TEACHING PIERSON V. POST
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The case of Pierson v. Post is “one of the old chestnuts of property law.” It is usually included as one of the first cases in a first-year Property casebook, which means that Pierson is often one of the first cases that incoming law students struggle with during their first week of law school. This exposure, coupled with the fact that Pierson involves an accessible (and somewhat entertaining) fact pattern, explains why many practicing attorneys can still remember “the fox case.”

I have now taught Pierson thirteen times. I love the case. (My former students would confirm this statement.) After experimenting with different ways of teaching Pierson, I have developed a unique approach that, I believe, accomplishes many of my pedagogical objectives for the first week of class. The students also seem to enjoy it.


1 Professor of Law, Baylor Law School.
2 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).
4 See, e.g., Josh Blackman, Outfoxed: Pierson v. Post and the Natural Law, 51 AM. J. LEGAL HIST. 417, 417 (2011) (describing Pierson as “one of the first cases” first year law students read).
5 See A. JAMES CASNER & W. BARTON LEACH, CASES ON PROPERTY 2 (rev. temp. ed. 1948) (“For more than a half century law students have teethed upon this particular mammal. He is to the law of property what ‘Omnis Gallia’ is to Latin; it is conceivable that a student might start somewhere else, but it would hardly seem right.”).
6 See Charles Donahue, Jr., Papyrology and 3 Caines 175, 27 LAW & HIST. REV. 179, 180 (2009) (bemusing the fact that the story in Pierson is “the only thing that the students remember about the property course”); Banner, supra note 2, at 188 (“Everyone remember[s] the fox . . . .”).
7 As others have noted, there are multiple ways to teach the case. See, e.g., Blackman, supra note 3, at 460 (stating that Pierson “represents a fascinating vignette of the role natural law played in early 19th century common law American courts”); Donahue, Jr., supra note 5, at 179 (“I have been teaching Pierson v. Post to first-year property students for forty years . . . . I use the case to introduce law students to what the litigation process is all about . . . .”); John William Nelsen, Fiber Optic Foxes: Virtual Objects and Virtual Worlds Through the Lens of Pierson v. Post and the Law of Capture, 14 J. TECH L. & POL’Y (continued)
This Article explains my approach to teaching *Pierson v. Post*. I teach *Pierson* as the very first case in Property I, and spend about two-and-a-half classes on the case. I recognize that most professors will not want to devote this much class time to *Pierson*. Even for those that use *Pierson* differently than I do, I hope there are ideas herein that others might find useful.

In my first draft of this Article, I narrated and paraphrased my approach to teaching *Pierson*. This proved to be somewhat clunky. What follows below, then, is the actual presentation I use for *Pierson*. Notes to the reader will be italicized and demarcated with brackets.

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[Before coming to class, I print out a *Pierson v. Post* “ballot” for each of my students. The ballot has eight rows, simply labelled “Vote 1, Vote 2, etc.” There is a blank slot next to each row for the student to fill in the name of either Post or Pierson. Upon entering the room, I distribute the ballots to the students. I then spend about ten to fifteen minutes covering course introduction and logistics. Part of this introduction involves telling the students that we will spend the first half of Property I wrestling with three fundamental questions: (1) What is Property?; (2) How Do I Get It?; and (3) Why Property? I engage the students in a brief discussion of the “What is Property?” question by calling on them for the Dr. Seuss story “Thidwick the Big-Hearted Moose,” which is part of their reading assignment for the first day. I use Thidwick to introduce the idea of private decision-making (which I call an “entitlement”). I inform them that we will continue to revisit and develop our understanding of the “What is Property?” question, but that we will spend the next couple weeks talking about the “How Do I Get It?” question.]

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Our first case, *Pierson v. Post*, addresses the “How Do I Get It?” question. Mr. Johnson, I’m going to call on you for that case. But let me give you a few minutes to collect your thoughts, because I want to provide a little background on *Pierson v. Post* before we start our discussion.

First, you should know that *Pierson v. Post* is a very famous case. In my estimation, it is the second-most famous American common law case. This is not to say that it is the second-most famous American legal case. There are multiple constitutional law cases decided by the Supreme Court of the United States that are more well-known than *Pierson v. Post*. You might be familiar with some of these Supreme Court cases even before coming to law school: *Brown v. Board of Education*, the *Dred Scott Case*, *Roe v. Wade*, and *Obergefell v. Hodges*.

But with regard to American common law cases, I believe *Pierson v. Post* is the second-most famous. What do I mean by a common law case? You have already briefly talked about this in your introduction to law school class, but simply put, it is the body of law that judges developed to resolve disputes when there was no other source of law (such as a statute or a constitutional clause) that addresses the dispute between the parties. So, say a man swings a stick while trying to break up a dogfight at the park; in doing so, he pokes another guy in the eye, causing great injury. The injured man sues the stick swinger, seeking some sort of monetary compensation. There is no legislative statute or constitutional clause that addresses this question. But the judge has to resolve the case: Is the injured man entitled to monetary compensation from the stick swinger? This is what we mean by a common law case. So judges resolved these disputes, and eventually started writing opinions explaining their conclusions. From these opinions came rules that might be used by other courts to resolve similar disputes in the future.

In my view, *Pierson v. Post* is the second most-famous common law case decided by an American court. Now, I know what you are thinking: This fox case that I read is famous? This dispute over a dead fox hide? Surely not!

But it is. That this case over a dead fox hide became so famous suggests that there is more to this dispute than initially meets the eye. Indeed, that is the case. This case is like an onion, in that it has many different layers.

We are going to come back later and talk about the many different layers at which this case operates (peel the onion, if you will), and why this dispute about a dead fox hide became so famous. But, here at the outset, I do want you to appreciate that you are reading a very famous case. You need to know this case, if for no other reason than this: some years down the road you will be gainfully employed as a lawyer, and you will be at a
happy hour after work. At which point, somebody in your firm will make some corny legal joke referencing “the fox case.” You will know what he is talking about.

(Coincidentally, because I introduced *Pierson v. Post* as the second-most famous American common law case, what is the first? It is a case called *Palsgraf v. Long Island Railroad*, which was decided by Benjamin Cardozo, a very famous judge. You will talk about this case in your Torts class this year. I mention this now for one reason: some of the reasons that *Pierson v. Post* is famous are the same reasons the *Palsgraf* case is famous. But we will come back to this point later.)

The second introductory point I want to make concerning *Pierson v. Post* is to explain where this fits in with regard to (1) our “How Do I Get It” question and also (2) the organization of the Dukeminier casebook.

How does one get Property? What do I mean by that question? Nowadays, people most often “get” property by buying it from somebody else. So, if I asked you: “Is that your Property book?” you would respond that it is. But if I pressed you on that question, and asked you why it was your book, you would explain (I hope) that you purchased it from somebody... either the bookstore or off the internet. You would justify your ownership of the book by the fact that you purchased it from somebody else.

For most people, and in most circles, that would end the conversation. The book is your book—your property—because you purchased it. But that explanation is not good enough for property lawyers or scholars; property lawyers know this fundamental aspect of property law: A buyer can only buy the rights that the seller has. I will state it again to emphasize this important point: A buyer can only buy the rights—what we come to call “title”—that the seller has.

We will come back to this important concept, and explore some of the important legal repercussions deriving from it, later. But, for now, the “buyer can only buy the rights a seller has” concept means that your explanation as to why the property book is your book is not sufficient, at least for property lawyers and scholars. To say that you purchased the book just begs the question: It is only your property book if it was your seller’s book before your purchase?

So, to answer the question as to whether the book sitting on your desk is really your book, we have to dig a little deeper: Was it your seller’s book? But here is where things can get tricky. If we asked your seller (we will assume it was the bookstore) to justify its ownership of the book in question, they would almost surely respond by explaining that they purchased it from a different seller.
So, we haven’t made any real progress in answering the question as to how you got property ownership of the book—you purchased it from the bookstore, which means your rights depend on the bookstore’s rights. But the bookstore purchased it from a different seller, which means that the bookstore’s rights depend on the rights of its seller.

These series of transactions—buyer from seller, again, again, and again, going backward in time—is quite common. Think of land, and how often it is bought and sold. In each of these transactions, the buyer is only buying the rights the seller has in the land. But how do we know, in the first instance, who actually owned the land or the book? The series of transactions—what we will eventually call a chain of title—is only good if somebody can prove, in the first instance, that they were the first owner of the thing in question—that is, not by simply showing that they purchased it from somebody else.

This idea of first ownership is what is addressed in the first chapter of Dukeminier. In this first chapter (titled “First in Time”), Dukeminier is exploring all of the ways that somebody might come to own property in the first instance. Later, in the second chapter of Dukeminier (titled “Subsequent in Time”), we will explore the ways that you might become the owner of something even though you were not (1) the first owner or (2) able to trace your ownership (say, by sale or gift) to the first owner. But, for now, in Chapter One, we are focused on the question of how one gets ownership in property that has not been previously owned by anybody else.

This is where Pierson v. Post fits in, because the case involves a dispute about a thing—not a book or piece of land, but a fox hide—that has not previously been owned by anybody else. So Pierson v. Post presents a question of “first ownership.”

