IRIS FREEMAN, *Lord Denning: A Life*+

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In his 1982 review of a biography of the famed American academic and Supreme Court Justice Felix Frankfurter,[1] Professor Allan Hutchinson wrote that 'judicial biography is an infrequent and neglected product of English legal scholarship'.[2] 'Sophisticated and original treatment of English legal luminaries', he continued, 'is conspicuous by its absence'.[3] With some notable exceptions - works like the collection of essays commemorating the career of Lionel Murphy[4] and Lord Hailsham's 1990 autobiography[5] come to mind - Professor Hutchinson's appraisal holds just as true today as it did twelve years ago. Even in places like Canada and New Zealand, where the courts have been formally elevated to a supra-constitutional role as in the United States, the art of judicial biography remains either virtually non-existent or trite.

It was therefore not surprising that for those interested in the genre, the prospect of a new biography of Lord Denning was met with tremendous anticipation. Lord Denning has, after all, been a larger-than-life figure in the common law world for almost half a century now. More than any other person in living memory, he has been associated with legal and social change. Since his landmark decision in 1946 in the *High Trees* case,[6] his work (at least outside of the United States) has become the paradigm of judicial activism. Indeed, one would scarcely exaggerate to say that Lord Denning has been at the vanguard, either as architect or champion, of *every* major advance in the common law - even in places where the English writ has not run for some decades - since the Second World War. His life's story is accordingly in many ways also the story of the modern common law: of its evolution from high-Victorian 'civiliser' of Empire to neo-Elizabethan unifier of Commonwealth, and from an ethos of

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+ I Freeman, *Lord Denning: A Life* (Hutchinsons, 1993) pp ix, 449, 8 (photographs).

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1 H Hirsch, *The Enigma of Felix Frankfurter* (Basic Books, 1981).

2 Review of Hirsch, *The Enigma of Felix Frankfurter* (1982) 3 *J Leg Hist* 83 (quoted in JA Thompson, 'Judicial Biography: Some Tentative Observations on the Australian Enterprise' (1985) 8 *UNSWLJ* 380).

3 Ibid.

4 JA Scutt (ed), *Lionel Murphy, A Radical Judge* (Macmillan, 1987).

5 *A Sparrow's Flight* (Collins, 1990).

6 *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

protection of private property rights in a culture of individualism to one of the defence of public rights in an era of collectivism.

Sadly, then, those who were expecting Iris Freeman's new biography to cast some original light on the significance of this man's life and times will be disappointed. Simply put, *Lord Denning: A Life* is little more than a factual recounting of Lord Denning's life story, much of which has already been told by Lord Denning himself.[7] Freeman begins with a discussion of the weather in Hampshire on the day of 'Tom' Denning's birth there, and progresses through to a more-or-less chronological examination of his life in four parts. The first deals with Lord Denning's life up to 1944, when he was appointed to the High Court; the second with his work as a judge prior to his appointment as Master of the Rolls; the third with his twenty years as Master of the Rolls and head of the Court of Appeal; and the fourth with his life since retirement from the bench in 1982. In each part, Freeman's narration is well-crafted, and her attention to detail is thorough. But apart from a few broad generalisations, the book makes little reference to the broader context of Lord Denning's judicial career.

The book's chief advantage is in its timing. Coming as it does as Australian courts have begun to indicate a greater inclination to engage in 'judicial creativity', it may serve two ends. First, it should act as a counter to some of the cocky and ill-informed malevolence which features so prominently in much of the discussion of Lord Denning's life today. Lord Denning's reputation, particularly among younger members of the legal community, does not seem to have fared well with the passage of time. Far from being the hero that he was to law students in the 1960s and the yearly 70s, he is now seen at best as a quaint old man with an amusing turn of phrase. At the other end of the spectrum, however, there are many who see him as nothing less than a representation of all that is wrong in society; as an anachronistic throw-back to a racist, patriarchal and imperialistic past. Moreover, his judgments now tend to provoke mirth rather than consideration, and cynicism rather than debate.

