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HARD-NOSED IDEALISM AND U.S. HUMAN RIGHTS POLICY

DAVID SLOSS*

The history of U.S. foreign policy can be characterized as a pendulum swinging between the extremes of moralistic idealism and amoral realpolitik. The presidencies of Woodrow Wilson and Jimmy Carter typify the moralistic pole, whereas the Nixon-Kissinger era exemplifies the realpolitik approach to foreign policy. Against this background, Harold Koh's prescription for a twenty-first century human rights policy¹ is best understood as a plea for "hard-nosed idealism,"² an approach that attempts to blend the best aspects of both idealism and realism, while avoiding the pitfalls of a foreign policy that is either amoral, or rigidly moralistic.³

Koh organizes his policy prescriptions around four guiding principles: telling the truth, justice, inside-outside engagement and preventing future human rights abuses. This Response suggests that Koh's four principles have a common theme: each attempts to craft a middle way between moralistic idealism and amoral realpolitik. This Response generally endorses Koh's hard-nosed idealist approach, as embodied in his four principles. It also highlights areas in which Koh's application of those principles to specific cases is problematic.

I. TELLING THE TRUTH

Professor Koh contends that the State Department's annual country reports on human rights practices⁴ should be used "to *tell the truth* about human rights

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1. Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293 (2002).

2. The term is a variation of the "hard-nosed utopianism" advocated by Peter Berger. See PETER L. BERGER, *PYRAMIDS OF SACRIFICE: POLITICAL ETHICS AND SOCIAL CHANGE* xiv (1974).

3. Koh's recommended human rights policy can be viewed as an application to the human rights arena of a more general foreign policy approach advocated by Stanley Hoffmann. See STANLEY HOFFMANN, *WORLD DISORDERS: TROUBLED PEACE IN THE POST-COLD WAR ERA* 54-69 (1998) (advocating a synthesis of realism and idealism).

4. The State Department is required to publish an annual report on the human rights practices of other countries. See 22 U.S.C. §§ 2151n(d), 2304(b) (1994 & Supp. V 1999). To

conditions around the globe, however painful or unwelcome that truth might be.”⁵ Prior to Koh’s tenure as Assistant Secretary for Human Rights, although the State Department generally refrained from publishing outright lies, the country reports frequently contained half-truths about human rights abuses in friendly countries.⁶ The realpolitik opponents of truth-telling apparently believed it was necessary to understate the severity of human rights abuses in friendly countries in order to avoid damaging our relationships with those countries.

The realpolitik defense of half-truths is problematic for both moral and pragmatic reasons. The President and Secretary of State have both a moral and legal duty to tell Congress the truth about human rights conditions around the world—even in friendly countries.⁷ From the standpoint of the Executive Branch, failure to tell the truth simply invites Congress to enact new legislative provisions to advance Congress’s human rights agenda, which provisions tend to place unwanted constraints on the President’s flexibility to implement foreign policy.⁸ Moreover, the realpolitik resistance to truth-telling undermines U.S. credibility overseas, making it more difficult for the United States to advance its human rights agenda internationally. Finally, anecdotal evidence suggests that Koh’s truth-telling approach, which he actually implemented during his time as Assistant Secretary,⁹ *did not* have any serious adverse consequences for U.S. relations with friendly countries.¹⁰

view the COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2000 (released February 2001), see <http://www.state.gov/g/drl/rls/hrrpt/> (last visited Mar. 10, 2002).

5. Koh, *supra* note 1, at 306.

6. “In the earliest years of the Country Reports, the tendency to shield strategic allies . . . from plain-spoken criticism was quite strong, even when the record of their violations was clear.” Statement, Elisa Massimino, Director, Lawyers Committee for Human Rights, Washington Office (Mar. 7, 2001), in *State Department Country Reports on Human Rights Practices: Roadmap for Budgeting of Democracy and Human Rights Programs of the State Department: Hearings and Markup Before the Comm. on Int’l Relations House of Representatives and the Subcomm. on Int’l. Operations and Human Rights*, 107th Cong. 171, 202 (2001).

7. The statute requires a “full and complete report regarding . . . the status of internationally recognized human rights . . . [in all] foreign countries which are members of the United Nations . . .” 22 U.S.C. § 2151n(d)(1)(B) (1994).

8. See Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT’L L. 246, 249-56 (1982) (describing the evolution of increasingly stringent legislative requirements that Congress enacted in response to the Executive Branch’s resistance to implementing statutory requirements related to human rights).

9. See Koh, *supra* note 1, at 307 n.35 (noting that the Lawyers Committee for Human Rights discontinued its annual critique of the State Department human rights reports on the grounds that the State Department reports were accurate).

10. For example, the 1999 country report on Turkey—the last report published during Koh’s tenure as Assistant Secretary—was highly critical of ongoing human rights abuses in Turkey. See U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, *Turkey*, in 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (released Feb. 23, 2000), available at

So much for *realpolitik*. It is equally important to note that Koh's prescription for truth-telling differs markedly from a strictly moralistic approach. This is evident if one considers the statutory requirement to terminate both security and development assistance to "the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights . . ."¹¹ A rigid moralist might fault Professor Koh because the key terminology—"consistent pattern of gross violations"—is noticeably absent from his exposition of the truth-telling principle. Moreover, it is noteworthy that the human rights country reports produced under Koh's stewardship never identified a friendly government as a country that engaged in "a consistent pattern of gross violations," despite the fact that there are friendly governments to which that label could easily be applied.

The Clinton Administration's refusal to label friendly countries as "gross violators," and Koh's decision *not* to cast his truth-telling principle in terms of the gross violation language, reflect a pragmatic political judgment that the costs of name-calling outweigh the benefits. Consider Saudi Arabia, for example. Saudi Arabia is a major recipient of U.S. security assistance.¹² Saudi Arabia also has one of the worst human rights records of any country in the

<http://www.state.gov/drl/rls/hrrpt/1999/365.htm> (last visited Mar. 10, 2002). Even so, Turkey continues to cooperate with the United States on a variety of important national security and foreign policy issues.

