



Aug 8th, 9:30 AM - 9:45 AM

## Law in Culture and Society

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# Law in Culture and Society

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University of California Press  
Berkeley and Los Angeles, California

University of California Press, Ltd.  
London, England

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for Anthropological Research, Inc.

First Paperback Printing 1997

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Library of Congress Cataloging-in-Publication Data  
Law in culture and society / edited by Laura Nader.

p. cm.

Originally published: Chicago, Ill. : Aldine Pub., 1969.

Includes bibliographical references and index.

ISBN 0-520-20833-1 (alk. paper)

1. Law and anthropology. 2. Ethnological jurisprudence. 3. Law, Primitive. I. Nader, Laura.

K487.A57L385 1997

340'.115—dc20

96-34175  
CIP

Printed in the United States of America

This book is a print-on-demand volume. It is manufactured using toner in place of ink. Type and images may be less sharp than the same material seen in traditionally printed University of California Press editions.

The paper used in this publication meets the minimum requirements of ANSI/NISO Z39.48-1992 (R 1997) (Permanence of paper.)

UNIVERSITY OF CALIFORNIA PRESS  
Berkeley · Los Angeles · London

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## *Preface to the Paperback Edition*

Since the first publication of *Law in Culture and Society* in 1969, there has been a virtual revolution in thinking about law by practitioners in sister disciplines. The story of what has happened is written about elsewhere in long and protracted form. Here I will merely note that movements made the difference, in the direction of scholarship at least. The Development Movement sought to democratize the third world by exporting Europe-American legal education and legal codes and statutes, an inexpensive kind of development which is currently being renewed by efforts in Eastern Europe. The Law and Society Movement made a niche for law and society scholars who were marginal or who did not fit in law schools, political science, sociology, psychology, criminology, history or anthropology departments—people who saw in law the tools for research and reform related to poverty, racism, and sexism, for example. The Critical Legal Studies Movement is a progressive examination of the assumptions of American law and legal education that revealed a law that was more political than neutral; results that might not surprise the downtrodden. Law and Economics, Chicago style, was a reactionary move that loosely paralleled the Reagan Revolution. For scholars there was excitement, for example, in discoveries of law as a vehicle for cultural transmissions or legal imperialisms. When the same patterns were found on home ground there was a crisis of contradictions. The law was not neutral as supposed.

Finally, there has come a recognition of dead-ends. Law and Society is increasingly encapsulated, and more and more replicating that which many sought to escape—boundary controls. Critical Legal Studies is often caught in disembodied literatures and narrative techniques that focus on more discourse-based positions to the exclusion of other factors involved in the

creation of social beings. Thus, whether about the everyday or the abstract, the original power of the "new thinking" wanes just as new thinking about law is taking hold in places like Italy or France.

From the perspective of anthropology as a discipline the change was cumulative, not dramatic, because intellectually the anthropology of law gave to the movements perhaps more than we received. "Our" terrain—the non-western other—our approaches and methods such as participant observation, and what we had learned about social and cultural processes through ethnography, filtered into other disciplines. Notions of critique and comparison, culture and local knowledge, and the various ideas about pluralism and perception had now moved horizontally into sister disciplines, albeit in altered forms.

But there were also subtle changes during this period. Anthropologists learned about the power of law and in law, something more obvious to lawyers than anthropologists. The ethnographic study of law in other cultures, a study that had already yielded a small number of classic ethnographies, continued to be small in number while distinguished anthropologists chose to write ethnographies of law in the United States. New work in Africa diminished and a few outstanding monographs began to appear in Mexico, Brazil, Tibet, Indonesia and the Pacific and elsewhere.

In 1969, dispute resolution was a subject matter that engaged empirically-grounded ethnographers concerned with what law does instead of what law is. In 1996, dispute resolution is an industry that has penetrated the neighborhoods, the schools, the prisons, the corporations, the NAFTA and the GATT, and once again, third world countries dealing with conflicts accompanying decolonization. Throughout this period mainstream legal thought has been severely shaken.

In 1969, anthropologists were treated with disdain by fellow social scientists for examining the everyday in law life because for them real social dramas were elsewhere—in the prisons, in the judgehips, in the streets, or in jurisprudential exploration. By 1996, the anthropological domain had been run over by our fellow social scientists with interest in everyday life and the part played by law in communities. Legal pluralism and dispute resolution interested activists and juridical planners, as well as "identity construction." Now, it is more difficult to tell who is an anthropologist and who is not, or indeed to respond to assertions that by the late 1990s "there are more anthropologists of law who are lawyers than anthropologists," but it is clear that there is a continued interest in anthropologically-rooted studies concerned with the less visible face of law and the view from below.

