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Aims And Methods Of Legal Research

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BOOK REVIEWS

The Law of AWOL. By ALFRED AVINS.* New York: Oceana Publications. 1957. Pp. xxxi, 288. $4.95.

Winthrop's *Military Law and Precedents* may be unknown to the average jurist, teacher or practitioner, but it has long been regarded as a classic by military lawyers. It demonstrates that a general treatise has the same usefulness in this field as in other branches of the law. Although there is an abundance of source material in military law, there has been little by way of commentary. The work being reviewed, Avins' *The Law of AWOL,* attempts to partially fill that near void.

The first thought which occurred to this reviewer was: why limit consideration to this particular phase of military law? A moment's reflection was sufficient to cause realization that the expansions of the field of military law, since Colonel Winthrop's time, have been such as to require a reduction of the area covered by any dissertation to a manageable size. Of all phases of military law, probably that which relates to the offense of Absence Without Leave is the most important. In this respect *The Law of AWOL* is self vindicating. The author points out that more than half of all military offenses are AWOL. Although the statistics cited are not entirely convincing, there can be no doubt but that a very large portion of the law of military offenses does relate to the offense of Absence Without Leave.

A legal treatise can fulfill four functions, serving as:

(1) a guide to more primary source material;
(2) a condensation of abstract principles of law;
(3) an exposition of independent thought on certain legal subjects; and
(4) an authoritative statement of the law.

Few works accomplish all four missions; in fact, it is rare that the writing of a single author is regarded as an authoritative statement of law (except, possibly, by the author's students). Wigmore on *Evidence* is a notable example of a treatise which is accepted as authoritative, much as statutes are. Most legal writing achieves only one or more of the first three objectives. Avins, *The Law of AWOL,* accomplishes principally the first and third of the above mentioned objectives.

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The greatest value of this work lies in its collection, in one convenient volume, of source material dealing with all of the problems that might arise in connection with the law of AWOL. The material gathered here is well classified, and logically arranged. The highly analytical table of contents is thorough and useful.

This work does not merely cite decisions, but it also abstracts the more important ones. This feature greatly adds to its usefulness to the judge advocate in the field who does not have access to an extensive law library. It is not confined to the holdings of any particular adjudicatory body, but gathers together, in one volume, decisions from military and civilian tribunals, throughout the English speaking world. Historical precedents are used in developing some of the important concepts. Some of these precedents are as early as 1385 and 1422. There is here a library, in one volume, as far as the law of AWOL is concerned.

There is little in the way of an abstract statement of general principles. This is not a Hornbook. It presents problems more than answers; but it also presents the adjudications in connection with those problems.

It is not to be assumed that cases are set forth uncritically, as a digest would do. One of the strong points of this volume is that the reasoning underlying decisions is evaluated. The usefulness of *The Law of AWOL* is thereby greatly enhanced. The author shows himself to be capable of strong, independent and resourceful thought.

In legalistic writing a proper balance must be maintained between the general and the particular. In order to avoid making abstract statements, of little utility, a legal writer often gets mired into a web of minute detail, what the late Mr. Justice Holmes called "The small change of the law." This hazard seems to be especially pronounced in the field of military law. Practitioners must have sources to which they can turn to find answers to specific problems. However, no treatise can be regarded as learned which fails to relate these specific rules to underlying principles. *The Law of AWOL* is not a mere catalogue of rules. It presents thought and analysis, and gives to the user something a digest could never give. The author's use of specific cases shows the value of the case system. It maintains the proper tension between the general and the specific. Detailed rules are used by the author principally as examples of general propositions.

One of the valuable features of this work is the distinction that is made between AWOL and military offenses of a similar nature. There is a very specific concept of AWOL, but there are also other offenses of an AWOL type. Outstanding among these are desertion and failure

to go to an appointed place of duty. In addition to these, there are offenses which do not seem like AWOL, but which, nevertheless, can be confused therewith. For example, AWOL must, in some situations, be distinguished from insubordination. The need for such a distinction, and the distinction itself, is forcefully brought out by the author.[1] Also, especially interesting, at least to this reviewer, is the distinction between constructive knowledge and actual knowledge proved by circumstantial evidence.[2]

As sharp as are the distinctions made by the author, he is not always convincing. For instance, at pages 104 and following the author seems to be taking a latitudinarian view of his subject. The distinction which he has made between AWOL and insubordination seems to be blurred. Also the indication that more than 50 per cent of all military offenses are AWOL[3] does not accord with the experience of this reviewer. I wonder if all AWOL type offenses are here being considered.

The present reviewer finds the concept of *Leave Implied by Law*[4] rather obscure. Seemingly, such a "leave" is not a defense to a charge of AWOL, while an actual leave, or a leave implied in fact, would be. Rather, it seems to be treated as a mitigating circumstance. The foregoing conclusion does not clearly appear from the text but it is one which this reviewer finds necessary to infer.

Whether this work will ever be accepted as an authoritative statement of law, time alone will tell. As indicated above, not many treatises have arisen to that stature. Whether it does, or not, its utility is not thereby impaired. This study shows both industry and thought. It is good to have published a volume such as this. This reviewer predicts that *The Law of AWOL* will prove indispensable to practicing judge advocates both for background reading and for help in the solution of specific problems. It should also be interesting reading for other persons interested in the field of military law.