11. 22 U.S.C. § 2151n(a) (1994) (prohibiting development assistance to such countries). *See also* 22 U.S.C. § 2304 (a)(2) (1994) (prohibiting security assistance to "a country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights . . ."). There are other statutes, as well, that impose a variety of economic sanctions on countries with poor human rights records. *See generally* Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 *YALE J. INT'L L.* 1, 92-102 (2001).

12. Appendix E to the human rights country reports for the year 2000 provides details of U.S. economic and security assistance to foreign countries. *See* U.S. DEP'T OF STATE, 2 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2000, 2837-48 (Sept. 2001), *available at* <http://www.state.gov/drl/rls/hrrpt/2000/app/1183.htm> (released Feb. 23, 2001). That appendix shows that the FY2000 Foreign Operations Budget totaled about \$16.5 million. *See id.* at 2848. This figure, though, includes only what might be termed "foreign aid." Saudi Arabia was not a recipient of foreign aid in FY2000. *See id.* at 2842-43 (omitting Saudi Arabia from the list of FY2000 actual obligations).

However, the statute defines the term "security assistance" to include "sales of defense articles or services . . ." 22 U.S.C. § 2304 (d)(2) (1994). The Report by the Department of State Pursuant to Sec. 655 of the Foreign Assistance Act summarizes sales of defense articles and services for FY2000. REPORT BY THE DEP'T OF STATE PURSUANT TO SEC. 655 OF THE FOREIGN ASSISTANCE ACT: DIRECT COMMERCIAL SALES AUTHORIZATIONS FOR FISCAL YEAR 2000, http://www.pmdtc.org/docs/rpt655_9_99.pdf (last visited Mar. 10, 2002). The report "details approximately \$25 billion in licenses authorizing the export of defense articles" and approximately \$30 billion in licenses authorizing the export of defense services. *See id.* at 2. This includes more than \$500 million in defense articles for Saudi Arabia and more than \$700 million in defense services for Saudi Arabia. *See id.* at 82-83, 132.

world.¹³ Despite the fact that Saudi Arabia arguably engages in a consistent pattern of gross human rights violations, no President has ever made such a finding. The reason is obvious: Saudi Arabia is an important ally in the United States' pursuit of key strategic interests. A Presidential finding that Saudi Arabia engages in a consistent pattern of gross human rights violations could trigger a termination of security assistance,¹⁴ which in turn would jeopardize important U.S. regional and global interests.

From a pragmatic standpoint, one can maximize the benefits of truth-telling, while minimizing the costs, by publishing a report that tells the unvarnished truth about Saudi Arabia's abysmal human rights record, without naming Saudi Arabia as a gross violator. This is Koh's hard-nosed idealist approach. It constitutes an appropriate middle way between moralistic name-calling and realpolitik half-truths.

II. JUSTICE

Whereas Koh's first principle focuses on the State Department's human rights country reports, his second principle addresses issues that arise when countries in transition from dictatorship to democracy must decide how to handle past human rights violations. Various commentators have described the dilemma posed by such "transitional justice" issues as a choice between "punishment and pardon,"¹⁵ "vengeance and forgiveness,"¹⁶ or "truth versus

13. Freedom House publishes an annual report which ranks countries on a scale of 1 to 7 for both political rights and civil liberties, with 1 being the best rating, and 7 the worst. In the most recent Freedom House report, Saudi Arabia scored a 7 on both political rights and civil liberties—the worst possible score. See FREEDOM HOUSE, FREEDOM IN THE WORLD 2002: THE DEMOCRACY GAP 14 (2002), available at <http://www.freedomhouse.org/research/freeworld/2002/essay2002.pdf> (last visited Feb. 15, 2002). This puts Saudi Arabia in the same league with Afghanistan, Burma, Cuba, Iraq, Libya and North Korea, all of which are targets of U.S. sanctions. See *id.*

14. The statutory scheme related to termination of security assistance is quite complex. The statute provides an "escape clause," which enables the President to continue certain types of security assistance, notwithstanding a finding that a country has engaged in a consistent pattern of gross violations, if the President "certifies in writing . . . that extraordinary circumstances exist warranting provision of such assistance." 22 U.S.C. § 2304(a)(2) (1994). Therefore, a Presidential finding that Saudi Arabia engages in a consistent pattern of gross human rights violations would not necessarily result in the termination of all security assistance for Saudi Arabia. However, Congress has the power to override such a Presidential certification by adopting a joint resolution to terminate or restrict security assistance. See 22 U.S.C. § 2304(c)(4)(A) (1994).

15. See, e.g., Ruti Teitel, *From Dictatorship to Democracy: The Role of Transitional Justice*, in DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 272 (Harold Hongju Koh & Ronald C. Slye eds., 1999) ("For a decade now it seems we have been struggling with the so-called . . . 'punishment-pardon' dilemma.").

16. See generally, e.g., MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998).

justice.”¹⁷ Koh’s second principle is that “we need to promote principles of accountability for past human rights violations. . . . [without] ignoring the reality that societies in which large-scale human rights abuses have occurred also need to achieve internal reconciliation to make the transition to the next phase of their political existence.”¹⁸ Koh’s second principle is eminently sound. It constitutes a middle way between the moralistic view that all violators must be punished,¹⁹ and the realpolitik view that amnesty for human rights violators is a necessary element of the transition from dictatorship to democracy. Unfortunately, Koh does little to illuminate that middle way. He discusses a variety of different approaches that have been utilized in different countries without critically evaluating the pros and cons of various approaches.²⁰

Detailed analysis of the complex issue of transitional justice is well beyond the scope of this brief Response; however, this section suggests that the problem is best conceptualized as an attempt to craft a middle way between moralistic idealism and amoral realpolitik. Whereas the moralistic extreme attempts to disguise a primitive thirst for vengeance in the cloak of justice,²¹ and the realistic extreme attempts to utilize official pardons (amnesty) to promote social amnesia, the hard-nosed idealist middle way embraces a concept of “restorative justice” whose aim is “not so much to punish as to redress or restore a balance that has been knocked askew.”²² States can promote restorative justice, I suggest, by utilizing a combination of: (1) punishment of the worst offenders; (2) amnesty for lesser offenders who acknowledge their crimes; and (3) full disclosure of the atrocities committed. This section illustrates the hard-nosed idealist approach by comparing Chile’s blanket amnesty, South Africa’s societal reconciliation model, and the retributive justice model exemplified by the International Criminal Tribunal for Yugoslavia (ICTY).

