

5-1-2002

Using Property to Teach Students How to “Think Like a Lawyer:” Whetting Their Appetites and Aptitudes

Peter T. Wendel
Pepperdine University School of Law

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

Recommended Citation

Peter T. Wendel, *Using Property to Teach Students How to “Think Like a Lawyer:” Whetting Their Appetites and Aptitudes*, 46 St. Louis U. L.J. (2002).

Available at: <https://scholarship.law.slu.edu/lj/vol46/iss3/14>

This Great Property Cases is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

USING PROPERTY TO TEACH STUDENTS HOW TO “THINK LIKE A LAWYER:” WHETTING THEIR APPETITES AND APTITUDES

PETER T. WENDEL*

Like many law professors, particularly those who teach first-year courses, I subscribe to the theory that it is not my job to teach students “Property,” it is my job to teach them “to think like a lawyer.”¹ So when I was invited to write an article about “teaching Property,” I had to chuckle. In light of my teaching philosophy, which disavows that teaching Property is my job, was I qualified?² My concern was compounded when I considered my teaching style. I use the Socratic approach. On the first day of each semester, I tell my students “it is not my job to teach you, it is your job to teach me.”³ Who am I to write an essay about *teaching* anything, much less Property?

Although the incongruity of the situation made me laugh at first, my laughter soon turned to reflection.⁴ I began to construe the invitation to write an essay about teaching Property in light of my teaching philosophy and style. To the extent I claim to “teach students how to think like a lawyer,” could I write an essay about how I use the law of property to achieve that goal? What does it *mean* to “think like a lawyer?” *How* does one teach students to “think like a lawyer?” I suddenly felt compelled to justify my whole existence.⁵

But if I’m unqualified to write an essay about “teaching Property,” I’m even more unqualified to write about teaching students how to “think like a lawyer.” Many learned law professors (more learned than me⁶) have acknowledged that the primary purpose of law school is to teach students how

* Professor of Law, Pepperdine University School of Law; B.A., 1979, University of Chicago; M.A., 1980, Saint Louis University; J.D., 1983, University of Chicago. The Author thanks Professor Jesse Dukeminier of the University of California, Los Angeles, and Professor Edward Rabin of the University of California, Davis, for their helpful comments on earlier drafts of this submission. The Author also thanks Ms. Suzanne Baker, research assistant extraordinaire.

1. Sounds a hell of a lot more noble and meaningful, too.
2. My students have wondered the same for years.
3. As you can imagine, students just *love* it when you say that.
4. One of the classic criticisms of legal analysis is that it becomes a way of life. We can’t limit it to legal issues. We tend to overanalyze everything, taking the fun out of everything. Think about it. How often have you heard a law professor described as the life of a party? How often have you heard a Property professor described as the life of a party?
5. Or at least my salary.
6. “Me”? “I”? See what I mean?

to “think like a lawyer;⁷” yet few have attempted to explain what it means or how to go about it.⁸ It seems like defining what it means to “think like a lawyer” is a bit like defining what constitutes pornography: we may not know how to define it, but we know it when we see it.⁹ Where learned professors fear to go, only a fool would rush in.

It would be neither the first time I was called a fool, nor, I dare say, the last; but, nothing ventured, nothing gained. I attacked the challenge of defining what it means to “think like a lawyer” with great effort and audacity. I spent days engaged in the “sacred idleness” of professorial reflection. I thought long and hard about what it means to “think like a lawyer.” Yet I kept coming back to the same descriptions: “it means to think critically, to think analytically, to think thoroughly.”¹⁰ Descriptions which admittedly are so conclusory that they yield little insight into either what it means to “think like a lawyer” or how one goes about teaching others how to do it.

I finally decided that the reason it is so difficult to define what it means to “think like a lawyer” is that no one professor, and no one course, can achieve the objective. Learning how to “think like a lawyer” is the cumulative effect of three years of law school, of being exposed to different methods of teaching and different methods of analysis. Since the process is larger than any one professor, no one professor can define the process. Moreover, the process of learning how to “think like a lawyer” is a “growing” process. Students “grow analytically” with each class, just like children grow physically each day. Such growth is so slow and incremental that it is near impossible to notice. Just as we have a hard time noticing how much our children grow day to day,

7. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). Edwards, circuit judge for the United States Court of Appeals for the D.C. Circuit, stated that “the function of the first-year classes, rightly understood, is to create in students the capacity to understand and use the full range of legal doctrines.” *Id.* at 58. Pierre Legrand, *John Henry Merryman and Comparative Legal Studies: A Dialogue*, 47 AM. J. COMP. L. 3 (1999). Merryman, a professor of law at Stanford University, stated that “[o]ne of the purposes of the first-year courses is to make our students think like lawyers.” *Id.* at 7. Margaret M. Russell, *Beginner’s Resolve: An Essay on Collaboration, Clinical Innovation, and the First Year Core Curriculum*, 1 CLINICAL L. REV. 135, 140-41 (1994) (stating that a purpose of “first year courses is to convey to students . . . a rigorous structure for ‘learning to think like a lawyer’” and further stating that “what it means to ‘think like a lawyer’ is itself multifaceted and subject to divergent interpretations”).

8. Marc Feldman & Jay M. Feinman, *Legal Education: It’s Cause and Cure*, 82 MICH. L. REV. 914, 928 (1984) (stating that “[p]ractically nowhere in legal literature is there a definition of ‘thinking like a lawyer’”).

9. Paraphrasing Justice Stewart’s classic definition of obscenity in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring).

10. Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education*, 6 HARV. NEGOT. L. REV. 97, 99-100 (2001) (suggesting that thinking like a lawyer is “legal, analytic and analogical thinking” which is “a part, but not the whole” of problem solving).

so too law professors have a hard time noticing how much their students grow analytically class to class. Paradoxically, the process of learning how to “think like a lawyer” is both too large and too small for any one professor to describe.

There. I had rationalized my way out of defining what it means to “think like a lawyer.”¹¹ But my relief was short-lived.¹² The conclusion that “the process is larger than any one professor” still assumes that each professor and each law school course contributes to the process. What contributions, if any, do I and the law of property make? Moreover, even though we can’t “see” our children grow on a day to day basis, we still encourage them to “eat well,” to eat their vegetables. How do I encourage my students to “think well?” What are the “vegetables” of the law of property?¹³

There are many different parts of the property course that provide “food for thought” and that contribute to the process of teaching students how to “think like a lawyer.” No doubt some academics would argue that forcing¹⁴ students to chew on the difficult theoretical question of “what is property?”¹⁵ helps them grow the most. Others would argue that forcing students to chew on a whole host of difficult doctrinal questions contributes the most. “Is adverse possession legalized theft?”¹⁶ “What is the Rule Against Perpetuities?”¹⁷ “Do you have a property interest in your own body?”¹⁸ But for me, the Property question which contributes the most to the process of learning how to “think like a lawyer” is “who gets the fox?”¹⁹ That’s the issue²⁰ in *Pierson v. Post*,²¹ the first case I cover in my Property class. It is the

11. If that isn’t thinking like a lawyer, I don’t know what is!

12. See *supra* note 4.

13. No doubt my students would argue that I have the wrong food group. In light of all the “lemons” in Property, “fruits” may be the more appropriate food group.

