the time of divorce. *See* Meghan R. Dimond, Note, *Civil Procedure—Collateral Estoppel as a Bar to Post-Divorce Litigation of Paternity*—Tedford v. Gregory, 30 N.M. L. REV. 95, 104 (2000) (asserting that, where courts give preclusive effect to paternity admissions in divorce decrees, "divorce attorneys would be remiss if they did not encourage their male clients to deny paternity as a matter of course in a divorce proceeding").

89. *See, e.g.*, State *ex rel.* W.V. Dep't of Health & Human Res. v. Michael George K., 531 S.E.2d 669, 678 (W. Va. 2000) (holding that paternity determinations in divorce decrees "are not *res judicata* and do not inure to the benefit of a putative parent in an action brought *on behalf of the child* to obtain support").

90. *See, e.g.*, Pedregon v. Pedregon, 132 Cal. Rptr. 2d 861, 865-66 (Cal. Ct. App. 2003) (applying the doctrine of "parentage by estoppel" to impose a child support obligation on a husband who knowingly held himself out as the child's father for more than ten years and discouraged his wife from contacting the child's biological father).

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estoppel doctrine has some significant limitations as well.[91] Equitable estoppel generally requires both a knowing misrepresentation by the party sought to be estopped and detrimental reliance on that misrepresentation by another.[92] Where a marital father claims—often quite convincingly—that he was not aware during marriage of the real facts surrounding the child's conception, most courts reason that he could not "knowingly" have misrepresented his parenthood to the child in question.[93]

Moreover, even where a husband's conduct meets the misrepresentation requirement, courts have found that the family's reliance on that conduct was not sufficiently detrimental to justify the application of estoppel principles. Indeed, courts have been especially reluctant to view the emotional harm that a child experiences as a result of a parent's rejection as sufficient detriment to satisfy estoppel requirements.[94] Only where the child has suffered a financial detriment—for

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91. *See* Theresa Glennon, *Expendable Children: Defining Belonging in a Broken World*, 8 DUKE J. GENDER L. & POL'Y 269, 275-77 (2001) (discussing elements of equitable estoppel and asserting that most states have not applied the doctrine to preclude a husband from denying paternity at the time of divorce).

92. In *Breen v. Aetna Casualty & Surety Co.*, the court stated,

> There are two essential elements to an estoppel: the party must do or say something which is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief; and the other party, influenced thereby, must actually change his position or do something to his injury which he otherwise would not have done.

220 A.2d 254, 259 (Conn. 1966). Similarly, in *Miller v. Miller*, the court noted,

> To establish a claim of equitable estoppel, the claiming party must show that the alleged conduct was done, or representation was made, intentionally or under such circumstances that it was both natural and probable that it would induce action. Further, the conduct must be relied on, and the relying party must act so as to change his or her position to his or her detriment.

478 A.2d 351, 355 (N.J. 1984).

93. *See, e.g.*, Dews v. Dews, 632 A.2d 1160, 1168-69 (D.C. 1993) (holding that equitable estoppel is not applicable where the husband was unaware of facts surrounding child's conception); Jefferson v. Jefferson, 137 S.W.3d 510, 517 (Mo. Ct. App. 2004) (asserting that equitable estoppel "has never been applied where the wife has falsely misrepresented to the husband his paternity of the child, and he has acted on that misrepresentation until discovering the truth"); Masters v. Worsley, 777 P.2d 499, 504 (Utah Ct. App. 1989) (holding that the husband did not knowingly misrepresent parentage to child where the wife misrepresented parentage to husband); *cf.* Kohler v. Bleem, 654 A.2d 569, 576 (Pa. Super. Ct. 1995) (holding that estoppel principles were inapplicable despite a husband's knowledge that he was not child's biological father, where husband was "operating under the misrepresentation that an 'unknown' man had fathered the child").

