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TOWARD A CRITICAL EXAMINATION OF THIRD WORLD LEGAL ISSUES

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Western liberal thought[1] has consistently failed to provide a coherent theory of rights for the Third World in legal discourse.[2] If to name a thing is to be its master, how revealing that Western global newspeak has labeled (and thereby implicitly prioritized) the complex matrix of social, economic and political crises confronting minority groups, indigenous cultures and underindustrialized nations as "third world problems." The label's cavalier nebulousness serves to legitimate inaction while denying the immediacy of the need.[3]

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[1]For a discussion on liberalism and liberal thought, see generally, G. Frug, "The City As a Legal Concept," 93 HARV. L. REV. 1057 (1980) (hereinafter cited as Frug).

[2]On liberalism's failure to articulate a coherent theory of rights against the state, see R. UNGER, KNOWLEDGE AND POLITICS (1975).

[3]For a discussion on naming and symbolizing, see R. BARTHES THE EIFFEL TOWER AND OTHER MYTHOLOGIES (1979) (hereinafter cited as BARTHES). On page 55, Mr. Barthes writes:

Within recent decades, this self-serving stance of Western liberal thought has been challenged by the non-occidental nations and cultures of the world. This challenge has led to a critical re-examination of the structure and outcomes of liberal legal and political theory. But the attack has been only partial. It has been constrained by the unavailability of effective and suitable forums, many of which were controlled by the members of the "First and Second Worlds.[4] What is needed is a total reconstruction of liberal ideology's approach to the problems of the Third World. Such an approach would allow third world individuals, groups and nations to meaningfully assert their own vision and theory of the facts and values which should inform and shape the domestic and multinational legal processes by which the rights of the fortunate wealthy and the struggling poor of this globe are justly determined.

(footnote 3 continued)

> [G]ood sense consists in establishing a simple equivalence between what is seen and what is. When an appearance is decidedly too peculiar, this same common sense still has a means of reducing it without relinquishing the mechanism of equalities. This means is symbolism. Each time that something seen appears unmotivated, good sense calls in the heavy cavalry of the symbol, admitted to the petit-bourgeois heaven, insofar as, despite its abstract tendency, it unites the visible and the invisible in the form of a quantitative equality (this is worth that); calculation is saved, and the world still abides.

And see P. Gable and J. Feinman, "Contract Law As Ideology," (an as yet unpublished anthology of critical essays on law, D. Kairys, ed. 1982), on denial and legitimation.

[4]The "First World" refers to the industrialized nations of the West and Japan. The "Second World" refers to the Soviet Union and other countries within the Communist bloc. Again, Barthes' comment (see BARTHES, supra note 3) is certainly appropos, even here.

This article is an attempt to begin constructing such an approach. It inquires into the content and interconnection of conflicting rhetorical modes found in the traditional liberal stance on solutions to (or proposals for) social, economic, and political problems confronted by third world peoples and cultures. It examines the underlying ideological, political and philosophical presuppositions within liberal discourse on a few selected topics involving the rights of third world groups. This examination opens up to us the possibilities of constructing a broader conceptual framework, one capable of identifying legal and political solutions which legitimate oppression and alienation and one which would not deny the unjust relations existing presently between third world peoples and nations and the industrialized nations. The methodology used to reveal the content and interconnection found within the traditional liberal stance is that developed by Professor Duncan Kennedy of Harvard Law School. Professor Kennedy, in two law review articles,[5] has attempted to construct a critical legal framework for addressing the content of ideas which make up modern law. Kennedy argues that all legal issues can be reduced to a "single dilemma of the degree of collective as opposed to individual self-determination that is appropri-

[5]See D. Kennedy, "Form and Substance In Private Law Adjudication," 89 HARV. L. REV. 1685 (1976) (hereinafter cited as "Form and Substance"), and "The Structure of Blackstone's Commentaries," 28 BUFF. L. REV. 205 (1979) (hereinafter cited as "The Structure of Blackstone's Commentaries").

ate."[6]

Professor Kennedy's model enables us to examine the deeper levels of contradiction, which he demonstrates are everpresent in modern legal thought. Inevitably, "we are divided among . . . and within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future"[7] whenever we critically examine any complex legal issue. Critical legal theory has been adopted by other writers[8] for varying problems.[9] As of yet no writer has attempted to apply the model to third world legal issues. This paper will attempt to apply the critical model advanced by Kennedy and determine its pedagogical value for grappling with the complex economic, political and social problems confronted by the Third World.

The paper will not single out for any overintensive examination one single issue confronting the Third World in this country or abroad.[10] Rather, its purpose is to present

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[6]"The Structure of Blackstone's Commentaries," supra note 5, at 213.

[7]"Form and Substance," supra note 5, at 1685.

[8]See, e.g., Frug, supra note 1, and M. HORWITZ, THE TRANSFORMATION of AMERICAN LAW: 1780-1860 (1977) [hereinafter cited as HORWITZ].

[9]Frug reviewed the concept of the American city within the liberalist framework. Horwitz analyzed certain developments in American property law utilizing the critical framework.

[10]For a discussion on the Third World, see generally, W. Langley, "The Third World: Towards A Definition," 2 B.C. THIRD WORLD L. J. 1 (1981), the Fall '81 Registration issue of the Harvard University Independent (the Director of the University's Third World Center said: "The whole notion of the 'third world' is vague. In some people's minds it

a general critical framework for analyzing in a broad manner many seemingly diffuse and unrelated legal issues from within the liberal stance. Inevitably, such an endeavor must be incomplete and tentative. Even so, the need for exploration of new forums and modes of understanding for grappling with the challenges posed by the Third World both domestically and internationally, is immediate. Caution, and our desire for the security of the pristine vision must now yield to the immediacy of a billion exhortations to action.

The discussion proceeds as follows. Section I will draw from Professor Kennedy's two law review articles, "Form

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(footnote 10 continued)
often boils down to the powerless colored against the powerful whites.") and the following definition:

> The concept "Third World" includes a geo-political dimension: those nations of the world, especially in Africa and Asia and Latin America, who share, in many cases, a common history as colonial depedendents of the major European powers.
>
> It also includes a psychological dimension: oppressed people generally, who have come to identify with the struggles of the former colonized nations and see the anti-colonial struggles as organically linked with their own attempts to obtain improvements in their conditions.
>
> Finally, the concept "Third World" includes a "Programmatic" dimension: those people in the above two groups who identify with the general concepts of economic and social progress, that this Journal has characterized here as the New International Economic Order and related concepts.

Comment, Toward A Definition of the Term Third World, 1 B.C. Third World L. J. 1, 13-35 (1981).

For examples of third world legal issues, see Comments, "Indian's Regulation of Direct Foreign Investment: Article 29 of the 1973 Foreign Exchange Regulation Act;" "The Federal Communications Commission's Approach to Minority Ownership of Broadcast Facilities;" and "An Introduction to Tax Incentive To Investment In The People's Republic of China," 2 B.C. Third World L.J. at 65-154.

and Substance" and "The Structure of Blackstone's Commentaries," in order to elaborate on his liberalist construct. Sections II, III, and IV will utilize the Kennedy liberalist construct in order to frame the central issues in a few representative on-going controversies within third world law.

Section II focuses on the law of the sea controversy and the questions over production limitation in deep-sea mining. Section III considers the issue of resource control and development by indigenous Indian nations in the Western hemisphere in general, and the United States in particular. Section IV reviews the controversy within landlord-tenant law in America over the use of the implied warranty of habitability as a means of guaranteeing safe and decent apartment rentals to America's urban minorities. Section V is a conclusion. It attempts to begin the construction of a conceptual framework for analyzing third world legal issues.

