

1966

Book Reviews

Robert E. Parker

Eduardo Le-Riverend

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Robert E. Parker et al., *Book Reviews*, 32 J. AIR L. & COM. 623 (1966)
<https://scholar.smu.edu/jalc/vol32/iss4/7>

This Book Review is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

BOOK REVIEWS

SPACE AND SOCIETY: STUDIES FOR THE SEMINAR ON PROBLEMS OF OUTER SPACE, edited by Howard J. Taubenfeld, Oceana Publications, Inc., 1964, pp. xviii, 172. \$5.95

In the spring of 1963 Professor Taubenfeld arranged a series of seminars on the problems of outer space through the Carnegie Endowment for International Peace. *Space and Society* is a very rewarding spin-off. It consists of papers presented at the seminar and revised for this book, and offers, in compact and intelligible format, a provocative survey of the legal and political problems of space activity.

After an introductory essay that establishes the current political and technological context in which space research moves, individual papers are devoted to more particular topics: to science vs. scientism in space research; to the objectives and promise of space exploration; to commercial space communications; to the ordering of national interests in space; to the military uses and abuses of space; and to the competing claims to the uses of space.

The continuities between the historical experiences of states and the national expectations and strategies in relation to space far exceed the discontinuities. This central fact, kept in mind, will avoid the exaggerations that are implicit in a view of space as a bright, virginal arena. When man enters, whatever the wilderness, he carries his hopes and fears, his loyalties and suspicions, his small learning and vast ignorance. This caution is sensibly reiterated through most of the book. When it is neglected or minimized, it leads to prescriptions for forbearance that exceed one's most sanguine hopes.

The introductory essay by the two Taubenfelds is quite good. To anyone unfamiliar with space law problems, it offers a clear, reasoned introduction to the pressures, the aspirations, and the competitive tensions involved. Calling for the most rational allocation of national resources possible, the authors warn of the multiplicity of unknowns and reject all searches for formulary solutions. They point out that under competitive stress nations tend to give heavy weight, perhaps irrational weight, to the unknowns. This tiny truth illuminates many of the possibilities and improbabilities raised in later essays. If the Taubenfelds tend to overstate the isolation of each nation state, they do not gloss over or depreciate the need for effective assurances of compliance by rival powers.

The Taubenfelds see the pressure for space regulation springing from two almost desperately important aspirations, that space may not become

a medium for mass destruction and that it may not become merely another arena for contests of power and prestige among nation states.¹

Pointing up successes and failures of unenforced and uninspected self-policing, the authors find hope in the work of the United Nations, but caution against excessive faith in largely sanctionless systems of regulation.

In dealing with the social nature of space investment, they point out that the desire of some scientists to conduct unfettered, pure research in space is disingenuous, if not dishonest, considering the immense social costs that must support such research.

These insights are typical of their perceptive and candid survey of the field.

Dr. Jastrow's contribution, "Science, the Scientist and Space Developments," was characterized in an introduction by Joseph E. Johnson as "vibrant and dynamic." It is neither. It is a simple account of some of the physical science research potentials of space programs, a reminder that the drama and activity that attend the space launches should not be allowed to obscure the purpose of these flights, and an argument against uncritical deference to scientists or scientism. It closes with the suggestion that space research is a unifying force in science, but such impressions are often formed by scientists in applied fields, and reassembling the splintered body of *science*, a variant of wholistic theories in specific disciplines, is a recurring objective of some in academic science. A better relating of the scientific objectives to the social planning and international issues may be found in the other essays, particularly those of Taubenfeld and Silk.

Mr. Silk has written a well-organized, lucid contribution, "Values and Goals of Space Exploration." It begins with the sources of doubt about the wisdom of *any* substantial space research program; attempts to identify the national interests; discusses the economic consequences, direct and indirect; criticizes our machinery for establishing priorities; and closes with an estimate of the expectations that are leading contemporary societies into space research. The most provocative portion of his paper is in his description of the difficulties in evaluating and controlling the enormous scientific programs required. It calls forth shadows of David Truman's classic account of the United States Army Corps of Engineers, where an apparent control by the executive proved illusory when a popular agency, with strong congressional bonds, pursued its own goals independently and aggressively.² The potential in the space programs for exotic boondoggles makes one giddy. Although this is not Mr. Silk's point, it leaps out of his concern.

