

Summer 1984

## Looking at Law

Carol Weisbrod

*University of Connecticut School of Law*

Follow this and additional works at: [https://opencommons.uconn.edu/law\\_papers](https://opencommons.uconn.edu/law_papers)



Part of the [Law and Psychology Commons](#)

---

### Recommended Citation

Weisbrod, Carol, "Looking at Law" (1984). *Faculty Articles and Papers*. 65.  
[https://opencommons.uconn.edu/law\\_papers/65](https://opencommons.uconn.edu/law_papers/65)

# HEINONLINE

Citation: 16 Conn. L. Rev. 1007 1983-1984



Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Mon Aug 15 18:32:20 2016

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=0010-6151](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0010-6151)

# LOOKING AT LAW

by Carol Weisbrod\*

It is by now widely understood that law can be studied from both the inside and the outside and that scholarly questions can be legitimately explored from either position.<sup>1</sup> This discussion concerns research from the outside.

The attempt to look at a thing from the outside seems to require that the researcher stand mentally, if not physically, someplace else. The enterprise is aided when the researcher has some clear sense of where that place is. Where are we standing when we say that we are looking at law from the outside? There is no single answer, but much work that looks at law from the outside does so from the standpoint of a particular discipline or theory. Thus, research is often done from the viewpoint of economics, anthropology, or sociology. The alternative mode might be thought to involve a peculiarly personal and even autistic angle of vision. These two are the most obviously available routes by which an academic lawyer can escape from the constraints of the inside perspective.<sup>2</sup> But there is also a way to look at law from the outside that is broader than either of these and that requires nothing dramatic

---

\* Professor of Law, University of Connecticut School of Law, J.D., Columbia University. Professor Weisbrod teaches Contracts, Commercial Law, Family Law, and a seminar on Church and State.

This article draws on my experiences as a visitor at the University of Exeter in the fall of 1983, under the auspices of the Exeter/Connecticut Exchange Program. It seems appropriate, therefore, to include it in an issue of the *Connecticut Law Review* dedicated to Dean Phillip Blumberg, who encouraged the exchange at every point as part of his broad commitment to the scholarly enterprise.

1. For discussions of internal and external views of law from the jurisprudential side, see H.L.A. HART, *THE CONCEPT OF LAW* 99-107 (1961), and from the social science perspective, see L. FRIEDMAN & S. MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* (1969). For a discussion of a particular legal theory that "looks at law from outside law," see L. LIPSON, *Is There a Marxist Theory of Law: Comments on Tushnet*, in *MARXISM: NOMOS XXCI* 189 (J.R. Pennock & J.W. Chapman eds. 1983).

2. The present discussion assumes the importance of looking at law from the outside. See Bok, *A Flawed System of Law Practice and Training*, 33 *J. LEGAL EDUC.* 570 (1983); Trubek, *A Strategy for Legal Studies: Getting Bok to Work*, 33 *J. LEGAL EDUC.* 586 (1983).

Traditional legal research, often narrow and technical, studies problems as seen from the inside. Until very recently, legal scholarship was defined as analytic work of this type. It has been

in the way of retraining or self-consciousness. Legal academics can usefully look at law from the viewpoint of an outside observer in general. Because lawyers are not ordinarily trained to stand outside the legal system (as we are not trained in many other things), it seems worthwhile to suggest that the deliberate adoption of the observer's role is a readily available technique that can be used for contextual legal scholarship.<sup>3</sup>

Far from its being impossible for us to identify with such a point of view, it seems to me that lawyers adopt the observer's role more often than we realize. Thus, when we as lawyers who are not comparativists look at another legal system for the first time, even one very close to our own, we do so with instructed but not altogether professional eyes. We look at that system without feeling part of it and are, in this sense, observers in relation to that other system. I would like to use, as two examples, approaches to the law of contemporary England and nineteenth century America.

Let us start with the American lawyer looking at English law. An American lawyer's conception of English law derives from and is illustrated by the fact that we conventionally speak of the Anglo-American legal system, or Anglo-American law. These formulas assume that there are important and even fundamental continuities between the English and American legal systems. We share a common legal culture, a common past (up to a point), a common legal language, and "the common law."<sup>4</sup>

noted that:

legal scholarship is in many ways a bad joke [partly because of the] prevalence of pieces like *The Rule in Dumpor's Case in Kansas: Toothless Tiger or Trap for the Unwary Draftsman?* and the twin evil, the ringing of the most minute changes on major constitutional cases such that the articles ought to be known not by author and title, but, like prints in a series, by number—*Stone v. Powell* No. 617.

