

Circumstantial Evidence: Of Law, Literature, and Culture

Alexander Welsh, *Strong Representations: Narrative and Circumstantial Evidence in England*. Baltimore: The Johns Hopkins University Press, 1992. Pp. xi, 262. \$29.95.

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I. INTRODUCTION

The "law and literature" movement to date consists of two rather different enterprises and concerns. The older, more familiar variety, "law in literature," consists of examining literary works such as Shakespeare's *Merchant of Venice*, Melville's *Billy Budd*, or Kafka's *The Trial* for their insight into and assessment of legal issues and problems.¹ The second—the driving force in the recent law and literature movement—emphasizes interpretation of literary and legal texts. Interpretation, of course, has always been central to literary and humanistic endeavors, but has taken on growing importance for law as belief in literature as a unique variety of text has eroded. The tendency to speak about legal and literary texts in the same breath thus seems more appropriate than it might have in earlier decades and largely stems from changes in modes of literary criticism. Interest is now focused on the extent to which the same or similar interpretive modes and strategies can or should be employed in a variety of different discourses.²

Alexander Welsh's *Strong Representations: Narrative and Circumstantial Evidence in England* does not fit easily into either category. It may

1. See Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1 (1988). Such studies may be undertaken for their own sake, or as Richard Weisberg has recently suggested, for what lawyers can learn about ethical aspects of law. See RICHARD H. WEISBERG, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE (1992).

2. See STANLEY FISH, IS THERE A TEXT IN THE CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980); HANS-GEORG GADAMER, TRUTH AND METHOD (1975); RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988); *An Interpretive Symposium*, 58 S. CAL. L. REV. 1 (1985); Owen Fiss, *Objectivity and Interpretation*, 37 STAN. L. REV. 739 (1982); Sanford Levinson, *Law and Literature*, 60 TEX. L. REV. 373 (1982); Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982). The development of the law and literature movement also owes much to the large number of American legal scholars who have done advanced work in literary and related areas prior to entering the legal profession.

be thought of as having extended the boundaries of the second, more recent development of law and literature studies. Perhaps Welsh, a distinguished literary scholar, has even developed a third variety, one that seeks to link legal modes of thought of particular historical eras with non-legal cultural experience of the same era. Welsh attempts to demonstrate a close relationship between eighteenth- and early nineteenth-century concepts of circumstantial evidence in English criminal law and the development of the English novel during that period. If that were all he attempts one might wish simply to state his thesis, suggest the extent to which he is able to support it, and be done with it. But he has done a good deal more—he has begun to explore the relatively unknown area of the history of the Anglo-American law of evidence, and has attempted to show how both literary and legal concepts of evidence were linked to the wider world, in the areas of religion and natural science. If he has not been altogether successful, he has made a significant foray into an important, though little explored, area of law and culture.

My essay has two parts. The first describes Welsh's argument and suggests the extent to which it might be accepted or emended. In order to establish the connection between the concepts of circumstantial evidence in law and the "strong representation" he finds so characteristic of late eighteenth- and nineteenth-century novels, Welsh not only examines several features of the English criminal trial but also looks to such important legal thinkers as Jeremy Bentham and James Fitzjames Stephen. He also attempts to link these materials to circumstantial modes of thinking present in eighteenth-century natural theology and nineteenth-century geology and paleontology. Although Henry Fielding's *The History of Tom Jones* and Sir Walter Scott's *Waverley Novels* provide the primary foundation for the importance of circumstantial evidence and for the prosecutorial manner in which it was handled by narrators, Welsh also explores the way in which several leading drama critics utilized circumstantial evidence to create their own narratives. The concluding portion of the book traces the erosion of "strong representation" in the novel in the late nineteenth and early twentieth centuries. With this development, Welsh implies, the close linkage between law and literature comes to an end.

My aim in the second part of this essay is to develop the relationships among the concepts of circumstantial evidence as they appear in a number of different areas of life. To achieve this, I explore the relationships Welsh discusses in the context of a more extended time frame than the one he examines. I begin with a brief characterization of classical rhetoric's formulation and use of "circumstances," and attempt to show how rhetorical devices found their way into the Romano-canon and common law systems at both the pretrial and trial phases of criminal law proceedings. This analysis is followed by some suggestions about the

uses of direct and circumstantial evidence in connection with seventeenth- and eighteenth-century natural and revealed religion, as well as a brief treatment of the role of circumstantial evidence in the casuistical tradition, and the literary techniques that evolved from it. I discuss the interrelated role of "facts," "inferences from facts," and narrative issues in connection with historiography, a topic largely omitted by Welsh. I then make some suggestions concerning the role of circumstantial evidence and facts in early modern natural philosophy and science. I conclude with some reflections on the relationship between "facts," "circumstantial evidence," and "probability" in law, history, early modern natural philosophy, and the rhetorical tradition.

II. THE ARGUMENT OF ALEXANDER WELSH'S *STRONG REPRESENTATIONS*

Focusing on the period spanning the late eighteenth century to the end of the nineteenth century in England, Welsh argues that "narrative consisting of carefully managed circumstantial evidence, highly conclusive in itself and often scornful of direct testimony, flourished nearly everywhere—not only in literature but in criminal jurisprudence, natural science, natural religion, and history writing itself."³ Beginning with the Enlightenment, novelists from Henry Fielding to Henry James typically "chose narratives built on carefully managed circumstantial evidence."⁴ This mode of "strong representation"—making facts speak for themselves—became the most prominent narrative form.⁵ These narratives do not simply set forth a quantity of circumstantial evidence calculated to prove a certain case. They also suggest that firsthand testimony is untrustworthy unless corroborated by circumstances. They "subordinate facts to a conclusion" and make claims to "know" without anyone having observed what is known. For over a hundred years "strong representations" "outmanned and outmaneuvered" narratives actually or purportedly based on firsthand knowledge.⁶

For Welsh, "strong representation" in literature needs to be put into a historical context. Welsh suggests that the preference for circumstantial evidence first appeared in natural theology. He notes that the rational proofs for the existence of God and the promise of a future life, which had been commonplaces since the late seventeenth century, relied on circumstantial evidence. He places particular emphasis on the role of Bishop Butler, who in 1736 provided one of the earliest uses of the term "circumstantial evidence." Butler insisted that circumstantial evidence

3. ALEXANDER WELSH, *STRONG REPRESENTATIONS: NARRATIVE AND CIRCUMSTANTIAL EVIDENCE IN ENGLAND* ix (1992).

4. *Id.* at 17.

5. *Id.* at ix, x.

6. *Id.* at 6, 8-9.

was "very often altogether as convincing, as [t]hat, which is the most express and direct."⁷ While the circumstantial nature of the proofs of natural religion, which required arguing from effects to causes, is undeniable, one must also note that theologians of the same era invoked the testimonials of multiple and credible witnesses to prove the truth of revealed religion and its miracles. Acceptance of circumstantial evidence in religion was thus not accompanied by the suspicion of direct testimony that Welsh found characteristic of eighteenth-century literary narrative and criminal trials.

