

One City's Experience

Why Pit Bulls Are More Dangerous and Breed-Specific Legislation is Justified

— by Kory A. Nelson —

In April 2005, the latest litigation over breed-specific legislation (BSL) concluded in Denver, Colorado. The state Legislature had previously passed H.B. 04-1279, which prohibited local governments from regulating dangerous dogs by specific breeds.[1] The City and County of Denver filed a civil action[2] seeking a ruling that the State Constitution's provisions for municipal home rule authority[3] allowed Denver's pit bull ban ordinance[4] to supercede H.B. 04-1279. In late 2004, Denver District Court Judge Martin Egelhoff, ruling on cross-motions for summary judgment, held that the regulation of dangerous dogs was a matter of purely local concern, and that, pursuant to the Colorado Constitution, Denver's home rule authority superceded H.B. 04-1279.[5] However, the court allowed the State's affirmative defense[6] to continue to trial, allowing the Colorado Attorney General's Office to argue that the ordinance no longer had a rational relationship to its legitimate government interest in public safety, and asking the trial court to reverse the Colorado Supreme Court's 1991 ruling in *Colorado Dog Fanciers, Inc. v. City and County of Denver*.[7] On April 7, 2005, Judge Egelhoff issued an oral ruling from the bench on the State's affirmative defense, finding that the State failed to provide any new evidence to undermine the original findings in *Colorado Dog Fan-ciers*; that the city had provided new evidence to provide additional support for Judge Rothenberg's findings; and upholding the ordinance as constitutional.[8] This article will provide a review of the developments in the field of ethology—the study of animal behavior—in relation to pit bull dogs, review the 1990 factual findings of the trial court in *Colorado Dog Fanciers*, and outline the evidence relied on by the city in the most recent case.

Colorado Dog Fanciers

Between 1984 and 1989, pit bulls attacked and seriously injured more than 20 people in Colorado. The victims included three-year-old Fernando Salazar, fatally mauled in 1986, and 58-year-old Reverend Wilber Billingsley, attacked by a pit bull in the alley behind his home.[9] As a result, the local community called for increased regulations and bans on pit bulls.[10] Accordingly, in 1989, the Denver City Council enacted an ordinance making it unlawful to own, possess, keep, exercise control over, maintain, harbor, transport, or sell any pit bull within the city.[11] Several organizations and individual dog owners immediately filed suit challenging the ordinance as unconstitutional.[12] The litigation concluded in 1991 with the Colorado Supreme Court's decision in *Colorado Dog Fanciers*, upholding the trial court's ruling that Denver's ordinance was constitutional.[13] While the decision followed prior decisions by other state courts reviewing similar ordinances,[14] the decision focused on procedural issues and glossed over the noteworthy and extensive factual findings made by the trial court as to the differences between pit bulls and other dogs, which provided a rational relationship between the differential treat-

ment of pit bulls and the legitimate interest of protecting public safety.

Not Like Other Dogs

To fully appreciate pit bulls as being different than other breeds, one must examine the history and purposes of the intentional selective breeding of dogs and why the unique pit bull breed was developed. The phenotypes of dogs that share the common definition of "pit bull" derive their heritage from "the Butcher's Dog"[15] developed through the sport of bull-baiting in England.[16] These dogs were intentionally bred to result in better, stronger, and bolder dogs, more inclined to engage in the dangerous behaviors likely to win in the ring. By 1835, bull-baiting was banned. Rather than give up their gambling and dog-fighting exploits, the owners took their dog fighting underground—literally. The coal-mining communities in Staffordshire County, England, brought their dogs to coal pits to fight. The breed was manipulated to be better at fighting other dogs than bulls; the dogs needed to be quicker and more agile, and not signal their intentions through their body posture, as most dogs do.[17] This eventually resulted in smaller, tenacious terriers—the similar phenotypes known as the American Pit Bull Terrier, the American Staffordshire Terrier, and the Staffordshire Bull Terrier.[18]

