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Book Reviews

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BOOK REVIEWS

WORLD PEACE THROUGH SPACE LAW, by Jerome Morenoff. Charlottesville, Virginia: The Michie Company. 1967. Pp. xviii, 329.

The title of this book tends to suggest an imaginative design, consisting of complex legal schemes and a considerable dose of optimism, all marshalled together for the lofty task of securing the world's peace. The content of the book, however, does not bear out these expectations; it is almost entirely devoted to a single aspect of space activities—reconnaissance by satellites. A far more appropriate title for this volume would be the one originally given by the author to his doctoral dissertation of which this book is an enlarged version.[1]

The use of outer space for purposes of military reconnaissance has been one of the most debated and contested issues of space law to date. Ever since it became known that the United States intended to employ reconnaissance spacecraft, the Soviet Union, its allies and some other countries have been questioning the legality of surveillance from outer space. The dispute about whether or not such satellites are or are not "peaceful", in the sense of various U.N. General Assembly resolutions, may have been responsible for the slow pace in the development of space law by the United Nations. More recently, however, the opposition to satellite observation has considerably subsided, possibly because it has been realized that for compelling practical reasons efforts to ban space reconnaissance cannot succeed and, perhaps, also because the Soviet Union itself has embarked upon a similar program. Indeed, according to some educated estimates, the Soviets have placed approximately 80 reconnaissance spacecraft in orbit by June 1967, while the number for the United States is between 90 and 100.[2]

It is well known that many space activities can serve both military and scientific purposes and that the dividing line between them is often difficult, if not impossible, to draw. This is particularly true of spacecraft equipped with photo cameras and other devices designed to record conditions existing in the surrounding and subjacent environment. Think, for example, of meteorological satellites, against which no objections have been raised. Even though

1. "Reconnaissance in Airspace and Outer Space: A Legal Analysis and Prognosis". P. x.
2. "Satellites in Daily Operation". 22 *Interavia* 1517, 1520 (October 1967).

their primary purpose is to take pictures of the underlying cloud cover, the cameras they carry do not stop recording when there are no clouds beneath. Hence they often supply clear pictures not only of the cloud formations but also of the surface of the earth. Or, consider the potentialities for unrestricted observation by manned space vehicles. Both the Soviet and American astronauts are known to have taken from orbit excellent photographs of the subjacent continents. No one protested their picture-taking activities nor were they accused of space espionage. If space vehicles known as or suspected of being "reconnaissance spacecraft" are considered to present such a threat to the security of the underlying communities that they should be banned, as some officials and many commentators have urged, it would only be logical to ban also all other camera-equipped satellites. Possibly nothing short of prohibiting photographic equipment in outer space could effectively remove this alleged threat.

The most important reason given for the United States' decision to deploy observational satellites has been the necessity to obtain swift and accurate information about the location of the Soviet long-range missile sites, as a protection against a surprise attack. While information thus acquired probably enhanced the security of the United States several years ago, it can no longer be of equal importance at this time. Following the American example, the Soviet Union has in recent years resorted to the development of invulnerably sited strategic missiles. A rapidly increasing portion of the Soviet "deterrent" force is being installed in hardened underground silos, in Polaris-type submarines and in mobile surface launchers. Against these strategic weapon-systems, the usefulness of observation from space for purposes of attack or defense appears to have been sharply reduced. As the legality of nuclear detection satellites (formerly "Vela"), operating in the 50,000 mile orbit, has never been seriously challenged, it may be argued that the issue of observation from space in terms of its threat to national security and to world public order as well is increasingly moot.

These features of space reconnaissance, even as debating points, regrettably are not reflected in this book which with few exceptions traverses the more conventional paths of the problem. The framework of inquiry adopted by the author is quite comprehensive and the reader will find in the book a panoramic view of technical and legal aspects of aerial and space reconnaissance. However, the value of Dr. Morenoff's work is marred by a variety of serious shortcomings which include inaccuracies, omissions, out-of-date information, poor editing and occasionally questionable judgment. The following are some examples of these shortcomings.

