

CALIFORNIA STATE UNIVERSITY, LONG BEACH

BACK TO THE FUTURE: NATURAL LAW AND THE
ORIGINAL MEANING OF THE ALIEN TORT CLAIMS ACT

THESIS PROPOSAL TO
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CONTENTS

PART I: INTRODUCTION.....	1
A. Thesis Statement.....	1
B. Background of the Statute.....	1
C. Methodology.....	4
PART II: CHAPTER DESCRIPTIONS.....	6
A. Chapter One- History of the ATCA.....	6
B. Chapter Two- Theories of Statutory Interpretation.....	7
C. Chapter Three: The Philosophical Framework.....	9
D. Chapter Four: The Future of the ATCA.....	10
PART THREE: BIBLIOGRAPHY.....	12

PART I: INTRODUCTION

A. Thesis Statement

This paper will argue that the present day uses of the Alien Tort Claims Act, for the adjudication of human rights abuses committed against foreign nationals in violation of the law of nations, are justified both legally and philosophically given the current state of the law and the natural law theories upon which the statute was predicated.

B. Background

The Alien Tort Claims Act of 1789 (“ATCA”),¹ provides that the district court of the United States shall have original jurisdiction over “any civil action by an alien for a tort only, in violation of the law of nations or a treaty of the United States.” As is often the case, in both law and philosophy, the seemingly straightforward language of this statute belies its controversial nature. Presently, fierce debates are raging over the validity, scope, and future of these few short phrases and the implications, both in practical and conceptual terms, are profound and far-reaching.

In the recent (and only) Supreme Court case interpreting the ATCA, *Sosa v. Alvarez-Machain* (2004), the court found that the statute is best read as a jurisdictional grant of authority to recognize common law causes of action for a limited number of international violations with the potential for personal liability.² Furthermore, the court

¹ 28 U.S.C. §1350. It should be noted that there exists some disagreement as to what the proper name of this statute should be. The actual title of §1350 states, “Alien’s Action for Tort.” In this paper, as with numerous others, the law will be referred to as the Alien Tort Claims Act (“ATCA”). However, in certain notes hereafter the same law might be referenced as the “Alien Tort Statute” (“ATS”). References of this sort are usually found in articles opposing the modern-day use of the statute (presumably, to avoid any implication from the title that aliens *actually have a claim* under the law).

² *Sosa v. Alvarez-Machain*, (2004) 124 S. Ct. 2739; 159 L. Ed. 2d 718; 2004 U.S. LEXIS 4763; 72 U.S.L.W. 4660; 158 Oil & Gas Rep. 601; 2004 Fla. L. Weekly Fed. S 515. In this case, a Mexican citizen, Sosa, was recruited by United States federal drug enforcement agents to kidnap a Mexican doctor, Alvarez-Machain, (who had been indicted in the US for the torture and murder of a DEA agent). Sosa’s orders were to kidnap Alvarez and bring him across the border into the jurisdiction of the United States where he could be arrested. Alvarez-Machain was later acquitted of all charges and sued Sosa and the United States under the ATCA for torts arising from his kidnapping and arrest. The Supreme Court reversed the lower courts granting of relief to Alvarez-Machain’s on the basis that his cause of action did not meet the applicable

found that nothing in the two centuries since the enactment of §1350 has “categorically precluded the federal courts from recognizing a claim under the law of nations *as an element of common law*.”³

At this point, those with deep-seated fears of judicial activism will hear the distinct sound of alarmist bells ringing. There is seemingly no fend to the potential expansion of judicial authority under the ATCA. The statute is historically significant; having been written by the First Congress whose members included many of the framers of the Constitution. The statute, as it was written, is still good law. And the statute states in plain and unambiguous language that the federal courts have jurisdiction over any and all tort claims by an alien that violate the law of nations which—in the words of William Blackstone—was understood at that time to be the following:

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.⁴

Certainly such a grant of authority exceeds our contemporary notions of the permissible limits of judicial action; and the present day Supreme Court acknowledges this to be the case. However, it is not clear on what legitimate grounds, if any, limitations to the ATCA grant of authority are to be found.

