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STORIES OUT OF SCHOOL:
TEACHING THE CASE OF BROWN v. VOSS

Elizabeth J. Samuels*

INTRODUCTION

In a deft parody of conventional education—inspired by a vote to put a school system on a year-round schedule—the parodist purports to have unearthed a letter from Huck Finn to Tom Sawyer’s aunt, Mrs. Phelps. In the letter, Huck reports on a productive summer spent in school, studying long hours and earning high grades.¹

We did get a bit of relief from the daily routine last week when the entire biology class took a field trip over to Jackson’s Island to collect specimens. The teacher, Mr. Dobbins, complimented me on my ability to identify the aquatic species of the Mississippi River. He urged me to consider a career in the biological sciences. Did you know, by the way, that the Mississippi is 2,350 miles long—second only to the Missouri, its primary tributary, in length among American rivers? It drains 1,231,000 square miles of the central U.S. watershed. A major transportation resource!²

Thus can school interfere with education,³ reducing to an empty recitation of facts the mystery and the majesty, the moral complexity and the symbolic power of the Adventures of Huckleberry Finn’s Mississippi.

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² Id.
³ Mark Twain is reported to have said, “I never let my schooling interfere with my education.” EVERYONE’S MARK TWAIN 553 (Caroline T. Harnsberger ed., A.S. Barnes & Co. 1972) (1948). Mark Twain also opined, “Soap and education are not as sudden as a massacre, but they are more deadly in the long run. . . .” MARK TWAIN, THE FACTS CONCERNING MY RECENT RESIGNATION, in MARK TWAIN’S SKETCHES NEW AND OLD 265, 265 (Hartford, American Publishing Co. 1879).
The case method of legal education is traditionally thought to avoid such *reductio ad absurdum* by placing the study of law in the context of the stories out of which the law arises. Karl Llewellyn, in his classic exhortation to law students, tells them to "visualize the initial transaction between the parties. Who were they? What did they look like? Above all, what did each one want, and why did he want it?" He directs the students' attention to the question: "[W]hat would you, had you been counsel have advised this man on this point, at each stage of the negotiation? How do you analyze the facts thus far? . . . If you can read facts thus the case is no longer flat. It foams as golden as Toronto ale."

Students can benefit in several ways from such "dramatization" of cases. At one level, these dramas, these stories of the cases, engage their attention and perhaps their sympathies, as well as provide them with a cognitive bridge from more familiar factual situations to less familiar modes of legal analysis. At another level, they enable students to enter imaginatively into the lawyering process by analyzing how the attorneys translated into the language of law the stories brought to them by the parties. Finally,

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4 Karl N. Llewellyn, *The Bramble Bush* 60 (1960). He continues:

If you can see the facts in their chronological order, one by one; if you can see them occurring one by one as particular people (be they well or ill advised) were moving to the accomplishment of their desires—if you can see these desires and feel them in the light of who the parties were and of their situation—then and then only will the case become real to you, will it stick in your head, will the words speak and set your mind to working.

5 *Id.* at 60-61 (emphasis omitted).

6 Call it, if you will, dramatizing. Call it, if you will, the writing of fiction. It resembles them at least in this: that to do it will require you to lose your imagination—but with discipline; will require you first to feel yourself into the situation as depicted and then to see, to feel the texture and the rough knobs of each fact.

7 *Id.* at 60.

8 Lawyers have always been and have always been viewed as storytellers. As James R. Elkins put it: "Lawyers are enmeshed in stories, first as an audience for the stories of our clients and then as storytellers ourselves. We listen to clients' stories and retell them to judges and juries and to other lawyers. . . . Lawyers are knee-deep in stories." James R. Elkins, *From the Symposium Editor, Introduction to Pedagogy of Narrative: A Symposium, 40 J. Legal Educ. 1, 1* (1990). In an analysis of feminist narrative jurisprudence, Kathryn Abrams notes that for trial lawyers, "law" is inevitably about presenting concrete and nonlinear stories, about sensing the features of a narrative that will engage a judge's or juror's attention or expose the tension in a legal rule. Using and telling clients' stories requires trial lawyers to make constant assessments of what they mean . . . ." Kathryn Abrams, *Hearing the Call of Stories, 79 Cal. L. Rev. 971, 1043* (1991).

A few legal scholars have written about the process by which lawyers "retell" their clients' stories. James Boyd White, a professor of English as well as law, has written exten-
they give concrete meaning to the rule applied and illustrate its effect, and thus help students evaluate critically the court's selectively on this subject. In his Justice as Translation: An Essay in Cultural and Legal Criticism, he provides the following subtle description:

Think now of the life of the lawyer: in her conversations with her client, from the beginning, her task is to help him tell his story, both in his own language and in the languages into which she will translate it. This conversation proceeds in large part by her questioning, trying to get it straight, suggesting complexities and difficulties, as she tries to help her client understand things more fully both in his terms and so far as possible in the language of the law... at the same time, the lawyer must learn something of the language of the client; between them they create a series of texts that are necessarily imperfect translations of the client's story into legal terms, and in doing so they also create something new, a discourse in which this story, and others, can have meaning and force of a different kind: the meaning and force of the law.


This Article, which analyzes a single dispute between neighbors over the use of an easement, has grown in part out of my desire to empirically explore what Cunningham describes as "the process by which disputes are transformed from a layperson's initial sense of injury into legal claims," Cunningham, The Lawyer as Translator, supra, at 1300, and to make one sort of response to the fact that "these transformations have been largely invisible to and unstudied by the legal academy." Id. Work in this area, which has focused primarily on low-income clients, is increasing and includes: Anthony V. Alfieri, Impoverished Practices, 81 GEO. L.J. 2567, 2639-47 (1993); Anthony V. Alfieri, Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 YALE L.J. 2107 (1991); Anthony V. Alfieri, Speaking out of Turn: The Story of Josephine V., 4 GEO. J. LEGAL ETHICS 619 (1991); Christopher P. Gilkerson, Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories, 43 HASTINGS L.J. 861 (1992); Gerald López, Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration, 77 GEO. L.J. 1603 (1989); Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 BUFF. L. REV. 1 (1990). See also Naomi R. Cahn's discussion of a feminist litigation perspective on translating clients' stories, Defining Feminist Litigation, 14 HARV. WOMEN'S L.J. 1, 17 (1991); Homer C. La Rue's discussion about and example of teaching students in clinical programs to become effective "partisan" translators, without becoming the storyteller themselves, Developing an Identity of Responsible Lawyering Through Experiential Learning, 43 HASTINGS L.J. 1147 (1992); and William H. Simon's discussion about the difficulty of understanding a client's view of her case, Lawyer Advice and Client Autonomy: Mrs. Jones's Case, 50 MD. L. REV. 213 (1991).

9 As Llewellyn insisted about the emptiness of rules alone,

We have discovered that rules alone, mere forms of words, are worthless. We have learned that the concrete instance, the heaping up of concrete instances, the present, vital memory of a multitude of concrete instances, is necessary in order to make any general proposition, be it rule of law or any other, mean anything at all. Without the concrete instances the general proposition is baggage, impedimenta, stuff about the feet.

LLEWELLYN, supra note 4, at 12.
tion of and application of the rule. In a more general and overarching sense, as a number of philosophers, legal scholars, and others have suggested, stories may promote kinds of learning and understanding not facilitated by purely analytical exposition.

10 See, e.g., id. at 76-77. The dramatization also, of course, helps students to evaluate "the court's interpretation or transformation of the raw evidence." Id. at 76.

With respect to the benefits at all of these levels, see infra notes 320-23 and accompanying text.


Carol M. Rose, in an article on storytelling and the origins of property, discusses how storytelling or narrative can explain and inspire actions that are not motivated by the rational utility-maximizing preference orderings assumed by classical theory and explained in game theory. Carol M. Rose, Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory, 2 YALE J.L. & HUMAN. 37, 55-56 (1990).

[Storytelling can both create a sense of commonality, and reorder [the] audience's ways of dealing with the world. ... The storyteller places herself with the audience experiencing the tale; she takes a clutch of occurrences and through narrative reveals them for her audience as actions ... in which the audience can imagine themselves as common participants or common observers.]

Id. at 55.

When a case report by itself or supplemented in a casebook provides a sufficiently complete narrative of the circumstances of a dispute, students can and do benefit in these ways, while in the process being introduced to the interplay among doctrine, theory, and practice that will characterize their professional lives.

As a property law teacher, I have observed these benefits of the case method, particularly with conducive appellate opinions and a skillfully assembled text. But I have also experienced, as I suspect most law teachers have, instances in which a case that lacks a sufficiently revealing narrative seems to mystify more than elucidate. Although an understanding of the lawyering and the law of a case depends upon “the brute events outside,” the facts can be so sifted through the litigation process, as Llewellyn warns, that “[w]e cannot typically trust the facts given in the opinion all the way, even as a record of a single concrete instance of what the rule has meant. . . . [Y]our hunger must be directed partly to something not found in law books, but lying beyond and still to be explored.”

When an incomplete or untrustworthy opinion is not a window on the story of a case, but instead is a drawn, opaque curtain, can school interfere with education?


14 One of the property texts in which the case explored in this article appears, Jesse Dukeminier and James E. Krier's Property, contains a great deal of background information about the cases, as well as handsomely produced drawings and photographs. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY (3d ed. 1993). I suspect that these supplementary materials contribute to the effectiveness as well as the popularity of the text by situating doctrinal and theoretical issues in concrete, practical contexts. See infra notes 314-19 and accompanying text.

15 LLEWELLYN, supra note 4, at 40.

16 Id.
For me, teaching a case about a "simple" controversy between neighbors over an easement brought this question sharply into focus. The case of Brown v. Voss appears in a number of property law casebooks, including the widely used Property by Jesse Dukeminier and James E. Krier. In Brown v. Voss the State of Washington Supreme Court departs, in a somewhat disingenuous way, from an almost universally accepted common law rule and makes a cross-boundary allocation of property rights. In the process of finding the traditional rule unsuited to the facts of the case, the court presents what the reader suspects is a highly simplified narrative of the dispute between the neighboring residential landowners over a right of way across one of the neighbors' property. Even the way the property involved in the dispute is described in the opinion, and represented in a drawing, appears to have been simplified and abstracted. In my experience, students often find this case more difficult than more complex cases in the same text, and they often wonder with some discomfort what really led the neighbors to litigate such a "small" dispute all the way through the court system. As I have led them through different analytical approaches to the opinion, I have felt a bit like Mr. Dobbins, the biology teacher in the parody: a largely unhelpful repository of, in my case, empty analytical facts.

17 715 P.2d 514 (Wash. 1986).
18 DUKEMINIER & KRIER, supra note 14, at 835-41 (edited slightly to remove a few citations and fewer than two sentences). A promotional brochure for the third edition that was distributed by the publisher of the Dukeminier and Krier text calls it the "#1 Property Casebook" and lists 135 law schools in which the text is used. The case also appears in EDWARD H. RABIN & ROBERTA R. KWALL, FUNDAMENTALS OF MODERN PROPERTY LAW 384-87 (3d ed. 1992) (omits recital of trial court's findings of fact and part of dissent). The case is described in a number of other property law texts: RALPH E. BOYER ET AL., THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY 365 (4th ed. 1991); JOHN E. CRIBBET ET AL., PROPERTY CASES AND MATERIALS 633 (6th ed. 1990); SHELDON F. KURTZ & HERBERT HOVENKAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW 642-43 (2d ed. 1993).

19 See infra notes 73-80 and accompanying text.
20 See infra notes 38-54 and accompanying text.
21 See infra notes 181-85 and accompanying text.
22 See infra note 314 and accompanying text.
I was drawn, therefore, to explore the circumstances, the stories behind the curiously abstracted narrative of the *Brown v. Voss* opinion. What I discovered from the record in the case,23 related land and other court records, and interviews with the parties was predictable in some ways and startling in others. As the reader of the opinion suspects, the conflict between the neighbors had a dark and bitter emotional history.24 As one cannot easily suspect, the physical aspects of the property differ in legally significant ways from the court's description and understanding.25 When the supreme court of Washington decided the case, the controversy, unbeknownst to the court, was moot.26 And the party who appears to be the loser in the opinion was in reality the winner.27

This Article proceeds by telling a set of stories about the case within a story about teaching the case, in the process conveying its analytical content in part through narrative form. Part I describes and discusses standard analytical approaches to the story told by the opinion that are available to the teacher. Part II descriptively analyzes the narrative strategies behind the lawyers' stories, contrasting their and the court's stories with the stories unearthed by my research. Part III critically analyzes the lawyers' narrative strategies. The narrative of one lawyer effectively translated his client's story and led to the client's victory in court. But the client lost in reality and might have been better served if his lawyer had persuaded him to revise his story. The narrative of the other lawyer was an ineffective translation of his client's story, which

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The second missing item is a transcript, if one was ever made, of the final oral arguments of counsel at the trial level that were delivered on December 19, 1980, nine months after the trial of the case. The fact that these arguments occurred is noted in the trial court's opinion. Findings of Fact and Conclusions of Law at 1, *Brown v. Voss*, No. 14076 (Wash. Super. Ct., July 15, 1982), *rev'd*, 689 P.2d 1111 (Wash. Ct. App. 1984), *rev'd*, 715 P.2d 514 (Wash. 1986).

24 See infra notes 92-95, 198-224 and accompanying text.

25 See infra notes 181-85 and accompanying text.

26 See infra notes 82-86 and accompanying text.

27 See infra notes 246-49 and accompanying text.
thwarted the client's desire to communicate his view of events and led to his legal defeat. Even though he won in reality, that client might have been better served if his lawyer had used the client's story and available physical facts about the property to construct a compelling narrative justification for applying the traditional common law rule.

Part IV discusses how the analyses in Parts II and III demonstrate the ways in which studying an opinion in its narrative context can facilitate the kind of learning Llewellyn prescribes. In the case of *Brown v. Voss*, a more complete and accurate narrative would provide students with a concrete, evocative context that would enable them to engage in a more fruitful doctrinal and theoretical analysis. Students could better comprehend and evaluate the social and economic meaning of the court's decision because they could assess the court's conclusions about the parties' behavior, they could contemplate whether the relative value of the parties' reallocated rights was as disparate and as simple to assess as the court believed, and they could consider whether the manner in which the court reallocated the parties' rights was practicable. A more complete and accurate narrative would also give students an opportunity to enter imaginatively into the lawyering process. It would enable the teacher to take up the challenge of law professor James Boyd White, who has written extensively about law as translation: "[I]f the lawyer is a translator, should we not teach our students how to do what translators do?"28 The kind of teaching White contemplates "insist[s], across the curriculum, on bringing to the surface of attention some sense of the different ways in which the stories of cases we read could be told in different languages and voices," and it leads the teacher "to call upon our students' sense of ordinary language, ordinary life, not just as a matter of intellectual curiosity or political ideology, but with the sense that to do this is an important part of training in the activity of lawyering."29

My methods in this Article are, of necessity, and like my subject, in some respects unconventional. To analyze the lawyers' narrative strategies, I have applied to the written records and to my interviews with the parties some of the techniques of a literary critic, mining the language of their texts for pieces of evidence, large and small. In the process of assembling these pieces in Parts II and III, I have become a storyteller myself because my reader has not shared the texts and because I have translated the evidence

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28 White, *Translation as a Mode of Thought*, supra note 8, at 1391.
29 *Id.*
from them into my own analytical narratives. The lawyers in *Brown v. Voss* translated their clients' stories within the peculiar conventions of their form, the lawsuit. I attempt here to present the complex web of all these stories within the peculiar conventions of my form, the law review article. I hope I have spun the threads in a way that permits the reader to perceive not only my interpretations, but also his or her own patterns of meaning.

I. THE OPINION

The case of *Brown v. Voss* involves the question of whether an owner of a dominant estate that enjoys the benefit of an appurtenant easement—a right of way across a neighboring servient estate—may unilaterally expand the size of the parcel of land that is benefitted by the easement.\(^\text{30}\) The standard common law answer is that the owner of the dominant estate may not use the easement to benefit additional property later annexed to the originally benefitted property.\(^\text{31}\) Either damages or an injunction are the remedies available at common law to the owner of the servient estate whose property is being used to benefit an expanded dominant estate.\(^\text{32}\) The supreme court of Washington in *Brown v. Voss*, while declaring that it accepts this general rule,\(^\text{33}\) declined to grant the ordinarily available relief of an injunction against a continuing trespass.\(^\text{34}\) Reversing the decision of the court of appeals of Washington, the court concluded that the trial court had not abused its discretion in denying injunctive relief to the owner of the servient estate: the trial court's factual assessment of the servient estate owners' conduct and of the relative harms to the parties adequately supported its exercise of discretion.\(^\text{35}\) Two justices dissented, on the grounds that the misuse recognized by the majority is a continuing trespass for which damages would be difficult to measure and for which in-


\(^{31}\) Id. at 517; see 25 AM. JUR. 2d Easements and Licenses § 77 (1966 & Supp. 1994); AMERICAN LAW OF REAL PROPERTY, supra note 18, § 6.02[8][c][iii]; 28 C.J.S. Easements § 92 (1941 & Supp. 1994); CUNNINGHAM ET AL., supra note 18, § 6.02[8][c][iii].

\(^{32}\) See, e.g., AMERICAN LAW OF REAL PROPERTY, supra note 18, § 6.02[8][c][iii]; see also infra note 73 discussing the general availability of injunctive relief.

\(^{33}\) *Brown v. Voss*, 715 P.2d at 517.

\(^{34}\) Id. at 517-18; see infra note 73 on the general availability of injunctive relief.

\(^{35}\) Id. The supreme court of Washington reversed the court of appeals of Washington, which had found that the trial court erred in denying injunctive relief because an injunction is the superior remedy for a continuing trespass such as the Browns' use of the easement to benefit the annexed parcel *Brown v. Voss*, 689 P.2d 1111, 1114-15 (Wash. Ct. App. 1984), rev'd, 715 P.2d 514 (Wash. 1986). The court of appeals also found that a balancing of the equities was inappropriate because the Browns should have known that the easement did not provide access to the annexed parcel. *Id.*
junctive relief is the proper remedy, regardless of whether use of the easement to benefit non-dominant property would actually increase the burden on the servient estate. The dissenting opinion noted that the Browns could pursue a statutory procedure for condemnation of a private way of necessity.