On p. 22 the author states that "there are presently no specific prohibitions or restrictions on space flight", forgetting the prohibition against nuclear testing in outer space, stipulated in the Moscow Partial Test Ban Treaty of August 1963. The U.N. General Assembly resolution 1884 (XVIII) passed in 1963, urging states not to orbit or station in outer space weapons of mass destruction, now incorporated in the Space Treaty of January 1967,[3] should also have been mentioned in this context, especially because it received the support of both superpowers.

In discussing the U.S. and Canadian air defense identification zones, the author relies on obsolete national regulations (for U.S.—1961, and for Canada—1955) and neglects to mention that in addition to these, many other countries have in the meantime established comparable zones (e.g., Philippines, Japan, Taiwan, South Korea, Italy, Iceland, Australia). (P. 57 and 146). Similarly obsolete is information relating to the U.S. reconnaissance satellite launchings which are given as of March 1964, though a much more up-to-date count is readily available. (Pp. 60, 63, 64). The Chicago Convention on International Civil Aviation is, according to this book, "ratified or adhered to by fifty-seven nations", while, in fact, as of July 1, 1966, the number of parties to the Transit Agreement is not 41, as Dr. Morenoff has it, but 72.[4] On p. 124 the author refers to the Soviet Air Code of 1935, apparently unaware of the new USSR Air Code of 1961.

As to the consequences of non-compliance with the ADIZ regulations, Dr. Morenoff states that aircraft presenting a security threat are "dealt with in an appropriate manner", but the reader is left wondering what exactly this phrase entails. (P. 57). Again, on p. 51, discussing the American aerial overflights of the Soviet Union, the author alleges as a fact that "hundreds of planes [presumably U.S. planes] were intruding upon Soviet air space although they were unable to penetrate more than a few hundred miles", but omits to give the source of his information or the period when these overflights occurred.

Few will agree with Dr. Morenoff when in reference to the "legal status of unoccupied territory on the moon and other planets" and the potential exploitation of natural resources of celestial bodies,

3. In force since October 10, 1967. The Treaty does not prohibit military uses of the "void" of outer space. Its prohibitions against military activities cover only celestial bodies. But even in that context, it is not clear whether observation conducted by the military from celestial bodies is permissible or not. The uncertainty is due to a clause in Article IV (2) of the Treaty which explicitly permits the employment of military personnel on celestial bodies for scientific or for "any other peaceful purposes". It is the position of the United States government that space reconnaissance is "peaceful" and therefore not forbidden by any international agreement. As long as there is no authoritative definition of "peaceful uses" of space, the uncertainty will continue.

4. *Memorandum on ICAO* 9 (ICAO Public Information Office, 5th ed. 1966).

he concludes that "it is improbable that . . . [these problems] will arise at all . . ." (P. 9). It is widely believed that within very few years, possibly before 1970, men will land on the moon and in anticipation of this event many commentators and a number of officials have urged elaboration of appropriate rules and procedures to guide states in the early exploration and use of the Earth's natural satellite. The principles enunciated in the Space Treaty are far too general to satisfy anticipated contingencies.

The book also suffers of poor editing. For example, on p. 69 Dr. Morenoff correctly states that in 1964 the U.S. commenced "reconnaissance overflights of Laos at the request of the Laotian Government". However, the reader will discover on p. 129, that these missions are "clearly in violation of the air space sovereignty" of Laos. Further, even a moderately informed reader knows that the former Soviet Foreign Minister A. Y. Vyshinsky, dead since 1954, could not have possibly participated in the 1960 U.N. debate on the shooting down of a U.S. reconnaissance plane (RB-47) off the coast of the USSR. (P. 131).

