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Finlay on Legitimate Authority: A Critical Comment

Abstract:
Christopher J. Finlay claims "that a principle of moral or legitimate authority is necessary in just war theory for evaluating properly the justifiability of violence by non-state entities when they claim to act on behalf of the victims of rights violations and political injustice." In particular, he argues that states, unlike non-state actors, possess what he calls "Lesser Moral Authority." This authority allegedly enables states to invoke "the War Convention," which in turn entitles even individual soldiers on the aggressive side to use military violence against soldiers defending the victim state. Non-state actors, in contrast, have to fulfill more stringent requirements. If they do not, then even their attacks on military personnel can properly be called terrorist. In the following I will argue that Finlay's attempt to show the importance of the legitimate authority criterion of just war theory and to demonstrate that non-state violence has to satisfy heavier burdens of justification than state violence fails for a number of reasons: his claim that defenders would wrong victims if they defended them against their will is mistaken, he overlooks the fact that non-state agents need not claim to fight on someone's behalf, the full moral authority he mentions is redundant, the powers he ascribes to "Lesser Moral Authority" are, depending on interpretation, either morally irrelevant or nonexistent, and his claim that granting states "Lesser Moral Authority" is beneficial from a "moral pragmatic" point of view while granting the same authority to non-state actors is not, is unwarranted.

Key words:
aggressors; Finlay, Christopher J.; legitimate authority; non-state actors; other-defense; states; terrorism; victims; war

Introduction

Christopher J. Finlay argues "that a principle of moral or legitimate authority is necessary in just war theory for evaluating properly the justifiability of violence by non-state entities when they claim to act on behalf of the victims of rights violations and political injustice." (288)[1] This formulation immediately raises two questions: given that Finlay only mentions non-state entities making certain claims, does he mean to imply a) that a principle of legitimate authority is *not* necessary for evaluating the justifiability of violence by *states*? This would indeed be a noteworthy – and curious – difference between the moral status of states on the one hand and of non-state entities on the other. Moreover, does he mean to imply that the principle of legitimate authority is not necessary for evaluating the justifiability of the violence of non-state actors who do not claim to act on behalf of *others* but simply act on behalf of themselves? If he does not mean to imply this latter proposition, but in fact means to deny it, it should be noted

[1] Christopher J. Finlay, "Legitimacy and Non-State Political Violence," *The Journal of Political Philosophy* 18(3) (2010): 287-312, page numbers in parentheses refer to this text.

already here that he has not provided an argument in support of such a denial (indeed, he does not explicitly address the issue).

Finlay divides his study into three parts. In the first part he focuses on individuals rather than communities and evaluates "the relevance of victim autonomy to determining the limits of legitimate acts of defensive assistance by third parties." (288) In the second part he focuses on communities instead, and argues "that for non-state entities to be able to characterize the killing of military personnel as attacks on 'combatants' they have a heavier burden of justification than is conventionally and legally demanded of sovereign states." (288) However, it is not entirely clear why he wants to argue that. To wit, why should the justifiability of the violence of non-state groups depend on such a belligerent's ability to "characterize the killing of military personnel as attacks on 'combatants'"? Why should a non-state entity not simply characterize its attacks as attacks on people who culpably engage in or contribute to severe rights violations? And isn't the *truth* of a moral proposition more important than how things are being "characterized"?

Anyway, in the third section Finlay argues "that representative legitimacy and consultative input are typically vital to the authorization of non-state entities and hence to their ability to invoke the targeting rights characteristic of war. In some cases, failure to fulfill these requirements will mean that attacks launched even on military personnel can properly be adjudged 'terrorist' on the 'orthodox' definition." (288-289)

In the following I will argue that Finlay's attempt to show the importance of the legitimate authority criterion of just war theory and to demonstrate that non-state violence has to satisfy heavier burdens of justification than state violence fails.