14. Inasmuch as we are talking about Property, and not Torts or Criminal Law—selections for which most students have a natural appetite, I think “force-feeding” the students is the proper description.

15. Is it a “bundle of rights” which attach to respective property interests, though not necessarily the same bundle for all property interests? Or is it the allocation of rights between and amongst different parties, thereby defining how different parties relate to each other with respect to different property interests?

16. Is adverse possession the essence of communism or capitalism?

17. Many students have “gagged” on that doctrine.

18. Has cannibalistic overtones.

19. Though by the time I’m done with the case, students tend to think the issue looks more like “road kill” than an appetizing part of the course.

20. Kind of; at least that’s what most students think the issue is at first. See *infra* text accompanying note 34.

21. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805). The case of *Pierson v. Post* is discussed very early on in many of the most well-known property casebooks. See, e.g., BARLOW BURKE ET AL., FUNDAMENTALS OF PROPERTY LAW 1 (1999) (starting with *Pierson v. Post* on the first page of the casebook); JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 19 (1998) (including *Pierson v. Post* as the second case discussed in the casebook); JOHN P. DWYER & PETER S. MENELL,

perfect case for giving students a taste of what it means to “think like a lawyer.”

To understand why *Pierson v. Post* is the perfect case for introducing students to “thinking like a lawyer,” one has to put it in context. At most law schools, Property is a first-year, first-semester course.²² The start of law school is truly a dizzying experience. The study of law is such a multifaceted endeavor, and so different from anything first-year law students have done before, it can be overwhelming. We ask them to read a different type of text—cases;²³ we teach them using a different technique—the Socratic approach;²⁴ and we test them differently—asking them to analyze fact patterns.²⁵ As if

PROPERTY LAW AND POLICY 94 (1998) (including *Pierson v. Post* as the third case discussed); J. GORDON HYLTON ET AL., PROPERTY LAW AND THE PUBLIC INTEREST 4 (1998) (utilizing *Pierson v. Post* as the first case in the casebook); GRANT S. NELSON ET AL., CONTEMPORARY PROPERTY 32 (1996) (using *Pierson v. Post* as the first case discussed in the casebook).

22. Even where Property is a second-semester course, *Pierson v. Post* is still the perfect case to start with because many students will still be struggling with what it means to “think like a lawyer” and what it is they are supposed to be doing. In some respects, the case works better when Property is a second-semester course because the students have spent a whole semester banging their heads against a wall. They are looking for some help, whereas one could argue that the first day of the first semester is too early to use *Pierson v. Post* because the students are not open to its full significance.

23. We ask students to read cases, but we do not tell them *why* they are reading cases as opposed to traditional educational texts, and we do not tell them *how* to read cases. Instead, we recommend that they brief the case: what’s the procedural history, what are the “relevant” facts (Relevant to what? How are they supposed to know when they’ve never briefed cases before?), what’s the issue, what was the court’s analysis, what’s the rule of law, what was the holding? And all that assumes that the students can figure out what the court is saying. The law has its own language, a foreign language to the uninitiated. It is not uncommon for students to take up to an hour to read just one page of a case. When first starting, to have any chance of understanding the case, students need to have their legal dictionary at their sides as they read. Little wonder that first-year law students are a bit confused when they come to class.

24. If students think reading cases is confusing, just wait until they come to class and are introduced to the Socratic teaching method. In class, students are expected to be able to critique each opinion they’ve read. From day one, without any prior legal training, students are asked to sit in judgment of the opinion. (I tell my students that as law students they sit on the highest court of the law, for we sit in judgment of every opinion written by any court.) Did the court get it right? Is it a “good” opinion? Why? How are they supposed to know? How do you judge an opinion? What makes an opinion a “good” opinion? What makes an opinion a “bad” opinion? To make matters worse, the Socratic teaching style assumes that the best way to learn the answers to these questions is for the professor to ask more questions. How are students supposed to learn when all they get are questions? What are they supposed to be learning?

25. The typical law school exam presents law students with a fact pattern and asks them to “analyze the issues presented.” What’s an issue? Is that a Property concept or a law school concept—and who teaches it? Are these the same types of issues as in the cases they read? How does one “spot” an issue? Were students taught that during the course? How are they supposed to know? Even assuming they can spot an issue, what are they supposed to do with it? What

these differences were not enough, within each difference are a whole host of tasks that students must perform.²⁶ We ask them to perform these tasks without teaching these tasks or explaining how they are relevant to the larger law school educational process. First-year law students find the start of law school baffling. On top of that, the classroom discussion appears to pay scant attention to what they assume they are supposed to be learning—the rules of law. What the hell is going on, anyway? The course is entitled Property, isn't it?

Much of the reason the start of law school is such a dizzying experience is that students come to law school with the mentality of Pavlov's dog.²⁷ As a result of more than seventeen years of education,²⁸ they have been conditioned to think that the goal of the educational process is obtaining substantive knowledge, and that the text and classroom components are merely means towards that end. That end is tested by an exam, which asks them to regurgitate the substantive knowledge they have learned during the course of the class. Students begin law school salivating at the thought of reading books setting forth the relevant rules, which they will memorize and regurgitate on the exam. First-year law students are understandably confused, then, when they are asked to read cases instead of texts, which set forth the relevant rules of law. Why not just read hornbooks or student outlines? They are confused when the professor continually asks questions instead of answering questions. How can a running line of questions impart substantive knowledge? They are confused when the test sets forth a fact pattern and asks them to analyze, instead of asking them to regurgitate the rules they have learned.

The problem is first-year law students fail to appreciate that law school turns the educational process on its head. What they assume are the “ends” of the course, the rules of law, are merely the means used to teach them the process of learning how to “think like a lawyer;” and what they think are the means (the process), becomes the end.²⁹ No one bothers to tell this to the students though. Instead, they are simply “subjected to the process,”³⁰ and it is

does it mean to “analyze” an issue? What does the professor want? How are the students supposed to know since the professor never told them?

26. See *supra* notes 23-25.

27. Not that that justifies treating them like a dog. Hence, I prefer to use the “benevolent” Socratic as opposed to the traditional “dog-kicking” Socratic approach.

28. Kindergarten, plus eight years of grade school, plus four years of high school, plus four years of college, equals at least seventeen years of schooling before law school.

