Summer 2020

Book Review: Angela Fernandez, Pierson v. Post, The Hunt for the Fox: Law and Professionalization in American Legal Culture

Jennifer Nadler
Osgoode Hall Law School of York University, jnadler@osgoode.yorku.ca

Source Publication:
The University of Toronto Law Journal, vol. 70, no. 3, 2020, pp. 387–93.

Law and Literature in Angela Fernandez's *Pierson v. Post: The Hunt for the Fox*

Jennifer Nadler

Published version can be found in the University of Toronto Law Journal

In her new book, *Pierson v. Post: The Hunt for the Fox,* Angela Fernandez uncovers the history of the famous property law case, placing the dispute between Pierson and Post against its rich local historical backdrop and the majority and dissenting opinions in their literary and intellectual contexts.

The book begins with a puzzle. On first reading, *Pierson v. Post* seems fictional and absurd. It begins with two wealthy young men fighting over an economically insignificant fox on a beach in the Hamptons and a jury award of 75 cents, and it ends, after another two years of litigation, with a majority opinion full of references to arcane authority and a dissenting opinion expressing deep concern for chickens, referring to the fox as the enemy of mankind and one of the young men as a saucy intruder. And yet, this case, for all its apparent absurdity and triviality, has become a canonical case in the law of property. It has been used in law schools for over a hundred years to introduce students to the concept of possession, and the standard view today is that the majority and the dissent were engaged in a serious debate about whether one acquires property in a wild animal by capture or by pursuit.

How did this happen? Fernandez answers this question with painstaking research and attention to detail, imaginatively weaving together *Pierson v. Post*'s literary, historical, and intellectual contexts into an argument for re-thinking the case's meaning and importance. In this review, I will outline the main strands of Fernandez' argument: the literary, historical, and intellectual contexts of *Pierson v. Post.* Then, focusing on the literary dimensions of the

argument, I will raise some questions about whether it undermines the view that *Pierson v. Post* is a foundational case reflecting a debate about first principles in property law.

Fernandez begins by questioning the standard view of Livingston's dissent as a straightforward legal text. Here, she makes a number of points. The first is that a close reading of the dissent reveals that much of it is so silly that it cannot have been seriously intended (64). Can Livingston have been serious when he said that the whole dispute should have been decided by a panel of hunters? Fernandez thinks the answer is clearly no. As she points out, this wasn't a dispute between hunters. Post was hunting; Pierson was on his way home from work and, annoyed by the hunt, killed the fox to spoil the fun (53). Moreover, Fernandez argues, Livingston's suggestion that elaborate English-style fox-hunting is the best way to eradicate foxes and save farmers' chickens is surely mistaken. The point of the fox hunt was the fun of the hunt; it required a healthy population of foxes. It was Post's elaborate fox hunting, not Pierson's spur of the moment fox killing, that threatened the farmers and their chickens (51). Finally, after declaring Barbeyrac the most rational of the ancient authorities on the subject, Livingston goes on to say that if he were at liberty to do so, he would chart a middle course between the authorities and decide the case based on the size of the dogs used for the hunt (72). Surely this must all be a joke.

Rather than reading the dissent as a serious legal text, Fernandez argues that we should read it as a literary text (35, 77). She makes this argument by situating the dissent in a literary context, and her conception of this context is rich and diverse. Fernandez begins by drawing parallels between Livingston's dissent and other instances of judicial literary playfulness or "solemn foolery" (79). She argues for analogies between Livingston's mock seriousness and the mock trials of the Courts of Dover social clubs (94), between Livingston's break with decision-

writing norms and the annual law school follies (102), between Livingston's playful creativity and law school fact patterns (104-105). We learn, moreover, that Livingston's naming the fox Reynard is a reference to a medieval text and that his characterization of foxes draws on the long-standing literary anthropomorphization of foxes as deceitful and tricky (107-108). Livingston's style – its over-the-top display of learning, its digressions and playful spirit – is an instance of Rabelaisian humour, popular in American literature in the first half of the nineteenth century (110-111). Finally, in Livingston's dissent we find echoes of Shakespeare's *Titus Andronicus*, which features an important hunting scene, violent acts committed for sport, and even reference to a "saucy controller" and "unmannerly intruder" (113-117).

