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Natural Law and the Ninth Amendment

By THOMAS E. TOWE*

In *Griswold v. Connecticut*,¹ the famous Connecticut birth control case, Justice Goldberg, in a concurring opinion, dusted off a constitutional amendment which had virtually lain dormant since its adoption in 1791. Joined by Chief Justice Warren and Justice Brennan, Justice Goldberg invoked the ninth amendment as authority for the adoption of a constitutional right of privacy.²

The ninth amendment stated: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." Justice Goldberg contended that this amounted to constitutional recognition of the existence of other fundamental rights in addition to the fundamental rights enumerated in the first eight amendments. These additional fundamental rights are then given effect as against the states by the fourteenth

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1. 381 U.S. 479 (1965).

2. Although the ninth amendment had been urged as the basis for protection of certain rights in several cases prior to *Griswold v. Connecticut*, only once before had the Court recognized that it might protect certain constitutional rights and then it did so without discussion. *United Public Workers v. Mitchell*, 330 U.S. 75 (1946). See PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 29-32 (1955) for a summary of other cases in which the ninth amendment was unsuccessfully raised as grounds for relief.

amendment. Thus, the right of privacy—a right which is not included in the first eight amendments—cannot be infringed by state legislation.³

Justice Black disagreed vehemently with Justice Goldberg on this point. Such an interpretation, he claimed in his dissent, would give the Supreme Court unlimited power to hold state laws unconstitutional whenever the *Court believed* the legislative policy on which they were based was unreasonable, unwise, or irrational.

The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional . . . will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country.⁴

The framers of the ninth amendment certainly would not agree that it presented such a loose, flexible, and uncontrolled standard that it would give unlimited power to the judiciary. Aside from the question of whether the constitutional framers intended the Supreme Court to have the power of judicial review, the phrase, "certain rights . . . retained by the people" had a very definite meaning to the men who fought a revolution to protect "certain unalienable rights."⁵ These rights were natural rights; according to John Locke, they were reserved to the people when man left the "state of nature" by forming a "social compact."⁶ These rights were derived from "self-evident" truths and no government could deny them to the people. James Otis, in a 1764 pamphlet, spoke of "natural inherent and inseparable rights" that would remain even if the charter privileges of the colonies were disregarded or revoked.⁷ As Vice President, John Adams was the presiding officer of the Senate when that body passed a bill proposing the Bill of Rights as a group of amendments to the Constitution. Twenty-six years earlier, as he embarked on the career that was to make him one of the most important leaders of the Revolution and the new Republic, he wrote:

3. 381 U.S. 479, 486-99.

4. *Id.* at 521.

5. Declaration of Independence, July 4, 1776. See POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 73-75 (1957).

6. See LOCKE, *TWO TREATIES OF GOVERNMENT* 169-70, 186 (Cook ed. 1947). See also the VIRGINIA DECLARATION OF RIGHTS, art. 1. (June 12, 1776).

7. OTIS, *THE RIGHTS OF BRITISH COLONIES ASSERTED AND PROVED* (1764) quoted in C.P. PATTERSON, *THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON* 49-50 (1953) [hereinafter cited as C. P. PATTERSON].

I say RIGHTS, for such [the poor people] have, undoubtedly, antecedent to all earthly government,—Rights, that cannot be repealed or restrained by human laws—Rights, derived from the great Legislator of the universe.⁸ (Emphasis in original.)

Thomas Jefferson declared in 1774 that the rights of Americans were “derived from the laws of nature.”⁹ In summarizing the philosophical background to the American Revolution, C. P. Patterson says:

Natural rights, in conclusion, was a juristic conception regarded as embodied in immutable law. Violations of natural rights by the English Parliament were null and void since contrary to natural justice. To the forefathers, these rights were not merely moral beatitudes, abstractions of the Age of Reason, but irrevocable rights conferred by the “law of nature and nature’s God”—the basis of all law, to which man-made law must conform in order to be law.¹⁰

As our forefathers saw them, there was nothing arbitrary or indefinite about natural rights. The power of the judiciary implicit in the ninth amendment was clearly intended to be limited by natural law.¹¹

Since 1791, however, natural law has fallen from favor among many legal philosophers. To many it has “become an anachronism, out of harmony with the thought and needs of the times.”¹² Justice

8. 3 ADAMS, WORKS 449 (1851). See also C.P. PATTERSON, *supra* note 7, at 463.

9. JEFFERSON, SUMMARY VIEW (1774) quoted in C.P. PATTERSON, *supra* n.7, at 52.

10. C.P. PATTERSON, *supra* note 7, at 49. The principle author of the Bill of Rights was James Madison. For a discussion of his views on natural law and natural rights see BARNES, JAMES MADISON, PHILOSOPHER OF THE CONSTITUTION 71, 78-83, 87, 126, 163-67 (1938). In summarizing Madison’s views on natural rights, Barnes states:

Guaranties of freedom of speech, of religion and the press, trial by jury, exemption from unlawful searches and seizures, and the other natural rights which are reserved when the political compact is entered into are the prime requisites of free government. To a certain extent it is desirable to embody them in a formal declaration or bill of rights, although there is the danger that such a declaration may not be interpreted with sufficient latitude, with the result that a definite enumeration of rights may provide a pretext for the violation of other rights not enumerated. But whether a bill of rights is drawn up or not, these essential elements of the law of nature constitute an absolute limitation upon the powers of government which neither the legislature nor any other agency can modify or evade [at 166].

See letter to Jefferson in 1 MADISON, WRITINGS 423-27 (Cong. ed. 1865). See also the reference to “immutable laws of nature” in *Declaration and Resolves of the First Continental Congress*, 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 67 (Ford ed., Gov’t Printing Office, 1904).

11. See PATTERSON, THE FORGOTTEN NINTH AMENDMENT 20-23, 53 (1955); Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 313 (1936); Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928).

12. Gardner, *Legal Idealism and Constitutional Law*, 10 VILL. L. REV.

Black claimed that natural law did not present any meaningful limitations; under a natural law formula, courts "roam at will in the limitless area of their own beliefs as to reasonableness . . ."¹³ Further, he believed that the natural law formula had too often been used to invalidate legitimate state regulation of business activities.¹⁴ Finally, he contended that "the 'natural law' formula . . . should be abandoned as an incongruous excrescence on our Constitution."¹⁵ It is the purpose of this article to make a careful examination of the natural law theory to see if it can present any guidance in the modern world to the type of problem that is presented by the ninth amendment. In other words, does the doctrine that was so influential during the founding of our nation have any effective utility for the same country in the last half of the twentieth century?

I. CRITICISMS OF NATURAL LAW

Before embarking on a discussion of the adaptability of natural law to the present day legal realities, it is necessary to outline some of the criticisms that have been levied against natural law. Natural law generally involves a belief in the existence of absolute principles based on the nature of man. From these principles a body of law can be derived that will best organize the life and activities of man. The principles themselves are discovered by the application of reason to a study of the nature of man or of the nature of the universe, either with or without guidance and assistance from God. These principles are nearly always considered absolute, universal, and immutable.¹⁶

Most critics of natural law deny man's ability to prove with certainty the existence of absolute principles. According to David Hume, morality is not based on reason but is based on sentiment, feeling and passion.¹⁷ Thus, to the extent that these principles are

1, 37 (1964). See also SEARLE, *SPEECH ARTS* (1969); Searle, *How to Derive an 'Ought' from an 'Is'*, 73 *PHIL. REV.* (1964). *Contra*, Perkins, *Natural Law in Contemporary Analytic Philosophy*, 14 *AM. J. JURIS.* 54 (1969).

13. *Adamson v. California*, 332 U.S. 46, 92 (1947) (Black, J. dissenting).

14. *Id.* at 68-92.

15. *Id.* at 75.

16. For a sample of traditional natural law thinking see the legal philosophies of Aristotle, Cicero, Saint Augustine, St. Thomas Aquinas, Hugo Grotius and John Locke.

17. HUME, *TREATISE OF HUMAN NATURE* 463-69 (Bk. III, Part I) (Selby-Sigge ed. 1888).

moral principles, they cannot be determined with mathematical certainty. Jeremy Bentham stated that man may have certain natural inclinations but these inclinations should not be called law. They are nothing but natural sentiments of pleasure or pain.¹⁸ Justice Oliver Wendell Holmes insisted that what an individual regards as *truths* are really nothing but dogmatic and deep-seated preferences. A person's opinions and beliefs can be fully understood only by a study of that person's own background and environment. Viewed in this light, it is apparent that the opinions and beliefs accepted by one person will not necessarily be accepted by others; such deep-seated preferences cannot even be argued about constructively because "you can not argue a man into liking a glass of beer."¹⁹ Thus, according to the critics of natural law, absolute principles which can be proved with mathematical certainty are non-existent.

Even if natural law principles could be proved as absolute for one society at one time, they certainly could not be proved as absolute for all societies at all times. According to Joseph Kohler, just as culture varies from time to time and from place to place so does law. He claimed that the law that is suitable for one period is not necessarily suitable for another, and similarly the law that is suitable for one society is not necessarily suitable for another.²⁰ In the words of Professor Allen:

The moment we have disengaged some principle of which we think to say, with a sigh of relief, 'Well, that at least is an indispensable element of all law', some patient investigator into the legal systems of the Houyhnhnme in the mist of antiquity will discover a fragment of stone or pottery which disturbs all our conclusions.²¹

This view is reinforced by the realization that man does not presently know all there is to know about the universe. Professor Goble explains that even in the field of physical sciences, principles that were once thought irrefutable have been forced to yield to the discoveries of modern science. If we cannot be certain about the immutable nature of principles which govern the behavior of the physical sciences, continues Professor Goble, we certainly cannot be certain about principles which govern the behavior of man. The introduction of life and consciousness into the study introduces factors which are far more difficult to calculate than the factors

18. BENTHAM, *THE THEORY OF LEGISLATION* 83 (Odgen ed. 1931).

19. HOLMES, *Collected Legal Papers* 311-12 (Essay on Natural Law originally appearing in 32 *HARV. L. REV.* 40 (1918) (1920). O.W. HOLMES, *Natural Law*, in *COLLECTED LEGAL PAPERS* 311-312 (1920); this essay originally appeared in 32 *HARV. L. REV.*

20. KOHLER, *PHILOSOPHY OF LAW* 5 (Albrecht trans. 1914); PATON, *JURISPRUDENCE* 108-09 (3rd ed. Derham, 1964) [hereinafter referred to as PATON].