Chile’s transition from dictatorship to democracy began in October 1988, when the Chilean people voted for an end to military dictatorship.²³ Seventeen months later, in March 1990, Patricio Aylwin was inaugurated as the first

17. See generally, e.g., TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis Thompson eds., 2000) [hereinafter TRUTH V. JUSTICE].

18. Koh, *supra* note 1, at 311.

19. See generally, e.g., Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

20. See Koh, *supra* note 1, at 311-14.

21. More than a century ago, Nietzsche commented on people’s tendency to attempt “to sanctify *revenge* under the name of *justice*.” See FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 73-74 (Walter Kaufmann & R.J. Hollingdale trans., 1967).

22. MINOW, *supra* note 17, at 81 (quoting a remark attributed to Archbishop Tutu).

23. See PAMELA CONSTABLE & ARTURO VALENZUELA, A NATION OF ENEMIES: CHILE UNDER PINOCHET 296-311 (1991).

democratic President of the post-Pinochet era.²⁴ However, Decree Law No. 2191, enacted by the Pinochet government in 1978, granted a general amnesty to all “those who had committed criminal actions while the state of siege was in effect from September 11, 1973 to March 10, 1978, or had been accomplices to, or covered up such actions.”²⁵ The amnesty law remained in effect even after the transition to democratic government. Thus, the Chilean approach attempted to dispense with punishment altogether, granting a blanket amnesty to all human rights violators, without requiring them to acknowledge their crimes.

Like South Africa, Chile did establish a Truth and Reconciliation Commission in the context of its transition from dictatorship to democracy.²⁶ The Chilean Commission published extensive documentation about the victims of human rights abuses.²⁷ However, in contrast to South Africa, the Chilean Commission did not identify the perpetrators, nor did it require any public acknowledgment of their crimes.²⁸

The best defense of the Chilean model is a *realpolitik* defense: the blanket amnesty was necessary to ensure a smooth transition from dictatorship to democracy. However, the Chilean example illustrates both the moral and practical flaws associated with the *realpolitik* approach.

From a moral standpoint, it is impossible to justify a blanket amnesty for the horrible crimes committed—especially for the top-level officials who orchestrated the violence. Such a blanket amnesty is patently inconsistent with the ethic of retributive justice. It is also incompatible with the ethic of restorative justice, because Chile’s decision *not* to require the perpetrators of human rights abuses publicly to acknowledge their crimes substantially impaired the value of its Truth and Reconciliation Commission in promoting societal reconciliation.²⁹

From a practical standpoint, Chile’s amnesty has not worked. More than ten years after the transition to democratic rule, Chile’s courts are still clogged with a variety of criminal and civil cases against the alleged perpetrators.³⁰ Moreover, Chilean lawyers and victims have been remarkably active in

24. *See id.* at 311-20.

25. 1 REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION 89 (Phillip E. Berryman trans., 1993).

26. *See generally id.*

27. *See id.* at 146-453, 505-620, 645-79.

28. *See id.* at 42-43 (explaining that the decree establishing the Commission “forbade it to take a stand on the potential responsibility of individual persons”).

29. Martha Minow’s work highlights the importance of the relationship between full public disclosure and societal reconciliation, or “healing.” *See MINOW, supra* note 17, at 57-83.

30. *See* U.S. DEP’T OF STATE, 2 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2000, at 2441 (Sep. 2001) (“At year’s end, over 200 cases concerning human rights violations had been filed in the courts against Pinochet.”), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/wha/736.htm> (last visited Mar. 2, 2002).

bringing claims against Pinochet and his cronies not only in Chile's domestic courts, but also in European courts,³¹ U.S. courts,³² and international human rights tribunals.³³ The ongoing litigation indicates that the surviving family members of those murdered by Pinochet's henchman do not accept the legitimacy of the amnesty. Thus, the Chilean example suggests that, for societies that have suffered through serious human rights violations under dictatorial regimes, there can be no societal reconciliation unless those responsible for the abuses have, at a minimum, publicly acknowledged their crimes.

Whereas Chile illustrates the problems associated with a *realpolitik* approach, Yugoslavia illustrates the problems associated with a moralistic emphasis on the duty to prosecute human rights offenders. In response to the horrible events that occurred in the former Yugoslavia in the early 1990's, the United Nations Security Council enacted Resolution 827, which established the International Criminal Tribunal for Yugoslavia (ICTY).³⁴ The Tribunal has a broad mandate to prosecute and punish "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council"³⁵

Although the creators of the ICTY undoubtedly had good intentions, the actual operation of the ICTY raises significant ethical and practical difficulties. From an ethical standpoint, the most troubling feature of the ICTY is the problem of selective prosecution.³⁶ In a situation like Yugoslavia, where large numbers of people committed unspeakable atrocities, there are not "enough courtrooms, lawyers, witnesses, experts, or time for prosecuting all who

31. See *Regina v. Bow St. Metro. Stipendiary Magistrate, Ex parte Pinochet Ugarte* [2000] 1 A.C. 61 (H.L. 1998), *vacated by Regina v. Bow St. Metro. Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 2), [2000] 1 A.C. 119 (H.L. 1999), *reprinted in* 38 I.L.M. 430 (1999); *Regina v. Bow St. Metro. Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147 (1999) (ultimately granting the former Chilean leader no immunity from any allegations of torture occurring after section 134 of the Criminal Justice Act of 1988 came into effect in the United Kingdom).