1. The Individualist Perspective

Finlay claims "that the victims of aggression might sometimes claim a right to refuse assistance." (290) With the qualifier "sometimes" he refers to "situations in which the victim is in a position to make an informed choice and to communicate it to a would-be defender." (292-293, emphasis removed) And his conclusion is that:

> the absence of consent or the presence of strong objections by the victim of aggression means that defensive actions taken on their behalf will be *less* justified. Whether the objections of the victim entirely negate the justification, however, depends on the meta-ethical frame we adopt. … Third parties, on this view, who proceed with a violent intervention in the face of a refusal of authorization lack legitimacy in relation to … the victim of aggression and putative beneficiary of defensive actions ... Thus, even though their use of force may not do any wrong to the aggressor, it might constitute an injustice to its supposed beneficiary. (294)

Finlay's only argument for this conclusion seems to be the claim that "on the basis of human dignity and the victims' *prima facie* entitlement to be involved in important moral decisions taken in the name of their rights" (296) "third parties might sometimes be obliged to value—or at least to consider valuing—a victim's autonomous choice over their right to life even when faced with probable death" (293).

This argument, however, is flawed. First of all, one needs to distinguish between a person's autonomy over her *life* and a person's autonomy over her *right* to life. A third party who defends a victim who does not want to be defended violates neither. To wit, the defender does not keep the victim from disposing of her life. If the victim wants to commit suicide, she is free to do so. In fact, the defender is not interfering with the victim

at all, she interferes solely with *the aggressor*. Therefore it is unclear how the defender can violate her autonomy. Accordingly, the defender is most certainly not interfering with the victim's *right* to life: the victim can waive or relinquish her right to life, her right against aggression, and her right of self-defense anytime. The defender is not keeping her from doing this at all. Moreover, the state could express its respect for this autonomy of the victim later on: if the victim had validly waived or relinquished her right against aggression, and the aggressor succeeded in killing the victim, then the state, out of respect for the victim's autonomy, should refuse to admit any later attempt by the victim's relatives to bring a wrongful death suit against the aggressor. The state should say: "We respect the victim's autonomy. The victim waived her right against aggression. Therefore the aggressor did not violate any rights of the victim, and you therefore cannot sue him."

In fact, if anybody's autonomy is being violated by a demand not to attack an aggressor, it is the defender's autonomy. If the victim does not want to attack the defender, fine, but that does not give the victim a right against the defender that he not interfere with the attacker. Of course, Finlay thinks there is such a right on the part of the victim (at least in those situations where the victim is capable of autonomous choice): as we just saw, he states that the use of force by the defender against the aggressor "might constitute an injustice to its supposed beneficiary." However, so far Finlay has not provided a convincing argument for this view.

Moreover, according to the law in many European jurisdictions, an *attack* is any rights-violation (that is, any injustice) stemming from human action – and people have a right to defend themselves against attacks. This is also the correct stance to take from a moral point of view: persons not only have a right to defend themselves against violence directed against their bodily integrity, they have a right to defend themselves against all kinds of right violations. Without such a right, all other rights would not be worth very much.

But then, it seems, Finlay's view would imply that the victim who has refused assistance has a right to attack the defender who is attacking the aggressor. He could even enlist others to help him defending his rights against the defender. This, I submit, is extremely counter-intuitive. In fact, it would seem that if the victim tried, for instance, to taser the defender in order to keep him from attacking the aggressor, the defender would thereby acquire a right of self-defense against the victim (turned aggressor), too. This speaks against the victim having the right against the defender that the latter not attack the aggressor.

Finally, let me say something about intuitions. Finlay states that it is "counter-intuitive" to claim that "any suitably positioned individual or group could claim rights of violent assistance on behalf of the individual members of a community that was suffering violence, say from the state or another community" and that "[n]o consultation with the victims would be required as the duty to assist occurs independently of the defensive rights of the victim." (290) I, in contrast, find it enormously intuitive to claim that any suitably situated group has a right to defend potential victims from aggressors, whether the victims like it or not. I believe, with thinkers as different as Kant and Locke, that persons have a fundamental – that is, underived – natural right to attack aggressors.[2] (Of

[2] See Uwe Steinhoff, *On the Ethics of War and Terrorism* (Oxford: Oxford University Press, 2007), esp. pp. 45-50.

course, such rights can be overridden by countervailing considerations: if the exercise of the right would lead to some very bad effects, then the agent might be prohibited from exercising the right. German legal scholarship calls the exercise of a right under such circumstances "rights abuse." Rights abuse is, as it were, the mirror image of a necessity justification: the necessity justification permits one to override other people's rights because this would be the lesser evil under the circumstances, the rights abuse proviso prohibits one from exercising one's own right because this would incur too great an evil under the circumstances.) Consider now the following example: A group of Swedish pacifists who have publicly and to everybody's knowledge waived their rights to life, absolved non-pacifists from any special duties towards them, and enjoined all people from abstaining from helping them against aggressors have a convention on some meadow. A group of police officers are watching the scene because some Swedish militarists have made credible death threats against the pacifists. And, indeed, the militarists appear on the scene, draw their machine pistols, and start mowing the pacifists down. The police interfere, forcibly stopping the aggressors.

