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Marsiglio of Padova: Father and Creator of the Modern Legal System

By Peter J. Riga

Introduction

Biographical Sketch

It is uncertain when or where Marsiglio of Padova1 was born. He went to Paris, where he was Rector of the University of Paris from September 1312, until May 1313. It appears that he returned to Italy and studied philosophy with Peter of Albano from 1313 to the end of 1315. He may have visited Avignon, and Papal Bulls of 1316 and 1318 reveal that he was offered benefices at Padova. He returned to Paris in 1321, where he worked on his Defensor Pacis2 with the collaboration of his friend, John of Jandun. The book was finished on June 24, 1324. The book was denounced by the Papacy in 1326, and that same year both Marsiglio and John of Jandun had to flee to Paris. Both men took up residence at Nurenberg with the German Prince, Ludwig of Bavaria, in whose entourage they entered Rome in 1327. In a Papal Bull dated April 3, 1327, Marsiglio and John were denounced as “sons of perdition and fruits of Malediction.” The presence of Marsiglio at Ludwig’s court was an obstacle to the success of Ludwig’s attempts at reconciliation, first with John XXII and then with Benedict XII. Ludwig had a very high opinion of both the author and his magnum opus, the Defensor Pacis. A discourse of Pope Clement VI, dated April 10, 1343, asserts that the “heresiarchs” Marsiglio of Padova and John of Jandun were both dead, but the exact date of Marsiglio’s death is unknown.

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1. The English translation is “Marsilius of Padua.”
2. The English translation is The Defender of Peace.
The Historical Setting

Marsiglio of Padova wrote his *Defensor Pacis* during a turbulent period which witnessed the transformation of medieval into modern society, characterized by nascent nationalism, the secular state, and independent jurisprudence. The introduction of the political works of Aristotle at the end of the twelfth and beginning of the thirteenth centuries was of fundamental importance in this transformation. The *Civitas* was no longer regarded as a whole, with its hierarchic strata of inferior-superior realms of the spiritual and secular kingdoms. Aristotle's concept of the state as a "body of citizens sufficing for the purposes of life" introduced a radically new concept into the West's vision of society, its government, and its law. The revolution of secularity was gaining ground, reaching its theoretical apogee in the *Defensor Pacis* in the fourteenth century and its practical implementation in the eighteenth century during the French revolution with its secular *egalité, liberté, et fraternité*. The concepts of the state and the citizen undermined the structure of medieval Christian society and government. This radical transformation from a theocratic to a secular state was felt throughout the thirteenth and fourteenth centuries.

With Aristotle's introduction into the West, the concept of natural man reasserted itself and was restored to the autonomous position it enjoyed prior to the fourth century. The unipolarity or totality of the individual gave way to the bipolarity of the individual as a natural man and as a Christian. Thus, the good citizen need not be a good man, nor was a good man necessarily a good citizen. This view embodied a totally new dimension because it expressed the difference between politics (law) and ethics (morality). The moral code laid down the requirements for one to be a good man, while the political-legal code formulated the demands to be made of a good citizen. This dichotomy was the beginning of the process of atomization of human activities into such categories as moral, political, religious, and legal.

Thus, with the introduction of Aristotle into the West, the citizen was to replace the *sub/ditus*, the individual as the subject of higher authority. The citizen now took part in the shaping of his own community, the state, by creating the law. This involvement was a serious challenge—a mortal one—to the accepted premises of the public and social life of the Middle Ages.
The great predecessor of Marsiglio, Thomas Aquinas, attempted to synthesize these apparently irreconcilable differences. He mastered the intricate Aristotelian corpus within the context of the Christian tradition, making the crucial distinction between the humanitas and the Christianitas. Nature for Aquinas was a divine creation, and for this reason he credited it with autonomous standing. The natural product, the state, had nothing to do with faith or grace in regard to its origin or operation, but for its better working, grace and faith were necessary complements. The laws of the secular state were valid in their own right, but in order to be perfect, and adequate for Christian society, they were still in need of ecclesiastical approval. Thomas's thesis was composed of two tiers which complimented each other. Thomas materially contributed to the release of the individual from the fetters of "superior authority" and to his formation as a fully developed citizen. The struggle between theocratic and secular views was to continue throughout the fourteenth century. Marsiglio was only one of the more vocal advocates of the latter view.

The early fourteenth century was also rich in sources that illustrated the ascendence of bipolarity over the formerly unquestioned unipolarity of political ideology. Although the old papal hierocrats, represented by the official papal output, went untouched by the new ideas, there were other writings that attempted an accommodation of Aristotelian-Thomist thought within a theocratic framework, with drastic restrictions imposed on the legal and jurisdictional power of the ecclesiastical authorities. This mortal struggle was exemplified in the official declarations of the Bonifician papacy during its conflict with France, in the decrees Clericis Laicos (1296), Apostolica Sedes (1300), and Unam Sanctam (1302). These documents sought to confirm comprehensive papal jurisdiction and the papal right to establish empires and kingdoms, to depose rulers, and to demand obedience from everyone. This line of authority set its face squarely against the newly advancing ideologies of secularity. In particular, Unam Sanctam was intended to warn the faithful against the "pernicious" naturalist ideas of the Aristotelian-Thomist movement, which constituted a danger to the whole framework of Christianitas.

Another predecessor of Marsiglio at the University of Paris was John Quidort (John of Paris), who wrote the famous treatise, De Postestate Regia et Papali (1306). He dealt with man in the state

3. Thomas Aquinas died in 1274.
along Thomist lines and postulated an elective kingship in which the king could be deposed by the people. The ascending theme was applicable both to the secular state and to the church. This tract marked the entry of the concept of the state as an independent, autonomous entity into the arena of scholarly political discussion. The tract also had an enormous influence on Marsiglio some twenty years later when he wrote his own *Defensor Pacis*.

