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Introduction to Law for Second-Year Law Students?

Alan Watson

At one time I thought of misappropriating Maimonides and calling this paper "A Guide for the Perplexed." That would have been pretentious and, worse, wrong. Second-year law students are not perplexed. Only, they don't know that they don't know. In the first year they have been given a quite misleading picture of what law is, how it develops, and how it relates to society—a picture that is at the same time made too complicated and too simple.

Normally I teach upper-level courses, but within the traditional first-year curriculum I have also taught Property, so I will concentrate on property here. What do second- and third-year law students not know, not just about property, but about law?

- They are unable to discuss the nature of the holding. They use the word *holding* glibly, but when asked to explain what it means or how to find it they are at a loss.
- They have never considered whether there might be a rational approach to statutory interpretation, whether any principles might be advanced. Is interpretation merely judicial politics?
- They have never asked themselves what drives legal development. When asked, they will answer more or less vaguely, "Society."
- They have not wondered about the weight of precedents from another jurisdiction. Why are they cited? Which jurisdictions have weight?
- They are quite unaware of the pressure of legal doctrine. Law seems to be about distinguishing one case from another "on the facts." Yet in the very subjects they have studied—contracts, torts, property—the great bulk of the law is settled.

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- For them, the relationship between one branch of law and another is quite obscure. They are daunted by such questions as "Why is employment not property?" Does it matter? Why may incorporeals be "things" in all the states of the U.S.A., when in Germany they are not? Are foreign legal systems just so very different, not worth looking at for understanding our own legal assumptions?

I should first like to say a little about the Rule Against Perpetuities. George L. Haskins tells us with his usual insight: "The Rule Against Perpetuities is among the oldest, most respected, and difficult to understand rules of the common law."[1] The classic statement of the rule is by John Chipman Gray: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[2] To those who are no longer *cognoscenti* I give one simple example to illustrate the working of the rule:

> To *A* for life, remainder to his widow for life, remainder to the eldest of his brothers living at the widow's death.

The remainder to the brother is void if *A's* parents are alive. The rationale (I believe) is this. Even if *A* is now married, his wife may possibly predecease him, and possibly he may eventually marry someone who was not born at the time of the gift; and she possibly may outlive him by more than twenty-one years. Such a conjectural second wife would not be a life in being for the purpose of the rule. Thus, a brother to *A* who might be born after the gift—not a life in being—could be the purported beneficiary more than twenty-one years after the death of *A*, the life in being. This is the position even if *A* is already very old. *A's* mother, even if older than 100 at the time of the gift, could still give birth according to the rule, which does not take physical impossibility into account. And any preexisting brothers of *A* may predecease his widow. The remainder to *A's* widow is valid, even if she is yet unborn, because *A* is a life in being and obviously her interest must vest, if at all, within twenty-one years of his death. The rule is fun.

The Rule Against Perpetuities is also notoriously difficult—"It gives me hives," said a colleague—a trap for student and practitioner, wary and unwary alike. There are a few basic questions—that then should be generalized—to which I would expect no answer from second-year students.[3]

1. Why did the rule not apply to the fee tail, the most obvious example of perpetuities?
2. What was its original purpose since it did not cover fee tails? How well did it serve such purpose or purposes?
3. What useful function does it serve today?

1. Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities, 126 U. Pa. L. Rev. 19, 20 (1977).
2. The Rule Against Perpetuities, 4th ed., ed. Roland Gray, 191 (Boston, 1942).
3. I tried the questions today, September 7, 1995. I got no answers.

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4. What are its disadvantages? How, if at all, to justify its continued existence do its advantages outweigh its disadvantages?

5. What is the input of today's society (other than lawyers) on its application?

6. Why are the rules so rigid, and apparently so removed from society?

7. What accounts for its longevity? Originating in a feudal or postfeudal land-holding society, it flourishes in the capitalist, industrial world of England and the United States.[4]

8. Why, if it emerged in seventeenth-century England in the conditions of the society of that time, could it be transported to the rather different North America?

9. Why is it unknown outside England and England's former colonies or other possessions? If it is as necessary and important as is often claimed, why is nothing like it found in such places as, for example, Germany[5] or Scotland?[6] Most strikingly, perhaps, there is in all of the vast surviving sources of ancient Roman law not the slightest trace of any of the problems that the Rule Against Perpetuities is supposed to be needed to remedy.

Similar questions can be asked, and should be asked, for any legal doctrine. The answers are fundamental to an understanding of law, its course of development, and its relation to the society in which it operates. The questions are simple, but are not posed to first-year students. The answers are fundamental, but are not known to second-year students. Indeed, the questions, if asked, would throw light not just on legal doctrine but on legal institutions and practice. Why in much of the U.S., for example, are buyer and seller, mortgage holder, and attorneys all physically present at the settlement of a real estate transaction?[7]

Even the most superficial answers to the specific questions on the Rule Against Perpetuities—no more than superficiality need be attempted here—indicate that students have been left much uninformed about the nature of law.

