

SPILLER V. MACKERETH: THE INSEPARABILITY
OF LAW AND NARRATIVE

Note

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SPILLER V. MACKERETH: THE INSEPARABILITY OF LAW AND NARRATIVE

INTRODUCTION

In *Rosengrant v. Rosengrant*,¹ an elderly couple wanted to leave their farm to their nephew, Jay. They wanted Jay's interest to vest upon their death. But they also wanted to avoid the probate process. They took the farm's deed to a local bank. There, the bank president presided over a (meaningless) ceremony: the couple "handed the deed to Jay to 'make [it] legal'" and then placed the deed in a lockbox.² The court rejected Jay's claim of ownership once his aunt and uncle died.³ The couple lacked a present intent to transfer title, so the "ritualistic 'delivery of the deed' to the grantee and his redelivery of it to the third party for safe keeping created . . . only a symbolic delivery."⁴ The rule? Inter vivos transfers require a present intent to convey.⁵

In first-year property class, we learned *Rosengrant*'s rule, but we ignored the most interesting detail: the couple favored Jay because he maintained the property while his aunt, Mildred, had cancer.⁶ The Court explained: "In July, 1972 Mildred and Harold went to Mexico to obtain laetrile treatments . . . Jay remained behind to care for the farm."⁷ Mildred wanted to live. Her desire to live was so strong that she and her husband traveled from Oklahoma to Mexico to delay the inevitable.⁸ They were desperate, and Jay helped them in their desperation. Sure, facts are not the *most* important part of a case. Mildred's personality won't be tested on the exam. But law school is about learning, and stripping away a case's narrative limits how much students learn. *Rosengrant*'s narrative—especially Mildred's desire to live—is why I remember the case. Ignoring the narrative is why many law students (I imagine) have forgotten it.

Law complements narrative, just as narrative complements law. Opinions and briefs begin with facts because without story, the law is ephemeral. Richard

1. 629 P.2d 800 (Okla. Civ. App. 1981).

2. *Id.* at 802.

3. *Id.*

4. *Id.* at 803–04.

5. *See id.*

6. *Id.* at 802.

7. *Id.*

8. *Id.*

Kluger's *Simple Justice* is illustrative.⁹ *Simple Justice* pairs civil rights cases with civil rights stories. The stories add depth to the rules. One reviewer wrote that Kluger's narrative "dispelled myths" that the Supreme Court is the only actor in judicially ordered social change.¹⁰ Through narrative,

[w]e witness the growth of the NAACP and its Legal Defense Fund, the development of the Howard Law School as a crucible for civil rights lawyers, and the roles played by a vast cast of characters, including Thurgood Marshall, his mentor, Charles Houston, William Hastie, W.E.B. DuBois, and Walter White.¹¹

Simple Justice's narrative proves, ironically enough, that civil rights justice was not simple at all. It was complicated. *Brown v. Board of Education* was the culmination of a decades-long chess game involving dozens of actors and activists.¹² Kluger takes us beyond the opinions' pages, into the story.

In law school, we study more *Rosengrants* than *Browns*. We study cases without 800-page, Pulitzer Prize-winning narratives. So often, discussion never ventures beyond the opinion. And even narrative within the opinion may not be discussed at length. Without extensive narrative, is something lost? Did my property class miss something when we ignored *Rosengran*'s narrative? Did our laser-like focus on *Rosengran*'s rule cheapen our understanding of that rule?

To answer, this Note turns to another famous first-year-law-school case: *Spiller v. Mackereth*. *Spiller* was a property dispute between two residents of Tuscaloosa, Alabama.¹³ *Spiller* and *Mackereth* were tenants in common who, besides shared property, had little else in common. Jesse Dukeminier and James E. Krier introduced *Spiller* to the world in their casebook, *Property*.¹⁴ Dukeminier & Krier is—and for decades has been—the most widely adopted property book in American law schools.¹⁵ Because of *Spiller*'s inclusion in Dukeminier & Krier, a generation of American lawyers have studied it.¹⁶ But what they have studied is formulaic¹⁷—incomplete. The decision, written by the Alabama Supreme Court, includes few facts about the case and fewer about the parties. No law review article or book provides any context. The *story* is untold.

Part I tells that story. With primary sources, interviews with one of the party's attorneys, discussions with parties' family members, and inference, Part

9. See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976).

10. Edward N. Beiser, *Simple Justice*, 89 HARV. L. REV. 1945, 1946 (1976) (book review).

11. *Id.*

12. See generally KLUGER, *supra* note 9.

13. *Spiller v. Mackereth*, 334 So. 2d 859, 860 (Ala. 1976).

14. JESSE DUKEMINIER ET AL., *PROPERTY* 416 (9th ed. 2018).

15. Peter T. Wendel, *The Perfect Blend of Methodology, Doctrine & Theory*, 22 SEATTLE U. L. REV. 1031, 1031 (1999) (reviewing JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* (4th ed. 1998)).

16. See *id.*

17. By "formulaic," this Note means "incomplete"—surface-level reasoning that goes no deeper than black-letter legal elements.

I fills gaps and takes *Spiller* beyond the casebook. Part II asks what lessons we can learn from *Spiller's* narrative that we cannot learn from its black-letter law. If we understand *Spiller's* narrative, do we better understand the law it represents? After showing in Parts I and II, through *Spiller*, that disaggregating narrative and law misses opportunities, Part III discusses the importance of historical narrative for education and the legal profession. Part IV acknowledges some potential costs of narrative and story for classroom dialogue and ideas of legal impartiality. This Note concludes by reaffirming the value of story despite these costs.

