

LEGAL FICTIONS IN *PIERSON V. POST*

Andrea McDowell*

*American courts and citizens generally take the importance of private property for granted. Scholars have sought to explain its primacy using numerous legal doctrines, including natural law, the Lockean principle of a right to the product of one's labor, Law & Economics theories about the incentives created by property ownership, and the importance of bright line rules. The leading case on the necessity of private property, *Pierson v. Post*, makes all four of these points. This Article argues that *Pierson* has been misunderstood. *Pierson* was in fact a defective torts case that the judges shoe-horned into a property mold using legal fictions and antiquated "facts" about foxhunting. Moreover, at least one of the judges knew his arguments were farfetched. My conclusions undermine several theories about private property that are based on *Pierson v. Post*.*

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* Associate Professor of Law, Seton Hall School of Law. I would like to thank Bethany Berger, Carl Coleman, Charles Donahue, Angela Fernandez, Rachel Godsil, Robert Gordon, Brian Simpson, Henry Smith, Charles Sullivan, and James Whitman for their help. I am also grateful to Alan Schwartz for drawing my attention to the Dharmapala article, Anita Allen for alerting me to *Sharpe v. Sabin*, Ms. Jeanie Sherman at the Connecticut State Library for providing me with a copy of the same, Mr. James Folts at the New York State Archives, and Ms. Marci Vail at the East Hampton Library. Finally, I have benefited greatly from the comments of my colleagues at Seton Hall.

INTRODUCTION

Pierson v. Post was decided in 1805, just over two hundred years ago.¹ It is famous today as the leading case for the proposition that private property is necessary and desirable, and it is included for that purpose in leading property law textbooks² and in property law scholarship.³ Some of the practical claims and policy arguments in the opinions, however, are peculiar, and I would even go so far as to call them frivolous. We can infer from the half-joking, half-serious tone of the dissenting judge, Henry Brockholst Livingston, that he would agree with this assessment. Despite what should be obvious from his style, scholars have taken seriously his description of foxhunting and based their theories, at least in part, on insubstantial foundations. This article seeks to correct those misunderstandings.

The whole statement of facts in the reporter, at least part of which was taken from Post's complaint, is one sentence long:

Post, being in possession of certain dogs and hounds under his command, did, "upon a certain wild and uninhabited, unpossessed and waste land, called the beach, find and start one of those noxious beasts called a fox," and whilst there hunting, chasing and pursuing the same with his dogs and hounds, and when in view thereof, *Pierson*, well knowing the fox was so hunted and pursued, did, in the sight of *Post*, to prevent his catching the same, kill and carry it off.⁴

Post, the hunter, sued Pierson, the killer, in trespass-on-the-case and won at trial. Pierson appealed on six grounds, but the Supreme Court of New York granted certiorari on a single issue: whether Post had acquired a property in the fox.⁵

Judge Tompkins, writing for the majority, finds no property in the hunter and holds for the killer on two grounds. First, he cites Roman and civil law

1. *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

2. *Pierson* is used to kick-start many, perhaps most, property law classes in U.S. law schools. See Charles Donahue, Jr., *Animalia Ferae Naturae: Rome, Bologna, Leyden, Oxford and Queen's County, N.Y.*, in *STUDIES IN ROMAN LAW IN MEMORY OF A. ARTHUR SCHILLER* 39 n.1 (Roger S. Bagnall & William V. Harris eds., 1986); Robert G. Natelson, *The Constitution and the Public Trust*, 52 *BUFF. L. REV.* 1077, 1129 (2004) (calling *Pierson v. Post* "the immortal New York 'fox chasing' case still regularly inflicted on American law students"); Joan Williams, *The Rhetoric of Property*, 83 *IOWA L. REV.* 277, 285 (1998).

3. A complete list of law journal articles that discuss *Pierson v. Post* would be too long to be included here. Among them are Lawrence Berger, *An Analysis of the Doctrine That "First in Time is First in Right,"* 64 *NEB. L. REV.* 349, 354-355 (1985); Richard A. Epstein, *Possession as the Root of Title*, 13 *GA. L. REV.* 1221 (1979); Eric T. Freyfogle, *Water Justice*, 1986 *ILL. L. REV.* 481, 496 n.42 (1986); Carol M. Rose, *Possession as the Origin of Property*, 52 *U. CHI. L. REV.* 73 (1985) [hereinafter Rose, *Possession*]; Carol M. Rose, *Given-Ness and Gift: Property and the Quest for Environmental Ethics*, 24 *ENVTL. L.* 1, 5 & n.13 (1994). Other journal articles focusing on *Pierson* are cited in the references below.

4. *Pierson*, 3 Cai. at 175.

5. The Supreme Court of Judicature was the appellate court for criminal and civil matters at this time. The court of last resort was called the Court for the Trial of Impeachments and Correction of Errors. See N.Y. STATE ARCHIVES & RECORDS ADMIN., "DUELY & CONSTANTLY KEPT": A HISTORY OF THE NEW YORK SUPREME COURT, 1691-1847, at 2-3 (1991).

jurists for the principle that property in *ferae naturae* can only be acquired by capture. This natural law argument, however, did not necessarily resolve the dispute. As Charles Donahue notes, jurists differed on the question of what amounted to capture.⁶ This enabled Tompkins to choose the outcome consistent with his second consideration, namely the advantage of a bright line rule. Ultimately, he favored Pierson, the killer, because this was the result that would provide the most certainty and thereby promote the policy of peace and order in society.

Judge Livingston dissented, also making two arguments: first, a utilitarian argument that the court's holding should promote the extermination of pests; second, a Lockean fairness claim that one is entitled to the fruits of one's labor. Readers have given too much credit to both of these arguments, however. The first was based on the fiction that the elaborate and expensive sport of foxhunting served an important public purpose; the second on the fiction, required by the posture of the case, that the dead fox was valuable property.

The multiple policy considerations raised by *Pierson v. Post* make it a rich case for class discussion—it truly has endless possibilities. However, by taking Livingston's argument seriously, generations of students and a number of prominent scholars have built their understanding of property on a shaky foundation. Modern scholars, including James Krier,⁷ Dhammika Dharmapala and Rohan Pitchford,⁸ and Carol Rose,⁹ have based arguments on a misunderstanding of the facts on the ground and have given the Livingston opinion a general application that is not only undeserved but ironic.

In this Article, I show that Livingston's unpersuasive argument that the law should favor hunters because they perform a public service reflects English law that was already archaic in 1805. His reasoning presumes an English-style foxhunt. The horn, horses, and pack of hounds, as well as the all-day hunt and the phrases "honours of the chase," "at the death," and "triumph," are all characteristic of formal foxhunting. They are not appropriate to more utilitarian ways of killing an animal, such as shooting, trapping, poisoning, or, as in Pierson's case, bludgeoning to death.

While it is true that English common law had favored hunters because of their service to the community, that rule was long outdated when Livingston wrote his opinion. Foxhunting had become a luxury sport, and social norms had changed to reflect a more Coasian approach to the conflict between hunters and land holders. Within four years of *Pierson v. Post*, this rift

6. See Donahue, *supra* note 2, at 62–63 (showing that the writers of the natural law school were divided on the question presented in *Pierson*, and suggesting that Tompkins chose the opinion that supported the result he wanted to reach).

7. James E. Krier, *Capture and Counteraction: Self-Help by Environmental Zealots*, 30 U. RICH. L. REV. 1039 (1996).

8. Dhammika Dharmapala & Rohan Pitchford, *An Economic Analysis of "Riding to Hounds": Pierson v. Post Revisited*, 18 J.L. ECON. & ORG. 39 (2002).

9. Rose, *Possession*, *supra* note 3.

between social practice and the law evoked in Livingston's opinion was recognized in *Essex v. Capel* (1809).¹⁰ In practice, foxhunters of the eighteenth century did not seek to eradicate foxes but actually went to great lengths to maintain the population by protecting their breeding areas and, when there was a scarcity in one location, by bringing in foxes from another.

I will also show that, by 1800, the English population, and, in 1809, the English courts, understood that the issue before them was which of two competing activities—hunting for sport or destroying vermin—should be favored. This was eventually settled not by the courts but by the evolution of a convention that foxes should be allowed to thrive and that hunters would compensate farmers for farm animals lost to foxes. In other words, English hunters internalized the damage caused by a healthy, huntable fox population.¹¹ Livingston, however, used the outdated common law rules in a changed world, and it is no wonder that his opinion is somewhat convoluted. If, in addition, Livingston's assumption that Post was hunting in the English style was mistaken, as it may have been, his reasoning would be even more off the mark. Modern scholarship on *Pierson* that takes Livingston's policy statement at face value is therefore misguided.

Moreover, the dead fox was worth little to Pierson and nothing to Post. Yet Livingston's opinion has been taken to mean that the hunter's efforts should be rewarded with the fox pelt. As Livingston knew, however, Post had no use for a dead fox; he wanted the triumph of the kill. In fact, at the end of an English style hunt, there was no fox at all—it was eaten by the hounds.

Contrary to most property theorists, I shall argue that the harm Post suffered was malicious interference with the hunt, but that he had to shoe-horn the facts into a property claim because of common law constraints. There are signs that Post originally sued in tort. Without the equivalent of the modern "hunter harassment statutes," however, he had to show a property interest as part of his claim, giving rise to the novel questions of property law for which the case is famous. The paradoxes in the opinion arise from the court's willingness to treat this as a property case.

This Article begins with a brief review of the majority and dissenting opinions and of the parties in *Pierson v. Post*. Part II discusses the special status of the fox as "vermin" in the common law, which differed from that of other *ferae naturae*. The fact that vermin could not be owned, for instance, has interesting repercussions for the property claims made in *Pierson v. Post*. Part III covers the eighteenth-century development of fox-

10. AN ACCOUNT OF THE TRIAL BETWEEN GEORGE EARL OF ESSEX, PLAINTIFF, AND THE HON. & REV. WM. CAPEL, DEFENDANT, BEFORE THE RIGHT HONOURABLE LORD ELLENBOROUGH, CHIEF JUSTICE OF THE COURT OF KING'S BENCH, AND A SPECIAL JURY, AT THE SUMMER ASSIZES HOLDEN AT HERTFORD, JULY 20TH, 1809; FOR TRESPASSES COMMITTED IN HUNTING WITH THE BERKELEY FOX HOUNDS (Luke Hansard & Sons 1810) [hereinafter AN ACCOUNT OF *Essex v. Capel*]; *Hertford Assizes, Monday, July 24, The Earl of Essex v. The Hon. and Rev. —Capel*, TIMES (London), July 26, 1809, at 2 (describing the trial) [hereinafter *Hertford Assizes*].

11. We might call this a Coasian solution. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

hunting from extermination to a sport for gentlemen. Livingston's argument that riding to hounds was a public service was long out of date, as the English recognized.

Part IV considers foxhunting in the United States. The cost of a hunt was very high compared to either the comparatively low value of a fox skin or the damage that foxes inflicted on farmers. The live fox was much more valuable to Post and his friends than the dead fox was to either Post or Pierson. In America, however, "sportsmanlike" hunting or "hunting to hounds" was practiced only south of New England up to and including New York City and Eastern Long Island. New Englanders disapproved of the elaborate form of the sport, causing additional friction between hunters and non-hunters, and, perhaps, adding to the tensions between Pierson and Post.

Finally, Part V discusses various approaches to *Pierson v. Post* that build on the shaky foundation of Livingston's dissent, including attempts to "solve" Livingston's problem of how best to promote the killing of foxes, analyses of the case in the language of Law & Economics, and the suggestion that Post's counsel could have framed his claim as malicious interference. These discussions go wrong because of Livingston's mischaracterization of the problem.

I shall argue that the facts of *Pierson v. Post* as presented suggest that the issue was not which of the hunters should get a disputed fox, but whether the rules should favor sportsmen or persons who did not value foxes or who regarded them as pests. The *Pierson* case is therefore comparable to modern confrontations over wolves between environmentalists, who want to protect them, and ranchers, who see them primarily as a danger to livestock. It also resembles Coase's example of the rancher and the farmer, in which the rancher's free-roaming cattle cause damage to the farmer's standing crops.¹² I suggest that both classroom discussions and the analysis of the case in scholarship should be adjusted accordingly.

I. THE ISSUE, THE OPINIONS, AND THE PARTIES

Post's immediate grievance was not the loss of the fox, but that Pierson maliciously interfered with his hunt. The complaint suggests as much when it claims that Pierson's motive in killing the animal was "to prevent [Post's] catching the same," i.e., to spoil Post's sport.¹³ The climax of that sport should have been that the hounds killed the fox. After that, the trophy parts were removed—the tail or "brush," the pads, and the mask—and the carcass thrown back to the hounds. A dead fox was no good to Post and it would not have been worth much to Pierson, either. As we shall see, a fox skin was

12. *Id.* at 2.

13. See also Donahue, *supra* note 2, at 48 ("[T]he point of Post's suit against Pierson is not that Pierson took Post's fox. The point is that Pierson interfered with the hunt."). Donahue shows that Post would have had a cause of action for *iniuria* in Roman law, regardless of whether he could prove ownership of the hunted animal. *Id.* at 49–50. I argue below that this cause of action was not available in the U.S.

worth almost nothing compared to a live fox, let alone to the hundreds of dollars invested in the hunt.

A. *The Opinions*

Unfortunately, the New York state archives do not include any briefs or other background material relevant to the underlying quarrel, Post's original suit (which he won), or the details of Pierson's appeal.¹⁴ We know only that, in Livingston's words, "Of six exceptions, taken to the proceedings below, all are abandoned except the third, which reduces the controversy to a single question."¹⁵ The property issue was thus evidently part of a legal theory that covered more than the damage to the fox itself. That the property issue was prior to Post's main cause of action is suggested also by Pierson's counsel's opening, "If . . . Post had not acquired any property in the fox, when it was killed by Pierson, he had no right in it which could be the subject of injury."¹⁶ I suggest that Post originally sued Pierson for the tortious interference with his pursuit of this fox and that Pierson's counsel on appeal, Sanford, successfully argued that a property interest in the fox was a necessary element of this claim.

In any case, the Supreme Court of New York granted certiorari on the single issue of whether Post, by his hunting activity, "acquired such a right to, or property in, the fox as will sustain an action against Pierson for killing and taking him away."¹⁷ Tompkins, who writes the majority opinion, begins by reviewing the positions of various civil law jurists. Charles Donahue has reviewed these works of Roman and natural law writers as they pertain to possessory rights in *animalia ferae naturae*, and found, first of all, that they did not have very much to say on the subject and, second, what they did say was not conclusive.¹⁸ The high level of generality of some sources and the split between others, Donahue suggests, enabled Tompkins to choose the result with which he was most sympathetic, namely the one that provided a bright line rule that would keep these cases out of the courts in the future.¹⁹ Tompkins's decision seeks neither to promote a socially useful activity nor to recognize a moral claim based on the hunter's investment in the hunt.