1. Why did the rule not apply to the fee tail? The statute *De Donis conditionalibus* of 1285 placed the fee tail on a firm footing though it did not create it.[8]

4. What we regard as feudal law results in fact from the breakdown of the feudal system. See Alan Watson, Roman Law and Comparative Law 141–46 (Athens, Ga., 1991).

5. For Germany the *Bürgerliches Gesetzbuch* § 2100 allows the possibility of a substitute heir after another had first been heir. Section 2101 declares that if a person unborn at the time of succession is named as heir, then in case of doubt that person is regarded as a substitute heir. Section 2109 prohibits, with exceptions, vesting in a substitute heir thirty years after the succession opened. The problems of the Rule Against Perpetuities are avoided. Cf. Otto Palandt, Bürgerliches Gesetzbuch, 14th ed. (Munich, 1995) on these articles.

6. For the absence of any equivalent in Scots law, see generally Robert Burgess, Perpetuities in Scots Law (Edinburgh, 1979).

7. The answer lies in the history of English land law, in tradition, and in the self-interest of practitioners.

8. See A. W. B. Simpson, A History of the Land Law, 2d ed., 81–102 (New York, 1986).

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Whatever the statute may originally have meant, by 1346 at the latest it was interpreted as continuing an entail in perpetuity.[9] The Rule Against Perpetuities, in contrast, was created by judicial precedent. Four formal sources of law have existed in the Western world: custom, statute, judicial precedent, juristic opinion. But they are not all of equal authority. Thus, in general, precedent cannot overrule statute; hence the Rule Against Perpetuities, when it did eventually develop, did not apply to the fee tail, which was believed to have statutory support. Still, it should be noted that precedent can interpret, reinterpret, misinterpret statute. Sources of law, their relative values, their interaction, are not subjects of explicit study in first-year classes.

2. What, then, was the rule's original purpose? The Rule Against Perpetuities as it developed served no particular obvious useful purpose. It arose because of judicial hostility to the fee tail, resulting in a hatred of anything that smacked of "perpetuities." Yet the fee tail was beyond the reach of the rule. Not only that, but even before the rule any "owner" in possession could by 1472[10] at the latest bar an entail by the device known as common recovery: so in one sense there was no need for anything like the rule with respect to the fee tail. (That is, the entail was valid—as it would not have been if the [future] rule had applied to it—but it could have been ended at any time if the "owner" wanted.) Other executory devises of terms that were not executed by the Statute of Uses (1535) and which might have been thought to be objectionable[11] were for all practical purposes unaffected by the rule as it emerged. To understand the relationship between the development of law and society the student would find it instructive to look at theories of the origins of the rule. The theories vary according to the vision of the author, Marxist or other, about the society of the time. Was seventeenth-century England a society changing from a feudal to a capitalist order? Was the dominant ethos that prevailing in a landed class generally hostile to mercantile or capitalist ideas? Was the society fluid, so that a young lawyer of humble origins could amass an enormous fortune? The theories of the origins of the rule all fit the author's vision of the society. Only, not all the theories can possibly fit the facts of the time: not all the visions can possibly fit the society of the time.[12]

Is it perhaps misleading, one must ask, to look for an explanation of legal development only in societal conditions?[13]

3. Has the rule a useful function today? None that is obvious or significant.

4. Has the rule disadvantages? The obvious disadvantage, apart from the discomfort of students and the threat of sanctions to draftsmen, is the thwarting of reasonable desires of owners for the future distribution of their prop-

9. Y.B. 20 Edw. 3 (R.S.), pt. 2, at 202 (ed. & trans. Luke Owen Pike); cf. Simpson, *supra* note 8, at 84.

10. Taltarum's Case (1472), Y.B. 12 Edw. 4, Mich., fo. 14, pl. 16, fo. 19, pl. 25; 13 Edw. 4, Mich., fo. 1, pl. 1; cf. Simpson, *supra* note 8, at 129–32.

11. See Simpson, *supra* note 8, at 215–17.

12. See Haskins, *supra* note 1, at 20–46; Simpson, *supra* note 8, at 208–41.

13. For arguments pointing to an answer in the positive, see Watson, *supra* note 4, at 97–110.

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erty.[14] Owners do not often intend to tie up their property for centuries, but have a relatively immediate goal. If I devise a piece of land to the town of Elgin for "so long as it be used as a garbage dump, remainder to my oldest living direct descendant," I am not thinking of a situation that might arise in 2095. Nor am I trying to do anything that most people would find unreasonable. Yet the remainder is entirely void, even if at the time of the gift the city council is contemplating closing the garbage dump.[15] What is to be remembered is that because of the way the rule developed—through cases, over time—the result is clumsy and arbitrary, and thwarts reasonable intentions. Any danger that an interest would vest too far in the future could be avoided much more simply by rules akin to those in Germany.