The most significant point about the justification for bans or restrictions of pit bulls is that these are not dependent upon a claim that every pit bull has a higher than average propensity for attacking humans. The justification is based on the clear evidence that, *as a group*, pit bulls, compared to other breeds, generally have a higher propensity to exhibit unique behavioral traits during an attack. These behaviors have a higher likelihood of causing more severe injuries or death. The *Colorado Dog Fanciers* trial court made this clear, stating that, while it could not be proven that pit bulls bite more than other dogs, there was "credible evidence that Pit Bull dog attacks are more severe and more likely to result in fatalities."[19] The court, in great detail, noted fourteen separate areas of differences, including: [20]

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- **Strength.** Pit bulls are extremely muscular and unusually strong for their size, generally stronger than many other dogs.
- **Manageability and temperament.** While pit bulls are one of many aggressive types of dogs, their temperament varies in the same manner as other dogs and they can make gentle pets. Proper handling, including early socialization to humans, is very important. Even their most ardent admirers, however, agree that these dogs are not for everyone and they require special attention and discipline. The court cited one study which reported that over thirteen percent of pit bulls attacked their owners, as compared with just over two percent of other dogs.[21]
- **Unpredictability of Aggression.** Pit bull dogs, unlike other dogs, often give no warning signals before they attack.
- **Tenacity.** Pit bulls trained for fighting are valued for "gameness"—the tenacious refusal to give up a fight. The court found that pit bulls trained for fighting had this attribute, and that credible testimony also proved that, when a pit bull began to fight, it would often not retreat.
- **Pain tolerance.** Although there was no scientific evidence that pit bulls had a greater tolerance of pain than other dogs, the evidence showed that, when a pit bull attacked, it would not retreat, even when considerable pain was inflicted on the dog.
- **Manner of attack.** The city proved that pit bulls inflicted more serious wounds than other breeds because they tend to attack the deep muscles, to hold on, to shake, and to cause ripping of tissues. Pit bull attacks were compared to shark attacks.

Recent Developments in Ethology

Since 1990, there have been few developments in ethology that directly relate to the behavior of pit bulls and the justification for BSL, but one updated study and one new article published by a recognized expert in the field were thoroughly discussed before Judge Egelhoff in the most recent case.

A study published in 2000 by Sacks, Sinclair, Gilchrist, Golab, and Lockwood involved a statistical review of dog bites resulting in fatalities (DBRF), broken down by the breed reported to have been involved.[22] (A previous version of the study was introduced into evidence before the *Colorado Dog Fanciers* trial court; the updated 2000 study provided an additional ten years of data.) The State of Colorado thought this study was significant because, during the last six years studied, there were more DBRF involving dogs reported to be Rottweilers than involving dogs reported to be pit bulls. The State argued that because pit bulls were no longer the national leader in DBRF, there was no longer a rational basis for Denver's pit bull ban. Judge Egelhoff disagreed and accepted the city's argument on this issue—namely, that the *Colorado Dog Fanciers* decision was clearly not based on a

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Kory A. Nelson is a Senior Assistant City Attorney in the Prosecution Section for the City & County of Denver, Colorado. He has prosecuted a variety of cases in Denver County Court for over 15 years. He is an instructor with the Denver Sheriff's Training Academy and various municipal inspection agencies. He is a graduate of Arizona State University's College of Law, has a B.S. in Criminal Justice from A.S.U., and is a U.S. Army veteran. He is the owner of Heidi, a German Shepherd.



determination that pit bulls were more likely to bite or attack than other breeds, so the ten years of additional data did not undermine the original findings.[23] In fact, Judge Egelhoff specifically found problems with the use of the DBRF statistics, similar to those noted by the original trial court.[24] These included that: (a) the accuracy of the "reported breed" of dog involved was unknown; (b) the study included only reported cases resulting in fatalities, but not injury short of death; (c) the impossibility of determining a bite/attack ratio for each breed because the number of dogs in the U.S. as a total and per breed was unknown; and (d) the last six years was too short and too speculative a time frame on which to base a conclusion.[25] However, over the entire 20 years of the study, pit bulls were still involved in 67 percent of the DBRF, while Rottweilers accounted for only 16 percent.[26]

