



POLICY BRIEF

Recreational Marijuana: Is the Case for Legalization Going Up in Smoke?

I. Issue

Since 2012, four states and the District of Columbia have legalized the sale and/or use of recreational marijuana.¹ At least five other states, including Arizona, are expected to consider the question of whether or not recreational marijuana should be legal by 2016.²

This policy brief gives an overview of the nationwide landscape of marijuana legalization efforts, and lays out some of the arguments both in favor and against legalization. While some may disagree as to the relative weight of these arguments, it is clear that legalization poses significant risks.

II. Marijuana Legalization Efforts Thus Far

In 2014, Oregon, Alaska, and the District of Columbia considered whether to legalize recreational marijuana. In Oregon, voters approved an initiative to legalize recreational marijuana by a margin of 54% to 46%.³ Alaska voters also approved the legalization of recreational marijuana by a margin of 52% to 48%.⁴ Alaska has an interesting history with recreational marijuana: The state decriminalized the use of marijuana in the 1970s, but then recriminalized it in 1990.⁵ And voters in Washington, D.C. approved the use (but not the sale) of recreational marijuana.⁶ In Florida, where a supermajority was required for passage, voters rejected an initiative to legalize medical marijuana.⁷

In Colorado, where the recreational use of marijuana was legalized in 2012, many cities and counties have banned the sale of recreational marijuana.⁸ For example, the city of Lakewood passed Measure 2A, which outlaws retail marijuana sales in the state's fifth most populous city. Other cities outlawing recreational marijuana sales in Colorado include Canon City, Palisade, Palmer Lake, and Ramah.⁹

In Maine, a measure to legalize the use of marijuana fell in the city of Lewiston, but passed narrowly in South Portland.¹⁰

In Vermont and Rhode Island, the state legislatures are considering bills that would legalize recreational marijuana;¹¹ to date, every state that has legalized recreational marijuana has done so by asking the voters directly to approve its use. Vermont's measure is unlikely to succeed this year and it may be too soon to predict the fate of Rhode Island's bill, but if passed either state could become the first in history to legalize recreational marijuana via the state legislature.¹²

Proponents of legalization, led by national marijuana advocacy groups, are also pushing ballot initiatives in a number of additional states, including Arizona, California, Massachusetts, Minnesota, and Nevada, as well as legislative efforts in Delaware, Hawaii, Maryland, New Hampshire, and Texas.¹³



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III. Arguments in Favor of Legalization

Proponents of legalization generally argue that it results in a net economic benefit to the state by (1) decreasing spending on the criminal justice costs of marijuana enforcement, and (2) increasing tax revenues by creating a new funding stream.

With regard to the criminal justice argument, proponents maintain that because of stringent and/or mandatory sentences for nonviolent drug crimes, America's prisons are full of low level nonviolent offenders. By legalizing recreational marijuana, proponents contend that states can save the economic and social costs to investigate, prosecute, sentence, and incarcerate citizens that, in their view, have committed a minor offense.

Proponents of legalization initiatives also point to revenues that states may realize by legalizing the sale of recreational marijuana by taxing it and designating those revenues to other state policy priorities like education.¹⁴ In the current economic climate, where some states are facing financial shortfalls, the potential for another source of tax revenue is appealing. For example, Washington State imposes a series of taxes on producers, processors, retailers, and customers that add up to a total effective tax of 44%, and it has been reported that Washington has thus far collected tax revenue within the range suggested to voters.¹⁵

IV. Arguments in Opposition to Legalization

Arguments against the legalization of recreational marijuana generally fall into three categories: (1) the social and economic costs outweigh any net benefits; (2) the anticipated economic benefits of legalization are overstated; and (3) there are numerous unintended consequences of legalization that are harmful to employers, citizens, and the state as a whole.