In his discussion of the legality of the U-2 flights and the upper boundary of a state's sovereignty, Dr. Morenoff asks the reader to accept some highly questionable conclusions. Using the arguments submitted by two American officials—Arthur Dean and Spencer Beresford (acting in their private capacities)—he concludes: that "on May 1, 1960 the legal definition of air space, . . . extended vertically to at least 9 miles, and most probably, to 13.7 miles" (p. 127); that "question of the illegal invasion of Soviet sovereignty appears to be contingent upon the actual altitude at which the U-2 was functioning" (ibid); that the "only amendment to the concept of customary law as it was accepted in May 1960, is that the maximum altitude to which sovereignty may extend has been increased to the highest altitude at which U-2 was capable of flying (as opposed to the former 13.7 mile limit); and that, for these reasons "any aircraft capable of flying above the altitude might be able to avoid charges of invasion of sovereignty". (P. 129). It suffices to say that these arguments were never espoused by the U.S. government or, for that matter, any other government. Having thus apparently opted for the widely rejected doctrine of "effective control" as the main factor in determining the territorial limits of a state's sovereignty, on p. 163, following the unsubstantiated assertion that "a number of states adhere to this doctrine today" (what states?), he concludes nonetheless that "according to the dictates of international law, this doctrine of effectiveness is the least acceptable of all doctrines thus far proposed".

The author's treatment of space cooperation by the Soviet

Union is less than complete. While the extent of Soviet cooperative arrangements with other countries is modest, it does embrace more than merely meteorological cooperation with the U.S. (P. 177). The U.S.S.R. is known to have cooperative agreements with the Eastern Bloc countries and with India, U. A. R. and France. In 1965-66, for example, the Soviet comsats were used for the experimental transmissions of color TV between Moscow and Paris. Even the Soviet cooperative agreements with the U.S. cover, in addition to meteorology, space communications, geo-magnetic research and space biology and medicine.

Possibly because he views the world of 1967 as an "era of dichotomous ideologies" (pp. 166 and 192), the author fails to note the identity of interests that the two superpowers often exhibit in the field of regulation of space activities (e.g. resistance to the establishment of a line of demarcation between airspace and outer space; a lukewarm attitude, at best, toward attempts to demilitarize outer space; a marked lack of enthusiasm for expanding the role of the United Nations in the application of space technology; great caution in the codification of space law; etc.). Further, it is an oversimplification to assert, as Dr. Morenoff does, that on the question of the definition of "peaceful uses" of outer space there are only "two divergent views" (the Soviet and the American) and to ascribe to the USSR the view according to which "peaceful purposes are the same as 'non-military' purposes". (P. 187). The latter view is shared primarily by some non-aligned nations, notably India and U.A.R.; the Soviets have carefully avoided condemning all military uses of outer space and have instead preferred to label specific activities as "non-peaceful", especially reconnaissance by satellites. While the USSR presumably has placed observational satellites in orbit, it has never "openly admitted" to having done so, as the author claims on p. 205, without revealing the source of his information. One can also question the soundness of the author's assertion that since "espionage does constitute a moral wrong . . . [it] is therefore, a crime under international law." (Pp. 210, 213).

The major and original contribution in Dr. Morenoff's volume can be found in ch. 13, which contains an elaborate computer-oriented program designed to assist national policy-makers in deciding whether or not and when to embark upon unauthorized reconnaissance of another state and with what means. It seems that the primary objective of this program is to indicate to governments in each particular case the most effective method of accomplishing reconnaissance objectives and the one which will be least disruptive of international public order. What reception this program would

receive from the community of states is of course a matter of speculation. The fact that it could be employed only by the technologically advanced countries would likely make it unacceptable to many.

The purpose of this book judging by its title is to indicate certain effective measures which will help achieve "World Peace Through Space Law". Unfortunately the author fails to elaborate upon his objective and leaves far too much to the imagination of his readers. In the concluding chapter (ch. 14), consisting of three pages, he recommends the establishment of a U.N. Reconnaissance Agency whose aim would be "to deter any state from instituting activities which could cause the disruption of world order." (P. 300). That giant task would be accomplished by the use of satellite technology. Even if states were willing to subscribe to this plan, Dr. Morenoff seems to be unduly optimistic about the detection capabilities of satellites. With all its observational satellites, and continuous aerial, sea and ground surveillance, the United States continues to experience great difficulties in detecting the movement of men and supplies from North Vietnam to South Vietnam. And it is precisely this type of activity that is likely to be the most serious threat to peace in the coming years.

