



# FACTS & OPINIONS

*On Public Interest Issues*

## Quotes

A man is likely to mind his own business when it is worth minding. When it is not, he takes his mind off his own meaningless affairs by minding other people's business.

—Eric Hoffer

We have all heard about the "mid-life crisis," but did you know that there is now a book out titled "Quarterlife Crisis"? It is about how tough it is to turn 25.

Apparently everybody has to whine about something.

—Thomas Sowell

Even America's socialists enjoy capitalism. We're probably one of the few countries in the world where, when socialists and communists meet, the parking lot is full of expensive cars.

—Charley Reese

## The Over-Criminalization of Social and Economic Conduct

Paul Rosenzweig

The origin of modern criminal law can be traced to early feudal times. For its inception, the criminal law expressed both a moral and a practical judgment about the societal consequences of certain activity: to be a crime, the law required that an individual must both cause (and attempt to cause) a wrongful injury and do so with some form of malicious intent. Classically, lawyers capture this insight in two principles: in order to be a crime there must be both an *actus reus* (a bad act) and a *culpable mens rea* (a guilty mind). At its roots, the criminal law did not punish merely bad thoughts (intentions to act without any evil deed) or acts that achieved unwittingly wrongful ends but without the intent to do so. The former were for resolution by ecclesiastical authorities, and the latter were for amelioration in the tort system. In American today, this classical

understanding of criminal law no longer holds.

The requirement of an actual act of some form is fundamental. As an initial premise, Anglo-American criminal law does not punish thought. For a crime to have been committed there must, typically, be some act done in furtherance of the criminal purpose. The law has now gone far from that model of liability for an act and, in effect, begun to impose criminal liability for the acts of another based upon failures of supervision that are far different from the common law's historical understanding.

Similarly, the law historically has required that before an individual is deemed a criminal he must have acted with intent to do wrong. Accidents and mistakes are not considered crimes. Yet contemporary criminal law punishes acts of negligence and even acts which are accidental.

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## FACTS & OPINIONS

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Dr. Don Racheter

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## Political Clarity

Thomas A. Rexroth

One of the biggest myths perpetuated on the American people is that if you care about people and issues you have to consider yourself to be a liberal. This myth drives the liberal base, and many independents and minorities, to vote for liberal political leaders. A new book, written by Thomas A. Rexroth, *Truth or Consequences, Exposing Hidden Political Agendas*, dispels this fallacy.

It examines the real differences between conservatives and liberals, offering unique insight about the way liberals think. It shows why the liberal worldview leads to socialism and despair, and why the conservative agenda leads to freedom and prosperity. It explores the way each group categorizes people and sees the world.

*Truth or Consequences* illustrates why it is not in a liberal

leader's best interest to solve a problem — unless fixing one problem creates other problems. The opposite is true for conservative leaders. They must solve problems and take credit for it.

This book also puts forth seven principles which must be considered before any legislation becomes law. If any of the principles are violated, the new law will eventually cause more problems than it solves. It shows how ignoring these principles has eroded our freedoms.

*Truth or Consequences* sheds new light on issues which often make little sense. It explains why some of our citizens ignore evidence to the contrary and believe that America is evil. It explains why conservatives should be setting the agenda instead of trying to put a conservative twist on the liberal agenda. You will find this book to be an enlightening read for all who seek political clarity.

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## Criminalization of Social and Economic Conduct

Paul Rosenzweig

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In the regulatory context, as Justice Potter Stewart has noted, there is, in effect, a standard of near-absolute liability.

### Expanded Reach of Criminal Law

To these fundamental changes in the nature of criminal liability, one must also add significant changes in the subject matter of criminal law. At its inception, criminal law was directed at conduct that society recognized as inherently wrongful and, in some sense, immoral. These acts were wrongs in and of themselves (*malum in se*), such as murder, rape, and robbery. In recent times the reach of the criminal law has been expanded so that it now addresses conduct that is wrongful not because of its intrinsic nature but because it is a prohibited wrong (*malum prohibitum*) — that is, a wrong created by a legislative body to serve some perceived public good. These essentially regulatory crimes have come to be known as “public welfare” offenses.