Livingston is the one who introduces these broader policy considerations. It is clear from his opinion that Livingston understood the

14. Letter from James Folts, Head of Researcher Services, New York State Archives, to author (Aug. 11, 2003) (on file with author) ("New York State Archives staff have made an intensive search for filed papers in the case of *Pierson v. Post* and found nothing relating to the case. Since our NY Supreme Court judgment rolls (1797–1847) are not indexed, I assigned a clerk to go through every single file for the letter P for the years 1805–1806 (several hundred files), and he did not find the judgment roll. I personally reviewed a separate series of writs of certiorari, for which we have a complete listing of cases, and again found no filings for *Pierson v. Post*.").

15. *Pierson v. Post*, 3 Cai. 175, 180 (N.Y. Sup. Ct. 1805).

16. *Id.* at 175.

17. *Id.* at 177.

18. Donahue, *supra* note 2, at 47 (suggesting the case could have come out either way).

19. *Id.* at 62–63.

peculiarities of English-style foxhunting and its history. He dismisses the Roman and civil law rules governing *ferae naturae* because they do not fit the role of the fox as a thing to be chased rather than a thing to be captured or consumed. His own analysis, however, reflects the paradox of foxhunting in the nineteenth century, namely that an activity that was once nothing more than exterminating vermin had become the sport of the very rich. On the one hand, Livingston notes that the dispute between Pierson and Post is really about who is entitled to the pleasure and glory of the kill. On the other hand, to decide who is entitled to that glory, Livingston falls back on the legal fiction that a fox is a noxious beast and “to put him to death wherever found, is allowed to be meritorious, and of public benefit.”²⁰ His argument that foxhunters should be favorites of the law because they performed a social service reflected the English law as it stood when Pierson was decided. Four years later, however, an English court would expose the social service argument as a fiction.

I tentatively suggest that Livingston’s opinion is somewhat convoluted because parts of it are meant to be funny, perhaps to express his exasperation that the case was brought before the Supreme Court in the first place. The first section is particularly humorous, mainly because it grossly exaggerates the importance of the case, which, after all, concerned a dead animal worth at most three dollars. He begins by noting that the case should have been submitted to arbitration, “without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone,” i.e., without bringing in the heavy guns. Since it is now before the Supreme Court of New York, however, Livingston says the judges must do their best using “the partial lights we possess, leaving to a higher tribunal, the correction of any mistake which we may be so unfortunate as to make.”²¹ Such self-deprecation might suit a court deciding a truly epochal question, such as slavery in the territories, though even then the humility would be striking. In a case about a fox, it must be ironic.

Livingston further describes the parties in extravagant terms. The fox is a “wily quadruped,” whose “depredations on farmers and on barnyards, have not been forgotten,” and who is “cunning and ruthless in his career.”²² The hunter is a hero who labors all day to save local poultry. Livingston’s characterization of Pierson as “a saucy intruder” is widely quoted, for no other reason that I can think of but that modern day readers find it funny—and so it is.

The majority opinion contains long quotations in Latin from famous jurists. Livingston, surely in mocking imitation, peppers his own opinion with everyday Latin phrases meaning “speak no ill of the dead,” “enemy of mankind,” and “times change.” In fact, there is hardly a sentence in the first paragraph that is not funny, if one allows oneself to think so. A quick glance

20. *Pierson*, 3 Cai. at 180.

21. *Id.*

22. *Id.* at 181.

at Livingston's other opinions will demonstrate that this is not his usual style.

In the second paragraph, the tone suddenly becomes sober with the observation that Pierson's counsel has a right to expect "that more particular notice be taken of their authorities," and there follows a serious discussion of these sources.²³ "After mature deliberation," Livingston writes, he concludes that Barbeyrac's approach is the most reasonable.

But the next section is whimsical again. Livingston says he would prefer to give an opinion based on essentially arbitrary distinctions in order to avoid giving offense to either party. For instance, the court might find that the fox should go to the hunter if he used large hounds, but to the captor if the hunter used beagles. Who knows what size Post's hounds were? There is, at any rate, no evidence that they were not "of imperial stature," so one might as well find for Post. Thus "by ingenious distinctions, [we might] render it difficult to say (as often happens after a fierce and angry contest) to whom the palm of victory belong[s]."²⁴

Livingston gets serious again in the final paragraph. He repeats the traditional argument that the law should favor persons who hunt vermin and states his proposed holding in precise legal terms: "a pursuit like the present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporal possession, or bodily seisin, confers such a right to the object of it, as to make any one a wrongdoer, who shall interfere and shoulder the spoil."²⁵ This could serve as a black letter rule.

If much of Livingston's opinion is meant to be funny, what does that mean for us? It means that we need not take his argument so seriously and that we should not try too hard to make sense of the internal contradictions. The humor also makes it plausible that the future Justice Livingston did not entirely believe his own argument about the special privileges of foxhunters and that he himself knew there were holes in his reasoning.

B. *The Parties*

The "real" facts of the case are not important at present because the Supreme Court's decision was based on the statement of facts in Post's complaint.²⁶ One cannot help wondering, however, about Pierson's side of the argument and about the relations between the Piersons and the Posts more generally.²⁷ There must have been some larger issue at stake than who owned the fox carcass.²⁸ Pierson and Post both hired distinguished and pre-

23. *Id.*

24. *Id.* at 182.

25. *Id.*

26. *See* Donahue, *supra* note 2, at 43 n.15.

27. For a thorough study of what is known about the Pierson and Post families, see Bethany R. Berger, *It's Not About the Fox: The Untold History of Pierson v. Post*, 55 DUKE L.J. 1089 (2006).

28. For examples of scholars who assume the dispute was about the fox, see Peter A. Appel, *The Embarrassing Rule Against Perpetuities* 54 J. LEGAL EDUC. 264, 280 (2004); Steven M. Wise,

sumably expensive counsel to take their case to the Supreme Court in Albany;²⁹ indeed, legend has it that Pierson and Post spent £1000 each on litigation, an implausibly high figure.³⁰ Either the lawsuit took on a life of its own and grew out of all proportion to its origins, or it was a proxy for some other difference between the two families.

Besides the statement of the facts in the published opinion, the only other descriptions of the encounter between Jesse Pierson and Lodowick Post were written by Judge Henry P. Hedges in the 1890s or quoted from his writings.³¹ Hedges was born in 1817 and moved to Bridgehampton only in 1854.³² Although he knew and conversed with the protagonists in his youth, he did not claim to have discussed the lawsuit with them.³³ His information about the legal proceedings appears to have been derived entirely from the published opinion, and, for the rest, he must have relied on the accounts of local men and women who remembered the events which were, by then, at least thirty years in the past.

As Hedges reconstructs the story, Jesse Pierson was coming home from Amagansett, where he taught school, when he saw the fox “fleeing from his pursuers.”³⁴ It hid in “an old shoal well” or “an unused well” near Peter’s pond.³⁵ “In a moment, with a broken rail, he [Jesse Pierson] was at the well’s mouth and killed the fox, threw it over his shoulder, and was taking it home when Lodowick, with his hounds and partisans met him and demanded the fox.”³⁶ To Lodowick’s objection that Jesse’s act was an “impertinent interference” with his hunt, Jesse replied, in words that sum up succinctly the court’s future holding, “it may be you was going to kill him, but you did not

The Legal Thinghood of Nonhuman Animals, 23 B.C. ENVTL. AFF. L. REV. 471, 531 (1996); Kyle Bjornlund, Book Note, 2004–05 J. HIGH TECH. L. BIMONTHLY REV. BOOKS ONLINE 1 n.1 (reviewing MCKENZIE WARK, *A HACKER MANIFESTO* (2004)), http://www.jhtl.org/book_reviews/2004_2005/bjornlund.pdf.

29. For a discussion of Post’s counsel, Colden, and Pierson’s counsel, Sanford, see Berger, *supra* note 27, at 1133–35. Berger also notes that the court would have been sitting in Albany when *Pierson v. Post* was argued. *Id.* at 1135.

30. Henry P. Hedges, *The Story of Bridgehampton, Long Island, 1660–1910*, in TRACING THE PAST: WRITINGS OF HENRY P. HEDGES 335, at 350–51 (Tom Twomey ed., 2000). Hedges’ remark about the cost of the suit is noted in JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 23 n.8 (6th ed. 2006). The figure is so extremely high, however, that Hedges’ memory may have fooled him on this point. See Berger, *supra* note 27, at 1133.

31. HENRY P. HEDGES, *A HISTORY OF THE TOWN OF EAST-HAMPTON, N.Y.* (Sag-Harbor, J.H. Hunt 1897); H.P. Hedges, *Pierson v. Post*, SAG-HARBOR EXPRESS, Oct. 3, 1895 [hereinafter Hedges, *Pierson v. Post*]. The latter version was quoted in JAMES TRUSLOW ADAMS, *MEMORIALS OF OLD BRIDGEHAMPTON* 167 (1916) and WILLIAM DONALDSON HASLEY, *SKETCHES FROM LOCAL HISTORY* 131 (1935). It is included in the recent collection of Hedges’s work, *The Story of Bridgehampton*, in TRACING THE PAST, *supra* note 30, at 350–51.

32. ADAMS, *supra* note 31, at 166–67 (giving a short biography of Hedges).

33. Hedges, *Pierson v. Post*, *supra* note 31.

34. *Id.*; Hedges, *The Story of Bridgehampton*, in TRACING THE PAST, *supra* note 30 (speaking of Lodowick and “a company with him”).

35. *Shoal for shallow*, presumably. See HASLEY, *supra* note 31, at 200 (map of Bridgehampton showing the site of Peter’s Pond).

36. Hedges, *Pierson v. Post*, *supra* note 31.

kill him. I was going to kill him and did kill him.”³⁷ The more Post accused Pierson of unfairness and meanness, the more resentful Pierson became.

Hedges’s account of the events provides several new details. Most surprisingly, Hedges tells us that Jesse Pierson was not out hunting and did not have a gun. He just seized an opportunity to destroy some vermin or perhaps to have some fun. We also learn from Hedges that Pierson killed the fox at Peter’s Pond, which was near the Pierson family property.³⁸ This provides a possible motive for Jesse’s killing of the fox, namely that it was a danger to Pierson poultry. Generally speaking, Hedges’s version of the events is somewhat more favorable to Pierson’s case than the published statement of the facts—not surprisingly, given that the statement was Post’s version of the story.

David Pierson and Nathan Post, the fathers of the two young men who claimed the fox, were very different characters.³⁹ David Pierson was a farmer, descended from the earliest settlers of Southampton, and a leader in his community.⁴⁰ He was a strict Presbyterian, whose Calvinist convictions were said to border on fatalism.⁴¹ His epitaph was certainly not that of a fun-loving man: “He was distinguished for strong mental power[,] firmness of character & strict integrity.”⁴² It is probably safe to say that, like most New Englanders, David Pierson disapproved of hunting for sport as wasteful and self-indulgent.

The Posts, on the other hand, appear to have been relative newcomers to Southampton.⁴³ Nathan Post’s name first appears in the census of 1776. At that time, he was not yet literate, and his signature was an X.⁴⁴ He may have been a whaler, since he was later a whaling captain.⁴⁵ During the Revolution, Nathan served as First Lieutenant and then Captain of a privateer.⁴⁶ Afterwards, he bought a share of a West India ship and had the means to “own a large farm, build a capacious dwelling, decorate its walls, wainscot his rooms, and finish his house in what was then thought superior style.”⁴⁷ In the meantime, Nathan Post had learned to write, and on his tombstone his name

37. *Id.*

38. *See id.*

39. *See* Berger, *supra* note 27, at 1119–33. Professor Bethany Berger has skillfully reconstructed the histories of the Piersons and the Posts from the records of Southampton and Bridgehampton. *Id.* (suggesting that the underlying dispute between the two families was about who had the right to use the common lands of the community).

40. *Id.* at 1123–25.

41. Hedges, Pierson v. Post, *supra* note 31; *see* Berger, *supra* note 27, at 1124.

42. ADAMS, *supra* note 31, at 319.

43. Berger, *supra* note 27, at 1124–25.

44. *Id.* at 1129.

45. BRIDGEHAMPTON’S THREE HUNDRED YEARS 69 (Paul H. Curts ed., 1956) (providing a “Supplementary List of Whaling Captains”).

46. Berger, *supra* note 27, at 1128.

47. Hedges, Pierson v. Post, *supra* note 31.

carries the honorific *Esquire*.⁴⁸ We have seen already that his son Lodowick was riding to hounds while Jesse Pierson was teaching school.

It is easy to imagine that David Pierson and Nathan Post were so incompatible that any dispute might escalate into a legal battle. The fox was a perfect symbol of their differences. To the puritan farmer, the fox was vermin; to the newly wealthy whaler and merchant, the fox was sport. This particular encounter was also literally close to home for David Pierson, at Peter's Pond, which was on or near the beach less than a mile from Jesse Pierson's house.⁴⁹ So the question "Who owned the fox?" was more than—or less than—an economic one.

II. THE FOX IN ENGLISH COMMON LAW

A striking difference between Tompkins' and Livingston's opinions is that the former addresses the problem of property rights in *ferae naturae* generally, while the latter focuses on foxhunting specifically. As I shall show below, the law treated vermin, including foxes, differently from valuable animals. It would have been fairly straightforward for Tompkins to show that one could not have property in vermin and thus reach his preferred result on narrow grounds. Yet he chose to reach back to Roman law to establish a broader principle—following the lead of Sanford, Pierson's counsel. Why?

It may have been simply to fill a legal vacuum respecting the status of wild animals. As Charles Donahue notes, this was an open question.⁵⁰ On the one hand, New York courts had not addressed the issue. On the other, the English case law was unhelpful because it turned on either the ownership of the land where the animal was killed or on the English Game Laws, which Tompkins dismissed as irrelevant.

But Tompkins may also have been weighing in on a centuries-old debate about property in wild animals, a debate that had pitted the common law lawyers against the Game Laws. At common law, the right to hunt had been open to all.⁵¹ The Norman view, however, was that the rights to all wild animals vested in the king, and he decided who could hunt. Beginning in 1389–90, the class of the privileged was steadily restricted by statute,⁵² until only very large landowners could kill game.⁵³ All others—the vast majority of the

48. Berger, *supra* note 27, at 1129.

49. Hedges, Pierson v. Post, *supra* note 31. Professor Berger thinks the dispute may have been even more personal. She suggests that Peter's Pond was on common land that the Piersons shared as proprietors of the community. Berger, *supra* note 27, at 1095. The New York Supreme Court, of course, accepts Post's statement that he started the fox on "the beach," but says nothing about where the fox was killed.

50. Donahue, *supra* note 2, at 40–41.

51. *Id.* at 61; 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 415 (4th ed., Dublin 1771).

52. ROGER B. MANNING, HUNTERS AND POACHERS: A SOCIAL AND CULTURAL HISTORY OF UNLAWFUL HUNTING IN ENGLAND, 1485–1640, at 57 (1993).

53. 3 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 328 (1st American ed. 1813).

population—were forbidden to hunt even on their own property. Common lawyers and the general population opposed the Game Laws as contrary to the Ancient Constitution.⁵⁴ In sweeping aside English statutory law, Tompkins may have been using this case to announce a return to the Anglo-Saxon freedoms.⁵⁵

Livingston, on the other hand, looks to the common law regarding fox-hunting, which was never subject to the Game Laws. The hunting of foxes and other vermin, as opposed to game, had always been permitted and indeed encouraged.⁵⁶ Vermin were like mad dogs. Everyone had a right to kill them even if it meant riding over his neighbor's property. The law treated them differently from other *ferae naturae* in this respect.

