OutFoxed: Pierson v. Post and the Natural Law

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OutFoxed

*Pierson v. Post and the Natural Law*

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INTRODUCTION

Think back to first year property class. You are a bright-eyed 1L, and one of the first cases you read deals with hunting foxes on the beaches of Long Island, New York. The fact pattern seems obscure enough, but *Pierson v. Post* is the seminal case used to teach generations of law students about the acquisition of property. The interest in *Pierson* has recently been reinvigorated thanks to the research of Angela Fernandez in uncovering the original record of this case, as THE LAW AND HISTORY REVIEW dedicated an entire issue to the facts, policies, and lessons to be learned from this famous foxhunt. Over 200 years after *Pierson v. Post* was litigated in the New York Supreme Court of Judicature, this case remains an archetypal case for property students, discussing how property rights can be acquired in the absence of positive legal allocations. In this case, Lodowick Post was tracking a fox with his hounds in an elaborate hunt.


1. *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805). Because the entire opinion is five pages long, subsequent citations to *Pierson* are omitted.
4. Bethany Burger, *It’s Not About The Fox: The Untold History of Pierson v. Post*, 55 DUKE L.J. 1089 (2006) (“*Pierson is a canonical case because it replicates a central myth of American property law: that we start with a world in which no one has a rights to anything, and the fundamental problem is how best to convert it to absolute individual ownership.”); *Id.* at 1100 (“Through the case, generation after generation of law students have returned to
Jesse Pierson, aware that Post was hunting the fox, intercepted and killed the fox. Post was none too pleased, and sued Pierson.

The majority opinion by Judge Tompkins ruled for the interloper Pierson, because he actually captured the fox. The dissent, written by Judge Livingston, found that Post had the proper claim to the fox because of the labor expended during the hunt. Post was out of luck, even though he invested the time in tracking down the fox. What was the moral to this story, as well as the black letter property rule? Possession is obtained through physical occupancy.

The holding in *Pierson v. Post* has been accepted as gospel for law students and property scholars alike—but how did the Court arrive at that conclusion? In 1805, New York did not have any positive or common law to govern this dispute, so both jurists turned to the civil and natural law. Judge Tompkins, writing for the majority justifies his opinion by relying on the Roman Civil Law, including Justinian’s Digests, as well Natural Law writers, including Samuel von Pufendorf and Hugo Grotius. Judge Livingston, writing for the dissent, primarily relied on the writings of Jean Barbeyrac.

Professor Charles Donahue has masterfully written about Judge Tompkins’s citations to the Roman codes. Yet the reliance of Judges Tompkins and Livingston on the natural law writers has been neglected in property scholarship. This article aims to fill that gap. Pufendorf, Grotius, Barbeyrac, as well as William Blackstone and John Locke, wrote at great length about obtaining a property right to a wild animal. This article provides the first thorough digest of these writings, highlights where the jurists agree and disagree with one another, and analyzes how faithfully Tompkins and Livingston construed their writings. By gaining a more complete

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understanding of the competing arguments of these jurists, *Pierson v. Post* is revealed to be a much more sophisticated opinion than we all thought as 1Ls. This article proceeds in five parts. Part I introduce the facts of *Pierson v. Post*, and recites the majority and dissenting opinions.

Part II explores the two primary competing natural law theories of how to obtain possession of a wild animal. This first theory is known as the doctrine of first possession, as defined by Samuel von Pufendorf and Hugo Grotius. First possession requires mancupation—or the actual physical capture of the beast—in order to confer a property right to the hunter. Mere pursuit of the beast is inadequate. Possession could also be obtained if the beast is mortally wounded or if the beast escapes, but is subsequently recaptured.

The second theory is known as the labor theory of property, as defined by John Locke and Jean Barbeyrac. The labor theory of property grants a property right to the hunter who invests labor in the pursuit of the beast. Occupancy can be obtained without mancupation, and pursuit of the beast may be adequate. These alternate theories of property cut to the core of *Pierson*—can pursuit yield dominion? Judge Tompkins relied on the doctrine of first possession to rule for the interloper Pierson. He found that pursuit was inadequate to yield occupancy, and physical capture was required. Judge Livingston in dissent relied on the labor theory to rule for the hunter Post. Livingston found that physical capture was not necessary, and the pursuit vested Post with a property right in the fox.

Part III answers a prerequisite question that is always neglected when *Pierson v. Post* is studied in class—what is the role of the natural law in civil society? It is important to remember that *Pierson v. Post* was argued and decided in a common law court of New York, and not in the state of nature or in the fecund minds of Grotius, Pufendorf, and Barbeyrac. In order to answer this question, this part explores how these writers considered the role of the natural law in the
courts of civil society. Additionally, this part recounts the legal atmosphere in 1805—a time when New York was moving away from British common law, but had not yet enacted any statutes to govern the hunting of foxes. Finally, piecing together the metaphysical and jurisprudential elements, this part concludes by tracing the interaction between the natural law and the positive law.

Part IV synthesizes the preceding three parts, and compares and contrasts the writings of the natural law jurists with the opinions of Tompkins and Livingston. There is a conflict among the authorities. Barbeyrac and Locke do not require the physical capture of the fox. Pufendorf and Grotius would require the physical capture. When the authorities conflict, how is a common law judge supposed to resolve the differences? Specifically, this part aims to determine how faithfully the judges cited to the “ancient writers,” and whether the natural law in fact supported the holding of *Pierson v. Post*.

Part V concludes by considering the congruence between the natural and common law, and economic theory. Economic analyses reveal that the doctrine of first possession promotes principles of certainty and economic efficiency better than the labor theory of property. Thus the rule that Judge Tompkins adopted not only mirrored the majority of the sentiments among the natural law jurists, but also maximized economic incentives. The court’s reliance on the natural law should not be seen as a disingenuous method to achieve a certain result—as some realists may see it—but rather a reflection of the common law court’s implicit desire to promote certainty and economic efficiency.
I. Pierson v. Post Revisited

The facts of Pierson v. Post are rather simple. In 1805, Lodowick Post, a hunter, was chasing after a fox on “unpossessed and waste land” on a beach in Long Island, New York with “dogs and hounds.” Jesse Pierson, aware that Post was in hot pursuit of the fox, intercepted the fox, killed it, and carried it away. Post sued Pierson. The justice of the peace in the lower court ruled in favor of Post. Pierson appealed the decision to the New York Supreme Court of Judicature. The Supreme Court granted certiorari on whether Post, by his hunt “will sustain an action against Pierson for killing and taking [the fox] away.”

Judge Tompkins, writing for the majority, relied on the natural law jurists Grotius and Pufendorf—who favor the doctrine of first possession—and rewarded Pierson for actually capturing the fox. Livingston, writing for the dissent, relied on Jean Barbeyrac—who favored a Lockean labor theory—and would have rewarded the hunter Post for the labor he invested into the elaborate hunt.

A. Judge Tompkins’s Majority Opinion

At the beginning of the opinion, Judge Tompkins concedes that “[i]t is admitted [by both parties] that . . . property in such animals is acquired by occupancy only.” Thus, the case is narrowed to “the simple question” of whether Post, “by the pursuit with his hounds . . . acquired such a right to, or property in, the fox,” and specifically, “what acts amount to occupancy,

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6 ALEXANDER HAMILTON, PRACTICAL PROCEEDINGS IN THE SUPREME COURT OF THE STATE OF NEW YORK 77 (2004) (“A certiorari issues to an inferior court to remove the record generally, after judgment in the court below.”). Certiorari was used for “causes which did not proceed according to the course of the common law, viz. where no jury lay.” Writs of error were used for common law suits where a jury lay. Id. at n. 15. See RON CHERNOW, ALEXANDER HAMILTON 168 (2005) (“This compendium of 177 manuscript pages and thirty-eight topics is the earliest surviving treatise that captures New York law as it shifted away from British and colonial models.”).
applied to acquiring right to wild animals?” As Blackstone observed, all jurists in the debate agreed that “occupancy is the thing by which the title was in fact originally gained.” Elsewhere Blackstone comments, “To create a title to an animal Feræ naturæ [wild animal], occupancy is indispensable. It is the only mode recognised by our system.” But what defines occupancy? The majority opinion chose not to rely on “cases which have occurred in England” because they “have [been] decided upon the principles of their positive statute regulations.” Because the law of Parliament had no effect in New York in 1805, “[little] satisfactory aid can, therefore, be derived from the English reporters.”

Tompkins found the answer to this “novel and nice question” by “recourse to the ancient writers upon general principles of law,” and found that “the judgment below is obviously erroneous.” Tompkins first considered the Institutes of the Emperor Justinian, Fleta, and Henry de Bracton for the proposition that “pursuit alone vests no property or right in the huntsman” and that pursuit, “accompanied with wounding, is equally ineffectual . . . unless the animal be actually taken.” Tompkins next cites Samuel von Pufendorf and Cornelius van Bynkershoek, who wrote that “occupancy of” wild animals, or feræ naturæ, is accomplished with “the actual corporal [i.e., bodily] possession of them.”

Tompkins wrote if a “pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control,” then “actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts.” For example, “mortal[ly] wounding of such beasts, by [a hunter] not abandoning his pursuit” and trapping “such animals with nets and toils,” or “otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may

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7 William Blackstone, 2 Commentaries * 9.
8 Blackstone, supra note 7, at 403.
justly be deemed to give possession of them to those persons who, by their industry and labour, have used such means of apprehending them.” These “foregoing authorities are decisive to show that mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him.” This principle has come to be known in Black Letter property law as the doctrine of first possession.⁹

Despite the agreement of these jurists, Tompkins notes that it is still necessary to “inquire whether there are any contrary principles, or authorities, to be found in other books, which ought to induce a different decision.” The only “contrary principle” Tompkins cites are those of Jean Barbeyrac. Barbeyrac, “in his notes on Puffendorf [sic] . . . affirms, that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals.” Tompkins finds that Barbeyrac’s “objections to Puffendorf’s [sic] definition of occupancy are reasonable and correct.” Tompkins, narrowly construing Barbeyrac’s argument, concedes that mortally wounding a beast without capturing it could confer occupancy. Tompkins writes that because the fox was not mortally wounded, or trapped by Post, the case at bar “is one of mere pursuit, and presents no circumstances or acts which can bring it within the definition of occupancy” as defined by Pufendorf, Grotius, or even Barbeyrac.

