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STOCK STORIES, CULTURAL NORMS, AND THE SHAPE OF JUSTICE FOR NATIVE AMERICANS
INVOLVED IN INTERPARENTAL CHILD CUSTODY DISPUTES IN STATE COURT PROCEEDINGS

Diana Lopez Jones^{a1}

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***458 Prologue**

Imagine two tales. The stories are told at separate times, in separate places, and for different reasons. Consider the story behind the stories--i.e., how do the storytellers envision the concepts of fairness, justice, and personal responsibility?

In the first story, the all-wise king sat on a throne above a multitude of cowering supplicants.¹ Among the petitioners were two women, would-be mothers, each claiming parenthood of a single child.² Unable to determine which woman was the baby's true mother, the king called for a sword; he then ordered that the baby be sliced into equal parts and divided between the two women.³ The baby's true mother threw herself at the king's feet, desperately pleading for her child to be spared, even if the false mother received custody of the child.⁴ Realizing that the woman begging for mercy on the child was the true mother, the king immediately halted the execution and gave the mother her baby.⁵ The king's decision became known throughout the land, and all the people stood in awe of the king because the wisdom of God informed his decisions.⁶

The second story tells the tale of a beautiful young woman who lived alone in the mountains.⁷ She had many suitors, but she chose not to marry.⁸ One day, as she lay sleeping, a drop of rain fell on her stomach and she became pregnant with twins.⁹ All the young woman's suitors, hoping to marry her, claimed the babies as their own.¹⁰ When the twins began to crawl, the woman called her suitors together and told them to form a circle around the two babies.¹¹ If the twins crawled up to any man, then he would be the father and she would marry him.¹² However, the babies climbed upon no one, and the woman never married.¹³

***459** Consider the forms of justice that must be common in the cultures that produced these stories. If, as in the first story, resolution is properly imposed on litigants by a wiser, more powerful, and possibly divinely-inspired being, a member of that community is unlikely to accept judgment by a culture that regards justice as a discernable event in which independent, self-determinative sources make their own life choices. Likewise, if a person believes that justice is related to individual choice with its inevitable link to life consequences, a unilateral resolution imposed by a higher authority-- one not part of that person's community or its daily life--is unlikely to resonate as an act of justice with that individual.¹⁴

In the American judicial system, an act of justice is fundamentally, inextricably linked to the concept of notice and the opportunity to be heard.¹⁵ Litigants are, essentially, storytellers.¹⁶ Each party comes to the table with a different version of the same story, i.e., a version that she believes will entitle her to a favorable judgment.¹⁷ A disappointed litigant sometimes fails to realize that the final judgment results not from her story alone, but from the judge's reinterpretation and narration of the events giving rise to the case.¹⁸ Although the judge's rendering of the story determines the ultimate remedy as between the parties, it also has the unique power to shape the story itself.¹⁹ Judges select facts for their narratives after the conclusion of the events giving rise to the litigation, and expressly for the purpose of "'situat[ing] the case doctrinally.'"²⁰ From a litigant storyteller's point of view, however, justice is done only when the litigant's original story dominates the judicial narrative and drives the end result.

When the judge and the litigants start with different concepts of justice, as in the stories told above, the judge's final narrative may--accidentally or intentionally--divest the litigants' stories of important cultural nuance.²¹ The loss of these subtle distinctions may implicitly devalue the storytellers' culture and suggest doubts about whether the judge has reached a fair result.

***460 I. Introduction**

In an American courtroom, a litigant relies on the evidence and his words--strung together in story form--to convince the judge (or jury) of the merits of the case. The litigants compete, within strict parameters, to tell the stronger and more resonant story. Because stories almost always begin with a shift in "the way things generally are,"²² stories of change essentially form the foundation for much litigation, especially in family courts.²³ The stories presented by litigants in family court are not only emotionally compelling, but they also incorporate themes common to daily life: family conflicts, spousal relationships, parental responsibilities, financial difficulties, and child-rearing concerns. Therefore, this Article uses the competing stories offered by two Native American litigants in a bitterly contested child custody case²⁴ to suggest ways to enhance the authority of judicial narrative when the judge's cultural norms differ from those of the litigants.

Initially, this Article argues that a key characteristic of a successful litigant's narrative is the story's ability to evoke immediate recognition in the judge. Under most circumstances, this immediate recognition, or familiarity, has an emotional rather than logical quality.²⁵ Scholars refer to this quality of unconscious familiarity as a "stock story."²⁶ Even though a litigant's stock

story has great emotional or psychological pull, the ultimate storyteller is the court, whose duty it is to digest these stock stories and return them to the parties as a judicial narrative.²⁷ American jurisprudence demands that the court set aside its story biases to administer justice.²⁸

***461** Next, this Article examines whether and to what extent it is possible for a fact finder to eliminate story biases from her judicial narrative despite the thorny influence of culture, particularly indigenous culture, on the courtroom drama. In law, as in any story, the narrator's perspective influences the selection of facts, the weight accorded to the selected facts, and the order in which the story is told.²⁹ Consequently, the judicial narrator does not simply "tell a story"; instead, she purposefully culls specific facts from the parties' narratives in order to support her ultimate decision.³⁰ This Article further argues that when a court is faced with a decision involving unfamiliar cultural norms, it is not unusual for a judicial narrator to ignore the cultural aspects of the case, opting instead for a strict application of the Rule-of-Law model.³¹ As a result, cultural narratives familiar to and resonant with Native American litigants can become distorted in ways that make them indistinguishable from courtroom narratives produced by the dominant culture.³² If the cultural portion of the judge's narrative is absent, a Native American litigant may not recognize the legitimacy of the decision even if it is based on the Rule of Law.³³ Much as a Solomonic story may not resonate with an individual who believes the twin babies should choose their own father, a judicial narrative lacking a cultural component may be so unfamiliar to a Native American litigant that he may reject the judge's story. In other words, since the judge's narrative does not accurately reflect "his" story, a Native American litigant may also resist the judge's proposed remedy because the narrative's version of justice does not apply to him.

Finally, this Article suggests a stewardship model as a way to resolve competing family court narratives when disparate cultures are involved. In family court cases, especially where the custody of a Native American child is at issue, the judge's application of the Rule-of-Law model may adhere to precedent, but leads to a rigid and sterile decision,³⁴ devoid of the cultural nuance that many Native American litigants value. On the other hand, by resisting the lure of a decision based on the Rule of Law and instead implementing a model of stewardship, the judicial narrator may engage a Native American litigant's sense of justice simply by acknowledging the richness of Native cultural and familial relations.³⁵ This Article concludes by suggesting that given two equally valid, ***462** competing narratives, thoughtful legal practitioners might soften the application of the Rule-of-Law model by negotiating fiduciary concessions from the custodial parent. For example, a fiduciary concession might take the form of an agreement between the parties to allow the child to take part in seasonal ceremonies important to the non-custodial parent's tribe. Such concessions, embedded into the judicial narrative, might raise the cultural profile of the opinion and legitimize the narrative in the eyes of a cultural minority.

II. Swapping a Story for a Remedy: In the Courtroom, Litigants Exchange Narratives in Competition for Their Desired Legal Outcome

Think of a story as the currency of basic human interaction.³⁶ Swapping stories allows people to acknowledge other members of a community and interact with them in socially meaningful ways.³⁷ Often, the purpose in exchanging stories with another is not simply to recall an experience, but to assert and confirm a certain perception of the world based on a shared meaning.³⁸ Under normal circumstances, the stories build on each other and form an "interpretive network," or common way of understanding the world that shapes both social expectations and personal responses.³⁹ Eventually certain stories, or "stock stories," permeate a culture so thoroughly that the teller of a stock story need only supply his audience with a few discrete facts because those facts are automatically imbued with "assumed" background information.⁴⁰ For instance, when two individuals are faced with a difficult choice, one person might say to the other, "Why don't we split the baby?"⁴¹ When both parties share a common American Judeo-Christian upbringing, the aphorism is clear, though multi-layered: it means that there is no good solution, that

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only divinely-inspired wisdom can save the day, and that compromise on both sides will resolve the conflict. Therefore, as long as the parties share an understanding of the same *463 basic story, there is no need to retell the entire tale. Instead, the tale is understood instantaneously after reference to only a few key facts.⁴²

A litigant whose story can be instantly grasped--either emotionally or intellectually--by the judge has an undeniable advantage in the courtroom.⁴³ Litigants tell competing stories to the judge to persuade her of the legitimacy of each litigant's version of events.⁴⁴ If the judge can be persuaded of the merits of a litigant's story, the judge will elevate that story by incorporating all or part of it into her judicial narrative.⁴⁵ Although legal processes and rules of evidence limit the nature and quantity of facts considered by the judge, the litigants' individual stories have the power to influence “real effects in the material world . . . [and] shape the course and direction of the law.”⁴⁶ The judge, of course, reacts not to the actual event that gave rise to the story, but to the storyteller's version of that event.⁴⁷ Hearsay or other rules may prohibit the judge from considering some parts of the story,⁴⁸ so a litigant must carefully consider how the courtroom rituals could alter the telling of his story.⁴⁹ As a result, successful litigants seek to influence the judicial narrative through a ritualized, or ceremonial, exchange of “story” for “remedy.”⁵⁰

A. Familiar Stock Stories Tend to Favorably Influence the Judicial Narrative

No matter how many stories are told in the courtroom, the law has the last word. From an advocate's perspective, an important key to victory is whether, and to what extent, his client's story will resonate with the judge.⁵¹ In other *464 words, the advocate must present the client's story in a way that strikes a familiar or intimate note with the judge and impels her to favorable action.⁵² The advocate does not simply repeat the client's story ad infinitum, but rather re-presents the client's story--i.e., the advocate shows the client to the world not as he is, but as he wants to be understood.⁵³ This is the art of persuasion.

