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Natural law and common law
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*Edin. L.R. 4* If you scan through the law reports of the last century or so, you will come across a sprinkling of references to Natural Law, commonly in conjunction with some such phrase as “manifest nonsense”. Introductory books dealing with the sources of law hardly place it in the forefront of their treatment, to say the least; and anyone writing a practitioners' manual on some practically useful area of law who began with a chapter on Natural Law would be thought to have taken leave of his senses. Go back two or three hundred years or so and the picture looks very different. References to the law of nature abound in the reports of the seventeenth and eighteenth centuries; institutional writers dealing with the Common Law will regularly list Natural Law as one of its principal sources, and when Stewart Kyd wrote the first English book on what we would now call company law the obvious starting point for his first chapter was the work of the Natural Lawyers of the previous century. England, like everywhere else in Europe, had been caught up in a fervour of Natural Law thinking. Legal historians, of course, are well aware of this, but commonly portray it in their books as part of the background against which the Common Law was worked out, rather than as an integral part of the story of English law's development. This downplaying of the practical significance of Natural Law represents something of a lost opportunity, not merely because it can give a frame of reference within which some sense can be made of the reorientation of English law in the eighteenth century, but also because it provides an important point of contact between the all-too-insular history of English law and the apparently more homogeneous legal history of the rest of Europe.

Let me begin by sketching in the background. The period between the first half of the seventeenth century and the second half of the eighteenth has rightly been described as the heyday of Natural Law. The ideas of writers such as Hugo Grotius and Samuel Pufendorf became part of the intellectual baggage of educated people; they underpinned a good deal of rationalist thought; they had a huge influence on the movement towards legal codification in continental Europe; and Grotius' writings lay down the foundations of the rules of international comity that have come to be known as international law. Their influence was as widely spread through Europe and America as it was well diffused. The part played by their works in the formation of the thought of the writers of the Scottish Enlightenment is well known; and though less work has been done on the part they played in English thinking in the seventeenth and eighteenth centuries, there is no doubting the use that was made of their works by the most powerful philosophers of the time--John Selden, Thomas Hobbes and John Locke--as well as by the host of political, moral and religious thinkers of the second rank whose works have fallen from view in the last quarter millennium. As between Grotius and Pufendorf, it is generally accepted today that Grotius was the more powerful intellect, but it was Pufendorf whose works were better known and more influential in their time. His De Officio Hominis et Civis--translated as The Whole Duty of Man According to the Law of Nature--formed the basis of many university courses throughout Europe; and no less a man than John Locke described his main work, the Law of Nature and Nations, as “the best book of its kind”. His works were many times reprinted. In England alone there were some seventeen editions of the De Officio, seven of which were in English translation, and five editions of the English translation of the Law of Nature and Nations by Basil Kennett together with the explanatory notes of the Swiss writer Jean Barbeyrac. Not every book that is bought is read, of course, and Pufendorf has something of a reputation for indigestibility and tedium; but the number of reprintings of his works must give a fairly clear impression of how far his ideas spread into popular currency.

It does not require a great deal of imagination to see why this Natural Law theory exercised such a powerful attraction for such a relatively long period. First, it was secular in the sense that it distanced itself from the tenets of revealed religion. Although analytically God was essential to the theories, since it was only through Him that the rules could be said to obtain their foundations and their binding force, the content of Natural Law was deduced from basic data about human nature: the desire for self-preservation, something accepted as fundamental even by the most sceptical of skeptics, or the
need for co-operation or sociability as the only way to ensure human survival. Second, it was systematic. Moral philosophy was thus able to ape the seeming harmony of natural philosophy in a Cartesian and post-Newtonian *Edin. L.R. 6* world. Just as Newton was able to derive complex conclusions from a small number of basic laws established by observation, so the Natural Lawyers could create a structure of rules governing social behaviour by deduction from their basic data about human nature. The parallel is abundantly clear in Pufendorf’s early work, the Elements of Universal Jurisprudence, which is explicitly framed in terms of definitions, axioms, and deductions. Truth—Truth with a capital T—it could be argued, was as much the preserve of the moral sciences as of the natural sciences. Third, for lawyers, there was the attraction of a system that was seen to be more rationally structured and of more general application than even Roman law had been. This was especially important in England, where there had never been any formal reception of Roman law, and where lawyers still framed their thinking around the medieval forms of action. Natural law provided both a systematic framework that had some claim to objective validity and a source of abstract ideas that cut across the traditional learning. Law did not have to be just an arid set of rules, known only to experts, that just happened to apply in some particular state.

It is one thing to say that Common Lawyers might have been attracted by the endeavours of the Natural Lawyers, quite another to say that they used them in their formulations of the Common Law itself. However much English lawyers through the ages may have felt the good sense of a moral proposition as basic as the injunction to love your neighbour as yourself, for example, it has not had any discernible effect on the rules or reasoning of the law in practice. Natural law was different. In a range of different ways, its lessons were learned by Common Lawyers, and seemingly consciously used to re-orient English law. It would not be too much of an exaggeration to say that the classical Common Law of the nineteenth and twentieth centuries was really a product of the eighteenth-century Natural Law tradition.

