Hiding in Plain Sight

Knowledge Concealment and Consumer Powerlessness

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About the Critical Corporate Theory Collection

The Critical Corporate Theory Collection is part of the *Systemic Justice Journal*, published by the Systemic Justice Project at Harvard Law School. The Collection is comprised of papers that analyze the role of corporate law in systemic injustices. The authors are Harvard Law students who were enrolled in Professor Jon Hanson's Corporations course in the spring of 2021.

The Collection addresses the premise that corporate law is a core underlying cause of most systemic injustices and social problems we face today. Each article explores how corporate law facilitates the creation and maintenance of institutions with tremendous wealth and power and provides those institutions a shared, single interest in capturing institutions, policies, lawmakers, and norms, which in turn further enhance that power and legitimates its unjust effects in producing systems of oppression and exploitation.

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ABSTRACT

In 2018, U.S. companies spent approximately $19.2 billion in an attempt to decipher consumer data. Despite common rhetoric that the "customer is king," average consumers are reporting increasing levels of powerlessness in their relationships with corporations. Dissatisfied with immoral corporate actions, consumers are often at a loss in determining how to change corporate behavior, with many consumers giving up on the endeavor altogether.

This paradox can be traced to foundational elements of corporate power and corporate law that conceal knowledge from consumers, resulting in a loss of consumer agency. Utilizing the professionalization of the corporate world and false narratives of transparency, corporations lock average consumers out of corporation decision making. Thus, the consumer-centric narrative turns into a consumer-captured reality.

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PART 1: INTRODUCTION

In today's data-driven world, corporations spend billions of dollars collecting and deciphering consumer data, looking for any patterns or insights into consumer preferences and behaviors. Despite this corporate fixation on consumer thought, most consumers feel powerless in their relationships with corporations. Even though consumers often find actions of a corporation immoral, they tend to be at a loss in figuring out how to change corporate behavior. This paradox is created by and made to benefit corporations, which use knowledge concealment to disempower consumers, eliminating an important check on corporate power. This paper looks to understand how this phenomenon occurs.

By first looking at classical economic theory, which focuses heavily on consumers, Part II discusses the current dominant narrative around the consumer-corporation relationship. Part III then questions the validity of this narrative by describing the "average consumer" and their growing feelings of powerlessness in consumer-corporation relationships. Part IV then looks to decipher the root of this paradox by analyzing basic tenants of corporate power and corporate law that facilitate knowledge concealment from consumers. Part IV then uses this insight to evaluate a commonly proposed solution to feelings of powerlessness — vote with your wallet campaigns.

PART 2: CLASSICAL ECONOMIC THEORY AND MODERN DATA-DRIVEN BUSINESS STRATEGIES CLAIM THAT CONSUMERS ARE AT THE CENTER OF CORPORATE DECISION MAKING.

The current dominant narrative around the consumer-corporation relationship is that the consumer lies at the heart of corporate decision making. In classical economic theory, consumer spending and consumer preferences drive demand, which is fed by corporations who supply the demanded products and services.[1] This relationship causes many to see "[c]onsumer spending [as] the single most important driving force of the U.S. economy."[2] In fact, the branch of economics known as consumer theory was created to analyze how consumers "spend their money based on their individual preferences and budget constraints" so vendors can "predict which of their products will sell more and enable[] economists to get a better grasp of the shape of the overall economy."[3] Many other subsets of economics like behavioral economics, which tries to understand the psychology behind consumer decision making,[4] also focus on consumers.

This emphasis has been exacerbated in the digital age. In 2018, the Interactive Advertising Bureau estimated that U.S. companies would spend nearly $19.2 billion on data solutions related to consumers, including data about consumer's personal information, preferences, responses to advertising campaigns, and transactions.[5] Additionally, data-driven marketing has allowed companies to tailor ads to perceived, individualized consumer preferences in an attempt to increase sales.[6] Often using artificial intelligence, data-based business solutions have been praised for providing corporations unfettered insight into consumer preferences, resulting in better matching consumers to their desired products, driving innovation to meet consumer demand, and enhancing consumer experiences.[7]

Market efficiency theory,[8] a contested cornerstone of economic theory, connects consumer preferences to corporate success. The theory suggests that stock prices reflect all available, relevant information about a corporation. Thus, events that alter a consumer's preference, like bad press of a certain corporation or superiority of a different product, will be built into a corporation's stock price, incentivizing corporate agents and stockholders to pander to consumer preferences.