The tenor of Marsiglio's work was in many respects the logical extension of the Thomist thesis. Marsiglio realized that both the strength and weakness of Thomas was the thesis that God was the author of nature, but, according to Marsiglio, this link was an axiom of *faith* and hence outside the purview of political science proper. He cut this link and rested nature on its own basis. Thus, with one stroke, he severed the natural and the supernatural. In matters of the human state, only natural things counted. Only human jurisdiction and human law were valid and determinative norms. Law was enforceable precisely because it embodied the will of the citizens; the idea of sacred rule simply vanished. The state was the corporation of all citizens and rationalism was the hallmark of political science; what was irrational lay outside its realm and belonged to religion. The voluntarism of Marsiglio marked the emergence of a full-fledged political science that rested on its own norms, axioms, insights, and, ultimately, on the judgment of the citizens. The *Defensor Pacis* appeared precisely at a time when contemporaries had become dissatisfied with the accepted thinking and government. Marsiglio introduced *modernità* almost singlehandedly, and his doctrine gained acceptance later in unexpected quarters, to wit: feudal England. English constitutional reality had been decisively prepared for the reception of Marsiglian ideas by antecedent doctrine and practice.

Thus, the sources of fourteenth century political philosophy reveal the emergence of "politics" as an autonomous science that took its place next to professional jurisprudence. The two still had a great deal in common, but their basic assumptions began to change. One of the central ideas common to both was that of justice, but the temporal perspective was different: jurisprudence looked backwards from the law to fix the contents of justice, whereas politics operated with the extralegal idea of justice and therefore looked forward to future law. The political vision of justice lies at the very heart of the rise of modern law, politics, and constitutionalism. Along with
Marsiglio's contemporaries of the fourteenth century, he gave it flesh and bone in his *Defensor Pacis*. He is the first of the truly modern secular political scientists, as well as the forerunner of today's juridical positivists.

**The Civil and Legal Thought of Marsiglio of Padova**

Marsiglio of Padova occupies a unique position in the history of legal thought. He wrote at the crossroads of the origins of the truly secular state as it groped to find its own independence and identity amidst the struggle with the then dominant power, the Church. Marsiglio's concept of the independent and autonomous, civil, state government was closely allied with his concept of law, which he viewed as civil and secular. The law, according to Marsiglio's theory, was an autonomous body of rules independent not only of the Church and its canonical judicial system but also of the traditional concept of the relationship among divine law, natural law, and human (positive) law. Marsiglio's visions of the political structure and of the law occupy the very core of the *Defensor Pacis*.

In order to establish the fundamental secularity of Marsiglio's legal thought, it is necessary to follow the development of that thought and to contrast it with that of the traditional authors of the high middle ages, Thomas Aquinas, Giles of Rome, Albert the Great, and Ptolemy. Marsiglio's thought on the concept of the secular city (*civis, civitas, pax, communitas, regnum*) will be explored first. The discussion will then proceed to an exposition of his legal thought.

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4. The author has followed the original Latin text of R. Scholz, *Defensor Pacis* (1932) [hereinafter cited as *Defensor Pacis*]. The translations in the text are those of the author. A. Gewirth, *Marsilius of Padua: The Defender of Peace* (1956) [hereinafter cited as *Gewirth*] as a translation is much too loose in some parts and at times biased.

5. Marsiglio's work remains unique because he composed a system without a corresponding state to implement it. It was a work of genius, not conceived by any of his predecessors, and it foreshadowed the modern secular state and its legal system in many ways. Marsiglio injected a dimension into the traditional church-state argument that continues to occupy legal scholars.

The Secular City

The Defensor Pacis was written to establish a theoretical basis for an independent and autonomous civil society and its laws; as used here "independent" means freedom from the encroachments of the priesthood and the pontifical power which Marsiglio viewed as the enemy of properly civil society. In the midst of the great church-state struggle of the fourteenth century, Marsiglio sided with the forces seeking to limit the Church's power. It is therefore no surprise that a pope would condemn as heresy the following thesis taken from the Defensor:

"The punishment of heretics, in so far as that is permissible, belongs only to the human legislator. The heretic cannot be punished except that human law punishes heresy."6

Such statements, according to the popes, bordered on heresy, for implicit within such an assertion was a denial that the Church had any temporal power whatever. Although condemned as a heretic, in the fourteenth century Marsiglio was resolute in his beliefs, which today would be accepted by society as self-evident. According to some authors, Marsiglio sought to dethrone the pontifical power of the Middle Ages by giving civil society its properly civil and secular dimension. This secularity forbids the Church from dictating its law to civil society. By this belief, Marsiglio simply wished to reserve to the state the regulation of the external manifestations of religious life.7 American jurisprudence would not affirm this proposition until 1878, when the Supreme Court announced Reynolds v. United States.8

Yet Marsiglio remained modest. He did not elevate the civil society to the status of a moral demand. Marsiglio's purpose in writing the treatise was clear: he wished to subordinate the priesthood to the civil power and to integrate religious life with larger social life. The Defensor Pacis was essentially "a treatise on ecclesiastical politics which attempted to present the systematization of Church subordinated to the state."9

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6. Defensor Pacis, supra note 4, at II, 7; II, 3.
A noteworthy aspect of Marsiglio's work is its simplicity and its lack of abstraction and philosophical detail. This simplicity is somewhat surprising, because Marsiglio was a contemporary of some of the most subtle of all scholastics: William of Ockham, John of Jandun, and Peter of Albano. In contrast to these authors, Marsiglio wrote neither a detailed metaphysics of the state of law nor any detailed rational systematization. An honest evaluation of the *Defensor Pacis* would characterize it as a dry, ambiguous, and, at times, contradictory treatise. It can be faulted for its reliance on examples and illustrations taken exclusively from Marsiglio's own time. The *Defensor Pacis*, as an entity, lacks a refined, rational consistency. This deficiency makes the *Defensor* a frustrating work to understand.

According to Gewirth, the *Defensor* is in reality the first conscious effort of modern times to laicize politics in the modern sense of the word. Marsiglio was not interested, as were the authors before and after his time, in distinguishing the two powers, civil and ecclesiastical; nor did he attempt to fix their boundaries or define their limits. Rather, Marsiglio wished to deflate the philosophical arguments by which authors justified the presence, in the midst of civil life, of a "normative transcendent value," as well as to undermine its authentic interpreter, the Church and the pontifical power. While he recognized the existence of religious and moral norms, he denied them any power over political life. They could not dominate, justify, or orient secular society. Neither the Augustinian divine law nor the Aristotelian-Christian natural law dominates political life. More than any of his predecessors, Marsiglio clearly distinguished politics from morals. In reality, he *separated* them.

