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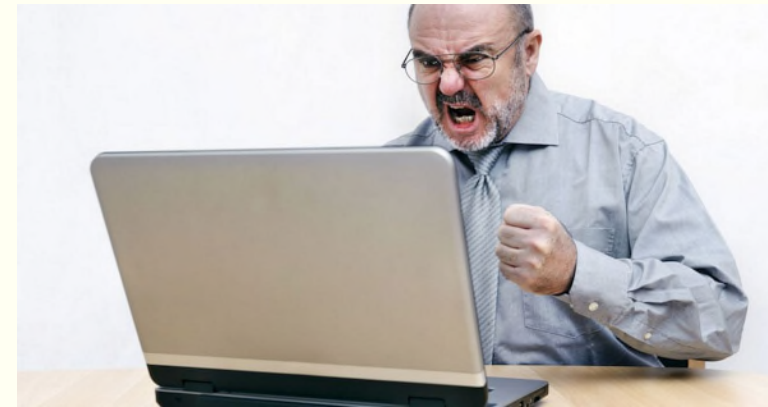


"I Approve This Message:" Political Speech During an Election Year



Today's Agenda

- ✓ Review sources of law regarding employee and student First Amendment free speech rights
- ✓ Review legal analysis and revisit key court decisions regarding the First Amendment
- ✓ Consider controversial First Amendment issues and provide practical guidance



FREEDOM OF SPEECH



Sources of Law and Guidance

- United States Constitution
- Missouri Constitution
- Federal and state laws and regulations
- Case law
- School board policies

U.S. Constitution - First Amendment

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; or the right of the people to peacefully assemble, and to petition the government for a redress of grievances.”



Missouri Constitution, Article I § 8 – Freedom of Speech

“That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty...”



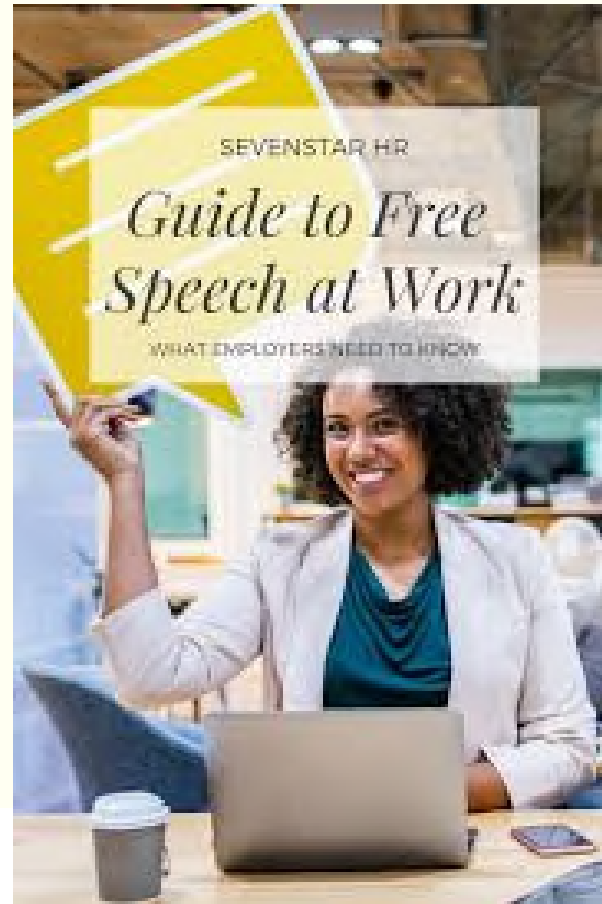
First Amendment Lawsuits

- What types of lawsuits do we see?
 - A School District has taken action against an employee, and the employee alleges that the District retaliated against the employee for exercising his/her First Amendment rights.
 - Parent lawsuits on behalf of children

First Amendment Lawsuits

- **42 U.S.C. § 1983 –Why do we care about this statute?**
- **Who are the typical defendants in these cases?**
 - School Districts
 - Boards of Education/ Individual Board Members
 - Administrators
 - Other individuals who are acting under the color of state law
 - Parents of students

Employee Speech



Teacher Expression

Where are we likely to see teacher expression?