One more introductory note about Pierson v. Post, and, indeed, the first two chapters of Dukeminier: the first two chapters of Dukeminier deal almost exclusively with a particular type of property. There are two basic types of property that we will encounter in this class—real property and personal property.

[On the board, I draw the following:

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Property

Real Property                             Personal Property
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The term “real property” is just a fancy phrase for land. On the other hand, “personal property” refers to all of the other types of stuff (besides land) that might be owned as property. So, when we were discussing the
ownership of your book, we were talking about personal property. The disputed fox hide in *Pierson v. Post* is a dispute about personal property.

Indeed, the entire first two chapters of Dukeminier deal almost exclusively with personal property, and that will be our focus during the first few weeks of class. So, as we begin our discussion of “How Does One Get Property?” and as we consider that question as it relates to “first ownership” in Chapter One of Dukeminier, we will be talking about personal property. (You might have noticed that we skipped the *Johnson v. M’Intosh* case, which is the very first case in Dukeminier. That case deals with the first ownership question as it related to land. It turns out that first ownership of land is not very analytically interesting or useful. I can reduce that body of law to the following: First ownership of land is established by a grant from a government that is strong enough to defend its land against other governments. That’s all we need to say about that question, for the time being.)

Now, for those of you that go on to practice property law after graduation, you will most likely be doing so primarily with regard to real property. Then why do we start our class with personal property? The answer to that question is pedagogical: the same general principles and rules that govern personal property also apply to real property. It is just that these concepts are more easily learned—particularly for someone in their first quarter of law school—within a discussion of personal property. I am fully aware that none of you are likely to have an actual dispute about a fox hide (or whale blubber, which is our next case), but we are learning fundamental concepts that will control when we move onto a discussion of real property later this quarter. And those same fundamental concepts will govern when you are a practicing property attorney, most likely dealing with real property.

With those introductory remarks, we are ready to begin our discussion of *Pierson*. Mr. Johnson, please give me the facts and procedural history of this case.

[We then go through the facts and procedural history. I am usually teaching students during their first day of law school, so I am careful to explain the following terms: plaintiff, defendant, cause of action, appellant, and appellee. In addition, I think it is important to stress that the cause of action is trespass on the case. I inform the students that it is always important to understand the basis of the plaintiff’s claim, but that it is especially important in this instance, for a couple of reasons. In a few days, we will read an animal dispute (*Keeble v. Hickeringill*) that appears to be much like *Pierson*, but is actually resolved according to a completely different analysis because the plaintiff relied on a different cause of action.]
In addition, the cause of action being asserted by Post is for a return of the disputed thing in question (or the monetary equivalent of that thing), and not for Post’s hurt feelings or Pierson’s purported “rude” behavior. Thus, to recover on the trespass on the case cause of action, Post must show that he acquired property rights in the fox in question. Without establishing ownership of the fox, Post’s cause of action could not succeed.

Because the students are going to be voting on this case as I move through my discussion of it, and to avoid confusion as to the parties, I write the following descriptions on the board as we move through our discussion of the facts and procedural history:

Post: hunter, plaintiff, trial court winner, appellee (the “present defendant”)
Pierson: captor, defendant, trial court loser, appellant (the “now plaintiff”)

We have now gone through the facts and procedural history of the case. Let’s vote. I want you to pretend that you are a judge on the New York State Supreme Court; how do you think this dispute should be resolved? Vote with your gut. Don’t worry, there is no wrong answer. You know from reading the case that the New York State Supreme Court was split on how to decide the matter. As you can see from your ballot, we are going to vote multiple times, and you will be free to change your mind later. Go ahead and take a moment, think about what you know about the case, and write down under “Vote 1” whether you think Post or Pierson should win this case.

[I give them about 30 seconds to vote. (Vote 1)]

Now let’s look at the actual decision by the New York appellate court. Let’s start with the opinion by Judge Tompkins, because he is writing for the court. That means that his opinion represents the judgment of the court and the disposition of the appeal.

Let’s begin with the basics: Mr. Johnson, did the court affirm or reverse Post’s trial court victory?

That’s correct, it reversed. We will add that to our description of the parties to this dispute:

[Pierson: captor, defendant, trial court loser, appellant (the “now plaintiff”), appellate court winner (Tompkins majority opinion)]
Next, we know there was a dissenting opinion by Judge Livingston. By “dissenting opinion,” we mean a disagreement with the conclusion reached by a majority of the judges on the court. So, if Judge Tompkins, writing for the majority, voted to reverse Post’s trial court victory, we know that Livingston wanted to affirm Post’s trial court victory.

[Update the description for Post:

Post: hunter, plaintiff, trial court winner, appellee (the “present defendant”), appellate court loser (Livingston dissenting opinion)]

Remember that our cause of action for trespass on the case required Post to show he had acquired a property interest in the fox to succeed on his claim. Well, we know from Judge Tompkins’ vote in this case that he believed Post had failed to establish this necessary ingredient of his claim. Judge Tompkins tells us that the question before the court is whether Post had “acquired such a right to, or property, in the fox.” Obviously, then, based on his vote in this case, Judge Tompkins believes that Post failed to establish this necessary ingredient in his claim.

Why? What rule is Judge Tompkins applying in coming to this conclusion? Judge Tompkins addresses this in the third paragraph of his opinion. He tells us that the fox is a ferae naturae (a wild animal) and “property in such animals is acquired by occupancy only.” For this type of case, then, “occupancy” is the controlling rule.

The questions that Judge Tompkins is answering in the third paragraph of his opinion are important steps in resolving any legal dispute: What type of case is this? What is the controlling legal rule? Judge Tompkins tells us that this is a case involving the acquisition of rights over a wild animal, and that the controlling rule is “occupancy.”

I think Judge Tompkins probably should have been a little more descriptive in saying what type of case this is, though. Mr. Johnson, remind us where the action in this case was occurring. Right the “beach,” which was not owned by anyone. For reasons that will become clear in a minute, I think the fact that this occurred on unowned land is an important detail to note in describing what type of case this is. So, we will assume our case involves the acquisition of rights over wild animals on unowned land, and we know that our rule is occupancy.

Earlier, I mentioned that law school is about much more than simply memorizing rules. This is a great example of that point. We now know that our rule is occupancy, but that really does not tell us much, does it? We need to know when occupancy is established, and when it is not. What
facts will establish occupancy? You can think of occupancy as a line, like this:

[I draw the following on the board:]

Type of case: Wild Animals, Unowned Land

Rule: Occupancy

To the left of the line, occupancy is not established. To the right of the line, occupancy is established. But now we have to apply that rule—that line—to actual facts. This gives life to the rule. It makes it useful, because now the rule can be used to solve our dispute.

So what did Judge Tompkins say about where to draw that line? Was occupancy established in this case? Mr. Johnson?

That’s right. Look at the fifth paragraph of the opinion. Tompkins says that Post’s “mere pursuit” was insufficient to establish occupancy over the fox. Thus, for Tompkins at least “mere pursuit” is not sufficient to establish occupancy.

[Update the depiction:]

Type of case: Wild Animals, Unowned Land

Rule: Occupancy

Facts: Mere Pursuit

Where is Tompkins getting this? He says that mere pursuit is insufficient to establish occupancy, but is he just making this up? Mr. Johnson?

That’s right, he is consulting a variety of legal treatises for the conclusion that mere pursuit does not establish occupancy. What do we mean by a legal treatise? It is a book, written by a law professor type, that attempts to describe legal rules. Dukeminier gives you some information
about the authors of the legal treatises that Tompkins is relying upon. And you can see that some of them are quite old. Nevertheless, these old treatises are the basis of Tompkins’ conclusion that mere pursuit does not give rise to occupancy. In other words, we must draw our occupancy line to the right of “mere pursuit.”

What do you think of Tompkins use of these legal treatises? Is it persuasive? Let me ask you this: If you were arguing a case, and wanted to cite a source for a rule you wanted the court to adopt, would your first choice be a book written by a law professor? Or would you prefer to have different types of sources for your rule? It’s okay, you won’t offend me. You would rather have other sources, wouldn’t you? What if there was a constitutional clause that said “mere pursuit does not give rise to occupancy.” Wouldn’t that be a better source to cite than Puffendorf, or Fleta, or Meier? Absolutely! Or what if there was a legislative statute that said “mere pursuit does not give rise to occupancy”? That would be preferable to a law professor article saying the same thing, right?

The point I want you to appreciate right now is that there are different sources for a rule, but not all sources are the same. Clearly, a constitutional clause would be your best source, followed by a legislative statute. But here, Tompkins is relying upon a law treatise rather than a constitutional clause or a statute. Why?

Mr. Johnson: Does Tompkins discuss a constitutional clause or statute in his opinion?
That’s right, he doesn’t. But why not?
That’s right; there clearly was not a constitutional clause or legislative statute that addressed the dispute in question. If there was, we know that Judge Tompkins would have discussed those sources of law. Indeed, he would have been compelled to apply those laws to resolve the dispute. His failure to address any such law in his opinion, then, means there simply was not a constitutional clause or legislative statute that addressed this dispute.

Earlier, we said that the common law is law that is made by judges to resolve disputes when there is no constitutional clause or legislative statute that controls. Surely a statement by a judge, in an opinion in an actual case, saying “mere pursuit does not constitute occupancy,” would have been a stronger resource for Judge Tompkins to rely upon than the treatise books, right? So does Judge Tompkins discuss previous common law cases in his opinion? Mr. Johnson?