Tompkins concludes by buttressing his reliance on the “ancient writers” with a healthy dose of pragmatism and realism. The Court is “more readily inclined to” define possession of wild beasts “within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society.” If merely “seeing, starting, or pursuing such animals” without “subject[ing] them to the control of their pursuer should afford the basis of” a property right, “it would prove a fertile source of quarrels and litigation.” In other words, in

⁹ Carol M. Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73, 75 (1985) (Property classes teaches all first year students “the doctrine of first possession and that first possession is the root of title.”)
the absence of the bright line rule established in this case—that is occupancy is obtained by
physical capture—there would be a flood of litigation from those who merely pursue, but not kill
foxes. Tompkins concedes that while Pierson’s deceit may be “uncourteous or unkind” towards
Post, his “act was productive of no injury or damage for which a legal remedy can be applied.”
The lower court judgment was reversed, and judgment was entered for Pierson.

B. Judge Livingston’s Dissenting Opinion

Judge Brokholst Livingston, who later received a recess appointment by President
Jefferson in 1806 to the United States Supreme Court, \(^\text{10}\) dissented and would have found for
Post. Instead of characterizing the case as a “novel and nice question,” as does Tompkins,
Livingston remarks that this case presents a “knotty point” that should have been resolved
“without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone.” (It
is worth noting that Tompkins did not cite to Blackstone or Locke, though traces of their writings
pervade the majority opinion.) Rather, this matter “should have been submitted to the arbitration
of sportsmen” who “would have had no difficulty in coming to a prompt and correct conclusion.”
Yet, the “parties have referred the question to our judgment, and we must dispose of it as well as
we can, from the partial lights we possess, leaving to a higher tribunal, the correction of any
mistake which we may be so unfortunate as to make.” Despite the “great . . . diversity of
sentiment among [the ancient writers], some conclusion must be adopted on the question
immediately before” the court.

\(^{10}\) Livingston, Henry Brockholst, History of the Federal Judiciary, available at
Livingston wrote an uncharacteristically sarcastic tongue-in-cheek opinion. Livingston refers to the fox as a “wild and noxious beast” and regards it “as the law of nations does a pirate”—“hostem humani generis” [enemy of all the people]. Elsewhere, he calls the fox a “wily quadruped,” whose “depredations on farmers and on barnyards, have not been forgotten,” and who is “cunning and ruthless in his career” of killing poultry. Livingston writes that exterminating the vermin fox, which preys on farmers and barnyards, is “meritorious and of public benefit.” Thus, the “decision [in Pierson] should have in view the greatest possible encouragement to the destruction of [this] animal.”

Yet, Livingston queries whether the incentives to hunt foxes would exist if a “saucy intruder” like Pierson “who had not shared in the honours or labours of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit.” Why would a hunter “keep a pack of hounds,” and “at the sound of the horn . . . mount his steed . . . [to] pursue the windings of this wily quadruped” if a thief could steal the fox at the last moment? Regardless of what “Justinian may have thought of the matter” when his “code was compiled many hundreds of years ago . . . it would be very hard indeed . . . not to have a right to establish a rule for ourselves.” When Justinian wrote his code, the sole purpose of this rule was “the preservation of Roman poultry.” At that time the pastime of the elaborate foxhunt had not yet come into existence. If “this diversion had been then in fashion, the lawyers who composed his institutes, would have taken care not to pass it by, without suitable encouragement,” and rewarded those who engaged in the pursuit of a fox.

Despite Livingston viewing the reliance on the ancient writers as farcical, Livingston feels compelled to consider the “ancient writers,” as “expected . . . by the learned counsel,” and

“examine[s] them all.” In this case, because there were no “municipal regulations” on which to rely, a resource to these jurists [was] necessary. Following “mature deliberations,” Livingston “embraces [the views] of Barbeyrac, as the most rational, and least liable to objection.” Livingston wrote that pursuit can vest a property right to a wild beast for the hunt.

The nebulousness of “pursuit,” and the absence of a certain bright line rule raise several issues. At what point should the pursuit of a fox constitute occupancy? Should “it be sufficient that we barely see [the beast], or know where it is, or wish for it, or make a declaration of our will respecting it?” Or, should “setting a trap, or lying in wait, or starting, or pursuing, be enough?” Alternatively, is “an actual wounding, or killing, or bodily tact and occupation . . . necessary?” Livingston “feel[s] great difficulty in determining” how to “acquire dominion over a thing,” as the “writers on general law . . . differ on” all of these questions.

Judge Livingston seeks to “imitate” the “middle course” adopted by a “certain emperor”—in this case Emperor Frederick. Although he provides no citation, Livingston references an entire passage from Pufendorf alluding to the “courtesy of a certain emperor, who . . . adopted a middle course, and [created an] ingenious distinction[]” to determine who should be entitled to the beast of the hunt, and “to whom the palm of victory belonged.” What was this “ingenious distinction[]”? Continuing to quote from Pufendorf, Livingston writes “if a beast be followed with large dogs and hounds, he shall belong to the hunter, not to the chance occupant.” But if the beast is “chased with beagles only, then he passed to the captor, not to the first pursuer.” It is not exactly clear why Livingston cites this passage from Pufendorf, because

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12 Samuel Pufendorf, De Jure Naturae et Gentium, at II.6.x citing Godofred, ad istam leg. Ex. Radevico de geft. Frederic. I. 1 c. 26. Citing the Emperor Frederick, Pufendorf writes “if the Beast were followed with the larger Dogs or Hounds, then he was the Property of the Hunter, not of the Chance-Occupant; and in like manner, if he were wounded or killed with a Lance or a sword. But if he were followed with Beagles only, then he passed to the Occupant not to the first Pursuer. If he was slain with a Dart, a sling, or a Bow, he fell to the Hunter, provided he was still in chase after him, and not to the Person who afterwards found or seized him.” N.B. Citations for this work refer to the book, chapter, and section numbers (e.g., II.6.x refers to book II, chapter 6, section 10).
Pufendorf rejected Emperor Frederick’s approach to possession. But Barbeyrac, who disagreed with Pufendorf, can be read to endorse this position.

Livingston, conceding that because “we are without any municipal regulations of our own,” the common law court is “at liberty to adopt one of the provisions just cited.” Because Post hunted with “dogs and hounds of imperial stature”—and not merely a diminutive beagle—Livingston sought to adopt Emperor Frederick’s “middle course.” Because “we are without any municipal regulations of our own,” the common law court is “at liberty to adopt one of the provisions just cited.” This pragmatic perspective recognizes the realistic manner in which common law courts operated. In this sense, Livingston is much more forthright than Tompkins regarding the role of the common law judge fashioning law in the absence of positive statues. Livingston writes, “After mature deliberation, I embrace [the views] of Barbeyrac, as the most rational, and least liable to objection.”

Livingston sets forth a test—“property in animals feræ naturæ may be acquired without bodily touch or mancupation, provided the pursuer be within reach, or have a reasonable prospect (which certainly existed here) of taking, what he has thus discovered an intention of converting to his own use.” Applying this test, Post was “within reach” of the fox, had a “reasonable prospect of taking” the fox, and expressed his “intention of converting [the fox] to his own use.” Thus Post “acquired [the fox] without bodily touch or mancupation.”

Livingston concludes with a tribute to farmers and “husbandmen, the most useful men in any community . . . [who would] be advanced by the destruction of a beast so pernicious and incorrigible.” The court “cannot err” in holding that a “pursuit like the present” which “must inevitably and speedily have terminated in corporal possession . . . confers such a right” to the
fox, “mak[ing] any one a wrongdoer who shall interfere and shoulder the spoil.” Livingston would have affirmed the “justice’s judgment,” and awarded the fox to Post.

II. The Natural Law and Occupancy of a Wild Beast

The ancient writers vigorously disagreed about whether occupancy should derive from the physical acquisition of a wild beast, or from investing labor and effort in pursuit of the animal. Blackstone accurately characterized the tension. “There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property.”13 Blackstone makes no effort this resolve this conflict, and writes that this is a “dispute that favours too much of nice and scholastic refinement!”14 Scholastic refinement indeed! Yet this split of opinion among the “ancient writers” represents the exact question presented in Pierson. This part first defines the natural law concept of the fox as a feræ naturæ, or wild animal. Second, this part reviews the doctrine of first possession, and the three ways in which the natural jurists would have determined occupancy to the hunter through mancipation. Third, this part explores the labor theory of property, and how a hunter could obtain a property right in a beast through the pursuit.

A. The Fox as Feræ Naturæ

At the outset of the opinion, the Court took judicial notice that “a fox is an animal feræ naturæ, and that property in such animals is acquired by occupancy only.” Feræ naturæ, or animal of a wild nature, was a term of art used in both Roman and natural law writings.

13 Id. at 8.
14 Id.
According to Pufendorf, the distinction between wild and tame animals is that “the former are more averse to human society, take greater delight in enjoying their boundless liberty, and cannot, without great difficulty, be accustomed to live with us; nor may we, after all, depend very safely on their fidelity.”\textsuperscript{15} Feræ naturæ range from traditional wild animals, like foxes and hares, to smaller yet equally feisty insects such as bees.\textsuperscript{16}

Some jurists found that domestic animals were subject to a different set of rules of occupancy than wild animals. Blackstone identifies domestic animals, such as horses, sheep, and poultry, as reducible to absolute property, because “these continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose him property.”\textsuperscript{17} But, “in animals Feræ Naturæ a man can have no absolute property.”\textsuperscript{18} Blackstone writes that a “qualified” property right can exist if a man tames a feræ naturæ, “or by so confining them within his own immediate power, that they cannot escape and use their natural liberty.”\textsuperscript{19} Blackstone denies that the laws of nature distinguish between types of animals. Rather, he attributes all distinctions to positive law from civil society: “there being in nature no distinction between one species of wild animals and another, between the right of acquiring property in a hare or a squirrel, in a partridge or a butterfly; but the difference, at present made, arises merely from the positive municipal law.”\textsuperscript{20}

\textsuperscript{15} Pufendorf, supra note 12, at IV.6.v.