This consumer-centric narrative implies that consumers are ultimately in control of corporate decisions because consumers control corporate profits through their spending patterns. Commentators have noted that this elevates "the consumer to the position of sovereign, both in the sense of being free and in the sense of commanding the firm."[9] Many have argued that this power has resulted in more corporate social responsibility based on consumer expectations.[10] However, the flip side is that since consumers control corporations, when consumers don't act to curb immoral corporate behavior, consumers are "the party truly responsible for socially deleterious corporate activity."[11] Thus, consumer action is seen as a powerful method for holding corporations accountable.

PART 3: FEELINGS OF POWERLESSNESS BY THE "AVERAGE CONSUMER" CHALLENGE THE NARRATIVE OF CONSUMER-CENTERED CORPORATIONS.

The current corporate landscape frustrates and confuses consumers who aim to effect corporations' choices through consumer activism. Exploring first the resources, demographics, and reactions of the "average consumer," this Part looks to paint a picture of the frustration that consumers experience when attempting to influence a large, multinational corporation.

A. The "average consumer": A narrative

On a bright Sunday morning, Cameron[i] sat down at their breakfast table with a large cup of coffee and their iPhone, planning to catch up on a few headlines before starting the day. The first story they stumbled upon was: *"We Didn't Sign Up for This": Amazon Workers on the Front*

[i] Although demographics are crucial in understanding the dynamics that perpetuate consumer powerlessness as discussed in the next section, Cameron's race and gender are intentionally ambiguous in an attempt to highlight how feelings of general powerlessness cut across demographics.

Lines.[12] Alarmed by the title and acutely aware of the pile of broken-down Amazon boxes in the recycling bin, Cameron read about how Amazon pledged to hire an addition 100,000 workers during the pandemic, but subjected these workers to unsafe work conditions and retaliated against employees who attempted to organize for increased safety measures.[13] Understandably troubled by the news, Cameron contemplated whether to cancel their AmazonFresh order scheduled for later that day. Cancellation would mean an extra trip to the grocery store, delaying the already overbooked to-do list. Cameron settled on keeping the order and adding a few extra dollars to the tip.

While finishing up the news, Cameron received a notification from Facebook. They had been invited to like a page supporting researcher Timnit Gebru. Curious about the invite, Cameron read the linked article, which explained Gebru had been an artificial intelligence researcher at Google, who was terminated because of her findings of racial bias in Google's algorithms.[14] Appalled by Google's actions, Cameron "liked" the page and emailed their friends about the situation.

Cameron then proceeded to their to-do list, first stopping to get gas. As they filled up the tank, Cameron ruminated further on Gebru's situation, particularly how Gebru's research also revealed that Google's large data processing was expanding Google's carbon footprint. As Cameron watched their gas total climb, they thought about how Google's silencing of Gebru mirrored Exxon's silencing of climate change researchers in the 1990s.[15] When the pump handle clicked, Cameron sighed, inserted their credit card, and hoped that electric cars would become cheaper in the next few years so they could make the switch with some of their savings.

B. The "average consumer": A statistic

Cameron's experience is meant to exemplify the "average consumer." According to the Bureau of Labor and Statistics,[16] the "average consumer" in 2019–2020 had an annual household income of $83,886, of which $61,749 was spent on expenditures. Housing was the largest expense at $20,973, with 65% of consumers identifying as homeowners and 35% identifying as renters. Transportation was another large category with the average consumer spending $10,160 annually and 90% of consumers owning or leasing a vehicle. Other large expense categories included food ($7,718), Utilities ($4,095), and entertainment ($2,864). However, these statistics are not uniform across income levels. A breakdown of the numbers by income level quintile shows that average consumers (in the 40th-60th percentile of income level), spend $38,488 out of their $56,688 after tax income, about 68%, on essential items like food, housing, public utilities, and transportation.[17] While consumers in the highest quintile spent $72,755 out of their $175,237 after tax income, about 42%, on the same essential items.