The second development is an article by Randall Lockwood.[27] Although the article should be read by anyone interested in this issue, given Lockwood's connection to the Humane Society of the United States, many of his conclusions appear to be softened, as the implications of his findings could be written in much more straightforward conclusions. For example, in his terms, Lockwood affirms that fighting dogs have a more exaggerated "decrease in the latency to show intra-specific aggression," a much higher tolerance of pain, suppressed or eliminated accurate communication of aggressive motivation or intent through postural and facial signals, and reduced termination or withdrawal from combat upon either the opponent's withdrawal or display of submissive behavior.[28] This can be more clearly summarized as: A pit bull will be more likely not to display its aggressive intent, be more likely to initiate an attack, and continue on with a furious attack with its great strength, regardless of what behavior the victim exhibits, and despite having great levels of pain or injury inflicted on it. Moreover, it can't be predicted which individual pit bull will engage in this behavior. To quote Lockwood:

> part of the problem with the 'Pit Bull' controversy is that the lineages of fighting and non-fighting animals [within] the fighting breeds have been separated for many generations, but have shown relatively little physical divergence. As a result, an American Pit Bull terrier from recent fighting stock may be physically indistinguishable from an American or English Staffordshire (bull) terrier 50 generations removed from the fighting pits, yet the two animals could be behaviorally very different.[29]

Expert Testimony

During the 2004 trial, the City of Denver presented the expert testimony of Dr. Peter L. Borchelt, a certified applied animal behaviorist,[30] who testified on a number of relevant subtopics, summarized here.

Aggressiveness Towards Humans: Dr. Borchelt rebutted the oft-cited argument that pit bulls were bred to not be aggressive to humans. While breeding to suppress the behavioral tendencies for "diverted aggression" towards humans may have occurred in the distant past, the increased demand for the breed means some breeders no longer have the incentive to cull "human-aggressive" dogs. Such dogs may, instead, be sold to the unwary public and bred, further diluting the suppression of this behavior.[31]

Shifted Higher Frequency Distribution Patterns of Dangerous Behavior. Fighting dog breeders artificially selected and bred towards dangerous behaviors in order to intensify the frequency of the behavior. This caused these breeds to have the frequency of these dangerous behavioral traits still represented statistically in a distribution pattern similar to the traditional bell curve, but *shifted* towards higher levels of the dangerous behavior, compared to other breeds. Moreover, these behavioral traits cannot be artificially shifted back to lower, normal frequency distribution pattern levels. Although the actual tendencies of an individual dog of these fighting breeds could be anywhere along the frequency distribution curve, the problem is that any specific dog's location on the curve cannot be determined merely by looking at it, since it shares the same phenotype or physical characteristics as other, more dangerous pit bulls. However, as the entire breed's selective breeding has caused its frequency distribution curve to be shifted higher, creating a reliable higher probability of higher frequencies of such dangerous behavior (such as the bite, hold, and shake behavior despite the infliction of greater levels of injury and pain), Dr. Borchelt testified there is a rational basis to differentiate pit bulls from other breeds of dogs.[32]

Effect of Multiple Pit Bulls. Dr. Borchelt has unique qualifications on this issue, having co-authored the only expert paper on "pack attacks" on humans and having conducted several reviews of individual cases of multiple dog maulings resulting in death and near-fatal injuries.[33] This included meeting with crime-scene investigators dealing with the gruesome death, from a sustained mauling by three pit bulls, of 30-year-old Jennifer Brooke.[34] On the effect of increasing the number of pit bulls involved in an attack upon a human and the likelihood of serious injuries or death, Dr. Borchelt testified that, rather than a simple multiplying effect (i.e., the mathematical pattern of x, $x + x = 2x$, $2x + x = 3x$) present with other breeds, the effect would be closer to an exponential effect (i.e., $1 = x^1$, $2 = x^2$, $3 = x^3$).[35]

Judge Egelhoff's Ruling

At the conclusion of the evidence, Judge Egelhoff, in an oral ruling, found that the State had failed to provide new evidence to undermine Judge Rothenberg's original 1990 findings regarding the differences between pit bulls and other dogs; moreover, he ruled the city had shown additional evidence in support of Judge Rothenberg's findings. Since Judge Rothenberg's 1990 decision was not based upon the claim that pit bulls had a higher propensity to bite or attack humans, the new Sacks study and Lockwood article were not relevant on the narrow issues presented in that decision. The State had failed to establish

that no rational basis for the ordinance's pit bull ban existed; accordingly, pursuant to the rule of *stare decisis*, the Colorado Supreme Court's ruling in *Colorado Dog Fanciers*—that Denver's ordinance was constitutional—remained valid and, therefore, the current ordinance was still constitutional.[36]