Of the unneighborly dispute that led to the litigation, the Washington Supreme Court tells the following simple story, illustrated with a stylized drawing that is reproduced in Figure 1 below. In April 1977, the Browns bought the dominant estate—Parcel B—in the drawing—and then, four months later, bought the adjoining Parcel C from a different seller. In the drawing, Parcel C looks approximately the same size as Parcel B. The owner of Parcel B, under the terms of an express grant made in 1952, had a right to use a private road easement across Parcel A, and other parcels lying to the south of Parcel A, for access to Parcel B. All three of the parcels bordered the Hood Canal. At the time of the Browns' purchase, there was a single-family dwelling on Parcel B. The Browns planned to remove this house and replace it "with a single family dwelling which would straddle the boundary line common to parcels B and C." To this end the Browns, in the fall of 1977, began clearing the two parcels and moving fill materials.

At some later date, the owners of Parcel A, the Vosses, "placed logs, a concrete sump[,] and a chain link fence within the easement." On March 23, 1979, the Browns sued the Vosses for the removal of these items, for an injunction against interference with the use of the easement, and for damages. In response, in

36 Brown v. Voss, 715 P.2d at 518-19 (Dore, J., dissenting) (joined by Justice Goodloe). Justice Dore's dissent rejects a balancing of hardships, noting that the "Browns are responsible for the hardship of creating a landlocked parcel. They knew or should have known from the public records that the easement was not appurtenant to [the annexed parcel]." Id. at 519. See infra note 293 and accompanying text.

37 Id. at 519.

38 The court additionally objectifies the characters in its narrative by referring to them as the plaintiffs and the defendants, id. at 515-18, as did the trial court, Brown v. Voss, No. 14076 (Wash. Super. Ct., July 15, 1982), rev'd, 689 P.2d 1111 (Wash. Ct. App. 1984), rev'd, 715 P.2d 514 (Wash. 1986). The intermediate court of appeals, which reversed the trial court, referred to the parties by name. Brown v. Voss, 689 P.2d at 1111. Although I have otherwise attempted here to describe the narrative related by the high court, I have used the parties' names to avoid confusion.


40 Id. at 517.

41 See Fig. 1, infra page 1455.


43 Id.

44 Id. at 516.

45 Id.
April of that year, after the Browns had spent more than $11,000 preparing their property for building, the Vosses counterclaimed for damages for trespass and for an injunction barring the Browns from using the easement to benefit property other than Parcel B. The opinion does not include the information that the Vosses made a motion that summer for a temporary restraining order, which was denied, or the information that when the trial began the following spring, the parties had limited the issues to the single question of

FIGURE 1. Drawing that appears in the Supreme Court of Washington's opinion, 715 P.2d at 515.

46 Id. at 515. The court misstates the amount that the Browns had expended before the Vosses filed their counterclaim. The Browns presented evidence at trial that they expended $7,500 before that date, and a total of $11,000 before the case came to trial. See infra note 170 and accompanying text.

whether the Browns could use the easement to benefit Parcel C as well as Parcel B. Before trial they had reached an agreement about the exact location of the easement, and they had agreed to an award of nominal damages of one dollar to the Browns for the Vosses' interference with the easement. The Vosses had agreed not to pursue their claim for damages for trespass.48

From an extensive quotation of the trial court opinion, the reader of the high court opinion learns that the trial court concluded there was "no unreasonable use of the easement"; that there were "no complaints of unreasonable use of the roadway to the south" of Parcel A by the owners of other, more southerly servient parcels; and that there was "no increase in volume of travel on the easement."49 Without access via the easement, the trial court found, Parcel C would be "landlocked," and the Browns "would not be able to build their single family residence in a manner to properly enjoy the view of the Hood Canal and the surrounding area as originally anticipated at the time of their purchase."50 Furthermore, a trespass by the Browns over a little corner of the Vosses' property was "inadvertent" and "de minimis," and the counterclaim filed by the Vosses was "filed as leverage" against the original claim filed against them by the Browns.51 The trial court awarded each party one dollar in dam-

48 Trial Transcript, pt. I, at 2-5, Brown v. Voss, No. 14076 (Wash. Super. Ct., July 15, 1982), rev'd, 689 P.2d 1111 (Wash. Ct. App. 1984), rev'd, 715 P.2d 514 (Wash. 1986); Plaintiffs' Trial Memorandum, supra note 23, at 1-2; Defendants' Memorandum of Authorities, supra note 23, at 1-2. At trial, the Vosses' lawyer said somewhat ambiguously that there were two prongs to what we are seeking here today. No. 1, we claim there has been a trespass in that there has been corner-cutting and going up the hill, the upper part of [Parcel C]; that is No. 1. No. 2, we claim that, as a matter of law, ... the Browns are not entitled to use this access here to service [Parcel C].

Trial Transcript, supra, pt. I, at 5. However, in his later-filed Memorandum he agrees with the Browns' lawyer that

the key issue here is whether the easement may be used to benefit the non-dominant [ Parcel C ] for which no provision was ever made in the express grant.

As the plaintiffs point out in their trial memorandum ..., "The only issue left ... [ ] is the counter[claim] of the defendants that the plaintiffs should not be allowed [ ] 'to a portion of their property.'"

Defendants' Memorandum of Authorities, supra note 23, at 1-2.

The supreme court of Washington opinion does not relate these facts about the agreement between the parties and the narrowing of the issues before trial. The court of appeals of Washington opinion does relate that, "Before trial, the parties agreed to relocate the easement. The trial court's order reflected this agreement .... The parties also agreed to settle their claims, except for the Vosses' request for an injunction." Brown v. Voss, 689 P.2d 1111, 1113 (Wash. Ct. App. 1984), rev'd, 715 P.2d 514 (Wash. 1986).

49 Brown v. Voss, 715 P.2d at 516 (quoting the trial court's findings of fact).

50 Id.

51 Id.
ages—"the awards offset each other"—and denied the Vosses' request for "an injunction to restrain the [Browns] from using the easement for ingress and egress to parcel C for the construction and use of a single family residence . . . to be built partly on parcel B and partly on parcel [C]." The damage awards were not appealed. The trial court granted the Browns the right to use the easement to benefit Parcel C as well as Parcel B, so long as they used the two parcels "solely for the purpose of a single family residence."

The supreme court of Washington's spare and conclusory narrative is devoid of any particulars of the parties' dealings with one another. Perhaps because of this paucity of information, the opinion suggests a great deal. There is a human inclination to supply a narrative context that plausibly explains the parties' actions, an inclination that leads the reader to "fill in the blanks." As students and I have read the case, its recitation of facts suggests, although it does not say, that the Vosses knew that the Browns had purchased both parcels and knew that the Browns intended to build a single structure, a new single-family house that would straddle the boundary line between Parcel B and Parcel C. The opinion relates the trial court's finding that the Browns acted reasonably, a finding which the reader might assume would mean, inter alia, that they had communicated their plans to the Vosses, and that the Vosses "sat by for more than a year while [the Browns] expended more than $11,000 on their project." That the Browns had been engag-

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52 Findings of Fact and Conclusions of Law, supra note 23, at 5; see also Brown v. Voss, 715 P.2d at 516.

The trial court's award of one dollar in damages to the Vosses was inconsistent with parties' agreement before trial that the Vosses would not seek any damages. See supra note 48 and accompanying text and infra notes 229-30 and accompanying text (although the parties had settled their damage claims, the Vosses' lawyer presented evidence relevant to his clients' abandoned claim).

The court denied both parties' requests for attorney's fees. Findings of Fact and Conclusions of Law, supra note 23, at 5. And the court denied the Vosses' "request for a mandatory injunction compelling the [Browns] to remove the road which they have constructed on their property," id., although the Vosses had abandoned their request for such relief before trial, Trial Transcript, supra note 48, pt. I, at 2-5; Plaintiffs' Trial Memorandum, supra note 22, at 1-2; Defendants' Memorandum of Authorities, supra note 23, at 1-2.


54 Id. at 516.

55 "[A] text provides only part of the information that a reader needs to make sense of the situation that it describes. The reader supplies the rest." Robert Glaser, Cognitive Science and Education, 40 INT'L SOC. SCI. J. 21, 26 (1988).

56 Brown v. Voss, 715 P.2d at 516.

57 Id. at 518 (emphasis added); see supra note 46 and accompanying text (discussing the inaccuracy of the dollar figure).
ing in the highly visible activity of clearing trees and moving fill materials⁵⁸ alone suggests that the Vosses must have known the Browns' plans.

The opinion further suggests that some animosity developed between the parties even though the Browns' use of the easement imposed no hardship on the Vosses.⁵⁹ This animosity is suggested by the presentation of the facts that the Vosses prevented or seriously interfered with⁶⁰ the Browns' reasonable use⁶¹ of the easement and that when the Browns responded with a lawsuit, the Vosses brought their counterclaim solely for leverage for opposing the suit.⁶² The story related by the opinion perhaps even suggests that the Vosses, although they had been adjudged to owe only one dollar in damages,⁶³ then spitefully pursued their unsuccessful counterclaim to the intermediate appellate court in order to thwart the Browns' plans to enjoy Parcels B and C. In my experience, students express puzzlement over and disapproval of the Vosses' actions, reactions that may account in some part for many students' strong approval of the supreme court's decision.

In teaching the case, with this spare but suggestive narrative as our only context, I have pursued a standard variety of analytical approaches with my students. We have examined the traditional common law rule that prohibits use of the easement to access both Parcels B and C, the other possible legal theories under which the Browns might be permitted to use the easement to access both parcels, the approach adopted by the court in the opinion, and the policy arguments in favor of and against the court's approach.

The threshold task, of course, is to understand the operation of, and reasons for, the underlying common law rule, which the court purports to leave undisturbed: that the owner of the dominant estate benefitted by an appurtenant easement may not unilat-

⁵⁸ Id. at 515.
⁵⁹ The opinion relates the trial court's finding that:
Other than the trespass [—a "slight inadvertent trespass" over a "little corner" of the Vosses' property—] there is no evidence of any damage to the [Vosses] as a result of the use of the easement by the [Browns]. There has been no increase in volume of travel on the easement . . . . There is no evidence of any increase in the burden on the subservient estate . . . .
Id. at 516. And, "there is and will be no appreciable hardship or damage to the [Vosses] if the injunction is denied." Id.

⁶⁰ The opinion relates that the trial court found the Vosses "placed logs, a concrete sump and a chain link fence within the easement." Id.
⁶¹ Id. at 518.

⁶² The opinion relates the trial court's finding that the Vosses' "counterclaim was an effort to gain 'leverage' against [the Browns'] claim." Id.

⁶³ "The trial court awarded each party $1 in damages." Id. at 516.
erally expand the size of the dominant estate and may not use the easement to benefit the enlarged property. The express grant of the easement was a transfer of an interest in the servient estate, Parcel A, to the owner of the dominant estate, Parcel B. The owner of the servient estate granted a right to use his land for the benefit of, and only for the benefit of, the dominant estate specified in the grant, that is, for the benefit of Parcel B. The owner of the servient estate, having parted with one stick from the bundle of rights he holds as the owner of private property, retained all of the other sticks in his bundle. Under the traditional common law rule, the task of a court in a dispute between owners of the dominant and servient estates is simply to apply a bright-line rule. The court need only determine whether all of the land that the dominant estate owner seeks to benefit by using the servient estate is or is not part of the original dominant estate.

In considering what possible legal theories might nevertheless allow the Browns to use the easement to benefit nondominant property, students discuss easements by necessity, by prescription, and by estoppel, all of which they have encountered earlier, as well as the availability in the state of Washington of a private condemnation statute. These three types of easements represent what Professor Stewart Sterk identifies as departures from the ordinary "geometric-box allocation" of property rights—instances in which a court steps in to reallocate property rights across boundary lines.

The first, an easement by necessity, may arise only when the servient and dominant estates originally belong to one owner and when a strict necessity for a right of way across the servient estate is created at the time that the original owner conveys one of the parcels to another person. But in Brown v. Voss, Parcel C had not been previously owned in common with Parcel A. The series of easements serving Parcels A and B, as well as additional lots to

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64 See supra notes 31-36 and accompanying text.
65 See Cunningham et al., supra note 18, § 1.2, for a brief summary of the work of legal philosopher Wesley Hohfeld and its role in the Anglo-American property law concept that ownership of personal or real property is composed of distinct, "smaller segments or 'interests.'"
67 See, e.g., Cunningham et al., supra note 18, § 8.5. Alternate justifications for the easement by necessity are: (1) that as in the case of easements by implication, the parties intended to create an easement; and (2) that regardless of the parties' intentions, the court will find an easement in order to make the landlocked property usable. See Dukeminier & Krier, supra note 14, at 820-21 (note on easements by necessity).
the south, are part of private land use arrangements that include only land lying to the south of Parcel C.68

With respect to the possibility of an easement having arisen by prescription, the Browns' use of the easement to benefit both Parcels B and C was obviously of too short a duration to have established any rights in this manner.69 In some jurisdictions, however, if the Browns' use was granted by what is ordinarily a revocable oral license, and if the Browns changed their position in reliance on the license, then the Vosses' ability to revoke their permission might be restricted by the courts, essentially creating an easement by estoppel.70 Students observe that there appears to have been no such claim of an easement by estoppel in Brown v. Voss, and, in any event, no state of Washington cases have adopted such a limitation on the power of a landowner to revoke an orally granted license.

Students also discuss the possibility of the Browns using an existing state of Washington statute to privately condemn the Vosses' land for the purpose of obtaining access to their property. In the dissent, Justice Dore notes that granting an injunction in the case "would merely require the Browns to acquire access to Parcel C if they want to build a home that straddles Parcels B and C. One possibility would be to condemn a private way of necessity over their existing easement in an action under [Revised Code of Washington section] 8.24.010."71 There is no indication in the opinion that the Browns sought relief under this statute, and no explanation as to why they might have chosen not to pursue a private condemnation.72

Students then return to the opinion itself to discuss whether the court in Brown v. Voss, although purporting to accept the traditional bright-line rule on the expansion of dominant easements, in effect departs from that rule by permitting the trial court to deny

68 As illustrated in Figure 2, infra, at 1481, the easement over Parcel A was part of a road or driveway that provided access from Highway 101 only to Parcels A and B and the four parcels lying to the south of those parcels.


70 See DUKEMINIER & KRIER, supra note 14, at 801-06.

71 Brown v. Voss, 715 P.2d 514, 519 (Wash. 1986) (Dore, J., dissenting). The state statute provides that an owner of land so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity . . . may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity . . . .


72 See infra note 240 and accompanying text.
on equitable grounds what would ordinarily be available, an injunction for a continuing trespass.\textsuperscript{73} It has been difficult for some students to entertain the notion that this decision is in effect a departure from the traditional bright-line rule. Perhaps it is difficult

\textsuperscript{73} AMERICAN LAW OF REAL PROPERTY, supra note 18, § 6.02[b][c][iii]; CUNNINGHAM ET AL., supra note 18, § 8.9, at 459-60; see also DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 38-39 (1991). The dissent explains that the misuse of the easement to benefit Parcel C is "a continuing trespass for which damages would be difficult to measure. Injunctive relief is the appropriate remedy under these circumstances. . . . And when an easement is being used in such a manner, an injunction will be issued to prevent such use." Brown v. Voss, 715 P.2d at 518-19 (citations omitted).

The analysis in Part III of this Article supports the conclusion that cross-boundary allocations of rights, whether outright or accomplished by the denial of injunctive relief, are not appropriate in these cases because they do not present the kinds of bilateral monopolies that justify such a reallocation and because they do not present the kinds of situations in which a cross-allocation of rights is appropriate for enforcing a social norm of neighborliness. See infra notes 261-70 and accompanying text; John W. Weaver, Easements Are Nuisances, 25 REAL PROP. PROB. & TR. J. 103, 141 (1990). Contra Robert Kratovil, Easement Law and Service of Non-dominant Tenements: Time for a Change, 24 SANTA CLARA L. REV. 649 (1984) (neither equitable relief nor damages should be available so long as court finds no unreasonable or unconscionable increase of burden).

A handful of opinions since 1930—one federal district court, two other state high courts, and two state intermediate appellate courts—have taken a similar approach to Brown v. Voss, finding a misuse of an easement to benefit non-dominant property but denying injunctive relief on the basis of a weighing of relative hardships. National Lead Co. v. Kanawha Block Co., 288 F. Supp. 357 (S.D. W. Va. 1968) (to enjoin use of adjoining tract for storage would seriously impede efficiency of dominant estate owner's operation and would be of little or no benefit to servient estate owner, in a case in which burden would have actually increased without use of adjoining land for storage); Carbone v. Vigliotti, 610 A.2d 565 (Conn. 1992) (denying injunction when character and extent of use of enlarged dominant estate, construction of two-family house, was same as was envisioned for original dominant estate); Wetmore v. Ladies of Loretto, 220 N.E.2d 491 (Ill. App. Ct. 1966) (denying injunction when misuse was "trivial and inconsequential," in case in which servient estate owner himself conveyed annexed land to dominant estate owner, and burden on easement had been greatly reduced by use of alternate access over annexed land); Ogle v. Trotter, 495 S.W.2d 558 (Tenn. Ct. App. 1973) (denying injunction because burden not greater than originally imposed for ingress to and egress from dominant lot, in case in which servient estate owner himself conveyed annexed land to dominant estate owner, and burden on easement had been greatly reduced); Chafin v. Gay Coal & Coke Co., 156 S.E. 47 (W. Va. 1930) (injunction denied because of "great disproportion" of expense and inconvenience, in case in which dominant landowner's bringing coal from much smaller tract of land to processing facility on dominant estate financially benefitted large group of persons who each owned part of servient estate, and plaintiff was the only one to deny consent). Citing only this last case, C.J.S. states: "it has been held that, where the additional burden is relatively trifling, the user will not be enjoined." 28 C.J.S. Easements § 92 (1941).