The majority opinion in *Sosa* points out that the act was written in a period when the philosophy of “natural law” prevailed. However, they point out, the movement

standard for actions cognizable by the ATCA—that is, cases that arise from actions so heinous as to be deemed *hostis humani generis* and which thereby violate “definable, universal, and obligatory norms.”

³ Id. 124 S.Ct 2739, 2761, 159 L.Ed. 2d at 749. (emphasis added).

⁴ 4 William Blackstone, Commentaries on the Laws of England (Wayne Morrison ed., 2001) (1753); cited in, Beth Stephens “Individuals Enforcing International Law: The Comparative and Historical Context,” *DePaul Law Review*, 52 DePaul L. Rev 433 (Winter, 2002)]

toward legal positivism in the early 20th Century has since shifted our perceptions regarding the source of law, and this in turn has changed our views about the proper role of judges.

Now...in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created.⁵

In other words, as the court explains, we no longer think of common law as a “discoverable reflection of universal reason, but in a positivistic way, as a product of human choice.”⁶ The court cites this shift in perception as grounds for caution in their discretion when evaluating ATCA cases but offers nothing in the way of legal precedent that would justify a limitation on the act.

Unsurprisingly, Justice Scalia, in his concurring opinion (joined by J. Thomas and C.J. Rehnquist) strongly agrees with this sentiment—limiting the reach of the ATCA—and further cites *Erie v. Tompkins* (1938) as grounds for a complete prohibition on the court’s ability to recognize causes of action arising from “federal” common law.⁷ He finds that the old notions of federal common law (in the sense of “judicially pronounced law”) have been dismantled in favor of a few, very specific, grants of authority to the courts to develop substantive law, and that culling the “law of nations” from international customs and norms is not one of these areas..⁸

[The] fact that a rule has been recognized as customary international law, by itself, is not an adequate basis for viewing that rule as part of federal common law. In Benthamite terms, creating a federal command (federal common law) out of “international norms,” and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the ATS is nonsense upon stilts.⁹

⁵ *Sosa*, at 2762, 159 L. Ed. 2d 718,749.

⁶ *Id.*, at 2763 159 L. Ed. 2d at 751-2.

⁷ *Erie Railroad Co. v. Tompkins*. 304 U.S. 64, 82 L.Ed.1188, 58 S.Ct. 817 (1938)

⁸ *Sosa*, at 2771, 159 L. Ed. 2d at 760. citing, *Texas Industries, Inc. v. Radcliffe Material, Inc.* 451 U.S. 630, 68 L. Ed 2d 500, 101 S.Ct. 2061 (1981)

⁹ *Id.* at 2772, 159 L. Ed. 2d., at 761-2. (citations omitted)

C. Methodology

I intend to argue that neither of the above positions is persuasive. As to Scalia's argument pertaining to the legal ramifications of the *Erie* precedent, I will argue (albeit briefly) that the issues arising from the ATCA require recognition of the "law of nations"—or *international* common law—and not *federal* common law. These two notions of common law are distinct entities. Therefore, I believe the majority opinion is correct in rejecting Scalia's assertions regarding the prohibitive effect of *Erie*. And, for our purposes here, the quagmire of the *Erie* doctrine will be justly (and thankfully) avoided.¹⁰ Thus dispensed, we will be free to examine whether the argument for restriction based upon legal positivism, made by both the majority opinion and the dissenting opinion, holds any validity.

What is fundamentally unique and fascinating about the ATCA is that it was written by the First Congress in the spirit of the natural law tradition, but then it essentially lay dormant through the rise to power (and perhaps the initial decline) of legal positivism. It has now been re-awakened, unperturbed by any legal precedent or statute that might prove to weaken it, to a world in the process of another paradigmatic shift; where issues such as international human rights, terrorism, and globalization are central tenets to any modern discussion of a civil action for tort in violation of the law of nations.