Konefsky & Shlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833, 848-49 (1982).

3. Lawyers whose work is formally comparative may have relevant skills, though even here there may be problems. See Renton, *The Gods, the Judges, and the Laws*, 9 KINGSTON L. REV. 3 (1979). "The difficulty is that Western commentators have a particular idea of law but they do not understand that it is a particular idea." *Id.* at 31.

4. English cases, often venerable and sometimes involving obscure technologies and mind sets—what is a carbolic smoke ball?, see *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q.B. 484; a bezar stone?, see *Chandler v. Lopus*, Cro. Jac 4 (Ex. Ch. 1603); Llewellyn, *On Warranty of Quality and Society*, 36 COLUM. L. REV. 699, 726 (1936)—are well known to American lawyers from their time as students. Americans, at least, take "Anglo-American law" to be real, solid, and whole. But perhaps not all Americans—note Llewellyn's comment that "England and any one of the United States remain from 1800 to 1935 wholly separate historical problems," and regretting the fact that the annotations in the Restatements were a-historical. *Id.* at 715-16.

Our preconception regarding the continuities between the two systems is largely validated by an initial exposure to English legal writing. We read, confident on the whole of our understanding, until we encounter something in the text which, while not wrong, is not quite what we would have said. In thinking about what we would have said, we discover that there is a significant difference (as important, one suspects, as any similarity) between English and American legal materials, a difference that is more than the obvious structural distinction, for example, between American casebooks and English textbooks.<sup>5</sup> Upon examination, this difference turns out to relate to the weight given by the two systems to earlier decisions, in short, the weight attached to precedent and the doctrine of *stare decisis*. For the American reader of English materials, the English approach to precedent may be first revealed by an English textbook that refers to old cases on the apparent assumption that they are as good as ever.<sup>6</sup> Such citations seem connected to the fact that, until quite recently, the House of Lords could not overrule its own decisions.<sup>7</sup>

The lawyer who sees this difference has noticed nothing new. Arthur Goodhart, writing in 1930, suggested that the assumed bond between England and the United States, that is, the bond of the common law, was a bond that was even then weakening. The English were, he thought, remaining loyal to a quite strict approach to precedent, while the Americans were much less committed to the idea that earlier cases were determinative of present issues.<sup>8</sup>

---

5. The over-general statement would be to the effect that American law teachers use casebooks (though textual presentations are also available, *see, e.g.*, E.A. FARNSWORTH, *CONTRACTS* (1982)), while the English use textbooks (though teaching materials based on cases and questions are also available, *see, e.g.*, J. SMITH & J. THOMAS, *A CASEBOOK ON CONTRACTS* (7th ed. 1982)).

6. In 1982, Lord Diplock indicated that, in the public law context at least, only recent case material should be cited. *Inland Revenue Comm'rs v. National Fed'n of Self Employed & Small Businesses, Ltd.*, [1981] 2 All E.R. 93, 103.

7. Of course, a strict use of precedent does not mean that nothing can ever be changed. It may mean that the system becomes adept at distinguishing cases. There have also been overt changes. The House of Lords in 1966 said that it would no longer be bound by its own earlier ruling. Practice Statement, [1966] 1 W.L.R. 1234. Glanville Williams quotes an English cartoon: "One Law Lord to another: 'I say, Uptort, I can't get used to the fact that we can ever have been wrong.'" G. WILLIAMS, *LEARNING THE LAW* 84-85 (11th ed. 1982).

For a discussion emphasizing a large change over time, see Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249 (1980).

8. Goodhart, *Case Law in England and America*, 15 CORNELL L.Q. 173 (1930). On the citation of "principles," *see* Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1041-42 (1961).