The most innovative portion of Welsh's initial chapter, then, focuses on the criminal trial and its influence on literary form. Facts represented in jury trials are necessarily absent and unseen, and there is need to make them present and consequential for the jury. Welsh points to an unusual feature of mid to late eighteenth-century English criminal trials—the inclination to prefer circumstantial evidence to direct testimony. Welsh is undoubtedly correct in emphasizing this preference for circumstantial over direct evidence, a clear reversal of previous legal practice. He is also able to show some continuities between earlier and later practice. For instance, Welsh is aware that earlier English courts, whatever their evidentiary preference, often convicted on the basis of circumstantial evidence. He notes that the legal concept of presumption—inferences drawn from circumstantial evidence—was in use long before the eighteenth century. He points out the civil law origins of Sir Edward Coke's categorization of presumptions and the Aristotelian argument that "probabilities are never convicted of perjury."⁸ But, given the scarcity of historical research on the the law of evidence,⁹ it is not surprising that Welsh views English attitudes toward circumstantial evidence in too insular a context, neglects the use of circumstantial evidence in pretrial procedure, and mistakenly views the role of circumstantial evidence in poisoning cases to be a novelty.¹⁰

Welsh points out that mid eighteenth-century jurors began to hear advice on the superiority of circumstantial evidence from prosecutors and judges *before* discussions of circumstantial evidence entered the treatise tradition. He draws particular attention to Francis Buller's charge to the jury in *R v. Donellan*, which included a statement that

7. *Id.* at 13 (quoting JOSEPH BUTLER, *THE ANALOGY OF RELIGION* 399 (1736)).

8. *Id.* at 16, n.25.

9. *But see* BARBARA SHAPIRO, *BEYOND REASONABLE DOUBT AND PROBABLE CAUSE: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE* (1991) [hereinafter SHAPIRO, *BEYOND REASONABLE DOUBT*]; BARBARA SHAPIRO, *PROBABILITY AND CERTAINTY IN SEVENTEENTH-CENTURY ENGLAND: A STUDY OF THE RELATIONSHIPS BETWEEN RELIGION, NATURAL SCIENCE, HISTORY, LAW AND LITERATURE* (1983) [hereinafter SHAPIRO, *PROBABILITY AND CERTAINTY*]; Alessandro Giuliani, *The Influence of Rhetoric on the Law of Evidence and Pleading*, 62 JURID. REV. 216 (1969); Theodore Waldman, *Origins of the Legal Doctrine of Reasonable Doubt*, 20 J. HIST. IDEAS 299 (1959).

10. *See infra* text accompanying notes 40-45.

a presumption, which necessarily arises from circumstances, is often more convincing and more satisfactory than any other kind of evidence, because it is not within the reach and compass of human abilities to invent a train of circumstances which shall be so connected together as to amount to a proof of guilt. . . . But if the circumstances are such, as when laid together bring conviction to your minds, it is then fully equal, if not . . . more convincing than positive evidence.¹¹

Baron Legge's charge to the jury in *R v. Blandy* similarly emphasized that presumptions arising from circumstances were "more convincing and satisfactory" than any other kind of evidence because "facts cannot lie."¹² Maxims such as "facts cannot lie," or "circumstances cannot lie," were reiterated in the courts and in the popular work of William Paley.¹³

While Welsh cannot fully explain the growing, if temporary, preference for circumstantial evidence, he offers interesting insights.¹⁴ Welsh notes that circumstantial evidence becomes an important prosecutorial tool in the late eighteenth century as lawyers begin to play a more central role in criminal proceedings. Welsh's focus on the prosecutorial uses of circumstantial evidence leads to a perceptive discussion of Edmund Burke's prosecutorial role and language in the impeachment of Warren Hastings, and an effort to link his performance with the language and doctrine of *R v. Donellan*.¹⁵ These considerations in turn are linked to Bentham's critique of the English rules of evidence, which is viewed as having much in common with Burke.¹⁶

Having established the legal context, Welsh moves on to his central thesis that the newly important legal concept of circumstantial evidence was of critical importance in the transformation of the English novel. In particular, he stresses the repudiation of the earlier novel's false frame of letters and other documentation, and its reports of firsthand witnesses in favor of narration constructed from circumstantial facts. The earliest novels had been presented as either a series of letters as in Samuel Richardson's *Pamela*, or as a personal journal or other first-person account as

11. WELSH, *supra* note 3, at 28 (quoting JOSEPH GURNEY, TRIAL OF JOHN DONELLAN 52 (1772)).

12. *Id.* at 29.

13. For Paley, see *id.* at 16 n.16. See also SHAPIRO, BEYOND REASONABLE DOUBT, *supra* note 9, at 220-21.

14. For one such insight, Welsh's reference to the Aristotelian maxim that "probabilities are never convicted of perjury," see *supra* text accompanying n.8. The existence of this Aristotelian notion points to the classical, European-based origins of the trends stressed by Welsh as being uniquely English.

15. WELSH, *supra* note 3, at 33. Burke's insistence that circumstances be considered as a whole, not singly and in part, echoes Sir Matthew Hale, who noted: "That imperfect evidence at Law which taken singly or apart makes but an imperfect proof, *sempiterna probatio*, yet in conjunction with others grows to a full proof, like *Silurus*, his twigs, that were easily broken apart, but in conjunction or union were not to be broken." SIR MATTHEW HALE, THE PRIMITIVE ORIGINATION OF MANKIND 130 (1677).

16. *Id.* at 30-39.

in Daniel Defoe's *Journal of the Plague Year*. The innovation of Fielding and his successors is characterized by the abandonment of these forms in favor of a narrative that purported to present facts from which the narrator and reader could build up knowledge of the characters' actions and motivations. The reality of these novels is "expressed by their internal connectedness of circumstances." *The History of Tom Jones* thus becomes the paradigmatic novel for Welsh, as he analogizes Fielding's stories of the characters' lives to the criminal trial. In both the novel and the criminal trial, themes of innocence and guilt are central. Welsh emphasizes the prosecutorial bent of the novel and highlights the role of the narrator in fixing intention and bringing conviction through the marshalling of evidence.¹⁷ Fielding first presents the various representations of facts marshalled against his protagonist, Tom Jones, and then provides a fuller representation of those facts which exonerates him. Welsh notes the evidence in the novel that holds up is nearly all indirect, and that the evidence that misleads is mostly direct. The narrator manages the evidence in large part by discrediting witnesses.¹⁸

Although Welsh acknowledges his indebtedness to Ian Watt's and William Empson's suggestions about the similarity of the role of novel reader and juror, and notes the consistency of his own approach with reader-oriented modes of literary criticism, he hopes to extend these approaches to "uncover the evidentiary basis of Fielding's realism."¹⁹ For Welsh, as well as Watt, *Tom Jones* represents a major shift in the novel as Fielding diverts attention "from the content of the report to the skill of the reporter" who now presents the reader with a "sifted and clarified report of the findings."²⁰ In Fielding's novel the narrator presents, summarizes, and evaluates evidence. Thus the narrator is not, for Welsh, comparable to a witness but rather to a prosecutor, judge, or, later, defense counsel.²¹

These insights, building on the work of previous critics, are the most interesting and innovative parts of the book. Even here, however, it may be advisable to query Welsh's prosecutorial emphasis. Fielding, after all, entitled his novel *The History of Tom Jones*, and insisted that he was a historian.²² Historians were experienced at marshalling both direct and

17. *Id.* at 47. Welsh notes the paradox of Fielding's prosecutorial role as a London magistrate and his management of the defense of his major character, Tom Jones.

18. *Id.* at 48, 57-58, 60-62.

19. *Id.* at 49.

20. *Id.* at 63 (quoting IAN WATT, *THE RISE OF THE NOVEL: STUDIES IN DEFOE, RICHARDSON, AND FIELDING* 29-30 (1957)).

21. *Id.* This line of argument is continued in the analysis of Sir Walter Scott's *Waverly Novels*. In *Waverly*, the arrested innocent hero's intentions and actions are judged by several characters. One construes the circumstantial evidence against Waverly as a coherent story of guilt while others exploit its potential for his defense. *Waverly* is thus characterized as "another carefully managed narrative analogous to a trial." *Id.* at 83, 86-88.

22. See LEO BRAUDY, *NARRATIVE FORM IN HISTORY AND FICTION: HUME, FIELDING AND GIBBON* 181 (1970).

indirect evidence in the process of creating their narratives of "strong representation." Why invoke the prosecutorial model if the model of the historian provides a better, or at least equally good fit *and* is suggested by the author himself?