That’s right, he does. But what does he say about those decisions?
That’s right; they weren’t controlling. Or, as lawyers like to say, those decisions weren’t “on point” with the dispute before the court in Pierson v. Post. They were different from the current dispute in ways that were not
controlling over the current dispute. How were those cases different, Mr. Johnson?

Right. Some of them, Judge Tompkins tell us, were decided according to a statute that directly addressed the situation. Others of them were disputes that occurred on land owned by private individuals, and thus pitted the captor verses the person who owned the land where the capture had occurred. Judge Tompkins says those cases are not “on point,” so we are not controlled by the decisions and opinions in those cases.

One more thing regarding the rule Tompkins is using to decide this case. We know that mere pursuit does not constitute occupancy, according to Tompkins, but what is sufficient to establish occupancy? What if we changed the facts of this case, such that Post had captured the fox, put it in a cage, and then later that night, while Post was relaxing by a campfire, Pierson snuck in and took the fox from the cage? Now, Post is suing Pierson for a return of the fox, and is asserting a cause of action for trespass on the case. Would Tompkins determine that Post had established occupancy in this hypothetical case?

Of course he would. From the sources that Tompkins cites, it is clear that an actual capture is sufficient to establish occupancy. An “actual capture” falls on the “yes” side of our occupancy line.

[Update the depiction:

Type of case: Wild Animals, Unowned Land
Rule: Occupancy
Facts: Mere Pursuit  Actual Capture

An actual capture is sufficient to establish occupancy, but is it necessary? Can someone who comes close to an actual capture, but does not achieve it, still claim occupancy? You notice that I have drawn our occupancy line somewhere between “mere pursuit” and “actual capture,” but should I have instead drawn it just to the left of an “actual capture”?

If we look at Tompkins opinion, and the sources that he is citing, we see an acknowledgement that an actual capture might not always be necessary to establish occupancy. In particular, Tompkins discusses
Puffendorf, who posits that occupancy is established with a mortal wounding or maiming followed by continued pursuit. Tompkins does not delve too deeply into exactly where the occupancy line is to be drawn. That isn’t necessary to his disposition in this case. Because Tompkins believes that Post was engaged in mere pursuit, and because he believes that “mere pursuit” falls on the wrong side of the occupancy line, that is all that is needed to resolve the case. Tompkins does seem to acknowledge, however, that this case might have turned out differently had Post mortally wounded or maimed the fox.

We’ve now heard Tompkins’ primary argument explaining his decision in favor of Pierson. Let’s vote again. You are free to change your mind at this point, or stick with your initial vote, but go with your gut feeling as to how you think this case should be resolved.

[Have the students vote again (vote #2)]

Let’s turn our attention to Livingston’s dissenting opinion. First things first: Livingston is dissenting, which means he disagrees with the conclusion reached by the court. Tompkins determined that Post had not established a property interest in the fox, and thus reversed Post’s victory in the trial court. Livingston, however, believes that Post did establish a property interest—occupancy—over the fox, and thus would affirm the jury verdict in favor of Post.

What does Livingston think about the authorities that Tompkins relied upon for his “mere pursuit does not constitute occupancy” rule? I think it suffices to say that Livingston is not impressed. For instance, Livingston points out that one of Tompkins’ authorities—Justinian—was written centuries ago. And, although Livingston does not make the same comment about Tompkins’ other sources, I think it is fair to assume that Livingston felt similarly about all of the old sources relied upon by Tompkins. As Livingston points out, times change, men change, and the laws should also undergo a change; Livingston believes that the court has “a right to establish a rule for ourselves.”

If Livingston is not impressed with the old legal treatises Tompkins is citing, how does Livingston think this case should be resolved? He has a couple of different ideas. First, he suggests that the dispute should have been “submitted to the arbitration of sportsmen.” That is an interesting idea. Who likes that idea? Why should egghead academic-type judges decide this dispute, when they might not even know the first thing about fox hunting? Let’s defer to people in the field—in the industry, if you will—to see if they have worked out an informal custom as to how this type of dispute should be resolved.
We will come back to this idea of deferring to industry custom—when it is a good idea for the law to do so, and when it is not—when we move on to our next case, *Ghen v. Rich*. But, for the time being, note that Livingston’s idea of deferring to the custom of hunters would have resulted in a victory for Post, as the notes after the case explain. Hunters in the region had a custom of not interfering with someone in “hot pursuit” of a wild animal. Pierson violated this custom, which means that Post would have won if the court had decided to defer to industry custom.

Livingston has an additional idea as to how the court should go about resolving the dispute, and he develops this argument more fully than he does his industry custom idea. Let’s turn to Livingston’s primary argument, then.

How does Livingston feel about foxes? He does not seem to care for them, does he? He calls them an enemy of mankind (*hostem humani generis*), and compares them to pirates. For Livingston, “a fox is a ‘wild and noxious beast.’”

What is Livingston’s beef with foxes? Is this a personal grudge? No. Livingston seems troubled by the havoc that foxes wreak on farmers. Foxes eat chickens for sure; there is some dispute as to whether foxes eat small lambs or goats, but they are at least blamed for that occasionally. Livingston states: “His depredations on farmers and on barn yards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit.”

Okay, so Livingston does not like foxes, and maybe he has a good reason not to. But what does that have to do with the resolution of this case? Livingston tells us: “Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career.”

In deciding this case, Livingston wants to adopt a rule that will encourage—or at least not discourage—the elimination of foxes. For Livingston, a dead fox is a good fox. And Tompkins’ rule does not fare very well under this metric, at least according to Livingston.

Remember Tompkins’ rule: Mere pursuit does not constitute occupancy; only an actual capture (or something close to it) does. What does Livingston say about the effect of Tompkins’ rule regarding the objective of the elimination of foxes?

Livingston says that Tompkins’ rule will discourage the hunting of foxes. He makes the argument in very colorful language. Who is going to go through the hard work of catching a fox if a “saucy intruder, who had not shared in the honours or labours of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit?”
For Livingston, then, if you want the end result of a dead fox, you have to protect the process that leads to that result. Otherwise, according to Livingston, you will discourage people from engaging in the process in the first place. They will invest their time, energy, and resources doing something else. This is the end result of Tompkins’ rule, Livingston believes, because the rule provides no protection for those who have engaged in pursuit of the wild animal.

Now we have heard Livingston’s primary response to Tompkins: “Who cares what Justinian says? Let’s adopt a rule that encourages the elimination of foxes; failing to protect the process that leads to a dead fox will discourage the hunting of foxes, resulting in fewer fox kills.” Livingston has definitely given us a different perspective on the case than Tompkins. Let’s vote again. Remember that you are free to change your mind, but vote according to how you feel the case should be decided.

[Have the students vote again (vote #3)]

Let’s now take a step back and consider the different styles of arguments that Tompkins and Livingston are making.

During your first year of law school, the primary objective is to become adept at “thinking like a lawyer.” There is a lot that goes into that, but one of the things that lawyers do is to make arguments. At a very basic level, there are two types of arguments that lawyers make: descriptive and normative.

[Write the terms descriptive and normative on the board.]

Descriptive refers to “what is,” whereas normative refers to “what should be.” With regard to legal arguments, a descriptive argument says “this is what the law is.” A normative legal argument (sometimes called a policy argument), on the other hand, says “this is what the law should be.”

The respective opinions in Pierson give us a nice example of both of these different styles of argument. Recall the primary thrust of Tompkins’ argument: I have read the books, and “the rule” requires a capture, or at least something close to it. But Livingston was approaching the case from a completely different perspective. Recall that Livingston was not particularly impressed with Tompkins’ citations to Justinian and Puffendorf. Instead, the thrust of Livingston’s argument was as follows: “Who cares what those old books say, let’s craft a rule that facilitates the elimination of foxes!” This a normative argument; Livingston is focusing on what the law should be—what rule should the court adopt to achieve particular policy objectives.
We can further break down normative arguments into three different types. First there is an efficiency argument. When you think of an efficiency argument, I want you to visualize a pie that is growing and getting bigger.

[I usually draw a pie on the board, with an arrow going right to a bigger pie.]

Think of the pie as “social wealth”; with an efficiency argument, then, the objective is to create more social wealth.

But what do we mean by social wealth? I’m sure some of you are asking that question already. It turns out that an efficiency argument involves a two-step process. First, there must be a definition of social wealth. It can be anything. Money or material wealth. Free time. Good coffee. It can even be apple pie, literally. The point here is that an efficiency argument proceeds from an assumption about what is good. And this is a value judgment, meaning that there is no analytical “right” or “wrong” about how to define social wealth. You will undoubtedly define social wealth slightly differently (or maybe dramatically differently) than I would, or the people sitting to the left and right of you. It is a political question, if you will. Nevertheless, an efficiency argument first requires a statement—an assumption—as to what constitutes social wealth.

This is step one of an efficiency argument. Step two involves the articulation of a rule, a policy, or decision that is supposedly going to produce more of that social wealth. So, if our definition of social wealth is good coffee, step two of the argument might be to say that we need to give tax breaks to coffee growers to encourage that activity and to produce more of that desired social commodity.