Persuasion of this sort is generally successful because, as a rule, people tend to gauge complex matters like frequency, probability, and causality⁵⁴ on the basis of superficially generated facts and easily digestible information--i.e., sound bites.⁵⁵ Because of the need to process vast amounts of information quickly and efficiently, people tend to accept common stock stories without independently assessing them.⁵⁶ This does not mean that most people mindlessly accept all stock stories as true.⁵⁷ Instead, it means that most people tend to make broad comparisons between competing stock stories: their cognitive judgments are relational, rather than objective.⁵⁸ When a listener can identify a stock story sufficiently similar to his own, he makes a “likeness judgment.”⁵⁹ Therefore, the facts of the story exist not independently of, but in relation to, a stock story that the listener already knows.⁶⁰ Because the number of variables required to make a single judicial decision would be overwhelming without a narrative structure to rely upon,⁶¹ the story that is familiar to the judge almost always wins.⁶²

B. Familiar Judicial Narratives Tend to Enhance a Litigant's Perception of Justice

In the American legal system, judicial storytelling is an exercise of power.⁶³ Ultimately, the judge selects one of the litigants' stock stories as the primary basis for the judge's narrative.⁶⁴ The judge's choice to elevate one story over another has profound implications for the litigants and for the ultimate *465 trajectories of their personal family histories.⁶⁵ Simultaneously however, the judge must consider whether, and to what extent, her narrative will be accepted--not only by the parties to the litigation--but also by the general public, the legal community, and of course, the appellate courts. Therefore, in constructing a narrative, the judge must use special care to develop a “coherent plot”⁶⁶ that will be familiar to many people in many roles, all

of whom bring their diverse life experience to the table when interpreting a stock story. If the judge successfully identifies and incorporates certain stock structures into her narrative, others will recognize the story as one familiar to their own experience.⁶⁷ When the judicial narrative is familiar enough, others will agree on its worth as an act of justice simply because of its repetitive themes.⁶⁸ Such is the power of stare decisis.

Consequently, the successful advocate must shape his story with two goals in mind. Not only must the story identify the client's preferred remedy,⁶⁹ but because his success depends on whether the court can easily make a likeness judgment, the advocate must also⁷⁰ ensure that his client's story sits squarely in the stream of precedent.⁷¹

At a structural level, the advocate's quest for an ultimate remedy drives the story toward a familiar plot. Likewise, the judge's quest to protect the integrity of her narrative, and prevent the decision from being overturned, drives the judicial narrative toward the familiar as well.⁷² Because the forces shaping the stories tend to emphasize the familiar or conventional, over the unusual or uncommon,⁷³ public perception of justice is likely to be similarly constrained. The ceremonial exchange of the story for the remedy will be perceived as "right" when the audience can also make a likeness judgment.⁷⁴ People sense, at some unspoken level, that the adopted version of "what happened often leads directly, if not inexorably, to what ought to be."⁷⁵ Shared norms, therefore, are a key factor in establishing the public's perception of justice.⁷⁶

***466 III. Sticks, Stones, and Broken Bones: How Language and Culture Tend to Distort the Telling of Unfamiliar Stock Stories**

When a litigant's stock story is not conventionally familiar to the judge, it becomes increasingly difficult for the judge to recognize that she is substituting a likeness judgment for the litigant's story.⁷⁷ Given the pressures of litigation and the unceasing flow of cases, the judge, by necessity, seeks out story patterns that make sense precisely because they readily match her existing repertoire of stock stories and those patterns "will then, not coincidentally, be given a familiar meaning."⁷⁸ The problem, of course, arises when words or stories that are familiar to the judge mean something wholly different to the litigants.

A. Language, Meaning, and the Judge's Dilemma

While stock stories might help a listener understand another's intimate circumstance and decide how to react,⁷⁹ stock stories also create a risk that two parties will accidentally "talk past each other."⁸⁰ Jean-Francois Lyotard, a postmodern philosopher, coined the term "differends" to refer to the ways in which citizens of different cultures use the same words to describe similar concepts, while the cultural narratives and language cues that are distinct to each culture prevent the parties from connecting at deeper levels of shared meaning.⁸¹ When the stock stories of the judge and the litigants diverge, differends can arise in the way that the narratives use basic words like "family" or "parenting." Although parenting is a universally recognized concept, it is enormously difficult to casually communicate specific ideas about parenting because the term has as many meanings as there are cultures and subcultures.

The center of a stock story told in a state court proceeding, for example, will likely define parenting as an exclusive, rights-based status.⁸² Early English common law, from which traditional American jurisprudence is derived, viewed children as chattels and vested fathers with an "absolute right to ownership and control" over their offspring.⁸³ Although society has moved away from the property model, modern family court jurisprudence often ***467** remains locked into stories that begin with the assumption that vesting primary custody with one parent is in the best interests of the child.⁸⁴

In contrast, the tribal court is more, though not entirely, likely to define parenting as a shared responsibility.⁸⁵ If the tribal court chooses to define parenting as a shared responsibility, then it is also likely to incorporate a broader definition of the word “shared.”⁸⁶ For the tribal court, “shared responsibility” may not only be a matter of splitting parenting duties between mother and father, but also of spreading that responsibility among members of the extended family, both old and young, who take turns caring for the child.⁸⁷ Many tribes perceive child rearing as the collective responsibility of an elaborate kinship system.⁸⁸ Therefore, the opinion of the collective can, and sometimes does, take priority over decisions made by a biological parent.⁸⁹

Consequently, courtroom conversations between cultures about family-related or parenting issues tend to be characterized by differends: the same words, with subtly different meanings, can result in no real communication at all. Yet all these cultures and subcultures come together in the courtroom with a shared expectation of fairness, justice, and resolution that is anticipated to be both legally correct and emotionally satisfying. Once the parties determine that they are unable to accept each other's stock stories, they look to the courts to write the ending to their own, often cautionary, tale. Our courtrooms, however, are simply gathering places for ritualized conflict resolution, devoid of magic or sentiment. The risk, of course, is that the parties will neither recognize the judge's stock story nor acknowledge it as a form of justice.

B. Impact of Custom and Tradition on the Judicial Narrative

Because the choice of forum can strongly influence the narrative structure, child custody litigants fight hard to lay groundwork for the acceptance of the story that they want to dominate the judicial narrative. Tribal member litigants, particularly those raised in or around a reservation community, understand that their stock stories are wholly unfamiliar to judges in the dominant culture.