94. *See, e.g.*, K.A.T. v. C.A.B., 645 A.2d 570, 573-74 (D.C. 1994) (requiring financial detriment in order to invoke equitable estoppel); Knill v. Knill, 306 Md. 527, 537-38, 510 A.2d 546, 551 (1986) (finding that estoppel did not apply absent financial detriment); *Miller*, 478 A.2d at 358 (holding that estoppel applies only where stepparent's actions precluded child from obtaining future support from a nonparty biological parent). *See generally* W. v. W., 728 A.2d 1076, 1083-85 (Conn. 1999) (discussing cases and describing as a

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example where a husband "actively interferes" with the child's ability to obtain support from a biological father—will estoppel principles prevail.[95] Ironically, federal child support policy now makes it difficult to establish such financial detriment because federal law requires that states extend statutes of limitation for paternity actions until a child's eighteenth birthday.[96]

Moreover, because estoppel is an equitable doctrine, courts often consider the mother's conduct in deciding whether to apply the doctrine.[97] Thus, even where a marital father's conduct toward a child might otherwise estop him from later denying paternity, that conclusion can be overcome (as it was in *Doran*) by what the court sees as the mother's fraudulent or misleading actions.[98] Perhaps ironically in this context, estoppel principles are much more likely to be useful in preventing *mothers* from disestablishing their husband's paternity (where a husband seeks to retain parental status despite the lack of biological connection) than in limiting the ability of marital fathers to sever their legal connections with the children that they have raised.[99]

"majority rule" the position that "emotional detriment alone [is] insufficient grounds for estoppel").

95. *W.*, 728 A.2d at 1084-85.

96. 42 U.S.C. § 666(a)(5)(A)(i)-(ii) (2000).

97. *See, e.g.*, *W.*, 728 A.2d at 1085 (characterizing estoppel as "an extraordinary measure" that must be applied "judiciously and with sensitivity to the facts particular to each case").

98. Doran v. Doran, 820 A.2d 1279, 1283-84 (Pa. Super. Ct. 2003) (concluding that, although Doran held himself out as the child's father for more than eleven years, he was not estopped from denying paternity because he "would not have held the child out as his own had it not been for [the mother's] fraudulent conduct"); *see Jefferson*, 137 S.W.3d at 517 (holding that estoppel is not available where a wife has falsely misrepresented paternity to her husband); J.C. v. J.S., 826 A.2d 1, 4 (Pa. Super. Ct. 2003) ("Under certain circumstances, fraud/misrepresentation can preclude the application of paternity by estoppel."); Sekol v. Delsantro, *763 A.2d 405, 410 (Pa. Super. Ct. 2000) (holding that the trial court must consider conduct of the mother and alleged biological father in determining whether to apply paternity by estoppel).*

99. *See* Ghrist v. Fricks, 465 S.E.2d 501, 506 (Ga. Ct. App. 1995) (refusing to allow mother and alleged biological father to rebut the marital presumption of paternity, noting that "public policy will not permit a mother and an alleged father to enlist the aid of the courts to disturb the emotional ties existing between a child and his legal father after sitting on their rights for the first three years of the child's life"); Randy A.J. v. Norma I.J., 677 N.W.2d 630, 641 (Wis. 2004) (finding that the mother was equitably estopped from rebutting the marital presumption at divorce where she failed to raise the paternity issue until her child was fifteen months old and her husband had paid all birthing expenses and developed a close emotional relationship with the child); Roberts, *supra* note 9, at 54 (noting that where a wife seeks to disestablish paternity, but HER husband "wishes to maintain a parent-child relationship and offers to assume the emotional and financial responsibilities of fatherhood, most courts try to maintain that relationship").

D. *Best Interests*

Finally, several courts have held that, before allowing a marital parent to disestablish paternity, a court must consider the best interests of the child. For example, in *Baker v. Baker*,[100] the Georgia Supreme Court held that the best-interests standard applied to a mother's attempt, during a divorce action, to rebut the marital presumption in response to her husband's claim for custody. The court noted that the case presented

> an unusual set of facts in that it involves a legal father who, despite knowing he is not the child's biological father and that the biological mother no longer wants him to be considered the father, nonetheless has made non-court-ordered child support payments to the mother and has made serious and prolonged efforts to maintain his parental relationship with the child.[101]

Under these circumstances, the court held that it was appropriate to consider the child's best-interests before allowing the mother to challenge her husband's presumed legal status.[102]

