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How to do Things with Law Students

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BOOK REVIEW

How To Do Things With Law Students

WILLIAM TWINING AND DAVID MIERS, *HOW TO DO THINGS WITH RULES: A PRIMER OF INTERPRETATION*, 4TH ED, LONDON, BUTTERWORTHS, 1999, PAGES 1-451 + XXXIV. ISBN 0 406 90408 1.

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INTRODUCTION

How to describe my delight when I first discovered Twining and Miers' *How To Do Things With Rules* in its third edition some eight or nine years ago?(!) One of the occupational hazards of a career in legislative drafting is being stranded at a party after trying to explain to someone (anyone!) just what *fun* it is, doing things with rules. The conversation teeters, then shifts to other guests and more engaging topics. Twining and Miers' work is a text that *enjoys* its subject, while demonstrating the fundamental importance of interpretation at all levels of the law and for all those who come into contact with the law (that is, everybody). Armed with the "case of the legalistic child" (10-12), or the strange-but-true story of the fire engine drivers both prohibited and permitted to go through red lights (51-56), a shy and retiring drafter could venture forth to the next social engagement and hold his own in the most brilliant company.

The first part of this review gives an account of the achievements of Twining and Miers' work in its previous incarnations — in terms of its subject matter, approach and method.

In the second part of the review, the distinctive features of the fourth edition are evaluated.

APPRECIATION OF A CLASSIC TEXT

Twining and Miers' work more than earns the laurel of "classic" bequeathed by Professor Goldring.[1] It represents a remarkable break with traditional legal teaching in three respects: in tackling the interpretation of rules as a subject worthy of legal instruction in itself; in what it has to say about interpretation and rules; and in the educational method it epitomises.

Interpretation – What?

The subject of Twining and Miers' work is the analysis of rules and the interpretation and application dimensions of "rule-handling", particularly as applied to legal rules. The authors extend the topic beyond the traditional confines of legal doctrine. By developing an approach to legal rules starting from a broader perspective of the social function of rules, their approach embodies the ethos of the law school at Warwick University at the time of first publication, when Twining was teaching there.[2] As Goldring notes, "the Warwick scholars considered that it was not enough to learn the rules without learning to appreciate them in their social context".[3]

The examples, questions and exercises collected in Part One (3-77) and the supplementary material in Appendix I (381-411) develop analogies between legal rules and non-legal rules (the judgement of Solomon, the legalistic child, school and prison rules etc), and some are used as case studies systematically throughout the book. Conversely, the legal analysis is always characterised by an awareness of larger social issues. For example, in other hands the fire-engine drivers' case, *Buckoke v Greater London Council*[4] (51-56; 120-21), might simply have been a footnote to a comment on the law-making jurisprudence of Lord Denning. Twining and Miers make it into a compelling illustration of how the realities of industrial relations affect interpretative standpoint. In another instance (among many), the authors' use of the domestic violence case study (78-109, 121-22, 266-73 *passim*) shows an acute awareness that the failure of the legislative reform concerned was not simply a case of "bad drafting" (or any other narrowly-

conceived technical error); it was as much, if not more, a consequence of the play of social forces surrounding the issue.

Who Interprets? Why?

One of the original features of Twining and Miers' approach is their emphasis on understanding how an interpretative problem arises in context. An interpretative problem only arises from the standpoint of the interpreter in question, playing a particular social role in a particular social setting.[5] From another standpoint, there may be no interpretative issue at all: "[w]hether an interpreter's reading of a rule is routine or problematic depends on who she is and the purposes for which she is reading it". (207)

Twining and Miers' work is rare among law texts in demonstrating an implicit understanding that the meaning of rules, like that of any other medium of communication, is crystallised fully only *in reception*. This is so to whatever degree (and here there is much to debate, of course) the sender, through the material form of the communication, predetermines or preconditions its meaning. In other words, the meaning of a rule is not fixed, determined by its form, but dynamic, constructed in each different situation in which the rule is invoked.

