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Defense attorney Clarence Darrow once said: "never forget, almost every case has been won or lost when the jury is sworn." Whether one adheres to that belief or not, no one can deny the importance of our fellow citizens when it comes to the American justice system. Clearly, this reliance on a panel of our peers is not lost on those in the field, evidenced even more plainly by the recent emergence and popularization of professions such as litigation consulting. The tradition of the voir dire process is long-standing in history. This vetting of potential jury members (venirepersons) gives attorneys a chance to dismiss those with biases that will affect their case. The efficacy of this process, however, has been called into question over the decades. Proponents of voir dire say that it is the best system we have to ensure a proper weighing of evidence so the outcome is fair. Those opposed to this procedure argue that the attitudes attorneys claim to reveal through the voir dire have no predictive value for future behavior of juries.

The first rounds of research investigate the result of the effect of voir dire presenter on how venirepersons answer questions. More recently, research has gone over the biases attorneys have historically exhibited when conducting their voir dire interviews; others have explored whether or not the process some judges try to use to dissuade potential jury members from letting bias affect their decisions yields any result. Using the findings of this research, I will apply the techniques to my own case and determine the best line of questioning for each side. Can the

addition of psychological knowledge help facilitate a fairer voir dire, ensuring the sanctity of our justice system as we know it? Is that the solution that litigation consultation provides?

The voir dire process is a pretrial proceeding in which the attorneys on each side of a case have a chance to interview potential jury members in order to specify and eliminate those with biases that will affect the trial. Literally translating to "to speak the truth", the purpose of voir dire is to allow attorneys to secure, as much as possible, the impartiality of a verdict, when they remove prejudiced potential jurors (Jones 1987). Attorneys do so by utilizing the challenges allotted to them by the court. Challenges for cause are reserved for blatant expressions of bias and are often agreed upon by both prosecution and defense. Peremptory challenges allow an attorney to dismiss a potential juror for any reason they see fit, whether that be tactical, for client comfort, or because the attorney angered the juror during questioning (Kovera et. al 2003). The length of questioning as well as the number of both causal and peremptory challenges varies between jurisdictions.

Jones (1987) researched the difference between voir dires conducted by judges and those conducted by attorneys. At the time that Jones was writing her paper, most voir dire questioning was conducted by the judge of the case, including which attorney-submitted questions to ask or omit (Bermant & Shapard 1978). The debate in question was between saving time and money through judge-conducted voir dire and having a greater chance of venireperson self-disclosure (a pinnacle of voir dire efficacy) when the questions are asked by attorneys. Related to the concern of venireperson self-disclosure, the formality of the voir dire was called into question. Jones had four total conditions in her study: a formal condition conducted by a judge or attorney where the judge/attorney held the voir dire in a cold and distant manner and a personal condition conducted

by a judge or attorney where the judge/attorney held the voir dire in a more casual, friendly manner.

Jones hypothesized that changes between the answers given during a pre-voir dire attitudes questionnaire and the answers given during the voir dire itself would be smaller in the attorney/personal condition than the judge/formal condition. She also predicted that the changes would be smaller in the judge/personal condition than the judge/formal condition. Overall, it was predicted that subjects in any attorney-conducted voir dire would show more consistency in their answers than those in a judge-conducted voir dire, and that any subject in a personal condition would show more consistency than in a formal condition. Finally, she predicted that subjects in the attorney/personal condition would show a greater decrease in self-awareness than those in the judge/formal condition.

Jones, consistent with her hypothesis, found that subjects changed answers twice as much in any judge-conducted condition than any attorney-conducted condition; judges were never more successful at soliciting information. It was discovered that venirepersons reported what they assumed the judge wanted to hear when being questioned by a judge rather than an attorney. The attorney-conducted condition also led to much more candid venirepersons. In addition, subjects in the attorney/personal condition answered more honestly than in any other condition. However, the predicted effect of voir dire style on subject consistency and self-awareness was not demonstrated. Overall, the experiment supports former suppositions that juror answers to voir dire questions do not indicate attitudes as accurately as previously assumed.