I. THE *SPILLER V. MACKERETH* NARRATIVE

Telling *Spiller's* story now, after forty-five years, is difficult. Parties have died. Memories have faded. Trial records, appellate briefs, attorney interviews, and discussions with parties' families allow for a limited narrative. This narrative is not exhaustive. Hopefully it adds to our understanding of a famous case, now part of the first-year curriculum. I begin with John Spiller.

Spiller was a decorated World War II veteran.¹⁸ He enlisted in the Army in the 1940s and served under General Patton during the North Africa campaign.¹⁹ Spiller was injured multiple times and earned two purple hearts and enough field promotions to leave as a major.²⁰ Spiller was gregarious. For more than twenty-five years, he cohosted a weekly Tuscaloosa radio show called *Ask the Authority*.²¹ Listeners called and asked Spiller for gardening advice.²²

Spiller entered business when he returned from war, operating a garden supply store in downtown Tuscaloosa, Alabama.²³ Spiller sold more than seeds and soil. According to his son, Spiller obtained one of the first alcohol licenses in Tuscaloosa County.²⁴ Spiller also owned a floral shop across town.²⁵ To increase storage space for his downtown garden store, on February 28, 1973, John Spiller purchased from Helen and Lawrence Green a one-half interest in a large building at the corner of Seventh Avenue and Lurleen Wallace Boulevard in Tuscaloosa.²⁶ The building adjoined Spiller's store.²⁷ Auto-Rite, an automotive

18. Telephone Interview with John Spiller Jr., son of plaintiff in *Spiller v. Mackereth* (Oct. 20, 2018).

19. *Id.*

20. *Id.*

21. *John Spiller Sr.*, TUSCALOOSA NEWS, Mar. 18, 1988 (Obituaries), at 4.

22. *Id.*

23. *Id.*

24. Telephone Interview with John Spiller Jr., *supra* note 18.

25. *Id.*

26. See Brief & Argument for Appellees at 5, *Spiller v. Mackereth*, 334 So. 2d 859 (Ala. 1976) (Civ. 657).

27. *Id.* at 6.

supply business, rented and occupied the building at the time of Spiller's purchase. For years, Auto-Rite had paid \$350 per month to rent the facility, divided proportionally between cotenants.²⁸

When Spiller purchased his interest, the building's ownership was labyrinthine. John Mackereth had devised his one-half interest to his wife, Hettie, and three children in the 1940s.²⁹ By 1973, five owners, all members of the same family, split John's interest: Hettie Mackereth (three-sixteenths owner), Esther Jean Mackereth (five thirty-seconds owner), Robert M. Ruckman (five ninety-sixths owner), Katherine B. Ruckman (five ninety-sixths owner), and John B. Ruckman (five ninety-sixths owner).³⁰ The cotenants' dispersion further complicated ownership. While Hettie and Spiller lived in Tuscaloosa, Esther worked as a nurse in New York City, and the three Ruckmans lived in West Virginia.³¹ Two of the three Ruckmans were minors in 1973.³² All owners had financial interests in the building, but most were incapable—either because of ignorance of their interest, their distance from Tuscaloosa, or their legal incapacity—of contributing to the property or making decisions.

Hettie Mackereth's story is murkier, but we know one thing about her that should influence how we understand *Spiller*: she suffered. On May 12, 1942, when Mackereth was in her forties, her husband John died unexpectedly.³³ John Mackereth was a prominent Tuscaloosa businessman.³⁴ His obituary, occupying the *Tuscaloosa News's* front page, explained that his death "came as a great shock to relatives."³⁵ In January 1962, Mackereth's only son died.³⁶ Shortly thereafter, Mackereth's daughter, Elizabeth Ruckman, also died unexpectedly.³⁷ Mackereth's suffering influenced how counsel framed her case before the Tuscaloosa Circuit Court. In briefs, Mackereth's attorneys described her as "ill" and a widow in her late seventies, helpless to stop Spiller from trampling on her rights and excluding her from her property.³⁸ Equitable and emotional appeals from Mackereth's counsel, tied to Mackereth's suffering, colored the *Spiller* dispute.³⁹

28. *Id.* at 6–8.

29. Will of John Mackereth (Oct. 1934) (on file with Tuscaloosa County Courthouse, Probate Office, Will Book 11, at 194–99).

30. Answer & Counterclaim at 2, *Spiller v. Mackereth*, No. 23278 (Tuscaloosa Cty. Cir. Ct. July 24, 1974).

31. *Id.* at 3.

32. *Id.*

33. *John Mackereth Dies Suddenly*, TUSCALOOSA NEWS, May 13, 1942, at 1.

34. *Id.*

35. *Id.*

36. Answer & Counterclaim, *supra* note 30, at 2.

37. *Id.*

38. Brief & Argument for Appellees, *supra* note 26, at 7.

39. Cf. Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 WIS. L. REV. 331, 366 ("Sometimes it seems that the court's sympathy, or lack thereof, for a particular in-tenant is the real basis for [an ouster] determination.").

