The Supreme Court Enlists in the Sexual Revolution

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We have traveled very far from 1888 when a majority of the U.S. Supreme Court was willing to endorse the notion that marriage “is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.”

Over the last two years, roughly forty federal courts have issued opinions on the question of whether states may continue to reflect in their laws the hitherto unanimous understanding of marriage as the union of a husband and wife. When they opine on the meaning of marriage, the conceptions they endorse are drastically at odds with the earlier description.

Thus, a federal court sitting in Alaska described marriage as “a deeply personal choice about a private family matter.” A majority decision from the U.S. Court of Appeals for the Fourth Circuit said marriage “allows individuals to celebrate and publicly declare their intentions to form lifelong partnerships, which provide unparalleled intimacy, companionship, emotional support, and security.” A panel of the Seventh Circuit recently said: “Marriage confers respectability on a sexual relationship.”

These court decisions all came in the wake of, and necessarily relied on, a summer 2013 Supreme Court decision, United States v. Windsor, in which a five-judge majority of the Court had ruled that the U.S. Constitution precluded Congress from specifying that “marriage” and related terms refer to a male-female union. That opinion had begun by suggesting that the law was invalid because Congress had not deferred to...
state marriage definitions but went on to make a much more significant claim, a claim that fueled the resulting challenges to every state's marriage laws.

In this decision, Justice Anthony Kennedy finds that by including in federal law a definition of marriage at odds with state recognition of same-sex “marriages,” Congress had singled out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.

Though the opinion is hardly opaque, its key holding appears to derive from a pair of previous opinions by its author, Justice Kennedy. One, from a 1996 case, Romer v. Evans, suggested that a law is invalid if motivated by “animus” towards people who experience same-sex attraction. In that case, the Court struck down a Colorado constitutional amendment that precluded municipalities in the state from adding a category of “sexual orientation” to their local anti-discrimination laws. Following Romer, the Windsor decision charged Congress with an “avowed purpose and practical effect of . . . impos[ing] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.” The Court says the purpose of the federal marriage definition means “to disparage and to injure those whom [New York], by its marriage laws, sought to protect in personhood and dignity.” In its most hyperbolic passage, the Court says the law “humiliates tens of thousands of children now being raised by same-sex couples.”

More important, however, is a 2003 decision, Lawrence v. Texas, which struck down Texas’ sodomy law. That decision began with an expansive, almost ethereal definition of “liberty”: “Freedom extends
beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.” The majority quoted a 1992 decision, *Planned Parenthood v. Casey*, by three justices including Justice Kennedy for this proposition:

matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.

In *Lawrence*, the majority concluded: “Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”

In *Windsor*, Justice Kennedy relied on *Lawrence*. According to Kennedy, when New York redefined marriage to include same-sex couples, it was “giv[ing] further protection to [the] bond,” including “consensual intimacy between two adult persons of the same-sex”—which had been provided constitutional protection in *Lawrence*. Justice Kennedy further charged Congress with creating a two-tier system of relationship recognition, a “differentiation [which] demeans the couple, whose moral and sexual choices the Constitution protects” (the Court here cites *Lawrence*). Here is the flow of the majority’s reasoning: this Court previously said same-sex sexual relations are protected by the Constitution, New York redefined marriage to give legal status to those relations, therefore the Constitution gives special status to New York’s decision.

**The Court Joins Up**

The *Lawrence* opinion also provides a critical clue to the genealogy of legal endorsement of same-sex “marriage” and illuminates how the Court could abandon the rich understanding of marriage as a public institution linked to children, family, and the broader society for the new conception of marriage as a purely private contract which the government is
constitutionally obligated to make widely available as a way of enhancing individual dignity.

The clue in *Lawrence* comes when Justice Kennedy says: “the most pertinent beginning point” in identifying the scope of the right to privacy that the Texas law was said to transgress “is our decision in *Griswold v. Connecticut*.”

Indeed, it’s fair to say that *Griswold* marks the Supreme Court’s formal enlistment in the sexual revolution.

