Lex Satis Iusta

Jeremy Waldron
"Lex iniusta non est lex." John Finnis reminds us, at the end of *Natural Law and Natural Rights*, that the central tradition of natural law theory did not formulate its thesis about the relation between law and justice by saying things like "an unjust *edict* cannot be law" or "a morally iniquitous *command* cannot be law." Instead, says Finnis, "the tradition . . . has affirmed that unjust LAWS are not law." He offers several elaborate explanations—and, I should say at once, they are helpful and convincing explanations—of why this paradox is not a contradiction. His explanations appeal to the distinction between normative, descriptive, and detached uses of terms such as "law," as well as to the further distinction, central to Finnis's jurisprudence, between the focal meaning and the secondary meanings of such terms.

Finnis explains the point as follows: to say that some norm which is unjust is not *law* is to use "law" in a non-detached, first-person, normative or practical way. It is to use the term in a way which (if it were *not* negated) would assert and engage—for purposes of action as well as reflection—all of the reasons and all of the normative consequences which flow from something being law, so far as its place in practical reasonableness is concerned. So the statement denies that the standard in question is "law" in that normatively central or, as Finnis calls it, "focal" sense.

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1 John Finnis, *Natural Law and Natural Rights* (1980).
2 *Id.* at 364 (emphasis in original).
3 *See id.* at 365–66.
4 *Id.* at 277.
To insist that the norm is nevertheless law in *some* sense, despite being unjust and thus despite not being *law* in the sense just outlined, is to do one or both of two other things. It is to use the term "law" normatively, but in a secondary sense—a sense in which the reasons and consequences for action and reflection are asserted and engaged hesitantly, ambivalently, or only in part. (For example, it may be to say that the unjust thing commands a modicum of law-like respect, but only by virtue of its connection with the legal system of which it is a part, rather than by virtue of that connection plus the contribution of its particular content to the common good.) Or it is to use "law" in a non-normative and non-practical sense—for example, in a way that conveys information about what is *in fact* accepted as having the normative consequences of "law" in a given community, or about what follows from the application of certain rules, like secondary rules, which are constitutive of a given legal system, to the thing in question.

In short, to say that an unjust law is not law is to say that something which is sort of law, or which is (sort of) accepted as law, is not *really* law (in a sense of "law" that really counts) on account of its injustice.

II.

Is natural law theory committed to saying something like that about every law which is unjust? Or, may natural law jurisprudence acknowledge that some unjust laws are—in spite of their injustice—laws in the fullest sense (using "law" in the focal, non-detached, first-person, practical, and normative sense, not just in the hesitant, detached, or descriptive senses)?

Finnis, I think, believes the answer is "no." (I shall explain why in a moment, though again I want to emphasize immediately that what he says is much more careful and qualified than what is said by most people addressing the *lex iniusta* doctrine.⁵) I suspect he is wrong about this. The aim of this Essay is to explicate the possibility I have just outlined—that natural law jurisprudence should acknowledge that some unjust laws are laws in the fullest sense in spite of their injustice.

Let me anticipate a little, so readers will know what moves to look out for. My argument will be based on the significance of *disagreement about justice* as one of the circumstances in which law characteristically makes its claims to human attention and respect. I shall argue that the existence of disagreement about justice is as central to the notion

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⁵ See infra Part III.
of law as the existence of moderate scarcity is to the concept of distributive justice.\textsuperscript{6} Though distributive justice is a critical ideal, the viewpoint from which (ideally) criticisms and evaluations are made in the name of distributive justice is not a viewpoint that excludes scarcity. And similarly, I want to say that although law is also a critical ideal, the viewpoint from which (ideally) criticisms and evaluations are made in the name of law is not a viewpoint from which disagreement about justice is excluded. Since people are likely to disagree about the justice of any norm that is proposed as law, and since a norm's validity as law for a community, even on a natural law criterion of validity, must be something that the members of the community in question can share a view on, it must be possible for someone to say wholeheartedly, "this norm, which I think is less just than an alternative available to us, is nevertheless law for us, in the fullest sense in which law answers to the requirements of human and social good."

Now, no one owns the rights to "natural law theory," and my point could be made cheaply by finding some obscure body of jurisprudence that could, at a pinch, be labeled "natural law theory" and which had the consequence I am interested in exploring. A shrewd positivist might even claim that his legal positivism is \textit{true} natural law theory, and from that, he might claim natural law credentials for the positivist thesis that at least some unjust laws are nevertheless laws in the fullest sense of the term. Thomas Hobbes comes close to this in his argument in \textit{Leviathan} that "[t]he Law of Nature, and the Civill Law, contain each other, and are of equall extent,"\textsuperscript{7} and in his broader insistence that natural law, properly understood, requires one to refrain from inferring any doubts about the lawfulness of a sovereign's command from one's beliefs about its injustice (or indeed to refrain from forming any independent judgment of its justice or injustice at all).\textsuperscript{8} I shall return to Hobbes later in the Essay. But my intention is to develop this hunch at the center of natural law theory, rather than on its margins. As we shall see, Finnis's own argument provides as good a place as any to begin.

\textsuperscript{6} See infra Part XI.


\textsuperscript{8} See, \textit{e.g.}, THOMAS HOBBES, \textit{ON THE CITIZEN} 8--9 (Richard Tuck & Michael Silverthorne eds., Cambridge Univ. Press 1998) (1642) (denouncing as an erroneous doctrine the view that a sovereign's commands "may rightly be discussed before they are carried out, and in fact ought to be discussed").
III.

Let me say first why I believe that Finnis denies the proposition I want to consider, namely, that an unjust law may nevertheless be law in the fullest sense. The matter has to do with the demandingness of what Finnis takes to be the viewpoint from which (that is, the basis on which) the focal meaning of the term "law" is appropriately distinguished from its secondary meanings. Such a viewpoint is not simply that of a participant in the legal system—as it is, for example, in H.L.A. Hart’s jurisprudence, where “law” and “legal system” are understood from the viewpoint of a member of the corps of specialist legal officials. It must be at least the viewpoint of a participant who takes law seriously, who regards its demands as requirements of practical reasonableness, and who thinks it a matter of overriding importance that law, as distinct from other forms of social order, should come into being and be sustained as the mode of governance for human communities.

Among those who take that viewpoint, there will be some whose views about practical reasonableness are more reasonable than others. Theirs, Finnis insists, is the viewpoint that we should place at the absolute center of our focal conception of law:

[T]he central case viewpoint itself is the viewpoint of those who not only appeal to practical reasonableness but also are practically reasonable, that is to say: consistent; attentive to all aspects of human opportunity and flourishing, and aware of their limited commensurability; concerned to remedy deficiencies and breakdowns, and aware of their roots in the various aspects of human personality and in the economic and other material conditions of social interaction. What reason could the descriptive theorist have for rejecting the conceptual choices and discriminations of these persons, when he is selecting the concepts with which he will construct his description of the central case . . . of law as a specific social institution?

It follows, says Finnis, that the legal theorist cannot identify the central case of this viewpoint unless he puts himself in the shoes of these persons—that is, unless he is prepared to ask himself “what the requirements of practical reasonableness really are, in relation to this whole aspect of human affairs and concerns.”