One of the red herrings exposed by this approach is the argument that the choice between "purposive" and "literal" interpretation is inherently political. For Twining and Miers, this is not a choice between liberalism and conservatism, but between interpretative tools that might, or might not, be used from particular standpoints in a given context. One could say that Twining and Miers take a purposive approach to the question of interpretation *itself*: their account is always conditioned by a consideration of the purpose served by interpretation in a particular context. Once this approach is taken, the method of interpretation (that is, the choice of interpretative technique) becomes secondary. As the authors note: "[W]e consider the rules of statutory interpretation and the doctrine of precedent to be relatively minor dimensions of the problems and processes of legal interpretation". (114)

A signal difference between Twining and Miers' account of statutory interpretation and that offered by most standard texts is that principles of interpretation are not regarded as a body of doctrine in themselves, abstracted from the context in which

interpretation actually takes place.[6] When treated like this, the principles are seen as means to an end: a "toolkit" from which the most appropriate may be chosen by a puzzled interpreter who has identified and diagnosed the source of puzzlement.[7] The student can then make some sense of the apparent confusion and internal contradiction of the assorted canons, rules and maxims that make up the law of interpretation.

Unfortunately, perhaps the status of Twining and Miers' work as a student text (and predominantly as a *beginning* student text at that) has prevented the authors' alternative approach from attaining a more authoritative standing.

Teach Interpretation? How?

The third remarkable thing about Twining and Miers' work is the method of law teaching that it represents. This is avowedly a "primer", not strictly speaking a legal text. The authors emphasise that their work is based on the assumption that "law is essentially a practical art" requiring the mastery of skills as much as the acquisition of knowledge. (viii) From my own experience, this approach accurately reflects the way in which the competency to think and act like a lawyer is acquired. There is a nicely tuned balance in the work between practical exercises and formal instruction that is doubtless also exhibited by many good teachers handling any legal subject, but that is rarely demonstrated so clearly in a textbook.[8]

Another evident assumption is that there is value in introducing students to the study of legal interpretation as they begin their training, rather than leaving them to develop such skill (or not) *en passant* while studying mainstream law subjects. (ix) The authors intend their study of rule-handling to function as an adjunct to conventional legal method courses in the preparatory stages of a law degree. A decided advantage of this use of the text, surely, is that it would encourage the more philosophically-minded or socially conscious of students to see more than dry doctrine, dull discipline and drudgery in the domain of the law.[9]

The authors also recommend their text for the study of jurisprudence. (xiii) They are convinced that "the art of interpretation is best learned by a combination of theory and practice". (ix) By the nature of the subject, deep theoretical

questions are encountered at every turn; for example: what is a rule? What is the relationship between rules and social values? How do words communicate meaning? Where is the common law? What is interpretation? But these are tackled for the most part in the course of, or just prior to, the detailed analysis of case studies and examples, following "the sound pedagogical principle that underlies much of contemporary legal education: the value of learning by doing". (ix) For those students (including this reader) who would pursue these topics further, there are more than ample references and indicative commentary and argument throughout, with "Suggestions for further reading" in Appendix IV. (435-42)

Twining and Miers use a "case study" method throughout. Part One ("Some Food for Thought": 3-112) gives a series of examples in the form of extracts from rules or cases, followed by questions designed to lead the students into the issues raised. The more formal instructional elements of the text (in Parts Two and Three) are made concrete throughout by the use of a number of those examples.[10] The use of this method clearly demands that students prepare material thoroughly beforehand. Speaking from my experience as a teacher, this method can lead to a very satisfying interactive teaching environment.[11] In Twining and Miers' work, not only are the actual case studies fascinating in themselves (as are the examples in Part One), they are deployed expertly so that most major points of principle are supported by detailed analysis of a relevant example.

The analysis of the case studies is as innovative as anything I have seen in a law text book. The authors make a good case for various forms of diagrammatic tools (the "algorithm" or flow-chart presentation of legislative logic is particularly illuminating: see Appendix II: 413-19). And in keeping with the overall methodology of their work, these various analytical tools are as much themselves the objects of practical teaching as the results obtained from their use.

THE LATEST EDITION

What's New?