The second type of normative argument is a fairness argument. Again, we can use a pie to visualize this argument. But whereas an efficiency argument was based on growing the pie as big as possible, a fairness argument considers how that pie is going to be divided amongst individuals—or groups—within society.

[Draw a new pie, but split it into pieces to represent a fairness argument.]

You hear fairness argument all the time. The “1% v. 99%” debate is an argument about how wealth should be divided in the United States. This is a gross simplification, but one way to understand the difference between the Republican and Democrat parties is along an efficiency v. fairness dichotomy. Republicans tend to say: “Let’s have policies that
grow the economy.” Democrats are more likely to say: “We need policies that ensure a ‘fair’ distribution of wealth within society.” Republicans want to make the pie bigger; Democrats are concerned with how that pie is distributed.

With regard to efficiency arguments, we noted that it requires a value judgment (a political judgment) about what constitutes “social wealth.” A fairness argument depends upon similar value judgments. First, in considering a fairness question, what are the groups or classes of people that are going to be considered? Old v. young? Black v. white? Men v. women? Professors v. students? Those with hair v. those without? There are thousands of different classes or groups that can be concocted for making a fairness argument; there is no right or wrong analytical answer as to the “correct” way to consider the distribution of social wealth. And, of course, a value judgment must be made as to what constitutes a fair distribution of social wealth. Consider the class of old v. young. Say that those sixty-five and older control 80% of the wealth in society—fair or not? If we debated that question, I am sure a variety of opinions would be formed. But we could not resolve that question analytically, because it depends on personal values.

The last type of normative argument is an administrative argument. An administrative argument considers how a rule works in practice. Simply put, some rules are easier to administer than others. They require less time, resources, and energy in terms of compliance and enforcement. An administrative argument says that, all things being equal, a rule that is easy to enforce and administer is better than a rule that is difficult to enforce and administer.

Part of what you are doing in your first year of law school is figuring out how to make these types of arguments and recognizing when a type of argument will—or will not—be persuasive. Pretend that you are representing a client, and the applicable rule of procedure requires you to file a document within a particular time period. You missed the deadline. Are you likely to gain any relief in your situation by making a normative argument here? “Your honor, I know the rules say ten days, but that is a foolish rule and unfair, and it should instead be twenty days.” Your argument will be unsuccessful, and you will have lost some serious professional reputation for even trying a normative argument in that instance. In some instances, the rule is the rule and a normative argument is not appropriate.

In any event, this distinction between descriptive and normative arguments—and when to make each type of argument—is something that you will be wrestling with during the coming year. But the first step to mastery, of course, is to appreciate and understand the different styles of
arguments being used. Once you get the hang of identifying how these arguments work, you will become more adept at doing them yourself; more importantly, you will be in a better position to dissect and refute the arguments being made by your opponent.

On that note, let us return to Livingston’s argument. We already concluded that Livingston was advancing a normative argument. But what type?

Yes, it was an efficiency argument. Let’s break it down further. An efficiency argument involves an assumption about social wealth. What was Livingston’s? Yes, that a dead fox was a good fox. A society with fewer foxes was a better society. For Livingston, each living fox reduces the size of our pie, while each fox that was eliminated increases the size of the pie.

Now, was Livingston correct about his definition of social wealth? I am sure that some of you out there are saying: “But I like foxes. They look cute. And I sure don’t want them to be killed.” Who is right? The fox lover, or Livingston? There is no analytical answer to that dispute. This is what I mean when I say that a definition of social wealth involves a political judgment. We could vote, perhaps, and get a sense of what most people thought about the question. And perhaps the vote would be in favor of the elimination of foxes. But that would not mean that our fox lover was “wrong,” just that she was outvoted and had a different set of values than others in the class.

Anyway, Livingston has a definition of social wealth that involves the elimination of foxes. And, for Livingston, Tompkins’ rule requiring an actual capture—or at least something close to it—will not produce the elimination of foxes. Because, according to Livingston, under Tompkins’ rule, hunters will not engage in the process of hunting foxes if that process is not legally protected such that pursuit is recognized as occupancy.

Now that we have broken down Livingston’s efficiency argument, let’s challenge it. We will concede his definition of social wealth—that a dead fox is a good fox—for the time being (although, of course, that does not mean that this is the “right” definition of social wealth). But, with regard to step two of the efficiency argument, does somebody want to argue that Tompkins’ rule requiring an actual capture (or close to) might, in fact, be the rule that results in the maximum elimination of foxes?

Exactly. Sometimes I like to think of this as the Larry the Cable Guy argument. Remember that phrase he coined: “Git-R-Done.” Well, I think a great question for Livingston is this: If you are committed to the elimination of foxes, shouldn’t you adopt a rule that rewards the behavior that we like? Pierson, after all, killed the fox; he “Got-R-Done.” Post was simply pursuing the fox. But remember that the behavior Livingston says
he wants to encourage is the elimination of foxes. Pierson did that, and Post did not.

Of course, Livingston assumes that unless you protect the hunt, you won’t get the kill. Presumably Pierson would not have been in a position to kill the fox had Post not started the fox on the run by his hunting activities. And Livingston assumes that unless we protect this process, hunters will refrain from hunting activities. But isn’t there another conclusion as to how hunters might react to Tompkins’ rule? Instead of going home and quitting hunting altogether, isn’t it possible that hunters would react to Tompkins’ rule by saying: “Hey, the fox isn’t ours until we catch it; we need to get better at hunting, so as not to afford someone like Pierson a chance to intervene in our hunt.” And if hunters react in this way to Tompkins’ rule, and decide to get better at hunting, won’t this produce the ultimate objective to which Livingston aspires—namely, the elimination of foxes?

But there’s even more to it than that. So far, we have focused on what sort of effect that Tompkins “actual capture—or close to it” rule would have on the Posts of the world. But what about the Piersons of the world? Remember that Pierson was the party that actually killed the fox in this dispute. Isn’t it possible that Pierson only intervened to kill the fox knowing that, under the traditional rule, he would be allowed to keep the spoils of his kill because Post had not yet established occupancy in the fox. But, if Livingston’s approach were to carry the day, and if Post’s conduct were sufficient to establish occupancy, might this have some inhibitive effect on people like Pierson? If Livingston were making the rules, and Post’s conduct constituted occupancy, then Pierson might not even bother to intervene and kill the fox in the first place. And if Pierson does not kill the fox, it is at least possible that Post never does either. Which means the fox escapes, which is exactly what Livingston does not want to happen.

I don’t know the answers to these questions. But notice how our classification and dissection of Livingston’s argument facilitated these challenges to his argument. Once you break an argument down to its component steps, it is easier to see the assumptions on which the argument is based. Here, not only was Livingston assuming that a dead fox was a good fox, but he was also assuming a particular reaction by hunters (namely, to quit hunting altogether) to Tompkins’ rule. But it might be that hunters react to Tompkins’ rule by deciding to get better at hunting rather than quitting hunting.

Notice that, theoretically at least, there is a definite “right” or “wrong” answer to the question of how hunters would react to Tompkins rule. With regard to the assumption that a dead fox is a good fox (step 1 of the efficiency argument), there is not a right answer because it involves a value
judgment. How hunters would react to Tompkins’ actual capture rule (step 2 of the efficiency argument), however, is an empirical question that could be answered. Of course, this would require control groups and polls and testing, etc. Practically speaking, it would be hard to get the answer to this empirical question. Notice how it is at least possible to answer this question, unlike the value judgment involved in defining social wealth.

We have now learned about the different styles of argument that Tompkins and Livingston were using. We have also considered a counter-argument to Livingston’s efficiency argument. I think it’s time for another vote. You know the rules. You are free to change, but vote how you feel about the case right now.

[Have the students vote again (vote #4)]

Let’s now return to Livingston’s argument. The primary thrust of Livingston’s argument, as discussed above, is his normative efficiency argument: a dead fox is a good fox, and Tompkins’ rule won’t produce dead foxes because hunters will quit hunting. But if we look closely at his opinion, we see that Livingston wasn’t content to leave it at that. He states: “It may be expected, however, by the learned counsel, that more particular notice be taken of their authorities.” Livingston knew that it was not enough for him to criticize Tompkins’ rule; he needed to supply his own rule to resolve the case.

As it turns out, Livingston dives into the exact same authorities that Tompkins had used as support for his “actual capture (or close to)” rule. Livingston, however, has a different reading of those authorities. He says that the authorities are in conflict as to what is sufficient to establish occupancy. In particular, Livingston stresses Barbeyrec, who draws a distinction of pursuit with “large dogs and hounds” as opposed to pursuit with “beagles only.”

[Show students overhead depiction, attached as Appendix A]

Livingston then gives us the rule he believes is consistent with the authorities: “Property in animals ferae naturae may be acquired without bodily touch or manucaption, provided the pursuer be within reach, or have a reasonable prospect (which certainly existed here) of taking, what he has thus discovered with an intention of converting to his own use.” This is sometimes referred to as the “reasonable prospect” rule; so long as the pursuer has a reasonable prospect of an actual capture, occupancy is established.
Livingston believes that his rule is consistent with the same authorities that Tompkins was relying upon. One way to view Livingston’s rule is that he has just expressed the rule more generally. Whereas Barbeyre stated that pursuit with large hounds and dogs was sufficient, and Puffendorf wrote that pursuit with maiming was sufficient, Livingston is taking those rather specific rules and articulating them more generically. I mean, pursuit with maiming, mortal wounding, or large dogs and hounds is pursuit with a reasonable prospect of success, right?