This theoretical laicization, which is found in the majority of modern secular states, gives the thought of Marsiglio its distinctively modern flavor. It was he, according to Gewirth, who laid the basis, defined the content, and justified the validity of secular "morality" in relation to secular politics. While Marsiglio accepted the idea that political society is natural, he rejected the view of Aristotle and St. Thomas that political society is a demand of the intellectual and rational nature of man. In Marsiglio's view, political society is born of the *desires* of man, and these desires are founded upon socioeconomic

10. See Gewirth, *supra* note 4, at 305.
11. *Id.* at 306-07.
12. *Id.* at 304, 306.
13. *Id.*
needs. Thus, as shall be discussed in more detail later, law is instituted in human society not as predetermined by some exterior transcendent "essence"; rather, law is that which men judge best adapted to their common utility. The object of the state and of the law is not to render man good but rather to satisfy man's vital external needs. Law creates the minimal conditions of a life worthy of the name. This material good of man can only be realized, however, within the civil state. Law, therefore, is a constraint imposed upon all in order to realize this objective, external good. This view of society and law is strikingly modern. There was no such tradition of thought before Marsiglio.

According to Gewirth, the essence of law for Marsiglio resides in its coercive force. This force need not be morally justified, because only the people as a whole can confer upon law its coercive dimension, and the people as a whole cannot be wrong. Because the people necessarily will the common good of all, the law can demand and obtain an authority without external, supernatural control. The people have an exclusive sovereignty over all social functions of life, even over the priesthood, so as to bring even it into conformity with the social good.

The enemy of civil peace is, of course, the uncontrolled religious and autonomous authority of the priesthood. For Marsiglio, therefore, the pontifical power, as an all-pervading force, must be attacked and destroyed if civil society is to be born in the first instance. Marsiglio attacks the very principle of the primacy of the spiritual power. The source of the threat to the civil power is not the abuse of this spiritual power but the omnipotence of the power. The very acknowledgement of an all-pervasive, spiritual power constitutes the enemy of civil peace. If one accepts this theory of spiritual power, that is, the inherent ability of the church to judge secular power and law, then one opens the door to its intrusion into political life, which must be avoided if the secular is to remain viable and autonomous.

What is the reason for this attack? The papacy is the enemy of secular society because it impedes the human legislator from fulfilling his office in the civil community, either by simply forbidding him

14. Id. at 310.
15. Id. at 313.
16. DEFENSOR PACIS, supra note 4, at I, xix, 8-13.
17. E.g., id. at II, iii, 7; II, xxiii, 5; II, xxvii, 2; II, xxviii, 8.
from exercising such an office or by interfering with the competence of the secular power. The spiritual power impedes civil government from performing the operations belonging properly to the civil power, either entirely or partially, to the extent required for its optimum functioning. 18 The Defensor, therefore, tries to demonstrate that the pontifical authority is rigorously incompatible with a healthy conception of the civil community and its authority.

As to the derivation of civil society, Marsiglio's views differed from those of his predecessors and contemporaries. Most of the scholastics writing before and during the time of Marsiglio emphasized the concept of man as a social animal. This social aspect of man finds expression both in the family, the fundamental cell of social organization, and in the city, the more complex unit of social organization. The concept of the family, as a manifestation of man's conjugal nature, is central to the works of Marsiglio's predecessors and contemporaries. The family was the indispensable, yet incomplete, unit of social organization; it acted as the model for the larger social structure. 19 Marsiglio's predecessors saw man's desire for justice as the mainspring of human activity. The spring had been wound by nature and implanted deep within the human soul. This need for justice could only be satisfied with the civitas. Yet, none of this concept appears in the work of Marsiglio. His analysis is simpler. He asks: does man have a natural tendency "to the perfect community which is called the city?" There was no need for justice in Marsiglio's equation. His predecessors did not attempt to explain morality by reference to society. To the contrary, they deduced society from morality. This point is precisely the one at which Marsiglio departs from these authors. In his view, the social structure and human law are derived not from nature or transcendent morality, but from reason, as it reflects on experience and interacts with imagination. Occasionally, Marsiglio even denies natural law. 20 Civil society emerges only when art, experience, and reason coalesce. 21 Civil society is more

18. Id. at I, ii, 3.
19. The scholastics were fond of making the comparison between the family and the civic community. See Thomas Aquinas, In libros Politicorum Aristotelis, n.37 (R.M. Spiazzi ed. 1951): "Igitur homo est naturaliter animal domesticum et civile"; Summa Theologica IIIa Supp. q. 41, a. 1: "Homo est naturaliter pars domesticae familae aut civilis societatis." See also Contra gentes III, n.123; In decem libros Ethicorum Aristotelis ad Nicomachum I, 9, n.112; V, 2, n.1007; VI, 7, n.1209 (R.M. Spiazzi ed. 1949) [hereinafter cited as In. Eth.].
20. Defensor Pacis, supra note 1, at I, xiii, 8; I, xiv, 5.
21. Id. at I, iii, 4.
the product of human industry than human nature. This form of thought, once again, is strikingly modern.

Yet, Marsiglio’s rejection of the premise that the human city could be explained by reference to a primordial moral law inscribed in the heart of human nature did not lead him to the conclusion that the city was disinterested in the moral conduct of its members. He often emphasized that the morality of citizens was one of the conditions of the good order of the city. Moreover, Marsiglio was not antireligious. To the contrary, Marsiglio stressed that the good morals of the citizens of the city lead them to a more perfect understanding of the role of morality and religion in the city. In other words, his form of secularity was not a rejection of the religious but rather was dependent upon the latter as strengthening the former.

The most important function of government, according to Marsiglio, is the execution of justice, which is accomplished through the coercive effect of law. In other words, civil government is charged with promulgating and applying the law and making it respected, even by constraint: “It [civil government] has authority to render judgments, to dictate prescriptions, to execute all that is necessary for the common good and for justice.” To render justice, apply constraint, and impose a punishment in any domain whatever is the exclusive prerogative of the secular state. It belongs to no one else. This point is an extremely important one for Marsiglio and is one of the main reasons why he so completely opposed the pontifical power which interfered with civil government. In other words, civil government was vested with exclusive jurisdiction in its domain. Marsiglio severed pontifical authority from the civil sphere with incisive reasoning which has been described as “Marsilius’ razor.” The pontifical power exists within the secular state and its law, not above them. Understanding this concept is a significant step in understanding Marsiglio’s basic legal system.