Otis, Greathouse, Kennard, and Kovera (2009) conducted a study exploring the effects of attorney bias on the questions they ask during voir dire and the conclusions they draw from the

answers venirepersons give them. Otis et al. ran two separate experiments to test their

hypotheses. In the first experiment, both prosecution and defense attorneys read a profile of a

hypothetical venireperson and were asked to come up with two voir dire questions that tested a

specific hypothesis assigned to their group. Hypothesis 1 was that the venireperson supported the

death penalty and Hypothesis 2 was that the venireperson did not support the death penalty.

Finally, they made inferences about the venirepersons' attitudes given the hypothetical answers.

All of this was also done by ten graduate-level psychology students who were blind to the

hypothesis being tested and the experimental condition applied. Researchers used Bayes'

Theorem to calculate baseline estimates and diagnosticity scores for each question in order to

better examine attorney answers for bias.

The authors originally predicted that the attorney participants would exhibit a positive

test strategy; that is, similar to confirmation bias, when one asks hypothesis-confirming

questions. Confirmation bias is a social psychology term used for the tendency for human beings

to interpret new evidence in a way that validates their preexisting beliefs. Also, they predicted

that attorneys would rate their own questions to be more diagnostic than the observers would

because of the general overconfidence displayed during voir dire. Diagnostic questioning is a

type in which the questions are directly and specifically looking for a particular trait. Also, Otis

et al. predicted that the attorney questions would be more diagnostic when the given hypothesis

to test did not match the venireperson profile. Finally, researchers predicted that the entirety of

attorney hypothesis testing would fall prey to the same biases of lay people – that there would be

hypothesis bias, question bias, and answer bias.

The first experiment revealed that attorneys did not ask hypothesis-consistent questions.

Participants did, indeed, ask more diagnostic questions when the venireperson profile was

inconsistent with the hypothesis the attorney was testing. Researchers found that the inferences attorneys made about each venireperson were biased predictably; they ignored base rate information and were biased by the questions they asked. Most notably, the conclusions attorneys drew from venireperson answers illustrated an over-reliance on those answers when making decisions about venirepersons and their predicted behavior.

Otis et al. corrected for the attorneys' assumed knowledge of base rates of death penalty supporters that might influence their conclusions of attitudes in the second experiment. Instead of testing the respective hypotheses of death penalty support or opposition, researchers asked attorneys to test that the venireperson is either an authoritarian, a libertarian, or the double hypothesis that a venireperson was either.

This time, the authors predicted that participants would again use a positive test strategy when asking questions. Also, that participants would rate their questions as more diagnostic than a neutral observer, leading to biased conclusions. Finally, researchers predicted that questions would be more diagnostic in the double hypothesis condition than either of the single hypothesis conditions.

The second experiment revealed, just as the first did, that attorneys use a positive test strategy when formulating their questions; they asked questions that would confirm the hypothesis if the answer was "yes". Conclusions were biased based on the hypothesis the attorneys were asked to test. The participants in this experiment, unlike those in Experiment 1, did not overestimate the diagnosticity of their questions.

Overall, Otis et al. concluded that attorney hypothesis testing is similar to, if not the same as, layperson hypothesis testing. The participants ignored base rate information, leading to

systematic errors and overall biased inferences. These biased inferences can lead to incorrect conclusions about the venire panel, negating any beneficial result of the voir dire process. Otis et al advise that attorneys take these influences into account when formulating the voir dire questions and interpreting venireperson answers.

Crocker and Kovera (2009) looked at the effects of venireperson rehabilitation methods practiced by judges. A worry when conducting any voir dire questioning is the lack of ability to highlight implicit biases that even the venireperson is unaware of. Even more worrisome, perhaps, is the practice of rehabilitation that some judges use. Even after the admission of bias, venirepersons are taken through a rehabilitative line of questioning and simply asked if they can set their biases aside for the sake of the duty at hand; if they answer "yes", they remain on the panel. In the eyes of the law, if a venireperson says they can set aside their bias, they are seen the same as one who never showed bias in the first place. This is what Crocker and Kovera were interested in exploring.

In their first experiment, this assumption was tested in the context of an insanity case. Many people have prejudice surrounding the insanity defense (Skeem, Louden, & Evans 2004) so subjects were split into two groups, one that received a normal voir dire and one that received what was considered rehabilitative questioning. Attitudes on the insanity defense were measured prior to the experiment.