21. ALLEN, *LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE* 4 (1931).

involved in inanimate things.²² How can we be sure that a future discovery about the nature of man will not undermine our present belief in a particular absolute principle? Thus, the universality and immutability of absolute principles cannot be proved.

In addition, there are several other criticisms which have been raised in regard to natural law. First, how can we be sure that even if man's behavior does conform to nature it will be good behavior? How can we be sure that all man's natural tendencies are good ones? In other words, even assuming we can discover principles based on the nature of man with infallible certainty, how can we be sure that these are ethically good principles?²³ Second, Professor Goble claims that natural law does not respect man's diversity in background, experience, tradition, tests and aptitude. By contrast, according to Goble, natural lawyers try to fit each man's thought and faith into a specified pattern, i.e., absolute principles. The result is intolerance for conflicting views and beliefs. Natural law, therefore, tends to ignore new situations, new knowledge, and deeper insights; it retards change.²⁴

Third, Professor Goble is concerned about the question of who is given the authority to determine what the absolute principles are. He claims that natural lawyers usually find or create natural law principles to support whatever they want to believe. Thus, natural law has been invoked by advocates arguing both for and against slavery. It has been invoked by opponents of child labor legislation, of minimum hours for women, and of improvement of working conditions in hazardous industries.²⁵ Since natural law principles can-

22. Goble, *Nature, Man and Law: The True Natural Law*, 41 A.B.A.J. 403-07 (1955) [hereinafter referred to as Goble, *Nature, Man and Law*]. See also HOLMES, *supra* note 19, at 315-16.

23. This argument is suggested by Hans Kelsen in Kelsen, *Plato and the Doctrine of Natural Law*, 14 VAND. L. REV. 23, 29-33 (1960).

24. Goble, *Nature, Man and Law*, *supra* note 22, at 474-75; Goble, *The Dilemma of the Natural Law*, 2 CATH. L. 226, 235 (1956).

25. Goble, *Nature, Man and Law*, *supra* note 22, at 473. See generally 16 AM. JUR. 2d § 330. See also *Lacher v. Venus*, 177 Wis. 558, 188 N.W. 613 (1922) (recognizing a natural affection between parents and offspring which will be protected by the Constitution as a natural right); *Smith v. Command*, 231 Mich. 409, 204 N.W. 140 (1925) (which recognized the right to beget children as a natural right in a sterilization of the insane case); *Colorado Anti-Discrimination Commission v. Case*, 380 P.2d 34 (Colo. 1963) (recognizing a natural right to acquire a home for one's self and dependents); *Carrol, Natural Law and the Freedom of Communication Under*

not be proved with scientific certainty, it is not surprising that natural lawyers are not in agreement as to either the absolute principles or the application of these principles. This inconsistency in the theoretical sphere is undoubtedly what prompted Justice Black to state that court members guided by natural law "roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies."²⁶

Fourth, Hans Kelson and other followers of John Austin, claim that natural law theory tends to confuse the question of what law is with the entirely separate question of what law should be.²⁷ Finally, natural law prevents man from creating moral precepts himself. Professor Goble says that by creating such precepts himself, rather than having them given to him by nature or by God, man achieves a higher sense of responsibility and a broader sweep for freedom of thought than natural lawyers are willing to give him.²⁸

II. REPLIES OF CONTEMPORARY NATURAL LAWYERS

Attempts have been made to answer most of these criticisms. At the beginning of the twentieth century there was a "revival of natural law."²⁹ This revival has taken many forms and there are nearly as many "renaissance" theories of natural law as there are natural law philosophers. Two such theories briefly need to be reviewed. The first is sometimes referred to as the neo-scholastic philosophy of law based on the theories of St. Thomas Aquinas. It is perhaps the most widely accepted natural law theory, especially among catholic lawyers, in current legal thinking. The second is the neo-Kantian juridical idealism based on the theories of Immanuel Kant. Rudolph Stammler is the principle advocate of this theory which has played an important role in modern jurisprudence.³⁰

Representative of the neo-scholastic philosophy is Father William

the 14th Amendment, 42 NOTRE DAME L. 219 (1966); and for a discussion of the Privileges and Immunities clause as giving practical effect to natural rights via the fourteenth amendment see Gardner, *Legal Idealism and Constitutional Law*, 10 VILL. L. REV. 1, 29-37 (1964).

26. *Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 599, 601, n.4 (1942) (Black, Douglas & Murphy concurring) quoted in *Adamson v. California*, 332 U.S. 46, 68, 92 (1947) (Black J., dissenting).

27. KELSEN, *GENERAL THEORY OF LAW AND STATE*, xv (Preface) (Wadberg trans. 1949). See also PATON, *supra* note 20, at 17.

28. Goble, *The Mutability of Law*, 11 HASTINGS L.J. 95, 109 (1959).

29. 1 POUND, *JURISPRUDENCE* 179 (1959).

30. According to Roscoe Pound, Stammler "has undoubtedly been the strongest single influence in philosophical jurisprudence in the present century." *Id.* at 143.

Kenealy, who vigorously insists that his views are representative of and would be accepted by other neo-scholastic philosophers.³¹ Further, Father Kenealy scrupulously avoids reliance on religious principles or church doctrine in advancing his position and in his direct replies to many of the criticisms mentioned above.³² According to Father Kenealy, true natural law, namely, classical natural law in the scholastic tradition of Aristotle and St. Thomas Aquinas, does not claim universality and immutability for all rules. Only certain basic principles are universal and immutable. These basic principles consist of a single primary principle, namely, "What is good ought to be done, and what is evil ought to be avoided,"³³ and a few secondary principles immediately inferable therefrom.³⁴ The truth of this primary principle cannot be proved or disproved because it contains a moral "ought." As the logically first "ought," however, it is immediately self-evident—no one can deny it—and therefore its universal and immutable application can be objectively established.³⁵

By "good," Father Kenealy means "suitability or conformity to nature."³⁶ The quest for knowing what is in conformity with nature, and therefore is good, is aided by the secondary principles.

31. Kenealy, *Whose Natural Law?*, 1 CATH. L. 259, 261 (1955). Other neoscholastic legal philosophers who are perhaps better known than Father Kenealy are Heinrich Romman and François Géný. Father Kenealy was a Professor of Law at Loyola University of Chicago and the former Dean of Boston College of Law, currently residing in a Boston Seminary.

32. Father Kenealy wrote three articles on this subject: *Whose Natural Law?*, 1 CATH. L., 259 (1955), reprinted in 17 CATH. L. 268 (1971); *Scholastic Natural Law—Professor Goble's Dilemma*, 2 CATH. L. 22 (1957); *The Immutable Foundation of Law*, 11 HASTINGS L.J. 440 (1959). All three were written in reply to the criticism of natural law expressed by Professor George Goble in *Nature, Man and Law: The True Natural Law*, 41 A.B.A.J. 403 (1955); *The Dilemma of Natural Law*, 2 CATH. L. 226 (1956); and *The Mutability of Law*, 11 HASTINGS L.J. 95 (1959). See also Fagan, *The Goble-Kenealy Discussion—Two Comments*, 2 CATH. L. 324 (1956); Constable, *The False Natural Law: Professor Goble's Straw Man*, 1 NATURAL L.F. 97 (1956).

33. Kenealy, *The Immutable Foundation of Law*, 11 HASTINGS L.J. 440, 443 (1959) [hereinafter referred to as Kenealy, *The Immutable Foundation*].

34. *Id.* at 442.

35. *Id.* at 448-49. See also *id.* at 441-42. Father Kenealy expressly rejects faith as the basis for the establishment of the primary principle. Kenealy, *Scholastic Natural Law—Professor Goble's Dilemma*, 2 CATH. L. 22 (1957).

36. Kenealy, *The Immutable Foundation*, *supra* note 33, at 443.

The human mind, inspecting essential human nature, immediately perceives things that directly pertain to the perfection of man. These are life, liberty, property, reputation, sexual faculties and such basic principles as can be found embodied in the Ten Commandments. These immediate specifications of the primary principle are also immediately self-evident, incapable of either proof or disproof, and can be objectively established as universal and immutable.³⁷

Lesser important principles and positive law are derived from these basic principles; the basic principles constitute a norm with which positive law should be consonant.³⁸ The implementation of this norm is a task of man and since man is not infallible, the positive law that results cannot be absolute, universal or immutable. Nevertheless, man should use all the scientific wisdom and data from the social sciences at his command in applying these basic principles to the constantly changing political, economic and social conditions of the civil society.³⁹ It "is a monumental and perpetual task demanding the constant devotion of the best brains and the most mature scholarship of the legal profession."⁴⁰ In this way natural law, according to Father Kenealy, does not retard change but, in fact, insists on a constant search for a better system of laws for the civil society.⁴¹

As the founder of the neo-Kantian juridical idealism, Rudolf Stammler attempted to separate form from content. He recognized that content because it is based on historical and empirical matter, is always subject to change.⁴² The *method* for determining when the content of a specific law is just, however, it not necessarily subject to change, according to Stammler. Such a universally valid method is discovered by seeking insight into the uniformity of law in general.⁴³ In using this process, Stammler discovered that every system of law necessarily has one thing in common, namely, that those persons subject to it can struggle for existence with greater success by joining together. Thus, by joining the community everyone is at the same time serving himself best.⁴⁴ The universal element of law is the idea of adjusting the individual desire to the purpose of the community. From this insight, Stammler

37. *Id.* at 450.

38. Kenealy, *Scholastic Natural Law*, *supra* note 35, at 26.

39. Kenealy, *Whose Natural Law?*, 1 *CATH. L.* 259, 260 (1955).

40. *Id.*

41. *Id.*

42. STAMMLER, *THE THEORY OF JUSTICE* 90 (Husik trans. 1925) [hereinafter referred to as STAMMLER].

43. *Id.* at 135.

44. *Id.* at 152.

derived a *social ideal*. The purpose of the community should be to combine all of the objective aims (as opposed to subjective aims) of its individual members. The social ideal, therefore, is a community which comprehends in a unitary fashion all possible purposes of persons united under the law; it is a community of men willing freely.⁴⁵ In other words, Stammer stresses the social interests in individual ends; each citizen should make as his own purposes or desires, the purposes or desires of others which can be justified objectively rather than subjectively.⁴⁶ This act is the first step in the universal method of achieving objective justice.