Thus, today the criminal law has strayed far from its historical roots. Many statutes punish those whose acts are wrongful only by virtue of legislative determination. The distortion of the classical

criminal law has arisen for a variety of reasons (some of which may have been accompanied by benign motives). For example, the Enron scandal and similar acts of intentional corporate fraud have led to overly broad reform proposal that may trap honest but unsophisticated corporate managers. But whatever the cause, the distortion is not without its consequences. The landscape of criminal law today is vastly different from what it was 100 years ago — so much so as to be almost unrecognizable.

### Lack of Judicial Constraint

Because the courts have deliberately chosen a limited, almost self-abnegating role in constraining the use of criminal sanctions, no effective judicial constraint currently limits the extent to which individual conduct that bears no direct causal relationship to a societal harm may be criminalized. Nor is there a limit on the extent to which, in the social and economic context, the legislatures may dispense with the traditional conceptions of *mens rea*. The consequences of this are two-fold: a pathological legislative approach to criminal law and an excess of prosecutorial discretion.

The legislative impetus is clear — there is a “market” of public approval for more criminal laws and no effective consideration of countervailing costs to society. And in the absence of any judicial check on this legislative trend, the result is a wholesale transfer of power from elected legislative officials to prosecutors who, in

many instances, are unelected. Where once the law had strict limits on the capacity of the government to criminalize conduct, those limits have now evaporated. Society has come, instead, to rely on the conscience and circumspection in prosecuting officers. Or, as the Supreme Court said in *United States v. Dotterweich*, Americans are obliged to rely only on “the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries” to determine the criminal conduct. In effect, the legislative branch has transferred a substantial fraction of its authority to regulate American social and economic conduct to those who have no expertise in the matter: prosecutors, trial judges, and jurors who make decisions on criminalizing conduct without any ability to consider the broader societal impact of their decisions.

Where once, to be a criminal, an individual had to do an act (or attempt to do an act) with willful intent to violate the law or with knowledge of the wrongful nature of his conduct, today it is possible to be found criminally liable and imprisoned for a substantial term of years for the failure to do an act required by law, without any actual knowledge of the law’s obligations and with no wrongful intent whatsoever. These developments are advanced in the name of the “public welfare” — an express invocation of broader social needs at the expense of individual liberty and responsibility. It is, ultimately, the triumph of a Benthamite utilitarian conception

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Social and Economic  
Conduct**

**Paul Rosenzweig**

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of the criminal law over the morally grounded understanding of criminal law advanced by William Blackstone. One may, and indeed one should, doubt the wisdom of such a course. Given how the criminal law has developed, a free people are constrained to ask the question: Are broader social needs well served when individual liberty and responsibility suffer?

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*Facts & Opinions*  
**Question of the Quarter:**

Has our society gone too far in criminalizing social and economic conduct?

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## American Unilateralism - Part II

Charles Krauthammer

There are two schools of committed multilateralists, and it is important to distinguish between them. There are the liberal internationalists who act from principle, and there are the realists who act from pragmatism. The first was seen in the run-up to the Congressional debate on the war on Iraq. The main argument from the opposition Democrats was that we should wait and hear what the U.N. was saying. Senator Kennedy in a speech before the vote in Congress, said, "I'm waiting for the final recommendation of the Security Council before I'm going to say how I'm going to vote." Senator Levin, who at the time was the Chairman of the Senate Armed Service Committee, actually suggested giving authority to the President to act in Iraq only upon the approval of the U.N. Security Council.

The liberal internationalist position is a principled position, but it makes no internal sense. It is based on a moral vision of the world, but it is impossible to understand the moral logic by which the approval of the Security Council confers moral legitimacy on this or any other enterprise. How does the blessing of the

butchers of Tiananmen Square, who hold the Chinese seat on the council, lend moral authority to anything, let alone the invasion of another country? On what basis is moral legitimacy lent by the support of the Kremlin, whose central interest in Iraq, as all of us know, is oil and the \$8 billion that Iraq owes Russia in debt? Or of the French, who did everything that they could to weaken the resolution, then came on board at the last minute because they saw that an Anglo-American train was possibly leaving for Baghdad, and they didn't want to be left at the station?