Recognizing (a) the inefficiency of a tenancy in common shared by six owners across three states and (b) the convenience of owning a building adjoining his store, in May 1973 Spiller offered Mackereth \$25,000 for “her interest.”⁴⁰ An ultimatum accompanied Spiller’s offer: accept, or “he would have no alternative but to force a sale at public auction.”⁴¹ Likely, by “her interest,” Spiller meant the one-half interest owned by the Mackereth family, not just Mackereth’s three-sixteenths stake.⁴²

What motivated Spiller’s offer is unclear. Spiller’s offer (or ultimatum) may have been a reaction to learning—postpurchase—about the building’s scattered ownership. Spiller’s attorneys were unaware of the *exact* ownership split until February 1974—a year after Spiller’s purchase.⁴³ Likely Spiller did not realize *ex ante* that his cotenants would be an elderly widow in Alabama, a nurse in New York City, and children in West Virginia. Mackereth’s late husband had owned a one-half interest. Even if Spiller suspected that John and Hettie’s children shared interest, Spiller had no reason to know that some of those children had died, adding more cotenants and fractional interests. As a businessman concerned with the bottom line, the inefficiency of a complex cotenancy likely influenced Spiller’s frustration and his offer to Mackereth.

Based on the property’s rentability (\$350 per month), \$25,000 was a reasonable offer. At her family’s \$175 per month share, \$25,000 exceeded eleven years of Mackereth’s rental income. Perhaps as a proud person—a widow who had survived, worked, and raised three children on her own—Mackereth resented Spiller’s take-it-or-leave-it mentality. Whatever her reasoning, Mackereth rejected Spiller’s offer.⁴⁴ Her rejection came through a letter written by attorney Olin W. Zeanah.⁴⁵ Zeanah’s letter, dated June 26, 1973, counteroffered: Mackereth offered to buy Spiller’s one-half interest.⁴⁶ Spiller either rejected Mackereth’s counteroffer or ignored it.⁴⁷

Zeanah’s letter proves that counsel represented both Spiller and Mackereth well before Spiller filed suit. Mackereth’s principal representative, Zeanah, was an experienced attorney. A former Tuscaloosa County district attorney, he founded his own litigation firm in 1959.⁴⁸ Spiller’s attorney was George Wright, a partner in the Tuscaloosa-based firm Rosen, Wright, Harwood, and Albright.

40. Brief & Argument for Appellees, *supra* note 26, at 6–7.

41. *Id.* at 6.

42. The cotenancy would have been more jumbled if Spiller purchased Hettie’s interest and not the others’. Hettie was the only local (convenient) cotenant.

43. See Answer & Counterclaim, *supra* note 30, at 2–3.

44. Brief & Argument for Appellees, *supra* note 26, at 6–7.

45. *Id.*

46. *Id.*

47. See *id.* at 8.

48. *About Our Office*, ZEANAH, HUST, SUMMERFORD, WILLIAMSON & COX, L.L.C., <http://www.zeanahhust.com> (last visited Feb. 15, 2020).

Wright later served for thirty-three years as a federal bankruptcy judge.⁴⁹ Both parties were well represented.

Zeanah assigned Mackereth's case to Wayne Williams, a young associate from southern Alabama with political ambitions.⁵⁰ After earning a bachelor's degree from The University of Alabama, Williams took a job with Senator John Sparkman's D.C. office.⁵¹ After his time in D.C., Williams returned to The University of Alabama School of Law, which was a training ground for those looking to enter Alabama politics.⁵² Williams clerked for Zeanah for three years during law school and accepted a full-time position at Zeanah's firm upon graduation.⁵³ *Spiller v. Mackereth* was one of Williams's first cases.⁵⁴ Certainly it was his first case to reach the Alabama Supreme Court.⁵⁵

Spiller filed a complaint in the Tuscaloosa Circuit Court on July 10, 1973.⁵⁶ The matter was assigned to Circuit Judge Fred Walter Nicol.⁵⁷ Spiller demanded that Nicol partition the property.⁵⁸ He alleged that the building's byzantine ownership made equitable partition in kind impossible. Spiller sought two remedies: (1) an order to sell the property (partition by sale) and (2) an order to establish a common fund for "reasonable attorney's fee[s]."⁵⁹ Spiller's complaint likely caught Mackereth and her attorneys off guard. Mackereth was hospitalized in New York City when Spiller filed suit.⁶⁰ The severity of Mackereth's illness is unknown. The distance between Mackereth and her attorneys inhibited attorney-client communication. To buy time to communicate with Mackereth, identify interest holders, locate cotenants, and form a defense, Williams filed a Rule 12(b) motion to dismiss Spiller's complaint on September 17, 1973.⁶¹ On September 26, Judge Nicol dismissed Williams's motion with an equally conclusory order.⁶²

As untimely as it was defiant, Williams's answer set the tone for the rest of the conflict. For one, Williams missed the pleading's deadline.⁶³ The answer

49. Jordan Bannister, *George Searcy Wright*, TUSCALOOSA AREA VIRTUAL MUSEUM, <https://tavm.omeka.net/items/show/846> (last visited Feb. 15, 2020).

50. Interview with Wayne Williams, Attorney, Wayne L. Williams & Associates, LLC, in Tuscaloosa, Ala. (Oct. 2, 2018).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Bill for Sale for Division at 4, *Spiller v. Mackereth*, No. 23278 (Tuscaloosa Cty. Cir. Ct. July 24, 1974).