Conclusion

A municipality that is experiencing a problem with pit bull attacks needs to consider for itself the best course of action to protect its citizens, especially those most likely to be unable to defend themselves from the tenacious and sustained attack of a pit bull, who will likely bite, hold, and tear at its victim despite efforts to stop it. However, given the clear rational evidence, breed-specific legislation is still a legally viable option. There is no new evidence that undermines the holdings of *Colorado Dog Fanciers*, only new relevant evidence that *adds* additional support for BSL, as the differential treatment of pit bulls is based upon logical, rational evidence from the scientific field of ethology.

Notes

1. H.B. 04-1279, concerning liability regarding the behavior of dogs, was codified as COLO. REV. STAT. § 18-9-204.5 (2004) and became effective on April 21, 2004.
2. The city's complaint was filed on May 13, 2004 in the matter of *City and County of Denver, et al. v. State of Colorado*, Denver District Court Case No. 04CV3756.
3. The Colorado Constitution grants home rule status to municipalities with a population over 2,000 that adopt home rule charters. COLO. REV. STAT. Const. Art. XX, § 6 (West 2004).
4. DENVER, COLO. REV. CODE § 8-55 (1989) prohibits pit bull dogs.
5. Order in City and County of Denver v. State of Colorado, No. 04CV3756 (Denver Dist. Ct., Dec. 9, 2004) (Re: Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Partial Summary Judgment). "The Court concludes that the issue of which dog breeds are permitted, prohibited, or restricted within a city is a matter of purely local concern. The State has not articulated, and the Court cannot conceive, a need for statewide uniformity. In fact, there seems to be a need for local control in this area. Each community has its own attitudes and preferences with respect to dogs. In each community, depending on culture and demographics, dogs occupy a different role. It would not make sense for the owners of mountain dogs in Telluride, farm dogs in Lamar, and urban dogs in Denver to be subject to the same kinds of laws and restrictions…local control of breeds means flexibility in crafting locally-acceptable solutions to the problems created by dogs. As the largest and most populous metropolitan area in Colorado, Denver faces unique challenges in ensuring that dogs enhance the lives of citizens rather than threaten their safety." The court did grant the State's motion for partial summary judgment, finding that the interjurisdictional transportation of a pit bull through Denver was a matter of mixed local and state concern, and struck the language of Denver's ordinance that required a pre-approved travel permit for such transportation. *Id.* at 4.
6. The court never made clear the legal authority for an affirmative defense of unconstitutionality due to a lack of a rational relationship in an action for declaratory judgment on a home rule issue.
7. 820 P. 2d 644 (Colo. 1991).
8. City and County of Denver, et al. v. State of Colorado, No. 04CV3756 (Denver Dist. Ct., April 7, 2005).
9. Jim Kirskey, *Pit Bull mauls Denver man, 58: Neighbor kills dog after 70 bites, 100 stitches, 2 broken legs*, DENVER POST, May 9, 1989 at page 1B. The dog's attack was sustained over a long period and a neighbor, Norman Cable, attempted to stop the dog by hitting it with a 2 x 4. This had no effect and Cable was able to stop the dog only by shooting it. The victim suffered serious injuries from over 70 bites, with both of his legs being broken.
