COMMENT

THE UNHEARD NARRATIVE: SIR WALTER SCOTT AND THE EXCLUSION OF CULTURAL EVIDENCE FROM SELF-DEFENSE CLAIMS

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> [T]his unhappy man ought personally to be the object rather of our pity than our abhorrence, for he failed in his ignorance, and from mistaken notions of honour. But his crime is not the less that of murder, gentlemen, and, in your high and important office, it is your duty so to find.[1]

With these words of instruction, a judge charges a jury with its duty to pass judgment on a defendant in a murder trial. The accused is found guilty, sentenced to death, and is duly executed for his crime. This is, however, no ordinary trial scene; the judge is English, the defendant is Scottish, and the clash between their respective cultures is the central theme of "The Two Drovers", a short story first published in 1827 by Sir Walter Scott. In this story, Scott emphasizes that during the Eighteenth Century the cultural disparity between England and Scotland was not merely a superficial distinction, but a strikingly opposed set of assumptions, practices and beliefs that often resulted in harsh consequences for those Scottish minorities whose cultural expectations differed from those of the dominant English legal system. While the precise legal and moral questions that Scott addresses in "The Two Drovers" are no longer applicable to the modern relationship between Scotland and England, the dilemma Scott raises remains directly relevant to the problem that U.S. courts have faced in confronting violations of American law by recent immigrants whose cultural expectations and standards are vastly different from those upon which American law is based. This confrontation has been the

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1. Sir Walter Scott, "The Two Drovers" in 1 *Chronicles of the Canongate* 293, 350 (Ballantyne 1827) ("*The Two Drovers*").

focus of a debate surrounding what has come to be known by many commentators as the "cultural defense" in criminal law, which is in essence an argument over whether evidence of a defendant's cultural beliefs, practices, and attitudes is relevant in evaluating a defendant's mental state with respect to the intent necessary for the commission of certain crimes.[2]

This Comment will address the problems associated with the admission of cultural evidence in support of a claim of self-defense to a charge of murder, a context in which cultural evidence is routinely excluded by many trial judges. An examination of the admissibility of cultural evidence in self-defense cases will be informed by a parallel inquiry into the way Sir Walter Scott structures the narrative of "The Two Drovers" to emphasize how the objective evaluation of criminal conduct can substantially affect judicial exclusion or admission of cultural evidence. Ultimately, this Comment argues that judges should be considered the true source of narrative authority in any court case, since judges are vested with considerable discretion to determine which stories are to be heard in court and which are to be silenced. This Comment concludes that judges' use of their narrative authority to exclude cultural evidence based on irrelevance or lack of objective reasonableness may in fact be a normatively-based decision which reduces actual objectivity in legal decisionmaking.

This Comment consists of four Parts. Part I explores the basic legal problem surrounding the admission of cultural evidence and examines the reasoning behind two recent cases in which cultural evidence in support of a claim of self-defense was rejected by the courts. Part II explores the various responses of the law and literature movement to the cultural evidence debate and suggests why the movement's support of cultural narratives has met with fierce criticism. Part III discusses how Sir Walter Scott's story, "The Two Drovers" is a particularly useful tool with which to explore judicial control over the admission and exclusion of cultural narratives in self-defense cases. Part IV returns to the cultural evidence cases introduced in Part I and re-examines their conclusions in light of the judicial abuse of narrative authority discussed in Part III.

2. See Myrna Oliver, *Immigrant Crimes; Cultural Defense—A Legal Tactic*, LA Times 1 (Jul 15, 1988) (discussing the increasing use of cultural defenses in American courts by immigrant defendants).

PART I. OBJECTIVE REASONABLENESS IN SELF-DEFENSE THEORY AND THE PROBLEM OF CULTURAL EVIDENCE

A. SELF-DEFENSE

The number of situations in which a cultural defense may plausibly be relevant are many. Some of the most troubling implications created by the cultural defense, in particular its potential use as an excuse for rape and domestic abuse, have been extensively discussed elsewhere.[3] Given that any attempt to embark upon a comprehensive analysis of the use of the cultural defense in criminal law would be beyond the scope of this Comment, the following discussion will focus specifically on the admissibility of cultural evidence in the context of an accused's attempt to advance a self-defense justification in a murder case. This setting is not only one for which Scott's short story is most directly on point, but is also a situation that has received relatively less scholarly attention than the arguably more notorious cases involving traditional Asian ritual suicide practices or the Hmong "marriage by capture" custom.[4]

One reason why self-defense cases involving the use of cultural evidence may have received less critical attention than other assertions of the cultural defense is the fact that self-defense arguments are so frequently advanced by defendants that objective legal inquiries have arguably been replaced by methodically routine exercises of normative judgment. Although the requirements for self-defense differ somewhat from state to state, the common law and modern state statutes require that a person attempting to justify the use of deadly force in self-defense must have reasonably believed that he or she faced an imminent, unlawful, and unprovoked threat.[5] In addition, some

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3. See generally, Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 NYU L Rev 36 (1995) (arguing that the admission of relevant cultural evidence is not inconsistent with the goal of preventing domestic violence); Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 Stan L Rev 1311 (1991) (finding cultural defenses unacceptably prejudicial to women); Alice J. Gallin, Note, *The Cultural Defense: Undermining the Policies Against Domestic Violence*, 35 BC L Rev 723 (1994) (concluding that the acceptance of cultural defenses contradicts policies against domestic abuse). While the impact of cultural defenses in the context of domestic violence has not yet been fully resolved, this Comment accepts Professor Maguigan's argument that the admissibility of cultural evidence cannot be decided by simply evaluating the worth of its normative message.

4. See *People v Wu*, 286 Cal Rptr 868 (Cal App 4 Dist 1991) (ordered depublished) (ritual suicide); *People v Kimura*, Case No A-091133 (Los Angeles Super Ct 1985) (unpublished opinion) (ritual suicide); *People v Moua*, Case No 315972-0 (Fresno Super Ct 1985) (unreported case) (marriage by capture).

5. Wayne R. LaFave and Austin W. Scott, 1 *Substantive Criminal Law* § 5.7 (West 1986).

jurisdictions impose a duty to retreat if possible to do so safely[6], and other jurisdictions have created certain exceptions to the duty to retreat such as the "true man" doctrine[7] and the "castle" exception[8]. Most attempts to introduce cultural evidence in support of a self-defense justification are vulnerable to exclusion as irrelevant to the "objective reasonableness" standard to which all defendants are held in assessing their perceived need to respond to a threat with deadly force.

B. CULTURAL DEFENSE OR CULTURAL EVIDENCE?

The cultural defense has often been characterized, in a somewhat inflammatory manner, as a suggestion that foreigners should sometimes be excused for actions that would not be illegal in their native cultures but which nevertheless violate the laws of the United States.[9] This broad characterization of the parameters of the defense may arguably lead to the conclusion that being from another culture should constitute an exemption from liability for certain criminal acts under American law. Framed in this manner, the cultural defense has unsurprisingly met with much emotional dissent which has only served to enhance the widely inaccurate public perception of the scope of the defense.[10] One scholar has recently argued that the use of the term "cultural defense" is itself misleading and tends to provoke undue condemnation.[11]

The practice might be better characterized as an argument for the admission of "cultural evidence" when such evidence may be pertinent to

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6. See, for example, *State v Gartland*, 149 NJ 456, 694 A2d 564, 571 (1997) (finding that New Jersey law imposes a duty to retreat on a woman attacked by her cohabitant spouse).

7. See, for example, *Wade v State*, 724 S2d 1007, 1010 (Miss App 1998) (finding that no duty to retreat exists so long as an individual is in a place where he or she has a right to be).

8. See, for example, *State v Laverty*, 495 A2d 831, 833 (Me 1985) (finding no duty to retreat from one's own dwelling place).