A. Costly Social and Economic Consequences

Short- and long-term health effects. An increasing body of medical evidence indicates adverse short- and long-term consequences for even occasional marijuana use. That medical evidence, coupled with new evidence suggesting that legalizing recreational marijuana will result in wider use of the drug, especially by adolescents,¹⁶ suggests that the legalization of recreational marijuana exposes Arizona's citizens to an array of significant health risks. The *New England Journal of Medicine* reports that short-term risks include impaired short-term memory, impaired motor coordination, altered judgment, and in high doses paranoia and psychosis.¹⁷ In the long-term, risks include addiction, altered brain development, poor educational outcomes, cognitive impairments (including lower IQ), diminished life satisfaction and achievement, and symptoms of chronic bronchitis.¹⁸ Worryingly, there is evidence to show that marijuana use during adolescence—when the brain is still developing—can actually cause long-term and permanent damage to the brain.¹⁹ In addition, motor functions like driving are affected by both immediate and long-term exposure,²⁰ which means that drivers who use marijuana are at an increased risk for motor vehicle accidents even if not impaired at the time of the accident. In fact, fatal car crashes involving marijuana have tripled in the past decade, and the 2014 National Roadside Survey of Alcohol and Drug Use by Drivers reported that “drivers with marijuana in their system grew by nearly 50% [in 2014].”²¹

There is also evidence to suggest that the use of marijuana in adolescence leads to addictive behaviors in adulthood.²² Though sometimes decried by legalization proponents as the “gateway drug myth,” there is scientific evidence to support the argument that marijuana is a gateway drug. Indeed, some studies have found that exposure to marijuana results in reduced dopamine



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reactivity in the brain's reward regions; in other words, marijuana can "prime the brain for enhanced responses to other drugs."²³ Among adolescents that try marijuana, one in six will become addicted; the addiction rate jumps to 25% to 50% among daily users.²⁴

There is also a mounting body of evidence showing that legalization gives teens more access to an increasingly potent and addictive drug. Unlike the marijuana of the 1960s and 1970s, when levels of THC (the psychoactive component) in marijuana averaged around 1% to just under 4%,²⁵ the average marijuana being sold in dispensaries today has an average THC level of 18.7%, with some retail marijuana containing THC levels as high as 30%.²⁶ Products like hash oil, which can be vaporized or infused into foods and drinks, can start at 85% potency.²⁷ The rising potency level of today's marijuana is no accident; bigger stronger plants maximize profits for the growers and meet the demand of consumers seeking a more intense high.²⁸

In addition to exposing youth and adult populations to a dangerous and addictive drug that carries significant short- and long-term health consequences—and in large part due to that exposure—marijuana use has a deleterious effect on general societal productivity. An article in the *Journal of the American Medical Association* reported that "workers who smoke marijuana are more likely to experience tardiness, accidents, workers' compensation claims, job turnover, and a 75% increase in absenteeism."²⁹

Finally, the legalization of recreational marijuana presents additional economic costs not just in funding the creation of a new regulatory system but also for drug education programs as well as increased drug treatment and rehabilitation programs that become necessary as marijuana use and addiction increase. In addition, states that have legalized recreational marijuana have been sued by various entities and under various

legal theories in an attempt to overturn the laws, requiring states to engage in lengthy and costly court battles.³⁰

B. Overstated Economic Benefits

Legalization opponents maintain that the anticipated economic benefits of legalizing marijuana in the form of criminal justice savings and increased tax revenue are often overstated.³¹

The argument for claimed "savings" in criminal justice expenditures does not carry much weight in Arizona, where fewer than 100 of Arizona's 40,000 prisoners are incarcerated for use or possession of marijuana.³² Because Arizona law requires mandatory probation for first- and second-time use and possession offenses, those 100 prisoners represent third-time offenders, offenders ineligible for probation because of prior violent offenses, and drug traffickers and other high-level offenders who have pled down to lower level offenses.³³ Legalization of recreational marijuana would therefore have very little impact on criminal justice costs in Arizona.

