ANGELS, DEMONS, US: RECONCILING RAZ AND AQUINAS ON THE COORDINATIVE FUNCTION OF LAW

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ABSTRACT

Contemporary legal theorist Joseph Raz claimed that, in a society of angels, there would still be need for law. This article will trace the history of this thought experiment back to the works of the medieval theologian St. Thomas Aquinas on the divine government and the society under the state of innocence. Despite writing centuries apart and belonging to the rival legal positivist and natural law jurisprudential traditions, both thinkers, quite surprisingly, agree that imagining a society of virtuous beings matters not only for recognizing the necessary coerciveness of law, but also its coordinative function. While disagreeing on the nature of law, Raz and Aquinas equally recognize the practical indispensability of legal rules even in a government of morally perfect beings and would also do so when it comes to its opposite—a society of demons. That this shared insight is not undermined by where Raz and Aquinas diverge is further proven when it comes to applying their theories when discussing the need for laws' coordinating ability in atypical settings, such as post-legal societies, wicked regimes, extraordinary measures, and international law.

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INTRODUCTION

"If men were angels, no government would be necessary."[1] So claimed James Madison in Federalist 51. The very existence of government, in his words, was a "reflection on human nature."[2] Specifically, man's hunger for power, the urge that makes the strong oppress the weak. Thus, the government exists to further justice and must restrain ambition to do so. I submit that Madison was wrong. His idea is successfully challenged by the legal philosopher Joseph Raz in his famous "society of angels" thought experiment. There, Raz claimed that, while there would be no need for legal coercion in a society of virtuous beings, law in this society would still be possible and, even more so, necessary, in part because it resolves issues of expertise, coordination, and efficiency.[3] Broadly speaking, this is law's coordinative function.

In this paper, I show that Raz's contribution was anticipated centuries before by comparing, for the first time, Raz's account of the angelic society to the medieval theologian St. Thomas Aquinas's unexplored but much more elaborate discussion of law in the divine government[4] and mastership of men over men in the state of innocence.[5] Even though I recognize that Aquinas's concept of law differed drastically from Raz's (Part I), I nonetheless argue that the thinkers' reasoning as to whether a society of perfectly virtuous beings needed law was strikingly similar. Like Raz, Aquinas relied on the coordinative function when explaining the need for law in the societies of angels and, even more strongly, men in the state of innocence (Part II). Next, I add to the society of angels thought experiment by reconstructing, also for the first time, what Raz and Aquinas would think about a converse society of demons. Unlike when it comes to the society of angels, only Raz would find law proper there, with Aquinas recognizing the existence of only rules that are law-like in the "secondary" sense in such a setting. Nevertheless, both thinkers acknowledged that demons would find the opportunities provided by these rules' coordination function—providing solutions to not just issues of coordination, but also prisoners' dilemmas—attractive (Part III). Finally, I demonstrate that Raz's and Aquinas's shared insight about the practical indispensability of law for coordinative purposes

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1. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).
2. *Id.*
3. JOSEPH RAZ, PRACTICAL REASON AND NORMS 159–60 (1999).
4. THOMAS AQUINAS, SUMMA THEOLOGICA pt. I, q. 108, art. 1 (Fathers of the English Dominican Province trans., 1947), https://aquinas101.thomisticinstitute.org/st-index. I argue that it is not necessary to believe in the existence of angels to find value in Aquinas's "political angelology," as Aquinas uses angels in part to teach about men. I thank Professor Ryan Meade for this idea.
5. *Id*. at pt. I, q. 95, art. 4. I thank Professor Adrian Vermeule for alerting me to this comparison.

transcends their differences, by exploring the indispensability of coordination through legal means in atypical settings: post-legal societies, wicked regimes, extraordinary measures, and international law (Part IV).

I. LAW

To start, one needs to distinguish the concept of law used by Raz from the one adopted by Aquinas. "Put in a nutshell," Raz states, law "is a system of guidance and adjudication claiming supreme authority within a certain society and therefore, where efficacious, also enjoying such effective authority."[6] Aquinas, on the other hand, defines a law as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[7] Aquinas's definition is in one sense narrower, but in another sense broader than the one suggested by Raz. Firstly, Aquinas is narrower in that, while Raz only looks at positive criteria (systemic character, relatedness to guidance and adjudication, claim to supreme authority, and efficacy), he adopts a normative check by looking at whether the promulgated ordinance is reasonable and oriented towards the common good. As a result, some of the rules recognized as legal by Raz would not be considered as such, at least in the focal sense, by Aquinas.[8] Secondly, at the same time, Aquinas recognizes several different types of law—eternal, natural, divine, and human. Eternal law is the order of things according to God's plan.[9] Natural law is the "participation of the eternal law in the rational creature"[10] including angels and humans. Divine law contains rules given to us by God.[11] Human (or positive) law is created by humans to better realize the precepts of natural and divine law in human affairs.[12] These are not just different senses in which the word "law" can be used, but elements of the same larger normative system, brought together by a combination of divine providence and practical reason, that human (positive) law is only one part of. Therefore, under Raz's conception of law, only human

6. JOSEPH RAZ, *Legal Positivism and the Sources of Law*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 43 (1979).

7. AQUINAS, *supra* note 4, at pt. I-II, q. 90, art. 4.

8. *See* AQUINAS, *supra* note 4, at pt. I-II, q. 92, art. 1, ad. 4; *see also* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 264 (2011). "Focal meaning," a device John Finnis borrowed from Aristotle, attends to more straightforward instances of a phenomenon, while "secondary meaning" is the "lowest common denominator" uniting both central and more problematic cases. For instance, to follow the Aristotelian example, the focal meaning of friendship is one where one has the best interests of another in mind, but the secondary meaning of friendship will include friendships made for convenience or pleasure. *See* FINNIS, *supra*, at 9–11. I will be returning to it again further on in Part IV.B.1.

9. AQUINAS, *supra* note 4, at pt. I-II, q. 91, art. 1.

10. AQUINAS, *supra* note 4, at pt. I-II, q. 91, art. 2.

11. *Id.* at pt. I-II, q. 91 art. 4.

12. *Id.* at pt. I-II, q. 91, art. 3.

(positive) law would be seen as law proper, as "legal systems contain only those standards which are connected in certain ways with the operation of the relevant adjudicative institutions."[13] Both divine and eternal law are outside Raz's theoretical ambitions as, in his work, he does not recognize the world as operating in accordance with the divine providence. Moreover, he characterizes natural law as "social rules and conventions" or "morality"[14] rather than law proper, while to Aquinas natural and positive law are united by practical reason.

II. ANGELS

With all this in mind, one may be surprised that such radically different thinkers came to similar conclusions when it comes to law in the society of morally perfect human beings. According to both Raz and Aquinas, said "angels" still need law as they need to coordinate themselves in pursuit of their ultimate aims.

A. Raz and Law in the "Society of Angels"

I will start by outlining Raz's "society of angels" thought experiment from his *Practical Reason and Norms*. In order to claim that coercion is not a necessary feature of law, Raz imagines a society of "rational beings . . . who have more than enough reasons to obey the law regardless of sanctions."[15] They are not "self-denying saints" and "pursue their self-interest when they think they are right to do so", and they "may be wrong."[16] In such a "society of angels," he adds, there will still be law, even though it would not be coercive.

Firstly, "angels may be in disagreement both about their values and the best policies for implementing them."[17] The legislature and the executive, therefore, would be necessary to issue rules and regulations that ensure harmony between these varying directions in which angels navigate their lives.[18] This line of argument tracks Raz's normal justification thesis, stating that practical authority, the ability to create reasons for action or impose

13. JOSEPH RAZ, *The Obligation to Obey the Law*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 233 (1979).

14. *Id.*

15. RAZ, *supra* note 3, at 159.

16. *Id.* at 160. Raz likely meant that they could be wrong not about moral matters, but about factual matters, even though, of course, factual errors might make these beings behave in a way which would be morally wrong. I thank Angelo Ryu for pressing me on this point.

17. *Id.* at 159.

18. *Id.*

duties[19] like a lawmaker does, is justified when the alleged subject can comply with reasons which apply to him (other than the alleged authoritative directives) better if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him independently.[20]

The normal justification thesis can work in practice by solving the problems of expertise, coordination, or efficiency.[21] In the first place, it will work because of the superior expertise of authorities compared to individuals under their command, broadly construed. For instance, an authority can possess superior knowledge—such as when it comes to regulation of dispensation and use of dangerous materials[22]—be less biased and prone to passions, exceed in available resources, or be better at indirect strategy or more complex planning.[23] In the second place, the normal justification thesis will hold when it comes to coordinating for shared activities—which is more explicitly seen in the case of game-theoretical coordination problems[24]—games in which players win if they choose to do the same thing, regardless of what it might be.[25] Borrowing an oft-quoted example: suppose car owners in a city need to decide whether to drive on the left or the right side of the road.[26] In this context, "deciding for oneself what to do causes anxiety, exhaustion, or involves costs in time or resources,"[27] so there should be some indication as to how to behave. This, among other options—such as developing a custom—can be achieved by a directive issued by an authority to this effect. This directive would not need to be coercive, as we take the participants in the coordination problem as

19. As contrasted with theoretical authority – the ability to create reasons for belief by giving expert advice. *See* JOSEPH RAZ, *Authority, Law, and Morality, in* ETHICS IN THE PUBLIC DOMAIN 211–12 (1995).