57. See *Spiller*, No. 23278, slip op. at 3.

58. Bill for Sale for Division, *supra* note 56, at 4.

59. *Id.*

60. Brief & Argument for Appellees, *supra* note 26.

61. Motion to Dismiss at 1, *Spiller*, No. 23278.

62. Decree on Motion at 1, *Spiller*, No. 23278.

63. See Answer & Counterclaim, *supra* note 30, at 5.

came four and one-half months after Judge Nicol ejected Williams's 12(b) motion.⁶⁴ From the pleading stage, Mackereth and Spiller's attorneys ignored deadlines and resisted compromise. All early signs suggested an amicable resolution was unlikely. Mackereth and her counsel were prepared to fight.

Despite Mackereth and Williams's pugilism, Spiller was always likely to succeed in forcing a property sale. In Alabama, a tenant in common has a right to partition his or her property, "regardless of the inconvenience resulting to joint owners."⁶⁵ A tenant's right to partition is absolute—even if, like in *Spiller*, the cotenants are children.⁶⁶ The "sole issue" for Spiller was proving that the disputed property could not equitably be partitioned in kind and, therefore, that equity required liquidation.⁶⁷ Once Spiller met that burden, the trial court could order a sale. Given the property's many interest holders, Spiller's burden was slight. Dividing a building into three-sixteenths (Mackereth's interest) and five ninety-sixths (the interest of each Ruckman child) is fantastical. Spiller wanted a partition, Alabama law guaranteed him one, and partition by sale was the only practicable option.

Reflective of Spiller's low burden, Judge Nicol granted a partition by sale and ordered the "Register of the Court" to auction the property on August 20, 1974.⁶⁸ The register advertised the auction for three consecutive weeks in the *Graphic*, a Tuscaloosa newspaper.⁶⁹ At noon on August 20, the register sold the Spiller–Mackereth property at a contested auction.⁷⁰ John Spiller bought full interest for \$59,500.⁷¹ While more than double Spiller's \$25,000 offer to Mackereth, the sale price shows that Spiller's original offer was reasonable. After attorneys' fees were deducted, the difference between Spiller's initial offer and the money Mackereth received was nominal.

Two counterclaims filed by Williams remained.⁷² Both alleged that Spiller "wrongfully, and without the consent of [Mackereth]" evicted the property's long-time tenant, Auto-Rite, in September 1973.⁷³ However, the counterclaims offered no evidence that Spiller evicted Auto-Rite.⁷⁴ The basis for that claim remains unclear. Williams sought \$5,000 for wrongful lease termination, lost rental income from October 1, 1973, to February 1, 1974, at a rate of \$175 per

64. *Id.*

65. *Chambliss v. Derrick*, 112 So. 330, 332 (Ala. 1927).

66. *See id.* ("The right [to partition] is not defeated because the widow or minor children of a deceased tenant in common have a homestead right in his moiety.")

67. *See Marshall v. Rogers*, 160 So. 865, 866 (Ala. 1935).

68. *Spiller v. Mackereth*, No. 23278, slip op. at 2 (Tuscaloosa Cty. Cir. Ct. July 24, 1974).

69. Register's Report of Sale at 1, *Spiller*, No. 23278.

70. *Id.*

71. *Id.*

72. Answer & Counterclaim, *supra* note 30, at 4–5.

73. *Id.* at 4.

74. *Id.* at 4–5.

month (\$700) “with interest thereon,” and \$2,000 in punitive damages for Spiller’s “wrongful, unlawful and fraudulent termination” of Auto-Rite’s lease.⁷⁵

Zeanah, Williams’s managing partner, recognized Spiller’s strong position and expected the court to order partition by sale.⁷⁶ Spiller, however, created an opening when, in November of 1973, he moved chattel into the disputed building. Sensing a mistake, Zeanah told Williams to research and develop a theory whereby Mackereth could exact rent from Spiller for the months that Spiller occupied the property.⁷⁷ Williams discovered the common law concept of ouster.⁷⁸

Generally, using property does not make a tenant in common liable for rent to his or her cotenants.⁷⁹ Even when one tenant—assume a 1%-interest holder—occupies an entire property, she is not overstepping. Courts assume the 1%-interest holder occupies the property for the benefit of *all* interest holders, even if all other interest holders are ignorant of the in-tenant’s exclusive possession.⁸⁰ Ouster is a narrow exception where cotenants in exclusive possession owe rent to out-of-possession cotenants. With tenants in common, property law assumes unity of possession.⁸¹ In other words, each cotenant is “deemed the owner of an entire and separate estate.”⁸² The law empowers a 1%-interest holder to “use and enjoy” 100% of the shared property. Alabama recognizes this legal fiction.⁸³ One ousts a tenant in common by denying him or her the right to full property use and enjoyment.⁸⁴

Williams had two bases for his ouster claim. First, Williams had written a letter to Spiller on November 15, 1973.⁸⁵ The letter demanded that Spiller “immediately vacate” the property or “remit to the appellee a full and fair share of [her] rental value.”⁸⁶ The letter’s wording suggests Williams either did not understand Alabama ouster law or believed he could prevail on equitable arguments. As a tenant in common, Spiller had a right to use and enjoy (occupy) the entire property. And the “[m]ere possession by one cotenant does not operate

75. *Id.*

76. Interview with Wayne Williams, *supra* note 50.

77. *Id.*

78. *Id.*

79. *See, e.g.,* *Fyffe v. Fyffe*, 11 N.E.2d 857, 861–62 (Ill. App. Ct. 1937) (“As tenants in common each had an equal right with his cotenants to enter upon the whole land, and every part of it and his possession was not unlawful . . .”).