“Although judges have the duty to understand minority perceptions, . . . the prevailing conception of justice may deprive an individual of a ‘voice that can be heard on terms which the system will understand.’”⁹⁰ The unrelenting pressure of the judicial economy forces judges to find the most efficient way to *468 process an unfamiliar stock story.⁹¹ Well-meaning judges sometimes unknowingly substitute their own superficial likeness judgments for unfamiliar stock stories, rather than processing the unfamiliar stories with careful thought and reflection.⁹² Even if the judge does incorporate an unfamiliar stock story into her narrative, important cultural nuance may disappear, simply because the judge does not have the vocabulary to capture those concepts. As a result, the need for a coherent judicial narrative can deprive a culturally unfamiliar stock story of its individuality.⁹³ The dichotomy between a Western concept of justice and a Native concept of justice becomes especially pronounced when the judge re-tells a story involving Native custom and tradition.⁹⁴

Many tribal court judges, for instance, rely not only on written precedent to make their decisions, but also on unwritten--though deeply rooted--forms of custom and tradition.⁹⁵ Fundamental cultural values underlie these forms of custom and tradition; values pass from generation to generation through example and the oral histories of tribal elders.⁹⁶ Tribal statutes often allow evidence of tribal custom or practice to be considered by the tribal courts and given appropriate weight.⁹⁷ Because law and culture are inextricably intertwined in a Native community, tribal court jurisprudence celebrates the inclusion of a cultural overlay in its decision-making processes.⁹⁸ Thus, the judicial narrative in a tribal court tends to serve a dual purpose, i.e., meting out justice while also “discern [ing] and extend[ing] the tribe's cultural character.”⁹⁹

In state court litigation, on the other hand, the cultural component is decidedly restrained, and the role of custom is virtually non-existent.¹⁰⁰ When state courts do acknowledge the role of custom and tradition in a child custody dispute, it often means that the litigants' stories are distorted in such a way as to fit the state court's idea of an appropriately familiar stock story. For

Native Americans, unfortunately, this sometimes means that their stories are vastly skewed when they appear in the judicial narrative. Not surprisingly, tribal *469 member litigants often embrace the cultural underpinnings of tribal court jurisprudence precisely because their own stock stories are often undervalued, sometimes distorted, and occasionally wholly ignored by courts of the dominant culture.¹⁰¹

The adversarial nature of the American justice paradigm assumes a number of stock structures that “conflict with the communal nature of most tribes.”¹⁰² Therefore, gaining more than a superficial understanding of a tribal member's stock story requires a depth and breadth of cross-cultural understanding that often is beyond the scope of the judge's daily docket. On occasion, conflicts raised in family court by a tribal member's stock story provide fertile ground for differends in terms of language and culture.

C. An Example of Cultural Conflict and a Clash of Stock Stories

A dispute between two devoted parents over the custody of a well-loved child can, and sometimes does, become a battle of mythic proportions. Indeed, a bitter dissolution proceeding, during which each parent vies for the undivided affection, presence, or custody of the child (or children), is the classic setup for the “somebody-done-somebody-wrong”¹⁰³ narrative. A child custody dispute can be difficult enough when the judge and the parents are part of the same majority culture.¹⁰⁴ However, when the mother, the father, and the judge are all from different cultures, an inter-parental child custody dispute can take on additional layers of misunderstanding and urgency.

*470 1. The Backstory

By 2006, Antanelle Duwyenie and Chris Moran had lived together in the City of Globe, Arizona for several years.¹⁰⁵ Duwyenie was a member of the San Carlos Apache Tribe,¹⁰⁶ whose reservation is located approximately five miles east of Globe. Moran, on the other hand, was a member of the Sicangu Oyate Lakota, or the Rosebud Sioux Tribe, whose reservation is located in south-central South Dakota,¹⁰⁷ along the Nebraska border. Their two-year-old son, known as “C.J.” in court documents, was born in 2004.¹⁰⁸ After several years together, the relationship broke down and the couple verbally agreed--without benefit of a court order--to split physical custody of C.J. on an alternating weekly basis.¹⁰⁹ When Duwyenie allowed Moran to take C.J. for the first week under their new arrangement, Moran and his mother took the toddler and fled Arizona for South Dakota in order to petition the Rosebud Sioux Tribal Court for sole custody of C.J.¹¹⁰ Litigation ensued.

Initially, the custody battle between Moran and Duwyenie was a fight for jurisdiction between the Rosebud Sioux Tribal Court and the San Carlos Apache Tribal Court.¹¹¹ As both parties were tribal members, it seemed that a tribal court was the more logical, and less expensive, place for the parties to resolve their dispute.

However, Moran evidently felt dubious about presenting his case in the San Carlos Apache Tribal Court, even though he worked as a police officer for the San Carlos Apache Tribe and his father was the lead officer for the Bureau of Indian Affairs' Criminal Investigation Unit at the San Carlos Agency.¹¹² It seems that Moran was afraid that the San Carlos Apache Tribal Court would favor a child custody suit by Duwyenie, a member of the San Carlos Apache Tribe. Based on this self-asserted and probably baseless supposition, Moran took C.J. and fled Arizona--apparently for what he hoped would be a more welcoming environment for his stock story.

Over the course of the next twelve months, Duwyenie endured the abrupt loss and prolonged absence of her only child.¹¹³ Due to the sheer physical distance between the parties and the financial burden associated with the trip, *471 Duwyenie was unable to travel to South Dakota except for required court hearings.¹¹⁴ Even when Duwyenie was in South Dakota, Moran repeatedly sought and obtained orders from the Rosebud Sioux Tribal Court that strictly limited Duwyenie's interaction with her son.¹¹⁵ Finally, during a rare visit with the child in Arizona, Duwyenie forced resolution of the matter by filing for temporary custody orders in Gila County Superior Court, instead of returning the baby to his father in compliance with the Rosebud Tribal Court's order.¹¹⁶ Using the state court forum deprived both Duwyenie and Moran of the chance to explore, in the relative safety of a courtroom setting, how and to what extent their son might benefit from learning the customs and traditions of their respective tribes. The Arizona state appellate opinion itself is curiously sterile, even though the Apache and Sioux traditions are rich and vibrant with ceremony.

2. Shaping the Next Chapters

Although this case, like many others, concerned who should maintain physical care, custody, and control of an only child, it also engaged the complexities of making likeness judgments between different cultures. Underlying the custodial questions in the case were deeper and thornier issues about the psychological impact of an abrupt change in the child's primary caregiver,¹¹⁷ the emotional repercussions of the child's identity as an Indian person,¹¹⁸ and the cultural implications of the child's tribal affiliation.¹¹⁹ Predictably, the stories told on behalf of the parties only grazed the surface of these subjects, emphasizing instead the larger American cultural theme of "somebody-done-somebody-wrong."¹²⁰

Moran alleged that Duwyenie was a neglectful parent and a promiscuous woman.¹²¹ Duwyenie emphasized that Moran, a uniformed police officer, took *472 C.J. from her under false pretenses and fled the state.¹²² Over the next four years, these stories--ostensibly for the purpose of gaining custody of the child--essentially became vehicles to present questions of continuity, identity, and culture to the fact finders in various jurisdictions. It consequently fell to the court system to choose between these wildly varying accounts of what had happened.¹²³

By ultimately choosing to elevate Duwyenie's story over Moran's, the Gila County Superior Court simultaneously--and by default--made choices regarding the continuity of C.J.'s care, his identity as a Native American person, and his cultural affiliation. The judicial narrative format, however, was ill-equipped to address these issues--the trial court orders and the appellate opinion omit any mention of continuity, identity, or culture--despite their overriding importance to Duwyenie, Moran, and their respective tribes.¹²⁴

3. Whose Story Is It, Anyway?

A story is successful when it elicits the outcome desired by the litigant-storyteller.¹²⁵ In a judicial context, this usually means that the litigant storyteller and her audience--the judge or the jury--must agree on certain shared norms before "justice" can be rendered.¹²⁶ Part of the storyteller's task is negotiating the terms of the parties' shared norms.¹²⁷ When the storyteller successfully negotiates the norms of the litigation, the parties tend to accept the verdict. On the other hand, when the parties refuse to agree on the norms of the litigation, the stories change dramatically as they pass from storyteller to audience, and the losing party always claims that the verdict was unjust--i.e., that its side of the story was not accepted as the norm, and therefore, not elevated by the fact finder as proof of a winning argument.¹²⁸

*473 Though Moran stipulated to the entry of judgment in the Gila County Superior Court, he continued to object to the judicial narrative,¹²⁹ at least partially because of a fundamental disagreement over how the court defined the norms for the case. Tribes and tribal members “tend to view the regulation of family relations as lying at the core of tribal sovereignty.”¹³⁰ Accordingly, Moran's position was that the Gila County Superior Court's exercise of jurisdiction in this matter impermissibly intruded upon his tribe's right to regulate the relationship between him and his son.