20. JOSEPH RAZ, THE MORALITY OF FREEDOM 53 (2003).

21. A classification also made in Larry Alexander, *"With Me, It's All Er Nuthin'": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 534 (1999).

22. This example is given in Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003, 1014 (2006).

23. This is roughly adapted from the list of reasons in RAZ, *supra* note 19, at 75. Later on, Raz claimed that expertise is relevant to practical (as opposed to theoretical) authorities "only when it is mixed with other considerations, such as need for coordination, for concretizing indeterminate boundaries, and the like." Joseph Raz, *On Respect, Authority, and Neutrality: A Response*, 120 ETHICS 279, 301 (2010).

24. I distinguish coordination in this narrower sense from coordination broadly speaking, specifically as encompassing expertise, coordination of shared activities, and prisoners' dilemmas. I shall indicate it further on in the paper by talking about "coordination of shared activities" and "coordination" respectively.

25. JOHN FINNIS, *Law as Coordination*, *in* PHILOSOPHY OF LAW: COLLECTED ESSAYS 67 (2011).

26. This example is given in Scott Shapiro, *Authority*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 400, 400–01 (Scott Shapiro & Jules L. Coleman eds., 2002).

27. RAZ, *supra* note 19, at 75.

being equally invested in all possible courses of action equally and would be happy with any choice the authority makes. In the third place, one can draw on Larry Alexander's extension of Raz's theory to the question of efficiency brought by authoritative settlement, claiming that "[e]ven if members of the community could, through lengthy deliberations, arrive at coordinated and correct decisions, the moral cost in terms of time and other resources devoted to such deliberations might outweigh the moral gains."[28]

Secondly, a society of angels will need to have courts for two reasons. One is to resolve disputes about the interpretation of the rules they are subject to.[29] The other is to exercise discretion when "[t]he law rules out certain solutions but does not decide between some other possible solutions."[30]

Thirdly, since accidental damage can occur even in this community due to angels' "misapprehend[ing] the facts or misinterpret[ing] the law"[31] (as they can, on Raz's conception, "be wrong"), laws will be needed to create a system of remedial rights and duties.[32]

B. Aquinas, Divine Government, and Mastership in the State of Innocence

Aquinas accepts Raz's argument for law's relevance even in a society of virtuous beings—that legal rules help them sort out their affairs—in his discussion of the angelic government and the society in the state of innocence. Unlike Raz's portrayal of a society of angels as merely a thought experiment, Aquinas's *Summa Theologica* is a work of theology, or study of the divine, that takes the existence of angels as part of the natural world as revealed by God and contemplated through reason. Even though Aquinas's angels are similar to Raz's in that they are by their nature benevolent in the sense of being incapable of sin,[33] the former differ from the latter in other ways. Angels in Aquinas's theology are incorporeal,[34] subsisting without matter. As a result, they do not have bodies,[35] are not vulnerable to human passions, or sensual appetites, and only possess a will,

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28. Alexander, *supra* note 21, at 536.
29. RAZ, *supra* note 3, at 159.
30. *Id.*
31. *Id.* at 160.
32. *Id.* Further, Raz considers whether these remedial measures would be coercive.
33. AQUINAS, *supra* note 4, at pt. I, q. 62, art. 8.
34. AQUINAS, *supra* note 4, at pt. I, q. 50, art. 1.
35. *Id*. at pt. I, q. 51, art. 1. They, however, may assume bodies when appearing before humans. *Id*. at pt. I, q. 51, art. 2.

or intellectual appetite.[36] This intellect manifests in love and is grounded in knowledge. Aquinas states that angels love God more than they love themselves and ultimately direct their actions towards Him as the ultimate end rather than their private good.[37] Moreover, angelic intellect is superior to that of humans as they do not gradually acquire knowledge. Rather, God impresses onto the angelic mind the entirety of the knowledge needed to perform its respective functions at its creation.[38] Therefore, angels cannot be self-interested or wrong,[39] except in the moment of angelic choice, when some of the angels rejected God and became known as demons.[40]

Still, even Aquinas's angels need the authority of law to better "know[] and lov[e] God by natural knowledge and love",[41] despite surpassing the beings in Raz's thought experiment in intellect and virtue. One can argue that angels cannot achieve better knowledge of God by being subjected to authority, as it is a substitute for understanding rather than something that gives understanding.[42] However, "understanding" does not necessarily refer to "autonomous reflection," as it can be gained from following the instructions of a superior, especially if they are better placed to assess the situation at hand.[43] A student can, for instance, achieve greater understanding of the class material if they follow instructions of the teacher. In this vein, Aquinas clearly believes that this understanding is impossible if angels do not form a hierarchical relationship with one another. Building on Pseudo-Dionysius's "Celestial Hierarchy," [44] Aquinas contends that angels are ranked according to their abilities[45]—namely, the higher angels possess more universal concepts than lower angels, making them better equipped to know things outside of themselves.[46] For example, "what a superior knowledge grasps *in one glance* through the idea of 'animal,' . . . an inferior angel grasps through several ideas, such as the ideas 'bird,'

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36. Which means that they can experience "emotions" like love, joy, and sorrow only through intellect and not passion. *See* AQUINAS, *supra* note 4, at pt. I, q. 59, art. 1, art. 4. *See* ROBERT C. MINER, THOMAS AQUINAS ON THE PASSIONS: A STUDY OF SUMMA THEOLOGIAE 1A2AE 22–48, at 36–37 (2009).

37. AQUINAS, *supra* note 4, at pt. I, q. 60, art. 5. As explained in SERGE-THOMAS BONINO, ANGELS AND DEMONS: A CATHOLIC INTRODUCTION 163–64 (Michael J. Miller trans., 2016). As will be explained in Part II.C.4, this is not unique to angels, but natural to all beings.

38. AQUINAS, *supra* note 4, at pt. I, q. 55, art. 2.

39. *Id.* at pt. I, q. 58, art. 5. This only applies to the sphere of his natural knowledge, but not supernatural truths. BONINO, *supra* note 37, at 151.

40. A more detailed discussion of demons will appear later in Part II.

41. AQUINAS, *supra* note 4, at pt. I, q. 108, art. 4.

42. I thank Dr. Lars Vinx for this potential counterpoint to my argument.

43. I thank Dr. Alex Green for this point.

44. DIONYSIUS THE AREOPAGITE, WORKS 120–24 (John Parker trans., 1897), https://www.documentacatholicaomnia.eu/03d/0450-0525,_Dionysius_Areopagita,_Works,_EN.pdf.

45. AQUINAS, *supra* note 4, at pt. I, q. 108, art. 1.

46. *Id.* at pt. I, q. 55, art. 3.

'reptile,' 'amphibian.[47]'" Such hierarchy is necessary as, in order to further their plans, higher-ranking angels need to guide lower-ranking angels whose intellect is weaker.[48] This line of thinking roughly corresponds to Raz's description of expertise. Angels' guidance is law under Aquinas's definition,[49] as it uses the authority of higher angels ("made by him who has care of the community") to direct lower angels towards their proper end ("an ordinance of reason for the common good"). As a result, angelic guidance is analogous to human positive law—law promulgated by humans, as it is a means by which angels organize themselves to carry out the precepts of natural law—law by which humans operate as a species.[50] It is no wonder that Aquinas compares the divine government to the one within an army or a state, where everyone is placed differently with regards to "the king or leader."[51]

Another passage that even better resembles Raz's "society of angels," *Summa* pt. I q. 96 art. 4,[52] deals not with angels, but with men—albeit "in the state of innocence," or before the Fall of Man (original sin).[53] These men are more similar to Raz's "angels" than to the disembodied beings discussed in the paragraphs above, as they are indistinguishable from humans after the Fall in everything but their disposition. Without discovering sin, men, naturally loving God more than themselves,[54] would have no motivation to refuse to act virtuously, making coercion redundant. Aquinas argues that even in this state, man would have been "master over man."[55] This does not mean slavery, or one man using another for his own gain—which is impossible in the world devoid of sin, but "directing him . . . towards his proper welfare, or the common good."[56] In this way, since some angels rule over others, as explained above, to better serve God, so do humans, to approach the common good. One reason is akin to the justification for a hierarchy in the angelic order. Even though, unlike angels, men are only one species, some of them "surpass[ ] [others] in knowledge and virtue." As a result, it is the more knowledgeable and virtuous men's duty to guide those

47. BONINO, *supra* note 37, at 139.
48. AQUINAS, *supra* note 4, at pt. I, q. 55 art. 3, q. 108 arts. 1, 4.
49. *Id.* at pt. I-II, q. 90 art. 4. *See also* Part I, *supra*.
50. This idea was suggested at the Thomistic Institute Study Group on the Creation, Governance, and the Angels, November 10, 2020, and further explained by Br. Nicholas Hartman, O.P. On the distinction between human positive law and natural law, see Part I, *supra*.
51. AQUINAS, *supra* note 4, at pt. I q., 108, art. 6.
52. AQUINAS, *supra* note 4, at pt. I, q. 96, art. 4.
53. Finnis refers to it as "the society of saints." JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 256 n.7 (1998).
54. BONINO, *supra* note 37, at 163. As will be explained in Part II.C.4, *infra*, this is natural to all beings.
55. AQUINAS, *supra* note 4, at pt. I, q. 96, art. 4.
56. *Id.*

who are less well-endowed.[57] This, like Aquinas's discussion of angels, corresponds to the expertise dimension of Raz's normal justification thesis—men in the state of innocence need to be guided by their betters in order to fulfill their shared goals, which, again, is better achieved via the legal form.