Observing this English pattern, one reflects on the possibility that the commitment to stability and rule is deep in the English culture, found somehow in many English artifacts including the legal system. John Stuart Mill noted that "[t]he English more than any other people not only act but feel according to rule." He suggested that for the English, "rule has to a great degree substituted itself for nature," and that in England, "[t]he greater part of life is carried on, not by following inclination under the control of rule, but by having no inclination but that of following a rule."<sup>9</sup> And Goodhart noted the connection between the doctrine of precedent and larger cultural issues. The case system, he thought, better satisfied the needs of England, where "conditions are more or less static," while the system was "less suited to the United States with its kaleidoscopic civilization."<sup>10</sup> He observed that "[t]he rapidly changing social and economic conditions in the United States place the rigidity of the case system under an unusual and heavy strain."<sup>11</sup> Underlying the particular doctrines of the English system, then, are central values of continuity and order.<sup>12</sup> Change in such a system might well carry a heavy burden of justification. And in America, by contrast. . . .

Speculations about relationships between law and other parts of the culture go on from there. The point is that, whether the generalizations are right or wrong, whether or not England is now or was ever more stable than the United States, there is nothing "legal" in this attempt to relate a legal fact to more general cultural attributes.

A similar phenomenon occurs when we look at nineteenth century

For a discussion of "the divergence in the two legal cultures," see Stevens, *Two Cheers for 1870: The American Law School*, in 5 PERSPECTIVES IN AMERICAN HISTORY 465-70 (Fleming & Bailyn eds. 1971). See generally Johnstone & Hopson, *Lawyers and Their Work: An Analysis of the Legal Profession*, in ENGLAND AND THE UNITED STATES (1961).

One can imagine the reciprocal reaction triggered by a first exposure to the fact that the American system permits a sequence of cases like the flag salute cases. See *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled by West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

See also Alder, *The Westfarms Mall Case: An English View*, 16 CONN. L. REV. 709 (1984), suggesting that it is easy to overstate the differences between the two systems.

9. J. MILL, *THE SUBJECTION OF WOMEN* (1869), *reprinted in* 21 COLLECTED WORKS OF JOHN STUART MILL 313 (Robson ed. 1984).

10. Goodhart, *supra* note 8, at 189.

11. *Id.* at 188-89.

12. Cf. Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187 (1981). See generally Gower, *English Legal Training*, 13 MOD. L. REV. 137, 174 (1950) (referring to the traditional disinterest of English lawyers in law reform). But see R. GOODE, *COMMERCIAL LAW* 288-91 (1982) (including a discussion of possible additions to the list of implied terms in sales contracts).

American law.<sup>13</sup> A professional and internal assumption of continuity and substantial identity<sup>14</sup> between the legal systems of nineteenth century and present day America is modified if not defeated by observations that are not fundamentally linked to either professional skills or internal perspectives. Often, when we read nineteenth century legal materials, the sense that something is different relates to some very general discussion of values, relating, for example, to gender roles, marriage and the family,<sup>15</sup> or religion.<sup>16</sup> These discussions are important signals as to something outside the legal system; they are keys to larger questions of law and social context. Just as English doctrines of precedent may be seen as relating to cultural characteristics, so judicial discussions of gender may be seen as involving more than the sexism of individual judges or even of judges as a class, and judicial reference to the "truth" of Christianity<sup>17</sup> may suggest something beyond the religious commitment of the individual judge. Thus, it was the outside observer's understanding of the *Girard Will* case that Perry Miller insisted on when he remarked that, while there were many issues in the case, "the central question, as the populace knew and as Webster made unmistakably plain, was that of the religiosity of the law."<sup>18</sup>

Recognition of the connection between the legal event and the underlying assumptions of the legal system or indeed of the social order

13. One takes as given that to some extent the effort to understand the past must fail. As Raymond Williams has noted, "the lived culture [contrasted with the recorded culture and the culture of the selective tradition] in a particular time and place [is] only fully accessible to those living in that time and place." R. WILLIAMS, *THE LONG REVOLUTION* 49 (1961). But less than full access does not mean no access. Thus, Corbin's comment is useful:

In an ancient case, (Y.B. 17 Edw. IV, 2), Brian, C.J., remarked, perhaps erroneously, that "the devil himself knoweth not the thought of man." Every day experience shows that man himself believes that he can discover the thoughts of another man. This he does by inferences from the other's external expressions, in words, in features, and in acts. Such evidence may indeed lead to woeful error; but it is the best we have and we act upon it daily.

A. CORBIN, *CORBIN ON CONTRACTS* 540 n.5 (one vol. ed. 1952).

14. See Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017, 1052 (1981).

15. See, e.g., *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring).

16. 1 S. GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* 412-23 (12th ed. 1866).