Did the police violate the rights of the pacifists by attacking and stopping the aggressors? It does not appear so.[3] In fact, if the pacifists disabled the weapons of the police with their remote non-violent police weapons deactivator, they could be arrested and imprisoned for obstruction of justice, and it seems that this is not only legally, but also morally fair. Moreover, to claim that the police were not *justified* in attacking the aggressors seems to be not only counter-intuitive but downright absurd.

Now, it might appear that Finlay has a reply to this objection. Finlay states that there are "types of relationships … where the responsibility of the third party defending is such that it overrides the autonomy of the victim" (292) as in the case where a mother defends her daughter without the daughter's consent. And although Finlay is of the opinion that such a relationship does not ordinarily occur "between two adults with full moral competence" (292), he could nevertheless claim that the situation with the police is extraordinary and that the police – a state-agent – have certain special responsibilities. Yet, note that given how I constructed the pacifist/militarist example these special duties cannot be duties *towards* the pacifists – after all, the pacifists have absolved all non-pacifists from all special duties towards them. Admittedly, however, the police might still have special duties *with regard* to them. To wit, if you and I are sitting in a café and you ask me to watch your belongings while you go to the bathroom, and I accept your request, then it is not your belongings that acquire a claim right against me to watch them – *you* are the one who has a claim right against me that I watch your belongings, and you acquired it by me making a promise to you.

Likewise, police officers might acquire a special obligation to protect others from harm by some kind of tacit agreement, or more ordinarily, by signing a contract and making a solemn oath. However, nothing hinders non-state actors from signing contracts

[3] It has been suggested to me that a mother who has been attacked by her child and who asked not to be defended against him would be wronged if someone defended her anyway. I find this entirely implausible, especially if the child is a 30 year old culpable aggressor. I would also like to know if the mother would be wronged if the state decided to punish the aggressor later on – against the will of the mother. If not – what is supposed to be the difference?

or making solemn oaths to defend the rights of the downtrodden, whether those downtrodden want to be defended or not. There simply is no difference here between state actors and non-state actors; at least Finlay has not yet demonstrated that there is. Moreover, his arguments from autonomy have, as we saw, failed to establish that defensive actions taken on the behalf of the victim are "less justified" if the victim objects to such defensive actions. There is no reason to assume that persons lack a fundamental right to attack aggressors; and persons do not need a victim's consent to exercise this right.

2. The Group Perspective

In the second section of his paper Finlay, as already stated, wants

> to show how a principle of moral authority is needed in order to ground the distinction between justifiable violence by non-state political entities and unjustified criminal violence, and, second, to argue that entities of this kind typically have to fulfil a more demanding moral authority requirement than states do in the current international order. (297)

This passage seems to contain the implicit assumption that there can be no justified criminal violence. This is also suggested by Finlay's bank robber example, where armed robbers are facing the security forces and, according to Finlay, the latter acquire a permission to target the former, but not vice versa. But of course the reply is: that depends. If the Nazis legally disappropriate and then kill a Jewish gallerist and put his most famous picture in the vault of their Nazi bank which is protected by Nazi security guards, and in 1943 a group of Jewish bank robbers unrelated to the gallerist break in to steal the picture in order to sell it and to live a life in luxury in Brazil (their motive is personal gain), then it seems to me entirely justified for them to shoot down the Nazi security guards. We are dealing with a case of justified criminal violence here. Moreover, nothing changes – whether we are talking about a Nazi bank or not – if the bank robbers are state-agents, for example secret service men from another country. In any case, it is not a "principle of moral authority" that is "needed in order to ground the distinction between justifiable violence by non-state political entities and unjustified criminal violence." Instead, what is needed are the *right* distinctions to begin with. To wit, there is the distinction between criminal violence and non-criminal violence. To make this distinction we need the concept of the law: criminal violence breaks the law, non-criminal violence does not. Furthermore, there is the distinction between political violence and non-political violence. To make this distinction we need a concept of the political. And third, we need a distinction between morally justified violence and morally unjustified violence. For this distinction we need a concept of morality. These distinctions do not neatly map onto each other: there is morally unjustified legal political violence, and there is morally justified criminal non-political violence, and there is, of course, also criminal, that is illegal, political violence. Perhaps Finlay means by criminal violence violence that does not *also* aim at a political goal. But, of course, there is also both justified and unjustified criminal violence in this sense.