The other reason—that corresponds to coordination rather than expertise—builds on the differences between angels and humans. Aquinas says: "a social life cannot exist among a number of people unless under the presidency of one to look after the common good; for many, as such, seek many things, whereas one attends only to one." Common good, according to Petar Popovic, can refer to two distinct things—the common good (singular) as the *telos* of one's existence,[58] or the common good*s* (plural) or common enterprises.[59] As claimed by John Finnis[60] and Russell Hittinger, and underscored by Popovic, the latter act as preconditions for the fulfillment of the former.[61] The common enterprises, in turn, can, in most cases, be achieved only under the lead of a designated authority that helps rational beings to coordinate. As a result, one often cannot achieve the pursuit of the common good without that authority. In the same way that Raz's "angels" need legislators to structure their shared social life, men in the state of innocence require authoritative guidance to advance the common good. Even though, as Finnis notes, this passage does not explicitly state that "in such state of affairs there would be need for specifically

57. *Id.*

58. This notion of the common good will be employed further on in this paper and expanded on later on in Part II.C.4.

59. PETAR POPOVIC, NATURAL LAW AND THOMISTIC JURIDICAL REALISM: PROSPECTS FOR A DIALOGUE WITH CONTEMPORARY LEGAL THEORY 151 (2022). Popovic builds on John Finnis's and Russell Hittinger's observations to this effect. FINNIS, *supra* note 8, at 168. Russell Hittinger, *Polity in Catholic Social Doctrine: Some Recent Perplexities*, *in* RELIGION AND CIVIL SOCIETY: THE CHANGING FACES OF RELIGION AND SECULARITY 42–43 (Mary Ann Glendon & Rafael Alvira eds., 2014).

60. The "New Natural Law Theory" developed by Finnis, Germain Grisez, John Boyle, and Robert George is not infrequently criticized by Thomists for diverging from Aquinas in a number of ways. *See*, *e.g.*, Steven A. Long, *Fundamental Errors of the New Natural Law Theory*, 13 THE NAT'L CATH. BIOETHICS Q. 105 (2013); John Goyette, *On the Transcendence of the Political Common Good: Aquinas versus the New Natural Law Theory*, 13 THE NAT'L CATH. BIOETHICS Q. 133 (2013). To do this debate justice, I will focus on more uncontroversial observations made by Finnis and take note of all the divergences and points of contention.

61. FINNIS, *supra* note 8, at 168. Hittinger, *supra* note 59, at 42–43. *See* POPOVIC, *supra* note 59, at 151 (citing Hittinger).

political government or law,"[62] he states, based on Aquinas's other observations, that this argument undoubtedly still applies to legal systems.[63]

Specifically, while Aquinas's main *use* for having human (positive) laws in the current state of society is that those "prone to vice" are made to refrain from acting on their immoral dispositions for the sake of others and themselves,[64] which is redundant in the state of innocence, it is not the main *reason* for having such laws, which is its coordinative function in service of the common good.[65] As stated above, Aquinas defines natural law as the way in which human beings participate in eternal law—the plan of God.[66] Even though some opponents of natural law claim otherwise,[67] human (positive) law is not a mere copy of this natural law. There are two types of human (positive) law—one is derived from natural law as "a conclusion from premises" (for instance, that "one must not kill"), and the other "by way of determination of certain generalities" or *determinatio* (say, "the law of nature has it that the evil-doer should be punished; but that he be punished in this or that way, is a determination of the law of nature"[68]). This is because "the general principles of the natural law cannot be applied in the same way on account of the great variety of human affairs"[69] and hence *determinatio* is needed to respond "to specific coordination problems of communal life."[70] In the state of innocence, as Aquinas claims, the need for coordination will still exist, and so will laws responding to this need.

While Aquinas does not address efficiency directly in either his discussion of the angelic government or the society in the state of innocence, this argument can be implied when it comes to both. Both angels and men before the Fall want to live more well-ordered lives that will allow them to pursue their goals, and having to decide on the best course of action based

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62. FINNIS, *supra* note 53, at 248. Finnis also notes that Aquinas, without contesting, reports the Aristotelian view that there would be "no need for kings and judges" if people were disposed well enough to comply with parental admonitions and that "law is for the unjust, not the just." However, in *Summa Theologica*, Aquinas agreed with the latter only in a limited sense of AQUINAS, *supra* note 4, at pt. II, q. 96, art. 5., where "the good are not subject to the law, but only the wicked: referred to only the being coerced by law rather than said law only existing for the wicked as opposed to the good. *See also Id.* at pt. I–II, q. 96, art. 5, ad.1. For Aquinas, this coercion is only secondary, law being principally a "work of reason." Goyette, *supra* note 60, at 142. *See also* Part II.C.2.

63. As Finnis himself hints at in FINNIS, *supra* note 53, at 265.

64. AQUINAS, *supra* note 4, at pt. I-II, q. 95 art. 1.

65. I thank Br. Nicholas Hartman, O.P., for alerting me to the distinction between *reason* and *use*.

66. AQUINAS, *supra* note 4, at pt. I-II, q. 91, art. 4.

67. This point is particularly emphasized by Finnis in his response to Hans Kelsen. FINNIS, *supra* note 8, at 28–29.

68. AQUINAS, *supra* note 4, at pt. I-II, q. 95, art. 2.

69. *Id.* at pt. I-II, q. 95, art. 2, ad.3. *See also Id.* at pt. I-II, q. 91, art. 3, ad.1.

70. FINNIS, *supra* note 8, at 28; *see also* FINNIS, *supra* note 53, at 265; *see also* John Goyette describing the same rationale in Goyette, *supra* note 60, at 143–44.

on first principles will slow them down compared to having some of this intellectual work done by an authority.

Turning to Raz's second statement on law's place in a society of angels, there is also no reason a Thomistic divine government or a society in the state of innocence would not, likewise, have courts issuing interpretations of authoritative directives or discretionary judgments when they are incomplete. Aquinas himself states that while, in general, human life is better regulated by general laws rather than particularized individual decisions,[71] certain "individual facts," that cannot be dealt with by law alone, "have necessarily to be committed to judges."[72]

Finally, when it comes to Raz's third claim, it is not clear whether there would be any need for remedies to cover the aftermath of accidental damage. It is hard to imagine it in the case of angels. Firstly, as they are not embodied, it significantly lowers the possibility of their suffering any relevant damage. In addition, angels, as discussed above, possessing complete knowledge, cannot make mistakes that will lead to any such damage. Likewise, Aquinas strongly implies that while men in the state of innocence are, of course, embodied, God would have given human beings the grace to direct their own lives and the lives of others perfectly,[73] therefore making unintentional damage unlikely, if not impossible—depending on how broadly one interprets this statement.

C. Implications

The reason both Raz's and Aquinas's "angels" need law is ultimately rooted in the fact that, beyond coercion, law performs an important coordinative function that they would use, respectively, for their own private ends or the common good.

1. Law and Coercion

Both Raz's "society of angels" and Aquinas's "divine government" and "state of innocence" bear on whether coerciveness is a necessary feature of law. Raz's thought experiment was, in his words, intended to show that a legal system that "does not provide for sanctions or which does not authorize their enforcement by force" is "humanly impossible but logically

71. AQUINAS, *supra* note 4, at pt. I-II, q. 95 art. 1, ad.2.

72. *Id.* at pt. I-II, q. 95, art. 1, ad.3.