22. Id. at I, v, 11 (Min., 4): “Omnes actus civiles humani quos lex humana fieri praecepit vel prohibet sunt boni mores vel mali. Unde ab humanis legislatoribus lex hoc modo descriptur. Lex est sanctio sancta, justa et honesta praecipiens et prohibens inhonesta.”
23. Id. at I, v, 10-11.
24. Id. at I, xv, 4.
25. Id. at I, xv, 6, 11.
26. See Gewirth, supra note 4, at 232.
The Legal Structure

In many places in Marsiglio’s writing, he teaches that the Prince is subject to and under all positive civil law. In order to understand the boldness of this position, an investigation into the background against which he wrote his own work is necessary.

This background was one of thought born of the Aristotelian renaissance. Legal scholars in the fourteenth century were attempting to restore the glory of Roman law in its expression of the will of the Emperor and of the whole body of the people whose delegate the Emperor was. Moreover, most of the thinkers of Marsiglio’s age found in Aristotle the consummate thinker, who advanced the idea that “to desire a regime of law, is to desire the exclusive regime of God and of reason.” For these thinkers, arbitrary power was immoral and unthinkable. The Prince was to govern, therefore, in accordance with this higher law, dictated by God and discovered by reason. These authors proclaimed and defended the absolute primacy of divine and natural law.

Among these same authors, however, there was dispute about the concept of positive law. Legal thinkers highly regarded the declaration of Theodosius, inserted in the Justinian Code (lex digna), which affirmed both that the Emperor is above this law and that he voluntarily submits himself to that law. St. Thomas discusses this classical case in his Summa Théologica. He concedes that an absolute ruler who would respect natural law and be guided by reason would be an acceptable ruler. Yet he also teaches that such men of virtue are rare, and, therefore, a regime of law (positive) in which everyone, including the Prince, is bound by the rule of law is preferable. For Thomas, legislative power was grounded on the competence of the multitude to define for itself its own common good. He accepted the

27. Defensor Pacis, supra note 4, at I, xi, 4, 7, 8; I, xiv, 8; I, xv, 4.
29. See, e.g., Giles of Rome, De Regemine Principium 532-33 (Rome 1607) [hereinafter cited as Giles of Rome]: “principantem esse medium inter legem naturalem et positivam.”
30. Summa Theologica, Ia IIae, q. 96, a. 5 ad 3: “Digna vox est majestate regnantis legibus alligatum se principem profiteri.”
31. For more information in this respect, see E.H. Kantorowicz, The King’s Two Bodies 104-18 (1957).
same competence in a public person chosen to represent the multitude and exercise authority over it.\textsuperscript{32}

Other thinkers of this era had slightly different concepts of the role of positive law. Giles of Rome saw positive law as the product of the public person charged with making law, who is the Prince in a monarchy or the multitude in a popular regime.\textsuperscript{33} Although Giles states that the Prince is above the positive law, he advises him to accept ancient laws and accepted customs.\textsuperscript{34} William of Ockham questions whether there is any longer a truly royal government because all Princes swear at their initiation ceremony to respect established customs and the fundamental laws of their realms.\textsuperscript{35} Dante advises the people to follow the road of liberty by submitting themselves to imperial law which, for him, was a reflection of natural law.\textsuperscript{36}

Ptolemy, perhaps the most original thinker of this period, saw in the Empire an incarnation both of natural law and popular sovereignty. The Empire, he says, is composed of both “political” regimes and “royal” constitutions. These regimes are political because they are based on an election in which anyone, of any race or background, might be elected Prince. This Prince, being elected, cannot transmit his powers or office to his descendants. Other regimes are founded on “royal” constitutions because the Prince is master of fiscal matters, because he is crowned, and above all because he has legislative power. The consuls and rectors of \textit{communes} are required to rule by established law decided freely by the people. On the other hand, Kings and other monarchical persons can, on occasion, act by proper inspiration, “because the laws are contained in their breast and what pleases the Prince is law.”\textsuperscript{37} This is the concept of \textit{quod placuit principi}.

\textsuperscript{32} \textit{Summa Theologica}, Ia IIae, q. 95, a. 1, ad 2: “Melius est omnia ordinari lege, quam dimittere judicium arbitrio.” “Quia ergo justitia animata judicis non invenitur in multis et quia flexibilis est, ideo necessarium fuit, in quibuscumque est possibile, legem determinare quid judicandum sit et paucissima arbitrio hominum committare.”

\textsuperscript{33} Giles of Rome, supra note 29, at 526.

\textsuperscript{34} Id. at 541.

\textsuperscript{35} See \textit{Dialogus Ia IIae}, II, c. 6, 795 (M. Goldast, \textit{Monarchia s. romani imperii}, Frankfort, 1612-1621, II): “Et talis principatus regalis dicitur secundum legem quia licit unus principatur, modo tamen principatur secundum voluntatem, sed quibusdam legis, et consuetudinibus humanitatis introductis astringitur, quas tenetur servare et ipsas se servaturum juare vel promittere obligatur et quanto tales plures leges et consuetudines servare tenetur . . . .”

\textsuperscript{36} See \textit{Monarchia} I, xi, 363 (the Società dantesca italiana ed. 1921).

\textsuperscript{37} See \textit{De regimine principum} III, xx, 62; IV, i, 66 (Mathis ed. 1948).
Such was the philosophical background when Marsiglio began to write the *Defensor Pacis*. These authors attempted to limit the power of the Prince by reference to divine and natural law as well as by established customs. Yet the Princes were uneasy with these limits on their power. They were aided in their efforts to expand their power by the newly revived interest in the Roman law.38

In accord with his predecessors, Marsiglio strongly emphasized that “the right to judge or order civil affairs is given to no judge nor Prince without law.”39 The civil judgments of Princes were to “be ruled and determined by the law,” not by their own will.40 Princes were not above the law.41 They were not endowed with powers permitting them “to violate the laws and to govern despotically by despising the laws.”42 Rather, the Prince was to govern “according to the laws which are made and do nothing beyond what the laws call for without the consent of the multitude or of the legislator because it is from this latter authority that the Prince has his force and authority.”43

The reasons for withdrawing arbitrary power from the Prince and for subjecting him, like all other persons, to the rule of law were given by Marsiglio:

—government ought to be the regulator of the civil acts of men, and therefore the regulations should have a definite form;44

—government ought to be a judge, and its judgment ought to rely upon an objective standard;46