Welsh's third chapter is concerned with eighteenth- and nineteenth-century Shakespearean character analysis and it is less satisfying than the earlier chapters, in part because Welsh has some difficulty linking his insights into criticism to his discussion of the novel. Although Welsh suggests that drama should be included in his treatment of law and literature, particularly because circumstantial evidence plays an important role in plays such as *Othello*, he does not develop this line of thought because he believes Shakespeare lived before the "heyday of circumstantial evidence."²³ Welsh's concern with drama, therefore, centers on a mode of Shakespearean criticism rather than drama itself. It is this mode of criticism which Welsh attempts to link to both the narrative tradition of the realistic novel of "strong representation" and the modern criminal trial.²⁴ He suggests that both Maurice Morgann's late eighteenth-century defense of Falstaff and A.C. Bradley's 1904 defense of Hamlet employ a forensic mode to defend and analyze dramatic characters. By both discrediting the testimony of witnesses and drawing inferences from other evidence, Morgann vindicates Falstaff of the charge of cowardice.²⁵ Welsh suggests not only that the entire process leads to an exchange of drama for narration, but also that the attempt to modify our assessment of Falstaff is modeled on the jury trial. Without the popularity of criminal trials in print, he insists, it would be difficult to explain Morgann's enthusiasm for circumstantial evidence.²⁶

While the popular trial narrative genre may have influenced Morgann, there are alternative explanations. Classical rhetoric, an important element in English education, divided orations into three types, which might be employed for a variety of purposes. Of significance here is the "forensic" or "judicial" mode.²⁷ The forensic model had often been employed for non-legal topics long before the eighteenth century. Sir Philip Sidney's *The Defense of Poesy* suggests how easily the forensic model might be used within a literary context. Long and widespread familiarity among literary men with the classical rhetorical tradition suggests that the emergence of printed trial narratives could hardly have provided a sudden and entirely novel impulse for a forensic style of dramatic criticism.

23. WELSH, *supra* note 3, at 103. As we shall later see, knowledge of and interest in circumstantial evidence was actually quite extensive in the late sixteenth century, and was employed during that era in both legal and literary contexts.

24. *Id.*

25. *Id.* at 111-13.

26. *Id.* at 119.

27. The three types of oration were the deliberative, the judicial, and speeches of praise or blame.

The critique and judgment of moral character and action as an aspect of eighteenth- and nineteenth-century literary criticism also may be explained by reference to casuistry. The tradition of casuistry, always concerned with judgments of moral behavior, was transformed during the eighteenth century. Casuistry's "cases of conscience" were first transmuted into the fictional story in the form of moral essays that abounded in the eighteenth-century literary periodical, and then transformed again into the eighteenth-century novel.²⁸ It is thus unnecessary to refer to the courts to account for the kind of moral analysis provided by Morgann. Literature itself had adopted such moral concerns directly from religion.

Widespread interest in physiognomy, reading character from physical attributes and actions, was also part of Morgann's intellectual milieu and may have played some role in Morgann's defense of Falstaff. In 1743, Fielding, Welsh's paradigmatic novelist of "strong representation," himself discussed the extent to which strength and weakness of character might be judged from physical signs. Like his fellow novelist Tobias Smollett, Fielding was deeply interested in the process of judgment by which one can come to understand character, but he thought of that process as an integral part of the human endeavor rather than as peculiar to judge and jury.²⁹

Like Morgann's defense of Falstaff, A.C. Bradley's highly influential defense of Hamlet's dilatoriness was developed by looking behind the words and events actually depicted on stage to the whole set of circumstances surrounding the necessarily fragmenting stage episodes. Hamlet's character is reassessed on the basis of what can be inferred from those circumstances, rather than simply from what the audience can see and hear. Bradley's psychological explanation is thus characterized by Welsh as being insistently circumstantial. And so it is. But is it necessarily exclusively, or even primarily, based upon the model of the criminal trial? Belief in the superiority of circumstantial evidence in trials already had faded by the time Bradley wrote in 1904. Welsh himself observes that Freud, roughly a contemporary of Bradley, also looked for signs, symptoms, and traumatic experiences with which to make explanations. If both developed explanations on the basis of "things unseen," it seems

28. See GEORGE STARR, *DEFOE AND CASUISTRY* (1971).

29. DOUGLAS PATEY, *PROBABILITY AND LITERARY FORM: PHILOSOPHIC THEORY AND LITERARY PRACTICE IN THE AUGUSTAN AGE 200-09* (1984). Rules based on signs developed for judging character, like circumstantial evidence in the courts and elsewhere, were always considered fallible and probabilistic, not conclusive. While circumstantial evidence might result in the "strong representation" Welsh associates it with, it need not do so, and might on some occasions be considered little more than "conjecture." *Id.*

Patey, who has investigated some of the ways that "signs" shaped literature in the eighteenth century, notes a significant shift in how such signs were interpreted in the 1760s. He suggests that the increased influence of the common sense philosophers meant that calculations of probabilities became increasingly more likely to characterize villains than the sentimental hero. *Id.* at 221-22.

unwise to single out the criminal case built on circumstantial evidence as Bradley's primary intellectual forerunner. For centuries, medical practice had been inferring causes from signs and symptoms. By the end of the nineteenth century, inferences derived from the observable to the non-observable were such a commonplace of the natural and social sciences that it hardly seems possible that a sophisticated early twentieth-century critic like Bradley could have been peculiarly influenced by court practice. What thinking person of the early twentieth century would not have looked to background events and overt behavior in assessing the character of persons who spoke to him?

The next chapter is perhaps the least satisfying in the book. Welsh presents a number of topics, including James Fitzjames Stephen's treatment of circumstantial evidence, eighteenth- and nineteenth-century natural theology, nineteenth-century investigations of the extinction of species, and Tennyson's *In Memoriam*.

Stephen was the outstanding evidence writer of the Victorian era. Welsh focuses on Stephen's view that the law of evidence must employ the same rational conception of proof in matters of fact as do other fields.³⁰ Welsh is certainly correct in this emphasis, although he overstates Stephen's originality. In fact, the linkage between the law's search for proof and that of other disciplines had become commonplace in philosophical and legal writing by the early nineteenth century.

Having dealt with Stephen, Welsh turns to using "death" to connect law and religion. He notes that both religion and law are greatly concerned with death,³¹ although one might respond with Ben Franklin's and Woody Allen's "Who isn't?" Welsh then argues that because natural religion failed "to deliver the promised circumstantial proof of a future life," the law was particularly provoked to punish "at least those who intentionally caused death." Of course the law of many societies punished murder long before anyone had thought about natural religion or circumstantial evidence, so it is difficult to know what to make of this argument.³²

One theme of this chapter is that in the nineteenth century, growing disappointment with natural religion led to increased reliance on natural history. Just as both natural religion and law had been concerned earlier with circumstantial evidence, by the mid nineteenth century so too was natural history. Thus, Welsh seeks to connect the treatment of circum-

30. WELSH, *supra* note 3, at 158.

31. Welsh suggests that "because of their specialized concerns with death, developments in the fields of religion and the law were not only parallel but complementary." *Id.* at 165.