Mr. Moulton, "Commercial Space Communications," contributed essentially a descriptive paper, refreshing in its concreteness. Readers familiar with the history of the International Air Transport Association will especially appreciate Mr. Moulton's suspicion of the multilateral solution

¹ See also Taubenfeld, *Outer Space—Past Politics and Future Policy*, A.S.I.L. PROCEEDINGS 176 (1961).

² TRUMAN, *THE GOVERNMENTAL PROCESS* 410 (1960).

to space communication negotiations. Mr. Moulton's comment that "satellite communications should not become a pawn in a larger diplomatic game," may give meaning to an undeveloped preference of RCA at the satellite hearings.³

Professor Falk perceives among nation states a "drive for order" that may justify considerable risks of national security for its satisfaction. Without denying that human beings admire and are attracted to symmetry, design, coherence, and other organizational aesthetic values, and without denying that such designs may reduce tension, divert energies into productive channels, and encourage trust between large social institutions, one may still reasonably argue that these are subordinate objectives for most decision makers when national security is challenged or thought to be challenged. Biologically, such subordination may be suicidal, but it is clearly the normal response.

Professor Falk tends to prefer order. This preference may be grounded, however, in two questionable presumptions. First, he has adopted a sociology of states that puts them in a horizontal plane of action. He prefers this, he says here and elsewhere,⁴ to the less realistic vertical arrangement that would presume a non-existent, authoritative hierarchy of states. I see no such dilemma. A review of western history readily shows that we have a long experience of antagonisms, effective antagonisms, between states of radically disparate size and resources, e.g., European history in the seventeenth and eighteenth centuries. And if we are to use models, certainly a three-dimensional model is superior to one of either plane. Further, a different model is required by each criteria for disposition, e.g., army personnel, weaponry, heavy industry, agricultural vulnerability, etc. Once this substitution of models is made, purely formal orderings no longer appear as the only practicable means for relating nation states. Second, Professor Falk appears to exaggerate the importance purely formal orderings, international law, and diplomatic intercourse have in decision making when experience tells us that the critical decision makers may lack experience in, and may refuse to defer to, the advice of those most experienced in foreign affairs. Nikita S. Khrushchev and Lyndon B. Johnson are only two of many who have headed major powers in recent years with little or no prior experience in foreign relations.

Another difficult problem raised by Professor Falk is the weight to be given to unobtainable intelligence by the public and by non-military critics and decision makers. This factor is treated by Professor Falk as

³ *Hearings Before the Senate Committee on Aeronautical and Space Sciences*, 87th Cong., 2d Sess., at 111 (1962). (Communications Satellite Legislation)

⁴ "There are two primary dimensions of order. There is vertical or hierarchical order between formally unequal centers of legal authority; there is horizontal or non-hierarchical order between equal centers of legal authority." Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 TEMP. L.Q. 295 (1959). Although cited by Professor Falk to show that the horizontal forms permit a detailing of great sophistication, Professor McDougal's writings tend to suggest models more faithful to what he terms "the rich complexity of structure." McDougal & Feliciano, *Initiation of Coercion: A Multi-Temporal Analysis*, 52 AM. J. INT'L L. 241, 249 (1958); McDougal, *The Prospects for a Regime in Outer Space*, LAW AND POLITICS IN SPACE 105, 110 (1964); McDougal, Lasswell & Vlasic, LAW AND PUBLIC ORDER IN SPACE 3-66, 360-93, and 409-512 (1963).

an unknown and, for the public, an unknowable. Is this sound? In fact, does not the public experience in relation to the Soviet Union's military and political history permit a probability statement to be made and a hypothesis of recognizably limited reliability as to the classified information formulated? A dilemma that offers total capitulation to military judgment as "self-sufficient justification" as one horn, and a decision that a "prudent substantive conclusion" is not possible without access to highly classified materials as the other, is certainly a false dilemma. And the only escape need not be an ordering by the sacrificial restraint of one party.

Further, when Professor Falk writes, "the horizontal and provisional ordering possibilities that arise from unilateral self-restraint [in not orbiting observational satellites] . . . will not always gain more order, but they may postpone friction and induce reciprocal self-restraint by the Soviet Union," we may well reply, "and they may not." Further, when he writes, "it is rational to take some risks to give order to international relations even though these risks may conceivably accrue to the strategic benefits of the Soviet Union," we may reply, "it is rational to take some risks to obtain strategic benefits, even though these risks postpone the ordering of international relations."

