Revisiting Law's Claim of Authority

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Rob Mullins, *Presupposing Legal Authority,* __ **Oxford J. Legal Stud.** __ (forthcoming), available at SSRN.

In *Essays on Bentham,* Hart noted the importance of what he termed "authoritative legal reasons" to legal theory. In this idea–of reasons that apply to us independently of their content and in that special modality of *foreclosing* our normal deliberation–lies the "embryonic form" of legality. More simply put: law necessarily operates in the register of authority. This insight represents a foundational commitment held in common between various strands of legal philosophy, in part because of what Brian Bix has identified as a "hermeneutic turn": theorists accept that an understanding of law must take account of the distinctive way in which it engages human agency and rational consciousness. Authority, as a practical concept, promises such an understanding of law.

The idea of law as a matter of authority plays an especially central role in positivist legal theory, in no small part due to Joseph Raz's influential work on the topic. Raz and his many followers argue that law necessarily *claims* moral authority. We can see this, it is generally explained, in the deontic language used by legal officials (especially judges). And such claims to authority, Raz insisted, should be understood in moral terms. Much of recent positivist legal theory grapples with this final thesis: how can legal claims to authority be understood in moral terms, and what would that mean for the separation thesis? Rather less attention has been devoted to the first part: that law necessarily claims authority. In his forthcoming article, *Presupposing Legal Authority*, Rob Mullins calls this the "claim thesis." He offers a long-overdue, thorough, and incisive scrutiny of the thesis. In doing this, he also invites us to revisit our understanding of the authority of law.

Mullins agrees that the use of deontic language by officials is something to be taken seriously in legal theory. However, he persuasively demonstrates that moving from this observation–that legal officials use deontic language–towards a thesis about law's claim to authority is no simple matter. He does so by exploring three possible ways of making this move. The first is that of moralized semantics: the position that words like "ought," "right," "obligation," etc., have univocal meaning across contexts. He shows that there is nothing in the standard semantics of deontic language which compels this conclusion. A sentence like "legally, J ought to stop at the red light" *could* mean "legally, J has a moral obligation to stop at the red light" (as Shapiro seems to argue), but it need not. Standard deontic semantics would simply interpret the sentence to mean that according to the ordering of possible worlds provided by law, the worlds closest to the ideal modal base are worlds where J stops at the red light. To insist on a moralized semantics requires an independent argument, one that has not yet been made.

Mullins then turns to another option: perhaps legal officials indicate their moral endorsement of deontic legal statements by making these from a committed, internal, point of view. But, as he points out, this could be the case without necessarily entailing that law claims authority over the addressees of these statements. Legal officials' statements could be understood, without contradiction, as expressing something like this: "I have no authority to tell you, but you have a legal obligation to do X, and I think you really ought to do it".

In the final, and in my view most valuable, part of his article, Mullins turns to a more promising route:

one that follows closely the thoughts of Hart in *Essays in Bentham*. He starts, as Hart does, with speech acts like commands and orders. The felicity conditions of speech acts like commands include, amongst other things, that those who issue commands have authority over the persons they address. Those who perform these speech acts, he shows, take for granted–or presuppose–their authority over those they address. In issuing a command, one does not necessarily *claim* authority or *imply* it, but a successful command *presupposes* authority. Such presupposition is pragmatic: it reflects common ground between the issuer of a command and her addressee. Mullins carefully shows the affinity between presuppositions and felicity conditions. Commands are the kinds of things that only make sense against background presuppositions about authority.

Mullins ends up rather close to where he started, but with an important if nuanced distinction. He shows that insofar as legal officials perform authoritative speech acts, it is necessary that they presuppose authority over their addressees. He *also* shows, however, that this is not sufficient to establish that law makes a claim to legitimate moral authority. It is in the space between these two arguments that I see his analysis opening opportunities for fruitful further inquiry.

One might want to keep these two notions closely connected as Raz would, but there is also space for a more Hartian approach, relying on what is accepted in practice rather than on moral understandings of that practice. Mullins does note a problem with this latter approach, however: officials who presuppose authority over subjects without actually having moral authority are acting infelicitously. They are not failing in their assertion of authority, but that assertion is in some way deficient. This, in turn, places a burden on the addressees of such claims. Legal subjects can either go along with claims to authority, accommodating the presupposition of authority, or take on the burden of challenging it. Mullins thinks this shows the communicative value of protest and civil unrest. It does. But I also think it provides insight into an important and overlooked aspect of our understanding of legal authority by bringing the reactions and understandings of those *subject* to authority, *addressed* by legal officials, into the fold.

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