

THE LAW OF AWOL. By Alfred Avins. New York: Oceania Publications, 1957. Pp. 288. \$4.95.

A MANUAL OF COURTS-MARTIAL PRACTICE AND APPEAL. By Benjamin Feld. New York: Oceania Publications, 1957. Pp. 192. \$5.00.

There are a number of signs that American law may be in the process of a basic change (or anyway there are to those who think it is about time). In theory we have presently a system governed by case law; and, despite the presence of a large number of statutes, this is still largely true in fact as well. One has only to look at law reviews and such publications as Annotated Law Reports to realize the dominance of the judicial decision as a source of law. These decisions, however, have grown quite unmanageable. Their enormous number makes an authoritative statement of "*the law*" on a point impossible without an enormous amount of research. In fact, in view of defects in the index systems, it may be that such a statement cannot be made. Perhaps as a result of this, the stirrings of a movement towards codification seem evident. Thus, there are the various uniform laws, most notably the Uniform Commercial Code which takes over a much larger section of the law than any previous American code has attempted (except perhaps the Field codes). Furthermore, the formulation of the Restatements by the American Law Institute could obviously lead towards total codification of private law.<sup>1</sup>

If codification should come, it will come to a legal community which has been thoroughly trained in the case tradition—for decades the "case system" has been standard in American law schools. It is, then, a subject of some interest—one almost said concern—to wonder how these lawyers and judges will deal with codes.

In the past their general attitude has been hostile. The maxim "statutes in derogation of common law must be strictly construed" is perhaps indicative. The history of the various statutes that abolished the forms of action, and, for that matter, the history of the interpretation and acceptance or rejection of the uniform commercial laws, bears out one's feeling as to this attitude.

Still, there were special circumstances in all these cases that might have led to these results. The real test of the abilities of common law lawyers to deal with a code would arise if they faced a code which dealt with a subject matter in which there were no vested interests in particular rules of law, a code which was well drafted, and one in which the legislative intent to make a completely fresh start was evident. Such a situation seems to be present in the case of the Uniform Code

---

1. There are those, of course, who take the position that the Restatements are just a phase that the legal profession had to go through—like puberty perhaps—and are best recognized as that and forgotten. See Arnold, Institute Priests and Yale Observers—A Reply to Dean Goodrich, 84 U. Pa. L. Rev. 811 (1936).

of Military Justice.<sup>2</sup> Drafted by a committee headed by Professor Edmund M. Morgan,<sup>3</sup> it has been administered primarily by fairly recent law school graduates not connected with the military (supposedly better trained than their predecessors) and has had as its chief interpreter a court composed (initially) of two state supreme court judges and the former dean of a law school. It was clearly designed to supersede all previous collections of rules that dealt with the subject and was the result of great dissatisfaction—detestation is not too strong a word—with the prior law. Further, it has been accompanied by a carefully drafted treatise, the *Manual for Courts Martial*.<sup>4</sup>

One turns, then, with considerable interest to the two books under review which, since they deal with several aspects of the work that has been done under the Code in its first six or seven years, should indicate how things are going under the Code. Alas, they seem to prove that one's worst fears as to the inability of common lawyers to handle a code are fulfilled a thousand times over. Even more depressing is the fact that no one seems to be aware that anything terrible has happened. The result is evidently assumed to be the natural one. So Mr. Avins cheerfully uses 282 pages to summarize the decisions, both before and after the enactment of the code, arising out of unauthorized absence from a military post—an offense dealt with by a section 60 words long (Art. 86 of the Code).<sup>5</sup> Mr. Feld uses 163 pages to outline practice under the code and includes numerous case citations. However, before going into the questions raised by the books, it is only fair to say that both appear to be fairly useful, and, within their set limits, complete.

The Feld book might well be used by one who was unfamiliar with procedures under the Code to orient himself, e.g., a civilian attorney retained to represent someone accused under the code. I should think such a person could use it without much difficulty and would get from it to the Code and Manual. Whether it would be easier to use than the Code and Manual alone, I cannot say. The Avins book is presumably of interest only to specialists, probably only to service personnel. It deals in enormous detail with an offense which—though admittedly the most common military offense under the Code—does not carry with it a very large penalty<sup>6</sup> and hence is usually tried only by a subordinate court

---

2. 70A Stat. 36 (1956), 10 U.S.C. § 801 (Supp. V, 1958).

3. See Morgan, *The Background of the Uniform Code of Military Justice*, 6 *Vand. L. Rev.* 169 (1953).

4. Exec. Order No. 10214, 3 C.F.R. 408 (1949-53 Compilation).

5. 70A Stat. 67 (1956), 10 U.S.C. § 886 (Supp. V, 1958).