These statistics suggest that average consumers are quite financially constrained compared to high-income consumers. Taking Cameron's example, despite their disapproval of Amazon's conduct, Cameron had to contemplate whether an extra trip to the grocery store was financially and administratively feasible. Amazon often uses these constraints to entice consumers, with AmazonFresh being a "free" grocery delivery service combined with Prime Membership.[18] Similarly, although Cameron was concerned about their gas usage and its connection to the environment, they couldn't contemplate changing their routine until they had saved enough to potentially switch to a more ecologically conscious mode of transportation. These examples complicate arguments that consumers have the unfettered ability to influence corporations through their purchases.

Turning to demographics, the "average consumer" lived in a household of 2–3 people and was 52 years old. Furthermore, 53% of the reference people in the survey were women, 13% identified as African-American, and 14% identified as Hispanic or Latino. Finally, 68% had attended college.[19] This trend again diverges across incomes, with only 43% of reference people in the highest-income quintile identifying as women, 7% identifying as African-American, 9% identifying as Hispanic or Latino, and 89% having attended college.[20] These changes in demographics are crucial as section IV.A notes that an "in group/out group" phenomenon between "average consumers" and corporate actors (most of whom are part of the highest-income quintile) contributes to the problem of consumer powerlessness.

C. Expectations v. Reality

Despite Cameron's clear disdain for Amazon, Google, and Exxon's actions, one could argue that they do nothing, or at least very little, to try and effect the situation. To understand this response, it is crucial to understand the psychology behind consumer powerlessness and the reactions that follow.

In 2009, Professors Matthew Bunker and A. Dwayne Ball conducted a study about customer powerlessness and its effects.[21] Bunker and Ball's study looked specifically at customer-company relationships where customers faced high-exit barriers — defined as costs to the consumer in time, money, a belief that there isn't "an exit option because of a lack of actual competition within an industry," "or because the customer lacks knowledge regarding exiting options."[22] Although at first glance this situation may not seem to define most customer-company relationships, given the financial constraints of the average consumer and the growing monopolistic power of many large companies (a trend that will be further analyzed in section IV.B), average consumers arguably face high-exit barriers in nearly all relationships with large, multinational corporations today. Thus, Bunker and Ball's powerlessness analysis can help to explain the somewhat paradoxical responses of "average consumers" like Cameron who care greatly about the harmful conduct of corporations but take few active steps to stop such situations.

Bunker and Ball define powerlessness in a consumer relationship as "the customer's belief that he or she is unable to influence the outcomes of a relationship with a firm. In other words, the firm holds a large majority of power in the relationship and the customer (in the extreme case) is trapped and open to exploitation."[23] Given this loss of agency, Bunker and Ball find that consumers are not likely to use primary control, defined as "active behavior to alter a situation to one's liking," but are more likely to resort to secondary control, "the use of active or passive behaviors to alter one-self rather than altering the situation."[24] Bunker and Ball then identify "grudge-holding, avoidance, and retaliation desire" as common secondary control methods employed by consumers experiencing powerlessness in consumer-company relationships.[25] These secondary control methods are exemplified in Cameron's experience. Instead of taking steps to try and effect the corporation's behavior, Cameron looks for ways they can change their own actions through potentially cancelling an AmazonFresh order or switching to a different type of vehicle.

The decision to circumvent primary control methods for secondary control methods is a direct result of powerlessness. The following Part looks to explore how knowledge concealment by corporations, facilitated through corporate power and corporate law, has made this phenomenon an inherent characteristic of consumer-corporation relationships.

PART 4: CORPORATE POWER AND CORPORATE LAW WORK IN TANDEM TO CONCEAL INFORMATION FROM CONSUMERS, MINIMIZING CONSUMER CHOICE AND DEPLETING CONSUMER AGENCY.

A. Role of Corporate Power

The average consumer's feelings of powerlessness stem from several fundamental characteristics of corporations. First, the professionalization of the corporate world — largely made up of CEOs, lawyers, financiers, and the occasional economist — signals to consumers that understanding corporations requires a level of expertise, often signified by a graduate school degree or a certification. The effect of this professionalization compounds to create an "in group/out group" relationship, characterized by differences in income, education, and demographics between corporate actors and average consumers. The results of this phenomenon, its connection to capture, and relation to feelings of powerlessness can be best exemplified by the recent GameStop stock controversy.