My goal in this paper will be to explore the necessity, and possible ramifications, of a return to a natural law perspective when applying the ATCA to the present-day

¹⁰ The literature on the meaning and legal effect *Erie v. Tompkins* is extensive and remains controversial. I, by no means, intend to portray the matter as settled, even as to ATCA cases. I assert only that the majority of the Supreme Court has not found it applicable. Thus, the state of law, today, permits for the finding of cases under the law of nations, or international common law. This question is nevertheless a relevant consideration and I intend to deal with in an extended note in my final chapter regarding objections.

litany of cases. I will argue that only a natural law approach is legally and philosophically justified. Thus, my methodology will include not only a philosophical analysis but a legal analysis as well. In other words, while this is predominantly a work in philosophy, I feel that, in order to have any practical application whatsoever, what is proposed must have some legal feasibility as well. The legal analysis, however, will invoke philosophical perspectives on natural law as they have been understood by the courts.

This legal analysis will include a recitation of the history of the statute (from its inception to its present day incarnation as a tool in human rights cases). This history will show that the statute was designed to give the federal courts the power to address civil actions by foreign nationals, quickly and succinctly, in order to show the nation's commitment to the international community and the rule of law thereof. It will also establish the natural law pedigree of the statute and describe the attitude of the time toward the source of law and role of judges. My further intent, with regard to legal analysis, is to show that all theories of statutory interpretation—and in particular Scalia's own brand of textualism—support my contention that the ATCA should be interpreted from the perspective of natural law precepts.

Once the above is established, I will analyze the statute from a more strictly philosophical standpoint. The majority of this section will involve defining the terms and explicating the differences between the legal positivist's position and that of a natural law theorist. I will identify current trends that I see emerging in the literature on naturalism and in natural law theory in particular. I will then re-examine the language and intent of

the statute in light of these definitions and show why a natural law perspective is called for in the types of cases likely to come before the court under the ATCA today.

In the end, I hope to have demonstrated my thesis—that a modern day natural law interpretation of the ATCA is the only legally and philosophically justified option. I will conclude by identifying possible stumbling blocks to a more expansive interpretation of the statute, suggest ways to overcome these obstacles, and speculate about possible trends for the future use of the Alien Tort Claims Act.

PART II: CHAPTER DESCRIPTIONS

A. Chapter One- History of the ATCA

Fueling the debate over the meaning of the Alien Tort Claims Act is the fact that so little is known about this obscure and enigmatic statute. The legislative history of its enactment is sparse and the statute itself lay dormant for the better part of the last two centuries. It was not until the late 1970's that the statute was resurrected as an instrument for seeking justice and compensation for victims of human rights abuses¹¹. Since the success of *Filartiga v. Pena-Irala* in 1980, numerous other civil lawsuits have been filed in federal district courts against individuals, corporations, organizations, and nation-states alleging human rights abuses, and even environmental rights abuses, around the world.

Prior to *Filartiga*, however, the ATCA came before the federal courts only a handful of times in 200 years. This chapter will explore what is known about the creation of the statute, its purpose, its enactment, and also its early application. Particular attention

¹¹ In *Filartiga v. Pena-Irala*, a Paraguayan family used the ATCA to sue the police officer responsible for the torture and extrajudicial killing of their family member in Paraguay. 630 F.2d 876, 876-90 (2d Cir. 1980).

will be paid to the tenor of the times. For instance, one of the prime motivations for the statute seems to have been a demonstration of a fledgling nation's commitment to the standards and expectations of the international community at large; a commitment to deal swiftly with disputes by foreign nationals that might otherwise lead to international incidents that put us on a path to war. Thus, it might be argued that for purposes of functional practicality, the "law of nations" was understood in broad terms. I will also lay the groundwork for the argument that—given the natural law theorist's instrumental faith in reason as a tool for the just adjudication of disputes—the grant of judicial authority is equally broad in the philosophical sense.

I will then discuss the present standard found in the Supreme Court's analysis in *Sosa v. Alvarez-Machain* and query if, and of what significance, certain elements in the socio-political climate have changed since the origination of the statute that might justify the Court's proposed limitations.