10 See Finnis, supra note 1, at 14–15.
11 Id. at 15 (emphasis and footnotes omitted).
12 Id. at 16.
Prominent among the demands of practical reasonableness is justice. Like other aspects of practical reasonableness, justice is something one can get right or one can get wrong. It follows, from what was said in the last paragraph, that the viewpoint from which the focal meaning of law is distinguished from its secondary meanings is the viewpoint of a person who holds reasonable views about justice—that is, a person who is not likely to think just (or present as just) what is in fact unjust. Of course, justice is not all there is to that viewpoint. Still, the central case of law and the focal meaning of the term "law" cannot possibly be understood with reference to an unjust (or, as to justice, misconceived) understanding of practical reasonableness. The viewpoint of any such understanding must be regarded as at least somewhat lesser or secondary, relative to a viewpoint constituted by an understanding that is not unjust or misconceived about justice in this way.

From this, it would seem to follow that an unjust law cannot possibly be regarded as law, in the focal sense of "law." To think that it was a focal case of law would be either to judge it from a viewpoint that involved a misapprehension about justice or a misapprehension about the importance of justice so far as the relation between law and the demands of practical reasonableness were concerned, or to make some sort of mistake in the application of a viewpoint that did involve an adequate grasp of these matters.

By the same token, to think that a law is unjust is (on Finnis's account) necessarily to think of it as law only in a lesser or secondary sense. Even if one is wrong in thinking it unjust, what one is thinking is something which entails that the law in question is not in the fullest sense law. In other words, there does not seem to be any looseness in Finnis's system in the implication from (a) the judgment that something is law in the fullest sense to (b) the judgment that it is just. Any doubt about (b) is eo ipso a doubt about (a), since the viewpoint from which the central case of law and the focal meaning of the term "law" are understood is a viewpoint defined, inter alia, as the best possible view about justice. To raise a doubt about the justice of a law entails raising a doubt about whether it satisfies that viewpoint. And similarly, to disagree with a fellow citizen about the justice of a law is to disagree about whether it can be regarded as law in the fullest sense.

As far as I can tell, all this follows from the natural law position as Finnis presents it. Finnis does not of course infer any easy entitlement to disregard or disobey a law simply because it has been shown to be unjust. But it does seem to be Finnis's position that whatever follows

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13 See id. at 181.
14 See id. at 354.
about respect and compliance from the fact that something is the law, follows more equivocally and with greater hesitation in a case in which the law in question is unjust.

IV.

There is, however, material in Finnis's conception that might form the basis for a different view. Consider the account he gives of the need for authority in chapter nine of *Natural Law and Natural Rights*. Authority, Finnis argues, is needed in human communities not only on account of people's weakness or wickedness. It would also be needed, even among a people of great intelligence and dedication, so far as the demands of practical reasonableness and the common good are concerned. A person dedicated to the common good will always be looking out for new and better ways of attaining the common good, of co-ordinating the action of members, of playing his own role. And the intelligent member will find such new and better ways, and perhaps not just one but many possible and reasonable ways. Intelligence and dedication, skill and commitment thus multiply the problems of co-ordination, by giving the group more possible orientations, commitments, projects, "priorities," and procedures to choose from. And until a particular choice is made, nothing will in fact be done.

So we face what Finnis calls "co-ordination problems"—problems to which there are "two or more available, reasonable, and appropriate solutions, none of which, however, would amount to a solution unless adopted to the exclusion of the other solutions available, reasonable, and appropriate for that problem." The function of authority is to resolve such problems, to enable the intelligent and imaginative creatures we are to focus our cooperation, in relation to each set of competing alternatives, on just one of the schemes that offer us ways of promoting the common good.

Here is an example. (It is mine, not Finnis's.) Human communities face questions about how to deal with natural disasters such as floods and earthquakes. Various proposals might be made about how the community should prepare itself for these eventualities. Someone may propose a scheme \((C_1)\) in which every citizen undertakes some fairly intense basic training in civil defense; someone else may propose an alternative scheme \((C_2)\) in which a specialist civil defense

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15 See id. at 231–59.
16 See id. at 231.
17 Id. at 231–32.
18 Id. at 232.
corps is set up and trained (among other things) in the art of mobilizing a largely untrained population in the event of disaster. For the sake of preparedness, a community vulnerable to catastrophe must settle on one of these schemes. Let's say that the magnitude of the disasters it may face is such that either all civilians have to have basic training in civil defense, or some corps of specialists has to be trained in mobilizing an untrained citizenry. The community needs some way of designating either \( C_1 \) or \( C_2 \) as the scheme in which its energies will be invested so far as preparedness is concerned, and the citizens must know which of the schemes has been selected so they know what they are to do, both in advance and in the eventuality of a disaster. (They must know which script has been chosen before they can play their role.) Fortunately, the community has a mechanism for settling problems of this sort: its members have elected a leader to solve coordination problems by selecting among the available alternatives in cases like these and designating just one of them as the community solution. The leader turns his attention to the matter and designates \( C_1 \). The decision is promulgated, \( C_1 \) is instituted, and everyone plays the part \( C_1 \) assigns him. As a result, when an earthquake strikes two or three years later, the community is about as prepared on the civil defense front as it could reasonably have been expected to be.

The example illustrates a couple of things, both of them implicit, I think, in the account of authority and coordination that Finnis provides. First, a trivial point: I take it we all agree that although authority is an ideal-type concept\(^{19}\)—that is, the term is used normatively and evaluatively—it has a "focal meaning," there are central and secondary cases of authority, etc. It is not shifted from its central ground in this case by the fact that it is being used to address a regrettable and less-than-ideal circumstance that faces human communities—namely, natural disasters. Such a regrettable and less-than-ideal circumstance is exactly the sort of circumstance in which authority does its central and ideal work.

Second, we should also not regard it as a derogation from the centrality of this case that the members of the community have come up with more than one scheme, competing (as it were) to fill this single slot of community-preparedness. On the contrary, what could be better in a civic-minded community than that people propose a variety of bright ideas to address problems like civil defense preparedness? Anyway, we simply cannot say that the multiplicity of schemes compromises the centrality of this instance of authority. For the mul-

\(^{19}\) For a discussion of "ideal-type" concept, see id. at 9.
tiplicity of schemes is exactly what poses the problem that calls for authority in the first place.

V.

Now consider a third point, which Finnis's formulation does not bring out nearly so well. When $C_2$ is proposed, it is unlikely to be proposed simply as another way of doing what $C_1$ proposes to do. Instead, we should imagine that those who propose $C_2$ do so because they think it is a better way of addressing the preparedness problem. Or more abstractly, they think that $C_2$ better embodies the demands of practical reasonableness (prudent coordination in regard to this aspect of the common good) than $C_1$. That is why they propose it.

They are not necessarily right about this, of course. Certainly, they are not right just because they think they are. But I am interested in what follows from the content of their thought, particularly so far as the exercise of authority in the community is concerned. Let's call the particular exercise of authority (choosing $C_1$ over $C_2$) "E." The proponents of $C_2$ believe,

(1) $C_2$ embodies the demands of practical reasonableness better than $C_1$.

And they know that:

(2) By exercise of authority $E$, $C_1$ has been selected over $C_2$.

At the end of Part IV, I said in effect,

(3) In these circumstances, $E$ is a central, not a secondary or marginal, instance of the exercise of authority.

And I thought I was following Finnis in this. That is, I thought this was exactly the sort of case in which Finnis would think the concept of authority was fully and centrally engaged.

