

Seminar: Pierson v. Post and the Theory of Property

Tentative Syllabus and Assignments

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The basic website for this course is at <http://www.law.harvard.edu/faculty/cdonahue/courses/PvPSeminar/>. In addition to the syllabus, it will contain class outlines and PDFs of the class assignments from the materials. We will be using the Canvas site for the course for email, the discussion board, storage of complete copies of the course readings, and links to the Zoom classes.

There are two separate documents that are connected with this syllabus and referred to in it:

(1) [Background Questionnaire](#) (let me know what your background and interests are so that I can form the break-out groups and fix what I have spend time on in class). Please return this sheet by email by noon on 25 January.

(2) [Procedure for Zoom Classes](#) (some relatively simple procedures for the Zoom classes that should make them more effective).

Introduction. Many first-year property courses begin with Pierson v. Post, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805). A considerable amount of historical work has been devoted to that case recently, and what it has shown is that there was a lot more going on in the case than can normally be covered in a first-year course. The case also has considerable relevance to the theories of property that were current in its time, principally those of Hobbes, Pufendorf, and Locke, and also to theories of property that were developed later, such as those of Hegel, Marx, Bentham, and Hohfeld, and their various more modern followers and critics. This seminar will give you the opportunity to explore both the history and the theory in some depth. A substantial piece of writing will be required, either on the history or on the theory or on both. An extra hour of writing credit will be available.

A Note about CD's Background and Yours. I'm not a philosopher or even a legal theorist. I have taught first-year Property for many years, and I have written some articles about *Pierson v. Post*, particularly about the Continental juristic sources that are cited in the case. I think of myself as a legal historian, and one of the histories that legal historians must pursue is the history of ideas. That's what leads to the combination of topics that we will deal with in this seminar. Some of you may have a better acquaintance with the philosophy and/or the American legal history that is involved in this seminar than do I. Some of you may have nothing more than what you learned in first-year Property and in one and half or two and half years of law school. That's just fine. The whole point is that we can learn from each other.

First-year Property courses vary widely in their coverage. I have posted online a 'Background Questionnaire' that asks you a number of specific questions about what you had in first-year Property. If you can fill out this questionnaire before you come to the first class, it will help me a lot in figuring out how to pitch the classes.

Materials. I've cobbled together a set of primary materials, largely derived from my first-year Property casebook: |C. DONAHUE, CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION (unpublished tent. 4th ed., 2019). I have also put on Canvas (it's not there now [early January], but will be by the time the seminar begins): ANGELA FERNANDEZ, *PIERSON V. POST, THE HUNT FOR THE FOX* (Cambridge Historical Studies in American Law and Society; Cambridge, 2018), the most comprehensive, but by no means the only, recent historical study of the case. An e-book version of the book is available through [HOLLIS](#) if you use your Harvard ID. I have assigned the book at various points in the third through the fifth weeks of the seminar not in the order in which Fernandez wrote it. That may not do justice to her achievement, so you might want to go back over it in her order after you've done it in the one that I suggest.

So far as I am aware, there is no recent secondary account of the philosophy of property on the scope of Fernandez's account of the history of *Pierson v. Post*. Jeremy Waldron wrote the entry in the online Stanford Encyclopedia of Philosophy. He is also one of the major contemporary theorists of property. The entry types out to 20 pages of which four are Bibliography. I've included it in the materials. The entry in the online Internet Encyclopedia of Philosophy is written by Hugh Breakey, who is more junior and less well-known than Waldron. It also types out to 20 pages, of which three are bibliography. I have included it in the materials because it deals more specifically than does Waldron with the debates about property in US (and to a lesser extent UK) legal academe. Put the two bibliographies together and that should be more than enough for anyone who wants to write a paper on the philosophy or on *Pierson v. Post* plus the philosophy.

Papers. The name of the game in this seminar is to get you to write a substantial paper either about the history of property beginning, but necessarily ending, with *Pierson v. Post*, or about the philosophy of property beginning, but not necessarily ending, with the philosophical ideas that lie behind *Pierson v. Post*, or about both. The registrar's office regards 30 pages as 'substantial' and for an extra hour of credit it expects 50 pages. I am far less interested in quantity than I am in quality, and you are likely to find me suggesting that you boil it down rather than bulk it up. One frequently has to write a draft of 50 pages to produce a decent final draft of 25 pages.

One way to boil a paper down to what it is that you are really saying is to do an oral presentation of it. I've scheduled three sessions for this in the seminar. I will try to accommodate your wishes as to schedule, but I may have assign people to an earlier session than the one that you would prefer. You will need to distribute a draft before the session at which you are going to speak. I will get back to you with comments after the presentation. Commenting on drafts takes time. If you want to get your comments early, you should schedule your oral presentation early.

The papers should be based on primary sources. If you are writing, for example, about Locke's theory of property you should tell me what Locke says, not what someone else says that he says. Similarly, if you are writing about how the ideas expressed in *Pierson v. Post*

did, or did not, affect the whaling industry in 19th-century America, you should tell me what the whaling cases from that period say, not what someone else says that they say.