\textsuperscript{16} Id. (“Yet Bees are no doubt wild by Nature, since their custom of returning to their hive, doth not proceeding from their familiarity with Mankind, but from their own secret instinct.”). See also, 2 Blackstone *392 (“Bees also are feræ naturæ; but, when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law”) citing Pufendorf, supra note 12, at IV.6.v.

\textsuperscript{17} Blackstone, supra note 7, at 390.

\textsuperscript{18} Id.

\textsuperscript{19} Blackstone, supra note 7, at 391 (Emphasis added).

\textsuperscript{20} Blackstone, supra note 7, at 403.
B. The Doctrine of First Possession

Tompkins relies on Samuel von Pufendorf to establish that “occupancy of” wild animals, or feræ naturæ, is accomplished only with “the actual corporal [i.e., bodily] possession of them.” From this authority, Tompkins concludes “mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him.” This is the doctrine of first possession. The natural law jurists recognized three ways to acquire occupancy under the doctrine of first possession—possession by mancupation, possession by wounding the animal, and recapture of an escaped animal.

1. Possession by Mancupation

Grotius and Pufendorf wrote occupancy results from the physical “mancupation,” or bodily possession of the animal, as men have “no power over” the “beasts, fish, and fowl” before they are “found or taken.”21 Pufendorf finds that “the property of things flow’d immediately from the Compact of Men, whether tacit or express.”22 In order for man to acquire a claim to property, “nothing was wanting but for Men to take Possession; yet that one Man’s seizing of a thing should be understood to exclude the Right of all others to the same thing.”23 This necessitated an actual bodily possession of the object.

Pufendorf elsewhere writes that “moving things cannot be made our own but by bodily seizure; and this we are to use in such manner as to take them from the place where they were

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21 Pufendorf, supra note 12, at IV.6.iv.
22 Pufendorf, supra note 12, at IV.4.iv.
23 Id.
found, into our lordship, or at least into our safe custody.”  

As an example, he notes that a person does not obtain possession of a nest of birds until he “carr[ies] them home,” nor does he “fix a property” in a “litter of young beasts of pray” until he “remove[s] them, as Prisoners to [his] own quarters.”  

Pufendorf does not limit seizure to beasts captured “only with our Hands.”  

Citing Grotius, Pufendorf permits occupancy through tools and instruments, including “[s]nares, gins, traps, nets, wheels, hooks, and the like.”  

Grotius adds that possession can be had by appliances “provided that two conditions are observed: first, that the appliances are in our possession; then, that the wild creature has been caught in such a way that it cannot escape.”  

Blackstone also adopts the corporeal possession requirement of possession, and writes “when a man has once so seized [the wild beasts], they become while living his qualified property, or, if dead, are absolutely his own.”  

The “right of occupancy is founded upon a tacit and implied assent of all mankind, that the first occupant should become the owner.”  

To Grotius, Pufendorf, and Blackstone the doctrine of first occupancy derives from positive law and the social compact, rather than from principles of natural law.

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24 Pufendorf, supra note 12, at IV.6.ix.  
25 Pufendorf, supra note 12, at IV.6.ix (“Thus a nest of birds, though I lay my hands upon them, yet are not my own unless I carry them home. If I find a litter of young beasts of prey, I then fix a property in them, when I either remove them, as Prisoners to my own quarters.”).  
26 Id.  
28 Hugo Grotius, De Jure Belli ac Pacis Libri Tres (the title translates to The Law of War and Peace) II.8.iv. N.B. Citations for this work refer to the book, chapter, and section numbers.  
29 Blackstone, supra note 7, at 403.  
30 Blackstone, supra note 7, at 7.
2. Possession by Wounding the Beast

Pufendorf acknowledges a conflict of authorities exists over whether wounding an animal is sufficient to obtain occupancy.\(^{31}\) Though this is not an issue presented in *Pierson*, Judge Tompkins notes that Pufendorf with hesitancy concedes that an animal that is “mortal[y] wounded, or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of the person inflicting the wound continues.”\(^{32}\) However, the hunter only maintains a right to the animal if he initially wounded or maimed the animal, thus signifying he at one point had physical contact, either through his hands or through a hunting instrument. By “manifest[ing] an unequivocal intention of appropriating the animal to his individual use, [the hunter] has deprived [the wild beast] of his natural liberty, and brought him within his certain control.”\(^{33}\) The hunter can also deprive the animal of his natural liberty with “nets and toils” or by “render[ing] escape impossible.”\(^{34}\)

Grotius disagrees, and contends that it is “not sufficient to have [only] wounded an animal” in order to constitute occupancy.\(^{35}\) Favorably citing Harmenopolous, Grotius notes “[h]e who has wounded a wild beast does not become owner of it unless he also has taken it”\(^{36}\)—actual physical possession is a necessity. Grotius favorably cites the proverb, “[y]ou started the hare, but others caught it.”\(^{37}\) This directly conflicts with Locke’s argument that “the hare that any one is hunting is thought his who pursues her during the chase.”\(^{38}\) Grotius also quoted from the “fifth

\(^{31}\) Pufendorf, *supra* note 12, at IV.6.x.
\(^{32}\) Id.
\(^{33}\) Id.
\(^{34}\) Id.
\(^{35}\) Grotius, *supra* note 28, at II.8.iii.
\(^{36}\) Harmenopolus, II. i [II. i. 21]:
\(^{38}\) JOHN LOCKE, TWO TREATISES OF GOVERNMENT V § 29 (1690).
book of Ovid’s Metamorphoses, [where] we read that it is one thing to know where a thing is, and another to find it.”  

The chase is not enough. Physical appropriation is a necessity. Yet, Pufendorf rejects Grotius’s absolutist approach, and writes that “if the beast be mortally wounded, or very greatly maimed, he cannot fairly be intercepted by another person whilst we are in pursuit of him,” but if the wound is not mortal, he can be intercepted by another.  

3. **Possession Recovered if Escaped Beast is Recaptured**

Pufendorf and Grotius do not require continuous physical control, and allow for regaining occupancy in the event that the beast escapes. Even if possession is lost, initial “ownership gives us the right to recover possession.”  

However, Grotius stipulates, “an actual physical possession is requisite in order to acquire [initial] ownership,” and occupancy obtains only after the initial catching or wounding the beast.

Several of the natural rights jurists grant dominion of a wild beast if the animal is denied its “natural liberty.” In the state of nature, beasts belong to the commons, and are free and possess liberty until man appropriates them. If the animal is caught, dominion is established, and the animal loses its natural liberty. When the animal escapes, while it may regain its natural liberty, possession is not necessarily lost.

Grotius writes that “wild animals cease to be our property as soon as they regain their natural liberty.” Pufendorf mostly concurs with Grotius. Pufendorf recites the “noted case of

39 *Id.*  
42 *Id.*  
43 *Id.*
the Boar in the Toil proposed in [Justinian’s] Digests.” In this case, if a boar was entangled in a trap set by X, then he belonged to X. But if Y “had loosed [sic] him, and restored him to his Natural liberty,” Y is liable to person X. Blackstone mostly echoed Pufendorf and Grotius. Blackstone considered game a form of “transient property” that persists “for long as they continue within [the hunter’s] liberty,” but “the instant they depart into another liberty, this qualified property ceases.” Blackstone continues, “if at any time they regain their natural liberty, [the hunter’s] property instantly ceases.”

An animal that escapes resumes his natural liberty, but possession may be regained. Grotius writes, “ownership is not actually lost because the wild beasts have escaped, but because of the natural inference that we have abandoned ownership on account of the difficulty of the pursuit, especially since the wild creatures which belonged to us cannot be distinguished from others.” Pufendorf highlights his dismay of this approach. According to Pufendorf, if wild beasts “escape out of our Hands, and repossessed of their natural liberty,” possession is irrevocably lost. Furthermore, a “wild beast is then supposed to recover his natural liberty . . . when he is quite out of our sight, or when though he is within view, yet it would be very difficult to follow him.” Pufendorf also writes “that what the wolf takes from us, is so long our property, as there is a possibility of recovering it.” Pufendorf maintains a much higher standard for possession of escaped animals that Grotius.

44 Pufendorf, supra note 12, at IV.6.ix.
45 Id.
46 Blackstone, supra note 7, at 395.
47 Blackstone, supra note 7, at 392.
48 Grotius, supra note 28, at II.8.iii.
49 Pufendorf, supra note 12, at IV.6.xii.
50 Id.
51 Id. citing D. ib. & l. 5. Princip.
52 Id. citing Vid. L. 8 f.2 D. Famil. Erciscund.
However, in somewhat of a contradiction, Pufendorf later insists that “a wild beast is not supposed to have recovered its freedom, so long as any person pursues, with probable hopes of retaking.” 53 That a wild beast does not recover liberty if there is pursuit implies a Lockean labor approach, rather than the all-or-nothing requirement of the doctrine of first possession. This view stands in stark contrast to Pufendorf’s view on acquisition, wherein pursuit is not adequate, and actual corporeal possession is a necessity. But this quote seems to be the anomalous outlier, and is not consistent with the remainder of Pufendorf’s views.

Nonetheless, when a wild animal “gets loose into their natural liberty” they should pass to whoever catches them. 54 Pufendorf justifies this approach, arguing for a “need of a most strict guard, or a kind of perpetual occupancy, for the retaining a creature, which is by nature empowered to wander without bounds . . .” 55 This comports with Judge Tompkins’s bright line rule, to grant possession to whoever catches the fox first.

Grotius writes that even if a wild beast escapes, they “are none the less the property of those who captured them, if they can be properly identified.” 56 Grotius further clarifies that a beast once possessed can be distinguished from other beasts “if ‘identification marks’ or bells, were placed on the wild creature; this, we know, has been done in the case of deer and hawks, which, when identified thereby, have been restored to their owners.” 57 In order to brand the animal with identification marks or bells, actual physical possession is a necessary condition.
Grotius argues that by using certain badges or marks to signify that the beast belongs to a certain person, dominion can be reestablished.\textsuperscript{58}

However, Pufendorf seeks to confine this practice only where the animal has been “divested of their native ferity, and are therefore deservedly admitted to the same rights as tame creatures.”\textsuperscript{59} The “native ferity” is likely a reference to a beast’s natural liberty. Similarly, Blackstone wrote “But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure; or if a wild swan is taken, and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him: but otherwise, if the deer has been long absent without returning, or the swan leaves the neighbourhood.”\textsuperscript{60}

C. \textit{Labor Theory of Property}

In dissent, Judge Livingston relies on the writings of Jean Barbeyrac and, implicitly, those of John Locke to introduce a labor theory of property. Under this approach, a hunter who invests, time, energy, and effort into the hunt can obtain a property right in the fox, even if he is not the first person to physically capture it. This section provides a brief introduction to Locke’s labor theory of property, and explores how possession of a wild beast could be had in the absence of mancipation.