10. Editorial, *Let's outlaw killer dogs*, DENVER POST, June 12, 1989, at page 4B; Editorial, *Tougher rules and stronger enforcement on Pit Bulls*, ROCKY MOUNTAIN NEWS, May 12, 1989 at page 82.
11. DENVER, COLO. REV. CODE § 8-55 (a) (2) (1989). A "Pit Bull" is defined as an American Pit Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier, or any dog displaying the majority of physical traits of any one or more of the above breeds, or any dog exhibiting those distinguishing characteristics which substantially conform to the standards established by the American Kennel Club or United Kennel Club for any of the above breeds. The A.K.C. and U.K.C. standards for the above breeds are on file in the office of the clerk and recorder, ex officio clerk of the City and County of Denver, at City Clerk Filing No. 89457.
12. Colorado Dog Fanciers, Inc., et al. v. City and County of Denver, No. 89CV11714, consolidated with Colorado Humane Society, Inc., et al. v. City and County of Denver, No. 89CV12348 (Denver District Court June 28, 1990) (Rothenberg, J.).
13. 820 P.2d 644 (Colo. 1991).
14. *See, e.g.*, Hearn v. City of Overland Park, 772 P.2d 758 (Kan. 1989); Garcia v. Village of Tijeras, 767 P.2d 355 (N.M. Ct. App. 1988).
15. A subtype of Molossian dogs known as "Bullenbeissers" were valued for their ability to control unruly cattle, earning their keep as butcher's dogs. These dogs had to catch and grip escaping or uncooperative bulls on their way to market. The dog would hang on the bull's nose without letting go until the butcher could regain control. As with all people who depend upon their dogs, butchers were proud of their best "bulldogs" and anxious to prove them better than the neighboring village's butcher's dog. D. CAROLINE COILE, PIT BULLS FOR DUMMIES 9 (Wiley Publishing, Inc. 2001).
16. The British placed high value on contests that featured animals fighting to the death. The spectacle of a dog killing a bull was the highest entertainment that most small villages could offer their poor inhabitants. *Id.* at 8.
17. Dogs exhibit characteristic postures that reveal their states of mind. Fighting dogs were bred and trained not to display behavioral signals of their intentions, to give these dogs an advantage in the ring. The pit bull dog is frequently known to attack "without warning" for this reason. Lockwood, Randall, *The ethology and epidemiology of canine aggression*, THE DOMESTIC DOG: ITS EVOLUTION, BEHAVIOUR, AND INTERACTIONS WITH PEOPLE, at 133 (James Serpell, ed. Cambridge University Press, 1995); republished in ANIMAL LAW AND DOG BEHAVIOR at 289 (David Favre and Peter L. Borchelt, Ph.D., eds. 1999) (hereinafter "Lockwood").
18. PIT BULLS FOR DUMMIES, *supra* note 15 at 7-12.
19. Colorado Dog Fanciers, Inc. v. City and County of Denver, No. 89CV12348 at Para. 27 (Denver Dist. Ct., June 28, 1990) (Rothenberg, J.).
20. Aggressiveness, athletic ability, biting, catch instinct, destructiveness, fighting ability and killing instinct, frenzy, gameness, health status, manageability, strength, temperament, tolerance to pain, unpredictability. *Id.* at Para. 28.
21. *Id.* at para. 28(j), p. 7.
22. Sacks, Sinclair, Gilchrist, Golab, and Lockwood, *Breeds of dogs involved in fatal human attacks In the United States between 1979 and 1998*, JAVMA, Vol. 217, No. 6 (Sept. 15, 2000).
23. Judge Egelhoff determined the parameters of the trial to be that the State Attorney General's Office had the burden of proof to establish, beyond a reasonable doubt, that, since the time of Judge Rothenberg's original 1990 ruling, there had been sufficient changes in the facts or ethology (the study of animal behavior) to prove that there was currently no rational basis to justify the pit

