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THE CATHOLIC MOMENT IN LEGAL EDUCATION

Daniel J. Morrissey*

Thank you for the kind introduction. It's great to be in Chicago, even if I did have to leave Miami in January. I grew up here and almost all of my family still lives in the city. And because I am back in my home town, perhaps I can begin my comments about Catholic legal education with a bit of personal narrative. I come from the South Side, from what Tom Shaffer, the former Dean of Notre Dame Law School, calls one of those vital ethnic communities that has formed the base constituencies of urban Catholic law schools.

Most importantly, I feel fortunate to carry with me a Chicago-based religious and cultural heritage from my family and early schooling. Both my late father, who practiced law here for fifty years, and my brother Mike are graduates of DePaul Law School. Mike still takes time from running the homicide unit of the Cook County Public Defenders office to serve as an adjunct professor there.

My home base in the legal academy for much of the last decade was the University of Tulsa, a private institution with a nominal connection to the Presbyterian Church. Last summer I became the Dean of St. Thomas University Law School in Miami, one of the twenty-five American law schools run under the aegis of the Catholic Church. Along with other challenges, my new position gave me the opportunity to address an issue that I'd been wondering about for some time: Why is the Catholic Church in the business of running law schools? Because a touch of cynicism is bred into all Chicagoans, the first answer that came to my mind was rather crass: Catholic universities have law schools so they can make money off them.

But I must presume that the Church's intentions are a little better than that, and besides, the American Bar Association (ABA) will not let

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These remarks were delivered at Loyola University—Chicago on January 26, 1995. I would like to thank Dean Nina Appel, Professor Alan Raphael and the faculty and students of Loyola for their hospitality during my visit.

For reasons that will become apparent, these comments are dedicated to the memory of my father, James J. Morrissey (1914-1987).

I would like to thank Professor John Makdisi of the University of Tulsa and Associate Dean Jay Silver of St. Thomas University Law School for their suggestions and comments.
universities get away with plundering their law schools—thanks to people like your widely-respected Dean Nina Appel, the immediate past chair of the Council of the ABA’s Section on Legal Education.

Ascribing good motives to the Church, I wrote an article this fall for the Jesuit magazine America entitled “A Catholic Moment in Legal Education.”¹ The article was really about something more than legal education. At root it was, perhaps, my attempt at a personal response to a question I heard posed a long time ago by an old Irish-American priest to his congregation in Chicago: Without our faith, where would we be? Over the last twenty years or so, I have thought about that very existential inquiry and extrapolated it to Catholic lawyers: Does our faith really make a difference in who we are, and particularly, how we act?

Two of the great attributes of American Catholics are that we do not wear our religion on our sleeves, and we do not proselytize about it.² So without doing either of those things, I nevertheless will share a few thoughts with you on the meaningfulness of our faith, because these considerations are integral to defining the mission of a Catholic law school.

Not long ago, in a reflective mode I came up with a pithy answer to the old priest’s question. Without my faith, I would be just another aging yuppie. I ran that hunch by my youngest brother Joe who is in practice on LaSalle Street. Joe had just graduated from law school, so with good Socratic instincts he asked me if I could be a little more descriptive about the mores of an aging yuppie. Then, before I could formulate a response, he followed up with the real killer question: How could I be sure that being a Catholic made any real difference in my life other than obliging me to show up for Mass on Sunday mornings.

My brother’s response prompted me to find a well-known figure to fit my slightly pejorative label of the not-so-young urban professional. Attorneys are certainly a prominent species of that phenomenon, and indeed Louis Auchincloss wrote a very good novel a few years back about a Wall Street lawyer called Diary of a Yuppie.³ Nevertheless, to

². For example, in the charter founding Georgetown College, the first Catholic institution of higher learning in America, Bishop John Carroll wrote:

Agreeably to the liberal Principle of our Constitution, the Seminary will be open to students of every religious profession—They who in this respect differ from the superintendents of the Academy (the Jesuit fathers), will be at liberty to frequent the places of worship and instruction appointed by their parents . . .”