Similarly, in *Evans v. Wilson*,[103] the Maryland Court of Appeals held that the best-interests standard governed an alleged biological father's request for genetic testing to establish his paternity of a child born to a woman married to another man. The Maryland court acknowledged that state law automatically provided for genetic testing to determine the paternity of children born outside of marriage but held that a different standard applied to paternity disputes involving marital children.[104] The appellate court also upheld the trial judge's finding that genetic testing would be contrary to this child's best interests because the putative father had failed to show a strong bond between himself and the child and because his request for genetic testing threatened to dismantle an existing family unit.[105]

While the addition of a best-interests inquiry represents a step in the right direction in that it focuses on the child's needs, the best-interests standard has significant shortcomings as a rule of judicial decision. The standard is cumbersome and fact-specific. It has been

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100. 582 S.E.2d 102 (Ga. 2003).

101. *Id.* at 105.

102. *Id.*; *cf. Randy A.J.*, 677 N.W.2d at 639 (interpreting a Wisconsin paternity statute providing for the best-interests inquiry to apply only where genetic tests have not yet been completed).

103. 382 Md. 614, 856 A.2d 679 (2004).

104. *Id.* at 633-36, 856 A.2d at 688-92.

105. *Id.* at 636-38, 856 A.2d at 692-93.

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criticized in other contexts for its indeterminacy and susceptibility to judicial manipulation.[106] The unpredictability of the standard encourages litigation and works to the disadvantage of the more risk-averse party.[107] Moreover, because the standard allows for so much judicial discretion, appellate review is difficult, and "[p]rior reported cases now provide little basis for controlling or predicting the outcome of a particular case."[108] Indeed, several commentators have argued that requiring an individualized best-interests inquiry in every case may undermine children's overall interests—both by compromising family integrity and by increasing the costs of legal decisionmaking.[109] Thus, while most courts invoke the best-interests standard to resolve custody disputes between legally recognized parents, there is considerably more dissent about whether the standard is an appropriate vehicle for assigning or terminating parental status.

III. OPTIONS FOR REFORM

So what are the options for legal reform? I can envision two approaches that point in opposite directions. One approach would be to succumb to biological determinism and embrace the technology that makes it possible. This approach would mandate (or strongly encourage) universal paternity testing at birth for both married and unmarried parents. Parental status would be determined based on the results of that testing—or assumed voluntarily in the face of it—and marriage per se would have little relevance. In a recent law review article, two well-known family law scholars proposed such a mandatory

106. *See, e.g.*, IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 565 (4th ed. 2004) ("As a broad discretionary standard, the best interests test does little to constrain judges who might be inclined to base the custody decision on their personal moral and social values."); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 622 (1992) (describing limitations of the best-interests standard).

107. Scott, *supra* note 106, at 653 ("An imprecise rule such as the best interests standard imposes particularly heavy costs on the party who is more risk-averse about the outcome of adjudication.").

108. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 253-54 (1975); *see Evans*, 382 Md. at 623, 856 A.2d at 684 ("Questions regarding the best interests of a child fall generally within the sound discretion of the trial court and ordinarily will not be disturbed absent a clear abuse of discretion."). Additionally, the *Evans* court noted that "[a]bsent a clear abuse of discretion, an appellate court ordinarily will not disturb a trial court's assessment of the best interests of a child." *Id.* at 637, 856 A.2d at 693.

109. *E.g.*, Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 22-26 (1987); *cf.* Troxel v. Granville, 530 U.S. 57, 69-70 (2000) (criticizing the use of the best-interests standard to award grandparent visitation rights).

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paternity-testing regime, arguing that it would provide certainty for parents and stability for children.[110]

I find this approach unappealing for several reasons. For one thing, it would operate prospectively only; it therefore would not address the burgeoning number of disestablishment cases involving existing marital children. Mandatory paternity testing also runs the risk of disrupting a significant number of marriages. Although hard evidence is difficult to come by, the few empirical studies that do exist suggest that upwards of ten percent of children born to married women are not, in fact, the biological offspring of the mother's husband.[111] To be sure, one might argue that these marriages are already in trouble and that many of them would eventually end in divorce—but I suspect that the reality is more complex. More philosophically, I fear that adoption of such a universal-testing regime overemphasizes the importance of biology and underemphasizes the relevance of marriage in providing support and encouraging paternal investment in children.[112]