Section I

The Kennedy Liberalist Construct

In "Form and Substance" and "The Structure of Blackstone's Commentaries," Professor Kennedy posits a jurisprudential "angle of vision"[11] which attempts to bring some

[11]Professor Kennedy would prefer that the ideas emerging from "Form and Substance" and "The Structure of Blackstone's Commentaries" not be viewed as a cohesive jurisprudential theory. Instead, he prefers to view these ideas as "an opened-textured angle of vision" for understanding various legal results. Telephone Interview with Professor Duncan Kennedy, Harvard Law School, October 17, 1981.

measure of order to the chaotic mass of "policies" lawyers use in justifying particular legal results. In "Form and Substance," he suggests that there are two opposed modes for dealing with "questions of form" in which legal solutions to substantive problems are cast: equitable standards or general rules. Equitable standards allow a court to respond to a private law dispute in a flexible manner. Court rulings which are based on standards are usually ad hoc in nature and are of relatively little precedential value.[12] General rules are more rigid in definition and in application. They tend to be clearly defined and highly administrable; however, they do not allow the court the same flexibility as equitable standards.[13]

There are at least three dimensions of both general rules and equitable standards. The three dimensions of general rules are as follows: "formal realizability"; "generality"; and "formality".[14] "Formal realizability" refers to the degree to which a legal directive has the quality of ruleness. A formally realizable rule leads to greater certainty (i.e., more predictable results) and places a restraint on the judge's arbitrariness.[15] The generality aspect of rules allows the framer of the legal directive to kill many birds with one stone. This minimizes

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[12]"Form and Substance," supra note 5, at 1685.

[13]Id.

[14]Id. at 1687-94.

[15]Id. at 1687-89.

judicial discretion in choosing between conflicting lines of authority.[16]

The formality aspect of rules goes to the question of the role of the judiciary in society. Professor Kennedy argues:

> There is a third dimension for the description of legal directives that is as important as formal realizability and generality. In this dimension, we place at one pole legal institutions whose purpose is to prevent people from engaging in particular activities because those activities are morally wrong or otherwise flatly undesirable. Most of the law of crimes fits this pattern: Laws against murder aim to eliminate murder. At the other pole are legal institutions whose stated object is to facilitate private ordering. Legal institutions at this pole, sometimes called formalities, are supposed to help parties in communicating clearly to the judge which of various alternatives they want him to follow in dealing with disputes that may arise later in their relationship. The law of conveyancing is the paradigm here.[17]

The three dimensions of equitable standards are as follows: "principles or policies"; "particularity"; and "regulation" (or rules designed to deter wrongful behavior). Professor Kennedy draws from contract law to give us examples of principles or policies: e.g., good faith, due care, fairness, unconscionability and unjust enrichment.[18] The particularity aspect of standards allows the court to overcome the overinclusiveness and underinclusivenss of general rules. However, this aspect undermines the formal realizability goal by increasing the number of jurisdictional

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[16] Id. at 1689-90.

[17] Id. at 1691 (During the discussion on formality Kennedy refers to Fuller, "Consideration and Form," 41 COLUM. L. REV. 799 (1941).)

[18] Id., at 1688.

questions, i.e., what is the scope of a particular rule?[19] Finally, the regulatory aspect of standards attaches sanctions to courses of conduct in order to discourage them.[20]

In "Form and Substance," Professor Kennedy also develops the dichotomy of altruism and individualism, suggesting that these two rhetorical modes are useful for dealing with substantive issues in private law disputes. Individualism refers to the pursuit of individual goals. Professor Kennedy writes:

> The essence of individualism is the making of a sharp distinction between one's interests and those of others, combined with the belief that a preference for one's own interests is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly self-interested. The form of conduct associated with individualism is self-reliance. This means an insistence on defining and achieving objectives without help from others (i.e. without being dependent on them or asking sacrifices of them). It means accepting that they will neither share their gains nor one's own losses. And it means a firm conviction that I am entitled to enjoy the benefits of my efforts without an obligation to share or sacrifice them to the interests of others.[21]

Professor Kennedy argues that the certainty of individualism is embodied in the calculations of Holmes' "bad man," who is concerned with the law only as a means or an obstacle to the accomplishment of his antisocial ends. He explains, "The essence of individualism certainty through rules is that because it identifies for the bad man the

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[19] Id. at 1689-90.

[20] Id. at 1690-94.

[21] Id. at 1713. (In his discussion on liberalism Professor Kennedy refers to nineteenth century treatments of self reliance: R. EMERSON "Self-Reliance," in ESSAYS, FIRST SERIES 37 (1847) and H. SPENCER, JUSTICE (1981), and Smith v. Brady, 17 N.Y. 173 (1858).)

precise limits of toleration for his badness, it authorizes him to hew as close as he can to those limits."[22]

Altruism refers to the pursuit of broad societal goals. Professor Kennedy writes:

> [T]he essence of altruism is the belief that one ought not to indulge a sharp preference for one's own interest over those of others. Altruism enjoins us to make sacrifices, to share, and to be merciful. It has roots in culture, in religion, ethics and art, that are as deep as those of individualism. (Love thy neighbor as thyself.)
>
> The simplest of the practices that represent altruism are sharing and sacrifice. Sharing is a static concept, suggesting an existing distribution of goods which the sharers rearrange. It means giving up to another gains or wealth that one has produced oneself or that have come to one through some good fortune. It is motivated by a sense of duty or by a sense that the other's satisfaction is a reward at least comparable to the satisfaction one might have derived from consuming the thing oneself.[23]

If individualism is embodied in the "bad man" concept, then altruism is embodied in the "good man" notion: "the law is certain when not the bad but the <u>good</u> man is secure in the expectation that if he goes forward in good faith, with due regard for his neighbor's interest as well as his own, and a suspicious eye to the temptations of greed, then the law will not turn up as a dagger in his back."[24]

Kennedy asserts that altruism leads to a willingness to resort to standards in administration of justice while individualism harmonizes with rigid rules rigidly defined. He explains:

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[22] <u>Id.</u> at 1773.

[23] <u>Id.</u> at 1717.

[24] <u>Id.</u> at 1773-74.

> There is a connection, in the rhetoric of private law, between individualism and a preference for rules, and between altruism and a preference for standards. The substantive and formal dimensions are related because the same moral, economic and political arguments appear in each. For most of the areas of conflict, the two sides emerge as biases or tendencies whose proponents have much in common and a large basis for adjustment through the analysis of the particularities of fact situations. But there is a deeper level, at which the individualist/formalist and altruist/ informalist operate from flatly contradictory visions of the universe. Fortunately or unfortunately, the contradiction is as much internal as external, since there are few participants in modern legal culture who avoid the sense of believing in both sides simultaneously.[25]

He views the conflict of individualism as having three distinct phases, including, (1) the antebellum period (1800-1870) in which the legal conflict was often in terms of "morality vs. policy;" (2) classical individualism (1850-1940) in which "free will" was all important and (3) modern legal thought (1900 to the present) in which courts are increasingly aware of a "sense of contradiction."[26] During

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[25] Id. at 1776.

[26] For a more thorough treatment of the three phases of the conflict between individualism and altruism, one should read "Form and Substance," supra note 5, at 1725-37. For the purpose of this article, the following summary should suffice:

> The Antebellum Period (1800-1871) Morality vs. Policy
> [I]ndividualism was at first not an ethic in conflict with the ethic of altruism, but a set of pragmatic arguments perceived as in conflict with ethics in general. Antebellum judges and commentators referred to these pragmatic arguments by the generic name of "policy" and contrasted it to "morality."
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> * * *
>
> Classical Individualism (1850-1940): Free Will
> [C]lassical individualism rejected the idea that particular rules represented an ad hoc compromise between policy and altruist morality. Rather, the rules represented a fully principled and consistent solution both to the ethical and to the practical dilemmas of legal order.
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> * * *

this modern legal period, courts not only have rejected classical individualism but also have rejected the notion that morality is unequivocally altruist and policy unequivocally individualist. He suggests that the modern phase of conflict occurs over three main issues which he calls, somewhat arbitrarily, community vs. autonomy, regulation vs. facilitation, and paternalism vs. self-determination.[27]

(footnote 26 continued)

> Modern Legal Thought (1900 to the present): The Sense of Contradiction.
>
> [I]n private law, modern legal thought begins with the rejection of Classical individualism. Its premise is that Classical theory failed to show either that the genius of our institutions is individualist or that it is possible to deduce concrete legal rules from concepts like liberty, property or bodily security. For this reason, morality and policy reappear in modern discussions, in place of first principles and logic. The problem is that morality is no longer unequivocally altruist -- there is a conflict of moralities. Nor is policy any longer unequivocally individualist -- there are arguments for collectivism, regulation, the welfare state, along with the theory of economic development through laissez-faire. This conflict of morality with morality and of policy with policy pervades every important issue of private law.
>
> In private law, this modern phase of conflict occurs over three main issues, which I will call, somewhat arbitrarily, community vs. autonomy, regulation vs. facilitation, and paternalism vs. self-determination.