For practical purposes in England, the most important legal consequence of foxes' status as vermin was that foxhunters were favorites of the law. They were legally entitled to trespass on the property of others: "the common law warrants the hunting of ravenous beasts of prey on another's ground, such as foxes, wolves, badgers, &c. so that the party in pursuing those through the grounds of another is subject to no action whatsoever . . ."⁵⁷ Landowners who could exclude all others from their property had no remedy against foxhunters, even if they caused damage to their crops and hedges—so long as they hunted in the ordinary and usual way.⁵⁸ John William Ness, writing about Scottish law, wrote that hunters could lawfully search for and pursue foxes "through the open or enclosed grounds of any person, without his consent, or even against his will, as in the pursuit of a thief, or a mad dog."⁵⁹

The English courts granted the pursuer of foxes peculiar privileges, but not an exclusive right in his prey. On the contrary, the law recognized a universal privilege to kill foxes. Wolves, foxes, and mad dogs had similar legal status in that no one—no landowner or dog owner—had a cause of action against the man who killed them. In this sense, they were like the outlaws of

54. MANNING, *supra* note 52, at 58 (stating that most common lawyers believed that wild beasts could not be owned and that the Game Laws in effect "attempt[ed] to assert possession of deer and game" and thus expanded the realm of private property); *id.* at 61 ("[T]he popular belief persisted that wild animals could not be possessed . . .").

55. See Donahue, *supra* note 2, at 61 ("For the court in *Pierson* any notion that an animal belonged to the person who started it or on whose land it was started or killed was inextricably intertwined with the concept of the king's prerogative, about which a Revolution had just been fought.")

56. Donahue, *supra* note 2, at 41; *Hannam v. Mockett*, 4 Dowl. & Ryl. 518 (1824).

57. BACON, *supra* note 53, at 326.

58. *Marsh v. Newman*, in SIR JOHN POPHAM, REPORTS AND CASES 163 (London, Roycroft 1656) (noting that a foxhunter did not commit a trespass when he pursued a fox into another man's land, breaking his hedges, "because a fox is a noysom creature to the Common-wealth"). *But see* JOHN WILLIAM NESS, A TREATISE ON THE GAME LAWS OF SCOTLAND 79 (Edinburgh, Michael Anderson 1818) ("If in the course of these excursions, however, the hunters do actual damage to any person's property, they are no doubt liable to repair it.")

59. NESS, *supra* note 58, at 79. English law, in contrast, did not permit a hunter to go onto another's property in search of foxes. (JOSEPH CHITTY, A TREATISE ON THE GAME LAWS AND ON FISHERIES 31–32a (Samuel Brook, London, 1826) (stating that it was always held to be unlawful to do so).)

old, and, vice versa, outlaws were like wolves. Blackstone writes, “anciently an outlawed felon was said to have caput lupinum, and might be knocked on the head like a wolf, by any one that should meet him.”⁶⁰ Livingston himself, in *Pierson v. Post*, says that both parties in the suit regarded the fox “as the law of nations does a pirate,” that is, “to put him to death wherever found, is allowed to be meritorious, and of public benefit.”⁶¹ Since we no longer feel the same about outlaws and pirates, Ness’s reference to mad dogs is perhaps most helpful to the modern reader. We still have laws entitling anyone to kill a mad dog. The owner of the dog, if there is one, has no claim against someone else who kills it.⁶²

In fact, it is not clear what property right the erstwhile “owner” has in his dog if it becomes mad, because he is missing the most important element of property, the right of exclusion. Similarly, it is unlikely that one could have a meaningful property interest in a live fox. The law distinguished between vermin and other wild animals in this respect. It recognized a number of legal interests in *ferae naturae* that could not be acquired in vermin; the most important of which, for our purposes, was the doctrine of *ratione loci*, which gave a landowner a limited property interest in wild animals on his own land.⁶³ This interest was variously called a “local Property,” “possessory Property,” or not property at all but merely *propter privilegium*,⁶⁴ which entitled the landowner to kill the animal and to exclude others from doing so.⁶⁵

This doctrine was often invoked in rabbit, or conie, hunting cases.⁶⁶ Significantly, the status of conies was explicitly contrasted with that of foxes in *Bellew v. Langden*.⁶⁷ After stating that the owner of the soil on which conies were feeding had an “interest in them against all strangers,” the court adds as a further argument that conies are profitable beasts and the keeping of

60. 4 BLACKSTONE, *supra* note 51, at 315.

61. *Pierson v. Post*, 3 Cai. 175, 180 (N.Y. Sup. Ct. 1805).

62. *E.g.*, N.C. GEN. STAT. § 67–14 (2005) (“Any person may kill any mad dog, and also any dog if he is killing sheep, cattle, hogs, goats, or poultry.”); *see also* *Perry v. Phipps*, 32 N.C. (1 Ired.) 259, 261 (1849) (stating in dicta that any person may kill a dog that is mad and at large, but not reaching the question of whether a person can go onto the owner’s property to kill it).

63. *See* WILLIAM NELSON, *THE LAWS CONCERNING GAME* 31–32 (6th ed., London, T. Waller 1762) (discussing a case in which a defendant accused of killing rabbits on the plaintiff’s land claimed that they were *ferae naturae* and that the plaintiff could have no property in them; the court held, however, that the plaintiff did have a “local property” in the rabbits while they were on his land).

64. *Id.* at 28; *see also* 2 BLACKSTONE, *supra* note 51, at 394–95 (calling *propter privilegium* a “transient property in . . . animals, usually called game, so long as they continue within [the landowner’s] liberty”); Wise, *supra* note 28, at 527–28 (noting that Coke, in *The Case of Swans* (1592), called this not a right of property but “merely a right of privilege”).

65. This principle was most famously applied in *Blades v. Higgs*, (1865) 11 Eng. Rep. 1474, 1478–79, which was brought against trespassers who killed rabbits on the estate of the Marquis of Exeter.

66. NELSON, *supra* note 63, at 28–29.

67. *Id.*

them is lawful, and they are therefore not to be compared with vermin.⁶⁸ This suggests that vermin could not be kept lawfully and a landowner had no property right in the vermin on his estate.⁶⁹ The universal license to destroy foxes means that Post, had he lived in eighteenth-century Britain, could not have a property interest in a live fox and therefore could not have had an action in trespass against another for killing the fox.

The social reality, however, was that people not only valued and monitored the foxes and fox litters on their property, but also captured and confined foxes and even raised fox pups to adulthood. This is part of the story of Part III, the rise of foxhunting as an elite sport.

In short, as Livingston suggests, foxes were an anomaly within the genre of *ferae naturae*. Far from being potential property, foxes and other vermin were legally classified as nuisances, the killing of which was a service to the public. They were the “outlaws” of the animal world, unprotected by the Game Laws or the property rules pertaining to *ferae naturae*. Even the landowner’s right to exclude strangers from his property was limited by the foxhunter’s right to follow his prey wherever it went. So even if the common law had been correctly applied in *Pierson v. Post*, Post would still have lost his suit, not because he failed to capture or confine or wound the animal, but because he could not have any right in the fox that gave him standing to sue Pierson. This reasoning leaves aside the question of who owned the fox once it had been killed, but that was not the issue before the New York Supreme Court.

III. FOXHUNTING AS AN ELITE SPORT IN ENGLAND

To understand the facts in *Pierson v. Post*, and to evaluate Judge Livingston’s opinion, it helps to know some of the rules and customs of foxhunting. This Part describes riding to hounds in England around 1800, where it is far better documented than in America. Part IV presents what is known about early American hunts. Important elements of English foxhunting for present purposes include the form of the hunt; the importance to the hunt of maintaining, rather than eradicating, the fox population; the cost of the hunt; the relations between hunters and farmers; and, finally, changes in the English law in response to the changed nature of the hunt.

68. *Bellew v. Langdon*, in 5 SIR GEORGE CROKE, REPORTS 876 (Dublin, Sir Harbottle Grimston 1791). Ownership of conies was often litigated. They were housed in specially prepared warrens but of course wandered onto neighboring land to feed. Both the owner of the warren and the neighbor might claim a property in the animals. See, e.g., *Clarke’s New Game Laws* 65 (London, V. & R. Stevens & G.S. Norton 1843).

69. Richard Posner has suggested that other nearly valueless animals are virtually impossible to own because the cost of creating a system of ownership is far greater than the value that could be realized from it. Dean Lueck, *The Economic Nature of Wildlife Law*, 18 J. LEGAL STUD. 291, 300 (1989) (citing RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 34 (3d ed. 1986)).

A. *The Form of the Hunt*

Hunting to hounds as practiced in its golden age was described in Peter Beckford's practical guide to foxhunting in 1781 and remained the same in England until recently, when the sport was made illegal.⁷⁰ The hounds did the actual hunting and killing. The goal of the human participants was to keep up with the pack and, ideally, to be present at the death. The fun of a perfect hunt was a gallop cross-country, the satisfaction of knowing that the hounds had been successful, and the socializing before, during, and after the hunt. For those who fell behind, or did not even try to keep up, there was the fresh air, the spectacle of the hunt, and even more socializing. There were many who joined the hunt for part of its course, who followed on foot, or who merely came to watch the hunters set off or pass by.⁷¹ Finally, the hunt ball at the end of the season was one of the major social events in the neighborhood.⁷² The number of participants in a local hunt could be enormous; it was a big, sprawling, noisy event.

The central actors in the hunt were the hounds, the Master of Fox Hounds (Master), the hunt servants, and, of course, a fox. The element of chance in finding a fox was reduced to a minimum through planning and preparation. On the day before the hunt, if not earlier, the Master decided which covert would be drawn.⁷³ Since the foxes hunted at night, hunt servants stopped the foxholes before dawn, forcing the foxes to stay above ground during the day.

While the hunt servants drew the covert, the sportsmen waited for the fox to make its break; this was one of the opportunities for keen hunters to get ahead of the others. The hounds—forty to sixty⁷⁴—showed their skill in staying close to the fox and picking up the trail when it had been lost.⁷⁵ A fox might double back, run through water, etc., and those who knew the countryside and the ways of foxes cultivated the skill of judging where it would go next. The whole cavalcade barreled after the fox across the fields,

70. For a full description of an ideal foxhunt, see PETER BECKFORD, THOUGHTS ON HUNTING 164–74 (London, Sarum 1781). The British House of Commons enacted a ban on hunting mammals with dogs (with limited exceptions) on November 18, 2004, and this ban came into force on February 18, 2005. Hunting Act, 2004, c.37 (Eng.). For a description of hunting and its effect on the social life of the countryside, see, for example, COMM. OF INQUIRY INTO THE HUNTING WITH DOGS IN ENG. AND WALES, THE FINAL REPORT 68–80 (2000), <http://www.huntinginquiry.gov.uk/mainsections/report.pdf>.

71. DAVID C. ITZKOWITZ, PECULIAR PRIVILEGE: A SOCIAL HISTORY OF ENGLISH FOXHUNTING, 1753–1885, at 101–02 (1977). Thirty to forty thousand people turned out to see the hounds meet at Coventry Railway Station in 1861, while 1500 foot followers attended the Pytchely Meet on Boxing Day, 1841. *Id.* at 101. These numbers were record-breaking, but even regular fox hunts might have several hundred participants and onlookers. *Id.* at 100.

72. *Id.* at 103.

73. Coverts are small woods or areas of gorse, which are favorite hiding spots for foxes. “Drawing a covert” means moving from one end to the other with the hounds in the hope of flushing the fox out and getting it to break out into open country. BECKFORD, *supra* note 70, at 140.

74. *Id.* at 37–38 (recommending this number for any given hunt, and about eighty in the kennel in all).

75. *Id.* at 79–85 (providing a lengthy discussion of how to train hounds to follow a scent).

meadows, and even lawns of the local landowners. Jumping hedges and fences was part of the fun and frequently caused damage to those fixtures—damage for which the hunt felt no obligation to pay compensation.⁷⁶ The hounds running after the fox made a great deal of noise, which enabled the hunters to follow them. The hallooing of the hunters themselves and the sound of the horn added to the din, which incidentally would make it impossible for anyone in the vicinity not to know that there was a foxhunt in progress.⁷⁷ Finally, the hounds ran down the fox.⁷⁸ A hunt servant briefly rescued the carcass to remove the brush (tail) as a trophy, and then threw the remains back to the hounds to devour. It was important that the hounds eat the fox. Beckford, the original expert on foxhunting, writes that when the fox is caught, “I like to see hounds eat him eagerly.”⁷⁹ He believed that hounds that went for more than two or three hunts without a taste of blood would lose their edge. No hound, he wrote, “can fail of killing more than three or four times following, without being visibly the worse for it. When hounds are out of blood, there is a kind of evil genius attending all they do”⁸⁰ If necessary, Beckford writes, the Master should see to it that the hounds get a bagged fox to keep them “in blood.”⁸¹

B. *The Fox Population*

Not surprisingly, everyone who was interested in the hunt, which in a hunting country meant almost the entire neighborhood, was devoted to building up the fox population.⁸² This was true as early as 1781, when Beckford wrote his *Thoughts on Hunting*. To a correspondent who wrote that his neighbor was unhappy about the number of foxes in the area, Beckford replied that one could never have too many foxes: “I should as soon have expected to have heard your neighbor R—— complain of having too much money”⁸³ If the writer thought the foxes were a problem, however, Beckford recommended that he go hunting every day for a week and reduce the population that way.

76. ITZKOWITZ, *supra* note 71, at 123.

77. BECKFORD, *supra* note 70, at 83–84 (commenting that frequent hallooing is useful with young hounds and although Beckford disapproves of hallooing to old hounds, he does it himself when he is in high spirits).

78. If the fox ran to ground, it would have to be dug out by humans and dogs. ITZKOWITZ, *supra* note 71, at 101.

79. BECKFORD, *supra* note 70, at 202.

80. *Id.* at 282. This view changed in the nineteenth century. See ITZKOWITZ, *supra* note 71.

81. BECKFORD, *supra* note 70, at 282.

82. *Contra* Dharmapala & Pitchford, *supra* note 8, at 44 (suggesting that maintaining the fox population and killing the fox at the end of the hunt were mutually exclusive).

83. BECKFORD, *supra* note 70, at 211.

The most important measure to preserve the fox population was to maintain the coverts where they had their earths and bred their cubs.⁸⁴ Huntsmen kept or even planted coverts on their own land and sometimes required their tenants to do so, with compensation for the tenants' loss of arable land.⁸⁵

Masters of Foxhounds might also raise fox cubs, which they had either bought or found abandoned. Beckford states that one could sometimes add the cubs to a wild litter.⁸⁶ Alternatively, the master might raise the cubs himself or, as they got older, release them into cover—but in the latter case, he had to feed them regularly to keep them near home.