Since 1969, the view from below has expanded upward and outward. Anthropologists had consistently underestimated the role of legal ideologies in the construction or deconstruction of culture writ large. Legal ideologies such as the harmony law model were used as techniques of pacification among colonized peoples, in nation-states and as well in the international

arena. Yet, the effort to understand the political economy of legal models as adumbrated in our volume in papers on legal styles, historical changes in the law of nation-states, colonialism and the politics of law, and even the Bohannan-Gluckman controversy over folk and analytic categories was more political in nature than either of them might admit.

Arguments over the notion of autonomous systems were embedded in boundary concerns. Could there be a legal system that operated independent of its environment? In our volume, indigenous systems of law are described ethnographically as part of the indigenous culture and society. Years later we were to realize that the study of colonialisms shifted our entire perspective as to what constituted indigenous culture and society. In 1996, we include legal transplants, missionary justice, AID programs, economic globalization as part of the local ethnographic picture. We were correct to be uneasy about drawing boundaries in 1969; boundaries are continually erased as knowledge and political domains shift.

In my first Preface, I indicated that the conference which produced the volume had been tumultuous. Clearly, the intellectual issues about ethnography and interpretation were all there simmering—whose categories do we use, the Other or the West? What is ethnography? When is ethnography ethnographic? Should we standardize data collection? When do we include colonials and missionaries? Do we recognize Pueblo law as a result of forces of conquest?

The political differences between us were there, but they were unmentionable. Only later are we coming to realize the tightrope that many ethnographers were walking between advocacy and objectivity, between generalization and interpretation. A rereading of these essays from the vantage of the 1990s with an improved understanding of the impact of colonialism, the Cold War, and the competition for world resources, suggests the lasting worth of these detailed studies which span generations, disciplines, nationalities, and four continents.

Laura Nader  
Berkeley, California  
August 1996

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## Introduction

This essay, introducing the volume, attempts to describe briefly, in the context of past and present anthropological arguments, what I believe has been and what will be the style of future anthropological studies of law. Since World War II there has been in anthropology a proliferation of various subdisciplines—such as the anthropology of religion, political anthropology, the anthropology of law—that will presumably merge into problem areas in the next decade; in the meantime we have developed these narrower fields in order to make some systematic progress in data accumulation and theory building. We can sometimes profit from looking at the parallel patterns of developments in the subfields, and in this essay I will make specific reference to the development of socio-linguistic studies as it relates to developments in the anthropology of law. For similar reasons I will cite extensively from a memorandum written at the request of the conference members by the sociologist Wilhelm Aubert. In order that a variety of views might be expressed, separate introductions to the four sections were written by other participants. These introductions, better than anything I could say, summarize the sometimes convergent positions expressed at the conference.

Over forty years ago Robert Lowie wrote a chapter in Ogburn and Goldenweiser's book, *The Social Sciences*, entitled "Anthropology and Law." It is interesting perhaps to note the flavor and content of that article as a backdrop for the present volume. Lowie was interested in how anthropology might benefit from a neighboring branch of learning. He writes: "The jurisprudence of advanced civilizations, refined by centuries of acute intellects, is marked by a clarification of basic concepts

such as the student of anthropology may well envy. There are obvious pitfalls to be avoided. Primitive customary law does not present the rigid formalism of codified law. It would assuredly be the acme of artificiality to pigeonhole the rules of inheritance in a North American aboriginal community according to the standards of English jurisprudence. But the comparative fluidity of primitive conditions is fully recognized at the present time, and little danger threatens from that source." Lowie then briefly summarizes the results of anthropological investigations as they bear on what he sees as four main problems of legal theory: family law, property, associations, and the state.

It is of interest to note a continued interest in the "pigeonhole problem" and the general lack of interest at this conference in substantive law and, for the most part, in questions having to do with political development—questions that were the core of Lowie's summary of anthropology and law forty years ago. In our groping for concepts, problem formation, and method, we moved from anthropology and law to law in culture and society as it is affected by and affects the individuals who make the law both similar and different.