—government ought to assure its own permanence, and this permanence can better be accomplished by respecting an objective law.46

Thus, for Marsiglio, “the matter or subject of the law . . . is the *pars principans* who has the mission to regulate the civil and political acts of men *secundum legem*.47

40. *Id.* at I, xi, 7.
41. *Id.*
42. *Id.* at I, xiv, 8.
43. *Id.* at I, xv, 4.
44. *Id.* at I, x, 1.
45. *Id.* at I, xi, 1.
46. *Id.* at I, x, 5.
47. *Id.* at I, x, 2.
Although this *regualre secundum legum* is often found in the works of thinkers who preceeded Marsiglio, none of them emphasized this concept with such vigor and consistency as he. This point was the one at which Marsiglio departed from his predecessors. He condemned all personal power exercised *extra legem*: "He who orders what reason commands, prescribes what God and the laws command; he who commands what man commands [without law and according to his arbitrary whim] desires the rule of a savage beast." Nowhere in the *Defensor Pacis*, or even in the *Defensor Minor*, is found the phrase "*quod principi placuit,*" which was very popular among legal thinkers and theologians. Theologians held the *placuit* principle valid as long as this will of the Prince did not violate the natural law or reason. Marsiglio rejected the principle, including root and branch.

While Marsiglio’s work was a monumental piece of philosophy, it was not without its inconsistencies and weaknesses, which unfortunately appear throughout the body of the treatise. Aristotle had already remarked that the law was, at times, insufficient to reach its end. General law was not equal to the task of solving each and every problem arising in life. Marsiglio, recognizing this shortcoming, states that moral goodness and justice are especially demanded of the Prince because the law cannot regulate everything. Therefore, certain decisions must be left to the discretion of the Prince. Equity ought to permit him not to apply the law when its application would be unjust. *Epikeia* thus finds a place in Marsiglio’s concept of law. This reservation, however, is somewhat at odds with Marsiglio’s idea of the primacy of positive law.

In discussing the concept of positive civil law in the action of the ruler, one of the great drawbacks of Marsiglio’s work is the lack of any concrete norms formulated in constitutional form to act as a guide for the human legislator. In smaller cities, the citizens would be informed enough about the conditions of their community to make objectively good laws. Such politics by assembly, however, would be unworkable in the larger regions which, likewise, were to be governed by law. This absence of constitutional framework is a conspicuous flaw in Marsiglio’s concept of government by and through law. In the fourteenth century, constitutionalism was as yet in its primitive stages.

48. *Id.* at I, xi, 4.
50. DEFENSOR PACIS, supra note 4, at I, xiv, 4.
Another point on which Marsiglio is somewhat unclear is how positive law relates to reason and justice. To be sure, Marsiglio strongly emphasizes the concept of law as a rational act or as an act of reason. However, he is unwilling to impose reason or justice as a limit on the power of Princes. This position is in contrast to the philosophers writing before Marsiglio.

Prior to the Defensor, authors had stressed that the law is valid only if it is rational. Only its conformity to justice as dictated by right reason can give essence to law. An unjust law is no law at all, but a deformation of law. The will of the Prince might carry the weight of law, but his edicts are not true laws unless they are just edicts. An author like John of Jandun could clearly say that natural law is at the source of all positive civil laws and that such laws are acceptable only if they do not contradict reason. Aristotle had convinced all his later disciples that positive law must reflect justice and reason.

Marsiglio rejects this earlier tradition. He is not disposed to make justice or natural law or reason the fundamental limit on the power of Princes because the philosophical foundation of law interests him very little. Occasionally he does say that the law is “the expression of justice and of the common good” or that the law has as its object the creation among citizens of an equilibrium conforming to the common good of the city. His real emphasis, however, is upon another characteristic of law: its coercive force. Just or iniquitous, conforming to the common good or not, a rule becomes law if it is sanctioned by force. Law, according to Marsiglio, is that which one does if one does not wish to be hanged.

In this respect, the authorities on Marsiglio are divided as to his ultimate meaning. Gewirth paints him as the founder of the positivist philosophy of law. Others claim that Marsiglio did nothing more than continue the same tradition as his predecessors, but with a new formula of the juridical order. Both of these views warrant examination in some detail.

51. In duodecim libros Metaphysicæ juxta Aristotelis et magni commentatoris intentionem I, II, q. XI, f. 34 (Vienna 1554).
52. Defensor Pacis, supra note 4, at I, x, 3, 4; I, xii, 2; I, xi, 3.
53. Id. at I, v, 7.
54. Id. at I, x, 5; II, viii, 5: “preceptiva et transgressorum coactiva supplicio sive pena pro statu presentis seculi tantum.”
55. Id. at I, xii, 2.
Gewirth claims that the positivist philosophy of law of Marsiglio is opposed to the Augustinian and Thomastic tradition of the West. Thus, instead of subordinating positive law to a transcendent law, Marsiglio envisioned law as a free creation of man born of the necessity of living in society. Man creates and enforces law because it appears useful to him and appropriate to his needs, not because it is an expression of natural law or right reason. Men know that law will be respected only if it is applied by a constraining force. Men give law this coercive force. The essence of law is not to be just but to be desired by a people. Once desired, the law will be endowed by the people with constraining sanctions. This endowment does not mean that law is arbitrary or that it is pure violence. Why? Law is not arbitrary because it is rooted in the popular will, which by “biological determinism” always coincides with that which is useful for the city. Neither is the law violence, because it emanates from the general will which accepts it. In reality, law constrains only those persons who are not sufficiently attuned to the social good. Marsiglio refuses to make justice essential to law because such a requirement would open the way to the consequences of papal interference and anarchy.

The view of Johannes Heckel stands in opposition to that of Gewirth. It must be remembered, says Heckel, that Marsiglio wrote that a perfect law ought to be inspired by an “exact knowledge of the just man and of justice.” Marsiglio boldly proclaims that it is the people who are better able to distinguish the just from the unjust. Marsiglio protests the fullness of the power of the pope, who may impose his own prescriptions without regard to “right reason.” Thus, for Heckel, there are various strands in Marsiglio that have to be reconciled: the voluntarist character of law, the exaggeration of the role of the coercive power, and a misunderstanding of the natural law. These seemingly divergent strands, however, can be harmonized into a total system resembling that of the Christian Aristotelianism of his day. Thus, says Heckel, according to Marsiglio,

56. As used here, “biological determinism” refers to the fourteenth century concept of the body politic, which, as a whole, represents the popular will. That which is best for the body politic in a sense biologically determines the will of the people, which is ultimately expressed in positive law.
57. GEWIRTH, supra note 4, at 132-52.
58. Id. at 144.
man is directed by God in a double way, by the revealed law and by right reason, whose expression is contained in the popular will.  