The corporate world is a highly professionalized field. Looking at the actors within this world, corporations are primarily managed by CEOs and C-Suite executives, who handle the day-to-day operations and decision making. This group is often aided by lawyers, in both in-house and outside counsel capacities, who focus on potential liabilities, merger and acquisition possibilities, employment contracts, and litigation. Finally, since most large, multinational corporations are publicly traded, stock brokers also become key actors in this field, buying and selling corporate stocks based on a company's perceived financial success. A common trend among these roles — the abundance of college degrees, professional degrees, and board certifications.

Looking first at the common faces of corporations, despite notable anomalies like Mark Zuckerberg and Bill Gates, most CEOs of Fortune 500 companies boast at least a bachelor's degree, with about half also holding a Masters in Business Administration (MBA).[26] Practicing lawyers at the top corporate law firms are all required to hold JDs and pass the bar exam, with most graduating from the top schools in the country.[27] Finally, stock brokers are required to pass licensing exams administered by the Financial Industry Regulatory Authority (FINRA), and most brokerage firms require employees to have at least a bachelor's degree.[28]

Considering that most of the actors described above have more education and higher incomes than the average consumer, the professionalization of the corporate world creates an "in group/out group" dynamic between corporate actors and average consumers. A prime example of this dynamic is participation in the stock market. The dominant rhetoric is that bad press and consumer preferences are built into stock prices, and thus shareholders can be persuaded to act in ways that will not adversely affect stock prices. However, investing in the stock market is not uniform across income levels or race. Individuals with higher incomes and more education, emblematic of the corporate actors described above, are more likely to invest in the stock market.[29] Additionally, 61% of white families reported having direct or indirect investment in the stock market compared to only 31% of Black families and 28% of Hispanic families.[30] Furthermore, low and middle income consumers reported "not enough savings," "worry about losing money," and "paying off debt" as the highest barriers keeping them from investing in the stock market. All of these concerns were reported less frequently among high income consumers, with 26% reporting no challenges to investing in the stock market.[31] Emphasizing that a disparity in access can correspond with a disparity in outlook, consumers with annual incomes under $100,000 were more likely to agree with the statement that the stock market is unfair to the average investor and favors wealthy, industry insiders, whereas consumers with annual incomes over $100,000 were more likely to be neutral on the statement or disagree slightly.[32] These disparities lead to the suggestion that the stock market itself, a neutral evaluator of corporate value, is perceived as captured by those who do not participate in it.

This suggestion has been seemingly confirmed by the recent GameStop stock debacle. In January of this year, GameStop's stock price was artificially inflated by anomalous behavior in the stock market.[33] Using the Robinhood app as the trading mechanism and reddit as the rallying platform, amateur traders congregated to inflate GameStop's stock and profit off of this valuation, to the loss of several stock market alums, including several hedge funds.[34] Soon after the stock was inflated, Robinhood restricted buying GameStop stock on its platform, citing "market volatility" as the reason for the restrictions.[35] Robinhood's actions have led to several lawsuits and calls by Congress for formal investigation.[36]

Despite its marketing campaign as the app that aimed to "democratize finance," Robinhood became the prime example of "in group" financiers locking "average" traders out of profitable deals. A crucial point in this scenario is that other actors like hedge funds did not have their access restricted as they do not use applications like Robinhood to conduct trades. Thus, Robinhood's conduct seems to signal that even if "average" traders or consumers (if one can consider Robinhood's services a product for consumption) can break through the professionalization of the corporate world — exemplified through their coordinated action of complex financial trading — "in group/out group" dynamics will continue to limit the agency of "average" consumers.