5. What is society's input? None.

6. Why is the rule rigid and remote from society? Law when developed by judges is largely dependent on the *legal* culture of that particular elite. Not all types of reasoning are culturally and legally acceptable.[16] In some systems, for example in France, judges may not refer to previous decisions; in England until 1992 judges were not allowed to refer to parliamentary debates for legislative history.[17] In particular, when the rule was developing, judges did not (usually) regard it as appropriate to base express arguments on social realities.

7. Why is the rule so long-lived? It is in the nature of law that once it is established it continues. Much of law—legal institutions, rules, modes of reasoning, theoretical structures—survives despite great changes in social, economic, political, and religious circumstances.

8. How could it be transported to the English New World? Transplanting or borrowing is the most fruitful source of legal development. Failure to accept the huge extent of borrowing, often mindless borrowing, is the greatest obstacle to understanding law, and its relation to society.

9. Why is the rule known only to the common law world? Borrowing, though often mindless, is usually selective in one sense: one foreign system comes to be regarded by another as *the* system to be raided. For the so-called civil law systems this law to be borrowed was once Roman, in more modern times (for some systems) French law. English law was ignored. This emphasis on borrowing from one particular system again raises the issue of the appropriateness of law in its society.[18]

The above are the answers I would give. I am not claiming that they are the only answers or that all scholars would find all of them the most plausible.

14. I am assuming that it is a reasonable desire of owners to want to exercise some control over their property after their death. That view would be generally acceptable in the U.S. today. But many societies, e.g., France for long before the Revolution and the *code civil,* have refused to recognize testate succession.

15. Except in a state where the wait-and-see doctrine applies.

16. For my argument, see Watson, *supra* note 4, at 221–44; Alan Watson, The State, Law and Religion: Pagan Rome 63–72 (Athens, Ga., 1992).

17. Pepper v. Hart, [1993] A.C. 593.

18. For paragraphs 7, 8, and 9, see William Ewald, Comparative Jurisprudence (II): The Logic of Legal Transplants, 43 Am. J. Comp. L. 489 (1995), and works cited therein.

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Some, indeed, may be wrong. But my main point is that the questions invite answers that relate not only to the Rule Against Perpetuities but also to the fundamental understanding of law, and the questions are not put by law teachers to their first-year students. The origins, survival, rationale, scope, and utility of the Rule Against Perpetuities raise issues that prompt similar questions in very many other contexts.

It is in the highest degree revealing for the nature of law and law teaching that so soon into their studies students accept the Rule Against Perpetuities unthinkingly, without much questioning the wisdom of it, the need for it, at its beginnings or today. So, of course, do their elders and betters (or worsers) even though there has been tinkering with the rule, above all in the famous wait-and-see doctrine. Legal thinking, in the Western world at least, is authoritarian and essentially conservative.

One last question about the rule. Is it necessary to know something of the history of the rule to make its parameters explicable? If the answer is yes—as it certainly is—what are the implications for our understanding of the nature of law and of its relation to society?

So far I have talked primarily about a failure to convey information. But actual misinformation about law begins at the outset of the student's first semester. One of the earliest topics in a Property class is usually "acquisition by find." At the very beginning of the second chapter of their casebook, Jesse Dukeminier and James E. Krier state: "Possession, as we saw in the preceding chapter, is a powerful concept in the law of property."[19] But they have not described possession in the preceding chapter, far less attempted a definition, nor will they in this chapter. What they have done is quote a few cases, and pose a few questions. But it is not difficult to offer at least a tentative description of the concept. One will readily be found, for instance, in Ray Andrews Brown, *The Law of Personal Property.*[20]

What is misleading in the standard approach is that in fact the law is not contained in a few cases but, in property as in other areas, is usually distilled from many cases. When only a few are studied, each appears out of context. The casebook does not put any of these into the general framework of the concept, say of possession, to give students the big picture. Students cannot

19. Property, 3d ed., 103 (Boston, 1993). In no sense do I concentrate on that book because I regard it as the worst among the casebooks. On the contrary, it is the one I use most when I teach Property. The approach does not differ much from casebook to casebook, nor from property to contracts to torts. Moreover, according to a flier from the publisher, Dukeminier and Krier's book is "Universally Admired for its Teachable and Engaging Presentation of Property Law," and is adopted at more than 150 law schools.

For a rather similar critical approach to the casebook method but with regard to the very special issue of casebooks on comparative law, see William Ewald, Comparative Jurisprudence (I): What Was It Like to Try a Rat? 143 U. Pa. L. Rev. 1889, 1966–75, 1985 (1995). I agree completely with him (and have long held the opinion) that these books desperately misrepresent the spirit of continental European law.