If the supply of foxes were truly inadequate, the Master might resort to a “bagged” or captured fox. According to Beckford, bagged foxes were a poor second best to free ones: they had a strong smell, they were weak from confinement and lack of food, they were frightened, and they were released in open ground.⁸⁷ In short, they were too easy to catch and spoiled the hounds for real hunting. Beckford recommends using them only as a last resort, when the hounds had not killed for some time and needed blood. Moreover, he writes, gentlemen who bought foxes were creating a market, which in turn encouraged theft. “The price some men pay for them might well encourage the robbing of every hunt in the kingdom”⁸⁸ Unfortunately, Beckford does not say what price some men pay. Despite his opinion that the bagged fox was worth much less than those in the wild, some hunters relied heavily on bagged foxes.⁸⁹ In short, live foxes were worth a substantial amount, dead foxes were worth nothing, and killing a fox was a cost—it did not create value and it was not a social service.

Because, from a hunter's perspective, there could never be too many foxes, shooting a fox was considered a terrible waste. As Trollope says, “Many things are, no doubt, permissible under the law, which, if done, would show the doer of them to be the enemy of his species—and this destruction of foxes in a hunting country may be named as one of them.”⁹⁰ Even setting traps or using poison on one's own land for the purpose of protecting one's own animals was beyond the pale: it was called *vulpicide*, and not always in jest. Englishmen from kings to commoners agreed that shooting a fox was not acceptable. Beckford, the great expert on foxhunting, quotes a farmer who claimed that a fox had killed all of his ducks. “I would

84. On hunters as conservationists generally, see JAMES A. TOBER, WHO OWNS THE WILD-LIFE? THE POLITICAL ECONOMY OF CONSERVATION IN NINETEENTH-CENTURY AMERICA 49–52 (1981).

85. ITZKOWITZ, *supra* note 71, at 119 (stating that by custom, farmers were paid rent for the coverts kept on their land).

86. BECKFORD, *supra* note 70, at 302.

87. *Id.* at 300–01.

88. *Id.* at 305.

89. ROGER LONGRIGG, THE HISTORY OF FOXHUNTING 61 (1975) (stating that Roger de Coverly, before 1700, used a great number of bagged foxes).

90. ANTHONY TROLLOPE, PHINEAS REDUX, 580 (London, Trollope Society 1990) (1873) [hereinafter TROLLOPE, PHINEAS REDUX].

not gin him though—too good a sportsman for that.”⁹¹ At the other end of the social spectrum, James I told his son Henry that hunting with hounds was the most noble sport, “for it is a thievish forme of hunting to shoote with gunnes and bowes”⁹²

The hounds’ role in the hunt is significant for the holding in *Pierson v. Post* for two reasons. First, if Post’s hunt had gone smoothly, the hounds would have killed the fox. Post had no particular interest in a dead animal and, in fact, there would not have been a dead animal. Second, Pierson’s killing the fox and taking it away spoiled not only Post’s sport, but also his foxhounds.

This norm suggests a third, overlooked alternative to the two outcomes suggested in *Pierson v. Post*: no person may kill a fox. The majority in *Pierson* decided that the pursuer had no property right in the fox, mainly on the grounds that this was a bright line rule, which would be easy to administer. The English alternative of no killing by humans at all would also have been easy to administer, though even in England this norm was never made law.

C. The Cost of Foxhunting

Not only was riding to hounds an inefficient way to kill foxes, it was extraordinarily expensive, certainly many hundreds of times as costly as the damage caused by the foxes’ depredations. Between 1800 and 1813, the annual cost of hunting in England varied from £1170 to £1935.⁹³ If the hunt employed a professional huntsman, this added £300 to the cost. On the other hand, a small, local hunt could cost as little as £500.⁹⁴ It all depended on the number of hunting days, quality of horses and servants, and the investment in breeding and keeping hounds.⁹⁵

In addition, individual participants in the hunt had to pay for their own horses, grooms, transportation, and lodging. An average horse cost from £75 to £150; subscriptions could be as high as £800 per person, but averaged £10 to £25.⁹⁶ Itzkowitz reports that an individual would have had to spend at least £100 to hunt in comfort in 1876.⁹⁷

91. BECKFORD, *supra* note 70, at 313.

92. LONGRIGG, *supra* note 89, at 55.

93. ITZKOWITZ, *supra* note 71, at 78 (citing estimates by a certain Colonel John Cook, who kept hounds during this period); *see also* ANTHONY TROLLOPE, HUNTING SKETCHES 93 (London, Chapman & Hall 1865; reproduced in facsimile, Arno Press 1981) [hereinafter TROLLOPE, HUNTING SKETCHES]. Trollope says a Master of Hounds should expect to be paid £500 times the number of days per week that he hunts, thus £1500 for three days per week. *Id.* But, Trollope says, this is not enough to cover his expenses. The Master must be a rich man and dip deep into his own pocket. *Id.*

94. ITZKOWITZ, *supra* note 71, at 78 (stating that this was the cost of the West Somerset Hunt in the 1839–40 season).

95. *Id.* at 78–79.

96. *Id.* at 32.

97. *Id.*

D. Relations between Hunters and Farmers in England

Foxhunting obviously depended on the forbearance of local farmers, whose interests were directly affected.⁹⁸ Beckford wrote that the enemies of the fox were farmers because of lambs, gentlemen because of game, and old women because of poultry.⁹⁹ Farmers had to be induced to cooperate by not disturbing the fox litters or trapping, poisoning, or otherwise killing the foxes. Landholders also suffered when a hunted fox happened to run across their land followed by a pack of hounds and tens if not hundreds of hunters on horseback. Even though hunting took place in the winter and the participants did not trample the crops, they damaged fields, meadows, hedges, and fences.¹⁰⁰ Before *Essex v. Capel* was decided in 1809, foxhunters were believed to have a legal right to pursue the fox onto private land even against the farmer's wishes, though they would have caused bad blood by insisting on this right.¹⁰¹ After *Essex*, it was clear that landholders could legally exclude hunters, making hunting difficult or even impossible, although, again, someone who excluded the hunt from his land would be very unpopular. This is explained to the obtuse title character of *The American Senator*:

‘Everybody rides across everybody’s land out hunting.’

‘Would they ride across your park, Mr. Morton, if you didn’t let them?’

‘Certainly they would—and break down all my gates if I had them locked, and pull down my park palings to let the hounds through.’

‘And you could get no compensation?’

‘Practically none. And certainly I should not try. The greatest enemy to hunting in the whole county would not be foolish enough to make the attempt.’

‘Why so?’

‘He would get no satisfaction, and everybody would hate him.’¹⁰²

Foxhunters expected and depended upon landowners to accept considerable losses to property and poultry for the sake of the hunt.

In English hunting counties, conflict seldom crystallized, however, because the farmers themselves hunted and because the members of the hunt acknowledged the debt they owed to farmers, minimized damage to farms,

98. *Id.* at 113–14 (describing the various ways in which farmers suffered from the presence of foxes and stating that foxes would have been eradicated but for preservation for the hunt). Although farmers were not entirely free agents, I am treating them as such for the sake of simplicity. *Id.* at 116–17, 119 (noting that most farmers were tenants and that their landlords could require them to allow the hunt to cross their property or to maintain coverts as part of the lease).

99. BECKFORD, *supra* note 70, at 313. By *game*, Beckford meant partridges and pheasants. A healthy fox population was a scourge for game birds.

100. ITZKOWITZ, *supra* note 71, at 114.

101. *See infra* note 151.

102. ANTHONY TROLLOPE, *THE AMERICAN SENATOR* 60 (Trollope Society 1994) (1877) [hereinafter, TROLLOPE, SENATOR].

and compensated farmers for some of their losses.¹⁰³ Strong social norms—as reflected in the quotation from *The American Senator*—did the rest.¹⁰⁴ According to the upper classes, the shared belief that hunting was an important part of the fabric of country life was the most important basis for mutual cooperation. In reality, the economic and social pressure placed by landlords on their tenants may have been the most effective force.¹⁰⁵

It is especially interesting to note that foxhunters compensated farmers and old women for the damage caused by the preservation of foxes.¹⁰⁶ In practice, of course, it was difficult to prove that a fox had pilfered a duck, to take an example. The farmer seldom had evidence that the “missing” duck ever existed, or that its disappearance was the work of a fox, and might have difficulty getting what he thought was his due.¹⁰⁷ Even so, significant sums were paid to farmers. For instance, earth stopping and poultry damage together could amount to £500 to £600 per year in 1903.¹⁰⁸

In modern terms, the hunt aimed to internalize the cost of foxhunting. The presence of foxes was valuable to the hunters and costly to farmers and old women with poultry. If there had been no tradition of foxhunting, the farmers would have killed the foxes with traps and poison to protect their animals, and in that sense, good farming practice would have been costly to hunters. In England, the law gave farmers the right to kill foxes, but in effect, they ceded (or were made to cede) that right to the hunters, who compensated them specifically for the value of their lost poultry—and also gave them social status, invitations to participate in the hunt, and other sweeteners. In the language of economics, there was a net gain; the farmers came out more or less even, and the hunters gained the pleasure of hunting, which presumably exceeded their total costs, including the amounts paid for poultry.

We have already seen that the right to hunt animals to the exclusion of others was a qualified property interest or a privilege called *propter privi-*

103. ITZKOWITZ, *supra* note 71, at 78. There is probably a bias in our sources, however. Although most eighteenth- and nineteenth-century accounts of foxhunting describe farmers as among the staunchest supporters of the hunt, these accounts were written and read by the persons who associated themselves with the upper classes.

104. TROLLOPE, SENATOR, *supra* note 102, at 60.

105. ITZKOWITZ, *supra* note 71, at 116–17 (quoting from a supposedly sent letter that was published in the *Sporting Magazine* in 1793, in which an unnamed “nobleman” instructed his agent to allow tenants friendly to the hunt to buy their farms, but not to have any such dealings with those who destroyed foxes).

106. *Id.* at 117–18 (describing the custom of paying for poultry killed by foxes and explaining that this was a moral, not legal, obligation). Farmers might refuse compensation in order to show their identification with the hunt. See TROLLOPE, SENATOR, *supra* note 102, at 58–59 (“[O]ld Mrs[.] Twentyman, Larry’s mother, was fond of young turkeys, and . . . her poultry-yard had suffered [from foxes]. Larry, in his determination to be a gentleman, had always laughed at his mother’s losses.”).

107. ITZKOWITZ, *supra* note 71, at 118 (noting the difficulty of proof and describing the haggling between farmers and the hunt representative over the amount of compensation to be paid). The difficulty of proof was one of the problems at the heart of the dispute between the farmer Goarly and the hunter Lord Rufford in Trollope’s novel *THE AMERICAN SENATOR*. See TROLLOPE, SENATOR, *supra* note 102.

108. ITZKOWITZ, *supra* note 71, at 78.

legium.¹⁰⁹ This interest was relatively easy to enforce when it ran with the land, but it is difficult to imagine when separated from the land. An immediate objection is that it would be impracticable to buy and sell something so inchoate as the right to preserve foxes on the one hand and to kill them on the other.¹¹⁰ Would not everyone in the neighborhood (at least) have a right to kill the fox, and a right to claim compensation for not killing it?¹¹¹ How would other hunters know that an English Post had bought the right? Indeed, what was to stop some rich outsider from coming to the county and killing foxes independent of whatever deal the locals might have struck among themselves?

Here it makes a difference that foxhunting was a large scale affair, expensive, flashy, and involving many people. In England, the problem of who had a “right” to hunt a given area was solved, at least in part, by the fact that each club had its particular territory that was known to itself and to other hunts and jealously guarded.¹¹² There was no question about who qualified as a potential “buyer.” Furthermore, payment for giving up the right to kill—i.e., for tolerating the preservation of foxes—was settled, if badly enforced, by the principle of compensation for the animals that were killed. It was from the local hunt that farmers could request compensation and they could join the hunt and its associated social events when they wished. The English, in short, had reached a sort of Coasian bargain.¹¹³ The *Pierson* court’s decision might have led to the same result if the underlying quarrel was about damage to poultry and if the parties had still been on speaking terms. After *Pierson*, at any rate, hunters in New York would have an incentive to reach an arrangement with farmers.

Coase might favor a different solution, namely, to assign the exclusive right to kill foxes to the party that would eventually acquire it anyway, thereby saving the considerable transaction costs.¹¹⁴ Coase would point out that, in theory, the English arrangement gave the farmers no incentive to safeguard their poultry, or to give up poultry altogether for some activity less attractive to foxes, because they received the full market value of their poultry in any case. Giving hunters the exclusive right to kill should push

109. See *supra* note 64 and accompanying text.

110. It may seem odd to treat the right to kill the fox as a property right, but, as Carol Rose argues, “property” is a good way to settle conflicting claims. Carol M. Rose, *Property in All the Wrong Places?*, 114 *YALE L.J.* 991, 1019 (2005) (book review) (arguing that property rights are a useful way to think about interests as diverse as cultural heritage and cattle grazing: “When we come right down to it, we do not have a lot of ways other than property to talk about people’s relationships to resources and to one another with respect to resources.”).

111. Once potential interlopers are in a position to demand compensation, their numbers may go up, making negotiations more complicated. See Dharmapala & Pitchford, *supra* note 8, at 47 n.17 (noting that the authors’ economic analysis of *Pierson* assumes that there was only one potential interloper).

112. ITZKOWITZ, *supra* note 71, at 71 (explaining how hunts acquired exclusive hunting rights in particular neighborhoods).

113. The first sentence of Coase’s famous article states, “This paper is concerned with those actions of business firms which have harmful effects on others.” Coase, *supra* note 11, at 1.

114. See *supra* note 11.

farmers to put their energies to their highest use. Such a change in the law was not an option in 1805, and, as it happened, farmers did have an incentive to minimize their losses, because efforts to get compensation from the hunters were troublesome and not always successful. This is one of the many situations in which a Coasian solution is counterintuitive or unworkable because of traditional feelings about a property owner's rights against trespassers.¹¹⁵ The *Pierson* scenario therefore provides an opportunity for teachers to discuss possible problems with implementing a Coasian result given entrenched ideas about private property and the right to defend it.

A useful modern parallel to the friction between hunters and farmers over foxes is the conflict between environmentalists and ranchers over wolves. In an interesting twist, modern law favors the environmentalists and prohibits cattlemen—and anyone else—from killing wolves; the ranchers are expected to bear the cost of the environmentalists' sensibilities.¹¹⁶ It is generally believed that the law would be ineffective were it not for non-profit organizations that promise to compensate cattle owners for property lost to wolves. At any rate, the compensation programs are credited with making the law work.¹¹⁷ As Terry Anderson puts it, "The basic problem is that those who want wolves will be imposing a cost on the ranchers who expect to suffer losses. Clearly, the incentives are all wrong."¹¹⁸ Substitute "foxes" for "wolves" and "farmers" for "ranchers," and you have the fox-hunting problem. The "public" (in one form or another) places a higher

115. See Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 391 (2001) (discussing resistance to the Coasian premise that both the property owner and the actor "cause" the harm to the property resulting from the activity).

116. See Harry R. Bader & Greg Finstad, *Conflicts Between Livestock and Wildlife: An Analysis of Legal Liabilities Arising from Reindeer and Caribou Competition on the Seward Peninsula of Western Alaska*, 31 ENVTL. L. 549, 560 (2001) (noting that the state has no tort liability for damage caused by wildlife); Anna R.C. Caspersen, Comment, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357, 359 (1996) ("[T]he public trust doctrine trumps the Fifth Amendment prohibition against takings without compensation in regards to wildlife.").