A "recent development" Note on Brown v. Voss argues that Brown v. Voss and a number of the cases cited above were incorrectly decided because a court's weighing of relative hardships to determine whether injunctive relief is available will reduce predictability and increase litigation. McClaran, supra note 18, at 303-04, 308-09. The Note argues that a court's equitable power to deny injunctive relief for this kind of misuse of an easement "should be reserved for extreme cases" that "threaten economic waste and bestow substantial and unequal power." Id. at 309. Brown v. Voss was not such an extreme case because of the availability in the State of Washington of an action to condemn a private way of necessity. Id. at 304 n.66.
for them because the authoritative voice of the majority opinion simply tells the reader, first, that it accepts the common law rule, and second, that traditional equitable principles are always applied in considering a request for an injunction74 and that, "based upon the equities" in the case, "the trial court acted within its discretion" when it denied the injunction.75

In determining whether to grant injunctive relief, the trial court did not apply a bright-line test of whether the land sought to be benefitted by the easement is or is not part of the original dominant estate. Instead the court undertook the more amorphous task of evaluating the parties' conduct and of weighing the harm to the servient estate owner if the injunction were denied against the harm to the dominant estate owner if the injunction were granted. This distinction between rules and standards is a theme running through the property course, the contrast between "crystals and mud" in Carol Rose's evocative terminology.76 Students may compare how the court in Brown v. Voss had a choice between a bright-line rule and a more amorphous standard, unlike the courts in the cases they have encountered involving disputes not over the expansion of the dominant estate but over the scope of the original easement, that is, disputes over the nature and extent of the dominant estate owner's right to use the easement to benefit the original dominant estate. In such cases, the court, of course, has no choice but to apply a standard, under which it must determine the scope of the easement intended and anticipated at the time of the easement's creation.77

74 Brown v. Voss, 715 P.2d at 517.

75 Id. at 518. The majority of the court, considering the relative hardships to the parties and the question whether there was "actual and substantial injury sustained by the person[s] seeking the injunction," id. at 517, concluded that the denial of relief was supported by the following facts found by the trial court. The Browns acted "reasonably," while by contrast the Vosses "sat by for more that a year while [the Browns] expended more than $11,000." Id. at 516. The Vosses filed their counterclaim "to gain 'leverage' against [the Browns'] claim." Id. at 518. The Browns would suffer considerable hardship if an injunction were granted, whereas the Vosses had suffered no actual damages from the Browns' use of the easement, and, with only a single-family house on the Browns' land, there would be no increase in the burden on the Vosses' land or in the volume of travel on the easement. Id.


Robert Kratovil argues in Easement Law and Service of Non-dominant Tenements, supra note 73, however, that the same standard, rather than a bright-line rule, should apply to the use of easements to benefit non-dominant property.
In assessing the court’s choice in this case, students may go through what by that time in the semester has become a familiar catalog of policy considerations of rights, fairness, expectations, judicial administrative burden and competence, and instrumental consequences, including economic ones, continuing to discuss the case in the context of the opinion’s spare but suggestive factual narrative. Should the court alter the previously established property rights of the parties? Is the rule or the standard fairer, and which is more consistent with the parties’ expectations? Is the rule or the standard preferable from the perspective of judicial administration? Should the courts decide when it is appropriate to allow the unilateral expansion of dominant estates or should they leave the matter to the legislative and executive branches, which in the state of Washington have provided private condemnation procedures for owners of landlocked property? Economically and socially, will the rule or the standard have more beneficial effects in the community? In discussing the last question, students may grapple with the relevance of the Coase theorem and the possible problem of high transaction costs in a bilateral monopoly situation that could prevent the parties from reaching an economically efficient agreement on their own.

On the basis of the opinion alone, a majority of my students have strongly favored the court’s result. Like the court, they have stressed the reasonableness of the Browns’ plans, the hardship the Browns would suffer if an injunction were issued, and the lack of adverse effects on the Vosses if an injunction were denied, even though, as one student commented, a judicial reallocation of entitlements to achieve a more economically efficient result “flies in the face of private property.” From a social perspective, they have stressed in support of the outcome that the Vosses were probably attempting to interfere with the Browns’ plans out of spiteful motives unrelated to concerns about the use of the easement.

II. The Stories

Today there is no longer an easement across the Vosses’ Parcel A providing access to the Browns’ Parcels B and C. The Browns

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79 See supra note 71 and accompanying text.
80 See infra notes 267-70 and accompanying text, describing and discussing this issue.
81 See infra notes 296-307 and accompanying text, applying a “social norm of neighborliness” to the case.
never built their house. Before the supreme court of Washington issued its decision in March 1986,82 the Browns had forfeited Parcel B for failure to make payments on the land installment contract they entered into with the original owner, Mrs. Christensen.83 The Browns had also lost Parcel C before the decision of the supreme court, in a tax sale conducted by Mason County in January 1986, as a consequence of their failure to pay taxes on the property for a period of more than three years.84 Thus Parcels B and C were no longer in common ownership. Shortly after the supreme court of Washington’s decision, the Vosses bought Parcel B from Mrs. Christensen,85 thereby merging Parcel A and Parcel B into common ownership, terminating the bitterly contested easement.86 The Browns had left behind on Parcel B stacks of cedar shake shingles and old tires, which Mr. Voss sold and which helped defray his litigation expenses,87 as well as new power lines,88 a deep new well,89 and a new structure.90 The Browns’ victory in the seven-year legal

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Mr. Voss said he told his lawyer in 1985 about Mrs. Christensen’s pursuing a forfeiture and quiet title action against the Browns. He speculated that his lawyer had not done anything in response to the information because Mrs. Christensen’s court action had not yet concluded. Interview with Fred R. Voss, Defendant, in Lilliwaup, Wash. (July 3, 1992) [hereinafter Interview with Mr. Voss].

The Browns’ lawyer was notified in March 1985 that Mrs. Christensen had elected to declare a forfeiture and cancel the installment land contract. Declaration of Forfeiture and Cancellation of Contract, Mar. 22, 1985 (document indicates it was sent to a specified list of persons, including the Browns in Alaska and their lawyer in Washington).

85 Deed from Alphilde A. Christensen to Fred R. Voss and Hattie G. Voss, recorded May 15, 1986.

86 When a dominant and servient estate merge, that is, when they come into common ownership, the easement is extinguished. See, e.g., AMERICAN LAW OF REAL PROPERTY, supra note 18, § 6.02[8][a]; CUNNINGHAM ET AL., supra note 18, § 8.12.

87 Interview with Mr. Voss, supra note 83. He sold these items for several hundred dollars. Id.
88 Id.
89 Id.
90 See infra notes 160-64 and accompanying text.
contest had conferred no practical benefit on them. The outcome reminds one of Abraham Lincoln's admonitions: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."  

A. Mr. Brown's Stories

By the time the case was decided by the supreme court of Washington, Mr. Brown had relocated to Alaska in the wake of his financial reverses. I reached him there by telephone, in the remote town of Metlakatla. He insisted he did not want to talk about the case but allowed me to persuade him to discuss it briefly. He referred to the litigation as "an unpleasant part of my past" that involved "very unpleasant people [and] very unpleasant circumstances." He reported that he entered into the purchase agreements for both Parcel B and Parcel C without the advice or participation of a real estate broker or lawyer.

Like Parcel A, Parcels B and C are long, narrow lots that slope up a fairly steep hill from their eastern boundary, the Hood Canal, to their western boundary. Parcel C, however, unlike Parcels A

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92 I refer to Mr. Brown's and Mr. Voss's stories, rather than to the Browns' and the Vosses' stories, because it was they who were the real antagonists in the dispute, as the following accounts demonstrate.
93 A computer search of available databases by a private research firm reveals that there were six court cases involving either Mr. Brown or a company he owned, in two other counties, that were filed in the early 1980s and are labelled either "collection" or "foreclosure." Attorneys' Information Bureau, Inc., Seattle, Wash., Aug. 5, 1994 (print-out of research results on file with author). See supra notes 83-84 and accompanying text.
94 Telephone interview with Willard H. Brown, Plaintiff (June 8, 1994) [hereinafter Interview with Mr. Brown]. Mr. Brown reported that he is the director of the Indian Housing Authority. He had not returned my earlier call to a prior residence in Anchorage, Alaska. When I located him again, and reached him by telephone, he told me that he had not called back because he did not want to talk about the case. Nonetheless, in response to my questions, he did consent to speak with me about the matter for half an hour. Id.
95 Id.
96 Id.
and B, is wedge- or pie-shaped, becoming much wider as it slopes upward to the west. The Browns began work on their two parcels in the fall of 1977, starting to clear parts of them and extending the road from the easement over Parcel A to part of the way across Parcel B, towards Parcel C. The next spring and summer they continued clearing part of the property, and began bulldozing and filling some wet and uneven terrain. In August 1978 they resumed work on the road, continuing uphill, across Parcel C and back around almost to Parcel B in a wide loop on Parcel C. (See Figure 1.)

During this time Mr. Voss argued with Mr. Brown about the location of the easement across Parcel A and about trespassing by Mr. Brown and his contractors, both through their use of a wider easement than the Browns owned and their use of a triangular piece of Parcel A, adjacent to the northwest corner of the easement, for backing up and turning vehicles working on the Browns' land. In the spring of 1978 Mr. Voss had put up a chain link fence.

97 See Fig. 2, infra page 1481.
98 Plaintiffs' Trial Memorandum, supra note 23, at 9.
99 Trial Transcript, supra note 48, pt. II, at 59-60 (direct examination of Mr. Brown as adverse witness); id. at 7-8, 154-55 (direct examination of Mr. Voss).
100 Plaintiffs' Trial Memorandum, supra note 23, at 9; Trial Transcript, supra note 48, pt. II, at 61-62, 119, 128-30 (direct examination of Mr. Brown as adverse witness and direct examination of Mr. Brown).
101 Trial Transcript, supra note 48, pt. II, at 7-8 (direct examination of Mr. Voss).
102 See, e.g., id. at pt. I, 2, 6 (statements by Browns' lawyer); id. at pt. II, 9-27 (direct examination of Mr. Voss); id. at pt. II, 75-76 (cross-examination of Mr. Brown as adverse witness); id. at pt. II, 132-35 (direct examination of Mr. Brown).

Mr. Brown confirmed in my conversation with him that before the Browns filed their lawsuit, the continuing dispute over the easement was not about the Vosses preventing the use of the easement but was instead over its exact location and over the trespass on the triangular piece of Parcel A. Interview with Mr. Brown, supra note 94. The Browns' initial complaint alleged that logs, a concrete sump, and a chain link fence had “prevent[ed] its full use” and “severely restrict[ed] its continued use.” Plaintiffs' Complaint at 2, Brown v. Voss, No. 14076 (Wash. Super. Ct., July 15, 1982), rev'd, 689 P.2d 1111 (Wash. Ct. App. 1984), rev'd, 715 P.2d 514 (Wash. 1986). In Mr. Brown's August affidavit, he stated, “We are presently in dispute in this case as to the proper location of [the] easement.” Plaintiff's Affidavit, filed with Plaintiffs' Memorandum in Opposition to Motion for Temporary Injunction at 4, Brown v. Voss, No. 14076 (Wash. Super. Ct., July 15, 1982), rev'd, 689 P.2d 1111 (Wash. Ct. App. 1984), rev'd, 715 P.2d 514 (Wash. 1986). It was not asserted by the Browns that the Vosses ever prevented them or their workers from passing over the easement.

At trial Mr. Brown testified that when his fill contractor conveyed Mr. Vosses' complaints about trespassing on Parcel A outside of the easement, “[I]t was in the wet season of the year. I told [him] that, yes, we would remedy the situation, but that we would do it at the proper time. He wasn't authorized by me to let him do it at his leisure, no.” Trial Transcript, supra note 48, pt. II, at 139 (cross-examination of Mr. Brown). The contractor confirmed in his testimony that “Mr. Voss told me the road where it was supposed to be that I had made it infringing or whatever at the Y, and I told him I would correct it, only
fence\textsuperscript{103} that Mr. Brown claimed encroached on the easement by running alongside and a couple of feet inside of its eastern edge.\textsuperscript{104} Mr. Brown also complained that logs and a concrete sump pump encroached upon the easement, although he did not allege that he was ever unable to cross Parcel A.\textsuperscript{105} That summer, in August, the two men came to blows on Mr. Voss's property,\textsuperscript{106} an event that both men told me about but neither mentioned in the course of the litigation. The following March, the Browns filed the suit against the Vosses for interfering with the easement, and at the end of that month, the Browns began construction of a building on Parcel B set close to the lot line between Parcels A and B.\textsuperscript{107} The building permit issued for the structure was for a utility building.\textsuperscript{108}

When the Vosses filed their counterclaim in April, "it was news to everybody," Mr. Brown told me, that the Vosses could make a legal claim that the Browns did not have a right to use their easement to benefit Parcel C.\textsuperscript{109} Although Mr. Brown said in the interview that he has now "put [the experience] in the past" and is unwilling to discuss the matter in detail, he communicated in general terms his version of his story.\textsuperscript{110} "My position was always that I had an easement."\textsuperscript{111} In his view, his easement gave him access to both parcels; once he passed onto one half of his property, Parcel B, he then had a right to continue from there to the other half of his property, Parcel C.\textsuperscript{112} Mr. Voss failed to recognize this right—which was subsequently recognized in their "precedent-setting" case—because Mr. Voss was "an extremely unreasonable person, to the point of some mental problem."\textsuperscript{113} In the litigation, the story of the dispute communicated by the Browns' lawyer\textsuperscript{114} largely re-

\textsuperscript{103} Trial Transcript, supra note 48, pt. II, at 10 (direct examination of Mr. Voss).
\textsuperscript{104} Id. pt. II, at 92 (direct examination of Browns' surveyor).
\textsuperscript{105} See supra text accompanying note 102.
\textsuperscript{106} Interview with Mr. Brown, supra note 94; Interview with Mr. Voss, supra note 83.
\textsuperscript{107} Trial Transcript, supra note 48, pt. II, at 11 (direct examination of Mr. Voss); id. pt. II, at 68 (direct examination of Mr. Brown as adverse witness); id. at pt. II, 120 (direct examination of Mr. Brown).
\textsuperscript{108} Id. pt. II, at 68 (direct examination of Mr. Brown as adverse witness) (testifying that they started a utility shed and "later got permission to put temporary living quarters in it"); see infra note 204 and accompanying text.
\textsuperscript{109} Interview with Mr. Brown, supra note 94.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} I refer to the Browns' and the Vosses' lawyers simply as their lawyers, rather than by name, with the fact in mind that I have strictly limited my task to analyzing their roles as
flected Mr. Brown's own view, and Mr. Brown believes that his situation was well represented.\textsuperscript{115} In the metaphor of lawyering as translation, Mr. Brown believes that their lawyer conveyed an accurate translation of his story.\textsuperscript{116} The central theme of his lawyer's story was that it is a pointless property law reification to view property assembled by a single owner into one parcel as two distinct parcels—one with access via the easement and one without. As a common sense matter, the fact that the house would simply straddle what had been the boundary between two lots, rather than being located solely on one lot, itself demonstrates the absurdity of a rule that would allow access over the easement to one half of the house but not to the other.\textsuperscript{117} Using the easement to benefit a single family house built on two lots instead of one is a reasonable use that would not increase the burden on the servient estate. A property owner naturally expects and ought to be able to do what he wants with his own property—in Mr. Brown's case to build his and his wife's "dream home."\textsuperscript{118} Mr. Brown had already made a considerable investment relying on the use of the easement to benefit both parcels. While Mr. Brown made this investment, Mr. Voss stood by and did not object. If an injunction were granted, the Browns would not have access to their property. The fact that Mr. Voss seeks an injunction under these circumstances shows he is a difficult person, unreasonably seeking to frustrate their reasonable plans.

In translating Mr. Brown's story, as described below, the Browns' lawyer adopted a sort of "anti-narrative" narrative strategy. By skillfully selecting from among the facts about relations between the neighbors, he presented a general, decontextualized story that was ultimately reflected in the supreme court of Washington's opinion and that invited the story's audience to conclude that Mr. Voss must have been acting in an unreasonable, unneighborly way.\textsuperscript{119} At the same time he both insisted on the irrele-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{115} Interview with Mr. Brown, \textit{supra} note 94.
\item \textsuperscript{116} See \textit{supra} notes 28-29 and accompanying text.
\item \textsuperscript{117} See \textit{infra} notes 124-36 and accompanying text.
\item Mr. Brown, in the telephone interview conducted fifteen years after he filed the lawsuit, characterized the operation of the rule in exactly this way. It would make no sense, he told me, to have a rule that would allow him to use one part of his house and not another. Interview with Mr. Brown, \textit{supra} note 94.
\item \textsuperscript{118} Plaintiffs' Trial Memorandum, \textit{supra} note 23, at 3: "Their present plans are to begin construction of their 'dream home' later in 1980."
\item \textsuperscript{119} See \textit{infra} notes 169-70 and accompanying text.
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vancy of evidence about relations between the neighbors and suggested that Mr. Voss's objections, because there was no reason for them, grew out of irrational spiteful feelings. With respect to the law, the applicable legal rules did not fit well with this factual account. In his doctrinal narrative, therefore, he omitted a key legal distinction and recast the law to fit his factual account.

In pursuing these narrative strategies, the Browns' lawyer was aided by the Vosses' lawyer's primary reliance on the established common law rule and his concomitant failure, discussed below and in the next Part, either to effectively refute the Browns' story or to present a compelling competing story. Most strikingly, the Browns' lawyer benefitted on appeal from the trial court's inaccurate finding, unchallenged by the Vosses' lawyer, that Parcel C would be landlocked without access via the easement.

The Browns' lawyer began his opening statement at trial by relegating any discussion of the law to his Trial Memorandum, but then assailing the property law reification of Parcels B and C into two separate entities. In the service of a kind of re-reification of their property from two legal entities into one, he maintained at trial that "there now is a unity of title, and common ownership of the entire parcel here," a point emphasized in his Trial Memorandum. In a colloquy before his opening statement, he at-

120 See infra notes 138-46 and accompanying text.
121 See infra notes 186-88 and accompanying text.
122 See infra notes 225-31, 271-305 and accompanying text.
123 See infra notes 181-85 and accompanying text.
124 Trial Transcript, supra note 48, pt. I, at 7: "With regard to . . . their claim that we cannot use the easement to get to [Parcel C], we have a significant amount of law we will want to argue, and I will set forth in my brief, but factually . . . ." (emphasis added).
125 Id.
126 See infra notes 138-46 and accompanying text.

In an earlier filing in the case, the Browns' lawyer had explained that the "Browns have acquired two parcels of property which are now joined as one." Plaintiffs' Memorandum in Opposition to Motion for Temporary Injunction, supra note 102, at 3 (five months after Browns filed suit, Vosses filed motion for temporary injunction, which was denied).

The Browns' lawyer stated:

The defendants continually want to segregate those two parcels, and there is no reason to do so. . . . Mr. and Mrs. Brown do not drive across the easement to get to the Rylander parcel as alleged by the defendants: [t]hey drive across the easement to get to their property. The Rylander and Christensen parcels have merged. The Browns have a right to an easement to have access to their property.