But let us move on. Following Jeff McMahan, Finlay distinguishes a "'deep moral' point of view" from a "morally pragmatic" perspective regarding war (302). And while he believes that it is "necessary to accept the force of revisionist arguments that just warriors aren't usually liable to the use of force from a deeper moral perspective" (300)

he has great sympathies for what he calls "[c]onventionalist approaches" (298), explaining that "there is a morally pragmatic case for maintaining moral equality as a principle governing the conduct of hostilities between states." (302) This "morally pragmatic" case is that upholding this principle makes war less destructive and reduces the number of rights-violations. Allegedly, however, applying this principle to non-state actors as well would not have the same beneficial effects.

I will return to this latter point in a moment. For now, however, the question is what all this is supposed to have to do with "legitimate authority." Finlay argues "that a link is silently made between the *jus in bello* and the *jus ad bellum* on Conventionalist views, grounding the non-immunity of combatants, one that rests on a particular notion of moral authority." (300) He explains this further in the following important passage, which I quote at length:

> On Conventionalist accounts of just war theory … the initiation of hostilities by an aggressor state does entail some adjustment in the distribution of individual rights. In particular, it entitles individual soldiers on the aggressive side to use military violence against soldiers defending the victim state. This is the major import of the doctrine of moral equality. Despite the fact that it isn't entitled to declare the war it has initiated, once it has done so, the aggressor state is implicitly entitled to invoke the terms of the War Convention, that is, to create a State of War and bring to bear the rules governing such a condition, the *jus in bello*. States, therefore, appear to have two forms of moral authority: first, the moral right to declare a just war *justly* (i.e. when the other terms of the *jus ad bellum* are fulfilled); second, the purely conventional ability to create a State of War even, apparently, in the absence of a just cause or despite a failure to fulfil the other terms of the *jus ad bellum*. Moral authority in this latter sense—which I'll call 'Lesser Moral Authority'—thus appears as an intermediate right: it arises implicitly in relation to the *jus in bello* but is also relevant to the *jus ad bellum* (and thus connects the two, despite common pronouncements to the contrary). (301)

Note that in the first sense of "moral authority" having moral authority just means having jus ad bellum. Moral authority in this sense has absolutely no independent role to play and is therefore entirely redundant. The important question, however, is what the invocation of the "State of War" is supposed to do. Unfortunately, Finlay is anything but explicit and clear on this point, so I need to speculate a bit. Remember that Finlay states that it is "necessary to accept the force of revisionist arguments that just warriors aren't usually liable to the use of force from a deeper moral perspective while upholding the principle of moral equality as a convention on morally pragmatic grounds." (300) I think this talk about a "deeper moral perspective" and "upholding the principle of moral equality as a convention" obscures things more than it illuminates them. What might be meant, however, is Hugo Grotius's 400-year-old thought – and since this thought is so old there is nothing particularly revisionist about it – that the soldiers on the justified and on the unjustified of a war are *not* moral equals but that the latter should nevertheless enjoy *legal impunity* (which is different from upholding the principle of *moral* equality) for their participation in an unjustified war, that is, they should not be *punished* (as opposed to being killed in combat) for their participation.[4] Again, the pragmatic reasons

[4] See Uwe Steinhoff, "Rights, Liability, and the Moral Equality of Combatants," *Journal*

for this is that this would, allegedly, reduce the destructiveness of the war.