\textsuperscript{58} \textit{Id.}
\textsuperscript{59} Pufendorf, \textit{supra} note 12, at IV.6.xii.
\textsuperscript{60} Blackstone, \textit{supra} note 7, at 392.
1. **Locke’s Labor Theory of Property**

John Locke’s Second Treatise of Government has deeply influenced the American view of property from the beginning of our Republic.  

Thomas Jefferson considered Locke—along with Sir Isaac Newton and Francis Bacon—as among “the three greatest men that have ever lived, without any exception,” who have “laid the foundation of those superstructures which have been raised in the Physical and Moral sciences.”

James Madison wrote that Newton and Locke “established immortal systems, the one in matter, the other in mind.” The Supreme Court has regularly focused on the significance of Locke’s views on property in the development of American law.

The crux of Locke’s theory of property is based on man acquiring property through his efforts, skills, and labor. “Every Man has a property in his own person” and “the labour of his body and the work of his hands . . . are properly his.” Flowing from this premise, whatever man “removes out of the State that Nature hath provided, and left it in, he hath *mixed his Labour* with, and joined to it something that is his own, and thereby makes it his Property.” Locke illustrates this concept through the pursuit of a rabbit. According to Locke, the hare that is hunted belongs

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65 Locke, *supra* note 38, at V § 27.

66 *Id.*
to the hunter who “pursues her during the Chase.”\textsuperscript{67} Because the animal is looked upon as part of the commons, and no Man’s private possession, “whoever has imploy’d so much labour about any of that kind, as to find and pursue her, has thereby removed her from the state of Nature, wherein she was common and hath begun a property.”\textsuperscript{68} The pursuit constitutes the mixing of labor, and from this effort, man obtains occupancy of the animal.

In contrast with Grotius and Pufendorf’s conception of property that was based on the rules of the social compact, Locke’s views of property derive from the laws of nature. Wrote Blackstone, Locke adopts a theory of acquisition of property, “holding, that there is no such implied assent [needed by civil society], neither is it necessary that there should be; for that the very act of occupancy, alone, being a degree of bodily labour, is from a principle of \textit{natural justice, without any consent or compact}, sufficient of itself to gain a title.”\textsuperscript{69} The doctrine of mixing labor to acquire property derives not from the social compact, but from the laws of nature.

In the Second Treatise, Locke describes a state of nature without an initial allocation of property rights, where everyone had an equal right to appropriate items. \textit{Pierson v. Post} represents a classic Lockean puzzle—no municipal law existed to govern the conflict and the fox on the barren beach was the property of no one. The fox could be appropriated without offending any positive laws.

\begin{footnotesize}
\begin{itemize}
\item [67] \textit{Id.}
\item [68] \textit{Id.}
\item [69] Blackstone, \textit{supra} note 7, at 7.
\end{itemize}
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2. **Mancupation Not Necessary for Occupancy of a Wild Beast**

Barbeyrac’s views on property were largely influenced by Locke. In his “commentary on Pufendorf’s discussion of property Barbeyrac refers his readers to [Locke’s] Two Treatises for the *definitive analysis* of the topic.” Barbeyrac “grants Locke the honor of completing the theoretical construction [of natural law theory] in a definitive manner.” For Barbeyrac, “to speak of Locke’s theory of property is to speak of Locke’s theory of rights.” Barbeyrac wrote “Mr. Locke means by the word ‘property’ not only the right which one has to his goods and possessions, but even with respect to his actions, liberty, his life, his body, and in a word, all sorts of a right.” It is very curious that neither opinion directly cited Locke, even though much of Barbeyrac’s analysis is derived directly from Locke’s Second Treatise.

Continuing the Lockean concept of mixing labor, Barbeyrac notes that the products of a person’s “labor of his body and work of his hands entirely and solely belongs to him.” Using the gathering of acorns as an example, as did Locke, Barbeyrac reiterates that “nothing but his

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70 JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES 6 (1983).
71 *Id.* at 7.
72 *Id.*
74 Burger, *supra* note 4, at 1135-1137.
75 Pufendorf, *supra* note 12, at IV.4.iv.4. The fourth number corresponds to Barbeyrac’s comment on that section. In this citation, I am referring to Barbeyrac’s note number 4 of Pufendorf’s Book IV, Chapter 4, Section 4. See also Locke, *supra* note 38, at V § 27 (“Every Man has a property in his own person” and “the labour of his body and the work of his hands . . . are properly his.”).
76 Locke, *supra* note 38, at V § 28 (“He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. No body can deny but the nourishment is his. I ask then, when did they begin to be his? when he digested? or when he eat? or when he boiled? or when he brought them home? or when he picked them up? and it is plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and common: that added something to them more than nature, the common mother of all, had done; and so they became his private right. And will any one say, he had no right to those acorns or apples, he thus appropriated, because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him. We see in commons, which remain so by compact, that it is the taking any part of what is common, and removing it out of the state nature leaves it in, which begins the property; without which the common is of no use.”).
labour in gathering them, can make them his own.” The same principle applies to the “stag which we have killed, the fish we have taken . . . and the Hare which we have hunted down.”  

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77 Pufendorf, supra note 12, at IV.4.iv.4.
78 Locke, supra note 38, at V § 30 (“And even amongst us the Hare that anyone is Hunting, is thought his who pursues her during the Chase. For being a Beast that is still looked upon as common, and no Man’s private possession; whoever has imploy’d so much labour about any of that kind, as to find and pursue her, has thereby removed her from the state of Nature, wherein she was common and hath begun a property.”).
79 Pufendorf, supra note 12, at IV.4.iv.4.
80 Id., at IV.6.xi.2. Id. at IV.6.vii.2.
81 Pufendorf, supra note 12, at IV.6.ii.
82 Pufendorf, supra note 12, at IV.6.xii.8.

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lawfully put in a claim to it.” Barbeyrac, repeating his refrain, retorts that bodily seizure is “not always necessary, as is before proved.” Barbeyrac argues that for Pufendorf “to maintain his principles [he] runs himself into manifest absurdities.”

Barbeyrac provides an illustration—when one finds a “swarm of Bees in the hollow of a Tree and makes a Mark whereby it may be known that he is gone to seek a hive to put them in, no Man may meddle with them, they are thought by right to belong to him that first discovered them, as the first occupier, because he has manifested his design to make them his own.” In this case, openly and notoriously expressing one’s intent to seize the bees at some point in the future is adequate to confer a property right to the insects. Barbeyrac contends that if the “beast has any mark by which they can be distinctly known, the Proprietor has no less right to claim them, than any other thing he has unwillingly lost, and of which he never showed any signs of neglect.”

The example of the Bees is very instructive, because Pufendorf considered bees to be wild animals. Actual sustained physical occupancy of a swarm of bees is impossible. Rather one of the few ways to signify possession in the case of these feisty insects is to mark the hive. If confronted with this situation, Pufendorf would have to concede that this is one of the few practical means of acquiring the bees, even though there is no physical capture.

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84 Id.
85 Pufendorf, supra note 12, at IV.6.ix.2 (“So that in the Example propounded by our Author, supposing that one finding a nest, and seeing that the young ones need to remain yet with their Dam leaves them, with a design to come again another time, they to whom he tells it, declaring to them his intention at the same time, do not deal well with him, it they do as to the Curate, of whom Bourfault speaks in his Letters, did to a Countryman, who to revenge himself went to him to put a false Confidence in him about something curious; whereupon the Curate, desirous to know all the particulars of the Matter to play a like trick with the Countryman, answered him, A bubble, the Birds are gone.”).
86 Pufendorf, supra note 12, at IV.6.ii.2.
87 Pufendorf, supra note 12, at IV.6.ix.2.
88 Id.
89 Pufendorf, supra note 12, at IV.6.v.
Barbeyrac continues, posing the hypothetical of “one seizes upon a thing which he finds in a publick place, but which he can’t carry home with him that moment . . . [and] leaves it, declaring to some other present, that he intends to take it, and will come soon for it.” According to Barbeyrac, another person can only establish a claim to the thing if the first possessor actually relinquished it, or he delayed a long time in returning to take it.

III. The Role of the Natural Law in Civil Society

It is important to remember that *Pierson v. Post* was argued and decided in a common law court of New York, not in the state of nature or in the fecund minds of Grotius, Pufendorf, and Barbeyrac. New York in 1805 was mired in a veritable legal black hole, with neither English common law nor New York statutory law available to decide this case. As a result, both Tompkins and Livingston decided to resort to the natural law jurists. This raises several questions. What is the role of natural law in civil society? What did the ancient writers say about the interaction between the natural law and civil society? In the absence of statutory or other positive law, what persuasive or precedential value do common law courts give the natural law? Even today our courts grapple with the question of whether it is appropriate for judges to enforce unenumerated or natural or pre-existing rights. The answers to these questions either grant

90 Pufendorf, supra note 12, at IV.6.ix.2.
91 Id.
92 See McDonald v. Chicago, 561 U.S. ____ (2010) (Thomas, J., concurring in judgment) (“A separate question is whether the privileges and immunities of American citizenship include any rights besides those enumerated in the Constitution. The four dissenting Justices in Slaughter-House would have held that the Privileges or Immunities Clause protected the unenumerated right that the butchers in that case asserted. See id., at 83 (Field, J., dissenting); id., at 111 (Bradley, J., dissenting); id., at 124 (Swayne, J., dissenting). Because this case does not involve an unenumerated right, it is not necessary to resolve the question whether the Clause protects such rights, or whether the Court’s judgment in Slaughter-House was correct.”). District of Columbia v. Heller, 554 U.S. ____ (2008) (“We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.”); Troxel v. Granville, 530 US 57, 91-92 (2000) (Scalia, J., dissenting) (“In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights” with which the Declaration of Independence proclaims "all men . . . are endowed by their Creator." And in my view that
legitimacy to Judge Tompkins’s formalistic opinion, or favor Judge Livingston’s faint-heard reliance on the natural law.