But is 3 something the proponents of $C_2$ can believe? Is 3 compatible with 1 and 2? Surely not, according to the reasoning I attributed to Finnis earlier in Part III. For if it is true that the focal meaning of "law" (and the centrality of certain cases of law) cannot possibly be grasped with reference to a wrong or misconceived understanding of practical reasonableness, the same must surely be true of the focal meaning of "authority" and central cases of authority. They, too, are best grasped from a viewpoint that is not mistaken about practical reasonableness. So, if proposition 1 is true, then authority-exercise $E$ cannot be regarded as a central case; any claim to regard it as such would have to involve either an inadequate viewpoint so far as practical reasonableness was concerned or, in the case of an adequate viewpoint, a mistake in its application to $E$. I am not saying that this is
true (that favoring $E$ does involve a mistake or an inadequate viewpoint), but I am saying that this follows from what the proponents of $C_2$ think. I am saying it follows from the content of their thought as expressed in 1. Or, to put it the other way around, since 2 is undeniable, it looks as though the proponents of $C_2$ can accept 3 only by giving up 1.

This is not just a problem from the point of view of the proponents of $C_2$. It is also a problem for their rivals and for the whole community. What began as a disagreement over the desirability of $C_2$ over $C_1$ has become a dispute about whether $E$ is a central, as opposed to a marginal, instance of the exercise of authority. And that logic seems subversive of the point of authority. For surely—and certainly on Finnis's account—it is the central function of authority, in cases like this, to settle on one or the other of the competing schemes in the name of the whole community despite the community-members' disagreements about their merits.

VI.

Finnis may be tempted to say that those who believe 1 cannot believe that $E$ is a central instance of authority, because the central case of authority has to do with the choice between "two or more available, reasonable, and appropriate solutions." He may think that their acceptance of 1 shows that they think that $C_1$ is unreasonable and inappropriate, at least compared to $C_2$. That is, Finnis may be tempted to identify the central case of authority with effective selection in the name of the community among equally eligible alternatives. He may be tempted to say that selection among alternatives, one of which is eligible and the other not, either is not a central case of authority or is a central case of authority only on the condition that the eligible alternative is chosen. And he may use this to explain why those who accept 1 should, therefore, deny 3. I believe, however, that this temptation should be resisted.

Unless it is resisted, the focal meaning of authority will be associated with a class of cases in which its tasks seem least consequential—a class of cases that game-theorists call pure coordination games. In a pure coordination game, the matrix of possibilities for two persons looks like Figure 1.

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20 *Id.* at 232 (emphasis added).
In each cell (for each outcome), the value of the outcome in Row-Chooser's eyes is stated first, and the value of the outcome in Column-Chooser's eyes is stated second. The pay-offs are valued ordinally in each case and for each player as follows: \((1, 2)\) means that the outcome is the best of the possible outcomes in Row-Chooser's eyes and the second-best of the possible outcomes in Column-Chooser's eyes.

"Drive on the left" and "drive on the right" are possible instances of \(X\) and \(Y\) that satisfy this scheme for any pair of choosers who share the same roads, and it illustrates appropriately enough the gravity of the problems to which this sort of conception applies. Neither party thinks \(X\) or \(Y\) a better solution. Each would be entirely content with either, provided the other party adopted it also. And each knows this about the other. It is clear enough that a community needs authority to solve problems like this. But it is clear, too, that the cases which satisfy these specifications are miles away from the central and serious cases in which authority is required in human life.\(^{21}\)

It seems characteristic of serious cases of the exercise of authority that it is exercised in order to select among options which the persons over whom the authority is exercised do not regard as equally eligible. As I said earlier, the fact that they do not regard them as equally eligible is probably indispensable in explaining the genesis of the alternatives. The alternatives do not appear by magic or out of nowhere (nor, as in the simple driving case, are they more or less given by the situation). They are proposed as an upshot of the exercise of human intelligence. Moreover, they are proposed, not as playful alternatives—"What say we try this?"—but as suggested improvements. One cannot propose something as an improvement and then be indifferent as between its adoption and the adoption of the alternative on which it is supposed to improve. That is what is going on in our civil

\(^{21}\) Also, as one of Finnis's critics has pointed out, the more Finnis concentrates on cases exactly like this, the more difficult a task he has in moving from the central case of authority (so understood) to what he would regard as the central case of law. See Leslie Green, Law, Co-Ordination, and the Common Good, 3 Oxford J. Legal Stud. 299, 299–324 (1983).
defense example—the choice between $C_1$ and $C_2$. People came up with $C_2$ because they thought it would be better.

In cases like this, then, what becomes of Finnis’s stipulation that authority is a response to problems in which there are “two or more available, reasonable, and appropriate solutions, none of which, however, would amount to a solution unless adopted to the exclusion of the other solutions available, reasonable, and appropriate for that problem?” The answer is that we can interpret “reasonable and appropriate” in a way that does not amount to “indistinguishable as to reasonableness and appropriateness.” We do so in the following matrix Figure 2.

<table>
<thead>
<tr>
<th>Column-Chooser</th>
<th>$C_1$</th>
<th>$C_2$</th>
</tr>
</thead>
<tbody>
<tr>
<td>$C_1$</td>
<td>1, 2</td>
<td>3, 4</td>
</tr>
<tr>
<td>$C_2$</td>
<td>4, 3</td>
<td>2, 1</td>
</tr>
</tbody>
</table>

**Figure 2: Partial Conflict**

(The values here are as they were before: ordinal as to the common good and representing the opinion of each party, with Row-Chooser's evaluation stated first. As before, the values represent the parties' judgments of desirability so far as the common good is concerned.)

Though Column-Chooser regards $C_2$ as better than $C_1$, he nevertheless thinks $C_1$ is a reasonable and appropriate solution for the parties to coordinate upon, at least compared to the value of non-coordination. That is, he thinks outcome $(C_1, C)$ would be better for the community than $(C_2, C_2)$. Clearly, a community facing this sort of choice requires authority to choose among outcomes which are reasonable (in this sense), in order to avoid the occurrence of the third or fourth-ranked outcomes—$(C_2, C)$ and $(C_2, C_1)$—that would result from non-coordination. Though the parties value the different schemes and the different outcomes differently—by which I mean they value them differently in terms of the common good—they agree that it would be disastrous for each to attempt to play his part in his favorite scheme without regard to the part that the other was playing. To avoid this disaster, each needs to share knowledge with the others about what scheme will be regarded by others as the salient point of coordination, and they need collective assurance that *that* is the

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22 Finnis, supra note 1, at 232.
scheme in which the others will play their part. That knowledge and that assurance are what authority can provide. And it seems to me that providing such knowledge and assurance in precisely these circumstances—circumstances where people disagree about the merits of what is proposed—is a central case, not a secondary or marginal case, of the contribution that authority can make to the pursuit of common good in human communities.

VII.

What, then, would it be for a proposal to be thought unreasonable in this context? Well, consider a pair of proposals, \( C_1 \) and \( C_2 \), evaluated by the parties as follows in Figure 3.

![Figure 3: Non-Coordination](image)

In this case, Column-Chooser regards coordination on \( C_1 \) as worse than no coordination at all. Like someone who would rather not go with others to a restaurant if they have to go to an English restaurant or who would rather that there was not a single Republican presidential candidate if it were going to be someone like Newt Gingrich, Column-Chooser judges that the desirability of a coordinative outcome is not unlimited. Row-Chooser denies this, of course. According to him, the situation is pretty much like the choice in Figure 2: \((C_i, C_i)\) is better than either of the non-coordinative outcomes. But Row-Chooser may be wrong about this and Column-Chooser right, for it is a fact that not every coordinative scheme proposed for the sake of the common good is better, from the point of view of practical reasonableness, than no coordination at all. So Figure 3 provides an interpretation of what it is for someone to judge a coordinative proposal unreasonable (and also what it is for someone else to deny this).