73. "[T]he first man was established by God in such a manner as to have knowledge of all those things for which man has a natural aptitude . . . [and] knowledge of . . . supernatural truths as was necessary for the direction of human life in that state." *Id.* at pt. I, q. 94, art. 3. I thank Br. Nicholas Hartman, O.P., for this idea.

possible."[74] On Lucas Miotto's exposition, this means that, to Raz, a non-coercive legal system is practically impossible "given the biological and psychological dispositions of human beings,"[75] but nevertheless theoretically "consistent with the most fundamental logical principles and categories that structure reality."[76] In other words, while it is impossible to guarantee human compliance with law without sanctions since some humans would otherwise not have sufficient motivation to obey the law, this is not true in a society where everyone wants to obey the law.[77]

Similarly, to Aquinas, angels and men in the state of innocence, being incapable of not acting virtuously, do not need to be coerced into following the law. In relation to angels, law without coercion remains not only a logical, but also a practical possibility. However, when it comes to men, after the Fall, the state of innocence no longer exists. The Original Sin, at least on the interpretation that Aquinas accepts,[78] means that human beings may become prone to vice. Therefore, coercion through law is required as these men need to be restrained from evil by force and fear. Firstly, this is needed so these men might desist from evil-doing and leave others in peace. Secondly, this is important so "that they themselves, by being habituated in this way, might be brought to do willingly what hitherto they did from fear, and thus become virtuous."[79]

According to Aquinas, human law without coercion is thus only a logical possibility, even though it was once humanly possible.

2. Moving Beyond Coercion: the Concept and Functions of Law

One can, of course, question the relevance of Raz's thought experiment and Aquinas's theology as to determining the nature of law. Law, after all, is an artefact which is distinctly man-made.[80] As a result, Kenneth Himma argued, there is "no plausible reason for adopting a concept of law that

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74. RAZ, *supra* note 3, at 158.

75. Lucas Miotto, *From Angels to Humans: Law, Coercion, and the Society of Angels Thought Experiment*, 40 L. & PHIL. 277, 280 (2020).

76. *Id.* at 281–82 (citing E. J. LOWE, THE POSSIBILITY OF METAPHYSICS: SUBSTANCE, IDENTITY, AND TIME 13 (2001)). Miotto refers to "nomological" and "metaphysical" possibility instead of "human" and "logical" possibility, but this paper will remain faithful to Raz's language.

77. RAZ, *supra* note 3, at 159.

78. "According to the Catholic Faith we are bound to hold that the first sin of the first man is transmitted to his descendants, by way of origin." AQUINAS, *supra* note 4, at pt I-II, q. 81 art. 1. The precise workings of the original sin depend on which Christian tradition we are talking about.

79. *Id.* at pt. I-II, q. 95, art. 1. *See also id.*, at pt. I-II, q. 90, art. 3, ad 2 ("[A] private person cannot lead another to virtue efficaciously: for he can only advise, and if his advice be not taken, it has no coercive power, such as the law should have, in order to prove an efficacious inducement to virtue.").

80. I thank Angelo Ryu for directing me towards this line of thought.

departs from what we are and what we do with law."[81] Or, as per Frederick Schauer's slightly more forgiving, but similar, point, while coercion is not a necessary feature of law,[82] it does not matter much as we ought to inquire "what is typical of law rather than what is necessary for it,"[83] lamenting "preoccupation with law's conceptually necessary properties."[84] As a result, one so inclined might suggest that Aquinas's discussion of angels and the society before the Fall does not tell us much about law as it currently exists in an imperfect world populated by humans who are susceptible to "sin." Unlike in a society of morally perfect beings, coercion would be a "natural necessity"[85] in a legal system of humans as fallible creatures. Some, however, may object to this line of thought, appealing to both hypothetical examples of non-coercive law,[86] or anthropological insights into some non-Western societies that were not governed in a coercive manner,[87] and study of international law as a legal system that is not coercive in the same way as ones of individual states.[88] While this discussion is of much interest to

81. Kenneth Einar Himma, *The Authorisation of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law*, 7 JURISPRUDENCE 593, 603 (2016).

82. FREDERICK SCHAUER, THE FORCE OF LAW 93–94 (2015).

83. *Id.* at 94.

84. *Id.* However, this charge has been questioned by Leslie Green as "unfair" as it is not representative of the state of the field and "incorrect" because absence of coercion from the list of necessary features of law does not make it not worth examining (in which, I believe, he actually agrees with what Schauer claims). Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, 29 RATIO JURIS 164, 176–77 (2016).

85. SCHAUER, *supra* note 82, at 93 (citing H. L. A. HART, THE CONCEPT OF LAW 190 (3rd ed. 2012)).

86. For example, Miotto employs, to this effect, "the argument from the wounded state," imagining a situation when the coercive apparatus is disabled yet citizens continue to obey the law out of solidarity, and "the argument from the fair criminal system," or envisaging a criminal law system built on mutual respect. *See* Miotto, *supra* note 75, at 295–301.

87. For example, David Graeber and David Wengrow write about how, according to archeological evidence, prehistoric cities in Mesopotamia, the Indus Valley, Ukraine, and China operated without a centralized coercive power. DAVID GRAEBER & DAVID WENGROW, THE DAWN OF EVERYTHING 123–44 (2021). Or, Pierre Clastres, writing about indigenous inhabitants of North and South America, writes about chiefs of these tribes as "peacemakers" or mediators rather than authorities, grounding their power in consent and not coercion. PIERRE CLASTRES, SOCIETY AGAINST THE STATE: ESSAYS IN POLITICAL ANTHROPOLOGY 22, 130 (Robert Hurley & Abe Stein trans., New Edition ed. 1990). As cited in JOHN GLEDHILL, POWER AND ITS DISGUISES: ANTHROPOLOGICAL PERSPECTIVES ON POLITICS 27–30 (2d ed. 2000). Finally, Fernanda Pirie describes how in Ladakhi villages, any wrongdoings—even serious ones such as rape—would be addressed through reconciliatory meetings rather than coercive mechanisms. Fernanda Pirie, *Legalism: A Turn to History in the Anthropology of Law*, 15 CLIO@THEMIS, 5–6 (2019). I thank Dr. Alex Green for this suggestion and Dr. Lucas Miotto for examples.

88. For instance, Alexander Thompson notes that sanctions in international law are by and large "decentralized" in that they are imposed by states themselves rather than some higher bodies. Alexander Thompson, *Coercive Enforcement of International Law*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 502, 504 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012). International law will also be investigated below at Part IV.D. I thank Dr. Alex Green for this suggestion.

jurisprudence, Raz's and Aquinas's descriptions of the society of angels matter beyond identifying the extent to which law needs to be coercive.

Even if one agrees with Himma that coercion is necessary for law as it exists in any human community, the society of angels thought experiment is still conceptually as well as practically useful in understanding the multiplicity of law's functions. More precisely, it shifts our focus from coercion to coordination by imagining the legal system in question without the former. If we only consider coercive legal systems, we are likely to only focus on what Tom Campbell terms the control rationale for legal rules—"the general need to prevent directly harmful and encourage directly beneficial behavior,"[89] but there are other functions in play. Firstly, for Aquinas, law in a world of imperfect humans is used not just to prevent harm, but to perform an educational function by "training" individuals to forego their vices through the force of habit.[90] Secondly, and even more importantly for this paper, the non-coercive legal systems described by Raz and Aquinas show that law is needed also for coordination, or to "enable people to anticipate the conduct of others and thus more successfully achieve their objectives either personally or in cooperation with others."[91] More so, for Aquinas, this function of law is more important than its coercive function—"law is principally a work of reason: it belongs to the very definition of law to be a work of reason, whereas coercive power is something secondary, made necessary by those who do not cooperate with the intention of the legislator."[92]

In other words, to quote Alexander, "the problem to which law is a solution is not that men are not angels, but that they are not Gods,"[93] a statement with which both Raz and Aquinas would agree with, the latter probably more literally than the former.

3. Coordination and Law's Practical Necessity

One can ask, however, whether the need for coordination leads to the need for law. After all, as Finnis, whose theory of law builds on Aquinas's arguments, admits, coordination can be achieved by a variety of

89. TOM D. CAMPBELL, THE LEGAL THEORY OF ETHICAL POSITIVISM 50 (1996).

90. AQUINAS, *supra* note 4, at pt. I-II, q. 95, art. 1. While this paper centers on Aquinas's account of such, this point was also made by others. *See generally* Brian Burge-Hendrix, *The Educative Function of Law*, *in* LAW AND PHILOSOPHY (Michael Freeman & Ross Harrison eds., 2007).

91. CAMPBELL, *supra* note 89, at 50.

92. Goyette, *supra* note 60, at 142.

93. Alexander, *supra* note 21, at 549.

mechanisms such as "propaganda, extortion, and custom."[94] Yet there is something special about law that renders it better suited for coordinative purposes. Finnis argues several characteristics of law lend it to coordinative purposes. Firstly, law is a "seamless web" that connects benefits and burdens imposed by legal means. As a result,

> [w]here burdened by a legally enforced coordination scheme he thinks misguided, each can reflect that he has been or at some time will be benefited by the burdens which the law has in other respects (other ways, other contexts) imposed and will impose on others.[95]

This can be read in two alternative but not necessarily mutually exclusive ways—either as an appeal to self-interest, which does not matter to angels, or as a guarantee of fairness, which might be applicable even to morally perfect beings.