The second step involves two general categories of principles which are derived directly from Stammer's social ideal. First, there must be an atmosphere of *mutual respect*.⁴⁷ Second, persons must receive their necessary share in the community of which they are members.⁴⁸ These principles serve as a general formula by which concrete historical and empirical data of particular cases should be evaluated. The method of subsuming doubtful questions of right conduct under these principles is unitized into what Stammer called "the model for just law."⁴⁹ This model consists of the notion of a special community into which the opposing or conflicting volitions of persons are mentally brought for the purpose of objectively adjusting these volitions. It is strictly a theoretical community which is based on the notion that every member of it has a good reason for claiming respect and has a right of participation.⁵⁰ Finally, the making of a correct judgment in a particular case is what Stammer called his fourth step in finding just law.⁵¹

Stammer carefully distinguished ethics from law. Law, he claimed, deals with the reciprocal relationships of man in his society. Ethics, on the other hand, is a personal thing; it deals with the perfection of the individual or the purification of man's inner being. Thus, pure justice, which deals with problems of law, is not

45. *Id.* 153.

46. 1 POUND, JURISPRUDENCE 150 (1959); GÉNY, SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSTIF (See STAMMLER, *supra* note 42, at 493, 521 for translation of Chap. 6 of GÉNY).

47. STAMMLER, *supra* note 42, at 161.

48. *Id.* at 163.

49. *Id.* at 212.

50. *Id.* at 212, 215.

51. *Id.* at 212.

burdened with ethical considerations.⁵² Once the principles of just law have been determined, however, ethics should unite with the concrete consequences of those principles “to lend to the cold and dry commands of just law the warm and fresh stream of a devoted will and an unchanging resolve to do the right.”⁵³ The united methods of ethics and just law will, according to Stammler, open the path to that “ideal thought of the highest unity of being.”⁵⁴

Both the theories of Father Kenealy and Rudolph Stammler have attempted to avoid excessive reliance upon highly questionable abstract principles. Father Kenealy confines his reliance on universal and immutable principles to one relatively innocuous and undeniable primary principle plus several immediate specifications of the primary principle which he claims are also self-evident and undeniable. Rudolph Stammler confines his reliance on universal and immutable principles to an abstract notion of pure justice with both ethics and substantive content extracted. To this extent they have made natural law much more acceptable than the seventeenth and eighteenth century natural law philosophies of Hobbes, Pufendorf, Spinoza, Locke, and Rousseau. Nevertheless, they both still accept the existence of universal and immutable principles. Although they may have solved the problem of how to cope with changing empirical data, they have not solved the problem of how we can be certain about the universality or immutability of any principle. How can we be sure that future discoveries about the nature of man will not disprove Father Kenealy’s primary and secondary principles? How can we be sure that Stammler’s abstract notion of justice can be used effectively in all societies for all time?

It may be true that Father Kenealy’s primary principle is, when viewed in the abstract, undeniable. However, to say that good ought to be done and evil ought to be avoided tells us precious little about what we ought to do until we are given a definition of good and evil. Father Kenealy defines good as that which is in conformity with nature and evil as that which is in difformity with nature.⁵⁵ Such a definition involves an assumption that cannot be proved, namely, whatever conforms with nature is good. Man’s limited knowledge of the universe does not equip him with the information that is necessary for him to prove the absolute certainty of the truth of such an assumption. In fact, Hans Kelsen

52. *Id.* at 62-64.

53. *Id.* at 71.

54. *Id.* at 487.

55. Kenealy, *The Immutable Foundation*, *supra* note 33, at 443.

raises the question of whether man's bad tendencies do not conform to nature just as much as his good tendencies.⁵⁶ The same thing can be said for his secondary principles. For example, the principle that "no one ought to deprive another unjustly of his . . . property,"⁵⁷ is based on the assumption that private property is a necessary element in any society. Future revelations about the nature of the universe may someday reveal to our fallible minds that private property is not a necessary element in every society.

Rudolph Stammler's universal principles of just law are also based on certain basic assumptions which he cannot prove. He assumes that every system of law should have as its fundamental purpose the furthering of the objects of each of its members. Stammler cannot prove that non-human objects, such as the conservation of certain animal or plant life which has no conceivable utility for man, should not also be furthered. Furthermore, he has assumed that mutual respect for the individual and mutual participation in the community are *sufficient* guides to permit an evaluation of all positive laws.⁵⁸ The possible existence of other criteria presently known or to be revealed in the future is obvious. In the final analysis, therefore, both the neo-scholastic philosophy of Father Kenealy and the neo-Kantian philosophy of Rudolph Stammler prove unconvincing and unsatisfactory in our modern world. These same general criticisms can be levied at nearly every modern natural law theory.⁵⁹

III. THE NEED FOR AN IDEAL STANDARD

Nevertheless, natural law does have some very important advantages. G. W. Paton states that natural law was particularly effec-

56. Kelsen, *Plato and the Doctrine of Natural Law*, 14 VAND. L. REV. 23, 29-33 (1960).

57. Kenealy, *The Immutable Foundation*, *supra* note 33, at 450.

58. STAMMLER, *supra* note 42, at 215, 156-66.

59. See, e.g., the legal philosophies of L. DUGUIT, *TRAITÉ DE DROIT CONSTITUTIONNEL* (3rd ed. 1927); J. DABIN, *THEORIE GÉNÉRALE DU DROIT* (2d ed. 1969) (for an English trans., see WILK, *THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH AND DABIN, THE 20TH CENTURY LEGAL PHILOSOPHY SERIES*, vol. iv. (1950) [hereinafter referred to as WILK, *THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH AND DABIN*]); J. DABIN, *Is There a Judicial Law?*, in *THE NATURE OF LAW* (GOLDING ed. 1966); L. FULLER, *THE MORALITY OF LAW* (1964); F. GÉNY, *SCIENCE ET TECHNIQUE EN DROIT PRIVE POSITIF* (1925); G. W. CONUSTABLE, *A Response to Professor Perkins*, 17 AM. J. JURIS. 111 (1972); as well as those of Heinrich Romman, Joseph P. Maguire and John Wild.

tive during the middle ages. He claims that modern theories of law based on commands or on the general will of the community would probably have been inadequate in these times:

Since the fall of Rome, Europe was steering uneasily between the two dangers of tyranny and anarchy—Austinian theories might lead to the first, and, in the absence of a cohesive community, the doctrine of the general will may lead to the second. Men sought for a law that was based on something more enduring than the wills of man, that could provide an element of unity in the battle against chaos and an element of protection against the arbitrary will of a sovereign.⁶⁰

Natural law did both.

It would be foolish to claim, even in our modern world of highly developed nation states, that the twin dangers of tyranny and anarchy have been completely eliminated. A recent history of nearly any of the underdeveloped countries of the world should easily verify this point. Anything, therefore, which can provide an element of unity in the battle against chaos and an element of protection against the arbitrary will of a sovereign should be very useful even today. Speaking of a much later period, Roscoe Pound appraised the results of the natural law theory in the following language:

So long as men were agreed as to the main features of ethical custom, [natural law] thought was a powerful agency of growth. It led each jurist to work out ideal standards to serve as a critique of the traditional law in every detail. It led to many a bold stroke for judicial improvement of the common law⁶¹

Natural law can still be a powerful agency of growth in a modern society. Natural law always searches for a standard—an ideal standard—which can be used as a critique for evaluating and improving the positive law. If a standard could be found which could receive widespread *acceptance* in the social community, I do not believe that proof of this standard's immutable and universal validity would be crucial to its effectiveness. Acceptance is probably more important than either universality or immutability. According to Paton:

Even if the philosopher could prove the validity of a scale of values, that would not of itself influence actual legal systems, save in so far as that scale of values was *accepted* by the ruling classes in each community.⁶² (Emphasis supplied.)

There has always been widespread acceptance of certain basic values in the United States,⁶³ as there has been in every stable

60. PATON, *supra* note 20, at 98.

61. POUND, *LAW AND MORALS* 96 (1924).

62. PATON, *supra* note 20, at 123.

63. "We hold these truths to be self-evident—that all men are created

democracy. The success of a democracy depends, not upon theoretical rules or formal constitutional documents, but upon the widespread and common acceptance of democratic values by the people. The use of the Constitution of the United States as a model for the framing of many of the constitutions adopted by Latin American countries and many other countries in the world has not guaranteed a stable democracy in those countries. Despite the tremendous success of the English constitutional system in England, Britain has had only limited success in transplanting this system to its former colonies in Africa and Asia.⁶⁴

But acceptance of a vaguely articulated group of basic values is not enough. There must be room for growth. There must be a recognition that our society is subject to change and as it changes the basic concept of values will change. New values will be created and the importance of certain old values will be diminished. This much seems clear both from empirical evidence and from the continual insistence of the critics of natural law. In order to correlate and coordinate this change an ideal standard is needed to constantly evaluate and test the basic values.⁶⁵ Furthermore, some standard is needed to evaluate the numerous and diverse values that con-

equal; that they are endowed by their creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." Declaration of Independence, July 4, 1776. Although the application of the basic values represented by this statement has frequently varied and although there has been much argument over their true derivation, I doubt whether anyone would seriously contend that their basic content has not always been widely accepted by the people of the United States. These values, plus certain other fundamental values implicit in the Constitution of the United States are placed near the top of the scale of values; in a general sense they serve as both a unifying and limiting standard for evaluating other values.

64. "The secret of the English success [in achieving a stable democracy] lies not in the method, but rather in the temper of public opinion." PATON, *supra* note 20, at 133. See TOWS, *PARLIAMENTARY DEMOCRACIES—SWITZERLAND, GREAT BRITAIN, FRANCE, JAPAN* 54-60 (Ms. 1961). See also CARTER, RANNEA, HERZ, *MAJOR FOREIGN POWERS* 758 (Rev. ed. 1952). However, the constitutional history of all the South American countries, without exception, has been violent and turbulent at some time during their nearly 150 years of independence. WILGUS, *4'ECA, LATIN AMERICAN HISTORY* (5th ed. 1963).

65. Justice Holmes makes the following statement about ideals: "Man is born a predestined idealist, for he is born to act. To act is to affirm the worth of an end, and to persist in affirming the worth of an end is to make an ideal." HOLMES, *SPEECHES* 96-97 (1918).

stantly vie for acceptance in society's market place of ideas. According to Constable, without some

standard to measure the true and the good, we are simply in a sea of relative and unstable subjective values with no logical basis of preferring one value to another, no principle of hierarchy or permanent validity among goods.⁶⁶

In short, there would be nothing to prevent value anarchy.