All of this is not merely a game of "it may" and "it may not." Professor Falk hedges his position carefully, but if it is to have meaning it must be reduced to a recommendation, a preference, or a criterion. The reduction tends to produce a strategy many readers will find unacceptable.

Professor Woetzel contributed a carefully organized paper in which he dealt, among other things, with the casuistry of characterizing a use as *non-aggressive* or as *non-military*. This illustrates the preoccupation with labels rather than behavior that has weakened a great deal of writing in international relations, and Professor Woetzel handles it quite sensibly, tying it to conduct and to purposes, rather than retreating into further abstractions. Since the identification of the character of a satellite is not a straight-forward matter and the risks are diverse and extensive,⁵ it is surprising that Professor Woetzel then concludes that a ban on military uses of space would be desirable.

Professor Taubenfeld, in his second contribution, agrees with Professor Woetzel that a sorting of information-collecting satellites on the basis of their peacetime utilities may permit reasonable criteria to be applied. Neither writer suggests, however, that reliable determinations of function are within the present state of the arts. If technical identification were readily accomplished, it would do much to promote the military use ban they desire. Short of such reliable means of identification, such a ban would seem to expose the good faith conformer to extraordinary vulnerabilities.

Professor Taubenfeld offers an excellent discussion of the extra-national claimants, such as scientists of varying interests and concerns, another

⁵ Taubenfeld, *supra* note 1; McDougal, Lasswell & Vlasic, *op. cit. supra* note 4, at 443-47.

equally succinct on communications systems, and a third on meteorological and navigational systems. In discussing the difficulties for participants placing high valuations upon openness and coherence facing participants with historical preferences for expediency in framing and following rules, Professor Taubenfeld raised the most pervasive, haunting element of space agreements and negotiations.

The final essay is a recapitulation and highlighting of issues and might profitably be read as an introduction to the other essays. The book is a stimulating survey. It lacks an index and some of the most complex essays lack internal divisions, but the contributions are very provocative. It is highly recommended for all collections touching upon space law and policy.

*Robert E. Park**

RIGHTS IN AIR SPACE, by D. H. N. Johnson. Manchester University Press, Oceana Publications, Inc., Manchester & Dobbs Ferry, New York, 1965, pp. 129. \$4.50

There is a particular feature in books reproducing lectures, such as this one. Without the audio and visual contact with the orator that provides the greatly increased satisfaction which comes from direct association with his personality, the mere reader undergoes a feeling of want, of eagerness for more material and details, and an impression of something which is insufficient. Even with lectures such as these, masterly in spite of their obvious limitations, the reader is unrewarded; perhaps because of their high value that feeling is more acute. On the other hand, for those who may read this booklet with but little leisure, it is a source of abundant data, a real refresher of useful information long forgotten or dimming in the memory.

One special characteristic deliberately imparted to these lectures is their overall contents—a quite thorough sightseeing of that long sought-for but only recently-achieved activity of flying by machine. There is no particular field or aspect excluded, be it public or private law and aviation, civil and military aircraft and operations, airspace and outer space, in peaceful and not-so-peaceful times or in outright war of one temperature or another. It is very satisfying to revive the one thousand and one events which have occurred, their importance for aviation, and the pendulum-like come-and-go of the peculiar activities and experimentation during the peaces between wars or, for that matter, during the wars between peaces (which is more determining of progress and which is of a greater accelerating effect on technical progress, I could not say, if anyone can). Even if, due to the very special nature of the work, the learned author could not stop and dig very deeply into many an instance of salient inter-

* Associate Professor of Law, George Washington University.

est, he managed to intersperse his speeches with valuable observations, appropriate remarks, and suggestive thoughts that stimulate the yearning for further developments, alas unrealized, in addition to making the reader aware of the massive knowledge displayed.

This publication consists of five lectures given by Professor Johnson in the Melland Schill Series, University of Manchester, in 1965. In all, seventy-nine pages; plus just two not-very-much-to-the-point International Conventions, that of Chicago (1944), too well known or at least oft-published, and that of Tokyo (1963); finally, a bibliography which, like all these lists, seems either plausibly comprehensive or lamentably insufficient according to the reader's appetite: this one, enumerating choice materials mostly French or Anglo-American, will enable one to add to or complete the many topics discussed or simply alluded.