The matrices I have given so far reflect nothing but the judgments of the parties—their individual beliefs or convictions about the contribution that possible outcomes would make to the common good. But this format is not intended to suggest that there is no fact of the matter. We could concoct a set of matrices just like Figures 1–3,
except that they are designed to express what we might think of as the *objective* value of the various schemes:

<table>
<thead>
<tr>
<th></th>
<th>C₁</th>
<th>C₂</th>
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<tbody>
<tr>
<td>C₁</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>C₂</td>
<td>2</td>
<td>1</td>
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</tbody>
</table>

**First matrix:** pure coordination

<table>
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<tr>
<th></th>
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<tbody>
<tr>
<td>C₁</td>
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<td>3</td>
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<tr>
<td>C₂</td>
<td>3</td>
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</table>

**Second matrix:** partial conflict

<table>
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<th></th>
<th>C₁</th>
<th>C₂</th>
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<td>C₁</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>C₂</td>
<td>2</td>
<td>1</td>
</tr>
</tbody>
</table>

**Third matrix:** non-coordination

In the second matrix of Figure 4, option C₁ is portrayed as objectively reasonable, despite its objective inferiority to C₂. Its reasonableness consists in its being objectively preferable to either of the non-coordinative outcomes. In the third matrix of Figure 4, option C₁ is portrayed as objectively *unreasonable* as a point of coordination, despite its being thought reasonable by one of the parties, whose evaluations are presented in Figure 3. The distinction between reasonable and unreasonable options, portrayed here, is quite independent of what anyone thinks.²³ The sense in which C₁ is a reasonable option in the second matrix of Figure 4 has nothing to do with anyone’s *thinking* that it is superior to C₂ (though no doubt it is the case that there would not be a C₁ to consider unless someone thought it superior). Its reasonableness consists simply in its objective superiority to either of the non-coordinative outcomes.²⁴

**VIII.**

It has been a while since we said anything about justice. It may be thought that the analysis I have given is all very well when we are choosing between things like alternative schemes for civil defense (C₁ and C₂), where an option can be described as reasonable, even though it is believed to be inferior. But is it acceptable to think along these lines when the issue is justice?

Finnis’s own presentation of the coordination idea seems to suggest that the answer is “yes” (though in Part XII, below, I shall consider some suggestions he has made in more recent work that there

²³ It is purely a matter of whether authority (a device which, on Finnis’s account, can do nothing for the common good which does not involve facilitating coordination) makes things better or worse than they would be without coordination.

²⁴ I think Finnis is referring to something like this when he talks about the use of authority “to promote schemes thoroughly opposed to practical reasonableness” as a deviant use of authority. **Finnis**, *supra* note 1, at 246.
cannot be reasonable disagreements about the fundamentals of justice). The passage which I quoted from *Natural Law and Natural Rights* at the beginning of Part IV observed that intelligent individuals are likely to come up with a plurality of schemes for social coordination and that some choice will need to be made. The passage continued, "[U]ntil a particular choice is made, nothing will in fact be done. Moreover, in some forms of human community, that something be done is not just a matter of optional advantage, but is a matter of right, a requirement of justice." For example, Finnis says, there has to be a social decision among alternative ways "of reconciling aspects of justice with each other, and of reconciling human rights with each other."

To illustrate this, let us explore an example about justice, analogous in form to the case of civil defense preparedness which we considered earlier. Any society has to face the issue of what to do about economic misfortune that for certain families or individuals results in desperate poverty. But any societal response has to reconcile competing demands that may be made in the name of justice and relate them also to broader considerations of the common good: there are the sheer claims of need, considerations of desert, justice-based concerns about the acceptable range and patterns of economic inequality, issues about the fair distribution of opportunity as between the innocent children of the poor and the innocent children of the rich, property-based claims which the better-off might raise as objections to redistributive taxation, and concerns about incentives and efficiency in the community at large.

In a given community, some intelligent members might propose a scheme of social welfare and market organization to meet what they regard as the complex demands of justice. Their scheme, \( J_1 \), involves relatively limited welfare payments to those in poverty, but this limited cash support is offered against the background of a nationalized health system, free education of high quality to tertiary level, and a tightly regulated housing market. Others in the community propose an alternative scheme, \( J_2 \), which administers rather more generous cash payments to those in desperate poverty, but which allows public schools to fall into disrepute, does not offer anything other than bare-minimum socialized medicine, and permits landlords to charge what they like for housing.

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25 *See supra* note 17 and accompanying text.
26 FINNIS, *supra* note 1, at 232.
27 *Id.*
28 For a helpful discussion, see *id.* at 192.
The proponents of $J_1$ and $J_2$ may agree that it is important, from the point of view of justice, that one or the other scheme be put into effect (or some further alternative addressing the same problems). They may agree that the lack of any organized scheme of this sort would be a disaster from the point of view of justice. But of course, they disagree on the merits. $J_1$ and $J_2$ are not playful alternatives. While acknowledging that the matter is complex, the proponents of each believe that the other falls seriously short of what justice requires. And though each acknowledges that the other alternative is better, from the point of view of justice, than nothing at all, they are inclined, nevertheless, to condemn the opposing proposal as unjust. (And for all that I have said, one or the other of them may be right about that.) Their evaluations of the respective proposals may be expressed in the following (I hope, by now, familiar) form:

<table>
<thead>
<tr>
<th>Row-Chooser</th>
<th>Column-Chooser</th>
</tr>
</thead>
<tbody>
<tr>
<td>$J_1$</td>
<td>$J_1$</td>
</tr>
<tr>
<td></td>
<td>1, 2</td>
</tr>
<tr>
<td>$J_2$</td>
<td>3, 4</td>
</tr>
</tbody>
</table>

**Figure 5**

The matrix in Figure 5 is the same as that in Figure 2, except that $J_1$ and $J_2$ replace $C_1$ and $C_2$. The numbers represent, respectively, Row-Chooser's and Column-Chooser's ordinal rankings of each outcome from the point of view of justice.\(^{29}\)

For completeness, we should add a couple more matrices, which are the justice/law versions of the matrices in Figures 1 and 3, respectively:

\(^{29}\) It is important, for the points that I am making, to emphasize the ordinal nature of these rankings. Row-Chooser ranks outcome $(J_1, J_1)$ first, outcome $(J_2, J_2)$ second, and outcome $(J_1, J_2)$ third; but what the numbers 1, 2, and 3 do not convey is how much better, from the point of view of justice, Row-Chooser may regard the first outcome than the second. The first may beat the second narrowly, or the second may be very considerably worse than the first, from the point of view of justice. All that is important, for the points I am making, is that, whatever the discrepancy between the two outcomes, both parties rank both coordinative outcomes as better, from the point of view of justice, than a failure to coordinate.
The left-hand matrix in Figure 6 presents a case where there are two alternative schemes of justice, and the parties believe there is nothing to choose between them. As in the rules of the road case, they think that justice is indifferent as between them, though, of course, justice is not indifferent as to whether a choice is actually made between them or not. In the right-hand matrix, however, the parties are so divided on the merits of the rival schemes that one of them, Column-Chooser, regards coordination on the first alternative, \( J_1 \), as worse, from the point of view of justice and the common good, than no coordination at all, whereas Row-Chooser regards \( J_2 \) as the most eligible option.30

What I am concerned to deny is that the authority of law makes its central claims only in situations like the left-hand matrix in Figure 6, where there is really nothing to choose (from the point of view of justice) between the alternatives, \( J_1 \) and \( J_2 \), proposed in a society.