- Classroom
- Coaches at athletic training/events
- Clothing
- Social Media
- Communications at Board Meetings
- Letters to Editor/ Yard signs

Hypothetical #1

Mr. Jack Black teaches social studies at the infamous School of Rock Middle School, a public school located in Fantasy, Missouri. Jack also is the leader of the a cappella group and coaches 7th grade boys soccer. The District is going “hybrid” this year, so Jack is teaching some students face-to-face and some on-line.

On the first day of school, which began his week-long lesson on presidential elections, Jack wore a Make America Great Again t-shirt to class. Several parents called to complain and many made comments on the district’s website demanding Jack be suspended or fired.

When Principal Strictly addressed the complaint, Jack said he had the First Amendment right to wear the shirt.

Hypothetical #2

The next day, Jack wore a “Joe 2020” button, and the next day, he wore a “Kayne 2020” hat. Several parents called to complain and many made comments on the district’s website demanding Jack be suspended or fired.

When Principal Strictly addressed the complaint, Jack said the clothing was part of his lesson and he has not advocated for any candidate.

Hypothetical #3

Ms. Johnson teaches virtual instruction at her home during the 2020-2021 school year. On the first day of instruction, Ms. Johnson begins the virtual lesson in her home basement. In the background, students are able to see a picture of her husband in a police uniform. Next to the picture is a sign that states "BLUE LIVES MATTER."

A student screenshots the background and forwards it to the school principal.

Can the school require Ms. Johnson to remove the sign from her home wall?



Freedom of Speech – Public Concern

Do public employees have the First Amendment right to express opinions?

It DEPENDS on the context!

What is protected speech?

***Pickering v. Board of Education*, 391 U.S. 563 (1968)**

- **Is the teacher/staff member speaking on matters of “public concern”?**
- **Balancing Test**

***Connick v. Myers*, 461 U.S. 138 (1983)**

- To determine whether an employee’s speech is a matter of public concern, courts examine the “**content, form, and context**” of a given statement

Freedom of Speech – Official Duty Speech

***Garcetti v. Ceballos*, 547 U.S. 410 (2006)**

- Plaintiff claimed he was passed on a promotion because he criticized the legitimacy of a warrant
- First Amendment protections do not apply when the employee is speaking pursuant to his or her **official duties**.

***Consider - Lee-Walker v. N.Y.C. Dep't of Educ.* (S.D.N.Y. 2016)**

- English teacher made comments about Central Park 5; received bad evaluations and nonrenewed
- Some courts have applied this rule to teachers, but the *Garcetti* court specifically held that question open.

Classroom Speech

- ***Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477 (7th Cir. 2007)***
 - Court of Appeals for the Seventh Circuit in Chicago upheld firing of teacher who made comments in her classroom criticizing the U.S. war on Iraq.
 - ***Garcetti*** directly applied.
 - Despite the fact that the current-events lesson was part of the assigned tasks in the classroom, the first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.



photo credit: Newsweek.com

Teacher Expression

Considerations:

- Teacher speech at school usually bears the school's imprimatur.
- Teacher speech as part of his/her official duties is typically not protected by the First Amendment.
- The above factors shape the school district's authority to regulate the speech of its employees.

First Amendment Analysis

1.) Is the employee speaking as a citizen or pursuant to official duties? (*Garcetti*)

- For employee to be speaking as a private citizen, speech itself cannot have been made in the course of the employee's ordinary duties
- Does the speech relate to the employee's job duties?
- Was the speech made while on or off duty?
- "Chain of command speech," speech made by an employee to his superiors, is typically "employee" speech

First Amendment Analysis

2.) Is the speech relating to an issue of public concern based on content, form, and context? Or, is the speech related to the employee's private concern?

- *Connick* – touches on aspects of “political, social, or other concern in the community”
- Personal issues and grievances do not typically constitute issues of public concern
- Focus on identifying speech that may implicate broader public issues and current events

First Amendment Analysis

3.) If the speech is “protected,” balance the employee’s interests against those of the school district.