29. If that's not dizzying enough in the abstract, try putting it into practice in the classroom against a backdrop of seventeen years of conditioning that the opposite is true. The first couple of weeks of law school is a challenging period for first-year professors as well, at least for those who use the Socratic method.

30. Teaching students how to “think like a lawyer” by “subjecting them to the process” is like teaching students how to swim by throwing them in the deep end of the pool and telling them to swim. While some figure it out on their own, others drown.

assumed that with time they will figure it out. This works for many students, however, some become so battered and bruised in the learning process that they become exasperated and quit trying. While there is no doubt that in the end the process of “thinking like a lawyer” is a process, a skill, an art, which can be learned only by trial and error, paying a bit more attention to the process would facilitate the transition from thinking like a layperson to thinking like a lawyer.³¹ From a Property perspective, *Pierson v. Post* is the perfect place to “de-program” students and start the transition.

Pierson v. Post is a simple case, and its simplicity helps to make it the perfect place to begin the process of teaching students how to “think like a lawyer.” Its simplicity is deceiving in that there is so much more to the case than meets the eye,³² and there are so many different ways the case can be used to introduce the students to the concept of how to “think like a lawyer.”

To the extent learning how to “think like a lawyer” is a “growing” process, I use *Pierson v. Post* to “measure” my students analytically—or I should say, to let them measure themselves. Just as parents put pencil marks on door frames to mark the growth of their children, I put the students’ initial analysis of *Pierson v. Post* on the board to help them measure where they are in their analytical development when they start law school. I start my treatment of *Pierson v. Post* by asking for the facts, the issue, and the answer to the issue. I write abbreviated versions of the students’ responses on the board:

FACTS: Post, hunting w/ dogs, spies fox; in hot pursuit, closing in on the kill when Pierson, seeing Post & knowing Post’s intentions, shoots & kills fox³³

ISSUE: Who gets the fox?³⁴

ANSWER: Pierson³⁵

31. There was a time when many law schools had a course, which was specifically designed to introduce law students to the legal analysis process. There has, however, been great change in law school curriculums, especially in the first-year curriculum. As more and more was crammed into the first year, the luxury of having a separate course on introducing students to legal analysis proved to be too expensive. No doubt the assumption was that each first-year professor implicitly covered the material in his or her own course. As the basic first-year courses were cut from six to four or even three credits, however, professors felt more pressure to rush through the legal methodology material to make sure they covered the core substantive material. The result has been that at most law schools today there is no meaningful coverage of the topic of introducing students to legal analysis.

32. Especially the eyes of a first-year law student.

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

34. *Id.* at 177.

35. *Id.* at 179-80.

First-year law students tend to think about cases from a simplistic perspective which focuses too much on the factual nature of the case. Unfortunately, this tendency is reinforced by the classic case-briefing model that instructs students to start by stating the facts of the case.³⁶ Having started down that path, students tend to stay on that path, stating the issue in a very fact-sensitive manner. Having stated the issue in a fact-sensitive manner, they tend to state the answer to the issue in a fact-sensitive manner. Hence the tendency to "overfocus" on the factual nature of the case.³⁷

After letting the students "brief" the case, I give them a chance to critique the case, or at least their fact-sensitive version of the case. "Putting aside the court's holding, what should have been the outcome in the case, and why?" Emboldened by their apparent success so far, students jump in eagerly. It doesn't take long for a debate to break out. Again, however, the students interpret my question from their fact-sensitive perspective. I write abbreviated versions of their answers on the board as fast as I can:

<i>Post</i>	<i>Pierson</i>
Post, because he put in all that time hunting the fox.	Pierson, because he shot it.
Post, because it would be unfair to let Pierson have it after Post was the one who made it run towards Pierson.	Pierson, because we don't know for sure if Post would have ever caught the fox.
Post, because it was his business.	Pierson, because he got it first.

Even the students' analysis of the case, pro and con, focuses too much on the particular facts of the case.

Having "measured" the students, and left their mark on the board, I try to make them aware of the "growth" they will need to make to "think like a lawyer." I start the process by asking them to compare their comments to the court's opinion. "Whichever way you think the case should have come out,

36. See, e.g., JEFF DEEVER, THE COMPLETE LAW SCHOOL COMPANION 50 (1984) (suggesting that "facts" should be the first element in a law student's case brief following the case name, court and date); GARY A. MUNNEKE, JR., HOW TO SUCCEED IN LAW SCHOOL 34 (1989).

37. But once the students learn how to read and analyze a case properly, it is important that the students return to the facts of the case to determine which facts are the key facts, the "outcome-determinative" facts. See *infra* notes 79-88 and accompanying text, discussing the "What if . . ." game and the interaction between the factual plane, the rule plane and the public policy plane.

why doesn't the court's opinion look more like our treatment of the case, our comments on the board? Why is the court's opinion so different from our discussion of the case?" The questions make the students pause and think, and, I hope, to begin to "measure" themselves. Most of the students recognize that their initial analysis of the case, as expressed on the board, is definitely different³⁸ from the court's treatment of the case, but they are not quite sure how to articulate the differences; and they definitely are not prepared to comment on the differences.

While the students are pondering the differences between their analysis of the case and the court's treatment, I try to help them by shifting gears and asking: "What is a case? What is an opinion?" Ever since the adoption of the Langdellian approach to the study of law,³⁹ students are fed a steady diet of cases during law school.⁴⁰ Understanding what a case is, and what a judicial opinion is, goes a long way towards facilitating what it means to "think like a

38. At this point it is probably premature to say that the students realize that their comments and treatment don't measure up to the court's treatment, but in recognizing the differences and coupling it with the natural deference first-year law students have for courts, one can't help but assume that at least some of the students have begun to measure themselves.

39. See, e.g., Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1090 (1986) (describing the Langdellian approach as the assumption "that 'law is rules' and therefore the function of legal education is to define and teach the rules"); Laurie A. Morin, *Reflections on Teaching Law as Right Livelihood: Cultivating Ethics, Professionalism, and Commitment to Public Service From the Inside Out*, 35 TULSA L.J. 227, 274 (2000) (stating that "the Langdellian method emphasizes logic and reason over personal conviction"); Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449, 449-53 (1996) (explaining that the Langdellian approach refers to "Christopher Columbus Langdell's proposal that law be taught as a process of thinking as well as a doctrine of thought," and through case law "as a science rather than a craft").