9. See generally Sanford H. Kadish and Stephen J. Schulhofer, *Criminal Law and Its Processes: Cases and Materials*, 281-82 (Little, Brown 6th ed 1995); Margaret Talbot, *Making American Law Suit All No Easy Task*, Mainichi Daily News 2 (Aug 29, 1997) ("If a crime here is not a crime in the defendant's own country, the thinking goes, then he should not be held as accountable for it as an American-born defendant would be.").

10. See, for example, Deroy Murdock, *Call Them Citizens*, Wall Street Journal A20 (May 14, 1998) (Midwest ed) (criticizing applications of the cultural defense as "demented legal theories"); Beverly McPhail, *Unacceptable in Any Culture and in Any Country*, Houston Chronicle 17 (Feb 26, 1996) (suggesting that an acceptance of the cultural defense by the legal systems of other countries would allow American servicemen stationed abroad to cite being from a rape-prone country as a defense to rape).

11. Peter Margulies, *Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense*, 51 Rutgers L Rev 45, 113-14 n 293 (1998) (explaining the author's decision to use the term "counterorthodoxy" as being less misleading than "cultural defense" and observing that "[t]he homogenization of such cases into the category of 'cultural defense' may make them easier targets in the media.").

ascertaining whether a defendant's state of mind meets the requisite level of intent needed to commit a crime under American law.[12] Such cultural evidence, when offered, has usually taken the form of expert testimony by sociologists, psychologists, and anthropologists specializing in the culture to which a defendant professes membership.

One rare case in which cultural evidence was successfully used to win the reduction of a charge and corresponding sentence was a California case in which an Ethiopian national was allowed to introduce expert testimony in support of his claim that he shot a woman in self-defense against her use of witchcraft.[13] Claiming that the woman was a *bouda*, or host, for an Evil Spirit who inflicted headaches and stomachaches upon him, the defendant explained that after having begged her several times to stop, he went to her apartment with a gun only to frighten her, but wound up shooting her twice. Alameda County Superior Court Judge Richard A. Hodge admitted the expert testimony of both an anthropology professor and a psychologist who testified to the authenticity of the cultural practice and the probability that the defendant believed in the practice at the time of the attack. Judge Hodge later noted that he felt no hesitation about permitting the testimony and remarked that the admission of the evidence was needed "to show whether [the defendant's] mental state was diminished by his belief and to show that he was not making this up".[14] As a result, the jury in the case determined that the defendant lacked the requisite intent to commit attempted murder and instead found him guilty on the lesser charge of assault with a deadly weapon; Judge Hodge subsequently sentenced the defendant to seven years in prison, which was five less than the minimum sentence required for attempted murder. Although the admission of cultural evidence was unusual, Judge Hodge's decision nevertheless shows that it is within the scope of a trial judge's discretion to admit expert testimony on cultural practices and beliefs if such evidence could be considered relevant to a defendant's state of mind.

Despite the compatibility of the admission of cultural evidence with traditional U.S. evidentiary practices, the prospect of admitting such evidence still conjures the spectre of double standards and the promulgation of subjective justice in the courts.[15] In the context of the law of self-defense, some

12. Maguigan, 70 NYU L Rev at 42 (arguing that cultural evidence is most often presented not for the purpose of asserting a separate cultural defense, but is instead usually consistent with the introduction of evidence in support of existing criminal law defenses) (cited in note 3).

13. See Oliver, *Immigrant Crimes*, LA Times at 1 (cited in note 2).

14. Id.

15. See, for example, Valerie L. Sacks, Note, *An Indefensible Defense: On the Misuse of Culture in Criminal Law*, 13 Ariz J Intl & Comp L 523, 550 (1996) (suggesting that courts are reluctant to adopt the cultural defense in part because "the possibilities for its extension are nearly limitless").

fear that the admission of cultural evidence might force courts to adopt a new subjective standard under which to analyze the reasonableness of a defendant's belief in the need to use deadly force. A recent opinion by a Michigan court expressed a common reaction to this perceived threat to American law: "We recognize that other cultures may have adopted legal doctrines that differ from American legal doctrine—as in what constitutes self-defense, for example. However, persons in America are bound to abide by American legal doctrine and American courts are obligated to apply such doctrine."[16] As a result of this approach, which might be described as embracing an "American courts, American law" attitude, most courts have consistently rejected the admissibility of cultural evidence in support of a self-defense claim by appealing to the "objective reasonableness" standard that governs the elements of the defense.

C. THE IRRELEVANCE OF CULTURE TO OBJECTIVE REASONABLENESS: TWO CASES

1. Xi Van Ha: Unreasonable Fears

In *Ha v State*[17], the Court of Appeals of Alaska upheld the second-degree murder conviction of Vietnamese defendant Xi Van Ha, rejecting Ha's assertion that evidence of his Vietnamese culture was improperly excluded at trial as being irrelevant to his claim of self-defense. The defendant, who spoke only rudimentary English, was an immigrant employed aboard a fishing vessel in Alaska. The confrontation that was the subject of the dispute took place between Ha and another Vietnamese fisherman named Buu Van Truong who, though uninvited, had accompanied the defendant and some of his friends to the defendant's boat for some food. Buu's family had a reputation for having threatened and beaten those who crossed them, and Ha apparently fell into this category when he failed to heat the food rapidly enough; becoming impatient, Buu harassed and insulted Ha, making comments such as "fuck your mother".[18] When Ha responded by cursing and telling Buu to get off the boat, Buu began beating Ha, holding him by the hair while striking Ha's face repeatedly with his fist. Although the severe beating was temporarily halted by one of Ha's friends, Buu returned a few minutes later armed with a hammer with which to renew the attack, screaming "I'm going to kill you, and I will strike you until you die!"[19] Ha attempted to escape the assault by jumping onto another nearby

16. *People v Truong*, 218 Mich App 325, 338 (1996).
17. 892 P2d 184 (1995).
18. Id at 186.
19. Id.

boat, running into the cabin and holding the door closed while Buu stood outside shouting "Fuck your mother! I will strike you and I will kill you!"[20] Four or five minutes passed before Ha's friends were able to come to his aid and escort Buu away.

Fearing that Buu was certain to return to fulfill his threat to kill him, Ha retrieved a rifle that he had previously used to shoot birds and subsequently lay awake all night with the rifle by his side. Ha further testified that in the morning he tried to think of someone who could help him, but was unable to think of anyone who could do so. Ha told a friend, "Last night [Buu] beat me up and told me he was going to kill me; he already threatened to kill me. If he doesn't kill me today, he'll kill me tomorrow."[21] That afternoon, still frightened that Buu would enact his revenge, Ha went in search of Buu and upon finding him returning from the grocery store, shot Buu seven times in the back with the rifle, killing him.

At trial, Ha attempted to plead self-defense as a justification and sought to introduce evidence to show that Vietnamese culture taught that, in the words of the appellate court, "all police are corrupt, that one can expect no help from the authorities, and that people must take the law into their own hands to resolve personal disputes."[22] Rejecting this argument, the trial court found that:

> [T]his case is absolutely devoid of any evidence that there was . . . any threat of imminent harm from Mr. Buu to this defendant. . . . Any threat of harm . . . had been made twelve to thirteen hours earlier. . . . To an objective third-party observer, that could not possibly amount to imminency of threat of harm.[23]

Since Ha's actions were not viewed as objectively reasonable, the proffered cultural evidence was rejected as irrelevant to the promulgation of a self-defense claim. The self-defense claim itself was therefore disallowed and the jury convicted Ha of second-degree murder. As noted, the conviction was affirmed on appeal.

2. Michael Romero: Irrelevant Honor

People v Romero[24] is another recent case in which cultural evidence was rejected as being irrelevant to the ostensibly objective standards required by the law of self-defense. In the late hours of August 3, 1995, the defendant, Michael

20. Id.
21. Id at 187.
22. Id at 195.
23. Id at 189.
24. 81 Cal Rptr 2d 823 (1999).

Romero, was crossing the street with a group of friends, including his brother, when a car driven by Alex Bernal came quickly around the corner and had to brake suddenly in order to avoid hitting the group. When some members of the group yelled at the driver, Bernal parked the car, got out, and challenged Romero to a fight. The two began a fight which temporarily ended when Bernal fell to the ground. As Romero was walking away, Bernal struck him from behind. Romero turned around, producing a knife which he began to swing at Bernal, who was kicking at Romero. On the third swing, Romero stabbed Bernal in the heart, killing him.