Two very obvious features were of paramount importance. First of all was the acceptance of the view that law had a systematic structure, whose parts were related to each other in a logically comprehensible way. Second, and more to the point, all legal systems could be reduced to the same basic structure of abstract categories. It can hardly be an accident that the first serious attempt to produce a structural overview of the Common Law, at any rate the first successful attempt, was the work of Sir Matthew Hale, a man well acquainted with Grotius’ *De Iure Belli ac Pacis* and himself the author of an unprinted tract on Natural Law; and half a century or so later the great Sir William Blackstone was himself strongly influenced by Grotius, Pufendorf and other writers in the Natural Law tradition. Natural law thinking facilitated, perhaps even brought about, the transformation of the Common Law from a “system”; *Edin. L.R. 7* if we can use the word “system” loosely, in which legal knowledge was largely framed around the forms of action, into a system held together by abstract categories; a transformation from the four books of Sir Edward Coke’s *Institutes* --the commentary on Littleton, the commentary on selected statutes, the treatise on criminal law, and the list of courts together with their separate jurisdictions and procedures--to the four books of Blackstone’s *Commentaries* --the rights of persons, the rights of things, the law of private wrongs, and the law of public wrongs. There is still much of the medieval Common Law in Blackstone, with its only partly antiquarian concern with the forms of action and the nature of feudalism, but within a generation or so this medievalism was being sloughed off. As the direct influence of Natural Law thinking began to wane--a lecturer in Lincoln’s Inn at the end of the eighteenth century started with the assumption that his audience might know nothing about Grotius but his name--its legacy came into its own; in its commitment to analysis in terms of general legal categories—contract, torts and the like--rather than in terms of the forms of action, the burgeoning treatise literature of the early nineteenth century owes a great deal to the Natural Lawyers’ teaching that a legal system was reducible to a relatively simple conceptual structure, the description of whose individual parts inevitably presupposed a relationship to the whole.

I hope it will not be thought perverse if I put on one side these central aspects of the influence of the Natural Lawyers on the foundations of the Common Law, but concentrate instead on a third feature, a feature which is not quite so obvious: the ways in which Natural Law came to affect substantive legal doctrine as particular ideas and doctrines worked out there infiltrated themselves into English law. It is all too easy for this to escape attention. Lawyers accustomed to identifying legal rules by reference to statutes and decided cases can all too easily slip into overlooking the sources from which the statutes and cases themselves derived the rules. In the seventeenth and eighteenth centuries Natural Law was one such source.

Arguments, or assertions, based on the law of nature were ten a penny in the courts of the seventeenth and eighteenth centuries. Frequently, it has to be said, these amount to little more than
appeals to common sense or to essentially trivial observations about human relations. “As we commonly talk of the law of nature”, said Chief Justice Vaughan in 1670, “it is pons stultorum, when fools can't tell which way to go further they go there”. But his objection was to the way in which Natural Law featured in legal argument, not to the fact that it was there at all. In the same case he was perfectly content to put weight on “one of the greatest human authorities … the opinion of Hugo Grotius, the learnedest man of his time”. He was undoubtedly right to do so. Statements, for example, that parents are obliged by the law of nature to provide for their children, or that children should cherish their parents, hardly get out of the starting-blocks as serious legal propositions. But even this sort of low-grade argument could generate important substantive legal doctrine. The observation that the law of nature required that husbands provide for their wives was a bland and uncontroversial statement in the context of seventeenth-century social mores; but it was on the basis of this that the courts in the 1690s created the Common Law rule that a wife could pledge her husband's credit in order to provide herself with necessaries. In general, though, assertions of this sort are the equivalents of the ornamental references to Natural Law found in some of the institutional writers of the period, makeweight justifications with little pretence to do anything more than give a learned gloss to claims that nobody had any inclination to doubt. It is easy to dismiss them as utterly banal and trivial, but in truth they did have their part to play in establishing the acceptability of arguments from Natural Law in Common Law discourse. They both reflected and reinforced the common preconception that Natural Law was a body of self-evidently valid ideas antecedent to the Common Law and in some way superior to it.

One step beyond this are those cases where arguments from the law of nature do have a genuine function in generating or providing support for a legal conclusion, but where we may strongly suspect that they are really being used as ex post facto justifications for conclusions that have already been determined on for more or less pragmatic reasons. Take for example the reasoning in Omychund v Barker, the great case establishing the admissibility of evidence given on oath by a Hindu. Against the clear authority of Bracton, Britton, Fleta and Lord Coke, the Solicitor-General, the Scottish William Murray, later Lord Mansfield, argued that the matter had to be determined as a matter of reason, “stated to be the first ground of all laws by the author of the book called Doctor and Student”, and general principles. This reason and general principle was, for him, found explicitly in Grotius and Pufendorf (whom he quotes at some length), supported by the Decretals, the Digest, and--we might add--Lord Stair. But not far beneath the surface we find another layer of reasoning, reasoning based on the commercial convenience, not to say the commercial necessity, of providing mechanisms to allow the effective adjudication of claims stemming from Indian contracts at the time. Unsurprisingly, these arguments found favour with the judges. It would be naive to attribute this to the all-powerful quality of arguments based on Natural Law in the middle of the eighteenth century; but we would be no less blind if we failed to recognise that when faced with very strong Common Law authority to the contrary it was to Natural Law that Murray turned. In purely formal terms, arguments from the writings of Natural Lawyers--of foreign Natural Lawyers at that--provided a legally acceptable foundation for the overturning of long-standing Common Law rules.

