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*Pierson v Post, the famous fox case, has come to be understood by law and economics scholars as a parsed down lesson about rules versus standards, specifically the superiority of the clear capture rule over the allegedly fuzzy standard of hot pursuit articulated by Justice Livingston in his dissent. This article argues first, that the case actually does not illustrate very well the superiority of rules over standards. And second, that, even if it did, scholars who look at the case in this way are missing something very important; namely, the tongue-in-cheek style of Livingston's dissent, which if taken completely seriously will lead one astray. The article traces the process of the serious 'mandarization' of the case from James Kent in the 1820s to Oliver Wendell Holmes, Jr, in the later nineteenth century. It then shows how that serious treatment continued in the twentieth century. This survey of the uses (and abuses) of the case will be of interest to those who read legal history, legal pedagogy, legal theory, and property law.*

*Keywords:* legal history, *Pierson v Post*, property, law and economics

### 1 Introduction

The summary of the children's book *Duck and Goose* reads, 'Duck and Goose learn to work together to take care of a ball, which they think is an egg.'<sup>1</sup> Shortly after the two waterfowl come upon this round object in a wide open green field, an argument ensues, as it usually does between the two.

'I,' said Duck, puffing out his feathered chest, 'am the one whose egg this is. I saw it first.'

Goose quickly raised one webbed foot. 'It's mine. I touched it first.'<sup>2</sup>

The two proceed to fantasize about erecting fences and putting up signs that exclude each other and say things like 'this egg is private property.'<sup>3</sup> This is one of my four-year-old daughter's favourite books, and

\* Associate Professor, Faculty of Law, University of Toronto

1 Tad Hills, '*Duck and Goose*.' Publisher's Summary (New York: Random House, 2006) at copyright page.

2 Ibid at unnumbered pages 3–4.

3 See ibid at unnumbered pages 9–10.

when we read it, I try to do an experiment. ‘Who do you think is right Isabel,’ I ask, ‘Duck or Goose?’ She always picks Duck (and then she usually says ‘Mama, you be Goose’).

The analogy to *Pierson v Post*<sup>4</sup> is not perfect. In the famous fox case, Post did more than merely sight the fox. He was in hot pursuit with ‘dogs and hounds,’ when Pierson swooped in and killed the animal. Outraged, Post took the issue to a jury trial later in December 1802, where he was awarded just 75¢ in damages (and a more substantial \$5 costs award).<sup>5</sup> Pierson appealed to the New York Supreme Court where the decision was reversed. Pierson’s lawyer, Nathan Sanford, convinced the court that Justinian’s *Institutes* was the controlling authority, a passage from which seemed to support the so called ‘capture rule’; that is, killing and capturing a wild animal so that escape was no longer possible was a method of perfecting possession which was superior to mere pursuit.<sup>6</sup> Post’s primary counter-authority was an annotator of Puffendorf’s named Barbeyrac, who thought that ‘manucaption,’ actually laying your hands on the wild animal, was not necessary in order to be in possession of it. So long as the person was in hot pursuit, this created a property right sufficient to exclude others.<sup>7</sup>

These two rules are both compelling – hence the difficulty in deciding between Duck and Goose that one is supposed to feel (but that Isabel does not seem to experience for some reason). Other children when presented with the hypothetical in the fox case will suggest that Pierson and Post share the fox.<sup>8</sup> And, indeed, that is what happens in *Duck and Goose*, appropriately enough. The two birds push and shove each other. Both manage to climb on top of the ball and, in the time that they are waiting for the egg that will never hatch to hatch, they learn to be friends and to share. The sharing message seems less anti-social than the capture rule. And, indeed, some property teachers have replaced *Pierson v Post* with *Popov v Hayashi*, a case about a Barry Bonds record-breaking home run baseball, precisely because it carries something like that lesson – the two fans who came in contact with the ball were forced by the court to share the proceeds of its sale.<sup>9</sup>

4 3 Cai R 175 at 175 (NY Sup Ct 1805) [*Pierson*].

5 See Angela Fernandez, ‘The Lost Record of *Pierson v Post*, the Famous Fox Case’ (2009) 27 Law and History Review 149 at 158 [Fernandez, ‘Lost Record’].

6 *Pierson*, supra note 4 at 175–6.

7 *Ibid* at 176.

8 Thanks to Hanoeh Dagan for sharing that anecdote about a presentation of the case he made to the class of one of his children.

9 *Popov v Hayashi*, 2002 WL 31833731 (Cal Sup Ct, San Francisco County, 2002) [*Popov v Hayashi*].

It is tempting to see *Pierson* as a case that rejects local custom – that is, the customs of fox hunting – which is certainly how the dissenting judge, Brockholst Livingston, presented it. He wrote,

This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone . . . [T]hey [the sportsmen] would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcase of poor *Renard* would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of Diana.<sup>10</sup>

It was ungentlemanly or unsportsmanlike to interfere in another person's hunt. That is likely how Post thought about the wrong done to him. However, this view is not the whole story, as *Pierson*, who was not a fellow hunter, would not have seen things the same way.

*Pierson* was a member of a large wealthy family who were farmers. The beach where the altercation is said to have happened was surrounded by *Pierson* family land.<sup>11</sup> Foxhunting, because it usually meant importing foxes into an area, would probably have been something he and his family opposed. More foxhunting in the area would mean riders knocking down fences and trampling fields and *more* foxes, not *fewer*, eating chickens and the like, as hunters would encourage breeding in order to have objects of pursuit for their game.<sup>12</sup> Post's father was also wealthy and his roots went back as far as *Pierson*'s.<sup>13</sup> However, his wealth came

<sup>10</sup> See *Pierson*, supra note 4 at 180.

<sup>11</sup> See HP Hedges, 'Pierson vs Post,' *The Sag-Harbor Express* (24 October 1895) at unnumbered page 1, identifying 'Peter's Pond' as the place where the fox was caught [Hedges, *Pierson*]. See also map 'About the year 1800,' reproduced in an appendix to William Donaldson Halsey, *Sketches from Local History* (Southampton, NY: Yankee Peddler Book, 1966) [Halsey].

<sup>12</sup> See Andrea McDowell, 'Legal Fictions in *Pierson v Post*' (2007) 105 Mich L Rev 735 at 738, 748–54 [McDowell].

<sup>13</sup> Post was not a newcomer, as Bethany Berger states he was; see Bethany Berger, 'It's Not about the Fox: The Untold Story of *Pierson v Post*' (2006) 55 Duke LJ 1089 at 1125 [Berger]. There is a problem with the genealogical source Berger uses to make this claim. She rejects the standard source – George Rogers Howell, *The Early History of Southampton, Long Island, New York, with Genealogies* (New York: JN Hallock, 1866) at 266 (Berger cites *ibid*, 2d ed, 1887), which lists Nathan Post as a descendant of original town proprietor, Richard Post – preferring instead *Long Island Genealogies: Families of Albertson, Andrews, Bedell, Birdsall . . . Willets, Williams, Willis, Wright, and other families. Being kindred descendants of Thomas Powell, of Bethpage, L.I., 1688*, compiled by Mary Powell Bunker (Albany, NY: J Munsell's Sons, 1895) at 263–5, online: <<http://longisland-genealogy.com/ligpost.html>>, which does not list Nathan Post as a descendant of Richard Post. However, the Bunker genealogy focuses on a later Richard Post, who

from shipping and trade in Sag Harbor.<sup>14</sup> The dominant way of life in Bridgehampton, and specifically to the south in Sagaponack where the Piersons owned so much land and the beach was located, was rural and agricultural.<sup>15</sup> The jury gave Post only 75¢, about the amount that was given for a fox killed as bounty.<sup>16</sup> In other words, they can be seen as having vindicated the custom of the area as anti-fox hunting, valuing agricultural over recreational use of land. This is not a case where custom was over-ruled; it is a case where there was a fight precisely because there was no shared custom. Or, differently put, (at least) two customs (specifically, two different ways of being wealthy and important) had come into conflict.<sup>17</sup> The parties turned to the law in order that it might choose between them or, perhaps, split the difference, which is what the jury seemed to do – give something for the fox but not much. The appellate court took the more legally familiar all-or-nothing route, which, at the end of the day, cost Post a lot of money: \$121.37.<sup>18</sup> Post's own net worth declined considerably after the case and it was rumoured that the lawsuit caused him considerable financial trouble.<sup>19</sup>

settled on a different part of Long Island (Hempstead in Nassau County), was married in 1732, and was having his children in the 1740s, not the 1640s. This later Richard Post is listed in Howell.

- 14 See Henry P Hedges, 'Early Sag-Harbor' in *Tracing the Past: Writings of Henry P Hedges, 1817–1911, Relating to the History of the East End, Including East Hampton, Southampton, Sag Harbor, Bridgehampton, and Southold in Suffolk County, New York*, ed by Tom Twomey (New York: Newmarket Press, 2000) 178 at 188.
- 15 See Mary Cummings, 'Introduction' in Mary Cummings, *Images of America: Southampton* (Charleston, SC: Arcadia 1996) at 7–8.
- 16 In 1791, the bounty was four shillings; i.e. forty-eight pence; see *The Third Book of Records of the Town of Southampton with Other Ancient Documents of Historic Value* (Sag Harbor, NY: John H Hunt, 1878) at 332, cited in Berger, *supra* note 13 at 1130; also McDowell, *supra* note 12 at 762. Six volumes of the Town Records are available at 'Town of Southampton Historic Record Books,' online: Town of Southampton, Long Island, NY <<http://www.southamptontownny.gov/content/760/762/792/2530/default.aspx>>. A statute in 1717 provided five shillings for the extermination of foxes (and nine shillings for wild cats), and in 1650, two guilders were provided for a fox (three for a wolf); see Benjamin F Thompson, *History of Long Island* (New York: E French, 1839) at 134, 442.
- 17 That Pierson and Post were both wealthy is borne out by local tax records provided to the author by Southampton Town Historian, Henry Moeller: Town of Southampton, Tax Assessment Rolls, 1801, 1803, 1806, and 1818.
- 18 Fernandez, 'Lost Record,' *supra* note 5 at 158. The judgment roll was *Pierson v Post*, judgment roll, New York City, Division of Old Records, New York County Clerk's Office (Law judgment #1805 P-33) [judgment roll]. Unfortunately, it has been lost. Copy and transcript are on file with the author.
- 19 In 1801, Lodowick and Nathan Post are listed on the tax assessment roll with real property worth \$2,900, higher than David Pierson's \$2,460. However, in 1806, following his father's death in 1803 and one year after the case, Lodowick Post appears alone on the roll at \$1,900, a decrease of \$1,000. Lodowick sold his father's grand

The judge who wrote the majority decision, Daniel Tompkins, gave a policy reason for siding with Pierson, one that sounded strongly in the first chapter of Blackstone's volume on property.<sup>20</sup> When it came to potentially troublesome unowned property like wild animals, a clear rule was best 'for the sake of certainty, and preserving peace and order in society.'<sup>21</sup> On the authorities, as Pierson's lawyer pointed out, Barbeyrac was a mere annotator and his views could not outweigh the opinion given in a text as classic as Justinian's *Institutes*.<sup>22</sup> The dissenting judge, Brockholst Livingston, made fun of this deference to authority, writing '[w]hatever Justinian may have thought of the matter, it must be recollected that his code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves.'<sup>23</sup> He formulated a version of the 'hot pursuit' rule and sided ultimately with Barbeyrac.<sup>24</sup> However, the dissent as a whole drips with humour and a hyperbolic style that makes it difficult to know which parts to take seriously and which not. It is at any rate, a treat to read. Not quite *Duck and Goose* but close.