- Do the interests of the employee as a private citizen in commenting on matters of public concern outweigh the interests of the public employer in promoting the efficiency of the public services it performs? (*Pickering*)

Hypothetical Discussion

What are the answers to the hypotheticals?

1. Public or private citizen?
2. Related to issue of public concern?
3. Balancing of interests?

What about “off duty” speech?



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Hypothetical #4

Teacher sends a series of tweets directed to President Donald Trump's Twitter account, asking him to "remove the illegals from her city" and saying that her school district was "loaded" and "taken over by" undocumented students from Mexico. Teacher later said she thought her tweets were private messages to Trump.

Are the tweets protected speech?

What Result?

First Amendment - Balancing Analysis

- Considerations:
 - Need for harmony in the workplace;
 - Whether the government's responsibilities require a close working relationship to exist between the employee and co-workers when the speech in question has caused or could cause the relationship to deteriorate;
 - What about relationship between staff member and students?
 - Time, manner, and place of the speech;
 - Context in which the speech arose;
 - Degree of public interest in the speech;
 - Whether the speech impedes the employee's ability to perform his or her duties

Social Media and Public Employee Speech

- **Be careful when venting on social media!**
 - If venting shows a racial animus—or gender, ethnicity, religion, disability, etc.—it is inconsistent with the ability to serve *everyone* in the community and shows bias that is inconsistent with what we expect from our public employees.

Employee Discipline Considerations

- **Is the employee a teacher? Probationary or Tenured?**
 - If yes – consider the provisions of the Teacher Tenure Act
- **Does the employee have a contract?**
- **Is the employee a member of a union?**
 - Is there a CBA that would apply?
- **Does the District have policies that would apply?**
- **Public Relations Issues?**
- **Other?**

Freedom of Speech- Yard Signs

- ***Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016)**
 - When an employer demotes an employee out of a desire to prevent the employee from engaging in protected political activity, the employee is entitled to challenge that unlawful action under the First Amendment and Section 1983 even if the employer's actions are based on a factual mistake about the employee's behavior.



Allowable Activities

- School employees have the right to express their personal views regarding election issues, as long as such actions do not use district funds or other resources.
- Administrators and employees may appear at meetings/rallies away from school property and outside of school hours and speak in favor of an issue of public policy (so long as they are speaking as private citizens, and not giving the appearance of a district-endorsement).

Prohibited Activities

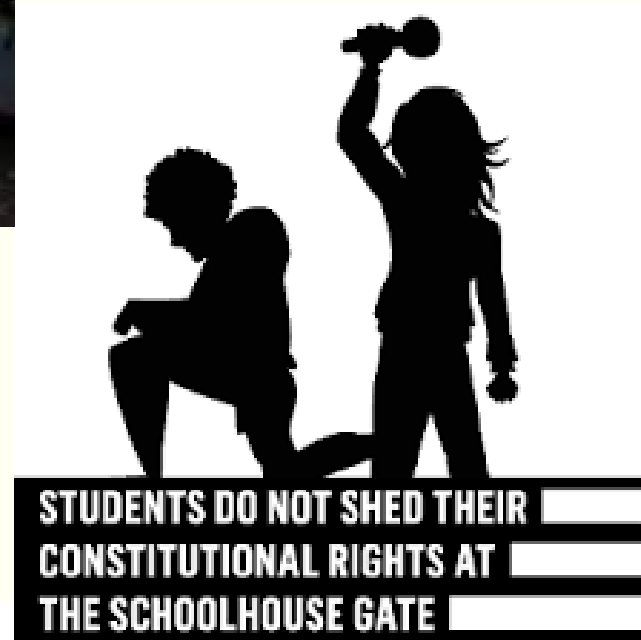
- Employees may not actively advocate, support, or oppose any ballot measure or candidate for public office **during working hours**, which includes any planning periods.
- Employees and Board members may not spend district funds (which includes using such district-funded items such as postage, paper, copiers, fax machines, etc.) to advocate, support, or oppose any ballot measure or candidate for public office.