*Griswold* involved a challenge to a Connecticut law criminalizing both providing and using contraceptives. A Planned Parenthood employee and a doctor were charged as accessories for providing contraceptives “to married persons,” a fact the Supreme Court decision emphasized. Justice William Douglas wrote the Court’s opinion and found the law “operates directly on an intimate relation of husband and wife and their physician’s role in the aspect of that relation.” (It is interesting that though the decision focused on marital privacy, the claims were brought by third parties, not the married couple themselves.) Since the U.S. Constitution does not explicitly mention marriage, contraception, or privacy, the trick for the Court was to somehow ground the result—that Connecticut’s law was unconstitutional—in the Constitution. Justice Douglas’ opinion did that by arguing that marriage was “a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.” In particular, “specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance.” The guarantees invoked in the opinion were: the First Amendment’s right of association (itself an extrapolation from the amendment’s language); the prohibition on quartering soldiers in peacetime; the prohibition on unreasonable searches and seizures; and the Fifth Amendment’s protection against self-incrimination. (The Ninth Amendment is mentioned, and one concurring opinion would have relied on it more fully, but the mention in the majority opinion is in passing.)

The opinion did result in some powerful dissents, focused not on the question of marital privacy but on the role of the Courts. Justice Hugo Black charged:

> no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of
legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous. . . . Use of any such broad, unbounded judicial authority would make of this Court’s members a day-to-day constitutional convention.

Justice Potter Stewart would have denied the Court a role in saying “whether we think this law is unwise or even asinine,” noting that if the people of Connecticut did not like the law, they could “freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it.”

It must be admitted that the Connecticut law struck down in the case was unusual, and there is something obviously unseemly in the potential of the government to police marital relationships (though that is not what happened in *Griswold*). It may have been that this decision would have been something of an anomaly created to address an unusual circumstance, were it not for the case’s “progeny” (as a later Court ironically termed the subsequent sexual rights cases).

Prominent in this progeny are a trio of cases decided in the 1970s that dramatically shaped the Court’s involvement in cases challenging pre-revolutionary norms. We might call them the “weird sisters” among the Court’s sexual revolution cases because of the vague standards they use and the dark portents they contain. All are cited in *Lawrence v. Texas*.

These cases were shaped by Justice William Brennan, who authored the majority opinion in two of them and worked “quietly behind the scenes” in another. Judge Richard Posner, who authored the 2014 Seventh Circuit opinion mandating same-sex “marriage” referenced above, was a clerk to Justice Brennan in the early 1960s and described his chambers as “the cockpit of the revolution,” referring to the larger legal revolution in the role of the judiciary. So too, Justice Brennan’s chambers were at the center of the Court’s advancement of the sexual revolution.

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Justice Brennan wrote the 1972 majority opinion in *Eisenstadt v. Baird*, the Court’s next major contraception case. Here, the challenged Massachusetts law allowed distribution of contraception to married persons but not to single individuals. Marital privacy was not at risk here, but Justice Brennan nimbly reframed the right at issue: (1) *Griswold* said married couples must be allowed access to contraceptives, and (2) marriage is “an association of two individuals each with separate intellectual and emotional makeup,” so, (3) the right to privacy is an “individual” right which necessarily applies to those who are not married. In a strategy that would become pervasive in the later same-sex “marriage” cases, the opinion dismissively writes off the state’s justifications for the law as unreasonable.

*Eisenstadt* then became an important precedent for the next year’s decision in *Roe v. Wade* and its companion case, *Doe v. Bolton*. In those cases, the Court invalidated every state’s abortion law. Here the Court said the right of privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” The Court said this was not an unqualified right but that abortion must be allowed in order to protect a mother’s health. In *Doe v. Bolton*, issued at the same time, that type of exception was construed so broadly as to essentially require that abortions must be allowed at any stage of pregnancy for any reason.

The final case in the trio was also written by Justice Brennan. This 1977 decision, *Carey v. Population Services*, invalidated a New York law that required contraceptives to be distributed by physicians and prohibited their distribution to minors. Justice Brennan’s opinion purports to put the Griswold decision “in proper perspective” by holding that “in the lights of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusions by the State.” To the Court, the physician requirement was such an intrusion. A plurality of four justices also invoked the Court’s self-assigned power to determine if the state had adequate justifications for its laws to hold the portion of the law prohibiting distribution of contraceptives to minors unconstitutional.

Justice Rehnquist issued a classic dissent from the opinion, beginning with this passage:
Those who valiantly but vainly defended the heights of Bunker Hill in 1775 made it possible that men such as James Madison might later sit in the first Congress and draft the Bill of Rights to the Constitution. The post-Civil War Congresses which drafted the Civil War Amendments to the Constitution could not have accomplished their task without the blood of brave men on both sides which was shed at Shiloh, Gettysburg, and Cold Harbor. If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men’s room of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction.