[27] Professor Kennedy uses contract law doctrines to describe what he means by the three main issues in the modern phase of the conflict. The following delineation appears in "Form and Substance", supra note 5, at 1733-37:

> (a) Community vs. Autonomy -- The issue here is the extent to which one person should have to share or make sacrifices in the interest of another in the absence of agreement or other manifestation of intention.
>
> * * *
>
> Given the decision to regard contract and tort law as compensation rather than punitive, the altruist and individualist have disagreements at three levels:
>
> scope of obligation: Given a particular relationship or sitaution, is there any duty at all to look out for the interests of the other?

The moral, economic and political conflict and the contradictory visions of the universe in "Form and Substance" are explored further in "The Structure of Blackstone's Commentaries." Contending that the conflict is an aspect of a fundamental contradiction within modern legal thought,

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(footnote 27 continued)

intensity of obligation: Given duty, how great is the duty on the scale from mere abstention from violence to the highest fiduciary obligation?

extent of liability for consequences: Given breach of duty, how far down the chain of causation should we extend liability?

The individualist position is the restriction of obligations of sharing and sacrifice. This means being opposed to the broadening, intensifying and extension of liability and opposed to the liberalization of excuses once duty is established. . . The altruist position is the expansion of the network of liability and also the liberalization of excuses.

(b) Regulation vs. Facilitation -- The issue here is the use of bargaining power as the determinant of the distribution of desired objects and the allocation of resources to different uses. . .

There are many approaches to the control of bargaining power, including:

Incapacitation of classes of people deemed particularly likely to lack adequate bargaining power (children, lunatics, etc.) with the effect that they can void their contracts if they want to.

Outlawing particular tactics, such as the use of physical violence, duress of goods, threats to inflict malicious harm, fraudulent statements, "bargaining in bad faith," etc.

Control of the competitive structure of markets, either by atomizing concentrated economic power or by creating countervailing centers strong enough to bargain equally.

Direct policing of the substantive fairness of bargains, whether by direct price fixing or quality specification, by setting maxima or minima, or by announcing a standard such as "reasonableness" or "unconscionability."

The individualist position is that judges ought not to conceive of themselves as regulators of the use of economic power. This means conceiving of the legal system as a limited

Kennedy argues:

> The fundamental contradiction -- that relations with others are both necessary to and incompatible with our freedom -- is not only intense. It is also pervasive. First, it is an aspect of our experience of every form of social life. It

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(footnote 27 continued)

set of existing restraints imposed on the state of nature, and then refusing to extend those restraints to new situations. The altruist position is that existing restraints represent an attempt to achieve distributive justice which the judges should forward rather than impede.

(c) Paternalism vs. Self-Determination -- This issue is distinct from that of regulation vs. facilitation because it arises in situations not of conflict but of error. A party to an agreement or, one who has unilaterally incurred a legal obligation seeks to void it on the grounds that they acted against their "real" interests. . . .

No issue of bargaining power is necessarily involved in such sitautions. For example:

Liquidated damage clauses freely agreed to by both parties are voided on grounds of unreasonableness.

* * *

Merger clauses that would waive liability for fraudulent misrepresentations are struck down or reinterpreted.

* * *

Persons lacking in capacity are allowed to void contracts that are uncoerced and substantively fair.

Consideration doctrine sometimes renders promises unenforceable because there was no "real" exchange, as in the cases of the promissory note of a widow given in exchange for a discharge of her husband's worthless debts, or that of a contract for "conjuring."

Fraud and unconscionability doctrine protect against "unfair surprise" in situations where a party is a victim of his own foolishness rather than the exercise of power.

The individualist position is that the parties themselves are the best and only legitimate judges of their own interests, subject to a limited number of exceptions, such as incapacity. People should be allowed to behave foolishly, do themselves harm, and otherwise refuse to accept any other person's view of what is best for them. . . .The altruist response is that the paternalist rules are not exceptions, but the representatives of a developed counterpolicy of forcing people to look to the "real" itnerests of those they deal with. This policy is as legitimate as that of self-determination and should be extended as circumstances permit or require.

> arises in the relations of lovers, spouses, parents and children, neighbors, employers and employee, trading partners, colleagues, and so forth. Second, within law. . . it is not only an aspect, but the very essence of every problem. There simply are no legal issues that do not involve directly the problem of the legitimate content of collective coercion, since there is by definition no legal problem until someone has at least imagined that (s)he might involve the force of the state. And this is not just a matter of definition. The more sophisticated a person's thinking, regardless of her political stance, the more likely she is to believe that all issues within a doctrinal field reduce to a single dilemma of the degree of collective as opposed to individual self-determination that is appropriate.[28]

It is here that the term "liberalism" is used to describe the mode of mediation or denial which allows one living in such a mode to not experience or not acknowledge the contradiction. He explains "liberalism":

> [F]or the moment, I hope it is enough to define it very roughly in terms of a splitting of the universe of others into radically opposed imaginary entities. One of these is "civil society," a realm of free interaction between private individuals who are unthreatening to one another because the other entity, "the state," forces them to respect one another's rights. In civil society, others are available for good fusion as private individual respecters of rights; through the state, they are available for good fusion as participants in the collective experience of enforcing rights. A person who lives the liberal mode can effectively deny the fundamental contradiction.[29]

Kennedy readily admits that his notion of "liberalism" is rather difficult to grasp. In fact, he gives a series of definitions or descriptions of "liberalism," at various levels of abstraction, as the need arises in his discussion in "The Structure of Blackstone's Commentaries."

Another critical legal theorist, writing in the same vein as Kennedy, defines "liberalism" in this way:

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[28]"The Structure of Blackstone's Commentaries," supra note 5, at 213 (emphasis added).

[29]Id. at 217.

> Liberalism is a term of many definitions, but it is sufficient here to say that liberalism is the dominant ideology in the modern Western world, an ideology that pervades our views of human nature and of social life. Liberalism, as I use the term, should not be distinguished from conservatism, as it is in modern American political jargon, but should be interpreted to include, and be broader than, both these strands of American political thought . . . . it describes the way we understand ourselves and society as a whole. Liberalism is our world view, one that emerged from such theorists as Hobbes and Locke, was developed by both Bentham and Rousseau, and was forcefully expressed in the mid-nineteenth century in the work of John Stuart Mill. . .
>
> For some, liberalism is characterized by its emphasis on the belief that the passions can be subordinated to reason, that the world can be rationalized both in terms of thought and by organization of social life, and that the way to do so is by a scientific dissection of all aspects of life . . .[30]

In summation, critical legal theory argues that liberalism is a view based on seeing the world as a series of complex dualities. It is based on the "fundamental proposition that the world is divided into spheres of reason and of desire, of fact and of subjective need for communal relationships, of the free interaction of civil society and of the demands of the state, of the controlling importance of empirical fact and the controlling importance of ideas.[31] A person who lives in the liberal mode can effectively deny the fundamental contradiction[32] that relations with others

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[30]Frug, supra note 1, at 1074-75.

[31]Id. at 1075.

[32]Professor Kennedy discusses the "fundamental contradiction" at greater detail in "The Structure of Blackstone's Commentaries," supra note 5, at 211-12.

> [M]ost participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it.

are both necessary to and incompatible with our freedom.