Plaintiffs' Trial Memorandum, supra note 23, at 5-6.

tempted to represent the two lots as being essentially the same size. The Vosses’ lawyer had prepared a “not-to-scale” sketch of the claimed “corner-cutting” trespass on a triangular piece of Parcel A.\textsuperscript{127} The Browns’ lawyer pointed out that the sketch was not illustrative . . . because it does not show the size of the parcels, and if this is meant to imply there is a small Christensen parcel [(Parcel B)], and we are attempting to get a large Rylander parcel [(Parcel C)], the Court will find that isn’t the case, that these are, essentially, equivalent pieces of real estate.\textsuperscript{128}

As Mr. Brown testified, however, when examined as an adverse witness, Parcel C is substantially larger in area than Parcel B. Mr. Brown testified that Parcel B is approximately 2.3 acres, and that the two parcels together include approximately eight acres of land.\textsuperscript{129} Calculating from these estimates, Parcel C is two and a half times larger than Parcel B.\textsuperscript{130} Rhetorically, the Browns’ lawyer referred to Parcel B as “the Christensen parcel,” which enjoys access via the easement, while referring several times to Parcel C as “the so-called Rylander parcel.”\textsuperscript{131} Mr. Brown himself repeatedly stated at trial, and the Browns’ lawyer repeatedly elicited statements, that the Browns and others thought of Parcels B and C as a single piece of property. For example, Mr. Brown volunteered during his direct examination as an adverse witness, when the Vosses’ lawyer had referred to the “Christensen tract” and the “Rylander tract”: “It’s all one piece of property to us. We don’t refer to it as the Christensen and Rylander tract.”\textsuperscript{132} On direct examination by his lawyer, Mr. Brown was asked, “[H]ave you ever been concerned about the location of the boundary line between B and C since you purchased the Rylander property?” Mr. Brown answered, “No.” His lawyer contin-

\textsuperscript{127} Trial Transcript, \textit{supra} note 48, pt. I, at 4-5.
\textsuperscript{128} Id. pt. I, at 5-6. The Browns’ lawyer may not have been well acquainted with the Browns’ property. There is no view of Mount Rainier from the property, but at trial he and Mr. Brown engaged in the following exchange:

\begin{itemize}
  \item Q: By view, what do you mean?
  \item A: View of the canal and tidelands with the property.
  \item Q: A beautiful view of Mt. Rainier also?
  \item A: Not really, . . . no.
\end{itemize}

\textit{Id.} pt. II, at 114 (direct examination of Mr. Brown).
\textsuperscript{129} Id. pt. II, at 70-71 (direct examination of Mr. Brown as adverse witness).
\textsuperscript{130} The Mason County Auditor’s office records of transfers of the parcels indicate that Parcel A is 1.77 acres, Parcel B is 1.4 acres, and Parcel C is 5.05 acres. Using these figures, Parcels B and C together are 6.45 acres, and Parcel C is approximately three and a half times larger than Parcel B.
\textsuperscript{131} Trial Transcript, \textit{supra} note 48, pt. I, at 7, 9 (opening colloquy with the court); pt. II, at 48 (cross-examining Mr. Voss).
\textsuperscript{132} Id. pt. II, at 59-60 (direct examination of Mr. Brown as adverse witness).
ued, “You always considered it entirely your property?” “Yes, we didn’t even bother with that line on the survey.”133 When the Browns’ surveyor testified, he was asked by the Browns’ lawyer, “For your purposes, was there any reason to segregate [the Browns’ property into Parcels] B and C?” He answered: “No, there was no purpose to segregate it.”134

Presumably to stress this pointless reification of viewing Parcels B and C as two separate entities, the Browns’ lawyer told the trial court at the outset that “our facts [will] show we intend to build a home that will go across the imaginary line of what was the line between the Rylander and [Christensen] property.”135 He had explained in his Trial Memorandum the Vosses’ impliedly absurd position that if a home were built on the “imaginary line,” then “the Browns can enter the home on the southside, or former Christensen portion of the property [Parcel B], but they cannot walk into the northern part of that house which would lie on the former Rylander portion [Parcel C].”136 At trial, it was the Vosses’ lawyer who elicited Mr. Brown’s testimony that the house would “straddle where the old line was between the parcels.” But when Mr. Brown

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133 Id. pt. II, at 116 (direct examination of Mr. Brown).

When the Vosses’ lawyer asked whether he was aware that he had no easement access to the “Rylander property,” Mr. Brown responded. “We do have easements; it is all one common piece of property. It has been our contention from the very beginning, and there is no question in my mind.” Id. pt. II, at 61 (direct examination of Mr. Brown as adverse witness). Again in response to a reference to the “Rylander tract”: “I don’t consider it the Rylander tract; it is just one piece.” Id. pt. II, at 71 (direct examination of Mr. Brown as adverse witness).

134 Id. pt. II, at 80.

Similarly, the Browns’ lawyer inquired of the contractor who was moving fill dirt for the Browns:

Q: Were you ever informed or did you know there was some sort of a line or separation between two parcels here when you were working on the Brown’s property?
A: No, not when Brown was [the owner of the properties].
Q: It was all one parcel of property as far as you were concerned?
A: Yes.

Id. pt. II, at 107-08.

135 Id. pt. I, at 12 (emphasis added).

136 Plaintiffs’ Trial Memorandum, supra note 23, at 3.

The Browns’ lawyer similarly told the judge at the beginning of the trial that, Even if we do build on the [Christensen] property [Parcel B], we have no access to the so-called Rylander property [Parcel C], even if we want to walk out of the house and stand out on the bluff and watch the sunrise; we can’t go over on that Rylander property. That is the position they indicated to us they are taking . . . .

Trial Transcript, supra note 48, pt. I, at 12.

He told the same story to both appellate courts. Brief of Respondents, supra note 126, at 7; Petition for Review, supra note 126, at 3.
was then asked whether the house, if not "just down the middle" of the line, would be located "pretty close" to that, he responded somewhat equivocally, "No, maybe yes, yes and no; we haven't located it exactly."\footnote{137}

The Browns' lawyer maintained at trial that the particulars of the poor relations between the neighbors were not relevant to the case. He objected when the Vosses' lawyer asked Mr. Voss about the men's first meeting. Mr. Voss answered: "I was invited in there to talk things over, meet him, howsoever[,] [a]lmost the first blast I got out of Mr. Brown was the fact that—how do I phrase it—my nephew sat on his grass a few days before and he didn't like that."\footnote{138} The Browns' lawyer argued, "Obviously, there is a problem between these neighbors or we wouldn't be here in the courtroom. If we are going to start through each name-calling, each mud-slinging that has been going on for the last couple of years . . . we will be here for a long time on issues not relevant to the case."\footnote{139} With the trial court in basic agreement, the Vosses' lawyer went along: "Yes, Your Honor, the more we leave personalities out of it, the better."\footnote{140} The Browns' lawyer had argued, however, in his Trial Memorandum that there was no reason for issuing an injunction against the Browns "except for a claimed technical legal interpretation of an old rule for spiteful purposes. The court should not be used for such a result."\footnote{141}

At trial, the Browns' lawyer argued successfully that evidence that none of the owners of the servient parcels to the south of Mr. Voss had complained about the Browns' use of the easement to benefit Parcel C was relevant to determining whether there had

\footnote{137} Trial Transcript, supra note 48, pt. II, at 69 (direct examination of Mr. Brown as adverse witness). The Browns' lawyer did not elicit any testimony at trial about the planned location of the house. He asked Mr. Brown a single question during his redirect examination:

Q: Do you know, as of today, Mr. Brown, the exact location of where your house is going to be?
A: The exact location[,] I do not.

\footnote{138} Id. pt. II, at 141 (redirect examination of Mr. Brown).

\footnote{139} Trial Transcript, supra note 48, pt. II, at 5-6.

\footnote{140} Id. pt. II, at 6. The Vosses' lawyer said that he did not "propose to do that," to go through "each name-calling." Id.

\footnote{141} Plaintiffs' Trial Memorandum, supra note 23, at 8-9. See supra note 23 and accompanying text.
been "excessive or unreasonable use" of the easement. Such evidence also comported with his story that because there was no reason for Mr. Voss to object, he must be acting irrationally. The Browns' lawyer also suggested ill-tempered and obsessive behavior on Mr. Voss's part with questions such as, "Do you have a practice of stopping [people going onto the Browns' property] and harassing them?" and, "Would you say when you [had a discussion with the Browns' fill contractor] you raised your voice?" During questioning later about the location and size of the easement, he asked Mr. Voss, "[W]hy was it necessary to go out and make that measurement 40 or 50 separate times?"—an exchange echoed later by Mr. Brown's remark, "I'm a busy man, I have better things to do than to keep track of trivial things as Voss does."

With respect to Mr. Voss's knowledge and conduct while the Browns were preparing their property for building the habitable utility building, and later the single-family house, the Browns' lawyer asserted at the beginning of the trial that the Browns "made known their intentions to the Defendants Voss of building a home in that area." The Vosses "observed [clearing, fill dirt moving, and road building] and knew that, in fact, my clients were going to be building a home there." In her direct examination by the Browns' lawyer, however, Mrs. Brown testified that she and her husband did not communicate any "specific plans [about] what [they] were going to build or where it would be located," but that they did "tell them generally, [their] purpose in buying this property and becoming their neighbor would be to build a home." The Browns' lawyer asked Mr. Brown whether he had any conver-

142 The Browns' lawyer was responding to the Vosses' lawyer's objection to the question put to Mr. Brown: "Have you had a single complaint from any other of the property owners whose property you crossed in your use of the property?" The Browns' lawyer failed to pose the question again to Mr. Brown, after the judge overruled the objection on the ground that the evidence would be relevant "as far as any excessive or unreasonable use, at least in the eyes of the other persons that live adjacent to the subject easement." It appears from the transcript, however, as if the impression was created, at least, that Mr. Brown knew of no such complaints. Trial Transcript, supra note 48, pt. II, at 74-75 (during cross-examination of Mr. Brown as adverse witness).
143 Id. pt. II, at 44 (cross-examination of Mr. Voss).
144 Id.
145 Id. pt. II, at 47 (cross-examination of Mr. Voss) (about measurements taken by Mr. Voss after the Browns filed suit).
146 Id. pt. II, at 138 (cross-examination of Mr. Brown).
147 Id. pt. I, at 7.
148 Id. pt. I, at 8.
149 Id. pt. II, at 143 (direct examination of Mrs. Brown).
Q: Did you have any conversations with the Voss[es] in 1977 telling them about your plans to build a home?
sations with Mr. Voss in 1977 "in which you told him what your future plans were with regard to building a home up there [on Parcel C]?" Mr. Brown answered, "There was some discussion. I have never had very much discussion with Mr. Voss, but there was no discussion about homes going up there." 150

Following up on Mr. Brown's response during cross-examination, the Vosses' lawyer elicited Mr. Brown's feeling that he should not have to inform Mr. Voss about his plans.

Q: Did you ever sit down with Mr. Voss, at any time, and show him exactly where you planned to build your new structure and exactly where the property lines were?
A: [], I had no reason.
Q: Your answer is no?
A: It is my property.
Q: Your answer is no, you did not?
A: Why should I?
Q: I would appreciate your answering the question.
A: No, I did not. 151

Mr. Voss managed to assert during his cross-examination by the Browns' lawyer that "their intentions were never made known to me. I have no idea where they are going, what they are going to build, and where they are going to build it ...", 152 and that "[o]fficially ... I still don't know that they are going to" build a home. 153 Thus the Browns' lawyer failed to demonstrate that the Vosses knew about the Browns' plans in any detail, although the Browns' lawyer did establish that Mr. Voss most probably never denied permission to the Browns to use the easement to service both Parcel B and Parcel C. 154

A: Well, just that we planned to build a home there, and that it would probably take awhile to develop it.
Q: Did you give them any specific plans of precisely what you were going to build or where it would be located?
A: No.
Q: But you did tell them generally, your purpose in buying this property and becoming their neighbor would be to build a home?
A: Yes.

Id.

150 Id. pt. II, at 136-37 (direct examination of Mr. Brown).
151 Id. pt. II, at 140-41.
152 Id. pt. II, at 36. The Browns' lawyer had asked Mr. Voss whether the Browns would have to add dirt fill where they wanted to build, as Mr. Voss had done. Id.
153 Id. pt. II, at 37. The Browns' lawyer had asked Mr. Voss, "When did you become aware that the Browns were going to build a home?" Id.
154 Mrs. Brown answered "No, never," when asked by the Browns' lawyer, "Did they raise any objection to you prior to [their] filing a [counterclaim] in this lawsuit to your having access across the easement on their property to the northern portion of their prop-
At the heart of the Browns’ lawyer’s story was the fact that the Browns wanted to build only a single-family house on the property line between Parcels B and C, a house that would be the same as a house built entirely on Parcel B and that would therefore not create an additional burden on the easement. Both Mr. and Mrs. Brown testified that their plan was to build a single-family house. The trial court revealed its receptivity to the Browns’ lawyer’s factual and legal contentions when the judge said during preliminary discussions with the lawyers:

I assume the use being sought by the Plaintiff[s] of the easement is for the purpose of construction of a family residence, not a duplex or a multi-purpose building on the premises and . . . [that] you are asking that the Court find that by building that residence in the area of the Christensen and Rylander property?”

Id. pt. II, at 143 (direct examination of Mrs. Brown). Mr. Brown also testified that Mr. Voss had not objected to this, although Mr. Voss had continually raised objections to Mr. Brown’s use of the easement:

Q: Did he ever tell you that he objected to your using the easement to go on the northern part of your property, or the Rylander portion of it?
A: Not specifically that I can ever recall, no.

Q: Was there ever anything like that said to you or any action taken by him objecting to that until this [counterclaim] in this lawsuit was filed?
A: No, Mr. Voss made many allegations and so forth up there, which I made no effort to keep particular track of, but specifically objecting to anything, I would say probably that he objected to everything, but to the road building, no. He was there the entire time the road was being built.

Q: Precisely, did he raise an objection to your using the easement across this property in order to get to the northern part or the Rylander part [Parcel C] of your property?
A: Not to me, no.

Id. pt. II, at 137 (direct examination of Mr. Brown).

Mr. Voss testified that he never gave permission for the Browns to make any use they wished of the easement, id. pt. II, at 29-30 (direct examination of Mr. Voss). He also claimed at one point that he had objected as early as 1977, id. pt. II, at 39 (cross-examination of Mr. Voss), and in early 1978, id. pt. II, at 155 (cross-examination of Mr. Voss), to the construction of the road from the easement through Parcel B and up into Parcel C, but he conceded later that the road did not extend beyond Parcel B until late 1978. Id. (the Browns’ lawyer’s questioning on this point confirmed that the Browns did not seek either to inform the Vosses of their plans or to gain their permission).

155 Plaintiffs’ Trial Memorandum, supra note 23, at 3, 5-6. The memorandum stated that, “They plan to construct a single family dwelling. Their use of the easement to get to their property is concededly not excessive, and not a burden on the easement.” Id. at 3. “As long as only a single family dwelling is being erected, there can be no additional burden on the easement, and no damage whatsoever to the defendants.” Id. at 5-6; see also Brief of Respondents, supra note 126, at 5; Petition for Review, supra note 126, at 13.

156 Trial Transcript, supra note 48, pt. II, at 39 (direct examination of Mr. Brown as adverse witness); pt. II, at 114 (direct examination of Mr. Brown); pt. II, at 142 (direct examination of Mrs. Brown).
erty, if it is part on one and part on the other, that there will be no increase on the [burden on] the easement? 157

The trial court noted further, "If [the Browns] would prevail, [they] would prevail in connection with a single family residence, and if [they] sought to put in a duplex, it would go beyond the terms of the order." 158 Indeed, the Findings of Fact and Conclusions of Law later issued by the trial court specifically denied the "defendants' request for an injunction to restrain the plaintiff from using the easement for ingress and egress to parcel C for the construction and use of a single family residence to be built partly on parcel B and partly on parcel [C]." 159

In fact, at the time of trial, two small houses stood on Parcel B, although one was denominated a utility building and one was slated for removal. 160 A third house, for which the Browns were preparing their property, was to be larger than most of the houses in the surrounding area. 161 The Vosses' lawyer asked Mr. Brown at trial about the utility building: "When you go out there, do you live in the utility shed now or live in the old Christensen structure?" He responded, "Both, we utilize both buildings." 162 In an affidavit filed earlier in the litigation, Mr. Brown had stated that a substantial amount of work had been done on the utility building:

The plumbing has been installed, the electricity has been installed and appliances are in. There is some drywall work to be done; there is finish carpentry work to be done; there is carpeting to be put down; there is painting to be done. There is also going to be a carport constructed adjacent to the utility building. 163

The utility building, which still stands, is an attractive, partly two-story, barn-shaped structure the size of a small house. 164 The original Christensen house, which was razed by Mr. Voss after he ac-

157 Id. pt. I, at 10.
158 Id. pt. I, at 11.
159 Findings of Fact and Conclusions of Law, supra note 23, at 5 (emphasis added).
160 There may also have been on the property at that time both a "work shed" and a "wood shed." Trial Transcript, supra note 48, pt. II, at 116-17 (direct examination of Mr. Brown) (smaller structures as well as the original house were present on the property before clearing and filling began).
161 See infra note 167 and accompanying text.
162 Trial Transcript, supra note 48, pt. II, at 68 (direct examination of Mr. Brown as adverse witness).
163 Plaintiffs' Affidavit, supra note 102, at 2-3.
164 Observations of the author. I conducted my interview with Mr. Voss in this structure.
quired Parcel B, was a modest structure. With respect to the size of the single-family house planned by the Browns, the Browns' lawyer asked Mr. Brown at trial if Parcel B alone would be "large enough for what you wanted to do in building a home?" Mr. Brown answered, "No. . . . The general intention was to create a piece of property large enough to take advantage of our view and enough room for the size home we are contemplating." Mr. Brown testified that the house would "range from 2,000 to 4,000 [square] feet" in area.