The prospects in the foreseeable future are for the continuation of unilateral surveillance by traditional means (spies, aircraft) as well as by long-range electronic devices and satellites. Perhaps in the more distant future, presumably within a major disarmament program, reconnaissance by satellites will also be employed but only as one among several parallel methods of international inspection. In that context some of the author's ideas may prove valuable.

Despite its many flaws—and the absence of an index and lack of any post-1964 references are inexcusable—the Morenoff book is a useful effort to contribute to the understanding of the technical and legal problems of contemporary aerial and space reconnaissance.

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CRIME AND PUBLICITY: THE IMPACT OF NEWS ON THE ADMINISTRATION OF JUSTICE, by Alfred Friendly and Ronald L. Goldfarb. New York: The Twentieth Century Fund, 335 pages. $5.00.

This scholarly and lucid work undertakes to chart a course between the scylla of an uninformed public and the charybdis of an unfair criminal trial. The authors plot well.

It is appropriate that they early cite the comments of the Warren Commission on publicity and the administration of criminal justice. The tragedy which engendered that report has been the progenitor of the public's current concern with the seeming dichotomy of free press and fair trial. Quoting Chesterton, the authors underscore the gravity of the apparent conflict: It is not the conflict of right and wrong but of right and right.

The basis of the alleged conflict emanates from the communication to prospective jurors of material that would be inadmissible at trial. Such communication potentially prejudices the verdict. The frequency of publication of prejudicial material appears primarily to be limited to *causes celebre*. The actual impact on the talesman according to recent but incomplete reports seems meager, although his initial opinion may well be manipulated by early publicity. Whether the impact of such publicity is large or small, our system of justice demands an impartial trial in every case. It is therefore necessary that publicity be confined to a sphere that does not impeach the right to fair trial nor impinge on the public's right to be informed.

Legal procedure contains numerous prophylactic techniques directed toward the protection of the accused without abating mass media's right to publish. Such procedures, denominated by the authors as "filtering procedures", are the change of venue, continuance, voir dire and the jury charge. These devices if skillfully and properly employed can assist in bringing about a fair trial. However, their effectiveness may be inherently limited. Hence, a change of venue is of limited utility where prejudicial publicity has had broad geographic impact. Other techniques directed toward the objective of a fair trial are the power of criminal contempt, a device the courts are reluctant to employ, and the reversal (in cases of denial of due process) which is not the most efficacious means to insure fair trial.

Despite the presence of these techniques the actual failure to achieve impartial adjudication in every case has proved disquieting.

As a result, a plethora of schemes have been proposed to correct abuses (both real and fancied) of the press and mass media. Most attention has been directed to the British system and the proposals of the Reardon Commission. Our authors note that the recommen-

dations of the Commission postulate improved use of the so-called filtering procedures and the contempt rule. In addition, the bar and the public officials, the sources of much of the material used by mass media, would be subject to restraint in the disclosure of information, violations of which would subject the utterer to bar or court disciplinary proceedings. Friendly and Goldfarb find two generic problems with the Report. First is a "pervasive, underlying notion that the less said about crime news, the better will justice be served." As the Report emphasized negative commands to law enforcement agencies, it created an underlying propensity toward official secrecy. Secondly, the Reardon Report would apply its stricture of silence to defense counsel as well as police and prosecution. In so providing, it could well inhibit public protest by defense counsel when it is needed most—when the power of bureaucracy and institution impose "self-regulated" sanctions to prevent legitimate protest against their machinations.

The second scheme that has attracted considerable popularity in the fair trial-free press argument is the so-called British system which precludes, at pain of criminal contempt, publication after arrest of matter that might affect a potential juror prior to its actual disclosure in open court.