Secondly, Finnis writes that law's three "procedural" features "give reason for regarding it as authoritative in identifying and solving coordination problems."[96] I will first deal with the two features that are not applicable to angels. The first one is law's ability to penalise free-riders "so that the willing collaborator in the legally required coordination solution can have some assurance that he is not a mere sucker or fall-guy."[97] The second one is the resulting minimization of unfairness.[98] With angels being naturally predisposed to follow the law and never acting as free riders, these two points seem not to be of our concern here.

What is left is the third feature, which, by contrast, is wholly relevant to the discussion in this paper. In describing it, Finnis writes,

> the law's legislative capacities hold out the prospect of generating relatively prompt but also relatively clear and subtle solutions to coordination problems [and, by extension, coordination in general] as they emerge and change.[99]

This is what makes law so attractive even to angelic communities—it possesses the possibility to perform coordination in a more efficient way, making it practically necessary for pursuing this goal.

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94. *See* John Finnis, *Law as Coordination*, *in* PHILOSOPHY OF LAW: COLLECTED ESSAYS 67, 70 (2011) (citing Raz, *supra* note 20, at 233–49).
95. Finnis, *supra* note 94, at 470.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*

4. Individual Interests and the Common Good

The key difference between Raz and Aquinas lies in the "objectives" to which the coordinating function of law is oriented. Raz's "society of angels" experiment envisions a pluralistic society, whose members disagree about their values.[100] To him, harmony produced by coordination via law is necessary for the pursuit of angels' individual interests in "settling disputes and resolving conflicts of interest by mutual agreement."[101]

Conversely, for Aquinas, law's coordination is needed to serve not the individual interests, but the common good, even though the two are not mutually exclusive. All creatures (including angels and men) are also naturally oriented towards this good rather than just their particular good, as

> in the physical world it appears that every subject whose nature depends on another by way of participation is primarily inclined toward that other, more so than toward itself . . . in the body, the hand exposes itself to harm in order to protect the head; in the animal world, the individual faces its own destruction for the survival of the species.[102]

The common good, for Aquinas, is common, "not as to a common genus or species, but as to a common final cause."[103] In other words, it is not just any sum of individual goods, e.g., when two friends both want to share a bottle of wine and the more wine one of them has, the less is left for the other,[104] but is "a good that is one in number and is able to be shared by many without being diminished."[105] Common good is also not mere "community interest"—as Dominic Legge notes, it is not something "alien and hostile" that

> trumps or even destroys the good of the individual… [but] is a good for the individual, a good of a higher and nobler sort in which the individual participates, and without which it is impossible to have a full measure of human happiness.[106]

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100. RAZ, *supra* note 3, at 159.
101. *Id.*
102. BONINO, *supra* note 37, at 163–64.
103. AQUINAS, *supra* note 4, at pt. I-II, q. 90, art. 2, ad. 3.
104. To borrow Goyette's example. Goyette, *supra* note 60, at 137–38.
105. *Id.* at 138.
106. Dominic O.P. Legge, *Do Thomists Have Rights?*, 17 NOVA ET VETERA 127, 145–46 (2019).

This "universal happiness" is the ultimate end of political communities,[107] and hence the law as noted, *inter alia*, in its definition as an "ordinance of reason for the common good."[108] More specifically, Aquinas writes that "[i]n order that man might have peace[109] and virtue [justice][110] [the two elements of the common good of a political community], it was necessary for laws to be framed."[111] As Goyette points out, justice and peace (intrinsic common good) matter not for their own sake, but to order the lives of members of the political community towards virtuous living (extrinsic common good).[112] Securing peace and justice is of paramount importance as it plays a special role of actively ordering and directing men "toward the good life, the life of virtue lived in common with other members of the city (*civitas*)."[113]

Aquinas's orientation of the state and law towards the common good of the community rather than the individual good of its members comes out in the discussions of both societies of angels and saints. Angels need to be hierarchically ordered to "know and love God by natural knowledge and love,"[114] not to accumulate knowledge for their own vanity or power, which is contrary to their nature.[115] Likewise, in the state of innocence, the mastership of men over men is necessary for securing the common good rather than their individual interests.[116]

As a result, while Raz's and Aquinas's angels benefitted from law's coordination, they did so for different purposes—pursuit of individual interests and common good respectively.

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107. AQUINAS, *supra* note 4, at pt. I-II, q. 90, art. 2. In relation to which it is known as *public good*.

108. *Id.* at pt. I-II, q. 90, art. 4. For a detailed discussion, *see Id.* at pt. I-II, q. 90, art. 2. *See also* Part I, *supra*.

109. By peace in this context, Aquinas means not just, as one would expect, the "concord" between persons and groups encompassing the community, but, in addition, inner tranquility or harmony between an individual's desires. AQUINAS, *supra* note 4, at pt. II-II, q. 96, art. 1.

110. Virtue, as applied to interpersonal relations translates as "justice**"** or "a habit whereby a man renders to each one his due by a constant and perpetual will." *Id.* at pt. II-II, q. 58, art. 1. While abundance will only join peace and justice later as an expression of the *ragion di stato* tradition (*see, e.g.*, GIOVANNI BOTERO, REASON OF STATE 71 (Robert Bireley trans., 2017)), Aquinas suggests that the peaceful condition would include sufficiency of at least necessities of life. "[H]ousekeepers or civil servants . . . have to provide the household or the state with the necessaries of life." AQUINAS, *supra* note 4, at pt. II-II, q. 77, art. 4. *See also* FINNIS, *supra* note 53, at 227. (discussing the same topic).

111. "In order that man might have peace and virtue, it was necessary for laws to be framed." AQUINAS, *supra* note 4, at pt. I-II, q. 95, art. 1.

112. Goyette, *supra* note 60, at 154–55.

113. *Id.* at 141.

114. AQUINAS, *supra* note 4, at pt. I, q. 108, art. 4.

115. Unlike in case of fallen angels, or demons.

116. AQUINAS, *supra* note 4, at pt. I, q. 96, art. 4.

III. DEMONS

One can juxtapose a society of angels, perfectly moral beings, to a society of perfectly immoral beings, a society of demons. Demons would instinctively refuse to follow the law when it conflicts with their self-interest. Surprisingly, those "demons" or "devils," in both Raz's and Aquinas's paradigms, nevertheless, would, similarly to angels, be appreciative of the coordinative benefit that law-like rules provide.

A. Raz

Let us first imagine demonic beings in Raz's paradigm. Demons in Raz's paradigm would, like angels, be rational, at least in the instrumental sense—while they do not desire good, they have other, evil, goals in mind and are willing to act in pursuit of those aims. As a result, unlike "angels" from Raz's thought experiment, those demons would not want to follow the precepts of law for their intrinsic good. At first sight, such actors would not allow themselves to be limited by laws, rendering the institution of law and state impossible. This logic can, however, be resisted. One can build on Immanuel Kant's remarks that "the problem of the formation of the state, hard as it may sound, is not insoluble, even for a race of devils, granted that they have intelligence"[117] as devils would comply with such law for self-preservation reasons. This formulation of the problem can be further corrected. Contrary to Kant, H.L.A. Hart has rightly remarked that, if we take devils as having plans of some sort beyond just behaving in a chaotic way for its own sake, "with devils prepared to destroy, reckless of the cost to themselves, [rules requiring forbearances] would be impossible."[118] In cases like these, we ought to modify the Kantian view by talking about self-interest instead, which might, but does not have to include, self-preservation. Devils might be indifferent to their own demise as long as they successfully pursue their destructive plans, but they will still be invested in that success, akin to how angels are invested in following good objectives.

Regardless of whether we emphasize demons' self-preservation or self-interest, we can make similar conclusions about the desirability of law to those beings. While Kant, in the passage reproduced above, was interested in the question of whether a legal system is possible rather than desirable for a demonic society, one can further extend this claim by drawing on his

117. IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL ESSAY 153–54 (Mary Campbell Smith trans., 1917), https://www.gutenberg.org/files/50922/50922-h/50922-h.htm [https://perma.cc/3TVC-U7PA].