117. See Terry L. Anderson, *Enviro-Capitalism vs. Enviro-Socialism*, KAN. J.L. & PUB. POL'Y, Winter 1995, at 35, 38 [hereinafter Anderson, *Enviro-Capitalism*]; Terry L. Anderson, *Markets and the Environment: Friends or Foes?*, 55 CASE W. RES. L. REV. 81, 88 (2004) (discussing compensation programs for livestock killed by wolves); Terry L. Anderson, *Viewing Land Conservation through Coase-Colored Glasses*, 44 NAT. RESOURCES J. 361, 372 (2004) (describing for-profit hunting and game-viewing companies that pay landowners to maintain wildlife); Brian B. O'Neill, *The Law of Wolves*, 18 ENVTL. L. 227, 234 (1988) (noting public support for the Minnesota Livestock Compensation Program for farmers who lost livestock to wolves); Brian N. Beisher, Comment, *Are Ranchers Legitimately Trying to Save Their Hides or Are They Just Crying Wolf—What Issues Must Be Resolved Before Wolf Reintroduction to Yellowstone National Park Proceeds?*, 29 LAND & WATER L. REV. 417, 440–41 (1994) (noting that the Defenders of Wildlife fund was then paying for wolf depredations in Montana, and that Alberta and Minnesota had similar compensation programs); Craig R. Enochs, Note, *Gone Today, Here Tomorrow: Policies and Issues Surrounding Wildlife Reintroduction*, HASTINGS W.-NW. J. ENVTL. L. & POL'Y, Summer 1997, at 91, 102–03 (noting that environmentalists and state governments have compensation funds for livestock killed by predators).

118. Anderson, *Enviro-Capitalism*, *supra* note 117, at 38.

value on the wolves and has the law on its side, but enforcement would be impossible without some further inducement for the ranchers.¹¹⁹

In short, Livingston's argument that the court should encourage foxhunting has obscured the real dynamic between sportsmen and farmers. By 1805, gentlemen who claimed the privilege of riding over another's land in pursuit of a fox were not performing a public service.

All of the above applies only to those sections of Britain in which there was a tradition of riding to hounds. In areas that were too rocky and hilly for horses, too poor, or where there was not a critical mass of hunting families, foxes were in fact "just vermin."¹²⁰ Foxes were either trapped or shot by hunters on foot as a more pedestrian (in both senses of the word) sport. Unlike riding to hounds, such an extermination hardly featured in the written records. There were, however, instruction manuals for killing vermin that included tips on trapping foxes.¹²¹ As we shall see, Bridgehampton was on the borderline between foxhunting country and fox-shooting country in the United States, though Livingston seems to assume that it belonged to the former.

E. *English Law Brought Up to Date*

In two famous cases from real life—as opposed to literature for the hunting class—landowners sued hunters for trespass and damage to property. In both cases, the hunters responded that they had a right to enter private property in pursuit of property. The earlier case relied on the old common law of foxhunting, while the later case changed the law to bring it in line with contemporary society.

The hunter's point was persuasive to the court in the 1786 case of *Gundry v. Feltham*, which heard arguments on the question "whether a person hunting has a right to follow foxes upon the ground of another."¹²² The

119. According to Terry L. Anderson, *Viewing Wildlife through Coarse-Colored Glasses, in WHO OWNS THE ENVIRONMENT?* 259 (Peter J. Hill & Roger E. Meiners eds., 1998), the situation of environmentalists and ranchers illustrates the Coase theorem, but I do not see this. Once the legal entitlements have been set by law, according to Coase, the ranchers should either invest money to protect their herds, swallow the loss, or pay the state to stop protecting wolves. Coase's theory does not include an option of shooting the wolves, any more than his farmers could shoot his ranchers' cattle without an agreement between them.

120. CHARLES ST. JOHN, *SHORT SKETCHES OF THE WILD SPORTS AND NATURAL HISTORY OF THE HIGHLANDS* 232 (London, John Murray 1847) (stating that in the Highlands, where hunting to hounds was impossible, foxes were regarded as true vermin and were hunted by a professional "fox-hunter"); TOM SPEEDY, *THE NATURAL HISTORY OF SPORT IN SCOTLAND WITH ROD AND GUN* 33 (1920) (stating that the methods of destroying foxes in the Highlands are very different from those in England and the south of Scotland; the fox is a universal enemy, and is killed with guns, dogs, and poison).

121. R.W., *A NECESSARY FAMILY-BOOK: BOTH FOR THE CITY & COUNTRY* 3–5 (London, John Harris, 1688) (containing particularly gruesome instructions for catching foxes on enormous iron hooks baited with meat and hung from a tree). Landowners whose preferred sport was shooting birds also resented the depredations of foxes, and gamekeepers sometimes killed them. ITZKOWITZ, *supra* note 71, at 148–49.

122. *Gundry v. Feltham*, (1786) 99 Eng. Rep. 336 (K.B.).

plaintiff, Gundry, had brought an action against Feltham for “trespass for breaking and entering the plaintiff’s closes, with horses dogs, &c. and for beating down and hunting for game therein, and for breaking down, trampling down, and destroying the hedges of the plaintiff.”¹²³ This is said to have happened multiple times. Feltham’s defense was that on each occasion, he had “started and found one of those destructive and hurtful vermin”¹²⁴ called foxes, that the fox fled onto the plaintiff’s land, and that the only means by which he could kill the fox was to go after it with his horses and hounds. Feltham argued that he had done as little damage to the defendant’s property as he possibly could, but could not help “treading down, consuming, and spoiling a little of the grass . . . [and] destroying a little of the hedges and fences.”¹²⁵

For the judges, this appears to have been an easy case. Lord Mansfield said simply, “By all the cases as far back as in the reign of Henry 8th, it is settled that a man may *follow* a fox into the grounds of another.”¹²⁶ Judge Buller added that this was true only if the hunter could not kill the fox except by going onto the other’s property, and that this case did not entitle him to do more damage than was absolutely necessary to attain his end. Because Feltham did not cause more damage than he could help, he was not liable to Grundy for trespass.¹²⁷ Clearly the judges accepted the principle on which the defendant based his case, namely “that it is for the public good to destroy the animal, and that the convenience and rights of individuals must give way.”¹²⁸

Grundy v. Feltham was still good law in England when *Pierson v. Post* was decided in New York in 1805. If Livingston had a copy of *Grundy*—which is unlikely—he may have had it in mind when he wrote his opinion for *Pierson*. In any case, he was clearly aware of the older law treating foxes as vermin.

It was not until the case of *Essex v. Capel* was decided in 1809 that a British court finally stated the obvious: hunting was a luxury, not a service to the community, and hunters should not necessarily be privileged.¹²⁹ It is probably no coincidence that, for once, the named plaintiff was the Earl of Essex and most of the defendants were wage earners.

Essex was one of a group of cases brought by persons who owned property near London in Hertfordshire and Middlesex against members of the

123. *Id.* at 334.

124. *Id.* at 335.

125. *Id.* at 334.

126. *Id.* at 337. *Follow* is italicized in the original text; it is a response to the plaintiff’s statement that the law does not grant a right to hunters to *search* for fox in the grounds of another. *Id.*

127. *Id.* at 338.

128. *Id.* at 337.

129. AN ACCOUNT OF *Essex v. Capel*, *supra* note 10, at 47–48.

Berkeley Hunt. The named parties happened to be brothers,¹³⁰ George Capel-Coningsby, 5th Earl of Essex, and William Capel, the Master of Hounds. Behind the Earl, however, stood over seventy landowners and land occupiers,¹³¹ while Capel represented the interests of hundreds of horsemen who rode with the Berkeley hunt.¹³² The landholders formed an association first to object to the fox hunters trespasses, then to bring legal action against them, and finally to publish a verbatim account of the trial together with a Preface which described their version of the story.¹³³

It appears that the Berkeley Hunt was a different phenomenon from the communal gatherings in the provinces. The neighborhood was relatively densely populated, and the hunters were alleged to have trespassed not only on farmland—to the detriment of the cattle and ewes in lamb grazing there—but also on the “parks, gardens, and pleasure grounds, which by other Hunts are held sacred”¹³⁴ Meanwhile, the hunters were clergymen, bankers, brewers, tradesmen, clerks, and others who lived in London, most of whom were “both ignorant and careless of what damage they do”¹³⁵ It was particularly aggravating that the hunters had little or no land in the area themselves. In short, this was mere trespass without any of the social interactions, shared norms, and mutual accommodations that characterized England’s great national sport.

Capel’s defense, as summed up by the plaintiff, was the usual: “that the fox being a noxious animal, and liable to do mischief, he, for the purpose of killing and destroying the fox, and as the most effectual and only means of killing and destroying such noxious animal, broke and entered the Plaintiff’s park, and galloped over his closes”¹³⁶ Under *Grundy v. Feltham*, this gave him a right to trespass on the plaintiff’s land.¹³⁷ In *Grundy*, however, the parties had stipulated that riding to hounds was the only way to kill the fox. The plaintiff’s strategy in *Essex* was to distinguish this case from *Grundy* by showing, first, that the defendant’s purpose in hunting was pleasure, not public service, and, second, that riding over the plaintiff’s land was, in any case, not “the most effectual and proper way” to achieve his end.¹³⁸ The plaintiff, in fact, meant to show that the premises of *Grundy* were

130. See *Hertford Assizes*, *supra* note 10. Although one theme of this paper is that empty speculation is fruitless, it is difficult to resist conjectures about this sibling rivalry. William presumably grew up at Cashionbury Park, but the estate went with the title to his brother George. Perhaps he felt entitled to hunt on the family land?

131. AN ACCOUNT OF *Essex v. Capel*, *supra* note 10, at 6–8.

132. *Id.* at 4 (estimating the average number of participants in any given hunt at 100 to 150); *id.* at 28 (estimating the number to be 150 to 200).

133. AN ACCOUNT OF *Essex v. Capel*, *supra* note 10.

134. *Id.* at 5.

135. *Id.* at 4, 26.

136. *Id.* at 23.

137. *Id.* at 28 (demonstrating that the plaintiff cites *Grundy v. Feltham* and accepts it as law, but distinguishes it from this case).

138. *Id.* at 22.

false. Incidentally, since those same premises were used to justify all contemporary foxhunting, a victory for Essex would make the foxhunters' right to trespass obsolete everywhere in England.

Essex v. Capel had the perfect set of facts for showing that foxhunting was pure sport and not productive in any way. Plaintiff's counsel made the most of them, noting—as mentioned above—that the subscribers to the hunt were London men with day jobs who had little or no property in the area of the hunt and were unlikely to have used their free time helping farmers of Hertfordshire with pest control.¹³⁹

Destroying foxes was the last thing they wanted, said Essex's counsel:

I most potently believe, that if they were to start a fox that should take its course through Cashionbury Park [Lord Essex's estate], and a man who happened to have a gun in his hand was to fall in with their patriotic motive, and should destroy the fox by shooting him at once, he would meet with but *lenten* entertainment¹⁴⁰

This was a good guess, as the reader of *Pierson v. Post* knows. In fact, in the associated case of *Ridge v. Capel*, two of Capel's employees testified “that a regular traffic was carried on in the buying, feeding, and turning out of foxes, making earths for, nursing and encouraging them, in the woods and covers about the country, by Mr. Capel's own orders”¹⁴¹ Clearly, the goal of the foxhunters was not to decrease, but if possible to increase, the fox population.

Lord Ellenborough eventually stopped the questioning of witnesses on the grounds that it was a pointless exercise because the defense of hunting to kill vermin was obviously “against all nature and conviction.”¹⁴² He put the question to the jury with instructions to impose nominal damages—as requested by Lord Essex—asking, “Can any man of common sense hesitate in saying, that the principal motive and inducement [of the Berkeley hunt] was not the killing of vermin, but enjoyment of the sport and diversion of the chase[?]”¹⁴³ The sheer number of hunters made the idea far-fetched; dozens of persons riding after the hounds contributed nothing to the job.¹⁴⁴ *Essex* put an end to the idea that hunters had a legal right to trespass in pursuit of their prey.¹⁴⁵

139. *Id.* at 25–26.

140. *Id.* at 26–27. *Lenten* is defined as “somber.” WEBSTER'S II NEW COLLEGE DICTIONARY 628 (3d ed. 2004).

141. AN ACCOUNT OF *Essex v. Capel*, *supra* note 10, at 15.

142. *Id.* at 46.

143. *Id.* at 47–49.

144. *See id.* at 42 (stating that approximately fifteen people were not at all useful).

145. In another case arising from the same dispute between landholders and the Berkeley hounds, *Ridge v. Capel*, Lord Ellenborough said in his charge to the jury that Capel apparently believed that he had a legal right to enter another's property in pursuit of a fox, but he was wrong. “[N]o man has a right to go on the land of another against his consent, in pursuit of any animal, whether fox or hare; and any person so doing is a TRESPASSER.” *Id.* at 16 (referring to *Ridge v. Capel*).

Before the judge interrupted the trial, Lord Essex's steward testified to, among other things, alternative means of killing foxes. Could the steward or game keepers have shot a fox on foot, without the help of hounds? Yes, was the answer. The steward could have killed the fox faster than the hunters, by waiting and watching at places where foxes were wont to pass.¹⁴⁶ He could shoot a fox every day the hounds met, "except for fear of giving offence to the manager of a hunt."¹⁴⁷ Further, those who set out to destroy foxes usually did so by setting traps.¹⁴⁸ In short, not only was riding to hounds not the only method of killing foxes, it was the least efficient method. "[T]here are ten thousand better ways of killing them," as Lord Essex's counsel said.¹⁴⁹

As a postscript, the holding in *Essex v. Capel* appears to have had no effect on actual practice.¹⁵⁰ Hunting continued as before, and the social pressure on the farmer who denied access to his land was intense. He had the legal right to exclude hunters, wrote Trollope, but "strong as such an one is in his fortress, there are still the means of fighting him. The farmers around him, if they be hunting men, make the place too hot to hold him."¹⁵¹ Landowners were also still expected to provide a friendly environment for foxes by maintaining coverts and the like.¹⁵²

In *Pierson v. Post*, of course, the alleged right of trespass was not at issue. But Essex's evidence addresses several questions that are relevant to *Pierson v. Post*. Was the main purpose of foxhunting to reduce the fox population? Did the hunters regard the fox as a noxious animal to be exterminated? And was riding to hounds the only or even a particularly good way to kill foxes? Finally, was Post's act of "starting" the fox, i.e., flushing it out of cover, essential to the kill, so that Pierson's success was dependent on Post? Modern readers often treat these as imponderable questions. Essex provided the judge and the jury in his case with evidence that the answer to all of them was no.

We can draw the following interim conclusions. In England, Livingston's position that foxes are vermin and that the law should encourage foxhunting was legally correct at the time of *Pierson v. Post*, but in practice long out of date. By 1800, if not earlier, the assertion that it was the best way to kill vermin was a fiction. Even the idea that hunting with hounds reduced the number of vermin was a fiction: hunters actively increased the number of foxes in their neighborhood. Foxhunters acknowledged this by compensating farmers for the damage caused by the fox population. In short, Livingston's arguments based on rewarding labor

146. *Id.* at 40–41.