In the first lecture, the problem of "sovereignty" immediately appears accompanied by its possible fill-ins, "exclusive competence" and "independence" ("jurisdiction" is the correct one in my opinion), any one of which would have been a more fortunate choice than the meaningless, too much meaning-stuffed, word or concept officially confirmed in international treaties, beginning in Paris, 1919 (an unhappy happening, most appropriate as to place, persons, and time, but inexplicable in 1944, at Chicago, where it was reconfirmed). If it is suggested that sovereignty is no more now than a conventional notion, then, I reflect, choice could have fallen on something less misleading than to call black what is white. "Sovereignty" that is not "sovereign" is the balance of the misunderstanding established to facilitate understanding; a polemic concept more apt to atomize instead of unify the world.

It was a must for aviation law to be international in its sources and essence, as had been asked by many since early times. If, in its final form, it is not anarchically piecemeal and territorial, it has failed, nevertheless, to acquire an absolute, general, and univocal expression or context, and its most important sources are, therefore, the multi- or bilateral agreements. Aviation very well permitted and required an international legislation: the chance was lost. That is what occurred with regard to tri-dimensional new surged law; now, in the threshold of the quadri-dimensional law, Professor Johnson asks what is about to happen?

The author surveys the "beginnings of aviation" and those of "air law," recalling the most significant facts, omitting as usual Pégoud's. Technical advancements, from the Wright brothers on, and primitive juridical normation, emphasizing the importance of the 1899-1914 period are highlighted. Astonishingly, the main concern was to regulate war aerial activities and we all know what those regulations amounted to. Skepticism on the behavior of nations appears when the author refers to the 1868 St. Petersburg Declaration and the manner in which it was drafted, allowing the killing of "large numbers of men" despite the fact that the covenant was aimed at alleviating "as much as possible the calamities of war." Not until the diplomats use the language of the street peddlers,

for its undisguised bluntness, is international life secure in relying on Treaties, Conventions, Agreements—so many skeletons in every closet!

Ironically, Professor Johnson mentions the “progress, or rather regression” in the laws, when comparing the Hague Convention of 1907 and the Brussels Declaration of 1874. Apparently, in these matters we have been jumping from “progress” to “progress.” Aviation has been the perfect instrument for the backward *advancement* in warfare. What in civil achievements? He again notes the futile struggle of the Fauchille principle of “freedom of the air,” and explains the ultimate triumph of the opposite views, those of the Hazeltines, the Richardses, and many more, including the English Acts of 1911 and 1913. The Paris Convention of 1919, the offspring of, and inspired in, the attitudes of the victorious Powers, or the majority (!), imposed the complete and exclusive sovereignty of the subjacent State over the air space above its territory, the “granting” of innocent passage being set forth “merely as a contractual right under the Convention.” (Nowadays, following the usual semantics thoroughfares, this thing, very aptly called “a right,” has been re-christened as a “freedom,” adding thus, to an un-sovereign sovereignty, a freedom which is not free.) After Paris came Madrid, mainly a carbon copy; then, Havana, with new trends indeed. But, if one thing was to agree upon the terms of the Conventions, another, for sure, was to ratify the so painstakingly arrived at “agreements.” At the sight of the regionality of some of these Pacts and the absurd shortsightedness they reveal, the author soliloquies: “it is useless to pretend, however, that aviation can be regulated satisfactorily otherwise than on a world basis.” (*Eppur si muove!*) A by-product of daily practice brought in fact a further degree of unity: that on the liability of carriers, as per the Warsaw Convention of 1929, said to be of a “private nature,” also a very conventional terminology.

The Hague Warfare Rules of 1923, a legal-eagles masterpiece, failed entirely to stop aerial bombardments, no matter how deeply concerned was the world public; “this had little or no influence upon events,” confesses Professor Johnson. (Are you telling me?)