[Show students Appendix C on overhead.]

So now we have two different perspectives as to “the rule” established by the treatise writers. I think it is time to vote again; you know the drill.

[Have the students vote again (vote #5)]

Let’s revisit our discussion of descriptive and normative arguments. We characterized Livingston’s argument as normative—let’s make a rule to encourage the elimination of foxes—as that was definitely the starting point of his opinion. The thrust of his opinion, if you will, was normative. But he wasn’t content to leave it at that. Livingston needed to articulate a rule for himself, and in doing this he was not content to just make something up on his own. When it came time for expressing a rule, Livingston justified his rule in light of the only authority that was available. The thrust of Livingston’s argument was normative, but he also made a descriptive argument.

It turns out that Tompkins does the same thing, albeit in reverse. Recall that Tompkins primarily makes a descriptive argument based on his reading of the authorities: Actual capture, or close to, is required. That is the thrust of his opinion. But, like Livingston, Tompkins is not content with only one style of argument. Tompkins makes a normative argument at the end of his opinion, in direct response to the “reasonable prospects” rule that Livingston has articulated.

The argument occurs in the second-to-last paragraph of Tompkins’ opinion. Here is what Tompkins says:

We are the more readily inclined to confine possession or occupancy of beasts ferae naturae, within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as
to deprive them of their natural liberty, and subject them to
the control of their pursuer, should afford the basis of
actions against others for intercepting and killing them, it
would prove a fertile source of quarrels and litigation.

What type of argument is this? Yes, a normative argument; Tompkins
is saying what the rule should be here. And Tompkins thinks there are
problems with the rule that Livingston has expressed. More specifically,
Tompkins thinks there are administrative problems with Livingston’s
“reasonable prospects” rule. Tompkins is making an administrative
argument.

Tompkins thinks that a “reasonable prospects” rule will be a “fertile
source of quarrels and litigation.” Why does he think that? Tompkins
might be reacting to the generality of Livingston’s rule. Earlier, we stated
that Livingston’s rule was arguably consistent with what Barbeyre and
Puffendorf had stated, but that it was just stated at a broader level of
generality. Sometimes the law is expressed in a generic “rule” like
“reasonable prospects”—this is actually called a “standard” as opposed to a
“rule.” When the controlling law is expressed in a generic standard—such
as “reasonable prospects”—there is a lot of uncertainty as to how the law
might be applied in the future to a variety of fact patterns. There is
“wiggle room” going forward, so to speak. This means, of course, that
lawyers and judges are going to have to resolve, in the future, how the
controlling legal standard applies to the particular dispute they are working
on. Compare that to a hard and fast rule, such as Puffendorf’s “pursuit
with maiming” rule. Notice how it is easier to know how Puffendorf’s rule
is going to apply to most fact patterns: If you are still chasing, no
occupancy; if you have struck and maimed the animal, occupancy has been
established.

All things being equal, then, rules are easier to administer than are
standards. This is not to say that there are not benefits of legal standards.
Tompkins, however, seems to be focusing on the drawbacks of fuzzy
standards when he makes his administrative argument: What does it mean
to have a “reasonable prospect” of capture? Lawyers and judges are going
to have to resolve that, in a case-by-case fashion, going forward. And that
will require time, money, and effort. In other words, Livingston’s fuzzy
standard will be more costly to administer than Tompkins’ actual capture
rule.

I also think Tompkins is being slightly tricky in this portion of his
opinion. Let’s go back and look at Tompkins’ opinion; he says “if the first
seeing, starting, or pursuing such animals” were the rule, it would cause
administrative problems. What is he talking about the first to “see” an
animal? That was not Livingston’s standard; Livingston adopted the reasonable prospects standard, which requires way more than simply seeing an animal. It requires pursuit in which the animal is likely to be caught—eventually—by the pursuer. Livingston didn’t talk about a rule of discovery—meaning the first to see an animal establishes occupancy over it.

So why did Tompkins, in making his administrative argument, talk about the “first seeing, starting, or pursuing such animals”? As I mentioned above, I think Tompkins was being tricky here. Lawyers call Tompkins’ tactic “setting up a strawmen.” Under this approach, you mischaracterize your opponents arguments in a way that make it easy to destroy them. If your opponent is a strawman, it is easy to blow them over with your logic and arguments.

By mischaracterizing his opponent’s argument as the first to “see” an animal, Tompkins has set up a strawman by cleverly injecting a slightly different administrative issue into the argument. Suppose that the governing rule was discovery—the first to see an animal had occupancy over it and thus became the owner of it? Easy rule to administer? No way! Can you imagine the disputes?!

Ben: “Hey Chuck, look at this nice deer I shot yesterday.”

Chuck: “Ben, I saw that deer yesterday, it’s a real beauty. I saw it first, so it is mine. At least, my lawyer tells me that is the rule.”

Ben: “No, this deer is a different one.”

Chuck: “Nope, it is brown and has a black nose. It’s the same deer. I will see you in court, where I will prove it.”

Ben: “Bring it; I have a really good lawyer.”

The administrative problems associated with a discovery rule are obvious. The same administrative problem exists for Livingston’s reasonable prospects rule. Livingston’s rule requires a reasonable prospect of capture—not definite, eventual capture. Which means that, under Livingston’s rule, occupancy is established (the animal becomes the property of the pursuer) in some situations in which an eventual capture does not occur. And if the animal escapes, after the pursuer has a “reasonable prospect” of capture and thus occupancy, the same administrative problem exists that occurred in the Ben and Chuck dialogue above. Someone has occupancy under the governing rule, but they don’t actually capture the wild animal; this can lead to messy disputes like the Ben and Chuck example above.
Of course, this administrative problem is not nearly as acute under Livingston’s reasonable prospects rule as it is under a rule of discovery. It is less likely that occupancy will be established, with no eventual capture, under Livingston’s rule as opposed to a discovery rule. But that is the beauty (the sneakiness) of Tompkins’ argument: He groups Livingston’s “reasonable prospects” rule with other rules in which the same administrative issue exists, but on a greater level. Tompkins is being pretty clever here.

So now we have heard Tompkins’ normative argument: Livingston’s standard is no good because it will be too hard to administer. Time for another vote.

[Have the students vote again (vote #6)]

I mentioned earlier that *Pierson v. Post* is a fantastic case; now you are starting to see one of the reasons why. It is a fantastic teaching case. Think of the arguments we have encountered in the two opinions: Tompkins’ descriptive argument that mere pursuit does not constitute occupancy; Livingston’s normative efficiency argument that a “dead fox is a good fox;” Livingston’s descriptive argument that occupancy is established when there is a “reasonable prospect” of capture; and Tompkins’ administrative argument against Livingston’s “fuzzy” standard. We have been exposed to different styles of legal argument in these opinions.

The only type of argument we haven’t encountered, thus far, is a fairness argument. But there is one in there. We are going to have to work a little harder to see this one, but it is there.

Let’s start by looking at the second paragraph of Judge Tompkins’ opinion, the paragraph that starts “The question submitted.” Go ahead and take a moment to reread that paragraph.

In this paragraph, Tompkins is framing the issue that must be decided by the court. Sometimes lawyers will call this the “question presented” or the “issue” before the court.

Now, skip ahead to Livingston’s dissenting opinion. In the second paragraph of his opinion, Livingston is also framing the “question presented” or the “issue” before the court. Go ahead and reread this paragraph as well.

Does anybody see the difference in the way that Livingston and Tompkins have framed the issue presented? There is one fact that Livingston includes in his question presented that is absent from Tompkins opinion. What is it?
Livingston is stressing the fact that Pierson intervened with full knowledge that Post was in pursuit: “who in view of the huntsman and his dogs in full pursuit, and with knowledge of the chase.” This is missing from Tompkins’ “question presented.” Tompkins describes the conduct of Pierson in his question presented, but only for “killing and taking [the fox] away.” The fact that Pierson was aware that Post was in pursuit is not mentioned in Tompkins’ question presented.

I think that Pierson’s knowledge of Post ongoing pursuit of the fox factored into Livingston’s decision. But let’s test this assumption. Let’s pretend that Livingston’s opinion was the opinion of the New York State Supreme Court in Pierson v. Post, meaning that Post won under Livingston’s “reasonable prospects” rule. Now, let’s fast forward in time to 1810, five years later. And let’s assume there is another dispute involving facts almost identical to the dispute in Pierson v. Post. As it turns out (and lucky for us), the parties names in this dispute are Bierson and Bost. Almost everything about the dispute involving Bierson and Bost is the same as the dispute between Pierson and Post: Bost was in pursuit of a fox, Bierson saw the fox, killed it, and carried it away, and Bost has brought a trespass on the case claim against Bierson seeking the fox hide (or the monetary equivalent). But there is one factual difference: Bierson, unlike Pierson, was unaware of Bost’s pursuit when he intervened and killed the fox.

You have been hired by Bierson to represent him in this litigation. Your opponent, Bost, has relied heavily on Livingston’s opinion for the court in Pierson v. Post (remember that we are assuming that Livingston’s opinion was the majority opinion). According to Bost, he had a reasonable prospect of catching the fox, and thus he established occupancy under Livingston’s “reasonable prospects” rule.