20. 3d ed., ed. Walter B. Raushenbush, 19–23 (Chicago, 1975).

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tell how far a case that is quoted reflects general propositions or whether it stands at the very edge of a doctrine. They have no way of seeing how the law builds up. The role of authority is not clarified. Important aspects of a concept may not be discussed in any of the chosen cases. When a case is discussed in isolation, it is often impossible to know which facts are to be regarded as relevant. The issue is not that casebook editors ought to pick the right case. The law is to be garnered from the effect of many cases.

The casebook method of teaching is, in fact, an exercise in futility. It is the students themselves who are expected to build up a picture of law from the few generally disconnected scraps available to them and with virtually no tools. Students are left to guess what the *editors'* view of the law is rather than getting to what the law is all about. Instead of looking at the reasoning of a case in the light of the developed conceptual thought that preceded it, and of its place in a structured web of reasoned principle, they are provided in the first place with a single instance that justifies itself only by reference to particular features, leaving much to be understood. Much of importance to the case is left unsupported and unsaid because it rests on established principle. The students study, as it were, the status of a grain of sand by walking around inside the grain and without reference to the rest of the beach, the surf, and the sky. The problem is compounded when the discussion is limited largely to the concept *Is it fair?*[21]

Dukeminier and Krier set out only three cases for discussion on acquisition by finding. Is all the relevant law to be found in them, and the few other cases referred to? How is one to find the parameters of the law?

Their first case is *Armory v. Delamirie.*[22] A "chimney sweeper's boy" found a ring with a jewel in it. What rights did he have when a goldsmith's apprentice, to whom he handed it to know what it was, removed the jewel from its socket and refused to return it? Lo and behold, the case is from 1722, more than two-and-a-half centuries old. Does it still have authority? Did it establish some principle? Odder still, it is not a U.S., but an English case. Has it any relevance here? Because it was before the Declaration of Independence? Or is there no issue of relevance but the case is chosen because of the piquant details? I have been told that the point of the casebook method is to teach the student how to argue about law. But if it does that, it is teaching how to argue about law without thinking about law—for me a difficult concept. And it is teaching how to argue about law without thinking about law in the supposed context of teaching law. The casebook method is reminiscent of some cases in Seneca the Elder's (c. 55 B.C.–A.D. 40) Controversiae. Whether the law in a particular problem that is set out in that work existed or was correctly stated was not the point, which was to teach the student how to argue. The aim of the Controversiae was to teach young Romans the techniques of rhetoric, not law.

The second case is also English, *Hannah v. Peel,* from 1945.[23] Does modern English case law still have authority in the U.S.? If so, how much? Why? Is any

21. The reader will notice here, as elsewhere, the fine Australian hand of Mr. Justice Derrington.

22. 1 Strange 505, 93 Eng. Rep. 664 (K.B. 1722), *in* Dukeminier & Krier, *supra* note 19, at 104.

23. [1945] K.B. 509, *in* Dukeminier & Krier, *supra* note 19, at 107–14.

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remaining authority the result of the former colonial status of part of the U.S.? Do Canadian cases have any weight here?

What is needed for the acquisition of possession? Is intention relevant? We are not told how old the "boy" in *Armory v. Delamirie* was, but chimney sweepers' boys tended to be very young, first because they had to be small enough to fit into chimneys, second because in that line of business they tended not to live long. Was he of an age to form the legally relevant intention, if intention is needed? We are not told. Nor does either of the other two cases quoted in the book[24] throw any light on whether intention is needed. Likewise none of the cases reveals anything about the kind of intention that would be relevant. Intention to possess, intention to act as owner, intention to exclude all others except the true owner, intention to hold on behalf of another? Is the place where the jewel was found relevant? We are not told where it was found, whether in a house or on the sidewalk. Whether any of these features are relevant to some (and what?) general principle to be applied in other cases, and where to look for points of distinction, is not evident. The other two cases quoted show that the place is relevant, but this one does not. Should we assume that in 1722 the place was not relevant? If the jewel was found in the chimney while the boy was working, did this give the chimney sweeper any right to it? Neither of the other cases tells us anything about possession acquired by an employee "in the course of employment." Nor do any of the cases indicate whether bad faith has an impact on the finder's possession. Dukeminier and Krier report that the action is trover. Does that action still exist?[25] If not, has the right of action been affected? What difference does it make to the students' understanding of the case that the references to authority in the original report are omitted by the casebook authors? Lastly, the authors do not indicate whether the term *possession* has the same meaning in all contexts.