The Browns' lawyer's story that a single-family house straddling two parcels would not burden the easement more than a single-family house on one of the parcels was bolstered by his assertion, adopted by the trial court, that the Vosses had filed their counterclaim solely for the purpose of gaining leverage in the suit filed against them, an assertion that—coupled with the

165 Mr. Voss reported that it was a small and dilapidated house. Interview with Mr. Voss, supra note 83.
166 Trial Transcript, supra note 48, pt. II, at 115.
167 Id. pt. II, at 59 (direct examination of Mr. Brown as adverse witness). This estimate, in my observation of the area, would have made the house from somewhat larger to much larger than most of the surrounding houses in this part of the western shore of the Hood Canal.
168 Findings of Fact and Conclusions of Law, supra note 23, at 4. The court stated: "the defendants' ['] counterclaim seeking an injunction to bar plaintiffs['] access to [P]arcel C was filed as leverage against the original plaintiffs' claim for an interruption of their easement rights."
169 The Browns' lawyer pursued this assertion in the following exchange with Mr. Voss:
Q: After responding to our lawsuit, didn't you, in turn, yourself, file a lawsuit against the Browns? The Browns only lawsuit was to stop you from putting a sump and logs and your fence on the easement, wasn't it?
A: It's not clear to me.
Q: So, you don't feel you are bringing a lawsuit against the Brown's [sic] to stop them from having access to the north part of your property?
A: In the fact, sir, that we are using this as leverage for settlement of this other thing, yes, I guess we are filing a lawsuit. However, he improved that road or built that road through the Rylander property without any questions or counsel with me, and he put it where he wanted it. He did it completely without any counsel or consideration for my interests. I made objections just as soon as I knew about it.
Q: So, really you were disturbed about that, so you filed this action kind of as a leverage to help resolve the issue, is that right?
A: Hope to, yes, sir.
Q: I guess you were unhappy Mr. Brown filed a lawsuit against you for encroaching on the easement?
A: Sir, in my estimation, that whole thing is fraud because I didn't put that fence on the easement; it is as simple as that.
Q: And so you felt that maybe you could have enough leverage to file that?
A: I thought it would resolve easier if we went ahead and pressed our right to have the Browns not trespass and to not have the Browns use that access road for something other than that provided for in the easement document.
Vosses' continued pursuit of their counterclaim—in turn supported the story of Mr. Voss's unreasonable, unneighborly behavior. The Browns' lawyer did not suggest that the court, whether or not it found a misuse of the easement, should weigh the parties' relative burdens with and without an injunction, and should find that the Browns would suffer more harm from a grant of an injunction than the Vosses would suffer from a denial. But he did make what he called an "estoppel" argument in which he emphasized that the Vosses should not succeed in their claim—made only after the Browns had expended more than $7,500 on the property—that the Browns "cannot have access to their property." (He did not include in that expenditure figure the $12,000 that the Browns had paid for Parcel C. At trial, the Browns' lawyer presented evidence of all of their expenditures developing the property, both before and after the Vosses filed their counterclaim.)

On the subject of the Browns' possible access to and use of Parcel C without the easement, the Browns' lawyer's Trial Memorandum had asserted that "[i]t would be unconscionable to deny [the Browns] the right to gain access to a portion of their property as is claimed by the defendants." There was no actual testimony at trial that there would be no access to Parcel C from a public road without the easement. The Browns' lawyer did have Mr. Brown explain how the Browns reached their property by turning off Highway 101 onto a private road that passed through a number of other parcels before passing through Parcel A. This private road traverses the hill on which the three parcels and other parcels to the south are located; it climbs uphill in a northwesterly direc-

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170 Plaintiffs' Trial Memorandum, supra note 23, at 9.
171 This is the sale price noted in the Mason County, Washington, Auditor's Office's record on the parcel, and it is also reflected in the tax stamp on the deed from the Rylanders.
172 Trial Transcript, supra note 48, pt. II, at 110-11, 130-32 (introduction of bills received for work performed on the property).
173 If Parcel C would be landlocked without access via the easement, it would seem that the Browns either would incur the cost, whatever that might be, of purchasing and developing alternate access or would lose the entire value of Parcel C, as well as some part of their investment in developing the "double lot."
174 Plaintiffs' Trial Memorandum, supra note 23, at 5.
tion, passing on the Vosses' property behind their house.175 The Browns' lawyer also asked both of the Browns if they would have purchased Parcels B and C “[i]f [they] had known that [they] weren’t going to have any access to the northern part of [their] property,”176 or “[i]f [they] had known that there would be any problem in having access to the northern portion . . . ?”177 Mr. Brown testified that he would not have done construction work on the utility building in the same location: “[T]he entire layout of the property would be different, even if we, in fact, ever bought it.”178 Mrs. Brown testified that they would not have purchased the property: “No . . . we are not that rich, and it has been just too costly, and we wouldn’t have had we known we couldn’t build there or use it.”179 Their responses were consistent with the fact that the easement was the only developed access to the part of their property that they were developing.180

The trial judge had suggested that he understood Parcel C would be landlocked without access via the easement,181 and he subsequently stated in his Findings of Facts and Conclusions of Law that if an injunction were granted barring “access to [Parcel] C across the easement to a single family residence, Parcel C would become landlocked; plaintiffs would not be able to make any use of their property . . . .”182 The simplified representation used at trial

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175 See Fig. 1, supra page 1455.
176 Trial Transcript, supra note 48, at pt. II, 136 (emphasis added).
177 Id. pt. II, at 143.
178 Id. pt. II, at 136.
179 Id. pt. II, at 143-44.
180 Mr. Voss testified at one point, in response to questioning by his lawyer, that Mr. Brown could not only have brought a trailer to the upper portion of the Browns' property over the easement, but that he could have also driven a tractor up from the highway across the Browns' property. Id. pt. II, at 51-52.
181 The trial judge noted at the beginning of the trial that if the Vosses prevailed, “[t]hen, the next lawsuit would be a lawsuit for a way of necessity.” Id. pt. I, at 13. Under Washington law, a private condemnation action to create a right of way is possible if such a right of way is reasonably necessary. See supra notes 71-72 and accompanying text.
182 Findings of Fact and Conclusions of Law, supra note 23, at 3-4. At trial, the judge announced that he would view the property before issuing a decision, Trial Transcript, supra note 48, at pt. I, 13, and in the opinion he noted that he had viewed the property. Order and Judgment at 1, Brown v. Voss, No. 14076 (Wash. Super. Ct., July 15, 1982), rev'd, 689 P.2d 1111 (Wash. Ct. App. 1984), rev'd, 715 P.2d 514 (Wash. 1986). Perhaps he meant by the term “landlocked” that the property would lack developed access. In property law, however, the term is used to mean that “a piece of land belonging to one person [is] surrounded by land belonging to other persons, so that it cannot be approached except over their land. Access to such land will normally be via an easement from surrounding landowner.” BLACK'S LAW DICTIONARY 818 (6th ed. 1990). See, e.g., CUNNINGHAM ET AL., supra note 18, § 8.5; BOYER ET AL., supra note 18, at 361.

It was a different judge who, in December 1979, denied the Vosses' motion, filed in August 1979, for a temporary injunction. Order Denying Temporary Injunction, supra
and ultimately published with the opinion, Figure 1, seems to confirm this understanding because it shows only Parcels A through C and because it omits the small tideland slivers of these parcels that actually lie to the east of State Highway 101, along the Hood Canal. The representation therefore gives the impression that the nearest public road lies somewhere south of Parcel A and is accessible to all three parcels only via the private road that comes up from the highway and passes through the parcels lying to the south. ¹⁸³

The more complete representation in Figure 2 below shows that State Highway 101 runs straight through the foot, or the eastern end, of all three parcels; it passes along the bank of the canal and over easements for the highway established on each of the three parcels. ¹⁸⁴ Relying perhaps on the impression conveyed by the representation, as well as the statement in the trial court’s opinion, the Browns’ lawyer did refer several times in papers filed in both of the appeals to the fact that Parcel C would be landlocked without access via the easement. ¹⁸⁵

With respect to the Browns’ lawyer's doctrinal narrative, the common law rule, of course, did not support the contention that the Browns had a right to use the easement for access to Parcel C as well as Parcel B. ¹⁸⁶ At the trial level he omitted the legal dis-

¹⁸³ This was my own impression and I found in a survey of more than sixty students in my spring 1994 first-year property course that this was also the impression of all but one student. On re-inspection of Figure 1, one sees the line and the notation “S.R. [State Route] 101.” Perhaps this cryptic notation is cognitively “trumped” for most readers by the textual assertion that Parcel C would be landlocked without access via the easement. The effect may be somewhat analogous to an experiment in which a subject is presented with a list of words for different colors. Each word is printed in a color different than the color named by the word. The subject is asked to read off the colors in which the words are printed, rather than the words themselves, a task that proves difficult. BARRY H. KANTOWITZ ET AL., EXPERIMENTAL PSYCHOLOGY 199-208 (5th ed. 1994).

¹⁸⁴ An easement for the highway is described in the deed to each piece of property: Deed from Virginia C. Debard to Fred R. Voss and Hattie G. Voss, recorded May 8, 1973; Deed from Alphilde A. Christensen to Will H. Brown and Jean M. Brown, recorded Apr. 1, 1977; Deed from Clanton Rylander, Jr., and Lillian P. Rylander to Will H. Brown and Jean M. Brown, recorded Aug. 29, 1977.


¹⁸⁶ See supra notes 31-36 and accompanying text.
FIGURE 2. This drawing is an isometric composite based on: survey maps on file at the Mason County, Washington, Auditor's Office; a plaintiff's exhibit admitted into evidence at trial, a surveyor's drawing which shows the location of the easement on Parcel A; the drawing published in the Supreme Court of Washington's opinion, 715 P.2d at 515, and reproduced here in Figure 2, which roughly approximates the location of the road or driveway constructed by the Browns on Parcel A and B. The path the road or driveway follows from Parcel A down through the lots lying to the south, and out to the highway, is a rough approximation based on the author's observation. The drawing was created by Stephen Greene of the Institute for Language, Technology, and Publications Design at the University of Baltimore.

tinction between cases involving changes in the use of easements to benefit the original dominant estate and cases involving the use of an easement to benefit non-dominant property. He argued solely in terms of the former cases, under which easements may be “put to all reasonable use” and “used in the reasonable development of the dominant estate.”187 The Browns’ use of the easement to ac-

187 Plaintiffs' Trial Memorandum, supra note 23, at 3-5. "Washington law is not greatly developed in this area. Reference to other sources shows that generally the court is guided by a rule of reasonableness." Id. at 3.

The Browns' lawyer made unsuccessful attempts to distinguish cases that had been cited by the Vosses in their cross-complaint as authority for the rule that an easement may not be used to benefit property other than the original dominant estate. See id. at 6-8 (and cases cited therein). For example, he “distinguished” one case because it concerned an easement that arose by implication rather than an express easement. Id. at 6; see Defendants' Memorandum of Authorities, supra note 23, at 4-8 (and cases cited therein).
cess their enlarged Parcel B was reasonable and did not increase the burden on the servient estate; therefore, he concluded, it would be "unconscionable" to deny them a right to use the easement to access Parcel C. 188 The Browns' lawyer also argued that as an equitable matter the Vosses, who had not "show[ed] any damage," should be estopped from making their claim because they had not asserted the claim until after the Browns had spent more than $7,500 on their property. 189 Of course, he technically did not convince the trial court that the Browns had a legal right to use the easement to benefit Parcel C. But his story did persuade the trial court, to the same effect, that the requested injunction should not issue.

At the appellate levels, the Browns' lawyer revised his doctrinal narrative, acknowledging case law holding that easements may not be used to benefit nondominant property, but characterizing it as always involving situations in which, unlike the instant case, the use of the easement to benefit nondominant property did create an additional burden on the servient estate. 190 If there is a misuse, he added at both appellate levels, it is "nothing more than a technical misuse." 191 Although neither appellate court agreed that there was no misuse, 192 the supreme court of Washington did agree that the

188 Plaintiffs' Trial Memorandum, supra note 23, at 5, 8.
189 Id. at 9. The only authority presented in support of this argument was as follows: "The general principles of estoppel and waiver are set forth in Voelker v. Joseph, 62 Wash. 2d 429 (1963) although the facts of that case are not applicable in the instant case. Numerous cases in Washington, however, support the principle of the application of estoppel in instances such as this." Id.

The Browns' lawyer also made an unfounded argument that the Vosses' claim should be barred by the doctrines of res judicata and collateral estoppel because another judge had denied their motion for a temporary restraining order, and "[a]ll of the evidence that will be heard at the time of trial was presented at that time by affidavits," and "[a]ll of the law that is being argued now was presented . . . at that time." Id. at 10. See rebuttal of these assertions in Defendants' Memorandum of Authorities, supra note 23, at 9-10.

190 Brief of Respondents, supra note 126, at 10-15; Petition for Review, supra note 126, at 10-15.

The Browns' lawyer also argued that an injunction prohibiting the Browns from using the easement to access Parcel C while allowing them to access Parcel B would be difficult to enforce "as [Mr.] Brown would be technically violating the injunction if he drove his vehicle across the easement to Parcel B and then got out and walked onto Parcel C to view the Hood Canal." Brief of Respondents, supra note 126, at 17-18.

191 Brief of Respondents, supra note 126, at 8; Petition for Review, supra note 126, at 10. At the trial level, the Browns' lawyer had noted, in concluding that the use of the easement was reasonable and lawful, that "[i]t is reasonable to enter the type of injunction that they are requesting, except for a claimed technical legal interpretation of an old rule for spiteful purposes." Plaintiffs' Trial Memorandum, supra note 23, at 8-9.

B. Mr. Voss's Stories

When I visited Mr. Voss on his property, he talked at length with me about the case. Like Mr. Brown, Mr. Voss is still troubled by the memory of the litigation, but unlike Mr. Brown, Mr. Voss feels as if he "never had a chance to tell [his] story."194 The Vosses' involvement with the property on the Hood Canal began in 1973 when they bought Parcel A.195 They began constructing their house in 1974 and were still finishing it at the time of trial in 1980.196 Mr. Voss did much of the work on their house, contracting out jobs he could not do himself.197 His first, unpropitious contact with Mr. Brown was in 1977, a number of weeks after the Browns purchased Parcel B. The Vosses had recently hosted a family picnic on their property during which Mr. Voss's nephew and grand-nephew had sat on a blanket over the line between Parcels A and B. This was the trespass that Mr. Voss said Mr. Brown complained of at their first meeting.198

Beginning with that first meeting, in Mr. Voss's account, Mr. Brown's conduct was unneighborly: Mr. Brown consistently failed

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194 Interview with Mr. Voss, supra note 83. I telephoned Mr. Voss from close by to ask if I could speak with him about the lawsuit and to ask if I could see the property. He agreed and we met on his property for a couple of hours. Mr. Voss reported that he was retired from a career in the military and as a civilian employee of the military; he had most recently served for many years as an air traffic controller at a military airport. Id.
196 Trial Transcript, supra note 48, pt. II, at 36 (cross-examination of Mr. Voss).
197 Id.; Interview with Mr. Voss, supra note 83.
198 Mr. Voss also told me he supposed Mr. Brown "couldn't be all bad" because he had offered Mr. Voss a beer at their first meeting. Interview with Mr. Voss, supra note 83.
to inform Mr. Voss about or consult with him about any of the Browns’ plans. Mr. Brown’s own view of his rights and the testimony of the parties at trial, as described in the section above, confirms that Mr. Brown did not inform the Vosses with any specificity about the Browns’ plans and that he did not feel obliged to inform them. 199 When Mr. Brown began the work on the new road, Mr. Voss reported that he had “said nothing about it” to the Vosses. 200 As Mr. Voss complained in his testimony at trial, Mr. Brown “improved that road or built that road through the Rylander property without any questions or counsel with me, and he put it where he wanted it. He did it completely without any counsel or consideration for my interests.” 201 The Browns’ lawyer supported Mr. Voss’s story when he dismissively cross-examined him: “It is just you are unhappy they went up that road and he built that road without consulting you in the first place, isn’t that the essence of it?” 202

When the Browns later began work on the utility building, shortly after they filed the lawsuit, Mr. Voss said he had to look up the building permit to try to figure out what sort of structure the Browns were constructing just over his property line. 203

In Mr. Voss’s view of his own conduct, he was trying to be a good neighbor. As he reminisced about the events of 1977 and 1978, he gave the impression that he was distressed that Mr. Brown rejected his assistance. Asked at trial by the Browns’ lawyer whether he had stopped people coming across the easement and harassed them, Mr. Voss said of the period before he and Mr. Brown came to blows,

> I have some interest in who is using the access road, and you know I think up until August 8, 1978, I had some interest in kind of protecting the Brown property. I did it because it was a neighborly sort of thing, you know. I didn’t mean any malice toward anybody; I didn’t harass anybody. 204

When a workman first came to work on the existing house on Parcel B, Mr. Voss said, he lent him tools, pipe, and sheetrock. “The man asked me not to tell Will [Brown]; said he won’t like it very much.” 205 Similarly, Mr. Voss indicated he had hoped to give Mr.

199 See supra notes 147-54 and accompanying text.
200 Interview with Mr. Voss, supra note 83.
201 Trial Transcript, supra note 48, pt. II, at 37 (cross-examination of Mr. Voss).
202 Id. pt. II, at 50 (cross-examination of Mr. Voss).
203 Interview with Mr. Voss, supra note 83. The building was permitted as a “workshop,” he said. Id. As described in the section above, however, it was built and used as a dwelling. See infra notes 162-64 and accompanying text.
204 Trial Transcript, supra note 48, pt. II, at 44-45.
205 Interview with Mr. Voss, supra note 83.
Brown advice. On all of these properties water is very much a common enemy, he said, and he had developed considerable expertise dealing with this problem. He told me he was disappointed that Mr. Brown did not want his counsel on the subject.

Mr. Voss also said he was offended when Mr. Brown, in the fall of 1977, invited him to walk the corners of the Browns' property with a surveyor, and then made clear to him when they all met that he was only to listen and not to talk with either Mr. Brown or the surveyor. Mr. Brown's trial testimony shows that he had hoped to deal with Mr. Voss's concerns not by trying to talk with him, but instead by hiring a surveyor to delineate the location and width of the right of way. Mr. Voss's frustration with what he viewed as this unneighborly conduct may have been what led him to testify, when asked whether he also had had a survey done, "What value is a survey? It puts a few lines on a piece of paper and it doesn't say anything to anybody. Will Brown doesn't know where he is yet.