17. *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127, 198 (1844) (Story, J.) (discussing the relationship between Christianity and the common law).

18. P. MILLER, *THE LIFE OF THE MIND'S AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 199 (1965).

The will contained a provision barring clergymen from Girard College. Daniel Webster, representing the heirs, argued that the devise was invalid. His speech was published under the title "A Defense of the Christian Religion, and of the Religious Instruction of the Young" (N.Y. 1844).

has no necessary relation to the package of organizational and analytical skills usually called "thinking like a lawyer." But then, thinking like a lawyer, in the narrow sense, is simply one more thing we know how to do. Viewed this way, one may suggest that for legal academics looking at historical, comparative, or current legal materials,<sup>19</sup> a serious part of the task involves thinking quite consciously like an observer rather than a participant in order to break down professional assumptions about what things mean and why they are important.<sup>20</sup>

In *Unequal Justice*, Jerrold Auerbach, writing as a professional historian, emphasized the significant strengths of the layman's outside perspective. To begin with, he said, laymen are clearly able to "understand how lawyers have responded in their professional capacity to public issues."<sup>21</sup> Further, Auerbach wrote, "laymen must insist—until law-

19. Llewellyn invoked the Man from Mars and the New Adam as observers when he wrote on the American Constitution. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3 (1934).

20. See Arthur Leff's comments on "metaphoric reasoning," a mode which "cuts across, indeed rolls right over, the subtleties of ratio decidendi." Leff, *Law and*, 87 YALE L.J. 989, 1007 n.45 (1978).

The lawyer's view of what is important in or about law can be very limited. As Willard Hurst noted:

Anglo-American law men are by tradition and training biased toward equating law with what judges do, to the neglect not only of legislative, executive, and administrative activity, but also to the neglect even of the out-of-court impact of the work of lawyers, let alone the additions or subtractions made in legal order by lay attitudes and practices affecting legal norms.

Hurst, *The Law in United States History*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 3, 6 (L.M. Friedman & H.N. Scheiber eds. 1978).

One of the important things an outside observer tends to know is that state law is not the only sanctioning system affecting individuals.

21. J. AUERBACH, *UNEQUAL JUSTICE* 8 (1976).

It seems clear that, as professionals in law, we have a certain stake in maintaining that, as was once said, "the subject matter of law is somewhat transcendent, and too high for ordinary capacities." L. FULLER, *LEGAL FICTIONS* 2 (1967) (quoting the writer of Sheppard's *Touchstone*). See also 1 DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 267 (Reeve trans. 1966) (Unlike the French lawyer, "the English and American lawyer resembles the hierophants of Egypt, for like them he is the sole interpreter of an occult science.").

Still, certain fundamental ideas are entirely available as an intellectual matter to people who do not stand within the legal profession. Human beings look at law in their environment all the time, and they know it, however imperfectly and non-technically. Consider the descriptions of precedent (English and American) offered by the satirists, Swift and Bierce. When Jonathan Swift attacked precedent, he thought in terms of a system that perpetuated injustices that had been once approved by law. Thus the familiar passage in *Gulliver's Travels*:

It is a maxim among these lawyers that whatever has been done before may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice, and the general reason of mankind. These, under the name of *precedents* they produce as authorities. . . .

yers venture from their professional cocoon—that the law is social not scientific; that legal history is a chapter of social history, not a self-contained entity. . . .”<sup>22</sup> As Auerbach’s comment makes plain, lawyers are not, by virtue of their training, disqualified from this enterprise. Rather, an aspect of the famous legal omniscience may well involve an ability to put aside one’s training, at least to the extent that it purports to define the subject, and to stand outside one’s discipline.

J. SWIFT, *GULLIVER’S TRAVELS* 266 (1726). See Dicey’s response in A. DICEY, *LAW AND PUBLIC OPINION* 366-67 (1926).

By contrast, when the American Ambrose Bierce attacked, the point was that the doctrine of precedent, of unknown content in any event, simply masked judicial arbitrariness. Thus, in *The Devil’s Dictionary*, Bierce defined precedent as a “previous decision, rule or practice which, in the absence of a definite statute, has whatever force and authority a judge may choose to give it, thereby greatly simplifying his task of doing as he pleases. . . .” A. BIERCE, *THE DEVIL’S DICTIONARY*, in *THE COLLECTED WRITINGS OF AMBROSE BIERCE* 330 (C. Fadiman ed. 1960). And in response to the question, “What is precedent?”: “It has been defined by five hundred lawyers in three volumes each. So how can anyone know?” *Id.* at 235.