This fundamental contradiction is played out in our legal system because participants in the legal system (e.g. judges, lawyers, public officials, legislators, etc.) are able to mediate or deny the contradiction through the recognition of and use of alternative rhetorical modes for dealing with the ultimate question of the degree of collective versus individualistic self-determination that is appropriate in the resolution of a legal dispute. If altruism and individualism are viewed as end-points along a spectrum, then varying degrees of collective or individual self-determination are appropriate in almost any legal situation. "Community," "regulation," and "paternalism" are abstractions approaching the altruism end-point. "Autonomy," "regulation," and "self-determination" are abstractions

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(footnote 32 continued)

> Others (families, friends, bureaucrats, cultural figures, the state) are necessary if we are to become persons at all -- they provide us with the stuff of our selves and protect us in crucial ways against destruction. Even when we seem to ourselves to be most alone, others are with us, incorporated in us through processes of language, cognition, and feelings that are, simply as a matter of biology, collective aspects of our individuality.
>
> Moreover, we are not always alone. We sometimes experience fusion with others, in groups of two or even two million, and it is a good rather than a bad experience.
>
> But at the same time that it forms and protects us, the universe of others threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. . . Through our existence as members of collectives, we impose on others and have imposed on us hierarchical structures of power, welfare, and access to enlightenment that are illegitimate, whether based on birth into a particular social class or on the accident of genetic endowment.

approaching the individualism end-point.

There is a connection between individualism and a preference for rules, and between altruism and a preference for standards. The three dimensions of equitable standards -- "principles/policies," "particularity," and "regulation" are related to the "community," "regulation," and "paternalism" aspects of altruism. Simultaneously, the three dimensions of rules -- "formal realizability," "generality," and "formality" are related to the "autonomy," "facilitation," and "self-determination" aspects of individualism. Professor Kennedy attributes the interrelatedness of the substantive and formal dichotomies to the fact that the same moral, economic and political arguments appear in each. While he views the individualism/rules dichotomies and the altruism/standards dichotomies as two sides emerging as biases or tendencies, which operate from contradictory visions of the universe, he also recognizes that many participants in the legal culture believe in both sides simultaneously. The individualist wants to stop short of egotism while the altruist wants to stop short of saintliness.

Thus, the (above) opposed rhetorical modes jurists use in disposing of a legal dispute reflect a deeper level of contradiction. We are divided, among ourselves,, and, also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future.

The Kennedy liberalist construct has been praised by

some of Professor Kennedy's contemporaries[33] and criticized by others.[34] It is beyond the scope of this article to critique the construct in an in-depth fashion. For the purposes of this article, this angle of vision should be utilized for its pedagogical value. It is the central premise of this paper that third world legal issues squarely confront the contradiction in modern Western legal thought.

The Chart on the next page is a summary of the Kennedy liberalist construct or, what Professor Kennedy prefers to call, "an open-textured angle of vision." The substantive dichotomy within the construct has been modified to reflect these authors belief that the altruism-individualism continuum is itself an aspect of a larger spectrum in which totalitarianism and anarchism are the extremes of altruism and individualism respectively. It is the purpose of the Chart to serve as a quick reference for certain terms that will appear in Sections II through V of the article.

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[33] See Frug, supra note 1. See also HORWITZ, supra note 8.

[34] See generally, C. FRIED, CONTRACT AS PROMISE (1981) and A. KRONMAN and R. POSNER, THE ECONOMICS OF CONTRACT LAW (1979).

THE KENNEDY LIBERALIST CONSTRUCT

FORM:

EQUITABLE STANDARDS producing ad hoc decisions with relatively little precedential value

Clearly defined, highly administrable GENERAL RULES

DIMENSIONS OF FORM:

1.	Principles/Policies	1.	Formal Realizability
2.	Particularity	2.	Generality
3.	Regulation or Rules Designed to Deter Wrongful Behavior	3.	Formality

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SUBSTANCE:

ALTRUISM leads to a willingness to resort to standards in administration

INDIVIDUALISM harmonizes with rigid rules rigidly defined.

The SUBSTANTIVE SPECTRUM:

Totalitarianism----Saintliness---ALTRUISM-------INDIVIDUALISM------Egoism-----Anarchism

DIMENSIONS OF FORM:

1.	Community	1.	Autonomy
2.	Regulation	2.	Facilitation
3.	Paternalism	3.	Self-Determination

The LIBERALISM COMPONENT:

The fundamental contradiction is that most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. . . . At the same time that it forms and protects us, the universe of others (i.e., families, friends, bureaucrats, cultural figures, the state, etc.) threaten us with annihilation and urges upon us fusion (with others) that are quite plainly bad rather than good.

Thus, the (above) opposed rhetorical modes jurists use reflect a deeper level of contradiction. We are divided, among ourselves, and, also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future.

See generally, D. Kennedy, "Form and Substance In Private Law Adjudication," 89 HARV. L. REV. 1985 (1976), and "The Structure of Blackstone's Commentaries," 28 BUFF. L. REV. 205 (1979).

Section II

Law of the Sea

In a 1967 speech to the United Nations, the Maltese Ambassador, Arvid Pardo, called for the creation of an international authority to oversee the exploitation of deep-sea resources.[35] The Ambassador claimed these resources[36] as the common heritage of mankind, to be used primarily for the benefit of the poorer nations of the world.

To develop the appropriate machinery for the regulation of the seas, the Third United Nations Conference on the Law of the Sea was convened.[37] The Conference has been successful in reaching agreement on such varied issues as marine pollution, conservation, fisheries and freedom of navigation through straits.[38] However, one remaining point of contention is the question of production limitations from deep seabed mining. Such a limitation is of particular concern

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[35]Statement by Ambassador Arvid Pardo of Malta, November 1, 1967, 22 GAOR, A/C.1/PV. 1515 & 1516 (1967).

[36]Minerals expected to be produced from sea-bed mining are cobalt, manganese, nickel, and copper.

[37]The United Nations General Assembly created an Ad Hoc Committee to study the peaceful uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction. (See G.A. Re. 2340, 22 GAOR Supp. 16 A/6/76, at 14 (1968). This Ad Hoc Committee was replaced the following year by the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction (G.A. Re. 2467 A, 23 GAOR Supp. 18 A/7218, at 15 (1969). This Committee later became the preparatory body for the Third World Nations Conference on the Law of the Sea. The Conference began in 1973 and, after nine sessions, has produced a Draft Convention on the Law of the Sea. See U.N. Doc. A Conf. 62/WP. 10/Rev. 3 (1980).

[38]R. ECKERT, THE ENCLOSURE OF OCEAN RESOURCES, 214, (1979)

to developing countries, typically more dependent on the minerals concerned for export earnings and government revenue than developed countries.

Countries with the requisite mining technology argue that under current international law, the seabeds are unclaimed territory. The occupation of unclaimed territory by a State is a method of acquiring such territory and is recognized under current international law.[39] This theory is analogous to the ancient Roman concept of res nullius, meaning a thing which has no owner, the property of nobody.[40] Res nullius was originally acquired by occupancy, that is by taking possession of it.[41]

Those nations lacking this technology argue that seabed minerals are not res nullius but res communes or, "those things which are used and enjoyed by everyone, even in sin-

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[39] See generally Charney "United States Interests in a Convention on the Law of the Sea: The Case for Continued Efforts," 11 VAND. J. TRANSNAT'L L. 39, 41 (1978).

[40] BLACK'S LAW DICTIONARY 1470 (4th ed. 1968) [hereinafter cited as BLACK'S].

[41] To acquire ownership by occupancy, four conditions need to be met:

1. The thing must be a res nullius, a thing which never had an owner or has been abandoned;

2. It must be a thing which is capable of ownership, that is, res in commercio;

3. It must be brought into the actual possession or control of the aspiring owner; and

4. The person must acquire it with the intention of assuming ownership of it, that is, possession must be juridicial.

See STEPHENSON, A HISTORY OF ROMAN LAW 385 (1912).

gle parts, but can never be exclusively acquired as a whole,"[42] such as air or light.[43]

Res communes has also been defined as those things which may be reduced to monetary terms, but are incapable of appropriation to individuals."[44] Under this definition, sea-bed minerals could not be considered as res communes. Indeed, it is precisely because these minerals may easily be converted into dollars and appropriated by individuals, that the contoversy arises.

When the Kennedy liberalist construct is applied to the legal status of the mineral wealth of the seabed beyond national jurisdiction, one notes that the res nullius (a thing with no owner) concept is individualistic in its substantive nature and rule-oriented in form. On the other hand, res communes (a thing owned by all) is altruistic in nature and standard-oriented in form.