As to tax revenues, experience in other states has shown that tax revenue from legal recreational marijuana may be far less than anticipated. In Colorado, for example, tax revenues from the first year of legal marijuana sales were anticipated to be \$70 million,³⁴ with the first \$40 million designated for the rebuilding of Colorado's schools.³⁵ In reality, Colorado collected only \$44 million—a mere drop in Colorado's \$20.5 billion state budget for 2014.³⁶ Even if Colorado had taken in the full \$70 million it expected, that would only have represented .34% of that year's budget. A recent study also determined that the high-water mark for tax revenue would be in the initial years, because as the "wow" factor of legal recreational marijuana wears off, use—and tax revenue—is anticipated to decline.³⁷ Some additional reasons for Colorado's disappointing tax revenues include:

Black market consumption. When projecting tax revenues, economists overestimated the number of



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people who would opt out of the black market.³⁸ To the contrary, states where marijuana is legal have thriving black markets. The Marijuana Policy Group, a national marijuana advocacy organization, estimates that in fact only 60% of Colorado consumers purchase marijuana through legal channels.³⁹ This is partly because black market marijuana is significantly cheaper than that purchased in legal dispensaries, where it is taxed at more than 27%. Resale of the otherwise legal purchase or use—either from patients who purchase medical marijuana legally and resell it, or individuals who legally grow marijuana for themselves and then resell it—has also driven down tax revenues.⁴⁰

Steady or Increased Medical Marijuana Consumption. Colorado projected a large switch from medical to recreational marijuana after the retail purchase became legal, but that has not materialized. To the contrary, state economists have acknowledged that they were wrong in assuming a large switch from medical to recreational marijuana. About 23% of the estimated marijuana users in Colorado have medical cards and, although the state has not provided data on the number of individuals who obtained cards since the sale of recreational marijuana became legal, at least one Colorado economist claims the number is growing;⁴¹ other reports show the number has remained steady.⁴² The reason: Although Coloradans must visit a doctor to obtain a card, the cost of the card is a mere \$15, and unlike recreational marijuana's high tax rate, medical marijuana is taxed at just 2.9%.⁴³

Overly optimistic revenue forecasts. A provision in Colorado's Taxpayer Bill of Rights requires the government to refund revenue derived from any new taxes if the state collects more than expected; for that reason, some have suggested that the state made "rosier" projections to avoid returning money collected from retail marijuana sales.⁴⁴ Ironically, Colorado may have to return the money anyway; the state is expected to take in \$219 million more in total revenue (not just from marijuana) than anticipated, so even

though revenue from the sale of marijuana has been disappointing, that revenue—derived from a new tax—must be refunded.⁴⁵ While this outcome was due to a specific law in Colorado that is not necessarily found elsewhere, states considering legalization should nevertheless be wary of overestimating anticipated tax revenues.

C. Unintended Consequences of Legalization

Legalization of recreational marijuana also opens the door to a number of adverse unintended consequences that, because of a unique provision in Arizona law, may be impossible to reverse.

In 1998, Arizona voters approved Proposition 105, also known as the Voter Protection Act. Proposition 105 amended the Arizona Constitution by preventing the Governor or legislature from repealing or amending laws passed through citizen initiative or referendum, unless the changes further the purpose of the voter-approved measure. In addition, those changes must receive approval of at least three-fourths of the members of each house of the legislature.⁴⁶ If voters in Arizona approve an initiative legalizing recreational marijuana and find down the road that doing so was a mistake, the ability to repeal or amend the initiative would be significantly constrained. In other words, once an initiative legalizing recreational marijuana passes, Arizona is essentially stuck with it.

Here are just some of the unintended adverse consequences that can result from the legalization of recreational marijuana:

Employers are exposed to significant risk of liability. The legalization of recreational marijuana exposes businesses to a significant risk of liability in two ways. First, legal marijuana creates serious workplace safety issues, and employers may be found liable for acts of negligence committed by employees while on the job, and also for injuries to workers sustained on the job in the form of workers' compensation claims.



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Indeed, the Arizona Supreme Court has held that a worker's compensation claim cannot be denied even if the employee was impaired by drugs or alcohol at the time of the injury.⁴⁷ (Relatedly, under a new Arizona law workers' compensation carriers and self-insurers are not required to pay for a patient's medical marijuana.⁴⁸) A team at Washington State University is currently working to develop a breath test to determine whether an individual is under the influence of marijuana akin to that now available to test blood alcohol level, but at present employers must rely solely on blood and urine tests, neither of which can reliably provide information about present impairment—only whether there is a detectable level of THC in an individual's system.⁴⁸ Without an on-demand way to test for impairment, employers are left without an obvious mechanism to ensure workplace safety and insulate themselves from liability.

