It was agreed that work should be undertaken in specific areas, first with a view to describing the present procedures involved, and then for the purpose of suggesting administrative procedures incorporating the maximum feasible amount of public notice, statement of applicable standards, a public record, opportunities for cross examination, the making of reasoned findings of fact and legal conclusions, and judicial review.

One member agreed to prepare a paper on the subject of the State Department's determination of nationality procedures, and another to prepare a bibliography on the whole subject. It was decided to enlist the cooperation of the A.B.A.'s Administrative Law Section, other legal groups and the law schools.

The paper was thereafter presented to the 5th Summer Conference on International Law, held by the Cornell Law School at Ithaca, New York, from June 18 to 20, 1964, under the leadership of Professor Cardozo. In the discussion that followed the views set forth in the paper, the desirability of researching the field and of pressing for improvement of administrative procedures was endorsed by the discussants, who included, among others, Professors Bishop, McDougal and Sohn, and Messrs. Harry L. Jones and Harvey Reeves. Two of the law professors indicated that they would assign students to work on specific phases of the general area.

It is the view of the Committee that the program herein outlined—that of developing individual studies of specific areas where the rights of individuals are affected by proceedings of the State Department and cognate agencies handling international affairs without proper administrative safeguards being afforded—be continued for the forthcoming year, and that in this connection the cooperation of all interested law school and professional groups be enlisted.

Respectfully submitted,
SIGMUND TIMBERG, *Chairman*

REPORT OF COMMITTEE ON

COMPARATIVE JURISPRUDENCE AND LEGAL PHILOSOPHY

The shift in direction of the legal thinking of the second and third quarters of the 20th century in the common law world has become more clearly manifest since the last Report of this Committee (1963). Three recent events indicate the trend. These are: the First World Conference on World Peace Through Law at Athens in July, 1963; the Ecumenecial Council at Rome, 1962–; and the recent addresses of the Attorney-General of the United States to students in the great law schools, especially the challenge delivered at the University of Chicago Law School on Law Day, May 1, 1964.

The Athens Conference, which was nongovernmental in sponsorship, provided members of the profession an unique opportunity to speak to each other as lawyers about problems confronting them in more than a hundred national legal systems. With obvious delight and amazement, the delegates of bar associations the world over found, that notwithstanding procedural differences, the goal of justice was uppermost on all sides. The unanimously adopted Resolution to establish a permanent Center where professional talks may be continued, experiences compared, and information shared, marks the beginning of a new consciousness of professional responsibility for the advancement of justice in the world, which cannot fail to be revolutionary in breaking down provincialisms which have traditionally set up barriers to progress. This is not a project for one world system of law imposed from an arbitrary top, but a grass roots project on the local levels, building upon freedom in experimentation. In the 21st and later centuries to come, it will undoubtedly be a noteworthy event in the development of justice under law that this new departure has become possible because of the encouragement of the American Bar Association, and especially of this Section of International and Comparative Law.

The Ecumenical Council at Rome constitutes a historic convening, not of lawyers, but of churchmen, and, on that account, might appear, at first glance, entirely unrelated to jurisprudence. However, because of

the great size of the Council, no geographic area of the world lacks representation. The potential significance of this on human lives is attested by the remarkably extensive and excellent reporting provided by the communications media. Jurists, long so deeply concerned over technicalities and procedural forms that they have continually yielded place to psychologists, sociologists, educators, economists, bankers, and other specialists in the adjustment of substantive problems of human living, may not yet be ready to consider anew the relation of religion to the conscientious observance of law and its connection with justice, order, and peace.

No similar intellectual barriers by the Council Fathers are disclosed by a cursory perusal of the press reports. On the contrary, repeated allusions to problems of conscience, liberty, freedom, authority, and justice, suggest a deep concern for matters which are also the concern of lawyers. Jurists from many nations, developed and developing, are showing interest, although not yet in organized fashion, over the implications of the Council's work on the law. Were more profound jurisprudential studies available to explain the essence of "the American dream" as envisioned in our legal system, the Council documents touching upon these topics might be more quickly drafted upon a broader base. The intellectual and spiritual challenges of an Ecumenical Council can scarcely be met by a prevailing "university" education in law which terminates in most cases with licensure.