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In Our Next Issue:

In the September/October issue of *Municipal Lawyer*—The First Amendment and Recent Issues for Local Governments. Articles include a review of solicitation ordinances; First Amendment and adult business—evidentiary issues; airports and the First Amendment; and an update on regulating signs.

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bull ban, requiring the court to reverse the *Colorado Dog Fanciers* decision. City and County of Denver, et al. v. State of Colorado, No. 04CV3756 (Denver Dist. Ct., April 7, 2005).

24. *Id.* The 1990 trial court noted: "It is difficult to accurately determine the breeds which cause the most bites for several reasons: (a) It is difficult to identify a particular breed of dog, especially with mixed breeds; (b) There is a tendency to over report dog bites attributed to a particular breed; (c) Certain dog breeds are owned by a population of dog owners who are more likely to be irresponsible; and (d) There is inaccurate reporting of the total population of particular breeds. Defendants' Exhibit LLL, Lockwood Report." *Colorado Dog Fanciers*, J. Rothenberg, *supra* note 19 at Para. 26.

25. City and County of Denver, No. 04CV3756 (Denver Dist. Ct., April 7, 2005).

26. *Id.*

27. Lockwood, *supra* note 17 at 133 and 289.

28. *Id.*

29. *Id.* at 133.

30. Dr. Borchelt had previously testified as an expert witness on the behavior of pit bulls in litigation over Toledo, Ohio's pit bull ordinance, and had published several articles on dangerous dogs, including the only published book on this legal topic, *Basic Behavioral Principles and Misunderstood Words*, Animal Law and Dog Behavior (David Favre and Peter L. Borchelt, eds., 1999).

31. Testimony of Dr. Peter L. Borchelt, Denver v. Colorado, No. 04CV3756 (Denver Dist. Ct., April 7, 2005). Lockwood also notes, "Dog fighters and advocates of fighting breeds note that, historically, fighting animals that showed aggression to people were generally removed from the gene pool, either by being destroyed or being deemed unsuitable for breeding.... However, there is no indication that the same selective pressures are in operation since there is currently a market for even the most intractable animals in the guard dog trade." Lockwood, *supra* note 17 at 133.

32. Testimony of Dr. Borchelt, Denver v. Colorado, No. 04CV3756 (Denver Dist. Ct., April 7, 2005).

33. Dr. Borchelt co-authored the only known article in the field of ethology on the attack of packs of dogs on humans: Borchelt, Peter L., Ph.D., Lockwood, Randall, Ph.D., Beck, Alan M., Sc.D., Voith, Victoria L., D.V.M., Ph.D., *Attacks by Packs of Dogs Involving Predation on Human Beings*, Animal Law and Dog Behavior (David Favre and Peter L. Borchelt, eds., 1999).

34. Hector Gutierrez, *Owner of Pit Bulls Headed for Prison: Woman takes plea deal in fatal attack in Elbert County*, Rocky Mountain News, Sept. 25, 2004 at http://www.rockymountainnews.com/drmn/state/article/0,1299,DRMN_21_3208879,00.html. *See also*, The DenverChannel.com, *Pit Bull Owner Sentenced For Mauling Death*, at http://www.thedenverchannel.com/news/3999446/detail.html ("Many deputies said that Brooke's mauled body was one of the most gruesome things they had ever seen. Eight firemen had to be counseled after they responded to the scene").

35. Testimony of Dr. Borchelt, Denver v. Colorado, No. 04CV3756 (Denver Dist. Ct., April 7, 2005).

36. City and County of Denver, et al. v. State of Colorado, No. 04CV3756 (Denver Dist. Ct., April 7, 2005). On Monday, May 9, 2005, the City and County resumed enforcement of its Pit Bull ordinance. **ML**

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very basis of Congress's power to enact RLUIPA has been deferred. Justice Thomas, in a concurrence, makes it clear that there are serious reasons to doubt whether Congress had the power to enact RLUIPA. The federal government is a government of enumerated powers, and RLUIPA's proponents must explain how this law, a law governing state and local governments for the sake of religious entities, is a valid exercise of federal power under the Spending or Commerce Clauses, or Section 5 of the Fourteenth Amendment.

On this issue, we'll hear from the Sixth Circuit on the prison context before we hear from the Supreme Court. On the land use side, this question is an especially weighty one: Federalism concerns are at their height when a federal law interferes with what is the most inherently state and local issue: local land use. So stay tuned, because there is much left to be decided with respect to RLUIPA.

Editor's Note: Marci Hamilton, at hamilton02@aol.com, is the Paul R. Verkuil Chair in Public Law at Benjamin N. Cardozo School of Law, Yeshiva University, where she specializes in church/state issues. She wrote an *amicus* brief on behalf of IMLA and others in the *Cutter* case, in order to bring to the Court's attention the issues involving Congress's power to enact RLUIPA. Her most recent publication is *God vs. the Gavel: Religion and the Rule of Law* (Cambridge 2005). A longer version of this column first appeared on June 2, 2005 in Marci Hamilton's bimonthly constitutional law column posted at the Findlaw site, www.findlaw.com. **ML**

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