Bishop John Carroll, Proposal For Establishing an Academy at George-town, Patowmack-River, Maryland (1789) (available from the archives at Georgetown University).
³. LOUIS AUCHINCLOSS, DIARY OF A YUPPIE (1986).
epitomize the aging yuppie, I came up with someone who is not a lawyer, but a fellow professional, Dr. Frasier Crane, the eponymous hero of a very well-received situation comedy.\textsuperscript{4} We have known Frasier for years as a practicing psychiatrist who played a high-brow foil to all the regular guys at the Cheers bar. Now, Frasier has taken his act to Seattle as a psychologist on a call-in radio show, dispensing therapy in a more democratic (and presumably more lucrative) manner.

Now that I had my archetypical "Aging Yuppie," I will be so presumptuous as to pass moral judgment on his life style. Frasier is certainly materialistic and a bit pompous, but the more I thought about him the more I began to see him as somewhat of an endearing figure. He is intelligent (which is not a vice) and he makes his living trying to help people, albeit in the only way he seems to know how, with the nostrums of pop-psychology. Moreover, Frasier, the radio-shrink, even has the good grace to poke fun at himself, which makes the show such an amusing commentary on our times.

Even if it is not always with the decorum that his professional ethics might proscribe, Frasier seems genuinely concerned about his patients, and surprisingly for my generation, he likes his own family members. His best friend is his even yuppier brother, and despite the plebeian sensitivities of his convalescent father, Frasier has taken his father into his luxury condo and arranged for his live-in care.

Somewhat contrary to my initial intuition, it was hard for me upon reflection to see someone like Frasier in any morally reprehensible way. Still, can Frasier be said to lack something that the Catholic faith might provide? For all his good humor, Frasier spends a lot of time brooding at coffee bars, and his supreme goal in life seems to be to find the perfect cup of decaf cappuccino. Moreover, Frasier's father is continually chiding him for being deeply morose. In a scene that frequently recurs in the series, Frasier's dad points to the family dog chasing a sock and gruffly says, "Look, the dog's happy with a sock, Frasier. Why can't you be happy?" Perhaps Frasier, a rather insightful and articulate fellow, one day may answer that his life represents the best that post-modernism has to offer: either a this-is-as-good-as-it-gets benign materialism or, from another perspective, the triumph of style in a world lacking any real substance. In that vein I am reminded of a partner in a Wall Street firm who, while chatting with me started discussing his expensive shoes,

stated: "The greatest thing about my job is that we get the best of everything."

If Frasier's life seems a bit shallow, I am afraid we lawyers may have to face the fact that Frasier's quest for meaning may be easier than ours. For the most part, psychiatry is still a respectable calling. And as everyone knows, there is a pervasive distrust of lawyers and lawyering that borders on contempt—with attorneys themselves among the most disillusioned with the legal system and their roles in it.

Nevertheless, isn't the law also supposed to be a helping profession? For the last fifteen years I have watched students enter law school motivated at least in part by a sense of idealism, expecting to find some rewards in their work other than money, power, or status.

With the scornful attitudes that prevail about our profession it is amazing that students still have some of those altruistic motives. Where on earth do they get them? Perhaps these motives come from reading the literature law schools send them portraying law as a high calling for public service and social change. Such catalogue prose draws on the almost antiquated notion that lawyers are not meant to be money-grubbing hired guns, but artisans of the most illusive of social goals—justice.

Justice was the ethic of past generations of our profession, says Anthony Kronman, the Dean at Yale, in his recent work The Lost Lawyer. Historically, attorneys thought of themselves as civic statesmen, called to counsel their clients to courses of action that benefitted society rather than their own selfish ends. Lawyers were held up as persons of character, uniquely qualified to give such advice because of their common law training in prudential reasoning. Today such norms are suspect as elitist, says Kronman, in an intellectual culture that correspondingly views all ethical opinions as potential tools of oppression.

Why should we be surprised, asks Kronman, that after the trashing of this role model, the vacuum left in our profession has been filled by an ethos of greed? The practice of law, as epitomized by big firms, has become increasingly mercenary and impersonal, saddling lawyers with the need to narrowly specialize and devote almost their energy to generating billable hours.