We can see the same thing at work in the leading eighteenth-century case on the enforceability of agreements in restraint of trade, Mitchell v Reynolds. Chief Justice Parker, giving the judgment of the Court of King's Bench, gave a wide range of reasons why certain agreements not to exercise a trade would be enforceable and others not. Listed among these is the proposition, explicitly derived from Pufendorf, that an agreement of no benefit to the other party should not be enforced. And if useless agreements should not be enforced, continues the Chief Justice, how much less should those which are oppressive? Nowhere is there a hint that Pufendorf's principles are any less valid as sources of legal argument than are the earlier decisions of the English courts. As Thomas Wood had it, in his Institute of the Laws of England, the law of nature was one of the principal foundations of the law of England. What could be better than an argument drawn directly out of this foundation?

Arguments of this sort might not simply underpin pragmatically-based conclusions, or tip the balance between competing arguments from Common Law. They might be the channel through which English law was pricked into adopting rules found elsewhere. Take, for example, the evidential privilege against self-incrimination. This was a basic rule of the canon law, and more generally of the European ius commune. It was known in English ecclesiastical law, and mutterings based on it are found in political trials in the middle of the seventeenth century. It was also found, quite explicitly, in Pufendorf's Law of Nature and Nations. But it had never been recognised as part of Common Law. Tentative moves had been made to argue for its acceptance in Attorney-General v Mico in 1659, explicitly on the basis that where the Common Law was inconsistent with the law of nature it was the law of nature that should prevail. It does not look as if this argument succeeded, or at least if it did it...
had very little influence on the courts over the next half century. Around the beginning of the eighteenth century we begin to find hints of it in the case-law, but it was really locked in place by Sir Jeffrey Gilbert's *Treatise on Evidence*, which was *Edin. L.R. 10* written about this time. The source of Gilbert's thinking is as transparent as it could be: "Our law in this differs from the Civil law, that it will not force any man to accuse himself; and in this we do certainly follow the law of nature, which commands every man to endeavour his own preservation." Natural law was not simply prayed in aid when some basis was needed for a conclusion different from that which would have been generated by superficially more orthodox Common Law sources. It was taken seriously in its own right, and where Common Law sources were lacking it could provide in itself the basis for legal conclusions. A straightforward example of this is the reasoning of Chief Justice Wilmot in *Collins v Blantern* in 1767. The issue in the case was whether a contractual bond which was valid on its face should not--and to all children and not just the eldest. The outcome of the case is neither here nor there; what is important is that both counsel and the judge treated the existence and scope of the Natural Law rule as the principal factor in determining whether the defendant's conduct constituted a criminal offence.

Nor should we get the impression that Natural Law provided a body of useful maxims that could just be trotted out when needed to make a point. Natural lawyers might disagree among themselves, and in such a case Common Lawyers would deal with the arguments on either side in the same way that they would deal with competing reported decisions. The just-cited case of *Collins v Blantern* provides a convenient example, with Chief Justice Wilmot having to decide between conflicting conclusions of Grotius and Pufendorf. More commonly, and more fertile in its effects, reasoning based on Natural Law principles could generate different results, and it was for the judges to decide between these competing lines of argument. In 1697, for example, a prosecution was brought for conspiring to marry off an expectant heir to a woman of ill repute. There was no clear Common Law authority on whether this was in fact a criminal offence, but Chief Justice Holt argued that since the law of nature provided that a father should have guardianship of his eldest son until the age of twenty-one, it followed that the indictment was well-founded. On the other hand, though, Holt's premise was not quite watertight. It could not be a principle of the law of nature, it was said, that a father have guardianship of his eldest son, for if so the rule should apply to aliens as well as citizens--which it did not--and to all children and not just the eldest. The outcome of the case is neither here nor there; what is important is that both counsel and the judge treated the existence and scope of the Natural Law rule as the principal factor in determining whether the defendant's conduct constituted a criminal offence.

*Edin. L.R. 11* The Natural Law being called upon in this case was pretty unsophisticated, the Natural Law of common sense and bare assertion. It was not always so. Take, for example, the availability of a defence of necessity to otherwise criminal conduct. For both Grotius and Pufendorf a basic principle from which Natural Law was derived was the innate desire of man for self-preservation. This continued to operate as a limitation on the rules of Natural Law, so that it would be legitimate for one man to kill another if that was the only way to save his own life, as in the standard illustration of two drowning men on a plank large enough to support only one of them. Not so, said Sir Matthew Hale in his treatise on Natural Law. Self-preservation was not as fundamental as Grotius and Pufendorf had made it, and killing except in genuine self-defence was not to be condoned. In the same way, for Grotius and Pufendorf it would be legitimate to steal if that was the only way to avoid dying of starvation. Not so, said Blackstone, following Hale's argument in his work on the *Pleas of the Crown*: "Men's properties would be under a strange insecurity if liable to invaded according to the wants of others"; and in any event the Common Law in its wisdom had provided a sufficiently comprehensive system of poor relief that none should be forced to steal to avoid starvation.