A. Natural Law and the Absence of Positive Law

After the Revolution, New York, like many colonies had adopted the English common law and William Blackstone’s Commentaries were the leading legal treatise. Yet, at the turn of the Century, several states, led by New York, “began to reject reliance on English law in favor of principles designed to serve the new republic.” In 1805, St. George Tucker, presaging future animus towards the reliance on foreign law, attacked the applicability of English property law in the states, in his introduction to the Blackstone Commentaries, writing that the Revolutionary War had “produced a corresponding revolution not only in the principles of our government, but in the laws which relate to property, and in a variety of other cases, equally contradictory to the law, and irreconcilable to the principles contained in the Commentaries.” Professor Burger notes that the Pierson opinion, by citing Roman law and Enlightenment philosophers, but

right is also among the “other[r] [rights] retained by the people’ which the Ninth Amendment says the Constitution's enumeration of rights “shall not be construed to deny or disparage.” The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to “deny or disparage” other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has no power to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me as a judge entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.”).  
93 Burger, supra note 4, at 1135.  
94 Burger, supra note 4, at 1136.  
95 Roper v. Simmons, 543 U.S. 551, 626-627 (2005) (Scalia, J., dissenting) (“Instead, the Court undertakes the majestic task of determining (and thereby prescribing) our Nation's current standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War— and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by continental jurists—a legal, political, and social culture quite different from our own.”).  
96 Burger, supra note 4, at 1136.
rejecting Blackstone, signified their rejection of English law as the source of law in the new Republic.\textsuperscript{97} Professor Burger theorizes that this may have been the reason why neither opinion cited Blackstone.\textsuperscript{98}

In 1805, New York lacked the law—either common or positive—to resolve \textit{Pierson v. Post}. In the absence of positive law, how should a common law court resolve this case? Livingston concedes “this [case presents] a knotty point.” Judge Tompkins ultimately based his decision on the writings of famous natural law jurists including Samuel von Pufendorf, Hugo Grotius, and Jean Barbeyrac. Was it appropriate to pass judgment based on the natural law? Grotius and Pufendorf largely agreed that any statutory laws governing the acquisition of wild animals would trump the natural law. Grotius, citing the Roman civil law, defined “the first method of acquiring property” as “taking possession of that which belongs to no one.”\textsuperscript{99}

However, this doctrine was valid “so long as no statute established any provision to the contrary . . . [f]or property ownership can be brought about also by the civil law.”\textsuperscript{100} Grotius finds that these natural principles will only be applicable “if no statute has prevented” it.\textsuperscript{101}

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\textsuperscript{97} Id. \\
\textsuperscript{98} Id. at 1135-1137. \\
\textsuperscript{99} Grotius, \textit{supra} note 28, at II.8.i (“Now the first method of acquiring property, which by the Romans was ascribed to the law of nations, is the taking possession of that which belongs to no one. This method is without doubt in accord with the law of nature, in the state to which I referred, after the establishment of property ownership, and so long as no statute established any provision to the contrary. For property ownership can be brought about also by the civil law.”). Citations for this work refer to the book, chapter, and section numbers. \\
\textsuperscript{100} Id. at II.8.i (“Now the first method of acquiring property, which by the Romans was ascribed to the law of nations, is the taking possession of that which belongs to no one. This method is without doubt in accord with the law of nature, in the state to which I referred, after the establishment of property ownership, and so long as no statute established any provision to the contrary. For property ownership can be brought about also by the civil law.”). \\
\textsuperscript{101} Id. at II.8.v.
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that they cannot be changed.”

Rather, “[t]hey are not a part of the law of nature absolutely, but are such only under a certain condition, that is, if no provision has otherwise been made.”

Pufendorf also makes it abundantly clear that hunting is a privilege and not a natural right. This privilege does not derive from the laws of nature, but from the positive institutions of civil government. “Hence it is apparent, that it depends on the Will of the Sovereign, and not on any Natural and Necessary Law, what right the private members of a state shall enjoy, as to the gatherings of movables not yet possessed, as to Hunting, Hawking, Fishing, and the like.”

Pufendorf later repeats that “the privilege of hunting is left wholly to the Governors of the Commonwealths” and that the “liberty of hunting” can be abridged “without any injustice” according to the laws of Nature. Blackstone mostly agrees with Pufendorf.

With regards to wild animals, “all mankind had by the original grant of the creator a right to pursue and take any . . . beast or reptile of the field: and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country.” Blackstone reaffirms that most of the laws governing possession of wild animals derives not from the laws of nature, but from civil society.

Both Tompkins and Livingston acknowledged that New York did not have any positive law that would decide this issue. According to Judge Tompkins, this case presented a “novel and nice question.” The case’s novelty was due to the fact that it was a case of first impression, and New York had no statutes or precedents governing this matter. As Livingston noted in dissent,

102 Id. at II.8.2.8.5
103 Id. at II.8.v.
104 Id. at IV.6.v.
105 Id. at IV.6.vi.
106 Blackstone, supra note 7, at 403.
107 Id. (emphasis added).
108 Id. (“But those animals, which are not expressly so reserved, are still liable to be taken and appropriated by any of the king’s subjects, upon their own territories; in the same manner as they might have taken even game itself, till these civil prohibitions were issued.”).
“[n]ow, as we are without any municipal regulations of our own.” According to Professor Donahue, the court in Pierson implies that there was little other law to turn to.109 Colonial statutes on hunting had been repealed by the Revolutionary War,110 and there were no reported cases in New York on hunting and acquisition of property rights in wild animals.111 Further, the cases in the “English reporters” were of little precedential value, because most of the cases “have either been discussed and decided upon the principles of their positive statute regulations.”

Tompkins needed to rely on something to rationalize his decision, and he chose to rely on the “ancient writers upon general principles of law”— the Roman Civil Law and Natural Law. Livingston concedes this point in dissent, and writes “But the parties have referred the question to our judgment, and we must dispose of it as well as we can, from the partial lights we possess,” and “some conclusion must be adopted on the question immediately before us.” Deciding tough cases with limited information has been the role of the courts since time immemorial.112

B. Criticisms of Relying on Natural Law

Livingston is critical of Tompkins relying on Roman and natural law for several reasons. First, relying on hunting customs would be a more optimal way of resolving this case. Sardonically, but pragmatically, he notes that this matter “should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Pufendorf, Locke, Barbeyrac, or Blackstone.” (Judge Tompkins cited neither Locke nor Blackstone.) Livingston

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109 Donahue, supra note 5, at 40.
110 Id. at 40, n. 9
111 Id. at 40, n. 10.
112 For a modern twist on this necessity of judgment by the courts, see Planned Parenthood v. Casey, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring in judgment in part and dissenting in part) (“The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution.”) (emphasis added).
predicts that had sportsmen arbitrated this matter, “they would have had no difficulty in coming
to a prompt and correct conclusion,” and the precedent set would not have interfered with any
customs or usage, known to every follower of Diana (the Roman goddess of the hunt). In such a
court, “the skin and carcass of poor reynard [fox] would have been properly disposed of.”

In Swift v. Gifford, another classic case studied in first year property classes, the District
Court of Massachusetts chose to allocate property rights based on the customs of whale
hunters. In this case, the crew of the ship Rainbow harpooned a whale it was pursuing. The
whale escaped, and was caught by the ship Hercules. If the case was resolved on the doctrine of
first occupancy, the rule adopted in Pierson, Hercules would have had a proper claim to the
whale. However the Court, following the universal maritime custom, assigned the whale to the
Rainbow, for its harpoon struck the whale first. In Swift, “the custom of the sea” took precedence
over “the positive rule of property law.” In Pierson, the Court did not decide the case
according to customs. Professor Epstein argues that the decision in Pierson could be reversed
“since it appeared from the record that all hunters in the region regarded hot pursuit as giving
rights to take an unimpeded first possession.” Yet, Epstein doubts the validity of relying on
traditions; “like contract, custom cannot serve as a satisfactory source of property rights.”

Second, Tompkins citations to Justinian’s Digests should not be viewed as an invocation
of reason based judgment—the core of natural law. According to Professor Donahue, during the
period Pierson was written, the legal environment was “ripe for Roman law.” Yet, “. . .
Justinian resolves the matter as much on the basis of his authority as emperor as on the basis of

115 Id. at 1221.
116 Id. at 1236.
117 Donahue, supra note 5, at 40 citing P. Stein, The Attraction of the Civil Law in Post-Revolutionary America, 52
natural reason.” Rather than divining fundamental rules of property from reason and natural law, Justinian merely invoked the rule of fiat. In this sense, the only value Justinian provides is the ability to persuade a common law judge.

Third, times change and modern society should not be bound by edicts written during a different time under different circumstances—especially when those laws were written by different civilizations. Regardless of what Justinian wrote “many hundred years ago,” the court should have a “right to establish a rule for ourselves.” To quote Holmes, who wrote nearly a century later, “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”

Judge Livingston realized that the case was really about “who is entitled to the pleasure and glory of the kill,” as the hunting of foxes had evolved from a way of exterminating pests to a gentlemen’s sport. Therefore, the Roman laws governing wild animals did not apply to the fox, because the modern purpose of the foxhunt was the chase, rather than the capture and the kill. If Justinian was aware of prevalence of the modern sport of fox hunting, Livingston contends the Digests would have encouraged this beneficial activity for the “preservation of Roman poultry.” “Tempora mutantur [times change]; and if men themselves change with the times, why should not laws also undergo an alteration?”

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118 Donahue, supra note 5, at 43 n. 16.
119 See Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 469 (1897).
120 Id. at 741.
121 Id.
C. Interaction between Natural Law and Positive Law

While Pufendorf and Hobbes generally tend to disagree on most things, the two agreed on the dominance of positive over natural law to define property rights. Pufendorf stresses that a property right based on the doctrine of first possession stems not from the laws of nature, but rather from the social compact—in other words, civil society. To justify this distinction, Pufendorf introduces a lengthy discussion from Hobbes’s *Treatise de Principis justi et decori*—

“That there is in Nature no more reason why Men should define a Right from the first occupancy of things than from the first discovery of them with the Eye. Therefore, the difference will arise from the Institution of Men [i.e., positive law], ordaining, that the Right to a piece for Land, for example, should be in him who first took possession of it, not in who saw it before others.”