So I would take the opposite approach. I would begin by recognizing that marriage matters—and should continue to matter—in determining legal parenthood. Specifically, I would reinvigorate the marital presumption to provide that marriage ordinarily constitutes a legally sufficient basis (albeit not a necessary or an exclusive one) for ascribing paternal rights and responsibilities. This recognition reflects the judgment that parenthood—and particularly fatherhood—is primarily a legal and social construct, not a biological fact.[113] As Eliza-

110. June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1066-70 (2003). Furthermore, several European countries have implemented something resembling mandatory paternity establishment for children born outside of marriage. *See* W. Craig Williams, Note, *The Paradox of Paternity Establishment: As Rights Go Up, Rates Go Down*, 8 U. FLA. J.L. & PUB. POL'Y 261, 271-79 (1997) (discussing paternity establishment procedures in Denmark, Germany, and the Netherlands).

111. *See* Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 324 (2004) (citing studies indicating that "surprisingly high percentages of children born in the context of marriage or marriage-like relationships are not genetically related to their mothers' partners, the men who have been functioning as their fathers"); Ellman, *supra* note 17, at 55-57 (concluding that "the professional consensus is that the rate of paternal discrepancy for couples in stable unions, whether legally married or cohabitating, is from ten to fifteen percent").

112. Mandating paternity testing at birth for children born to unmarried—but not to married—mothers would raise serious equal-protection concerns.

113. The law's treatment of children born as a result of assisted-reproduction techniques underscores this conception of parenthood. A husband who consents to assisted reproduction is treated as the legal father of any resulting child, regardless of his lack of biological ties. Roberts, *supra* note 9, at 47-48; *see* Nanette Elster, *Who Is the Parent in Cloning?*, 27 HOFSTRA L. REV. 533, 538 (1999) ("Under artificial insemination laws, if a man

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beth Bartholet put it recently, "[l]aw decides who is and who is not a parent and whether and on what basis someone who is a parent is allowed to stop being one."[114] And the available social science evidence suggests that there continues to be persuasive reasons for recognizing husbands as legal fathers of the children born during a marriage.

Second, I would provide marital parents with a relatively short window for challenging the presumed link between marriage and parenthood. Here, the two-year limitations period contained in the new Uniform Parentage Act (UPA) seems about right.[115] Such a finite limitations period makes sense from both the child's and the presumed parents' point of view. It ensures that, if legal parentage is disputed, the dispute is aired before the child has had the opportunity to develop a deep emotional bond with an adult who is functioning as a parent. And it gives a spouse adequate time to assert that his or her marriage was not one that included a commitment to co-parenting at the time the child was born. For disestablishment claims brought within this two-year time period, DNA evidence would be freely considered and would generally trump the marital presumption.[116]

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provides sperm for the artificial insemination of a consenting woman and her consenting husband, that couple, and not the sperm donor, are recognized as the legal parents of any child born as a result of the procedure."). Indeed, a substantial number of states have enacted statutes providing that a sperm donor is not the legal father. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Century Ends with Unresolved Issues*, 33 FAM. L.Q. 865, 918 chart 9 (2000) (showing that Alabama, California, Colorado, Connecticut, Idaho, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Texas, Virginia, Washington, Wisconsin, and Wyoming have laws to this effect).

114. Bartholet, *supra* note 111, at 325.

115. UNIF. PARENTAGE ACT § 607(a) (amended 2002), 9B U.L.A. 31 (Supp. 2005). The two-year time limit does not apply if: "(1) the presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception; and (2) the presumed father never openly held out the child as his own." *Id.* § 607(b)(1)-(2), 9B U.L.A. at 31. The UPA also allows a husband, wife, and nonmarital, biological father to rebut the marital presumption through the use of a voluntary acknowledgement process if all three parties wish to do so. *Id.* §§ 302-304, 9B U.L.A. 314-16 (2000). Such a voluntary acknowledgement of paternity by the nonmarital father and the husband's accompanying denial are binding on all three parties once sixty days have passed. *Id.* §§ 305, 307, 9B U.L.A. at 316-17. The UPA also incorporates the doctrine of paternity by estoppel. *Id.* § 608, 9B U.L.A. 32-33 (Supp. 2005). For a discussion of these UPA provisions, see Roberts, *supra* note 14, at 65-66. To date, Delaware, North Dakota, Texas, Utah, Washington, and Wyoming have adopted the Act. UNIFORM LAW COMMISSIONERS, NAT'L CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, A Few Facts About the Uniform Parentage Act (2002), http://www.nccusl.org/update/uniformact_factsheets/uniformacts-fs-upa.asp.