### Major Discussions

The major discussions of this conference swung between two different subjects, having as a common denominator a concern with various aspects of method: the position of jurisprudence in social science and the study of dispute settlement in terms of processes relating to society and the individual. Wilhelm Aubert, a scholar trained in both the formal law and behavioral science commented on the first question in a memo sent to me shortly after the Burg Wartenstein conference (n.d.):

There are several ways in which law and social science may be brought into touch with each other. One may use social science to analyze legal problems. Fact-finding surveys, on attitudes or other social items, may be utilized as a means to substantiate legal propositions. . . . The analytical scheme into which the sociological findings are fed, remains legal or jurisprudential. One may, on the other hand, use sociological or anthropological concepts and theories to interpret legal phenomena. It may be necessary to know something about legal thinking in order to get the empirical basis straight, but the analytical scheme remains sociological.

Although there is considerable interest among lawyers in employing sociological methods for purely legislative or juridical purposes . . . there was little of this represented at the conference. There were some, however, who seemed to come close to maintaining that certain parts of Western jurisprudence might furnish a framework within which legal facts in tribal societies might be interpreted (Gluckman and Hoebel). Their intention was probably not to aid jurisprudence by pointing to new data which might lend

new credence to old legal assumptions. Rather, it seemed these scholars believe that . . . Western legal thought has developed concepts (like the "reasonable man" or Hohfeld's scheme) . . . which may be applied also to furnish order in otherwise meaningless anthropological findings relating to social order and conflict resolution.

This point of view was strongly opposed by Bohannan who finds it necessary to grasp, from the inside, the legal concepts of that society which is being studied. I felt that the discussion on this point to a large extent hinged on questions of empirical observations. For it may well be that a good way of understanding what goes on in the other people's minds is to use the schemes which are available in one's own mind. They may, or may not, fit, but this method seems to be one of those we always have to use. Some do it well, others do it less well. Some read into others what they find in themselves, but some also fail to see parallels which are actually there. The one fallacy is as dangerous as the other one. But I do not think this is a point which can profitably be pursued in abstract debates without simultaneously having a chance to inspect the data. . . .

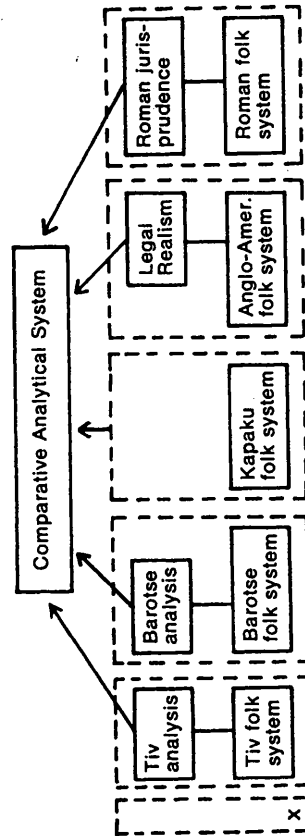
In one sense I find it difficult to believe that Western legal concepts can be applied to tribal materials . . . that is, if it were to be claimed that the Western legal concepts apply with implications identical to those which they have in Western law. Since legal concepts are defined in relation to a complete legal system it is highly unlikely that they should fit in a very different social system if one wants to be precise and specific. The concept of "the reasonable man" is, of course, on a level so general that its application in a non-Western society has the ring of truth. However, if we were to include its specific implications in a certain Western system, its applications to a non-Western society might fail. In both types of societies, however, one interesting point is that such loose concepts are used in juridical argumentation, and that this provides the decision-maker with a certain amount of freedom vis-à-vis a set of rules by which he is, in principle, bound. This tells us something about the need for elasticity, loopholes, malleability, etc., in a normative system. In order to characterize this aspect of the legal system, and of the enforcement of norms, we would use concepts derived from social science and not from law.

The analytical position of the Hohfeldian scheme is probably slightly different. Hohfeld's concepts do not, as I have understood them, belong to the working tools of the practicing lawyer. They represent some kind of generalization of the terms and concepts actually applied in legal work. Although they have been developed by a lawyer as a means to understand law, they seem, nevertheless, to belong more than halfway in the social sciences. They are applicable to all normative phenomena, to all situations where rights and obligations obtain between actors, whether these are legal in origin or not. This, of course, does not detract from the usefulness of Hohfeld's scheme, which is amply illustrated in Hoebel's "Law of Primitive Man." The usefulness of Hohfeld should not, however, be misinterpreted as a symptom that law and social science are closer to each other than they actually seem to be for the moment.