32. Both law and religion, Welsh suggests, were "alert to death"—religion denies it and the law "fixes the blame for it." He emphasizes the differences between death and murder as well, explaining that the strong need to punish the latter was prompted by the failure of natural religion. According to Welsh the failure of natural religion provoked the thought that "at least those who intentionally caused death can be sought and punished." *Id.* at 173.

stantial evidence by the nineteenth-century evidence writer, Thomas Starkie, with contemporary geology. Starkie uses the term "vestiges" in analyzing circumstantial evidence and, of course, geology seeks the natural history of the earth in its current vestiges. But it is hard to know whether this is much more than a verbal coincidence. What is clear, however, is that Starkie's work tends to undercut, rather than reinforce, Welsh's chronology of the law/literature connection. While Starkie does note that crimes often leave vestiges by which offenders can be traced, he also specifically rejects the superiority of circumstantial evidence, and this rejection seriously undermines Welsh's thesis. As early as 1824, Starkie rejected the maxim that "facts cannot lie," and insisted that *both* direct and circumstantial evidence are capable of reaching proof beyond reasonable doubt.³³ For Starkie, circumstantial evidence could be used to create both strong *and* weak representations. Moreover, Stephen thought the term circumstantial evidence to be a misnomer because it mistakenly led jurors to believe that they were being scientific when they were only forming conjectures on the fact. And as Welsh himself points out, the weakness of circumstantial evidence was stressed by defense counsel precisely because belief in circumstantial evidence had eroded.³⁴ Thus the briefly-held dominant position of circumstantial evidence in law at the end of the eighteenth century began to erode long before the late nineteenth-century erosion of strong representation in literature, which is the theme of Welsh's last chapter.

This portion of the book ambitiously extends Welsh's focus on law and literature to religion and science.³⁵ As we shall later see, he might also have gone on to historiography. Indeed, one might argue that Welsh's field of vision is insufficiently broad since it could include potentially all fields of knowledge and experience that seek explanations and theories drawn from "facts" which cannot be directly confronted. Although Welsh moves cautiously in this direction, he cannot move very far without weakening his thesis. An exploration of all disciplines and areas of study which attempted "strong representations" in extended narrative form would also have the effect of vitiating the specific linkages Welsh has drawn between law and literature.

The difficulties with this portion of the book, then, are many. What is seen as distinctive in Stephen, the late Victorian, is equally true for earlier treatise writers. The connections drawn between religious and legal

33. 1 THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE 444, 495, 514 (2d ed. 1833). See also WELSH, *supra* note 3, at 496-97, 512.

34. WELSH, *supra* note 3, at 18.

35. As part of his natural history theme, Welsh shows us that nineteenth-century paleontology began to construct narratives drawn from circumstantial evidence. He concludes the chapter with a discussion of Tennyson's *In Memoriam*, a lengthy work mourning the death of his friend Arthur Hallam in which the poet finds a relationship between the extinction of an individual and a whole species.

concerns with death seem far-fetched as well. This chapter contains a *mélange* of interesting observations rather than a sustained argument that links its component parts. Despite its difficulties, however, Welsh continues to develop the interesting idea that the development of a continuous narration is linked to efforts to produce explanations and judgments from circumstantial facts.

The lengthy concluding chapter traces the shift away from literary narratives built on circumstantial evidence to a renewed interest in experience and subjectivity that could be captured only from testimony.³⁶ The erosion of "strong representation" in literature, Welsh suggests, can be seen as early as Tennyson's *In Memoriam*, since it already exhibits greater interest in the poet's experience than its ostensible subject.³⁷ The erosion, charted in the poetry and novels of Robert Browning, Wilkie Collins, and Henry James, is marked by a return to testimony as the primary means of representation. Authors became less adjudicative, the appropriate response was no longer a "pending verdict," and life was no longer treated as a trial. Unlike the earlier form of the novel, however, testimony is not merely reported, but investigated, and authors devise multiple narratives, provide a larger role for the unconscious, and combine direct testimony and managed indirect evidence.³⁸ Art turns away from its preoccupation with "strong representations" that fix blame or exoneration, presumably ending its century-and-a-half connection with the law.

The law/literature connection thus has limited chronological boundaries for Welsh. It begins in the mid eighteenth century, as "strong representation" borrowed from and relied on legal notions of circumstantial evidence and its cognates in natural theology and geology, and fades toward the end of the nineteenth century when "strong representation" in the novel is superseded by different modes of representation.

III. AREAS FOR FURTHER EXPLORATION

Despite the difficulties, Welsh has made a substantial contribution to the law and literature movement. His contribution, however, needs to be put into an even larger context and time frame because many of the developments he investigates belong to a lengthy tradition in Western thought and culture. The remainder of this essay is aimed at extending our current understanding of the relationship between law and culture and elaborating some of the themes suggested by Welsh.

36. WELSH, *supra* note 3, at 198-256.

37. *Id.* at 200.

38. *Id.* at 200-01.

A. *The Ancient World*

Given Welsh's special interest in the concept of circumstantial evidence, we should begin with the rhetorical tradition, for it is here that the distinctions between artificial, or indirect proofs, and inartificial, or direct proofs, were first drawn. Although not identical to the divisions between circumstantial and testimonial evidence, these distinctions gradually evolved into them. Articulated in their best known form by Aristotle, Cicero, and Quintilian, notions of artificial and inartificial proofs were advanced in the context of oration rather than in connection with the law of evidence, which was largely undeveloped in the ancient world. Witnesses, deeds, reports, and precedents were inartificial proofs not created by the orator, while artificial proofs constructed by the orator included signs, arguments, and examples. In establishing the responsibility of an individual for a particular act, the orator might construct artificial proofs, or make arguments based on "persons," that is, family, nationality, sex, age, education, and status. An individual's passions or inclinations might be noted. Questions of time, place, and manner of an event, and the capacity of an individual to have performed the act in question, might be utilized by an orator, as could antecedents of the affair, collateral circumstances, opportunity, instruments, and method. Circumstances were the incidents of an event, the particularities that accompanied an action. "Probable circumstances" could thus be deployed to elicit positive or negative assessments of individuals and their relation to an action under consideration.³⁹

B. *The Romano-Canon Legal Tradition*

Although the rhetorical tradition dealing with "circumstances" was largely eclipsed during the early medieval era, it was revived and transformed during the high middle ages. The orator's artificial proofs, somewhat modified, came to play an important role both in Romano-canon pretrial procedure and in evidentiary concepts. Romano-canon lawyers developed probabilistic concepts such as "suspicion" and "common fame" to bring persons before appropriate tribunals. The ancient rhetorical "signs" or "indicia" relating to family, education, habits, companions, social status, time, place, and the capacity to do the act were also

39. See CICERO, *DE INVENTIONE* I.xvii.24 (H.M. Hubbell trans., Loeb Classical Library 1949); 1 QUINTILIAN, *INSTITUTES OF THE ORATOR* 1-4 (J. Patsaill trans., 1777). See also 4 QUINTILIAN, *supra*.

Since Welsh attempts to link the legal concept of circumstantial evidence with natural philosophy and religion, it is important to note that ancient natural philosophy was not characterized by arguments from effects to causes or from "facts" to general principles. Physicians, however, unlike natural philosophers, did examine "signs" to explain probable causes. Medical diagnosis, like the circumstances of rhetoric, resulted in probable, not certain, knowledge. See IAN HACKING, *THE EMERGENCE OF PROBABILITY: A PHILOSOPHICAL STUDY OF EARLY IDEAS ABOUT PROBABILITY, INDUCTION AND STATISTICAL INFERENCE* (1975).

deployed to provide a uniform set of standards for the judicial decision to employ torture.

Either confession or the testimony of two unimpeachable witnesses was required for "full" or "legal" proof in serious criminal offenses. Circumstantial evidence was considered inferior and in most instances insufficient for conviction. The two witnesses or confession rule eventually proved too stringent, and here again the classical rhetorical "circumstances" proved useful. By the thirteenth century, convictions based on "undoubted indicia" resulting in "violent presumption" were permissible at least in some instances. Thus conviction came to be based on those same "signs," or circumstantial evidence, that provided the criteria for torture. For instance, conviction on the basis of this admittedly inferior evidence was also permitted in exceptional and unlikely-to-be-witnessed crimes such as poisoning and witchcraft.⁴⁰ The Romano-canon evidentiary tradition, disseminated and elaborated in an erudite Latin treatise tradition, was utilized in the ecclesiastical courts and increasingly in most secular jurisdictions on the continent. Circumstantial evidence played an important role in this development.