147. *Id.* at 37.

148. *Id.*

149. *Id.* at 29.

150. ITZKOWITZ, *supra* note 71, at 131.

151. TROLLOPE, HUNTING SKETCHES, *supra* note 93, at 46.

152. E.g., TROLLOPE, PHINEAS REDUX, *supra* note 90 ("The Duke might have his foxes destroyed if he pleased, but he could hardly do so and remain a popular magnate in England.").

and encouraging the destruction of vermin described the law in England but not the reality at the time. And finally, the “public benefit” of hunting was trivial in comparison with the sums invested in the hunt and the damage to property.

IV. FOXHUNTING IN AMERICA

Foxhunting in America developed at roughly the same time as in England and in such a similar manner that it was clearly influenced by developments there. The Game Laws did not apply, as we have seen.¹⁵³ The common law rules promoting the destruction of vermin, however, were not unreasonable in the American context,¹⁵⁴ except, perhaps, insofar as they permitted the hunter to invade the enclosed property of others.¹⁵⁵ Indeed, Bethany Berger notes that in 1791, the town of Southampton offered a bounty of four shillings for each fox killed between March 20th and June 20th.¹⁵⁶ There were good grounds, then, for the stipulation in *Pierson v. Post* agreed that “a fox is a ‘wild and noxious’ beast” and that there were grounds for Livingston’s statement, relating to the law of New York in 1805, that “to put [a fox] to death wherever found, is allowed to be meritorious, and of public benefit.”¹⁵⁷

As in England, however, foxhunting was pest control to some and an elite sport to others. Before the Revolution, it was particularly the English upper class in America and those who imitated them who adopted the sport.¹⁵⁸ Riding to hounds became very popular in the late eighteenth century

153. See Donahue, *supra* note 2, at 40–41 (suggesting that the court evidently rejected the game laws as received law when it held that English cases were inapplicable insofar as they were based on these statutes); *supra* Part II.

154. Donahue notes that a 1702 New York “Act for the more Effectual preservation of Deer and other Game and ye Destruction of Wolves Wild Cats and other Vermin” set bounties for the taking of vermin, including foxes. Donahue, *supra* note 2, at 40 n.8. Donahue points out that the court’s failure to cite this statute suggests that it did not know about it or took it to be repealed. *Id.*

155. Trollope suggested that those who took for granted the English farmers’ cooperation should talk to farmers in America or France. A Frenchman could not be induced, he wrote, “to believe that if he held land in England, . . . he would be powerless to keep out intruders, if those intruders came in the shape of a rushing squadron of cavalry, and called themselves a hunt.” TROLLOPE, HUNTING SKETCHES, *supra* note 93, at 45. This was written sixty years after *Pierson* and fifty-four years after an English court rejected the right to pursue a fox onto private property, but it captures the oddity of the English custom to outsiders. On the other hand, American law in the early eighteenth century and today permits hunters to enter unenclosed private property. See Master of Foxhounds Association of North America, <http://www.mfha.com/abfo.htm> (last visited Aug. 25, 2006) (“Today’s hunters have a special reward, the permission to ride over private and public land which still constitutes magnificent open spaces.”).

156. Berger, *supra* note 27, at 1130 (citing 3 RECORDS OF THE TOWN OF SOUTHAMPTON WITH OTHER ANCIENT DOCUMENTS OF HISTORIC VALUE 333 (William S. Pelletreau ed. 1884)). Rhode Island law permitted the offer of fox bounties until 1968. R.I. GEN. LAWS §§ 20-33-1 to -4 (1968) (repealed 1968).

157. *Pierson v. Post*, 3 Cai. 175, 180 (N.Y. Sup. Ct. 1805).

158. J. BLAN VAN URK, THE STORY OF AMERICAN FOXHUNTING 35 (Derrydale Press 1940) (quoting 35 VA. MAG. 324 (1927), which states that after 1730, when the tobacco inspection law was enacted and planters became much richer, they began to live like British aristocrats, i.e., taking up hunting).

in Virginia, Maryland, Pennsylvania, and the area around Manhattan, including the western end of Long Island.¹⁵⁹

That American formal foxhunting was patterned after the English hunt is illustrated by the rules of Gloucester Foxhunting Club near Philadelphia. This was the first such club in America, formed in 1766 by “gentlemen of landed property in the blessed retirement of a country life, and the less secluded liberal minded friends, over the river, confined to their respective vocations in the rising city of Penn[sylvania].”¹⁶⁰ In 1774, the Gloucester Hunt adopted a hunting uniform, and in 1775, it had fifteen brace of hounds. The Master of Hounds, Natt, was given a salary of £50 plus the use of a house, a horse, and an assistant.¹⁶¹ In short, seven years before Beckford published his hunting handbook, American foxhunting had many, perhaps all, of the trappings of a proper British hunt.¹⁶²

Thanks to the work of historian J. Blan van Urk, we also know some of the minor expenses of the hunt, including the value of live and dead foxes. Bagged foxes were in common use and were advertised in the newspapers; prices included a standing offer of half a guinea per fox and a one-time offer of one guinea or more.¹⁶³ Foxes were also bred, but this was considered not quite *comme il faut*.¹⁶⁴ A fox pelt, on the other hand, sold for a mere two shillings six pence in Pennsylvania in 1750,¹⁶⁵ and in 1815 the market price of a fox skin was said to be about one dollar.¹⁶⁶ A fox was thus worth as much as ten times more alive than dead. Despite this discrepancy, hunters made much of the service they were doing farmers by killing “the greatest common midnight enemy of the farmer.”¹⁶⁷

In New York in particular—getting closer to Bridgehampton—hunting took place well before the Revolution in Westchester, Long Island, and on the island of Manhattan itself.¹⁶⁸ When the British occupied the city during

159. *Id.* at 32 (stating that English-style hunting began in Virginia and Maryland, closely followed by Pennsylvania).

160. MEMOIRS OF THE GLOUCESTER FOX HUNTING CLUB NEAR PHILADELPHIA 3 (Philadelphia, Judah Dobson 1830) [hereinafter MEMOIRS OF THE GLOUCESTER HUNT].

161. Natt was a slave whom the hunt first rented from his master. When he was later freed, he was made Master of Hounds. *Id.* at 10.

162. *See id.* at 7–11.

163. VAN URK, *supra* note 158, at 96 (half a guinea offered for every Bag Fox in the *Royal Gazette* Oct. 13, 1779); *id.* at 99 (one guinea or more offered in the *Royal Gazette*, November 14, 1781); *id.* at 85 (a fox offered for sale in the *New York Gazette and Weekly Mercury* on November 1, 1779); *id.* at 91 (a hunt with a bagged fox advertised in the *Mercantile Advertiser*, March 12, 1807). A guinea was twenty-one shillings or five dollars.

164. *Id.* at 44.

165. *Id.* at 17.

166. MEMOIRS OF THE GLOUCESTER HUNT, *supra* note 160, at 26–27 (noting that the hunt servant, Jonas, got a red fox late at night when the others had given up, and sold it for three dollars, about three times the market price).

167. *Id.* at 36.

168. VAN URK, *supra* note 158, at 84 (stating that *Turf, Field and Farm*, Jan. 13, 1882, reported foxhunting began around 1760 in the area then called “North Riding,” i.e., English settlements at Oyster Bay, Hempstead, Long Island, and Westchester County).

the war, their officers hunted regularly, and as they began to withdraw, Charles Loosely, who arranged hunts from Brooklyn, politely requested “[t]hose gentlemen who are preparing to leave this country”—that is, British military men and sympathizers—to settle their accounts.¹⁶⁹ Out with the old, and in with the new: by the end of that same year, the American revolutionary officers were foxhunting from New York City.¹⁷⁰ In 1783, the American officers and gentlemen formed a subscription hunt club called the St. George; General George Washington and John Jay were among the members.¹⁷¹ Twenty years later in 1805, the sport cost the Federalists their control of the city when a hundred of “the opulent citizens of the lower wards” were off hunting on election day. They took back the government in 1806.¹⁷² Hunting petered out in the New York area not long after.¹⁷³

Hunts met at various locations on Long Island, including Oyster Bay, Hempstead, and Jamaica.¹⁷⁴ Oyster Bay is the furthest from Manhattan, about thirty-five miles, whereas Bridgehampton is 100 miles from the city. To what extent there were other, local hunts on Long Island, it is impossible to say.

In most of America, however, the population did not have the leisure or inclination for formal foxhunting.¹⁷⁵ Some Virginians, in the late seventeenth and early eighteenth centuries, engaged in “vermin hunting,” in which a group of hunters went out at night, on foot, with a few dogs. In New Jersey, there was a form of foxhunting along the beach, where the surf washed off the foxes’ scent. Here, the hunters are said to have shot all their foxes before the dogs reached them.¹⁷⁶ In New England, meanwhile, the population was hostile to English-style hunting, and although “many” are said to have practiced the sport, they did so in the teeth of general disapproval.¹⁷⁷ New Englanders did kill foxes for entertainment, the original meaning of “sport,”¹⁷⁸ but not in a “sportsmanlike” way. The Puritans are said to have hunted at night. They “placed a sledge-load of codfish heads on the bright

169. *Id.* at 102 (citing the *Royal American Gazette*, May 11, 1782); *id.* at 99 (advertisement for a hunt in Brooklyn by Charles Loosely).

170. *Id.* at 98.

171. *Id.* at 85 (describing the establishment of the St. George and providing a list of members).

172. *Id.* at 87 (citing *Turf, Field and Farm*, Jan. 15, 1882, and an editorial in the *Commercial Advertiser*, Nov. 19, 1805 that noted the shortfall of votes from the First Ward and urging the Federal Republican electors who had been hunting to vote at the eleventh hour).

173. *Id.* at 91–92.

174. *Id.* at 109 (stating that Henry Wansey, an English traveler, wrote in the summer of 1794 that “a pack of fox hounds hunts twice a week at Jamaica, during the season”).

175. *See id.* at 122.

176. *Id.* at 120 (quoting a New Jersey correspondent).

177. *Id.* at 115.

178. 16 THE OXFORD ENGLISH DICTIONARY, 316 (J.A. Simpson & E.S.C. Weiner, eds., Clarendon Press 1989) (reporting that *sport* was not used for *hunting* in particular until 1653).

side of a fence or wall, and hiding in the shadow ‘as long as the moon shi-neth’ could sometimes kill ten . . . [foxes] in a night.’¹⁷⁹

Bridgehampton was thus on a boundary, of sorts, between hunting in style and hunting to kill. This brings us to the 1796 case of *Sharpe v. Sabin*,¹⁸⁰ a Connecticut case the facts of which are almost identical to those in *Pierson v. Post*. Sabin’s complaint stated that he kept hounds, guns, and ammunition for the purpose of hunting foxes; that his hounds started a fox; that he was in close pursuit of the fox and that in all probability either his hounds would have killed the fox or he, Sabin, would have been able to shoot it; and that Sharpe, knowing of Sabin’s hunt and with intent to injure him, shot the fox, and carried it off. As in *Pierson*, the pursuer won at trial. Unlike Post, however, Sabin stated specifically that he intended his dogs to kill the fox or to shoot it himself. Also, unlike Post, Sabin brought his case in trespass and the complaint specifically sued for the value of the fox, which it claimed to be twelve shillings, although the court in fact awarded seven shillings plus costs. He was not, therefore, suing on some theory of tortious interference.

The facts in *Sharpe v. Sabin* raise the possibility that Post, too, was on foot and did intend to shoot the fox, that is, that he was not hunting to hounds after all. Like the other parts of the possible “true story” behind the lawsuit, however, this would make little difference to our understanding of Livingston’s dissent. Livingston was working with the facts as stated in Pierson’s complaint, and Livingston had in mind hunting to hounds.

But why did both Post and Pierson stipulate the noxiousness of foxes if Post was a sportsman in the English sense? Pierson, of course, stood to gain from the “fox as vermin” rule because live vermin could not be owned. Post’s counsel, on the other hand, evidently tried to use the rule to persuade the court to decide in favor of the hunter as one who invested heavily in fox-hunting. He seems to have claimed that sportsmen deserved concessions in return for their public service, the argument that worked in *Grundy* and was persuasive to Livingston.

V. *PIERSON V. POST* AND LEGAL SCHOLARSHIP

What are the implications of the above for *Pierson v. Post* and legal scholarship? It makes no difference to the rule of capture in general because the litigants and the court in *Pierson* agreed to consider foxes *ferae naturae* for the purposes of this case, and the majority’s reasoning applies to all animals. The holding ignores the fact that foxes are different. But it is precisely the information provided in the dissent that generates both classroom discussion and academic literature, and because Livingston’s policy arguments are spurious and disconnected, the conversation can become rather surreal.

179. ALICE MORSE EARLE, *CUSTOMS AND FASHIONS IN OLD NEW ENGLAND* 238 (New York, Charles Scribner’s Sons, 1896).

180. Petition for Writ of Appearance, *Sharpe v. Sabin* (Conn. Super. Ct., Sept. Term 1796). The whole record of *Sharpe v. Sabin* is included in the Appendix.

In short, *Pierson v. Post*, in its simplified form, makes a good hypothetical for the classroom or parable for a theoretical discussion, but attempts to draw more from this particular case are often based on misunderstandings or mistaken assumptions.¹⁸¹ I have pointed out a number of misinterpretations in the discussion above, and, in this Part, I will note a selection of further illustrations of misuse of *Pierson v. Post*. They fall into two categories: those based on the social policy arguments suggested by the opinions combined with mistaken assumptions about foxhunting, and those that make sense with respect to *ferae naturae* generally, but for which *Pierson v. Post* happens to be a bad example. Finally, I address the suggestion that Post's lawyers could have framed his case against Pierson as one of malicious interference and so have avoided the property issue altogether. I argue that this would not have worked at common law because foxhunting was not a gainful activity.

A. Discussions of Social Policy

Trying to fit *Pierson v. Post* into larger normative theories is likely to fail if the effort relies on Livingston's dissent. For instance, James Krier, co-author of the Dukeminier and Krier Property Law casebook,¹⁸² suggests that *Keeble v. Hickingill* and *Pierson v. Post* illustrate a similar approach to cases in which one person interferes with the activities of another, specifically, that the courts aim "at resolutions that produce[] net benefits for society, given the conditions then present."¹⁸³ In *Keeble v. Hickingill*, the defendant, Hickingill, scared ducks away from Keeble's duck decoy in a spiteful attempt to reduce Keeble's catch.¹⁸⁴ The court found Hickingill liable to Keeble because he had deliberately injured the latter's business. But if Hickingill had lured ducks away with his own decoy, he would not have been liable because competition between duck catchers served society by bringing more ducks to market. In *Pierson v. Post*, Krier believes, the rule of capture applied by the court served society by reducing the total number of foxes, thus preserving more chickens. But if Pierson had caused Post to lose his fox by, for instance, tripping him, his act would have been unlawful, because that would have interfered with a socially beneficial activity.