No wonder other respected commentators like Harvard professor Mary Ann Glendon in her new book A Nation Under Lawyers find it

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6. Id. at 41-42.
7. Id. at 300-07.
difficult "to make sense of this turbulent period in the life of the American legal profession." Why, she asks, are "American lawyers, wealthier and more powerful than their counterparts anywhere else in the world . . . in the grip of a great sadness." A mature despair seems to have set into our profession that might make Frasier Crane's attitude on life look downright optimistic by comparison.

Unfortunately, the theories that have controlled our recent legal discourse have provided no real exit from this ethical wasteland. When I was in law school back in the early 70s we were served up a skeptical and exclusively secular brand of liberalism which held that the only legitimate basis for juridical norms could be that they maximize personal autonomy.

As a reaction to the emptiness of that outlook, the Critical Legal Studies Movement came along bringing with it a lot of dense analysis on the fundamental contradictions of liberalism and some noble, if utopian, aspirations about transforming society into a more communally fulfilling human habitat. While proponents of the Critical Legal Studies Movement ("Crits") talk about debunking illegitimate authorities spoke to some of our primal, scriptural-like instincts about justice, all their lofty prose seemed to lead nowhere.

For example, a few years back when I was still a rather young and idealistic law professor, I had a conversation with Professor Duncan Kennedy of Harvard, a leading figure of the movement. I asked him if he had any thoughts about how our students could find a framework for moral satisfaction in the real world of law practice. In response, he gave me only a blank stare as if to confess that he had no ideas whatsoever on the matter. But at least the Crits have good hearts.

A competing theory, Law and Economics, has much more dangerous overtones. In the business context, orienting legal theory toward more efficient use of our resources has some promise. But when "wealth creation" is made an all-embracing slogan and joined with the value skepticism of modern philosophy, we get a legal theory that reinforces all the

9. Id. at 14.
10. That aspiration is expressed most eloquently in the writings of Roberto M. Unger. See Roberto M. Unger, Knowledge and Politics v (1975) (dedicating his work to producing "a kind of thought and society that does not yet and may never exist").

worst selfish, materialistic tendencies of contemporary American society.\textsuperscript{11}

If I may be allowed one more anecdote about my meetings with great legal minds: I found myself a few years ago in a discussion group on the plight of the homeless with a United States Court of Appeals Judge who had recently been appointed to the bench from the University of Chicago where he had been renown for his work in law and economics. When a member of the group asserted that something had to be done to feed hungry people, the Judge asked why. "Because if they don't get food they'll die," was the obvious answer from one of our group. "Well prove to me that life is better than death," responded the Judge. I felt like responding with St. Thomas Aquinas's observation that life is a self-evident good, but then remembered St. Thomas's additional comment that some things are self-evident only to the wise. While some law and economics proponents may know the price of everything, they seem to know very little about the real value of anything.

Putting such symbolic encounters aside, it is my experience that most law professors honestly care about our society. They would sincerely like to imbue our legal system with an ethic that is both altruistic in general and sensitive in particular to the voices of those who have been disadvantaged. I would certainly put most feminists in this genuinely caring camp.

Like Kronman and many outside observers, most legal academics are deeply troubled by the increasingly unsatisfying nature of the work that we send our students off to do. If the law cannot achieve the Crits' utopian goals of social transformation, can the law at least have some effect in safeguarding human rights and promoting civic harmony? Such aspirations are vestiges of an ancient belief that the roots of the law are deeply spiritual, and its votaries are thus called to a service that is both priestly and prophetic.\textsuperscript{12}

\begin{itemize}
  \item \textsuperscript{11} See, e.g., \textit{Richard A. Posner, Economic Analysis of Law} (3d ed. 1986) (providing a classic example of this school). The author does concede that "the term efficiency, when used as in this book to denote that allocation of resources in which value is maximized, has limitations as an ethical criterion of social decisionmaking—although perhaps not serious ones, as such examples are very rare." \textit{Id.} at 12 (citation omitted). For a more balanced view of the philosophical underpinnings of this law and economics outlook see \textit{Robin P. Malloy, Law and Economics: A Comparative Approach To Theory and Practice} 48-56 (1990).
  \item \textsuperscript{12} As Richard Hooker, the late medieval Anglican jurist and theologian wrote: "Of lawe there can be no lesse acknowledged, then that her seate is the bosome of God, her voyce the harmony of the world." \textit{Richard Hooker, Of the Laws of Ecclesiastical Polity} 142 (Folger Library ed. 1977) (1593).
\end{itemize}
In my *America* article, I wrote that recalling these lost ideals can lead to a genuinely Catholic moment in legal education. Whatever the views of other Christian denominations may be, the Catholic outlook never gives up on the world. It embodies what the great Jesuit social philosopher John Courtney Murray called an “incarnational humanism.” Applying the Catholic outlook to law, the most worldly of arts, it gives rise to a moderately optimistic belief that it is possible for us to reason to the good and to build a just society through law where humans can thrive and flourish.