As elaborate as the lawyers' arguments were, it turns out that they had not equipped themselves with all of the relevant authority or dealt with it as intensively as they might have. Charles Donahue has pointed out that Post's lawyer, David Cadwallader Colden, could have challenged Sanford's interpretation of Sections 12 and 13 of Justinian's *Institutes*.<sup>25</sup> The parallel passage in Justinian's longer work, the *Digest*, cribbing Gaius, provides an authority that the *Institutes* does not; namely, the Roman thinker Trebatius, who formulated a version of the 'hot pursuit' rule.<sup>26</sup>

house to a Pierson in 1817 and this was said to have been a consequence of the lawsuit; see A James Casner & W Barton Leach, eds, *Cases and Text on Property*, 2d ed (Boston, MA: Little, Brown, 1969) at 15 ['Casner & Leach']. His real property was listed as worth \$1,200 in 1818.

<sup>20</sup> See *Blackstone's Commentaries on the Laws of England, Book the Second – Chapter the First: Of Property in General* (Oxford: Clarendon Press, 1765–9), online: The Avalon Project <[http://avalon.law.yale.edu/18th\\_century/blackstone\\_bk2ch1.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk2ch1.asp)> [Blackstone]. See text accompanying notes 70–1.

<sup>21</sup> *Pierson*, supra note 4 at 179.

<sup>22</sup> See *ibid* at 177: 'Sanford, in reply. The only authority relied on is that of an annotator.'

<sup>23</sup> *Ibid* at 181.

<sup>24</sup> *Ibid* at 181–2.

<sup>25</sup> See Charles Donahue, Jr, '*Animalia Ferae Naturae*. Rome, Bologna, Leyden, Oxford and Queen's County NY' in Roger S Bagnall & William V Harris, eds, *Studies in Roman Law: In Memory of A Arthur Schiller* (Leiden: EJ Brill, 1986) 39 at 41–2. See also Charles Donahue, Jr, 'Noodt, Titus, and the Natural Law School: The Occupation of Wild Animals and the Intersection of Property and Tort' in JA Akum, JE Spruit, & FBJ Wubbe, eds, *Satura Roberto Feenstra* (Fribourg: Presses Universitaires de Fribourg, 1985) 609 at 610–1.

<sup>26</sup> See Dig 41.1–2 (trans F de Zulueta).

The lawyers likely did not have access to the *Digest* and this would explain why Colden did not put Trebatius forward.<sup>27</sup> As for Barbeyrac, his annotations on Puffendorf's text were highly esteemed by early Americans, many of whom thought them superior to the Puffendorf text they annotated.<sup>28</sup> And then there were the writings on property by Joseph Pothier, who also mentioned Gaius and Trebatius in his discussion of how one acquires first possession in the hunting of an animal and expressed a preference for Barbeyrac's view.<sup>29</sup> This treatise was less well known to early Americans probably due to its unavailability in English and to the limited facility most lawyers, even elite ones, would have had working in French.<sup>30</sup> So this is all just to say that the case could certainly have gone the other way on the authorities. However, once *Pierson v Post* was decided, it became the authority.

The capture rule was accepted as the baseline common law rule, and derivations based on 'custom' for seals and whales later in the nineteenth century were understood as exceptions, as we learn from the other two articles in this focus feature by Bruce Ziff and Robert Deal. It was not hyperbole, then, for one late-nineteenth-century account to state as it did that '[q]uestions arising out of conflicting claims concerning the whale fishery, game laws, fish law, whale law, *all bow to the decision in Pierson vs. Post.*'<sup>31</sup>

<sup>27</sup> See Herbert A Johnson, *Imported Eighteenth-Century Law Treatises in American Libraries, 1700–1799* (Knoxville: University of Tennessee Press, 1978) at 18, giving a listing for a 1761 English translation of the *Institutes* by George Harris; no listing for the *Digest* is included. See also Alan Watson, 'Introduction to Law for Second-Year Students?' (1996) 46 J Legal Educ at 437, n 26 [Watson], describing the *Institutes* as a textbook for first-year students; also *ibid* at 440, noting that the *Digest* 'was often simply not ready to hand or was thought too difficult.'

<sup>28</sup> See e.g. Daniel R Coquillette, 'Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758–1775' in *Law in Colonial Massachusetts, 1630–1800: A Conference held 6 and 7 November 1981 by the Colonial Society of Massachusetts* (Boston, MA: Colonial Society of Massachusetts, 1984) 359 at 382, n 7 [Coquillette]: Adams wrote of his mentor, Jeremiah Gridley, that '[h]e was a great Admirer of Barbeyrac: thought him a much more sensible and learned Man than Puffendorf.' See also Christopher P Rogers, 'Continental Literature and the Development of the Common Law by the King's Bench: c 1750–1800' in Vito Piergiovanni, ed, *The Courts and the Development of Commercial Law* (Berlin: Duncker & Humblot, 1987) 161 at 169, noting that '[t]he most frequently used edition of Puffendorf was that by Barbeyrac, whose own commentary on the text was itself cited with approval in a number of cases.'

<sup>29</sup> See Robert-Joseph Pothier, *Traité du droit de domaine de propriété, de la possession, de la prescription qui résulte de la possession*, vol 10, *Oeuvres complètes de Pothier*, ed by M Siffrein (Paris: Chez Chanson, Imprimeur-Libraire, 1821) at 15–8 [Pothier].

<sup>30</sup> See Michael H Hoeflich, 'Translation and the Reception of Foreign Law in the Antebellum United States' (2002) 50 Am J Comp L 753 at 757.

<sup>31</sup> Hedges, '*Pierson*,' *supra* note 11 [emphasis added].

The present article traces the process by which *Pierson v Post* became an authoritative or canonical text, not just for cases relating to the possession of wild animals but in more general thinking about possession and property. I begin, in Part II, with someone who was familiar with Pothier's take on the issue of the ownership of wild animals, James Kent, and I explain how he included a discussion of the case in the property section of his *Commentaries on American Law* (1827). Oliver Wendell Holmes, Jr, probably influenced by this, included the case in his famous lectures on *The Common Law* (1881). Shortly thereafter, the case began appearing in law school casebooks. I track this in Part III. The fourth and final section looks at the way that the 'new mandarins,' legal scholars in the twentieth century, have used the case in their theorizing about the law of property and specifically how it has come to be pared down to a lesson about clear rules versus allegedly 'fuzzy' standards. I argue in Part IV that the case does not actually illustrate very well the superiority of rules over standards. Even if it did, scholars who focus on this are missing something very important in the decision; specifically, the tongue-in-cheek way that Livingston was responding to the elaborate treatment of a dispute over a 75¢ fox. Attaching hard and fast policies to rules in such circumstances is a mistake. What we need to do, instead, is appreciate that a text like the *Pierson* case is fluid, moving, and multi-faceted in the way that a literary text is, resisting a straightforward interpretation. This is difficult to do. However, I argue elsewhere that it is helpful to see the case (and specifically the dissent) as an instance of 'solemn foolery.'<sup>32</sup>

## II *Kent and Holmes*

It seems likely that *Pierson v Post* would have languished in obscurity in the third volume of George Caines's Reports<sup>33</sup> had it not been brought to the attention of a larger audience by James Kent in his *Commentaries on American Law* in 1827.<sup>34</sup> Unlike Blackstone, Kent prioritized personal property over real property, and he included animals *ferae naturae* – that is, wild animals – in his discussion of the basic distinction between absolute and qualified property in chattels. Where absolute property gave a

<sup>32</sup> See Angela Fernandez, 'The Ancient and Honorable Court of Dover: Serious Mock, Solemn Foolery, and Sporting Wit in Nineteenth-Century New York State' (2012) *Australia & New Zealand Law & History E-Journal*, online: <[http://www.anzlhsejournal.auckland.ac.nz/pdfs\\_2012/Fernandez-Court%20of%20Dover.pdf](http://www.anzlhsejournal.auckland.ac.nz/pdfs_2012/Fernandez-Court%20of%20Dover.pdf)>.

<sup>33</sup> George Caines, *New-York Term Reports of Cases Argued and Determined in the Supreme Court of that State* (New York: Van Winkle and Wiley, 1806) vol 3 at 175 [Caines].

<sup>34</sup> James Kent, *Commentaries on American Law* (New York: O Halsted, 1827) vol 2 at 281–3 [Kent].