181. Alan Watson makes the general point that cases removed from their legal context are incomprehensible. He discusses the legal context and the court's copious use of foreign and even ancient legal authorities in *Pierson v. Post*, and also notes the mistakes in Livingston's opinion—the mistaken assumptions that a rule favoring hunters will lead to the destruction of more foxes and that Roman hunters did not hunt with dogs. Alan Watson, *Introduction to Law for Second-Year Law Students?* J. LEGAL ED. 430, 438 (1996); see also William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?* 143 U. PA. L. REV. 1889 (1995) (arguing that understanding international law cases requires knowledge of the legal, cultural, and philosophical contexts).

182. DUKEMINIER & KRIER, *supra* note 30.

183. Krier, *supra* note 7, at 1050.

184. *Keeble v. Hickingill*, (1707) 103 Eng. Rep. 1127 (K.B.). For more on *Keeble*, see *infra* text accompanying note 215.

In their casebook, Krier and Jesse Dukeminier accept Livingston's statement that the court's "decision should have in view the greatest possible encouragement to the destruction" of foxes,¹⁸⁵ but argue that Tompkins' verdict, not Livingston's, would best achieve this end.¹⁸⁶ Krier imagines that Livingston's logic was as follows: both Post and Pierson hunted for the thrill of the chase; neither would hunt if the law allowed an opportunistic rival to shoot "his" fox; as a result, there would be no more hunting and the fox population would explode; therefore, the right to kill the fox should be given to the hunter who starts the animal. But Krier argues that Livingston's reasoning is flawed. Tompkins's rule of capture would not necessarily mean the end of foxhunting, Krier says. It might just as well prompt Post to invest more in the hunt—buy better guns, get faster horses, and so on. In fact, experience has shown that the rule of capture is more likely to lead to the depletion of a resource than to its conservation.¹⁸⁷ Krier's conclusion is that the majority's decision to apply the rule of capture was correct because it promoted the social goal of eliminating foxes.

Krier makes a strong normative argument for allowing interference with an activity if such interference promotes social goals and prohibiting it if it does not, and it does seem likely that the rule applied in *Pierson* was more likely to eradicate foxes than Livingston's proposed alternative. But nothing in the case suggests that the majority had these goals in mind. Tompkins did not mention the social policy of eradicating vermin and his citations to legal scholars concern *ferae naturae* in general, not vermin. On the other hand, Livingston's argument that hunters should be privileged because they performed a public service cannot be taken seriously because, as we have seen, anyone who knew anything about hunters knew that they were more likely to import foxes into a neighborhood than to reduce the fox population. If the majority holding in fact resulted in the eradication of either foxes or *ferae naturae*, it was not because any of the judges intended that result.

Moreover, in Livingston's vision of the hunt, Pierson and Post were not competing to kill the most foxes, but had different agendas. Post was in it for the thrill of the hunt, while Pierson killed foxes to annoy Post or to protect his poultry or both. If there were fewer foxes on Long Island, Post would stop hunting, use bagged foxes, or switch to less desirable "drag hunting"—in which hunters lay down a scent with a bag of anise-seed, no fox required.¹⁸⁸ What Post would not do is invest in long range rifles, as Krier suggests,¹⁸⁹ because men who rode to hounds would never shoot a fox.

185. *Pierson v. Post*, 3 Cai. 175, 180 (N.Y. Sup. Ct. 1805).

186. DUKEMINIER & KRIER, *supra* note 30, at 21–23, asks students to consider whether Justice Livingston's rule would promote the destruction of foxes more effectively than the majority opinion's rule of capture. The Teacher's Manual summarizes Krier's reasoning. JESSE DUKEMINIER & KRIER, PROPERTY: TEACHER'S MANUAL 23 n.8 (6th ed. 2006).

187. Krier, *supra* note 7, at 1051–52.

188. VAN URK, *supra* note 158, at 122 (quoting from *A Journal of Civilization*, HARPER'S WKLY., Oct. 14, 1882, which describes drag hunting as practiced in the neighborhood of New York).

189. Krier, *supra* note 7, at 1051.

Indeed, making the hunt “more efficient” in almost any way would debase it.¹⁹⁰ Pierson, however, whatever his goal, would continue to kill foxes when he saw them, and if he were serious about destroying foxes, he would also have done so with guns, traps, or poison, or by killing fox cubs, or other less sporting methods not affected by the holding. In short, the policy question raised by Livingston lays a false scent. *Pierson*’s holding did not resemble *Keeble*’s in promoting a social good. It simply refused to create a right in Post to non-interference with his sport.

B. Economic Analysis of *Pierson v. Post*

An economic approach to *Pierson v. Post* based solely on the scant information provided in the opinion is particularly problematic because it requires the author to build on many distinct assumptions and thus has many vulnerabilities. Dhammika Dharmapala and Rohan Pitchford make a game attempt at such an analysis¹⁹¹ based on *Pierson* and an article on American foxhunting in *The American Heritage*.¹⁹² They set out to identify the implicit assumptions behind the majority holding and the dissent and to determine which solution is socially optimal, though they grant that alternative data would change their conclusions.¹⁹³ The social costs and benefits they consider include the utility that serious hunters derive from killing a fox, the value of the fox pelt, the damage to poultry prevented by killing the fox, the cost of the hunt (or investment in the hunt), and the effort or investment expended by the casual hunter or interloper. The casual hunter is assumed to derive no utility from killing the fox. Dharmapala and Pitchford conclude that Livingston’s rule, giving the fox to the hunter in pursuit, is optimal if the pursuers kill every fox they flush out, while Tompkins’s rule, giving the fox to the interloper who actually killed it, is optimal if foxes sometimes escape the hounds and if this rule does not reduce the investment in riding to hounds.¹⁹⁴

So many of Dharmapala and Pitchford’s variables are known quantities, however, that one need not “express the arguments . . . in terms of the language of modern economics” to discover the socially optimal result.¹⁹⁵ We know that in England, at any rate, the utility of the serious hunters over the course of the season was greater than their investment in hunting plus the

190. VAN URK, *supra* note 158, at 122 (quoting *A Journal of Civilization*, HARPER’S WKLY., Oct. 14, 1882, which sarcastically describes hunters on their way to an exciting chase, beginning with a cab ride to East Thirty-Fourth Street and arriving eventually by train at the place of the meet).

191. Dharmapala & Pitchford, *supra* note 8. This article is recommended to teachers as “a rigorous economic treatment of the consequences of the rule in *Pierson v. Post*” in DUKEMINIER & KRIER, *supra* note 186.

192. Caroline Jones, *Fox Hunting in America*, AM. HERITAGE, Oct. 1973, at 62.

193. Alternative data might include the possibility that hunting clubs sought to maximize the fox population, Dharmapala & Pitchford, *supra* note 8, at 44 n.9, 46 n.14, or the hypothesis that *Pierson v. Post* arose from hostility between hunters and farmers, *id.* at 44 n.9.

194. *Id.* at 41, 54.

195. *Id.* at 54 (stating that this was one of the aims of Dharmapala & Pitchford’s analysis).

value of the pelts and the damage done by all of the foxes in the neighborhood. If we assume with Dharmapala and Pitchford that the interloper derives no utility from killing the fox, then the answer is clear—Livingston’s decision is optimal.

Again, the point is not just that information from the real world contradicts statements made in the published opinion. The problem is that, for historical reasons, Livingston’s dissent itself contains a legal fiction and internal contradictions, and it is a shaky foundation for scholarship on the rule of capture.¹⁹⁶ The assumptions that authors add to Livingston’s flawed argument compound the problem. For instance, Dharmapala and Pitchford understand Livingston to say that foxes can only be killed if hunters with hounds flush them out of their hiding places, so that Post’s sport was essential to the enterprise of killing foxes.¹⁹⁷ Livingston does not say this, and it was not true. Second, Dharmapala and Pitchford mention, but dismiss, the possibility that foxhunters might seek to maintain the fox population.¹⁹⁸ Yet we know this to be the case. Third, they ignore the fact that hunters took some pleasure in hunting a fox even if it escaped and lived to be hunted another day.¹⁹⁹ Finally, their analysis treats reduced damage to livestock purely as an externality of the hunt, regardless of whether the hunter is a sportsman or an interloper.²⁰⁰ They suppose that the sportsman’s incentive is the utility of the hunt plus the value of the pelt, while the interloper’s incentive is the pelt alone. If fox skin is worthless, the interloper would exert no effort to kill the animal, they say.²⁰¹ In fact, if a particular fox posed a threat to a particular farmer, and this would be an incentive for him to kill it, something that Dharmapala and Pitchford do not take into account. Almost any economic analysis of *Pierson v. Post* is likely to go wrong in this way if it builds on Livingston’s policy argument.

C. Possession as Communication

In other studies, *Pierson v. Post* is simply a poor example of the author’s thesis. For example, Carol Rose and Henry Smith note that an important function of possession—indeed the one that Tompkins stressed—is communication.²⁰² “Seeing” or “starting” the animal, Tompkins says, is not an adequate basis of possession because the question of who first “saw” the

196. Dharmapala and Pitchford state specifically that their analysis highlights Livingston’s dissent. *Id.* at 40.

197. *Id.* at 41–43.

198. *Id.* at 44 n.9.

199. *Id.* at 49 (factoring in the utility that the hunter derives from the kill, but not the utility derived from a chase that does not result in a kill).

200. *Id.* at 42 (stating that the benefits to the hunter and the interloper were the pleasure of the hunt and the value of the fox pelt, and that the benefits to farmers were externalities).

201. *Id.* at 51 n.30.

202. Rose, *Possession*, *supra* note 3; Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105 (2003).

animal could be “a fertile source of quarrels and litigation.”²⁰³ Moreover, as Rose and Smith stress, everyone recognizes possession and understands (or can guess) the rights that go with it.²⁰⁴ But a rule that gives a property interest in some lesser relationship to the fox might be news to individuals outside the hunting coterie. The majority in this case wanted not only to settle this case between the neighbors Pierson and Post, but to achieve certainty “at a low cost to a wide audience, not all of whom are concerned with foxes.”²⁰⁵

Because of the nature of foxhunting, however, this sort of communications problems was trivial both in this particular case and in general. In this case, the court accepted the facts as stated in Post’s complaint, and thus that Pierson knew that Post was after the fox. He shot it for that very reason, to prevent Post from getting it. And generally, foxhunting was a local affair and one which touched the lives of everyone in the area of the hunt. In this sense, the community was homogenous and relatively small, and we can be sure that everyone in Bridgehampton and the surrounding areas knew within days the rule created by the court. Moreover, if the issue is not “who owns this fox?” but “who is hunting this fox?” or “who has claimed the right to kill this fox?” then Post had certainly communicated his intention. Foxhunting was a raucous sport; rarely would a person who spotted a fox be uncertain about whether it was being pursued by the hunt or not—the hunting horn and the cry of the hounds could be heard for miles. Post’s behavior actually reflects Carol Rose’s comment on the importance of possession as a signal: “Possession as the basis of property ownership . . . seems to amount to something like yelling loudly enough to all who may be interested.”²⁰⁶

D. Possibility of an Action for Malicious Interference

Finally, I present an example of a proposed solution for *Pierson v. Post* that I believe would not have worked in practice. Charles Donahue, among others, has suggested that “Post’s counsel made a fundamental tactical error in focusing his argument on the proposition that his client had acquired property in the fox when he should have been focusing on Pierson’s wrong, the knowing interference with the hunt.”²⁰⁷ In fact, Donahue has devoted a separate and very learned article to the question of whether Post might have

203. *Pierson v. Post*, 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805). See also Tompkins’s statement that the two basic requirements of possession are control and the manifestation of “an unequivocal intention of appropriating the animal to his individual use.” *Id.* at 178.

204. See Rose, *Possession*, *supra* note 3; Smith, *supra* note 202.

205. Smith, *supra* note 202, at 1118.

206. Rose, *Possession*, *supra* note 3, at 81.

207. Donahue, *supra* note 2, at 39; see also Joseph William Singer, *Starting Property*, 46 ST. LOUIS U. L.J. 565, 569 (2002) (suggesting that teachers encourage students to think about *Pierson* as a case of unfair competition); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 971 (2004) (raising the connection between tort law and property law).

had an action for *iniuria* in Roman law.²⁰⁸ He suggests that Post may have had such an action, but that this option appears to have been forgotten by the eighteenth century,²⁰⁹ when rights in wild animals were framed entirely in property terms.²¹⁰

I suggest that Post's lawyer at trial did have in mind something like a suit for malicious interference. This approach could not succeed at common law, however, without establishing a property interest in the fox, because foxhunting was a sport and Post suffered no actual damage. Post had to get the property "hook" to make his larger claim for interference.

Unfortunately, we do not know Post's original legal theory. The introductory notes in the reporter state that Pierson's action was "trespass on the case."²¹¹ This is puzzling and seems to be an attempt to shoehorn a novel complaint into an existing writ. The writ of "trespass" itself was not an option because it lies only for an assault on the person or property of the plaintiff, and Post's lawyer may have foreseen that he would have difficulty establishing a property interest in the fox.²¹² "Trespass on the case" or "case," on the other hand, was the proper form of action for various civil wrongs that did not constitute trespass, including indirect or consequential harms.²¹³ Post's lawyer evidently thought that interference with the hunt might fall into this category. Sanford, Pierson's learned counsel, presumably saw that an action "on the case" required actual damages.²¹⁴ Because the only conceivable damage here was the destruction of the fox, Post would have had to show a property interest in the fox.

This is illustrated by two contemporaneous English cases. The obvious analogy to *Pierson v. Post* is *Keeble v. Hickeringill*,²¹⁵ mentioned above,

208. Charles Donahue, *Noodt, Titius, and the Natural Law School: The Occupation of Wild Animals and the Intersection of Property and Tort*, in SATURA ROBERTO FEENSTRA OBLATA 609–29 (J.A. Ankum et al. eds., 1985).

209. *Id.* at 614.

210. *See id.* at 627–29 (stating that the shift is difficult to explain, but it might reflect a broader trend beginning in the Middle Ages to analyze problems on the basis of possessory rights whenever possible).

211. *Pierson v. Post*, 3 Cai. R. 175, 175 (N.Y. Sup. Ct. 1805). BLACK'S LAW DICTIONARY 1542 (8th ed. 2004) defines "trespass on the case" as "an action to recover damages that are not the immediate result of a wrongful act but rather a later consequence. This action was the precursor to a variety of modern-day tort claims, including negligence, nuisance, and business torts.—Often shortened to case." For a thorough study of the history of trespass and trespass on the case, see M.J. Prichard, *Scott v. Shepherd (1773), and the Emergence of the Tort of Negligence*, in THE SELDON SOCIETY LECTURES: 1952–2001, at 415 (2003). For shorter histories, see J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 60–64 (4th ed. 2002), and RICHARD EPSTEIN, CASES AND MATERIALS ON TORTS 90–93 (8th ed. 2004).

212. F.W. MAITLAND, EQUITY: ALSO, THE FORMS OF ACTION AT COMMON LAW 365–66 (A.H. Chaytor & W.J. Whittaker eds., 1st ed. 1910) ("Trespass . . . served for all cases in which the defendant had been guilty of directly applying unlawful force to the plaintiff's body, goods or chattels.").

213. *See* DAN B. DOBBS, THE LAW OF TORTS 25 (2000).

214. *See id.* at 26 (noting that a plaintiff suing in trespass did not have to show a pecuniary loss, whereas a plaintiff could not recover under a writ of case unless he proved some legally cognizable harm).