Elements of the truth are contained in the views of both authors. Marsiglio, not being a great systematizer, often put down contradictory assertions without attempting to reconcile them. To emphasize only one aspect of Marsiglio’s thought does violence to his total thought. Thus, Gewirth is correct when he suggests that, if Marsiglio had been totally logical with his juridical positivism, he would have proclaimed that the law is the arbitrary will of the people, sanctioned by the coercive authority which the people give it. It is rather evident that Marsiglio never went so far. The comparatively few passages that are cited to support this position of the absolute autonomy of the will of the legislator cannot obviate the values that Marsiglio consecrated to an establishment of an enduring legal system approaching perfection: justice. Nor can the passages explain away his continuous preoccupation with seeking in divine law an argument to reinforce man’s obligation to submit to civil laws. Indeed, says Marsiglio, in case of conflict between divine and human law, the first to be preferred over the second. This thought is not that of a strict juridical positivist.

Marsiglio’s positivism is therefore more intuitive than carefully structured. He did not trace his fundamental concepts to their logical conclusion to determine what kind of society they would produce in the extreme. He never reduced law to an expression of an arbitrary will having the necessary force to be respected. While Marsiglio thought that law is, or should be, the expression of the will of the people, he also believed that the law should be “just and conformed to the common good.” Admittedly, all of these thoughts

60. Gewirth, *supra* note 4, at 152: “[T]he explicit will of the whole people, and not rules of right reason supposedly apprehended by each person, is to be the check upon the legality of laws.”
62. Id. at II, ix, 12: “regule talium actuum commensurative ad proporcionem, quam volunt homines . . . .”
63. Id. at I, x, 3; I, xii, 2; I, v, 7; I, xii, 8.
64. Id. at II, xii, 9: “Verumptamen licitum et illicitum simpliciter attendenda sunt secundum legem divinam pocius quam humanam, in quibus dissonant praeceptis, prohibitis aut permisissis.”
are not easily integrated into one logical and consistent theoretical system. Hence arises the uneasiness of the natural law theorist.

Gewirth asserts that this paradoxical thought of Marsiglio can be understood in the context of an awareness that the philosophical basis of Marsiglio's political and legal thought is determinism. At the core of determinism, Gewirth reminds us, is the idea that man is not free. Man is inserted into a whole process which he has created but of which he is not the master. Justice and common utility are nothing but the expression of this determinism. The people are inexorably driven by a secret force which is infallible; the people, therefore, are incapable of arbitrary action because they can never will anything but what we call justice. On its face, this view of Gewirth's is self-contradicting.

This view is ingenious, but unfortunately it cannot be found in the Defensor Pacis. Gewirth's concept of determinism is at odds with Marsiglio's view of human acts. Among the primary classifications of human acts that Marsiglio posits are two that merit attention: "commanded acts" and "noncommanded acts." The noncommanded acts are imposed upon man by nature and guide his vegetative and animal life. The city tempers, perfects, and sustains these acts. Man has no control over some of these acts, although there are others over which he does exercise a degree of choice. This freedom is crucial to Marsiglio. He admits that certain ideas and images, like some appetites, escape human power. For Marsiglio, however, man possesses some limited ability to pursue or control them; he can obey them or disregard them altogether. In Marsiglio's view, "according to the Christian religion, we are entirely free in our conscious acts and we can even voluntarily develop habits that protect us against involuntary appetites." Thus, Marsiglio confirms this Christian concept in many passages in the Defensor, where Marsiglio states that the acts commanded by the law are freely done by the human will, that man alone has control over his acts, that the will is free

66. See Gewirth, supra note 4, at 57, 208. One is reminded of Hegel's famous adage: "Weltgeschichte ist Weltgericht."
67. Defensor Pacis, supra note 4, at I, v, 4: "Accionum autem humanarum et suarum passionum quedam proveniunt a causis naturalibus preter cognitionem, quales fuinit per elementorum contrarietatem, nostra componencium corpora, propter ipsorum permixtionem." See also id. at II, viii, 2.
68. Id. at II, viii, 3.
69. Id. at II, xiii, 9.
and active,\textsuperscript{70} that our acts and passions are voluntary, and that, finally, only free acts interest the legislator.\textsuperscript{71} This view is far from the determinism that Gewirth sees in Marsiglio.

For example, this freedom of the human will is critical to Marsiglio's discussion of voluntary poverty. Poverty, he says, is meritorious only if it is the product of free human choice. Voluntary poverty exists only so long as the individual has no intention of being the owner of anything and no intention of vindicating possession by others in justice. The whole theory of poverty, an important element in the work of Marsiglio, rests not on determinism but on an act of human will.\textsuperscript{72}

Throughout the \textit{Defensor Pacis}, Marsiglio says that "according to the Christian religion the will is free." In order to brand Marsiglio's work as "determinist," as does Gewirth, either these many passages must be ignored or Marsiglio must be branded a hypocrite. Neither alternative is tenable. The fact is that, without this human freedom, Marsiglio's whole legal system crumbles. Violence must be done to his thought to draw the opposite conclusion.

On the other hand, it is equally difficult to accept Heckel's characterization of Marsiglio's work as a more or less clear reflection of Christian Aristotelianism in line with the classical authors of Thomas Aquinas, Albert the Great, Giles of Rome, and Ptolemy. These Christian authors were all of one mind in declaring that the only thing to be respected in a law—any positive law—is its conformity to right reason, to justice, and to the natural law.