This disagreement eventually became the basis for a federal complaint.¹³¹ Essentially, the complaint alleged that the Gila County Superior Court “impermissibly trenched [sic] upon the sovereignty of the Rosebud Sioux Tribe” by exercising jurisdiction over the child custody case involving C.J.¹³² One of the fundamental structures underlying Moran's stock story involved the absolute authority of a tribal nation to govern the affairs of its people.¹³³ Because Moran's stock story differed radically from the stock structures assumed by the state court in its jurisprudence, he was unable to make an easy “likeness judgment.”¹³⁴ The Gila County Superior Court's story was so unfamiliar to Moran that he was unable to accept either the judicial narrative or the legal outcome associated with it. Ultimately, the Rosebud Sioux Tribe agreed, took up the cause, and filed a complaint in federal court challenging the Gila County Superior Court's right to exercise jurisdiction over C.J.¹³⁵

Unless the court's stock story is conventionally familiar to the litigants, it can have the unintended effect of increasing negative tension in the litigation.¹³⁶ Because the state court's narrative focused only on the Rule of Law, without reference to the sovereignty of the Rosebud Sioux Tribe or the child's tribal affiliation, the narrative maintained its legal integrity but lost Moran and the Rosebud Sioux Tribe--key members of its audience.¹³⁷

*474 IV. On the Mend: Three Ways of Approaching a Solution

A primary concern for any court is whether its narrative is likely to be recognized as legitimate by all parties, including the losing side. When the parties recognize the judicial narrative as legitimate, they essentially acknowledge the narrative's ability to define their reality. The judicial narrative can be characterized as “reality” not only because specific legal consequences flow from the judge's version of the events, but also because the story is fixed in the stream of precedent due to the judge's elevated status as a storyteller.¹³⁸ In cases such as *Duwyenie*, where the losing party declines to recognize a court's decision as lawful, the court's only choice--if it wants to protect the integrity of its narrative--is to rely on the Rule of Law.¹³⁹

Generally, the Rule-of-Law model requires that decisions made by those in authority--judges or those in executive offices--conform to previously articulated rules without the slightest deviation.¹⁴⁰ As a corollary, the Rule-of-Law model also means, strictly speaking, that substantive justice-- fairness--must be “sacrificed in favor of the consistent application of the legal principle.”¹⁴¹

Balanced against the harsh landscape of the Rule-of-Law model is the so-called Ethic of Care.¹⁴² The Ethic of Care gained ground with the legal community in the 1990s with its “call to context.”¹⁴³ At the heart of this call was a plea for more individualized justice.¹⁴⁴ For proponents of the Ethic of Care, the ultimate goal of the court system is to do justice; according to these proponents, this means “judges must hear the various competing stories before them, and engage in an empathy that goes beyond their personal experience in prioritizing these stories under existing law, or in creating new law.”¹⁴⁵ In other words, the Ethic of Care encourages judges to listen to litigants' stories with something akin to compassion or empathy, and then to incorporate those feelings of compassion or empathy into their final decisions.¹⁴⁶

The Rule of Law and the Ethic of Care each represent far ends of a continuum. Marginalized voices will always clamor for the Ethic of Care,¹⁴⁷ especially in relation to stock stories involving unfamiliar issues like cultural identity. On the other hand, a call for empathy in judicial decision making inevitably leads to greater discretionary authority on the part of the judge.¹⁴⁸ Such discretionary authority, which is often both standardless and non-reviewable, contradicts the values of American jurisprudence.¹⁴⁹ A third model, stewardship, emphasizes the value of interpersonal relationships¹⁵⁰ and suggests a way to break free of a continuum that leads to all-or-nothing results in the judicial narrative.

A. The Rule-of-Law Model Elevates Certainty Over Cultural Enfranchisement in the State Court's Judicial Narrative

By far the most widely accepted Rule-of-Law model in the context of inter-parental child custody disputes is the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). Forty-nine states have adopted some form of the UCCJEA,¹⁵¹ and the comments to Section 104 of the UCCJEA suggest that tribes can adopt its provisions as enabling legislation by replacing references to "this State" with references to "this Tribe."¹⁵²

Arizona's version of the UCCJEA vests its state courts with the authority to exercise initial jurisdiction over a child custody dispute if Arizona is the child's "home state" at the commencement of the proceeding, provided that the child is absent from the State of Arizona and a parent continues to live there.¹⁵³ "Home state" jurisdiction is generally defined as the state where the child has *476 lived with a custodial parent for the past six consecutive months, including any periods of absence from the state.¹⁵⁴ Once Arizona exercises initial jurisdiction over a child custody matter, it retains exclusive continuing jurisdiction until the parties no longer have significant connection with Arizona and substantial evidence regarding the child is no longer available in the state, or the parties no longer reside in Arizona.¹⁵⁵ The only circumstance that allows a court to modify a child custody order issued by another jurisdiction is when that jurisdiction has exercised its authority "substantially in conformity" with the UCCJEA.¹⁵⁶ Similarly, child custody decisions made by tribal jurisdictions will be recognized and enforced in Arizona as long as the "substantial conformity" requirement has been met.¹⁵⁷ Arizona's UCCJEA further provides for discretionary communication and cooperation between courts.¹⁵⁸

These provisions of the UCCJEA protected Duwyenie when she made the decision to file for temporary custody orders in the Gila County Superior Court despite the terms of the visitation order issued by the Rosebud Sioux Tribal Court. Not surprisingly, Duwyenie's decision led to accusations by Moran and the Rosebud Sioux Tribe that she had acted in bad faith by keeping the child and seeking protection from the state court.¹⁵⁹

In his arguments to the Superior Court, Moran emphasized that the Rosebud Sioux Tribal Court was the first court to exercise jurisdiction over the case.¹⁶⁰ Fundamentally underpinning Moran's stock story was the assumption that any impingement on Moran's first-in-time exercise of jurisdiction was a threat to tribal sovereignty.¹⁶¹ Another stock structure of Moran's story involved his assertion that the Rosebud Sioux Tribe should have the exclusive right to preside over legal questions involving the welfare of its tribal members, including him and his son.¹⁶² Ultimately, Moran found himself in a legal *477 morass because his argument conflated the legal issue of jurisdiction with cultural issues related to his son's tribal affiliation and identity.¹⁶³

Questions related to the continuity of C.J.'s care, his identity as a Native person, and his ultimate tribal affiliation, were simultaneously short-term developmental and long-term cultural issues that were crucial to both C.J.'s personhood and the ultimate sustainability of tribal nations. Although both Duwyenie and Moran likely had much to say about these issues, the

superior court's application of the Rule of Law effectively annulled any discussion about the continuity principle, the identity question, or the cultural issues involved in the case, and it virtually assured that the opinion would not be reversed.

By applying the UCCJEA, the state courts successfully avoided muddying the waters with an unfamiliar stock story related to the child's cultural heritage. The Arizona Court of Appeals affirmed the lower court on the issue of "home state" jurisdiction¹⁶⁴ and rejected Moran's sovereignty argument on the basis that a first-in-time filing must be in a jurisdiction having substantial conformity with the UCCJEA.¹⁶⁵ The Court of Appeals also engaged in a close reading of the statutory language to distinguish Moran's claim that Duwyenie's "unjustifiable conduct" required the Arizona courts to decline jurisdiction in favor of the Rosebud Sioux Tribal Court.¹⁶⁶ Thus, under the Rule-of-Law model, the Gila County Superior Court's decision to award physical custody of C.J. to his mother, Antanelle Duwyenie, seems not only logical, but also inevitable. Under the provisions of the UCCJEA, Arizona was unquestionably the child's home state, and Moran, the only bad actor.

B. In State Court Proceedings, Application of the Ethic-of-Care Model Promotes Cultural Enfranchisement at the Expense of Precedent

Viewed from the Rule-of-Law perspective, the inevitability of the court's decision in Duwyenie is shockingly evident, even self-proving. In litigation, however, the end of the story is hardly ever obvious.¹⁶⁷ In Duwyenie, the state court resorted to the Rule of Law to resolve the parties' dispute, but what if the *478 situation had been different? If the parties could have agreed on a tribal court forum, would the outcome have changed? Would the tribal courts have been better suited to address the underlying issues of continuity, identity, and culture? Would the judge's likeness judgments have more closely resembled the stock stories of the litigants? By applying the Rule of Law, the state court avoided any consideration of whether, and to what extent, the inculcation of Apache or Sioux customs and traditions could have benefitted the child. But because the social structure of the San Carlos Apache Tribe differs markedly from that of the Rosebud Sioux Tribe,¹⁶⁸ it may have been instructive for the state court to delve into those nuanced differences--even if only to incorporate certain elements of the parties' stock stories and to make the final outcome more palatable to the losing party.