32. See *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D. Fla. 2001) (civil suit against former member of Chilean secret police ("DINA") brought by surviving family members of individual who was allegedly executed by DINA shortly after the coup in Chile in 1973). In the interest of full disclosure, I note that I am serving as one of plaintiffs' counsel in the *Cabello* case.

33. See, e.g., *Chanfreau Orayce v. Chile, Cases 11.505 et al., Inter-Am. C.H.R. 512, OEA/ser. L/V/II.98, doc. 7 rev. (1998)*, available at <http://www.cidh.org/annualrep/97eng/97ench3a41an.htm> (last visited Jan. 24, 2002).

34. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), available at <http://www.un.org/docs/scres/1993/827e.pdf> (last visited Mar. 2, 2002).

35. *Id.*

36. For a good general discussion of the problem of selective prosecution in international criminal law, see MINOW, *supra* note 17, at 40-47.

deserve it”³⁷ Given insufficient resources, one option is for ICTY prosecutors to focus on the “big fish,” leaving prosecution of “small fish” to the national courts. A second option is for prosecutors randomly to select a few “small fish” for show trials. Unfortunately, the ICTY has adopted the latter approach. The majority of those indicted and prosecuted have been “small fish.”³⁸ Selection of a handful of low-level officials for show trials undermines the moral authority of the ICTY.³⁹ It would be far better to limit the prosecutions to a small number of high-level officials who bear the primary moral responsibility for orchestrating the ethnic cleansing campaign.⁴⁰

From a practical standpoint, there are two major difficulties with the ICTY’s approach. First, prosecution is a poor tool for advancing the goals of restorative justice and societal reconciliation⁴¹ —goals that are, or should be, as important for the former Yugoslavia as the goal of retributive justice. Restorative justice is best realized by an approach that encourages perpetrators to acknowledge their guilt in the presence of victims, thereby inviting victims to forgive the perpetrators.⁴² In contrast, the ICTY’s prosecutorial approach creates incentives for defendants to deny their guilt, thereby inhibiting opportunities for societal reconciliation.⁴³

Second, the ICTY’s prosecutorial approach is far too time-consuming to make a useful contribution to societal reconciliation in the near term. Since its

37. *Id.* at 45.

38. For a list of individuals indicted and tried by the ICTY, see Fact Sheet on ICTY Proceedings, available at <http://www.un.org/icty/glance/procfact-e.htm> (last modified Jan. 4, 2002).

39. There do not appear to be any published criteria for determining which low-level officials are actually prosecuted and which ones escape criminal liability. However, the decision is driven, at least in part, by the fortuitous circumstance that the ICTY is able to obtain jurisdiction over the unlucky few who happen to be in the wrong place at the wrong time.

40. Carla del Ponte, the chief prosecutor for the ICTY, has apparently made a similar suggestion. See Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT’L L. 255, 330 n.391 (2001) (quoting Carla del Ponte, chief prosecutor for the ICTY). The arrest of Slobodan Milosevic, who is currently in the ICTY’s custody, represents a significant positive step in this respect. Unfortunately, arrest warrants are still outstanding for Ratko Mladic and Radovan Karadzic. Moreover, as noted above, the majority of those indicted and tried have been small fish. See *supra* text accompanying note 39.

41. See MINOW, *supra* note 17, at 57-61.

42. See Lorna McGregor, *Individual Accountability in South Africa: Cultural Optimum or Political Facade?*, 95 AM. J. INT’L L. 32, 36-38 (2001). Of course, even in cases where a perpetrator does acknowledge his guilt in the presence of a victim, there is no guarantee that the victim will forgive the perpetrator. But this type of process facilitates genuine forgiveness, which in turn helps promote societal reconciliation. See MINOW, *supra* note 17, at 18-20, 76-78.

43. Cf. Ronald C. Slye, *Amnesty, Truth, and Reconciliation: Reflections on the South African Amnesty Process*, in TRUTH V. JUSTICE, *supra* note 18, at 170, 173 (noting that, in a criminal trial, the “accused are placed in a defensive position,” and “[t]heir goal is to escape liability”).

inception, the ICTY has tried only twenty-three defendants.⁴⁴ A report by the Tribunal's President estimates that the trial chambers will not complete their work until 2016.⁴⁵ As one commentator has noted, it is likely that the victims "will perceive justice delivered in 2003, 2007, or 2016 as being 'too little, too late.'"⁴⁶ It is difficult to justify spending billions of dollars⁴⁷ for a process that is projected to take another fifteen years to complete, especially because there is little or no evidence that this process is actually contributing to societal reconciliation.

If Chile illustrates the problems of a *realpolitik* approach, and the ICTY illustrates the problems of a moralistic approach, then South Africa illustrates the middle way between excessively moralistic prosecutory zeal and the *realpolitik* defense of amnesties. In 1993, South Africa adopted an Interim Constitution, which was designed to provide "a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence"⁴⁸ The Interim Constitution attempted to address past human rights violations on the basis that "there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization"⁴⁹ Shortly after adoption of the Interim Constitution, Parliament enacted the so-called Truth and Reconciliation Act.⁵⁰ The Act established a Committee on Amnesty, in order to "facilitat[e] the granting of amnesty to persons who make full

44. See Fact Sheet on ICTY Proceedings, *supra* note 39.

45. Claude Jorda, *Report on the Operation of the International Criminal Tribunal for the Former Yugoslavia* (May 12, 2000), available at <http://www.un.org/icty/pressreal/RAP000620e.htm>.

46. Ivkovic, *supra* note 41, at 329.

47. To date, the Tribunal has spent over \$470 million. See ICTY Key Figures, available at <http://www.un.org/icty/gliance/keyfig-e.htm> (last visited Jan. 24, 2002). If the ICTY continues for another fifteen years at its current rate of spending roughly \$100 million per year, it will have spent a total of about \$2 billion by 2016. See *id.*

48. *Preamble*, Promotion of National Unity and Reconciliation Act 34 of 1995, 1 JSRSA 2-405 (1996) [hereinafter National Unity and Reconciliation Act]. For the full text of the Interim Constitution, see S. AFR. CONST. (Act 200 of 1993) (date of commencement April 27, 1994), 5 JSRSA 1-266, available at <http://www.polity.org.za/govdocs/legislation/1993/constit0.html> (last visited Jan. 25, 2002).