This kind of justification of law does not appear in the work of Marsiglio. Heckel is correct in pointing out that some of Marsiglio's texts state that law is the expression of justice and of the common good.\textsuperscript{73} Specifically, Marsiglio wrote, "Art and reason are both necessary for the discovery of the law,"\textsuperscript{74} but these passages do not go so far as to make the \textit{recta ratio} the norm of law for Marsiglio, as Heckel

\textsuperscript{70} \textit{Id.} at II, viii, 5.
\textsuperscript{71} \textit{Id.} at II, ii, 4: "in ipsius potestate existencia . . ." "humanis accionibus et passionibus voluntariss et transeuntibus . . ." See also \textit{id.} at II, xiii, 1.
\textsuperscript{72} See \textit{id.} at II, xiii, 14. See also \textit{id.} at II, xiii, 8: "paupertas spontaneam . . . non est virtus aut eius opus sine eleccione, eleccione vero non sine consensu . . . ."
\textsuperscript{73} \textit{Id.} at I, x, 2, 3; I, x, 4; I, xi, 3.
\textsuperscript{74} \textit{Id.} at I, ii, 3; I, xv, 6: "in civitate convenienter instituta secundum racionem . . . ."
suggests. Marsiglio, unlike the classical authors, never defines the ideal law as that which is derived from the imperative of right reason or the natural law. Moreover, Marsiglio refuses to cite natural law as a justification for positive civil law because natural law seems to him rather amorphous and equivocal.

Implicit in Marsiglio's recognition of two fundamental systems of law—divine law and human law—is a rejection of the third system of law generally included in the traditional categorization: natural law. Marsiglio discounts the concept of natural law because the precepts that are generally considered "natural" are not recognized by all nations. Given this lack of uniformity, he refuses to assimilate so-called natural law into divine law because of natural law's disruptive influence on the synchronization between the precepts and prohibita of both divine law and human law.

This concept has a profound significance. It is an original position vis-a-vis the traditional authors, especially in the relationship between justice and law. For Marsiglio, the licit is defined uniquely with reference to the two positive laws which he recognizes. All that is ordered or permitted by one of these laws is licit with regard to one or the other. The licit of one does not necessarily coincide with the licit of the other. In case of open opposition, he says, the Christian will prefer the divine law to human law. Beyond recognition of this preference, however, no guidance may be sought from some alleged system of natural law.

The positivism of Marsiglio is evident, and within this limited context, it is true to say that he is one of the first juridical positivists in a long tradition to follow. Although he did not follow the positivist theory to its logical conclusions, it is not possible to deny that the positivist ethic permeates the work of Marsiglio.

As discussed above, Marsiglio does not envision positivist law as a totally arbitrary exercise of the human will or of the will of the people. Contrary to tradition, however, his assertion was not that

75. Heckel, supra note 59, at 323.
76. Defensor Pacis, supra note 4, at II, xii, 6: "Multa enim sunt secundum (recte) racionis dictamen, ut que videlicet non omnibus sunt per se nota et per consequens neque confessa, que non ab omnibus nacionibus concedantur tamquam honesta."
77. Id. at II, xii, 8.
78. Id. at II, xii, 5, 6.
79. See text accompanying notes 57 & 60-64 supra.
the fundamental criterion of human law is the *justum* but that human law is law because it is sanctioned by political authority. This concept of law is distinctly modern in flavor, and it is this concept of civil law which is embodied in all modern state constitutions and legislative enactments.

Admittedly, this original concept of civil law is at variance with some passages found in Marsiglio's work containing comments on the relationship between law and justice. However, it must be recalled that even truly original ideas are products of their times and are therefore bound to be contaminated partially by the traditional thinking on the subject. In studying Marsiglio's concept of the law, the important thing is to remember and develop this original thinking and justification of civil law, because this concept will become the basis of law in the modern civil state. This original concept, therefore, warrants closer examination.

To illustrate the inadequacy of the concept of natural law, Marsiglio points out that there are certain laws in barbarian countries that are regarded by civilized nations as unacceptable. Yet, such laws are nevertheless true laws because they are sanctioned by coercive authority. Marsiglio embraces Aristotle's belief that the good and the just over which the government has charge are a product of good and just laws and not of nature. This belief means "that men do not pass laws so as to conform themselves to an imperative of nature, but because it appears to them just and the contrary, unjust." Neither right reason nor divine law are the foundation from which the legal system flows. The most that the human legislator can hope to gain from right reason is the preservation of his power over the civil sphere. Divine law must be respected and may be consulted for its moral principles. Beyond this role, there remains a vast domain given over to the free judgment of men.

In order to make good law, in Marsiglio's view, men must make use of art, experience, and human reason. They must formulate

80. See, e.g., notes 60-64 supra.
81. Defensor Pacis, supra note 4, at I, x, 5.
82. Id. at I, xiv, 4: "[U]t videantur sola lege esse, non natura, id est, quia sic velint homines de ipsis statuere, non quia ipsorum agibilium natura determinata sit, ut videlicet hoc quidem sit iustum, illud vero injustum . . . ." This directly contradicts St. Thomas in his In Eth., supra note 19, at L.V, 1.XII, n.1018.
83. Defensor Pacis, supra note 4, at II, xxx, 8.
84. Id. at I, iii, 4; I, iv, 2, 3; I, xv, 6.
"a judgment [based] on that which is civilly just and useful and that which contradicts it." This judgment forms a foundation for the drafting of laws to govern civil society while it justifies the intervention of wise men in the formulation of new laws. Finally, the evolution of this judgment explains the role reserved to the Prince to correct the laws when they are insufficient or when unforeseeable results are produced (epikeia). This view is a very far cry from the traditional scholastic notion of the subordination of human law to right reason.

Moreover, Marsiglio's thought distinguishes itself from much of the traditional thinking on law by its emphasis on the sanction or vis coactiva, as the essential characteristic of human law. To be sure, other scholars recognized the coercive aspects of law; Thomas Aquinas, for example, introduced the concept of force in law only indirectly in his definition of law. Thomas states that law will have, by its nature, and must have, for its operation, a coercive force. Thomas clearly teaches that as "there are recalcitrants of vicious disposition who are not easily convinced by words, it is necessary that they be turned away from evil by force and fear . . . . It is the discipline constrained by menace of punishment which is the discipline of the laws." Giles of Rome also recognized that for a law to be human, it must have a "coercive power." Thus, Marsiglio's originality is not his recognition of an evident truth about