Even natural law's critics agree that some fundamental values must be recognized and protected.⁶⁷ In fact, many recent legal philosophers have dealt extensively with societal and individual values.⁶⁸ The recent German legal philosopher, Gustav Radbruch (1878-1949), claimed that legal philosophy should study legal values but not attempt to choose between them.⁶⁹ Certain key values, namely, justice, expedience, and certainty of the law, are antinomic and contradictory to each other. Since "[p]hilosophy is not to relieve one of decisions," Radbruch saw no defect in the failure of a particular theory to resolve these contradictions.⁷⁰ The choices involved should be a matter of conscience; tolerance is essential. The law of a country, therefore, is a tentative compromise between ideals that are logically irreconcilable.⁷¹ It seems to me, however, that this very compromise represents a reconciliation of sorts. In fact, to continue the analogy further, without some sort of recon-

66. Constable, *The False Natural Law: Professor Goble's Straw Man*, 1 NATURAL L. F. 97, 101 (1956).

67. See, e.g., Bentham's four subordinate ends of civil law in BENTHAM, *THE THEORY OF LEGISLATION* 96 (Ogden ed. 1931); Kelsen's concept of the basic norm in Kelsen, *The Pure Theory of Law*, 50 L.Q. REV. 474 (1934), 51 L.Q. REV. 517, 518-20 (1935); Kohler's "jural postulates of our times" in PATON, *supra* note 20, at 120; Austin's "Divine Law" in AUSTIN, *JURISPRUDENCE* 174 (5th ed. Campbell ed. 1885); and Goble's reference to "moral values that have stood the test of time and experience" Goble, *Nature, Man and Law*, *supra* note 22, at 403, 476.

68. See, e.g., Emil Lask and Gustav Radbruch in WILK, *THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DARIN*, *supra* note 59. 1 POUND, *JURISPRUDENCE*, chs. 7 & 8 (1959); PATON, *supra* note 20, at 119-59; Harvey, *The Challenge of the Rule of Law*, 59 MICH. L. REV. 603 (1961); Bodenheimer, *Case Against Natural Law Re-assessed*, 17 STA. L.R. 39, 42 (1964).

69. PATON, *supra* note 20, at 122.

70. RADBRUCH, *LEGAL PHILOSOPHY*, (trans. in) WILK, *LEGAL PHILOSOPHIES*, LASK, RADBRUCH & DABIN, *supra* note 59, at 107-12.

71. PATON, *supra* note 20, at 123. Radbruch sees a triangular battle between the ends of law. The conservative wants security; the radical wants justice; and the individualist wants greater emphasis put on ethical values. This conflict, according to Radbruch cannot be solved by theory, but only by sovereign choice of such community as that community struggles to make those adjustments which are necessary for its existence. After World War II, Radbruch altered his position slightly; he accepted the necessity for a theory of minimum absolutes. See a summary of Radbruch's post war "conversion" in Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 616-18 (1958).

ciliation, the society would slip into anarchy whenever a compromise was unattainable. Further, if there is no ultimate or ideal standard to serve as a guide to this reconciliation, the society could easily slip into tyranny.⁷²

IV. THE REQUISITES OF A SATISFACTORY IDEAL STANDARD

The term *ideal standard* as it is used here is a general measuring rod under which all of the basic values a particular society wishes to protect can be subsumed. Care must be taken in formulating such a standard. First, since no standard can be proved universally or immutably valid, we must recognize that the ideal standard will be based on one or more basic assumptions whose truth must be accepted as a matter of faith.⁷³ But the ideal standard will be of

72. This course of events is exactly what happened in Radbruch's own country; when Hitler asserted values of race supremacy, militarism, and conquest there was no generally accepted ideal standard by which these values could be tested and rejected. However, I believe that if the lawmakers in Germany had been constantly striving for an ideal scale of values which implied a search for the proper role of each individual in his own society, in the society of mankind, and in the universe, the respectable leaders of that society may have been in a better position to refute Hitler's values. Any accepted values which have as their foundation and keystone the perfection of all men, rather than just a certain class of men, would certainly have been inconsistent with the values Hitler urged people to accept. See *infra* section on "The Third Requisite—Assist in the Struggle Against Tyranny and Anarchy." Much has been said about the failure of Germany's positive law tradition to check the rising tide of "National Socialism." See, e.g., Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 658 *et seq.* (1958). Since Germany was not the only country to have a positive law tradition (e.g., England), the empirical evidence does not fully support this conclusion. If the rise of Nazism can be attributed to the failure of any theory of law, I would say it would be the failure of the natural law philosophers to come up with an ideal standard that both could have received widespread acceptance among the people and could have enabled the people to see more clearly the evil in the values that Hitler was thrusting upon them.

73. Both Justice Holmes and Professor Goble recognize the importance of starting out with an assumption established only by faith. "We all, the most unbelieving of us, walk by faith. We do our work and live our lives not merely to vent and realize our inner force, but with a blind and trembling hope that somehow the world will be a little better for our striving." HOLMES, SPEECHES 93 (1918).

We believe many things we cannot prove. We act daily upon the basis of faith. . . . I believe in the greatness of my profession, my country and its national traditions, though I cannot prove that they are worthy of my faith. I believe in the beneficent power of love, sympathy and charity though I cannot comprehend their meaning.

little value unless it can receive considerable, if not widespread, acceptance by the members of the community. To receive such acceptance, the basic assumptions will have to be reasonable in view of the existing body of empirical knowledge. Second, we must be able to subsume all of the values considered basic to the needs of society under this one ideal standard. At the same time, however, it must not be so vague and so general that it fails to provide a significant guide to the evaluation of all the possible values and interests that may emerge from the creative imaginations of the people. Third, it must provide some help in man's struggle against tyranny and anarchy. Finally, it must be sufficiently definite to provide stability and sufficiently flexible to promote tolerance.

A theory of natural law based on an ideal standard which met these requisites would either avoid or satisfactorily meet the criticisms that have been levied against the natural law theory. It would not insist on the acceptance of universal and immutable principles derived from the nature of man. It would make no pretense of obtaining moral absolutes from abstract reasoning. It would not confuse the existing law with what should be the law; but would clearly distinguish the ideal standard by which the positive law was to be evaluated from the positive law itself. It would not contend that the study of human nature holds some magical key to justice, goodness, and perfection of man. Finally, it would recognize and tolerate a difference of opinion as to moral values and it would even encourage change.

There are several possible ideal standards. If the claim of universality and immutability is taken away from the neo-scholastic position one such possible ideal standard would emerge, namely, "What is good ought to be done and what is evil ought to be avoided."⁷⁴ As previously explained, however, this standard offers little, if any, guidance unless a meaningful definition is given to the words "good" and "evil." Father Kenealy's definition of "good" namely, "suitability or conformity to nature," may provide a meaningful definition but it is based on the assumption that human nature holds some magical key to justice and goodness. Inasmuch as badness may conform to nature as well goodness, such a basic assumption does not appear to conform well with the existing body of knowledge and, thus, probably would never receive widespread acceptance.

I believe in the moral and spiritual values of our religious and cultural heritage, but I cannot prove that they are eternal verities. I believe in these things because their truth seems more probable than their falsity.

Goble, *Nature, Man and Law*, *supra* note 22, at 403, 405.

74. See *supra* note 33.

Another possible ideal standard would be Stammler's theory of a just law unattached to its claim of universal and immutable validity. However, more than justice is involved in a good legal system and the twin principles of mutual respect and mutual participation would not be sufficient to adequately evaluate all the values that might contend for acceptance. Ethical considerations should not be entirely excluded from this evaluation process. A possible ideal standard might be Bentham's principle of utility, namely, to provide the greatest happiness for the greatest number.⁷⁵ Paton claims that this standard of utility is, indeed, typical of much natural law writing.⁷⁶ Although it is perhaps more acceptable than the first two, certain difficulties creep into it because of Bentham's total reliance on pain and pleasure.⁷⁷ Such limited concepts can hardly present a satisfactory basis for the evaluation of all other values.

Additionally a possible ideal standard might lie in what Pound calls "the end of law," namely, "the satisfaction of as much of human demand as we can satisfy with a minimum of friction and waste."⁷⁸ If it could be accepted, this would make an excellent ideal standard. It is somewhat similar to a concept developed by Paton, namely, "the development of the potentiality of the personality of the common man." The protection and development of the dignity of man's personality, I believe, should be close to the top of any scale of values. However, both concepts place man, and man alone, at the center of things. Too much emphasis on man without any recognition of an independent importance in other creatures and creations of God or in God himself may not receive widespread acceptance in a community deeply imbued with Judeo-Christian values.

V. AN IDEAL SCALE OF VALUES AS AN IDEAL STANDARD

I suggest that instead of looking to the nature of man, the nature of the legal system, the maximization of human wants, or the development of the human personality, we look to the nature of the universe. Also, that we look to the notion of order, symmetry, and harmony in the universe for an ideal standard. Implicit in this notion is the proposition that man, as well as other creatures and

75. BENTHAM, *THE THEORY OF LEGISLATION* 1 (1931).

76. PATON, *supra* note 20, at 107.

77. BENTHAM, *THE THEORY OF LEGISLATION* 2 (1931).

78. 1 POUND, *JURISPRUDENCE* 432 (1959).

things, has a proper role in the universe. This role, if achieved, will bring about the maximum order and harmony. Also, it implies that man's relations with his fellow man can be perfected into a perfect order. Assuming that a perfect hierarchy of values does exist, then it follows that man's adherence to this hierarchy will bring about his perfection in both of the senses described above. Thus, the following ideal standard is proposed: that there does exist an ideal scale of values which presents the best guide for organizing a society at any one time. In other words, from the point of view of any society at a particular time, a perfect hierarchy of values does exist. Hereinafter this shall be referred to as the ideal scale theory.

The ideal scale theory does not specify the values; it just hypothesizes the existence of a perfect or ideal scale. Further elaboration with the precise values at the precise places on the scale is impossible. The empirical facts that make up the economic, social and political conditions of one society are not the same for every society. Thus, the scale of values which is appropriate for achieving the perfection of man in one society may be quite inappropriate in another society. For example, a country with strong tribal rivalries and little tradition of national unity like Nigeria may be compelled to place much more emphasis on national unity than a country such as Switzerland whose people have enjoyed centuries of joint cooperation as a nation. Further, an appropriate scale of values for a small village in India would not be appropriate for a similar village in the United States because of the differing religious, cultural, and social traditions that affect the lives of the respective villagers. Thus, each society has its own ideal scale of values and this scale differs from society to society. Just as there is a hierarchy of societies from that of the smallest village to the society which encompasses the whole world, as there is a hierarchy of ideal scales. At the top of the hierarchy is one ideal scale of values which presents the best guide for organizing the entire world.