118. HART, *supra* note 85, at 194.

Metaphysics of Morals. Kant wrote that entering the "civil condition," or placing oneself in a law-governed society, was necessary to realize and preserve one's freedom.[119] In the terms employed in this paper, to him, self-preservation might not just be a reason to follow the law, but also a reason to have law in the first place. This can be unpacked as follows if one talks about demons. Firstly, the "race of devils" scenario, unlike the converse case of the society of angels, resembles a prisoner's dilemma[120]—situations when actors will be motivated to pursue their self-interest to the exclusion of compromise, but may reach a negative outcome as a result. While devils would be incentivized not to follow social rules so they would not be constrained in their actions, they would lose out both individually and collectively. Coercion is thus necessary to reorder these incentives and allow devils to make an optimal choice. This coercion would benefit from being framed as law—as discussed earlier,[121] per Finnis, the seamlessness of law and its procedural features incentivize compliance with its coercive directives.[122] Secondly, devils—just like any other rational beings—would need these instructions to be clear and thus would benefit from non-coercive functions of law as described in Raz's thought experiment: to resolve issues of expertise, coordination, and efficiency, to interpret the law and resolve discretionary matters, and to remedy accidental damage.[123] This, similarly to a case of angels,[124] will be helped by the law's procedural features, namely, as per Finnis, its superior "legislative capacities."[125]

One can object that devils would not be moved by these arguments by virtue of their immorality. However, the need for coordination Raz describes is not unique to "angels"—even immoral actors have individual needs that would be satisfied by legality. Stability in our day-to-day life and ability to plan our actions are what we all desire, whether good or evil. Raz recognized this, writing that the Rule of Law in the formal sense[126] (and

119. *See generally* IMMANUEL KANT, THE METAPHYSICS OF MORALS 77 (Mary Gregor trans., 1991).

120. I thank Dr. Jordan Perkins and Angelo Ryu for this suggestion.

121. Part II.C.3, *supra*.

122. Finnis, *supra* note 94, at 71.

123. RAZ, *supra* note 3, at 159.

124. As discussed in Part II.C.3, *supra*.

125. Finnis, *supra* note 94, at 71.

126. In other words, describing how the legal rules are constructed as opposed what do these rules say (substantive sense). For an exploration of both, *see generally* Paul P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, PUBLIC LAW 95 (1997). The language employed with regards to this distinction had since been challenged, most notably by Gardner, who would rather describe the Fullerian Rule of Law as "modal." John Gardner, *The Supposed Formality of the Rule of Law*, *in* LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 211 (2012).

therefore the existence of law in general[127]) is at least instrumentally valuable as it facilitates individual planning because the existence of clear and unambiguous rules allows the law-subjects to rely on them for guidance when living their day-to-day lives.[128]

B. Aquinas

Aquinas, taking a different stance, maintains that demons do not have law strictly speaking as true law can never be unjust. However, he still agrees with the account laid out above that those immoral beings would still resort to law-like rules' ability to help them coordinate in pursuit of their evil goals.

1. Law and Justice

In Christian theology, demons are fallen angels that have chosen to defy God. Their nature mirrors that of good angels: they are incorporeal (and so only possess will and intellect rather than passion) and are similarly knowledgeable with regards to natural matters.[129] However, as a result of their choice, they are "misled with regard to supernatural matters" as they are "utterly perverted from the Divine wisdom."[130] As a result, the demons' will is "obstinate in evil," rather than "confirmed in good."[131]

I submit that Aquinas would not consider governance in such a society to be "legal" in the primary sense of the word. To that effect, one should recall Aquinas's definition of law as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[132] As a result, following Aquinas's definition,[133] laws contrary to human good can be so in three ways: (i) in respect of the end, (ii) in respect of the author, and (iii) in respect of the form.[134] For the

127. Raz states that some conformity with the Rule of Law is required for law to exist—"[t]he law to be law must be capable of guiding behaviour, however inefficiently." JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 227 (1979).

128. *Id.* at 219–23.

129. AQUINAS, *supra* note 4, at pt. I, q. 64, art. 1. However, this natural knowledge is not referred to the praise of God. "[T]he demon's mind is darkened: it is totally deprived of the light of wisdom." BONINO, *supra* note 37, at 211.

130. AQUINAS, *supra* note 4, at pt. I, q. 58, art. 5. BONINO, *supra* note 37, at 211.

131. AQUINAS, *supra* note 4, at pt. I, q. 64, art. 2.

132. *See* the definition at *id.* at pt. I-II, q. 90, art. 4.

133. As highlighted in E. J. Damich, *The Essence of Law According to Thomas Aquinas*, 30 THE AM. J. JURIS. 79, 92–93 (1985) (noting that injustice 'in respect of the form' (iii), or disproportionality, does not directly correspond to any element of Aquinas's definition, but can nevertheless be construed as being contrary to the common good).

134. AQUINAS, *supra* note 4, at pt. I-II, q. 96, art. 4.

purposes of this discussion, I will center on the first category of (i) unjust laws in respect of the end, or "when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory."[135] Hence, for Aquinas, such law—the kind of which the law of demons would undoubtedly be—is not law *simpliciter* (in the focal sense)[136] as it does not fit his definition of law in the primary sense. It is no wonder that Aquinas remarks that "these are like acts of violence rather than laws."[137] In other words, the "law" of demons would be analogous, to paraphrase St. Augustine, to the "honor code" of a band of robbers rather than a state.[138]

Many laws in a society of wicked beings would be undoubtedly unjust and hence, not laws *simpliciter*, however, one can wonder whether this would be the case with all laws produced in such an order. After all, such a society will not just need laws compelling or permitting evil and prohibiting good, but, on the surface, neutral or even benign laws that would prevent the demonic society from disintegrating similar to those regulating traffic rules as per the example above.[139] However, Aquinas's definition of unjust laws is not framed in terms of the consequences of laws, but their end and their author.[140] Therefore, even neutral or benign laws would be unjust if not produced for the common good. This will be the case of all laws in a demonic or quasi-demonic order, the goals of which are presumed to be antithetical to the objectively existing common good as opposed to their own good. Like the "honor code" of a band of robbers, which exists to sustain a criminal entity, the "law" of demons ultimately serves their fight against God's justice.

As a result, it can be seen that Aquinas, unlike Raz, would not classify the internal arrangements of the society of demons as law, strictly speaking.

2. Law and Coordination

However, Finnis is correct to note that while to Aquinas unjust law would not be "law" in a primary sense, it would still be law *secundum quid*

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135. *Id.*

136. FINNIS, *supra* note 8, at 264 (quoting THOMAS AQUINAS, SUMMA THEOLOGICA, at pt. I-II, q. 92, art. 1, ad.4).

137. AQUINAS, *supra* note 4, at pt. I-II, q. 96, art. 4.

138. AUGUSTINE, THE CITY OF GOD bk. IV, ch. 4 (Rev. Marcus Dods trans., 1871), https://www.gutenberg.org/files/45304/45304-h/45304-h.htm ("Without justice what are kingdoms but great bands of robbers? And what is a band of robbers but such a kingdom in miniature?") [perma.cc/4Z2X-PEGK].

139. *See supra* Part II.A.

140. The third type—in respect of the form—will not be discussed here as it only concerns laws that are oriented towards the common good. *See* AQUINAS, *supra* note 4, at pt. I-II, q. 96, art. 4.

(in a secondary sense)[141] that I will hence refer to as "law-like rules." These rules, despite being unjust, share some features with laws in the first sense of the word. As such, they would be laws in Raz's formulation. Law-like rules operate similarly to laws by purporting to employ a specific set of techniques. Recognising this affects our understanding of what they can do and informs us how to best respond to them. In Finnis's explication to that effect,

> the [classical] tradition [that Aquinas belongs to] explicitly (by speaking of 'unjust *laws*') accords to iniquitous rules legal validity, whether on the ground and in the sense that these rules are accepted in the courts as guides to judicial decision, or on the ground and in the sense that, in the judgment of the speaker, they satisfy the criteria of validity laid down by constitutional or other legal rules, or on both these grounds and in both these senses.[142]

There are indeed at least three instances in which Aquinas expresses this sentiment: (i) tyrannical laws issued for the tyrant's good;[143] (ii) unjust laws issued by someone in a position of authority;[144] and (iii) unjust laws being obligatory when not conforming to them will cause a "scandal or disorder."[145] As Campos notes, (ii) and (iii) might only be exceptions to the rule that "unjust law is not a law" because "ultimately they are justified by the fact that they are preferable to the common good (the good *simpliciter*) when compared to the possibility of having no laws whatsoever."[146] As a result, Aquinas's account of law-like rules is, by and large, still influenced by the notion of the common good.

Nevertheless, the plausibility of the aforementioned reading is underscored by the fact that the same sentiment shines through Aquinas's remarks on the society of demons. One would expect these immoral beings to thrive on chaos and being opposed to order, but this proposition is undermined in Aquinas's angelology. To Aquinas, since demons retain

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141. *See* FINNIS, *supra* note 8, at 364.

142. *Id. at* 365.

143. *See* Andre Santos Campos, *Aquinas's "Lex Iniusta Non Est Lex": A Test of Legal Validity*, 100 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 366, 370 (2014) (citing AQUINAS, *supra* note 4, at pt. I-II, q. 92, art. 1, ad. 4). Even though, as Andre Campos notes further on, that "further on, Aquinas says that tyranny is totally corrupt and therefore is no law", there is no reason why one should dismiss the earlier, and not the latter, statement as a mistake. *Id.* (citing AQUINAS, *supra* note 4, at pt. I-II, q. 95, art. 4).