My point is emphatically not that learning the law would be much easier—it obviously would be—if concepts and rules as they had developed in hundreds of cases were set out briefly, then were followed by discussion of a few cases chosen to illustrate the rules, their parameters, and issues raised by borderline situations; and that this is something necessarily desirable. Perhaps there is a virtue, as some colleagues think, in making first-year law study unnecessarily difficult.[26] My point is that the standard approach misrepresents the way law is, how it develops, and its relation to society. Concepts and principles are badly downplayed. So are rules, and their authority and stabil-

24. McAvoy v. Medina, 93 Mass. (11 Allen) 548 (1866), is discussed by Dukemenier & Krier, *supra* note 19, at 114–16, but it need not be treated in this article.

25. It does, as a matter of fact.

26. The Byzantine emperor Justinian would strongly disagree with such an opinion. His Institutes was at the same time statute law and a textbook for first-year students. It was expressly designed to make the approach to law easy for beginners. Institutes 1.1.2. Has this purpose anything to do with the success of the Institutes as a teaching tool over many centuries and in many lands? For the view that, without the Institutes, the shape of modern law in the U.S. as well as in continental Europe and Latin America would be very different, see Alan Watson, The Importance of "Nutshells," 42 Am. J. Comp. L. 1 (1994).

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ity. Cases are removed from their legally relevant context, and the authority of the context is dismantled. Oddly perhaps, a further result of this approach is that often cases are removed from their social context. The judges' yearning for authority and the future judges' respect for it are downgraded. So is the nature of the authority that is requisite or desired.

But the misrepresentation of law in general, and its development, is only part of the problem. When a few cases for study are removed from their legal context, the individual case itself and what is going on in it are also misrepresented and become largely incomprehensible. The absence of theoretical underpinnings is a fatal flaw in the casebook approach. I would like to illustrate my argument by just one case that is usually studied in the first week of law school: *Pierson v. Post.*[27]

Post was hunting a fox on a beach with his dogs, and was in sight of it. Pierson, knowing what was going on, killed and carried off the fox to prevent Post's having it. Tompkins, J., delivered the court's opinion in favor of Pierson. He cited Justinian's Institutes 2.1.13, Fleta 3.2.p.175, Bracton 2.1.p.8, Puffendorf 4.6.2, and Bynkershoek, for the proposition that actual corporeal possession of animals that are wild by nature is needed to acquire ownership by occupancy. He also stated that Puffendorf affirmed with hesitation that a mortally wounded beast or one greatly maimed cannot be fairly intercepted by another while the person who inflicted the wound is in pursuit. He further recorded that Barbeyrac, in his notes on Puffendorf, affirmed that bodily seizure was not necessary in all cases for the acquisition of ownership.

Why are the authorities cited? We are not told. A first part of the answer is that in general judges require authority to bolster their opinion. It does not accord with good judicial practice just to say "This is my decision because I like it." But this should alert us to the belief, erroneous or not, that behind a case stands law. A case may make law, but within the context of previous cases that made law.[28] If one denies that the previous cases were law, then the instant case also cannot be law. A true search for authority is always backward-looking. Law as expounded by judges has a built-in tendency towards conservatism. Even a radical judge, if he wishes to make his decisions acceptable, must seek to make his reasoning look conservative. But then we have to know what it is in a case that is important for future decisions.

But why these particular citations? Justinian's Institutes is, after all, a Byzantine emperor's textbook for first-year law students, issued in 533 with the force of statute, and largely based on a second-century Roman model. Bracton's (c. 1210–68) famous book is entitled De legibus et consuetudinibus Anglie (On the Laws and Customs of England), and Fleta (c. 1290) is an epitome of

27. 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. Sup. Ct. 1805).

28. Even if the previous cases then have to be reinterpreted.

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Bracton. Samuel Puffendorf (1643–94), whose life and career spanned several European states, is best known for his De jure naturae et gentium (On the Law of Nature and Nations) and his attempt to establish by reason a law that should be applicable in all civilized nations. Dutch jurist Cornelius van Bynkershoek (1673–1743) wrote on a wide range of subjects including the law of Holland. Jean Barbeyrac (1674–1744) is a leading figure in the development of international law and published an edition of Puffendorf with a commentary.

Why then are these works of these authors cited? A first part of the answer is that the judges had no useful cases they could rely on, not even English cases, far less American, not to mention any from New York.[29] A second part of the answer is the great importance attributed to these works. Justinian's restatement of Roman law[30] was—still is—regarded as the foundation stone of subsequent Western law. Puffendorf, who was much admired in the U.S. at the time, was attempting to set up on rational principles rules that ought to be valid everywhere in the civilized world, hence including New York. Naturally, in the circumstances of the time, these principles very much derived from the Roman law of Justinian. Fleta and Bracton give the English connection. Dukeminier and Krier do the student no service when they say the opinions "are peppered with references to a number of obscure legal works and legal scholars."[31] The works are assuredly not to be regarded as obscure even though in all likelihood they would not have been cited by the court if there had been nearer authority in the shape of judicial precedent.