It may have been Mr. Voss's desire for Mr. Brown to acknowledge and express respect for the Vosses' rights and interests in their property that motivated his complaints about the Browns enlarging the easement and trespassing on an additional triangular piece of ground. And it may have been this desire that later motivated him to pursue at trial and on appeal his counterclaim regarding the use of the easement to benefit Parcel C. The arguments between the two men about the location and width of the easement and the trespass on a triangular piece of Parcel A led to their physi-

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206 See Trial Transcript, supra note 48, pt. II, at 128 (Mr. Brown testified that eight springs drain from above his building site) (direct examination of Mr. Brown).

Mr. Voss said that Mr. Brown had disturbed a streambed in the course of the work on his property, diverting water into the Vosses' carport, but had said "no word" about it to Mr. Voss. Interview with Mr. Voss, supra note 83.

207 Interview with Mr. Voss, supra note 83.

208 Id.

209 Mr. Brown testified that he had a surveyor locate a line for the western edge of the easement at a distance of 16 feet, the width specified in the grant of the easement, from the Vosses' encroaching fence, in order to "get the easement thing settled without any further problem with the neighbors." Trial Transcript, supra note 48, pt. II, at 133 (direct examination of Mr. Brown). When asked whether he did "something affirmatively" to avoid trespassing on Parcel A, Mr. Brown answered,

Yes, I'm the only one that spent any money up there to define any of the boundaries on everything, and we, in fact, had the surveyor come up and show us precisely where the line was[,] so it could only be done by a licensed surveyor, and move that post down to eliminate that further trespass.

Id. pt. II, at 135.

210 Id. pt. II, at 41 (cross-examination of Mr. Voss).
cal confrontation in August 1978. Mr. Brown said Mr. Voss assaulted him, and Mr. Voss said Mr. Brown, who was in his late thirties and some fifteen years younger than Mr. Voss, knocked him down and threatened him: "If you ever touch me again, I'll put you under." Mr. Voss also said that he tried unsuccessfully to have Mr. Brown prosecuted for threatening him and that he received a letter later in the month from the Browns' lawyer threatening legal action against him.

It is a more difficult and delicate job to assess Mr. Voss's story than it is to assess Mr. Brown's. From my brief conversations with neighbors of Mr. Voss, my observation of Mr. Voss's property, and my conversation with Mr. Voss, it appeared that he is extremely sensitive to trespasses. His property was prominently posted. His neighbors said that he had fired shots in the air to chase young trespassers away from the tideland and that he was rumored to have scared off a potential buyer of Parcel B from Mrs. Christensen after the Browns lost the property in her forfeiture action.

211 Interview with Mr. Brown, supra note 94; Interview with Mr. Voss, supra note 83.
212 Interview with Mr. Brown, supra note 94.
213 Interview with Mr. Voss, supra note 83.
214 Id. Mr. Voss said that he went to the sheriff's office to make a statement and later took in a statement by his wife, but that the sheriff did not visit the property until later in the month, after Mr. Brown had departed for the season. Mr. Voss said that the prosecutor to whom the matter was referred got a statement from a witness, Mr. Brown's fill contractor, a statement that the prosecutor said "[didn't] look so good" for prosecuting Mr. Brown. Mr. Voss said that the contractor's view of the two men was blocked by the open door of Mr. Brown's truck. Id.
215 Id. The Browns filed their lawsuit the following March.
216 Even if Mr. Voss had discouraged a potential buyer, he does not appear to have acted unfairly or unsympathetically in the process of purchasing Parcel C from Mrs. Christensen, his former neighbor. In the installment land contract Mrs. Christensen had entered into with the Browns in 1977, the purchase price was stated to be $29,500, with a down payment of $7,000, monthly payments of $215.03, and "interest on the declining balance at the rate of 8% per annum ... which interest will be deducted from each payment and the balance applied on principal." Real Estate Contract, dated Apr. 1, 1977, recorded in the Mason County, Washington, Auditor's Office. In November 1983 the Browns had ceased making payments, and in January 1986 a default judgment had been entered against them. See supra notes 83-84 and accompanying text.

In May 1986, the Vosses paid Mrs. Christensen $36,000 in cash for the improved Parcel B, plus approximately $2,300 in unpaid taxes. Mason County, Washington, Auditor's Office tax records; Interview with Mr. Voss, supra note 83. Mr. Voss told me that this transaction enabled Mrs. Christensen, who was living in straitened circumstances, to buy her first new car. Id. His account was supported by Mrs. Christensen's pleadings in the forfeiture and quiet title action against the Browns, in which her attorney stated in an affidavit in a Motion for Summary Judgment: "My client has not received any payment on this property for a great period of time. She is fundamentally deaf, lives in a mobile home, has an unreliable automobile, and absolutely needs the money from this property." Motion for Summary Judgment at 2, Christensen v. Brown, No. 85-2-00091-2 (Wash. Super. Ct., Jan. 6, 1986).
But his neighbors also said they had always maintained good relations with the Vosses. 217 When I approached him with a respectful and sympathetic ear, he spoke unguardedly and at length, answering all my questions in detail. I may have found him more willing to talk with me than I found Mr. Brown 218 because he had “won in the end,” as a practical matter, but he appeared to be still distressed about the litigation and his legal defeat.

Like Mr. Voss, Mr. Brown valued his privacy; in testifying about purchasing his property, he said: “we had water, we had a view, we had privacy, or so we thought, at the time.” 219 Mr. Brown appears in the record of the case, and described himself to me, as “an extremely adamant person about his rights.” 220 He believed throughout the dispute that he had a right to use the easement to benefit Parcel C without consultation with, or permission from, the Vosses, and he expressed satisfaction that this right was vindicated by his legal victory, although “Voss won in a way.” 221 When I asked Mr. Brown why he thought their dispute had gone to, and all the way through, the court system, he said, “It took an extremely unreasonable person to the point of some mental problems . . . and a fellow who won’t stand by and be wronged.” 222 Fifteen years after the lawsuit began, he continued to express frustration and anger with Mr. Voss, whom he called “one of the scum-baggiest persons I’ve ever met.” 223 When he learned near the end of our conversation that Mr. Voss now owns Parcel B, he commented—after long moments of silence—that Mr. Voss did not deserve to have the property and that “it’s unfortunate we didn’t bury him right there.” 224

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217 I spoke with a number of neighbors of the Vosses who preferred not to be identified.
218 See supra note 94 and accompanying text.
219 Trial Transcript, supra note 48, at pt. II, 114 (direct examination of Mr. Brown).
220 Interview with Mr. Brown, supra note 94. Mr. Brown told me that he was not then and is still not “intimidated by property threats.” Id.
221 Interview with Mr. Brown, supra note 94. See infra notes 246-49 and accompanying text.
222 Interview with Mr. Brown, supra note 94.
223 Id. He said that of all the sorts of people he had met in his life, “there is no one I have more total disregard for” than Mr. Voss; he referred to Mrs. Voss as “his bozo wife.” Id.
224 Id.
Mr. Voss's view of his story was not reflected in or incorpo-
rated into the story presented by the Vosses' lawyer.225 In the met-
aphor of lawyering as translation, Mr. Voss believes their lawyer's transla-
tion did not convey his story, that it was a mistranslation.226 The lawyer's legal argument was based simply on the application of the com-
mon law rule that an easement may not be used to benefit nondomina-
tory property,227 the rule that preserves the established private allocation of property rights. He did not attempt to use the facts of the case to argue either for or from any proffered reasons for the rule. Nor did he argue from the facts that, if a weighing of the equities was legally relevant to the outcome, then the balance was in favor of granting an injunction.228 The only factual narrative necessary for the Vosses' lawyer to present, therefore, was that the easement was created to benefit Parcel B and that it was being used by the Browns to benefit Parcel C as well as Parcel B. Curiously, however, a majority of the testimony he elicited concerned trespasses that had been committed by the Browns and their con-
tractors straying onto Parcel A outside the area of the easement.229 The facts of these trespasses were irrelevant to his simple reliance on the common law rule. The issues to which these facts would have been relevant had been resolved before the trial, when the parties agreed on the location of the easement and the Vosses abandoned their claim for damages for trespass.230

Mr. Voss, and even the Vosses' lawyer on his behalf, expressed discom-
fort with the translation of Mr. Voss's story they presented in the litiga-
tion, the translation that made such a poor fit with Mr. Voss's original story. As the trial began, the Vosses' lawyer told the court that the common law rule "may seem arbitrary, but we submit these property laws are very strict, and when I give my final on this, it will show it is Hornbook Law, very plain and simpl[e] . . . . It may seem extreme, but I suggest that is what the law i[s]."231

225 See infra notes 271-305 and accompanying text.
226 See supra note 194 and accompanying text on Mr. Voss's reaction; see supra note 8 and accompanying text, on the role of a lawyer as a translator.
227 See infra notes 231, 237-42 and accompanying text.
228 See infra notes 237-42, 281-85 and accompanying text.
229 Roughly calculating by pages in the transcript, more than forty percent of all the testimony of any kind elicited by the Vosses' lawyer during his case-in-chief involved these trespasses.
230 See supra note 48 and accompanying text. Eliciting testimony about the trespasses may have been a kind of attempt to tell Mr. Voss's story, to convey his sense of injury at Mr. Brown's hand. If so, however, it was an ineffective one because the fact of the trespasses was never incorporated into or related to the Vosses' lawyer's story of the case.
Mr. Voss understood the common law rule, and hoped that he would prevail under it in his dispute with Mr. Brown, but he did not wish to be, or appear to be, unreasonable, in his objections to his neighbors' use of the easement. On direct examination, when chronicling trespasses on Parcel A outside the easement, he referred to a day a few months after the Browns filed suit when the Browns had a big party "and [Mr. Brown] had people parked everywhere, which is all right, but every one of them went on that access road and had to cross that trespass." A few days later, "and I really shouldn't object to it, but on the other hand . . . equipment was parked in there for . . . perhaps four days [to drill a well], and this necessitated vehicles going across the trespass . . . ." When the Vosses' lawyer first attempted to elicit a statement from Mr. Voss that he had never given permission to Mr. Brown to use the easement to access Parcel C, Mr. Voss instead testified he gave permission on some occasion for Mr. Brown to exceed the sixteen-foot width of the easement "[i]f necessary to get some piece of equipment in there, something exceeding 16 feet."

All three courts were persuaded that the Browns' easement did not include the right to access Parcel C, but this was of no avail to the Vosses as the trial court and the court of last resort nevertheless refused to enjoin them from using it for that purpose. In the two appeals, the Vosses' lawyer argued persuasively that the common law rule applied, that an injunction is the "usual and

232 Interview with Mr. Voss, supra note 83.
233 Trial Transcript, supra note 48, pt. II, at 21 (emphasis added).
234 Id. pt. II, at 21-22 (emphasis added).
236 For the reader's convenience I refer to the Vosses' lawyer rather than to the Vosses' lawyers even though they were represented by more than one person. In the Court of Appeals, the Brief of Appellants is signed by the original lawyer's son, who had recently gone into practice with his father. Then, both father and son signed the Reply Brief filed in that court as well as the Answer to Petition for Review filed in the Supreme Court. Brief of Appellants at 33, Brown v. Voss, 689 P.2d 1111 (Wash. Ct. App. 1984) (No. 06490-1); Appellants' Reply Brief at 24, Brown v. Voss, 689 P.2d 1111 (Wash. Ct. App. 1984) (No. 06490-1), rev'd, 715 P.2d 514 (Wash. 1986); Answer to Petition for Review at 8, Brown v. Voss, 715 P.2d 514 (Wash. 1986) (No. 51283-3).

The father alone made the oral argument in the Court of Appeals, and the father and his daughter, who had recently gone into practice with his father, together made the oral argument in the Supreme Court. Letter from Paul Grice, Senior Case Manager, Court of Appeals of Washington, to the author (Nov. 15, 1993) (on file with the author); Bailiff's Record of Counsel at Oral Argument, Brown v. Voss, 715 P.2d 514 (Wash. 1986). The son had been admitted to the bar in 1982, the year the briefing of the appeal began in the Court of Appeals, and the daughter was admitted to the bar in 1985, the year the case was briefed and argued in the Supreme Court.
traditional” relief,\textsuperscript{237} and that a showing\textsuperscript{238} of actual damages is not required.\textsuperscript{239} With respect to the criteria for deciding whether to grant an injunction, he stated rather cryptically that the issue of delay, if any, in bringing suit was not relevant in the case; that the issue of misconduct by the Vosses, if any, was not relevant in the case; and that, with respect to relative hardships, the Browns, “if properly enjoined, would suffer no appreciable harm other than the construction of another road or seeking (and paying for) access through private eminent domain.”\textsuperscript{240} The Vosses, on the other hand, might see the Browns’ misuse “ripen[ ] into an easement by prescription” and “will have lost a valuable property right without receiving a cent in compensation.”\textsuperscript{241} He did not explain that the Browns could build “another road” to their building site because a public highway passes through both Parcels B and C. Nor did he explain why the Vosses neglected to pursue their original claim for damages if they considered a harmful result of affirming the trial court decision to be their loss of property rights without adequate compensation.\textsuperscript{242}

\textsuperscript{237} Brief of Appellants, \textit{supra} note 236, at 21; Answer to Petition for Review, \textit{supra} note 236, at 7.

\textsuperscript{238} Brief of Appellants, \textit{supra} note 236, at 23; Answer to Petition for Review, \textit{supra} note 236, at 7.

\textsuperscript{239} \textit{See} Brief of Appellants, \textit{supra} note 236, at 23; Appellants’ Reply Brief, \textit{supra} note 236, at 4-12, 23; Answer to Petition for Review, \textit{supra} note 236, at 5-7.

\textsuperscript{240} Brief of Appellants, \textit{supra} note 236, at 30-31; accord Appellants’ Reply Brief, \textit{supra} note 236, at 16-17, 23; Answer to Petition for Review, \textit{supra} note 236, at 7.

In addition, the Vosses’ lawyer distinguished this case from a case in which injunctive relief was denied, on the grounds that in this case the Browns were not acting innocently or unintentionally. He asserted that the Browns knew their actions were unlawful and that they made no attempt to comply with the terms of the easement. Appellants’ Reply Brief, \textit{supra} note 236, at 14; Answer to Petition for Review, \textit{supra} note 236, at 7.

The Vosses’ lawyer also made an argument in the intermediate appellate court that the Vosses might be forced by the denial of the injunction to forcibly prevent the unlawful use of the easement, an act that a court would be unlikely to enjoin. Brief of Appellants, \textit{supra} note 236, at 31-32. But surely a court would give injunctive relief under those circumstances if it would not grant an injunction in favor of the Vosses against the Browns.

With respect to the possibility of the Vosses condemning a private way of necessity across the Browns’ property, see \textit{supra} note 71 and accompanying text.

\textsuperscript{241} Brief of Appellants, \textit{supra} note 236, at 30-31; accord Appellants’ Reply Brief, \textit{supra} note 236, at 16-17, 23; Answer to Petition for Review, \textit{supra} note 236, at 7.

\textsuperscript{242} Similarly, the argument that the Browns ought to be relegated to a different cause of action, in which they would have to pay to use the easement to benefit Parcel C, is undermined to some extent by the Vosses’ failure to pursue their damage claim in this litigation. See \textit{infra} note 306, however, discussing why the Vosses nevertheless would prefer to have the Browns proceed in that manner.
III. LAWYERING THE CASE OF BROWN v. VOSS

The Browns' lawyer's simple narrative of events was not effectively refuted by the Vosses' lawyer. In fact, it was reinforced by the Vosses' lawyer's failure to contradict it. The Browns' lawyer's narrative strategy was successful in that the trial court, and ultimately the court of last resort, were persuaded that an injunction should not issue. It also succeeded in satisfying Mr. Brown that his story was well translated into, and therefore vindicated, by the legal process. Another possible benefit of the litigation itself, to the community, Mr. Voss, and Mr. Brown, a benefit independent of the outcome, was that the parties engaged in no further physical violence after the inception of the lawsuit. But, as Mr. Brown himself said, Mr. Voss "won in a way." Mr. Voss now owns Parcel B, and the easement is extinguished. Mr. Brown's construction plans were almost certainly delayed and therefore perhaps ultimately defeated by the lengthy litigation and its attendant costs, as well as by his financial difficulties.

One can commend the Browns' lawyer's effort both to respond sympathetically to his clients' story and to zealously represent, or effectively translate, his clients' point of view. Furthermore, one can empathize with his desire to defeat the troublesome counterclaim that arose in the lawsuit he initiated for the Browns. But might his clients have been even better served if he could have persuaded Mr. Brown to amend his story, to par-

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243 See supra notes 225-31 and infra notes 271-305 and accompanying text.
244 See supra notes 115-20 and accompanying text, discussing Mr. Brown's satisfaction with the way his story was presented, and infra note 259, with respect to how litigants may be dissatisfied because they feel they did not have a chance to tell their stories.
245 See supra note 106 and accompanying text.
246 Interview with Mr. Brown, supra note 94.
247 See supra notes 83-86 and accompanying text.
248 See supra note 83 and accompanying text.
249 The trial court decision was issued more than three years after the lawsuit and the counterclaim were filed. The complaint was filed March 23, 1979. The counterclaim was filed on April 17, 1979. Finally, the trial court issued its decision on July 15, 1982. The court of appeals reversal came more than two years later, on October 15, 1984, and the supreme court decision almost a year and a half after that, on March 6, 1986.
251 Mr. Brown told me his lawyer "took a personal interest" in the case, even though his lawyer was "never fully compensated." Interview with Mr. Brown, supra note 94. That his lawyer was concerned about payment by the Browns is evidenced by the fact that in September 1984, in the pending case between the Browns and the Vosses, he filed a lien against Parcel C ($3,539.52 for legal services rendered from June 1982 through Sept. 1984). The Browns' lawyer continued to represent them after they had stopped paying installment payments and taxes on their property and had moved to Alaska. See supra notes 83-93 and accompanying text.
ticipate in a reconstructive translation of his own experience that might have facilitated settlement, perhaps even before the suit was filed?\footnote{252} Once the counterclaim arose, could his lawyer have persuaded him that vanquishing the traditional rule was not only unlikely, but was also unnecessary in principle, as onerous as it then seemed to him in operation, because the rule is based on his own concern for the rights of property owners to do as they please with their property? In other words, could his lawyer have effected a positive example of the assertion that “the power to define the client’s problem is one tool professionals may use to induce client cooperation with their prescription of appropriate behavior”?\footnote{253} Or, in the ideal of successful translation described by Professor Clark Cunningham, could his lawyer have used language to help the parties “recognize[] the conceptual difference[s] that separated them” in order to “revitalize[] perception,” “constitute[] new knowledge,” and “bridg[e] the gap” between them?\footnote{254}

\footnote{252} A “self-help law book,” Neighbor Law, advises the reader to approach his or her neighbor with the reader’s complaints and “to assume that the neighbor is unaware he is making your life miserable.” Cora Jordan, Neighbor Law: Fences, Trees, Boundaries and Noise 1/12 (1991). “[S]imply telling your neighbor will resolve a significant number of problems,” the book predicts, but “[d]on’t be surprised if the neighbor answers with a complaint of his own.” Id. Relations between Mr. Brown and Mr. Voss seem to be an extreme illustration of this warning, with Mr. Brown complaining of Mr. Voss’s relations’ trespass (according to Mr. Voss), Mr. Voss complaining about the Browns’ use of the easement, the men’s fight and its aftermath, the Browns suing over their general right to use the easement, and, finally, the Vosses rolling out the cannon of their counterclaim. See supra part II.