In support of his self-defense claim at trial, Romero attempted to introduce the testimony of a sociologist who would testify about street fighters and the value of honor in the Hispanic culture. Defense counsel stated that the sociologist would testify that:

> (1) street fighters have a special understanding of what is expected of them; (2) for a street fighter in the Hispanic culture, there is no retreat; (3) the Hispanic culture is based on honor, and honor defines a person; and (4) in this culture a person "would be responsible to take care of someone," i.e., defendant had a strong motivation to protect his younger brother. Stated differently, "He's the eldest male. He would assume a paternalistic role whether he wanted to or not. Something is expected of him."[25]

Thus, Romero claimed that as the eldest male, he was expected to assume a protective role toward his younger brother, and it was in this capacity that he acted in self-defense. As Romero testified at trial: "I don't know where my brother was standing, who was doing what, where. All I know [sic] I couldn't let [Bernal] get there."[26] Affirming the trial court's exclusion of the cultural evidence, a California appellate court found that such cultural evidence was irrelevant to the objective reasonableness of the self-defense claim: "we conclude the testimony . . . was irrelevant to whether defendant actually believed he was in imminent danger of death or great bodily injury, and whether such a belief was objectively reasonable."[27] Thus once again, a judge's determination that cultural evidence was irrelevant to objective reasonableness standards resulted in the exclusion of such evidence from the jury's consideration. The jury duly found Romero guilty of murder.

As both *Ha* and *Romero* make plain, the chief problem that proponents of cultural evidence must overcome is the court's threshold determination of

25. Id at 827.
26. Id at 826.
27. Id at 827.

admissibility. At least two commentators on the cultural defense have devoted a significant amount of time to addressing the role of the judge in the admission and exclusion of cultural evidence. Nancy Kim has made a strong case for the relevancy of cultural evidence to criminal defenses and described in detail how judges may use their traditional discretion in evidentiary matters to admit such evidence.[28] Holly Maguigan has attempted to explain why judges are often quick to exclude such evidence entirely, observing that judges often exclude testimony primarily on the basis of its offensiveness to the judge.[29] While such normative judgments should not be the basis for threshold admissibility determinations, in reality such judgments are common.[30]

Given the apparent prejudices that weigh against the admission of cultural evidence and in favor of concluding that such evidence is irrelevant, the primary goal of proponents of cultural evidence has been to provide some substantive reason why judges should overcome their normative prejudices and admit such evidence. Among those who have tried to answer this question, the law and literature movement has produced some of the strongest arguments to justify overcoming prejudicial practices in order to secure admission of cultural evidence at trial.

PART II. CULTURAL EVIDENCE FROM THE LAW AND LITERATURE PERSPECTIVE

One response to those who oppose the admission of cultural evidence as irrelevant to the promotion of objective justice has come from the proponents of the law and literature movement. Most of the contributions of law and literature theorists to the cultural evidence debate have focused on the importance of the narrative voice of the defendants themselves as an important tool that can be used to emphasize cultural identity and provide representation for those cultural perspectives that have been traditionally excluded in court.[31]

A. THE OTHER VOICE: CULTURAL EVIDENCE AS STORYTELLING

Law and literature specialists, feminist legal scholars, and critical race theorists have found a common ground in the assertion that cultural evidence

28. Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 NM L Rev 101 (1997).

29. Maguigan, 70 NYU L Rev at 89-90 (cited in note 3).

30. Id at 90.

31. Paul Gewirtz, *Narrative and Rhetoric in the Law*, in Peter Brooks and Paul Gewirtz, eds, *Law's Stories: Narrative and Rhetoric in the Law* 5 (Yale 1996).

should be considered to be a form of narrative that represents the stories of traditionally subordinated groups that have experienced a lifetime of prejudice and oppression at the hands of dominant groups.[32] As commentator Peter Brooks has summarized:

> The concept of narrative has entered legal studies largely with an emphasis on its use as a vehicle of dissent from traditional forms of legal reasoning and argumentation. In this view, storytelling serves to convey meanings excluded or marginalized by mainstream legal thinking and rhetoric. Narrative has a unique ability to embody the concrete experience of individuals and communities, to make other voices heard, to contest the very assumptions of legal judgment. Narrative is thus a form of countermajoritarian argument . . .[33]

One of the most successful cultural defense cases to have apparently employed this theory of oppositional narrative, *People v Croy*, was a self-defense case in which the defendant was allowed to present expert testimony on the history of Native Americans as a subordinated group to establish the reasonableness of the defendants' belief in the need to employ deadly force against a police officer.[34]

The relaxation of the imminence requirement for self-defense through narrative evidence has been advocated on behalf of abused women as well. As commentator Marina Angel has recently observed:

> Common law doctrines of provocation and self-defense were based on men's emotions, men's realities and men's stories . . . Self-defense required a physical attack, evidence of which immediately preceded the killing.
>
> For abused women, the stories are much different. Fear, not anger, is the primary emotion. It is a fear that builds as abused women learn that avenues of escape are blocked. For abused women both provocation and self-defense extend over time.[35]

Thus, narrative evidence tends to help explain the reality-shaping experiences of individuals, particularly those of traditionally excluded groups whose

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32. See generally, Paul Harris, *Black Rage Confronts the Law* (NYU 1997); Marina Angel, *Susan Glaspell's* Trifles *and* A Jury of Her Peers*: Woman Abuse in a Literary and Legal Context*, 45 Buff L Rev 779 (1997); Alex M. Johnson, Jr., *The New Voice of Color*, 100 Yale L J 2007 (1991); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich L Rev 2411 (1989).

33. Peter Brooks, *The Law as Narrative and Rhetoric*, in Brooks and Gewirtz, eds, *Law's Stories: Narrative and Rhetoric in the Law* at 16 (cited in note 31).

34. See *People v Croy*, 221 Cal Rptr 592 (1985); David Talbot, *The Best Defense: Hooty Croy was on Trial for His Life. But Tony Serra Put American History on Trial Instead*, SF Examiner 16 (Jul 8, 1990).

35. Angel, 45 Buff L Rev at 821 (cited in note 32).

viewpoints have been under-represented. One example of the relevance of narrative evidence at trial is the relatively recent acceptance of expert testimony on Battered Women's Syndrome in interpreting a defendant's subjective belief in the need to kill her batterer in self-defense. At least one court has even gone so far as to accept Battered Women's Syndrome testimony in support of the objective reasonableness of that belief.[36]

Despite the obvious value of narrative evidence to the clarification of routine legal inquiries like state of mind defenses, such evidence has nevertheless been strongly criticized as both distortionary and inflammatory. One leading criticism of narrative evidence is that the very oppositionist character that gives it value may also be seen as a call for juries to pass judgment on society rather than to address the criminal liability of the individual defendants themselves. Trials in which cultural evidence has been admitted have often been regarded as "bad social environment" cases in which the exoneration of the accused might be interpreted as a societal recognition of the harms of prejudice and discrimination. The effectiveness of these narratives at trial may arguably depend on the gender and racial composition of the jury and the existence of jury nullification, for the stories themselves often present an indictment of the legal system and the society that promulgated it. As Richard Delgado has observed, such "oppositionist" stories may be highly confrontational and accusatory: "[t]he story places the majority-race reader on the defensive. He or she alternately leaves the storyteller's perspective to return to his or her own, saying, 'That's outrageous, I'm being accused of. . .'".[37] Ironically, the accusatory nature of some cultural narratives may ultimately detract from the legal questions to be answered in any particular case by shifting the focus of the case to a direct assault upon social prejudices in general.[38]