The British plan does not assure a fair and proper trial in Britain. The British system provides for an open pre-trial judicial proceeding, the preliminary hearing, wherein the prosecution is compelled to present its case in detail, and the press is allowed to report the hearing fully. Such publicity allows prejudicial information to invade the minds of prospective jurors. In addition, adherents of the British plan fail to appreciate the substantive and cultural difference between the American and British administration of justice. Such differences do not augur well for wholesale transplantation of the British system to American shores.

The intrinsic defects of the proposed panaceas are many. Most proposals would require that publication of any material which might be prejudicial be postponed until the completion of trial. Postponement does not solve the problem to which it is directed. Thus, it would not affect cases where arrest is delayed as in the case of escaping fugitives. Nor would postponement preclude publication where the facts of the offense itself engender potential prejudice. Numerous other examples, carefully drawn by the authors, show the futility of such a directive.

A more fundamental defect of the rule of postponement exists, however. Such a rule compels a choice between the right of fair trial and the right of free press when we are entitled to both. In our system of government, the accused is entitled to a fair trial.

Underlying the system that assures the right is an informed citizenry. This right to be informed of necessity includes the right to information pertaining to the administration of society's justice. Since the administration of that justice is at once a social and governmental issue, it is incumbent that the agencies entrusted with the collection and dissemination of information be permitted to transmit it to the governing public when it is both timely and pertinent. Without this communication the political system is jeopardized.

Behind the American concept of freedom of the press lies the right of the people to have information and opinion on matters of public concern, gathered and disseminated through a press free from governmental control or restraint.

The First Amendment was designed to establish a press free from governmental control. It is a grant of immunity from every conceivable form of abridgment.

By unfettering the press from historic forms of restraint, the courts have not immunized it from punishment for abuses.

The character of every publication depends upon the circumstances in which it is reported. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.

The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils to the fair trial concept. It is a question of proximity and degree.

Any attempt to restrict First Amendment liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.

Much of today's free press-fair trial turmoil is based on Sheppard. As to this decision, the question was whether he had been deprived of a fair trial because of the trial judge's failure to protect him from the massive, pervasive and prejudicial publicity that attended his prosecution. The significance of Sheppard lies in the fact that while the Supreme Court discussed pretrial publicity at length, it explicitly declined to hold that such publicity *in itself* worked a denial of due process.

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field.

The press has the responsibility to do more than publish information about trials; the press must guard against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Where there is no threat or menace to the integrity of the

trial, courts have consistently required that the press have a free hand, even though its sensationalism is deplored.

But legal trials are not like elections, to be won through the use of the meeting hall, the radio, and the newspaper.

Nobody can say, with any degree of certainty, that the jury reading a story or viewing a picture will prejudice a defendant in his trial. You cannot prejudice a juror against a Dillinger, an Oswald, a Ruby, a Stroble, a Hauptman or a Speck.

Certainly the jurors in such cases have read the papers and have watched television. Certainly they know that this case is about to come to trial and certainly they form opinions; but I believe that when these same jurors raise their hands and swear to God to decide an issue on the evidence introduced in court, they honestly try to do so.

I have tried hundreds of jury cases during my career, and during these years, I have never found that newspaper, radio, or television pre-trial publicity has done harm to any of my clients or to me.

Juries are mindful of their responsibility and this sense of duty brings a determination to do justice and to live with the knowledge that they participated in one of the most sacred duties of American citizens.

Jefferson, while criticizing the press, so saliently noted, "our liberty depends on the freedom of the press, and that cannot be limited without being lost."

It is within this Jeffersonian context that Friendly and Goldfarb correctly recognize that we cannot choose between First and Sixth Amendment rights, but that we must have both.

We can have both only by following the mandate that is the touchstone of our system of government: the rule of reason. Those charged with enforcement of our law, the bench, the bar, the police, must all exercise restraint and common sense in providing reportage. In accordance with the same standards, the mass media must acknowledge its societal function and acquiesce in the awareness that its denial of the rights of a single individual by unfair, biased or prejudicial information serves only to delimit the capacity of our system of balanced freedoms.

The end of the law is not to abolish or restrain, but to preserve and enlarge freedom.

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