After 25 years and four editions, this is clearly a text that is here to stay. But how has it changed over that time? According to the authors, the text was extended in the second edition in 1982, then in

1991 further revised to take account of significant developments in legal theory (Dworkin's *Law's Empire*; critical legal studies; the law and literature movement: x) The influence of European law on the law of the United Kingdom has been growing steadily over the life of the book, and this was one of the main areas of change in the third and now the fourth editions. In the fourth edition, for example, two significant new sections are added on "the European dimension" of legislative material and on interpretation of legislation, looking particularly at the *Human Rights Act* 1998 (UK). (221-26; 296-301) The authors have also thoroughly revised and re-edited their work, incorporating references to and discussion of recent legislation, cases and secondary materials, and rewriting for style as well as substance.[12]

Flow of Argument

The fourth edition is reorganised to clarify its structure and to emphasise its treatment of legislation. The third edition had just two parts: the first with the case study extracts and questions, the second with the instructional material. The fourth edition includes the extracts and questions in Part One, like the third edition, but splits Part Two of the third edition into two: Part Two, dealing with rules in general; and Part Three, dealing more specifically with the interpretation of legislation and the common law. The argument of the text now flows more clearly, emphasising the authors' conviction that legal rules are best understood as a species of social rule, and not as a genus all of their own. The new edition also emphasises the common features of legal interpretation, whether applied to legislation or case law (for example, the relevance of standpoint to each), by framing its treatment of legislation and case law by the concluding chapter on legal reasoning in general.

Treatment of Legislation

The treatment of legislation is more prominent in the fourth edition. An indication of this changed emphasis is that the two chapters devoted to the subject (chs 7, 8) now *precede* the chapter on the interpretation of cases (ch 9).[13] More significantly, in the fourth edition much of chapter 7 on legislation (ch 9 in the third edition) is reorganised and a significant amount rewritten, with new material added to increase its length by about a third. While some

of the material is not particularly relevant in the Australian context (for example, the addition of the section on "the European dimension" and the changes to the material relating specifically to UK legislative processes), there are two additions of significance. The first of these is an expanded section dealing with the criticism of "too many and too detailed laws", in which the greater use of "framework" primary legislation together with extensive subordinate law-making power is noted and criticisms of the approach are thoughtfully assessed. (241-44)

The second addition deals with plain English drafting style. (245-53) The authors note that drafters' "reservations [about plain English] are least in New Zealand and Australia" and are partial to the assessment of plain English proposed by former Chief Parliamentary Counsel for Australia, Ian Turnbull.[14] The section on plain English gives a useful history of the reasons for the detailed black-letter style, and a balanced assessment of advantages and risks involved in plain English reform. There is, however, an unfortunate tendency to conflate "plain English" drafting with "general principles" drafting (or at least to regard the latter as the most desirable form of plain English). The authors appear to take their cue from Turnbull, whose views on the topic are quoted at length.

It is inherent in the general principles approach that the policy of the law (or of the relevant part of the law) is indicated in terms of the "principles" which are to govern the implementation of the law. Consequently, in my view a "general principles" draft may communicate its policy (or purpose) more directly than a traditional "black letter" draft that avoids a direct statement of policy for fear of including words that have no specific job to do. But that is not to say that a "plain English" detailed approach to drafting the same law might not succeed in conveying that policy just as clearly (or even more so, given the opportunity to flesh out that policy with "detailed" context). Plain English drafting (of any sort) does not shy clear of the inclusion of unnecessary words, when those words can be justified as clarifying the meaning of the law (and, in particular, its purpose).

As I see it, the most important feature of general principles drafting is the effect it has on delegating the task of determining the scope and meaning of the statute to whichever government official, tribunal or court has the function of applying it. Depending on the

context, this may be advisable or inadvisable. But it is primarily a policy choice, not a stylistic preference.[15]

At any event, it is pleasing to see that the new edition canvasses these important current issues, to read the views of these distinguished authors, and (one must admit) to see due credit given to developments in Australia and New Zealand.

ASSESSMENT

This text is invaluable for the light it sheds on legal interpretation and in its approach to teaching the topic. The latest edition improves the book in a number of ways. It is no mere "touch-up" either, but a thorough review of all aspects of the text, with improvements in organisation and in its detailed treatment of particular topics.

The standpoint of Twining and Miers' work is, of course, predominantly that of the United Kingdom legal system; most important case studies and examples emanate from that jurisdiction or are viewed from the United Kingdom legal perspective.[16] The lack of local materials and Australian context is most keenly felt, perhaps, in the chapter on legislation, which contains a relatively detailed commentary on the United Kingdom situation. We still lack in Australia a general text on legislation which takes this approach. An Australian edition of Twining and Miers' work, remedying these deficiencies, would doubtless be preferable for use in Australian law schools.