80. *Wheat v. Wheat*, 67 So. 417, 419 (Ala. 1914) (“The possession of one cotenant is presumed to be for the benefit of all . . .”).

81. *See* *Fee v. Linthicum*, 26 Ohio Law Abs. 590, 591 (C.P. 1938) (“Tenants in common enjoy, as a legal right, unity of possession; that is to say, the possession of one is the possession of all . . .”).

82. 20 AM. JUR. 2D *Cotenancy & Joint Ownership* § 34 (2015).

83. *E.g.,* *Newbold v. Smart*, 67 Ala. 326, 331 (1880) (“Tenants in common are seized *per my et per tout*.”).

84. *Id.*

85. Brief & Argument for Appellees, *supra* note 26, at 6.

86. *Id.* at 8.

as an ouster of another.”⁸⁷ Spiller had no duty to vacate, Mackereth had no right to demand he vacate, and his refusal to vacate was never enough to subject Spiller to rent liability. Judge Nicol bit and awarded Mackereth rent, but the Alabama Supreme Court later reversed:

To prove ouster, Mackereth’s attorney relies upon the letter of November 15, 1973 This letter, however, did not demand equal use and enjoyment of the premises; rather, it demanded only that Spiller either vacate half of the building or pay rent. . . . In jurisdictions which adhere to the majority and Alabama rule of nonliability for mere occupancy, . . . the occupying cotenant is not liable for rent notwithstanding a demand to vacate or pay rent.⁸⁸

Williams’s second ouster theory had a sounder basis in law, even though the Alabama Supreme Court rejected it.⁸⁹ After Auto-Rite vacated in October 1973, Spiller replaced the property’s locks.⁹⁰ Williams characterized the changed locks as an attempt to exclude Mackereth.⁹¹ He blended the changed locks with an emotional appeal: “[C]hanging the locks and keeping the only key constitutes as effective an ouster as one can conceive of against a 78 year old widow, two minor children and two non-residents.”⁹² The Alabama Supreme Court rejected Williams’s claim on factual grounds.⁹³ Spiller denied he purposely excluded Mackereth.⁹⁴ Instead, he claimed that Auto-Rite took the property’s locks when they vacated.⁹⁵ Accepting Spiller’s explanation, the Court held that there was “no evidence that Spiller was attempting to do anything other than protect the merchandise he had stored in the building.”⁹⁶ Mackereth never requested keys to the new locks. In Alabama, there can be no ouster through changed locks unless the out-of-possession cotenant requests to enter.⁹⁷

87. *Wheat v. Wheat*, 67 So. 417, 419 (Ala. 1914).

88. *Spiller v. Mackereth*, 334 So. 2d 859, 862 (Ala. 1976).

89. Williams’s lock-change argument was reasonable even though it was unsuccessful. Some jurisdictions hold that locking a cotenant out of property ousts that cotenant. In *Morga v. Friedlander*, for instance, the Arizona Court of Appeals found ouster when an attorney changed the locks on an office he co-leased with another attorney and erased his cotenant’s name from the office door. 680 P.2d 1267, 1270 (Ariz. Ct. App. 1984).

90. *Spiller*, 334 So. 2d at 862.

91. Brief & Argument for Appellees, *supra* note 26, at 17.

92. *Id.*

93. *Spiller*, 334 So. 2d at 862 (finding that changing locks wasn’t enough for ouster *here* because “there is no evidence that Spiller was attempting to do anything other than protect the merchandise he had stored in the building”).

94. See Brief & Argument for Appellant at 7, *Spiller*, 334 So. 2d 859 (Civ. 657).

95. *Id.*

96. *Spiller*, 334 So. 2d at 862.

97. *Id.*

In May 1974, trial-court proceedings sped up. Williams responded to the July interrogatories; he identified all interest holders and estimated their respective interests.⁹⁸ Between March and May, Wright served all out-of-state defendants.⁹⁹ Williams answered all complaints, using the same answer, verbatim, that he used on Mackereth's behalf.¹⁰⁰ All pleadings exhausted and all administrative matters handled, the stage was set for case resolution.

In a "Final Decree," Judge Nicol found that Spiller ousted Mackereth and ordered him to pay Mackereth \$2,100 in rent.¹⁰¹ Further, finding that both parties' attorneys contributed to the property's sale, Judge Nicol established a "common fund" and ordered \$7,500 in attorneys' fees: \$4,500 to George Wright and \$3,000 to Williams and Zeanah.¹⁰² Nicol dispersed the remaining \$51,470 amongst all interest holders. Spiller received \$24,685.10.¹⁰³ Hettie Mackereth received \$11,356.91; Esther Jean Mackereth received \$7,711.62; and Robert, Katherine, and John Ruckman each received \$2,572.19.¹⁰⁴ Nicol's order was not final. On August 15, 1975, more than two years after Spiller's complaint filing, Wright submitted a notice of appeal to the Tuscaloosa Circuit Court.¹⁰⁵ On appeal, the Alabama Supreme Court overturned Nicol's finding of ouster but upheld his attorneys' fees award.¹⁰⁶

II. ADDITIONAL LESSONS FROM *SPILLER'S* NARRATIVE

Property uses *Spiller* to teach ouster, cotenant rent liability, and the legal fiction that cotenants are seized by the part and by the whole.¹⁰⁷ But by understanding *Spiller's* narrative—the parties, the dispute, the equitable considerations, the facts—the case teaches two additional lessons. First, *Spiller* showcases the partial nonfungibility of real property. Real property is unique, and owners defend their interests even if costs outweigh benefits. Second, *Spiller* shows how attorneys use equity and emotion to blur ouster rules. These lessons are lost without *Spiller's* narrative.