One aspect of the Carey decision was particularly important for future Court analysis of family-related laws. It stems from the passage quoted above identifying a Constitutional principle of non-intrusion into choices related to procreation. The use of “intrusions” in the passage is somewhat odd since the part of the statute being discussed was not a ban on contraceptives but merely a limitation on who may distribute them. This represents a significant shift from a right to be left alone in the earlier cases to a new right to the “means of effectuating [the] decision [to use contraceptives].” This shift transforms the right to privacy from a negative to a positive right.

This sort of analysis had been part of a 1973 opinion, Department of Agriculture v. Moreno, by Justice Brennan in a case involving a decision by Congress to make “hippie communes” ineligible for food stamps. The Court invalidated the requirement, famously saying that “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” This passage became the linchpin of the first (Romer v. Evans) of Justice Anthony Kennedy’s trio of “gay rights” cases. The case also reflects an ambivalence about the unique nature of family ties (i.e. suggesting Congress was actually illegitimately distinguishing between families made up of related people and other groupings) and an assumption that the Constitution includes positive
guarantees to entitlements. These ideas reflected in and underlying the other sexual rights cases would become foundational for the continuing revolutionary work of the Court.

**The War Continues**

*Griswold* and its “progeny” established a new set of sexual rights but did not end the revolution in the legal treatment of the family. To understand how the “privacy” cases laid the groundwork for the more recent redefinition of marriage, we could examine another trio of cases—the Supreme Court’s “right to marry” cases.

The first in this trio was actually not revolutionary at all. In the 1967 case *Loving v. Virginia*, the Court invalidated a Virginia criminal statute prohibiting marriages between white people and people of other races. A unanimous Court easily invalidated this law on the clear grounds of racial discrimination—the precise evil the Fourteenth Amendment was enacted to prevent. The Court also included in its opinion a brief section identifying a second flaw in the Virginia law: that it interfered with a “right to marry.” This right the Court identified in venerable cases like *Maynard v. Hill* (with its rich, institutional description of marriage) and *Skinner v. Oklahoma*, which had explicitly linked marriage and procreation.

The next time the Court invalidated a law as an infringement of the right to marry, the privacy cases appeared to have modified the Court’s approach. *Zablocki v. Redhail* (1978) centered on a law that required an individual who was not providing financial support to his child to seek court permission before obtaining a marriage license. An unwed father who had not provided court-ordered support to his daughter since she was born challenged the law, and Justice Thurgood Marshall, a close collaborator of Justice Brennan’s, ruled that the law was unconstitutional as a violation of the right to marry. Importantly, the decision links its result to *Griswold* and subsumes marriage in a more general privacy right: “the decision to marry [is] among the personal decisions protected by the right of privacy.”

*Zablocki*’s discussion of marriage does reference older cases and nods to more robust conceptions of marriage but is fundamentally confusing. Most obviously, how can the right to seek official state sanction
of one’s relationship properly be characterized as private? The answer is in the previous cases. Though these cases discussed contraception and abortion, and so did not immediately impact marriage, they do include discussions and descriptions of marriage that illustrate a radical reformulation of its meaning and purpose.

In **Griswold**, the Court defined marriage: “Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.” In **Eisenstadt**, the Court fully embraces the “associational” model: “the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.” In the 1992 decision **Planned Parenthood v. Casey**, reaffirming a constitutional right to abortion, three Supreme Court justices, including Justice Kennedy, endorsed **Eisenstadt**’s description of marriage as an accurate depiction of “the basic nature of marriage.”

The Court’s decision in **Zablocki** to treat marriage as just another manifestation of individual choice imports into the marriage context the Court’s preeminent solicitude for individual choice and its emerging recognition of a government duty to guarantee the effectuation of adult choices.

The hollowing out of marriage proceeded apace in the next decade’s right to marry case. There, an inmate challenged a Missouri prison’s policy of requiring prison officials to give permission before he could marry. The state reasonably argued that confinement in prison was not conducive to marriage. The Court disagreed, suggesting an understanding of marriage that would be consistent with imprisonment:

Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the
commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock).

It hardly seems coincidental that the Court here prioritizes the aspect of expressive individualism above all others and inculces eligibility for government entitlements.