Or, yet more sophisticated, take the great eighteenth-century controversy over whether at Common Law, independent of statute, authors were entitled to perpetual copyright in their books. In the first, inconclusive, English case dealing with the subject, the arguments for the plaintiff were founded on the property theories of Selden, Grotius and Locke, those for the defendants on principles derived from Pufendorf, Bynkershoek and Lord Kames. Should a view that authors were entitled to the fruits of their labour prevail over the more concrete view that seemed to limit property to physical things? Both lines could be found in Pufendorf, for example, but the indeterminacy of the sources did not prevent their being cited in extenso. They were no less prominent when the issue first came to judgment, in *Millar v Taylor* in 1769. Of the three judges favouring authorial protection, two-Lord Chief Justice Mansfield and Willes J--wanted nothing to do with the comings and goings of the Natural Lawyers:
I have avoided a large field which exercised the ingenuity of the Bar. Metaphysical reasoning is too subtle, and arguments from the supposed modes of acquiring the property of acorns, or a vacant piece of ground in an imaginary state of nature, are too remote.  

The third, Aston J, was not so self-denying. Distancing himself from the arguments of the traditional Natural Lawyers—though still giving references to Locke, Pufendorf, Grotius, Bynkershoek and Barbeyrac—he based himself heavily on ideas culled from William Wollaston's *Religion of Nature Delineated*, a popular book on the margins of the Natural Law tradition, in which a more abstract view of property was formulated. Almost as if embarrassed by such a wealth of non-Common Law reference, he covered himself by citing the view of the early seventeenth-century judge John Dodderidge to the effect that the Common Law was founded on the law of nature and reason, which he identified with the primitive folk-right of the English people. Only the dissentient judge, Yates J, was willing to adopt the more literal interpretation of the Natural Law texts and say that property rights could only be said to persist over tangible things, so that apart from statute the author was without protection. After all this effort and learning, the matter was finally disposed of by the House of Lords five years later, where it was held, in accordance with the barest of majorities of the judges advising the House, that whatever rights the Common Law had given to authors had been impliedly taken away by the Copyright Act of 1709. The ambiguity within Natural Law was resolved in the traditional Common Law way, by sidestepping it.

It would be easy to carry on adding to the catalogue of examples of cases in which seventeenth- and eighteenth-century Englishmen used arguments from Natural Law, from Grotius, from Pufendorf, in their Common Law reasoning. But little purpose would be served by doing so. However thick the veneer, in all the cases so far looked at the arguments derived from Natural Law might have been in reality no more than a veneer. In the eighteenth-century, just as today, the conventions of legal argumentation demanded that conclusions be justified by reference to sources with an appropriate stamp of respectability; but it in no way followed that the conclusions were necessarily generated by those sources. It is still well worth making the point that Natural Law provided an acceptable base for eighteenth-century legal argument in a way that it would not do today, but we are a long way from demonstrating that the arguments of the Natural Lawyers had any genuine influence on the actual rules of English law, that their reasoning was in any way woven into the fabric of the Common Law. To do this we have to look beneath the surface of the legal rules themselves, to the underlying structure of the legal institutions.

To do this I shall look at four examples of areas of law whose basic structure came to be heavily influenced by ideas drawn from the writings or theories of the Natural Lawyers: the law of trusts, where a throwaway sentence or two in the English translation of Pufendorf's *Law of Nature and Nations* proved to be surprisingly fertile when transplanted into new soil; the law of contract, where pieces of Pufendorf were used to articulate doctrines in what had thithereto been grey areas in English law, and where the underlying basis of Natural Law theory re-oriented English law in the nineteenth century; the law of unjust enrichment, where Blackstone's espousal of Grotius and Pufendorf skewed English law off course for the better part of two centuries; and the law of torts, where ideas lifted directly or indirectly from Pufendorf skewed English law onto the course which led rapidly to the formulation of the tort of negligence.