Thus, in the state of nature, in the absence of civil laws, property need not be defined by the doctrine of first possession. Indeed, property could even be obtained based on the first person to cast a furtive glance at a beast. The doctrine of first possession prevails only because it is based on the laws of civil society.

Pufendorf continues citing Hobbes, and poses the hypothetical of “two men, one swift, and one slow of foot” who pursue an animal. Pufendorf comments that despite the mismatch, “the right by which he who first seizeth the thing, in this case, should be the true owner of it.” This notion is not derived from the laws of nature, but from the social covenant. A “bare corporal act” of actually taking the object only constitutes possession as a result of consent of others, or if a “covenant[—such as a social compact—]intervenes.” Because the social covenant approves of

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122 Donahue, *supra* note 5, 56. Professor Donahue claims that with respect to the acquisition of wild animals, “Pufendorf was a Hobbesian. His adherence to Hobbes led him to expend considerable effort on the concept of occupancy.”
acquisition by first possession, this weakens the argument that it is unfair to a hunter like Post, who pursues the fox, and mixed his labor, yet loses it to the interloper Pierson. In a sense, civil society agreed to this allocation of rights and predetermined this issue of fairness.

Barbeyrac strenuously objects to the Hobbesian illustration Pufendorf discussed, and rejects that in the state of nature possession by mere sight would be possible. Barbeyrac contends that if a person does not “declare[] . . . an intention to set apart such a thing for his use, or to appropriate it to himself” objects would become useless to any Man.125 The “mere sight of a thing can’t have the same effect, because we see many things without any design of taking them to our selves only.”126 But, when “we perceive a thing first, and we discover any ways an intention of reserving it to ourselves, others may not more pretend to it, that if we were actually seized of it.”127 The focus is on the “intentions” and labor used to appropriate the property, rather than merely looking at it. If the beasts of the Earth could be acquired merely by glancing at them, without exerting labor, indolent man would be rewarded in a prodigious manner by acquiring a property right. Citing Locke, Barbeyrac writes that the person who takes the item first has a dominion, “provided he takes no more than he needs and leaves enough for others.”128 This would violate Locke’s “enough, and as good”129 and “spoilage”130 provisos, which provide that a fundamental principle of the laws of nature that whatever “is more than [man’s] share . . . [must] belong[] to others.”

125 Pufendorf, supra note 12, at IV.4.v.6.
126 Id.
127 Id.
128 Id.
129 Locke, supra note 38, at V § 33 (“Nor was this appropriation of any parcel of Land . . . any prejudice to any other Man, since there was still enough, and as good left”).
130 Id. at V § 31 (“As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others.”)
IV. *Pierson v. Post and the Natural Law*

Tompkins is faced with a conflict. The leading natural law jurists disagree on how to resolve this question presented in *Pierson*. Barbeyrac and Locke do not require mancupation. Pufendorf and Grotius would require mancupation. When the authorities conflict, how is a common law judge supposed to resolve the differences? The same way modern judges do—by creatively construing or distinguishing precedents. Judge Tompkins, writing for the majority, narrowly construed Barbeyrac’s view of pursuit in order to resolve a split of opinion among the jurists, and rule in favor of Pierson. Judge Livingston writing for the dissent—to his own detriment—also narrowly construed Barbeyrac, and conceded that pursuit cannot establish dominion. Therefore, the holding in *Pierson* was not necessarily consonant with all of the natural law authorities on point.

A. *Tompkins Narrowly Construes Barbeyrac to Resolve Conflict*

According to Tompkins, Barbeyrac does not permit that “pursuit alone is sufficient for that purpose.” Tompkins views this position as “reasonable and correct.” Except this is not Barbeyrac’s position. Barbeyrac held that “The truth is, that till we cease pursuing the beast, and so leave it to the first occupant, it belongs to us as much as can be, so that no man can lawfully put in a claim to it.” Barbeyrac argued that occupancy could be had without physical

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131 Pufendorf, *supra* note 12, at IV.6.xii.8. N.B.
capture—“mancupation is only one of many means to declare the intention of exclusively appropriating that, which was before in a state of nature.”\textsuperscript{133}

Tompkins attempted to subsume Barbeyrac’s views into those of Grotius’s by quoting Grotius’s “qualification” of the mancupation requirement—“physical possession of wild creatures can be acquired \textit{not only by the hands}, but also by appliances, such as traps, nets, and snares, provided that two conditions are observed: first, that the appliances are in our possession; then, that the wild creature has been caught in such a way that it cannot escape. On this basis the question of the boar caught in a snare should be decided.”\textsuperscript{134} Tompkins remarks that “this qualification embraces the full extent of Barbeyrac’s objection to Pufendorf’s definition.” While Barbeyrac did write “mancupation is only one of many means to declare the intention of exclusively appropriating that, which was before in a state of nature,”\textsuperscript{135} he did not limit dominion to situations in which the “appliances are in our possession . . . [and] the wild creature has been caught in such a way that it cannot escape.” Tompkins attempts to narrowly construe Barbeyrac’s writing, though to little avail.

Barbeyrac can be read to deem an openly declared intent to seize the beast, combined with the pursuit, as adequate to constitute possession. “Indeed, that which properly makes the Right of the first occupier, is that he makes known to others his design to seize upon a thing.”\textsuperscript{136} Barbeyrac stresses that declaring an intent to seize an animal can be a valid method of appropriation, even in the absence of capture—either by physically capturing the beast or through instruments. Although taking occupancy is one form of possession, simply indicating an

\begin{flushleft}
\textsuperscript{133} \textit{Id.} at IV.6.ii.2. \textit{Id.} at IV.6.vii.2. \\
\textsuperscript{134} \textit{Id.} \\
\textsuperscript{135} \textit{Id.} at IV.6.ii.2. \textit{Id.} at IV.6.vii.2. \\
\textsuperscript{136} Pufendorf, \textit{supra} note 12, at IV.6.ii (“Sed possessio illa potest non solis manibus, sed instrumentis, ut decipulis, retibus, laqueis dum duo adsint: primum ut ipsa instrumenta sint in nostra potestate, deinde ut fera, ita inclusa sit, ut exire inde nequeat.”)
\end{flushleft}
intent to seize could be enough to establish possession. These writings are in direct conflict with Tompkins’s characterization.

Rather, “[i]f [the hunter] . . . declares his will by some other act, as significative, or if others have openly renounced it with respect to him the Right which they had to any thing, which belonged no more to him than to them, he may then acquire the Original property without any actual Possession.” Instruments are not necessary in this case. Barbeyrac does not embrace Grotius’s reasoning, even according to Tompkins’s distinguishing “qualification.”

Barbeyrac also rejected the writings of Pufendorf—who largely agreed with Grotius. Pufendorf argued that occupancy could not be obtained through the hunt. Pufendorf reiterates that “we are then said to have occupied any thing, when we actually take possession of it; and this commenceth at our joining body to body . . . but the bare seeing of a thing . . . is not judged as sufficient title of possession.” Barbeyrac distinguished what Pufendorf wrote, and commented “taking possession actually (occupatio) is not always absolutely necessary to acquire a thing that belongs to nobody. Tis only a means to let all to hers know, that we have an intention to appropriate such a thing.”

What should a court do when the natural law sources conflict, as Barbeyrac disagrees with Grotius and Pufendorf on requirements for possession? Simply put, jurisprudential ledgermain. Judge Livingston wrote explicitly what is implicit in Judge Tompkins’s formalistic holding; “we are at liberty to adopt one of the” provisions the court thought best. The modern realist must remember the role of the 19th century common law court; to find the most intelligent

\[137\] Pufendorf, supra note 12, at IV.6.ii (“Sed possessio illa potest non solis manibus, sed instrumentis, ut decipulis, retibus, laqueis dum duo adsint: primum ut ipsa instrumenta sint in nostra potestate, deinde ut fera, ita inclusa sit, ut exire inde nequeat.”)
\[138\] Id. at IV.4.vi.8.
\[139\] Id. at IV.6.ii.
rule for future situations, and incidentally decide the case in the process.\textsuperscript{140}

Tompkins decision can be rationalized thusly—as a common law judge, he was responsible for fashioning the law where it was unsettled, and he could properly rely on any precedents he saw fit to cite. Barbeyrac’s reasoning would seem to support Post’s claim. Post engaged in an ostentatious and showy fox hunt with hounds, chased a wily fox, and openly and notoriously declared his intent that he wanted that fox. To Barbeyrac, that could have been enough to establish possession. It is questionable whether Barbeyrac would have determined occupancy in fact existed for Post, but considering the labor expended by Post, the use of the hounds, and Post not abandoning the pursuit, it is a closer call than Tompkins is willing to admit. Though, by narrowly construing Barbeyrac’s objections, Tompkins is able to reconcile the views of the jurists, and find that this case “presents no circumstances or acts which can bring it within the definition of occupancy by Pufendorf, or Grotius, or the ideas of Barbeyrac upon that subject.” Thus, Tompkins is able to neatly resolve the case, without having to concede conflicting authorities. This was a very weak distinction, yet it made the holding acceptable. Judge Tompkins essentially punted on this difficult question by narrowly construing Barbeyrac to eliminate the perceived conflict.

While Tompkins did not explicitly rule that the laws of nature supported his holding, he neglected to mention that the laws from Pufendorf and Grotius were not derived from the laws of nature, but from positive law. This sin of omission might lead the casual reader to conclude that Tompkins was enforcing the natural law. But this is not the case. Furthermore, the rule of first

\textsuperscript{140} \textit{ANTONIN SCALIA, A MATTER OF INTERPRETATION} 1997 6 (“Famous old cases are famous, you see, not because they came out right, but because the rule of law they announced was the intelligent one. Common-law courts performed two functions: One was to apply the laws to the facts. All adjudicators-French judges, arbitrators, even baseball umpires and football referees-do that. But the second function, and the more important one was to make the law.”).
possession was well understood to 19th century common law judges, and Tompkins was “not striking out on . . . [his] own terms, creating a legal rule of property from a novel theoretical foundation by” enforcing this rule.  