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[1] P. 43 et seq.
[2] P. 100 et seq.
[3] P. 34.
[4] P. 92-93.

Aims and Methods of Legal Research, Michigan Legal Publications, University of Michigan Law School, 1955. Pp. x, 199.

A conference on Aims and Methods of Legal Research was held at the University of Michigan Law School in November 1955. The papers delivered and the commentaries thereon have now been published. The papers are: Social Significance in Legal Problems, by Karl N. Llewellyn, of Chicago; Research for Legislation, by Charles B. Nutting, of Pittsburgh; "Looking Out of the Cave"—Some Remarks on Comparative Legal Research, by Hessel E. Yntema, of Michigan; Manpower for Research, by David F. Cavers, of Harvard; The Law and Some Aspects of Criminal Conduct, by Thorsten Sellin, of Pennsylvania; The Legal Scholar and the Criminal Law, by Herbert Wechsler, of Columbia; and Report on the Jury Project, by Harry Kalven, Jr., of Chicago.

A conference of such a group of eminent scholars will inevitably be productive of ideas that are both useful and provocative. One thread of thought running through many of the papers is that a distinction should be made between doctrinal and nondoctrinal research. The point was first made by Llewellyn,[1] but it was perhaps most clearly expressed by Cavers, who distinguished between research *in* law and research *about* law.[2] Llewellyn thinks that the legal profession is "pretty well set on steady doctrinal research."[3] He and the other participants at the Conference believe that the greatest need today is for nondoctrinal research, or research about the law.

For some inexplicable reason, the South appears to have been entirely unrepresented at the Conference. It cannot be determined from an observation post between the Blue Ridge and the Alleghenies whether this is a sad commentary on the representative character of the Conference or on the caliber of legal research in the South and its interest in such matters.

However that may be, before southern institutions embark on large-scale legal research projects, they will do well to study this publication and to take stock of their purposes and aims. The report on the Chicago jury project indicates that, at least in some of its features, this well-publicized undertaking became lost in aimlessness. When the project undertook to find out whether in criminal cases a majority of the jury is more likely to persuade the minority to its viewpoint, or vice versa, it was doing nothing more than determining whether juries

[1] P. 8.
[2] P. 91.
[3] P. 8.

are subject to the laws of common sense.[4] Again, the project's researches into whether a blue-ribbon juror is more likely than a non-blue-ribbon juror to vote "guilty" on the first ballot[5] appear to have no ascertainable relation to the administration of criminal justice.

The South can well consider adopting as its aim for legal research foreseeable usefulness, particularly a usefulness for persons and interests for whom research will not otherwise be done. This might be called grass roots research in the public interest.

The first sputnik was hardly in orbit before the wheels of research began grinding out commentaries on the law of space.[6] These may be interesting, perhaps eventually useful, but they hardly are of any present value to the ordinary lawyer and citizen. The plethora of law review articles, far outnumbering the cases, on artificial insemination attest to the interest of the subject. Nevertheless, legal research may here be itself creating the very problems it purports to solve. Since an absence of publicity is essential to accomplish the social objectives of this medical development,[7] it is not entirely clear that it is in the public interest to concoct and publicize the legal problems involved, since these problems may prove to be more imaginary than real.

This is not to say that individuals should not pursue their research interests wherever they may lead, whether to the consternation of a family or of the people of Mars. It is only to say that before an agency undertakes legal research it should clearly define in terms of the practical world the objectives it seeks to accomplish.

The naturally-created family presents enough problems so that the legal researcher should not find it necessary to turn to the artificially-

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[4]It can be reported that the laws of common sense *do* operate upon juries in criminal cases. When a majority of the jurors voted guilty on the first ballot, the defendant was ultimately found guilty in 90 per cent of the cases. On the other hand, when a majority voted not guilty on the first ballot, the defendant was ultimately found not guilty in 97 per cent of the cases. When the jury was evenly split on the first ballot, the final verdict was guilty 50 per cent of the time and not guilty 50 per cent of the time. P. 160. The preciseness of this last finding is such as to make it suspect. Perhaps, though, these findings support two conclusions: (1) The number of jurors should be odd-numbered. (2) Cases should be decided upon the basis of a majority vote on the first ballot.

[5]Jurors qualified as blue-ribbon jurors by giving the right answers to three questions, "namely, whether they had scruples against the death penalty, whether they would convict on circumstantial evidence, and whether they would draw a negative inference if the defendant failed to take the stand." P. 161. Unfortunately, the report on this project does not tell what the "right" answers are. Is a person who has scruples against the death penalty a "blue-ribbon" or a "non-blue-ribbon" juror?

[6]Pepin, Legal Problems Created by the Sputnik, 4 McGill L.J. 66 (1957).

[7]Medical Correspondent, A.I.D.—a physician's view, Manchester Guardian Weekly, Feb. 13, 1958, p. 5.

created family for source material. The more urgent problems requiring legal research, doctrinal or nondoctrinal, probably lie unnoticed beneath our very noses. It may take a little doing and imagination, but the agencies interested—the bar associations, law schools, law reviews, etc.—may find a closer look at their own immediate communities will reveal research opportunities that have a foreseeable usefulness. The best field for legal research may be in the grass roots instead of in the stars.

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