State courts, however, seem to have a more difficult time when wrestling with the identity principle.¹⁶⁹ An Indian identity, and the importance of it, is something that is not familiar to many state court judges; in the adversarial world of family court litigation, "identity" tends to become an "either-or" concept.¹⁷⁰ On the other hand, a tribal court is more likely to view its role in "fostering the child's sense of tribal identity" as an appropriate part of its jurisprudence.¹⁷¹ Minority communities tend to define themselves via their differences, and a minority culture's jurisprudence is likely to do so as well.¹⁷² For instance, while a state court might balk at applying a law such as the Indian Child Welfare Act ("ICWA") to a child of Indian heritage who has no ties to the reservation,¹⁷³ the tribal court might specifically talk about the role of the clan in the child's upbringing and talk about how to "enforce the childrens' [sic] rights [as tribal members], and only incidentally provide for the rights of the parents, where they are in harmony with those of the children."¹⁷⁴

In Goldtooth, for example, the Window Rock District Court analyzed competing custody claims between a Navajo father and a Hopi mother.¹⁷⁵ In *479 reviewing the home study submitted in support of the father's custody claim, the court particularly noted the father's fluency in the Navajo language and his ability to provide his children with an appropriate cultural foundation.¹⁷⁶ Mindful of the historical trauma and personal and family tragedies related to the Navajo-Hopi Joint Land Use Area, the court struggled with the appropriateness of awarding joint custody where one parent was Navajo and the other parent was Hopi.¹⁷⁷ As part of an extended discussion of tribal court precedent for its decision, the court stated as follows:

[I]n Navajo culture and tradition, children are not just the children of the parents but they are children of the clan. In particular children are consider [ed] members of the mother's clan. While that fact could be used as an element of preference in a child custody case, the court[] wants to point out that the primary consideration is the child's strong relationship to members of an extended family. Because of these strong ties, children frequently live with various members of the family without injury. This is the condition throughout Indian Country (as Indian reservations as a whole are called). Therefore the court looks to that tradition and holds that it must consider the children[']s [] place in the entire extended family in order to make a judgment based upon Navajo traditional law. . . . This family is in an excellent position to be maintained in harmony, notwithstanding the sorrow of divorce, and I hold that the best interests of these children require an award of joint custody to their parents.¹⁷⁸

Although the Goldtooth court's emphasis on Native tradition and custom is not unusual for a tribal court opinion, it would be extraordinary for a state court to integrate the cultural component into its decision in the same way that Goldtooth did. A stock story offered by a Native American litigant in this context would probably be so unfamiliar to a state court that any decision based *480 on such an unusual stock story would render the opinion virtually useless as precedent. Yet, for some Native Americans, the state court's reluctance to incorporate such unfamiliar stock stories may trigger a certain level of discontent or unease with respect to the court's final order.

For instance, although the parents in *Duwyenie* both agreed that their son was Indian, they could not agree whether he should be enrolled in the San Carlos Apache Tribe or the Rosebud Sioux Tribe.¹⁷⁹ Although this was a matter of overriding long-term importance to parents and child alike, the unfamiliar nature of this conflict arguably allowed the Gila County Superior Court to avoid the question by emphasizing the Rule of Law over and above the Ethic of Care.

Professor Barbara Ann Atwood has identified certain state court trends when the subject of Native ethnicity is involved. Specifically, when a state court identifies a child as 'Indian' for purposes of ICWA, then the tribal often prevails in the litigation. On the other hand, when a state court identifies a child as mixed race for purposes of ICWA, then the tribe's request for relief is likely to be only partially granted, if at all.¹⁸⁰ Viewed from the outsider's perspective, a tribe seeking to advance the story of the child's "Indianness" may appear to be objectifying the child, perhaps treating the child like a number or statistic--i.e., the child is just one more notch in the tribe's population count.¹⁸¹ On the other hand, a tribe advancing such an argument would say that the child's identity reveals the tribe's perspective on that child as an individual who is valued in his own right.¹⁸² So, being identified as a tribal member results in the inculcation of a particular feeling of permanent belonging, and not simply as a number or a statistic, but as a valuable, individual addition to a larger population--i.e., a population vibrant with a shared appreciation, and *481 largely unspoken understanding, of what it means to live a communal life.¹⁸³ Yet the American legal system is not geared to allow tribes to tell their stories of what it means to be an Indian family.¹⁸⁴ To do so would require the judicial narrative to incorporate the Ethic of Care and result in an opinion that could be reversed and may not even constitute precedent. Consequently, tribal members in state court may feel as though their stock stories have never been fully elucidated, at least not in a way that they recognize.

C. Using the Stewardship Model to Reconcile the Rule of Law and the Ethic of Care in State Court Proceedings Involving Native American Child Custody Disputes

While the Rule of Law tends to eviscerate the cultural issues involved in litigation between tribal members, a decision based on the Ethic-of-Care model will necessarily incorporate an unconventional stock story. As a result, a decision based on Ethic of

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Care may not be recognized as valid precedent in the legal community. In other words, the opinion will be distinguishable based on its unusual facts. Therefore, the Rule-of-Law model seems to present itself as the only viable option in child custody cases where tensions run high and cause otherwise rational people to do irrational things in the name of parenting. Yet the application of the Rule of Law remains unsatisfactory in cases that demand recognition of each party's culture.

One alternative might be the application of a stewardship model, originally propounded to resolve the parental rights of an unmarried man whose biological progeny presumptively belongs to the mother's husband.¹⁸⁵ Building on existing theories of others, Professor Maillard offers a "stewardship vision" that applies property concepts--simultaneous interests of borrowing and possession--to parental rights.¹⁸⁶ According to Maillard, "the classic ownership model dispossesses indigenous groups of objects, ideas, and land that originated within Indian communities. In response to this appropriation, stewardship replaces the classic bundle of rights--'use, representation, access, and production'--with a 'web of interests' that displaces discrete ownership with shared considerations."¹⁸⁷ Although Maillard makes the argument in the context of the biological father and the presumption of paternity for the marital *482 father,¹⁸⁸ his reasoning logically flows to inter-parental child custody disputes as well. As a result, it is possible to view the custodial parent of an Indian child as a fiduciary who owes duties to the non-custodial parent and to the non-custodial parent's tribe.¹⁸⁹

If the debate is recast in terms of stewardship, the rhetoric between the parties can move from all-or-nothing arguments over the child's tribal identity to a more productive discussion of the appropriate allocation of rights and responsibilities within the complex web of interests connecting the child to his parents and their respective tribes.¹⁹⁰ As the story shifts from the emotional intricacies of tribal membership (and the landmines of a physical custody dispute) to established fiduciary duties--loyalty, care, and good faith--the warring parties are, ironically, forced to focus on the best interests of the child.¹⁹¹ As one court stated during a particularly brutal intra-family custody battle, "[t]he fact that all the people seeking custody of [the child] are members of an Indian tribe does not suggest that each of the proposed custodians is equally capable of raising [the child] to respect the unique social and cultural environment of Indian life."¹⁹² When the courts engage in a detailed examination of the parties' proffered stock stories, instead of making quick likeness judgments, the child's long-term and short-term interests are better protected. Forcing the courts to assert flat and conclusory statements about the Rule of Law and Indian children tends to legitimize false arguments over the child's tribal identity, while minimizing the validity of the "nuanced webs"¹⁹³ of family and kinship structures historically present in tribal communities.

While thoughtful practitioners will no doubt identify many creative ways to implement a stewardship model, state courts may want to afford greater consideration to the process by which their ultimate decisions are made. In instances where culture and tribal identity raise strong feelings in the parents, state courts may want to stay proceedings to refer the parties to a talking circle, a peacemaking court, or another culturally-based dispute resolution process. The referral's purpose would be to discuss sensitive issues related to Native custom and tradition in the presence of a neutral individual, who would be acceptable to both sides and knowledgeable about families and child-rearing practices common to the Native communities to which the parents belonged.¹⁹⁴ Any concessions *483 arising out of the traditional dispute resolution process could be reduced to writing and appended to the judge's final order. For example, if the Gila County Superior Court had the opportunity to initiate a peacemaking-type process during the Duwyenie case, the parties could have negotiated an arrangement to teach their son about the non-custodial parent's custom and traditions. If the non-custodial parent had turned out to be Duwyenie, for instance, she might have argued for and obtained a concession that her son be placed with her during the summer season, when Apache Sunrise Dances are traditionally held. Likewise, Moran might have argued for and obtained a concession that C.J. be permitted to participate in the Sun Dance ceremonies of the Sicangu Oyate Lakota. Although the lengthy intricacies of such delicate negotiations might impede on the state court's desire for a quick and effective resolution of the matter, the state court's willingness to acknowledge the parties' specific concerns via a traditional dispute resolution process could successfully elevate the cultural profile of the

judicial narrative. In turn, other judges could potentially make a likeness judgment based on the decision, which in its turn, might mean that the opinion could retain an appropriate level of precedential authority.