Finally, although common law courts perhaps are not the ideal forum for dispute resolution, because they are “fair reflections of some larger social requirements, as indeed they are, . . . they can offer some limited criterion of relative virtue that allows us to choose between the two alternative systems of original property entitlements.”

B. Livingston, To His Own Disadvantage, Narrowly Also Construes Barbeyrac

As previously demonstrated, the writings of Barbeyrac support Post’s claim. Yet, Livingston, to his own detriment, narrowly construes the writings of Barbeyrac, making it a much closer call than it should have been. Livingston begins by phrasing the question presented slightly differently than Tompkins, and asks “Whether a person who, with his own hounds, starts and hunts a fox on waste and uninhabited ground, and is on the point of seizing his prey, acquires such an interest in the animal, as to have a right of action against another, who in view of the huntsman and his dogs in full pursuit, and with knowledge of the chase, shall kill and carry him away?” The phrasing of this question focuses more on the pursuit of the beast, rather than the actual capture. Livingston stresses the labor that Post expended with his hounds, and noted that


142 Richard Epstein, Possession as the Root of Title, 13 GA. L. REV. 1221, 1241 (1978) (“There must be some way to break a philosophical impasse, and it is in this connection that we should return again to both the institutional constraints and past practices that characterize the common law mode of adjudication. It is not that our philosophical inquiry has taken place in an intellectual vacuum. It is that the inquiry has taken place on the assumption that we can begin structuring entitlements as if we wrote upon a blank slate, indifferent to all events and practices that have developed over time. The common law courts . . . never had the luxury of philosophical purity in some original position. If we accept these constraints upon the judiciary as unfortunate features of the legal system alone, then perhaps there is no great reason to attach any weight to them. Yet if we regard them as fair reflections of some larger social requirements, as indeed they are, then they can offer some limited criterion of relative virtue that allows us to choose between the two alternative systems of original property entitlements. The point is simply that some weight should be attached to the rules under which a society in the past has organized its property institutions.”).
this ostentatious hunt was readily viewable by Pierson the interloper.

Livingston proposes the following rule: “property in animals *Feræ naturæ* may be acquired without bodily touch or mancupation, provided the pursuer be within reach, or have a *reasonable* prospect (which certainly existed here) of taking, what he has *thus* discovered an intention of converting to his own use.” He notes that this test “comports also with the learned conclusion of Barbeyrac.” However, Barbeyrac never explicitly mentions this three-factor test. In fact, this test adds several layers of complexity on top of Barbeyrac’s philosophy towards acquiring a property right in a wild beast.

First, Barbeyrac certainly did not require that the “pursuer be within reach.” If a speedy hare is within a hunter’s reach, and it quickly hops away from the indolent hunter, a property right would not vest. In contrast, if a swift and industrious hunter chases after the hare, even if it is far away, and the hunt is long and protracted, Barbeyrac would find that the hare belongs to the hunter, even if another intercepts it first. Wrote, Locke “the hare that any one is hunting is thought his who pursues her during the chase.” The proximity of the prey is not dispositive from a Lockean perspective.

Second, a narrow reading of Barbeyrac’s writings could suggest that the hunter needed to “have a reasonable prospect . . . of taking” the beast, but Pufendorf only required that the beast should go to “him, who, before others took bodily possession of it, with intention to keep it as his own.” The concept of a “reasonable prospect” of success is an *ex post* rationalization that ignores the energy invested before the capture. Rather, *ex ante*, the probability of success is a factor of how much labor the hunter had already expended in chasing the beast. The Lockean view focuses on the *ex ante* view—the labor invested and intentions expressed—rather than the

143 Locke, *supra* note 38, at V §29.
ex post view—the likelihood of success.

Third, only the last prong of Livingston’s test—that the hunter “discovered an intention of converting [it] to his own use”—closely “comports . . . with the learned conclusion of Barbeyrac.” Barbeyrac wrote, “[t]ill we cease pursuing the beast, and so leave it to the first occupant, it belongs to us as much as can be, so that no man can lawfully put in a claim to it.”

The focus is on the expressed intentions. Yet, the added requirements that the hunter “be within reach” or have a “reasonable prospect” of success disregards the labor theory, and applies a heightened requirements that approaches the doctrine of first possession.

To his own detriment, Livingston narrowly construed what Barbeyrac wrote. Why would Livingston not broadly, or at least accurately, construe Barbeyrac in order to support his argument that Post had title to the fox? Livingston could have cited other provisions of Barbeyrac, which much more clearly support Post’s claim to the fox. Whereas Barbeyrac could have more forcefully supported Post’s position, Livingston improperly conceded that Barbeyrac could not be read to support his position. Barbeyrac does not rule out a pursuit conferring a property right—if the hunter “declares his will” and “makes known to others his design to seize the best,” dominion can obtain.

While labor theory lacks certainty—for example, how much pursuit is needed in order to confer occupancy—the test Livingston fashioned seems much more likely to resolve future cases. By narrowly construing Barbeyrac, almost to make it Pufendorfian, Livingston succeeds in proffering a useful test that society and the courts can rely on. He crafts a middle path between

145 Pufendorf, supra note 12, at IV.6.xii.8.
146 Pufendorf, supra note 12, at IV.6.ii (“Indeed, that which properly makes the Right of the first occupier, is that he makes known to others his design to seize upon a thing. If then he declares his will by some other act, as significative, or if others have openly renounced it with respect to him the Right which they had to any thing, which belonged no more to him than to them, he may then acquire the Original property without any actual Possession.”).
the unforgiving doctrine of first possession and the nebulous labor theory. It seems that Livingston was more concerned with fashioning a workable test than faithfully citing to Barbeyrac.

V. Certainty, Efficiency, and the Natural Law

Towards the end of the opinion, Tompkins writes that he is willing to adopt the “limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society.” Tompkins argues that if a hunter could claim a wild beast merely by pursuing it without wounding the animal or depriving it of its natural liberty, “it would prove a fertile source of quarrels and litigation.” One can infer from this statement that Tompkins’s willingness to rely on the natural law jurists cited is not based on the reason of the natural law, but because their rule promotes certainty and reduces litigation.

If Tompkins merely wanted to adopt a rule to promote “certainty” and minimize litigation, why did he need to comb through Justinian, Pufendorf, and Grotius? Why couldn’t he just announce a rule to promote efficiency in common law fashion, like in another 1L classic—Hadley v. Baxendale?147 Curiously, the common law style of the rule Judge Livingston fashioned is quite similar to the holding in Hadley.148 Can this parting salvo be seen as an implicit instrumentalist refutation of the validity of the natural law? Is the natural law reasoning mere

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148 Compare Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854) (in a suit for breach of contract, not all damages suffered as a result of the breach can be recovered, but only those that “could have been fairly and reasonably contemplated by both parties when they made [the] contract.”) with Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805)(Livingston, J., dissenting) (“that property in animals fere naturae may be acquired without bodily touch or mancipation, provided the pursuer be within reach, or have a reasonable prospect (which certainly existed here) of taking, what he has thus discovered an intention of converting to his own use.”)(emphasis added).
window dressing\textsuperscript{149} to make his ultimate conclusion seem more justified? Not necessarily. Indeed, the natural law and the doctrine of first possession create certainty and promote economic efficiency—a frequent goal of the common law. Indeed, there is a discernible congruence between the natural and common law and economic theory.

\textbf{A. The Common Law and Efficiency}

Professor Epstein objects that the “[t]he large question [in \textit{Pierson}]{\textsuperscript{150}}—why is first possession sufficient to support a claim of ownership—received no consideration at all.”\textsuperscript{150} Perhaps this question can be answered by recourse to an important element of the common and natural law doctrines—the desire to promote economic efficiency. Contemporary law and economic analyses often show the “common law’s congruence with economic theory.”\textsuperscript{151} In the words of Judge Posner, common law judges have a “taste” for efficiency. \textsuperscript{152} “From its inception, an animating insight of the economic analysis of law has been the observation that the common law process appears to have a strong tendency to produce efficiency-enhancing legal rules.”\textsuperscript{153} Many theorists postulate that the “common law process had built into its structure a self-correcting evolution mechanism,”\textsuperscript{154} or as Lord Mansfield put it, the common law over time “works itself pure.”\textsuperscript{155}

\textsuperscript{149} See Graham v. Florida, No. 08-7412 (2010) (Thomas, J., dissenting) (“In the end, however, objective factors such as legislation and the frequency of a penalty’s use are merely ornaments in the Court’s analysis, \textit{window dressing} that accompanies its judicial fiat.”)(emphasis added).
\textsuperscript{150} Epstein, \textit{supra} note 114, at 1225.
\textsuperscript{151} Lawrence A. Cunningham, Traditional Versus Economic Analysis: Evidence From Cardozo And Posner Torts Opinions, 62 Fla. L. Rev. 667, 682 (2010).
\textsuperscript{154} \textit{Id}.
\textsuperscript{155} Omychund v. Barker, 1 Atk. 21, 33 (K.B. 1744).
According to Locke, efficiency and utility can be reconciled with labor theory, as activities expending labor were generally Pareto optimal—that is at least one person is made better off and nobody is made worse off. To Locke, “labor creates value because ‘labor’ means production, i.e., the creation of new materials for maintaining human life and happiness.” Indeed, “[t]he doctrine of the origin of property through labor will not be properly understood if it is not recognized that Locke thinks of labour as a rational (or purposeful), value-creating activity.” Locke and Pufendorf, in agreement with the Greek Stoics, wrote that acting in accordance with the laws of nature yielded happiness and maximized social utility—hallmarks of economic efficiency.