'full and complete title,' qualified property gave a more limited right.<sup>35</sup> A person was limited to a qualified property in things that were common by the law of nature: air, light, water, and animals *ferae naturae*.<sup>36</sup> 'It was held by the Supreme Court of this state, in *Pierson v. Post*,' Kent wrote, 'that pursuit alone gave no property in animals *ferae naturae*.'<sup>37</sup>

Kent was a furious annotator and his copy of *Pierson v Post* includes a handwritten annotation in the margin of his text to Pothier, stating that '[t]he animal must be brought within the Power of the Pursuer.'<sup>38</sup> The citation here appears to be incorrect.<sup>39</sup> However, Pothier discusses wild animals in his property treatise and, speaking specifically of the hunt, he writes, '[I]t is not precisely necessary that he [the hunter] get his hands on it [the animal]; it is sufficient that the animal be in the person's power in a manner in which it cannot in any way escape.'<sup>40</sup> Kent mirrors this when he writes at the bottom of the page on his copy of the case:

Almost all the modern civilians agree that the Beast must have been brought within the reach or Power of the Pursuer to vest Property. [A]ctual Taking may not in all cases be requisite but all agree that such Pursuit without bringing the animal within the Power of the Party, is not sufficient.<sup>41</sup>

This matched almost exactly what Kent wrote in the *Commentaries*.<sup>42</sup>

Now we can see that what Pierson did, capture and kill the fox, was not necessary in order for him to vest property in the fox – as Kent put it, an '[a]ctual taking may not, in all cases, be requisite.'<sup>43</sup> If the fox was in Post's imminent reach, then it might well have been said to have been under his power or *puissance*, the key word for both Pothier and Kent. Pothier discussed Gaius, Trebatius, and also Barabeyrac's position that mere pursuit should be sufficient, calling this the more civilized sentiment that was followed in practice and grounded in an old law of the Salians.<sup>44</sup> Kent would certainly have been aware of this, having written

<sup>35</sup> *Ibid* at 281.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid* at 282.

<sup>38</sup> The annotations are on James Kent's copy of the second edition of Caines, *supra* note 33, in Albany, New York, New York State Library. A copy is reproduced in Angela Fernandez, 'Pierson v Post: A Great Debate, James Kent, and the Process of Building a Learned Law for New York State' (2009) 34 *Law & Soc Inquiry* 301 at 314 [underlining is Kent's] [Kent, Annotations] [Fernandez, 'Debate'].

<sup>39</sup> See *ibid* at 317.

<sup>40</sup> Pothier, *supra* note 29 at 16 [my translation].

<sup>41</sup> Kent's Annotations, *supra* note 38 at 314 [underlining is Kent's].

<sup>42</sup> See Kent, *supra* note 34 at 283; see also Fernandez, 'Debate,' *supra* note 38 at 320, for an interposing of the two texts.

<sup>43</sup> Kent, *supra* note 34 at 282.

<sup>44</sup> Pothier, *supra* note 29 at 18.

about Pothier in the margins of his copy of the case and having also provided there the reference to Justinian's *Digest*, which he added to the text of the *Commentaries*.<sup>45</sup> New York, however, was bound by *Pierson v Post* and Kent dutifully records that *Pierson v Post* was followed in another New York case called *Buster v Newkirk* in 1822.<sup>46</sup>

We fast forward now about forty-five years to Oliver Wendell Holmes, Jr, and his edition of Kent's *Commentaries*.<sup>47</sup> Holmes was quite obsessive about this project in his 'proving years,' exhibiting what his biographer Mark DeWolfe Howe calls a 'frightening intensity' about the work.<sup>48</sup> So, for instance, 'Mrs. Henry James,' mother of the philosopher William James, wrote to one of her other sons, the novelist Henry James, telling him that, when Holmes dined with their family, he refused to be parted from the manuscript, apparently even in his own house:

Wendell Holmes dined with us a few days ago. His whole life, soul and body, is utterly absorbed in his *last* work upon his Kent. He carries about his manuscript in his green bag and never loses sight of it for a moment. He started to go to Will's [William James's] room to wash his hands, but came back for his bag, and when we went to dinner, Will said, 'Don't you want to take your bag with you?' He said, 'Yes, I always do so at home.'<sup>49</sup>

Holmes probably took such care with the manuscript because he saw the project as important to his being recognized for greatness, a status that he believed had to be achieved before the age of forty.<sup>50</sup> Holmes writes, 'I remember that I hurried to get it [*The Common Law*] out before March 8, because then I should be 40 and it was said that if a man was to do anything he must do it before 40.'<sup>51</sup>

Holmes wrote an article on possession in the *American Law Review* in 1877,<sup>52</sup> much of which was repeated in his famous Lecture VI on

<sup>45</sup> Kent, *supra* note 34 at 283, n b, acknowledging there that '[t]he civilians differed on the issue.'

<sup>46</sup> *Ibid* at 283.

<sup>47</sup> Kent, *supra* note 34, 12th ed by Oliver Wendell Holmes, Jr (Boston, MA: Little, Brown, 1873).

<sup>48</sup> Mark DeWolfe Howe, *Justice Oliver Wendell Holmes II: The Proving Years, 1870–1882* (Cambridge, MA: Belknap Press of Harvard University Press, 1963) at 22 [Howe, *Justice Oliver*].

<sup>49</sup> 1873 letter from Mrs. Henry James [Mary Robertson Walsh] to Henry James in RB Perry, *The Thought and Character of William James*, vol 1 (1935) at 519, cited in Howe, *ibid* at 22.

<sup>50</sup> Howe, *ibid* at 49: 'Those minds which are fittest to survive must prove their strength. Holmes was resolved that for him the proving must occur before he was forty years of age.'

<sup>51</sup> *Ibid* at 135.

<sup>52</sup> See OW Holmes, Jr, 'Possession' (1877) 12 Am L Rev 688 [Holmes, 'Possession'].

'Possession' in *The Common Law* in 1881.<sup>53</sup> Here Holmes describes *Pierson v Post* and cites Kent's discussion of it in the *Commentaries*, stating that 'the difference between the power over the object which is sufficient for possession, and that which is not, is clearly one of degree only, and the line may be drawn at different places at different times.'<sup>54</sup> It seems likely that this language of *power* came from Kent (who, as we saw above, probably took it from Pothier). Holmes writes,

The Roman law and the common law agree that, in general, fresh pursuit of wild animals does not give the pursuer the rights of possession. Until escape has been made impossible by some means, another may step in and kill or catch and carry off the game if he can. Thus it has been held that an action does not lie against a person for killing and taking a fox which had been pursued by another, and was then actually in the view of the person who had originally found, started, and chased it.<sup>55</sup>

The citation to the *Commentaries* and *Pierson* also includes *Buster v Newkirk*.<sup>56</sup> Holmes went on to discuss an 1844 deer hunting statute in New York that changed the rule of capture from *Pierson* to a hot pursuit rule, a point that had been added to the sixth edition of Kent's *Commentaries* and continued down to the twelfth, the one that Holmes edited.<sup>57</sup>

The influence of Kent on Holmes's lecture fairly bristles from the page. Yet, most interesting here is the way that Holmes nonetheless seems bothered by the place *Pierson* has taken him to. The first concern relates to the arbitrariness of the line-drawing exercise; that is, figuring out 'the difference between the power over the object which is sufficient for possession, and that which is not.'<sup>58</sup> Holmes uses a Herman Melville-like review of the variety of customs in the whaling industry in order to bring home the point. In Greenland, Holmes explains, the first person to strike the whale

<sup>53</sup> OW Holmes, Jr, *The Common Law* (Boston, MA: Little, Brown, 1881) at 206 [Holmes, *Common Law*].

<sup>54</sup> *Ibid* at 217.

<sup>55</sup> *Ibid*.

<sup>56</sup> See *ibid* at n 1.

<sup>57</sup> See Kent, *supra* note 34, 6th ed (New York: W Kent, 1848) vol 2 at 348–9, n e: 'The legislature of New York have enlarged the right of acquisition of game by pursuit, in the case of deer in the countie[s] of Suffolk and Queen's, by declaring, that any person who starts and pursues such game, shall be deemed in possession of the same, *so long as he continues in fresh pursuit* thereof. Laws of N.Y. April 1, 1844, ch. 109. *N.Y.R.S.* 3d edit. Vol. 1. 883' [emphasis in the original]. See also *ibid*, 7th ed by William Kent (New York: W Kent, 1851) vol 2 at 410, n d; *ibid*, 8th ed by William Kent (1854) vol 2 at 417, n e; *ibid*, 9th ed (Boston, MA: Little, Brown, 1858) vol 2 at 484, n a; *ibid*, 10th ed (1860) vol 2 at 446, n c; *ibid*, 11th ed by George F Comstock (1866–7) vol 2 at 429, n d; *ibid*, 12th ed by Oliver Wendell Holmes, Jr, (1873) at 350, n d.

<sup>58</sup> Holmes, *Common Law*, *supra* note 53 at 217.

needed to hold it ‘fast’ in order to maintain priority to it.<sup>59</sup> Whereas in the Galapagos, the first striker took half the value of the whale even if he lost the line.<sup>60</sup> And in the Massachusetts case of *Swift v Gifford*, the first person to strike and leave their iron in the whale took all of it.<sup>61</sup> All of these ways of formulating the rule, as Holmes puts it, ‘tend(s) . . . to shake an *a priori* theory of the matter.’<sup>62</sup> He notes the range of opinion on the issue from Justinian, who said that even wounding the animal was insufficient, to *Swift v Gifford*, where it was enough to put in a harpoon.<sup>63</sup> Apparently, there was a different rule for foxes than for whales and another for fish, which were a separate case again.<sup>64</sup> As Bruce Ziff explains in the first piece in this focus feature, even when killed, seals could still ‘escape,’ as sealers would leave the slaughtered animals in piles on the ice, and floating ice or bad weather would often prevent the original ship from returning to collect them. The capture rule, being the first to *kill* the animal, was an inadequate way of dealing with the issue of who owned such seals when another ship came to ‘save’ seals that would otherwise go to waste. Holmes does not discuss these cases.<sup>65</sup> However, had he known about them, they could only have exacerbated his sense that the decision about what kind of exercise of power was sufficient for possession in wild animals was ‘clearly one of degree only, and the line may be drawn at different places at different times.’<sup>66</sup> We could add, ‘for different animals.’