Also, the scale of values which is appropriate for achieving the perfection of man in a particular society at one time may not be the most appropriate at another time. The requirements of an eighteenth century society may be quite different from the requirements of that same society today. As the environment and enlightenment of the individual members change, so will their values change. Thus, specific values cannot be added to the ideal scale theory; all the theory can do is to hypothesize the existence of an ideal or perfect scale of values for any one society at any one time.

The scale of values envisioned by the ideal scale theory is an ideal or perfect one. It must be acknowledged, therefore, that as a finite

being with a limited mind, man is unlikely to discover this ideal. Even if he did chance upon it, he would be unable to recognize the truth of his discovery.⁷⁹ The value of any theory postulating an ideal goal is not in the ability to attain the goal but in the process of attempting to attain it. Similarly, the value in the ideal scale theory is not in the ability to discover an ideal scale itself but in the process of attempting to discover such a scale. By continually attempting to discover and adhere to an ideal scale of values, man will in the process achieve the best system that he, as a fallible being, is capable of achieving. Arnold puts this same idea in the following words:

Law must be a "brooding omnipresence in the sky". This is an ideal which can never be attained, but if men do not strive for it the law loses its moral force.⁸⁰

In writing about Morris Cohen, Hunting Cairns stated:

His final admonition was to recall the ancient wisdom that it is romantic foolishness to expect that man by his own weak efforts can make a heaven on earth. But it is the essence of human dignity . . . to wear out our lives in the pursuit of worthy though imperfectly attainable ideals.⁸¹

By creating an ideal goal, therefore, man is continually challenged to attain that goal; by postulating the existence of an ideal scale of values, man is continually challenged to discover that scale and thereby achieve societal perfection.

Keeping in mind the ultimate aim of achieving man's proper role in the universe and his proper role vis-a-vis his fellow man, a society must establish a scale of values which it thinks most closely approximates the ideal scale of values for that society. It may be contended that agreement on any particular scale of values would not be possible among a large group of people. Complete agreement, however, is not necessary; widespread acceptance is sufficient. There should be sufficient genuine acceptance of the values

79. Presumably the fact that man's capacities and knowledge are limited could be contested. The empirical evidence of this fact seems overwhelming and I would not hesitate to call it an assumption and act on it as such. See what Professor Goble calls the "true natural law" in Goble, *Nature, Man and Law*, *supra* note 22, at 475. See also FULLER, *THE MORALITY OF LAW* 145 (1964).

80. Arnold, *Judge Jerome Frank*, 24 U. CHI. L. REV. 63 (1957).

81. Cairns, *The Legal Philosophy of Morris R. Cohen*, 14 VAND. L. REV. 239, 244 (1960).

to create a workable consensus upon which the country could cautiously proceed.⁸² Furthermore, perfect agreement as to the location of these values on the scale is not necessary to enable the society to proceed to the tasks of government based on those values. General agreement as to which values in the society are most important and which of the values that frequently conflict should take priority is sufficient.

As previously stated, most stable democracies do, in fact, have widespread agreement among their people on a considerable number of basic values.⁸³ In the United States, for example, I believe that there is general agreement that the individual citizen is supreme; that all government and all laws exist only for his protection and well-being. I believe there is general agreement that very high on the scale of values is the notion that ultimate authority of any one person or groups of persons should be reviewed periodically by a system of elections. I believe there is general agreement in the acceptance of checks and balances to protect the citizens from the possibility of arbitrary government, and that this value should be placed very high on the scale of values. These checks and balances would take the form of a separation of government powers, civilian control of the military, a federalist system of strong local governments, and a notion of legality or illegality for all government action based on the guidance of a written constitution and clearly enunciated laws and regulations. Finally, I believe there is a general agreement that the protection of certain fundamental human rights of individuals is a value that should be placed very high on the scale of values.⁸⁴ Undoubtedly, there are many other

82. Cf., PATON, *supra* note 20, at 123 for his comment that there must be acceptancy by "the ruling classes" in each community; *see also* Kelsen's determination of the content of the basic norm—the condition of fact out of which the order emerges and to which *there corresponds a substantial measure of actual behaviour* in Kelsen, *The Pure Theory of Law*, 50 L.Q. REV. 474 (1934), 51 L.Q. REV. 517, 519 (1935) (Wilson, trans.); H.L.A. Hart's statement that the secondary rules of recognition and change must be "effectively accepted as common public standards of official behaviour by its officials" in HART, *THE CONCEPT OF LAW* 113 (1961). I would not be satisfied with Hart's concept of acceptance of the rule of recognition by the *officials* as being sufficient. Instead, sufficient acceptance among all the people to obtain a genuine and workable consensus should be required. By genuine acceptance I mean an acceptance that is freely and willfully made by each individual. The method of measuring and determining this acceptance will not be an easy task; it will, I fear, remain one of the greatest challenges to the society.

83. *See supra* notes 64 and 65.

84. *See* Declaration of Independence, July 4, 1776; U.S. CONST.; POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* (1957); *see also* Griswold v. Connecticut, 381 U.S. 479, 486 (1965); 42 U.S.C. § 1983 (1971) recognizing the necessity of protecting these rights.

basic values upon which general agreement could be reached by the people of the United States.⁸⁵

The positive law of the United States has provided considerable elaboration of these values. Behind most of the laws are values that do receive widespread acceptance. The degree of importance given by the society to each of these values corresponds roughly to a scale of values. The scale of values reflected in the laws of the United States roughly corresponds, with a few significant exceptions,⁸⁶ to what I believe the ideal scale of values should be for the United States at this time. It is, however, the task of legal writers and other scholars to continually examine these values and the relative importance given to them to see if they correspond to each scholar's concept of the ideal scale of values for the society at the time. In arriving at his own concept of the ideal scale of values each scholar should be guided by a desire to achieve the perfect role of man in the universe and the perfect harmony of man in his relations with his fellow man.

VI. ARGUMENTS IN DEFENSE OF THE IDEAL SCALE THEORY

Previously it was stated that most natural law principles are based on certain basic assumptions which cannot be proved universally and immutably valid. The ideal scale theory is no exception.

85. See, e.g., the eight desiderata of the inner morality of law suggested in FULLER, *THE MORALITY OF LAW* 33-94 (1964). The eight desiderata are as follows:

- 1) the need to make rules; 2) the need to publicize those rules;
- 3) the need for a prohibition against abuse of retroactive legislation;
- 4) the need to make rules understandable; 5) the need for a prohibition against the enactment of contradictory rules;
- 6) the need to have the rules reasonable and not to require conduct beyond the powers of the affected party;
- 7) the need to prohibit such frequent changes in the rules that the subject cannot orient his action by them; and
- 8) the need to make the administration of the rules conform to the actual announced intention of the rules.

86. For example, the importance of the value placed on human life as reflected by the many laws in this country sanctioning the death penalty is, in my opinion, grossly under rated. I believe the value of human life should be moved much higher on the scale of values—high enough so that it would not yield to the value inherent in the protection of the society from crime. The California Supreme Court in *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), seemed to agree with this philosophy when it stated: "The dignity of man, the individual and the society as a whole, is today demeaned by our continued practice of capital punishment." [*Id.* at 650, 493 P.2d at 895, 100 Cal. Rptr. at 167].

The ideal scale theory is derived from the nature of the universe; it is derived from the notion of order, symmetry, and harmony in the universe.⁸⁷ It is based upon the assumption that there is order in the universe and that this order applies to the social behavior of man as well as the behavior of the physical world. Because man's knowledge of the universe is imperfect he cannot be *certain* as to the existence or non-existence of order in the universe. Nevertheless, most men do assume that a scientific explanation does exist for the inconsistent and puzzling phenomena that now confront him. In other words, although we do not yet know how a migratory bird is directed "in a straight line to a dot of an island in the ocean 3000 miles from its starting point" or how "leaves of a giant redwood are able to draw their sustenance from the earth 300 feet below,"⁸⁸ most people do think a scientific explanation does exist. To refute this would be disastrous because it would destroy the motive necessary for continuing the search for such an explanation.

The same thing applies to the social behavior of man. We cannot be certain as to the existence of a perfect method of organizing man's social behavior. In other words, we cannot be sure a method of organizing society exists which would allow man to develop to perfection, namely, to develop in such a way that he could best fit into his proper role in the universe. However, to refute the existence of such a method would again be disastrous because it would destroy the motive necessary for continuing the search for the discovery of the best possible method of organizing man's social behavior. Furthermore, there is nothing known to man at the present time to indicate that there is no order in the universe or that man does not have a definite role to play in this symmetrical plan for universal order. Thus, this basic assumption is not inconsistent with the presently known empirical facts. It is a reasonable assumption.

VII. THE FIRST REQUISITE—WIDESPREAD ACCEPTANCE

As just explained, the basic assumption that there is order in the universe is a reasonable one and is one which is not in conflict with the presently known empirical fact. Furthermore, nearly everyone's system of values can easily be adapted to the ideal scale theory. In fact, most people already have a scale or hierarchy of values which governs their behavior. The ideal scale of values can be likened to St. Thomas Aquinas's eternal law. Aquinas denied

87. See *infra* section on "Ideal Scale of Values as an Ideal Standard."

88. Goble, *Nature, Man and Law*, *supra* note 22, at 403, 405.

that all things happened by chance; by contrast he claimed that there is an unailing order in the universe which implies the existence of a government of all things.⁸⁹ The governor of this government is, of course, God, and the model or ideal exemplar which guides his divine wisdom in this government is eternal law.⁹⁰ Eternal law, therefore, is the exemplar of universal order; it is "a dictate of practical reason emanating from the ruler who governs a perfect community."⁹¹ The notion of the exemplar of universal order and the notion of a perfect community governed by God are not inconsistent with the notion of an ideal scale of values. The ideal scale of values is, in effect, God's plan for life on earth.⁹²

On the other hand, for those who are more secularly inclined, the ideal scale of values can be likened to an ideal public policy. If the notion of public policy is comprehensively defined it could include a full recognition of individual rights. A notion of public policy which protects freedom of speech, freedom of press, and other fundamental rights because it is in accord with public policy to do so would not be inconsistent with an ideal scale of values.⁹³ For these reasons, the ideal scale should be widely acceptable; therefore, it should meet the first requisite of an ideal standard.

89. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Part I, Question 103, Arts. 8 (Vol. 1, 951, 960, PEGIS ed. 1944).

90. *Id.* Part II, First Part, Question 93, Art. 1 (Vol. 2, 762-64; PEGIS ed.).

91. *Id.* Question 91, Art. 1 (Vol. 2, 748-49, PEGIS ed.).

92. See Professor Goble's discussion of "the master plan." Goble, *Nature, Man and Law*, *supra* note 22, at 476.

Aquinas's contention that eternal law is not fully known to rational creatures is also not inconsistent with the ideal scale theory. ST. THOMAS AQUINAS, *supra* note 89, Part II, First part, Question 93, Art. 2 (Vol. 2, 764, PEGIS ed.). Natural law, according to Aquinas, is rational creature's participation in the eternal law. *Id.* Question 91, Art. 2. The truth or rectitude of the common principles which made up this natural law is, according to Aquinas, the same for all men and is equally known by all men. *Id.* Question 94, Art. 4. The contention that there are certain principles that are true for all men and are equally known by all men is highly questionable. This contention raises most of the same questions earlier discussed with regard to the attempts to prove that certain principles are universally valid. Aquinas's concept of eternal law, therefore, can be useful in understanding the ideal scale of values only if it is not inseparably tied to the notion that certain common principles are equally true for and equally knowable by all men.

93. See a discussion of public policy as a yard-stick for measuring public interests in PATON, *supra* note 20, at 130-32.

VIII. THE SECOND REQUISITE—A SIGNIFICANT AND ALL-INCLUSIVE GUIDE

The ideal scale theory must be broad enough to measure all possible values and specific enough to be useful: The existence of an ideal scale of values presuppose a constant and vigorous effort on the part of man to discover and implement this ideal. Any such effort must include a consideration of all the possible values that are brought to his attention. Thus, to work properly, the ideal scale theory must include a consideration and evaluation of each and every value that vies for acceptance in the marketplace of ideas. Each society's own approximation of its ideal scale should include all the values considered basic to the needs of that society based on that society's perception of the ideal scale. Every value that presents itself to the society for evaluation should be considered for a possible place on that scale.

The much bigger question is whether the ideal scale of values is so broad and stated in such general terms that it fails to provide any significant guide to the evaluation of the various values and interests. I believe it does. In the "sea of values" that is drowning modern man it is important that a point of departure be established so that man can make an intelligent and systematic evaluation of all of the values. The ideal scale of values does exactly this. Although it says nothing about the substantive content of values that are included within the scale, it does tell us that we must look to the whole picture in making our evaluation. It requires a *teleological* approach; it looks toward the perfection of man and the perfection of his role in the universe. It reminds us that, as individuals or as a society, we are only a part of mankind and mankind constitutes only a part of the universe. This same idea was stated by Justice Holmes as follows:

[L]ife is a roar of bargain and battle, but in the very heart of it there rises a mystic spiritual tone that gives meaning to the whole. It transmutes the dull details into romance. It reminds us that our only but wholly adequate significance is as parts of the unimaginable whole.⁹⁴

By requiring us to look to the whole picture in making our evaluation, the ideal scale of values has given us a starting point. According to Morris Cohen, "[w]e need some comprehensive ideal to organize our conflicting judgments into something like a coherent body."⁹⁵ From this starting point the society can proceed to re-

94. HOLMES, SPEECHES 97 (1918).

95. COHEN, REASON AND NATURE, AN ESSAY ON THE MEANING OF SCIENTIFIC METHOD 419 (1931).

search the pertinent historical and empirical data, debate the propositions, and reconcile the various views. During the course of this debate, the reminder that our goal is to achieve the proper role of man in the universe should always provide a helpful assist. Naturally, we will fall *far* short of achieving that goal on some occasions. But in the balance, a constant effort to achieve this goal will produce the best scale of values and, consequently, the best system of law that fallible beings are capable of achieving. The scale of values so produced will then be applied by the law makers in their never ending task of improving the law and the legal system.⁹⁶

There are three other reasons why the ideal scale of values is useful. First, implicit in the existence of such a scale is the notion that evaluation of law is a continuous process. As previously stated, because of man's own fallibility and because of his limited knowledge of the universe, it is highly unlikely that he will ever discover this ideal scale—even if he did he would have no way of recognizing the truth of his discovery. The efforts to discover this goal, therefore, will never cease. This continuing effort should prevent us from accepting the existing laws, institutions or even basic values as sufficient. It operates as a built-in mechanism for keeping law and legal institutions in tune with the times. Second, the existence of an ideal scale of values challenges us to search for the perfect method of organizing man's social behavior. It challenges us to seek man's proper role on the earth and in the universe. In other words, it challenges us to seek the perfection of man. Third, the existence of an ideal scale of values to act as a guide in evaluating the law provides a noble and honorable purpose or objective for law. To view the law as a command of the sovereign implies

96. There may not always be general agreement on the basic values that underlie certain statutes, constitutional amendments, court decisions, or other legal rules and there will undoubtedly be many times when such general agreement will remain unnoticed and unrecognized. Nevertheless, the more these values are articulated and debated, the better our positive law and legal institutions will be.

It is not within the scope of this article to determine the responsibility an individual has towards a law which he feels conflicts with his own scale of values. On this topic see Wasserstrom, *The Obligation to Obey the Law*, 10 U.C.L.A.L. REV. 780 (1963); Kenealy, *Law and Morals*, 9 CATH. L. 201 (1963); Greenwait, *A Contextual Approach to Disobedience*, 70 COLUM. L. REV. 48 (1970); Hughes, *Validity and the Basic Norm*, 59 CALIF. L. REV. 695 (1971). For a discussion of the importance of "intelligent action guided by a sense of purpose," see FULLER, *THE MORALITY OF LAW* 150 (1964).

that the purpose of the law is to provide the sovereign with a tool to control the people according to its own wishes. The purpose of law is noble and honorable only so long as the desires of the sovereign are noble and honorable. To assume the existence of an ideal scale of values, however, implies that the purpose of law is to develop conditions which will help promote the perfection of man in his proper role in the universe. The society will be in a much better position if its law makers, from the justice of the peace to the supreme court justice and from the city councilman to the national legislator, are guided by this more noble sense of purpose. Therefore, although the ideal scale of values is broad enough to measure all possible values it is specific enough to be useful. It meets the second requisite of an ideal standard.

IX. THE THIRD REQUISITE—ASSIST IN THE STRUGGLE AGAINST TYRANNY AND ANARCHY

Does the ideal scale theory discourage tyranny and anarchy? Prevention of anarchy is one of the primary needs of society and prevention of tyranny is one of the primary needs of man. Any standard which has as its goal the perfection of man as a part of the universe certainly encourages a conformity to the needs of society and the needs of man. Therefore, logically at least, this requirement is met. As a practical matter, however, would it prevent tyrannical rule? And, more specifically, would it have prevented the rise of Nazism in Germany if it had been widely accepted in that country at the time? No single conclusion to this latter question can now be conclusively proved by empirical evidence.

A much more sophisticated question is whether the ideal theory of values provides a restraint on the rulers of a relatively stable democratic society. I believe it can. Widespread acceptance of a scale of values to evaluate the law will obviously effect the law makers in formulating legislation and in making judicial and administrative decisions. It will provide a higher law for the law-makers to follow; the lawmakers will be responsible to this higher law rather than to the arbitrary whims of the sovereign. Therefore, the ideal scale of values provides some restraint on the law-makers of a stable democratic society. Admittedly it is not a panacea; there is nothing to guaranty that a bad scale of values will not be accepted and there is nothing to prevent a bad lawmaker or group of lawmakers from ignoring the scale of values even if it is a good one. Nevertheless, because the emphasis is placed on a constant effort to achieve the ideal perfection of man, it is probably the best guaranty against bad law that fallible beings can devise

in a theory of law. It is certainly better than a theory which presents no restraints at all. The ideal scale of values, therefore, meets the third requisite for an ideal standard.

X. THE FOURTH REQUISITE—PROVIDE STABILITY AND PREVENT INTOLERANCE

Is the ideal scale theory sufficiently definite to provide stability and sufficiently flexible to prevent intolerance? Because it is assumed on faith there is no dogmatic insistence on the validity of the ideal standard. The ideal scale theory is, therefore, tolerant of the discussion of other possible ideal standards which might someday replace the existing standard. Nonetheless, the ideal scale of values as an ideal standard is sufficiently comprehensive so as not to need frequent revision. At the same time it is not too inflexible and rigid. As previously stated, it has a built-in method for handling change. The scale of values which is ideal for a society at one time may not be ideal for the same society at another time. As the ideal scale of values changes, the society's attempt to approximate that ideal scale should also change—at least the society will constantly be challenged to keep its own scale up to date. New values will be added and old ones will be discarded as needed. All this can be done without disregarding the scale itself. Thus, the ideal scale theory is sufficiently rigid to provide considerable certainty and sufficiently flexible to provide considerable flexibility. It meets the fourth requisite for an ideal standard.

XI. THE IDEAL SCALE THEORY AND THE NINTH AMENDMENT

Let us now return to the question raised at the outset of this article, namely, whether natural law presents any meaningful limitation or guidance in the interpretation of the ninth amendment. In answering this question, let us substitute the ideal scale theory for the natural law theories of the founding fathers. Let us substitute the location on the ideal scale of values that is reserved for fundamental rights for the notion of inalienable, universal, and self-evident natural rights envisioned by the founding fathers. In effect, let us address ourselves to the question of whether the ideal scale theory, as a modern variety of natural law, presents any meaningful limitation or guidance in the interpretation of the ninth amendment. We must then ask the further question of whether

this theory preserves or violates the intentions of the drafters of the ninth amendment. To answer those questions, it is first necessary to find the location on the scale of values that should be reserved for the value implicit in the acceptance of certain fundamental rights.