The usefulness of law and literature's narrative approach to the admission of evidence has also been inherently limited by its tendency to stress ethical reasons for considering cultural narrative to the exclusion of pragmatic reasons. In his criticism of law and literature scholar James Boyd White's writing, Richard Posner has stressed a weakness that is aptly descriptive of the law and

36. See *People v Humphrey*, 56 Cal Rptr 2d 142 (1996).

37. Delgado, 87 Mich L Rev at 2435 (cited in note 32).

38. It should be noted that the tone of some cultural narratives may be less accusatory than that of other forms of narrative evidence, since the cultural evidence at issue in many cases can be characterized as having been inherited as a tradition or a belief, as opposed to being a consequence of external discrimination and prejudice. The voluntariness of the adoption of any cultural practice is, of course, susceptible to challenge. However, for the purposes of this Comment, the precise origins of the belief or practice are not critical, as it is the relevance of the evidence itself to the defendant's state of mind that is crucial to the ultimate determination of admissibility.

literature movement in general: "you will likewise find little in the way of proposals for improving the law's treatment of sensitive issues, beyond exhortation to the judge and the lawyer to be more sensitive, candid, empathetic, imaginative, and humane."[39] Posner's critique also seems to hint that one of the most troublesome aspects about the demand for cultural narratives is the implicit suggestion that the stories told by members of a subordinate group may be normatively superior to those promulgated by the dominant group. As commentator Toni Massaro has argued, the storytelling movement's ideal listener is not merely someone who is empathetic, but also sympathetic, and ultimately, capable of embracing the "correct" viewpoint as exemplified by the narrative:

> When pared to its roots, the "empathy" theme therefore seems not to be a call for more empathy, but for a different ordering of our empathetic responses. It represents a hope that certain specific, different and previously disenfranchised voices—such as those of blacks and women and poor people and homosexuals—will be heard, *and will prevail.* This is not a call to conversation; it is *convert*-sation.[40]

Massaro's pointed observation suggests that the proponents of cultural narratives are less concerned with legal rules than they are with the idea that courts and juries seem to be reaching what critics interpret to be the wrong conclusions. Indeed, law and literature scholars have been forced to spend a significant amount of time defending themselves against this precise charge of normative bias.[41] Although there is significant merit in the recognition that oppositionist narratives have often been neglected by the law, it is nevertheless important not to lose sight of the fact that any self-interested defendant who stands accused of murder will possess a substantial incentive to fabricate a cultural defense at trial. However, even when self-interest is taken into account, cultural narratives are nevertheless properly relevant to inquiries into a defendant's state of mind, and it is clearly within the province of judges to determine when such evidence may be admitted at trial.

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39. Richard A. Posner, *Law and Literature* 299 (Harvard Rev & enl ed 1998).

40. Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 Mich L Rev 2099, 2113 (1989) (emphasis in original).

41. See, for example, Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 Va L Rev 95 (1990) (responding to criticism that proponents of the narrative "voice" are privileging that voice over other viewpoints).

B. JUDGES AS AUTHORS

While the power of narrative evidence for amplifying underrepresented voices affirmatively provides distinct benefits, judges may be more persuaded by an illustration of what is lost when cultural evidence is excluded by courts. To this end, a practical evaluation of the usefulness of cultural evidence may benefit from a closer assessment of the judge's role in the admission or exclusion of cultural evidence instead of simply scrutinizing the details of the cultural stories themselves. While most existing scholarship on the cultural defense tends to portray the defendants as the tellers of cultural narratives, it is the judge who ultimately wields the narrative authority at trial; as Alison Dundes Renteln has argued, "[u]nder the current system, a defendant's fate would appear to hinge upon the attitude of the *judge* to the relevancy of the cultural evidence".[42]

Unfortunately, the law and literature movement, which has been so eloquent in articulating the benefits of cultural narratives, is somewhat less illuminating here. To the extent that the judge's role has been appraised by law and literature theorists, the scholarship has predominately stressed the importance of judicial narratives along the same ethical grounds that have been used to justify the inclusion of cultural narratives.[43] The other major focus of law and literature scholars has centered around the treatment of judicial opinions as a form of literature whose merit is subject to evaluation by literary and rhetorical standards. Richard Weisberg, for example, has advanced a theory of literary jurisprudence that attempts to craft a poetic method for law by emphasizing the inseparability of the words of a judicial opinion from its outcome and its holding.[44] While Weisberg's effort optimistically represents an ideal union of meaning and method to which judges should arguably aspire, his approach has been justly criticized for giving insufficient recognition to the political and social realities that place limits on the extent to which judges may harmonize the language and the outcome of an opinion.[45] Indeed, as Judge Pierre N. Leval has admonished, "[t]he objectives and duties of the judicial opinion are far different from those of polemics, poetry, and the narrative

42. Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S Cal Rev L & Women's Stud 437, 465 (1993) (emphasis added).

43. See, for example, James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* 134-35 (Wisconsin 1985) (emphasizing the need for judicial opinions to reflect openness to new characterizations of legal problems and consideration of the experiences of others).

44. Richard Weisberg, *Poethics and Other Strategies of Law and Literature* 5-10 (Columbia 1992).

45. See John Fischer, Note, *Reading Literature/Reading Law: Is There a Literary Jurisprudence?*, 72 Tex L Rev 135, 149-50 (1993).

forms of literature . . . The function of the published opinion . . . [is] to instruct in the meaning of the rules of law".[46]

Another criticism of the law and literature movement's attempt to provide rhetorical guidance to judicial opinions is the fact that by the time a judicial opinion is written, it is already too late for cultural evidence to be introduced. If law and literature analysis is to make a case for the admission of cultural evidence, it must be at the trial stage rather than at the judicial opinion stage, for no amount of creative expression could properly address the merits of cultural evidence that had been previously excluded at trial.

The law and literature movement has tended toward a treatment of judicial opinions and narrative voices as separate, self-contained sources of legal innovation and authority. An inevitable weakness in this approach is revealed by the fact that in the course of an actual trial, narrative evidence and judicial opinions are interdependent. Their relationship may in fact be characterized as permissive: at trial, the judge rules on the admission of evidence, cultural or otherwise, and in the absence of a decision favoring admission, cultural narratives will be largely excluded from the opinion as well. As interpreted from a literary standpoint, the bulk of narrative authority is vested in the judge, who in effect controls the admission of all narratives at trial. The inevitable tension between a judge's narrative authority and the danger of excluding relevant cultural evidence stands at the center of the events and narrative structure of Scott's story, "The Two Drovers".

III. THE ADMISSION OF CULTURAL EVIDENCE IN "THE TWO DROVERS"

A. THE LEGAL AND CULTURAL PERSPECTIVE OF SIR WALTER SCOTT

Among the challenges to the application of classic works of literature to modern legal problems is the fact that most of the writers whose "great works" have been deemed central to the law and literature movement's emphasis on rhetorical style and ethical content were neither truly familiar with the law nor sufficiently connected with any marginalized cultural group to be able to write on their behalf with authority.[47] Richard Posner has rightly criticized as circular the tendency to judge literary merit based primarily on the survivability of any work of literature in a competitive literary marketplace influenced by

46. Pierre N. Leval, *Judicial Opinions as Literature*, in Brooks and Gewirtz, eds, *Law's Stories: Narrative and Rhetoric in the Law* at 207 (cited in note 31).