Perhaps the most difficult question raised anew by the Council concerns the content of the natural law. The custom in the Anglo-American system in recent centuries has been to leave out of consideration difficult questions like this. Thousands of students have been educated in our law schools without ever coming to grips with the existence of the natural law. Indeed the history of jurisprudence in the last two hundred years can be written in these terms. The Declaration of Independence of 1776 and the United States Constitution of 1789 amount to reaffirmations of the traditional concept of the natural law, stated in positive terms. Blackstone's misunderstandings were not sufficient to discredit the term until Jeremy Bentham's positivistic criticisms began to make their way long after the latter's death in 1832. The philosophical inquiries at Harvard, which began in earnest with Charles Sanders Peirce and William James, carried over to the law school with Oliver Wendell Holmes, Jr., whose bitter battlefield experiences found their most graphic interpretation for him in the writings of Thomas Hobbes. From the 1870s on, there followed a concern with the interpretation and expression of legal rules, which was partly historical and partly literary in method, and which aroused comparable intellectual interest as a new challenge to uncritical assumptions, presumptions, and repetitions then current among preceptors and apprentices in the practice of law.

By 1912 the case method of studying law, adapted in 1870 by C. C. Langdell from the historical method of the 19th century German universities, under the cry of "back to the sources", had become accepted in the better university law schools. Not textbooks, but text, had become so all-important that context was largely excluded in questions of meaning. The exaggerated concern with positive statements of what the law *is*, became, in jurisprudence, the vogue for positivism. It found its way even into international law, with unrealistic notions like a league to enforce the peace. That its influence is still prevalent is evidenced by the recent book of Samuel I. Shuman, issued by the Wayne State University Press, 1963, under the title of *Legal Positivism: Its Scope and Limitations*. Professor Shuman's predeliction for the positivistic school of thought had been adumbrated in the *Journal of Legal Education*, 14: 213-228 (1961) where he, with Professor Richard A. Falk, reported on a jurisprudential conference held at Bellagio, in northern Italy, in 1960, where he found some jurists who had responded after World War II to a revived interest in natural law, only to find it too vague for their practice, or taste, so they began to renew interest in positivism, according to this account.

The essential difficulty with exaggerated emphasis on positivism in law has been found by many to be the lack of a criterion upon which to base a choice between alternatives equally acceptable, as statements of the law as it *is*. It was the great contribution of Roscoe Pound, who died July 1, 1964

at the age of 93, not only to win acceptance for a course in jurisprudence in the midst of an otherwise largely positivistic curriculum at Harvard Law School, at the start of the 20th century, but also to suggest a criterion. His lectures on "sociological jurisprudence" at Columbia Law School about 1911, implied that since law is classifiable as a "social science", a suitable selection between apparently conflicting rules should be made with the efficient functioning of society as the determining factor. In other words, after verification of what the law *is*, the question of what the law *ought* to be could be resolved, in Pound's view, by keeping in mind that what is satisfactory for society should be satisfactory for law. This shifted the emphasis away from positivism, and was an advance in depth, but it did so at the expense of reality by substituting the abstract idea of society for the actuality of the individual human beings who constitute society in fact.

The continued rejection of unclear abstractions, which had given rise in the first place to positivism, and in the next to sociological jurisprudence, was advanced further by the so-called "new realism" of the 1920s. Although the late Karl Llewellyn was not alone in the honest groping which characterized the new development, his essays, collected and published posthumously in 1962, by the University of Chicago Press, under the title of *Jurisprudence: Realism in Theory and Practice*, mark the advance as well as any. The significance of the effort was recognized by Roscoe Pound's article on the "Call for a Realist Jurisprudence" in the *Harvard Law Review* for 1931, volume 44, at 697, although Pound himself never got very far away from his own concern for ideals, notwithstanding a lack of clarity in their content.

