The Hunt as History and As Game

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- Angela Fernandez, *Pierson v. Post: The Hunt for the Fox* (2018).
- Angela Fernandez, *Pierson v. Post* in *Feminist Judgments: Rewritten Property Opinions* (forthcoming 2020).

Most American law students are familiar with *Pierson v. Post*, a case that has been a fixture in American property law casebooks for well over half a century. Decided by the New York Supreme Court in 1805, *Pierson v. Post* is used in property law courses to illustrate the question of how property rights arise in wild animals. Today, it is frequently taught alongside cases exploring how property rights arise in contemporary contexts such as ground water, human genetic materials, baseballs hit into stadiums crowded with fans, and the like. The facts of *Pierson* are simple and memorable: Post is in pursuit of a fox on a beach in Long Island when Pierson interrupts the hunt and kills the fox. Has Post acquired a property interest in the fox by virtue of the fact of being engaged in pursuit of it? The New York court deciding the case canvassed a range of European authorities going back to Justinian. The majority ruled that no property rights could arise in a wild animal unless it was captured. The rule it advanced has the virtue of clarity. But it risks being unfair to Post, particularly if he was at the point of killing the fox and/or if his labors had made it easier for Pierson to kill it. The dissent, in a witty opinion by Judge (and future U.S. Supreme Court Justice) Henry Livingston, would have allowed for property rights in the fox to arise through something short of actual capture, namely, imminent taking. The dissent's solution might be fairer to Post, perhaps, but specifying what counts as an imminent taking is no easy task, entailing more work for lawyers and judges.

In my own property law course, *Pierson v. Post* has appeared either at the beginning or the end, but in neither instance have I devoted more than half an hour of a single class session to it. I teach *Pierson v. Post* because it neatly illustrates the difference between clear rules and blurry standards, but also because it is a "classic." I do not want my students to leave the course without having a glancing familiarity with something they are "supposed" to have run into in law school.

What has been a minor pedagogical experience for me and my students has been, it is fair to conclude, an obsession for Angela Fernandez. She has spent a decade working on her new book, *Pierson v. Post: The Hunt for the Fox*, and has recently authored a "rewrite" of the *Pierson v. Post* dissent in which she adopts the style of someone writing in 1805 but advances feminist and animal rights sensibilities.[1] My review will cover both the book and the "rewritten" dissent and will set them in relationship to one another.

Fernandez offers us a history of *Pierson v. Post* backed by impressive archival research. She shows how our simple lawyerly rendering of *Pierson* as a choice between different rule regimes obscures the complex literary, social, and intellectual universes that shed light on, even as they are illuminated by, the case. However, Fernandez follows no linear narrative, advances no neat argument, offers no simple "takeaway." Instead, she picks up on the different leads the case presents and follows each into different archives. The result is a book without a stable center. The reader is offered exhaustive treatments of the following, each of which speak to some aspect of the case: the ribaldrous masculinist culture of literary games and theater engaged in by Anglo-American lawyers in the early nineteenth century; the practices of hunting foxes and whales; the lives of the *Pierson v. Post* litigants, their lawyers, and the judges; the relations between Native Americans and settlers in early nineteenth century New York; different legal characterizations of land and animals; the appropriation of *Pierson v. Post* in nineteenth century treatises and twentieth century casebooks; and so on. Fernandez even gives us photographs of the beach on Long Island where that famous fox hunt took place over two hundred years ago.[2]

What is one to make of this profusion of different tracks that take the reader to so many different places? Fernandez tells us that she embraces the methodology of "legal archaeology" pioneered by the legal historian Brian Simpson, but hers is no mere uncovering of buried objects. (P. 42). Instead, she is engaged in a fox hunt. Towards the end of the book, Fernandez confesses that *Pierson v. Post* is "so unstable that it is a mistake to approach it as a straightforward legal text; it ought instead to be approached as a slippery and wily fox . . . . One relies on it . . . at one's peril." (P. 327). The book's subtitle—"The Hunt for the Fox"—refers, then, to two fox hunts—Post's hunt for the fox on the beach in Long Island and Fernandez's own hunt for the fox-like dispute that it gave rise to. Fernandez chases *Pierson v. Post* wherever it will take her, from the New York archives to the plays of Shakespeare to the beaches of Long Island to the casebooks of the twentieth century and beyond. Like the fox, *Pierson* is wily, but its huntress refuses to give up. The parallels between the book's structure (that of following *Pierson* wherever it will go) and the Post's hunt for the fox among the scrub of a Long Island beach are, it must be emphasized, the genius of Fernandez' book.