*How does the blessing of the butchers of Tiananmen Square, who hold the Chinese seat on the [Security] Council, lend moral authority to anything, let alone the invasion of another country?*

My point is not to blame the French or the Russians or the Chinese for acting in their own national interest. That's what nations do. My point is to express wonder at Americans who find it unseemly to act in the name of our own national interest, and who cannot see the logical absurdity of granting moral legitimacy to American action only if it earns the prior approval of others which is granted or withheld on the most cynical grounds of self-interest.

So much for the moral argument that underlies multilateralism. What are the practical arguments? There is a school of realists, who agree that liberal internationalism is nonsense, but who argue plausibly that we need international or allied support, regardless. One of their arguments is that if a power consistently shares rulemaking with others, it is more likely to get aid and assistance from them.

I have my doubts. The U.S. made an extraordinary effort during the Gulf War to get U.N. support, share decision-making, and assemble a coalition. As I have pointed out, it even denied itself the fruits of victory in order to honor coalition goals. Did it garner support for subsequent **Iraq policy**— policy dictated by the original acquiescence to that coalition? The attacks of September 11 were planned during the Clinton Administration, an administration that made a fetish of consultation and did its utmost to subordinate American hegemony. Yet resentments were hardly assuaged, because extremist rage against the U.S. is engendered by the very structure of the international system, not by our management of it.

Pragmatic realists value multilateralism in the interest of sharing burdens, on the theory that if you share decision-making, you enlist others in your own hegemonic enterprise. As proponents of this school argued recently in *Foreign Affairs*,

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“Straining relationships now will lead only to a more challenging policy environment later on.” This is a pure cost-benefit analysis of multilateralism versus unilateralism.

If the concern about unilateralism is that American assertiveness be judiciously rationed and that one needs to think long-term, hardly anybody will disagree. One does not go it alone or dictate terms on every issue. There’s no need to. On some issues, such as membership in the World Trade Organization, where the long-term benefit both to the U.S. and to the global interest is demonstrable, one willingly constricts sovereignty. Trade agreements are easy calls, however, free trade being perhaps the only mathematically provable political good. Other agreements require a great skepticism. The Kyoto Protocol on climate change, for example, would have had a disastrous effect on the American economy, while doing nothing for the global environment. Increased emissions from China, India, and other third-world countries, which are exempt from its provisions, clearly would have overwhelmed and made up for whatever American cuts would have occurred. Kyoto was therefore rightly

rejected by the Bush Administration. It fails on its merits, but it was pushed very hard nonetheless, because the rest of the world supported it.

The same case was made during the Clinton Administration for chemical and biological weapon treaties, which they negotiated assiduously under the logic of, “Sure, they’re useless or worse, but why not give in, in order to build good will for future needs?” The problem is that appeasing multilateralism does not assuage it; appeasement only legitimizes it. Repeat acquiescence on provisions that America deem injurious reinforce the notion that legitimacy derives from international consensus. This is not only a moral absurdity. It is injurious to the U.S., because it undermines any future ability of the U.S. to act unilaterally if necessary.

### *The prudent exercise of power calls for occasional concessions on non-vital issues, if only to maintain some psychological goodwill.*

The key point I want to make about the new unilateralism is that we have to be guided by our own independent judgment, both about our own interest and about global interests. This is true especially on questions of national security, war making, and freedom of action in the deployment of power. America should neither defer nor contract out such as those imposed by the international criminal court.

Should we exercise prudence? Yes. There is no need to act the superpower in East Timor or Bosnia, as there is in Afghanistan and Iraq. There is no need to act the superpower on steel tariffs, as there is on missile defense.

The prudent exercise of power calls for occasional concessions on non-vital issues, if only to maintain some psychological goodwill. There’s no need for gratuitous high-handedness or arrogance. We shouldn’t, however, delude ourselves as to what psychological goodwill can buy. Countries will cooperate with us first out of their own self-interest, and second out of the need and desire to cultivate good relations with the world’s unipolar power. Warm feelings are a distant third.

After the attack on the U.S.S. Cole, Yemen did everything it could to stymie the American investigation. It lifted not a finger to suppress terrorism at home, and this was under an American administration that was obsessively multilateralist and accommodating. Yet today, under the most unilateralist American administration in memory, Yemen has decided to assist in the war on terrorism. This was not the result of sudden attack of Yemeni goodwill, or of a quick re-reading of the *Federalist Papers*. It was a result of the war in Afghanistan, which concentrated the mind of recalcitrant states on the price of non-cooperation.

