

Short test preview

There will be a short test during our class session on Thursday, February 13. You will be given four passages from the reading. You will be asked to do the following for *two* of them:

1. *Identify* the author.
2. *Describe* what the author was doing. This usually involves choosing an appropriate verb phrase such as: raising an objection, summarizing a position, stating a principle, posing a question, giving an example, and so on. It also requires *explaining* how the passage does what you say it does: how it raises, summarizes, states, poses, gives and so on.
3. *Evaluate* the passage's significance. Why does it matter for the author's position? For instance, a passage may be significant because of its relationship with other claims that the author makes. Or it may give rise to an objection to the author's position. Or it may explain why the author's position is superior to an opponent's.

You should plan on writing between three and four paragraphs on each passage. Each answer should take about thirty minutes.

Here is an example of how to do this. Suppose I gave you the following passage.

“taken with the meaning wherein I here understand it, the term *superiority* signifies *might*: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes.”

The author is John Austin (p. 80 in the textbook, for what it's worth). Austin is *defining* the term “superiority” in terms of the ability to hurt others. Austin did not mean that this is all that the term means in ordinary speech. Rather, his definition spells out the meaning he used in his theory of law. Austin defined laws as commands given by superiors to inferiors. This definition sharpens that one. It specifies that the “superiors” in question have to be able to back up their

commands with threats. Austin subsequently used his definition of sovereignty to identify exactly which superiors could make laws.

The definition leads naturally to Austin's claim that legal obligations consist in threatened sanctions. Laws are commands and commands are backed by threats. Obligations, in turn, consist in being threatened. So following this chain of definitions, all laws are obligatory.

Hart criticized Austin's definition on the grounds that it would treat the gunman's threat of 'your money or your life' as generating an obligation to hand over your money. This is not the normal meaning of "obligation." There would be nothing wrong with failing to pay the gunman if, say, he dropped his gun. Could Austin reply that this just shows that obligations last only as long as threats do? That is another inappropriate consequence of Austin's definition. Normally, obligations apply even when we can get away with breaking them. This is true of the law as well: we all know that the speed limit applies even when you are sure you can get away with driving too fast.

In reply, Austin could note that all he had said was that a command only requires the *possibility* of punishment (see p. 77, for instance). There is still the possibility of punishment even if you are alone on the highway, so the speed limit still applies even on Austin's theory.

In response, Hart would say that it is more direct to analyze legal obligation as the product of rules. The traffic rules state the speed limit and so that is what drivers are legally obliged to follow. The prospect of being caught could be zero and the obligation would still be there. Since that is closer to the way the law actually works, it is the more accurate theory.

Finally, Hart pointed out that there are a number of laws that do not fit this model of threats and commands. The laws that enable us to do things such as make a contract, get married, or elect a representative do not come with threatened sanctions for failing to comply. Austin could say that the commands are issued to judges who are charged with enforcing the rules about contracts and the like. But this would leave out the way the law guides the behavior of people who are

trying to make contracts, get married, or vote. When they ask how to do these things, they consult the law. As Hart sees it, they are trying to see what the rules say, not asking the indirect question of what judges are commanded to enforce. Thus Hart's theory that laws are rules more naturally accommodates this area of the law than Austin's theory does.