Zoom Procedure. A list of Zoom procedures is attached. Many of them will probably be familiar to you from your classes from last semester. Principal among them are: (1) I'm asking you to say something about the readings on the Discussion Board in Canvas before noon on the day of the seminar, and (2) we will take a ten-minute break in the middle of each class.

Office Hours. My office hours are officially scheduled from 1:30–3:30 on Tuesdays, or by appointment. Right now there is no sign-up sheet. Last semester I was able to get by simply by having people email me (rspang@law.harvard.edu) if they wanted to talk to me on Zoom. If things start to fill up, I'll use a sign-up sheet.

Syllabus. Setting a syllabus for a seminar that you have never taught before is dangerous business. Classes develop their own rhythm. I am confident that we will take up the material more or less in this order and that the readings will be no longer than what is given below. I am far less confident that we will take up the material on the specific dates mentioned or that what we will take up will be exactly what is given here. This is the basics; there will probably be variations.

The way I have it set up, we will deal in the first class with *Pierson v. Post* pretty much as we might deal with it in a first-year property. The second class then deals with the philosophy of property starting with Hohfeld, who wrote about a century after *Pierson v. Post*, and then with overviews by two contemporary philosophers. The third class returns to *Pierson v. Post*, and we spend three classes dealing with Angela Fernandez's book about the case, as she approaches it as a social, a literary, and a doctrinal phenomenon. Then we spend three classes dealing with various theories of property and the ways in which they might be seen to affect results in actual cases. We close with what is probably the most controverted issue in property law today, the problem of takings and the constitution, where I do not even dare to suggest what theory or theories of property may be affecting the results.

Tentative Assignments

Mon. 25 Jan. 1st hour: *Pierson*, pp. 5–26. (Read the principal case carefully, probably more than once. Then look at the Questions on p. 10. The Notes that follow give you material that you can use in answering the questions. In the first hour, we probably will not have reference to the material in Notes 4–6, but we may well have reference to the Problems on pp. 26–27. The Note on the Reception will not be the subject of much class discussion.)

2d hour: *Pierson* (cont'd); *Keeble*, pp. 27–32. Note on Game Laws, pp. S32–S36. (The 2d hour will begin with *Keeble* and will then loop back to reconsider *Pierson*, particularly in the light of Notes 4–6. Neither the Note on Reports nor the Note on the Private Law of Wild Animals Today will be subject of much class discussion, unless you want to ask questions about

them. The Note on the Private Law of Wild Animals Today will return on Feb. 22. With regard to the Note on Game Laws you might want to ask whether Livingston, J., was correct when he says “we are without any municipal regulations of our own” (p. 9), in the light of the paragraph on the New York statutes prior to *Pierson* (p. 34), and why Tomkins, J., is convinced that the English “positive statute regulations” (p. 7) are irrelevant to the decision of the case, in the light of the material about the English law on pp. 32–33.)

- Mon. 1 Feb. How do philosophers today think about property? Hohfeld, Waldron, Breakey, pp. 63–107. (We abandon *Pierson v. Post* here for a moment to take a preliminary view of the modern philosophy of property. The readings for the first two classes are not particularly long, but they are quite dense. If we need more time to explore them, we will truncate the next three classes. If we do that, I will make suggestions as to what in the Fernandez book can be skipped.)
- Mon. 8 Feb. What was going on on eastern Long Island in 1805? Fernandez Introduction, 1–43, and Part 2, p.143–219 ([HOLLIS](#))
- Mon. 15 Feb. How might we think about the dissent in *Pierson*? Fernandez Part 1, 49–139 ([HOLLIS](#)).
- Mon. 22 Feb. What happened as a result of *Pierson*? Fernandez Part 3 and Conclusion, pp. 223–330 ([HOLLIS](#)).
- Mon. 1 Mar. Blackstone, Maine, Locke, pp. 36–44. *Johnson, Percheman*, pp. 44–62. (We return to *Pierson v. Post* and the theories that were current at the time of the case. In this regard don’t ignore the theoretical implications of the authorities were and were not cited in the case (pp. 17–23). We will not cover the Note on Indian Titles in class, unless you want to talk about it.)
- Mon. 8 Mar. Bentham, Demsetz, Coase, *Shelley*, Hegel, *Flemming*, Reich, pp. 108–140.
PAPER TOPICS MUST BE CHOSEN BY THE END OF THIS WEEK..
- Mon. 15 Mar. Spring break. No class.
- Mon. 22 Mar. Marx, *Shack*, *PruneYard*, pp. 140–166.
- Mon. 29 Mar. Takings and the Constitution, pp. 167–171; *Penn Central*, pp. 171–179; Note on 1987, pp. 179–185; *Lucas*, pp. 185–204. (We really ought to try to say something about what the materials call ‘an intractable problem’. If, however, anything has to get short shrift, this is the topic that will get it. In most people’s view, including my own, the philosophy that we have been exploring in this seminar, does not shed much light on it, though if we do get to it, the question we should ask is why is that the case.)
- Mon. 5 Apr. Student Papers.
- Mon. 12 Apr. Student Papers.

Mon. 19 Apr. Student Papers.

23 Apr. to 7 May Reading and Exam Period

Fri. 7 May Final papers due by [email](#) by 4:30 p.m. If you are graduating, I must have the final of your paper by this day. If you are not graduating, extensions may be possible.