Fernandez contests the standard reading of *Pierson v. Post*, not only by pointing out the dissent's solemn foolery, but also by arguing that the majority and dissenting opinions were not very far apart. Many have thought that the majority held that acquisition of property in a wild animal required capture while the dissent argued that pursuit of the animal was sufficient. But Fernandez argues that this view mischaracterizes both positions. True, the majority said that "mere pursuit" could not confer title (7); but the dissent agreed that *mere* pursuit was not enough to confer title. True, the dissent said that first possession of a wild animal did not require capture; but the majority agreed with Barbeyrac that possession required an act that brought the animal within one's certain control, an act that did not necessarily have to be capture (10). What, then, were the majority and dissent disagreeing about? If the majority insisted that mere pursuit was not enough and found in favour of Pierson and the dissent agreed that mere pursuit was not enough but found in favour of Post, we have what looks like nothing but a narrow disagreement about the facts. Whereas the majority thought this was a case of mere pursuit, the dissent thought it was a case of *hot* pursuit, a case of imminent taking (8, 324-5).

After challenging the reading of *Pierson v. Post* as a serious debate about first principles of property law, Fernandez turns to a presentation of the case's historical context. Building upon her remarkable discovery of *Pierson*'s original Judgment Roll, Fernandez offers a careful and richly-detailed discussion of the case's historical background. This includes an account of the dispute between Pierson and Post as a local squabble between two wealthy families and an analysis of the initial proceeding in *Pierson* as an informal process of quick and relatively cheap dispute resolution.

The presentation of Livingston's dissent as solemn foolery, the controversy between the majority and dissent as one of fact rather than principle, the dispute between Pierson and Post as petty, and the initial proceeding as informal sets the stage for the question that Fernandez seeks to answer in the remainder of the book: how did this case become a serious precedent for what is known as the capture rule?

The answer weaves together three different stories. First, there is the story of law's professionalization, a development that required a generous allowance of appeals from the rulings of Justices of the Peace and ambitious lawyers trained in the classics, eager to engage in debates over first principles. Second, there is the story of *Pierson v. Post*'s beginning as a defective torts claim that was transformed into a controversy about first possession through the adoption of several fictions – for example, that the fox was a wild animal rather than vermin and that the publicly owned beach where the fox was killed was "unpossessed" "wasteland" (193).

The third story is the story of *Pierson*'s scholarly uptake. This begins with Kent's inclusion of only the majority opinion in his *Commentaries* – Kent's own seriousness and ambitions for the common law explaining the choice to treat *Pierson* as a serious precedent and ignore Livingston's peculiar dissent (253). When Justice Holmes addressed the acquisition of

wild animals in his *Common Law* Lecture, Holmes took a reference to Justinian in Kent's *Commentaries* to mean that the majority in *Pierson* had accepted Justinian's position on property in wild animals. Whereas the majority argued for a requirement of power or control over the animal, Holmes wrote that *Pierson* stood for the proposition that possessory rights in a wild animal depend on making escape impossible (258-9). It's Holmes' interpretation of Kent's interpretation of *Pierson* that makes *Pierson* stand for the capture rule. Moreover, this distinction between the majority's supposed "capture rule" and the dissent's fuzzier requirement of hot pursuit made *Pierson v. Post* seem an ideal case for those arguing, in the twentieth century, for the economic superiority of rules over standards (292-3). Legal economists solidified the conversion of a complicated and nuanced text into a simplified debate over which property rule would produce the most certainty.

While it is clear that Fernandez believes that the literary and historical contexts of *Pierson v. Post* are of intrinsic interest, she also believes that these contexts buttress a normative argument. Fernandez thinks that the capture rule is wrong, that it runs counter to strong intuitions about the proper treatment of animals and the preservation of natural resources (2). But, Fernandez argues, Livingston's playfulness obscured the normative value of the hot pursuit rule, and interpreters of the majority opinion transformed a nuanced requirement of "power and control" into a simplified rule of capture. Thus, Fernandez's idea is that the answer to the question – how did *Pierson v. Post* become a canonical precedent for the capture rule?- is a story of historical contingency and is thus also an argument for the viability, perhaps even the superiority, of the hot pursuit rule.

I'll address two of Fernandez's central arguments. The first is that the dissent is best understood as a literary rather than a legal text. The second is that the majority and the dissent were not actually engaged in a debate over first principles of property law.

It is not clear how seriously Fernandez intends her suggestion that Livingston's dissent be read as a literary text *rather* than a legal one. At times, she seems to be saying that buried in all the playful literary allusion and display of wit is a serious legal argument. Livingston may have believed that the hot pursuit rule was a serious candidate for determining ownership of a wild animal (74). Perhaps he was trying to tell the majority that disputes should not be decided on the basis of slavish deference to foreign authorities (73). Or perhaps the serious point was that Pierson ought to have paid the 75 cent jury award and not wasted time and resources appealing a resolution of a petty dispute over an economically insignificant fox (87-88). At other times, however, Fernandez suggests that the whole thing may have been a joke after all, that Livingston simply decided to forsake the norms of judgment writing in favour of a "delightful self-indulgent romp" (75). On this reading, any apparent seriousness is nothing but mock seriousness. In the end, Fernandez concludes, "it is difficult to know how seriously to take [Livingston's] dissent" (274).