This is the core of Aquinas’s natural law approach, which should serve as the basis for Catholic legal education. Catholic legal education combines the scriptural faith with insights from classical humanists to present law as a profession whose practitioners have a special calling to participate in the work of God on earth.

The principle challenges to this approach, I believe, are the modern world’s pervasive doubts that a loving God can be the ultimate reality in the universe. With so much evil in history and continuing troubles of all kinds in our own lives, the jury still seems to be out on what has the upper hand around here. The playwright Tony Kushner expresses this attitude poignantly in *Perestroika*, the second part of his Pulitzer-prize winning work, *Angels in America*. When Kushner’s AIDS-ridden protagonist makes his way to heaven to confront God about human suffering, he finds only angels helplessly wringing their hands. God cut out sometime in the early part of the century, he is told, and has not been seen since.

Given such a crushing reality check, perhaps it is wise for us to merely effect a mature despair. Can there be any real truth to the psalm-

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Even Oliver Wendell Holmes, renown for his skepticism and agnosticism, ended a famous address to law students with these sublime comments:

> The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.


ist's assertion that the Lord hears the cry of the poor? The idea that God himself once walked among us as a poor person seems even more improbable.

Even in Chicago a boy can still hope that there might be something to such a message, and in doing so get in touch with a truth that corresponds to our deepest understanding. We know that life, for all its difficulties, is ultimately good. And if we are lucky, those we love and trust have reenforced that instinct.

My three-year-old son goes to a Baptist pre-school in Coral Gables. He has come home singing, "Jesus loves me this I know, for the Bible tells me so." I like the general idea, although I would feel better if the song did not invoke a biblical authority that is subject to torturous interpretations. I would prefer, "Jesus loves me, this I know, for the community of believers tells me so." As Pope John Paul II writes beautifully in his new book, Crossing the Threshold of Hope, in Jesus, God does not answer Job from on high, but comes down to join him in the tragedy of redemption. This is Aquinas's faith, it is my faith, and it is the faith of the institution that sponsors the twenty-five law schools we call Catholic.

In my America article, I wrote about the various ways that such a vision might pervade a law school sponsored by the Church. Foremost, such a college would need a critical mass of members committed to its outlook. Along those lines, it would be appropriate to give special consideration in faculty recruitment to those candidates who show promise of scholarship from a Catholic perspective. With student admissions, it might likewise be fitting to look at factors which might indicate that the applicants shared the Church's mission of social justice.

While a Catholic law school would of course be dedicated to doing all the basics of legal education well, its curriculum would also reflect its special mission. For example, a course on jurisprudence could be required of all students and emphasize particularly Catholic outlooks, such as the natural law approach.

I helped develop, both at Tulsa and St. Thomas law schools, a course designed to deepen our students' understanding of the broader assumptions and principles that underlie our legal rules. The course includes readings from both classical and contemporary philosophy. It then

18. See, e.g., Psalms 40, 41, 82, 129.
19. Phil. 2: 7-8. See also John Dominic Crossan, The Historical Jesus: The Life of a Mediterranean Jewish Peasant (1991) for a critically acclaimed work of scholarship establishing Jesus as a man from the lowest socio-economic class of his time.
shows that thought has been reflected in judicial opinions and critiques those results from various perspectives.