144. AQUINAS, *supra* note 4, at pt. I-II, q. 93, art. 3, ad. 2. *See also* Campos, *supra* note 143, at 371.

145. AQUINAS, *supra* note 4, at pt. I-II, q. 96, art. 4. *See also* Campos, *supra* note 143, at 371.

146. Campos, *supra* note 143, at 371.

some of their nature after the angelic choice is made, they, like angels, are ordered hierarchically.[147] However, while the divine government is oriented towards the goal of serving God, the demons' subjection to one another is based "on their common wickedness whereby they hate men, and fight against God's justice."[148] In order to "carry out their own wickedness," weak demons must necessarily be joined to and subject to those whom they see to be stronger.[149] Just as angels need to coordinate (broadly speaking) for good ends, demons need to coordinate for evil aims. As such, a demonic order is still an order, and "if anarchy were to triumph, it would immediately self-destruct."[150] And, as stated right above,[151] just as in the case of Razian demons, this order is better secured through law due to its unique propensity for coordination, even though Aquinas's demons, just like his angels, are less individualistic and pursue collective—albeit evil—aims. Therefore, under both Aquinas and Raz, a society of demons would need some sort of structure of law-like authority for reasons of coordination, even though that authority would not be *stricto sensu* legal. In that, both outlined perspectives on demons resemble the literary exploration of the demonic government in C.S. Lewis's *The Screwtape Letters*, where demons are depicted as forming a bureaucratic structure that the author calls a "Lowerarchy."[152]

IV. US

To sum up, even though we are neither angels nor demons, a discussion of Raz's and Aquinas's descriptions of angelic societies, their application to demonic societies, and additional commentary leads to the following conclusions that will be relevant beyond that context:

- Non-coercive legal systems are at least logically possible. They are also humanly possible if we believe in the existence of angels.[153]
- Legal systems exist not only to coerce the law-subjects, but also to coordinate them in pursuit of their individual or collective goals.[154]

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147. AQUINAS, *supra* note 4, at pt. I, q., 109 art. 2.
148. *Id.* at pt. I, q. 109, art. 2, ad.2.
149. *Id.*
150. BONINO, *supra* note 37, at 280.
151. *Supra* Part III.A.
152. C. S. LEWIS, THE SCREWTAPE LETTERS: LETTERS FROM A SENIOR TO A JUNIOR DEVIL (2016).
153. *See supra* Part II.C.1.
154. *See supra* Part II.C.2.

- This coordination is best accomplished via law—or, at the very least, law-like rules.[155]
- The coordination-maximising features of these rules make them practically necessary to pursue both the particular good of individuals (Raz's conception) and the common good of the community (Aquinas's conception).[156]
- That coordination function can also work against the common good of the community[157] (even though Aquinas only considers such systems legal in a limited sense).[158]

One can see how these conclusions play out in four scenarios: post-legal societies, wicked regimes, extraordinary measures, and international law. Specifically, the differences between Raz's and Aquinas's conceptions of law do not matter when it comes to addressing the relevance of coordinative power in those practical scenarios.

A. Post-Legal Societies

Many claim that it is possible to build post-legal societies with perfect citizens and conditions, so that there is no need for law. One example is the promise of a communist society by Karl Marx, Friedrich Engels, and their heirs. After the proletarian revolution and subsequent abolition of class distinctions, as Engels remarked in a famous passage, the state and hence the law would "die out" or "wither away"[159] as they would no longer be needed to maintain and justify domination of some individuals over others. However, one may question this prediction. Brian Leiter noted that even in such a society, both law (in the sense employed in this paper)[160] and morality would persist, invoking nothing other than Raz's "society of angels"

155. *See supra* Part II.C.3.
156. *See supra* Part II.C.4.
157. *See supra* Parts III.A, III.B.2.
158. *See supra* Part III.B.1.
159. Frederick Engels, *Anti-Dühring*, *in* 25 COLLECTED WORKS OF MARX AND ENGELS 286 (1987).
160. *But cf.* Evgenii Pashukanis, *The General Theory of Law and Marxism*, *in* PASHUKANIS: SELECTED WRITINGS ON MARXISM AND LAW 61 (Peter B. Maggs ed., 1980). A notable outlier to this communist theory is Evgenii Pashukanis, who defined law as those rules that regulate the relationship of possessors of commodities. As a result, he stated that it would be obsolete in a communist society where no such relationship persists. *Id.* at 46. Pashukanis, however, admitted that law-like 'technical rules' would persist even under communism. *See generally id.* at 58. As emphasized by me earlier in Anna Lukina, *Between Exception and Normality: Schmittian Dictatorship and the Soviet Legal Order*, 35 RATIO JURIS 139, 147 (2022).

thought experiment.[161] Even under communism, "in the absence of the need for constant competition for economic survival, individuals will behave quite a bit differently than they do under capitalism,"[162] they would still have the same needs as Raz's "angels."[163] That is, they would be used to coordinate such "angels'" lives, interpret laws and make discretionary judgments, and remedy accidental damage.[164] As a result, even if we accept the controversial proposition that communism would not need coercive laws,[165] it would have laws nevertheless, serving other purposes. While Leiter's approach is hardly a natural law one, one could reach the same conclusion by referring to Aquinas's discussion of the state of innocence, where authority, including legal authority, continues to be needed even in a drastically different social context. This need for coordination is the reason why Vladimir Lenin, Evgeny Pashukanis,[166] and Andrey Vyshinsky, building on Marxist ideas in the context of a new Soviet state, envisioned a space for law even after the transition to a new socio-economic order.[167] This was important not just theoretically, but practically—this shift in ideas was mirrored in a gradual revitalization, or "refetishization,"[168] of legality in the Soviet state culminating in 1930s legal reforms that brought law and legality back on the agenda.[169]

B. Wicked Regimes

Engaging the 1930s Soviet Union is impossible without bringing up another theme—that of unjust, wicked, or evil law. This very category can seem paradoxical—as Nigel Simmonds has remarked, wicked regimes have no need for the rule of law, as for them legality "gets in the way" by putting fetters on legal terror.[170] The discussion of the society of demons goes against this thesis—as shown above, even intrinsically immoral actors can

161. Brian Leiter, *Marx, Law, Ideology, Legal Positivism*, 101 VA. L. REV. 1179, 1181–82 (2015).
162. *Id.* at 1182.
163. *Id.*
164. *Id.*
165. This might be questioned as one can imagine, for instance, non-property related crimes—such as murder—being committed under communism. Lenin acknowledged that, saying that, "[a]ll 'individual excesses' would be responded to 'by the armed people themselves as simply and as readily as any crowd of civilised people, even in modern society, interferes to put a stop to a scuffle or to prevent a woman from being assaulted.'" It is unclear whether these actions would amount to law or not. Vladimir Lenin, *The State and Revolution*, *in* COLLECTED WORKS (VOLUME XXV), 464 (1974). As cited in Lukina, *supra* note 160, at 145. I thank Angelo Ryu for alerting me to this.
166. In the non-Pashukanist sense described in note 160 above.
167. As explored in detail in my previous paper. Lukina, *supra* note 160.
168. PETER H. SOLOMON, SOVIET CRIMINAL JUSTICE UNDER STALIN 153 (1996).
169. *See*, in more detail *Id.* at 153–89.
170. NIGEL E. SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE: JUSTICE, LAW AND RIGHTS 230–32 (1986).

favor law-like mechanisms for self-preservation or to better achieve their goals. For instance, Matthew Kramer has remarked that wicked regimes would need law to systematically coerce their subjects into not going against their plans.[171] Moreover, as Kramer further notes,[172] such societies would need law—or, at the very least, law-like rules—not just for coercion, but for coordination. Wicked governments would need law to solve prisoners' dilemmas unique to them or problems of expertise, coordination, and efficiency that are also on the agenda of non-evil regimes, both in their wicked plans and in the routine maintenance of stability needed for the survival of the state. It is no wonder that a number of historical wicked systems have been described as "dual states" combining a "prerogative" element when it comes to more "political" issues and a "normative" element in relation to mundane matters.[173] This is something that both Raz and Aquinas would agree with. Even though, as indicated above, these two thinkers would disagree on whether law produced in those regimes is law properly so called,[174] Aquinas would still converge with Raz on the following two points. Firstly, as demonstrated above,[175] to Aquinas wicked law was still law *secundum quid*, and shared some characteristics with law properly speaking, overlapping, in multiple ways, with Raz's conception of it as fully law. Secondly, as per Ronald Dworkin's observation, this distinction is separate from the more practically relevant question of duties of obedience one would have in relation to such law, as a right to disobey unjust law can be ultimately derived not just from its imperfection as law, but from external moral duties.[176] This can be shown by the fact that both Raz's and Aquinas's theories have space for such a dispensation from law's authority. Raz emphatically argues that there is not even a *prima facie* obligation to obey the law, even in a good society.[177] One can either be guided by *ad hoc* moral judgments on individual matters or the general

171. Matthew H. Kramer, *On the Moral Status of the Rule of Law*, 63 CAMBRIDGE L.J. 65, 69 (2004). Simmonds replied that it is true only inasmuch as one conceives of legality or the rule of law as a "threshold" idea of minimal conditions of law rather than a full-blooded ideal of common good and justice, however, this has little bearing on this part of the discussion. N. E. Simmonds, *Freedom, Law, and Naked Violence: A Reply to Kramer*, 59 U. TORONTO L. J. 381, 385–88 (2009).

172. MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS 70 (1999).

173. The term was put into use by Ernst Fraenkel, who applied it to Nazi Germany. ERNST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP (2017).

174. *See supra* Part I.

175. *See supra* Part III.B.1.

176. RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 410–12 (2011). Further on, in *Law's Empire*, he argued that both positions might have value as they are employed for different purposes. RONALD DWORKIN, LAW'S EMPIRE 101 (1998).

177. Raz, *supra* note 13, at 233.

moral attitude of "respect for law."[178] In an unjust regime, the latter would be morally culpable.[179] Therefore, one has a right to disobey an unjust law and even an obligation to do so unless mandated by moral reasons independent of this attitude. Similarly, according to Aquinas, unjust law, being law only *secundum quid*, does not "bind in conscience," except when it may be necessary "in order to avoid scandal or disturbance," or when our separate personal moral obligation to the common good—and its "peace" component—directs us to do so.[180] Overall, even though Raz and Aquinas use different pathways, the conclusions are comparable.

C. Extraordinary Measures

Next, we must consider extraordinary or emergency measures that often stray from the boundaries of law. This phenomenon is most lucidly expressed by Carl Schmitt's notion of dictatorship—a departure from an existing legal order that is necessitated by emergencies: either the need to protect the *status quo* or to transition to a new regime.[181] This phenomenon can be seen in many legal cultures, including Ancient Rome,[182] Revolutionary France,[183] the Weimar Republic, and the Post-9/11 United States.[184] As I have argued in my previous discussion of dictatorships, even with supposed departure from the normal legal order, such dictatorships would still rely on legality due to law's practical necessity for coordination[185]—a conclusion one can derive from both Raz's and Aquinas's discussions of the society of angels and the application of their argument to the "race of devils." Whether aiming to protect or bring about good or wicked regimes, a dictator will rely on law—or, at least, law-like rules—to ensure the success of his plans. As to the relationship between law and justice, the same conclusions as above apply here. Both frameworks provided by Raz and Aquinas would allow for moral evaluation of such a system, however, the latter approach would deal with potential injustices within rather than outside the law.

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178. *Id.* at 260.

179. "While it is never wrong not to respect the law it is morally wrong to respect it in South Africa or other fundamentally iniquitous regions." *Id.* at 258–59.

180. AQUINAS, *supra* note 4, at pt. I-II, q. 96, art. 4. As interpreted by Keith D. Wyma, *When and How Should We Respond to Unjust Laws? A Thomistic Analysis of Civil Disobedience*, 43 CHRISTIAN SCHOLAR'S REV. 157 (2014).

181. CARL SCHMITT, DICTATORSHIP 7–8 (Michael Hoelzl & Graham Ward trans., 2014).

182. *Id.* at 1–2.

183. *Id.* at 127.

184. *See* discussion in BERNARD E. HARCOURT, THE COUNTERREVOLUTION: HOW OUR GOVERNMENT WENT TO WAR AGAINST ITS OWN CITIZENS (2018).

185. Lukina, *supra* note 160, at 152–53.

D. International Law

According to Hart, since states are different from individuals, "there is neither a similar necessity for sanctions . . . nor a similar prospect of their safe and efficacious use"[186] in international law. This is due to two reasons: (i) that the possibility of the use of force by states already provides enough deterrence from breaching the peace (akin to a society of angels), and that (ii) differences in strength and power between individual states will necessarily render sanctions either meaningless or unequal in their application (akin to a society of demons).[187] Both claims, however, can be questioned. First, in response to (i), while contemporary wars—from Syria to Ukraine— do not reach the magnitude of both World Wars, they are still palpably present in the international order, leading to death and destruction of great magnitude. Second, two points can be made to the claim (ii). One is that individuals are equally different in their capabilities,[188] although the state in state-individual relationships tends to be more powerful. Another is that sanctions are often applied within the international order. It does not mean, however, that this form of coercion is the same one as when it comes to states. Alexander Thompson concedes that coercion in international law, unlike in domestic law of individual states, is mostly decentralized, with coercive acts being undertaken by the states themselves rather than imposed top-down by some governmental body.[189] However, he echoes Anthony D'Amato that this does not mean that international law is not law, or is not coercive—there, coercion is just differently organized.[190] Aggrieved states can take actions against those who have wronged them, either individually, on their own, or collectively, as members of international bodies. The options available to them are numerous, ranging from economic sanctions to military action.[191] Even more so, these mechanisms may be rather effective in the right circumstances,[192] even though they might not be able to influence some States that have both the desire and power to ignore coercive measures.

Still, even if we accept Hart's characterization of the international order as at least partially true, international law is needed because of the practical

186. HART, *supra* note 85, at 219.

187. *Id.* at 219–20.

188. Dr. Alex Green has alerted me to that point.

189. Thompson, *supra* note 88, at 504–06.

190. Thompson, *supra* note 88, at 504, cites D'Amato for the same point. *See* ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 24–25 (1987).

191. As indicated by Thompson, *supra* note 88, at 505–06. For a more detailed treatment, see MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT (2008).

192. *See* O'CONNELL, *supra* note 191, Part II.

necessity of legal mechanisms for coordination as drawn from the theories of Raz and Aquinas. The primacy of this function is widely accepted in international law literature. For instance, Prosper Weil's influential article locates the rise of international law in "social organization," not only enabling the states to live peacefully (co-existence), but also making sure they succeed in pursuit of their common interests (co-operation).[193] Regardless of whether the states forming the international community are committed to peace (out of conviction or self-preservation) or to war, they would need to organize their mutual relationships to form military alliances, conduct trade, collaborate in pursuit of various projects—which is particularly important in the face of terrorism, global health problems, environmental challenges, scientific and technological advances, and more. According to Aquinas, the "law of nations," or what is currently referred to as international law, belongs to the same category of positive law as "civil law," or the law of individual states.[194] As a result, the same conclusions he made about domestic law—its practical necessity and its dependence on common good—apply to international law with the same force. Aquinas's version of "just war theory" is a vivid example of how the common good can provide checks on positive international law. Aquinas presents three conditions necessary for a war to be just and hence "lawful": that it is declared by an authoritative sovereign, that those who are attacked are pursued "because they deserve it on account of some fault," and that "the belligerents have rightful intention, so that they intend the advancement of good, or the avoidance of evil."[195] These conditions are the opposite of the previously discussed attributes of unjust law, namely lack of authority and orientation to a private rather than a common good respectively. As a result, one can conclude that, according to Aquinas, international law would have a fully law-like character insofar as it conforms to the common good of the international community.[196]

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193. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 418–19 (1983). Weil's view is shared by many, including John Tasioulas, despite him critiquing Weil's suggestions as to how the suggested ends of international law ought to be pursued. John Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, 16 OXFORD J. LEGAL STUD. 85, 113 (1996). As noted by Jason A. Beckett, *Behind Relative Normativity: Rules and Process as Prerequisites of Law*, 12 EUR. J. INT'L L. 627, 628 (2001).

194. AQUINAS, *supra* note 4, at pt. I-II, q. 95, art. 4.

195. *Id.* at pt. II-II, q. 40, art. 1.

196. This is a strong caveat. Many scholars, mostly writing in the Third World Approaches to International Law (TWAIL) tradition, deny that modern international law serves the common good of all states, privileging ones from the Global North. *See, e.g.*, B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L CMTY. L. REV. 3 (2006).

CONCLUSION

Even in a society of angels or demons, some form of law—or, at least, law-like rules—would be necessary for coordination. This idea has survived through centuries, finding expression in both Aquinas's and Raz's philosophy. To the present day, it continues to illuminate our understanding of law not just in ordinary, but in extraordinary situations, including in imagining post-legal societies, wicked regimes, Schmittian dictatorships, and in the international arena. The point of tension between Raz and Aquinas—on whether unjust law is properly regarded as law—does not undermine the thesis about law-like rules' practical necessity for coordinative reasons that seems to cross the boundary between the two thinkers' concepts of law. Therefore, anyone, regardless of their understanding of the interaction between law and morality, can gain from the medieval theological perspective just as much as from contemporary analytical jurisprudence.