Now, if this is *all* that Finlay means, namely that thanks to the laws of armed conflict or to "the" mysterious war convention[5] state soldiers are not legally or conventionally punishable for their participation in an unjustified war, then Finlay's entire discussion misses the moral question, and the "Lesser Moral Authority" is no *moral* authority at all. After all, the fact that some militant is punishable under some law or convention while his opponent is not implies pretty much *nothing* about the moral standing of the two enemies. For instance, it does not imply that the former is morally liable to force while the latter is not, nor does it imply that the latter's use of force is morally justified while the former's isn't, nor that the latter's use of force is less objectionable than the former's.

But perhaps Finlay means more. Perhaps the "adjustment in the distribution of individual rights" he mentions is not only an adjustment of legal rights, but of moral ones. Now, this interpretation seems to conflict with his statement that "[s]oldiers at war, … suffer a *prescription* of their ordinary human rights; they lose ordinary legal rights, not through actions entailing *forfeiture*, but as a result of political or legal decisions by states." (300) This passage suggests that he understands human rights as legal rights here. But, again, telling us that the armed forces of states on the one hand and certain non-state forces on the other have a different *legal* standing tells us nothing yet about their *moral* standing. Yet in this very same statement Finlay uses Simmons's term "prescription," and Simmons is discussing *moral* rights.[6] Thus, to repeat the question, might Finlay indeed ultimately entertain the idea that thanks to their "Lesser Moral Authority" states have the remarkable power of changing the *moral* standing of militants and civilians simply by invoking "the War Convention"? Can states *make* people liable to attack simply by "denominating" them "enemy combatants" (296)?

It would not appear so. Elsewhere, Finlay states that "by putting [just warriors] forward and designating them 'legitimate targets' the state actively aids and abets in their killing."[7] He goes on to explain: "My point … is that it is the *distribution* of legal liabilities to (morally unjust) harm under the LOAC in such cases that is 'not unjust' rather than the unjust warriors' attempts to kill just warriors. Under such a distributive scheme, truly voluntary just warriors would still suffer moral injustice when attacked by their enemies even if they suffered none from their own side."[8] Thus, it seems that the redistribution of legal or conventional rights does not have any effect on the moral rights of militants – and, of course, this was to be expected all along.

However, sometimes one can justifiably *override* the rights of others, typically on grounds of a necessity justification, and in a footnote, Finlay states that from "a deeper

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of Ethics 13 (2012), pp. 339-366, section 2.

[5] I say that the talk about "the war convention" is mysterious, because there is not *one* war convention, but rather different conventions; some are accepted by some people or organizations, others by others, and there is really no reason to assume that non-state organizations should be bound by the conventions that *states* find convenient.

[6] A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton: Princeton University Press, 1993), p. 48.

[7] Christopher J. Finlay, "Fairness and Liability in the Just War: Combatants, Non-combatants and Lawful Irregulars," *Political Studies* 61 (2013), 142-160, at 147.

[8] Ibid., p. 148.

moral perspective, the killing of a soldier in an unjust war who has done nothing to make himself liable to a forfeiture of rights is equally objectionable whether he is attacked by members of a non-state group or a legally recognized army." (312, n. 58) Is this meant to suggest that from a less deep, more, I suppose, superficial perspective it *is* more objectionable, and indeed more *morally* objectionable? But *how* can the redistribution of *legal* rights or the existence of a *legal* permission to kill certain people make killing them less objectionably *morally*?

Consider the following example. A certain state suffers from a lot of inter-ethnic violence. The wise state leader's sociologists have found out, however, that designating a certain ethnic group, let's say the Roma, legally and conventionally legitimate targets and allowing every ethnic group to designate their own legally and conventionally legitimate Roma killers will dramatically reduce the overall violence in the state since ethnic groups (apart from the Roma) would now direct their resources to Roma killing and this common goal would unite the other ethnic groups. The wise state leader knows that the rights of the Roma will still be violated "from a deeper moral perspective," but from a "morally pragmatic" perspective "the Genocide Convention" – that is, the new laws and practices of designating legitimate targets of inter-ethnic violence and legitimate agents to engage in such violence – is very useful and beneficial overall. In fact, after all the Roma are killed off, this state becomes a shining international example of multicultural peace. Now, do we really want to say that a designated Roma killer's killing of innocent Roma is less objectionable then a free-lance Roma killer's killing of innocent Roma? I doubt it. There is simply no good reason to assume that a legally designated combatant's – that is, a legally designated killer's – killing of innocent people is morally less objectionable than a non-designated killer's killing of innocent people. At the very least, Finlay has not offered us any reason to think otherwise.