The application of Hohfeld's scheme makes it possible to discern a number

of conflict-resolving situations and to bring out their affinity, but not identity, to court decisions in Western systems. The final conceptualization, however, should not, in my opinion, remain on this level. When comparing conflict-resolving devices and institutions it seems advisable not to classify institutions in term of concepts derived from procedural law, but to apply general sociological concepts. Among these latter belong concepts used in describing group structures (dyad-triad, etc.), the pattern variables (specificity-diffuseness, universalism-particularism, etc.). My impression is that the greatest scientific profit can be extracted also from the writings of Gluckman and Hoebel when their findings are analyzed in these terms.

The question of anthropological use of jurisprudential terminology, basic to an earlier disagreement between Max Gluckman and Paul Bohannan, was discussed and summarized at this conference. Intellectual agreement between Bohannan and Gluckman was arrived at by Professor Hoebel's skillful statement of the question by means of the following diagram, and the group expressed the belief that the argument had now been dissolved and need no longer occupy the attention and energies of scholars interested in law.



Bohannan's position focused on the importance of the ethnographer's getting at what the Tiv think about their own system; this is the Tiv analytical system. Gluckman has proved that the Barotse also have a folk analytical system. We need further a comparative analytical system competent to deal with all the folk systems. We can draw concepts from any of the lower levels to obtain the concepts for our comparative analytical system (or, Aubert would say and I would agree, from sociological or anthropological concepts). Bohannan suggested that for analytical purposes the folk system should be seen to include Tiv law as well as the Tiv folk analytical system (as is suggested by the dotted lines above). Selected parts of what is in the folk analytical systems can be taken to the comparative analytical box. It was at one time felt that the folk analysis of Western jurisprudence was sufficient in itself for the comparative box. This view is no longer considered valid; Gluckman

and Bohannan agreed on this point, at least at that time. The fact that all participants were so anxious to have this as part of the printed record indicated a degree of impatience with what many thought was indeed a nonproblem. As Frank Cancian said in his summation at the conference, he now concluded that there was no Bohannan-Gluckman controversy. He had previously thought that Bohannan wanted to use native categories and that Gluckman wanted "adequate" categories, which could be native or Western, and that Bohannan in turn had found Western categories inadequate. In fact, the disagreement is not on the level of description but on the next step of analysis. The intricacies of this discussion are summarized by Moore's introduction.

Be this as it may—an illustration of dispute settlement among two highly respected anthropologists—we are left with the general proposition that a field does not develop by deciding from where its terminology should be chosen. To find out whether any kind of analytical system should be used, it must be tried out on a problem. This is what Hoebel did in *The Law of Primitive Man* (1954). If it works, the product can be advertised. Jurisprudential scholars have often commented on how useful their language would be to anthropology. Someone at the conference even offered to compile a dictionary of such words for anthropological use. "Show me by doing" is my motto, and in the meantime I remain comfortable with Aubert's position on this subject.

How should this field develop, then? It was the feeling among several of the participants that an exploration of dispute settlement or conflict resolution could lead to some findings in the ethnography of law that are verifiable, and that such an investigation could well be an area of inquiry from which we could take off to other related domains, such as the question of the interrelationship between manifest and latent functions. There was no feeling that this was the central topic for study or that other subjects were not more interesting. It was simply a place to start, as Gulliver indicates in his section introduction. In 1965 I called attention to the lack of mutual interest between those who study something called "conflict resolution" and those who study "legal procedure" and "judicial process." Many of the papers in this volume indicate that there is value in joining forces among those interested in conflict resolution, legal procedure, and dispute settlement—a recognition that we are all interested in the same, or at least in related, materials. Aubert (n.d.) is particularly interested in this direction of study:

Information of institutions and methods of conflict resolution may be used for several analytical purposes. They may be used as a means to tap important general characteristics of the social system which employs a certain method of conflict resolution. Thus, Gulliver's study throws important light on the social structure of the Ndendeuli, as it is revealed in the course of the moots where the conflicts are discussed and settled. . . .

One may also conduct a different type of comparative study, namely by comparing institutions of conflict resolution as such. The institutions may belong to the same society, for example, in the form of a battery of methods, like courts, boards of arbitration, mediation, etc. . . . Thus, one may discover that typically legal methods are preferred in some situations and shunned under different circumstances. One may, of course, combine the comparison of legal and other conflict-resolving methods with the comparison of societies, thus clarifying the reasons why some social systems rely more upon law than others.