I'm going to address the suggestion that Livingston's dissent might be best understood as a literary rather than a legal text, leaving aside how far Fernandez intends to press this view. The suggestion is intriguing, but it is a bit difficult to understand. If we call a judgment "literary," we might mean that we are exploring a legal text's literary dimensions – for example, its use of language, ambiguity, or metaphor, or its reversal of expectations.[1] But in that case it would not

[1] This is the kind of exploration encouraged by James Boyd White and it is, I think, what he meant when he encouraged us to see the judge as poet and law as literature. See, for example, James Boyd White, "The Judicial Opinion and the Poem: Ways of Reading, Ways of Life" (1984) 5 Miss. C. L. Rev. 25.

be right to say that we are reading the text as literary *rather* than legal; we would be reading it as a legal text with literary elements. Alternatively, if we call a judgment literary, we might mean that it constitutes a narrative, a structured movement from the facts of the case to the normative conclusion. As Simon Stern has pointed out, however, although scholars have drawn connections between judicial opinions and literary narratives, the similarities should not be overstated. Legal judgments do not share the central features of literary narratives, features that draw us in and make us wonder what will happen and how it will end; there are no turns of plot or developments of character.[2] Livingston, in other words, is not telling us a story. But if Livingston's dissent is not a literary text in the ordinary sense of that term, what does it mean to read the dissent as literary *rather* than legal? It seems that we are left with the conclusion that the dissent is, after all, a legal text, though one that is rich with connections to literary texts. This brings me back to the question of its seriousness.

If this is a legal judgment, then we have to assume that it is giving reasons and that these reasons purport to justify a seriously intended conclusion. This doesn't mean that we have to understand Livingston's dissent as completely serious. Satire may be a very fitting mode for a dissenting opinion seeking to unsettle the authority of the majority.[3] And Fernandez persuasively shows that Livingston's dissent is satirical, that his overblown reference to authority is an implicit criticism of the majority's slavishness to authority and its refusal to ask which rule best serves the common good. But it is important to distinguish satire – which aims at serious

[2] Simon Stern, "Narrative in the Legal Text: Judicial Opinions and their Narratives" in *Narrative and Metaphor in the Law*, ed. Michael Hanne & Robert Weisberg (Cambridge University Press, 2018) 121-39 at 121 -122.
[3] Ferguson writes that "[d]issents unsettle by design" in Robert A. Ferguson, "The Judicial Opinion as Literary Genre" (1990) 2 Yale Journal of Law and Humanities 201 at 210. Justice Cardozo writes that the dissenter is "the gladiator making a last stand against the lions," a "poor man [who] must be forgiven a freedom of expression," and that we should not be surprised to find in dissent "a certain looseness of texture and depth of color rarely found in the *per curiam*." See Benjamin Cardozo, "Law and Literature" (1939) 48 Yale Law Journal 489 at 502, 505.

criticism – from flippancy or sheer playfulness – which have aims, of course, but not ones appropriately realized in a legal judgment. An interpretation of Livingston's dissent as satire is consistent with the text's status as a legal judgment; the same cannot be said of an interpretation that treats the dissent as sheer play. The point here is that we may not have to waver between reading the dissent as a legal text or a literary text or between reading it as a serious legal judgment or a non-legal send-up. Leaving aside the seemingly unanswerable question of what Livingston intended, we can read it as a legal judgment that skillfully employs literary allusion and satire.

But perhaps there is more to Fernandez's point about the literary dimensions of the case. Although the dissent is not literary in the sense of drawing us in with turns of plot and developments of character, others in the field of law and literature have argued that judicial judgments are literary in a looser sense – in the sense that every judgment begins with a narration of the facts of the case. And we should not, many have argued, make the mistake of thinking that the judicial narration of facts is more neutral than any other form of story-telling.[4] The narration of facts is an interpretive exercise and is therefore always shaped by the narrator's purpose. Fernandez brings this interpretive, purposive aspect of factual narration to the fore when she discusses the legal "fictions" adopted by the lawyers and judges in *Pierson* –that the fox was a wild animal rather than vermin and that the publicly owned beach was unpossessed wasteland.