Therefore, Finlay also lacks any justification for his claim that attacks on morally innocent legal or conventional combatants by agents who do not themselves have a legal or conventional "right to denominate enemy 'combatants'," that is, a right to invoke a "State of War" (or a "State of Genocide" for that matter) are *terrorist* while attacks on innocents by agents who did invoke such a "State of War" are not (311-312). It seems that Finlay is simply applying a double standard here.

This is, in my view, also evident if we consider an issue that I promised above to return to: Finlay claims that upholding the principle of moral equality makes war less destructive and reduces the number of rights-violations, but that applying this same principle to non-state actors as well would not have the same beneficial effects. But why is that? Finlay has two answers. First, "while the ability to invoke the *jus in bello* might encourage discrimination in favor of civilians by non-state actors, it would also give any individual or gang with political motives, however spurious, a blanket moral endorsement for 'cop-killing,' as Robert Goodin calls it, that is, carte blanche to kill soldiers and armed police with impunity (subject to defensive force)." (303) Actually, however, under *jus in bello* regular police officers are not legitimate targets at all, and therefore the cop-killing argument is spurious: invoking *jus in bello* would give non-state actors only the ability to legally target members of the armed forces (or people who "participate in hostilities"). That, however, is not any different with *states*. Thus, one can reply to Finlay: while the ability to invoke the *jus in bello* might encourage discrimination in favor of civilians by state actors, it would also give any individual state or gang of states

with political motives, however spurious (after all, they might just want to have another country's oil: is that "political"?) a carte blanche to kill soldiers with impunity (subject to defensive force). Finlay's second answer is that "if arrested, individuals with a claim to political status as members of non-state entities would have to be treated as prisoners of war while their 'war' persisted and they would have to be released if their organization came to terms of peace with its enemy." (303) But again, the obvious reply is: if arrested, individuals with a claim to political status as members of state entities would have to be treated as prisoners of war while their 'war' persisted and they would have to be released if their organization came to terms of peace with its enemy (which is, of course, precisely the current arrangement under international law). Thus, instead of showing that there is indeed a morally relevant difference between state and non-state actors as far as the moral utility of allowing them "to invoke the *jus in bello*" is concerned, Finlay simply ignores the fact that his arguments against giving non-state actors such a power apply equally to states.

Conclusion

I conclude that Finlay has failed to show "that a principle of moral or legitimate authority is necessary in just war theory for evaluating properly the justifiability of violence by non-state entities when they claim to act on behalf of the victims of rights violations and political injustice." (288) Even if he had shown this, however, he would not have shown that legitimate authority is necessary for an entity's legitimately declaring or waging war, since non-state entities need not claim to act on behalf of others; they can simply act on their own behalf, defending their own rights or the moral or legal order. They need not "represent" anybody.[9] Moreover, Finlay even admits himself that a non-state actor can have full moral authority if it has *jus ad bellum* (304), and the same would then also be true of states. Yet, as I pointed out above, this makes legitimate authority redundant and therefore unnecessary. Finlay also fails to demonstrate that non-state actors have to shoulder a heavier burden of *moral* justification than states in order to justify their violence. In fact, Finlay's discussion of legal and conventional issues simply misses this moral issue, and while he thinks that there might be relevant connections between these legal and conventional issues on the one hand and the moral ones on the other, he has failed to establish such a connection. Therefore, finally, his claim that attacks on morally innocent legal or conventional combatants by agents who do not themselves have a legal or conventional "right to denominate enemy 'combatants'" are *terrorist* while attacks on innocents by agents who did invoke such a "State of War" are *not* terrorist seems to be simply the expression of a pro-state bias.

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[9] See on this also Uwe Steinhoff, *On the Ethics of War and Terrorism* (Oxford: Oxford University Press, 2007), ch. 1. Finlay claims that I "dismiss the importance of legitimate authority in deciding on the moral questions arising from non-state political violence" (288), but I do not "dismiss" it so much as provide a sustained argument against it. Finlay also notes that A. J. Coates's "approach seems to point towards an account like the one [Finlay is] seeking though" (311, n. 57). Coates was one of my main targets in the chapter mentioned, but Finlay does not engage my arguments against the importance of representation and legitimate authority in detail.