C. *The English Legal Tradition*

Some of the same rhetorical sources refined by the Romano-canonist lawyers found their way into the English legal tradition, though the borrowing has often been slighted and/or disguised. Evidentiary criteria derived from classical rhetorical sources seems to have appeared first in connection with arrest.⁴¹ Bracton's pronouncements on suspicion, drawn in large part from Romano-canon sources, were cited in connection with arrest guidelines for several hundred years.⁴² Beginning in the sixteenth century, handbooks provided lists of the "causes of suspicion" to be used by justices of the peace in examining accused felons. These causes of suspicion typically consisted of the age, sex, education, parentage, character, associations, and habitual behavior of the suspect, as well as his ability to commit the crime, his whereabouts, the presence of witnesses, and other "signs," such as blood. Several English pretrial procedures, including arrest and interrogation, thus applied concepts of circumstantial evidence prior to the period emphasized by Welsh.

The same was true of trial courts. During the sixteenth century, juries

40. In addition, "suspicion proof or the *poena extraordinaria* was developed so that less than full proof permitted for less than full punishment," e.g., exile, monetary penalties, and the galleys. See G.A. PALAZZOLA, *PROVA, LEGALE E PENA: LA CRISI DEL SISTEMA TRA EVO MEDIO E MODERNO* (1978); JOHN LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME* (1977); Richard Fraher, *The Theoretical Justification for the New Criminal Law of the High Middle Ages: Rei Publicae Interest, Ne Crimina Remaneant Impunita*, 1984 U. ILL. L. REV. 577.

41. See SHAPIRO, *BEYOND REASONABLE DOUBT*, *supra* note 9, at 127-30.

42. Bracton, however, had discussed "suspicion" in connection with indictment, not arrest.

gradually shifted their attention from personal knowledge to the evaluation of evidence presented in court.⁴³ Common law courts, like continental courts, also relied upon indirect or circumstantial evidence as well as direct testimonial evidence, although they too were initially suspicious of it. Late sixteenth-century treason trials, as Welsh notes, indicate that the concept was well-known to judges and educated defendants, and that convictions were often based on such evidence. Circumstances might lead to light, probable, or violent presumption, although conviction was appropriate only where violent presumption could be established.

The most famous example of violent presumption derived from "circumstances"—a man standing over a dead body, bloody sword in hand—although frequently attributed to Coke, can be found earlier in Bartolus and his many Romano-canon successors. Both Coke and Hale were insistent, however, that presumptions derived from circumstantial evidence must be used exceedingly carefully, because they might be erroneous.⁴⁴ Their admittedly probabilistic character emphasized the possibilities of error. While circumstantial evidence might lead to the "strong representation" emphasized by Welsh, it often led only to weak ones, that is, to "light" or "probable" presumptions.

Long before the eighteenth century, the English also adopted the category of the *crimen exceptum*, crimes unlikely to be witnessed, where circumstantial evidence was all that might be expected. Poisoning, witchcraft, and later infanticide, rape, assassination, and forgery, were crimes where circumstantial evidence was an appropriate basis for conviction. It is not surprising that Stephen's examples of circumstantial evidence pointed out by Welsh involved poisoning, the most common crime of this type.⁴⁵

It is true, as Welsh notes, that the earliest English treatises on evidence ignore circumstantial evidence. But circumstantial evidence quickly appears with Capel Lofft's late eighteenth-century revision of Gilbert, and Lofft and later treatise writers incorporate a good deal of the

43. For a discussion of the development of credibility, see Barbara Shapiro, *To a Moral Certainty: Theories of Knowledge and Anglo-American Juries, 1600-1850*, 38 HASTINGS L.J. 153 (1986). For the development of the jury, see THOMAS A. GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800* (1985); *TWELVE GOOD MEN AND TRUE: THE CRIMINAL JURY 1200-1800* (J.S. Cockburn & Thomas A. Green eds., 1988).

44. SHAPIRO, *BEYOND REASONABLE DOUBT*, *supra* note 9, at 214. Thomas Starkie took a similar position. If circumstantial evidence sometimes offered "the most cogent arguments of guilt . . . it is to be recollected that this is a species of evidence which requires the utmost degree of caution and vigilance in its application." 1 THOMAS STARKIE, *A PRACTICAL TREATISE OF THE LAW OF EVIDENCE* 558-59 (3d ed. 1842), *quoted in* WELSH, *supra* note 3, at 174.

45. The crime of witchcraft elicited a discussion of circumstantial evidence and the presumptions drawn from them. There was disagreement as to whether these presumptions were appropriate for arrest and examination only, or whether they might also be used for conviction. See SHAPIRO, *BEYOND REASONABLE DOUBT*, *supra* note 9, at 51-54, 209-12.

Romano-canon tradition on presumption and circumstantial evidence.⁴⁶ Welsh is correct in emphasizing the positive assessment of circumstantial evidence in the late eighteenth century, but he overestimates its novelty given the long-term and familiar role of circumstantial evidence in arrest and pretrial examination, its use in unlikely-to-be-witnessed crimes, and the continuities between high medieval continental Romano-canon practices and sixteenth- and seventeenth-century English practices. Circumstantial evidence was firmly implanted in both continental and English legal traditions a very long time before “strong representation” appears in English literature.

D. Religion

Welsh has pointed to the importance of religion, particularly natural theology, in reversing the low esteem for circumstantial evidence and in bolstering its appeal in the context of law. The relationship of religious thought to legal evidentiary practices is, however, more complex and somewhat less favorable to circumstantial evidence than Welsh would have us believe. For instance, the “beyond reasonable doubt” standard of criminal law is directly related to the concept of the “moral certainty” developed by the natural theologians.⁴⁷ Yet the concepts of “moral certainty” and “beyond reasonable doubt” are distinctive precisely in requiring proof far beyond the “mere probability” that circumstantial evidence was initially thought likely to produce. Thus natural religion contributed to the creation of a very high standard of proof in criminal law, and, in this sense, created an obstacle to the acceptance of an entirely circumstantial case as a legitimate basis for conviction.

Several additional features of the English theological scene bear on the connections between law, religion, and literature. If circumstantial evidence—the argument from effects to cause—was important to natural theologians, many of the same theologians also utilized the concept of credible testimony to support belief in miracles and the truths of Revelation. Legalistic language of *both* testimonial and circumstantial evidence pervaded theological literature. The choice of direct or indirect evidence depended on the nature of the thing to be proved rather than a preference for one kind of evidence over another.

In his treatment of the religion, law, and literature connection, Welsh has neglected casuistry. This omission is unfortunate for two reasons. First, casuistry is one of the religious traditions that is most strongly related to the legal phenomena in which Welsh is interested. Second, it is quite possible that at least part of the literary development that Welsh

46. For a discussion of Capel Lofft's and later treatise writers' indebtedness to the continental legal tradition of circumstantial evidence and presumption, see *id.* at 220-43.

47. See *id.* at 1-41.

seeks to link closely to law may be linked directly and just as closely to religion through casuistry.