Let me begin with the trust. Before the middle of the seventeenth century, the practice of the Chancery was sufficiently open-ended that it would probably have been misleading to have looked for rules at all; in any event there had been no attempt to write down what they were. After the Chancellorship of Lord Nottingham in the latter part of the seventeenth century the principles of Equity had become more determinate, and, around 1700, legal writers began to produce texts on the subject. This required the imposition of an analytical framework of a type that had not formerly existed, which either had to be invented from scratch or built up by analogy with some other institution. Some writers, such as Francis Bacon and William Blackstone linked the trust to the Roman lawyers' fideicommissum; others, such as Jeffrey Gilbert, drew the analogy with the Romans' usufruct. A different approach was taken by Henry Ballow, in his *Treatise on Equity* published in 1737. He took as his foundation the Roman lawyers' contract of deposit, where the owner of property put it in the hands of another person for safe-keeping. We may have little doubt that this was taken from Pufendorf's *Law of Nature and Nations*, in the English version of which the translator, Basil Kennett,
used the language of trusts and trustees *Edin. L.R. 14* to render the Roman law contract known as depositum. Purely as a matter of English law the analogy was very forced; the trustee was in law the undoubted owner of the property, though he might owe very substantial obligations to the beneficiary; applying the analogy with deposit, though, the proprietary rights would seem to be vested in the beneficiary, giving the trustee bare custody of the land or goods. Scots law, we might note, was more sensible; though Viscount Stair adopted the same analogy between the trust and the Roman depositum, he did so in such a way that it was not over-played. Trust, for him, was only “a kind of deposition”, under which both the custody of the thing and the property in the thing are vested in the person of the trustee. But problematic as the parallel undoubtedly was, it enabled Ballow to formulate a model which allowed the trust to be portrayed as a multi-faceted institution. By locating the trust within an essentially contractual framework, he was able to explain the duties of the trustee in terms of the obligations imposed on him by the settlor; he could squeeze charitable trusts into his picture, something that could not easily be done by the other models; the standard of care demanded of the trustee could be formalised in terms of the obligation to look after the thing as his own, the duty of the depositee as described by Pufendorf; and he could pretend to square the circle by treating the trust simultaneously as a property right vested in the beneficiary, subject to rules of inheritance mimicking those of the Common Law, and a set of obligations owed to him by the trustee. However much his model cannot be defended from a purely critical standpoint, it worked well enough in practice as a skeleton on which the cases could be hung, around which the rules could be framed. His work was several times edited and reprinted and frequently cited favourably in the Court of Chancery in the eighteenth and nineteenth centuries. Particular rules, slanted in the direction of Ballow’s model, were in this way knitted into the fabric of English law. No less importantly, some rules that became fixed in place without express citation to Ballow could only really be made sense of in terms of his theoretical stance. The most obvious of these is the rule relating to the trustee’s standard of care, which continued to reflect that of the Roman contract of deposit right until the end of the nineteenth century when it was overturned by a blatant act of judicial legislation. Above all, though, it provided the groundwork for the locking in place of the analysis of the trust as an essentially proprietary relationship, and the *Edin. L.R. 15* fixing in English law of the duality of legal and equitable ownership. The idea was known before 1700, but it cannot remotely be said to have attained the status of orthodoxy. By 1800 it was a commonplace. And beneath it lay buried the seed of an idea transplanted from the writings of the Natural Lawyers.

It was not only in the conceptualisation of the law of trusts that Ballow’s work may have been influential. Despite its title as a Treatise on Equity, the first part of his book dealt in fact with the law of contract. It took the form of abstract propositions followed by concrete illustrations. The illustrations were impeccably drawn from English cases; but the abstract propositions were in the main lifted straight from the English translation of Pufendorf. Some of these reflected English law sufficiently well that the seams do not show: the need for voluntariness and hence contractual capacity, for example, or the vitiating effect of fraud. Some could be made to represent English law, though there was nothing in the pre-existing case-law to necessitate this. Thus, the Natural Lawyers’ proposition that a promise creates no obligation until it is accepted was able to do service as a formulation of what exactly constituted an agreement in English law; it may be no coincidence that the first reported case pointing to the existence of an explicit doctrine of offer and acceptance is a case in Chancery and not at Common Law. Perhaps, too, Ballow’s reproduction of Pufendorf’s doctrines of the vitiating effects of error or inequality, which are not backed up by any English authority, did something to crystallise Chancery practice in this area, though it is hard to demonstrate this. Sometimes the attempt to squeeze English-law illustrations into Pufendorf’s doctrinal strait-jacket was sufficient of a strain that the mis-match is not difficult to spot. The requirement that a contract be perfect in itself, and not simply an agreement to make a contract in the future, could not readily be grounded in English materials, and Ballow’s attempt to do so is not wholly successful. The same could be said of his efforts to identify in English law the Roman rule of laesio enormis, the principle that a sale at serious under-value could be called off by the seller, which had been incorporated into Pufendorf’s Natural Law. We cannot be sure that it was through Ballow that these ideas generated by the Natural Law school began to filter into English law; but filter in they did, even if they did not all survive the process. What is more, they were already becoming common currency before the great wash of contractual theory generated by Pothier, itself a spin-off from Natural Law thinking, began to dominate English legal thinking around the 1820s.

*Edin. L.R. 16* Ballow was, of course, not the only channel through which Natural Law ideas came into English contract law in the eighteenth century. In 1764, for example, it was said that the application of Natural Law led to the conclusion that contracts were vitiated by the concealment of any material fact, and a few years later we find Grotius cited to show that a promise not to perform
something that one was bound by nature to do was unenforceable at Common Law.\textsuperscript{17} The restraint of trade case of 1713 cited earlier, *Mitchell v Reynolds*,\textsuperscript{18} clearly uses Natural Law reasoning independent of Ballow; and, moreover, the case seems to be implicitly assuming the validity of the Natural Lawyers' contractual theory as well as explicitly applying their doctrine on the narrow point of the case.