Res nullius exhibits a bias toward the value of individualism. The concept implicitly makes a distinction between the interests of those countries which have the technological capability to discover and exploit the sea-bed minerals and those countries which do not. Assuming arguendo that these minerals are the property of nobody, then those industrialized nations which have the financial and technological means to explore ways of tapping the deep-sea wealth are at

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[42] BLACK'S, supra note 40, at 1469.

[43] Id.

[44] BUCKLAND, THE MAIN INSTITUTION OF ROMAN PRIVATE LAW 91 (1931).

an advantage. Res nullius encourages "autonomy,"[45] "facilitation"[46] and "self-determination"[47] on the part of industrialized nations in the mining and exploitation of the deep sea minerals.

Res nullius also has a rule-oriented content because it identifies for the mining interests the precise limits of toleration for their desires: those who are capable of discovering and exploiting the unclaimed sea riches may do so. The concept of res nullius leads to a more "clearly defined administrable rule" than res communes which ultimately places a great deal of discretion in an international authority to establish regulations for seabed mining.

When one considers the "formal realizability," "generality," and "formality" dimensions of general rules,[48] a res nullius rule of law does all the things that Professor Kennedy argues that rules attempt to do. It leads to more predictable results should a dispute over mining or exploitation arise. It places a restraint on the arbitrariness of the international tribunal (e.g. United Nations or the pro-

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[45]"Form and Substance," supra note 5, at 1733-37. In this context, res nullius supports and maintains the autonomy of the Western and Soviet businessmen interested in exploiting the deep sea-bed. Such businessmen are very skeptical of a seabed authority which would continually substitute its judgment for the judgment of businessmen.

[46]Id. Res nullius facilitates the many of the financial goals and expectations of the Western and Soviet business interests.

[47]Id. Res nullius supports the self-determination of the Western and Soviet mining interests. In other words, the mining interests themselves, as opposed to an international regulatory regime, are the best and legitimate judges of their own interests.

[48]Id. at 1687-94.

posed Seabed Authority) deciding the dispute. And finally it allows the framer of the legal directive to establish precedents that are useful when the international tribunal decides seabed mining and exploitation disputes in the future. The international tribunal is likely to apply the rigid rule of law to the fact situation when two or more litigants claim a right, title or interest in and to the same seabed minerals. And property rules regarding intent to control and the actual exercise of dominion and control over the res (in this case the seabed mineral) would most likely apply.

The res communes exhibits an altruistic vision in its substantive nature; it is based on the belief that there should not be a sharp distinction between the interests of those countries with the financial and technological means to exploit the sea-bed minerals and those countries which do not. The res communes concept suggests that the sea-bed minerals are to be used and enjoyed by all nations. Like the broad notion of altruism, it "suggests an existing distribution of good which the sharers rearrange."[49] Under this notion the industrialized nations of the world are expected to share the deep sea riches and thereby sacrifice some of the profits which would be made in the discovery and exploitation of these resources. Res communes would encour-

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[49] Id. at 1717.

age the values of "community"[50] "regulation"[51] and "paternalism"[52] on the part of the total world community with respect to the mining and exploitation of the deep sea minerals.

Res communes is "standard-oriented" in form because it tends to lead to equitable results which are ad hoc in nature but of little precedential value. Any international tribunal deciding rights under such a standard would be given a great deal of discretion in deciding a dispute and in fashioning legal directives that will inform the next set of disputes. If the tribunal were confronted with a title dispute, it is more likely to approach the questions regarding intent to control and exercise of dominion and control in a manner which attempts to balance equities on both sides of the adversarial line rather than applying a rigid rule to a narrow fact situation. Such a body would essentially be allocating or reallocating the deep sea resources. Thus, it is more likely to promulgate rules regarding what is a "reasonable" use of the deep-sea minerals in a given fact situation.

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[50] Id. at 1733-37. Res communes supports the community notion of sharing and sacrificing, namely, that one should have to share or make sacrifices in the interest of another in the absence of an agreement. The rationale is the community at large benefits from mutual sharing and sacrificing.

[51] Id. Res communes advocates the use of regulatory forces to achieve distributive justice which the international treaty-making body should forward rather than impede.

[52] Id. Res communes is paternalistic, as it suggests that the Western and Soviet sea-bed mining investors are not the best and only legitimate judges of their own interests.

Under current international practice, the minerals in the sea-bed have been considered as res nullius. Because the res nullius concept comes under the traditional freedom of the seas doctrine within international law, the developed nations have had certain advantages during the pendancy of treaty negotiations. Senator Daniel Moynihan, former U.S. Ambassador to the United Nations, asserted:

> [D]o the developing nations understand that by entering into the (Law of the Sea) negotiations, and remaining faithful to them, the United States and the western nations generally have agreed to negotiate for, and in the bargaining sense, to pay for rights which exist in the absence of a treaty? . . . we did not have to do this. . . the perfect right to extract mineral resources from the deep ocean beyond the Continental Shelf. Moreover, we have the technology to do so.[53]

The developed countries have always asserted that the "common heritage principle" promulgated by Ambassador Pardo will have to be decided by the Law of the Sea Conference and until that time, the traditional doctrines are in force.

Even now, the crucial point of contention over the United States' reluctance to sign the Law of the Sea treaty concerns the res nullius, res communes issue. Without United States' approval, such a treaty would be useless. The ultimate outcome of the Conference will indicate just how effective such international forums are in presenting the Third World vision on rights in the natural wealth of the globe. The Kennedy construct shows the clear dichotomy

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[53]See T. Beuttler, "The Composite Text and Module Mining-Overregulation As A Threat to the Common Heritage of Mankind," 1 HASTINGS INT'L & COMP. L. REV. 167, 193 (Winter 1977) (Senator Moynihan of New York, former U.S. Ambassador to the United Nations, gave the speech at the launching of the U.S.S. nuclear submarine New York City, in Groton, Conn. on June 18, 1977).)

between that vision, and the vision of the industrialized nations. The construct also suggests that the choice of a legal standard, whether it be res nullius or res communes, is a political and ideological choice. It is not based on neutral jurisprudential principles. That fact alone, dictates the pressing importance of a fair and equitable solution to a problem of such profound geo-economic dimensions.

Section III

Indigenous Indian Nations' Development and Control of Natural Resources

Liberal ideology and imagery mandate that the modern states' attitude toward questions regarding control and development of the natural resources belonging to Indian nations be appropriative and ultimately exploitive.[54] Numer-

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[54] See "Indian Rights Rediscovered," N.Y. Times, March 5, 1982, page A 28 (editorial page):

> [N]o offense against human rights is so persistent as the mistreatment of Native Americans. They have been butchered and enslaved for centuries; their lands have been stolen, their bodies infected and their culture trampled. . . . (T)he atrocities against Indians in the Americas continue in many places:
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> In Chile, about 500,00 Mapuches living on 3,000 reservations are menaced by a 1979 decree that abolished their claim to lands awarded them more than a century ago.
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> In Paraguay, the pathetic remnants of the Toba-Maskoy tribe have been forcibly moved to arid land, where their extinctions seems likely. In Brazil, disease and greed imperil the Yanomani, perhaps the last large South American tribe to have so far excaped the embrace of "civilization." Their traditional lands are being invaded by mineral prospectors and their resistance to European diseases is negligible.

ous indigenous Indian nations of North and South America reside on lands containing vast quantities of the hemisphere's resource wealth.[55] Yet, within the legal systems of modern liberal states surrounding those nations,[56] few, if any, meaningful restraints exist to protect and advance the interests of indigenous cultures in managing, developing and benefitting from their resource wealth.[57]

(footnote 54 continued)

> In Peru, about 15,000 Campa and Amuesha Indians are needlessly endangered by a highway that would connect what the Government bills as "men without land to lands without men," in the Amazon. The United States has earmarked a quarter of a million dollars in aid to this project, which could still be modified to spare the Indians.
>
> In Guatemala, the rightist military regime has been clearing Indians out of the western Peten region, for security and oil exploration. Perhaps 70,000 Guatemalans, most of them Indian, are now refugees in Mexico. The killing of Indians has become commonplace, with left-wing guerrillas committing their share of atrocities. If Indian rights are really the concern, there's much work to be done.