As I said, in the body of *Natural Law and Natural Rights* there are indications that Finnis denies this also—that he, too, believes that solving a problem like that set out in Figure 5 is central, not marginal, to the concept of legal authority. For example, in a couple of places, he addresses the possibility of a justice-related problem to which "various reasonable solutions may be proposed and debated and should be settled by some decision-making procedure which is authoritative."31 He does so with regard to the specification, demarcation, and balancing of human rights32 and with regard to the criteria of distributive jus-

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30 Don’t forget that the rankings are ordinal for each person. They are not interpersonally comparable. There is no sense whatever in which Row-Chooser’s ranking 4 is worse than Column-Chooser’s 3.

31 Finnis, *supra* note 1, at 220.

32 See *id.* at 218–21.

[We can say that people (or legal systems) who share substantially the same concept (e.g., of the human right to life, or to a fair trial) may none the less have different conceptions of that right, in that their specifications ... differ, partly because the circumstances they have in mind differ and partly because specification normally involves choices, by some authoritative process, from among alternatives that are more or less equally reasonable.]

*Id.* at 219. *See also infra* note 36 and accompanying text.
tice. In the latter instance, he talks of reasonable criteria for distributive justice failing to "yield any one pattern of distribution (or even any determinable set of patterns) on which all reasonable men would be bound to agree," while in the former case he notices that it is not the task of law or authority to bring on-going discussion to an end.

These formulations, especially the second, suggest that it is possible to adjudge both $J_1$ and $J_2$ "reasonable" even while debate continues to rage as to their relative merits. And that must mean that a solution—say $J_1$—may be regarded by both sides as reasonable, even though Column-Chooser thinks that a reasonable argument can be made that it is inferior on grounds of justice.

IX.

If this is accepted, then perhaps we ought to start thinking about two meanings of "lex iniusta"—(i) a meaning defined in terms of the matrix in Figure 5 (for in that case there is a sense in which Column-Chooser regards $J_1$ as $lex iniusta$ relative to $J_2$) and (ii) a meaning defined in terms of the right-hand matrix in Figure 6 (where at least one party regards one of the options as worse than no coordination at all on an issue of justice).

Sense (ii) of $lex iniusta$ clearly satisfies the claims by Finnis set out at the beginning of this Essay. Someone who thinks a given law is so unjust that we would be better off, from the point of view of justice, leaving each other to pursue our own best individual views on the issue which it addresses, cannot possibly think of the positing of such a law as a central case of law-making. But sense (i) of $lex iniusta$ arguably does not satisfy these claims. Indeed, I think I can show it is a mistake to insist that a $lex iniusta$ in sense (i) cannot be a central case of law. The argument to this effect is delicate. It goes as follows:

The work that legal authority has to do, on Finnis's general conception, is to facilitate conscious coordination in situations where coordination is practically necessary in pursuit of the common good. The reference to conscious coordination is important. Neither authority, nor legal validity, can do their work silently—that is, irrespective of what people think about the work they are doing. To vary the metaphor slightly, law is not like an invisible hand. It cannot do its work unless people are aware of its doing its work (or, frankly, unless they are doing its work for it). Law certainly cannot do its work of coordination if some, among those whose pursuit of the good is to be coordinated, do not believe that law is making a proper contribution to the

33 See FINNIS, supra note 1, at 192.
34 Id.
solution of a coordination problem. These points are not highlighted in Finnis’s account, but I think they follow pretty obviously from his conception of the “rule of law.” Certainly, we should want to insist, on Finnis’s behalf, that cases in which the community is divided, as to whether law is acting appropriately or helpfully or not (so far as coordination is concerned), cannot be central cases of law. A standard of legal validity (and the account of what law is doing, which backs up that standard) must be a shared standard of validity. That means that a central case of legal authority or legal validity cannot be a case in which the parties disagree about its centrality. Because of the commonality or shared-ness central to law, a case which is such that the parties disagree about its centrality must be less central than a case in which they do not.

Now clearly, the parties will agree about law’s contribution to the pure coordination problem in the left-hand matrix in Figure 6 (assuming law solves the problem). There is nothing in the merits of the case or in the parties’ respective opinions about the merits that could possibly generate any disagreement. However, as we have already seen, these are trivial cases, and it would be odd if there were no other cases than these in the core of the concept law. The problem is that the non-trivial cases are like those in Figure 5, where the parties disagree about the justice-related merits of $J_1$ and $J_2$. If legal resolutions of such cases are to figure (as central cases) in the core of the concept law, it must be possible to drive a wedge between the issue about the merits of the options and the issue about whether this is a central case of legal authority. It must be possible to insulate the latter issue from disagreements about the former. Or else, all such cases will have to be categorized as non-central.

Thus, suppose Column-Chooser were to say that the positing of $J_1$ was not a central case of law or legal authority, because it involved the choice of an option which was worse from the point of view of justice. Row-Chooser would, of course, deny this and would maintain that the positing of $J_1$ was a central case of law because $J_1$ was the more just alternative. So the parties over whom the putative authority was being exercised would disagree about whether it was a central or a marginal case of authority, and accordingly, their response to its claims would be somewhat different. The continuation of their debate over justice—which, as we saw, Finnis envisages—would constitute an ex post facto debate about the validity of the law. But surely, law and authority cannot operate in this way. Surely, in cases where a social choice is

35 See id. at 266–81.
36 See id. at 220.
made between two, reasonable, rival proposals, people ought to be able to agree on the issue of legality or legal validity ("Which proposal is now identifiable as the legally valid choice?") even while they disagree on the merits of the proposals. Indeed, it is hard to see what positive law could add to a situation like this, if it could not yield identical judgments about legal validity in this circumstance. If one of the parties thought $J_1$ was *lex iniusta* in sense (ii), while the other party denied this, then certainly we would be dealing with a problematic case, because the parties would be disagreeing, in effect, about whether the legal imposition of $J_1$ could contribute to the solution of the sort of coordination problem which, on Finnis's account, it is exactly law's mission to address. This could not possibly be regarded as a central case of law, not even by the party who regarded $J_1$ as just. Why not? Because law cannot be thought to be doing the work that it ought to do, if all know that at least one of the parties concerned, such as the supporter of $J_2$, believes, not unreasonably, that it is not doing that work. If, however, it is evident to all (and agreed by all) that the positing of $J_1$ can solve the coordination problem, then the fact that one or the other party thinks some alternative solution would be even better does not alter the fact that the chosen solution can be recognized as such (I mean, recognized as chosen) by both of them.

X.

Against the claims I am making about the natural lawyers' view of these matters, someone might say,

*Of course* a natural law theory, like Finnis's theory, is going to get into the tangles you have indicated. That is because natural lawyers do not take positive law seriously. Unlike Hobbes, Bentham, Austin, Hart, and Raz, they do not see the advantage of having a concept of legal validity relatively insulated from the moral assessment of the norms to which it applies. The argument in the last part insists that law, authority, and validity cannot do their work unless people can agree about when they are doing their work. That is a positivist view, for it requires people to disengage their faculty of making judgments about morality and justice when they are answering questions of law, authority, and validity.