The big problem was that the Natural Law model of contractual liability was promissory in nature, the obligation arising straightforwardly from the voluntary agreement of the parties. There was no place in it for anything like the Common Lawyers' doctrine of consideration; and Pufendorf was almost scathing in his criticism of the sixteenth-century French jurist Conuus, whose model of contract, like that of the Common Law, was based on an idea of reciprocity rather than a simple meeting of minds. Ballow seems to have been troubled by this, and when he deals with consideration he departs from his normal pattern of analysis and refers simply to Common Law authority without any culling from Pufendorf. Blackstone, too, seems to have been uneasy, going out of his way to stress that like the Common Law, the Civil Law always required that something be given in exchange in order to make a contract enforceable.\textsuperscript{19} As a matter of Civil Law this was simply wrong, and unless Blackstone was a far worse lawyer than we give him credit for it is a fair guess that he knew it was wrong. Worse than this, he supported the proposition by a doctored quotation from the Italian Gravina's *De iure Naturali, Gentium et Duodecim Tabularum*, missing out the word "almost" in Gravina's eminently correct and wholly unexceptionable proposition that exchange was at the basis of *almost* all contracts.\textsuperscript{20} There was, on the face of it, no need for Blackstone to twist the Civil Law in this way--unless, of course, the doctrine of consideration was something that needed justification and not simply exposition. Meanwhile, the Common Law courts were flexing their muscles in trying to bring English law more into line with Natural Law by abolishing the requirement. In *Pillans v van Mierop*, Wilmot J, aided and abetted by Lord Mansfield, attempted to expunge it, at least from agreements which had *Edin. L.R. 17* been put in writing.\textsuperscript{21} For Grotius and Pufendorf, he said, such promises were binding provided they were entered upon deliberately and with reflection, and the Common Law should not trench against this further than necessary.\textsuperscript{22} The argument, in this form, was short-lived. Just over ten years later, in *Rann v Hughes*,\textsuperscript{23} the House of Lords uncompromisingly reversed the effect of *Pillans v van Mierop*:

It is undoubtedly true that every man is by the law of nature, bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration.\textsuperscript{24}

None the less, gradually and no doubt under the further influence of Pothier, the effective requirement of reciprocal consideration gradually faded away as a doctrine applied in practice, as judges became ever more astute to discover within the parties' agreement something, however minimal or nominal, that could count as consideration.\textsuperscript{25} As a result, in substance, by the middle of the nineteenth century the Common Lawyers' model of contract was in all but name identical to the purely agreement-based model of the seventeenth-century Natural Lawyers.

I shall not dwell long on my third example, the effect of Natural Law thinking on the English law of unjust enrichment. It is an embarrassment in the history of the Common Law, and in any event I should be doing little more than repeating a story which has been told already by scholars from the University of Edinburgh.\textsuperscript{26} By the middle of the eighteenth century English law was perhaps moving towards the formulation of a general principle of unjustified enrichment, though it was some way from accomplishing it. We might not be too far out of line in guessing that it might have come to look something like the obligation to restitution found in Stair's *Institutions*, for this is an area in which English lawyers at the time were more than normally receptive to legal ideas from north of the border, displaying some familiarity with the Scots law of condition.\textsuperscript{27} This tentative movement was brought rapidly to a stop by Blackstone's adoption of a model of liability dependent on the existence of an implied contract between the parties in such cases Both Grotius and Pufendorf had made very considerable use of the idea of the implied contract in their theories, and Pufendorf had expressly described the Roman lawyers' obligations quasi ex *Edin. L.R. 18* contractu in such terms.\textsuperscript{28} He was not alone in this, for a number of writers in the Civilian tradition had done so too, but there can be little doubt that it was Pufendorf who was the immediate source of Blackstone's treatment. The analysis fitted all too seductively into English law; for, by chance, the action of indebitatus assumpsit, the form of action into which such claims were fitted by the eighteenth century, was based on an implied promise to perform what was due. It was, though, a false parallel: there was all the difference in the world between saying that as a matter of pleading form the action of assumpsit was brought on an implied promise and saying that as a matter of legal substance the claim was based on an implied contract. Blackstone did not draw this distinction, failing to take the opportunity provided by the
judgment of Lord Mansfield in Moses v McFerlan to draw the distinction between contractual and so-called quasi-contractual obligations and to articulate a general theory of the latter. The disastrous consequences of this are well-known; they took the better part of two centuries to grub out, and their after-effects still litter the law today.