116. In an article published while this Article was being edited, Professor Melanie Jacobs proposed a similar two-year statute of limitations for most paternity disestablishment claims. *See* Jacobs, *supra* note 82, at 233-37. Unlike the approach advocated here, however,

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After that, the grounds for rebutting the marital presumption would be significantly more limited. In particular, biological evidence of nonpaternity—standing alone—would not suffice, and there would be no entitlement to court-ordered DNA testing. Instead, the inquiry would focus on the *child's* interests, and the burden of proof would be on the party seeking to overcome the presumption; thus, a husband (or wife) who sought, more than two years after a child's birth, to disestablish the husband's status as a legal father would be required to show that such disestablishment would serve the child's best interests. Such a showing would ordinarily be difficult to make, particularly if the child had established a bond with the presumed father during the marriage. Moreover, because the inquiry would focus on the *child's* interests, the mother's conduct toward the presumed father would not be relevant.

Third, I would rethink the notion of fatherhood as an exclusive legal status.[117] One of the reasons that biological determinism has such appeal in this context is the assumption embedded in paternity jurisprudence that there can be one and only one legal father.[118] If, however, parenthood is a socially constructed status, rather than a biological fact, then there is no inherent reason why it must be exclusive. Indeed, family law developments in a number of areas already reflect the notion that a child may have legally protected relationships with multiple parent figures. For example, a number of states now protect the legal bonds between children and stepparents, even after dissolution of the stepparent's marriage to the child's biological parent.[119]

Jacobs's proposal would require a best-interests finding even within the two-year time period. *Id.* at 236.

117. I am by no means the first legal scholar to question the notion of parenthood as an exclusive legal status. In particular, Katharine Bartlett and Nancy Polikoff have argued eloquently for recognizing multiple parenthood in contexts other than paternity establishment. *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990); *see also* Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 180-82 (1999) (discussing legal recognition of "multiple parenthood" in context of divorce, stepparent, and grandparent relationships); Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 393-96 (1994) (advocating greater legal protection of relationships between children and adults who, despite not being the legal parents, have assumed parent-like responsibilities for the children).

118. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) (plurality opinion) ("California law, like nature itself, makefs no provision for dual fatherhood.").

119. *See, e.g.*, N.H. REV. STAT. ANN. § 458:17(VI) (1992) (authorizing custody and visitation awards to stepparents if a court determines it is in the best interests and welfare of the child); Logan v. Logan, 730 So. 2d 1124, 1127 (Miss. 1998) (holding that a stepfather can

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In addition, the growing acceptance of open adoption—where a child is adopted but retains legal ties to one or both birth parents—suggests that parenthood is not necessarily a "zero sum game."[120] Recent court decisions recognizing the custody and visitation claims of nonbiological lesbian co-parents reflect a similar, non-exclusive understanding of parenthood.[121] More generally, the legal concepts of "equitable parent" and "parent by estoppel" reflected in the American Law Institute's recent *Principles of the Law of Family Dissolution* envision that more than one adult of each gender can share parental status.[122]

Finally, a small but growing number of cases indicate that courts are beginning to accept the possibility that a child can have more than one legal father.[123] For example, at least one state—Louisiana—rec-

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be awarded custody); *see also* Paquette v. Paquette, 499 A.2d 23, 30 (Vt. 1985) (overturning a lower court's dismissal of a stepfather's petition for custody). *See generally* Jennifer Klein Mangnall, *Stepparent Custody Rights After Divorce*, 26 Sw. U. L. REV. 399, 418-22 (1997) (advocating greater legal protection of stepparent-child relationships); Bryce Levine, Note, *Divorce and the Modern Family: Providing In Loco Parentis Stepparents Standing to Sue for Custody of Their Stepchildren in a Dissolution Proceeding*, 25 HOFSTRA L. REV. 315, 342-45 (1996) (arguing that stepparents *in loco parentis* with stepchildren should be permitted to seek custody in a divorce).