XII. THE POSITION OF FUNDAMENTAL RIGHTS ON THE SCALE OF VALUES

Our society accepts the necessity to protect certain fundamental rights of the individual. Each fundamental right reflects a value. Collectively, these rights occupy a sacred spot in the collective conscience of the people; our society places great importance on the protection of these fundamental rights. The value reflected in the collective importance of these fundamental rights is placed very high on the society's scale of values. The values reflected in each fundamental right can be subsumed under this general value of collective importance. This notion can be better illustrated in the following chart which I believe is the best approximation of the ideal scale of values that could be accepted in our American society at the present time:

Scale	Values
	The individual should be supreme.
	Authority to govern should come from the people and this authority should be reviewed periodically by free elections.
	<p>The powers of government should have certain built-in checks and balances.</p> <ol style="list-style-type: none"> 1) Separation of powers. 2) Federalist system of relatively strong local governments. 3) Civilian control of the military. 4) A written constitution to delineate and articulate powers of government and to proscribe others not specifically mentioned.
	<p>Certain fundamental rights of the individual should be protected.</p> <ol style="list-style-type: none"> 1) Freedom of speech and press. 2) Freedom of assembly and right to petition the government for redress of grievances. 3) Freedom of Religion. 4) Right of equal protection of the laws. 5) Right to life, liberty, and property and protection from their denial without due process of law. 6) Right to vote regardless of sex, race, color, creed, national origin, or failure to pay poll tax. 7) Right of privacy, protection from unreasonable searches and seizures and protection from self-incrimination. 8) Rights of criminal accused: <ol style="list-style-type: none"> a) To have the assistance of counsel. b) To have a speedy and public trial by an impartial jury in the district wherein the crime was committed. c) To be informed of the nature and cause of the accusation.

	<ul style="list-style-type: none"> d) To be confronted with the witnesses against him and to have compusory process to obtain witnesses in his favor. e) To be free from excessive bail and from cruel and unusual punishment. f) To be protected from double jeopardy. g) To be protected from the use of coerced confessions. h) To have sufficient time to prepare his defense. i) To be protected from domination of the court by a mob. j) To be protected from conviction of treason except upon the testimony of at least two witnesses. 9) Right to a trial by jury in certain cases. 10) Right to be protected from ex post facto laws and bills of attainder. 11) Right to be protected from taking of property for public use without just compensation. 12) Right to be protected from peacetime quartering of troops in private homes. 13) Freedom to travel and to communicate.
	<p>The government should have sufficient power to effectively:</p> <ul style="list-style-type: none"> 1) Protect the citizens from crime. 2) Protect the citizens from foreign enemies. 3) Protect the citizens from undue economic exploitation by others. 4) Protect the citizens from arbitrary interferences with their lives and property by others. 5) Promote the education and general welfare of all of the people.
	<p>The Government should encourage the protection of freedom and promotion of general welfare in other parts of the world.</p>
	<p>Etc.</p>

In the above scale the most important values are placed at the top and each mark on the scale assigns a location or order to the value represented by that mark in relation to the other values on the scale. This scale is not the ideal scale of values for our American society, nor is it the scale that I think most closely approximates the ideal scale.⁹⁷ Instead, it is the scale that I think would have the best chance of receiving widespread acceptance by the people of the United States. Each person undoubtedly has his own scale of values, nevertheless there is general agreement on certain basic

97. As stated earlier, I believe the ideal scale includes the right to be protected from capital punishment high on the list of fundamental rights. I doubt, however, that there is sufficient widespread acceptance at the present time of this value to give it a place on the scale in the box reserved for fundamental rights. *But see*, *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972); *Furman v. Georgia*, 408 U.S. 238 (1972) (see the concurring opinions of Justices Brennan and Marshall).

values and their relative importance.⁹⁸ There may be disagreement as to the manner in which each value is stated, and there may be disagreement as to whether one value should be placed above or below another value on the scale. For example, the right to travel may conflict with environmental rights, just as the right to privacy may conflict with certain first amendment rights. However, despite disagreements, sufficient general consensus can be achieved to enable us to proceed on this basis.

The box reserved for fundamental rights is placed high on the scale. Certain fundamental rights are placed inside this box. However, since only a certain number of rights are entitled to the cloak of protection afforded to *fundamental* rights, there is room inside this box for only a certain number of rights. Such a limitation provides a meaningful restraint for such broad constitutional phrases as "due process of law" and "other [rights] retained by the people." Once a right is considered fundamental, it is entitled to constitutional recognition under these phrases. Rights not so considered are not entitled to such recognition. Assuming a workable method can be found for determining which rights are *fundamental*, such an approach is definite and certain. Contrary to Justice Black's contention, it does not allow judges to "roam at will in the limitless area of their own beliefs" in interpreting the broad constitutional phrases just mentioned.⁹⁹

The question of which rights are fundamental should, under the ideal scale theory, be determined by searching for those rights whose protection is essential to achieve the perfection of man. Each citizen will undoubtedly have a slightly different opinion, but again there should be general agreement on most of the rights—there should be sufficient consensus to permit our society to act on the basis of the fundamental rights so selected. This procedure is not entirely unlike the procedure envisioned by Justice Goldberg in determining which rights are fundamental. In the *Griswold v. Connecticut*¹⁰⁰ he made the following statement:

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental. . . .'¹⁰¹

The task of determining which rights are fundamental has fre-

98. See *supra* notes 64, 65, and 83. See also Harvey, *The Challenge of the Rule of Law*, 59 MICH. L. REV. 603, 608 (1961).

99. *Adamson v. California*, 332 U.S. 46, 92 (1947) (Black, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 525 (1965) (Black, J., dissenting).

100. 381 U.S. 479 (1965).

101. *Id.* at 493 (Goldberg, J., concurring).

quently been undertaken by Supreme Court Justices. As early as 1908, Justice Moody set forth the following question in his attempt to define the scope of "due process": "Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government."¹⁰² In 1926, Justice Van Devanter stated that the due process clause of the fourteenth amendment requires state action to be consistent with "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."¹⁰³ This same language was quoted by Justice Sutherland to substantiate his conclusion that the due process clause of the fourteenth amendment required the assistance of counsel for the accused facing the death sentence in *Powell v. Alabama*.¹⁰⁴

Justice Cardozo, in *Snyder v. Massachusetts*, stated that Massachusetts was free to regulate the procedure of its courts as it wished "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹⁰⁵ Again in *Palko v. Connecticut*, Justice Cardozo spoke of rights "found to be implicit in the concept of ordered liberty," and rights which are "of the very essence of a scheme of ordered liberty."¹⁰⁶ Justice Roberts, in *Betts v. Brady*, spoke of a constitutional denial as one which constituted "a denial of fundamental fairness, shocking to the universal sense of justice."¹⁰⁷ Justice Frankfurter spoke of "those canons of decency and fairness which express the notions of justice of English-speaking peoples."¹⁰⁸ In the same case he stated:

The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied.¹⁰⁹

102. *Twining v. New Jersey*, 211 U.S. 78, 106 (1908).

103. *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926).

104. 287 U.S. 45, 66 (1932).

105. 291 U.S. 97, 105 (1934).

106. 302 U.S. 319, 325 (1937).

107. 316 U.S. 455, 462 (1942).

108. *Malenski v. New York*, 324 U.S. 401, 417 (1945) (Frankfurter, J., concurring).

109. *Id.*

In *Haley v. Ohio*, Justice Frankfurter spoke of “deeply rooted feelings of the community.”¹¹⁰ And in *Wolfe v. Colorado*, he spoke of a right which was “basic to free society” and which was “implicit in ‘the concept of ordered liberty.’”¹¹¹

Justice Black dismissed all of these statements as “catchwords and catch phrases” employed by judges to strike down laws which offend their notions of natural justice.¹¹² When viewed in connections with the notion of a limited bundle of rights each of which is cloaked with special protection—in other words, when viewed in connection with the ideal scale theory—they are much more than mere catchwords. They are an attempt to define those rights which the society has singled out for special protection because there is general agreement that these rights are basic to the perfection of man.

XIII. THE NINTH AMENDMENT AS A VEHICLE FOR IMPLEMENTING THE IDEAL SCALE THEORY

It should be immediately apparent that most of the rights listed in the box reserved for fundamental rights in the above chart are already written into the document which contains the fundamental law of the land, namely, the Constitution of the United States. There are, however, a few significant additions and one significant omission.

By the framers' own admission, the Bill of Rights and the Constitution did not contain an exhaustive list of fundamental rights.¹¹³ Many of the rights that were listed by the framers were rights that they were painfully aware of because the former British sovereigns had attempted to deny these rights to the colonists. Thus, the British had forced the colonists to accept the quartering of British troops in their homes without their consent¹¹⁴ and this prompted the third amendment which states that no soldier should be quartered in any house without the consent of the owner in time of peace. The British customs officials obtained unlimited “writs of assistance” which gave them authority to break into any house and any trunk,

110. 332 U.S. 596, 604 (1948) (Frankfurter, J., concurring).

111. 338 U.S. 25, 27 (1949).

112. *Griswold v. Connecticut*, 381 U.S. 479, 511 n.4 (1965) (Black, J., dissenting).

113. Madison, speech in the House of Representatives, 8 June 1789, in 1 ANNALS OF CONGRESS (GALES & SEATON ed. 1834). See reprint in PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 93, 115 (1955). See also speech by Mr. Jackson of Georgia, *id.* at 119.

114. See Quartering Act, Act of Parliament of 24 March 1765, in DOCUMENTS OF AMERICAN HISTORY 61 (COMMAGER ed. 1949).

chest or other receptacle at any time to search for contraband goods. This prompted the fourth amendment which prohibited unreasonable searches and seizures.¹¹⁵ The British, however, did not attempt to prohibit travel and communications within and between the states; thus, it apparently never occurred to the framers that the right to travel and the right to send and receive communications could be just as important as the right to be protected from unreasonable searches and seizures.¹¹⁶ According to Lieber:

The right of freely corresponding is unquestionably one of the dearest as well as most necessary of civilized man; yet, our forefathers were so little acquainted with a police government, that no one thought of enumerating the sacredness of letters along with the freedom of speech and the liberty of the press. The liberty of correspondence stands between the two; free word, free letter, free print. The framers did not think of it, as the first law-makers of Rome are said to have omitted the punishment of perricide.¹¹⁷

For this reason, the right to travel and communicate should be included within the box of fundamentally protected rights.

Of perhaps even greater importance, however, the bundle of rights which are considered fundamental should not become too rigid. The ideal scale theory recognizes that the values appropriate for a society at one time may not be appropriate for the same society at another time. Thus, the values that were appropriate for the society in 1789 may not be appropriate for the society of today. According to Justice Frankfurter:

Basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of

115. See LASSON, *HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 51-78 (1937). See Roscoe Pound's list of eight grievances which preoccupied the founding fathers in POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 71-72 (1957).