98. See Answer & Counterclaim, *supra* note 30.

99. Brief & Argument for Appellee, *supra* note 26, at 4.

100. *Id.*

101. Spiller v. Mackereth, No. 23278, slip op. at 2 (Tuscaloosa Cty. Cir. Ct. Jan. 7, 1975).

102. *Id.* at 1–2.

103. *Id.* at 2.

104. *Id.*

105. Notice of Appeal, *Spiller*, No. 23278.

106. See Spiller v. Mackereth, 334 So. 2d 859, 862–63 (Ala. 1976).

107. See *DUKEMINIER ET AL.*, *supra* note 14, at 418–19.

A. *The Uniqueness of Real Property*

Unlike chattel or commercial interests, real property is not fully fungible.¹⁰⁸ Land is more than an asset. People grow attached to their homes and land, and they will defend their interests, even if doing so is irrational from, say, a law-and-economics perspective.¹⁰⁹ Property law understands real property's uniqueness.¹¹⁰ Courts presume that land is unique and "not a fungible good in which proprietary rights might be easily exchanged for money."¹¹¹ One scholar argues the uniqueness presumption dates to the manorial system and medieval England.¹¹² Back then, land was indicative of social status (as it still is), but it also provided power over tenants.¹¹³ In law-school terms, "widgeits and Blackacre are not the same."¹¹⁴

The uniqueness of real property often manifests itself in the form of eminent domain conflicts. The Constitution's Takings Clause requires governments to pay owners "just compensation" before appropriating private real property for "public use."¹¹⁵ Just compensation means fair market value; the government need not compensate owners for how they subjectively value real property.¹¹⁶ But because owners value parcels subjectively, they sometimes "hold out"—refuse an eminent-domain offer that is based on fair market value—to protect that subjective value.¹¹⁷ Owners fight, even when their opponent is the sovereign and even when victory is unlikely, because real property is unique. Real property is special.

108. See Lawrence Anderson Moye IV, Comment, *Is It All About the Money?: Considering a Multi-Factor Test for Determining the Appropriateness of Forced Partition Sales in North Carolina*, 33 CAMPBELL L. REV. 411, 423–25 (2011).

109. See *id.* at 423 ("There is more than economic value in land; one's history, pride in his ancestors, and sense of self may all be tied to property ownership.")

110. E.g., *Harris v. Harris*, 275 S.E.2d 273, 276 (N.C. Ct. App. 1981) ("[M]any considerations, other than monetary, attach to the ownership of land."); see also *Lynch v. Union Inst. for Sav.*, 34 N.E. 364, 364 (Mass. 1893) ("A particular piece of real estate cannot be replaced by any sum of money . . .").

111. Steven Wilf, *What Is Property's Fourth Estate?: Cultural Property and the Fiduciary Ideal*, 16 CONN. J. INT'L L. 177, 178 (2001).

112. Nancy Perkins Spyke, *What's Land Got to Do with It?: Rhetoric and Indeterminacy in Land's Favored Legal Status*, 52 BUFF. L. REV. 387, 394 (2004).

113. See, e.g., *id.* at 421 n.139.

114. Arthur Allen Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 U. PA. L. REV. 485, 535 (1967).

115. U.S. CONST. amend. V.

116. E.g., *United States v. 50 Acres of Land*, 469 U.S. 24, 35–36 (1984) (affirming "the principle that just compensation must be measured by an objective standard that disregards subjective values which are only of significance to an individual owner").

117. See generally Justin Lewis Bernstein, Note, *Tender Offer Taking: Using Game Theory to Ensure that Governments Efficiently and Fairly Exercise Eminent Domain*, 17 TEX. J. ON C.L. & C.R. 95, 98 ("Subjective-value holdouts are defined as landowners who refuse a government offer because they idiosyncratically derive more value from their land than the average buyer in the market, but the government does not include this subjective value in its offer.")

If students learn *Spiller's* narrative, they learn another example of real property's uniqueness.¹¹⁸ Mackereth likely never occupied the disputed property. Still, she rejected Spiller's \$25,000 offer and fought for years at the trial-court level and at the Alabama Supreme Court, only to receive \$2,000 less than Spiller offered. Granted, Mackereth did not know *ex ante* that she would receive less than \$25,000. But (a) her lawyers realized that the Court would likely order a sale, and (b) \$25,000 was eleven times the annual income from her family's half interest. Because of the property's sentimental value, Mackereth rejected Spiller's offer and fought a losing battle. Her husband owned it. Her dead children owned it. To her, the property was unique. Her lost loved ones owned the property, not Spiller's \$25,000.

Real property's uniqueness influenced *Spiller*. Parties do not fight for years, accruing tens of thousands of dollars in fees, over a \$2,100 widget. But Hettie Mackereth and John Spiller fought for nearly three years, accruing tens of thousands of dollars in fees, over Spiller's \$2,100 rent liability. Pride was likely a factor. Spiller likely offended Mackereth's pride by requesting a partition by sale. Why can one cotenant divest another of her interest? Mackereth likely offended Spiller's pride by requesting rent. Why should a co-owner pay rent for storing chattel in a building he owns? Their pride was unique because the object of their pride was unique. Without *Spiller's* narrative, this lesson is lost.