47. See Fischer, 72 Tex L Rev at 152-53 (cited in note 45).

perpetually changing tastes.[48] Given these concerns, a writer of such popular literary stature as Sir Walter Scott might seem suspect as a source of any authoritative legal criticism regarding the practice of admitting cultural evidence. However, unlike many other eighteenth and nineteenth-century novelists whose legalistic novels constitute the generally accepted Anglo-American canon of "great works", Sir Walter Scott was a practicing attorney whose practical experience within the legal system was frequently reflected in his fictional work. Furthermore, as a Scotsman himself, Scott was a passionate advocate, admirer, and genuine inheritor of the Scottish culture that he celebrated and memorialized in his stories; in fact, Scott is often credited for having single-handedly created the nineteenth-century Scottish tourist industry by generating a revival of interest in Scottish history and culture through the popularity of his novels.[49]

The story of "The Two Drovers" is itself an exemplary melding of the cultural and legal issues with which Scott was intimately familiar. Although the story is fictional, Scott reportedly based "The Two Drovers" on actual people and real events that took place near the border between England and Scotland during the late Eighteenth Century.[50] While the events in the story take place roughly between seventy and eighty years after the Act of Union of 1707 that had united England and Scotland politically, economically, and socially, the intervening time had not been a peaceful transition. The violent suppression of the 1745 Scottish Jacobite uprising against the English government could hardly be considered a distant memory, and Scott's own conflicted attitude toward the Union has been described by one commentator as "reluctant, grudging and conditional."[51] Another critic has observed that by the time of the publication of "The Two Drovers" itself in 1827, the Scottish people keenly felt the reality of being a subordinate culture within a Union dominated by the English: "Even where they had profited by Union, they felt themselved [sic] declining into a cultural colony of England."[52]

Given the lingering concern over past political instability and the existence of a culturally distinct minority population within the "United" Kingdom, the eighteenth-century tension underlying the Union between Scotland and England provides an instructive parallel for the current tensions between America's promotion of cultural diversity and its adherence to the idea of

48. Posner, *Law and Literature* at 15-21 (cited in note 39).

49. See generally, J.G. Lockhart, *Life of Sir Walter Scott* (A & C Black, 10 vols 1882); John Sutherland, *The Life of Walter Scott: A Critical Biography* (Blackwell 1995).

50. Coleman O. Parsons, *Foreward*, in Sir Walter Scott, *The Two Drovers* i-vii (Kindle 1971).

51. Paul Henderson Scott, *Walter Scott and Scotland* 73 (William Blackwood 1981).

52. Caroline McCracken-Flesher, Pro Matria Mori: *Gendered Nationalism and Cultural Death in Scott's "The Highland Widow"*, 21 Scottish Lit J 69, 70 (Nov 1994).

objective equality under the law. The fear that accepting a cultural defense might give rise to a wave of lawlessness and displace ostensibly objective standards of justice is a focal point for Scott in the "The Two Drovers". While the judge in the story appeals to notions of objectivity and "civilized" behavior in order to support a condemnation of the conduct of the Scottish defendant, the structure of the entire story itself questions the judge's overriding presumption that English law represents a truly objective standard by which all defendants should be judged.

B. THE STORY OF "THE TWO DROVERS"

For those who are unfamiliar with the story of "The Two Drovers", the basic outline and chief plot elements of the story will be briefly sketched here. However, while no previous familiarity with "The Two Drovers" is necessary, it must be acknowledged that no encapsulation can properly capture the full cultural flavor of the story or engage the imagination and sympathy of the reader in the manner that Scott does with such economy and effectiveness in the original tale.[53] This inability to impart a truly accurate reflection of a unique perspective is in itself an instructive analogy to the inability of a judicial opinion to represent adequately what cultural evidence a defendant would have chosen to present had the evidence not been excluded at trial.

The disparity in economic influence that marked the relationship between Scotland and England is immediately apparent in the subject of "The Two Drovers". Drovers were essentially cattle drivers who conveyed cattle from the Highlands of Scotland to the English markets, where a much higher price would be paid for them. The cultural difference between the two countries is also emphasized by the disparity in appearance of the eponymous drovers of the tale. Robin Oig M'Combich is a Scottish Highland drover whose best friend and business partner, Harry Wakefield, is an English drover. Robin's appearance is described at length, emphasizing his smallness of stature and sturdiness of frame. Most importantly, however, Scott spends a significant amount of time detailing Robin's ancestry, which is Robin's secret pride and joy:

> For Robin Oig's father, Lachlan M'Combich (or *son of my friend*, his actual clan-surname being M'Gregor,) had been so called by the celebrated Rob Roy, because of the particular friendship which had subsisted between the grandsire of Robin and that

53. Where necessary, key passages from "The Two Drovers" are quoted at length in order to avoid disturbing the flow of the original prose and to give emphasis to the portions of the story relevant to the discussion.

> renowned cateran[54]. . . . "Of such ancestry," as James Boswell says, "who would not be proud?" Robin Oig was proud accordingly; but his frequent visits to England and to the Lowlands had given him tact enough to know that pretensions, which still gave him a little right to distinction in his own lonely glen, might be both obnoxious and ridiculous if preferred elsewhere. The pride of birth, therefore, was like the miser's treasure the secret subject of his contemplation, but never exhibited to strangers as a subject of boasting.[55]

Robin's proud cultural heritage is thereby established early in the story; as one commentator has observed, Robin's realization that his pride would be seen as ridiculous by others outside his culture actually tends to win the sympathies of those readers who are outsiders to that culture in fact.[56] Harry Wakefield, by contrast, is Robin's exact opposite in appearance. Nearly six feet tall and "gallantly formed", Wakefield "was the model of Old England's merry yeomen, whose clothyard shafts, in so many hundred battles, asserted her superiority over the nations".[57]

As Robin prepares to depart the Highlands with several Scottish companions and their droves of cattle, he is intercepted by his aunt who, much to Robin's embarrassment, insists on performing a traditional Scottish ritual to ensure Robin's safety during the journey. Just as the ceremony is completed, she suddenly takes fright, for in a moment of precognition she foresees that if Robin goes on the drove he will somehow wind up with English blood on his hands. In order to assuage his aunt's fears, Robin agrees to give his *skene-dhu*, a knife traditionally carried by Highlanders, to a fellow drover, Hugh Morrison, for safekeeping. Since Morrison's drove will be following several miles behind Robin's drove, this appears to be a sufficient safeguard against the prophecy coming true.

Finally Robin departs his village, meeting his good friend Harry along the way, and together they journey southward. However, as night begins to fall and the two drovers approach the town of Carlisle, they temporarily separate in order to find a pasture where each drover can allow his cattle to graze for the night. Available pasture is scarce, but fortunately Robin meets a farmer with whom he strikes a bargain to rent the farmer's pasture for the night. However, when the two arrive at the farmer's land, they find Harry's cattle already

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54. A cateran was a Highland bandit; the term itself was not necessarily pejorative and in fact carried honorable connotations for some.

55. Scott, *The Two Drovers* at 297-98. In addition to Robin Oig's connection to Rob Roy, a quasi-mythical bandit hero to Scottish Highlanders, the narrative suggests that Robin also bears a relation to the legendary English outlaw, Robin Hood.

56. Seamus Cooney, *Scott and Cultural Relativism: "The Two Drovers"*, 15 Stud in Short Fiction 1, 2 (1978).

57. Scott, *The Two Drovers* at 305-06.

grazing there, for Harry had just reached a similar deal to rent the land from a bailiff, who is a servant of the farmer. Given that the deal was made by a mere servant who acted independently in his master's absence, Harry is forced to concede the land to Robin, and subsequently winds up paying a very high price to another landlord for grazing rights to comparatively poor land.