So, you need to make an argument for your client, Bierson. Bost is right in that he did have a reasonable prospect of catching the fox when your client intervened. Thus, you lose under the precedent of Livingston’s “reasonable prospects” rule. Therefore, you have to argue that that rule is not applicable to this case. You need to distinguish the facts of Pierson v. Post from your case; once you do that, you can argue that the rule from that case is not controlling in your case.

Distinguishing the facts of Pierson v. Post from your case is easy. It is probably different in a million ways. For one, your client wasn’t involved in Pierson; the Pierson case involved different parties. Moreover, Pierson occurred years earlier, while your dispute occurred in 1810. A little digging would undoubtedly reveal other differences. Perhaps your dispute occurred on a Friday, while the dispute in Pierson occurred on a Saturday.
Maybe the fox in your case was a red fox, while the fox in Pierson was a gray fox.

Finding factual distinction, then, is not particularly difficult. But does anybody think the factual distinctions discussed thus far will be helpful in convincing the court to apply a rule other than Livingston’s “reasonable prospects” rule? Of course not.

It isn’t enough to show factual distinction when trying to escape from an unwelcome precedent. You have to show that the factual distinction matters. The factual difference between your case and the precedent case must be a logical reason for your court to reject the rule used in the precedent case.

Now that we know that not just any factual distinction is going to be sufficient, let’s return to your representation of Bierson and your objective to evade the effect of Judge Livingston’s “reasonable prospects” rule from Pierson v. Post. Can we find a material factual distinction between our case and the Pierson case?

I think so. I told you that the facts of Bierson v. Bost were essentially the same as the facts of Pierson (notice how, in telling you that, I avoided obviously irrelevant facts such as whether the event occurred on a Friday or a Saturday?), but with one exception: Bierson, unlike Pierson, was unaware of the ongoing pursuit when he killed and carried away the fox.

Here, then, we have a factual distinction that appears more promising than the Friday/Saturday distinction. Is it a logical reason to apply a completely different rule? How are we going to prove that to the judge deciding our case?

We are going to quote Judge Livingston himself: “Your Honor, in Pierson v. Post, Judge Livingston framed the question presented as involving a case in which the captor intervened ‘with knowledge of the chase.’ That fact—knowledge—was obviously of utmost importance to Judge Livingston. Livingston’s “reasonable prospects” rule, then, should be viewed as a very narrow exception to the traditional rule, which required an actual capture, or at least something very close to an actual capture. Because my client did not intervene with knowledge of Bost’s chase, the actual capture rule—rather than Livingston’s reasonable prospects rule—applies. Because Bost did not have an actual capture, or even a mortal wounding or maiming, he failed to establish occupancy. Thus, my client should win this dispute.”

Pretty persuasive for Bierson, right? This suggests that Pierson’s knowledge or Post’s chase was, in fact, an important part of the case, at least for Livingston.

But I think there is even more evidence that Livingston believed that Pierson’s knowledge was an important fact to the case. Let’s go back and
look at how Judge Tompkins concludes his opinion. Tompkins begins his last paragraph with the following: “However un courteous or unkind the conduct of Pierson towards Post . . . .” Notice that Tompkins is not denying that Pierson might have acted in an unkind manner to Post. Instead, he is simply saying that it does not matter to the resolution of the dispute.

But that is somewhat of an odd thing for Tompkins to include at the end of his opinion. There are a million facts (Friday v. Saturday) that are not going to be relevant to the disposition of a case. Judges, however, do not usually list these unimportant facts. After all, that could go on for days. So why did Tompkins feel the need to state that this fact, in particular, was not relevant to the decision?

I think it is fair to conclude that Tompkins was directly responding to Livingston here. Tompkins, it seems, read Livingston’s opinion as depending upon the fact that Pierson had intervened with full knowledge of Post’s pursuit. That is why Tompkins felt the need to indicate that Pierson’s knowledge of Post’s pursuit was irrelevant to the case.

Thus, if Tompkins seems to have read Livingston’s opinion as revolving around Pierson’s knowledge of Post’s chase, I think we are justified in doing the same.

Let’s bring this back to where we started. Recall that we had found descriptive arguments, a normative efficiency argument, and a normative administrative argument within Pierson v. Post, but that we were also trying to see if there was a fairness argument within the opinion. I told you that it would take some work to find it, but now we have done that work: Livingston was influenced by the fact that Pierson acted with full knowledge of Post’s pursuit. The reason Livingston thought this was important, I believe, is because Livingston thought it unfair that Pierson should get to keep the fox in question.

Recall that a fairness argument is a dispute about the distribution of resources—how the pie should be divided. Livingston, I believe, thought that Post should be preferred over Pierson in this case, because Livingston did not like the way that Pierson had acted towards Post. In short, Livingston thought Pierson had been a jerk to Post. Livingston thought it was fair that Pierson, the jerk, should lose this case against Post.

It took a little work, but there was a fairness argument embedded in Livingston’s opinion. Let’s take another vote. Remember that you are free to change your mind, but vote on how you feel this case should be resolved.

[Allow students to vote again (vote #7)]
You will notice on your ballot that we have one vote left. Obviously, we are not quite done with Pierson v. Post yet. In introducing the case, I told you that Pierson v. Post is a very famous case. Let’s revisit that statement.

You should already appreciate one reason why Pierson v. Post is famous: It is a great teaching case. The fact pattern is relatively straightforward, and memorable. You have two, well-written opinions by influential figures: one, a future Vice President of the United States, and the other, a future Justice of the Supreme Court of the United States. The basic styles of legal argument are all right there in the opinion. For this reason, it has been taught in law school classes for at least a century, and usually on the first day or two of class. Because it is so useful to, and widely taught in, first year Property classes, it has taken on a life of its own. Almost all lawyers are familiar with “the fox case.”

That explains the contemporary, surface appeal of Pierson v. Post. But recall the previous comparison to an onion. This case operates on different levels, and different people see different things within the opinion.

Legal scholars assert deeper meaning to the opinions in Pierson v. Post. Recall the different styles of legal argument (descriptive and normative) that lawyers use. It turns out that, in different time periods or “eras” in American law, one or the other type of argument has become more common or acceptable. This is not to say that only one type of argument was used during a particular time period. Throughout American legal history (some might use the term “jurisprudential” history), each of these types of argument is present. It is just that during different time periods, one type of argument—descriptive or normative—became a little more common and accepted. Thus, during certain periods in our history, judges have been a little more inclined to be moved by normative arguments. During these periods, of course, descriptive arguments were still regularly employed by lawyers and accepted by judges. It is just that during these particular time periods, judges were a little more inclined to read precedent narrowly, and conclude that the case before them was different than any cases that had previously been decided. By reading precedent narrowly, the judge was then free to create a new rule based on the normative (or “policy”) arguments that judge found particularly persuasive. During other periods, however, descriptive arguments tended to predominate. During these periods, judges were more inclined to say: “The rule is x, and it controls this case despite the normative arguments being made against the result under rule x in this case.”

You can think of these shifting eras as a pendulum, swinging from one side to the other.
So what does this have to do with Pierson v. Post? Well, it just so happened that Pierson v. Post was decided at a time when the pendulum was starting to swing from an era in which descriptive arguments were more common, to an era in which normative arguments were more common. In the decades following America’s independence from England, American courts tended to rely very heavily on English common law precedent. Most scholars attribute this phenomenon to the fact that relying upon established English precedent tended to legitimize the American judges and courts. At this time, there was a perception that English common law was a neutral body of law deduced from logical principles. Applying this rational, neutral body of law tended to give authority and legitimacy to the American judges and courts.

But as we shift into the early part of the nineteenth century, there is momentum in favor of American courts developing their own body of laws. After all, America was very different than England. America had more land, a much more diverse populous, and a different set of values and ideals than England. At a certain level, then, it makes sense that American courts would want to develop their own sets of rules and laws that reflected American values and “worked” for America.

If you look closely, you can see this tension between the “old” way and the “new” way of thinking right there in Pierson v. Post. On one hand, you have the stuffy, formalistic opinion of Judge Tompkins, with his references to Fleta, Justinian, and Puffendorf. Tompkins’ descriptive opinion represented the “old” way of thinking: Find the rule, apply the rule, and do not question the rule.

Livingston’s opinion, however, is coming from a completely different perspective. He makes clear that he is not especially impressed with the citation to Justinian. Livingston believes that we should “have a right to establish a rule for ourselves.” In fact, Livingston seems generally annoyed with the stuffiness of Tompkins’ opinion. As Dukeminier points out, Livingston’s excessive reliance on Latin phrases and his dissection of Barbeyrac “probably reflects an intention on his part to mock the majority’s pedantry.” Livingston is explicit in stating that policy—not ancient treatise writers—should control the decision.

Because of the different styles of arguments used by Tompkins and Livingston, and because of the time period in which the case was decided—right as the pendulum was starting to swing from a descriptive era to a normative era—modern day scholars attribute deeper meaning to the respective opinions in Pierson v. Post. The Tompkins and Livingston opinions represent something different. Tompkins’ opinion carries the
day, but the style of reasoning used by Tompkins is falling out of favor during this time period. Livingston’s normative opinion represents the wave of the future, even if it was still in dissent in 1805. If Pierson v. Post had been decided in 1825 rather than 1805, it seems very possible that Livingston—rather than Tompkins—would have been writing for the court.