Coming full circle, the reduction of marriage to a manifestation of individual choice combined with the Court’s assertion of itself as the appropriate authority for policing state family regulation. Its endorsement of the fundamental tenets of the sexual revolution have converged to make possible the most significant shift in the legal understanding of marriage in the history of the United States—the redefinition of marriage to include same-sex couples. The federal courts ruling that such a redefinition is constitutionally mandated have relied on very thin conceptions of marriage, such as those promoted by the Supreme Court in its privacy and the latter two right to marry cases. The most recent cases (since Windsor) have depicted their decisions as required by the Supreme Court decisions in Loving, Zablocki, and Turner and the fact that the opinions in these cases did not qualify the right they applied by a specific definition of marriage. The assumption of these decisions is that the government’s role is to bestow dignity on individuals by valorizing their choices. Most important to these cases has been Justice Kennedy’s efforts to assemble all of these concepts into a unified doctrine that is flexible enough to apply when needed while not constraining the Court when that would be inconvenient.

It is worth specifying how the Court decisions outlined here are revolutionary. They are, of course, consistent with the tenets of the sexual revolution—such as marriage as a mere lifestyle choice, equal satisfaction of sexual desires as a prime value, and the separation of procreation from marriage and biology.
This is not all that’s radical about the Court’s approach to family issues, however. Indeed, the Court’s decisions, and its ability to invalidate competing conceptions in the law, make it a vanguard of the revolution. All the more important because its place in the mainstream of our governing institutions and its prominence among elite decision-makers invests its pronouncements with greater weight than other parts of the elite who are not as immune from credible challenges to their authority (like a Politburo of sorts, only in black robes, rather than dark suits). Poor ratings or viewer outrage may curb an outlandish television program, but the Court’s most radical decisions, like *Roe v. Wade*, remain in place notwithstanding decades of protest.

**The Fruits of the Revolution**

The revolutionary aspects of the Court’s decisions are their radical break with the past, their centralization of power, and the way they allow for continued application to a wide variety of new circumstances (making the revolution permanent).

However one assesses the effectiveness of the laws struck down by the Supreme Court and other federal courts, they reflected a rich and coherent understanding of marriage, family, and sexuality. This understanding was that sexual expression was always a moral act and, as such, had significant consequences the broader community was rightfully concerned about. Marriage was the only licit setting for sexual expression. The social institution of marriage united two very different types of people, a man and a woman. The union was not merely an expression of momentary desire or even of calculated bargaining but a real joining of two different people which created reciprocal obligations and obligations to the children the union would create. Though the act of marrying was freely chosen, its consequences could not really be. Children born to married couples enjoyed the blessing of belonging and a setting of stability, complementarity, and usually biological connectedness.

The ideology of the sexual revolution, by contrast, imagines no differences of significance between men and women. Sexual expression is a means of obtaining pleasure, though it may rise to an act of self-creation since it is the most potent item in the toolkit of expressive individualism. By rights, it ought to have no consequences that are not freely chosen.
by the consenting individuals. Thus, each has a right to be shielded and, indeed, the state has a duty to shield from the consequences (such as through contraception or the outlet of simplified divorce). If such consequences—pregnancy or unhappiness, for instance—are still manifest, one should be allowed to escape them, again with the collusion of the state. No freely chosen sexual coupling is illicit, and none should be privileged above another. Civil marriage is but a manifestation of individual will, valuable because it allows the state to bestow dignity on individuals by valorizing their intimate choices. If the parties desire, marriage could be useful to the project of “defin[ing] one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” Secondly, marriage may be accessorized by children who may provide personal satisfaction to the spouses. These children will presumably be benefitted by access to the resources of two adults and to the government benefits provided to married couples.

Centralization is a characteristic feature of revolutionary movements. The Court’s endorsement of the sexual revolution not only offers an alternative conception of marriage, family, and sexuality, but it brings all of these (and more) under the supervision of the state in an unprecedented way. Where once marriage was recognized as a pre-political institution, it now becomes an instrument of state policy. Where the law might once have been open to the charge of policing private sexual behavior, it increasingly uses legal categories like marriage and parenthood to promote the “dignity” of adult living arrangements and to enhance the self-actualization and autonomy of individuals, becoming the sponsor of sexual arrangements and attempting to guarantee they will not have unchosen consequences.