[55]See THE SOCIAL IMPACT ASSESSMENT OF RAPID RESOURCE DEVELOPMENT ON NATIVE PEOPLE, GEISLER, USNER, GREEN and WEST, eds. (1982).

[56]See generally, R. Chambers and M. Price, "Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Land," 26 STAN. L. REV. 1061 (1979) (hereinafter cited as Chambers and Price), where the authors note that under 25 U.S.C.A.s 415, Indian lands can be leased for such activities as mining, only with permission of the Secretary of the Interior. The authors write on page 1061-62:

> [S]tatutes such as section 415, which wholly or partially restrain the alienation of Indian lands, have been sustained as exercises of the federal guardianship or trust responsibility. But while the trust responsibility serves as a source of the Secretary's approval power, it is unclear whether and to what extent it furnishes standards which limit his discretion in administrative exercise of that power. . . .

[57]Id. at 1067.

Chambers and Price argue that in the context of leasing of tribal lands in the U.S., subject to Secretarial approval:

The questions regarding the rights of native cultures in the modern states have traditionally been analyzed within the confines of the Doctrine of Discovery[58] ("the Doctrine").

(footnote 57 continued)

> [I]t has become increasingly important to develop a coherent theory of the Secretary's trust duties and the purposes of his trusteeship. A virtually unconfined discretion now has potentially hazardous implications. Tribal self-government is endangered by the likelihood that the Secretary may have the authority and duty to disapprove leases desired by the tribe or its members. Unbounded discretion also creates the possibility of arbitrariness and uncertainty, two conditions that discourage development on reservation lands. Jurisdictional disputes flourish among state, tribal, and federal governments in part because the Secretary has failed to act decisively in proposing consistent or careful jurisdictional arrangements. These costs were barely tolerable when leasing was a less significant aspect of tribal political and economic development. But since 1955, the burdens of uncertainty have become aggravated as tribes themselves turn increasingly to major development projects and as the environmental and social implications of long-term leases have become far more pronounced.

[58]See Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823) [hereinafter cited as Johnson]:

> On the discovery of this immense continent, th egreat nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe migh claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

21 U.S. at 572.

The Doctrine holds that upon discovery of European nations, lands inhabited by Indian cultures came within the control and sovereignty of the discovering European country.[59] The Doctrine has served as the paradigmatic model for analyzing all legal and political issues respecting Anglo-Indian relations.[60]

When the Doctrine is analyzed within the Kennedy liberalist construct, one immediately recognizes its highly individualistic substantive nature. It makes a sharp distinction between the interests of discovering European nations and the discovered Indian nations. The Doctrine reflects the belief that a preference for the interests of the discovering European nations was legitimate, and that discovered Indian nations should be willing to respect the rules that made it possible for the discovering European nations to co-exist with one another.

The effect of the Doctrine was to sanction a monopolistic and unilateral relationship between the discovering European sovereignty and the indigenous native culture now within its exclusive control. Euphemistically labelled a guardian-ward relationship,[61] European-Indian relations now were marked by total domination and an unyielding determination to forceably assimilate the non-aggressive Indian

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[59] See generally, Cherokee Nation v. Georgia, 30 U.S. (S Pet) 1, 8 L. Ed. 25 (1831).

[60] See generally, N. Newton, "At The Whim of the Sovereign: Aborignal Title Reconsidered," 31 HAST. L. J. 1215 (1980).

[61] Johnson, 21 U.S. at 586-90.

nations.[62] This reduced-wardship status under the Doctrine has legitimated a wide spectrum of paternalistic and self-serving interference in tribal life by Western legal institutions.

In the United States, for example, the Doctrine has been used by the Supreme Court to legitimate the denial of Indian title to lands held and occupied since time immemorial.[63] The Doctrine has also served to deny Indian nations the ability to advance claims and protect rights in United States courts due to their postulated "diminished" quasi-sovereign status.[64] Finally, the Doctrine has served as the informing principle and underlying jurisprudential rationalization for denying Indian nations the capacity to try non-Indians in tribal courts for criminal offenses committed on Indian reservations.[65]

Liberal theory and ideology denies indigenous cultures the right to self-determination. It has imposed a harsh individualistic value structure upon the tribe and upon the approach of the United States government toward its Indian "wards." Unable to meet, or challenge Western standards of

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[62]See R. BERKHOFER, THE WHITE MAN'S INDIAN (1978) [hereinafter cited as BERKHOFER]. See also V. DeLORIA, BEHIND THE TRAIL OF BROKEN TREATIES (1974).

[63]See TeeHit-Toh v. United States, 348 U.S. 272, 755 S.Ct. 313, 99 L. Ed. 314 (1955).

[64]See Johnson, 21 U.S. at 587-90. See also United States v. Kagama, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886).

[65]See Oliphant v. Squamish Indian Tribe, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978).

civilization, tribal culture early on was relegated to an inferior status.[66] This status only served to legitimate the American frontier mentality, with its individualistic appropriative premises. It also transformed that mentality into law and legal doctrine.[67] An entire reservation system -- marked by the total control of the United States government, and enforced by its courts -- resulted in the disintegration of tribal government, and leadership. The federal government and the courts gradually usurped, and in some instances, outlawed, expressions of tribal culture.[68]

The ultimate dilemma posed by the Tribe for liberal thought is its totally altruistic vision of human culture, requiring each member of the group "to make sacrifices, to share, and to be merciful."[69] Unable to grasp tribal group dynamics, the capacity of the tribe to subsume individual desires and serve as an effective advocate of individual group rights, Western thought relegated the tribe to the status of a juristic anomoly, the "quasi-sovereign entity." This relegation effectively denied the oppressive and alienating structure created by the reservation system. The tribe, as a vehicle of group self-determination was inferior

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[66] See BERKHOFER, supra note 62, at 1-25.

[67] Id. at 113 and following.

[68] For an account of the violent supression of one form of Indian religious expression, see the Ghost Dance, W. WASHBURN, THE INDIAN IN AMERICA (1975) pp. 217-223. See generally, D. BROWN, BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST (1970) at 367-389.

[69] Id. at 1717.

to Western modes of political organization. Therefore, the United States, in a guardian capacity had to civilize its Indian wards. This could only be accomplished by total control of the Indian's social, ecnomic and political life.

This pattern of legitimation and denial has been copied in virutally every Western Hemisphere's governments' relations with its indigenous civilizations. The implications of such a "legal" approach to questions concerning tribal rights are immense. Under the liberal construct, all questions regarding control and development of Indian culture and natural resources are to be decided, not by those cultures, but by the assimilative and appropriative governments which surround and threaten to engulf them.

Yet, within the past two decades, especially in the United States, a new consciousness has emerged to challenge the familiar liberal approach to questions regarding the rights to self-determination for Indian tribes.[70] Escaping the shackles imposed by the paternalistic reservation-welfare system, Indian tribes have begun to assert a vision totally at variance with liberal thought. This vision postulates the tribe as a viable source and advocate of communal rights and power in relations with their "discovering" nations. That this appeal contains both a moral and political content, only serves to emphasize the needs for fair and just legal forums and principles in which to assert those appeals.

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[70]See Comment, "The Indian Battle for Self-Determination," 58 CALIF. L. REV. 445 and see, R. BARSH and J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL HISTORY (1980).

Section IV

The Implied Warranty of Habitability in the Nonfreehold Estate

The Javins v. First National Realty Corp.[71] case held that a warranty of habitability is implied by operation of law into leases of urban dwelling units and that breach of this warranty gives rise to the usual remedies for breach of contract. The court held that "the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranties to maintain the premises in habitable condition."[72]

During the past fifteen years, landlord-tenant law has undergone a transformation, in part because of the Javins holding. After Javins, many courts began to apply contract doctrine to the modern non-commercial leasehold estate and developed interesting variations on the Javins warranty theme.[73] The case has had a direct impact on the lives of America's poor and the Third World which inhabits our own nation. It has raised controversial questions within the American legal community about the role of the court in our social, political, and economic life.

Professor Kennedy has called Skelly Wright, the judge

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[71]428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1070) [hereinafter cited as Javins].

[72]Id. at 1082.