Surely it is professionally responsible, if not professionally imperative, for a lawyer to offer an alternate point of view to his client when the lawyer understands his client’s point of view and believes that the alternative would be more advantageous for his client. Indeed, the caring lawyer may even properly choose “paternalistic intervention when she believes that the very knowledge she has gained from her close engagement with her client demonstrates the need for action.” Stephen Ellmann, The Ethic of Care as an Ethic for Lawyers, 81 Geo. L.J. 2665, 2704 (1993).

Ellmann goes on to argue that the caring lawyer may, when faced with the possibility of treating a third party with indifference . . ., persuade her client to abandon his current, uncaring preferences. Declining to rank client autonomy as automatically superior to other moral concerns, the caring lawyer could properly feel that she should try to reshape her client’s decisionmaking rather than permit him to make a putatively independent, but uncaring, choice. Id. at 2708-09.

For citations to scholarly literature on client autonomy and a discussion of the difficulty in practice of distinguishing “a judgment that a client choice is autonomous from a judgment that a choice is in the client’s best interests,” see Simon, supra note 8, at 213 n.1.\footnote{254} Cunningham, A Tale of Two Clients, supra note 8, at 2490-91.
More prosaically, could his lawyer have persuaded him that it would be preferable to “win” as a practical matter—developing his property sooner and with less interference—by negotiating rather than litigating? It is not possible to tell from the record whether any settlement efforts were made and whether, if attempted, they could have been successful. The record in the case contains no reference to any such efforts, and none were reported by either party in his interview. Mr. Brown indicated to the contrary that he was determined not to be “pushed around,” not to acknowledge any assertion by Mr. Voss that the Browns might not be legally entitled to use the easement to benefit Parcel C.255

The Vosses, despite the aggravation and costs associated with the litigation, were almost certainly not as adversely affected as the Browns by the absence of a settlement and the years of litigation. As Mr. Voss concluded,256 the Vosses won in the end even though their lawyer’s narrative was ultimately unsuccessful.257 Nevertheless, Mr. Voss expressed frustration that he had not been able to tell his story,258 a reaction consonant with research about litigants’ dissatisfaction that has shown it to be “notably independent of outcome.”259 In sum, Mr. Brown won in court, at least in some sense lost in reality, and might have been better represented by a less faithful translation of his story; while Mr. Voss lost in court, won in

255 Interview with Mr. Brown, supra note 94.
256 Interview with Mr. Voss, supra note 83.
257 Mr. Voss told me that after the Supreme Court issued its decision, his lawyer told him he had won the case. He was surprised therefore, he said, to receive a notice that he was required to pay the Browns’ costs, but he paid the bill without comment. Interview with Mr. Voss, supra note 83. His lawyer may have reported accurately, even though the court left undisturbed the denial of an injunction, that the court agreed with the courts below that the Browns did not have a legal right to use the easement to benefit Parcel B.
258 See supra note 194 and accompanying text.

As Clark Cunningham reflected on his own representation of a case, a client may have concerns equally important yet unrelated to the outcome:

[I]t can be a mistake to assume that a client is interested only in “winning” the case rather than in understanding both “what happened” and what is happening. In that case the student lawyers and I had made the common assumption that our client was interested only in an outcome measured by dollars and that he did not particularly care what route was used to reach that outcome. In fact, he cared very much what route was used, what story was told on his behalf. Cunningham, A Tale of Two Clients, supra note 8, at 2492. Similarly, Naomi Cahn observes in her article on feminist litigation that sometimes it is “more important for the client to tell her story and for the trier of fact to hear it and incorporate the story into its decision than it is to win a major financial victory.” Cahn, supra note 8, at 17.

259 Cunningham, The Lawyer as Translator, supra note 8, at 1301.

A study of laypersons’ experiences in the legal system concluded that “[w]in or lose, people seem to be happier” if they have an opportunity to tell their stories. John M. Conley & William M. O’Barr, Rules Versus Relationships: The Ethnography of Legal Discourse 177 (1990).
reality, and might have been better represented if his lawyer had more faithfully translated his story and, in the process, refuted the suggestive narrative of the Browns' lawyer's story. The Vosses' lawyer might have effected a more faithful and ultimately more legally successful translation if he had explored the relevance of Mr. Voss's story, and of the available physical facts, to reasons why the courts in this case should not have departed from the traditional common law rule—either by an outright reallocation of the parties' rights or by applying a liability rule to reallocate the parties' rights but allow compensation in damages. 260

For departures from what Stewart Sterk calls the ordinary "geometric-box allocation" of property rights between two neighbors, the primary justification is that an allocation across boundary lines is faithful to the intent of the parties or their predecessors in interest. 261 This primary justification for departures from geometric-box allocations—represented, for example, by the rationale for easements by implication 262—is, of course, irrelevant to the dispute between Mr. Brown and Mr. Voss, who could not be said to have intended, either as part of a transaction or by a course of conduct, to agree to an expansion of the dominant estate.

A secondary justification for departures from the geometric-box allocation is that in bilateral-monopoly situations, in which "neither party has good alternatives to dealing with the other," 263 there may be high transaction costs that prevent neighbors from reaching efficient agreements. 264 Sterk argues that this secondary bilateral-monopoly justification, like the primary intent justification, does not supply a comprehensive rationale for all departures and that, even when it is most persuasive, the bilateral-monopoly justification itself rests on underlying social norms. 265 He therefore offers the alternative or additional explanation that departures from the geometric-box allocation both reflect and impose "social norms of neighborliness." 266 Neither this bilateral-monopoly justification nor this social norm of neighborliness supports the court's

260 Technically, of course, the court in this case applied the equivalent of a liability rule by denying only injunctive relief. In effect, however, the court accomplished an outright reallocation because the servient estate owners, the Vosses, had not pursued their damage claim and had not appealed the trial court's award of one dollar in (unsought) damages. See supra note 48 and accompanying text.
261 Sterk, supra note 66, at 56-67.
262 Id. at 63-64; see, e.g., CUNNINGHAM ET AL., supra note 18, § 8.4.
264 Id. at 61-62.
265 Sterk, supra note 66, at 83-88.
266 Id. at 90-103.
departure in *Brown v. Voss* from the geometric-box allocation of rights.

Under the Coase Theorem, there might be no economic efficiency justification for a judicial reallocation of the Browns' and the Vosses' rights. Whether the traditional common law rule assigns to one neighbor or the other the right to control use of the easement to benefit Parcel C, they will reach an agreement in the absence of transaction costs under which the right is allocated to the one who values it most. However, there may be transaction costs, and they may be high. For example, the neighbors may engage in nonoptimal bargaining strategies that prevent them from reaching agreement within a time limit, or they may engage in strategic bargaining that prevents them from ever reaching agreement. If so, reallocating rights, or imposing a bargain on the parties, may be efficient even when it is not possible to infer intent on the parts of the parties or their predecessors.

The Browns' lawyer's story capitalized implicitly on this rationale for a cross-boundary allocation. According to his narrative of the facts, an efficient bargain would award the right to the Browns because of its high value to them (access to their property) and its lack of any value to the Vosses, except as a strategic bargaining tool. Mr. Voss's irrational behavior and the Vosses' attempt through their counterclaim to thwart the Browns' higher-value use shows that strategic bargaining costs would impede private negotiations between the parties.

To counter these implications of the Brown's lawyer's narrative, the Vosses' lawyer could have argued, initially, that there was no bilateral monopoly in this case. The Browns sought property to develop in the general area in which Mr. Brown had grown up. The aggregated Parcels B and C, for which the Browns would need the Vosses' permission to access via the easement, was not the only property available for development. This case is quite different from one in which, for example, an established homeowner who

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269 Sterk, *supra* note 66, at 71.

270 *Id.* at 68-75; *see also* POSNER, *supra* note 263, at 62, 70.


272 This appeared evident from touring the far-from-fully-developed area, and the Browns and their lawyer refer at trial to the possibility of their having purchased other
accesses his property via an easement over Neighbor A’s property has an opportunity to annex a small, sunny strip of Neighbor B’s property in order to enlarge his vegetable garden.

Even if it were conceded that the situation involved a bilateral monopoly, the Vosses’ lawyer could have argued for two reasons that it was not a bilateral monopoly justifying a departure from the geometric-box allocation. First, and most simply, the facts explored in Part II show that there was no problem of strategic bargaining impeding the parties from realizing a gain from trade, a problem common to bilateral monopoly situations. Mr. Brown maintained throughout the dispute and maintains up to today that the Vosses had no right about which it was necessary to bargain. In other words, Mr. Brown was averse to bargaining with and consequently never attempted to bargain with Mr. Voss.273

The second reason the Vosses’ lawyer could have offered to explain why it was not a bilateral monopoly that justified a departure from the geometric-box allocation is that it was not a type of bilateral-monopoly situation in which it is efficient to and in which the law does depart from a geometric-box allocation. Two related problems that Sterk identifies with creating law that assigns rights to those who value them most highly are (1) the administrative difficulty and cost of ascertaining the relative value parties attach to a right and (2) the increased likelihood of litigation rather than private settlement when a rule is uncertain in application.274 In the cases of easements by implication from prior use, easements by necessity, easements by estoppel, and prescriptive easements, the efficiency advantages are “relatively clear without extensive, individualized investigation by courts” and “the alternative cross-boundary entitlements can themselves be defined with some rigidity.”275

In the case of easements by necessity, “a court need only ascertain that a landowner is landlocked and that he became landlocked on severance,”276 and the court need only provide for a right of way that will last as long as the necessity.277 In the case of easements implied from prior use, the court must undertake the

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273 See supra note 151 and accompanying text.
274 Sterk, supra note 66, at 74-75.
275 Id. at 75; see also id. at 75-79 (explaining why this is so with respect to each of the types of easements in turn).
276 Id. at 76; see, e.g., Cunningham et al., supra note 18, § 8.5.
277 See, e.g., Dukeminier & Krier, supra note 14, at 822.
somewhat more difficult task of determining the existence and nature of prior use before the severance. This determination regarding prior use, in turn, defines the scope of the easement by implication. With respect to easements by estoppel, the servient landowner's expenditures in reliance on informal permission, together with the dominant landowner's grant of informal permission and subsequent inaction, provide strong evidence of the relative value of the right to the neighbors and the nature of the easement. Similarly, easements by prescription also involve reliable indicia of relative value and of the nature of the easement: long-term use by the dominant estate owner and long-term inaction by the servient estate owner.

The Vosses' lawyer could have argued that weighing the relative hardships of the parties in this case, with and without an injunction—weighing the relative value of the right at issue—was not the simple matter that the Browns' lawyer implied with his story of a single-family house straddling two similar-sized lots. The situation, in fact, could be distinguished from a situation in which the Browns constructed a single-family house only on Parcel B. Parcel C was more than twice as large as Parcel B. The Browns had already constructed what was, in effect, a small house on Parcel B complete with carpeting, appliances, and a projected carport. The big house they were planning was to be considerably larger than a house that could have been constructed on Parcel B alone. Therefore, the land preparation and the construction work already undertaken and planned for the future was probably more substantial than the work that would have been undertaken on only one parcel. The Browns' lawyer had argued the relevance of the more southerly servient landowners' lack of complaints, but a walk through the properties of these neighbors immediately reveals that they have complete visual and sound privacy from Parcels B and C. This insulation is created by heavy vegetation and the manner in which the houses that were built to the south have been situated. In other words, their physical relation to the Browns' property is entirely different from the Vosses'.

278 Cunningham et al., supra note 18, § 8.4; Sterk, supra note 66, at 76-77.
279 Sterk, supra note 66, at 77.
280 Id. at 78-79.
281 See infra notes 282-83 and accompanying text.
282 See Fig. 2, supra page 1481; see also supra notes 127-30 and accompanying text.
283 See supra note 167 and accompanying text.
284 See supra note 142 and accompanying text.
With respect to the Browns’ potential hardship, the easement was not their only access to Parcel C: they could have built a driveway from the public highway passing through the foot of Parcel C up the hill to their building sites, a project that would have been expensive but that would have been facilitated by the width of their “double lot.” The Vosses’ lawyer could have argued that the existence of all of these facts made the task of weighing relative hardships both complex and costly. Instead of burdening the court with this task, why not let the parties weigh the relative hardships by bargaining?

Additionally, the Vosses’ lawyer could have argued that the trial court’s alternative cross-boundary entitlement was far from well-defined. The trial court essentially rewrote the original easement with its grant of permission to the Browns to use the easement to benefit Parcel C as well as Parcel B “as long as [the Browns’s] properties (B and C) are developed and used solely for the purpose of a single family residence.” Because of the unique nature of the trial court’s cross-boundary entitlement, there is no body of law that could help define it. At the time of the decision, there were already two habitable structures on Parcel B. What did the trial court mean by its limitation of the Browns’ use of their property to a house straddling the line between Parcels B and C? Did the new house actually have to sit squarely on the line? If outbuildings were permissible, could the Browns have erected structures on Parcel C for dry-docking a boat or storing vehicles and equipment used in a business? Could they have built additional habitable structures for guests or rent-paying tenants?

In addition to the easements by implication, necessity, estoppel, and prescription, another kind of bilateral-monopoly case in which the law departs from the geometric-box allocation is the case in which a court denies injunctive relief and awards only damages to a landowner whose property has been encroached upon by a neighbor’s “innocent” construction of an improvement over their mutual boundary line. In such a situation, the court relies on the

285 See supra notes 180-85 and accompanying text.
286 Findings of Fact and Conclusions of Law, supra note 23, at 5.
287 See supra note 159 and accompanying text.
288 Sterk, supra note 66, at 80.

In cases in which a boundary is altered by application of the doctrine of adverse possession, there are, as discussed above in connection with the acquisition of prescriptive rights, reliable indicia of the relative value of the adversely possessed strip of land: long-term use by the adverse possessor and long-term inaction by the adverse possessor’s neighbor. See id. at 79.
concepts of "relative hardship" or "balancing the equities."289 Once again, the court's underlying concern—that strategic bargaining difficulties will impede negotiation between the parties290—is not relevant to Brown v. Voss, in which there was no attempt at negotiation.291

Furthermore, the court generally will grant injunctive relief, and require removal of the improvement, when the encroaching improver knew he was encroaching, or should have investigated more carefully.292 The underlying reason for granting injunctive relief in such cases is relevant to the case of Brown v. Voss.293 Permitting the encroacher to evade responsibility for understanding information in the public records regarding the boundaries of his and his neighbor's property creates the unnecessary judicial burdens of first determining the encroacher's knowledge294 and, second, determining the relative hardships to the parties of granting or denying injunctive relief.295 The Vosses' lawyer thus could argue that Mr. Brown should have known from the documents in his chain of title that his easement was not created to benefit Parcel C, and could not therefore be used in such a way without the Vosses' permission. The courts should not expend their resources to protect him from the consequences of his carelessness.

Like the bilateral-monopoly justification, a social norm of neighborliness does not support a departure from the traditional common law rule in Brown v. Voss. The social norm that Sterk sees reflected in and enforced by departures from geometric-box allocations is a duty of neighbors to cooperate with one another in a relationship of "continuing mutual dependence."296 A failure to meet this duty generally results in an actual cross-boundary alloca-

289 Id. at 80.
290 Id. at 79-83.
291 See supra part II.A-B.
292 Sterk, supra note 66, at 80-81.
293 Brown v. Voss, 715 P.2d 514, 519 (Wash. 1986) (Dore, J., dissenting). The dissent made this point, noting that the Browns were responsible for creating their own hardship. They knew or should have known from the public records that the easement was not appurtenant to [P]arcel C. . . . In encroachment cases this factor is significant . . . . "The benefit of the doctrine of balancing the equities, or relative hardship, is reserved for the innocent defendant who proceeds without knowledge or warning that his structure encroaches upon another's property or property rights."

294 Sterk, supra note 66, at 82.
295 See supra notes 76-80 and accompanying text.
296 Sterk, supra note 66, at 95-96.
tion of entitlements only when there had been a prior course of dealing between the neighbors, such as a grant of land, or when a neighbor's assertion of the entitlement has continued without objection over a period of time, as in the case of an easement by prescription.\textsuperscript{297} Even when there has been an "extensive course of dealing" between the neighbors, courts generally make cross-boundary allocations only if "the neighbor [awarded the entitlement] could otherwise face a serious predicament."\textsuperscript{298}

Here again, the Browns' lawyer's story capitalized implicitly on this basis for cross-boundary allocations, and its success in this regard is reflected in the assumption made by many of my students that the Vosses had been and were spitefully interfering with the Browns' plans.\textsuperscript{299} According to the Browns' lawyer's narrative of the facts, Mr. Voss's conduct must have been and continued to be unneighborly because there was no reason for Mr. Voss to oppose the Browns' use of the easement to benefit Parcel C. The Vosses stood by while the Browns invested in their property, and the Browns' plans would be completely stymied without access to Parcel C via the easement. To counter these implications of the Browns' lawyer's story, the Vosses' lawyer would have found Mr. Voss's story and the physical facts the most relevant and useful of all.