In the remainder of this review, I wish to highlight a particular kind of intellectual dilemma that is raised, in my mind, in the way Fernandez's book on *Pierson v. Post* relates to her "rewritten" dissent in the case.

Apart from its structure, to my mind, the most important contribution of Fernandez's book is the way it foregrounds the plurality of what law is. We might think of law as giving us rules to solve problems. In one sense, it is that. Fernandez would surely agree. *Pierson* is, after all, a case that presents us with different rules for deciding when wild animals become private property. However, in the book, Fernandez shows brilliantly that law has been—and continues to be—a great deal more. Specifically, she highlights the many ways in which the law relates to, produces, and offers up things that are not instrumental in any simple sense, things that constitute a kind of excess, things that refer back to themselves. Here I have in mind Fernandez's exploration of the famous Livingston dissent in the *Pierson* case that takes us into the early nineteenth century masculinist legal culture of literary allusion, games, and theater and, later in the book, her investigation of the world in which law is the writing of treatises and case books all relating to and revising one another. The law, as she describes it for us, is *these* things—all of them excessive or self-referential in important respects—as much as it is about solving any particular dispute or problem. I agree entirely.

With this as background, I want to suggest that Fernandez's "rewritten" dissent in *Pierson v. Post*—her act of "updating" the case to reflect her feminist and animal rights sensibilities in the voice and tone of someone writing in 1805—is yet another instantiation of this self-referential, excessive, allusive, theatrical or game-like legal tradition she explores in such depth. What is the point of "rewriting" a dissent to a two hundred-year old opinion, one might well ask? Why not just ignore the opinion, or criticize it, or declare it to be unjust or wrong? Why go through the laborious exercise of "rewriting" it? What is this if not a literary exercise—another act of self-referential theater or a game–in which the object points to itself as much as to the new politics it seeks to perform?

What is the relationship between this kind of self-referential legal-literary exercise with the conventional disciplinary historical one of situating *Pierson v. Post* "in context"? One of Fernandez's stated goals in the book is to change our understanding of the case itself. As she herself puts it: "My intention in this book is to disrupt any previously dominant understanding of *Pierson* by changing the way we think about it." (P. 326). We know an enormous amount about *Pierson v. Post* thanks to Fernandez's attempt to track down everything related to it. But we do not really get a clear sense of how her hunt for details and the consequent massive building up of context relates to the self-referential, literary, theatrical, game-like quality of the law reflected in the original opinions in *Pierson v. Post*, the subsequent appropriation of the case by legal writers, and in Fernandez's own decision to "rewrite" the *Pierson* dissent *after* learning all that seems humanly possible to learn about it. How does one historicize a game? Is history the best way of understanding a game? Is playing the game a better way?

Fernandez does both. On the one hand, she historicizes the games of law: the book can be read as history. On the other, as revealed in the book and the "rewritten" dissent, Fernandez plays the games of law herself, both in structuring her book like a fox hunt (itself a sport) and following her prey wherever it takes her and in artfully "rewriting" the *Pierson v. Post* dissent to transpose her political sensibilities into the language of the early nineteenth century. She offers novel ways of doing history and playing with and in history. For these reasons, her work merits our attention.

1. Angela Fernandez, *Pierson v. Post* in Eloisa C. Rodriguez-Dod & Elena Maria Marty-Nelson, *Feminist Judgments: Rewritten Property Opinions* (forthcoming 2020).
2. I owe many of the insights in the two preceding paragraphs to a conversation with Christopher Tomlins.

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