Almost every course in substantive fields of law involves issues of social justice that could be examined from Catholic and other sources. Most obviously, our culture's commitment to human rights could better be understood as it has been underwritten by the Scriptures and other Judeo-Christian traditions. But even more prosaic subjects like corporate law and wills and trusts could include considerations of how moral duties involving societal or family resources should be expressed in law. In every course in which it is employed in a Catholic law school, the Socratic method should be used to find just solutions through dialogue and reason. It should not be used as a vehicle to inculcate a viciously skeptical attitude that can border on nihilism. Such an approach of reasoned discourse would be right out of the natural law tradition.

Campus liturgies and first-rate programs of psychological and spiritual counseling can also make Catholic law schools special places from which the faith community's support can prepare students and faculty for their difficult work. The entire milieu should be one where all the school's members feel valued and helped so that they in turn can act toward others with the same caring attitude.

Let me now discuss some key issues of institutional character and academic freedom that may be presented in a special way by the Catholic law school that I envision. Tom Shaffer, the former Dean at Notre Dame, whom I quoted at the beginning of my remarks, may be the leading Catholic or Christian legal theorist of the last two decades.

In 1993, he published a piece in the *Stanford Law Review* unapologetically advocating that Catholic law schools, to use his term, be more "sectarian" institutions. Shaffer surveyed the forty-eight religiously affiliated law schools in this country and found that thirty-seven of them are functionally secular. That is, they have no more religious content than their publicly-supported counterparts. Of the remaining eleven Catholic law schools, Shaffer found that seven of them operate under a religious ethos, but one law school saw its prime mission as serving civil society. Only four law schools (none of them Catholic) were properly sectarian. That is, they had guiding philosophies like the early Christians who, according to Dean Shaffer's citation of a passage from the

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23. *Id.* at 1864.

24. *Id.* at n.18.
Acts of the Apostles, saw their priority as serving God, not people. That priority, he said, should be the proper model for a Catholic law school.

Dean Shaffer went on to support his claim principally with authority from the separatist wing of reform, that is to say Calvinistic protestantism. Such thought is best kept alive in denominations like the Amish, the Quakers, and the Mennonites. Shaffer chose this quote from the works of one such theologian to further establish his point: "The challenge to the faith community should... be... to purify and clarify and exemplify [the word of God] so that the world can perceive it to be good news without having to learn a foreign language.

With such premises, the faculty and students of a truly religious law school would not be diverse, argued Shaffer, but would come together specifically as a community of believers to study law from the Church’s perspective. The Church would then commission them to the practice of law as a prophetic office in a society that is, in many ways, antithetical to its beliefs. Shaffer argued that even religiously-oriented Catholic law schools which aspire to serve the world, particularly a world that today is deeply hostile to its basic principles, will end up being compromised and corrupted by it. Better, he said, that we emulate the separatist churches who remained true to the bedrock principles of Christianity and never, like the mainline clergy, blessed troops that went off to kill people.

Dean Shaffer’s approach has a certain bracing and radical attraction to it. But, as he himself seems to admit, it is more protestant in its pessimism about this world than the Catholic tradition. As John Courtney Murray, one of the intellectual leaders of the Second Vatican Council, wrote that our God "is Creator not only of heaven but of earth, of the visible as well as the invisible... Therefore, [t]he material is susceptible of salvation... And... the creation of a temporal order of justice and civic fraternity has been a humanistic aspiration connatural to the Christian heart."

25. Id. at 1870.
26. Id. at 1870-71.
27. Id. (quoting John Howard Yoder, First Fruits: The Paradigmatic Role of God’s People—An Angle on “The Public Good,” Lecture at the Christian Theological Seminary of Indianapolis 6 (Oct. 4, 1992)).
28. Shaffer, supra note 22, at 1872.
29. Id. at 1868-69.
30. Id. at 1869.
31. MURRAY, supra note 14, at 190.
32. Id. at 192.
As I asserted in my *America* article, the Catholic law school should be open to all people of good will, including those who seek justice, despite stated aversions to religion. Professor Raymond Marcin of Catholic University Law School called my vision of a Catholic law school politically correct.\(^3^3\) When one is described like that these days, one knows it is not a compliment. My outlook finds a paradigm in perhaps the greatest Catholic university of all time, the University of Paris, as it existed in the high middle ages. There, under the auspices of the Church, scholars from Islamic, Jewish, and agnostic backgrounds joined Catholic thinkers in debating the ultimate issues of the human condition. Resolutions and clarifications of questions came from those disputations that have been unequaled in the history of intellectual discourse.