Although casuistry has a lengthy tradition, certain features of the English Protestant casuistical tradition merit special attention, given their legalistic formulations, their probabilistic conclusions, and their emphasis on "cases of conscience." Perhaps the most important feature of casuistry for our purposes is its use of legalistic formulations in reaching judgment. Conscience, which provided internal testimony and judgment, was likened to a judge who "holdeth an assize." The analogies of conscience as a tribunal and judge were commonplace in England,⁴⁸ and Locke, too, viewed moral actions legalistically. Moral action, for Locke, came under the jurisdictions of both outward and inward courts, that is, of magistrate and conscience.⁴⁹

Casuistry was that part of ethics in which particular circumstances might alter judgment. The judgments of conscience, like those of the criminal courts, were to take account of the circumstances that might alter cases in reaching judgment. Indeed, the familiar "beyond reasonable doubt" standard for conviction in criminal cases was initially formulated as the "satisfied conscience" test. Legal judgment, like that of conscience, involved making probabilistic judgments in situations where some element of doubt was always possible. In both instances frivolous doubts were to be rejected and only reasonable doubts allowed to influence judgment. The standard both for individuals reaching moral judgments and jurors reaching decisions in criminal cases was that of the "satisfied conscience."⁵⁰ Given the parallels, it may often be difficult to determine whether a literary concern for circumstances is derived from some kind of rough analogy of the reader to a juror, or simply from the treatment of the reader as an individual seeking to reach moral judgment and thus inclined to adopt a well-known technique for doing so.

By the early eighteenth century, casuistry was being reshaped in two rather different directions. Eighteenth-century moral philosophy, particularly that of the Scottish Common Sense school, owed a good deal to casuistry.⁵¹ For our purposes, casuistry's link with its literary successors is more important. George Starr's pioneering study traces the development from casuistry's "cases of conscience," to the moral essays involving fictitious characters in early eighteenth-century literary periodicals, and on to the novel, particularly the novels of Defoe.⁵² In all three forms

48. *Id.* at 4-17.

49. JOHN LOCKE, TWO TRACTS ON GOVERNMENT 225 (Philip Abrams ed., 1967).

50. See SHAPIRO, PROBABILITY AND CERTAINTY, *supra* note 9, at 74-118; SHAPIRO, BEYOND REASONABLE DOUBT, *supra* note 9, at 13-41.

51. For a discussion of the Third Earl of Shaftsbury as the turning point from casuistry to a self-conscious moral philosophy, see JEAN-CHRISTOPHE AGNEW, WORLDS APART 162-69 (1987).

52. See STARR, *supra* note 28, *passim*. Starr shows how the moral tales that pervade the *Athenian Mercury* and other periodicals were often little more than elaborated cases of conscience. These in turn are shown to have been expanded into novels by Defoe and other early novelists. For a

particular circumstances are analyzed in order to reach judgments about real and imagined individuals. And emphasis on moral judgment based on circumstances, we should recall, is central to Welsh's thesis.⁵³ Thus it is possible that "strong representation" owes as much or more to religion as to legal developments.

E. Historiography

It is perhaps ungrateful, given Welsh's efforts to investigate the connections between so many areas of thought, to complain of omissions, but one area, historiography, would seem to draw itself into consideration, since it so insistently relies on both factual evidence and narration. From its earliest beginnings, historiography has faced the problems of providing both truth and satisfactory narration. At least from the Renaissance to the nineteenth century, statesmen and others with close proximity to the events in question were assumed to be the best historians. The standard of the firsthand credible witness and the analogy of the law court were frequently invoked by the historical community.

The position began to change as documents and "facts" were compiled and subsequently analyzed by historians and antiquarians. Narrative representations, explanations, and "conjectures" based on indirect evidence such as buried urns, Stonehenge, and historical documents are evident from at least the mid seventeenth century.⁵⁴ We thus have a situation

more general discussion of casuistry, see ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* (1988).

53. Starr did not develop the casuistical principle that "circumstances alter cases" into a discussion of circumstantial evidence, no doubt because Defoe's narrative is so heavily dependent on testimony. Defoe's narrative technique is thus viewed by Welsh as characterizing the phase of the novel which *precedes* the novel's marshalling of circumstantial evidence.

54. John Nalson insisted that the historian was not merely to collect data, but "to tie up the loose and scattered Papers, with the Circumstances, Causes, and Consequences of them." JOHN NALSON, *AN IMPARTIAL COLLECTION OF THE GREAT AFFAIRS OF STATE* ii (1682). It should be noted, however, that many students of historiography have emphasized the differences between the antiquarian and the historian, viewing the former as having more in common with the natural historian and the latter with the man of letters.

For discussions of early modern historiography, see JULIAN FRANKLIN, *JEAN BODIN AND THE SIXTEENTH-CENTURY REVOLUTION IN THE METHODOLOGY OF LAW AND HISTORY* (1961); DENYS HAY, *ANNALISTS AND HISTORIANS: WESTERN HISTORIOGRAPHY FROM THE VIIITH TO THE XVIIIITH CENTURY* (1977); GEORGE HUPPERT, *THE IDEA OF PERFECT HISTORY* (1970); DONALD KELLEY, *FOUNDATIONS OF MODERN HISTORICAL SCHOLARSHIP: LANGUAGE, LAW AND HISTORY IN THE FRENCH RENAISSANCE* (1971); George H. Nadel, *Philosophy of History Before Historicism*, 3 *HIST. & THEORY* 291 (1964); Beatrice Reynolds, *Shifting Currents in Historical Criticism*, 14 *J. HIST. IDEAS* 417 (1953).

For the development of English historiography, see F.J. LEVY, *TUDOR HISTORICAL THOUGHT* (1967); D.R. WOOLF, *THE IDEA OF HISTORY IN EARLY STUART ENGLAND* (1990); F. SMITH FUSSNER, *THE HISTORICAL REVOLUTION: ENGLISH HISTORICAL WRITING AND THOUGHT, 1580-1649* (1962); STAN MENDYK, "SPECULUM BRITANNIAE": REGIONAL STUDY, ANTIQUARIANISM, AND SCIENCE IN BRITAIN TO 1700 (1988); SHAPIRO, *PROBABILITY AND CERTAINTY*, *supra* note 9; Barbara Shapiro, *History and Natural History in Sixteenth- and Seventeenth-Century England, An Essay on the Relationship Between Humanism and Science*, in *ENGLISH SCIENTIFIC VIRTUOSI IN THE SIXTEENTH AND SEVENTEENTH CENTURIES* (1979); MARTINE BROWNLEY, *CLARENDON AND THE RHETORIC OF HISTORICAL FORM* (1987); J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* (1957); Joseph H. Preston, *Was there an Historical Revolution?*, 38 *J. HIST.*

roughly comparable to that of the novelist who deals with circumstantial evidence of his own creation—the need to create a continuous narrative explanation based on facts that are viewed as existing separately from the narrator. We have already noted in this connection that Fielding's *Tom Jones* is called a "history" by its author, and that Fielding frequently insists that he is a historian.⁵⁵ It could perhaps be better argued that Fielding's narrator has more in common with the historian, attempting to make sense of both reliable and unreliable information and reports to reach a more accurate and probable understanding, than with the prosecutor in a criminal trial. It would certainly be worthwhile to explore the parallel shift from direct to indirect evidence in historiography and the novel. Those interested in more recent historiographical developments might see the breakdown of confidence in positivist historiography as analogous to Welsh's treatment of the breakdown of "strong representation" in the novel.

F. *Natural Philosophy*

It is obviously impossible to discuss the history of natural philosophy in detail; therefore, I note only a few points particularly relevant to Welsh's arguments. Early modern physicians, like their ancient counterparts, were accustomed to reasoning from effects to causes, that is, from signs to causal explanations. Initially, however, their enterprise did not count as natural philosophy, which continued to seek certain rather than probable explanations. The seventeenth century, particularly in England under the influence of Francis Bacon, introduced a greatly enhanced role for natural "facts" within natural philosophy.⁵⁶ Bacon, himself a lawyer and Lord Chancellor, spoke of interrogating nature, perhaps on the model of a Chancery judge.