The Second World War was ushered in with cries of how futile were the solemn rules which had been adopted supposedly in earnest. Many expressions of concern on that point are recorded by Professor Johnson, and many directives from the Chiefs-of-Staff, including one ordering that “in no circumstances should night bombing be allowed,” a rule whose outright violation was entirely condoned not too much later on. And what of the “morale” of the enemy as one target worth demolishing by means of TNT bombs? The author’s subsequent paragraphs contain the most indignant accusation against the breach of the rules we are mentioning. And I, for sure, take no sides: it is war itself that is to be suppressed, as the fright generally predominant after the scourge of actual war has subsided shows it can well be. Something like automobile accidents: were cars manufactured without the mechanical possibility of exceeding the upper limits of legal speed, quite a number of accidents

would be avoided, as simply as that. Give the instruments to commit an illegality and it will be committed in spite of any sermon on non-law breaking.

So "there was little confidence that the rules . . . would be kept." The author reproduces many an utterance showing unassuageable despair or disclosing the unconscious roots of future evils, none but the well-known same roots and evils of the past. Dark was the dawn of World War II.

The fifth lecture treats a few of the most discussed problems of contemporary international aviation law: the Chicago Convention and civil aviation, in thirteen very compact pages; a simple bird's eye view of "trespassing in air space"; and the old question of crimes and other analogous events in aircraft in flight with which the Tokyo Convention of 1963, reproduced in the Appendices, is an attempt to deal. Two Conventions, only, in the Appendices, why not six or none—Paris, Warsaw, Rome, Geneva?

When considering these matters a thought occurs to me which is, I hope, not otiose to mention. If what should have been a body of international law, unified and universal, has not been exactly realized, nonetheless by means of certain wide international agreements and numerous multi- or bilateral treaties, as well as through many national legislations reproducing in the main the broad lines of the sought-for international law, we are witnessing the establishment of a very much uniform world law, a fact that will probably inspire more togetherness in other fields, the new areas especially. We, jurists, have always been asking for natural law—equal, universal, above trivial changes; when looking at the past, trying to discover it as something inherited, we reach a negative conclusion: there is no such law. But, right now, I say, *we are creating* the natural law, the universal law. It is from now on that the great fundamental principles of law are spreading by obliterating national, provincial barriers, the tools of a burdensome diversity, little by little and in all fields, and becoming a bright hope for one law in one world.

*Eduardo Le-Riverend**

BOOK NOTES

LEGAL AND POLITICAL IMPLICATIONS OF SPACE RESEARCH, compiled by H. Peter Kehrberger, Verlag Weltarchiv GmbH, Hamburg, 1965, pp. 421. \$8.50

This book is a bibliography of materials published in the field of space law through 1 August 1965, and covers literature from fifty-five nations in thirty languages (with English translations). The publication encompasses more than 6,000 titles and an evaluation of over 900 periodicals.

* Adjunct Professor of Law, University of Miami. Formerly Professor of Law, University of Havana, Cuba, and Associate Justice of the Supreme Court of Justice, Republic of Cuba.

To quote from the forward by Dr. Alex Meyer: "The today existing space law literature has already reached such an extent that it is not possible even to the legal expert to reach an accurate survey on this material." This book provides a needed compilation in the field, and to one with no "expertise," the method of presentation seems both logical and sound. Part One covers Legal Problems, Part Two treats Background and Global Implications, Part Three deals with Activities of Non-Governmental Institutions, and Part Four covers Documents and Activities of States and International Organizations.

As stated by Andrew G. Haley in his forward: "The appearance of this bibliography is a milestone in the development of space law, and I hope that every interested student will have a copy available whenever serious research is to be done."

A.J.H.II

PROCEEDINGS OF THE EIGHTH COLLOQUIUM ON THE LAW OF OUTER SPACE, 1965, edited by Andrew G. Haley and Mortimer D. Schwartz, University of Oklahoma Research Institute, 1966, pp. 475. \$6.50

The volume contains fifty-five papers, speeches, and an ICAO Space Resolution delivered during the Colloquium on the Law of Outer Space by the International Institute of Space Law of the International Astronautical Federation (14-15 September 1965, Athens, Greece). The proceedings centered on the present and future legal status of space activities. Because of the increased use of space, the papers dealing with liability for damage caused by spacecraft and those dealing with communication satellites are of particular importance. Other topics include: (1) the work of the United Nations in the area of space, (2) Space Salvage, and (3) the ownership of Celestial Bodies. Such authorities as John Cobb Cooper, Harold Berger, and Aldo Armando Cocca have made this collection a valuable asset to those interested in space law.

J.K.M.