The pedagogical usefulness of Pierson v. Post, as well as the deeper meaning that scholars can attribute to the case, all contribute to making it a famous case. But, these are contemporary factors. We still have not resolved why the Post and Pierson families were willing to spend large amounts of money litigating a case in which the jury had determined the fox hide was worth a mere seventy-five cents.

Obviously, the Posts and the Piersons were willing to “go to the mat” in this case because each of them assigned deeper meaning—at that time—to the case. Just like modern scholars can see something deeper in the opinions in the case, the Posts and the Piersons viewed this case as representing something much deeper than a dispute about who was entitled to the value of the fox hide. These were litigants motivated by something other than money. So what did the case represent to the Posts and the Piersons?

For the Posts and the Piersons, the fox dispute was a case about class warfare. Not rich v. poor, 1% v. 99% class warfare. Both the Posts and the Piersons were probably part of the “1%.” Instead, this was a dispute between different classes of wealthy people. We will call it “old money” v. “new money.”

The best modern-day analogy I can think of is Mark Cuban and Warren Buffet. How did Mark Cuban become rich? To tell you the truth, I’m not even sure; it had something to do with building a website. He is a dotcom millionaire. He is our modern day example of “new money.” He became very rich, very quickly, and at a very young age.

Warren Buffet is a modern day example of “old money.” Sometimes when people use the term old money, they are referring to families that have passed down large amounts of money from one generation to another. That’s not Buffet. He earned his money. Nevertheless, he is a perfect example of “old money,” for present purposes, because of the way he earned it. He did not get rich quickly, at a very young age. Rather, Buffet accumulated wealth over a long period of time, by making very safe, smart investments, and slowly growing his wealth over decades. Buffet gets up at the same time every day (even as an older man), gets to the office, goes through the same routine, where he is pouring over tons of reports and information, all so that he can get a slight edge in discovering a company that is slightly undervalued. Buffet is the ultimate grinder.
Oftentimes, new money and old money clash because they have different personalities. Cuban and Buffet are a great example of the different personalities that often go along with old money and new money. Cuban is flamboyant and extravagant; he loves to have fun. I like basketball... I’m going to buy an NBA team! Cuban has an opinion on everything (whether he is an expert, or not). You can find him on TV, opining on everything from global economics, to politics, to investing.

On the other end of the spectrum is Warren Buffet. He still lives in the same house he purchased decades ago. He has stated that his idea of a great time is to pop some popcorn and to watch a Nebraska football game at his home. If he is really feeling crazy, he might set up a bridge card game with his buddy Bill Gates. As I mentioned above, he does the same thing every day. He drinks five cokes a day. He will opine on world events, but usually reluctantly and with great qualification. Buffett is prone to bold statements such as “I don’t know what the market is going to do in the short term” or “The United States economy will be mostly fine regardless of who wins the presidential election.” Because of his cautious, reserved nature, the public tends to hang on his every word.

Now, it turns out that Warren Buffett and Mark Cuban are acquaintances and, perhaps, even friendly. But I can’t shake the notion that if they had to spend a lot of time together, Cuban would get on Buffet’s nerves.

Cuban: “Warren, do you want to go fly to LA and get sushi tonight?”

Buffett: “No, I have a TV dinner at home in my freezer.”

Cuban: “Warren, let’s buy a MLB baseball team; it will be a blast.”

Buffett: “That is a horrible investment.”

Cuban: “Let’s go check out this concert tonight.”

Buffett: “No thanks. I want to be home and in bed by 9:30. And what are you doing in that t-shirt? It doesn’t even fit you.”

Despite their occasional, friendly exchanges at public events, I think their different personas and styles would lead to some friction and animosity if, say, they lived on the same block.

That is the way it was with the Piersons and the Posts. The Posts were Mark Cuban—new money. They had become very rich, very quickly through their work as merchants in the developing markets of the Northeast United States. The Piersons were Warren Buffett—old wealth.
The Piersons, conversely, had accumulated wealth over a longer period of time working as farmers. The available evidence suggests there was personal animosity between the new money Posts and the old money Piersons. Simply put, the families didn’t get along. And fox hunting was a flashpoint for this personal animosity.

Why fox hunting? We have to know a little bit about fox hunting to understand why it would be a source of contention between people like the Posts and farmers like the Piersons. Fox hunting in 1805 might be completely different than what you have been assuming up to this point in our discussion of the case.

First of all, fox hunting was not about ridding the countryside of problematic barnyard predators. It was a leisure activity engaged in by wealthy people... or at least certain classes of wealthy people (like the Posts). It was an all-day affair. A fox hunt would be set for a particular date and a feast would be planned for the end of the day. I’m quite sure that adult beverages were involved.

No guns were used in a fox hunt. That would have been too easy and too quick. The feast was set for later that day, so the fox hunt needed to last a long time. Guns would have messed up the schedule.

Instead of being shot, the fox would be pursued by horses and hounds. So the guys would show up on the morning of the fox hunt with their own horses and hounds. And, I’m sure there was some pride involved in showing up with some good equipment. The modern analogy, I think is the golf course; most golfers always want to have the latest driver or putter, if for no other reason than to impress their buddies.

The hounds were bred to have a very good sense of smell, and they would eventually pick up the scent of a fox, give chase, and “start” the fox on the run. The men would follow on horseback. The hounds were not quick enough to keep up with the fox, however. In fact, they had been bred so as not to be too fast; like with shooting the fox, the whole day is spoiled if the hounds quickly catch and kill the fox. The fox, then, was—initially at least—able to outrun the hounds. But the fox could not shake his scent and the hounds would continue in pursuit.

The hounds were also bred to have good endurance. So this scenario would play out over the course of a morning, the afternoon, or both. The fox runs away. The hounds stay on his scent, and keep plodding after him. Eventually, the fox would be exhausted, and the hounds would catch and kill him. All while the men followed on horseback.

Now that we know about fox hunting, we can appreciate why it was a flashpoint for people like the Posts and the Piersons. First of all, the fact that the Posts were out spending all day on this leisure activity might have rubbed the Piersons wrong. The Piersons were a family of farmers;
farming is hard work. It might be that they resented the whole idea of doing things just for fun.

But it was more than just that. Remember when I told you about the men on horseback following the pursuit? Well, often times that pursuit would go right through farmers’ fields. It turns out that this particular dispute in Pierson occurred on the unowned beach. But that wasn’t always the case. A fox being chased by a pack of dogs cannot be confined to open, public land; it is going to go wherever it can to try to escape. When it went through a farmers’ field, and the hounds, horses, and men would follow, there could be considerable damage to the crops. There are many accounts, during this time period, of farmers becoming irate at the damage caused to his crops by a fox hunt.

It is easy to see why fox hunting was a flashpoint for the new money and old money during this time period, and why the Posts and Piersons would have devoted so much effort to winning this dispute over seventy-five cents. But there is even more.

The kicker is that fox hunters during this time were known to import foxes into the area. After all, what’s worse than getting the pass from your wife, getting your horses and hounds ready, filling your flasks, arranging a feast, meeting the boys, only to come up empty handed? In order to have a proper fox hunt, you need a fox. So, the die-hards weren’t taking any chances; they were paying to have foxes imported into the area, and released into the wild. All so that there would be a fox when they were ready to have a fox hunt.

Now we know something about fox hunting; perhaps this gives you a different perspective on the dispute in this case. And we have covered all of the legal arguments made in the case. It is time for a final vote. This is your final answer. You are free to change your mind, but be true to your own instincts as to the “right” resolution to this dispute.

[Allow them to vote. Then collect the ballots. Go through the ballots, and find somebody who changed their vote from Post to Pierson between Vote 7 and Vote 8. There will usually be quite a few to do this.]

Ms. Smith, I see that you changed your vote from Post to Pierson between Vote 7 and Vote 8. Why?

Yes, the additional information about fox hunting changes things, doesn’t it? I didn’t know anything about fox hunting when I did this case in law school. Once I did, years later, it changed the way I thought about the case.

Learning about fox hunting really undermines some of the arguments that Livingston asserted. Remember his argument that we should submit
this to the arbitration of “sportsman,” that is, hunters? That doesn’t make sense now, does it? Pierson was not a hunter. He was from a family of farmers even though he, himself, was apparently a school teacher. So why should the customs of hunters get to control? Why not the custom of farmers (or school teachers)? I am quite sure that farmers would have a different perspective as to how this case should be resolved.

What about the fairness argument that we attributed to Livingston? We read Livingston’s opinion as characterizing Pierson as being a jerk to Post. And I can see from glancing through the ballots that some of you agreed with that characterization of Pierson. But getting that additional information about fox hunting changes things, doesn’t it? On first impression, Pierson’s intervention in Post’s pursuit seems like a jerk move, particularly considering that Pierson not only killed the fox, but he took it away. But perhaps Pierson had some justifiable reasons for acting like he did. After all, foxhunters might have caused harm to the Piersons’ livestock or fields. Remember that there isn’t a “right” or “wrong” to a fairness argument. It is a value judgment. But I think most of us feel differently about Livingston’s fairness argument once we are exposed to that additional information about fox hunting.