Crocker and Kovera found that insanity defense attitudes were directly correlated with the verdict granted in the study. Those with negative attitudes towards insanity as a defense were more likely to vote guilty than those with more positive attitudes. Rehabilitation did not change the judgements jurors made but did affect the confidence ratings each juror gave about their final

verdict; those who had been through the rehabilitative questioning were not as confident about their guilty verdict as those who underwent the standard voir dire. Both biased and unbiased jurors who went through the rehabilitative questioning shifted toward a more lenient attitude on the insanity defense.

Researchers attributed at least part of the findings from the first experiment to the influence that the judge conducting the voir dire had on the mock jurors. If the jurors believed that the judge viewed the insanity defense as credible, they, wanting to please the authority figure, would be less likely to go against that and vote guilty. To test this hypothesis further, the second experiment involved participants watching videos of voir dire examinations instead of being subjected to it themselves.

This second experiment revealed no change in the perception of judge beliefs between those who viewed the rehabilitative video and those who viewed the normal voir dire. However, viewing the rehabilitative video influenced participants' perception of defendant guilt pre-evidence. Jurors who did not view the rehabilitative voir dire provided a higher probability estimate of the likelihood of the defendant to be found guilty than those who did; those who did watch the rehabilitative video ended up figuring that the defendant was not as responsible for the crime. When asked whether or not rehabilitated jurors could be used in trial, subjects said that they believed even biased jurors could be fair. Subjects believed rehabilitation to be a successful tool to reduce bias.

What the subjects of Experiment 2 did not know was that if rehabilitation had indeed been successful, there would have been a different outcome of Experiment 1. There was no interaction between juror bias and rehabilitation. Crocker and Kovera were left to only speculate

as to why rehabilitation had an effect on the judgements of both biased and unbiased mock

jurors. There was evidence to support the informational influence of the judge on the jury,

however, researchers digressed to say more research was needed to say anything definitively. In

sum, they concluded that juror rehabilitation does influence judgements, but because every

venireperson was influenced, the assumption of the law does not seem to stand.

Litigation consulting is an emerging field that adds to and improves upon previous

methods of jury selection. Consultants are psychologists who have training in jury behavior

specifically. They use psychology, sociology, and principles of human decision making (such as

group influence, credibility, information processing, inoculation) to analyze courtroom behavior

of juries (Finkelman 2010). As much research has pointed out, attorneys use stereotypes and

their own biases when analyzing voir dire answers; litigation consultants add a layer of expertise

and psychological research to this analysis to enhance the accuracy of the conclusions. Litigation

consulting and social psychology's influence on the voir dire process can be best utilized in civil

cases and in cases involving high profile defendants or subject matters, where publicity becomes

a real issue. Litigation consulting can apply to many elements of pre-trial preparation, voir dire

questioning included. The goal of litigation consultation is not the security of justice, but instead,

winning. As such, the flaw in the potential use of litigation consulting as it is today is that,

instead of eliminating bias, clients with the monetary backing to hire such consultants just utilize

the expertise of a psychologist to gain an advantage and turn those biases against the other side

(Finkelman 2005).

A balance of current voir dire practices and litigation consultation would be to increase

training and awareness of social psychology within attorney populations. If attorneys were more

thoroughly trained in social psychology and human decision making, the inferences they inevitably draw from venireperson answers would be more accurate in predicting jury behavior.

In general, attitudes do not predict behavior. In fact, the opposite that is true in most situations. This occurs for a variety of reasons, including the self-presentation theory, which is the process of cultivating and conveying a specific image, regardless of legitimacy - a form of impression management. Another explanation has been cognitive dissonance, a theory that, when there is a difference between attitudes and behaviors, people feel internal tension. Because they have already engaged in the behavior, people change their attitude to align the two. Both of these systems control for consistency. Attitudes do occasionally predict behavior, but only when they are strong attitudes, there is a personal connection, personal experience, and/or a vested interest in the subject (all of which are theoretically controlled for in a voir dire). Group influence also plays a tremendous role in jury deliberations. Somewhat intuitively, there is the problem of group conformity. People find it difficult to speak up about doubt when their opinion is in contention with the rest of the group and they are the only jury member who disagrees. Two types of social influence work in tandem on human behavior. A normative social influence is the desire to meet others' expectations. There are internal (standards or duty) and external (the fear of ostracization) pressures acting on us at all times to contend with. Informational social influence causes us to look to others for accurate or correct behaviors to follow when they are in ambiguous situations (like jury deliberations). Jury members are primed toward the prosecution's case because they hear that side of the case first; that is the evidence they use as a reference when they finally hear the defense's case. Authority has an influence on the venire answers during jury selection (Jones 1987) and on juries themselves. Conforming to what one thinks a person in authority wants to hear is something that Jones talked about; it also applies to certain