49. *Preamble*, National Unity and Reconciliation Act, *supra* note 49. There is no precise translation for the term "ubuntu," but the term suggests that "my humanity is caught up in your humanity because we say a person is a person through other persons . . . [and] forgiveness is an absolute necessity for continued human existence." Archbishop Desmond Tutu, *Without Forgiveness There is No Future*, Foreword to EXPLORING FORGIVENESS xiii (Robert D. Enright & Joanna North eds., 1998), quoted in McGregor, *supra* note 43, at 38.

50. National Unity and Reconciliation Act, *supra* note 49, § 2(1) at 2-406.

disclosure of all the relevant facts relating to acts associated with a political objective” and comply with certain other requirements of the Act.⁵¹

The South African model represents a bargain between perpetrators and victims: “You publicly acknowledge your responsibility for human rights violations, and you will not be criminally or civilly liable for your actions.” This “amnesty for testimony” swap is preferable to the Chilean model because, inasmuch as full disclosure is a pre-condition for amnesty, those who receive amnesty are held accountable for their actions.⁵² Consistent with the statute, the Amnesty Committee denied amnesty to applicants who provided incomplete disclosures.⁵³ Moreover, in its final report, the Truth and Reconciliation Commission recommended criminal prosecution of those who did not receive amnesty.⁵⁴ In fact, some of the worst offenders have been prosecuted, albeit with mixed results.⁵⁵

The South African approach is also superior to the ICTY approach, because the ICTY has failed to establish any principled basis for distinguishing between perpetrators who are prosecuted and those who escape criminal prosecution.⁵⁶ In contrast, the South African approach does provide a principled basis for drawing such a distinction, because those who satisfied the statutory criteria received amnesty, and the government reserved the right to prosecute the others. Of course, South Africa is subject to criticism on the grounds that many perpetrators who did not receive amnesty, including some of the worst offenders, have not actually been prosecuted.⁵⁷

51. *Id.* § 3(1)(b), at 2-406.

52. *See generally*, Slye, *supra* note 44, at 179-82 (noting that South African model provides a form of accountability without punishment).

53. As of June 30, 1998, the Amnesty Committee had granted only 122 out of 4443 amnesty applications. 1 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 276 (Susan de Villiers ed., 1999). The Committee had denied 138 applications on the grounds of incomplete disclosure. *See id.* It denied an additional 369 applications on the grounds that the applicant denied his or her guilt. *See id.* The killers of Steve Biko, in particular, were denied amnesty, because they “continued to insist that Biko’s death was an accident for which they could not be held responsible.” Slye, *supra* note 44, at 187 n.34.

54. Ronald C. Slye, *International Law, Human Rights Beneficiaries, and South Africa: Some Thoughts on the Utility of International Human Rights Law*, 2 CHI. J. INT’L L. 59, 64 (2001).

55. *See* John Dugard, *Reconciliation and Justice: The South African Experience*, 8 TRANSNAT’L L. & CONTEMP. PROBS. 277, 299-300 (1998). The former Minister of Defence, Magnus Malan, was acquitted on murder charges. *See id.* Major Eugene de Kock was found guilty of six counts of murder and thirty other charges and sentenced to 212 years imprisonment. *See id.* However, he was apparently granted amnesty a few years later. *See* William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT’L L.J. 467, 495 n.125 (2001).

56. *See supra* text accompanying notes 37-41.

57. *See Where Have All the Bastards Gone?*, WKLY. MAIL & GUARDIAN, June 15, 2000, available at <http://www.sn.apc.org/wmail/issues/000615/NEWS17.html> (last visited Jan. 24, 2002).

Despite its shortcomings, though, South Africa's restorative justice model is preferable to the ICTY's retributive justice model because: (1) the creators of South Africa's truth and reconciliation process recognized that it was unrealistic to attempt to prosecute every perpetrator; and (2) they established a principled basis for determining which perpetrators had earned the right to receive amnesty.

It is still too early to formulate a definitive conclusion concerning the extent to which South Africa's Truth and Reconciliation Commission has advanced the goals of societal reconciliation and restorative justice.⁵⁸ However, few would dispute the proposition that South Africa's Truth and Reconciliation Commission, and its associated Amnesty Committee, have made a positive contribution to societal reconciliation in South Africa. In contrast, Chile's amnesty law probably had the effect of hindering, rather than promoting, societal reconciliation in Chile. What little progress Yugoslavia has made toward societal reconciliation is primarily attributable to changes in political leadership, which occurred in spite of, not because of, the ICTY.⁵⁹ Thus, although it is premature to render a final verdict on the South African experiment, there is little doubt that South Africa's approach is a better vehicle for achieving societal reconciliation than either the Chilean or Yugoslav model.

In sum, the South African model is not perfect, and the complex problems of transitional justice cannot be reduced to a simple formula. As Professor Koh notes, "no one solution fits all situations."⁶⁰ But South Africa's transitional justice mechanism provides a useful model because it strikes a good balance between the legitimate idealistic desire to punish human rights violators for their crimes, and the equally legitimate realistic desire to leave the past behind, so that society can move forward into a better future.

III. INSIDE-OUTSIDE ENGAGEMENT

Koh's third principle is that the United States should try to minimize ongoing human rights abuses in other countries by persuading "each country over time to accept the human rights norms of the international community as internal norms, using . . . 'inside' diplomatic channels for government-to-government dialogue against a background of 'outside' sanctions."⁶¹ As a general statement of principle, this approach is eminently sound. In keeping with his hard-nosed idealist approach, Koh's third principle attempts to craft a

58. For a tentative assessment, see Slye, *supra* note 44, at 177-82.

59. Slobodan Milosevic's stubborn, and ultimately unsuccessful, attempt to retain his position of political leadership in Serbia was undoubtedly influenced, to some extent, by fear that his ouster would lead to prosecution by the ICTY, as indeed it has.