B. Chapter Two- Theories of Statutory Interpretation

Having laid the groundwork in Chapter One for the premise that the *raison d'être* of the statute is a broad grant of authority to the courts, I will now deal primarily with interpretive methodology, further clearing the legal way for a modern natural law interpretation of the ATCA. My central argument will be that, in terms of theories of statutory interpretation, *textualists*, and in particular proponents of Scalia's own brand of *originalism*, are doctrinally prevented from recognizing the movement of legal positivism in ATCA cases and must instead interpret the statute as it was understood when it was promulgated. In other words, in the absence of a controlling statute or legal precedent dictating otherwise, the philosophy of judicial conservatism, and the parameters of *stare*

decisis, seem to dictate that the ATCA be interpreted as it was intended—from an understanding of the law of nations as an extension of natural law principles. Anything else, I will contend, would be blatant judicial activism.

Perhaps one of the more interesting facets of the opinion in *Sosa v. Alvarez-Machain* is the willingness of Justice Souter, and those joining in the majority opinion, to adhere to a Scalia-type ‘originalism’ when Scalia himself is unwilling to do so.¹² The basic premise of this *originalism* is that statutes should be interpreted to mean what they meant when they were written. In an attempt perhaps to mollify the dissent, the Court’s opinion limits the statute’s scope to causes of action which resemble three torts believed to have been on the framer’s minds at the time the statute was written: *violation of safe conducts, infringement of the rights of ambassadors, and piracy*. I will argue that the theory of originalism—as it engenders consideration of original *understanding* as opposed to original *intent*—requires the justices to go even further and incorporate into their analysis the philosophical perspective with which the statute was understood when written.

In sum, my position will be that (1) Scalia’s view, which is the most restrictive of the ATCA, is the least well supported in terms of *stare decisis* and—because it takes into consideration the evolving nature of the law—is violative of his own textual standards. (2) The majority view of the court, which recognizes the expansive potential of the statute and seeks to restrict that potential through a textualist interpretation, ignores the plain meaning of the text and the dictates of the historical and legal contexts in which it was written. (3) The proper interpretation of the statute (whether one is of a textualist,

¹² I will also posit that natural law principles are the appropriate source of law in this particular line of cases even if one is of the “purposivist,” or “dynamist” bent; that is, even if one views statutory interpretation from a more flexible approach which takes into account the evolving nature of legal standards

purposivist, or any other persuasion) incorporates natural law principles and therefore is more broad than the Court has heretofore set out.

C. Chapter Three: The Philosophical Framework

Chapter Three will be an attempt to lay out the fundamental differences between the relevant philosophical theories of law. Having demonstrated why a natural law approach to the ATCA is justified both historically and legally, this chapter will attempt to demonstrate why this approach is most appropriate *philosophically*.

Given the limited scope of this particular discussion, the primary focus will be on the fundamental differences between legal positivism and natural law theories.¹³ These two theories will be explored not with a mind to establishing the overall supremacy of one over another (a Sisyphean feat neither necessary nor prudent) but rather to show why a natural law perspective is most appropriate when approaching the particular issues presented by the Alien Tort Claims Act. In this regard I also intend to show (1) that given the paucity of positive international law on the question of torts that violate international common law, there is no other real alternative, and (2) that despite protestations to the contrary, the standard set out in *Sosa*—the search for “definable, universal, and obligatory norms.”—can easily be read to confirm this assertion.

D. Chapter Four: The Future of the ATCA

Chapter Four will conclude by addressing the possible obstacles to my proposed interpretation and identifying the current trends in ATCA cases: What cases have been

¹³ Some passing mention of Legal Realism and Dworkin’s own individual approach may prove necessary, but otherwise I intend to disregard—regretfully, but necessarily—all other legal theories; whether economic, feminist, pragmatist, or essentialist.

successful? What are the practical considerations? What kinds of future suits are foreseeable—by whom and against whom? And what are the realistic policy concerns?