witnesses and within the jury itself. Publicity is something that becomes relevant in high profile cases, when the defendant is a celebrity or a well-known businessman. It is hard to find a completely unbiased jury, but is important to give these individuals the same fair trial promised to all citizens of our society. Pre-trial publicity is shown to increase bias, especially biasing towards guilt. It has been shown that exposure to information in the media leads to greater guilt perceptions.

"Otto Blotto" is a case written for the 2017 Washington State Mock Trial competition. The story at the core of this case is one of the ethical considerations that go into life or death decision making. Isaac Arias was hired in 2015 to be the test passenger for a prototype self-driving car developed by the Auto Division of Ithacus Solutions. His job was to sit in the prototype and monitor for any issues, taking over control of the vehicle if need be. On June 16th, 2016, Arias was driving along county road Route 17 when his car collided with an oncoming mule and wagon. The mule had been distracted by a swarm of mosquitoes accidentally released from nearby VF Labs and veered into the opposite lane. The car did not stop or swerve, but instead slowed and hit the mule directly. The braking of the wagon driver caused the loose farming tools in the back to shoot forward; a pole pruner shot through the windshield of the car and killed Arias on site. Ithacus Solutions is being accused of the crimes of Manslaughter in both the First and Second Degrees (engaging in reckless and negligent conduct respectively).

The witness list commences as follows:

Prosecution:

1. M.J. O'Sullivan: A Deputy with the Cedar County Sheriff's Office since 2008, O'Sullivan was the first officer on the scene of the incident. Always one to stick a

tried and true method, O'Sullivan found many of the details of the case to be peculiar. O'Sullivan, when informed about the nature of Vehicle #1, was surprised that such "dangerous" equipment could be authorized and was mystified as to why the car did not avoid the wagon.

2. Bliss Bruder: A farmer in the Bruder Community, Bruder was on the way to town to sell some of the community's wares at market when the accident happened. For forty-five years, the religious Bruder Community has lived outside of town on their own rural farmlands. They focus on living simply, without the distraction or aid of technology, and choose to spend time working on the farm. They abstain from any use of modern technology and abhor all commercialism.

3. Crann Lee: Isaac Arias was Lee's, a vehicle interior designer previously employed with the "Auto-Auto" division of Ithacus Solutions, uncle. Lee was the one who suggested Arias for the job. It bothered Lee, however, when those in the company emphasized Arias focus on the passenger portion of his job, trying to avoid "operator intervention". Lee began to doubt, especially when the company began to rush to put the prototype on the road in order to remain ahead of the competition, pushing for finished work, not necessarily best work. Lee was on the phone with Arias when the accident happened. The company seemed to view the accident as mere data collection and has given Lee the cold shoulder since. Lee is pursuing action against Ithacus Solutions to make things right.

4. Terry Terhune: Called in as an expert witness, Terhune is a nationally certified accident reconstructionist. Terhune uses physics, engineering, "human factors" analysis to formulate conclusions. Common sense and life experience are most

important to Terhune, however. Terhune relies on police descriptions for the most part, but in this case, when Terhune tried to solicit the black box from the Auto-Auto car, Terhune was met with high-priced lawyers and an unwillingness to let the company's investment become public. The conclusion was that Arias died as a direct product of modifications done to the vehicle.

Defense:

5. Victa Funk: With a Master's degree in molecular biology, Victa Funk works in "species development and improvement", currently working on modifying the mosquito genome. Funk knows genetic modification scares many and that they think the work done at VF Labs is "playing God", but Funk thinks of it merely as human and scientific advancement. Schoolchildren who were visiting the facility on the day of the accident broke one of the sheds housing the mosquitoes and thousands of them escaped and swarmed the mule and wagon on the road.