60. Koh, *supra* note 1, at 311.

61. *Id.* at 316.

middle way between realism (which emphasizes “inside” dialogue) and idealism (which emphasizes “outside” sanctions). Here, the extreme realpolitik position is that human rights abuses in other countries are not a proper concern of U.S. foreign policy.⁶² The extreme moralist position is that the United States should disassociate itself from objectionable governments by severing ties, to the greatest extent possible, so that we are not “tainted” with the sins of those governments.⁶³ Koh’s recommended middle way “combines techniques of *internal persuasion* with techniques of *external pressure*,” or sanctions.⁶⁴

When Koh’s analysis moves from a description of his third principle to the application of that principle, he focuses on China as an example. With all due respect to Professor Koh, I suggest that U.S. policy towards China does not represent a middle way between realism and idealism. To the contrary, our China policy exemplifies the flaws of a realpolitik foreign policy because U.S. policy is characterized by almost exclusive reliance on “inside” dialogue, without any significant “outside” sanctions designed to pressure China into changing its behavior.⁶⁵

Koh identifies five “outside” techniques that the United States has utilized to pressure China into improving its human rights record: publicly condemning illegal arrests, publishing human rights reports that chronicle Chinese abuses, pressing China to ratify human rights treaties, sponsoring annual resolutions at the U.N. Human Rights Commission and designating China for sanctions under the International Religious Freedom Act (IRFA).⁶⁶ The first three of these so-called “outside” techniques closely resemble “inside” techniques, because they involve mere words, without any threat of sanctions.⁶⁷ The fourth technique—U.S. sponsorship of annual resolutions at the U.N. Human Rights Commission—does involve at least an implied threat

62. See, e.g., *Nomination of Henry A. Kissinger: Hearings Before the Senate Comm. on Foreign Relations*, 93d Cong. 117 (1973) (“I do believe that it is dangerous for us to make the domestic policy of countries around the world a direct objective of American foreign policy . . .”).

63. See, e.g., 22 U.S.C. § 2304(a)(3) (1994) (directing the President to “formulate and conduct international security assistance programs of the United States in a manner which will . . . avoid identification of the United States, through such programs, with governments which deny to their people internationally recognized human rights and fundamental freedoms . . .”).

64. Koh, *supra* note 1, at 317.

65. Koh admits that “this engagement strategy with China has thus far reaped only limited human rights improvements.” *Id.* at 318. But he nevertheless defends the strategy as “the only reasonable long-term approach . . .” *Id.* In contrast, I suggest that the United States’ China policy is flawed because it is inconsistent with Koh’s stated principle.

66. *Id.* at 317-18.

67. Of course, public condemnation is stronger medicine than private condemnation, but it distorts the meaning of the term “sanctions” to say that public condemnation is a “sanction.”

of sanctions. Unfortunately, though, China has successfully thwarted every U.S. effort to persuade the Commission to pass a resolution condemning Chinese human rights abuses.⁶⁸ The United States has imposed sanctions on China under the IRFA,⁶⁹ but that is the only “outside” technique mentioned by Koh that actually involves sanctions.

Moreover, the sanctions that the United States has actually imposed under IRFA are the mildest sanctions permitted under the statute. To clarify this point, some explanation of the statute is necessary. IRFA requires the President annually to “review the status of religious freedom in each foreign country” and to designate specific countries that are “of particular concern for religious freedom.”⁷⁰ The United States has twice designated China as a country “of particular concern for religious freedom.”⁷¹ Once the President has made that designation, the statute directs him either to impose one or more of the various sanctions identified in paragraphs (9) through (15) of section 6445(a),⁷² or to undertake “commensurate action.”⁷³ The sanctions in paragraphs (9) through (15) include, *inter alia*: suspending development assistance; terminating security assistance; instructing U.S. directors of international financial institutions to vote against loans; and/or prohibiting U.S. financial institutions from making loans or providing credits worth more than ten million dollars in any twelve-month period.⁷⁴ Additionally, the statute provides that the President may order “the heads of the appropriate United

68. See Michael J. Dennis, *The Fifty-Sixth Session of the UN Commission on Human Rights*, 95 AM. J. INT’L L. 213, 219 (2001) (“China again mobilized support from developing countries to block consideration of a U.S.-sponsored text that accused Beijing of suppressing religious freedom and crushing dissent. . . . [I]t marked China’s ninth escape from censure since the assault on unarmed protesters at Tiananmen Square in 1989.”)

69. International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2787 (1998) (codified as amended in scattered sections of 22 U.S.C.).

70. 22 U.S.C. § 6442(b)(1)(A) (Supp. V 1999).

71. See Designation of Countries of Particular Concern Under the International Religious Freedom Act, 66 Fed. Reg. 21,806 (May 1, 2001); Designation of Countries of Particular Concern Under the International Religious Freedom Act, 64 Fed. Reg. 59,821 (Nov. 3, 1999). This puts China in a group with Burma, Iran, Iraq and Sudan—the only other countries to be so designated.

72. See § 6442(c)(1)(A) (Supp. V 1999) (directing the President to choose from among the various sanctions listed in paragraphs (9) through (15) of section 6445(a)).

73. See *id.* §§ 6442(c)(1)(B), 6445(b) (Supp. V 1999). The statute does provide various “escape clauses” that authorize the President to refrain from imposing sanctions in certain cases. See § 6442(c)(2) (authorizing President to conclude a binding agreement with the foreign government in lieu of imposing sanctions); § 6442(c)(4) (exception for countries where the President previously imposed sanctions pursuant to the International Religious Freedom Act); § 6442(c)(5) (exception for countries that are “already subject to multiple, broad-based sanctions imposed in significant part in response to human rights abuses”); § 6447(a) (authorizing President to waive sanctions in some cases).

74. § 6445(a)(13).