But this ought not to prevent its use here, or elsewhere in the common law world: we share traditions and conventions of rule-handling. However frustrating it is not to have home-grown case studies, and having to skate over the treatment of European community law, this text remains, in my estimation, of great value for Australian students and teachers of interpretation and jurisprudence. One would also hope that it is read – with pleasure – by a few members of that elusive audience mentioned almost in passing in the Preface: those "non-lawyers who are concerned about problems of handling rules in their professional and personal lives". (x)

In short, Twining and Miers' work remains that rare commodity in the law – a significant contribution to its field; an inspirational primer; and a text that is a joy to read.

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1 J Goldring, Cultural Cringe or Lessons for Australian Legal Education? (1996) 7 *Legal Educ Rev* 125, at 128 (a review of W Twining, *Blackstone's Tower: The English Law School* (1994); GP Wilson (ed), *Frontiers of Legal Scholarship: Twenty Five years of Warwick Law School* (1995)).

2 *Id* at 126.

3 *Id* at 127.

4 [1971] 2 All ER 254 (CA).

5 The authors prescribe a "diagnostic model" for the "puzzled interpreter" whose reading of a rule is "problematic" in a particular situation. (208-20) After the overall context (standpoint, role etc) giving rise to the interpreter's puzzlement has been clarified, various "conditions of doubt" may be diagnosed. A well-ordered catalogue of such conditions is presented, for example: lack of clear policy objectives (item 4, 209); doubt about the meaning of words (item 8 (d), 210); poor drafting (item 13, 211); change in factual context after making of rule (item 17, 212); borderline cases. (item 33, 213) It is only then that the appropriate interpretative principle is to be applied.

6 The authors offer a strong, if compressed, critique of the standard approach to the common law of interpretation in a section headed "Judicial interpretation in general". (274-87)

7 See discussion, *supra* note 5.

8 This approach to the study of law is also represented in Twining's engaging "Reading Law Cookbook: A Primer of Self-Education about Law", a "skills-based" guide to handling (reading and analysing) a large variety of legal and related material. It is included in Appendix IV to the 4th edition. (421-33)

9 It should be added that the authors are careful to limit their aims to the teaching of *law student* skills (not *professional* legal skills); however, they note that there are obvious links between the two (as one would hope!). (viii-ix) This is a defence against the charge that their work is a capitulation to the view that legal education should be regarded purely as vocational training; the book's far-reaching scope more than amply rebuts that view in any case.

10 Notable among these are "the case of the legalistic child", whose efforts to steal jam from the larder are not thwarted by attempts to make his behaviour subject to the rule of household law; the bigamy case study (*R v Allen* (1872) LR 1 CCR 367: 42-50); and the domestic violence case study. (78-109)

11 In my varied career as an undergraduate law student, spread between three Australian universities, I had little formal introduction to legal method anywhere, and none to legislation or interpretation. At only one was regular, week-by-week preparation demanded (UNSW). While I had some good teachers, nowhere did I find anything as stimulating as the method represented by Twining and Miers' work. But I hasten to add that this was 20+ years ago, and of course I may just have been unlucky. In particular, I intend no slur on the teaching at UNSW, without which I might not have persevered in the law.

12 A few typographical errors caught my eye, all in new material (where one would expect them, if anywhere) – p 190 n 15 ("secton"); p 207 ("the rule may be appear"); p 274 ("in the exactly").

13 Similarly, the Table of Statutes appears *before* the List of Cases in the latest edition. Of course, this could just be the new publisher's (Butterworths) different house style.

14 The Commonwealth Office of Parliamentary Counsel began to initiate a number of "plain English" drafting reforms under Mr Turnbull, developed with

enthusiasm by his successor, Ms Hilary Penfold.

15 Of course, the sponsor of the Bill may be guided by advice from the drafter about the implications of drafting it in detail or by using general principles. But my point is that drafting in general principles is not, primarily, a matter of plain English. General principles drafting may lead to *less* direct communication of the effect of the law to the citizen, as it tends to abdicate the task of explaining how the law is intended to work in practice.

16 It is pleasing, however, to find a new example from an Australian text — on the laws of cricket (D Fraser, *Cricket and the Law* (1993)): 12-13.