6. Dory Dadalos: As VP of Ithacus Solutions and head of the Artificial Intelligence Research and Development Team, Dadalos was in charge of developing the self-driving car that was involved in the accident. The company was built on the memory of CEO Telemeka Tennyson's sister who died on the road on a biking accident; the goal was to eliminate human failure in driving and save lives on the road. A computer cannot be distracted by things like cell phones, passengers, or even alcohol. Dadalos', as well as Ithacus', priority was public safety. That being said, computers are not perfect either and some crashes cannot be avoided (although 94% are caused by human error). Dadalos is proud of the technology that allows the vehicle to make the instant calculations that resulted in Arias' death; though it was a tragedy, the

computer analyzed its options and made the decision that resulted in the smallest number of casualties. This situation is a learning experience for the company and it will move on.

7. Edison Cortado: A friendly acquaintance of Isaac Arias, Cortado served him his daily coffee every morning while he was working for Ithacus Solutions. A firm believer that "change is good", Cortado is a self-proclaimed "tropophile". Cortado serves the purpose of observing that Arias would peel off the dashboard sticker reading "**I**ntelligent drivers **K**eep hands on the wheel & **E**yes on the road" every day. Also, Cortado overheard Cran Lee exclaim "we have got to nail Ithacus!"

8. Hathaway Hunt: A well-trained philosopher, Hunt has focused expertise on philosophers such as Jeremy Bentham and John Stuart Mill. Hunt agrees with the Bentham school of thought about moral action being the one that maximizes utility; it is encouraged to increase happiness and reduce suffering for the greatest number in society. Sacrifices can be justified easily if it enhances the well-being of many. Hunt agrees with the mission of Dadalos and Ithacus Solutions and believes autonomous vehicles will save lives on the road. After conducting a utilitarian analysis, Hunt found that the Auto-Auto vehicle made the correct decision in risking Arias' life for the sake of not veering into the schoolchildren in the adjacent parking lot. The computer played a numbers game. J.S. Mill added a libertarian/free will argument to the theories of Bentham. In this case, there is no evidence that Arias could have made a better decision than the computer and, regardless, Arias willingly put his life and trust in the vehicle. The computer applied the algorithm set by the engineers well and optimized the outcomes of the situation.

The venirepersons would not know the details of the case and these witnesses while the voir dire was being conducted, but the attorneys would read each statement beforehand to prepare the questionnaire. Through my analysis of this case I have highlighted topics that could be particularly biasing to members of a jury. The prosecution will want to tap into issues of corporate greed and technology that is too advanced for human capacity. For example, the prosecution may start out by reminding the venire of the story of David vs. Goliath and why they would root for David. Additionally, they would poll those who may be longing for simpler times with less dependence on technology. The jury that the prosecution would want would be somewhat older, conservative, religious humanitarian. The defense would want to tap into the same things, as well as issues of sacrifice for the greater good. They could conceivably ask something like: how many of you think we are responsible for our own fate? In order to find those with intense bias against companies like the one they would be representing, they would ask: how many of you think corporations are dishonest? The jury that the defense would want would be young, entrepreneurial, well-educated progressives. In the case of both sides, the broad questions would taper down as specific answers are given and attorneys follow paths of bias through the jury pool. My theories are, again, built off of my own inferences and assumptions. How can these inferences be honed to an effective voir dire?

The law, as evidenced by the research highlighted in this paper, works off of assumptions that are never tested. An attorney only knows whether or not the voir dire eliminations were successful until the conclusion of the trial and the verdict is granted. Even then, it is still mere conjecture that assumes the voir dire had any actual effect. Psychologists specializing in law and its relation to human behavior could combat this by conducting pre-trial community studies in order garner basic community attitudes. As part of most litigation consultation, psychologists

will create a short survey of questions related to potentially aggravating topics from the case at hand. A short summary of the case follows, framed from the point of view of the prosecution. The participants are then asked which verdict they would grant if they were serving and learned this information. More information is given, now framed from the point of view of the defense, and participants are again asked to grant a verdict. Using statistical analysis, psychologists can then figure out which questions and attitudes, if any, correlate to which verdict. This information helps the attorneys focus their voir dire examinations on topics that will actually affect the case, ignoring those that had no consequence. An example of such a survey is given in Figure 1.