The Langdellian Approach, however, has been highly criticized. See, e.g., Derrick Bell & Erin Edmonds, *Students as Teachers, Teachers as Learners*, 91 MICH. L. REV. 2025, 2046 (1993) (stating that Circuit Judge for the United States Court of Appeals for the District of Columbia Circuit, Harry T. Edwards, "rejects Langdellian formalism and does not believe the case method is an effective method of teaching"); Bob Gordon, Jack Schlegal, James May & Joan Williams, *Legal Education Then and Now: Changing Patterns in Legal Training and in the Relationship of Law Schools to the World Around Them*, 47 AM. U. L. REV. 747, 768 (1998) (casebook author Joan Williams rejects the Langdellian model); Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877, 902 (1997) (stating that "[t]he very fact that virtually all American legal thinkers explicitly 'reject' or 'renounce' Langdellianism is usually understood in the American legal academy to spell the demise of the Langdellian paradigm").

40. Cases are what students are asked to read before they come to class; cases are what students are asked to analyze during class; the fact pattern for a new case is what students are given on the exam; students are asked to analyze and write a well-written opinion. The principal tool used to teach students how to think like a lawyer, and to evaluate how well they think like a lawyer, is the case.

lawyer.”⁴¹ Nothing in the traditional Property casebook prepares the students for this question, and I assign no supplemental reading for it. The purpose of the question and ensuing discussion is merely to convey a sense of the judicial process.⁴²

To help guide the discussion, and to help the students visualize the process, I suggest that we “diagram” the evolution of a typical case. I draw a timeline on the board. We start, naturally, at the beginning. “How does a case begin? How did the case of *Pierson v. Post* begin?” Someone recites the facts of the case again.⁴³ I put an “X” on the timeline and write above it “dispute arises.” I assign two students to play the roles of the respective parties. Verbally, we re-enact what might have happened that day—what the parties probably said to each other.⁴⁴ I ask the students to pay close attention to the arguments the parties made to each other—to pay close attention not just to the substance of the arguments, but to the *nature* of the comments.⁴⁵

“How does that factual dispute become a case?” The students have no problem with that step. I put another “X” on the timeline, just to the right of the initial mark, and write “Plaintiff (Post) consults an attorney.” I assign a new student to play the role of Post’s attorney. “What’s the role of the attorney? What does the attorney do? What does the attorney contribute to the evolution of the case?” We muddle our way through the role of the attorney: investigate the facts, research the law, and advise the client. I try to focus the discussion on what it means to say the attorney “researches the law.” “*Why* does the attorney research the law?” “What is the lawyer looking for?” Intuitively the students know the answer: a legal doctrine or rule of law which supports the party’s position.⁴⁶ I introduce the concept of a “cause of action”—a legal doctrine that, if established, entitles the party to relief.⁴⁷ “What cause of action did Post’s attorney rely upon?” Almost immediately one can hear the sound of pages being flipped as the students scan the opinion

41. I do not mean to imply that “thinking like a lawyer” applies only to case law as opposed to statutory law.

42. I assure the students that they will learn the details of the process in their other courses, Civil Procedure in particular.

43. See *supra* note 33 and accompanying text.

44. Profanity and all.

45. The students don’t really understand what I mean by the “nature” of the comments, but my hope is that my intent will become clear with time. The Socratic teaching approach often intentionally creates confusion, for confusion forces the students to exercise their minds. Thinking like a lawyer is an active process that requires an active mind, one which is “in shape” and which enjoys exercising: thinking.

46. We note the different types of law and the different places where a lawyer may find a legal doctrine or rule of law which supports the client’s claim: the constitution, statutory law, case law, administrative law, local ordinances, et cetera.

47. FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 3.11, at 156-57 (4th ed. 1992) (defining a “cause of action” as “a group of facts that give rise to one or more rights of relief”).

for help. The students begin to realize that maybe they haven't read the opinion quite as carefully as they thought. Finally someone finds it: trespass on the case.⁴⁸ "What's trespass on the case?" After an awkward moment of silence, one can hear the sound of backpacks being unzipped as the students reach for their *Black's Law Dictionary*. Our discussion has slowed noticeably. I assure the students we are not going to sweat the details of the evolution of a case, or the particular cause of action in any given case, but that they need to see how the cause of action relates to the rest of the case. The cause of action is one of the basic ingredients that contribute to the flavor of the case. We arrive at a working definition for trespass on the case—unlawfully interfering with the property of another.⁴⁹ To see if the students understand how the cause of action relates to the case, I ask what is Post's argument that he is entitled to relief under trespass on the case. The students surmise quickly that Post is claiming that by killing the fox, Pierson unlawfully interfered with Post's property—the fox.⁵⁰

Returning to the evolution of a case, we move on quickly. We discuss briefly how the plaintiff's attorney then drafts a document, called a complaint or declaration, which sets forth the facts, the plaintiff's cause of action, and the relief the plaintiff is seeking; how the attorney files it with the court⁵¹ and serves it upon the opposing party, the defendant; and how the defendant then goes to his or her attorney and develops a response or answer to the complaint which is filed with the court⁵² and served on the plaintiff.⁵³ I call on another student to play the role of Pierson's attorney. "What is Pierson's answer to Post's complaint?" The student quickly realizes the answer: "Pierson did not unlawfully interfere with Post's property because Post never acquired a property interest in the fox." I introduce briefly the concept of a demurrer.⁵⁴

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

49. I utilize a working definition, rather than the dictionary definition, of trespass on the case so that the students can fully grasp it. However, in actuality, this definition refers to the modern day cause of action for trespass to chattels. See BLACK'S LAW DICTIONARY 1509 (7th ed. 1999) (defining trespass to chattels as "[t]he act of committing, without lawful justification, any act of direct physical interference with a chattel possessed by another").

50. Although one could also make the argument that the property interest Post was claiming was in his right to hunt, his labor, that is beyond most, if not all, of the students on the first day. Most students don't see that argument until after we cover *Keeble v. Hickeringill*. See *infra* notes 82-86 and accompanying text.

51. Another mark on the timeline in the evolution of a case—filing the complaint.

52. Another mark on the timeline in the evolution of a case—filing the answer.

53. See generally DELMAR KARLEN, CIVIL LITIGATION 11-40 (1978) (discussing complaints and answers).

54. Even if the plaintiff can prove all the facts alleged, the plaintiff is still not entitled to relief as a matter of law. BLACK'S LAW DICTIONARY 444 (7th ed. 1999) (defining a demurrer as "[a] pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer").

“In light of Post’s cause of action and Pierson’s answer, what’s the issue in the case?” The students have little trouble stating the issue: How does one acquire a property interest in a fox? I write the new statement of the issue on the board next to the old one:⁵⁵

ISSUE: Who gets the fox? How does one acquire a property interest in a fox?

My hope is that by juxtaposing the students’ initial statement of the issue with their revised statement of the issue, the students will begin to appreciate the differences—to notice how fact-sensitive the one is and how generic and legal the other is; my hope is that the students will “measure” themselves and note the growth in their analysis.