The statute, as written, technically allows non-US citizens (aliens) to sue anyone for torts that take place anywhere, so long as they violate the law of nations. But the realistic threat posed by the ATCA, jurisdictionally, is far less daunting than it appears. Obviously, if a tort against an alien should happen here in the US then primary jurisdiction would exist there would be no need to resort to ATCA jurisdiction. Additionally, even though anyone can be sued under the ATCA (nation states, individuals, organizations, corporations, etc.), as a practical matter the judgments are only enforceable against those defendants who have attachable assets here in the US. Clearly, there are also foreign policy exceptions which may invoked when plaintiffs attempt to sue foreign nation states, thus barring those suits. Finally, many (including myself) find support the need for a rule requiring an “exhaustion of remedies” when dealing with actions arising in foreign lands that have legal systems capable of adjudicating them. These considerations narrow the field considerably and hopefully will serve to make the philosophical approach I am proposing more digestible.

At the moment, the primary focus of concern for ATCA is whether or not, and to what extent, US- based multinational corporations can be held liable for their activities around the world. Numerous cases have been filed in recent years against multinationals who have been charged with committing labor practices that amount to slavery, false imprisonment, or are even complicit in torture or extra-judicial killings (as in *Doe v. Unocal* where California-based Unocal was charged with aiding and abetting Burmese soldiers who raped, killed, tortured, and forced into slavery villagers in Myanmar in

order to build the Yadana pipeline). Obviously, the opponents of ATCA—international business groups and the Bush administration (concerned about potential liability for Guantanamo, Abu Ghraib, and the like)—are formidable, but they have not been successful in abolishing the statute or limiting it in any substantive way. Yet.

I will argue that this statute is more than just an ancient law with an impressive historical pedigree. It is true that much has changed in the two hundred years since this law was written. Most significantly, in world politics, the United States has gone from new initiate to singular superpower. However, the impulses and intuitions of the framers for why this act was necessary are still sound today and the Alien Tort Claims Act serves an important and practical purpose—the same purpose that the framers intended it to have—to demonstrate our commitment to justice in the world at large. However, to fully comprehend the role of the Act in the international drama of modern times will require a return to the past and an understanding of the best of the intentions of our founders—it is only then that we will be able to set about trying to fulfill them.

PART THREE: BIBLIOGRAPHY

A. Chapter One- History of the ATCA

Brav, Ehren J. (2005). "Recent Development: Opening the Courtroom Doors to Non-Citizens: Cautiously Affirming *Filartiga* for the Alien Tort Statute." *Harvard International Law Journal*. 46: 265

Burley, Anne-Marie. (1989) . "The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor," *The American Journal of International Law*, 83: 461.

Dubinsky, Paul R (2005) "Human Rights Law Meets Private Law Harmonization: The Coming Conflict." *Yale Journal of International Law*. 30: 211-332

Kontorovich, Eugene. (2004). "Implementing *Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute." *Notre Dame Law Review*. 80:111.

Londis, Lorelle (2005). "The Corporate Face of the Alien Tort Claims Act: How an Old Statute

- Mandates a New Understanding of Global Interdependence.” *Maine Law Review* 57:141-218
- Paust, Jordan. (2004) “The History, Nature and Reach of the Alien Tort Claims Act.” *Florida Journal of International Law*. 16: 249.
- Trnavci, Genc. (2005) The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law.” *University of Pennsylvania Journal of International Economic Law* 26: 193.
- Filartiga v. Pena-Irala*, 630 F.2d 876, 876-90 (2d Cir. 1980).
- Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).
- Sosa v. Alvarez-Machain*. (2004) 124 S. Ct. 2739; 159 L. Ed. 2d 718; 2004 U.S. LEXIS 4763; 72 U.S.L.W. 4660; 158 Oil & Gas Rep. 601; 2004 Fla. L. Weekly Fed. S 515 (with supporting briefs)