Ideas plucked from Natural Law, therefore, played a significant part in the structural formation of these branches of the Common Law. They nudged the law of trusts towards its modern formulation ambiguously positioned between the law of obligations and the law of property, and in doing so assisted in the setting in place of a number of concrete rules. They prepared the ground for the adoption of a model of contract based firmly on the will of the parties, and facilitated the articulation of doctrines that were consistent with the earlier Common Law but which had not previously been explicitly shaped. And they contributed to holding back the development of the law of unjust enrichment, setting it on an intellectually indefensible and practically disastrous foundation of implied contract. Their main success, though, was in the law of tort, where they provided all the materials out of which the Common Law was to fashion its tort of negligence. Here the parallels between English developments and those in Scotland are very marked, for in Scotland too, it seems highly likely that the Natural Lawyers' ideas were a primary factor in shifting the law from its early form to a more general principle of reparation, particularly through the institutional works of Stair and Erskine.

In England, the fixing of a qualified general principle of liability for negligence was the consequence of the work of two writers, dealing with ostensibly different topics, and making use of Natural Law ideas in very different ways. The first of these, and the simpler, was Francis Buller. In his Law of Trials at Nisi Prius, first published in 1767 when Buller was a young and inexperienced lawyer just starting out on a career at the bar, he gave what we can now recognise as the first formulation of the tort of negligence:

Every man ought to take reasonable care that he does not injure his neighbour; therefore when aiman receives hurt through default of another, though the same were not wilful, yet if it be occasioned by negligence or folly the law gives him an action to recover damages for the injury so sustained.

There is nothing remotely like this in the earlier Common Law; and it is fairly clearly borrowed straight from Pufendorf, who was the first theorist to formulate the general principle of an antecedent duty to take reasonable care, with liability arising for breach of that duty.

The second writer was Sir William Jones, who published his Essay on the Law of Bailments in 1781. Wholly independently of Buller, so far as we can see, Jones too framed a basic principle of liability based on the breach of a duty to take reasonable care. Jones's immediate source was Roman law, which he discussed with very considerable learning, rather than Natural Law; it is noteworthy, in fact, that the book does not contain even a passing reference to Natural Lawyers' arguments about the legal status of the bailee. His work, none the less, fits firmly into the Natural Law tradition stemming from Grotius. His whole aim, avowedly, is to synthesise rational general principles out of the positive laws of different states. Thus, as well as English and Roman law, Jones makes reference to Greek law, Jewish law, the law of Turkey, the medieval Welsh law books, classical Indian law, the contemporary laws of Germany, Spain, France, Italy and Holland, the barbarian laws of the Visigoths and Bavarians, and capitularies of the Emperor Charlemagne. Out of all of these, together with a degree of imagination and judicious selection, Jones was able to synthesise the general principles which underlay the laws of all nations. It is at this point, and at this point alone, that Grotius is referred to: "All of these agree with the Roman laws, though they are not derived from them but from the principles of natural equity."

The parallelism between Buller and Jones was fortuitous but fecund. Their two works dealt with the two principal situations in which the Common Law's action of trespass on the case would lie: Jones covering those situations where there was an antecedent relationship between the parties, of which bailment was the most typical example, and Buller the general case where injury was caused outside any such relationship. Glued side by side, they could be seen as expressing a principle of general application that there was a duty to take reasonable care not to injure another, with the legal liability flowing from the breach of that duty actionable by trespass on the case. And it was in this form towards the beginning of the nineteenth century, that the Common Law began to frame its general tort of negligence, a tort whose line of legitimate descent can be traced easily and unequivocally back to the writings of the Natural Lawyers of the seventeenth century.

Let me end by trying to pull together some observations. First is to note that the effect of the tendency of doctrinal legal historians to treat their subjects vertically—looking at the development through time
of individual legal institutions--can be to miss out on the horizontal connections between different institutions at the same time. These connections can often be of more importance than what appear to be the internal dynamics of particular areas of law, especially when they involve the application of general principles or theories that cut across specific legal categories. We ignore them at our peril.

Second is the fact that the writings of the Natural Lawyers can furnish a useful point of departure for comparative European legal history, or, in a more insular context, for comparative British legal history. Perhaps there were some in the seventeenth and eighteenth centuries who harboured hopes that Natural Law would supersede national legal systems and form a common European law founded on rational principles. If so, their hopes were not to be satisfied, except to the limited extent that the French Code can be seen to embody those principles and to have been adopted in other parts of Europe. In England, and for that matter in Scotland too, Natural Law provided just one source of ideas among many, ideas which might have been accepted or rejected or which might have been twisted in order to fit into a particular niche which needed filling at a particular time. There was no wholesale reception of Natural Law in many areas, though, its ideas were sufficiently pervasive that we can think of legal developments in terms of the acceptance, rejection or partial assimilation of particular rules or general theories of liability. National legal traditions continued to be of profound importance, and we must always be on our guard not to stress the points of similarity so much that we produce an artificially homogeneous European legal history--or British legal history for that matter--which serves only to generate a past for a politically desired homogeneous European law of the future. But, so long as we do not lose sight of this, seventeenth- and eighteenth-century Natural Law can provide a common language of concepts against the back-ground of which we can begin to make some sense of each others' legal history.