Returning to the timeline, we cover the remaining ground quickly. We talk briefly about discovery, motions,⁵⁶ the possibility of settlement discussions and alternative dispute resolution options, and the major steps in a trial:⁵⁷ jury selection, opening statements, plaintiff presents his or her case, defendant presents his or her case, closing arguments, verdict/judgment.⁵⁸ We talk about the purpose of a trial: to determine the facts and apply the law to see who should prevail. We discuss how typically the jury determines the facts,⁵⁹ and then how the court instructs the jury on the law to be applied to the facts.⁶⁰ We complete the timeline diagram of the evolution of a typical case by briefly discussing the appellate process: the different levels of courts of appeals,⁶¹ the general principle that courts of appeal accept the facts as determined at trial and can only consider questions of law,⁶² alleged mistakes of laws. As a

55. See *supra* note 34 and accompanying text discussing how the students came up with the original issue statement “Who gets the fox?”.

56. Assuring the students that these topics will be covered in other classes, most notably Civil Procedure.

57. Another mark on the timeline.

58. Again assuring the students that these topics will be covered in other classes, most notably Evidence and Trial Practice.

59. ROGER HAYDOCK & JOHN SONSTENG, *ADVOCACY, PLANNING TO WIN: EFFECTIVE PREPARATION* § 2.13 (1994) (stating that “[i]n a jury trial, the jury is the fact finder”).

60. *Id.* (stating that, in a jury trial, the judge “instructs the jury regarding the law” and “[t]he jurors apply the law given by the judge to the facts”).

61. The general rule is that each party is entitled to an automatic right to appeal to the intermediate court of appeals, with a right to petition for further appellate consideration, if need be, from the highest court of appeal. See generally FLEMING JAMES, JR. ET AL., *supra* note 47, §§ 12.7-12.9, at 659-74.

62. *Id.* § 12.9, at 668 (stating that “an appellate court reviews questions of law and may not substitute its own view of the facts or make new fact findings”).

general rule, parties cannot appeal questions of fact, only questions of law.⁶³ The issue on appeal must be an issue of law.

With this better understanding of what a case is, and how a case evolves, the students should have a better sense of how they should read and analyze an opinion. Enriched by this background, we return to *Pierson v. Post*. I ask the students if the opinion is a trial court opinion or a court of appeals opinion.⁶⁴ They quickly realize it is a court of appeals opinion.⁶⁵ I sense the students are starting to think about the opinion from a different perspective as they view the case from the perspective of the timeline. They begin to see the questions coming, to ask them themselves. “Who prevailed at the trial court level?” *Post*.⁶⁶ “What mistake of law does *Pierson* allege was made at the trial court level? What’s the issue on appeal?” Without fail an eager student blurts out: “How does one acquire a property interest in a fox?” Most of the students nod their heads in agreement. “Does everyone agree?” Someone finally offers that the court expressly said that the parties were in agreement that to acquire a property interest in a wild animal, there must be occupancy.⁶⁷ That answer, however, merely begs the question: what constitutes occupancy? After some hesitation, the students agree that *this* is the issue on appeal.

I go back to the board and write the new version of the issue statement next to the other two issue statements, implicitly asking the students to “measure” themselves, their reading of the case, their analysis of the case, yet again. By juxtaposing their different answers to the question “what is the issue in the case?” my hope is that they will see how we have moved from their initial statement of the issue, a purely factual statement of the issue,⁶⁸ to a purely legal statement of the issue.⁶⁹

ISSUE: Who gets the fox?	How does one acquire a property interest in a fox?	What constitutes occupancy?
--------------------------	--	-----------------------------

Implicit in the comparison of the issue statements is the question of which version is better. But I hold off on that question, for now.

63. *Id.* § 12.9, at 669 (stating that “[w]hether the fact issues in the trial court are determined by a jury or a judge, the appellate court limits itself to inquiring whether they rest on a substantial evidentiary basis”); *see also* FED. R. CIV. P. 52(a) (stating that “[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses”).

64. While that may sound like a “duh” question to anyone reading this, one has to remember how little a first-year, first-day law student knows.

65. Another mark on the timeline of the evolution of a case—the appeal.

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

67. *Id.* at 177.

68. One might say a layperson’s statement of the issue.

69. One might say a more “lawyerly” statement of the issue.

Having stated the issue on appeal, the students expect me to jump into the court's analysis of the issue. But presentation is everything. The table has not yet been properly set. Before analyzing the court's treatment of the issue, the students need to appreciate the significance of the discussion. "What is occupancy?" "Conceptually, how would you classify the statement 'what constitutes occupancy?'" Sometimes the Socratic approach is painful, particularly when asking such abstract questions. But sooner or later I usually find a student who is either a good mind-reader or who is on the same wavelength as I. "Occupancy is a rule of law." Therefore, the issue "what constitutes occupancy" must be a question of law. But recognizing that occupancy constitutes a rule of law is just the appetizer. The entree is "how does the court describe the issue." Again the students have to scan the opinion for the answer, not having appreciated the significance of the language in the opinion upon their initial reading of the case. The court calls it a "novel" issue.⁷⁰ "What's the significance of the court's description?" This point takes some time, but it is critical that the students understand what the court is saying, and hence "doing." It takes some time for the students to comprehend and articulate the point fully. By deciding a "new" or "novel" question, or a "question of first impression," the court is *making* law.

Many law students come to law school with the notion that a court's job is merely to *apply* existing law to the facts. Their high school civics classes taught them that legislatures make the law and courts apply the law. That is the layperson's understanding of legislatures and courts. The common law tradition that courts can *make* law is new to many students. We talk about the implications of saying that the court is *making* new law: "How should the court go about it? What should the court consider, and why? What will be the scope of the court's opinion? Who will be affected by the court's opinion?"

The students begin to see the case on two levels. There is "the case," the unresolved factual dispute between the parties that needs to be resolved; and there is "the issue," a novel question of law that needs to be resolved. In resolving the latter, the court is *making* law. When *making* law, the court needs to consider what is in the best interests of society, and why; the court needs to consider how similarly situated parties will be affected, not just the parties before the court. The students' discussion picks up pace again. One can sense the level of interest and excitement picking up as the students get their first taste of what it means to "think like a lawyer."

Having altered the students' state of mind, it helps to have them apply it to an actual case instead of simply continuing at the abstract level. *Pierson v. Post* is served up yet again. "How did the court answer the issue on appeal? What rule of law did the court adopt for 'what constitutes occupancy,' and why? What rule of law did the dissent argue should have been adopted, and

70. *Pierson*, 3 Cai. R. at 177.

why?” These are more challenging questions than “what are the facts.” Discerning what constitutes the rule of law to take away from the opinion, and why the court adopted that statement of the rule, is more of an “art” than a science. We spend a considerable amount of time attempting to identify the court’s statement of what constitutes occupancy. It is easier to find the dissent’s proposed rule of law: hot pursuit with reasonable prospect of capture.⁷¹ It takes longer for the students to agree on what constitutes the majority’s statement of its rule of law: one must manifest an unequivocal intent to appropriate the animal to one’s individual use, deprive the animal of its natural liberty, and bring the animal within certain control.⁷² We talk about how sometimes lawyers, and even courts, will disagree over the rule of law adopted by the court, and how that question will serve as an issue in later cases.