But this will not do, certainly not as a claim about Finnis (nor, if Finnis is right, as a claim about such other paradigmatic natural lawyers as Aquinas). For Finnis's theory of natural law *does* purport to take positive law seriously. It maintains that there are problems in human life that only positive law (with its authority and its standards of validity) can solve, and it provides an elaborate account of the relation be-
tween the concepts and mechanisms of positive law—including validity—and the concepts and mechanisms of natural law.37

What I was arguing in Part IX of this paper was not that Finnis will be unable to give a positivist account of law, if he sticks with his thesis that no unjust law can be a central case of law. I was arguing that he will not be able to give a coherent account of the work allocated to positive law by his own natural law theory, if he sticks with that thesis.

As we have seen, the work allocated to positive law in Finnis's own natural law theory does not require a notion of positive validity that is entirely insulated from moral judgment. Positive validity, as a legal notion, does its work in situations where practical reasonableness requires coordination among the members of a society. That is, it does its work in circumstances where it is better, from the point of view of practical reason, that people act in a coordinated way than that each try to figure out for himself what practical reasonableness requires of him. Now, that will not be true of every case in which people might coordinate. People might coordinate in a way that made things worse, not better, than the situation in which each tries to figure things out for himself. Any notion of positive validity oriented towards coordination in cases of that kind would be of negative interest to the theorist of natural law. (On a positivist view, by contrast, such a notion would be of no less interest, jurisprudentially, than any other.) So positive validity, on the natural law account, does have a moral dimension.

But I am arguing that that moral dimension must leave room for cases in which people disagree about which of two coordinative schemes would be better, from the point of view of justice, even though they agree—and rightly—that either would be better, from the point of view of justice, than no coordination at all. In that circumstance—which of course is specified morally (but not specified, so to speak, as a matter of maximizing morality)—the notion of legal validity should be oriented unequivocally to the part of the moral equation that has to do with the superiority of coordination over non-coordination, not to the part of the moral equation that has to do with the superiority of one of the coordinative schemes over the other. Without that unequivocal orientation, legal validity would do its work differently in the eyes of different participants, which is to say that it would fail altogether to do the only work allocated to it in a theory of this kind—that is, the work of supporting and facilitating coordination where coordination is morally important.

37 See, for example, the account of the emergence of custom (a form of positive law) in Finnis, supra note 1, at 238–45.
Near the beginning of this Essay (in Part II), I appealed to an analogy between the circumstances of justice and the circumstances in which law makes its claims upon us. This is an analogy I have used in several places in my recent work,\(^\text{38}\) and I would like to say a little more about its implications here.

I suggested that we should regard disagreement about justice and the common good not as an unusual situation for legal authority to have to deal with, but as the paradigm situation in which it does its central and characteristic work. The analogy was with scarcity and distributive justice. The situation in which goods are moderately scarce, so that not everyone can get all he wants, is not anomalous or unusual, so far as the application of rules of justice are concerned. Rather, this is one of the circumstances which make justice a necessary virtue.\(^\text{39}\) If you like, it is one of the presuppositions of justice.\(^\text{40}\) We may say, along similar lines, that the existence of disagreement about justice or the common good, together with the need for a single decision, is a presupposition of legal authority.

I think of this as a rather obvious point, but it has not been given great prominence in recent discussions of authority. It is obvious enough that authority presupposes a choice among courses of action. This is assumed, I take it, by all theories which analyze authority in terms of reasons for action.\(^\text{41}\) And Finnis makes this quite clear, too, when he acknowledges, as background to his discussion of authority, the fact that human intelligence characteristically gives the members of any community "more possible orientations, commitments, projects, 'priorities,' and procedures to choose from" than they can possibly adopt, necessitating some sort of choice among this plethora of alternatives.\(^\text{42}\) What is not emphasized enough—and what I have tried to emphasize here—is that authority presupposes not only that we are confronted by alternative courses of action, among which some choice is necessary, but also that we are confronted by alternative

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38 See Jeremy Waldron, The Circumstances of Integrity, 3 Legal Theory 1 (1997); see also Jeremy Waldron, Law and Disagreement 102, 105-17, 159-60, 189, 207-08 (1999).


40 For articles that discuss "presupposition" in Strawson's sense, see P.F. Strawson, On Referring, 59 Mind 320 (1950), and P.F. Strawson, A Reply to Mr. Sellars, 63 Phil. Rev. 216 (1954).


42 Finnis, supra note 1, at 232.
courses of action, concerning whose merits those who have to settle on a course of action disagree. The position of an authority is not characteristically that of a tie-breaker, one who settles on a single course of action from a range of alternatives among which everyone is indifferent. On the contrary, the position of an authority characteristically is that of a person or institution whose decision must override the considered opinions (concerning the merits of the alternatives) of some of those over whom he is an authority. So, if he is an authority on some matter of justice, his decision must override the considered opinion of some of those subject to his authority concerning the justice of the various options among which a choice is required.

From this, a quite important result follows. It cannot ordinarily count against an exercise, $E$, of authority that $E$ has selected an unjust outcome (say, $J_1$). For the proposition “$J_1$ is unjust” to count against $E$, it would have to be held by one of those over whom the authority in $E$ was exercised. But it is characteristic of authority, I have argued, that it has to settle on a course of action for a community, some of whose members believe the proposition “$J_1$ is unjust” and some of whose members deny it. That a given member of the community believes that $J_1$ is unjust is not a ground for impugning authority; it is one of the circumstances that elicit it.

A similar argument can be developed along lines suggested by Joseph Raz (if I may be permitted to adapt his argument to my terminology). Raz argues that $E$ cannot be authoritative unless there is a way of identifying $E$ as an exercise of authority which does not involve ascertaining whether “$J_1$ is unjust” is true.\footnote{See Joseph Raz, Authority, Law, and Morality, in Ethics in the Public Domain: Essays in the Morality of Law and Politics 219 (1994) ("[T]he subjects of any authority... can benefit by its decisions only if they can establish their existence and content in ways which do not depend on raising the very same issues which the authority is there to settle.").} By the same token, $E$ cannot be authoritative \textit{to any particular extent} (for example, a central case of authority, or a less-than-central, or a marginal, case of authority) unless there is a way of showing that it is authoritative \textit{to that extent} which does not involve ascertaining whether “$J_1$ is unjust” is true. This is my basis, then, for denying what I said in Part III was Finnis's position, that the choice of an unjust alternative detracts from the centrality of the exercise of authority which involves the making of that choice. I want to say that, in the circumstances of authority, an unjust law may be no less a law, even in the central and focal sense of “law” that we identified in Part I, than a law whose justice is unimpugnable.
It does not follow, of course, that "lex iniusta non est lex" has no work to do. If $J_i$ is so unjust that things would be better, from the point of view of justice, if the members of the community in question did not coordinate their activity in this regard at all, then the choice of $J_i$ cannot be a central case of authority, nor can a law embodying $J_i$ be a central instance of law. This is what I argued in Part VIII, with reference to the right-hand matrix in Figure 6. But $J_i$ may be less just than some alternative, although its adoption by a community may be better, from the viewpoint of justice, than non-coordination. In this case—where $J_i$, though unjust, is nevertheless just enough (lex satis iusta)—the centrality of $E$ as an exercise of authority and a basis of law is insulated from any verdict about justice on the merits.

XII.