Some felt, in addition, that if we were going to concern ourselves with process we must not neglect studies of the individual's role. Although in the development of political anthropology there apparently has been a steady progression of interests that led from a preoccupation with taxonomy, structure, and function to a concern with political processes (Swartz, Tuden, and Turner 1966), law studies from the start have been interested in process. In this volume the interest in taxonomy is conceived of as a way of getting at process in terms of specified functions. The papers here are not simply static, or structural. As Sykes suggested, the beginnings of a typology could develop out of categories such as: settlement or negotiation, decision-making, appeal, rule formation, rule alteration, and the execution of decisions. Any one of these categories could be taken as a sector for study of process. A discussion of various negotiation models, for example, led Schapera to ask, "Is there a difference between the type of negotiation where there is an anticipation of going to court, of where there is even the possibility of going to court, and where there is not?" Moore then suggested that there is a distinction between societies where there are professional intermediaries and those where there are not, implying that professional intermediaries have a stake in prolonging the process of negotiation. We know little about the influence of the possibility of resort to a third party upon negotiation processes in particular or upon the time problem in general.

The concern with process started with society and ended with the individual. When we began to focus upon the individual, two types of questions were raised. What changes result in legal institutions as a result of specific personality types? What is the effect of type of personalities on the use or application of the legal institution? The discussion that dealt with legal change as it is affected by an authority's legislative act (for example, a judge's decision) or by an individual's criminal act indicated that we needed to know more. Specifically we need to have more case studies taken within a single society in order to establish criteria for describing an innovation as effecting basic changes. Indeed, the question was raised as to the possibility of producing proof for an argument based on the proposition, "Individual variation causes innovation." Hoebel's comment on the permanence of tension within a system

—on the range of variation respective of conformity—led Bohannan to propose viewing a dispute case as an instance of boundary testing of personalities (which is another way of viewing change in law ways and which leads into the problem that Gibbs deals with in his introduction).

### *A Unifying Theme*

As late as 1953, Harry Hoijer, in a review article entitled "The Relation of Language to Culture," found it necessary to examine the proposition that language does not stand separate from culture but is an essential part of it. In the process of examining this assumption and of answering the challenges specifically posed by Voegelin (1949), he returned to a statement by Sapir (1933:11) that language "does not as a matter of fact stand apart from or run parallel to direct experience but completely interpenetrates with it." It is this interpenetration, which is not apparent immediately, that has recently concerned an increasing number of linguists and anthropologists and sociologists (for example, Gumperz and Hymes, in press).

The notion of language and culture assumes that language is measurable apart from culture. As a result of the work of the American school of descriptive linguistics—which, especially in the 1930's, concentrated upon physical cues—the notion developed that grammar was built on sounds and that language could be viewed and studied as an independent system. In order to understand the peculiarities of language, linguists then isolated language as an independent system, in much the same way a physiologist isolates certain parts of an organism for analysis. It is probably futile to ask whether language is in reality an independent pattern; we can say that it can be studied independently, with results that are limited, at least to one point in time. We can find out something if we are interested in the logical structure of the human ability to verbalize or if we are curious about the varieties of language structures the human mind has invented.

If, however, we are interested in questions of the relation of language to culture and society and if we are interested in understanding change, then, in the minds of such specialists as Gumperz and Hymes, such a view of language is likely to impede research. By saying that on the one hand there is language and on the other there is society and culture, the researcher cuts himself off from study of causal connections and from posing such questions as "Can certain social practices generate certain language practices and the reverse?" Such a question would probably never arise if we looked at independent linguistic phenomena and independent social phenomena; and indeed, in our field work, we would be collecting data accordingly, without taking into account the



social context in which speech takes place, neglecting all those factors relevant to understanding relationships.<sup>1</sup>

In sum, then, it is safe enough to isolate linguistic behavior as an independent system for limited purposes as long as we do not fall prey to the fallacy that because linguistic behavior may be treated independently, it is in reality independent of society and culture. If we are, and if we need to be, interested in the relation of language to society and culture, we cannot view language as independent.

At a recent Law and Society Association meeting the suggestion that that name of the society be changed from "Law and Society" to "Law in Society" was met with a sharp retort: "It is law and society, and not law in society. There is nothing hierarchical about this relationship." This reply exposed with complete spontaneity an attitude that has stood squarely in the way of even posing for research problems of law in society. Somehow law is conceived of as in reality being a system independent of society and culture; in the case of legal scholars in particular, their "professionalism" seems to encourage such a position.<sup>2</sup>

The contrast—law in, versus law and society—has not been much explored in recent social-science and law discussions about the subject. Professor Lon Fuller (n.d.) does note, however:

The intensified interest in the sociology of law that has developed in recent years has come to assume the proportions of something like an intellectual movement. In the United States this movement has found a kind of sloganized expression in the title, *Law and Society*. . . . there are, I believe, some dangers in this new title and in the allocation of intellectual energies it seems to imply. By speaking of law and society we may forget that law is itself a part of society, that its basic processes are social processes, that it contains within its own internal workings social dimensions worthy of the best attentions of the sociologist.

