

PHIL 168: Philosophy of Law
Winter 2008; David O. Brink
Wednesday, January 16

PAPER #1

Write a paper, approximately 3-4 pages, on one of the following topics. The paper is due in class on Thursday, January 24. If necessary and with suitable explanation, you can get an extension on the paper. But the extension must be arranged in advance of the due date. Otherwise, late papers will be penalized as described on the Course Description. Before starting, consult the Writing Guidelines handout on the course website. Students are welcome to discuss their topics and drafts with their TA or me.

1. Rules of criminal and tort law seem to fit pretty well Austin's theory of law as the command of the sovereign. Explain the command theory and why this is so. Does the command theory account for the variety of laws? In particular, Hart complains that laws conferring private and public powers do not fit the command model. Give an example of a power conferring rule and explain why such rules pose a problem for the command model. Explain how Austin might best defend the command model and assess the adequacy of this defense.

2. In their different ways, both Gray and Holmes appear skeptical about the existence of legal rules that judges apply to particular cases; they both identify law, in some way, with the decisions of courts. Focus on either Gray or Holmes and explain his "rule-skepticism". Consider how rule-skepticism might rest on appeal to the finality of judicial decisions. Is this a good argument for rule-skepticism? How does Hart's discussion of the imaginary game of scorer's discretion bear on the adequacy of this argument?