[73]Siegel, "Is the Modern Lease a Contract or a Conveyance? ---- An Historical Inquiry." 52 J. URB. L. 649, 650, 668-670 (1975).

who wrote the majority opinion for the D.C. Circuit in Javins, "an important actor in a symbolic representation of the conflict of commitments."[74] Judge Wright's Javins opinion, as well as others,[75] are examples of a court "willing to treat judicial power as an autonomous creative factor in the development of economic and political life. . . In private law it (judicial activism) refers to the court's willingness to change or evolve the law in ways that upset existing patterns of economic and social advantage."[76]

Judge Wright wrote:

> The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land that may have been reasonable in a rural, agrarian society. . . But in the case of the modern apartment dweller, the value of the lease is that it gives

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[74]"Form and Substance," supra note 5, at 1777.

[75]See Williams v. Walker Furniture 350 F. 2d 445 (D.C. Cir. 1965) [hereinafter cited as Williams]. The court held that the contract between the buyer (a black welfare recipient) and the seller (a retail furniture store) was unconscionable and, hence, unenforceable. Speaking for the majority of the court, et pages 449-50, Judge Wright reasoned:

> [O]rdinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

(Judge Wright referred to RESTATEMENT, CONTRACTS § 70 (1932) and to 63 HARV. L. REV. 494 (1950) in the above discussion.)

[76]D. Kennedy, "Toward An Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought In America, 1850-1940," 3 RESEARCH IN L. AND SOC. 3, 5-6 3 (1980) (hereinafter cited as Kennedy, "Legal Consciousness").

> him a place to live. . . When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services -- a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance. . .[77]

After taking judicial notice of these realities in the urban tenement, Judge Wright rejected the old no-repair rule of traditional landlord-tenant law under which the lessor is not obligated to repair unless he covenants to do so in the written lease contract.[78] He then drew from recent developments in contract law pertaining to the buyer of goods and services to conclude that an implied warranty of habitability can coexist with the obligations imposed on the landlord by a typical modern housing code.[79] His contention was that the landlord was in the better position to know about and to correct housing code violations.

The "no repair rule" is merely an extension of the caveat emptor rule (i.e., "buyer beware"). Such rules show a bias toward individualistic values for several reasons. First, they encourage the landlord's "autonomy" because they place "restrictions on the (landlord's) obligations of sharing and sacrifice . . . and oppose the broadening, intensifying and extension of (the landlord's) liability."[80] It limits the extent to which one should have to share or to

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[77] Javins, 428 F.2d at 1074.

[78] Id. at 1076.

[79] See, e.g., Williams, 350 F.2d at 445.

[80] "Form and Substance," supra note 5, at 1735.

agreement. Second, they suggest that "judges ought not to conceive of themselves as 'regulators' of the use of economic power . . . [judges should] conceive the legal system as a limited set of existing restraints imposed on the state of nature, and then refus[e] to extend those restraints to new situations."[81] In other words, such rules "facilitate" the landlord's use of his bargaining power as the determinant of the desired outcome in the landlord-tenant arrangement. Finally, such rules reinforce the landlord's and tenant's "self-determination": "the parties themselves are the best and only legitimate judges of their own interests . . . and should be allowed to behave foolishly, do themselves harm, and otherwise refuse to accept any other person's view of what is best for them."[82]

The Javins implied warranty of habitability attempts to bring greater parity to the landlord-tenant relationship, one that has traditionally been marked by the tenant's unequal bargaining position. When the implied warranty is contrasted with the no-repair rule, it is more altruistic in nature. First, it is "community"-oriented because it responds to the question of "the extent to which one should have to share or make sacrifices in the interest of another in the absence of agreement" by expanding the network of the landlord's liability.[83] Second, it "regulates" the bargain-

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[81] Id. at 1736.

[82] Id. at 1737.

[83] Id. at 1733-35.

ing relationship by taking the position that the regulation "represents an attempt to achieve distributive justice which the judges should forward rather than impede."[84] Finally, it is "paternalistic" in its stance on the question of whether or not the parties are the best judges of their own interests. Because the parties are not perceived as the best judge of their interests in each and every case, the paternalistic policy underlying the implied warranty of habitability holds itself out as being as "legitimate as (the policy) of self-determination and should be extended as circumstances permit or require."[85]

The net effect of the implied warranty of habitability rule is that the landlord's margin of profit is reduced in order to ensure that the rental unit comports with the municipality's housing codes. There is little data to indicate whether landlords affected by a Javins-type warranty of habitability make the necessary repairs and thereby lose some of their profit. Because many landlords are entrepreneurs whose goal it is to maximize profits, recent trends suggest that when the margin of profit is reduced to an unsatisfactory point, many landlords opt to get out of the rental housing market by converting to condominium ownership,[86] setting fires in order to receive insurance

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[84] Id. at 1736.

[85] Id. at 1737.

[86] See generally C. HAAR and L. LIEBMAN, PROPERTY AND LAW at 216-313 (1977).

proceeds[87] or simply by reinvesting in other ventures.[88]

More significantly, while many courts have developed interesting variations on the Javins warranty theme, other courts have limited the application of the implied warranty rule.[89] Judge Wright's attempt to impose values of sharing

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[87]There is little data to support the proposition that numerous landlords have indeed set fires to urban tenements and order to receive insurance proceeds. However, the popular wisdom in places like Boston, New York City and Washington, D.C. is that whenever an urban tenement becomes decisively unprofitable, owners have the option to make money be setting fire to the dwelling. During the last ten years, fire of suspicious origin in places like Dorchester, and Lynn, Massachusetts, New York City, and Washington, D.C., have given some credence to this popular wisdom.

[88]See generally, G. STERNLIEB, THE TENEMENT LANDLORD (1966).

[89]The following are interesting variations on the Javins implied warranty of habitability:

1. Boston Housing Auth. v. Hemingway, 363 Mass. 184, 189, 293 N.E.2d 831, 843 (19 3):

> [T]his means that at the inception of the rental there are no latent or patent defects in facilities vital to the use of the premises for residential purposes and that these essential facilities will remain during the entire term in a condition which makes the property livable.

2. Minn. Stat. Ann. §504.18(1)(Supp. 1975-1976):

> [I]n every lease or license of residential premises, whether in writing or parol, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, except when the disrepair has been caused by th ewillful, malicious, or irresponsible conduct of the lessee or licensee or a person under his direction or control.
>
> (c) To maintain the premises in compliance with the applicable health and safety laws of the state and of the local units of government where the premises are located during the term of the lease or license, except when violation of the health and safety laws has been

add sacrifice into an area of the law traditionally noted for its harsh, individualistic stance, demonstrates the difficulty in breaking through the barriers of previously unchallenged assumptions. That there would be resistance is not surprise. That there should be only an imperceptible change in the basic relations between the poor and wealthy as a result of Javins should only urge us to complete the breakthrough which Javins first accomplished, thereby creating a more just vision of the rights of those Third World peoples within our own borders.

(footnote 89 continued)

> caused by the willful, malicious, or irresponsible conduct of the lessee or licensee or a person under his direction or control.
>
> The parties to a lease or license of residential premises may not waive or modify the covenants imposed by this section.

3. Mease v. Fox, 200 N.W.2d 791, 796 (Iowa, 1972):

> [U]nder these circumstances we hold the landlord impliedly warrants at the outset of the lease that there are no latent defects in facilities and utilities vital to the use of the premises for residential purposes and that these essential features shall remain during the entire term in such condition to maintain the habitability of the dwelling. Further, the implied warranty we perceive in the lease situation is a representation there neither is nor shall be during the term a violation of applicable housing law, ordinance or regulation which shall render the premises unsafe, or unsanitary and unfit for living therein.

Compare the above judicial and legislative developments with the following post-Javins developments:

1. Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L. Ed. 2d 36 (The Supreme Court upheld the eviction procedures of the state of Oregon which gave tenants six days from the filing of landlord's eviction proceeding to prepare a response or a defense).