But something else is going on that is deeply significant for the nature of law: borrowing from a different system, from a different time. The law in the Institutes of the Byzantine emperor Justinian is very largely taken from a Roman jurist, Gaius, who was active near the middle of the second century. Fleta and Bracton took the Roman/Byzantine rule into medieval England; Puffendorf was making the Roman/Byzantine rule the law of all civilized nations in the Age of Reason; and Bynkershoek's work was more geared to showing it as law in the Dutch Republic in the early eighteenth century. Now the majority of the court in *Pierson v. Post* was borrowing the rule for the State of New York at the beginning of the nineteenth century. That the rule was not inevitable appears from the dissenting judgment of Livingstone, J., and the reference to Barbeyrac. What I want to stress is not just that the casebook approach omits any treatment of this dimension for *Pierson v. Post*, but even more that it ignores the significance of borrowing in general. At most times in most places, legal rules, structures, and institutions are borrowed—sometimes, but not always, out of respect for the time-tested accumulation of

29. It should be remembered how few American law reports there then were.

30. Now known as the Corpus Juris Civilis.

31. Dukeminier & Krier, *supra* note 19, at 24. Interestingly, the casebook's authors have escalated the obscurity of the works cited in the case from their treatment in the second edition. See *id.*, 2d ed., 19 (Boston, 1988).

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wisdom behind them.[32] This should perhaps make us wonder about the relationship between law and society.[33]

But we are not yet done with the significance of foreign law in *Pierson v. Post.* There are also wider implications. Tompkins, J., observes that Barbeyrac does not accept Puffendorf's definition and Barbeyrac affirms that bodily seizure is not necessary in all cases for the acquisition of ownership. But there is a source that seems more direct. There is in Justinian's Digest 41.1.5.1 a text attributed to Gaius:

> The question has been raised whether a wild beast that has been so wounded that it can be captured is understood to be ours at once. Trebatius held it became ours at once and remains ours so long as we pursue it, that if we cease to pursue it it ceases to be ours and again becomes the property of one who takes it. And so, if during the time we were pursuing it another took it with the intention to make a gain he is regarded as having committed a theft against us. The majority thought it did not become ours unless we captured it because much can happen that we do not capture it. This is the better opinion.

A question for us then becomes why the court does not refer to Trebatius (of the first century B.C.) when it does to Barbeyrac. The simplest answer is that, despite the lip service so often paid to Justinian's Corpus Juris Civilis, the only part of that compilation usually consulted by U.S. courts was the Institutes, the elementary textbook, either through the American edition of Thomas Cooper (first published in 1812) or with one of the European commentaries intended for students, that of Heineccius (1681–1741) or that of Vinnius (1588–1657). The Digest was often simply not readily to hand or was thought too difficult.[34] The contents of libraries have been surprisingly important for legal development.[35]

Tompkins notes that use cannot be made of cases from England that have been "decided upon the principles of their positive statute regulations."[36] That statutory law does not apply outside of its own state is a proposition also of Grotius, who declares it precisely in the context of acquiring ownership of wild animals.[37] The proposition is reasonable enough, but it raises various issues concerning the strength of foreign authorities that are not discussed in the casebooks. Why should an outside juristic opinion or judicial decision have any weight if an outside statute does not? The issue would not arise today

32. See generally Ewald, *supra* note 18.

33. For another property case that is just as instructive for the use of authority and for legal transplants, see Nebraska v. Iowa, 143 U.S. 359 (1891). In its turn, this case is cited with approval in the Scottish case of Stirling v. Bartlett, 1993 SLT 763.

34. Cf. Michael H. Hoeflich, Roman Law in America (forthcoming).

35. See Alan Watson, Aspects of Reception of Law, 44 Am. J. Comp. L. 335 (1996).

36. 2 Am. Dec. at 265. And other cases were irrelevant because they arose between huntsmen and the owners of the land they hunted.

37. De jure belli ac pacis 2.2.5. The proposition was, of course, a commonplace even long before. See Bartolus, on Justinian's Code 1.4, De summa trinitati, gloss *Quod si Bononiensis* § 19.

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with regard to Roman law,[38] but it might with regard to a case or statute from another state. If a case arises in Georgia, why should a statute of North Carolina not be treated with the same regard as a case from North Carolina or an article by a North Carolinian law professor? Does a case from elsewhere represent a reasoned approach to an issue, but a statute does not? If we say that societies vary, hence an outside statute provides no guidance, why then does an outside case? Are students to presume that, in the absence of statute, law is somehow everywhere the same?