That night, Robin goes to visit Harry at the inn where Harry is staying and finds the latter furious over the day's events and the rest of Harry's English companions similarly enraged on his behalf. As Robin sits down for a drink, he immediately becomes the target of the assembled company's racist invectives. Harry himself crosses the room and suggests that the two resolve their differences in a boxing match.[58] Robin declines this obviously unequal contest, suggesting that they can resolve their differences without necessitating any broken bones. In response, Harry accuses Robin of being a coward, and the subsequent interchange reveals that the cultural difference between the two drovers leads them to approach the impending conflict with markedly different attitudes and assumptions:

> ". . . Come, stand forward like a man." [said Harry]
>
> "To pe peaten like a dog," said Robin; "is there any reason in that? If you think I have done you wrong, I'll go before your shudge, though I neither know his law nor his language."
>
> A general cry of "No, no—no law, no lawyer! A bellyful and be friends," was echoed by the bystanders.
>
> "But," continued Robin, "if I am to fight, I have no skill to fight like a jackanapes, with hands and nails."
>
> "How would you fight then?" said his antagonist; "though I am thinking it would be hard to bring you to the scratch anyhow."
>
> "I would fight with proadswords, and sink point on the first plood drawn—like a gentlemans."[59]

This last claim is met with nothing but laughter and ridicule, but as Seamus Cooney notes, the same reaction does not occur in the reader, who remembers

58. Boxing in England at this time was an exceedingly violent and brutal sport that in this instance would essentially amount to a bare-handed fistfight. For additional commentary on the history of boxing in England and its relation to this story, see Christopher Johnson, *Anti-pugilism: Violence and Justice in Scott's "The Two Drovers"*, 22 Scottish Lit J 46 (May 1995).

59. Scott, *The Two Drovers* at 324-25.

Robin's pride of birth: "[the reader] can feel with compassion how bitterly the mockery of the bystanders wounds [Robin] in his most sensitive spot. To himself, and in terms of his own culture, he *is* a gentleman".[60] Robin's restraint is further emphasized by the fact that he offers to submit the dispute to an English judge, despite his unfamiliarity with English law or his inability to speak English well. Finally, as it becomes obvious that the scene will become violent if he stays, Robin gets up to leave, but Harry and the rest of the inn's patrons block the door. As Robin nevertheless tries to make his way out the door, Harry responds by knocking Robin to the floor "with as much ease as a boy bowls down a nine-pin", leaving him bloody and disoriented.[61] The prostrate Scotsman is surrounded by the crowd which spurs Harry on with cries of "'Well done, Harry'—'Give it him home, Harry'—'Take care of him now—he sees his own blood!'"[62] The conflict finally ends when Harry deals Robin an especially severe blow that leaves him lying motionless on the floor.

Having satisfied his own passions, Harry's tone then instantly changes to one of joviality; when he finds Robin to be still furious, Harry is genuinely surprised:

> "Come, come, never grudge so much at it, man," said the brave-spirited Englishman, with the placability of his country, "shake hands, and we will be better friends than ever."
>
> "Friends!" exclaimed Robin Oig with strong emphasis—"friends!—Never. Look to yourself, Harry Waakfelt."
>
> "Then the curse of Cromwell on your proud Scots stomach, as the man says in the play, and you may do your worst, and be d____; for one man can say nothing more to another after a tussle than that he is sorry for it."[63]

With this last interchange Scott once again emphasizes that the cultural differences between the two men have led to an entirely different interpretation of the events that have transpired. Harry dismisses the significance of the fight because he truly does not view it as anything more than an acceptable and ultimately friendly way of settling differences. On the other hand, Robin cannot help but understand the fight as a serious affront to his honor as a Scottish Highlander. As Robin departs the inn, Scott makes this point explicit

60. Cooney, 15 Stud in Short Fiction at 3 (emphasis in original) (cited in note 56).
61. Scott, *The Two Drovers* at 326.
62. Id at 327.
63. Id at 328.

by revealing Robin's reflections in a passage whose significance for the ideas of self-defense and cultural evidence justify its quotation at length:

> This was Robin Oig M'Combich.—"That I should have had no weapon," he said, "and for the first time in my life!—Blighted be the tongue that bids the Highlander part with the dirk—the dirk—ha! the English blood!—my muhme's word—when did her word fall to the ground?"[64]
>
> The recollection of the fatal prophecy confirmed the deadly intention which instantly sprang up in his mind.
>
> "Ha! Morrison cannot be many miles behind; and if it were an hundred, what then!"
>
> His impetuous spirit had now a fixed purpose and motive of action, and he turned the light foot of his country towards the wilds, through which he knew ... that Morrison was advancing. His mind was wholly engrossed by the sense of injury—injury sustained from a friend; and by the desire of vengeance on one whom he now accounted his most bitter enemy. The treasured ideas of self-importance and self-opinion—of ideal birth and quality, had become more precious to him (like the hoard to the miser), because he could only enjoy them in secret. But that hoard was pillaged, the idols which he had secretly worshipped had been desecrated and profaned. Insulted, abused, and beaten, he was no longer worthy, in his own opinion, of the name he bore, or the lineage which he belonged to—nothing was left to him—nothing but revenge; and, asthe reflection added a galling spur to every step, he determined it should be as sudden and signal as the offence.[65]

As may be surmised from the events thus far described, Robin retrieves his *skene-dhu* from Morrison, returns to the inn and duly kills Harry with a single stroke to the heart. Immediately afterwards, Robin surrenders himself to the authorities and is brought before an English judge whose instructions to the jury will be discussed in the following section. However, the key event for the story and this Comment is the just-quoted passage above, whose facts detail both the legal actions that determine Robin's sentence as well as the cultural evidence that might arguably mitigate it. For the judge in the story and presumably for most American judges, the fact that Robin had to walk several miles to retrieve his dagger puts an immediate end to any conceivable self-defense claim that Robin might have had, for he was no longer in imminent

64. "Muhme" is a reference to Robin's aunt, and in this sentence Robin is recalling the fact that his aunt had never been wrong in her prophecies.

65. Scott, *The Two Drovers* at 331-32.

danger. As in *Ha*, Robin would have difficulty sustaining a claim that he objectively believed that he was in immediate danger, nor does Robin attempt to do so in the story. However, Robin could argue that a self-defense theory is supported based on his conception of honor as an inseparable part of himself which could be considered to be still under attack and in need of defense. Given Scott's presentation of the cultural evidence on Robin's behalf, the readers are aware that Robin's actions are arguably involuntary. As Cooney has noted:

> [W]e fully understand the rendering of Robin's state of mind. He is now, even to himself, almost impersonal—a Highlander doomed to shed English blood, not simply Robin Oig who has quarreled with his friend. . . . Unless he takes revenge according to his code, he will have lost his integrity, his very definition of himself. It would be worse than dying; it would be a kind of utter annihilation. The act of revenge is for Robin thus wholly necessary.[66]

Simply put, given the evidence that Scott has provided for the readers, the judgment that must befall Robin Oig for his crime is complicated to some extent by mitigating cultural factors. However, the extent to which cultural evidence is accepted by the judge in the story dramatically affects Robin's fate.

C. OBJECTIVE TRUTH? THE JUDGE'S DIRECTED VERDICT

Until the moment of Robin Oig's surrender, the storytelling in "The Two Drovers" is relatively straightforward and can be fairly characterized as being full of cultural evidence relating to Robin's Scottish heritage and values. By providing the readers with full exposure to Robin's background and cultural belief in the sanctity of honor and Scottish ancestry, Scott's narration can be favorably compared to that of expert testimony detailing the cultural practices of the defendant. Thus, the narrative voice of the subordinated Scottish Highlander is given a full hearing by the readers, who have unwittingly embraced the story as "true" because it is the only story that is available to them until this point in the overall account of events. However, in a dynamic narrative twist, Scott switches the viewpoint to that of the judge and finishes the story in the judge's own words as he delivers a directed verdict to the jury. This change in viewpoints immediately fractures the narrative, as the reader is forced to realize the disparity between the original narrative and the concluding judicial evaluation. What follows is a dramatic revelation that helps to articulate what is missing when cultural evidence is excluded at trial. Ironically,

66. Cooney, 15 Stud in Short Fiction at 4 (cited in note 56).

Scott's narrative reveals that the exclusion of cultural narrative arguably results in the sacrifice of objectivity itself.