6. A maximum of one year's imprisonment for an absence of over 30 days. *Manual for Courts Martial* 1951 Para. 127c as amended by Exec. Order No. 10565, 3 C.F.R. 73 (Supp. 1954). An absence of the type principally dealt with by Mr.

and not by a General Court Martial. Lawyers are not normally involved in cases before subordinate courts-martial, though they may be. Furthermore, most absence cases are fairly cut and dried. It is rare that one is accused of being absent unless he was in fact absent—something that can be fairly readily determined. The only question usually is the amount of punishment to be inflicted. There are, of course, the unusual cases where it is not clear where the accused was supposed to be, or where he did not receive orders (or it cannot be proved that he did) to go to a certain place, and the like. These are what Mr. Avins deals with, and apparently quite thoroughly. The only thing it seemed to me (who claims no great expertness in the field) that he should have included and failed to, was a discussion of the problem of proof of absence by service record entries—usually the only evidence available—a most troublesome problem. It should be said that the physical make-up of the book makes it needlessly difficult to use. It is almost impossible to tell when one is reading text and when quotation, and, if the latter, from what. Furthermore, there is too much quotation in the text, making it difficult to follow the argument. If one ever had a doubt on the utility of the foot-note in legal writing this book would remove it. One might add that the text might well be fuller for clarity. However, since the book's utility is primarily as a source book for someone preparing an argument in an absence case, this is doubtless not a serious objection.

It may be said, then, that the authors have on the whole realized their intentions. It is the intentions that I question. As I understand it, the intention of both authors is to present an analysis of the "law" (or portions of it) under the Code and by the law they mean, of course, the statute as interpreted in the decisions of the various tribunals that operate under it. Thus they wished to produce something like a handbook in sales or bills and notes. There is every reason to suppose that this approach is general: the Code must be approached through the cases.<sup>7</sup> The consequence is obvious. These two books, a year or so after publication, are already out of date. Because of the intermediate "courts" (Boards of Review), the bound volumes of decisions are beginning to make a nice respectable mass in the well-appointed library. It will perhaps aid in understanding the present state of affairs to quote from Mr. Feld's book.<sup>8</sup>

---

Avins—failure to go to appointed place for duty—carries only one month of confinement and forfeiture of two-thirds pay for one month.

7. See, e.g., Neff, *A Pathway for Trial by Court-Martial*, JAG J., March 1959, p. 3, in which a member of a Navy Board of Review outlines the activities of a Board of Review with plentiful citations. And see Aycock & Wurfel, *Military Law Under the Uniform Code of Military Justice* (1955) (passim).

8. Feld, *A Manual of Courts-Martial Practice and Appeal* 21 (1957).

Finding all relevant precedents is, from a practical point of view, exceedingly difficult. The USCMA publishes its own cases. An official service report known as the Courts-Martial Reports (CMR) contains all case opinions of the USCMA and selected opinions of the Boards of Review in each service. The CMR is available in every major command, within and without the United States, and in some law libraries and law schools. Volumes of this report, however, are issued in permanent bound form without preliminary advance sheets. An appreciable gap may, therefore, be expected between the last bound volume of the report and the case with regard to which the law must be ascertained. The gap is partially filled by the advance sheet opinions of the USCMA reports. Distribution of the advance sheet opinions is much less extensive than that of the CMRs. Similarly, the distribution of the individual mimeographed opinions of the Boards of Review, and of the opinions not selected for inclusion in the CMR, is very narrow. Circulation of the opinions of The Judge Advocate General (TJAG) of a particular service is also very restricted. The most that can be hoped for, therefore, is to be informed of the opinions of the USCMA as they appear in the USCMA reports, the advance sheet opinions of the USCMA, the latest mimeographed opinions of the USCMA, which are normally issued on a Friday and antedate the advance sheet opinions by a week or two, and finally, the CMRs. Selected opinions of TJAGs may be found in the Digest of Opinions—TJAGs of the Armed Forces. See Appendix 2.

Although legal research is outside the scope of this volume, it must be noted that case law does not have the same permanency as statutory law. Often, later cases directly overrule or materially alter the scope of earlier cases. See *U.S. v. Hightower*, 5 USCMA 385, 18 CMR 9; *U.S. v. Fisher*, 4 USCMA 151, 15 CMR 152. In the civilian community, the Shepard's Citator system provides a ready means for evaluating the subsequent judicial history of a case. The services have provided a like publication for the CMR. It is known as Citators and Index to CMR. It is an invaluable and indispensable publication for every counsel in a court-martial case.

This fanatical devotion to case citation is surely enough to make one weep. Why should it be thought impossible to reason in any case from general principles as set forth in a code and treatise that are accepted by both sides and the court as authoritative, and not worry about what judges have said? What is gained by having permanently recorded the ratiocinations of innumerable tribunals on the nature of an "order" or "hearsay"? To be sure, it is inevitable that some inadequacies in Code and Manual will appear from time to time. When this occurs, however, it would seem quite possible to have a clarifying paragraph or two added to the Manual, or, perhaps, an amendment to the Code. Activity under the Code is, after all, subject to annual scrutiny by the Court of Military Appeals and the Judge Advocates General who are

supposed to recommend needed changes.<sup>9</sup> The situation would seem ideal for the development of a code approach with continuous amendment. The only thing lacking is anyone willing to try to develop it. Or, perhaps, any awareness that such a thing exists. The desire to assure the continuing truth of Gilbert's phrase that "the law is the true embodiment of everything that's excellent" can evidently be satisfied only by making sure that "the law" includes every statement ever made by every judge above the level of a Justice of the Peace. If this really is the inevitable way common law lawyers will react to a code, our fate is clear: to be submerged completely by the increasing torrent of reports. Unless, of course, we can get everything on punch cards. Doubtless this would be a better solution, though there will be some hardship when lawyers join assembly line workers and coal miners as victims of the technological unemployment resulting from automation. Still, a small price to pay for progress.