“Why did the court adopt the rule it did? Why did the dissent think that a different version of the rule should have been adopted?” As before, I write the students’ answers on the board:

<i>Majority/Court</i>	<i>Dissent</i>
minimize disputes promote peace efficiency/minimize costs of administration	custom of hunters maximize the kill of foxes fairness

I like to write these comments next to the students’ earlier comments about who should have won, and why.⁷³ I ask the students how they would “categorize” these considerations. “Are these factual considerations, legal considerations, or something else? If something else, how would they describe these considerations?” Again, it takes awhile for a student to see where I’m going, but sooner or later someone recognizes that these are public policy and theoretical considerations.

I ask the students to compare the “temporal direction” of these considerations as opposed to their initial thoughts about how the case should have come out and why.⁷⁴ As with many, if not most of my more abstract questions, the students are confused initially by the phrase “temporal direction.” I go to the timeline. Putting my finger on the “X” indicating the

71. *Id.* at 182 (proposing that “property in animals *ferae naturae* may be acquired without bodily touch or manucaption, provided the pursuer be within reach, or have a reasonable prospect . . . of taking, what he has thus discovered an intention of converting to his own use”).

72. *Id.* at 178.

73. *See supra* notes 36-38 and accompanying text.

74. *See supra* notes 36-38 and accompanying text.

time of the appeal, I ask which direction the court is looking when it focuses on these considerations—prospectively at the future implications of its ruling, or retrospectively, at the facts of this particular case? The students immediately recognize that the temporal direction of the court's analysis is prospective.

In making its rule of law, the court's focus is on the future implications of its ruling, not this particular case.⁷⁵ Since the court is *making* law, the court's focus is on what is in society's best interests and how similarly situated parties will be affected, not just the parties before the court. The students recognize that their initial analysis of the case was completely retrospective, focusing almost completely on the facts of this particular case and not on the larger issue. They did not appreciate the multiple levels of the opinion: the factual, the legal, and the theoretical/public policy. To the extent the court's opinion is an example of "thinking like a lawyer," the students have been forced to "measure" themselves, their analytical abilities, with those of the court.

Realizing that students are often dazed and confused by the start of law school, I pause at this point to let the students digest what they have been chewing on. I try to make the students more conscious of the process they have just experienced—of the interaction between the factual, legal, and theoretical/public policy considerations that is inherent in the process of "thinking like a lawyer." "How did the case start?" As a factual dispute. I do my best to draw a three-dimensional plane. I label it the factual plane. I put an "X" in the middle of the plane, representing the factual dispute. "Where did we go in our initial attempts to resolve the dispute?" The lawyers went looking for a legal doctrine or rule of law that would resolve the dispute. I do my best to draw a three-dimensional plane floating above the factual plane. I label this the rule plane. "To the extent there was no rule of law on the rule plane which resolved the dispute, or there was a rule but it was ambiguous, where did we go?" The court went looking for the relevant public policy and theoretical considerations to help it determine what the law should be. I do my best to draw another three-dimensional plane, this one floating above the rule plane. I label it the public policy plane.

"What's the relationship between and among the planes?" The relevant public policy and theoretical considerations determine the rules of law the courts adopt. Inasmuch as the court is creating new law, law which will apply not only to the case before the court, but to all similarly situated parties in the future, the rule is stated generically and more broadly than would be necessary

75. I often support this point by asking the students to categorize the paragraphs of the opinion. In particular, once the court states the issue, I ask how many paragraphs go by before the court mentions the parties in any meaningful way. What is the court doing in those paragraphs in between? Considering what should be the rule of law, and why, without mentioning the particulars of the case before it.

if the court were merely resolving the case before it. The wording of the rule establishes its scope. The “scope of the rule” casts a corresponding shadow on the factual plane. The new rule of law controls and resolves all disputes on the factual plane that come within the scope of the shadow cast by the scope of the rule of law. Disputes that arise smack dab in the middle of the scope of the rule are fairly simple cases. They merely involve applying the elements of the rule to the facts. Disputes that arise near the edge of the shadow cast by the scope of the rule fall into the “grey area.” As the factual disputes get closer to the edge, it is unclear whether the dispute comes within the scope of the rule and should be controlled by it or not. To the extent the court is called upon to clarify the scope of the rule, the court, in essence, is making new law by clarifying the limits of an existing rule. In clarifying the scope of the rule, the court must resort to the rationale for the rule. Thus, the court must resort to the public policy and theoretical underpinnings of the rule.

One could argue that is exactly what the court was doing in *Pierson v. Post*. There was an existing rule of law that both parties agreed controlled the case. To acquire a property interest in the fox there must be occupancy. As applied to the particular facts in *Pierson v. Post*, however, there was disagreement over what constituted “occupancy.” Was “hot pursuit” enough or must there be more? In clarifying the scope of the existing rule, the court was creating new law. In creating new law, the court was driven by the relevant public policy and theoretical considerations.

Students must properly understand what the court did and why before they are in a position to critique what the court did and why. Now that the students know how to read an opinion, they are in a position to critique it. *Pierson v. Post* is a great case for introducing the students to the process of critiquing a court’s opinion because the case has a dissenting opinion which serves nicely as both an example of how to critique an opinion and as a spring board for bringing in additional points and considerations.

Having identified the rule of law adopted by the court and its rationale, and the rule of law proposed by the dissent and its rationale, it is easy to start the critique of *Pierson v. Post*: “who got it right and why, the majority or the dissent?” In many respects, the ensuing debate resembles the initial debate over who should have prevailed and why,⁷⁶ only this time the debate is focusing on the relationship between the rule plane and the public policy/theoretical plane, between the rule statement and the public policy and theoretical considerations.⁷⁷ In particular, the debate concerns the latter. “To

76. See *supra* notes 36-38 and accompanying text.

77. Questions concerning the court’s definition of occupancy and why it adopted the rule it did require the students to see the interaction between the rule plane and the public policy/theory plane. To the extent the latter controls the former, it is important for the students to be comfortable with the relationship between the planes for that is the essence of the process of

the extent multiple public policies were identified by the court and the dissent, which one, or ones, should control and why? What are the assumptions underlying the respective policy considerations and arguments? Are there other considerations which should have been raised but were not?”

The students begin to see the different faces of an opinion. One can agree with the result (the outcome between the parties), but disagree with the rule adopted by the court. One can agree with the outcome and the rule, but disagree with the rationale for the rule. One can agree with the rule but disagree with the outcome (argue the court misapplied the rule). There are so many different ways to dissect an opinion.