It has been Dean Pound's successor in the chair of Jurisprudence at Harvard, Lon Fuller, whose influence in enriching the once positivistic curriculum has given direction to the latest advance. His quiet questionings about the narrow education provided by studies restricted to the law that *is*, have amounted to a modern Socratic gadfly's efforts at broadening the base of argumentation. This intellectual hospitality has even opened the door again to the recently discredited survivors of the natural law school, providing that they accept the challenge presented to positivists, idealists, and new realists alike, for clarification in the expression of their position. His new book, *The Morality of Law*, (Yale University Press, 1964) carries further his classic debate with the contemporary leader of the English positivistic school of thought, H. L. A. Hart in the *Harvard Law Review* for February, 1958, volume 71, number 4. (See also Hart's recent book, *The Concept of Law*, Oxford, Clarendon Press, 1961). The debate is largely over the relation of morals and law, upon which Jeremy Bentham's well-intended critique of Blackstone foundered a century and a half ago.

Ideas advance slowly. Particularly in the common law tradition there has been a marked hostility to innovations whose implications could not immediately be foreseen. On the whole this conservatism has been healthy in fostering sound growth. Conceptual aberrations have been detected almost instinctively and cut off before they achieved unmanageable proportions. The facts of life have, however, been acknowledged and absorbed at irregular intervals. Mansfield's adaptations of Roman law principles to regulate the new commercial order that followed the 17th century expansion of world trade was so realistically integrated with established practice that it provided intellectual advance without compromising the hard core of facts in much the same way that Henry de Bracton had acknowledged the Normandy-England interchanges in composing his great treatise five centuries before, or that the Commissioners of Uniform State Laws have been working out in a Uniform Commercial Code for the 20th century interstate and international payments.

That the enrichment of common law theory and practice, from the 12th to the 20th centuries at least, owes much to the challenge of international fact situations and the comparative law method becomes increasingly obvious to students of jurisprudence who survey the parallel developments in common law and international law fields in recent times. For example, the corrective to an exaggerated emphasis on sociological jurisprudence was suggested, not only by a call for realism, but also by the rising demand for a restatement of the protections afforded human rights since the

Declaration of Independence and the United States Constitution had been adopted. The needed scholarship was provided by Hersch Lauterpacht, a student of J. L. Brierly's in international law, who documented his studies of the cases in England and on the continent so thoroughly and effectively that he eventually became Britain's representative on the International Court of Justice before his death in 1960. His book, *An International Bill of the Rights of Man* (Columbia University Press, 1945) and his *International Law and Human Rights,* (Praeger, 1950) not only provided the foundations for the United Nations activities in this area, which dominate the political developments of the post-war world, but they also helped to restore the priority of person over property, first sounded in the Papal Encyclicals on labor, from 1891 on, in contemporary jurisprudential thinking.

The new trend is not back to an exaggerated individualism, which had been corrected in part by the notion of a sociological jurisprudence. Neither is it reaffirmation of the "jurisprudence of interests", which was a positivistic effort to spell out in jurisprudential terms the property and power priorities of society. The new jurisprudence constitutes, rather, a recognition of human beings, as the most distinctive and important feature of the universe which confronts our senses, and of the function of law as the historic means of guaranteeing that pre-eminence. Its significance may not yet have penetrated the legal education offered in those schools which so far provide no competent courses in jurisprudence or in international law, because the examinations for admission to the bar omit these areas in the mistaken opinion that they are irrelevant in local practice. That the new jurisprudence is essential to a comprehension of advanced court opinions, both state and federal, as well as legislation, and administrative agency activities, is obvious from even a cursory glance over the law reviews and the new books on the best-seller lists of non-fiction. To be learned in the law today means not only to have a knowledge of what the cases hold; it means also to be literate about the contemporary revolution of rising expectations and its implications for law the world over.