There is a larger nagging concern for Holmes, which is that, although the Roman law (Justinian) and the common law (*Pierson v Post* and *Buster v Newkirk*) had established a high threshold with respect to the degree of power in relation to the object to be possessed, there was a tension between this and ‘the general tendency of our law [which] is to favour

<sup>59</sup> Ibid at 212.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid. See *Swift v Gifford*, 2 Lowell 110, 23 F Cas 558 (Mass Dist Ct 1872). This case was decided not long before Holmes wrote his 1877 essay, and he draws on it quite extensively in what he writes in the essay and later in the lecture.

<sup>62</sup> Holmes, *Common Law*, supra note 53 at 213. This point and all three of the whale-rule positions were set out in the earlier text; see Holmes, ‘Possession’ supra note 52 at 719.

<sup>63</sup> Holmes, *Common Law*, ibid at 217–8.

<sup>64</sup> On this last, see ibid at 217, where Holmes discusses *Young v Hichens* (1844), 6 QB 606, 115 ER 228.

<sup>65</sup> Bruce Ziff, ‘The Law of Capture, Newfoundland-Style’ (2013) 63 UTLJ [present issue]. The first four of the five cases Ziff discusses were reported from 1859 to 1872 and so were theoretically eligible for inclusion by the time of the publication of *The Common Law* in 1881 (and even in the article on possession in 1877). Evidently, the Newfoundland Law Reports were not on Holmes’s radar screen, probably unsurprisingly. We only ever know what it is in our world to know.

<sup>66</sup> Holmes, *Common Law*, supra note 53 at 217.

appropriation.<sup>67</sup> Holmes goes on to discuss a case in which a man found logs that were afloat and tied them up. The logs then broke free and were found by another who tied them up for himself. The court held that ‘the first finder retained the rights which sprung from his having taken possession, and that he could maintain trover against the second finder, who refused to give them up.’<sup>68</sup> In other words, *the law wanted to assign possession in response to relatively light touching*. Why? Well, precisely in order to avoid the kind of ‘quarrels and litigation’ Tompkins talked about in the majority judgment in *Pierson v Post*.<sup>69</sup>

Blackstone discusses this problem at the beginning of his volume on property, referring to the ‘innumerable tumults’ that would result from property that ‘unavoidably remain[ed] in common’<sup>70</sup> and belonged to the first occupant like animals *ferae naturae*: ‘[D]isturbances and quarrels would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy.’<sup>71</sup> Arguably then, it was better to implement a rule that accorded possession in response to *relatively light touching*, which would leave less of this potentially troublesome kind of property lying around. As Holmes puts it, our law ‘abhors the absence of proprietary or possessory rights as a kind of vacuum.’<sup>72</sup> If the law favoured easy appropriation, then this was better, *as long as the signal was clear enough*. The kill and capture that *Pierson* said was superior to hot pursuit as a way of establishing possession in the fox was more than was required. Yes, the fox could escape – so could the logs in the case Holmes discusses; but that would not justify depriving the original possessor of their property right. Hence, even on the policy point that was put forward in the case, the decision arguably went the wrong way.

Isn’t it the whole point of property law to allow people to protect with a legal right precisely what they are unable to hold tightly in their hands? This is true most obviously in the case of land. However, it also applies to objects that move, ‘movables’ in the civil law. Property rights in a movable allow a person to put that object down and walk away but still exclude others, sell it, lease it; that is, be recognized as its owner. Now, the degree of possession required for first possession is greater than that required in order to maintain possession, in the case of both movables and immovable land. However, it does not follow from this

67 Ibid at 237: ‘We have adopted the Roman law as to animals *ferae naturae*, but the general tendency of our law is to favour appropriation.’

68 Ibid.

69 *Pierson*, supra note 4 at 179.

70 Blackstone, supra note 20 at 4, 14.

71 Ibid at 15.

72 Holmes, *Common Law*, supra note 53 at 237.

that the degree of possession required for first possession should be the greatest possible; namely, the capture rule. As the judgment in *Popov v Hayashi* puts it, ‘absolute dominion and control is not required to establish possession’ because ‘such a rule would be unworkable and unreasonable.’ Why? ‘The “nature and situation” of the property at issue does not immediately lend itself to unequivocal dominion and control. It is impossible to wrap one’s arms around a whale, a fleeing fox or a sunken ship.’<sup>73</sup> So long as the signal was clear enough, pursuit with the imminent prospect of taking, should have been enough to exclude *Pierson*.

There is an irony in Holmes’s refraining from following this instinct about the mismatch *Pierson* presented, since if he had looked into it more closely, he might have learned of Barbeyrac’s preference for the law of the Salians, as Pothier discusses it. The law of the Salians was a kind of old German customary law. Holmes was always on the look out for ‘Frankish’ or ‘Teutonic’ rather than Roman antecedents that explained the history of English law.<sup>74</sup> And ‘Teutonic’ meant traceable to the law of the Salian Franks.<sup>75</sup> The Salian connection might well have motivated Holmes to take his instinct that there was a problem with *Pierson* further than he did. However, his strong identification with *Kent’s Commentaries*, his living with them in the intense way that he did, might have made it difficult for him to disagree with them and Kent, who in full knowledge of the alternatives (Treatise, Barbeyrac, and Pothier) nonetheless chose the capture rule.

English jurist and friend of Holmes, Frederick Pollock, weighed in on the issue of wild animals and first possession. Holmes and Pollock talk about Holmes’s *American Law Review* article on possession in their letters in 1878.<sup>76</sup> Then, ten years after this, and seven years after Holmes published *The Common Law*, Pollock co-authored a book on possession. In it, Pollock writes, ‘At what point in the process of capture is the taker’s control complete enough to make him a possessor? This is in its nature as much a question of fact as anything can be, yet it is one upon which the law cannot escape having an opinion.’<sup>77</sup> Here is recognition of Holmes’s

<sup>73</sup> *Popov v Hayashi*, supra note 9 at para 5.

<sup>74</sup> See Howe, *Justice Oliver* supra note 48 at 153.

<sup>75</sup> See *ibid* at 211–2. Holmes thought that Kent and Story were wrong about the Roman origins of possession; see *ibid* at 221. Specifically, he argues that the English law of bailment was like the law of the Salian Franks; it was not Roman law; see Holmes, ‘Possession,’ supra note 52 at 697–8.

<sup>76</sup> See Mark DeWolfe Howe, ed, *Holmes–Pollock Letters: The Correspondence of Mr Justice Holmes and Sir Frederick Pollock, 1874–1932* (Cambridge, MA: Harvard University Press, 1941) vol 1 at 8–14.

<sup>77</sup> Frederick Pollock, *An Essay on Possession in the Common Law* (Oxford: Clarendon Press, 1888) at 37. This book was co-authored with Robert Samuel Wright but Pollock wrote the part where this passage appears.

point that the line-drawing exercise is an arbitrary one; yet also strong deference, as there is in Holmes, to the ‘opinion’ that Kent gives. Pollock uses Kent to support the claim that ‘[t]he general principle being that pursuit short of capture will not do.’<sup>78</sup>

Kent, Holmes, and Pollock made for a hat trick that was pretty hard to beat. Did anyone disagree with these three great mandarins of the law? Well, there was an American treatise on *The Law of Animals* by John Ingham, published in 1900.<sup>79</sup> Ingham points out that *Pierson v Post* and *Buster v Newkirk* both held that ‘[m]ere pursuit of a wild animal is not sufficient to confer property.’<sup>80</sup> However, he also includes a passage from Gaius noting that Trebatius held that any wounding of the animal made it the pursuer’s, as indeed, did mere pursuit, so long as the animal was not abandoned.<sup>81</sup> Ingham reads *Pierson* as holding that Barbeyrac was correct to say that actual bodily seizure was not required if, as Tompkins put it in the majority decision, and Ingham quotes, ‘[T]he pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control’.<sup>82</sup> Ingham also points to a Canadian case that held that pursuit could be sufficient if there was wounding and persistent chase. In this case from Quebec, the judge rejected Roman law and Justinian’s requirement that the wild animal (a bear) must be taken, choosing instead what he called the French law in which following the animal gave the pursuer possession of it against an interloper who killed and took it. Pothier’s property treatise was cited by the winning party.<sup>83</sup> There is some evidence of the penetration of Ingham’s perspective. The book is cited in a footnote to the dissent in one American property-law casebook in 1945.<sup>84</sup> However, Ingham does not disagree in an outright way with *Pierson v Post*. The alternative route it quietly advocated remained very much a minority position, as it does to this day.

<sup>78</sup> *Ibid* at 37–8 and 38, n 1.

<sup>79</sup> John H Ingham, *The Law of Animals: A Treatise on Property in Animals, Wild and Domestic, and the Rights and Responsibilities Arising Therefrom* (Philadelphia, PA: T & JW Johnson, 1900) at 5.

<sup>80</sup> *Ibid*.

<sup>81</sup> *Ibid*.

<sup>82</sup> *Pierson*, *supra* note 4 at 178; *ibid* at 6.

<sup>83</sup> See *Charlebois v Raymond*, 12 LC Jur 55 at 55–6.

<sup>84</sup> See Harry A Bigelow, *Cases and Materials on the Law of Personal Property*, 3d ed (St. Paul, MN: West, 1942) at 15, n 2. It also appeared the same year in the first two-volume collective edition for both real and personal property. See Ralph W Aigler, Harry A Bigelow, & Richard R Powell, *Cases and Materials on the Law of Property* (St Paul, MN: West, 1942) vol 1 at 11–2, n 2.

The argument in my book on *Pierson v Post* is that Livingston's dissent is fundamental to a proper understanding of what was going on in this case. Its learned seriousness, I argue, is a response to the elaborate presentations of the lawyers. Ignoring its humorous dimensions is problematic, as it means that we take seriously what Livingston did not mean to be taken seriously, attaching 'policy' arguments to things that are not real.<sup>85</sup> However, the presentation of the case in law school casebooks in the twentieth century has made this almost impossible to appreciate. The first issue is that the lawyers' arguments have literally been edited out of most of the casebooks and without them one cannot really see the exercise as I think it should be seen; namely, a great debate on a classic issue – how one establishes possession in wild animals.<sup>86</sup> The second is the way in which the sources themselves do not resonate with more modern sensibilities. This is where the historical reconstruction comes in, in terms of explaining why those sources were so important and familiar to the lawyers and judges.