I have tried to develop this case within the broad structure of Finnis's approach to jurisprudence. Nevertheless, Finnis is unlikely to accept my conclusion—that a law may be judged less than just but still consistently be regarded as law in the fullest sense. But I do not think the source of our disagreement has much to do with the logic of the argument in the preceding parts. I think Finnis might well accept that, if there were such a thing as reasonable disagreement about justice, then we would have to distinguish two senses of lex iniusta, along the lines I indicated in Part IX, and deal with them as I have suggested. In his recent work, however, he has committed himself quite firmly to the view that there cannot be reasonable disagreement about justice, at least not about its fundamentals.44

This view has been developed by Finnis in response to a suggestion by John Rawls about issues, like abortion, which seem to involve disputes about deep ethical or theological views. Rawls suggests that there are some propositions—such as the proposition that first-trimester foetuses are human beings with souls—about which "reasonable persons are bound to differ uncompromisingly."45 Rawls argues, in Political Liberalism, that such disputable propositions may not be cited in the public justification of any law or constitutional principle, and that, therefore, any law or constitutional principle which is indefensible apart from such propositions must be rejected. Finnis's response

44 See infra notes 47–51 and accompanying text.
is to ask (though these are not exactly his words), "in what sense of 'bound' are people bound to disagree about issues like abortion? Is this just a matter of prediction? Or is Rawls suggesting that the disagreement itself is reasonable, in the sense that reason actually underwrites the disagreement or underwrites both of the contestant positions?" Of course, Finnis is as well acquainted as anyone with actually existing disagreement about these issues as a matter of sociological fact. But he identifies himself with the tradition of ethical rationalism, which insists that reason can, in principle, reach a singular truth on matters like these, if it is used and followed expertly and conscientiously. With regard to the disputant positions about abortion that I mentioned—"first-trimester foetuses are human beings with souls" and "first-trimester foetuses are not human beings with souls"—Finnis denies that both of them can represent the conclusions of reason. He insists that anyone committed to reason must also be committed to the view that, at most, only one of these positions may be described as reasonable. Accordingly, he says, we cannot even say that the disagreement between the two positions is reasonable, since we all agree that at least one of the positions is unreasonable (even if we disagree about which one).

Finnis is working here with very strong senses of "reasonable" and "unreasonable." He treats them as terms which take their meaning, if you will, from the telos of reason—namely, truth. Ultimately the telos of reason in any domain, on any matter, is to attain the truth about the matter, and moreover, to obtain it in a way that is not arbitrary or accidental, but by a method which, given the way the world is, could only have led to that result. So, on Finnis's account, an unreasonable view is one to which (it will turn out) reason could not have led us. Of course, we may not know in advance of consummate, rational inquiry which proposition is true and which is not. But this deficit in our knowledge is not itself a ground for regarding both propositions as reasonable, any more than it is a ground for saying that they are both, for the time being, true.

Finnis also maintains that a reasonable person who affirms a proposition affirms, in effect, that all other reasonable people will agree with him. That is, reasonable affirmers must believe that at least under "favourable conditions of investigation" and reflection, "rea-

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46 See Finnis, supra note 45, at 365.
47 See id. at 364-65 n.19.
48 See id. at 365.
sonable people would agree with their affirmation." This, together with the unity of truth, quickly disposes of any idea that a reasonable affirmer could recognize the reasonableness of his opponent’s denial, according to Finnis, unless, perhaps, they are "mere propagandists willing to use any and every rhetorical device to win non-rational endorsements of the theses for which they are ‘arguing.’"  

Rawls approaches the meaning of “reasonable” and “unreasonable” in a quite different way. For him, a view is reasonable (at a given time) if it is capable of representing (at that time) the upshot of a conscientious use of human intellect. As Rawls observes in a footnote, “In a particular case someone may, of course, affirm a reasonable doctrine in an unreasonable way, for example, blindly or capriciously. That does not make the doctrine as such unreasonable.” Rawls believes that in the circumstances of human life, mutually inconsistent views, especially about deep matters of philosophy, ethics, and religion, will often both be reasonable in that sense. He speaks of these circumstances as “the burdens of judgement,” by which he means “the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgment in the ordinary course of political life” which stand in the way of any expectation of agreement among reasonable persons. Many of our most important judgments, Rawls says, are made about matters and

50 Finnis, supra note 45, at 365 n.21.
51 Id.
52 Let me say that I accept immediately Finnis’s suggestion that Rawls’s use of “reasonable” and “public reason” is confused. Id. at 363; see also Jeremy Waldron, Justice Revisited, TIMES LITERARY SUPPLEMENT, June 18, 1993, at 5–6 (distinguishing between (i) “reasonable” in the sense of willing to come to terms with others in good faith and (ii) reasonable in the sense of possibly being the upshot of a conscientious and unbiased application of epistemic capabilities). Rawls fails to see that (i) and (ii) may come apart. The discussion in the text refers only to (ii).
53 See Rawls, supra note 45, at 48–66. Two points about this definition are worth noting: (1) The time indices indicate that, in Rawls’s sense, one and the same proposition can be reasonable at one time, but unreasonable at a later time (for example, in light of a well known, intervening discovery). This relativity to time is not appropriate for Finnis’s use of “reasonable,” though it may be appropriate for the predicate “conscientiously and on good grounds believed to be reasonable (in Finnis’s sense).” See Finnis, supra note 45, at 369–70. (2) In sense (ii) of supra note 52 above, “reasonable” is applied to propositions not persons. A proposition is reasonable (at a time) if there is something about it (and the circumstances of the time) that make it a candidate for a conscientious and competent exercise of human intellectual powers (at that time).
54 Id. at 60 n.14.
55 Id. at 54–56.
56 See id. at 54–58.
under conditions "where it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will arrive at the same conclusion."\(^{57}\) On any plausible account, human life engages multiple values, and it is natural that people will disagree about how to balance or prioritize them. Also, on any plausible account, people’s respective positions, perspectives, and experiences in life will give them different bases from which to make these delicate judgments. These differences of experience and position combine with the evident complexity of the issues being addressed, resulting in disagreement among reasonable persons not only about what the world is like, but also about the relevance and weight to be accorded the various facts and insights that they have at their disposal. Together, factors like these make good faith disagreement not only predictable, but inevitable: “Different conceptions of the world can reasonably be elaborated from different standpoints and diversity arises in part from our distinct perspectives. It is unrealistic... to suppose that all our differences are rooted solely in ignorance and perversity, or else in the rivalries for power, status, or economic gain.”\(^{58}\) Rawls does not think this commits him to denying that, at most, only one of two such mutually inconsistent propositions (such as our pair of propositions about first-trimester foetuses) can be true. And he concedes, of course, that one who affirms a reasonable position usually affirms it as true.\(^{59}\)

Unlike Finnis, however, Rawls does not believe that truth directly spawns a notion of reasonableness that is helpful for politics, nor does he believe that the affirmation of truth indicates a commitment to a notion of reasonableness tied tightly to truth in this way. In response to the Rawlsian idea of the burdens of judgment, Finnis offers the following:

There are many reasonable differences which arise from differences of sentiment, of prior commitment, and of belief about likely future outcomes. In such cases, there is no uniquely correct opinion, though there are many incorrect opinions. But in relation to some matters, including at least some matters of basic rights, there are correct moral beliefs, accessible to all (even to those who in fact reject them). In relation to such matters, differing opinions can only be rooted in ignorance or some sub-rational influence, and it is mistaken—though this of course needs to be shown, by rational argument—to say that there is more than one “fully reasonable” or “perfectly reasonable” belief. If by “perfectly reasonable” though er-

\(^{57}\) Id. at 58.