Livingstone's dissenting opinion also raises issues that really cannot be understood without some explanation drawn from outside the case. First, Livingstone expressly bases his opinion in large measure on social policy. To what extent is this allowable or standard practice? It should be noted that such an express basis was unusual at that time in the U.S. and even now, in many legal systems, is not common or is even forbidden. Livingstone's approach probably ought to be explained simply as the result of the absence of legal authority. Moreover, what gives U.S. judges the expertise to decide social policy? Are judges chosen because of their sensitivity to social issues? Livingstone believed the greatest possible encouragement should be given to the destruction of foxes and this would be best done by favoring sportsmen. But would it? The experience from England at least is otherwise. Though foxes were indigenous to England, they long were rare until they were imported in large numbers for the purpose of hunting.[39] The great increase of foxes in the nineteenth century was due to the sportsmen. They wanted there to be foxes! Indeed, as is made plain time and again in Anthony Trollope's novels, the gentleman was expected "to preserve foxes," as the phrase was.[40] Woe—social woe—to the farmer who shot the fox devouring his chickens, instead of preserving it for the hunt. Poisoning or shooting foxes could be described as "vulpicide" or "murder" by the hunting fraternity.[41] Should the law in Virginia, where in some parts riding to hounds is socially highly regarded, be different from that of a state where the sport is unknown?

Second, Livingstone wanted to rely on custom. That suggests he had an instinctive theory of where law comes from. But how did Livingstone know what the custom was? I find that second-year students have had no exposure to the notion of custom as a source of law. Perhaps this is not too serious given the very limited scope today of custom in making law but, in the absence of a theoretical treatment in the first-year classes, custom and social policy are apt to be linked together. Why is custom considered law? When does custom become law? How is custom, as law, discovered? Whose custom ought to be law? Why is custom, as a source of law, so little used today? What about its role

38. The use of Roman law gives rise to particular questions in this context. The Corpus Juris Civilis was statute law of the Byzantine empire, but was widely regarded elsewhere as authoritative or influential. And Justinian's Code contained the legal replies of previous emperors.

39. See Brian Seymour Vesey-Fitzgerald, Town Fox, Country Fox 89 (London, 1973).

40. Perhaps nowhere more clearly than in Chapter 9 of *The Landleaguers*, of which publication began in 1882.

41. See, e.g., Anthony Trollope, The American Senator chs. 3–4 (publication began in 1876).

in trade, dealings between merchants? What about its place in alternative modes of resolving disputes?

Third, in the absence of further information, what is the student to make of Livingstone's argument to the effect that when times change law changes (or should change)? And to what extent should the court be satisfied that the change, social or legal, is enduring rather than fashionable and transitory? I have already observed that one of the striking features of law is precisely its longevity. In this connection, I must stress that when a judge argues from the facts of history, the watchword is *Beware.* False history is probably as often adduced to support a proposition as is plausible or even accurate history. Of course, *pace* Livingstone, the Romans did keep and breed dogs for hunting, a pastime passionately pursued even by emperors.[42]

Fourth, how wide ought the rationale be for a decision? Livingstone bases his opinion about acquiring ownership of the fox in large measure on the destructiveness of that animal. Should the approach be different when the animal is largely innocuous, a rabbit or hare? Ought it to be relevant whether the animal was usually pursued for pleasure or profit? Ought there to be one basic approach to the acquisition of wild animals, or should the law vary from species to species?

Finally, for this case, does it matter that Dukeminier and Krier omit the arguments of counsel for the parties and parts of the judgment?

Christopher Columbus Langdell, dean of the Harvard Law School, was mainly responsible for the success of the case method. He argued that law was a science and should be taught in a scientific manner, from cases.[43] But just imagine a college physics course where only a few isolated experiments are studied, where the relationship of one to the other is not set out, where the theoretical underpinnings are not stated, and where virtually all of the writings of scholars are ignored.[44]

Moreover, almost all substantive law courses are taught in the same way. It can be no surprise that third-year law students are widely perceived to be bored by law school.

42. See J. K. Anderson, Hunting in the Ancient World 83–100 (Berkeley, 1985). The emperor Hadrian's (117–138) passion for hunting made the activity even more fashionable. *Id.* at 101–21. Later, Nemesianus dedicated his Cynegetica, a treatise on breeding and training dogs, to the emperors Carinus (283–285) and Numerianus (283–284). *Id.* at 139–41. A mosaic of circa A.D. 200 from Roman North Africa shows hounds coursing after hare and fox. *Id.* at 98. I have a Roman oil lamp whose disc shows a hunter holding his horse's bridle in his left hand, a hare in his right, while his hound prances at the horse's hooves.

43. See Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s 51–72 (Chapel Hill, 1983); William P. LaPiana, Logic and Experience: The Origin of Modern American Legal Education 22–28 (New York, 1994).

44. I should not be understood as claiming that cases should not be studied—only that the present method of study is entirely unsatisfactory. If contemporary law review articles are so much ignored in teaching in part because of the casebook approach, then that approach is to be applauded. If the present nature of law review articles is in part because of the casebook approach, then that approach is to be condemned.