Finally, what about Livingston’s efficiency argument, that a dead fox is a good fox? According to Livingston, his “reasonable prospects” rule will produce social good because it will not discourage hunting, which will lead to the elimination of foxes. That is a ridiculous argument, in light of what we now know about fox hunting. (In fact, considering that Livingston almost surely knew about fox hunting, it seems likely that Livingston was being a smart aleck when he made this argument.) Fox hunting wasn’t about the efficient elimination of an “enemy of mankind.” If that had been the goal, the foxes would have been shot, or trapped, or poisoned. At the very least, they would not have been importing foxes into the area.

So the normative efficiency argument in Livingston’s opinion, where social wealth is identified as the elimination of foxes, simply does not work. Now, of course, there are other efficiency arguments that Livingston could have made. Instead of defining social wealth as the elimination of foxes, he could have simply said: “hunting is a good thing, because it is fun.” Under this argument, hunting is not a means to an end (the elimination of foxes), but is an end in-and-of itself. Is this a crazy argument?

As part of the readings associated with Pierson, I have the students watch the “Witnessing Perfection” scene from the movie A River Runs
Through It. In the scene, Brad Pitt uses all of his fly-fishing skills to catch a big trout.

What about the scene from A River Runs Through It? The narrator is the big brother of Brad Pitt’s character. He says that he is witnessing perfection in watching his younger brother catch a fish. Granted, it isn’t a legal argument, per se, but it is an argument: “At that moment, I knew, surely and clearly, that I was witnessing perfection. My brother stood before us—not on a bank of the Big Blackfoot River—but suspended above the earth, free from all its laws, like a work of art.” Pretty powerful stuff, right? Is anybody not moved by that scene and those words?

But Brad Pitt’s character was not being very productive in catching fish, right? I mean, if he really wanted to catch fish, couldn’t he have used nets? Or maybe dynamited the river and scooped the dead or stunned fish off the top of the water? How can it be perfect if he was being so inefficient?

The point of us watching that scene is to recognize that an efficiency argument does not need to be based on a definition of social wealth that involves material things. Art, beauty, and free time are all different ways to define social wealth; they are all acceptable definitions of what is “good or valued.” As Dr. Seuss famously said, “[t]hese things are fun and fun is good.”

The normative argument from A River Runs Though It is that hunting is a good thing, not because it is a means to an end (caught fish, killed foxes), but because it is an end in-and-of-itself. Catching fish—that is, hunting fish—is good because it is beautiful and it is fun.

So why didn’t Livingston make that argument in Pierson? Instead of going through the whole charade about fox hunting being important because it eliminated foxes, why didn’t Livingston just say (as Dr. Seuss might): “Hunting is fun, and fun is good.”

Would you have been persuaded by that argument in Pierson? Why not? Everybody in here conceded that that exact same argument was very powerful as it related to Brad Pitt’s fishing. Why doesn’t the same thing apply to Post and the other foxhunters?

Well, maybe Post was no Brad Pitt. But it is more than that, right? Notice that Brad Pitt’s fishing was producing no direct harm on anybody else. He wasn’t trespassing on other’s land to enjoy his sport. And he wasn’t importing a nuisance animal into the area so that he would never have to go home empty-handed. The whole “beauty,” “art,” and “fun” argument works better if it is not harming somebody else’s bottom line.

I think Livingston knew that the “hunting is fun” argument—that is, to define social wealth as hunting as an end to itself—would not be very persuasive in the context of fox hunting during this time period, given the
consequences of fox hunting on farmers. So he came up with the best he could. My instincts tell me, however, based on what I know about Livingston, and his social stature, that he was really driven by the “hunting is fun” argument, even if he knew that probably was not a persuasive argument to others.

In any event, notice how the exact same argument—hunting is fun and an end to itself—was persuasive in *A River Runs Through It*, but not persuasive enough for Livingston to even try in *Pierson v. Post*. What does that tell us? Context matters. Legal arguments are not made in a vacuum. They are contingent upon real-world facts. Those real world facts determine whether a legal argument is persuasive or not.

There is one more loose end that we need to tie up with regard to *Pierson v. Post*. Because Tompkins concluded that “mere pursuit” does not constitute occupancy, but conceded that an actual capture does, it was easy for Tompkins to determine who won the case. Because Pierson had established occupancy, but Post had not, Pierson won.

But notice that Livingston was in a slightly different situation, because Livingston had drawn the occupancy line differently than Tompkins. For Livingston, a “reasonable prospect” of capture was sufficient to establish occupancy. But Livingston would concede that an actual capture was also sufficient. So Livingston had a dilemma that Tompkins did not: For Livingston, both Pierson and Post had done something that was sufficient to establish occupancy. In deciding who won the case, then, Livingston had to pick between two people, both of whom had established occupancy.

So why did Livingston break this tie in favor of Post? Livingston does not address this issue in his opinion. The reason he does not, I would submit, is because the answer was so easy and obvious for Livingston that it did not even occur to him that he needed to explain this part of his thinking. In fact, Livingston might even have been unaware of the entire issue.

Livingston’s preference for Post over Pierson involved the application of a fundamental rule of property. Can anybody guess—why was Post’s occupancy favored over Pierson’s occupancy in Livingston’s opinion?

Yes, because Post’s occupancy occurred before Pierson’s occupancy. In property, first prevails over last; prior over subsequent; sooner rather than later. “I was first,” as we will see, is a powerful argument under property law.

We are going to come back to this bedrock property principle time and time again in this class. But it was right here, doing work, in this very first case (at least, in Livingston’s opinion). And Tompkins undoubtedly did not dispute this aspect of Livingston’s legal analysis. The difference between Tompkins and Livingston in *Pierson v. Post* was simply about
what counted under a first in time analysis. Both judges conceded that, however occupancy is defined, the person who established it first should prevail in the suit.

[That evening, I will compute the results from the class votes and compile the data into a chart, attached as Appendix D. I usually include results from previous class votes as well, so that the class can see that their voting patterns are largely consistent with the votes from previous classes. As students are coming into the classroom for the next class, I will hand them the results and tell them to check them out as we are waiting for class to start.]

You can see from the chart I distributed how our class voted. Spend some additional time looking at it tonight, but two conclusions should jump out at you.

First, our class voted similarly to how previous classes have voted. The classes tend to slightly favor Pierson at the outset, and at the end of the class discussion that support in favor of Pierson has usually increased.

More importantly, though, notice how the votes tended to shift in reaction to the arguments being discussed. I have charted the arguments made by Livingston, in support of Post, in blue, and the arguments in support of Pierson in Red. We voted each time we considered a new argument (or received additional information regarding the case). In every instance, the arguments in favor of Post shifted some votes to Post. Similarly, in every instance, the arguments in favor of Pierson shifted some votes to Pierson.

As an aspiring lawyer, this should be promising to you. Arguments matter. Lawyers operate in a world in which difficult disputes are resolved by impartial voters. And the arguments we were considering in Pierson v. Post had the effect of changing the way this class perceived that the dispute should be resolved. If these arguments changed your mind, don’t you see how they might change the minds of others, too?

Learning the different types of arguments that lawyers make, then, is not just an academic exercise. It is not knowledge for the sake of knowledge. This stuff is important because it is what lawyers are paid to do. It is the skill that lawyers possess: How do I make an argument such that the voters will be inclined to rule in favor of my client? Or, for some lawyers, they are structuring transactions and deals with an eye toward the arguments that might be made should a dispute arise. Either way, lawyers deal in arguments. The market wants people who are good at this skill. Cases are won and lost—real money changes hands—because of arguments. Learning how to do this—artfully, delicately, and
persuasively—is a big component of what you are doing in your first year of law school. *Pierson v. Post* is a fantastic introduction to this art.
APPENDIX A

Wild Animals (*Ferae Naturae*) on Unpossessed Property

When is Occupancy Established?

- Discovery
- Start
- Mere Pursuit
- Pursuit w/ Beagles
- Pursuit w/ Large Hounds
- Pursuit w/ Maiming
- Pursuit w/ Mortal Wounding
- Actual Capture

Barbeyrac

Puffendorf
APPENDIX B
APPENDIX C

Wild Animals (*Ferae Naturae*) on Unpossessed Property

When is Occupancy Established?

- Discovery
- Start
- Mere Pursuit
- Pursuit w/ Beagles
- Pursuit w/ Large Hounds
- Pursuit w/ Maiming
- Pursuit w/ Mortal Wounding
- Actual Capture

Barbeyrac

Puffendorf

Pursuit w/ Reasonable Prospect of Capture—Livingston
APPENDIX D

![Graphs showing election results from Summer 2016 and Winter 2015.](image-url)

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<thead>
<tr>
<th>Facts/Procedural History</th>
<th>Tompkins Descriptive Argument</th>
<th>Livingston Descriptive Argument</th>
<th>Counter To Livingston Efficiency Argument</th>
<th>Livingston Descriptive Argument</th>
<th>Tompkins Administrative Fairness Argument</th>
<th>Additional Information Re: Fox Hunting</th>
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<td>76%</td>
<td>85%</td>
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<td>42%</td>
<td>55%</td>
<td>13%</td>
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