120. *See generally* Cahn & Singer, *supra* note 117, at 181-82 (discussing the growing recognition of open adoption); Tammy M. Somogye, Comment, *Opening Minds to Open Adoption*, 45 U. KAN. L. REV. 619, 628 (1997) (surveying state laws on open adoption and advocating the passage of an open-adoption statute in Kansas).

121. *See, e.g.*, Rubano v. DiCenzo, 759 A.2d 959, 977 (R.I. 2000) (permitting a former nonbiological lesbian co-parent to bring action for visitation with the child she had helped to raise); E.N.O. v. L.M.M., 711 N.E.2d 886, 892-93 (Mass. 1999) (same); V.C. v. M.J.B., 748 A.2d 539, 553-54 (N.J. 2000) (same).

122. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 107-08 (2002) (defining parent by estoppel and de facto parent). Significantly, the comments to this section note that the fact that a child already has two (or more) legal parents "is not dispositive" in determining whether parenthood by estoppel is in the child's best interests. *Id.* at 115; *see also id.* at 414-15 (recognizing that "[t]he court may in exceptional cases impose a parental support obligation upon a person who may not be the child's parent under state law, but whose prior course of affirmative conduct equitably estops that person from denying a parental support obligation"); Sarah H. Ramsey, *Constructing Parenthood for Stepparents:* Parents by Estoppel *and* De Facto Parents *Under the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 285, 285 (2001) ("The *Principles* adopt the theory that parenthood should be a non-exclusive status when a child is not living in a nuclear family."). For a thoughtful discussion of these provisions, see James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute's* Principles of the Law of Family Dissolution, 2001 BYU L. REV. 923 (2001).

123. *See, e.g.*, Griffith v. Pell, 881 So. 2d 184, 186 (Miss. 2004) (reversing termination of divorced husband's parental rights on the grounds that "[m]erely because another man was determined to be the minor child's biological father does not automatically negate the father-daughter relationship held by Robert and the minor child"); Christensen v. Christensen, 868 A.2d 1143, 1149 (N.J. Super. Ct. App. Div. 2005) (suggesting that both the stepfather and biological father of teenage girl may have some responsibility for financial support). *See generally* Press Release, Paula Roberts, Paternity Disestablishment in 2004-

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ognizes the common-law concept of dual paternity—which allows a nonmarital, biological father to establish a legal connection with a child born during the mother's marriage to someone else, without erasing the rights and responsibilities of the marital father.[124] Such recognition of dual paternity offers a way of reconciling a revitalized marital presumption with the interests of a nonmarital biological father who has established a relationship with a marital child.[125]

To be sure, implementing the concepts of equitable parenthood and dual paternity raises serious legal and practical challenges that go beyond the scope of this Article, but their appearance in case law and in the ALI Principles suggests that the Supreme Court got it wrong when it asserted over a decade ago that the legal system, "like nature itself, makes no provision for dual fatherhood."[126]

Revitalizing the marital presumption offers at least one other important benefit. In the ongoing "culture wars" over whether and how the state should "privilege" marriage, a revitalized marital presumption offers a "win-win" solution, at least for children. It is likely to benefit children born into a marriage without disadvantaging or stigmatizing children born outside of it. In other words, a revitalized marital presumption recognizes that while there are multiple paths to legal parenthood, marriage in and of itself is one such path and that committing to marriage creates obligations and connections to children that cannot easily be undone.

2005 (June 10, 2005), *available at* http://www.clasp.org/publications/paternity_update_061005.pdf (surveying recent case law in various states dealing with paternity disestablishment).

124. *See* Smith v. Cole, 553 So. 2d 847, 854-55 (La. 1989) (deciding that Louisiana law allows for dual paternity). For a discussion of dual paternity as a potential solution to the racial and gender prejudices reflected in the traditional law of legitimacy, see Mary Louise Fellows, *A Feminist Interpretation of the Law of Legitimacy*, 7 TEX. J. WOMEN & L. 195, 205-06 (1998).

125. *See* Michael H. v. Gerald D., 491 U.S. 110, 150-53 (1989) (Brennan, J., dissenting) (discussing the nature of the biological father's interest in maintaining a relationship with the child who was born while the mother was married to another man).

126. *Id.* at 118 (plurality opinion).

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