Second, businesses that receive federal grants, federal funding, or employ federal contractors must comply with federal regulations, including enforcing a "drug-free workplace." The Department of Transportation, which regulates drug testing requirements for certain "safety-sensitive positions," has stated that it is "unacceptable for any safety-sensitive employee subject to [DOT's drug testing requirements] to use marijuana."⁵⁰

It is possible that businesses subject to federal regulations can safely continue to enforce drug-free workplace policies and mandate routine drug testing as long as marijuana remains illegal under federal law.⁵¹ And in some states where recreational marijuana is legal, all employers—not just those subject to federal guidelines—can maintain a "zero tolerance" marijuana policy, including drug testing programs.⁵² In Washington State, for example, the law legalizing recreational marijuana does not provide individuals any protections from workplace drug policies, and employers are free to rely on drug tests indicating marijuana use, not just impairment, when making employment decisions.⁵³

That said, the case law in states that have legalized marijuana is mixed and extremely fact dependent. As it stands today, employers do not have a clear directive from the courts on this question.⁵⁴ Of the 21 jurisdictions in which at least some form of marijuana is legal (medical or recreational), 15 do not provide any statutory protection for employers.⁵⁵ In contrast, courts in California, Oregon, Montana, and Washington have held that employers can fire employees for medical marijuana use,⁵⁶ and some state marijuana statutes (including Arizona's and Colorado's) expressly protect employers' right to enforce drug-free workplace policies. Under existing case law, employers are more likely to successfully enforce drug policies against at-will employees, and where the drug policy is clear, consistent, and unambiguous.⁵⁷

But even that is not always enough. This past fall, the Colorado Supreme Court heard arguments in a lawsuit brought by a medical-marijuana user in Colorado who was fired after failing a company drug test. Despite the Colorado statute's language protecting employers, the lawsuit is based on another Colorado law that prohibits an employer from firing an employee for "engaging in any lawful activity off the premises of the employer during nonworking hours."⁵⁸ The Colorado trial court and Court of Appeals both found in favor of the employer, holding that using marijuana is not a lawful activity in light of the federal prohibition.⁵⁹ But the Colorado Supreme Court has yet to issue an opinion, leaving Colorado employers in limbo.

In Arizona, employers have limited statutory protection in the medical marijuana context, but the statute has not yet been tested in court. As the law stands today, Arizona employers are prohibited from firing an employee who is a registered medical marijuana patient simply on the basis of a failed drug test unless the employer can demonstrate that the employee used or was impaired by marijuana in the workplace.⁶⁰ This is a seemingly high bar, given that the language of the statute appears to require an employer to prove that its termination decision was based on the employee's use, possession,



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or impairment while on the job.⁶¹ Because drug testing technology provides no information about present impairment but only indicates the presence of THC many hours or even days after consumption, employers may find it difficult to terminate an employee simply on the basis of a failed drug test. However, Arizona employers are granted immunity from state law claims arising from the proper enforcement of their lawful substance abuse policies, so employment decisions, including suspension, discipline, and termination, that are made based on a good faith belief that an employee was impaired at work cannot give rise to a claim against an employer.⁶² The law defines a “good faith belief” as one based upon observations of the employee’s behavior or appearance, reliable eyewitness reports of the use or possession of drugs or drug paraphernalia, or lawful video surveillance. Symptoms of impairment can include speech, coordination, movement, demeanor, appearance, odor, carelessness, irrational or unusual behavior, disregard for the safety of the employee or others, or involvement in an accident.⁶³

Marijuana growing facilities consume huge amounts of energy and water. The indoor cultivation of marijuana uses \$6 billion worth of electricity every year, which amounts to 1% of overall U.S. electricity; in high-production states like California, it amounts to as much as 3%.⁶⁴ Not only does marijuana cultivation require huge amounts of energy, but production is also incredibly inefficient: A 2012 study in the journal *Energy Policy* found that one kilogram of marijuana is associated with 4,600 kg of carbon dioxide emissions to the atmosphere—the equivalent of 3 million cars annually when aggregated across national production.⁶⁵