In the transitional paragraph between the end of the cultural narrative and the beginning of the judge's charge, a third narrative voice, identified only as that of a young Scottish lawyer who was a spectator at the trial, interjects to assert that "[t]he facts of the case were proved in the manner I have related them".[67] However, as commentator Kenneth Robb has observed, the facts "could not, of course, have been *presented* in their totality at public trial as they have been presented in the story to the solitary reader".[68] The faithfulness of the evidentiary presentation is thus rendered suspect as the lawyer goes on to describe the English audience's reaction to the story: "when the rooted national *prejudices* of the prisoner had been explained. . . the *generosity* of the English audience was inclined to regard his crime as the *wayward aberration* of a *false idea of honour* rather than as flowing from a heart naturally savage, or perverted by habitual vice."[69] The evidently paternalistic sympathy of the English audience seems inconsistent with the reaction that Scott's original narrative encourages. Having been previously exposed to Robin Oig's cultural background and assumptions, Scott's readers are more likely to view Robin's beliefs as honorable in fact, rather than merely as false ideas of honor to be pitied for their backwardness. In fact, by depicting Robin's patience in the face of Harry's brutal and unthinking aggression, Scott implicitly criticizes the English pugilistic tradition as the backward custom that should be condemned, rather than Robin's Scottish beliefs.

Another observation that discourages the reader's uncritical acceptance of the spectator lawyer's assertions is the possibility that the "facts" to which he refers are strictly legal facts, which may have excluded substantial portions of the cultural narrative. But even if the lawyer's assertions are accepted as true, this only serves to make the judge's subsequent charge all the more difficult to reconcile with the preceding narrative. As Scott was no careless writer, it may in fact be the case that he included this sentence for the very purpose of heightening the disparity between the earlier narrative and the judge's charge.

Paternalism continues to serve as an obvious proxy for the appearance of objectivity throughout the judge's speech. In his initial assessment of the case, the judge invokes a paternalistic tone in which he calls upon the jury to pity both men.

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67. Scott, *The Two Drovers* at 340.

68. Kenneth A. Robb, *Scott's* The Two Drovers*: The Judge's Charge*, 7 Stud in Scottish Lit 255, 258 (1970).

69. Scott, *The Two Drovers* at 341 (emphasis added).

> Here we have two men, highly esteemed, . . . one of whose lives has been already sacrificed to a punctilio, and the other is about to prove the vengeance of the offended laws; and yet both may claim our commiseration at least, as men acting in ignorance of each other's national prejudices, and unhappily misguided rather than voluntarily erring from the path of right conduct.[70]

By paternalistically urging "commiseration", the judge's speech appears to promote an atmosphere of fairness and objectivity. However, having already been exposed to the excluded cultural evidence, the reader readily identifies this tactic as an attempt to distract from the aspects of the speech that are considerably less objective. Voluntary or not, Robin has strayed from the normatively "right" conduct, and for that transgression the law will actively seek "vengeance".

The normative message of the judge's charge is clear, for despite the tears, the protestations, and the seemingly heartfelt sympathy expressed by the judge, the judge's charge to the jury is tantamount to a death sentence. This ostensibly conflicted jury instruction is characteristic of what Catharine MacKinnon has criticized as the "I so regret to do this" judicial opinion, a judicial style that denies moral culpability while simultaneously asserting heavy-handed authority.[71] As MacKinnon has noted, "[t]his ubiquitous trope of bench in extremis serves up the source of authority as 'not me,' such that the more you hate to do what you are doing, the more authoritative you become."[72] This double-edged judicial authority is readily apparent in the final words of the judge's charge; even as he is choked with emotion, the judge ends his instructions with a warning that the jury will bear personal responsibility for dire consequences should they do otherwise than find Robin Oig guilty: "Englishmen have their angry passions as well as Scots; and should this man's action remain unpunished, *you* may unsheath, under various pretences, a thousand daggers betwixt the Land's-end and the Orkneys."[73]

Although Scott's judge occasionally recognizes the distinctiveness of Robin's cultural outlook, such recognition is immediately followed by normative evaluation that tends to condemn Highland values as either uncivilized or outdated, and thus irrelevant to the law. For all intensive purposes, the judge effectively excludes the cultural evidence that was central to the original narrative. As a result, when it comes time to apply the law to the facts, the law appears blind to any facts that have been excluded as irrelevant to

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70. Id at 342.

71. Catharine A. MacKinnon, *Law's Stories as Reality and Politics*, in Brooks and Gewirtz, eds, *Law's Stories: Narrative and Rhetoric in the Law* at 237 (cited in note 31).

72. Id.

73. Scott, *The Two Drovers* at 350 (emphasis added).

English normative values. As might be predicted, Robin's fate is determined solely by the time interval between the initial conflict and the killing. Kenneth Robb notes how this ostensibly objective application of the law actually reveals a process that is far removed from objective reality:

> The particular case is fitted into the abstract framework, or rather, those parts of the particular case which are relevant to the framework are fitted into it, and inexorably the wheels of justice turn, inexorably the sentence is produced. We see this process as readers; it defies our experience of the story, it defies our sympathy with Robin.[74]

Apparently, the cultural evidence constituting a significant portion of the passage describing Robin's departure from the inn has been completely excluded at trial. At least such evidence makes no appearance in the judge's analysis of Robin's liability, presumably because the notions of honor that inspire such an outpouring of emotion throughout the rest of the charge have been ultimately determined to be completely irrelevant to the legal analysis. Thus, a death sentence is mechanically "produced" by the law without any substantial or accurate recognition of the facts as they are experienced by the readers.

In the final analysis, the judge's explanation of the events simply does not ring true for the reader who has read the entire story, because the judge has used his narrative authority to effectively exclude all cultural evidence from consideration. However, by providing the readers with prior access to the cultural evidence, Scott's narrative structure in fact turns the objective/subjective distinction on its head by questioning whether the objective reality as represented by the judge's charge is truly objective at all. As Seamus Cooney notes, "[the judge's] objective condemnation must remain a matter of assertion only. . . . The logic of the story points in a different direction, towards a conclusion subversive of the confident belief in objective truth."[75] Thus, Scott's literary narrative accomplishes through comparative evaluation what a separate analysis of the judge's role and the defendant's narrative voice cannot. Scott does not directly dispute the fact that the judge can and must remain the ultimate narrative authority in a legal system that purports to uphold objective standards. However, "The Two Drovers" suggests that when judges use their narrative authority to exclude the admission of all cultural evidence as presumptively irrelevant, true objectivity may be compromised. This does not, however, mean that Scott's nineteenth-century audience, or even his twentieth-century audience would have found a self-

74. Robb, 7 Stud in Scottish Lit at 261 (cited in note 68).
75. Cooney, 15 Stud in Short Fiction at 7 (cited in note 56).

defense theory to be plausible in this case. But as "The Two Drovers" seems to suggest, in order to retain true objectivity, a jury does not need to accept the defendant's story as true; they need only be allowed to hear it. Scott does leave some room for speculation as to what the jury in "The Two Drovers" was actually allowed to hear, but no such doubt is left in the cases of *Ha* and *Romero*, to which this discussion now returns.

PART IV. *HA* AND *ROMERO*: A NARRATIVE RE-EXAMINATION

Readers of "The Two Drovers" possess a distinct advantage when they come to assess the objectivity of the judge's charge at the end of the story, for they have heard both the defendant's cultural evidence and the judge's evaluation of the crime that took place. By comparing the narratives, the reader can determine with some degree of certainty which account appears to be the more objective of the two. In *Ha* and *Romero*, the cultural evidence is not directly available to the readers of the opinions since the evidence was excluded at trial and that exclusion forms the basis of the appeal itself. However, by comparing the general uncertainty of the discussions of the cultural evidence with the relative certainty of the legal conclusions that are made by the *Ha* and *Romero* courts, it is possible to see that the judges' decisions to exclude the cultural evidence may be contributing to a substantial sacrifice of true objectivity in decisionmaking.