In the long term, perhaps, Natural Law was a failure. Grotius has survived, but Pufendorf is all but forgotten by lawyers, caricatured by one writer as “an obscure German with a funny name who followed Grotius in the early development of international law”. But in their time their influence, on many disparate areas of law, was immense. Legal historians, and comparative lawyers, can learn a lot from remembering it.

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1. Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (1986) 53 P & C R 293 at 302
2. S Kyd, A Treatise on the Law of Corporations (1793-4)
3. See, for example, W S Holdsworth, A History of English Law (1952), vol 13, 10-24
5. See, for example, K Haakonssen, Natural Law and Moral Philosophy (1996)
12. Harrison v Burwell (1670) 2 Vent 9 at 18
13. Ibid, at 19
14. Manby v Scott (1661-2) 1 Keb 80 at 82, 1 Keb 361 at 366
15. (1744) 1 Atk 21, Willes 538
16. (1744) 1 Atk 21 at 32
17. (1744) 1 Atk 21 at 33-34
18. (1713) 10 Mod 130
19. (1713) 10 Mod 130 at 135, 137
22. R H Helmholtz, “The Privilege and the ius Commune the Middle Ages to the Seventeenth Century”, in op cit (note 21 above), 17, Pufendorf, De Jure Naturae et Gentium, 4 2 22, 4 1 20
23. Hardres 137, 139
24. J Gilbert, Treatise on Evidence, 99, quoted by Macnair, op cit (note 21 above), 84
25. 2 Wils KB 347
26. 2 Wils KB 347 at 349-350
27. R v Thorpe (1697) 1 Com 27, Comb 456.
30. Grotius, De Jure Belli ac Pacis, 2 2 6, Pufendorf, De Jure Naturae et Gentium, 2 6 5-7
31. Blackstone, Commentaries, 4 29-30, Hale, Pleas of the Crown, 1 54
32. M Rose, Authors and Owners (1993)
33. Tonson v Collins (1761) 1 W B 1 301 at 321, the court refused to give a judgment since they believed the case to have been brought collusively with a view to prejudicing the rights of third parties
34. 1 W Bl 301 at 302 (Wedderburn), 321-322 (Blackstone)
35. 1 W Bl 301 at 333-334 (Yates)
36. Pufendorf, De Jure Naturae et Gentium, 4 4 2, 4 7 7
37. (1769) 4 Burr 2303
38. (1769) 4 Burr 2303, 2399 (Lord Mansfield)
39. (1769) 4 Burr 2303, 2334
40. (1769) 4 Burr 2303 at 2338-2343
41. (1769) 4 Burr 2303 at 2337-2338
42. (1769) 4 Burr 2303 at 2343
43. (1769) 4 Burr 2303 at 2363
44. Donaldson v Becket (1774) 2 Bro PC 129, 4 Burr 2416
45. M R T Macnair, “The conceptual basis of trusts in the later seventeenth and early eighteenth centuries”, in R Helmholtz and R Zimmermann (eds), Itinera Fiduciae (1998), 207
46. Macnair, op cit (note 45 above), 213-216
47. Ballow, Treatise on Equity, 2 1 1 See Macnair, op cit (note 45 above), 216-218
48. Pufendorf, De Jure Naturae et Gentium, 5 4 7 The linking of deposit and trust is found earlier in English case law e.g. Lord Hollis’s Case (1680) 2 Vent 345; Coggs v Bernard (1703) 2 Ld Raym 909. For Ballow’s reliance on Pufendorf, see D Ibbetson, Historical Introduction to the Law of Obligations (1999), (hereafter Ibbetson, Historical Introduction).


51. Ballow, *Treatise on Equity*, ed Fonblanque, 2102 et seq

52. Ibbetson, *Historical Introduction*, 179-180


54. *Ford v Compton* (1786) 2 Bro CC 32 The statement to this effect is not found until the fifth edition of the report, published in 1820, but it is taken from the manuscript notes of Josiah Brown (the author of the report and counsel in the case) and is abundantly visible in the pleadings and in the reasoning of the Chancery decision so far as this can be discerned from the record Public Record Office, C12/2138/5, C33/465 f 204v


56. *Hodgson v Richardson* (1764) 1 W B I 463 at 465 (Yates J)

57. *Low v Peers* (1770) Wilmot 364 at 371

58. (1713) 10 Mod 130

59. Pufendorf, *De Jure Naturae et Gentium*, III 5 9-11

60. Blackstone, *Commentaries*, 2444, 445

61. *De iure Naturali, Gentium et Duodecim Tabularum*, 12 (in *Opera Omnia* (1717), 153). “Nam praeter permutationem rei cum re, quae peculiari permutationis nomine venit, in alius itidem contractibus fere omnibus sive nominatis, sive innominatis, permutatio continetur” (emphasis added)

62. (1765) 3 Burr 1663

63. (1765) 3 Burr 1663 at 1670

64. (1778) 4 Bro PC 27, 7 TR 350n

65. 7 TR 350n, per Skynner C B


70. (1760) 2 Burr 1005, 1 W Bl 219


73. *Introduction to the Law of Trials at Nisi Prius*, 35


76. Ibbetson, *Historical Introduction*