There had been no prior course of dealing between Mr. Brown and Mr. Voss. The Browns bought their parcels from others.\textsuperscript{300} There had been no acquiescence by the Vosses in the Browns' use of the easement. Because the Vosses had never learned the specific nature of the Browns' planned use,\textsuperscript{301} the Vosses' conduct could not have constituted acquiescence to that use; and the Browns knew, in Mr. Brown's own words, that Mr. Voss generally "objected to everything."\textsuperscript{302} The lawsuit began, in fact, with the Browns' claim against the Vosses that the Vosses were interfering with their use of the easement.\textsuperscript{303} Mr. Voss's complaints against Mr. Brown, before and after the lawsuit was filed, however zealously he may have felt and pursued them, were founded on what Mr. Voss experienced as a lack of neighborliness on Mr. Brown's

\textsuperscript{297} Id. at 96-100.
\textsuperscript{298} Id. at 100-01.
\textsuperscript{299} See supra text accompanying note 81.
\textsuperscript{300} See supra note 184.
\textsuperscript{301} See supra notes 147-54 and accompanying text.
\textsuperscript{302} Trial Transcript, supra note 48, pt. II, at 137 (direct examination of Mr. Brown).
\textsuperscript{303} See supra note 45 and accompanying text.
And the predicament the Browns would have faced without the use of the easement to benefit Parcel C was not as serious as it would have been if Parcel C had really been landlocked, as at least the two appellate courts believed it to be.  

If Mr. Brown had been willing to negotiate with Mr. Voss, the coin he would have had to offer might not have been monetary; it might have instead been a demonstration of respect for the Vosses' legal right and a willingness to make the Vosses privy to the Browns' development plans, both initially and as the plans were refined over time. In their relations, a social norm of neighborliness might have indicated a positive kind of strategic behavior aptly described in a recent murder mystery novel set in suburban New Jersey. The detective-narrator refers to his grass-obsessed neighbor's lawnmower:

[a] fearsome . . . two-seater mower, which reduced his tiny lawn to Astro Turf and decimated any tranquility that might have arrived with Saturday mornings. Worse, I was forced to repeatedly admire his machinery, even though I found it wasteful, polluting, and intrusive. But in suburbia, where today's enemy can provide tomorrow's school emergency-contact number, you offend your next-door neighbor only after life-and-death provocation.

IV. Teaching the Case of Brown v. Voss

For teaching the case of Brown v. Voss, does it matter that the narrative of the opinion is incomplete and inaccurate, as explicated in Part II of this article? In an important sense the answer is "no," given that a law professor must train students to analyze and apply
Particularly in the first year of law school, that may involve helping students substitute their initial emotional responses to the facts of a case with more complex and reasoned responses.

Law professor Paul T. Wangerin discusses this aspect of legal training in an article on the cognitive and moral development of law students. He applies developmental psychologist William Perry’s theory about students’ progressive stages of cognitive development, the theory that students move from a dualistic perception that “all information can be classified as either right or wrong and . . . uncertainty is an error of some sort” toward, and perhaps then beyond, a more multiplicitic perspective in which “‘all knowledge and values . . . [are] contextual and relativistic.’” Wangerin argues that the early, dualistic kind of thinking, “which must be rooted out,” may appear as “expressions by students of values, feelings, and beliefs.” To supply and thus emphasize narrative contexts of Brown v. Voss may only encourage such dualistic expressions. Furthermore, it is precisely the doctrinally anomalous quality of the Brown v. Voss opinion that makes it particularly useful intellectually for exploring the content of and theories underlying easement law, as explained in Part I of this Article. It is presumably this quality of the opinion that makes it attractive to the property text authors who have included or described it in their casebooks.

There are, nevertheless, a number of drawbacks to teaching the opinion in its incomplete and inaccurate isolation. First, it may make the cognitive task of understanding the case more difficult. Secondly, it divests the case of its value as a lesson in lawyering. And thirdly, it limits students’ ability to evaluate the court’s decision.

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308 See, e.g., Spiegel, supra note 13, at 585 (discussing the view of the case method as a “systematic way of teaching one important practice skill”).


310 Wangerin, supra note 309, at 1249.

311 Id. at 1282 n.171; see also Payton, supra note 13, at 236.

312 See supra note 18 for a list of these casebooks.
With respect to the cognitive task of understanding the case, research on the cognition of learning processes has suggested that students “come to the learning process with a base of knowledge and values as well as some cognitive structures already in place,” and that students learn not as passive “recipient[s] of information” but as active “constructor[s] of meaning,” either incorporating learning within prior knowledge or modifying prior knowledge.\(^{313}\)

Most students come to law school with some appreciation for and perhaps even some experience of the kinds of personal conflicts that may arise between neighbors. Most also arrive with little or no appreciation for the arguments that may be made for and against cross-boundary allocations of property entitlements. Thus, divorcing the unfamiliar doctrinal and theoretical territory from the more familiar terrain of neighborly feuding may make it more rather than less difficult for students to construct new legal meanings for themselves.

This possibility may account in some part for my observation that many students appear to have an easier time than they have with *Brown v. Voss* when, earlier in the semester, they analyze the doctrine and theories of the adverse possession case, *Van Valkenburgh v. Lutz*.\(^{314}\) The *Van Valkenburgh* opinion, which involves, *inter alia*, complex and internally inconsistent notions about the state-of-mind requirements for adverse possession,\(^{315}\) is preceded in the text by an extensive “prologue” in which the text’s authors summarize the background of the case based on information contained in the record and the briefs submitted by the parties.\(^{316}\) It is followed by an “epilogue” in which the authors summarize the aftermath.\(^{317}\) Students learn about the history of the couple claiming title by adverse possession (the Lutzes), the incident in 1946 that ignited the hostility between them and the owners of the disputed property (the Van Valkenburghs), and something of the lawyering of the case.\(^{318}\) Although the Lutzes lost the case, students learn both that the Van Valkenburghs failed to execute the judgment

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315 Dukeminier & Krier, supra note 14, at 128-30.

316 *Id.* at 125-28.

317 *Id.* at 134-35.

318 *Id.* at 125-35.
against the couple's house—because of a lawyer's procedural error—and that subsequent, protracted litigation by other members of the couple's family kept the family in actual possession of the disputed property until 1968, more than twenty years after the commencement of hostilities. Even though most of this information is not as relevant to the issues in that case as the information in Part II is relevant to the issue in Brown v. Voss, it gives students a concrete and familiar context within which they may analyze the lawyers' strategies and the legal issues.

With respect to its value as a lesson in lawyering, the Brown v. Voss opinion's incomplete and inaccurate narrative hinders the kind of learning process through which students can explore the activity of translating clients' stories. Theories about the development of professional knowledge and skills have stressed the value for students of participating in a community in which practitioners use their knowledge, of undertaking practical exercises under the guidance and supervision of expert practitioners, and of developing a personal stake in their knowledge. There is a large and growing body of literature that includes explorations of different ways these general notions can be applied to legal education. In the law school setting, live-client clinical offerings most closely approximate these educational ideals of experiential learning, requiring students to integrate doctrine and theory with practice in order to represent their clients and to reflect with their instructors on that representation. Simulated skills exercises to a lesser extent involve similar requirements and achieve similar benefits. But

319 Id. at 134-35.
even traditional classroom discussion can simulate and stimulate in an introductory way this kind of learning when a dramatically visualized case, in Llewellyn's exhortation, "foams as golden as Toronto ale." 323

The opinion alone in Brown v. Voss is too flat to fully facilitate this kind of learning. With only the opinion to go on, it is difficult for students to enter imaginatively into the lawyering process; they cannot engage in the descriptive analysis illustrated in Part II of the lawyers' narrative strategies. The strategies are concealed behind the drawn, opaque curtain of the opinion. Nor can students engage in the critical analysis illustrated in Part III of the lawyers' narrative strategies, which would allow them to ponder the doctrinal, theoretical, and, ultimately, professional responsibility questions raised in that part about the lawyers' representation of their clients, including the perhaps paradoxical questions of whether one lawyer's translation of his client's story was too faithful and the other's not faithful enough.

Finally, it is the questionable success of one lawyer as translator and the failure of the other that makes it difficult, especially for first-year law students, to evaluate critically the Supreme Court of Washington's cross-boundary allocation of rights. 324 Students lack a story complete enough to engage fully in the analysis illustrated in Part III of whether the court's departure from the geometric-box allocation of property rights is supported by any of the justifications that courts and scholars have advanced for such departures.

323 Llewellyn, supra note 4, at 61.

In response to a similar passage in The Bramble Bush, Jack Himmelstein responds that "I read these words as a plea for experiential learning. By experiential learning in law I do not mean clinical courses, although clinics have grown in part because of ... that need. By experiential learning, I mean, as I read Llewellyn to mean, the integration of idea and human experience." Elizabeth Dvorkin et al., Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism 149 (1981) (commentary by coauthor Jack Himmelstein on Llewellyn's The Bramble Bush).

324 "Failure to translate for the client ... impoverishes the law. Like all forms of knowledge, law arises out of experience. Clients are the source of that experience. Their understanding of that experience is likely to retain elements lost in the legal understanding, elements that might enrich our legal knowledge." Cunningham, Tale of Two Clients, supra note 8, at 2493. First-year law students' limited exposure to the law makes it more difficult for them than it is for more advanced students and lawyers to imagine the possible stories that may have been lost in translation.
In addition, the opinion's opaque narrative limits students' ability to respond emotionally to the character of the dispute between Mr. Brown and Mr. Voss. This limitation circumscribes their ability to evaluate the court's decision in the view of those who maintain that "fine attention and good deliberation require a highly complex, nuanced perception of, and emotional response to, the concrete features of . . . context, including particular persons and relationships." It is my perhaps immodest hope that the parts of this Article, and the stories they tell, demonstrate to some degree the validity of this view by providing the reader with the experience of evaluating and reevaluating the court's decision as he or she learns more about the story of the dispute. When students go without this experience, they are in a position not entirely unlike that of the jurist who resigned from the bench when a head injury rather than a lack of information deprived him of emotional response. He explained "that he could no longer enter sympathetically into the motives of anyone concerned, and that since justice involved feeling, and not merely thinking, he felt that his injury totally disqualified him." 

Exploring these pedagogical limitations of studying the opinion in isolation has led me to question whether they may be related

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325 Nussbaum, supra note 11, at 7 (describing novelist Henry James's belief); see supra notes 15-22 (discussing the limitations of the opinion and their impact on the educational value of the case); see also Henderson, supra note 11; Sandra Janoff, The Influence of Legal Education on Moral Reasoning, 76 MINN. L. REV. 193, 234 (1991) (psychologist's study of law students, supporting call for legal education to "reject the sexual discrimination between the putative dualisms of human behavior—i.e., thinking and feeling, objectivity and subjectivity, reason and emotion"); Frances Olsen, The Sex of Law, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 453 (David Kairys ed., rev. ed. 1990).

In a review of a book on moral theory, law professors Patricia A. Cain and Jean C. Love comment on the danger of teaching cases out of a fuller factual context. They conclude that the book author's hypotheticals and our edited cases [in law school texts], pared of their full facts, are valuable teaching tools. A good teacher can use the starkness of such stories to capture a student's attention. But when such stories are stripped of real human context, our intuitive reactions to them may be distorted. Therefore, when we are building moral and legal theory in the classroom, we must be sensitive to this risk. When stories are used as foundations for theory, perhaps they should be told in full.


to a kind of emotional stress experienced by some law students. It is beyond the scope of this meditation on one case in context to seek an answer in the significant body of academic literature exploring the emotional stresses experienced by law students. But I cannot conclude without adding an admittedly personal observation. Teaching the case of Brown v. Voss has not only led me to feel peculiarly unhelpful—as if I were a repository of empty analytical facts—but it has also evoked a feeling of discomfort I experienced as a first-year law student, and thus caused me to wonder if I have become, unwittingly, a collaborator in an element of legal education that troubled me as a student.

At the University of Chicago, I found most of my professors dazzlingly talented teachers, yet sometimes, in some of their classrooms, I felt alienated from their prodigious analytical feats. I think I perceived an implicit, even if entirely unintended, message in their exegesis of cases like Brown v. Voss that the more complex, nuanced narratives the opinions might lack, or only hint at—and the emotional responses such narratives might engage—were not important for lawyering and for judging the cases. That message seemed to deny the value of the knowledge one had brought to law school and, perhaps, even the value of the person who possessed that knowledge. And that message seemed to be fundamentally false. Is the perception of such a message by some students an inevitable part of their educational journey?

327 For a discussion of this topic, see, for example, Stephen B. Shanfield & G. Andrew H. Benjamin, Psychiatric Distress in Law Students, 35 J. LEGAL EDUC. 65 (1985); Stone, supra note 321; Watson, supra note 321.

328 See supra note 313 and accompanying text. As Jane Schukoske put it in an article on teaching law reform: “Traditional legal education gives students the impression that their experiences and previous education are secondary to the legal reasoning skills they are acquiring in law school. . . . Students need to hear their own voices as they learn to think about and use the law.” Schukoske, supra note 322, at 193.

329 See supra part IV.

Andrew S. Watson, a professor of psychiatry as well as law, describes a related reaction by law students to the fact that the appellate opinions they study report only a small part of the events as they occurred. . . . They reveal little, if anything at all, about the actual lawyer-client relationship, but only the conclusions which result from this process. This inevitably frustrates the avid desire of many students to find out how lawyers function, and will thus generate more resentment. . . .

Watson, supra note 321, at 118-19.

330 A closely related phenomenon is cogently described in Dvorkin et al., supra note 323, at 2 (in the book’s introduction):

The task of learning these [analytical] skills is a difficult, perhaps never-ending one, and it is not surprising that it absorbs most of the energy of teachers and students. Legal argument has a narrowing and focussing nature and when issues are put beyond the scope of what is legally relevant, by such concepts as
be waylaid in part by our clinical offerings, by our simulated skills exercises, and, in our traditional classrooms, by marshalling when we can—and acknowledging the significance of—the narrative contents and contexts of the cases we teach?

**Conclusion**

Investigating the background of *Brown v. Voss*, and telling and retelling the stories of the case through the sections of this Article, has been, in the lawyer's clichéd metaphor, like peeling away layers of an onion. The day I visited Parcels A, B, and C and interviewed Mr. Voss, I sat with him in the utility building the Browns built on Parcel B, in an area he was using as a workshop. We could not sit in his house, he said, because his wife was away in the hospital, recovering from hip surgery. He had just returned from his daily visit when I telephoned. We sat at his work table, with his ammunition-reloading equipment spread out in front of us and his hunting knife stuck upright in the surface. When we were almost done talking, as the sun dropped behind the hillside at our backs, I carelessly asked him how many children he had. I had been confused by the personal history he related.

In response he told me a terrible story of the death of the older of his two sons, which occurred before the Vosses bought the property on the Hood Canal. His son was his hunting and fishing companion, an athletic and intelligent high school student. Believing he was suffering only from a minor wrestling injury, Mr. Voss was caring for him at home after a visit to the doctor. He put him to bed on the living room sofa. Early the next morning he found him on the living room floor, "cold." As Mr. Voss spoke, and his eyes clouded white with grief, I thought about his prominent "No Trespassing" signs and his report of Mr. Brown's complaint, when the men first met, that his nephew and his nephew's infant son had trespassed on Parcel B.

Before I departed, Mr. Voss speculated about why the Browns, sometime before they abandoned their property, had pre-

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331 Interview with Mr. Voss, *supra* note 83. I find it difficult to retell this story of his son's death, and I fear my reader will feel I have invaded Mr. Voss's privacy. But he made it clear to me both that he had no reluctance to tell his story and that he had no interest in the academic aftermath of the dispute. He was not interested, for example, in seeing the opinion in the case as it is presented in a law school text or in learning about the results of my research.

332 See *supra* notes 138, 198 and accompanying text.
pared a large, flat area high up on Parcel C. He remained puzzled by this fact and wondered darkly whether they had been contemplating illegal agriculture. He never doubted that they intended to build their house where Mr. Brown had testified, on the line between Parcels B and C. To my more skeptical mind, the area seemed like a perfect site for a large house, high up on the hill for a good view of the canal, accessible from the upper portion of the Browns' new road, and a nice distance away from the habitable utility building on Parcel B. The Browns consistently maintained that they intended to build on the line between the parcels, but it seems odd to me, nonetheless, after the Browns had spent more than $11,000 preparing their property, had employed an architect, and had located and built their utility building, that Mr. Brown would say in answer to a question at trial about whether the house would be roughly centered on the line: “No, maybe yes, yes and no; we haven't located it exactly.”

In the parody of conventional education with which I began the Introduction, Huck confides in his letter to Tom's aunt that Jim has come to him for help escaping. “Talk about ethical questions! I didn't know what to do. And my ethics text . . . just didn't seem to help.” He also reports that “all these months of study have really helped me establish my priorities, and I'm already thinking about college and career. No more wasted moves for me. Judge Thatcher has been urging me to consider a career in law.” If Huck does go to the bar, I hope he remembers the lessons he learned on the river in Twain's account as well as the ones he studied in the summer school classroom. I hope he thinks hard and

333 See supra note 46 and accompanying text.
334 Trial Transcript, supra note 48, pt. II, at 131-32 (direct examination of Mr. Brown). Mr. Brown testified that the Browns' architect, a resident of Alaska, “came down and oversaw the property, and gave us general ideas of grades and so forth, so we could somewhat conform to what he needed for the type of home we have in mind.” Mr. Brown said that “[i]n all probability” this architect would design their home for them. Id.
335 See supra notes 160-64 and accompanying text.
336 Trial Transcript, supra note 48, pt. II, at 69.
337 The Talk of the Town, supra note 1, at 27.
338 Id.
339 On learning the technical art of river boat piloting, Mark Twain related how he asked an experienced pilot how he would ever be able to tell a wind reef and a bluff reef apart. “I can't tell you. It is an instinct. By and by you will just naturally know one from the other, but you never will be able to explain why or how you know them apart.”

It turned out to be true. The face of the water, in time, became a wonderful book—a book that was a dead language to the uneducated passenger, but which told its mind to me without reserve, delivering its most cherished secrets as clearly as if it uttered them with a voice.
creatively about how to translate his clients' stories into the language of law, with both his head and his heart. 340

MARK TWAIN, LIFE ON THE MISSISSIPPI 57 (Airmont Classic ed. 1965) (1883) (excerpted at greater length in the section on "Learning the Language of the Law" in JAMES B. WHITE, THE LEGAL IMAGINATION 10-12 (1973)).

340 As Curtis J. Berger passionately wrote: "I believe that legal education is too single-mindedly absorbed in affairs of the head and too inattentive to—indeed, rejecting of—matters of the heart. . . . I believe that the head is attached to the heart . . . ." The Legal Profession's Need for a Human Commitment, 3 COLUMBIA UNIVERSITY GENERAL EDUCATION SEMINAR REPORTS No. 2, 13-15 (1975).