\(^{58}\) Id.

\(^{59}\) Id. at 61.
roneous belief Rawls means a belief which is held without subjective moral fault in respect of the forming of it, I would say that that is an important category of *de facto* beliefs but one which would better be called, not “perfectly reasonable”—which it quite clearly is not!—but “inculpably erroneous,” blamelessly mistaken or, in one traditional idiom, “invincibly ignorant.” Public reasoning should be directed to overcoming the relevant mistakes, and public deliberations should be directed to avoiding them in practice—not pre-emptively surrendering to them.\(^6\)

Now, this position is stated carefully enough to leave a number of options open. Finnis acknowledges, first, that there are some matters on which there is no uniquely true or correct position. On such matters, it is possible that two or more positions may be reasonable, even though they are, in some sense, opposed to one another. Second, he of course accepts that someone may be blamelessly mistaken about a matter on which there is a right answer. For this case, all that Finnis denies is that the concept of “reasonableness” should go with the “blamelessness,” rather than with the truth. And his argument for that is that, even when we are blamelessly mistaken, we still want a concept of reasonableness that is oriented towards the avoidance of such errors and the improvement of our intellect rather than a concept which surrenders to such vicissitudes purely on account of their innocence.

Third—and this is the least clear point—Finnis appears to leave open the possibility that, regarding some matters of basic rights (and, I assume, it follows from that, some matters of justice), there is no uniquely correct view (for what he says is that “in relation to some matters, including at least some matters of basic rights, there are correct moral beliefs”).\(^61\) The acknowledgment of that possibility is congruent with what we saw earlier (in Part VIII above)\(^62\) was the position in *Natural Law and Natural Rights* concerning the detailed specification of certain arrays of rights:

> [W]e can say that people (or legal systems) who share substantially the same *concept* (e.g. of the human right to life, or to a fair trial) may none the less have different *conceptions* of that right, in that their specifications . . . differ, partly because the circumstances they have in mind differ and partly because specification normally involves choices, by some authoritative process, from among alternatives that are more or less equally reasonable.\(^63\)

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60 Finnis, *supra* note 45, at 369–70 (footnotes omitted).
61 *Id.* at 370 (emphasis added).
62 See *supra* note 32 and accompanying text.
63 Finnis, *supra* note 1, at 219.
Let's call these differences "S-differences" ("S" for "specification of rights"). I think it follows, from all that has been reported over the past couple of pages, that Finnis believes that, so far as these S-differences are concerned, there is no truth of the matter, just reasonable alternatives.

What I find interesting and attractive about this position is that Finnis refuses to associate reason's inability to specify a uniquely correct resolution of an S-difference with any Rawlsian-style exclusion of S-differences from the public realm. S-differences do have to be resolved; the legal system cannot do without their resolution. Since reason cannot resolve them, they must be resolved authoritatively by law, according to Finnis. And what I have been arguing, throughout this Essay, is that something like the resolution of S-differences is no less central a case of legal authority than a case on which reason does promise and yield a uniquely right answer.

With regard to this class of cases, the only outstanding difference between us (as far as I can see) is that Finnis may believe it is inappropriate for a participant in an S-difference to maintain that his specification (of some right) is better or more just than that of his opponent. I am not sure whether Finnis thinks this or not. (It would certainly be a mistake to think that this followed from his earlier insistence on the point that anyone who thinks there is a truth of the issue must think that his opponent is unreasonable.) Finnis might say that any person, P, who thinks his specification, $J_2$, is better than another citizen's specification, $J_1$, must believe that there is reason to support $J_2$ rather than $J_1$, and so, with that belief, P must take the issue out of the range of "S-differences" as I have defined them. But this would have the silly consequence we noted earlier that S-differences would turn out not to be differences that people took seriously or that they would turn out to be differences on which people thought they just "happened" to differ. And I do not think that is consonant with the tenor of Finnis's analysis in the relevant chapters of Natural Law and Natural Rights.

Assuming S-differences may be both reasonable and serious, there is one final issue, on which I find myself lining up firmly with Finnis against Rawls. According to Rawls, the likelihood of an issue's

64 See id. at 220.

[T]he resolution of all these problems of human rights is a process in which various reasonable solutions may be proposed and debated and should be settled by some decision-making procedure which is authoritative but which does not pretend to be infallible or to silence further rational discussion or to forbid the reconsideration of the decision.

Id.
being contested—and of two contradictory views of it being held in
the community, reasonably (by Rawls's lights)—is a sign that such is-

sue is appropriately excluded from the public realm and taken off the
agenda of justice. Of those matters should be raised as matters of
justice on which reasonable disagreement—of the sort explicated in
Rawls's idea of the burdens of judgment—is not to be expected. Us-

ing our earlier example, the question of whether a first-trimester foe-
tus is a human being with a soul may not be presented as an issue of
justice, according to Rawls, because it is a question on which reasona-
ble people are bound to differ (using Rawls's definition of "reasona-
ble"). As I understand it, Finnis will have no truck with that approach,
and I think he is right in that. The fact that reasonable disagreement
is anticipated (even in Rawls's sense of "reasonable") is not a ground
for excluding an issue from the public agenda. It cannot be, be-

cause everyone knows that all serious issues of justice and rights are reasona-

bly contested, in that sense of reasonable. True, Rawls uses the burdens of
judgment to explain only what he calls comprehensive philosophical
disagreements. But, evidently, the same idea can be used to charac-

terize our political deliberations, including our deliberations about
rights and justice, as well as ethics, religion, and so forth. The circum-
stances under which people make judgments about issues like affirma-
tive action, the legalization of abortion, criminal process, the limits of
free speech, the limits of the market, the proper extent of welfare
provision, and the role of personal desert in economic justice are ex-
actly those in which we would expect, given Rawls's account of the
burdens of judgment, that reasonable persons would differ. As in the


case of more comprehensive disagreements, we do not need to invoke
bad faith, ignorance, or self-interest as an explanation. The difficulty
of the issues—and the multiplicity of intelligences and diversity of per-
spectives brought to bear on them—are sufficient to explain why rea-
sonable people disagree. Disagreement about justice—like disagree-
ment about almost everything else—is (as I said in Part IX)
one of the circumstances of politics. Finnis deplores this, of course.
He says,

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65 See Rawls, supra note 45, at 243.
66 Of course, Finnis rejects Rawls's sense of "reasonable," but that does not mean
he finds the alleged definiens unintelligible. So (using that definiens rather than the
contested term itself), Finnis believes that the fact that conscientious and intelligent
uses of human intellect would come up with opposing positions on a matter is not, in
itself, a ground for excluding that matter from the public agenda.
67 See Rawls, supra note 45, at 58.
68 See Waldron, supra note 38, at 112, 151-53. See generally Jeremy Waldron, Dis-
To the extent that there is lack of agreement on basic issues, to that extent there is an obstacle to genuine community. This obstacle is in itself a great harm for a society, and so "pluralism" of opinion on matters basic to the common good is a deficiency, an evil, something to be regretted—not something to be held up as a standard.69

In the end, it is perhaps this that explains Finnis's reluctance to see the resolution of disagreements about justice by legal or political means as a central case of authority. But at least he does not think, as Rawls does, that the prospect of disagreement—reasonable or not, deplorable or not—is in principle incompatible with the exercise of public reason.

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