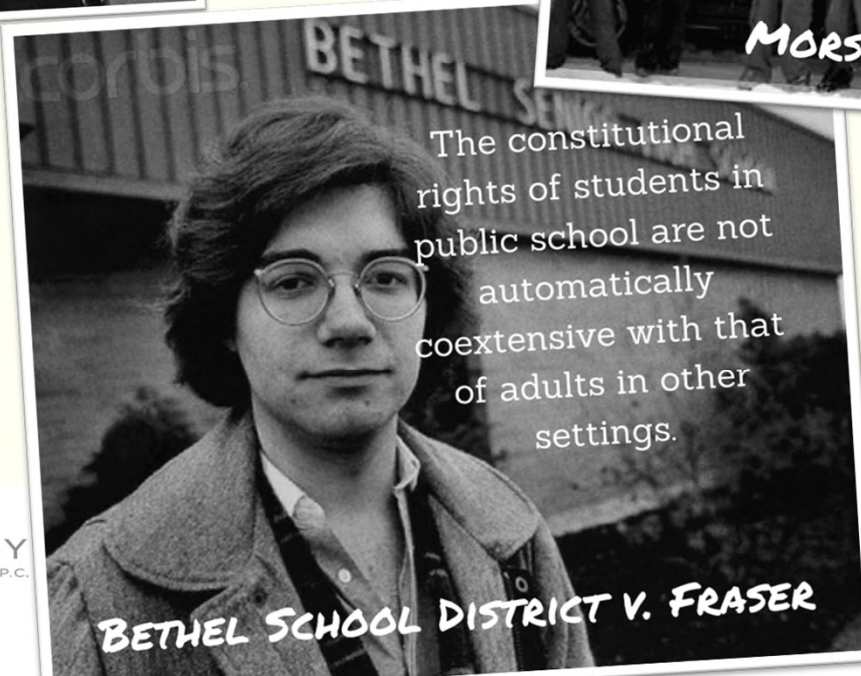
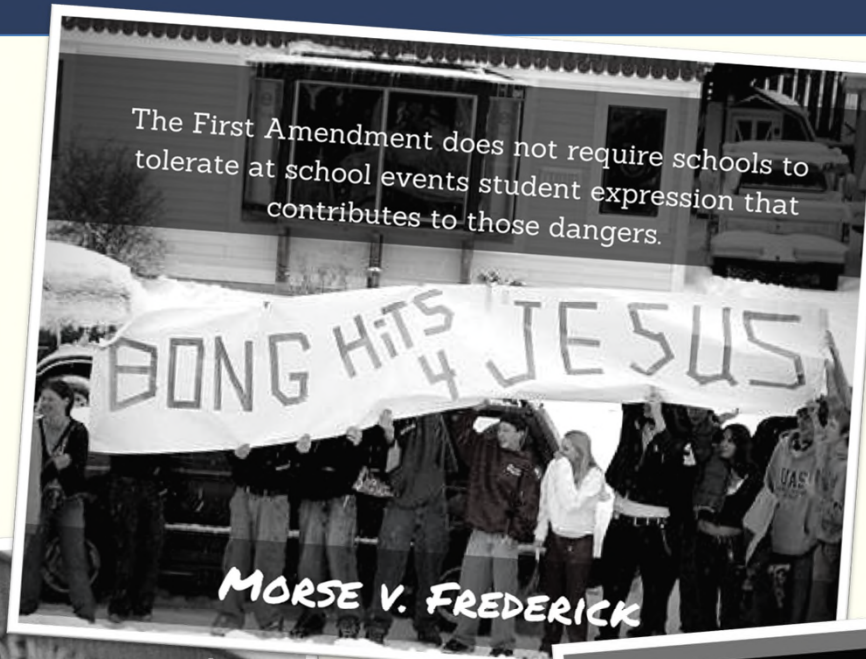
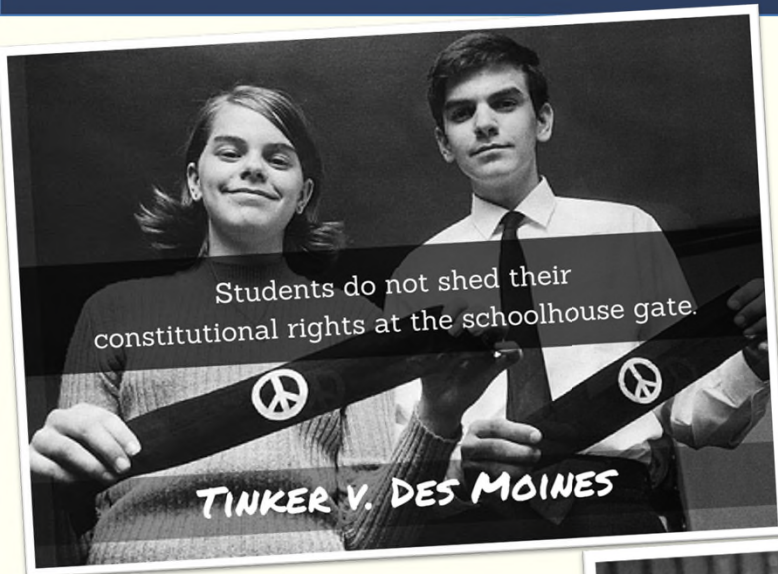
Other Speech Issues in the COVID-19 World