Having dissected and critiqued the opinion, the students need to know how to apply it. The easiest and arguably best place to begin is with the case itself.⁷⁸ “In light of the rule of occupancy adopted by the court, why did Post lose?” The question is designed to force the students to think about the relationship between the rule plane and the factual plane. How does one apply a rule to a particular fact pattern? Intuitively most of the students realize you should start with the rule. Intuitively most of them realize that you can break most rules down into segments or elements. The court’s statement of occupancy has three obvious elements. To help the students, I write the rule statement, as broken into its elements by the students, on the board next to the students’ statement of the facts:

<i>OCCUPANCY</i>	<i>FACTS</i>
(1) unequivocal intent to appropriate to one’s individual use	Post, hunting w/ dogs, spies fox; in hot pursuit, closing in on the kill when Pierson,
(2) deprive of natural liberty	seeing Post & knowing Post’s intentions, shoots & kills fox
(3) brought within certain control	

The students tend to see the relationship between the rule and factual planes more easily and quickly than they see the relationship between the rule plane and the public policy/theoretical plane.

In applying the elements to the facts, I suggest to the students that they start with the elements that they think are most easily satisfied and work their way to the elements or parts of the rule in dispute. In articulating their analysis, I suggest that they lead with the rule or element being analyzed and

making law. When challenging the wisdom of a particular law, or one or more of its elements, invariably the focus of the analysis will occur between these two planes (with reference to factual scenarios merely as evidence of the consequences of the rule).

78. Though a statistically disproportionate percentage of cases in casebooks are creation cases. That makes sense, though, from an academic perspective.

then bring in the facts. With respect to the first element, the students have no trouble. Post established his unequivocal intent to appropriate the fox by hunting and pursuing the fox. As for the second and third elements, the students argue that Post did not deprive the animal of its natural liberty or bring it within certain control because he did not capture the fox. Students tend to bunch the “deprived the animal of its natural liberty and brought within certain control” elements into one requirement—that the party actually possess or capture the animal.⁷⁹

I try to discourage such thinking by asking, “If you were Post, would you concede both elements, or is there an argument you can make in good faith at least as to one of them?” At this point, some creative student raises his or her hand and argues that Post had deprived the fox of its natural liberty because by chasing the fox, the fox was no longer free to roam the woods as it wished; its movements were in large part dictated by the hot pursuit of the hounds and dogs. Suddenly those students who thought the element was open and shut have their eyes opened. I encourage my students to be aggressive, to be creative, to raise all arguments which could be raised in good faith, even “losing” arguments. Effective advocacy puts the burden on the other party to rebut the losing argument. The issue of whether or not Post has deprived the fox of its natural liberty, however, arguably is made moot by the last requirement. All the students agree with the court that Post’s mere hot pursuit did not bring the animal within certain control. Whether or not the students agree with the rule statement the court adopted for occupancy, the students agree that the court applied the rule to these facts correctly.

But that is too easy. Having created the factual plane/rule plane/theoretical plane analytical template, it is time to let the students try it out. To the extent students are fed a steady diet of cases during law school, students need to realize that it is good to “play with your food.” In particular, I introduce the students to the “*What if . . .*” game.

“*What if* we had the same facts as *Pierson v. Post*, only this time, as Post was closing in on the fox, the fox collapsed, exhausted from all the running. As Post is getting off his horse to come over and grab the fox, Pierson walks up and grabs it first. Who gets the fox and why? Same case or different?” Most of the students argue that this is a different case. All agree that the first element is the same. Post has established his unequivocal intent to appropriate the animal by hunting and pursuing it. Most of the students think that Post deprived the animal of its natural liberty since the fox was lying on the ground, lifeless. The issue is whether the animal has been brought under certain control since it was lying on the ground, lifeless, but not restrained or dead.

79. I try to point out to them that while there is great overlap between the two elements, they are not necessarily the same, and that as a general rule students should be wary of combining elements of a rule that the court deemed necessary to set forth separately.

Some argue that inasmuch as Pierson was able to walk over and pick the fox up, it was brought under certain control the moment it collapsed. Others argue that until the fox is in someone's hands, at any moment it may regain its strength, spring to its feet, and be off again. Thus, Post did not bring it under certain control. "In light of the reasonable and good faith arguments which can be brought on behalf of both parties, how do we resolve the issue? What is the issue?" Most of the students realize that the issue in this hypo is what constitutes "certain control." In resolving the issue, we need to consider the relevant public policy and theoretical considerations. The students begin to understand that this is how the common law evolved. One case leading to another case, which leads to another, and so on. The process continues to this day, in all areas of the law.

"What if we had the same facts as *Pierson v. Post*, only the parties were named Wendel and Smith, and Wendel was the one hunting with dogs. Same analysis and result as before, or different?" The students all say same result. "Why? Can't I distinguish my case by saying that the parties are different?" Yes, but that distinction makes no difference to our analysis. Similarly situated parties should be treated the same. That is one of the basic principles of a legal system based on rules of law.

"What if we had the same facts as *Pierson v. Post*, only the events occurred on Post's property? Same result or different?" The students all say different result. Post should prevail. "Why? Why is this case different from *Pierson v. Post* when my earlier hypo wasn't?" Pierson is on Post's property. "So, what difference does that make?" Pierson is trespassing. "So?" We want to discourage trespassing, they say. I ask the students to notice how their arguments play out on the three plane analytical template. In determining whether a factual distinction makes a difference, the students intuitively go to the public policy plane to see if the factual distinction raises a new public policy and/or theoretical consideration. Changing the names of the parties raises no new public policy considerations, so the case is indistinguishable from the original case of *Pierson v. Post*. The result is the same, as it should be. On the other hand, having the events occur on Post's property raises a new public policy consideration: deterring trespass. That public policy consideration trumps the public policy considerations driving the rule of occupancy (maximizing the kill of foxes, efficiency, minimizing disputes),⁸⁰ so we create a different rule to control that factual scenario: the doctrine of

80. Though this last consideration supports both rules.

ratione soli.⁸¹ That rule promotes the controlling public policy consideration and socially desirable outcome of deterring trespass.⁸²

“*What if* Post was hunting ducks instead of foxes, and he had built a duck pond on his property which he used to attract ducks so he could catch them, take them to market, and sell them. Pierson lives next door. One day, Pierson goes to the edge of his property and shoots his gun off over his own property, thereby scaring away the ducks in the air. No ducks were in the pond when Pierson shot off the gun. Post sues. Who wins, and why?” Most of, if not all, the students say Pierson. Although Post *may* have established his unequivocal intent to appropriate the ducks to his individual use by building the duck pond, there is no evidence he deprived them of their natural liberty or brought them within his certain control. “But this hypo is basically the fact pattern in *Keeble v. Hickeringill*,⁸³ and there the court held that Keeble, the one who built the pond, was entitled to recover from Hickeringill for shooting off the gun.⁸⁴ Are the cases reconcilable, or irreconcilable?” I like to end class with that question. I assign *Keeble v. Hickeringill* for the next class, hoping that the hypo has whetted their appetites. Can they explain the apparent conflict between the holdings, or can they identify which opinion is wrong and why?