Outdoor cultivation fares no better—it is associated with deforestation and high levels of water use and pesticide contamination.⁶⁶ On average, a single marijuana plant consumes roughly six gallons of water per day.⁶⁷ In states that already experience dry conditions, the high levels of water consumption associated with marijuana cultivation are ravaging wildlife,

traditional farming, and local watersheds with the potential for more far-reaching consequences.⁶⁸ It has been estimated that growers in the watershed area of Mendocino County, California are drawing in excess of 156,000 gallons of water from a single river every day.⁶⁹ Said one Senior Environmental Scientist with the California Department of Fish and Wildlife: “Essentially, marijuana can consume all the water. Every bit of it.”⁷⁰ Although Arizona has been working hard to prevent cutbacks in its share of the Colorado River, federal forecasters predict that cuts could come as early as 2017.⁷¹ Given the uncertainty of Arizona’s future water supply, opening the door to a new water-guzzling crop has the potential to exacerbate Arizona’s water problems.

Confusion over edible forms of marijuana (“edibles”) has dangerous consequences. In the wake of the legalization of recreational marijuana, the “edibles” industry has taken off. By some reports, as many as 4.8 million edible marijuana products were sold in Colorado in 2014.⁷² And until February 2015, Colorado had no standards governing labeling, serving size, packaging, or potency. In the absence of guidelines, consumers could purchase “bite-sized products that pack in 100 milligrams of the psychoactive chemical THC”—by comparison, new regulations limit one serving size to 10 milligrams.⁷³ The high potency of marijuana-laced candies, cookies, and other edible products, coupled with insufficient or even nonexistent labeling, has resulted in multiple cases of marijuana overdose. Children’s Hospital Colorado reports that 14 children under age 10 were admitted “for ingesting marijuana edibles in the first 11 months of 2014. Of those, seven were in critical condition and required ICU treatment.”⁷⁴ This is nearly double the number of children that were admitted under similar circumstances in 2013, before recreational marijuana was legalized; in 2008, the number was zero.⁷⁵



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There have also been numerous reports of edible-related overdoses—some resulting in death—among adults.⁷⁶

The new regulations promulgated in Colorado in February 2015 attempt to deal with this confusion by: 1) officially setting the serving size of active THC at 10 milligrams; 2) setting the maximum serving size of an individual edible marijuana product at 100 milligrams of THC; and 3) requiring that each product be clearly labeled “in a way that enables a reasonable person to intuitively determine how much of the product constitutes a single serving.”⁷⁷ The regulations also limit the amount of THC to 10 milligrams in bite-size products, which are too small to contain all of the required labeling. Finally, the regulations require each edible product to be easily divided in a way that matches the number of serving sizes.

Some have called the new regulations a step in the right direction, but the efficacy of the regulations remains to be seen. As the senior director of enforcement at the Colorado Department of Revenue put it, “Some of the edibles that are produced are a cookie . . . For a retail user who doesn’t know about the effects of THC ingestion, he views that cookie as if anyone would a cookie: as a single serving.”⁷⁸

Legalizing marijuana in the United States undermines U.S. and Mexican efforts to curb smuggling and confront Mexican drug cartels. According to Mexican President Enrique Peña Nieto, the legalization of recreational marijuana in Colorado and Washington has “change[d] the rules of the game,”⁷⁹ and has sparked debate in Mexico about the “direction and costs of the U.S.-backed drug war” there.⁸⁰ At the behest of the United States, Mexico’s efforts to confront violent drug cartels cost billions of dollars and tens of thousands of lives every year. But the legalization of

marijuana in Colorado and Washington has caused the Mexican President to “think very hard about [Mexico’s] strategies to combat criminal organizations, mainly because the largest consumer in the world has liberalized its laws.”⁸¹ Indeed, one expert on drug trade has said that marijuana legalization in the United States will give Mexico an opportunity to resist pressure from the United States to maintain its hard line against drug cartels.⁸²