B. Opportunities for Advocacy in Ouster

Cotenancy obligations and ouster are *Spiller's* primary lessons. Through *Spiller's* narrative, a deeper understanding of both is possible. *Spiller's* narrative shows how ideas of fairness and emotional appeals blur ouster rules and create opportunities for advocacy. The narrative takes students beyond the opinion's formalism and into the practice of law.

Professor Evelyn Lewis's article, *Struggling with Quicksand*, surveyed ouster law. Some jurisdictions, such as Alabama in *Spiller*, use a "traditional factual ouster approach" where courts conduct a factual inquiry to see if one cotenant denied another an equal right to use and enjoyment.¹¹⁹ Some jurisdictions, such as Wisconsin¹²⁰ and California,¹²¹ codified ouster law, listing which factual incidents lead to ouster. Other jurisdictions further nuance ouster, particularly in the family-law context.¹²² Lewis noted that most ouster-law reforms were responses to the traditional approach's inconsistency.

118. While plenty other examples of real property uniqueness exist, *this* example still has pedagogical value—value lost without story.

119. Lewis, *supra* note 39, at 365.

120. WIS. STAT. ANN. § 700.23(3)(a) (West 2016).

121. CAL. CIV. CODE § 843(b) (West 2007).

122. Lewis, *supra* note 39, at 372–80.

For evidence of inconsistency, Lewis notes that traditional courts reach different conclusions in cases that are difficult to distinguish. In *Mauch v. Mauch*, for instance, the Oklahoma Supreme Court found ouster when one cotenant told another cotenant (his wife) that she “was not to come back” to their shared property.¹²³ However, in *Fitzgerald v. Fitzgerald* a traditionalist court did not find ouster when a cotenant (a) threatened to call the police if another cotenant entered and (b) “physically attacked” her cotenant when he defied her command and entered.¹²⁴ Lewis also points to the different outcomes in *Spiller* (finding no ouster when a cotenant changes the locks without giving a cotenant keys) and *Morga* (finding ouster when a cotenant changed locks and removed the other cotenant’s name from the door).¹²⁵ She concludes that these outcomes are confusing and that the answer lies in “judicial sympathies and views of fairness rather than meanings of ouster.”¹²⁶ Lewis characterized *Spiller* as “an action by out-tenants against an in-tenant who chose to use the building for storage rather than let it stand vacant.”¹²⁷ She implies *Spiller* was about efficiency and fairness, not formalistic property rules.

Spiller’s narrative supports Lewis’s conclusion. Mackereth’s attorneys colored ouster arguments with fairness. Williams’s brief exclaimed: “[C]hanging the locks and keeping the only key constitutes as effective an ouster as one can conceive of against a 78 year old widow, two minor children and two non-residents.”¹²⁸ Williams’s trial-court filings focused on Mackereth’s sufferings, her health, her helplessness, and her three motherless grandchildren. These arguments influenced Judge Nicol’s finding of ouster. As explained in Part I, Alabama ouster law was clear pre-*Spiller*. A refusal to vacate or pay rent was never sufficient for ouster. Still, Nicol ruled for Mackereth. And the gymnastics done by the Supreme Court to excuse *Spiller*’s lock change suggests the court’s hesitancy to punish an owner efficiently using otherwise vacant property. *Spiller*’s narrative shows how emotion, subjective measures of efficiency, and fairness blend with common law in the traditional approach to ouster.

Dukeminier and Krier teach a rule: a cotenant in exclusive possession does not owe rent to an out-of-possession cotenant unless there is an ouster, and there cannot be an ouster unless one cotenant denies the other an *equal* right to use and possession. However, the book does not teach how an advocate (Williams) used emotion and fairness to blur the rule and win a lower court judgment for his client. Only narrative teaches that. And it is a valuable lesson to

123. 418 P.2d 941, 946 (Okla. 1966).

124. 558 So. 2d 122, 125–26 (Fla. Dist. Ct. App. 1990).

125. Lewis, *supra* note 39, at 367–69 (first citing *Spiller v. Mackereth*, 334 So. 2d 859, 862 (Ala. 1976); then citing *Morga v. Friedlander*, 680 P.2d 1267, 1270 (Ariz. Ct. App. 1984)).

126. *Id.* at 368.

127. *Id.*

128. Brief & Argument for Appellees, *supra* note 26, at 17.

learn. From the case, one learns a rule. From the narrative, one learns how to manipulate the rule.

III. COSTS OF FORGOTTEN NARRATIVE

Part I chronicled a famous first-year case. Part II identified two lessons from that case's narrative—lessons lost without the narrative. But so what? So what if narrative and its lessons are lost in law school's myopia? At least two costs result.

First, students develop a warped image of law practice. Practicing lawyers (a) create a narrative, (b) blend the narrative with legal rules, and (c) communicate the law–fact hybrid to judges and juries to advance client interests. The discovery process exists to develop narrative: interrogatories, document requests, depositions, and witness interviews are tools to develop narrative. Practicing lawyers embrace narrative because judges and jurors are people, and people love story. But law school—the preparation for law practice—ignores narrative. Every year, thousands of law students study *Spiller*.¹²⁹ They (partially) learn the rule. They lose the process: why did the court reach *this* outcome, and how did narrative influence outcome?