B. Role of Corporate Law

Corporate law directly contributes to creating a feeling of powerlessness in consumers. Through the illusion of transparency, exemplified in federal disclosure requirements, corporations benefit from the narrative of being responsible, accountable entities while crucial decision making processes are hidden from the public. Additionally, corporate law exacerbates the professionalization aspect of the corporate world by tailoring requirements and expectations to the "expertise" of business professionals, as seen through the business judgment rule and its application in corporate law. Finally, the shareholder primacy narrative that undergirds all of corporate law aims to maximize market share, and thus profit, creating path dependencies for many consumers that make it almost impossible to break out of consumer-corporation relationships.

Corporate law provides a false narrative of transparency that corporations benefit from, allowing them to disclose a small sliver of information while keeping crucial decision-making processes hidden from the public eye. Large, publicly traded corporations are legally obligated to disclose information about their financial audits, reports, and tax obligations in "plain and simple English."[37] Such disclosures are used to determine a company's value, estimate its potential for future earnings, and uncover potential instances of fraud. Thus, they are often espoused as an accountability mechanism for corporations. In fact, expectation of disclosures has become so commonplace that then-President Trump received harsh criticism for hiding his personal tax returns, despite not being legally obligated to disclose such information.[38] Despite creating an aura of transparency, disclosure requirements reveal little about a corporation's inner workings. For example, disclosure requirements do not encompass details about treatment of employees, supply chain decisions, or environmental impacts, and thus would not have uncovered any of the actions taken by Amazon, Google, or Exxon described in section III.A. Thus, disclosure requirements allow many corporations to benefit from a narrative of transparency as publicly, traded companies, but do not give average consumers any real insight into the corporation's decision-making processes.

Corporate law also contributes to consumer feelings of powerlessness by exacerbating the professionalization aspect of the corporate world. The cornerstone of corporate law, the business judgement rule holds that courts cannot "properly evaluate whether corporate decision-makers made a 'right' or 'wrong' decision,"[39] and thus business decisions made by agents of the corporation are mostly shielded from judicial review. This rule suggests that corporate decision making is a complex endeavor best left to the business and financial experts. This theme reoccurs even in cases that hold the business judgement rule inapplicable. For example, in *Smith v. Van Gorkom*, although the Delaware Supreme Court found gross negligence by a Board of Directors in evaluating a price offering, making the business judgment rule inapplicable, both the majority and dissent highlighted the importance of financial expertise in making this determination.[40] In describing the actions of the Board, the majority highlighted that the Boarded acted "without 'any benefit of experts to identify what the limits were [in determining a stock price],'" bolstering the finding of gross negligence.[41] The dissent countered this claim of non-expertise by listening the financial and business credentials of the Board members.[42] Thus, despite conflict on what level of expertise and whose expertise would be necessary to invoke the business judgment rule, *Van Gorkom* exemplifies that expertise is at the heart of corporate law, reinforcing the idea that understanding such arenas is not for the "average consumer."

Today, corporate law's purpose is framed as maximizing shareholder value.[43] This shareholder primacy narrative focuses on profit as the singular metric for success. The dominant narrative is that corporations must engage consumers to meet this standard. However, shareholder primacy's emphasis on financial growth has resulted in monopolistic behavior, the antithesis of consumer accountability. A recent report by the Roosevelt Institute notes that a "40-year assault on antitrust and competition policy" coupled with the "pro-monopoly ideology of the . . . 'Chicago School'" and the "market dominance" by technology companies "collecting reams of data and acting as an all-knowing middleman between customers and upstream suppliers" have worked to disempower consumers and workers.[44] Professor Robert Reich emphasized this trend towards monopoly by noting that the U.S.'s major airlines had decreased from nine to four, "[e]ighty percent of Americans are served by just one Internet Service Provider," and the five biggest banks went from holding only 10% of all banking assets to 45%.[45] Reich then concluded that the effect of this trend is to provide "less consumer choice, which translates into less power."[46] This effect can be seen in Cameron's example. Although they disapprove of Google's actions, Cameron uses email to notify their friends of Gebru's firing. Given Google's ubiquity in providing a search engine, email services, GoogleMaps, and YouTube to name a few, it becomes almost impossible for Cameron to circumvent the Google machine, even in criticizing the company's actions.