Therefore, under a stewardship model, the legal rights of the parents--and their tribes--become secondary to the daily duties of every attentive parent.¹⁹⁵ From a fiduciary perspective, the duty of parental care requires the custodial parent to respect the interests of others, including the child, his non-custodial parent, and any tribe that claims an interest in the child.¹⁹⁶ Even if this so-called fiduciary duty fails to act in the interests of these other parties, the model has value because it acknowledges the outside influences on the child's life and creates a "dynamic of responsibility"¹⁹⁷ on the part of the custodial parent who is, essentially, raising a child for the tribe. Because it remains consistent with a worldview that embraces a communal form of justice, application of a stewardship model to the fiduciary duties and obligations owed to an Indian child creates an "equitable . . . accommodation"¹⁹⁸ for every tribe that claims an interest in the Indian child's identity. By embracing a stewardship model in disputes over Indian children, state courts can "champion[] parental duties"¹⁹⁹ over all-or-nothing claims of tribal identity. Decisions made this way, rather than decisions *484 made strictly on the basis of competing claims to the child's Indian heritage, are more likely to be consistent with indigenous values.

V. Conclusion

For many tribal members, fundamentally fair and legitimate acts of justice come not from a single individual with divine wisdom, but from a group consensus--forged over time and through open discussion--about what is right and what is wrong.²⁰⁰ When the judge's cultural norms differ from those of the litigants, there is an increased risk that the judicial narrative will distort the litigants' stock stories. Because of misunderstood language cues or the judge's being seduced by the false comfort of easy likeness judgments, even the most well-meaning and objective judge is unlikely to fully extricate her decisions from her own story biases.

Occasionally, a judge will revert to the strict application of the Rule-of-Law model in an attempt to minimize the impact of her own story biases vis-à-vis unconventional stock stories. However, instead of eliminating story biases, the application of the Rule of Law only emphasizes the vast divide between the litigants' stories and the judicial narrative. On the other hand, while the application of the Ethic-of-Care model may acknowledge the validity of unconventional stock stories, such as those told by Native Americans, it may not meet the needs of the American justice system for predictable, authoritative standards.

The key is to raise the cultural profile of a judicial opinion to give it legitimacy among persons who may feel that their stock stories are otherwise devalued or ignored. In a situation involving an inter-parental child custody dispute where issues of continuity, identity, and culture are intertwined, a thoughtful practitioner should seek written concessions based on stewardship in the context of a traditional dispute resolution process such as a talking circle, and a thoughtful judge should incorporate these concessions into the final narrative. A child custody order based on a stewardship model acknowledges and incorporates the nuanced webs of tribal kinship structures and family relations, even as it remains firmly rooted in the familiar legal concept of fiduciary duty.

*485 A court's effort to raise the cultural profile of the judicial narrative--especially where unconventional stock stories are in play and parental relationships are broken beyond repair--leads to better results for the children in terms of cultural identity. It further leads to better results for the judicial narrative in terms of longevity, durability, and integrity. Using the judicial narrative to bridge the gap between cultures, even in a small way, offers the possibility of justice to each person who has ever had a story to tell.

Footnotes

- a1 Assistant Professor, Phoenix School of Law.
- 1 See 1 Kings 2:12.
- 2 Id. at 3:16-22.
- 3 Id. at 3:24-25.
- 4 Id. at 3:26.
- 5 Id. at 3:27.
- 6 Id. at 3:28.
- 7 Comalk-Hawk-Kih, Aw-Aw-Tam Indian Nights: The Myths and Legends of the Pimas 171 (William John Lloyd trans. 2008).
- 8 Id.
- 9 Id.
- 10 Id.
- 11 Id.
- 12 Id.
- 13 Id. This story continues with the twins' search for their father, and its conclusion has several variants, depending on the source. See id. at 174 (comparing variants of the same story collected by United States military personnel assigned to Arizona territory).
- 14 See Ada Pecos Melton, Indigeneous Justice Systems and Tribal Society, 79 *Judicature* 126, 133 (1995).
- 15 U.S. Const. amend.XIV, § 1.
- 16 See Christine Metteer Lorillard, Retelling the Stories of Indian Families: Judicial Narratives that Determine the Placement of Indian Children Under the Indian Child Welfare Act, 8 *Whittier J. Child & Fam. Advoc.* 191, 192 (2009).
- 17 See id.
- 18 See id. at 193.
- 19 See id. at 193, 195.
- 20 Id. at 195.
- 21 See id.
- 22 See Christine Metteer Lorillard, Stories That Make the Law Free: Literature as a Bridge Between the Law and the Culture in Which It Must Exist, 12 *Tex. Wesleyan L. Rev.* 251, 254 (2005) (citing Jerome Bruner, *Making Stories: Law, Literature, Life* 6 (2002)).
- 23 Generally, litigants do not end up in family court without an external impetus-a story-that creates the impulse for change in the original family structure. Some of the more familiar stories in family court litigation are the ones that are the most sensational-those involving infidelity, violence, drug use, and aberrant behaviors.

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- 24 See *Duwyenie v. Moran*, 207 P.3d 754 (Ariz. Ct. App. 2009); *Rosebud Sioux Tribe v. Duwyenie*, No. CV 09-1660-PHX-MHM, 2010 WL 2534193 (D. Ariz. June 18, 2010).
- 25 See Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. Rev. 1, 3 (1984).
- 26 See *id.*
- 27 See Lorillard, *supra* note 16, at 192-93.
- 28 The image of Justice as a blind-folded woman holding a set of scales derives from antiquity. *Legal Symbols of the Anglo-American Legal Tradition*, 11 *The Guide to American Law: Everyone's Legal Encyclopedia* 685, 687, Appendix D (1985). For instance, the ancient Egyptians worshipped the goddess Ma'at, who was often depicted with an ostrich feather in her hair to symbolize truth and justice. *Id.* Ma'at (from which the term "magistrate" is derived) assisted Osiris in the judgment of the dead by weighing their hearts. *Id.* The deceased's heart was weighed against the feather, and if the soul was "lighter than a feather," the deceased was pure-entitling him to journey to Áaru, an eternal paradise. Wendy Christensen, *Great Empires of the Past: Empire of Ancient Egypt* 74 (rev. ed. 2009).
- 29 See Lorillard, *supra* note 16, at 193.
- 30 *Id.* at 193-94.
- 31 See Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 *Emory L.J.* 587, 633 (2002).
- 32 E.g., *Duwyenie v. Moran*, 207 P.3d 754 (Ariz. Ct. App. 2009).
- 33 See Lorillard, *supra* note 16, at 195.
- 34 See Atwood, *supra* note 31.
- 35 See Kevin Noble Maillard, *Rethinking Children as Property: The Transitive Family*, 32 *Cardozo L. Rev.* 225, 226-29 (2010).
- 36 See Lorillard, *supra* note 22.
- 37 See *id.*
- 38 See *id.* ("The goal of telling stories is to 'uncover what is universal, what is accessible to others in a way that allows them to walk around in our shoes.'").
- 39 See Lopez, *supra* note 25, at 5-6.
- 40 See *id.* at 3. According to Professor Lopez, "stock stories" are non-verbal (or pre-verbal) knowledge structures that "help us interpret the everyday world with limited information and help us make choices about asserting our own needs and responding to other people." *Id.* Alternatively called "scripts," "schemas," "frames," and "nuclear scenes," *id.* at 3 n.1, stock stories are universally recognized values that allow us to "carry out the routine activities of life without constantly having to analyze or question what we are doing[.]" *id.* at 3.
- 41 Cf. 1 Kings, *supra* note 3.
- 42 See Roger C. Schank, *Tell Me a Story: Narrative and Intelligence* 37-40 (1995). Schank suggests that all stories are simply shorthand for a longer, more detailed story, often a familiar one. *Id.* at 39. Schank offers the following example from the Woody Allen movie, *Manhattan*:
Yale: She's gorgeous.
Isaac: She's seventeen. I'm forty-two, and she's seventeen.

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“More needn't be said here because the point has been made without saying more. We all know stories or can imagine stories involving the complexities of a relationship between a forty-two-year-old man and a seventeen-year-old girl.... The reference here is to a story we all know which then serves as the basis for the story we are about to hear.” *Id.* at 40.