Section V

Conclusion

The term "third world," overinclusive and nebulous, displays an almost invidious attempt to delegitimate and aggregate the diffuse claims and problems of third world peoples and cultures in their relations to liberal governments within the Western world. Third world legal issues pose tremendous conflicts for international tribunals, treaty-making bodies, and American courts. The Kennedy liberalist construct helps us understand that third world

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(footnote 89 continued)

2. Mass. Gen. Laws Ch. 239, § 8A:

> Whenever any counterclaim or claim of defense under this section is based on any allegation concerning the condition of the premises or the services or equipment provided therein, the tenant or occupant shall not be entitled to relief under the section unless: (1) the owner or his agents, servants, or employees, or the person to whom the tenant or occupant customarily paid his rent knew of such conditions before the tenant or occupant was in arrears in his rent; (2) the plaintiff does not show that such conditions were caused by the tenant or occupant or any other person acting under his control; except that the defendant shall have the burden of proving that any violation appearing soley within that portion of the premises under his control and not by its nature reasonably attributable to any action or failure to act of the plaintiff was no so caused; (3) the premises are not situated in a holdet or motel, nor in a lodgining house or rooming house where the occupant has maintained such occupancy for less than three consecutive months; and (4) the plaintiff does not show that the conditions complained of cannot be remedied without the premises being vacated.

A careful reading of the Oregon statute referred to in Lindsey and the above excerpt from the Massachusetts General Laws suggests that an uneducated or unwary tenant could easily get caught in the cracks of unknown or complicated procedures, and thus never receive the benefit of the Javins ruling.

issues do indeed reflect the different substantive and formal modes jurists adopt in disposing of law disputes which ultimately deal with how a particular aspect of life should be allocated or reallocated. As in non-third world contexts, a critical examination of third world legal issues shows how divided we are between irreconcilable visions of humanity and society and between radically different aspirations for our common future.

In the law of the sea context, where the controversy focuses on the allocation of seabed minerals, the conflicting visions are reflected by the industrialized nations' advancement of a res nullius legal status for deep sea minerals and the third world nation's insistence of the res communes legal status. The former is individualistic in nature and would lead to clearly defined administrable rules.[90] The latter is more altruistic in nature, and would lead to a redistributive regulatory scheme which would produce ad hoc results which are of little precedential value.[91] The choice between the two cannot be obscured by the recitation of value-laden legal discourse. The choice is political and an expression of how we feel life on this globe should be lived.

In the Indian resource development and control context in Western nation-states, including America, the highly individualistic Doctrine of Discovery provides the concep-

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[90]"Form and Substance," supra note 5, at 1685.

[91]Id.

tual backdrop for the modern Anglo-Indian relationship. It also serves to relegate the tribal concept to a juristic and political anomaly within the American legal culture. This Doctrine contrasts with a more altruistic concept in which tribal sovereignty becomes a legitimate mode of expression for Indian rights. Again though, this vision will only gain credence within Western liberal theory by radically restructuring the framework upon which we have traditionally decided Indian rights questions. Such a choice is inherently political, and not legal.

Finally, in the landlord-tenant context, a warranty of habitability has been implied in the lease of urban dwellers, who make up America's own third world community. This implied warranty attempts to ensure that urban dwellers will receive an apartment which complies with local health and safety codes. It posits a more altruistic vision for the urban dweller than the individualist-inspired vision implicit in the no-repair rule, which essentially maximizes the landlord's profit margin. In Javins, Judge Wright sought to reallocate the landlord's and tenant's "bundle of sticks." Specifically, the implied warranty notion took one of the landlord's profit sticks and gave it to the tenant in the form of a "more habitable" rental unit.

A critical approach to liberal theory, then, as this paper has attempted to demonstrate, does provide a good starting point for the discussion of third world legal issues. A critical approach helps us to understand the

competing political and ideological interests and arguments on both sides of the adversarial line. It also suggests that third world legal issues squarely confront the fundamental contradiction within modern legal thought, namely, that the world of others is both necessary to and incompatible with our freedom. As suggested by the interdependence theme of former UN Ambassador, Donald McHenry,[92] the industrialized world and the developing third world are more economically and socially interdependent than any other time in modern history. However, the interests of each tend to modify, curtail, or cancel the interests of the other.

Consequently, we see that third world legal issues can, like so many other issues in liberal legal discourse, be "reduced to the degree of collective as opposed to individual self-determination that is appropriate."[93] In the third world context, "collective self-determination" is a euphemism for altruistic approaches to third world problems wherein others (e.g. private citizens, businesses, or industrialized nation-states) are expected to share their resources with aggrieved third world persons or nations in order to advance, inter alia, what has been coined, the New International Economic Order.[94] On the other hand, the familiar phrase "individual self-determination" is just

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[92]D. McHenry, "The Fole of Interdependence In United States Foreign Policy Toward The Third World," 2 B.C. THIRLD WORLD L.J. 29 (1981).

[93]"The Structure of Blackstone's Commentaries," supra note 5, at 213.

[94]See "Toward A Definition of the Term Third World," supra note 10, at 18-21.

another euphemism for individualistic approaches to third world problems wherein the interests of others should not be subordinated to the interests of aggrieved third world persons or nations.

"Liberalism, however, provides no method for deciding how any particular feature of life should be allocated among its competing dualities."[95] But, only by a critical approach to liberal theory and discourse are we able to discover how we, as jurists, do allocate some particular feature of life which ultimately turns on our own vision of the role of the jurist (lawyer, court, international tribunal or treaty-making body) in the global society.

We may be "collective self-determinists" believing that we should treat judicial power "as an autonomous creative factor in the development of economic and political life."[96] Or we may be "individual self-determinists," believing that "judges should not conceive of themselves as regulators of the use of economic power."[97] In either case, our choice as to a vision of laws' place in ordering our political and economic life is simply that, a choice amongst visions of how we as humans should live in the world. The outcomes are

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[95]See Frug, supra note 1, at 1075.

[96]Kennedy, "Legal Consciousness," supra note 76, at 5.

[97]See "Form and Substance," supra note 5, at 1736. See also, the stated judicial philosophy of Supreme Court Justice, Sandra O'Connell: "[I] know well the difference between a legislator and a judge, and the role of the judge is to interpret the law, not make it. I do not believe it is the function of the judiciary to step in and change the law because times have changed or because social mores have changed. . . ." Time Magazine, September 21, 1981, at 12.

by no means predetermined. Recognizing the choice makes it impossible to accept that the relations between the comforted and comfortless of our world are the result of immutable laws of reason and science.

Western liberal theory fails to provide a just framework in considering the claims of third world groups by refusing to integrate and recognize the Third World's altruistic appeals into legal discourse regarding claims and rights. Like the Indian tribe, third world concepts like "res communes," "implied warranty of habitability" or "fair share"[98] become little more than juristic anomalies, incapable of precise understanding and therefore, dismissed as without value or concrete meaning. Consequently, the liberalist vision ultimately leads to little more than a reiteration, rather than a resolution, of the fundamental contradiction. It thereby legitimates the results of concrete power struggles amongst peoples of the world as inevitable and therefore just.

Our examination of the ideological presuppositions

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[98]See Southern Burlington County NAACP v. Township of Mt. Laurel 67 N.J. 151, 336 A.2d 713, appeal dismissed and cert. denied, 423 U.S. 808 (1975).

The court held that the wealthy suburban community had to meet its "fair share" of Camden County's housing needs by building 500 apartment units for low and moderate income families by the year 2000. The Mt. Laurel holding began a debate within New Jersey's political and legal circles that remains heated to this day. The attorney who filed the original Mt. Laurel suit, Carl Bisgaier, filed similar suits in New Jersey in his capacity as the Director of the Public Interest Advocacy Division of the New Jersey Department of the Public Advocate (The Department). As a result of the election of Governor Kern in November of 1981, the future of the Department is questionable.

within liberal discourse has demonstrated that third world groups can only assert their vision of a just world order by challenging the very foundations of liberal legal thought. The assertion of a new vision opposed to the traditional, individualistically-oriented approach to third world problems is needed. This paper has attempted to begin the construction of the framework for such a vision. It is admittedly a tentative and wholly incomplete first step. But it is a step made from the conviction, that marginality and confusion are inevitable in the quest for human freedom. Such a quest is far more noble than adopting the smug attitude of complacency which attends the circular arguments used to deny the injustice which is everywhere present in our world.