WILLIAM C. JONES†

---

9. 70A Stat. 61 (1956), 10 U.S.C. § 867 (g) (Supp. V, 1958).

† Assistant Dean and Assistant Professor of Law, Washington University School of Law, St. Louis, Missouri.

# WASHINGTON UNIVERSITY SCHOOL OF LAW

The Washington University School of Law is a charter member of the Association of American Law Schools, and is on the approved list of the Section on Legal Education and Admissions to the Bar of the American Bar Association. While students are admitted with a minimum of three years of college work, intending applicants are strongly urged to procure the first baccalaureate degree before applying for admission. For further information write the Dean, School of Law, Washington University, St. Louis, Missouri.

ETHAN A. H. SHEPLEY, A.B., LL.B., LL.D. .....Bridge Chancellor  
 CARL TOLMAN, Ph.D. .....Vice Chancellor, Dean of Faculties  
 MILTON D. GREEN, A.B., J.D., LL.M., Jur.Sc.D. .....Dean  
 WILLIAM CATRON JONES, A.B., LL.B. .....Assistant Dean  
 ERNA ARNDT, A.M. .....Registrar

## FACULTY OF THE SCHOOL OF LAW

ARNO CUMMING BECHT, A.B., J.D., LL.M., Jur.Sc.D. .....Professor of Law  
 WENDELL CARNAHAN, Ph.B., J.D., LL.M., Jur.Sc.D. .....Zumbelen Professor of Law of Real Property  
 ZELMAN COWEN, B.A., LL.B., B.C.L., M.A. (Juris) .....Distinguished Visiting Professor of Law  
 GRAY LANKFORD DORSEY, A.M., LL.B., J.C.D. .....Professor of Law  
 THOMAS HOPKINSON ELIOT, A.B. LL.B. .....Nagel Professor of Constitutional Law and Political Science  
 MILTON D. GREEN, A.B., J.D., LL.M., Jur.Sc.D. .....Professor of Law  
 ELMER ERNEST HELPERT, A.M., LL.B., J.S.D. .....Professor of Law  
 HIRAM HENRY LESAR, A.B., J.D., J.S.D. .....Professor of Law  
 FRANK WILLIAM MILLER, B.A., LL.B., S.J.D. .....Professor of Law  
 BEN F. SMALL, A.B., J.D. .....Visiting Professor of Law  
 WAYNE LASALLE TOWNSEND, A.B., LL.B., J.S.D. .....Distinguished Service Professor of Law  
 JEAN ASHMAN, A.B. .....Assistant Professor of Law and Law Librarian  
 WILLIAM CATRON JONES, A.B., LL.B. .....Assistant Professor of Law  
 WILLIAM E. WALLACE, B.A., J.D., LL.M., S.J.D. .....Assistant Professor of Law  
 ROBERT L. ARONSON, LL.B. .....Lecturer in Trial Practice  
 FRANK PHILIP ASCHEMEYER, LL.B. .....Lecturer in Family Law  
 HAROLD B. BAMBURG, LL.B. .....Lecturer in Procedure  
 JOHN WOLFINGER CALHOUN, LL.B. .....Lecturer in Practice Court  
 RENFORD H. CARUTHERS, B.S.P.A., LL.B. .....Lecturer in Procedure  
 FORREST MERRILL HEMKER, LL.B. .....Lecturer in Profession of the Bar  
 LLOYD ROESCH KOENIG, B.S., LL.B. .....Lecturer in Patent Law  
 JACOB MARK LASHLY, A.M., LL.B., LL.D. .....Lecturer in Public Law  
 JOHN SIMON MARSALEK, LL.B. .....Lecturer in Appellate Practice  
 MARION CHARLES MATTHEWS .....Lecturer in Federal Jurisdiction  
 RALPH ROBERT NEUHOFF, LL.B. .....Lecturer in Federal Taxation  
 CHRISTIAN B. PEPPER, A.B., LL.B., LL.M. .....Lecturer in Law  
 JAMES JOHNSTONE RITTERSKAMP, JR., B.S.B.A., LL.B. .....Lecturer in Legal Accounting  
 W. MUNRO ROBERTS, LL.B. .....Lecturer in Creditors' Rights  
 STANLEY MELVIN ROSENBLUM, A.B., LL.B., LL.M. .....Lecturer in Estate Planning  
 GEORGE W. SIMPKINS, A.B., J.D. .....Lecturer in Legal Drafting