B. Chapter Two- Theories of Statutory Interpretation

- Alexander, Larry (1996). "Originalism, or Who Is Fred?," *Harvard Journal of Law and Public Policy*. 19: 321.
- Robert H. Bork, (1997). *The Tempting of America*. New York: Free Press.
- _____. (2003). *Coercing Virtue: The Worldwide Rule of Judges*. Washington, D.C.: American Enterprise Institute Press.
- Cardozo, Benjamin Nathan. (1921). *The Nature of the Judicial Process*. New Haven & London: Yale University Press.
- Farber, Daniel. (1989) “The Originalism Debate: A Guide for the Perplexed.” *Ohio State Law Journal*. 49: 1085.
- Gardner, James A. (1991). “The Positivist Foundations of Originalism: An Account and Critique.” *Boston University Law Review*. 71: 1.
- Goldsmith, Jack and Steven Walt. (1998). “Erie and the Irrelevance of Legal Positivism.” *Virginia Law Review* 84:673-713.
- Kesavan, Vasan and Michael Stokes Paulsen. (2003). “The Interpretive Force of the Constitution’s Secret Drafting History.” *Georgetown Law Journal*.
- Marmor, Andrei. “Constitutional Interpretation.” USC Public Policy Research Paper No. 04.4. Available from Social Science Research Network electronic library at <http://ssrn.com/abstract=506302>.
- Powell, H. Jefferson. (1985). “The Original Understanding of Original Intent.” *Harvard Law Review*. 98: 885.

- Scalia, Antonin.(1989). "Originalism: The Lesser Evil." *University of Cincinnati Law Review*. 57: 849
- _____. (1989). "The Rule of Law as a Law of Rules." *University of Chicago Law Review*. 56: 1175.
- _____.(1997). "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in *A Matter of Interpretation*. Amy Gutmann ed. Princeton: Princeton University Press
- Schultz, David A. and Christopher E. Smith. (1996) *The Jurisprudential Vision of Justice Antonin Scalia*. Lanham, MD: Rowman and Littlefield.
- Thomas, Clarence. (1996). "Judging," *University of Kansas Law Review*. 45: 1.
- Wilson, Bradford and Ken Masugi. (1998). *The Supreme Court and American Constitutionalism*. New York: Rowman and Littlefield Pub.s, Inc.
- Swift v. Tyson*, 41 U.S. 1, 16 Pet. 1, 10 L.Ed. 865 (1842),
- U.S. v. The Paquete Habana*. 189 U.S. 453, 23 S.Ct. 593, 47 L.Ed. 900 (1903).
- Black and White Taxi. Co. v. Brown and Yellow Taxi. Co.*, 276 U.S. 518, 48 S.Ct. 404, 72 L.Ed. 681 (1928).
- Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).
- Texas Industries, Inc. v. Radcliffe Material, Inc.* 451 U.S. 630, 68 L. Ed 2d 500, 101 S.Ct. 2061 (1981)

C. Chapter Three: The Philosophical Framework

- Austin, John (1832). *The Province of Jurisprudence Determined*. Ed. W.E. Rumble, 1995. Cambridge: Cambridge University Press.
- Coleman, Jules (1982) "Negative and Positive Positivism," *Journal of Legal Studies* 11:139.
- _____. (2001). *The Practice of Principle*. Oxford: Clarendon Press.
- Dworkin, Ronald (1978). *Taking Rights Seriously*. Cambridge MA: Harvard University Press.
- _____. (1982) "'Natural' Law Revisited," *University of Florida Law Review* 34:165
- _____. (1986). *Law's Empire*. Cambridge MA: Harvard University Press.