During the seventeenth century, naturalists attempting to purge the facts of natural history of myth and fable often employed the legal language of credible or multiple witnesses. The language of the law was readily available to provide for the substantiation of the "facts" increasingly central to natural philosophy. The language of credible witnesses

IDEAS 353 (1977); JOSEPH LEVINE, *HUMANISM AND HISTORY: ORIGINS OF MODERN ENGLISH HISTORIOGRAPHY* (1987); JOSEPH LEVINE, *DR. WOODWARD'S SHIELD: HISTORY, SCIENCE, AND SATIRE IN AUGUSTAN ENGLAND* (1977); THOMAS PEARDON, *THE TRANSITION IN ENGLISH HISTORICAL WRITING, 1760-1830* (1933); R.N. Strombert, *History in the Eighteenth Century*, 12 J. HIST. IDEAS 395 (1951).

See also SEYMOUR CHATMAN, *STORY AND DISCOURSE: NARRATIVE STRUCTURE IN FICTION AND FILM* (1978); JAMES JOHNSON, *THE FORMATION OF ENGLISH NEO-CLASSICAL THOUGHT* (1967); Leo Braudy, *Hayden White, Rhetoric and History*, in *THEORIES OF HISTORY* (1978).

55. BRAUDY, *supra* note 22, at 181. Braudy suggests interesting similarities between Hume's approach to writing history and Fielding's concept of the novel. See also Phil Stevick, *Fielding and the Meaning of History*, 79 PMLA 561 (1964); SHELDON SACKS, *FICTION AND THE SHAPE OF BELIEF* (1964).

56. For a discussion of the creation of the natural "fact," see Lorraine Daston, *Marvelous Facts and Miraculous Evidence in Early Modern Europe*, 18 CRIT. INQUIRY 92 (1991).

was thus not unusual among seventeenth- and eighteenth-century empiricists, and was frequently invoked by empirically and experimentally oriented Royal Society naturalists such as Robert Boyle.⁵⁷ Locke's epistemological explorations were couched in similar terms.⁵⁸

The language and concept of circumstantial evidence was less frequently exercised in natural philosophy, at least initially, though it was necessary to invoke something like hypothesis, conjecture, or inference from fact when advocating one or another form of the corpuscular hypothesis. Such inferences from fact, always considered probable, were not vastly different from "light," "probable," or "violent" presumptions drawn from circumstantial evidence. That Locke employed the concepts of witness testimony, rather than conclusions that might be drawn from "facts" or "signs," suggests that Welsh's observations on the preference for testimonial evidence in the law court and novel before the mid eighteenth century was paralleled in natural philosophy and epistemology. Perhaps it was necessary to be confident that natural facts *could* be "verified" before natural philosophers could feel confident about making inferences, or "strong representations," from them. Isaac Watts's *Logick*, written several decades after Locke, constructed probabilistic arguments from facts in a way that Locke had not.⁵⁹

Some eighteenth- and nineteenth-century philosophers used the term "moral certainty," a term clearly associated with law, to indicate that there were no infallible general principles of the physical world to be derived from the facts of nature. Indeed, such parallelism of language is not unusual in the legal literature. This is not surprising given that eighteenth- and nineteenth-century science, philosophy, and law were consciously and explicitly involved in the question of how high a probability of truth could be assigned to any particular inference from any particular set of facts.

G. Literature

Given the limits of space, it will only be possible to allude to a few literary developments not noted by Welsh that bear on his concerns with circumstantial evidence and narrative method. At a minimum, we must mention the revival of rhetoric that pervaded Renaissance literature and

57. 4 ROBERT BOYLE, *THE WORKS OF ROBERT BOYLE* 182 (1772); 5 ROBERT BOYLE, *THE WORKS OF ROBERT BOYLE* 529 (1772). See also STEVEN SHAPIN & SIMON SCHAFER, *LEVIATHAN AND THE AIR PUMP: HOBBS, BOYLE, AND THE EXPERIMENTAL LIFE* (1985). For Robert Hooke's use of the language of circumstances and conjecture, see ROBERT HOOKE, *A DISCOURSE OF EARTHQUAKES* (1668), quoted in *ENGLISH SCIENCE FROM BACON TO NEWTON* 145-47 (Brian Vickers ed., 1987). See also ISAAC NEWTON, *A NEW THEORY ABOUT LIGHT AND COLOURS* (1672), quoted in *id.* "Circumstances" appears to be a cognate of "fact."

58. JOHN LOCKE, *ESSAY CONCERNING HUMAN UNDERSTANDING* (1690).

59. Watts argued that the discovery of human bones in a particular location might be used to infer that the place was once a churchyard, or a battlefield, or that the bones might have arrived there in some entirely different way. PATEY, *supra* note 29, at 308.

education, a revival that, of course, highlighted rhetorical conceptions of circumstances. Erasmus's widely-read textbook *On Copia of Words and Ideas*,⁶⁰ known to generations of schoolboys, outlines the elements of the "circumstances" that make up the "inartificial proofs" of the orator. Thomas Wilson's rhetorical treatment of "circumstances," outlined in his popular 1553 *Art of Rhetorique*, was almost immediately transferred to the judicial handbooks to assist the justices of the peace in examining accused felons.⁶¹ Similar treatments appeared in the sixteenth-century rhetorical works of Ralph Lever and Richard Sherry.⁶²

Discussion of reasoning from effects to probable causes also appeared in several Renaissance dialectical texts.⁶³ It would have been difficult for early modern writers to avoid contact with the rhetorical treatment of "circumstances"; and rhetoric, we should recall, remained central in English education well into the nineteenth century.

Although analysis of the continental novel typically begins with Cervantes's *Don Quixote*, which emphasizes both its own fictionality and authorial presence, the early English novel tended to disguise its fictionality by means of such devices as letters and the testimony of witnesses. However, literary concern with the distinction between fact and fiction, as well as fact-likeness and verisimilitude, existed as early as the sixteenth century both in England and on the continent.⁶⁴ Later decades put increasing emphasis on truth, particularly the truth of "facts." The seventeenth century was characterized by a growing literary taste for a less rhetorical and more truth-oriented history, factual travel and political reports, accounts of international news, and natural history purged of

60. ERASMUS, *ON COPIA OF WORDS AND IDEAS* 66-67 (Donald King & H. David Rix trans., 1963).

61. SHAPIRO, *BEYOND REASONABLE DOUBT*, *supra* note 9, at 154. See also *id.* at 148-64.

62. PATEY, *supra* note 29, at 38-41. Sherry, who discussed both fallible and infallible signs, noted that blood on clothing might have resulted from a bloody nose. *Id.* at 39.

63. Such discussion appears both in Melanchthon's *Erotometa Dialectica* and Thomas Bludeville's *Art of Logicke*. *Id.* at 39-40, 51.

64. See WILLIAM NELSON, *FACT OR FICTION: THE DILEMMA OF THE RENAISSANCE STORYTELLER* (1973). For the early history of the novel, see WATT, *supra* note 20; LENNARD J. DAVIS, *FACTUAL FICTIONS: THE ORIGINS OF THE ENGLISH NOVEL* (1983); MICHAEL MCKEON, *THE ORIGINS OF THE ENGLISH NOVEL 1600-1740* (1987). McKeon, who emphasizes the role of individual life histories, traces the development from saints' lives through spiritual biographies and the picaresque and criminal biographies of real and fictitious persons. He emphasizes the importance of detailed lives. It would seem appropriate to investigate the ways in which rhetorical "circumstances" shaped drama. Shakespeare's *Othello* clearly shows how circumstantial evidence could be used by one character to deceive another, as well as to determine truth. Also "things," "facts," and the "circumstances" of time, place, and manner as well as those associated with individuals, e.g., social status, education, parentage, companions, etc., observed by theater audiences must have been used by them to reach assessments of characters and events, much in the way that a justice of the peace arrived at preliminary assessments of innocence and guilt, or the way that jurors reached judgments about witness testimony and circumstantial evidence. The kinds of moral judgments provided by Welsh's narrator of circumstantial evidence thus were probably internalized by theater audiences two centuries earlier. Their assessments, of course, did not take narrative, or even verbal, form.

mythical creatures. Without the heightened belief in the value of "facts," a fiction based on fictional "facts" would not have been persuasive.