The entire exercise, the lawyers' arguments and Livingston's response, can be helpfully understood by way of a term that has been used in connection with the performances and revels (often lawyerly) at the Inns of Court in sixteenth-century England: 'solemn foolery.'<sup>87</sup> This case was serious, yes (it ultimately cost Post a lot of money and established a widely accepted common law precedent); but it was also silly (this was a lot of time, attention, and money to spend on a €75 fox). I think Livingston got this, a fact that best explains the unusual style of his dissent; subsequent academic consumers of the case largely did not, certainly the uber-serious later nineteenth-century scholars like Kent, Holmes, and Pollock did not, nor did (with some exceptions) twentieth-century casebooks editors and legal scholars, the 'new mandarins' of the law.

All casebook reproductions of *Pierson v Post* that I have been able to locate, with the exception of Charles Donahue's, omit the lawyers' arguments.<sup>88</sup> Indeed, in many cases, there are not even ellipses in the text indicating that anything has been removed.<sup>89</sup> It is difficult to see how the typical law-student reader or law teacher is supposed to be able to appreciate the important role that the lawyers played when they have been

<sup>85</sup> These are the 'legal fictions' referred to by McDowell, *supra* note 12.

<sup>86</sup> See Fernandez, 'Debate,' *supra* note 38.

<sup>87</sup> Philip J Finkelpearl, *John Marston of the Middle Temple: An Elizabethan Dramatist in his Social Setting* (Cambridge, MA: Harvard University Press, 1969) at 37.

<sup>88</sup> See Charles Donahue, Jr, Thomas E Kauper, & Peter W Martin, *Cases and Materials on Property: An Introduction to the Concept and the Institution* (St. Paul, MN: West, 1974) at 1–2; 2d ed (1983) at 1–2; 3d ed (1993) at 2–3.

<sup>89</sup> See text accompanying notes 106–8.

rendered invisible in this way. There is a lot of Latin in the quotations given in the lawyers' arguments, which probably helps explain why editors have been inclined to exclude them. And yes, the authorities are (to us) obscure. However, they were not to the contemporary participants, who would be asked to read texts like Justinian's *Institutes* and Barbeyrac on Puffendorf by their mentors in the apprenticeship arrangements that still dominated legal education in the nineteenth century.<sup>90</sup> Not every lawyer-in-training would have thrown himself into this with the passion of a John Adams.<sup>91</sup> However, ambitious lawyers desiring to become elite members of the profession, like Pierson's lawyer, Nathan Sanford (who did, in fact, go on to replace Kent as Chancellor of the State of New York in 1823, at that time the state's highest legal office) were certainly enthusiastic about texts like these.<sup>92</sup> Exhibiting one's knowledge of and comfort working with such sources was a way to convince others you deserved a mark of distinction.<sup>93</sup>

Early casebook reproductions of *Pierson v Post* also omit the dissent.<sup>94</sup> The first casebook to include it appears to have been Casner and Leach in 1951.<sup>95</sup> Calling sources like Justinian 'outmoded,' the dissent was included for its insistence on the need to develop an Anglo-American common law separate from the civil law and Roman law.<sup>96</sup> The editors write that 'Justice Livingston, as evidenced by his dissent, was willing to make the separation complete in the early nineteenth century.'<sup>97</sup> This point is made more explicit in the second edition where the editors write that it was of interest, 'but little else,' what English authorities indicated about the relationship between pursuit and possession of wild animals, and 'of no interest at all' what Justinian said. Why? 'We should have been developing an *American* law suited to our needs and based upon our own situation – geographic, political, social.'<sup>98</sup>

<sup>90</sup> Hence the value of a text like David Hoffman, *A Course of Legal Study: Respectfully Addressed to the Students of Law in the United States* (Baltimore, MD: Coale & Maxwell, 1817).

<sup>91</sup> See Coquillette, *supra* note 28 at 83–6, on Adams use of Justinian in a whaling case.

<sup>92</sup> Biographical profiles of Sanford often note his love of learning and knowledge of various languages; see e.g. Halsey, *supra* note 11 at 184–5.

<sup>93</sup> See Robert A Ferguson, *Law and Letters in American Culture* (Cambridge, MA: Harvard University Press, 1984), arguing that law was less technical in this period and so expertise was broad and humanistic.

<sup>94</sup> See e.g. Edward H Warren, *Select Cases and Other Authorities on the Law of Property* (Cambridge, MA: The Editor, 1915) at 1–3; Harry A Bigelow, *Personal Property* (St. Paul, MN: West, 1917) at 141–3.

<sup>95</sup> See 'Casner & Leach,' *supra* note 19, 1st standard ed (1951) at 13–4.

<sup>96</sup> See *ibid* at 15.

<sup>97</sup> *Ibid*.

<sup>98</sup> 'Casner & Leach,' *supra* note 19, 2d ed (1969) at 15 [emphasis in the original].

The dissent certainly made the point about independence ('Whatever Justinian may have thought of the matter . . . [Have we] not a right to establish a rule for ourselves[?]').<sup>99</sup> Now, it is true that Livingston expressed frustration with civil law sources and their contrary indications in *Pierson* and other cases.<sup>100</sup> However, he also relied heavily on 'foreign' law in his later decisions on the United States Supreme Court, where he carved out a specialization in commercial and maritime law, areas that relied heavily on such sources.<sup>101</sup> One would not say, then, that he was willing in 1805 to make the separation between Anglo-American common law and foreign law 'complete.'<sup>102</sup> This is an example of the editors' wanting to have Livingston make the provincially inflected and, I suppose it seemed to them in the 1950s, patriotic point, putting it very far forward in the way that they edited the decision and presented it in the notes and questions. They also edited out some of the wackier parts of the dissent.<sup>103</sup> Students are expressly warned not to 'permit his [Livingston's] facetiousness of expression . . . to obscure the trend of his thought.'<sup>104</sup> The editing is clearly intended to help de-emphasize puzzling aspects of the text that might distract students from taking home the point about the irrelevance of 'foreign' law and the importance of an indigenous and truly *American* (their emphasis) perspective.

Casner & Leach notes Livingston's impatience with the parties and with the 'pomposity' of Tompkins' majority opinion.<sup>105</sup> Yet, the possibility that Livingston might have been responding to the pomposity of the lawyers and the ridiculous amount of energy and money spent on this 75¢ fox is not contemplated, and like earlier casebooks, Casner & Leach excludes the lawyers' arguments, and there are no ellipses marking where something has been removed.<sup>106</sup> Oddly, Casner & Leach asks students to consider 'how far Tompkins, J., was justified in stating that *Pierson v. Post*

<sup>99</sup> *Pierson*, supra note 4 at 181.

<sup>100</sup> See *ibid* at 181: 'Writers on general law, who have favored us with their speculations on these points, differ on them all.' See also *Penny and Scribner v The NY Insurance Co*, 3 Cai R 155 at 160 (NY Sup Ct, 1805); *Lawrence v Sebor*, 2 Cai R 203 at 207 (NY Sup Ct, 1804).

<sup>101</sup> See *Dictionary of American Biography*, 1936 ed, *sub verbo* 'Henry Brockholst Livingston,' noting that Livingston wrote only thirty-eight majority opinions when he was on the United States Supreme Court, none of which dealt with a constitutional issue – 'they deal rather with questions of maritime and commercial law in which he was deeply interest and highly trained.'

<sup>102</sup> See 'Casner & Leach,' supra note 19, 1st standard ed (1951) at 15.

<sup>103</sup> *Ibid* at 14.

<sup>104</sup> See *ibid*.

<sup>105</sup> See *ibid* at 15.

<sup>106</sup> See *ibid* at 11.

“was argued with much ability by the counsel on both sides,”<sup>107</sup> a question that would seem to have been leading them to answer that it had not been argued with much ability. It is difficult to see how the lawyers’ arguments could have made any impression at all, let alone be evaluated, if they were not even reproduced. Someone seemed to notice this and took that note out in the second edition but still no lawyers’ arguments or ellipses noting where they had been deleted appeared.<sup>108</sup>

Inclusion of the dissent in property law casebooks became standard in the 1970s, with some casebooks allowing the jocular tone of the dissent actually to have an impact on the kind of notes and materials appended to the case rather than setting out to contain and control it as Casner & Leach did. In 1977 (when I was 4 years old), Charles Haar and Lance Liebman published a casebook that includes the dissent (unedited) and added to the notes and questions section excerpts from a 1974 case in which a show parrot named Chester ‘flew the coop.’<sup>109</sup> Another note quotes a passage from Perry Miller about how knowledge of civil law operated as ‘a badge of cultivation,’ a way to ‘dazzle clients and juries’ and an opportunity for elite lawyers to ‘express their contempt for those who did not follow the law “as a liberal and scientific study.”’<sup>110</sup> A third includes a story in which a man discovered that he and his adversary in the dispute were described by his adversary’s lawyer as ‘[t]wo fat geese’ and that the adversary’s lawyer had recommended to the lawyer the man was about to retain, ‘You pluck one. I’ll pluck the other.’<sup>111</sup> A supplement published in 1982 provides students with a long excerpt from the ‘Fast Fish, Loose Fish’ chapter of Melville’s *Moby-Dick*.<sup>112</sup> The second edition includes a witty *repartee* or imaginary dialogue about jackasses and the ownership of their offspring.<sup>113</sup> Here, finally, were editors of the text who were not afraid of the mock aspects of the case, its literary dimensions, and its wider historical context.

<sup>107</sup> *Ibid* at 15.

<sup>108</sup> See ‘Casner & Leach,’ *supra* note 19, 2d ed (1969) at 15 [note deleted], 11 [ellipses lacking]. No lawyers’ arguments or ellipses appear in the third edition either; see *ibid*, 3d ed (1984) at 10–1. This remains true in the later Aspen publications of this casebook in the 2000s; see *ibid*, 4th ed by A James Casner et al (New York: Aspen Law & Business, 2000) at 23–9; *ibid*, 5th ed by A James Casner et al (New York: Aspen, 2004) at 34–40.