- 43 See Lorillard, *supra* note 16, at 195 (“[T]he choice of which story to privilege is most often determined by the story that comes closest to the experience of the judge.”).
- 44 See Lorillard, *supra* note 22, at 255.
- 45 See *id.*
- 46 See *id.* (quoting Lenora Ledwon, *The Poetics of Evidence: Some Applications from Law & Literature*, 21 *Quinnipiac L. Rev.* 1145, 1148 (2003)).
- 47 See Lorillard, *supra* note 16, at 195.
- 48 See, e.g., *Model Code of Judicial Conduct R. 2.9(C)* (2007).
- 49 See Lorillard, *supra* note 22, at 255.
- 50 See Lopez, *supra* note 25, at 27.
- 51 See Lorillard, *supra* note 22, at 256.
- 52 See Lopez, *supra* note 25, at 3.
- 53 *Id.* at 11.
- 54 *Id.* at 15.
- 55 *Id.*
- 56 *Id.* at 16.
- 57 *Id.*
- 58 *Id.*
- 59 *Id.* at 20.
- 60 See *id.* “We think we find the world; instead we make it ourselves. Stock structures create their own image; they search for themselves in the world and, finding something sufficiently like them, tell Man that they are what he sees and what the world is.” *Id.* at 19.
- 61 *Id.* at 27.
- 62 See *id.* at 43-44.
- 63 See Lorillard, *supra* note 22, at 255.
- 64 See *id.*
- 65 See Lorillard, *supra* note 16, at 196.
- 66 See *id.* at 194.
- 67 See Lorillard, *supra* note 22, at 256.
- 68 See *id.*

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- 69 See Lopez, supra note 25, at 10.
- 70 Id. at 16-18.
- 71 See id. at 43-44.
- 72 See id. at 44-45.
- 73 See id.
- 74 Id. at 41.
- 75 Id.
- 76 See id. at 44-45.
- 77 See id.
- 78 See id. at 44.
- 79 See id. at 3.
- 80 See Atwood, supra note 31, at 598.
- 81 See id.
- 82 See Barbara Ann Atwood, Tribal Jurisprudence and Cultural Meanings of the Family, 79 Neb. L. Rev. 577, 634 (2000).
- 83 Id. at 624-25.
- 84 Id. at 626.
- 85 Id. at 640.
- 86 See id. at 640-41.
- 87 Id.
- 88 Id.
- 89 Id.
- 90 Lorillard, supra note 16, at 195.
- 91 See Lopez, supra note 25, at 43-44.
- 92 See id.
- 93 See Lorillard, supra note 16, at 195.
- 94 See Melton, supra note 14.
- 95 Id. at 130.
- 96 Id. at 126.

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- 97 See, e.g., San Carlos Child & Family Protection Code, tit. 8, § 106(C) (“Because of the vital interest of the Tribe in its children and those children who may become members of the Tribe, the statutes, regulations, public policies, customs and common law of the tribe shall control in any proceeding involving a child who is a member of the Tribe....”) (emphasis supplied).
- 98 Atwood, *supra* note 82, at 599; see also Frank Pommersheim, Tribal Court Jurisprudence: A Snapshot from the Field, 21 Vt. L. Rev. 7, 27 (1996) (likening the process to “stitching the cultural past into the judicial present”).
- 99 See Atwood, *supra* note 82, at 599.
- 100 See Melton, *supra* note 14, at 126.
- 101 Cf. Atwood, *supra* note 82, at 599 (indicating that tribal courts typically identify the cultural basis of their decisions).
- 102 See Melton, *supra* note 14. Although such statements carry a risk of overbroad or inaccurate characterizations of Native culture, Native American scholarship tends to concede that tribal communities share certain features setting them apart from Western culture. See also Atwood, *supra* note 82, at 605 (“Certain fundamental cultural values seem to be shared by many North American tribes, including, for example, an emphasis on cohesion and harmony within family units and within the larger community, a belief in the interconnection of people and the natural world, a recognition of the need for balance between people and the natural world, and an acknowledgement of spiritual forces.”).
- 103 Larry Butler & Chips Moman, (Hey, Won't You Play) Another Somebody Done Somebody Wrong Song (1975).
- 104 See Sanford L. Braver, et al., The Consequences of Divorce for Parents, in Handbook of Divorce and Relationship Dissolution 329-30 (Mark A. Fine & John H. Harvey eds., 2006). Divorcing couples with children commonly tend to experience high levels of conflict immediately after the divorce and for approximately three years thereafter. *Id.* Although most couples disengage from protracted conflict after the initial three-year period, at least twenty-five percent of couples experience high levels of conflict more or less indefinitely. *Id.*
- 105 *Duwyenie v. Moran*, 207 P.3d 754, 755 (Ariz. Ct. App. 2009).
- 106 *Id.*
- 107 *Id.*
- 108 *Id.*
- 109 *Id.*
- 110 *Id.*
- 111 *Id.*
- 112 *Moran v. Duwyenie*, No. CIV 06-368 (Rosebud Sioux Tribal Ct. Oct. 11, 2006).
- 113 See *Duwyenie*, 207 P.3d at 755-56 (discussing that between September 2006 and February 2007, Duwyenie had approximately 10 days of visitation with CJ).
- 114 *Id.*
- 115 *Id.*
- 116 The use of the state court forum was not Moran's choice, as he contested the jurisdiction of the Gila County Superior Court throughout the proceedings before ultimately stipulating to a custody and child support agreement. *Id.* at 756-59. Considering that the Rosebud Sioux Tribe subsequently filed a companion case in District Court and lost, it is unlikely that the Superior Court's decision has gained

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- any legitimacy in Moran's eyes. See *Rosebud Sioux Tribe v. Duwyenie*, No. CV 09-1660-PHX-MHM, 2010 WL 2534193 (D. Ariz. June 18, 2010).
- 117 See *Atwood*, supra note 31, at 593-95 (referring to judicial narratives regarding a Native child's attachment to a primary caregiver as "the continuity principle").
- 118 *Id.* (referring to judicial narratives regarding a child's Native American heritage as "the identity question").
- 119 See *id.*
- 120 See *Bulter & Moman*, supra note 103.
- 121 Complaint for Paternity, Custody and Child Support, *Moran v. Duwyenie*, No. CIV 06-368 (Rosebud Sioux Tribal Ct. Sept. 6, 2006).
- 122 Special Appearance Answer, *Moran v. Duwyenie*, No. CIV 06-368 (Rosebud Sioux Tribal Ct. Oct. 11, 2006).
- 123 See *Lorillard*, supra note 22, at 255. Moreover, as a result of Moran's decision to appeal the lower court's judgment, Duwyenie's version of the story has been memorialized for all time in the law's literature—a published opinion.
- 124 Moran's perceived need for a legal forum that would accept and validate his stock story (the fallen woman and the helpless child) over and above the literal truth (inevitable end of a young relationship) was so great that it impelled him to abscond with C.J. to a jurisdiction more than one thousand miles away. In so doing, Moran unintentionally gave Duwyenie a very powerful narrative (police officer goes rogue, abducts child), which is the story that ultimately prevailed in the state court system, possibly because it echoes the 'somebody-done-somebody-wrong' theme in an emotionally wrenching and familiar way.
- 125 *Lopez*, supra note 25, at 14.
- 126 See *id.* at 16.
- 127 See *id.* at 28.
- 128 See *Lorillard*, supra note 22, at 255 (explaining that each storyteller will tell his version of the events, and the judge as the listener must decide which stories "are to be privileged.>").
- 129 *Duwyenie v. Moran*, 207 P.3d 754, 759 (Ariz. Ct. App. 2009).
- 130 *Atwood*, supra note 82, at 582; see also *id.* at 586-87 (explaining how dispute resolution is linked to tribal identity).
- 131 Complaint with Technical Correction, *Rosebud Sioux Tribe v. Duwyenie*, No. 2:09-cv-01660-MHM (D. Ariz. 2009).
- 132 *Id.* at 3.
- 133 See *id.* at 1-2.
- 134 See *Lopez*, supra note 25, at 43-44.
- 135 See generally *Rosebud Sioux Tribe v. Duwyenie*, No. CV 09-1660-PHX-MHM, 2010 WL 2534193 (D. Ariz. June 18, 2010).
- 136 *Lopez*, supra note 25, at 43-44.
- 137 Moran's refusal to acknowledge the Superior Court's decision as lawful has had consequences for his son. For instance, Moran and his family have refused all personal contact with C.J. since the Superior Court's order. Moran has also failed to voluntarily cooperate with the Superior Court's order for monthly child support payments. Telephone Interview with Antanelle Duwyenie (Sept. 3, 2011).
- 138 See *Lorillard*, supra note 16, at 196 (referring to Professor Carol Weisbrod's observation that "judicial narratives are a 'particularly intense form of storytelling that involves the shaping of personal history and private life.'").