Among the books the lawyer needs to have on his shelves, handy, today, are Myres McDougal's tremendous—in more ways than one—volumes issuing out of Yale Law School under titles like *Studies in World Order.* For paperbacks to carry in the briefcase, the indispensable books include (1) Dean Eugene Rostow's model commentary on a legislative enactment, *Planning for Freedom,* (Yale, 1962), which places the Full Employment Act of 1946 in its jurisprudential context; and (2) Harold J. Berman's jurisprudential interpretations of Soviet experimentation with law, now entitled *Justice in the USSR* (Vintage Books, 1963). The latter provides cumulative evidence of the broadening of the curriculum of Harvard Law School from mere mastery of rules and procedures to a clearer insight into the relations of human beings and the law. Barbara Ward's books, some in paperback, though written from an economist's, rather than a lawyer's, viewpoint, can be highly recommended for providing, in readable pages, an outline of goals which the modern lawyer has to understand. Robert Theobald's *The Challenge of Abundance* (Mentor, 1962) and Gunnar Myrdal's *Beyond the Welfare State* (Yale, 1960) are also important for legislators, lawyers, and law students, alike. There are many others. The economic developments known as the Keynesian Revolution, in finance and in employment relations, have had an influential impact on jurisprudential thinking in this country, as well as in England, and in international circles, not less important than Judge Lauterpacht's. In effecting a shift from the Marxian emphasis on production, to consumption, Lord Maynard Keynes actually was raising a very pertinent legal question—"What do we use for money?" Although this may appear at first glance to be not only highly practical, but also materialistic, its implications go deeply into the procurement of necessities for human survival if the individual is to live as a fully free person.

The new jurisprudence, as a whole, may be summarized as tending to explore specific, and familiar, situations from a new viewpoint. In a scientific age it asks, in effect, what is the nature of man, and what is the nature of the universe with which he is confronted. The terminology may vary,

but the questionings are in general the same throughout the history of human thought. Formerly the basic problem was conveyed by the term, natural law. Rejection of the term did not dispose of the problem. No satisfactory substitute having been found for general acceptance, the use of the old term has been creeping back to describe the still unexplained confrontment. Why is a human being important; what gives him dignity; what limits his freedom to do whatever he likes; what are his essential needs; whence comes his sense of injustice? The answers have been traditionally formulated in a figure of speech:—"written in the heart" was the way Saint Paul put it. Now, in the second half of the twentieth century, the question, the answer, and the meaning have come to the forefront once more.

Cardinal Augustin Bea, President of the Secretariat for the Promotion of Christian Unity, at the Vatican Council, although not a lawyer by profession, has continually called for renewed consideration of the meaning of the term, natural law. In two recent books that make his views available in this country, *The Unity of Christians,* (Herder, 1963), and, *Ecumenical Dialogue at Harvard,* (Harvard, 1964), he cites continually the basic, but little-known Document of December 20, 1949 of the Holy Office (*Instructio de motione oecumenica,* A.A.S., XVII (1950) 142-6), which underlines "among the possible areas of harmonious cooperation with non-Catholic Christians, *the joint vindication of ideas based on the natural law and the heritage common to all Christians.*" (*Unity,* 102). Since the term, natural law, is currently used in discussing the population explosion; the right to own, use, and dispose of private property; the right of nations to independence; and similar modern problems otherwise apparently unrelated, it would seem that the reexamination of the meaning of the term is necessary before the significance of the Ecumenical Council can be understood. The task is proper to moral theologians and moral philosophers, primarily (see Maritain's new volume on *Moral Philosophy,* Scribner's, 1964) (and also, *Natural Law and Modern Society,* edited by John Cogley, World Publishing Company, 1963) insofar as the Council raises the issue, but it is one that is also proper to jurists, primarily, in the secular world, to the extent that rights, obligations, liberty, and conscience, constitute the foundations of law. The international jurists have shown that the question is not moot, but is at issue. Shall the law schools, the lawyers, and the bar examiners in this country avoid the issue and yield place to those who refuse to lag behind?