Coalitions are not made by superpowers going begging hat in hand; they are made by asserting a position and inviting others to

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join. What even pragmatic realists fail to understand is that unilateralism is the high road to multilateralism. It was when the first President Bush said that the Iraqi invasion of Kuwait would not stand, and made it clear that he was prepared to act alone if necessary, that he created the Gulf War coalition.

Of course, unilateralism does not mean *seeking* to act alone. One acts in concert with others when possible. It simply means that one will not allow oneself to be held hostage to others. No one would reject Security Council support for war on Iraq or for any other action. The question is what to do if, at the end of the day, the Security Council or the international community refuses to back us? Do we allow ourselves to be dictated to on issues of vital national interest? The answer has to be “no,” not because we are being willful, but because we have a special role, a special place in the world today, and therefore a special responsibility.

Let me give you an interesting example of specialness that attached to another nation. During the 1997 negotiations in Oslo over the land mine treaty, when just about the entire Western world was campaigning for a land mine ban, one of the holdouts was Finland. The

Finnish prime minister found himself scolded by his Scandinavian neighbors for stubbornly refusing to sign on to the ban. Finally, having had enough, he noted tartly that being foursquare in favor of banning land mines was a “very convenient” pose for those neighbors who “want Finland to be their land mine.”

*Do we allow ourselves  
to be dictated to on  
issues of vital  
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The answer has  
to be “no.”*

In many parts of the world, a thin line of American GIs is the land mine. The main reason that the U.S. opposed the land mine treaty is that we need them in places like the DMZ in Korea. Sweden and Canada and France do not have to worry about an invasion from North Korea killing thousands of their soldiers. We do. Therefore, as the unipolar power and as the guarantor of peace in places where Swedes do not tread, we need weapons that others do not. Being uniquely situated in the world, we cannot afford the empty platitudes of allies not quite candid enough to admit that they live under the protection of American power. In the end, we have no alternative but to be unilateralist. Multilateralism becomes either an exercise in futility or a cover for inaction.

The futility of it is important to understand. The entire beginning of the unipolar age was a time

when this country, led by the Clinton administration, eschewed unilateralism and pursued multilateralism with a vengeance. Indeed, the principal diplomatic activity of the U.S. for eight years was the pursuit of a dizzying array of universal treaties: the comprehensive test ban treaty, the chemical weapons convention, the biological weapons convention, Kyoto and, of course, land mines.

In 1997, the Senate passed a chemical weapons convention that even its proponents admitted was useless and unenforceable. The argument for it was that everyone else had signed it and that failure to ratify would leave us isolated. To which we ought to say: So what? Isolation in the name of a principle, in the name of our own security, in the name of rationality is an honorable position.

Multilateralism is at root a cover for inaction. Ask yourself why those who are so strenuously opposed to taking action against Iraq are also so strenuously in favor of requiring U.N. support. The reason is that they see the U.N. as a way to stop America in its tracks. They know that for ten years the Security Council did nothing about Iraq; indeed, it worked assiduously to weaken sanctions and inspections. It was only when President Bush threatened unilateral action that the U.N. took any action and stirred itself to pass a resolution. The virtue of unilateralism is not just that it allows action. It forces action.

I return to the point I made earlier: The way to build a coalition is to be prepared to act  
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**American  
Unilateralism - Part II**

**Charles Krauthammer  
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alone. The reason that President Bush has been able and will continue to be able to assemble a coalition on Iraq is that the Turks, the Kuwaitis and others in the region will understand that we are prepared to act alone if necessary. In the end, the real division between unilateralists and multilateralists is not really about partnerships or about means or about methods. It is about ends.

We have never faced a greater threat than we do today, living in a world of weapons of mass destruction of unimaginable power. The divide before us, between unilateralism and multilateralism, is at the end of the

day a divide between action and inaction. Now is the time for action, unilaterally if necessary.

*Charles Krauthammer is a Washington Post columnist and FoxNews contributor.*

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