- Remember that First Amendment might apply to employee speech about COVID-19.
- What do you do if you hear that staff members have criticized the district on social media about plans for on-line instruction?
- **Is that speech connected to his/her job?**

Student Speech



Governing Cases for Student Speech



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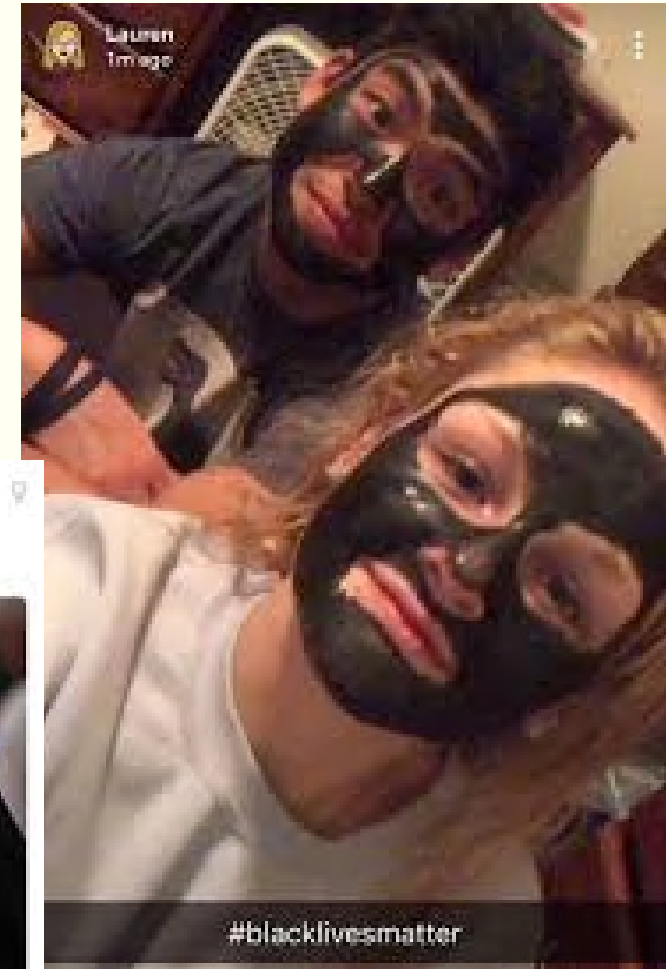
Tinker Analysis

- A public school can prohibit speech that **materially disrupts** classwork or involves **substantial disorder**.
- Factors to consider:
 - Content of the speech
 - Time, place, and manner of the speech
 - Student's intent in making the speech
 - The current environment in the community
- Also, consider – does the speech infringe on the rights of others?

Fraser, Morse, and Kuhlmeier Analysis

- Even if speech is protected...
 - Is it lewd, vulgar, or profane (Fraser)?
 - Does it promote illegal conduct (Morse)?
 - Is the speech school sponsored (Kuhlmeier)?