My misgivings about the possible implications of a newly coined slogan would hardly be worth communicating to you if there were not powerful streams of thought in both sociology and jurisprudence that tend toward

1. These and similar questions are treated in Gumperz and Hymes, *Directions in Sociolinguistics* (in press). I am grateful to John Gumperz for the various conversations we have had that sought to compare developments in the fields of our respective interests.

2. See Pound's classic "The causes of popular dissatisfaction with the administration of justice" (1906) for an example of the social repercussions of such an attitude. Or see his article "Sociological Jurisprudence: Stage One" (1907), where he concludes: "To this end it is the duty of teachers of law, while they teach scrupulously the law that the courts administer, to teach it in the spirit and from the standpoint of the political, economic, and sociological learning of today. It is their task to create in this country a true sociological jurisprudence, to develop a thorough understanding between the people and the law, to insure that the common law remain what its exponents have always insisted it is—the custom of the people, the expression of their habits of thought and action as to the relations of men with each other" (p. 615).

drawing a sharp line or division between the study of legal institutions and procedures, on the one hand, and the basic study of society itself, on the other.

As with the example of language in society and culture, for purposes of some kinds of analysis one may want to draw sharp lines of division between the study of legal institutions and the study of society, but such an approach would not raise such questions as "What are the social and cultural factors that determine the forms and/or substance of dispute settlement?" Or "What are the social dimensions (to paraphrase Fuller) which mold the adjudicative process and determine adjudicative results?"

In summarizing the situation in anthropology, I (1965b:17, 18) concluded several years ago:

During the past two decades the major contributions to the ethnography of law have been descriptive, functional analyses of systems both in isolated and in contact situations. The tendency has been to treat the legal system as an institution virtually independent and isolated from other institutions in society, except insofar as "society" is gleaned from the law materials. . . .

In most of the recent monographs, Gulliver (1963) being a major exception, the law has been treated as isolated from other social control systems, and indeed in some monographs it has been left for the reader to place the law in its socio-cultural context.

Although at the Wenner-Gren conference in Austria there was no discussion of whether law was a system independent of society, whether law was a system independent of culture, and whether it should or should not be viewed as such, it was clear that some of the underlying tensions in the discussions could be traced to basic disagreements, often more subconscious than articulate, on the issue of law as "something apart." For example, in discussing the use of jurisprudential terms, Max Gluckman commented, "An analysis of the mechanics of 'dispute settlement' could profitably be made by the use of sociological and anthropological methods, whereas a study of the 'judicial process' would better employ concepts taken from jurisprudence." Vilhelm Aubert, on the other hand, thought that the question of applicability of jurisprudential terms was irrelevant to problem conceptions in the field of the sociology of law. He saw a better chance of communication and integration of sociological and anthropological studies if we concerned ourselves with basic problems in conflict resolution, typological classification, and the like; and he did not include legal studies because he views legal scholars as having quite different aims from those of social scientists (see Aubert 1963).

There were indications at this conference that anthropologists are ready to consider studies of law in culture and society as core interests

and that they are contributing to enriching knowledge of what Professor Fuller has called "the social dimensions of the law itself." Some indications of shifting interests in the direction of law studies were the reluctance to draw tight boundaries around the domain of law or to expend effort in the search for a conclusive definition of law and the reluctance to accept jurisprudential terminology, without qualification, as the vocabulary for the anthropological study of law. Another indicator, and a more positive one, was the desire to focus on something intensively enough to make some intellectual headway: the single most dominant theme in the discussions and the papers was dispute settlement. The study of dispute settlement focuses on only one of the many functions of law. As a topic it crosscuts a segment of the law domain by incorporating a particular type of settlement—judicial process—into the broader domain—dispute settlement, which perforce leads us to dwell on problems of law in culture and society. The consideration of judicial process as one point of the continuum of the broader category of public forms of dispute settlement leads us to considerations of an anthropological nature in trying to explain process, use, and function of various dispute-settling mechanisms as they relate to the presence or absence of a judicial process.