Without narrative, the law becomes formulaic. Duty + Breach + Actual Causation + Proximate Causation = Negligence. Denying a cotenant the right to use and enjoy property → ouster → rent liability. But law is not a math problem. As Holmes explained: “The life of the law has not been logic: it has been experience. . . . [A]nd it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”¹³⁰ Appreciation of narrative deepens our understanding of rules and aligns the study of law with the practice of law. Without narrative, students detach law from the governed. They lose sight of consequence—the consequence that every rule and every decision has on people. Disaggregating law from narrative disaggregates law from people.

Second, without narrative, the legal community is less communal than it could be. First-year cases connect the legal world.¹³¹ Experienced lawyers and first-year law students alike identify with the *Palsgraf*¹³² firework explosion, the *Carbolic Smoke Ball*¹³³ offer, and the “well-coiffed” boy from the *Leonard v. PepsiCo, Inc.*¹³⁴ commercial. Lawyers and law students do not remember *Hawkins v. McGee*¹³⁵ because of its rule for expectation damages. We remember it because

129. See *supra* notes 15–16 and accompanying text.

130. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Boston, Little, Brown, & Co. 1881).

131. See Travis Turner, *Tradition vs. Innovation: Time to Rethink the First-Year Curriculum?*, 78 J. KAN. B. ASS'N 15, 15 (2009) (“The vast majority of American law students share a relatively universal first-year curriculum. Generations of lawyers have shared a similar introduction to legal education.”).

132. *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

133. *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 QB 256 (Eng.).

134. 88 F. Supp. 2d 116 (S.D.N.Y. 1999).

135. 146 A. 641 (N.H. 1929).

of the plaintiff's burned, hairy hand and its depiction in *The Paper Chase*. Facts and narrative from first-year cases create a folklore, and that folklore connects the profession. The deeper we understand the narratives, the deeper the folklore and connection. If (as is the case with *Rosengrant* and *Spiller*) we subordinate narrative to formalism, the legal community loses an important commonality.

IV. DOWNSIDES OF NARRATIVE INCLUSION

Part II submits that students and lawyers miss important lessons when case narrative is overlooked or forgotten.¹³⁶ Part III connects those missed opportunities to consequences: a loss of depth, inspiring what I dub a “formulaic” approach to law, and a loss of connective fibers between legal strata.¹³⁷ However, increased focus on narrative in classrooms and courts is not without costs of its own.

For instance, the more professors and practitioners discuss narrative, the less they discuss rules and black-letter legal standards. Class time and casebook space seems zero-sum. If casebook excerpts include more fact, they include less rules and reasoning.¹³⁸ By teaching *Spiller*'s story, professors and casebook editors have less time and space for ouster standards, cotenancy obligations, and jurisdictional nuances. The natural response is to challenge the premise that pedagogy is zero-sum. Perhaps time spent learning narrative does not trigger a proportional loss of time for black-letter law. Rather, perhaps narrative allows for rule mastery and the ability to manipulate rules to new scenarios. Despite any synergy between legal narrative and legal rules, narrative can, in some cases, detract from rule-based discussion and the predictability that a formulaic approach to law offers.

Too much narrative threatens the objectivity of legal analysis.¹³⁹ First-year law students learn to love efficiency, to loathe the irrational, and, on exams, to apply legal standards mechanistically. The legal profession likewise prides itself in objectivity. Judges' robes, for instance, represent impartiality—a cloaking of individualism.¹⁴⁰ Narrative's disruption of formulaic lawyering may, at some point, imperil pure objectivity (if such a thing exists). Take *Spiller*: Mackereth's advanced age and the loss of her husband and children made her a sympathetic

136. See *supra* Part II.

137. See *supra* Part III.

138. Professors heavily regiment syllabi. Assume a torts class dedicates one class to Judge Learned Hand's *Carroll Towing* opinion. *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947). Explaining the purpose of a tug boat, while (arguably) pertinent, would mean spending less time on the lauded Hand Formula.

139. See generally Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187 (1994), for a survey of arguments surrounding the existence of true legal objectivity.

140. See Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991, 1039 (2009) (discussing the importance of robes for judicial identity).

party. The human response is to empathize with her.¹⁴¹ The objective response, as the Alabama Supreme Court rightly decided, was to reject her ouster claim. Total immersion in narrative may lead to incomplete analysis and incorrect outcomes. Used properly, though, narrative augments rules, allowing for well-rounded and informed analysis.

CONCLUSION

This Note does not suggest that law schools and casebooks should subordinate rules to narrative. Rather, it posits that a healthier (while measured) appreciation for narrative complements rules and creates new rule-teaching moments. Pairing law with narrative prepares students for practice and connects the profession. Historical narrative is important for legal education and practice.

Hettie Mackereth and John Spiller were people, as were Wayne Williams, Olin Zeannah, Fred Nicol, and George Wright. If we understand the people, we better understand the law, and the legal profession has more in common. Hopefully, law professors and students recognize that without narrative, the law is a set of rules in dusty books. With narrative, law becomes experience and story. And people—both lawyers and lay—appreciate story.

*McGavinn Brown**

141. As anecdotal proof, three nonlawyers read a draft of this Note. I asked them for thoughts. All characterized Spiller as the villain and Mackereth as the helpless victim. Objectively, though, and as the Alabama Supreme Court decided, Spiller never acted extralegally.

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