Professor McDowell alleges that the “natural law argument . . . did not necessarily resolve the dispute.” Citing Professor Donahue, she observed that the different natural law jurists “differed on the question of what amounted to capture.” This “enabled Tompkins to choose the outcome consistent with his second consideration, namely the advantage of a bright

156 Locke, supra note 38, at V § 43 (“Nature, and the Earth furnished only the almost worthless Materials as in themselves” and commenting on the vast array of things “that industry provided and made use of”). See also Recovering the Full Complexity of Our Traditions: New Developments in Property Theory, 46 J. Legal Educ. 596, 599 (1996) (“Locke’s narrative embeds utilitarianism, with the argument that private property is efficient because common ownership would eliminate the incentive to gather more acorns, and so everyone would be hungrier.”); Jeremy Waldron, Two Worries about Mixing One’s Labour, 33 PHIL. Q. 37 (1983) (“In Locke’s view, the acquisition of private property results in extraordinary efficiency . . . Labor, in Locke’s view, increased value, and this was enough of a rationale for justifying private property”).
157 Adam Mossoff, Locke’s Labor Lost, 9 U. Chi. L. Sch. Roundtable 155, 160 (2002) (“Locke believes that labor creates value because ‘labor’ means production, i.e., the creation of new materials for maintaining human life and happiness.”);
159 Mossoff, supra note 141, at n.166 (“Pufendorf agrees with Locke that ‘actions in conformity with the law of nature have, indeed, this characteristic, that not only are they reputable, that is, they tend to maintain and increase a man’s standing, reputation, and position, but they also are useful, that is, they procure some advantage and reward for a man, and contribute to his happiness . . . The goal is successful living and happiness (what would be redefined in the modern era as “utility”), and the standard used to achieve this goal is objective moral principles derived from the facts of the world.”)(emphasis added)(citations omitted).
160 McDowell, supra note 11, at 737.
161 Donahue, supra note 5, at 62-63 (arguing that the natural law philosophers different on the question presented in Pierson and suggesting that Judge Tompkins picked the opinion that justified the outcome he wanted to reach).
line rule”\textsuperscript{162} “that would keep these cases out of the courts in the future.”\textsuperscript{163} McDowell argues that Tompkins favored the interloper Pierson because “this was the result that would provide the most certainty and thereby promote the policy of peace and order in society.”\textsuperscript{164} Professor Krier takes a less cynical view, and writes “[t]he formalist urge led [Judge Tompkins] to follow the view of classic jurisprudential commentators (much mocked by the dissent), and \textit{instrumental reasons supported that choice}.”\textsuperscript{165} I would agree more with Professor Krier. That is, Tompkins formalistically followed the natural law philosophy, and that decision incidentally yielded economic efficiency; not the other way around.

\textbf{B. \hspace{1em} Comparing the Efficiency of First Possession and Labor Theory}

According to Professor Burger, efficiency in \textit{Pierson}, is embodied in two competing property rules; the “real question [in \textit{Pierson}] is which property rule will [(1)] minimize transaction costs . . . and [(2) which rule] most effectively harness[es] individual self interest (Livingston’s sure reward for productive labor).”\textsuperscript{166} Professor Rose phrases these two rules slightly differently, but it accomplishes the same ends; “(1) notice to the world through a clear act, and (2) reward to useful labor.”\textsuperscript{167}

To resolve Professor Rose’s first principle, one must determine what is the \textit{clearest} act? In \textit{Pierson}, would the clearest act be the indeterminate chase or the corporeal kill? A clear act does not have a “natural meaning independent of some audience constituting an ‘interpretive

\textsuperscript{162} McDowell, \textit{supra} note 11, at 737.
\textsuperscript{163} \textit{Id.} at 740.
\textsuperscript{164} \textit{Id.} at 737. \textit{Id.} at 740 (“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.”).
\textsuperscript{166} Burger, \textit{supra} note 4, at 1102.
\textsuperscript{167} Rose, \textit{supra} note 9, at 77.
community.” Professor Epstein echoes this point, noting “the very nature and definition of the right seems to require some collective social institution to lie at its base.” Rather, the “clear act” must be based on extrinsic norms. Judge Livingston would rely on the customs of the hunting community to define the clear act—that is the pursuit. Judge Tompkins adopts a different clear act, the bodily possession of the beast, by following the norms of the natural and civil law jurists—Barbeyrac and Locke excepted. In defining what the clear act was, Judge Tompkins put “an imprimatur on a particular symbolic system and . . . [a]udiences [such as hunters like Post] that do not understand or accept the symbols are out of luck.” Depending on what level of abstraction the clear act is defined, some groups win, and some groups lose. Yet both conceptions seek to reward those who expend varying degrees of labor, promoting different levels of economic efficiency.

Practically speaking, the clearest possible sign of acquisition to the world, and to the courts, is actual possession. Under the doctrine of first possession, society can easily resolve whom the kill belongs to. Thus, Rose’s first principle embraces the views of Grotius and Pufendorf. The hunt, as proposed by Locke and Barbeyrac, would not be enough to constitute a clear act of possession, because it is difficult to prove who pursued the fox, how much labor was invested into the pursuit, what was the hunter’s true intent, etc. The inability to draw a bright line here eliminates the possibility of any “clear act.” Professor Rose’s second principle, however, “suggests a [Lockean] labor theory of property [in that] the owner gets the prize when he ‘mixes

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168 Rose, supra note 9, at 84.
169 Epstein, supra note 114, at 1228 (“Property may look to be an individualistic institution, but the very nature and definition of the right seems to require some collective social institution to lie at its base. No ‘natural’ act can legitimate a social claim to property.”).
170 Rose, supra note 9, at 85.
171 Id.
in his labor’ by hunting.” This principle embraces the views of Locke and Barbeyrac, because they are willing to grant dominion as a result of mixing labor in a pursuit.

The majority implies that the first principle is more economically efficient, while the dissent adopts the second principle. The majority wishes to make the resolution of disputes simpler, while the dissent seeks to reward hunters who partake in this gentlemen’s sport. Both views seem to answer Professor Epstein’s question about why first possession can support a claim of ownership from a utilitarian perspective. But which property rule is more desirable?

Professor Rose attempts to resolve this conflict by observing that Tompkins’s rule “tacitly conceded the value of rewarding useful labor [as its rule for possession would in fact reward the original hunter most of the time, unless we suppose that the woods are thick with ‘saucy intruders.’.” Pierson only claimed title to the fox after Post expended considerable labor in pursuit. Thus, Pierson’s interception of the fox represents the exception to the normal rule, in that the “clear sign (killing the fox) comes only relatively late in the game, after the relevant parties may have already expended overlapping efforts and embroiled themselves in a dispute.” The doctrine of first possession would generally comport with the Lockean notion of rewarding the labor of the hunter. According to Professor Rose, the common law doctrine of first possession “rewards [the] useful labor” of the hunter who actually captures the animal, and “speak[s] clearly and distinctly about [his] claim to [the] property.” In most cases, the hunter who invests his labor in the hunt will in fact catch the fox, and his work will be rewarded. In that sense, Pierson v. Post is an outlier of a case.

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172 Id. at 77.
173 Id.
174 Id. at 83.
175 Id. at 77.
C. Of Foxes and Transaction Costs

Professor Rose’s theoretical account of Pierson can in fact be supported empirically. Economists Dhammika Dharmapala and Rohan Pitchford attempted to explain whether the majority opinion in Pierson v. Post is socially optimal. The economists considered Pierson as a case arising from the relationship between hunters and farmers. The social costs and benefits the authors consider are the utility that serious fox hunters derive from killing a fox, the value of fox fur, the damage to poultry prevented by exterminating the fox, the cost and investment of the hunt, and the minimal effort expended by the interloping hunter. The economists found that the majority rule—where the interloper who kills the fox obtains possession—is optimal if the fox sometime escapes from the serious hunter, and if this rule does not decrease incentives to invest in hunting with hounds.

This explanation closely tracks Professor Rose’s account of the majority opinion. Professor Rose assumed there would be few “saucy intruders” like Post lurking in the woods. Therefore, the fox will seldom get away from the serious hunter. Further, because the interloper will rarely intrude on the hunt, the incentives to hunt will not be diminished in the aggregate. This economic theory supports the natural law doctrine of first possession, rather than Locke’s labor theory of property. In this case, Judge Tompkins’s “taste” for efficiency produced a common law holding exemplifying “a congruence with economic theory.”

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177 Dharmapala, supra note 176, at 44 n. 9.
In contrast, Judge Livingston’s dissent, which rejected the doctrine of first possession and adopted a modified labor theory, lacked a correspondence with economic efficiency. Livingston’s rule sought to reward hunters for engaging in the elaborate hunt, focusing on the “honours or labours of the chase,” rather than the efficient extermination of foxes.  

Professor McDowell writes “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.” In many cases, the “elaborate process involved in the elite foxhunt was an inefficient method to reduce the population of foxes, and the ‘public benefit’ of hunting was trivial in comparison with the sums invested in the hunt and the damage to property.” While Livingston’s goal was to have “in view the greatest possible encouragement to the destruction of [this] animal,” the approach he adopted was ill-suited to accomplish this end. Thus, we see that the bright line rule of the doctrine of first possession yields a superior allocation of resources than the potentially-prodigious labor theory of property—though this observation in no way disparages other normative appeals of Lockean views of property.

**CONCLUSION**

*Pierson v. Post* represents much more than a case about hunting foxes on the beach. First, it represents a fascinating vignette of the role natural law played in early 19th century common

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180 Rose, *supra* note 9, at 76 (“If we really want to see that foxes don’t overrun the countryside, we will allocate a property right-and thus the ultimate reward-to the hunter at an earlier moment, so that he will undertake the useful investment in keeping hounds and the useful labor in flushing the fox.”).

181 McDowell, *supra* note 11, at 761.

182 *Id.* at 762 (“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 and encouraging the destruction of vermin described the law in England but not the reality at the time.”)
law American courts. In the absence of positive laws, was it acceptable for Judges to revert back to the natural law? Judge Tompkins said yes. Judge Livingston resoundingly said no. When the natural law scholars disagree, how did Judges resolve that conflict? The same way Judges resolve conflicts today—by distinguishing and either narrowly or broadly construing whatever precedents are available.

Second, this case provides keen insight into the social mores of early America with respect to tort reform and hunting. Livingston sought to reward hunters for killing a “beast so pernicious and incorrigible.” Tompkins sought to minimize the number of suits filed and create certainty in the law.

Third, and finally, this case shows how common law judges, likely unbeknownst to them, strived for a rule that created economic efficiency. While Pareto Optimality and Kaldor-Hicks Efficiency are concepts of the 20th century, the rules Tompkins and Livingston created sought to maximize social utility by creating incentives for different activities. For these reasons, *Pierson v. Post* is a treasure in our legal history, and has a well deserved place in the Pantheon of American legal education.