<sup>109</sup> See Charles M Haar & Lance Liebman, *Property and Law* (Boston, MA: Little, Brown: 1977) at 25–7, 28, n, 4 [‘Haar & Liebman’]: the court ruled that the rule of *ferae naturae* did not prevail, as Chester was a domesticated animal and the person who had used food to lure him away from the ASPCA educational exhibitions for children had not acquired a property in him by capture.

<sup>110</sup> See *ibid* at 28, 29, n 5.

<sup>111</sup> *Ibid* at 29, n 6.

<sup>112</sup> See *ibid*, supplement at 7–9.

<sup>113</sup> See *ibid*, 2d ed, at 40–1.

Casebooks that started in the 1980s and 1990s tended to put *Johnson v M'Intosh* before *Pierson*, in order really to begin at the beginning, with white settlers and their relationship to previously owned Indian lands.<sup>114</sup> Jesse Dukeminier and James Krier's law-and-economics-oriented collection was first published in 1981.<sup>115</sup> It puts *Pierson* second to *Johnson v M'Intosh*, starting in its second edition in 1988.<sup>116</sup> Joseph Singer's casebook, first published in 1993, puts *Pierson* even a little deeper in, after two Indian land cases (including *Johnson v M'Intosh*), and is followed by cases relating to oil and gas, in this way making explicit the connection between wild animals and other 'fugitive' resources.<sup>117</sup> Dukeminier & Krier asks, 'What are the benefits of "certainty" in a property system? Might there be disadvantages in advancing the objective of certainty?'<sup>118</sup> Singer asks, 'What rule of Law – Tompkins' or Livingston's – creates the most certainty about ownership rights? Is the rule that creates the most certainty also the most just?'<sup>119</sup>

What the casebook editor includes or omits, what questions are asked after the text, just like the questions asked in the classroom itself, will shape what the case comes to mean collectively for the profession, as more and more students are exposed to it over time. What you see depends literally on what you can see, and certainly on what is emphasized to you; or, from the perspective of the authoritative casebook editor or treatise writer, you make sure to keep in sight what you think should be seen. For *Pierson v Post*, that seems largely to have meant, at least in its early law-school casebook days and until the 1970s, suppressing or carefully managing the dissent to keep its oddities from becoming too 'distracting' and making no space at all for the lawyers' arguments, a practice which continues, for the most part, to this day.<sup>120</sup>

114 *Johnson v M'Intosh*, 21 US (8 Wheat) 543 (1823); see Lindsay G Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous People of Their Lands* (New York: Oxford University Press, 2005).

115 See Jesse Dukeminier & James E Krier, *Property* (Boston, MA: Little, Brown, 1981) at 34–8 [Dukeminier & Krier].

116 See *ibid*, 2d ed (1988) at 15–9.

117 See Joseph William Singer, *Property Law: Rules, Policies, and Practices* (Boston, MA: Little, Brown, 1993) at 56–72 [Singer].

118 Dukeminier & Krier, *supra* note 115, 1st ed (1981) at 40, n 2.

119 See Singer, *supra* note 117 at 61, n 4.

120 This is true of both Dukeminier & Krier, *supra* note 115, and Singer, *ibid*, which like 'Haar & Liebman,' *supra* note 109, do at least include ellipses where the lawyers' arguments were, indicating that something has been removed. See Dukeminier & Krier, *supra* note 115, 7th ed by Jesse Dukeminier et al (New York: Aspen Law & Business, 2010) at 18; Singer, *supra* note 117, 5th ed (New York: Aspen Law & Business, 2010) at 152.

The point is to see that the case itself, while seeming to be the same, has not actually been the same text over time and that its meaning has been greatly influenced by the ways in which it has been reproduced, edited, and presented by casebook editors. Some of this looks like it could be roughly captured by differences in time of initial publication (Casner & Leach in the patriotic and conservative 1950s versus Haar & Liebman in the irreverent 1970s) or differences in political ideology between those on the right and more on the left of the political spectrum (Dukeminier & Krier's law-and-economics approach versus Singer's more liberal approach) as well as the rise of Aboriginal rights that would make the kinds of concerns associated with *Johnson v M'Intosh* relevant, starting in the 1970s. Such changes in law school casebooks show that the law school curriculum is not disconnected from the wider social, political, and cultural world in which law schools exist, if anyone needed a demonstration of that. Does anyone? You would think not. Nonetheless, hard-bound, expensive casebooks have a way of giving the impression that they capture something like an essential and natural world of what the law is, not just one authoritative version that is out there competing intensely with other versions, with different emphases and interests, that claim to be equally authoritative.<sup>121</sup> This is obvious if one stops to think about it; however, one gets the impression that few do.

#### IV *The new mandarins*

Starting in the 1960s, *Pierson v Post* began to be featured in the writing of prominent American legal scholars, who, unlike the legal mandarins of the nineteenth century, would have encountered the (memorable) case in their law school casebooks.<sup>122</sup> It soon became a staple of twentieth-century theorizing about property.

<sup>121</sup> Law school casebooks, then, are like legal treatises. See Angela Fernandez & Markus D. Dubber, 'Introduction: Putting the Legal Treatise in Its Place' in Angela Fernandez & Markus D. Dubber, eds, *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Oxford: Hart, 2012) 1. These collections are often highly personal, as they start their life as local teaching materials. For one account of an English contracts case and its adoption in the University of Toronto contracts casebook, see Angela Fernandez, 'An Object Lesson in Speculation: Multiple Views of the Cathedral in *Leaf v International Galleries*' (2008) 58 UTLJ 481.

<sup>122</sup> See e.g. Charles A. Reich, 'The New Property' (1963-4) 73 Yale LJ 733 at 778; Frank I. Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law' (1966-7) 80 Harv L Rev 1165 at 1244.

University of Chicago law professor Richard Epstein made *Pierson v Post* very central to an influential article he published in 1979.<sup>123</sup> For Epstein, the assumption and failure to demonstrate in the case that the fox was unowned illustrates what he calls ‘the legal reluctance to examine first principles afresh.’<sup>124</sup> He notes that what he calls ‘the little question – what counts as taking first possession – received exhaustive attention’ in the case, while ‘[t]he large question – why is first possession sufficient to support a claim for ownership – received no consideration.’<sup>125</sup> He takes the case as a challenge to try to articulate ‘how given bits of property are matched with given individuals.’<sup>126</sup> And in such an investigation ‘taking possession of unowned things’ as a way of acquiring ownership is the key focus.<sup>127</sup>

Carol Rose put *Pierson v Post* front and centre in her famous article in the *University of Chicago Law Review* in 1985, ‘Possession as the Origin of Property’; she uses the majority rule in *Pierson* to support her theory about property as communication and that possession, specifically, requires a ‘clear act.’<sup>128</sup> Rose writes, ‘possession as the basis of property ownership, then, seems to amount to something like yelling loudly enough to all who may be interested.’<sup>129</sup> However, it is unclear what was not clear about starting and chasing a fox. Anyone who saw that, hunter or no hunter, would know what it meant – they might not respect it, as in *Pierson*’s case, if they had reasons not to; but that is not a problem of comprehension or clarity. Starting and chasing a fox with ‘dogs and hounds’ is a clear declaration by the pursuer that he has demonstrated what Rose takes to be required; namely, ‘an unequivocal intention of appropriating the animal to his individual use.’<sup>130</sup> When Tompkins spoke about a clear rule being best, he meant *a clear rule to decide who should get the fox*, the hunter or the interloper. There was no lack of clarity in the signal the hunter sent, the problem was with the degree of control Post had obtained as compared with *Pierson*. Indeed, Post probably alleged that *Pierson* took the fox with malice precisely because it was so clear what he, Post, was doing hunting the fox.<sup>131</sup> Rose poses a series of

<sup>123</sup> See Richard A Epstein, ‘Possession as the Root of Title’ (1978–9) 13 Ga L Rev 1221 at 1224–31.

<sup>124</sup> *Ibid* at 1224.

<sup>125</sup> *Ibid* at 1225.

<sup>126</sup> *Ibid* at 1221.

<sup>127</sup> *Ibid* at 1222.

<sup>128</sup> Carol M Rose, ‘Possession as the Origin of Property’ (1985) 52 U Chicago L Rev 73 [Rose].

<sup>129</sup> *Ibid* at 81.

<sup>130</sup> *Ibid* at 76, quoting *Pierson v Post*.

<sup>131</sup> The point about malice is a new element revealed in the recently discovered judgment roll in the case; see Judgment Roll, *supra* note 18 at 4–5. However, we always knew

questions meant to make a slippery-slope point about the difficulty of pinpointing when exactly pursuit would be deemed to be sufficient: ‘The problem with assigning “possession” prior to the kill is, of course, that we need a principle to tell us when to assign it. Shall we assign it when the hunt begins?’<sup>132</sup> No. ‘When the hunter assembles his dogs for the hunt?’<sup>133</sup> Clearly, no. ‘When the hunter buys his dogs?’<sup>134</sup> Clearly, clearly, no. Why not assign it when the hunter finds and starts the fox? Livingston included a similar continuum when he implied that it could not be enough ‘to acquire dominion over a thing, before in common’ that ‘we barely see it, or know where it is, or wish for it’ – those things would clearly not be enough. However, to ‘make a declaration of our will respecting it?’ – that would be enough Livingston thought.<sup>135</sup> So long as we had a ‘reasonable prospect’ of catching it, an ambit that could be circumscribed by hot pursuit and/or wounding.

Henry Smith takes Rose’s point about possession as communication and uses it and *Pierson v Post* to focus on a point about audience specificity. ‘The certain-control rule is naturally addressed to a larger and more anonymous audience,’ Smith writes, ‘whereas the hot pursuit rule, with its greater detail, is more appropriate to a small group.’<sup>136</sup> The small group is hunters who will know the custom that pursuit is putting in a claim to the animal. Smith uses *Pierson v Post* as an illustration of how possession ‘relates to how we define objects for purposes of ownership, which involves the widest set of anonymous interaction among the most heterogeneous audience that the law addresses.’<sup>137</sup> This seems fine as far as it goes; but again, it presupposes that a non-hunter would not understand what pursuit with ‘dogs and hounds’ signalled and that just seems like a stretch.