States agencies not to issue any (or a specified number of) specific licenses . . . to export any goods or technology to the specific foreign government” under the Export Administration Act, the Arms Export Control Act or the Atomic Energy Act.⁷⁵

The option apparently selected by President Clinton was to restrict “exports of crime control and detection instruments and equipment[.]”⁷⁶ which are regulated under the Export Administration Act.⁷⁷ Thus, despite significant concerns about religious freedom in China, the Clinton Administration chose not to restrict exports under the Arms Export Control Act or the Atomic Energy Act. Nor did it restrict development assistance, security assistance or loans from either U.S. or international financial institutions. Moreover, inasmuch as the Clinton Administration chose to restrict only exports of crime control and detection instruments and equipment, the IRFA sanctions have no impact on the vast majority of equipment and materials regulated under the Export Administration Act.⁷⁸ Finally, a close analysis of the Export Administration Regulations shows that there has been no change whatsoever to the “crime control” portion of those regulations as a result of the sanctions imposed on China under the IRFA.⁷⁹

75. *Id.*

76. See *State Dep’t Annual Report on Int’l Religious Freedom for 2000: Hearing Before the Subcomm. on Int’l Operations and Human Rights*, 106th Cong. 10 (2000) (testimony of Firuz Kazemzadeh) [hereinafter *Kazemzadeh testimony*]. Mr. Kazemzadeh testified in his capacity as vice chairman of the United States Commission on International Religious Freedom, an advisory commission created by the International Religious Freedom Act, and composed mainly of U.S. citizens “who are not being paid as officers or employees of the United States . . .” § 6431(b) (Supp. V 1999). During his testimony, Mr. Kazemzadeh criticized the Clinton Administration for failing to publicize the sanctions imposed under IRFA. He noted, though, that the United States “restricts exports of crime control and detection instruments and equipment” to China. His statement appears to be the only public record of the specific sanctions imposed on China under the IRFA.

77. 50 App. U.S.C. §§ 2401 *et seq.* (1994). See also 15 C.F.R. §742.7 (2001).

78. The complete list of equipment, materials and technology subject to controls under the Export Administration Regulations (EAR) is at 15 C.F.R. § 774.2 (2001), which fills almost 175 pages in the Code of Federal Regulations. Crime control and detection instruments and equipment comprise only twenty-one categories of the hundreds of categories of equipment and materials that are controlled under the EAR. See 15 C.F.R. § 742.7(a)(1) (2001).

79. Under the regulations, an export license is required for exports of certain categories of equipment to countries designated in CC column 1 (Supplement No. 1 to part 738 of the EAR). See *id.* For equipment in the subject categories, the decision whether to grant a license for a particular export to a listed country is discretionary. China was already listed in CC column 1 in the 1999 version of the EAR, see 15 C.F.R. § 738, Supp. 1 (1999), before it was identified in October 1999 as a country “of particular concern for religious freedom.” See *Designation of Countries of Particular Concern Under the International Religious Freedom Act*, 64 Fed. Reg. at 59,821. China is still listed in CC column 1 in the 2001 version of the EAR. See 15 C.F.R. § 738.4 (2001). That has not changed.

Thus, in the final analysis, the “sanction” amounts to a decision that, in conducting its case-by-case discretionary review of license applications for exports of crime control equipment to China, the Executive Branch may choose to “distance the United States from [human rights] abuses”⁸⁰ in China by denying certain export license applications that might otherwise have been approved. As others have noted, “[i]t is difficult to believe that this sanction sends a strong message to Beijing on religious freedom.”⁸¹

Defenders of the Clinton Administration’s China policy may contend that the act of labeling China as a country “of particular concern for religious freedom,” by itself, puts substantial pressure on China to change its behavior. Indeed, one could make a persuasive case that the public identification of China as a violator of religious liberty is a harsher penalty than the restriction on export of crime control equipment. But that is precisely the problem. With respect to intellectual property rights, for example, the United States “has threatened to impose billions of dollars in sanctions to vindicate U.S. intellectual property interests.”⁸² In response to such threats, “the Chinese government changed its behavior.”⁸³ The juxtaposition of U.S. human rights policy with U.S. intellectual property policy sends a clear message to China: we are serious about protecting the intellectual property interests of U.S. companies that do business in China, but when it comes to human rights and religious freedom for the Chinese people, the U.S. policy is all talk and no action.

Other aspects of U.S. policy toward China reinforce the impression that human rights is a relatively low priority for U.S. foreign policy. While criticizing Chinese human rights abuses, the United States has simultaneously supported a broad range of political and economic benefits for China. On October 10, 2000, President Clinton signed into law an Act to extend

With respect to a particular category of shotguns, the regulations distinguish between countries for which an export license is required “regardless of end-user,” and countries for which an export license is required “only if for sale or resale to police or law enforcement entities” See 15 C.F.R. § 742.7(a)(2), (a)(3) (2001). Both before and after the imposition of sanctions, China has been included in the category for which a license is required “only if for sale or resale to police or law enforcement entities” Compare 15 C.F.R. § 738.4 (1999) to 15 C.F.R. § 738.4 (2001). Again, nothing has changed.

80. 15 C.F.R. § 742.7(b) (2001) (“The judicious use of export controls is intended to deter the development of a consistent pattern of human rights abuses, distance the United States from such abuses and avoid contributing to civil disorder in a country or region.”)

81. Kazemzadeh testimony, *supra* note 76.

82. *China, the WTO, and the Human Rights: Hearing Before the Subcommittee on International Operations and Human Rights*, 106th Cong. 4 (1999) (statement of Congressman Christopher H. Smith).

83. *Id.*

permanent normal trade relations (PNTR) to China.⁸⁴ With full U.S. support, the World Trade Organization (WTO) has recently concluded negotiations with China on China's terms of membership in the WTO.⁸⁵ The United States also decided not to oppose China's bid to host the 2008 summer Olympics in Beijing.⁸⁶ China will reap tremendous economic and political benefits from PNTR, WTO membership and the summer Olympics. By supporting these types of benefits for China, without obtaining any concrete improvements in China's human rights record, the United States has sacrificed its human rights principles on the altar of political and economic expediency.