- 139 See Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 Mich. L. Rev. 2099, 2102, 2122 (1989) (“Where consensus ends, lines are drawn; and those outside the line--legal losers--always will feel unheard and wounded.”).
- 140 *Id.* at 2103. The author acknowledges that the Rule-of-Law model has long been the subject of an ongoing and wide-ranging jurisprudential debate across a multitude of disciplines. Because of the complexity inherent in the ‘Rule of Law,’ the phrase can legitimately mean different things to different people. For the purposes of this article, however, the narrow definition identified above provides a sufficient, though by no means comprehensive, foundation for the discussion.
- 141 *Id.*
- 142 *Id.* at 2106.
- 143 *Id.*
- 144 See *id.*; see also Lorillard, *supra* note 22, at 257 (explaining that a collective focus of the law prompted a counter focus to the “Rule-of-Law” model in which there was a “call to context,” arguing for more individualized justice).
- 145 Lorillard, *supra* note 22, at 257.
- 146 See *id.*
- 147 See Massaro, *supra* note 139, at 2116 (“[L]aw often privileges the stories of the powerful and drowns out the voices of the weak and marginal.”).
- 148 See *id.* at 2116-17.
- 149 *Id.* at 2117.
- 150 See Maillard, *supra* note 35, at 226.
- 151 Legislative Fact Sheet - Child Custody Jurisdiction and Enforcement Act, Nat'l Conf. of Commissioners on Uniform St. Laws, <http://www.nccusl.org> (last visited February 19, 2012). The State of Massachusetts has introduced a bill proposing adoption of the UCCJEA, but has not yet enacted it. UCCJEA Adoptions, Nat'l Conf. of Commissioners on Uniform St. Laws, <http://www.uniformlaws.org/Shared/docs/UCCJEAadoptions.pdf> (last visited February 19, 2012).
- 152 Unif. Child Custody Jurisdiction & Enforcement Act § 104 (1997).
- 153 Ariz. Rev. Stat. Ann. § 25-1031 (Westlaw through 2011 legislation). Other grounds for home state jurisdiction include significant contacts and substantial evidence regarding the child. *Id.*
- 154 *Id.* § 25-1002(7).
- 155 *Id.* § 25-1032.
- 156 *Id.* § 25-1036.
- 157 *Id.* § 25-1004.
- 158 *Id.* §§ 25-1010, 1012.
- 159 *Duwyenie v. Moran*, 207 P.3d 754, 758 (Ariz. 2009).
- 160 *Id.* at 757.
- 161 See *id.*

- 162 Even after the original Rosebud tribal court judge dismissed Moran's complaint based on Moran's failure to disclose his flight from Arizona, *Moran v. Duwyenie*, CIV 06-368, Memorandum Decision at 2 (Rosebud Sioux Tribal Ct. Feb. 27, 2007), Moran continued to press his version of the story, striking two different judges and securing a Tribal Council resolution declaring that only Rosebud tribal courts could exercise jurisdiction over Rosebud tribal members:
THEREFORE BE IT RESOLVED that there is hereby established by the Rosebud Sioux Tribal Council a rule of Rosebud Sioux Tribal law that if one parent and/or the children that are part of a child custody dispute are enrolled members of the Rosebud Sioux Tribe in a civil action filed in the Rosebud Sioux Tribal Court, the Rosebud Sioux Tribe shall have the sole authority and jurisdiction to hear and decide that dispute[.]
Rosebud Sioux Tribe Res. No. 2006-327 (2006) (enacted).
- 163 *Duwyenie*, 207 P.3d at 756-60.
- 164 *Id.* at 756-57.
- 165 *Id.* at 757.
- 166 *Id.* at 758.
- 167 See *Lorillard*, *supra* note 16, at 193.
- 168 The San Carlos Apache Tribe is matrilineal, while the Rosebud Sioux Tribe is patrilineal. Sherry L. Hamby, *The Importance of Community in a Feminist Analysis of Domestic Violence among Native Americans in Domestic Violence at the Margins* 183 (Natalie J. Sokoloff & Christina Pratt eds., 2005); see Beatrice Medicine, *Learning to be an Anthropologist & Remaining "Native"* 144 (Sue-Ellen Jacobs ed., 2001). Aside from the differences in ceremonies, custom, and kinship structures, this difference presents a genuine question of what types of cultural influences might best shape a child of tender years.
- 169 See *Atwood*, *supra* note 31, at 593.
- 170 See *id.*
- 171 See *Atwood*, *supra* note 82, at 647-48.
- 172 See *id.* at 578.
- 173 See *Atwood*, *supra* note 31, at 635.
- 174 See *Atwood*, *supra* note 82, at 611 (quoting *Goldtooth v. Goldtooth*, 3 Navajo Rptr. 223, 227 (Window Rock D. Ct. 1982)).
- 175 *Goldtooth v. Goldtooth*, 3 Navajo Rptr. 223, P 9 (Window Rock D. Ct. 1982).
- 176 *Id.* P 12.
- 177 *Id.* P 35. Although there are distinct differences between the Navajo and the Hopi tribes, the likeness judgments made by a tribal court with respect to these parties' stock stories are likely to be more similar than the likeness judgments made by a superior court in the same situation, simply because a tribal court judge is more likely to have a repertoire of stock structures comparable to those of the Native American parents. For a brief summary of the very complicated land dispute issues and a description of the brutal realities of daily life for Native Americans who live in the Joint Use Area, see William F. Rawson, *110-Year-Old Navajo-Hopi Land Dispute Haunts Tribal Relations*, L.A. Times (October 17, 1993), [http:// articles.latimes.com/1993-10-17/news/mn-46610_1_hopi-land](http://articles.latimes.com/1993-10-17/news/mn-46610_1_hopi-land).
- 178 *Goldtooth*, 3 Navajo Rptr. at PP 28, 34.
- 179 *Moran v. Duwyenie*, CIV 06-368, Memorandum Decision at 1 (Rosebud Sioux Tribal Court February 27, 2007).
- 180 See *Atwood*, *supra* note 31, at 629-30 (quoting *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Ct. App. 1996) ("[A]ny application of ICWA which is triggered by an Indian child's genetic heritage, without substantial, social, cultural, or political affiliations between the child's

family and a tribal community, is an application based ... predominately[] upon race and is subject to strict scrutiny under the equal protection clause.”)).

181 See *id.* at 634 n.199 (discussing the holding in *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997), that the Tohono O’odham Tribe was not allowed to intervene in an ICWA case because the mother did not live on the reservation and had no contact with her tribe for fifteen years). *Contra* 25 U.S.C. §1911(c) (1978) (providing a mandatory right of intervention for any tribe wishing to participate in a state court proceeding involving foster care placement or termination of parental rights to an Indian child).

182 See *Atwood*, *supra* note 82, at 609 (citing *Alonzo v. Martine*, 18 Indian L. Rptr. 6129 (Navajo 1991) (“Navajos do not view children as property or possessions, but value them as individuals in a community.”)).

183 *Lorillard*, *supra* note 16, at 221-22 (quoting a Native grandmother’s rejection of the state court’s narrow definition of Indian heritage that required embracing “tribal politics ... Indian charities ... subscribing to tribal newspapers, and participating in Indian ... events.... It’s not how many activities you go to ... it’s something [that] you feel.”).

184 See *id.*

185 See *Maillard*, *supra* note 35, at 259.

186 *Id.*

187 *Id.* at 259-60.

188 *Id.* at 227.

189 See *id.* at 260-61.

190 See *id.*

191 See *id.*

192 *In re Custody of A.K.H.*, 502 N.W.2d 790, 795 (Minn. Ct. App. 1993).

193 *Maillard*, *supra* note 35, at 228.

194 See, e.g., Comment D.4, BIA Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67,584-67,595 (November 26, 1979) (defining Qualified Expert Witnesses as tribal members with knowledge of tribal customs pertaining to family organization and child-rearing practices, experts with substantial experience in the delivery of services to Indians, or professional persons with substantial experience in his or her specialty).

195 See *Maillard*, *supra* note 35, at 261.

196 *Id.*

197 *Id.* at 262.

198 *Id.*

199 *Id.*

200 See *Melton*, *supra* note 14, at 126 (“The indigenous justice system is based on a holistic philosophy ... a circle of justice that connects everyone involved with a problem or conflict on a continuum, with everyone focused on the same center. The center of the circle represents the underlying issues that need to be resolved to attain peace and harmony for the individuals and the community. The continuum represents the entire process, from disclosure of problems, to discussion and resolution, to making amends and restoring

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relationships. The methods used are based on concepts of restorative and reparative justice and the principles of healing and living in harmony with all beings and with nature.”).

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