Shareholder primacy and profit maximization make these expansion decisions a practical legal requirement for corporations,[ii] creating path dependencies for many average consumers. For example, Amazon's decision to offer Prime Memberships at 50% off to low-income families is an attempt to maximize market share in low-income communities.[47] This offer locks low-income consumers into a relationship that has extremely high-exit barriers since consumers will not be able to find the same services at Amazon's price. Thus, Amazon is able to monopolize this part of the market, creating consumer dependency while also immunizing itself from any consumer pushback due to that dependency. The end result is that instead of Amazon's bad conduct causing consumers to shun the company, leading to less sales and thus a plummeting stock price, Amazon's bad conduct can still be profitable. This deviation from the dominant narrative is becoming increasingly apparent, as the article that disclosed Amazon's unsafe work conditions noted that "the year's first financial quarter close[d] with Amazon stock up more than 5 percent, trading at $1,950 a share, during a period in which the Dow had its worst overall quarter since 1987."[48]

Thus, corporate power and corporate law create consumer powerlessness by concealing information from consumers, locking average consumers out of corporate decision making, and consolidating power to make consumers dependent upon corporations despite the

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[ii] Although modern corporate law has given corporate agents leeway in determining how to maximize profits, *see Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. Ct. 1968), profit maximization remains the doctrinal goal in corporate decision making.

common rhetoric that corporations are driven by consumer preferences.

C. Evaluating Solutions

The insights above provide a starting point for evaluating a commonly proposed solution to consumer powerlessness — vote with your wallet campaigns.

Over the past few years, vote with your wallet campaigns have become a conventional suggestion for consumer activism.[49] These campaigns encourage consumers to buy products and services from companies that align with their values and boycott companies that engage in immoral conduct. The premise behind the campaigns is that adverse sales will impact a corporation's profits, forcing corporations to change their conduct in order to regain consumer loss. A study by Professor Brayden King suggested that national media coverage of such boycotts can drop a company's stock price nearly 1% each day, with "25% of boycotts reap[ing] concession[s] from the targeted company."[50] Success stories of such campaigns include the boycott of Uber, which resulted in CEO Travis Kalanick stepping down from his position on then-President Trump's economic advisory council.

Despite these successes, such campaigns fall prey to false transparency narratives and "in group/out group" dynamics. First, these campaigns assume that consumers have the ability to find out about corporations' unethical behavior. While some actions are publicized by the news, others require large amounts of research by consumers to find companies that align with their values, or to find alternatives to companies they intend to boycott. Furthermore, as Professor David Yosifon notes "consumers will often find it difficult to track which firms are associated with what products. Consumers identify products by brand name, not by the corporation selling them, in no small part because this is how corporations advertise the items."[51] This tendency is compounded by the trend toward monopoly. For example, if a consumer wished to boycott Facebook because of its data privacy policies, that same consumer may not know that a switch to Instagram or Whatsapp would be futile because both alternatives are owned by Facebook.[52]

Additionally, "in group/out group" dynamics have led to the assumption that most consumers have the ability to vote with their wallets. Professor Yosifon observed that "one study showed that while consumers in surveys express a willingness to pay more for gasoline that is environmentally sensitive, actual consumer behavior indicates that, given the option, consumers tend to choose the cheaper, environmentally unfriendly option."[53] While this finding may seem paradoxical, a return to the description of the financial situation of the average consumer may help to clarify. As noted in section III.B, average consumers already spend almost 70% of their after-tax income on essential items, compared to only about 40% for high income consumers. Thus, while vote with your wallet campaigns assume that all consumers can afford to pay a few extra dollars to switch to an alternative or can afford to boycott certain companies in the hopes of effecting corporate decision making, this ability does not seem to hold true across income levels.

PART 5: CONCLUSION

Despite the common rhetoric that consumers drive corporate decision making through their purchasing habits, most consumers feel powerless to change the upsetting behavior of large, multinational corporations. This paradox can be traced to foundational elements of corporate power and corporate law. Corporations use knowledge concealment to disempower consumers, who are often locked into relationships with corporations, unable to effect and sometimes even unaware of a corporation's questionable behavior. The end result is that another method of corporate accountability has been captured by corporate power, changing the consumer-centered narrative into a consumer-silenced reality.

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[40] *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

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[42] *Id.* at 894 (McNeilly, J., dissenting).

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