The shift from precedents to justice, which characterizes the speculations of the new jurisprudence has found an eloquent advocate in the Attorney-General of the United States. Appropriately, his views were expressed most forcefully in the Law Day Address he delivered on May 1, 1964, to the students at the University of Chicago Law School, right next door to the American Bar Center. Recalling that the fundamental changes in our society do much more to determine the fate of law and the rule of law than do lawsuits, courts, and the formal legal learning upon which we traditionally have concentrated, he calls less for enforcement than for involvement, personal commitment, and participation in the needs of the people for protection against injustice. Not the writing of a check and then abdication, but the personal dedication of skills will alone change the word "legal" from a synonym for technicalities and obstruction into something that is to be respected or looked up to, he says. To the poor man, the law is always taking something away, and acts as an enemy, not a friend. In his inability to cope with the conditions of existence in our complex society, in his helplessness against the inadvertent harms done him by personnel of high or low degree on government payrolls who speak in the name of the law, the poor man has had little help from the legal profession in recent times. The need is for preventive rather than remedial processes, for counselling and negotiating skills, for the trained ability to ask direct questions and probe for relevant facts, in behalf of the poor man, if there is to be equal, *i.e.* social, justice for all, in fact, outside of law day speeches. Mr. Kennedy quoted his brother, the late President, who had spoken of inherited poverty as well as inherited wealth in this country, which requires those who are given a running start in life by graduation from the colleges, to put back into society their talents in the service of

the great republic. Otherwise the presuppositions upon which our democracy is based are proven fallible. The Attorney General extended these implications especially to the graduates of the great law schools. Unless the graduates are to repay in part the debt they owe to others for their training by assuming the obligations squarely placed upon their shoulders by the complexities of modern life as they affect those not so privileged, their abdication must inevitably leave open to others the rewards of leadership in the work of justice that historically brought respect for law. The challenge presented by the Attorney General is for a confrontment with realities. He points out the direction from which a renewed respect for law must come. The lawyers of the 21st century will have to broaden the base upon which they presume to practice and pay more attention to the new jurisprudence in order to correct the fallacies upon which customary approaches to legal problems have recently been rationalized. It is an heroic challenge, neatly timed at the beginning of the atomic, and the space, age.

In attempting to formulate a systematic program for this Committee, its members have been resourceful and cooperative. A suggestion to devote the annual Report to jurisprudential developments in a different area, or system, each year was welcomed. The proposal to begin with recent Soviet developments, because of their practical significance in the international field, could not be carried out this year because of 1) absence from the country of the proponent, and 2) inadequate time for a competent summer replacement to review the latest publications. A counterproposal, to begin with current developments in more familiar systems, such as Italy (or other NATO countries), found ready support, but arrangements could not be completed soon enough to be fair to the willing reporter. Both possibilities remain open for the future work of this Committee. In the absence of a full committee consensus, the chairman has undertaken again to provide the above summary of trends in this country, which, if not entirely novel, may be useful to the practicing members of the Section and the Association.

Respectfully submitted,
MIRIAM THERESA ROONEY, *Chairman*

REPORT OF COMMITTEE ON

COMPARATIVE PROCEDURE AND PRACTICE

I.
RECOVERY OF COSTS BY THE SUCCESSFUL PARTY

The comparative study in this connection by our Committee during the past few years of the legal procedures of the world emphasizes most dramatically the solitary situation of the United States on the issue of recovery of legal expenses by a successful party in a litigation. The case of *Farmer v. Arabian American Oil Company,* 324 F. 2d 359 (C.A.2, 1963), does show, however, a glimmer of what may be a new trend.

In that case an American employee had brought suit against his former employer, the defendant, charging a breach of the contract of employment and raising issues which required the transportation of defendant's witnesses from Saudi Arabia to the place of trial in New York.

The defendant prevailed and in taxing costs included substantial amounts for the air transportation of said witnesses. The Clerk taxed costs of $11,900, which were reduced by the Trial Judge to $831.00, and the defendant appealed.

The Circuit Court recognized the fact that although the question on its face appeared to be a routine issue, albeit of substantial monetary size, it actually represented "a question of importance in the administration of civil litigation."

The Court increased the allowance for travel almost to its original amount, holding that costs for such travel may be allowed as a matter of discretion, relying upon the seriousness of the charges made against the employer and the importance of "live" witnesses as against the testimony taken in advance of the trial.

The real measure and import of the case was sensed by three dissenting judges. These judges, in noting that the decision was a departure from the usual precedent of disal-