In sum, Koh's principle of inside-outside engagement constitutes an appropriate middle way between realism and idealism. The failure of the U.S. China policy should not be viewed as an indictment of Koh's principle. Rather, this policy has failed because it, contrary to Koh's principle, has relied almost exclusively on "inside" dialogue, without any significant threat of "outside" sanctions.

IV. PREVENTING FUTURE HUMAN RIGHTS ABUSES

Koh's final principle is that "the broadest challenge the United States faces is not simply to redress past abuses, or to minimize current ones, but to develop a *consistent strategy to prevent future human rights abuse*, by promoting early warning, preventive diplomacy and long-term promotion of democracy worldwide in all of its dimensions."⁸⁷ Koh's discussion of democracy promotion, in particular, is the most impressive part of his paper. This is not because the idea of promoting democracy is a new idea (which it is not), but rather because Koh convincingly demonstrates that "the Clinton Administration made democracy promotion a core priority" of U.S. foreign policy.⁸⁸ When it comes to democracy promotion, other Presidents have "talked the talk," but the Clinton Administration's multi-dimensional program for building democracy, as described in detail by Professor Koh,⁸⁹ shows that President Clinton actually "walked the walk."

84. See United States-China Relations Act of 2000, Pub. L. No. 106-286, 114 Stat. 880 (2000) (codified as amended in scattered sections of 22 U.S.C.); William J. Clinton, Remarks on Signing Legislation on Permanent Normal Trade Relations with China, 36 WEEKLY COMP. PRES. DOC. 2417 (Oct. 16, 2000). For analysis of the Act, see Leo Wise, *Trading with China*, 38 HARV. J. ON LEGIS. 567 (2001).

85. See Press Release, World Trade Organization, WTO Successfully Concludes Negotiations on China's Entry (Sept. 17, 2001), available at http://www.wto.org/english/news_e/pres01_e/pr243_e.htm.

86. Amy Shipley, *Beijing is Awarded Summer Olympics; Despite Protests, IOC Selects China for 2008 Games*, WASH. POST, July 14, 2001, at A1.

87. Koh, *supra* note 1, at 322.

88. *Id.* at 324.

89. *Id.* at 324-29.

In accordance with his hard-nosed idealist approach, Koh's program for democracy promotion can also be viewed as a middle way between realism and idealism. Advocates of a *realpolitik* approach contend that the United States should not attempt to promote democracy in countries where the introduction of democracy would have a destabilizing effect.⁹⁰ This position is morally unsatisfactory because it is inconsistent with the deep-rooted American commitment to democratic values. Moreover, in the final analysis, the *realpolitik* approach is unrealistic because it fails to recognize that non-democratic governments are inherently unstable inasmuch as they fail to serve the interests of their own citizens.⁹¹ For example, U.S. efforts to prop up the Shah of Iran in the 1960's and 1970's were doomed to fail because the Shah did not serve the interests of Iran's people. By aligning itself with the Shah under the *realpolitik* banner of "preserving stability," the United States helped produce the anti-American backlash whose effects reverberate today. In contrast, a hard-nosed idealist policy would have attempted to pressure the Shah into adopting democratic reforms which, if carried out successfully, may have helped to avert the theocratic revolution. Even if that revolution was inevitable, a prior policy that disassociated the United States from the human rights abuses of the Shah's regime would have helped to minimize the anti-American tendencies of the successor regime.

In contrast to realists, moralistic idealists do accept democracy promotion as a legitimate goal of U.S. foreign policy. However, moralistic idealists tend to be more concerned with the moral message implicit in a particular policy than with the practical effects of that policy. The Cuban Liberty and Democratic Solidarity (*Libertad*) Act of 1996,⁹² popularly known as the Helms-Burton Act, provides an excellent example. In addition to codifying pre-existing sanctions against Cuba, the Act imposed draconian sanctions against foreign companies that do business with Cuba.⁹³ Although a stated purpose of the Act was to promote freedom and democracy in Cuba,⁹⁴ there is no evidence that the Act produced any such result. However, the Act did spark "formal protests from the international community, which condemned the Act

90. See, e.g., GEORGE F. KENNAN, *AT A CENTURY'S ENDING: REFLECTIONS, 1982-1995*, at 273-74 (1996).

91. This statement presupposes a concept of democracy that is focused on "government for the people," rather than elections, as the touchstone of democratic governance. Under this definition of democracy, it is a tautology to say that a non-democratic government does not serve the interests of its citizens.

92. Cuban Liberty and Democratic Solidarity (*LIBERTAD*) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified as amended in scattered sections of 22 U.S.C.).

93. The Act authorizes U.S. nationals to bring civil suits against persons who "traffic" in property expropriated by the Cuban government. *Id.* § 302(a), 110 Stat. at 815. "Trafficking" includes "engag[ing] in a commercial activity using or otherwise benefiting from confiscated property . . ." *Id.* § 4(13), 110 Stat. at 790-91.

94. *Id.* § 3, 110 Stat. at 788-89.

as violating both customary international jurisdictional rules and the GATT.”⁹⁵ If the actual objective of the Act was to send a message of moral condemnation that would be heard around the world, without having any practical impact on democracy in Cuba, the Act’s sponsors could not have chosen a better vehicle for accomplishing that objective.⁹⁶

Professor Koh’s discussion of the Clinton Administration’s multi-dimensional program for building democracy represents hard-nosed idealism at its best. In contrast to the *realpolitik* approach, Koh’s hard-nosed idealist approach is consistent with the deep-rooted American commitment to democratic values. In contrast to the moralistic idealists, Koh’s approach exhibits a concern for practical results, rather than empty posturing. In sum, Professor Koh’s hard-nosed idealism constitutes a laudable third-way that avoids the extremes of moralistic idealism and amoral *realpolitik*.

95. Cleveland, *supra* note 11, at 60.

96. I am not suggesting that the Act’s sponsors sought purposefully to design a statute that *would not* promote democracy in Cuba. I am suggesting, though, that they were less concerned with achieving practical results than they were with broadcasting a message of moral condemnation.