When the Supreme Court requires a state to show good instrumental reasons for its definition of marriage or its unwillingness to facilitate extramarital sexual relationships, it is manifesting an assumption that family laws are essentially government programs with the aim of social engineering. Previously, family law recognized parenthood and marriage as prior to the state, and to a great degree, independent of it. This

understanding of marriage, for instance, derives from the natural realities
of sex difference and the procreative potential of the male-female union.
The state’s posture was to recognize, not create, the concepts of marriage
and family. Its role was to provide a legal structure for the family to be
recognized and to protect the integrity of that structure.

In the new system, even casual sexual encounters (such as between
college students) become the subject of complex rules and special legal
proceedings not to promote chastity or even chivalry but to ensure con-
sent, apparently the only remaining restraint on sexual expression.

The very tenuousness of the new legal conceptions of marriage also
invite further state involvement, whether through oversight of the divorce
process, assigning legal parenthood to facilitate the use of assisted repro-
ductive technology, or ensuring private citizens and organizations do not
“discriminate” against the new family-like arrangements.

The centralization of family regulation has two facets: it concentrates
authority in the national government, and specifically in one branch of
that government.

All but one of the cases discussed above involved invalidation of a
state law or policy. One can concede that some of the statutes the Court
struck down might have been inadvisable or even wrong while still rec-
ognizing that replacing them with a national standard was not the only
remedy. Indeed, a federal system would have allowed those troubled
by the laws to seek state-level reform or even to vote against the laws
with their feet. After the decisions, however, states are no longer free to
enact laws on abortion, contraception, and increasingly marriage, except
within bounds set by the national level.

It is not just that the Court has concentrated power at the national
level by treating broader swaths of family law as subject to national con-
stitutional constraints. In doing so, it has necessarily made them subject
to the jurisdiction of the federal courts, which have successfully estab-
lished themselves as the final arbiters of constitutional meaning. It’s
easy to see this if we simply restate the bottom line of one of the cases,
*Zablocki v. Redhail*: the state of Wisconsin may not require a man who
is not supporting his children to seek court permission to marry because
eight justices on the Supreme Court interpreted the U.S. Constitution as
requiring this result. This is particularly striking where, as in *Eisenstadt* or *Carey* or *Turner* or others, the Court’s conclusion was dependent on the justices’ determination that the state government’s justifications for its laws were not reasonable or adequate or even that the unstated motivations behind the laws were inappropriate.

Not only have the sexual revolution cases concentrated Court authority, but the reasoning and justifications offered by the Court in support of its conclusions ensure that it will be able to exercise essentially unlimited discretion in future issues that come before it. Professor Robert Nagel recently noted: “As a distinctive sense of law recedes, judicial supremacy emerges.” When the Court gives itself a charge to ensure that laws enhance personhood or eliminate stigma or assist individuals in a process of self-creation, it is hard to imagine any constraints on such power.

This can be illustrated by a contrast. When the Supreme Court narrowly rejected a right to physician-assisted suicide in 1997, it did so based on a rule that the Court would not find a new right not explicitly mentioned in the Constitution unless the party asserting the right could define it as narrowly as possible and show that it was consistent with the history and tradition of the nation and fundamental to our concept of ordered liberty. In that case, the universal disapprobation of suicide in the law made the question an easy one. It is not hard to see how the same analysis would easily defeat a claim to same-sex “marriage.” First, it would prevent the courts from defining a “right to marry” as broadly as a private choice to express commitment. Then, even a cursory review of history would show that same-sex “marriage” is not consistent with the nation’s history and traditions. It is not that such a rule is immune to abuse or manipulation, but it is much more constrained than a general right to privacy or to define one’s concept of meaning.

The sexual revolution cases generally eschew constraining legal rules in favor of the broad and ethereal. So, when the Court ruled Congress could not retain the universal understanding of marriage since

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doing so imposed stigma on same-sex couples and the children they raise (not precisely “their” children as the Court would have it, since a child raised by two people of the same-sex is necessarily separated from at least one parent), it is hardly a surprise that lower federal courts would find that state legislatures and voters could not retain that definition, notwithstanding the references in *Windsor* to the importance of federalism.

Later this year, the Supreme Court is currently scheduled to revisit the issue of same-sex “marriage” and potentially determine whether states may retain the understanding of marriage as the union of a husband and wife. This is an opportunity for the Court to step away from the revolutionary project of reframing norms of morality and redefining marriage and an opportunity to decentralize decision-making power on family regulation.

The end to the Supreme Court’s involvement is a “consummation devoutly to be wished.”

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