Livingston’s dissent included a rather obscure reference to deciding the case according to the size of dog Post used – were they ‘large dogs and hounds’ or ‘beagles only.’<sup>138</sup> It came from a passage from Puffendorf, located about a half a dozen pages from the passage Post’s lawyer referred to in his oral argument.<sup>139</sup> Smith refers to it as an example of a

that Post and his ‘dogs and hounds’ were in Pierson’s sight and that Pierson swooped in ‘well knowing the fox was so hunted and pursued’; *Pierson*, supra note 4 at 175.

<sup>132</sup> Rose, supra note 128 at 77.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> *Pierson*, supra note 4 at 181.

<sup>136</sup> See Henry E Smith, ‘The Language of Property: Form, Context, and Audience’ (2002–3) 55 *Stan L Rev* 1105 at 1118 [Smith].

<sup>137</sup> Ibid at 1119.

<sup>138</sup> *Pierson*, supra note 4 at 182.

<sup>139</sup> See Fernandez, ‘Debate,’ supra note 38 at 306–7.

‘very particularized bright line rule’ that would ‘impose a large processing burden on non-hunters,’ who would have little reason to know about this edict from the twelve-century Holy Roman Emperor Frederick I.<sup>140</sup> Smith notes parenthetically that it was meant ‘quite possibly ironically.’<sup>141</sup> I think it almost certainly was and Smith’s use is an excellent example of the way that legal scholars in the process of the serious mandarization of the case have ignored, or, in this case, relegated to a parenthesis, the solemn foolery of Livingston’s dissent.

There is a presumption in both Rose’s and Smith’s work that vagueness is bad (in Rose’s case)<sup>142</sup> and a limited audience is bad (in Smith’s). This seems to translate into a different but related assumption that the greatest amount of clarity is best and the most extensively understood communication is best. However, neither of these positions seems to recognize that a signal that is clear enough (i.e., finding and starting a fox) is okay, as is a heterogeneous audience, so long as heterogeneity is not a barrier to communication and comprehension. *Pierson v Post* is just not a very good case to illustrate that more (i.e., more communication of intent or a more homogenous audience) is always better, when more, at least in this context, is just overkill. To use Rose’s metaphor, the yell given was loud enough. More clarity and, indeed, perhaps even the maximum amount of clarity, can be very important in many legal situations – consider something like the ranking as between secured and unsecured creditors. However, context should be brought to bear when evaluating the varying degrees of importance of clarity and it should not automatically be assumed that more clarity and more certainty are always better.

Nonetheless, the idea that clarity is the most important thing and that the greatest amount of clarity is best even if it is overkill, as well as the failure to appreciate that a significantly lighter degree of attachment might well have been enough in this case, seems to inform the preference other property law teachers have for using *Pierson v Post* to make a point about the superiority of rules over standards; here, the clear capture rule, ‘he who seizes takes,’ over the allegedly ‘fuzzy’ standard that the person in hot pursuit with a reasonable prospect of taking has possession, the principle Livingston articulated in his dissent in *Pierson*. So, for instance, James Krier writes about *Pierson v Post* that ‘[t]he majority wanted a clear and certain rule, and here capture served best: it’s easier to determine who first caught a fox than to determine, as the dissenting judge would have it, who first pursued it with a reasonable prospect of

<sup>140</sup> Smith, *supra* note 136 at 1118–9.

<sup>141</sup> *Ibid* at 1118.

<sup>142</sup> See Rose, *supra* note 128 at 78: ‘Society is worst off in a world of vague claims.’

capture.’<sup>143</sup> And, he continues, ‘The rule of capture is just that – a firm fixed rule. The approach of the dissent is what we would today call a standard, as opposed to a rule. (An example of a rule is a stop sign posted on a roadway; an example of a standard is a sign that says “drive carefully when roads are wet”).’<sup>144</sup>

Robert Ellickson also expresses a preference for the majority over the dissent in similar terms in an article on the whaling industry in the late 1980s.<sup>145</sup> ‘[U]tilitarian whalers,’ according to Ellickson, ‘concerned with transaction costs associated with their rules . . . would prefer . . . bright-line rules that would eliminate arguments to fuzzy rules that would prolong disputes.’<sup>146</sup> Later he adds, ‘Compared to rules, however, standards are more likely to provoke disputes about proper application.’<sup>147</sup> Speaking specifically about the dissent, Ellickson writes,

Somewhat more responsive to incentive issues would be a rule that a whale belonged to a ship whose crew had first obtained a ‘reasonable prospect’ of capturing it and thereafter remained in fresh pursuit [citing to Livingston’s dissent in *Pierson v Post*]. This rule would reward good performance during the early stages of a hunt and would also free up lost or abandoned whales to later takers. A reasonable-prospect standard, however, is by far the most ambiguous of those yet mentioned, invites transaction costs, and, like the other rules so far discussed, was not employed by whalers.<sup>148</sup>

Robert Deal has argued that Ellickson is mistaken about this. There was a ‘general rule of honouring the rights of a first striker that remained in pursuit with reasonable prospects of success.’<sup>149</sup>

Given the level of disagreement between the authorities cited in *Pierson* (and those that were not cited, like Pothier for reasons of language or the *Digest* due to its unavailability / level of difficulty), Krier writes that ‘the *Pierson* case *should have been* resolved exactly as it was. (Whether it actually would have been resolved in the same manner is, of course, hardly clear).’ Krier is speaking, as he puts it, ‘[f]rom an instrumental point of view – where the end in mind is to have rules that promote

<sup>143</sup> James E Krier, ‘Facts, Information, and the Newly Discovered Record’ (2009) 27 Law and History Review 189 at 192 [Krier, ‘Facts’].

<sup>144</sup> *Ibid* at 193.

<sup>145</sup> See Robert C Ellickson, ‘A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry’ (1989) 5 *JL Econ & Org* 83.

<sup>146</sup> *Ibid* at 87.

<sup>147</sup> *Ibid* at 94.

<sup>148</sup> *Ibid* at 88.

<sup>149</sup> See Robert C Deal, ‘Fast-Fish, Loose-Fish: How Whalers, Lawyers, and Judges Created the British Property Law of Whaling’ (2010) 37 *Ecology LQ* 199 at 218.

constructive competition in the production of goods.<sup>150</sup> Whether the rule of capture does promote constructive competition is another question. Krier himself seems to suggest that, in the environmental context, it creates waste. This is because, as he puts it, the capture rule ‘has been shown in any number of instances to result in relatively rapid depletion rather than long-term conservation, because it induces people who seek to exploit common property resources to gear up, to get more, and to get it faster.’<sup>151</sup> Legislatures and courts (or both) have had to work around the capture rule in a number of situations in order to prevent it from creating waste or anti-social behaviour.<sup>152</sup> There is also a string of cases in which *Pierson* has interfered with or complicated a state’s ability to regulate or conserve its wild life, since, according to the case, the state cannot own animals that have not been subjected to possession.<sup>153</sup> Even if the rule did not create problems for waste reduction and environmental protection, we need to recognize that this instrumental view is just one perspective, which requires us to surrender an instinct about what would have been fair in the case when we really do not have to. Really, all the majority said was needed in order for there to be acquisition by first possession was a clear signal to take, and that signal (hunting with dogs and hounds), by Rose’s own understanding of property as communication, was plenty clear enough. It might be true that a clear capture rule deters lawsuits; it might not. Fact finding is fact finding, whether what is involved is finding out who killed and captured the animal or whether the original hunter was in hot pursuit with a reasonable chance

<sup>150</sup> Krier, ‘Facts,’ supra note 143 at 192, n 8 [emphasis in the original].

<sup>151</sup> James E Krier, ‘Capture and Counteraction: Self-Help by Environmental Zealots’ (1996) 30 U Rich L Rev 1039 at 1052 [Krier, ‘Capture’].

<sup>152</sup> See *Knighton et al v Texaco Producing Inc*, 762 F Supp 686 (US Dist Ct, W Dist of Louis, Shreveport Div, 1991): oil wells; *The City of San Marcos v Texas Commission on Environmental Quality*, 128 SW 3d 264 (Texas CA, 3d Dist, Austin, 2004): groundwater and lamenting the legislature’s failure to replace the capture rule with a reasonable use rule.

<sup>153</sup> See e.g. *Douglas v Seacoast Products Inc et al*, 431 US 265, 97 S Ct 1740 (US Sup Ct, 1977), on the question ‘can a state own its wild animals’ first posed by the US Supreme Court; *United States v Long Cove Seafood Inc*, 582 F 2d 159 (US CA, 2d Cir, 1978), stating that New York clams could not be ‘stolen’ by another state; *Idaho ex rel Evans v Oregon*, 462 US 1017, 103 S Ct 2817 (US Sup Ct, 1983): Idaho suing Oregon and Washington for equitable apportionment of fish in a shared river; *Clajon v Prod Corp v Petera*, 854 F Supp 843 (US Dist Ct, Dist of Wyoming, 1994): constitutional challenges to the state regulation scheme governing the allocation and distribution of hunting licences for elk, deer, and antelope by landowners; *State of Texas v Bartee*, 894 S W 2d 34 (CA Texas, San Antonio, 1994), asking is theft of white tailed deer possible? Like Wyoming and New York, Texas had a statute stating that its wild animals were the property of the state. Even if the state could use its police power to preserve and regulate wild animals, the law of capture created a problem.

of success. Even if there are more ‘transaction costs’ involved in the use of a standard rather than a rule, it might well be the right thing to do to adopt the standard when a rule is a bad rule.

The idea that clarity and certainty are the most important factors in the choice of the best rule even when they are more than what is required seems to have led to a fixation on rules versus standards that has received undue emphasis and has left scholars unable to challenge the holding in *Pierson v Post* even when there is the desire to do so, as in Krier’s case.<sup>154</sup> That seems like an odd (and undesirable) place to be, admiring the case for having been decided correctly (i.e., efficiently), while at the same time recognizing that the rule is actually a bad rule (from the perspective of societal consequences).