116. The importance of the right to travel was not fully appreciated until the twentieth century when restrictions were placed on external travel of members of the Communist Party. See *Kent v. Dulles*, 357 U.S. 116 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); CHAFEE, *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787*, at 193 (1956). However, this right seems to be enjoying the status of a fundamental right today. See *Construction Industry Association of Sonoma County v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974); *Dunn v. Blumenstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Guest*, 383 U.S. 745 (1966).

117. LIEBER, *CIVIL LIBERTY AND SELF-GOVERNMENT* 90-91 (2d ed. 1859).

a free society to advance in its standards of what is deemed reasonable and right.¹¹⁸

The change in the fundamental rights appropriate for a society should be minimal; nevertheless, it is necessary. For example, when our Constitution and Bill of Rights were drafted, the framers either were not aware of the right of privacy or did not believe it was sufficiently important to be cloaked with constitutional protection. Indeed, the pioneers who pushed across the Appalachian Mountains, and into the West to settle the growing country had little use for a fundamental right protecting their privacy. If anything, they had too much privacy. Eighty years after the closing of the frontier, however, seventy-three per cent of the people live in urban areas,¹¹⁹ and all of the people are subject to easy surveillance by means of incredible electronic devices. It is now apparent to many people that the right of privacy should receive equal importance with the other fundamental rights protected by the constitution; some believe it is even more important than the others.¹²⁰ The ideal scale theory is flexible enough to receive the right of privacy into the bundle of rights that receive special protection. It is widely accepted today as a fundamental right; thus, it is included in the box of fundamental rights.

The right of the people to keep and bear arms as protected by the second amendment, however, was not included. Because of the nature of the modern weapons—even small arms—it is doubtful that a genuine consensus of opinion could be obtained in support

118. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949). An example of the changes in values and priorities which time has wrought is in the area of the environment. Many have asserted that the right to a clean environment may be a fundamental right by necessity. The courts have yet to fully accept this thesis. See YANNAcone, ENVIRONMENTAL RIGHTS AND REMEDIES § 3:3, at 8 (Supp. 1974); Beckman, *The Right to a Decent Environment Under the Ninth Amendment*, 46 L.A. BAR. BULL. 415 (1971).

119. See DEPT. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 173, at 17.

120. "They [the makers of the Constitution] conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 436, 478 (1928) (Brandeis dissenting). Cited with approval by Goldberg, J., in *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965). The right of privacy is currently undergoing examination in areas not necessarily considered by the founding fathers. Much confusion as to just what should be considered constitutionally protectable in this area has been evident. For the right to privacy as it relates to abortions, see *Roe v. Wade*, 410 U.S. 113 (1973); *Babitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970); relating to marriage see *Loving v. Virginia*, 388 U.S. 1 (1967); relating to procreation see *Skinner v. Oklahoma*, 316 U.S. 535 (1942); for an excellent article of the expanding right of privacy see *On Privacy! Constitutional Protection For Personal Liberty*, 48 N.Y.U.L. REV. 670 (Oct. 1973).

of this right today. The dangers to society of allowing the uncontrolled distribution of high powered rifles among the citizenry are apparent.

The Constitution itself provides for no method of discarding outdated rights from the category of fundamental rights short of amendment to the Constitution. The courts may modify this rigidity to a certain extent by giving a very restricted and limited interpretation to the constitutional provision in question. The Constitution does, however, expressly provide for the recognition of those rights which society considers fundamental but which were overlooked by the founding fathers or were not considered sufficiently important by the founding fathers at that time to include them within the constitutional enumeration. Thus, the ninth amendment states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

To the founding fathers, the rights guaranteed in the Bill of Rights constituted a partial list of those "essential elements of the law of nature," which constituted an absolute limitation on the powers of government. These rights were considered the prime requisites of free government and were the rights reserved to the people when the political compact, that brought the people out of the state of nature, was entered into.¹²¹ Neither the legislature nor any other agency of government could modify or evade these rights.¹²² In spite of this fact, there was considerable hesitancy to adopt a formal declaration listing these sacred rights. The reason for this hesitancy is found in the nature of the Constitution itself; the Constitution set forth a federal government of limited powers and only the powers expressly listed in the Constitution were to be legal. Individual rights were reserved to the people by the very manner in which federal powers were granted.¹²³ For this reason many of the founding fathers considered a separate declaration of fundamental rights unnecessary and perhaps even dangerous. It was feared that the enumeration of limitations and exceptions to

121. BURNS, JAMES MADISON—PHILOSOPHER OF THE CONSTITUTION 166 (1938) [hereinafter cited as BURNS]; LOCKE, TWO TREATIES OF GOVERNMENT 189 § 135 (Cook ed. 1947).

122. Burns, *supra* note 113.

123. Madison, Letter of Jefferson in 1788 in 1 MADISON, WRITINGS 424 (Cong. ed. 1865).

powers that were not even granted might provide a pretext for claiming more power than was granted.¹²⁴ It was also feared that

by enumerating particular exceptions to the grant of power, it would disparage *those rights which were not placed in that enumeration*; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.¹²⁵ (Emphasis supplied.)

The author of the Bill of Rights, James Madison, admitted that this was "one of the most plausible arguments" made against its adoption.¹²⁶ The ninth amendment was drafted for the purpose of guarding against this possibility.¹²⁷

The language of the ninth amendment, therefore, amounts to a realization that the drafters were unable to make a complete enumeration of all the fundamental rights that would ever need protection. In this connection it should be noted that Madison was deeply concerned that the institutions and laws enacted by one generation should not be rigidly imposed upon succeeding generations.¹²⁸ Thus, it seems quite clear that the ninth amendment was intended to take cognizance of the rights which were considered by the people to be just as fundamental as the enumerated rights but which were either overlooked when the original enumeration was made or were not considered important enough to be included at the time of this enumeration. The ninth amendment is an excellent vehicle for giving constitutional recognition to rights which the society considers fundamental and wishes to cloak with special protection but which are not included in the constitutional enumeration of fundamental rights. To this extent, the ninth amendment is a vehicle for implementing the flexible ideal scale theory. At the same time, the ideal scale theory, I believe, preserves the exact intent of the founding fathers in regard to the treatment of fundamental rights.

CONCLUSION

Thus, to meet the objections levied against the neo-scholastic natural law philosophy of Father William Kenealy and the neo-

124. BURNS, *supra* note 113; THE FEDERALIST No. 84, at 579 (Cook ed. 1761) (A. Hamilton). See also POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 65 (1957).

125. Madison, speech in the House of Representatives, June 8, 1789, in 1 ANNALS OF CONGRESS (GALES & SEATON ed. 1834). See reprint in PATTERSON, THE FORGOTTEN NINTH AMENDMENT 93, 115 (1955). See also speech by Mr. Jackson of Georgia. *Id.* at 119.

126. *Id.*

127. *Id.*

128. BURNS, *supra* note 113, at 69-70.

Kantian natural law philosophy of Rudolph Stammler, I have presented an alternative theory. It is based not on a universal and immutable principle but on an assumed premise. This assumed premise is what I call an ideal standard. I have then proposed an ideal standard which I think best satisfies the necessary requisites for an ideal standard. It is expressed in the following words: There does exist an ideal scale of values which presents the best guide for organizing a society at any one time. Implicit in this standard is the basic assumption that there is a perfect method of organizing man's social behavior. This I accept on faith. I think it is a reasonable assumption and one which can receive widespread acceptance because to deny it would be to destroy the motive necessary for continuing our efforts to seek a perfect method of organization. Once it is accepted, the ideal standard can be used to evaluate the positive law. Widespread acceptance, however, is crucial to its effectiveness.

A summary of the ways in which the ideal scale of values meets the requisites for a good ideal standard reveals nine advantages of this theory of law over the traditional positive theory of law.¹²⁹ First, the acceptance of an ideal scale of values prevents value anarchy, namely, it gives the lawmakers and leaders of the society a starting point for sorting and evaluating all the values that legitimately contend for acceptance in a complex society. Second, it encourages and stimulates constant improvement of the legal system by requiring a constant evaluation of both the laws and the basic values in an effort to achieve the ideal. Third, it challenges the society to try to discover the perfect method of organizing man's social behavior. In other words, it challenges man to seek the perfection of man. Fourth, it provides a much more noble and honorable purpose for law than to provide the sovereign with a tool to control the people according to his own desires. Fifth, it sufficiently focuses the attention of all lawmakers on the needs of man to discourage tyranny and arbitrary laws. Sixth, it sufficiently focuses the attention of all lawmakers to the needs of society to discourage anarchy or laws that undermine the minimal public order. Seventh, it provides a higher law above the positive law to which the lawmakers are responsible, thereby lessening the tempta-

129. I refer primarily to the positive law of John Austin, Hans Kelsen and their followers.

tion for dictatorial control. Eighth, it provides a healthy climate for the discussion of all values and even all possible ideal standards. And finally, it places faith in man's ability to organize his own volitions and to achieve a satisfactory destiny.

The ideal scale theory does provide a theory of law which can act as a restraint on the open ended provision of the ninth amendment in much the same way the founding fathers intended. At the same time this theory can still be acceptable in today's world of realism and scientific achievement. Instead of looking to natural rights which are self-evident, inalienable, immutable and universal, we look to rights which are implicit in the acceptance of certain basic values. On society's scale, the scale which by common consensus the people of society believe most closely approximates the ideal scale of values for that society, these rights are placed in a box reserved for fundamental rights. The box of fundamental rights is high on the scale of values and there is only a limited amount of space inside the box; only a limited number of rights are cloaked with special protection. The scale is sufficiently flexible, however, to allow that minimal change which is necessary to the basic standards of any society. The ninth amendment acts as an excellent vehicle to implement this theory by allowing the addition of certain rights to the bundle of fundamental rights as they receive sufficient acceptance by the community to merit such additional recognition. At the same time, the legislative history of the Bill of Rights and the ninth amendment shows that such an interpretation of the ninth amendment is consistent with the original intention of the founding fathers in regard to both the ninth amendment and the fundamental rights enumerated in the Constitution in general.

Roscoe Pound once wrote:

The declaration of natural rights in the Ninth Amendment is not something to be relegated to a lumber room of outworn juristic or political ideas. The task is rather to make the natural law and natural rights as believed in by the founders of our polity effective political and legal instruments in the society of today.¹³⁰

I believe the ideal scale theory would accomplish this task.

130. See Roscoe Pound's introduction in PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* iii (1955). In this book, Patterson accepts the natural law of the founding fathers without discussion.