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My conclusions may be set out in three propositions.

- Students enter their second year unaware of fundamental elements and aspects of law and the broad sweeps of principle behind them. Questions of the utmost importance for understanding the nature of law and how it operates have never been put to them.
- Teaching law through the study of a few (abridged) cases on each point, with no attempt to place them in a wider framework or to give any theoretical structure, presents a thoroughly misleading picture of the law.
- Teaching law through the study of a few cases gives only a limited understanding even of these cases and their significance.

Introduction to law for second-year law students? By the beginning of the second year it is too late for them to learn to know better. First-year law students are misled because their teachers were themselves misled in their own first year.

It would be most wrong of me not to stress at the end of this paper my very high regard for the teaching ability of my colleagues. They point out that many of my gripes are attended to by first-year teachers. Those teachers, I am told, use the cases as tools on which to hang their teaching. They do discuss the relative value and interaction of the various sources of law. They do discuss the nature of the holding. They do deal with the weight of precedent from other states. They insist that they do treat the theoretical underpinnings.[45] I am sure they do. But to the extent that they do, and consciously so do, they underscore the weakness of the casebook approach. Their response scarcely amounts to a defense of the casebook system.[46] If students were given the basic information up front, teachers could spend more time on sophisticated issues and some time on selected cases, also reduce the number of hours required for first-year courses, and add greater variety to the curriculum.

In the end I am not persuaded by my colleagues. One friendly but critical reader observed that he uses the cases to illustrate what arguments are acceptable and what are unacceptable. But students should be shown more: they should know why some arguments are acceptable, while others, not illogical or obviously irrelevant, are unacceptable. The answer may sometimes lie in ancient history.[47] I am still convinced that second-year students (and others) do not recover from the misconceptions arising from the casebook approach. I still find that second-year students are unacquainted with, for example, the

45. They also stress the relevance and importance of rhetoric in law school instruction. But then why not have a class or classes specifically on rhetoric?

46. Moreover, the teachers' manuals put out by casebook authors do not seem to envisage professors using the books to teach the theoretical underpinnings.

47. See Watson, *supra* note 16, especially 91–93.

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vast extent of legal transplants and their significance for understanding the relationship between law and society. I still believe they gravely underestimate the force of legal doctrine. They have little understanding of the impact of past legal history on present-day institutions and rules. They still have only the vaguest notion of the parameters of important constructs. I am also left with a problem. Casebook writers not only extract cases, they pose some questions on them to the students. But these questions often do not put the issues that are fundamental: for example, what is possession, why is it important, how does it differ from ownership? In *Pierson v. Post,* is it relevant that Post was hunting on the beach? Would it have mattered if he had been hunting on another's land? With permission? Without permission, when the land was posted *No Hunting?* On his own land? On Pierson's land?

Law is a very conservative discipline. Awkward anachronisms exist for many years without improvement. We are accustomed to them, and we are blinkered by what we know.[48] Law shows only a few of its facets, never the whole gem: it appears differently to the elite who make it, to those who use it on a daily basis, to those oppressed by it, and to the outsider looking in.[49] Law students are blinded by the unrelenting blaze of one facet; as law professors they are still dazzled. We have used casebooks for many years. That does not mean they enable us to do the best job or even a good job.

A colleague who kindly criticized this paper asked, "What is your point?" My point is that legal education matters—for understanding law and its relationship to society, and for law reform. And, I firmly believe, U.S. law students are culturally deprived.

Not just students. U.S. Supreme Court justices are also culturally deprived. When I was revising this paper I had the privilege and pleasure of reading draft articles by two colleagues. In "Constitutional Torts, Common Law Torts, and Due Process of Law,"[50] Michael Wells convincingly shows that the Supreme Court's efforts at separating common law torts from constitutional violations have led it to divide cases into artificial Fourth, Eighth, and Fourteenth Amendment categories, applying different doctrinal principles from one category to another despite the essential commonality of the cases. Lower-court judges are in no better shape. In "Equitable Recoupment: Revisiting an Old and Inconsistent Remedy,"[51] Camilla E. Watson fully demonstrates in the area of federal taxation that judges in other courts have failed to understand the nature of equity, and they have received no guidance from the Supreme Court. Both papers show judges unable to fit the case before them into a principled framework. Such judicial failures could scarcely occur if the justices, when in law school, had spent time understanding principles rather than concentrating on a limited number of cases studied in isolation.

48. For examples of legal development that clearly show the impact of legal elites' being blinkered by what they know, see Alan Watson, The Evolution of Law 3–42 (Baltimore, 1985), especially 32–42.

49. Cf. Alan Watson, The Spirit of Roman Law 33–34 (Athens, Ga., 1995).

50. 72 Chi.-Kent L. Rev. (forthcoming).

51. 65 Fordham L. Rev. (forthcoming, 1997).

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