In *Romero*, the appellate court judge did in fact have some concrete idea of the nature of the cultural evidence that the sociologist intended to present.[76] Immediately following the enumeration of the cultural evidence, the court declares authoritatively that "[g]iven the law, we conclude the testimony . . . was irrelevant to whether defendant actually believed he was in imminent danger of death or great bodily injury, and whether such a belief was objectively reasonable."[77] Nevertheless, despite this ostensibly conclusive declaration of the irrelevance of the cultural evidence, the court proceeds to demonstrate a lingering indecisiveness that immediately undermines the certainty of its initial decision:

> We are unsure what defendant means by his reference to the sociology of poverty, and how it might affect his actual beliefs and the *objective* reasonableness of those beliefs. Similarly, even if we assume street fighters have a special understanding of what is expected of them, and that this is something with which the jurors are not acquainted, why is it relevant? Are street fighters expected to kill every person they fight with,

76. See Part I.C.2 for enumeration of cultural evidence in *Romero* (cited in note 24).

77. *Romero*, 81 Cal Rptr 2d at 827 (cited in note 24).

> regardless of the circumstances? If so, does this expectation replace or relax the legal requirement that before deadly force may be used a person must actually fear imminent death or great bodily injury?[78]

Having already ruled on the relevance of the cultural evidence to the objective reasonableness of Romero's belief in the need for self-defense, it seems counterintuitive for the court to reinvigorate the inquiry by asking how the cultural evidence might affect objective reasonableness and questions of relevancy. This seemingly quixotic behavior might be explained as an attempt by the court to provide some appearance of fairness and consideration despite its foregone conclusion to adhere to the traditional normative outcomes dictated by the established self-defense requirements. In the end, however, the court asks questions that only could have been answered if the cultural evidence had not been excluded at trial. Ironically, after asserting narrative authority to exclude the cultural evidence, the judicial opinion is left without the confidence to assert the objectivity of its own judgment. Ultimately, the appellate court relies on a conclusory statement by the trial court to support its own normative conclusions: "[a]s noted by the trial court, 'Then you're creating a separate standard for what you call street fighters.' No authority or case law has been cited which supports a separate standard, and we decline to adopt one here."[79]

The appellate court in *Ha* relies on a similar tactic of crafting a normatively objectionable argument from the defendant's cultural evidence appeal so as to be able to confidently dismiss the argument and affirm the judgment. However, unlike the *Romero* court, the *Ha* court apparently lacks any definitive statement from the defense as to the nature of the cultural evidence to be presented. As a result, the *Ha* court's refutation of the cultural evidence consists entirely of uncertain characterizations of the defense arguments in favor of admission:

> Ha also *appears to argue* that Vietnamese culture teaches that all police are corrupt, that one can expect no help from the authorities, and that people must take the law into their own hands to resolve personal disputes. *Assuming* for purposes of argument that Ha's characterization of Vietnamese culture is accurate, and *further assuming* that Ha believed all these things, this still does not establish that Ha reasonably believed that Buu posed an imminent danger to him.[80]

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78. Id (emphasis in original).
79. Id.
80. *Ha*, 892 P2d at 195 (cited in note 17) (emphasis added).

The indecisiveness of the court's language in addressing the cultural evidence argument stands in stark contrast to its approach toward the defendants' other contentions, for nowhere else in the opinion does the court use similarly faltering or inconclusive language to portray Ha's arguments. This noticeable linguistic hesitation in characterizing Ha's cultural evidence argument tends to undermine the strength of the court's own assertion regarding the defendant's characterizations of Vietnamese culture. Finally, in an attempt to dispose of the cultural evidence argument in a decisive manner, the court characterizes the defense's argument in such a way as to present the admission of cultural evidence as an exaggerated challenge to the existing legal system: "To the extent that Ha might be arguing that the law of self-defense should make exceptions for people whose culture encourages vendettas, killings to assuage personal honor, or preemptive killings to forestall future harm, we reject Ha's argument."[81] Notably, even this normatively inflammatory portrayal of cultural evidence is careful to limit the scope of its accusation with the word "might".

Ha also contains a notable dissent by Judge Coats, who argued in favor of allowing the self-defense argument which the exclusion of the cultural evidence by the majority effectively precluded. In referring to past decisions in which defendants were allowed to argue self-defense, Judge Coats observed that the Alaska Supreme Court "required the trial judge to instruct on self-defense even where the evidence supporting the defendant's self-defense claim was weak or implausible."[82] Despite the apparently implausibility of Ha's self-defense claim, Judge Coats argued that Ha had a right to put that claim before a jury:

> Ha's primary defense was self-defense. I agreethat Ha's defense suffered severe problems because of the time that elapsed between Buu's assault and the moment when Ha shot Buu. There is little evidence that Ha had a need to defend himself from Buu at the time he shot Buu.
>
> However, despite the problems with his defense, Ha was entitled to a jury trial, and it seems to me that it was Ha's right to have the jury decide his claim of self-defense based on proper instructions.[83]

Although Judge Coats did not explicitly address the issue of cultural evidence in his dissent, the opinion nevertheless seems to recognize that the majority's affirmation of the exclusion of the cultural evidence effectively amounted to a normative decision about the nature of Ha's self-defense theory. In using their own narrative authority to exclude Ha's cultural assumptions as presumptively

81. Id.
82. Id at 199 (citations omitted).
83. Id.

unreasonable, the judges composing the *Ha* majority may be understood as simply rubber-stamping the normative values inherent in existing law under the guise of promoting objectivity. By contrast, the reasoning in the dissent could actually lead to greater objectivity in the decisionmaking process by at least allowing the cultural evidence to be heard by the jury.

As briefly discussed at the end of Part III.C., objectivity does not depend on the decisionmaker being in agreement with the defendant who seeks to introduce cultural evidence. As Judge Coats noted, Ha was extremely unlikely to prevail on his self-defense claim because of the time interval between the initial beating and the killing; if Robin Oig had claimed self-defense he would have been similarly handicapped for precisely the same reason. A more liberal admissibility standard toward cultural evidence would therefore not change any legal standards, but might ultimately lead to greater maintenance of true objectivity in legal decisionmaking.

CONCLUSION

The admission of cultural evidence in support of a claim of self-defense is still a disfavored practice in the United States; although cultural evidence may be highly relevant to assessing the requisite state of mind necessary to commit an offense, the concept of the "cultural defense" continues to conjure notions of subjective justice. Despite the necessity that evidentiary rulings be made on the basis of relevance alone, the broad discretion of trial judges in making such rulings may often be susceptible to normative bias, particularly those decisions that involve as inflammatory a subject as cultural evidence. Recent law and literature scholarship has argued in favor of the admission of cultural evidence as a fulfillment of the law's need to embrace the narratives of traditionally excluded and subordinate groups. However, this contention in itself has been the subject of much criticism for its own attendant normative biases.

Instead of focusing on the details of the stories themselves, this Comment has advocated a need to examine the judge's role as the true narrative authority in legal decisionmaking, as it is the judge who ultimately determines which narratives are to be heard and which are to be excluded at trial. In the course of examining this contention, this Comment has explored Sir Walter Scott's short story, "The Two Drovers", which uses a dual narrative to emphasize the tension between the cultural narrative and judicial narrative authority. This story reveals that the judge's traditional appeal to the ostensibly objective standards of the law of self-defense may in fact reveal a bias towards entrenched normative values, an inclination which actually reduces objectivity in the legal decisionmaking process.

By examining some recent self-defense cases in which cultural evidence was excluded, judicial narratives are revealed to demonstrate uncertainty and over-reliance on established patterns of decisionmaking. As a result of their considerable narrative authority in evidentiary matters, judges have tended to exclude cultural evidence, while simultaneously exhibiting some implicit self-doubt in the text of their opinions. This Comment has ultimately concluded that in order to ensure the existence of true objectivity, judges need to reconsider their reluctance to consider cultural narratives at trial. In order to ensure objectivity in legal decisionmaking, juries and judges need not agree with cultural narratives; they need only be willing to hear them out.