Social Media and Student Speech



Social Media and Student Speech

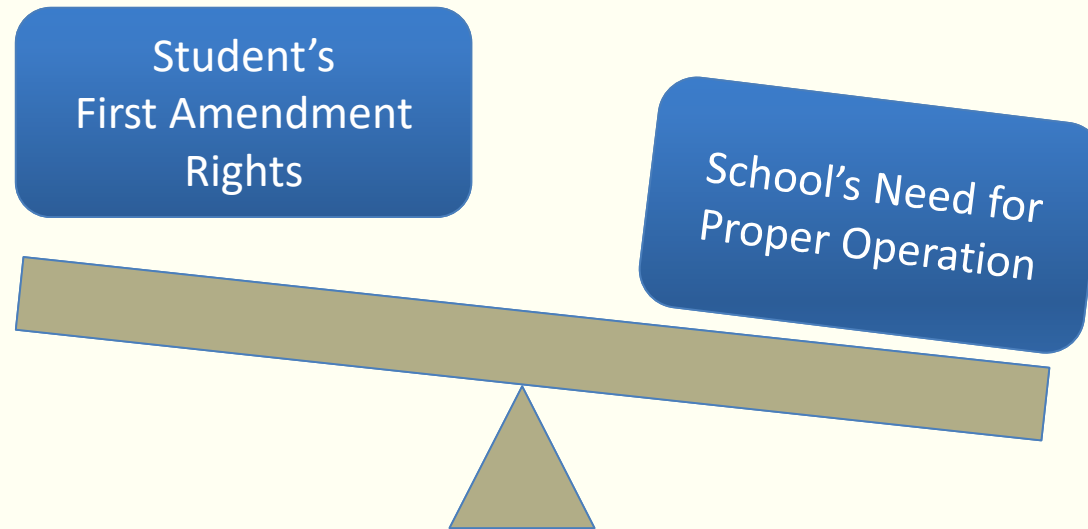
Student hate speech oftentimes:

- **Materially disrupts** classwork or involves **substantial disorder**
- Contains inappropriate content
- Is posted with intent to “hurt” others
- However, remember...

MISSOURI LAW (§160.775 RSMo.)

SUFFICIENT NEXUS to educational environment!

Balance between respecting the offending student's right to free expression under the First Amendment of the Constitution against the District's interest to operate without substantial disruption.



B.L. v. Mahanoy Area School District, No. 19-1842 (3d Cir. 2020)

- Cheerleading student posted Snapchap story that stated: "F**k school f**k softball f**k cheer f**k everything."
- Coach kicked student off team after determining that the post violated team rules which prohibited foul language and inappropriate gestures.

B.L. v. Mahanoy Area School District, No. 19-1842 (3d Cir. 2020)

- On appeal the Third Circuit Court found in favor of student and reasoned that:
 - The First Amendment protects individuals from even trivial acts of retaliation intended to punish for the exercise of free speech rights
 - Whether the government revokes something the speaker is not constitutionally entitled to is irrelevant
 - Student concerns, brief class disruptions, and general rumblings do not amount to substantial disruption

Hypothetical

Blueridge High has decided to implement a policy for the 2020-2021 school year, requiring all students and staff to wear face masks. Billy shows up to the first day of class complaining to his teachers that COVID-19 is a hoax and says he thinks it's stupid that everyone has been walking around with face masks. When instructed to put a face mask on or be sent home, Billy pulls out a Confederate flag mask. The mask doesn't appear to bother any of the students.



Should the school allow Billy to wear his confederate flag mask?



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Student Political Speech at School



**Student with banned Trump shirt to get apology,
\$25,000 from school district**



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Practical Considerations

- When disciplining employees, consider whether the employee has engaged in protected activity or protected speech.
- Carefully consider the impact of the employee's speech on the operations and/or mission of the school district.
- Document reasons for taking action.
- When disciplining students, look at the speech objectively and ask whether it is **reasonably foreseeable that the speech will disrupt the educational environment**
- Be consistent with rules regarding speech and treat all viewpoints equally.
- Take care when considering extra-curricular activities in light of new case.





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