David Riesman suggested that ethnocentric legal training “may lead the lawyer to overlook the possibility that the use of precedent is not merely a legal game played in America but not in France but is actually a human characteristic to be looked for everywhere.” Riesman, *Toward an Anthropological Science of Law and the Legal Profession*, 57 *AM. J. SOC.* 121 (1951).

The view of law held by non-lawyers includes much more “law” than the media version of a criminal trial. Laymen’s sense of details of the law can be acute when they are themselves involved or when the topic is current. Further, the lay point of view may tell us something even when we, as professionals, believe that there is something in the account that inadequately appreciates the law’s perspective. Consider the remarks of Bertrand Russell:

In America, . . . though it is not illegal to keep a mistress, it is illegal to travel with her from one State to another; a New Yorker may take his mistress to Brooklyn but not to Jersey City. The difference of moral turpitude between these two actions is not obvious to the plain man.

B. RUSSELL, *The Recrudescence of Puritanism*, in *SKEPTICAL ESSAYS* 129 (1928). An American lawyer may try to formulate an answer to Russell. Such response would not so much deny the description as it would try to explain some legal consequences of “Our Federalism.” See Soifer & Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 *TEX. L. REV.* 1141 (1977). But there remains a level—having, I suppose, to do with the phrase “In America”—at which the point is still there, unanswered.

While it is true that certain questions can be raised and perhaps clarified by a researcher with some appreciation of possible technical problems (e.g., it might have been illegal somewhere in America to keep a mistress, especially if one were already married), it also seems possible that the contribution that lawyers make to interdisciplinary conversation lies not so much in the fact that they think like lawyers as in the fact that they understand, better than non-lawyers of any kind, how lawyers think. Lawyers can, in short, act as translators between the disciplines. For a discussion of lawyers and philosophers on promising, see Atiyah, *Promises and the Law of Contract*, 88 *MIND* 410 (1979). And see J.F. Stephen on lawyers and doctors on questions of the insanity defense. 2 J. F. STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 124-86 (1883).

22. J. AUERBACH, *supra* note 21, at 8. It is often remarked that the English language uses the term “non-lawyer” but does not use, for example, the term “non-historian.” This does not mean, however, that we lack the concept “professional historian.” See J. HEXTER, *DOING HISTORY* (1971).

This discussion has made only one point. It is that adopting the observer's role is one way to place law in context. This outside point of view—which may be finally identical to that of the lawyer “in its largest sense”<sup>23</sup>—helps us to raise and answer such questions as: Who are these people?<sup>24</sup> Is this important? What is this rule doing? It is the outsider's view that we are using (and looking for) when we, as researchers, go to sources far beyond the legal system to see how a legal event is understood or was understood in its own time.<sup>25</sup> It is the outside point of view that we are using when we focus on the broad rhetoric—“mere dictum”—of a judicial opinion as communicating something important exactly because it is that language that is most generally comprehensible. And as to the famous comment of Thomas Reed Powell—“If you can think about something connected to something else without thinking about the thing it is connected to, then you have the legal mind”<sup>26</sup>—one may suggest that perhaps, for legal academics at least, the operative word is can.

---

23. Harold Berman quotes Oliver Wendell Holmes speaking to law students: “Your business as lawyers is to see the relation between your particular fact and the whole frame of the universe.” H. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* at vii (1983).

24. See J. NOONAN, *PERSONS & MASKS OF THE LAW* (1976).

25. If we have seen a profound shift in orientation between the nineteenth and twentieth centuries on a question such as the efficacy of religious sanctions, this shift would be most obviously important to law itself in any area in which an “original understanding” was understood to matter. See Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). For contextual work, these issues are important more generally. If underlying ideas about the reality are different, legal statements in many contexts would have different meanings. For example, the reference to the forum of conscience in *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (1825), might be read quite differently in religious and non-religious contexts.

26. L. FULLER, *THE MORALITY OF LAW* 4 (1964) (quoting T.R. Powell).