The role of fact-likeness in early fiction has, of course, been frequently noted. Lennard Davis, like Welsh, emphasizes the English fascination with real and fictional reports of criminality, rogues, and low-life, but does not extend his analysis to the criminal trial. In addition, Davis has shown what the early novel shared with other varieties of prose news.⁶⁵ Douglas Patey, who has traced the many ways in which the concepts of "probability," derived from rhetorical sources, were applied to a variety of Augustan literary genres, also touches on issues that bear on Welsh's themes. Among these are the theory and practice of verisimilitude in the novel and other genres. Patey's treatment of "signs" and "probable circumstances" sheds light on the Augustan literary tradition, albeit without Welsh's emphasis on the criminal trial. He notes the importance of philosophers Thomas Reid and James Beattie, who specifically relate "signs" to literary probability and decorum. Literary probability was to be "consistent with itself, and connected with probable circumstances," that is, the "outward circumstances of fortune, rank, employment, sex, age, and nation" and the "internal temperature of the understanding and the passions. . . ."⁶⁶ These traditions allowed early English novelists to provide moral judgments as well as verisimilitude.

Patey also suggests that Reid's and Beattie's theory of signs led to a theory of the structure of literary work. Probability in signs and circumstances guaranteed the unity and consistency of a literary work.⁶⁷ For Patey, eighteenth-century literature and literary theory were intimately connected with the notion of "circumstances." And this more generalized notion of "probable circumstances" needs to be placed alongside Welsh's more specialized concern with the circumstantial evidence of the criminal courts.

It must be emphasized, however, that early English novelists strove for moral impact as much as for factual verisimilitude. As we have seen, moral judgment so characteristic of early novels owed more than a little to the moral stories that had developed from casuistry. Fictional facts, whether provided by testimony or narrative based on circumstances and circumstantial evidence, led to moral assessments of characters placed in unusual or difficult situations or circumstances. Thus any complete account of the evolution of factuality in the English novel must give full weight to rhetoric and casuistry as well as law.

65. DAVIS, *supra* note 64, at 42-102, 123-137. Davis, like Welsh, emphasizes the English fascination with real and fictional reports of criminality.

66. *Quoted in* PATEY, *supra* note 29, at 87.

67. *Id.* at 88-89. For discussion of signs that point to internal mental qualities, and the influence of physiognomy on art, see *id.* at 90ff. Patey also suggests that the theory of signs and circumstances had an influence on theories of acting and on the analysis of character. *Id.* at 97-103.

IV. CONCLUSION

There are a number of conclusions that may be drawn from my discussion of Welsh's work, and from my brief attempt both to extend and further contextualize his innovative suggestions on the relationship between the development of "strong representation" in the novel and other areas of thought. The first is that current notions of "law and literature" are too limited and should be extended to incorporate the interaction and intersection between law and other aspects of culture during a particular period.

Welsh contributes in an important way to the increasing sensitivity to the fact that neither law nor literature is an isolated phenomenon and that both must be understood in much broader contexts than the ones in which they have traditionally been treated. To put the matter differently, the "literature" with which the law and literature movement concerns itself ought to encompass a great deal more than fiction. My preliminary survey suggests that the areas of eighteenth- and nineteenth-century epistemology, logic, moral philosophy, historiography, and natural philosophy have not yet been sufficiently integrated by legal, literary, or cultural historians.

It also suggests that the long-recognized relationship between rhetoric and law needs to be further explored. The rhetorical tradition has played an important role not only in legal argumentation, relevance, and interpretation, but in the law of evidence as well. This broad survey also suggests that the rhetorical tradition, developed in the ancient world by Aristotle, Cicero, Quintilian, and others, was equally important to the development of the English literary tradition. While the substantial overlap between poetry and rhetoric has long been acknowledged by Renaissance literary scholars, we are only beginning to recognize the importance of rhetoric for the development of drama and the novel.⁶⁸ One can, however, anticipate that the recent revival of scholarly interest in rhetoric should soon yield rich rewards in studies of eighteenth- and nineteenth-century literary culture.

Welsh's work also points to the importance of approaches to representing "reality" and the "verisimilar." This kind of work, currently being carried on by specialists in literature and in the history of science, needs

68. See, e.g., JOEL ALTMAN, *THE TUDOR PLAY OF MIND: RHETORICAL INQUIRY AND THE DEVELOPMENT OF ELIZABETHAN DRAMA* (1978); MADELEINE DORAN, *ENDEAVORS OF ART* (1954); WILLIAM KENNEDY, *RHETORICAL NORMS IN RENAISSANCE LITERATURE* (1978); WAYNE BOOTH, *THE RHETORIC OF FICTION* (1971); RICHARD LANHAM, *THE MOTIVES OF ELOQUENCE: LITERARY RHETORIC IN THE RENAISSANCE* (1978); *THE RHETORIC OF RENAISSANCE POETRY* (Thomas Sloan & Raymond Waddington eds., 1974); THOMAS SLOANE, *DONNE, MILTON, AND THE END OF HUMANIST RHETORIC* (1985); BRIAN VICKERS, *CLASSICAL RHETORIC IN ENGLISH POETRY* (1970); Hanna Gray, *Renaissance Humanism: The Pursuit of Eloquence*, 24 J. HIST. IDEAS 497 (1963).

There has been far less interest in the role of rhetoric in eighteenth-century literature despite the widespread recognition of the neoclassicism of the era.

to come together in a fruitful way. A great many philosophical pieces of the puzzle are still missing. In attempting to locate the missing pieces, however, it is important to note that philosophy is most likely to come into contact with law when both disciplines assume that a kind of practical, probabilistic knowledge is possible and desirable. Natural philosophy and law are unlikely to overlap when philosophers adopt a rigorous method of making claims to absolute certitude, or when they espouse radical skepticism. The law, particularly the law of evidence, can deal neither with too much certainty nor with too much doubt or skepticism, for it is obvious that legal trials cannot achieve absolute certainty, yet necessary that they come to some agreed conclusions.

Another missing element in our understanding of law and culture is a more comprehensive knowledge of the interaction among all disciplines purporting to deal with "facts." The facts of law, of natural philosophy, and of history, and the invented facts of the fiction writer, require belief in the capacity of human beings to attain adequate, if not perfect, knowledge of those facts, and to make adequate, if not perfect, inferences from those facts. Although the standards established may acknowledge the possibility of error, they cannot include extreme doubt. It seems likely, then, that the most "fact-oriented" eras are the ones in which we are most likely to find close connections between the fact-oriented disciplines such as law, history, and natural sciences, and fictional endeavors that purport to establish facts and make appropriate inferences from them. The lengthy period from the middle of the seventeenth century to the end of the nineteenth century appears to be that period *par excellence*, and Welsh gives us a major aspect of its linkage between fiction and non-fiction.⁶⁹ More study is required if we are to comprehend the relationship between law and literature more generally. But this essay also suggests that there are aspects of law, e.g., what constitutes appropriate legal proof, that must be placed not only within a broader context but also a longer time frame. A longer chronological examination than Welsh has attempted may well reveal that changes in both English legal and broader literary practices are as much the product of long-term origins and developments, many of which are European-wide, as they are of specific, contemporaneous, English interactions.⁷⁰

69. This is the period that most postmodern theorists and critics have labelled the "modern" era.

70. See, e.g., DONALD R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* (1990).