It is, admittedly, a tough set of cases to chew on so early in their development, but invariably some of the better students see, and articulate, that the cases are different. In *Pierson v. Post*, both parties were trying to kill the fox, the socially desirable goal. In *Keeble v. Hickeringill*, while Keeble was trying to capture the duck to bring it to market, the socially desirable goal, Hickeringill was simply trying to scare the ducks away to prevent Keeble from getting them. Hickeringill was not trying to advance the socially desirable goal of increasing the supply of goods for consumers. The court’s opinion in *Keeble v. Hickeringill* discusses implicitly the difference between productive competition (that which advances the socially desirable good) and destructive competition (that which merely hinders another without advancing the socially desirable good).⁸⁵ In light of the factual distinction,⁸⁶ which raised new public

81. An owner of real property has constructive possession of all wild animals on his or her property. *DUKEMINIER & KRIER, supra* note 21, at 33 n. 2.

82. I also use this hypo to discuss what constitutes a “relevant” fact. During the discussion, I ask the students why “deterring trespass” was not a relevant consideration in *Pierson v. Post*. Someone answers “because the hunt and confrontation occurred on ‘unowned wasteland.’” “Is that a relevant fact?” In light of this new hypo and rule of law (*ratione soli*), all the students say “yes.” “Should that fact have been included in our initial statement of the facts in the case?” *See supra* text accompanying note 33. All of the students now agree it should be. “Why?” Because it is what we call an “outcome-determinative fact”—if you change the fact, the outcome in the case changes. If a fact is an outcome-determinative fact, it should be included in the factual statement for the case.

83. 103 Eng. Rep. 1127 (1707).

84. *Id.* at 1129.

85. *Id.* at 1128.

policy considerations,⁸⁷ the court created a new rule, malicious interference with trade, which promotes the relevant public policy considerations and insures that the socially desirable goal is promoted in this factual situation.⁸⁸

By the end of *Pierson v. Post* and the other wild animal material, the students have been exposed to the basic legal analysis skills and techniques they will need to "think like a lawyer."⁸⁹ By then, they realize they need to be more conscious of the relationship between the factual, legal, and theoretical considerations at stake in each case. They need to see how the planes relate to one another. They need to see how "application cases" primarily involve the factual and legal planes; "creation cases" involve primarily the public policy plane and the legal plane; and "distinguishing cases" primarily involve the factual plane and the public policy plane.⁹⁰ More importantly, they need to become proficient at transitioning from one plane to another as the case and arguments dictate,⁹¹ and at using the interaction between the planes to further their analysis.⁹²

86. Keeble was not trying to promote the socially desirable outcome, killing the animal, while Pierson was.

87. The new considerations are promoting and protecting socially productive competition while deterring socially destructive competition.

88. Notice the interaction between the different analytical planes in this sentence alone. The dispute, which arose on the factual plane, introduced a new policy consideration, the public policy/theoretical plane, which gave rise to a new rule of law, the rule plane, which was then applied to the facts of the case, the factual plane, to promote the desired socially productive behavior.

89. I end up spending about four one-hour classes covering *Pierson v. Post*, *Keeble v. Hickingill*, and the related wild animal materials. I find that the students tend to not tire of the material though, because they hunger for guidance on legal analysis.

90. Some learning theories claim that people in general tend to learn in one of two ways. Some people focus on the big picture (the public policy/theoretical considerations) and have a more difficult time filling in the details (the rules and corresponding factual components). Other people focus on the details (the factual considerations and rules) and have a harder time with the big picture (the public policy and theoretical considerations). Interestingly, studies have shown that law students who tend to do well are those who are "ambidextrous"—they tend to be good at both the big picture and the details. Such findings are consistent with the notion that effective lawyers need to be adept at moving swiftly and smoothly between and among the different analytical planes inherent in "thinking like a lawyer."

91. The three plane analytical template is intended to help the students learn how to "think like a lawyer." It is merely a suggestion about how they might start out visualizing the process. As the template evidences, one of the reasons it is so hard to describe what it means to "think like a lawyer" is that there is no one analytical process. Depending on the scenario, the different planes interact differently. One needs to develop a comfort level with the different planes, and to be aware of the interaction between and among the different planes, to know how to use them in any given case. Moreover, "thinking like a lawyer" means that the three analytical planes need to be examined from all possible perspectives. One way of thinking about it is that the three analytical planes are cut from fine crystal and they are encased in a crystal ball. For each issue in each case, the lawyer's job is to hold the "crystal ball" up to the light and to turn and twist it

I have heard a number of students and professors say that the way law professors teach students how to “think like a lawyer” is like teaching students how to swim by throwing the students into the deep end of a pool. I prefer to think that teaching law students how to “think like a lawyer” is like teaching children how to ride a bike. First and foremost, “thinking like a lawyer” is a process, an activity, which one can learn and master only by doing—like riding a bike. No matter how much or how well one describes the process, in the end, one learns it only by trial and error—like riding a bike. Some will master the process quickly, as if they were “naturals,” while others will struggle for quite some time—like riding a bike. No doubt many would argue that the “swimming” analogy is better because students feel so overwhelmed by the process it is like they are drowning at first.

I prefer the “riding the bike” analogy. Just like riding a bike, students stumble and fall off at first, skinning their egos and embarrassing themselves. But with each ride,⁹³ they improve, they go a bit further, wobbly as it may be, until one day, it clicks. Suddenly, they master the “balance” between the factual, legal and theoretical/public policy planes that is necessary to master “thinking like a lawyer.” Once the students master the basics of balancing the different planes within the analytical template, then they can move on to the more creative uses of the process—“riding with no hands” and “popping wheelies.” But such challenging and advanced analytical skills are best left to the more exciting upper level courses—like Wills & Trusts.

slowly, to discern all the different colors created as the light refracts as it passes through the different planes, to discern all the different ways in which one could view the issue.

92. Invariably, after a couple of months of law school, a first-year Property student will stop me in the hall and proudly tell me that they think they are beginning to “think like a lawyer” because they can answer most of my questions now. I congratulate them on their “growth.” But I tell them the “measure” of whether they are “thinking like a lawyer” is not whether they can answer my questions, but whether they can ask them before I do.

93. As professors, we can simply give them a push and stand back and watch as they fall, or we can run alongside them for awhile, helping them get a sense of the process, before letting go to see if they can do it on their own.