The current successor to Casner & Leach is probably a good snapshot of where things currently are at. With the original compilers long gone, editions in the 2000s have stopped editing the dissent to contain and control it and have replaced the conservative/patriot notes and questions that had their origins in the 1950s with new ones. One of these notes reads,

The majority cites certainty as one of the reasons favoring the rule it adopted. What are the advantages of certainty in legal rules? As you will see, property rules range from ‘bright line’ clear rules, like first in time get it all, to ‘mushy’ rules that require sharing resources like water ‘reasonably’ or that mandate ‘equitable’ division of property on dissolution of marriage.<sup>155</sup>

The note then asks, ‘How would you characterize the rule that Post wanted to adopt?’ The answer to the question is clearly that Post’s rule is ‘mushy.’ Now, who is going to speak up in favour of that? Is ‘mushy’ ever good? It seems doubtful.<sup>156</sup> Carol Rose calls these ‘mud rules,’ which again are difficult to see in a positive light.<sup>157</sup> And, in this way, new (or relatively new) law students are being told that clear and certain rules are superior to vague, ‘fuzzy,’ ‘mushy,’ or ‘muddy’ standards.<sup>158</sup>

<sup>154</sup> See Krier, ‘Facts,’ supra note 143 at 193; Krier, ‘Capture,’ supra note 151 at 1052.

<sup>155</sup> See Casner & Leach, supra note 19, 4th ed by A James Casner et al (New York: Aspen Law & Business, 2000) at 23–9; *ibid*, 5th ed by A James Casner et al (2004) at 34–40, 4th ed (2000), at 40, n 6.

<sup>156</sup> The *Teacher’s Manual* says the following about this note: ‘Post’s proposed rule would certainly be mushier than the one the court adopted, but not as mushy as the kind of rule you might get if you pursued some sort of sharing, or punish-undesirable-behavior resolution of the dispute’; *ibid*, 5th ed, *Teacher’s Manual* at 14: ‘Page 40, Question 6’.

<sup>157</sup> Carol Rose, ‘Crystals and Mud’ (1988) *Stan L Rev* 577.

<sup>158</sup> But see *ibid* at 609, acknowledging that ‘there is a version of certainty and predictability in mud rules.’

This is a frustrating bias in the law-and-economics literature, as scholars have repeatedly pointed out that rules are not always superior to standards. So, for instance, when the language was used by Hart and Sacks and the legal process school, there was no pre-decided preference for rules over standards. Both were recognized as legitimate ways in which to formulate legal rules and a preference for one over the other was supposed to be determined by the desired social outcome.<sup>159</sup> Louis Kaplow has pointed out that ‘the familiar suggestion that rules tend to be over- and underinclusive relative to standards . . . is misleading because typically it implicitly compares a complex standard and a relatively simple rule, whereas both rules and standards can in fact be quite simple or highly detailed in their operation.’<sup>160</sup>

[T]here are simple and complex rules as well as simple and complex standards . . . in some instances in which the complex standard is superior, it may be that complexity is better than simplicity . . . or, it may be that a standard is better than a rule, but a simple standard would be preferable to a complex one.<sup>161</sup>

In *Pierson*, we arguably have a simple rule and a simple standard and it is not clear which one is superior, especially when one factors in the point that a standard effectively becomes a rule once it establishes a precedent.<sup>162</sup>

Unfortunately, however, students of law and economics have tried to take to the next level the rule versus standards way of looking at *Pierson v Post* and the assumption that rules are superior to standards, turning a complex and multifaceted text into an algorithm.<sup>163</sup> Not ‘getting’ what Livingston was doing in the dissent (responding to the pompousness of the lawyers and the trivialness of the nonetheless serious dispute) seems to have led these economists to repeat Livingston’s mistake or take

<sup>159</sup> See William N Eskridge Jr & Philip P Frickey, ‘The Making of the Legal Process’ (1993–4) 107 Harv L Rev 2031 at 2044.

<sup>160</sup> Louis Kaplow, ‘Rules versus Standards: An Economic Analysis’ (1992–3) 42 Duke LJ 557 at 565; also *ibid* at 589, pointing out that the suggestion is made that ‘rules limit the range of permissible considerations whereas standards do not. Observe, however, that a rule cannot be over- or underinclusive relative to a standard if one is comparing the standard to the rule equivalent to the standard. Implicitly, therefore, commentators must be comparing a complex standard to a simple rule’; also *ibid* at 594, calling it ‘a romantic perspective’ to imagine that standards allow more room to manoeuvre; and also *ibid* at 596: ‘[T]here is no universal tendency for standards as they are actually applied to be more complex than rules that would plausibly be promulgated.’

<sup>161</sup> *Ibid* at 566–7.

<sup>162</sup> See *ibid* at 577.

<sup>163</sup> See Dhammika Dharmapala & Rohan Pitchford, ‘An Economic Analysis of “Riding to Hounds”’: *Pierson v Post* Revisited’ (2002) 18 JL Econ & Org 39 [Dharmapala & Pitchford].

seriously a point he did not mean should be taken seriously; namely, that fox hunting means more foxes not fewer, a factor which would cause problems for their calculations.<sup>164</sup> If Ellickson can be accused of having read too much Melville, these scholars could have done with reading a bit more Anthony Trollope. His novels make it clear how important healthy fox populations were to the hunt and what a terrible crime it was ('vulpecide') to poison or otherwise exterminate foxes from a neighbourhood, treating them as if they were mere vermin.<sup>165</sup> So, for instance, one of the characters in *The American Senator* (1877) is described in the following way: 'Of course, Goarly was a brute. Had he not threatened to shoot foxes?'<sup>166</sup> And another member of the community says about him, disapprovingly, 'It wouldn't have been the first fox he's *murdered*.'<sup>167</sup> A reductionist way of thinking about the case has even resulted in its use in artificial intelligence modelling, certainly a sign that we have lost anything approximating a nuanced perspective.<sup>168</sup>

It is probably one of the inescapable human truths that some people like nuance and others do not, or, as the question is sometimes put to legal scholars, 'what do you prefer, the unrelenting desert heat of law and economics or the swampy terrain of law and society?'<sup>169</sup> As Ellickson has written, '[T]he law-and-economics scholars believe that the law-and-society group is deficient in both sophistication and rigor, and the law-and-society scholars believe that the law-and-economics theorists are not only out of touch with reality but also short on humanity.'<sup>170</sup> My own view is that, at least on *Pierson*, the law and economics perspective has failed to get what the case was about and the case really should be seen in its fullest and most interesting light – socially, historically, culturally – not as a parsed down point, pre-decided it seems, about the superiority of rules over standards. So, on the one hand, there are much more interesting things to say about the case. On the other hand, the case actually

164 See *ibid* at 44. For a litany of criticisms of this approach, see McDowell, *supra* note 12 at 768–9.

165 See Watson, *supra* note 27 at 441, relying on Trollope for the claim that fox hunting meant more foxes not fewer.

166 Anthony Trollope, *The American Senator* (New York: Oxford University Press, 2008) at 22.

167 *Ibid* at 27 [emphasis added]. The 'vulpecide' reference is *ibid* at 62.

168 See Thomas F Gordon & Douglas Walton, 'Pierson vs. Post Revisited: A Reconstruction Using the Carneades Argumentation Framework' in Paul E Dunne & Trevor JM Bench-Capon, eds, *Computational Models of Argument* (Amsterdam: IOS Press, 2006) at 208.

169 See Robert C Ellickston, *Order without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1991) at 147, attributing this language of desert and swamp to Arthur Leff.

170 *Ibid* at 7.

does a poor job of communicating what law and economics scholars want it to say. In the same way that the authorities upon a closer inspection do not clearly support *Pierson*, the allegedly ‘fuzzy,’ ‘mushy,’ or ‘muddy’ standard was actually quite clear enough.

Why has the case come to be seen as a parsed down lesson about rules versus standards? This is a complicated question and one would have to do a study of the American legal academy in the twentieth century and the rise of the law and economics movement in the 1980s in order to answer it properly. There must be something related to ‘path dependence,’ as the economists themselves would put it. People learn the case in a certain way and it makes it difficult for them to see it in any other way. Alan Watson has written the following: ‘First-year students are misled because their teachers were themselves misled in their own first year.’<sup>171</sup> It is true that law professors are free to choose whichever one of the casebooks they think provides the best overall perspective; however, it is also true that they probably often choose, as a matter of default, the casebook they were taught with and they know. Teacher manuals (a phenomenon that exists for American casebooks but not for Canadian ones given the much smaller law school market in Canada) must contribute tremendously to cementing an already rigid perspective about what is important and what is not.<sup>172</sup> A canonical case like *Pierson* can easily become a kind of sacred cow to those who are invested in seeing it in a particular way. That seems fundamentally problematic from the perspective of what we should be trying to do as scholars of the law and certainly of legal history.

<sup>171</sup> Watson, *supra* note 27 at 443.

<sup>172</sup> Canadian property casebooks do sometimes include references to *Pierson* but do not reproduce it in full. See e.g. Mary Jane Mossman & William F Flanagan, *Property Law: Cases and Commentary*, 2d ed (Toronto: Emond Montgomery, 2004) at 95–105 (reproducing Rose, *supra* note 128, Patricia William’s famous comparison between the fox and her great-great-grandmother who was a slave from *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge, MA: Harvard University Press, 1991) at 156–57, as well as a reference to some comic connections, including a humorous story from Newfoundland called ‘Stealin’ the Holes,’ which I recall reading as a child – see <http://www.pigeoninlet.com/stealin.htm>); Bruce Ziff et al, *A Property Reader: Cases, Questions, & Commentary*, 3d ed (Toronto: Thomson Carswell, 2012) at 293–306, reproducing *Popov v Hayashi*, *supra* note 9, excerpts from *Pierson*, and notes and questions that seem to favor a law and economics perspective – see n 7, referring to costs and Dharmapala and Pitchford, *supra* note 163; n 8, drawing out criticism of the sharing rule in *Popov* over winner-take-all in *Pierson*; and n 11 connecting first-in-time rules to the California gold rush and present-day Canadian mining law. *Pierson* was not included at all in the casebook I was taught with as a law student. See Derek Mendes Da Costa, Richard J Balfour, & Eileen E Gillese, *Property Law: Cases, Text and Materials*, 2d ed (Toronto: Emond Montgomery, 1990).