While some argue that the legalization of marijuana in the United States would deprive Mexican cartels of a market for their product thereby driving down their revenue, others have suggested that even if revenues decrease, any decrease would likely be insignificant.⁸³ That is in part because marijuana makes up only a small fraction of the cartels’ revenue; they make vastly more from cocaine, heroin, and methamphetamines, as well as human trafficking. Even if the legalization of marijuana in the United States hurts Mexican cartels’ marijuana profits, it is unlikely it will “drive them out of business,” as some have suggested. Rather, it has been reported that the legal availability of high-quality marijuana in the United States has caused Mexican drug cartels to switch to heroin and meth.⁸⁴ Last year, federal officials seized over 2,100 kilograms of heroin coming from Mexico—nearly three times the amount confiscated in 2009—and the Drug Enforcement Administration has reported that 90% of the meth on U.S. streets comes from Mexico.⁸⁵

Drug and cash businesses are targets for crime. Because dispensaries deal almost entirely in cash due to federal pressure on banks and maintain a large inventory of goods for which there is a ready black market, marijuana retailers—and their neighborhoods—have become prime targets for criminal activity.⁸⁶ While some dispensaries have attempted to contract with security companies, many—including ADT, the nation’s



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largest security provider—now refuse to provide security services to “businesses engaged in the marijuana industry because it is still illegal under federal law.”⁸⁷ While proponents of legalization claim that legalized marijuana will lower crime, the 2014 Rocky Mountain High Intensity Drug Trafficking Area Report found that the crime rate in Denver was up 6.7 percent in the first six months of 2014.⁸⁸ After medical marijuana was approved in California, the Los Angeles Police Department reported that “areas surrounding cannabis clubs had a significant increase in robberies, burglaries, aggravated assaults and auto burglaries near dispensaries.”⁸⁹ And, contrary to the claims of some, legalization does not necessarily curb illegal drug trade activity; indeed, as seen in Colorado, black market sales of marijuana continue to thrive. Without adequate security, marijuana retailers—and the neighborhoods in which they are located—remain vulnerable.

K-9 police units must be retired. Some states that have legalized marijuana have had to retire entire K-9 police force units.⁹⁰ Because a dog cannot be untrained to detect marijuana, the dogs have to be replaced. The economic cost to a local police force for a single new dog can be as high as \$7,000.⁹¹ Because this number fails to capture the myriad non-economic costs to a local police department in terms of manpower, training, and potential gaps in availability that could diminish the ability of the police to detect illegal narcotics, the actual net cost to local police departments of retiring an entire K-9 unit could be much higher.

V. Notable State Officials and State and Local Chambers Are Opposed to Legalization

Thomas Donohue, President and CEO of the United States Chamber of Commerce, spoke out against the legalization of recreational

marijuana at a recent Committee of 100 meeting. In addition, the following local state officials have made statements in opposition to efforts to legalize recreational marijuana in Arizona:

- Bill Montgomery, Maricopa County Attorney
- Sheila Polk, Yavapai County Attorney

State chambers of commerce around the country have also opposed similar legalization efforts in their respective states. For example, Florida’s Chamber of Commerce came out strongly opposed to the proposed constitutional amendment on Florida’s November 2014 ballot that would have legalized medical marijuana. (The amendment, which would have required 60% voter approval to pass, garnered only 57% of the vote and therefore failed.) The Alaska Chamber of Commerce opposed Ballot Measure 2, which passed in November 2014 and legalized recreational marijuana in Alaska. In Oregon, legalization efforts were opposed by both the Bend and Eugene Area Chambers of Commerce. In Colorado, legalization efforts were opposed by the Colorado Association of Business and Industry, as well as numerous local chambers including those in the Denver Metropolitan Area and Fort Collins. Other state chambers that have publically opposed legalization efforts include the California Chamber of Commerce, Michigan Chamber of Commerce (where a legalization measure is expected to be on the ballot in 2016), and Arkansas Chamber of Commerce.

VI. Conclusion

As outlined in this paper, there are arguments on both sides of the legalization debate. While medical marijuana, which has affected a small proportion of the population, has been legal in some parts of the country for almost 20 years, the advent of legal recreational marijuana is very new, and the long-term consequences of legalizing recreational marijuana are not yet clear. While proponents argue that states will derive net economic benefits from legalization, there is real evidence to indicate those benefits are often overstated, and there are a number of significant



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adverse consequences that cannot be discounted.

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