85. Id. at I, x, 4: "ordinacio de justis et conferentibus et ipsorum oppositis per prudentiam politicam . . . ."
86. Id. at I, xiii, 8.
87. Id. at I, xiv, 5. See text accompanying note 46 supra.
88. Even Heckel half agrees. See Heckel, supra note 59, at 320.
89. DEFENSOR PACIS, supra note 4, at I, xiii, 8; II, v, 6; II, viii, 4; II, xii, 3, 39: "lex autem proprie summpta praecipient coactivum est de fiendis aut ommittendis humanis actibus sub poena transgressoribus infligenda."
90. SUMMA THEOLOGICA, Ia IIae, q. 90, a. 4.
91. Id. at Ia IIae, q. 90, a. 3: Here Aquinas clearly says that the orders of a private person "non habent vim coactivam quam debet habere lex ad hoc quod efficaciter inducat ad virtutem." See also In Eth., supra note 19, at I, 9, n.2159.
92. SUMMA THEOLOGICA, Ia IIae, q. 90, a. 3. In this same passage, Thomas also makes it clear that, because the force of law is actually imposed on very few, such coercive force is not enough for the proper definition of civil law. For the vast majority of citizens who do not directly encounter the coercive aspect of law, civil law represents a guide to human behavior. Viewed as a guide in life, civil law shares with divine law its fundamental power over human affairs. See id. at Ia IIae, q. 96 a. 5, ad 3.
93. De Regimine Principum, I, III, 2a c. 27 & c. 1, 527 & 452 (Mathis ed. 1948).
the coercive dimension of law but his elevation of the coercive aspect, among all the characteristics, to the most important dimension of human law.

Law, for Marsiglio, must have coercive force, otherwise it is not law. The people, as the creators of civil law, must necessarily be the enforcers. It is the treat of civil punishment which gives to law its coercive power, and it is the people, and only the people, who are capable of meting out civil punishment. Thus, the coercive power of law resides exclusively in the people. The divine power finds no place in the equation. This idea was new in political and legal thought with regard to Aristotelian philosophy. For Marsiglio, it is the people alone who have the mission "to command with coercive force" and to impose sanctions on the disobedient by exclusive authority. In this respect, Marsiglio relies on the Roman tradition, which demanded of all citizens the respect of the majestas of the people. Ultimately, all persons answered to the majestas, including the magistrates, who were required to rule under its aegis in order to exercise any legitimate authority. In accordance with previous Roman tradition, Marsiglio demands that all law be promulgated, that every sanction be pronounced, and that every delegation of power be made "by the authority of the people." This series of demands is nothing more than the absolute sovereignty of the nation-state.

Marsiglio was careful to distinguish between law and justice. Justice was not law unless it was imposed by force on those persons who might disobey its principles. Only the people in globo have the moral power to assert the rule of justice and to delegate it to others, always under the authority of the people. Despite other inconsistencies, Marsiglio never waivered from this position in his work.

That this coercive rule be "just," because such is the arbitrary will of the people or because the people necessarily see what is just, is a philosophical paradox in Marsiglio's framework. He felt no need to choose between these positions nor did he attempt to synthesize them into a consistent theory. The coercive authority, as distinguished from justice, was the foundation of the human legal system for Marsiglio. Law was that which must be obeyed if the city was to have unity and peace. Whether this coercive authority was to

94. DEFENSOR PACIS, supra note 4, at I, xiii, 8; I, xii, 6.
be exercised by delegation, by the Prince, or by elected representatives was a minor detail for Marsiglio. As R. Scholz expressed it: "The people must not govern but it is they who must authorize the governors. The theory of popular sovereignty that one usually imputes to Marsiglio is nothing more than this." 95

This analysis is certainly weak from a constitutional as well as from a philosophical point of view. It did give, however, a firm foundation to civil government and civil law, essential to combat the demands and interference of the disintegrating pontifical power which threatened the pax civilis. In redefining the traditional moral foundation of law, Marsiglio barred the pretensions of the spiritual power and its claimed authority to control the moral value of laws passed and approved by the civil authority. 96 By stressing the coercive nature of law as its essential characteristic, Marsiglio foreclosed the priests from legislating. The priesthood has never had the power, in any of the legal theories, to coerce. The divine law which the priests defend imposes on them the duty to obey the coercive civil law which civil society promulgates. Civil law could be rendered impotent if its force could be abrogated by the moral authority of divine law. Thus, Marsiglio subordinated the role of divine law to the universal rule of civil law in the human sphere.

Marsiglio’s theory of the legal order makes good sense today, and it was especially timely in an age when civil government and its laws were struggling for independence from the forever encroaching pontifical authority. These arguments erected a philosophical barrier against the intrusion of the priesthood into the proper life of the city and civil government. These views of Marsiglio would eventually be accepted by most modern states as the cornerstones of their legal systems. Marsiglio can truly be called the father of the modern legal system.

Conclusion

The study of Marsiglio is valuable from two different perspectives: one from the point of view of church-state relations and their

95. *Marsilius von Padua und Deutschland*, in *Defensor Pacis*, supra note 4, at 34.
96. See the interesting comment of Gewirth, supra note 4, at 144: "[W]hy does Marsilius refuse to make justice essential to law? It is not too difficult to surmise the consideration underlying this refusal, on the basis of the doctrinal and institutional developments of his time. Such essentiality would open the way to the consequences of papal interference and anarchy."
history and the other from the perspective of the evolution of positive law as independent in its own domain from that of "natural" law.

Through the eye of either perspective one observes the birth of the modern secular state, from its separation from the sacred power to its implementation by human, positive law. It is difficult for people living in a constitutional democracy some five and a half centuries after the writing of the *Defensor Pacis* to appreciate the revolutionary impact of Marsiglio's doctrine. His work was the first theoretical and comprehensive treatment of these doctrines in the modern age. Marsiglio's thought represents the first truly modern formulation of positive law and its struggle to be independent from natural and divine law. Marsiglio formulated and codified in the fourteenth century what the Roman Jurists began exploring in the two preceding centuries. For the study of both legal history and church-state relations, Marsiglio is an indispensable source and guide. It is easy to underestimate his work; in truth, however, it lies at the foundation of the modern secular state and human positive law. Western constitutionalism owes much to both English common law and Marsiglio of Padova. Indeed, the struggle in American law during the eighteenth and nineteenth centuries between the ideal of the "natural" law and the reality of the positive law (particularly with regard to slavery) was similar to the doctrinal struggle Marsiglio encountered in the fourteenth century.

Thus, the study of Marsiglio is not an exercise in estoteric scholarship for musty historians; the thinking American lawyer faces daily the same problem of the relationship between law and the dictates of morality (or "natural" law). The problem endures and the study of Marsiglio can help us appreciate its depths, its agonies and—its excitement.