But it seems to me that Fernandez neglects the interpretative dimension of factual narration when she argues that the dispute between the majority and the dissent in *Pierson* is

[4] See, for example, Gretchen A. Craft, "The Persistence of Dread in Law and Literature" (1992) 102 Yale Law Journal 521 at 535; Jane B. Baron and Julia Epstein, "Is Law Narrative?" (1997) 45 Buff. L. Rev. 141 at 142, 144; Peter Brooks, "The Law as Narrative and Rhetoric" in Peter Brooks and Paul Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (New Haven: Yale U Press, 1996) 17; Kim Lane Scheppele, *Legal Secrets: Equality and Efficiency in The Common Law* (Chicago: University of Chicago Press, 1988) 94-104.

better understood as a narrow disagreement about the facts rather than a deep disagreement about first principles. As I noted above, Fernandez argues that the majority thought *Pierson* was a case of "mere pursuit" whereas the dissent thought it was a case of "hot pursuit." The suggestion is that the majority and dissent were just disagreeing about how close Post was to catching the fox.

But if we think of factual narration as an interpretive exercise, there is another possibility. This possibility is that because the majority regarded "certain control" as a requirement of first possession, anything short of certain control constituted "mere pursuit" – whether the hunter was an inch from the animal or whether he had tired of the hunt and gone home for the evening. In other words, from the perspective of a requirement of certain control, there is no difference between "mere pursuit" on the one hand and "hot pursuit" or "imminent taking" on the other. By contrast, because Livingston was interested in finding the rule that would encourage the eradication of foxes, he did distinguish between the hunter still in hot pursuit and the one who had given up for the day and thought it important to insist that this was a case of imminent taking. This suggests that what appears as a narrow factual disagreement is actually a deep disagreement, not only about the proper legal rule, but also about the kinds of reasons appropriate to determining the proper rule. The majority seems to think that the correct rule derives from a conception of property as mastery of an object; Livingston thinks that the correct rule is the one instrumentally adapted to a larger social good.

Finally, just as Fernandez' discussion of the choice to treat the fox as a wild animal and the beach as unpossessed wasteland reveals the non-neutrality of factual narration, so her analysis of *Pierson*'s scholarly uptake reveals the non-neutrality of legal interpretation. Legal scholars told a story about *Pierson v. Post*, a story that was shaped by their historical

circumstances, scholarly assumptions, and personal ambitions.[5] Fernandez persuasively argues that the economic interpretation of *Pierson* as the triumph of a certain rule of capture over a fuzzy standard of imminent taking is a complete misreading of the case - the economists saw in the case what they were predisposed to see. Her close reading of the text reveals that the majority did not assert an absolute capture rule in contrast to the dissent's hot pursuit standard. Rather, the majority argued that first acquisition required subduing the wild animal to one's power and control. Of course, "power and control" is as fuzzy a standard as hot pursuit[6] and so Fernandez has persuasively undermined the economic interpretation of *Pierson* as a debate about rules versus standards. But has she undermined the view that the majority and the dissent were engaged in a serious debate about first principles of property law? I don't think so.

If the majority required the animal to be within one's power and control whereas the dissent was satisfied with hot pursuit, the conceptual space between the two judgments remains. We might think of the majority as articulating a clear rule, not in the sense of a rule that isn't open to competing interpretations, but in the sense of rule that it is capable of singling out one individual among others as the property owner. Multiple individuals might simultaneously expend labour in hot pursuit of a wild animal; as the facts of *Pierson* illustrate, multiple individuals might simultaneously be within close reach of it. But only one person can subdue an animal to his or her power and control. Thus, we might think that while the dissent was articulating a rule derived from a view of what would produce the greatest social good, the majority was articulating a rule derived from the idea of property as exclusive possession, a rule that could single out one individual as exclusive possessor from all the other individuals in hot pursuit. This is not a debate about clear rules versus fuzzy standards, but it is a debate about first

[5] For an argument about the story-telling quality of law review articles see Baron and Epstein, *supra* note 4.
[6] *The Tubantia* [1924] All ER 615 is an illustration of this point.

principles of property law – about whether property is to be understood conceptually or instrumentally.

I have suggested that we might read Livingston's dissent as satire in the service of serious legal argument rather than sheer play and the majority and dissent as disagreeing, not simply about what constitutes possession of a wild animal, but about what property is. Despite its apparent triviality and absurdity, there may therefore be good reason for *Pierson*'s having become a foundational property case after all. However, although one may doubt whether *Pierson v. Post: The Hunt for the Fox* undermines *Pierson v. Post*'s status as a foundational case in the law of property, there can be no doubt that Fernandez's research, discovery, and close reading transforms and enriches our understanding of the case, requiring property scholars to see the judgment in a new light and teach it in a new way.