One such exchange can perhaps serve as a fitting model for academic freedom, and shed particular light on the relationship between Catholic humanism and post-modern thought. In thirteenth century Paris, Siger of Brabant was the leader of the school that championed pure knowledge, free of any theoretical limitations, including religion. He deemed religion unnecessary for the education person.\(^3^4\) According to Siger, good was solely what was useful to the human race, evil was whatever injured it.\(^3^5\)

Many orthodox Christian thinkers of the day considered Thomas Aquinas an equally dangerous and worldly freethinker. Aquinas was deeply influenced by Jewish, Arabic, and classical pagan philosophers like Maimonides, Averroes, and Aristotle. Aquinas’ work showed an open-minded rationalism and commitment to the scientific method that may well be considered the father of the enlightenment. Yet Aquinas could not go the last step with Siger and throw off faith. Also, revelation was important to show that the goodness of this life had transcendent underpinnings.

The two towering intellects battled it out in scholastic disputations at Paris, and not all observers believed that Aquinas got the upper hand. In his Divine Comedy, Dante, the most Catholic of all poets, places Siger in Paradise and places Aquinas there too singing Siger’s praises.\(^3^6\) Perhaps that is even the ultimate view of the Scriptures. As the prophet Micah tellingly reminds us, God does not ask for formalistic religious

\(^{34}\) *Friedrich Heer*, *The Medieval World* 216 (1961).
\(^{35}\) *Id.* *See also Philippe Delhaye*, *Medieval Christian Philosophy* 105-12 (1960).
\(^{36}\) *Dante Alighieri*, *The Divine Comedy*, Canto X at 137 (Singleton trans., 1975).
observances like burnt offerings, but only that we act justly and love tenderly.\textsuperscript{37}

In the 25th Chapter of St. Matthew's gospel, Jesus' great parable of the last judgment teaches us that the righteous seem genuinely surprised when their acts of human kindness get them into the blessed kingdom. "[W]hen," they ask God, "did we see thee hungry, or thirsty, or a stranger, or naked, or sick, or in prison, and did not minister to thee? ... [A]s long as you did not do it for one of these least ones, you did not do it for me."\textsuperscript{38} Pure human compassion, without any apparent religious motive, is what really matters to God.

It is working for goodness that is of ultimate importance. To quote Courtney Murray on the closeness of this world to the next, "There will be a new heaven and a new earth; and those who knew them once will recognize them, for all their newness."\textsuperscript{39}

To return to my foundational question, does Catholicism have anything explicitly to offer either Frasier Crane or American Legal education? My answer, like Aquinas', is "yes," because the truth that the Catholic faith reveals to us makes our mission in this life much clearer.

To illustrate that point, may I go back to Dean Kronman of Yale. He states that for all its rewards, the ethic of care and public concern is dead in American legal culture. With his fixation on big firm practice, Dean Kronman has missed the mark. The self-styled upper echelon of our profession that Kronman would hold up as exemplars of a lost ideal were hardly models of scriptural or humanistic virtue. After all, upper echelon served the wealthiest members of society, and their firms were often the repositories of the vilest types of racial and religious discrimination.

Perhaps a better model would be my father, who, although a top graduate of a Catholic law school in the 1930's, could not get an interview with the big firms on LaSalle Street. Instead, he spent his professional career in a Chicago neighborhood helping people of modest means through some of the most difficult periods of their lives. I never heard him say that the greatest reward of his practice was that he got to wear expensive shoes.

Thus, Catholic law schools should not accept Dean Kronman's bleak assessment. Because of our heritage, we have always infused the law with a special ethic of concern, and our graduates have thus had a rich and meaningful impact on the profession. It is not too wild a dream that

\begin{itemize}
\item \textsuperscript{37} Micah 6:6-8.
\item \textsuperscript{38} Matthew 25:44-46.
\item \textsuperscript{39} Murray, supra note 14, at 190.
\end{itemize}
our students can still hear such a call. After all, we have a lasting link to a man who preached good news to the poor and freedom to captives, and who showed us the ultimate value of service—that only when we die can we really begin to live.