215. *See* *Keeble v. Hickeringill*, (1707) 103 Eng. Rep. 1127 (Q.B.).

because it is almost as famous as *Pierson*, because it also concerned property interests in wild animals, and because it is the subject of a rich and fascinating study by A.W.B. Simpson.²¹⁶ Keeble owned and operated a duck decoy, a fairly elaborate system consisting of an artificial pond and a number of long “pipes,” or ditches, that curved out from the pond, narrowing as they went. The pipes were covered by netting strung over hoops, which also decreased in size along the length of the pipe. Wild ducks were lured into the pipes and so captured.

The lawsuit came about because Keeble’s neighbor, Hickeringill, maliciously frightened off the ducks from the decoy on several occasions by firing guns. Hickeringill was standing near the pond at the time, but on his own land, and there was no allegation of trespass onto the plaintiff’s property. This raised two problems for the court. Was there anything illegal about Hickeringill’s firing guns into the air on his own land? And what was the nature of Keeble’s loss, given that had no property interest in the ducks since they were uncaptured wild animals? Or as Simpson puts it, did he have “standing to sue even though there had been no entry on his property, and even though the ducks which were frightened away were not his ducks?”²¹⁷

The court found that Keeble did have a cause of action, and two features of the case were apparently considered significant. First, Hickeringill acted maliciously: his purpose was not to have fun or to make money, but to harm the plaintiff. This was alleged of Pierson as well. Second, the decoy pond was integral to Keeble’s trade and could be extremely profitable.²¹⁸ In fact, although Chief Justice Holt stated that Keeble had no property in the wild ducks, he also said Keeble’s action was for interference with his “property,” which, Simpson suggests, indicates that Keeble’s right to exercise his trade was characterized as a property right. Simpson further suggests that “the emphasis on the commercial character of the decoy was intended to differentiate the case from one in which a mere sporting interest was involved; there was an old dogma in the common law that it took no account of things of mere pleasure or delight.”²¹⁹ Post’s case would have been stymied by this dogma because hunting was not his trade—he hunted for pleasure and suffered no economic loss. Thus, trespass to his “property” in the fox was the only legally cognizable harm he had.

Simpson contrasts *Keeble v. Hickeringill* with *Hannam v. Mockett*, a similar case, decided in 1824, in which the defendant was alleged to have

216. A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW 45–75* (1995). *Pierson* is often compared and contrasted with *Keeble*. *E.g.*, DUKEMINIER & KRIER, *supra* note 30, at 29. The full opinion in *Keeble v. Hickeringill* was not available to the court in *Pierson* because it was not properly published until 1811. Donahue, *supra* note 2, at 41 n.12.

217. SIMPSON, *supra* note 216, at 64.

218. *Id.* at 55, 64.

219. *Id.* at 64.

frightened off the rooks from a neighbor's rookery.²²⁰ Mockett, like Hicker-ingill, was alleged to have discharged a gun near the trees to frighten off the rooks with the malicious intent of injuring the plaintiff.²²¹ The plaintiff asserted that he had formerly derived great profit from killing the rooks and that the rookery was ornamental and afforded him "great satisfaction and delight."²²² He claimed damages of £200 and at trial was awarded £10.

Mockett, who by this verdict lost not only £10 but also the power to rid himself of the company of rooks, appealed and won. Hannam had argued that young rooks are good for food; the court was agnostic about this, but noted that, in any case, they were not generally articles of sale. In fact, they had long been considered a nuisance to the neighborhood because they destroyed grain in the fields and wreaked havoc on the thatched roofs of houses and barns.²²³ Although rooks were not quite as disfavored by the law as vermin, a law enacted under Henry VIII required the inhabitants of every parish to set nets for the birds every year for ten years.²²⁴ The court distinguished *Hannam* from *Keeble* on the following grounds. First, *Keeble* concerned wild ducks, which were beneficial to the public as a good source of food and were protected by the Game Laws. Second, *Keeble* bought and sold ducks as his trade—he had invested in his decoy, used his skills to operate it, and drew his living from his land in that manner. The court found no redeeming qualities in rooks:

Upon the ground, therefore, that the plaintiff had no property in these rooks, that they are birds *ferae naturae* destructive in their habits, and not protected either by common law or statute, and that the plaintiff is at no expence with regard to them, we are of opinion that the plaintiff had no right to insist upon having them in his neighbourhood, and that he cannot maintain this action."²²⁵

Hannam had no "right" to the undisturbed enjoyment of his rooks. For the same reasons—foxes were vermin, one could not have property in vermin, and Post's hunt was merely for pleasure—Post did not have a case for malicious interference against Pierson.

Could Post's lawyer have asked the court to create a new tort for malicious interference with a hunt? No. Courts do, of course, sometimes

220. SIMPSON, *supra* note 216, at 70–71. A rook is a bird resembling a crow, and a rookery is a nesting colony of any type of gregarious birds—in this case, it is a cluster of trees in which rooks built their nests. *Hannam v. Mockett*, (1824) 107 Eng. Rep. 629 (K.B.).

221. *Hannam*, 107 Eng. Rep. at 629.

222. *Id.*

223. *Id.* at 630. Rookeries were landmarks, however, which gave name to several manors and halls. For instance, today Rookery Hall is described as a "magnificent Georgian mansion set in 38 acres of gardens, wooded parkland and meadows bordered by the River Weaver, [which] bears more than a passing resemblance to a French chateau." Hand Picked Hotels, <http://www.handpicked.co.uk/RookeryHall/> (last visited Aug. 26, 2006).

224. *Hannam*, 107 Eng. Rep. at 632.

225. *Id.* at 632–33.

recognize new intentional torts.²²⁶ In the eighteenth century, there was no unifying theory of what qualified as a new cause of action in torts, but the *Restatement (Second) of Torts* suggests that two characteristics of such new torts have been that the defendant's act harmed the plaintiff²²⁷ and that the defendant acted with disinterested malevolence.²²⁸ Post would have had trouble establishing either of these two factors, however. It would have been difficult for him to show harm because the common law takes "no account of things of mere pleasure" and because the defendant's act was not so outrageous as to cause severe emotional distress.²²⁹ It would have been difficult to show "disinterested" malevolence because Pierson belonged to a farming family, foxes are injurious to farmers, and hunters like Post act to preserve foxes. Pierson could have argued that he had an interest in discouraging the hunters, as well as an interest in the fox skin, trivial though that was.²³⁰ Again, Post's case depended on his having some property interest in the fox.

Even today, it would be difficult to state a cause of action at common law for malicious interference with the hunt. As it happens, a slight variation on the *Pierson v. Post* scenario has become common these days because animal rights activists have made a cause of disrupting hunts by any lawful means, particularly noise-making. For example, during one hunt, activists "allegedly yelled obscenities, slammed car doors, blew the vehicle's horn and allowed a dog to bark, all actions that could scare away the prey."²³¹ Because there is no common law remedy, forty-eight states have enacted "hunter harassment statutes" that prohibit a person from seeking to interfere with hunting, even if such interference merely consists of approaching someone who is hunting or preparing to hunt and speaking with the hunter in order to persuade the hunter to cease killing animals.²³² Before such stat-

226. See, e.g., RESTATEMENT (SECOND) OF TORTS § 870 cmt. a (1979) (stating that this section discusses the principles underlying recently created intentional torts).

227. *Id.* § 870 cmt. m ("With the exception of torts . . . deriving from . . . trespass, proof of actual harm is required.").

228. *Id.* § 870 cmt. i (stating that disinterested malevolence means that the defendant was promoting no interests of his own by his conduct, other than venting his ill will).

229. SIMPSON, *supra* note 216, at 64. *But see Restatement (Second) of Torts* § 870 reporter's note (citing *Cullen v. Dickenson*, 144 N.W. 656 (S.D. 1913), which found that the plaintiff had an action based on trespass on the case for refusal to let the plaintiff into a dance hall).

230. That Pierson was not acting from pure malice is the distinction a leading casebook's authors attempt to get students to make. DUKEMINIER & KRIER, *supra* note 30 at 33–35 (referring to Harold Demsetz, *Wealth Distribution and the Ownership of Rights*, 1 J. LEGAL STUD. 223, 231–32 (1972)).

231. Editorial, *Deer Culls Must Proceed Unhindered*, NORTHWEST IND. TIMES, May 9, 2003, available at http://www.nwtimes.com/articles/2003/05/09/opinion/times_editorials/ecb69f410da9b74886256d2100050de0.txt.

232. See John A. Grafton, Note, *Hunter Harassment Statutes: Do They Shoot Holes into the First Amendment?*, 96 W. VA. L. REV. 191, 192 (1993); see also Aileen M. Ugalde, *The Right to Arm Bears: Activists' Protests Against Hunting*, 45 U. MIAMI L. REV. 1109 (1991); Michael Satchell, *The American Hunter Under Fire*, U.S. NEWS & WORLD REP., Feb. 5, 1990, at 30; James E. Krier, *Capture and Counteraction: Self-Help by Environmental Zealots*, 30 U. RICH. L. REV. 1039 (1997) (noting that over forty states have enacted hunter harassment laws, and that some have been upheld by the courts and others invalidated).

utes, it was not unlawful to spoil someone's sport, as opposed to his trade, as long as the hunter had no property right in the hunted animal.²³³ Only today could Post win his case against Pierson.

VII. CONCLUSION: WHAT NOW FOR *PIERSON V. POST*?

Livingston's argument in favor of a rule that encouraged the killing of foxes is a red herring. Yet this argument that has been taken seriously by generations of professors and scholars.²³⁴ Where does that leave us?

Pierson v. Post is still a useful case for educational purposes. Even though Livingston's disingenuous remarks about promoting foxhunting or modern policy arguments about increased efficiency are immaterial, the facts raise many other important issues in property law. The cultural relativity of "possession" is one example. Others are the tension between unfair and unlawful, and that between clarity and fairness.

Arguments based on the assumption that the fox was worth money, however, must be abandoned. This includes Singer's suggestion that the teacher may want to elicit an argument that "[p]roperty should rightfully go, not to those who work the hardest, but to those who are successful in actually producing something of value."²³⁵ It also includes Epstein's lesson that, when two people pursue the same object, the labor of one will go unrequited.²³⁶ These are important points, but they are not illustrated by *Pierson v. Post*. The hunt itself, and not the fox, was the good that Post wanted to enjoy unmolested. Pierson's goal, meanwhile, was to get rid of vermin or to frustrate Post, not to acquire property.

Similarly, because the fox had little or no value, *Pierson v. Post* does not illustrate how the rule of capture affects the commons by promoting possible wasteful competition and depletion of resources and overinvestment in technology—in short, "the tragedy of the commons."²³⁷ Class discussion naturally touches on "the tragedy" because the rule of capture articulated in *Pierson v. Post* was later applied to natural resources like oil and gas with exactly the tragic consequences that could have been predicted.²³⁸ A

233. See Animal Rights Law, Hunter Harassment Statutes, <http://www.animal-law.org/huntharass/index.html> (last visited Aug. 16, 2006).

234. See, e.g., Dharmapala & Pitchford, *supra* note 8, at 40 ("[A]ll sides agreed [that foxhunting] was a socially beneficial activity in the context of the times.").

235. JOSEPH WILLIAM SINGER, PROPERTY LAW: RULE, POLICIES, AND PRACTICES, TEACHER'S MANUAL 55 (Aspen Publishers 3rd ed. 2002).

236. Epstein, *supra* note 3, at 1225.

237. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) (setting out his theory that common property and rule of capture lead to over-consumption and over-investment in capture technology). For scholarship both criticizing and supporting Demsetz's theory, see DUKEMINIER & KRIER, *supra* note 30 at 57 (reviewing the scholarly reaction to Demsetz).

238. See Rance L. Craft, *Of Reservoir Hogs and Pelt Fiction: Defending the Ferae Naturae Analogy between Petroleum and Wildlife*, 44 EMORY L.J. 697 (1995) (discussing the rule of capture as applied to wildlife and to oil and gas, and showing that the rule has led to waste and over-production of both resources); Dan Hunter, *Reason Is too Large: Analogy and Precedent in Law*, 50

“commons” analysis of foxhunting does not make sense, however, when hunters have a strong incentive to increase the fox population. Moreover, there was virtually no limit on the number of people who could join Post in the hunt; more hunters meant more pleasure, not wasteful duplication of effort.²³⁹

As for scholars of property theory, I would recommend that they no longer use *Pierson v. Post* as an example of the origins and functions of property rights. Certainly any attempt to find the rule that maximizes wealth or maximizes the number of foxes killed is doomed to fail.

EMORY L.J. 1197, 1231–32 (2001) (discussing the rule of capture, derived from *Pierson v. Post*, as applied to oil, water, and gas); Smith, *supra* note 207, at 1027–37 (“[T]he limited rule of capture with governance rules prohibiting gross waste is defensible if supplemented by public regulation.”).

239. *Contra* Aditya Bamzai, Comment, *The Wasteful Duplication Thesis in Natural Monopoly Regulation*, 71 U. CHI. L. REV. 1525, 1539 n.81 (2004) (stating that two individuals chasing the same fox is “wastefully duplicative activity”).

APPENDIX²⁴⁰*Reuben Sharpe, defendant v. Jonathan Sabin, plaintiff*

Windham County. Superior Court Files. Box 189. September Term, 1796. Item Number 35

The following is taken from the pleadings and is a copy of the original writ for the appearance before “Thomas Grosvenor Esquire, Assistant for the State of Connecticut at the dwelling house of Widow Chloe Hubbard” in Pomfret on January 30, 1796 at 2 P.M.

“In an action of trespass whereupon the Pltf declares & says that he is at much expense to keep Hound Dogs Guns & ammunition for the purpose of Hunting foxes & that on or about the 1st day of September last past in Pomfret aforesd the Pltf with his hounds was hunting foxes in sd Pomfret & the Pltf’s sd Hounds started a fox & were in close pursuit of the same upon his track in such manner that in all reasonable Probability the sd Hounds would either have caught & killed sd fox or would have drove sd fox within reach of the Pltf’s Gun in such manner that the Pltf might have shot him. But the Pltf says the Deft well knowing the same but with an intent to wrong & injure the Pltf & deprive him of the game which his hound had so started contrary to the mind & will of the Pltf did while sd Hounds were in close pursuit of sd fox shoot sd Fox & contrary to the Pltfs will without his liberty & by force & arms carry away the skin of sd Fox & convert it to his own use which skin was well worth the sum of twelve shillings Lawfull Money which doings of the Deft in the premisses was & is against Law & the Customs & rules of Hunting.”

The lower court (with both parties appearing pro se) found the defendant “guilty” and awarded the plaintiff 7 shillings damages and one pound, 5 shillings and 20 pence for costs.

On appeal the Superior court found no error despite the defendant’s claim that “the matters therein contained are wholly insufficient in Law to support any action against the defendant,” and asking for six pounds damnification.

240. “Rueben Sharpe, defendant v. Jonathan Sabin, Plaintiff,” Manuscript in the Connecticut State Library, State Archives, Record Group 3 (Judicial Records), Windham County Superior Court Files, Box 189, March 1795–September 1797, Item Number 35.