- Finnis, John (1980). *Natural Law and Natural Rights*. Oxford: Clarendon Press,
- Fuller, Lon (1958). "Positivism and Fidelity to Law: a Reply to Professor Hart," *Harvard Law Review* 71: 630.
- _____. (1964). *The Morality of Law*, rev. ed. New Haven: Yale University Press.
- Hart, H.L.A.(1955) "Are There Any Natural Rights?" *Philosophical Review*, 64:175-91.
- _____. (1958). "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71: 593 repr. in his *Essays in Jurisprudence and Philosophy* (1983). Oxford: Clarendon Press.
- _____. (1983). *Essays on Jurisprudence and Philosophy*. Oxford: Clarendon Press.
- _____. (1994, first edition 1961). *The Concept of Law*, 2nd ed. ed. P. Bulloch and J. Raz . Oxford: Clarendon Press.
- Himma, Kenneth Einar (1999) "Positivism, Naturalism, and the Obligation to Obey Law," *Southern Journal of Philosophy*, vol. 36, no. 2
- Leiter, Brian. (1995). "Legal Indeterminacy," *Legal Theory* 1: 481-492.
- _____. (1997). "Rethinking Legal Realism: Toward a Naturalized Jurisprudence," *Texas Law Review* 76: 267-315.
- _____. (2001). "Legal Realism and Legal Positivism Reconsidered," *Ethics* 111: 278-301.
- _____. (2001). "Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis," in J.L. Coleman (ed.), *The Postscript: Essays on Hart's Postscript to The Concept of Law* (Oxford: Clarendon Press).
- _____. (2001) "The Naturalistic Turn in Legal Philosophy." in *Newsletter on Philosophy and Law*, Theodore Benditt (ed). American Philosophical Association Newsletters. Spr 01; 00(2): 142-146
- Mackie, J.L. (1977). "The Third Theory of Law." *Philosophy & Public Affairs*. 7:1.
- Moore, Michael S. (1985). "A Natural Law Theory of Interpretation," *Southern California Law Review* 58: 277-398.
- _____. (1992a). "Law as a Functional Kind," in R. George (ed.), *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press).
- _____. (1992b). "Moral Reality Revisited," *Michigan Law Review* 90: 2424-2533.
- Murphy, Mark C. (1995) "Was Hobbes a Legal Positivist." *Ethics* 105: 846-873.

- Osborn, John G. (1999) "Legal Philosophy and Judicial Review of Agency Statutory Interpretation," *Harvard Journal on Legislation* 36: 115-146.
- Raz, Joseph (1979). *The Authority of Law: Essays on Law and Morality*. Oxford: Clarendon Press.
- _____. (1986) *The Morality of Freedom*. Oxford: Clarendon Press.
- _____. (1985). "Authority, Law and Morality," *The Monist* 68: 295-324.
- _____. (1990). *Practical Reason and Norms*. Princeton: Princeton University Press.
- _____. (1995). *Ethics in the Public Domain: Essays in the Morality of Law and Politics*. Oxford: Clarendon Press.
- Ripstein, Arthur. (1999) *Equality, Responsibility, and the Law*. Cambridge: Cambridge University Press.
- Stich, Stephen P (1994). "Could Man Be an Irrational Animal?" *Synthese*. 64: 115-134.
- Talbott, William J. & Alvin I. Goldman (1998). "Games Lawyers Play: Legal Discovery and Social Epistemology," *Legal Theory* 4 : 93-163.
- Waluchow, W.J. (1994). *Inclusive Legal Positivism* (Oxford: Clarendon Press).

D. Chapter Four: The Future of the ATCA

- Berkowitz, Benjamin. "Sosa v. Alvarez-Machain: United States Courts as Forums for Human Rights Cases and the Incorporation Debate." *Harvard Civil Rights-Civil Liberties Law Review*. 40:289.
- Borrowman, Scott. (2005) "Sosa v. Alvarez-Machain and Abu Ghraib –Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors." *Brigham Young University Law Review 2005 Comments*: 371.
- Brest, Paul. (1981) "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship." *Yale Law Journal* 90: 1063.
- Freyer, Tony Allan. (1981) *Harmony and Dissonance: The Swift & Erie Cases in American Federalism*. New York & London: New York University Press.
- Haberstroh, John (2004). "The Alien Tort Claims Act & Doe v. Unocal: A *Paquete Habana* Approach to the Rescue." *Denver Journal of International Law and Policy*. 32:231.
- Singer, Peter. (2002). *One World*. New Haven & London: Yale University Press.
- Stephens, Beth. (2002). "Individuals Enforcing International Law: The Comparative and

Historical Context.” *DePaul Law Review* 52:433.

_____. (2004) “The Alien Tort Claims Act: Corporate Liability Before and After *Sosa v. Alvarez-Machain*.” *Rutgers Law Review*. 56: 995.

_____. (2004-2005) “*Sosa v. Alvarez-Machain* ‘The Door is Still Ajar’ for Human Rights Litigation in U.S. Courts.” *Brooklyn Law Review*. 70:533.