There are many improvements to be made to the process of jury selection and voir dire questioning. Human beings cannot escape their biases and overconfidence, so incorporating social psychology theories into the process can assist in reducing such biases. Research past and present has shown this time and time again. Whether litigation consulting is the answer that solves these issues or not remains to be seen, as it has thus far been limited to clients with means enough to pay for such services. The voir dire process remains stuck on attorney experience and influence, however, if it gives even a small chance of a fairer outcome, it is worth it.

Figure 1. An example litigation consulting survey

Community Survey

Please select <u>one</u> option that best represents how much you agree or disagree with the following statements:
Please be honest - all answers remain anonymous

	Strongly Disagree	Disagree	Slightly Disagree	Neutral	Slightly Agree	Agree	Strongly Agree
1. I often drive while I am distracted (ex: eating, talking, texting, etc)	1	2	3	4	5	6	7
2. I would buy a self-driving car if they became available	1	2	3	4	5	6	7
3. I would willingly receive surgery from a robot	1	2	3	4	5	6	7
4. Corporations should be seen as persons in the eyes of the law	1	2	3	4	5	6	7
5. I support the development of artificial intelligence in machines	1	2	3	4	5	6	7
6. Corporations are inherently dishonest	1	2	3	4	5	6	7
7. I believe in sacrifice for the greater good	1	2	3	4	5	6	7
8. I think people rely too heavily on technology	1	2	3	4	5	6	7
9. There is always someone to blame	1	2	3	4	5	6	7
10. You are responsible for your own fate	1	2	3	4	5	6	7

<u>*Case Summary:*</u>

Isaac Arias was hired in 2015 to be the test passenger for a prototype self-driving car developed by the Auto Division of Ithacus Solutions. His job was to sit in the prototype and monitor for any issues, taking over control of the vehicle if need be. On June 16th, 2016, Arias was driving along county road Route 17 (a Level 4 test that the vehicle was not approved for), when his car collided with an oncoming mule and wagon. The mule had been distracted by a swarm of mosquitoes accidentally released from nearby VF Labs and moved into the opposite lane. Arias was doing a crossword puzzle, on the phone with his niece, Crann Lee; the company had encouraged Arias to relax and engage in activities such as this while he was in the car. The car did not stop or swerve, but instead hit the mule directly. The braking of the wagon driver caused the loose farming tools in the back to shoot forward; a pole pruner shot through the windshield of the car and killed Arias on site.

Charge:

Ithcaus Solutions is being charged with Manslaughter in both the 1st and 2nd Degrees. To be convicted of Manslaughter in the 1st Degree, the State must prove Ithacus Solutions recklessly caused the death of Isaac Arias. To be convicted of Manslaughter in the 2nd Degree, the State must prove Ithacus Solutions caused the death of Isaac Arias with criminal negligence.

A person is reckless when he/she knows of and disregards a substantial risk that death may occur and this disregard is a gross deviation from the actions of a reasonable person. A person is criminally negligent when he/she fails to be aware of a substantial risk a death may occur and this failure is a gross deviation from a reasonable person.

	Strongly Disagree	Disagree	Slightly Disagree	Neutral	Slightly Agree	Agree	Strongly Agree
1. Based on the above summary, how likely is it that you would find Ithacus Solutions guilty of 1st Degree Manslaughter?	1	2	3	4	5	6	7
2. Based on the above summary, how likely is it that you would find Ithacus Solutions guilty of 2nd Degree Manslaughter?	1	2	3	4	5	6	7

Additional Information:

- There was a sticker that was attached to the dashboard of the vehicle that read "**I**ntelligent drivers **K**eep hands on the wheel & **E**yes on the road" which Arias removed daily.
- The other two options that the vehicle had were to veer into a ditch or swerve into a group of schoolchildren who were watching the scene from the VF Labs parking lot.
- Crann Lee, a former employee of Ithacus Solutions, was heard exclaiming: "we have got to nail Ithacus!"

	Strongly Disagree	Disagree	Slightly Disagree	Neutral	Slightly Agree	Agree	Strongly Agree
3. Based on the above summary, how likely is it that you would find Ithacus Solutions guilty of 1st Degree Manslaughter?	1	2	3	4	5	6	7
4. Based on the above summary, how likely is it that you would find Ithacus Solutions guilty of 2nd Degree Manslaughter?	1	2	3	4	5	6	7

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