All of this, in my view, is a tragedy, and says more about the comparative poverty of our own standards of legal discourse than anything else. In our haste to deny contemporary relevance to Lord Denning's work (and the work of others like him), we have cut ourselves off from the link which connects the old, classical liberal, individualistic conception of society with the newer, social democratic, collectivist one. Herein lies the book's second end: given that development of the common law is by definition an

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7 In *The Family Story* (Butterworths, 1981) and *The Closing Chapter* (Butterworths, 1983).

*ev*oluntionary, rather than revolutionary, process, one would be hard pressed to imagine a greater act of folly. Right now, the social scientists tell us, we stand at the threshold of great economic and social transformation. A transformation, in fact, which may be of a greater magnitude than any since the industrial revolution. Our societies, therefore, also face the prospect of a fundamental change, but without a consideration of the past; of how we have gotten where we are today, the prospect is that the tenor of the debate will be one of intellectual faddism, rather than any sense of empirical appreciation of the nature of our society.

Taking this point in the Australian context, one cannot imagine how the appropriateness of the High Court's recent disposition towards curial activism can be evaluated on any informed basis without a consideration of the social and legal consequences of *past* judicial activism. It is difficult to conceive how our vision of the future can be drawn into focus unless it is first juxtaposed against the means by which we have arrived at the present. In this sense, while the significance of his substantive holdings has naturally faded with the passage of time, the *contextual* nature of Lord Denning's work remains of tremendous contemporary significance. To put it in curricular terms, the pertinence of Lord Denning's work to courses like torts and contracts may now be less than it was fifteen or twenty years ago, but his relevance to constitutional theory and to courses like 'Law and Society' is arguably now higher in Australia than ever before.

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Freeman reminds us that Lord Denning was born into humble circumstances. The family was not poor by English standards of the day - his father ran his own drapery business - but the young Tom was forced to rely upon the benefices of the Church of England-run National Society for the Education of the Poor for his early education. It may also be a revelation to some that Denning was only able to afford to go to university (Magdalen College, Oxford) because he won a scholarship. Freeman points out, too, that he saw active service (along with three of his four brothers, two of whom were killed) during the First World Ward. Together, these episodes, though each occurring prior to his taking up the law, came to form the three planks upon which his judicial philosophy was built: a deep sense of religiousness and Christian charity, an equally deep sense of patriotism, and a respect for the fruits of hard work.

Also of interest is Freeman's discussion of how the young Denning came to acquire his immense grasp of the common law. Initially, he read mathematics at university, in which he earned a double first. It was only after spending a semester as a public school teacher that he returned to university to study law (and in the course

of so doing, earned yet a *third* first). A few years later, after joining a set of chambers, Denning was offered a contract to edit *Smith's Leading Cases* and, for a shorter period, the *English and Empire Digest* (p 92). As he later said, '[i]t was an immense task ... [b]ut it taught me most of the law I ever knew'.[8] The lesson to be drawn from this, of course, is that the key to reform in the common law - for Denning was without doubt the most successful reformer of all in several centuries - is not so much a facility to enunciate vague or theoretical reasons for dissatisfaction with the status quo in any given area (however well-founded the lack of satisfaction may be), as a firm understanding of what has gone before, and an ability to identify and understand common threads which run throughout the law. As long as our legal system remains judge-made or interpreted, it behoves us all to remember that, ultimately, the road to reform lies not in the law reviews, but in the law courts.

Freeman's book is also useful in that it reminds us of the instrumental role played by Lord Denning in the judicial acknowledgment of the inequality of bargaining power and the use of doctrines like estoppel, fundamental breach and the constructive trust to counter it, and to offer redress to the disadvantaged and less powerful. She discusses cases like *Lloyd's Bank v Bundy*,[9] in which he held that the common law should provide relief to those who are influenced to enter into unfair contracts out of 'ignorance or infirmity', and *Karsales v Wallis*,[10] in which he began to limit the harsh effects of contractual exculpatory clauses. In a similar spirit was the decision in *Candler v Crane, Christmas & Co*,[11] in which Lord Denning carried out the spadework for the holding by the House of Lords thirteen years later[12] that professionals could be held liable for negligent misrepresentation.

Freeman considers as well (although unfortunately not in a really thematic sense) the cases in which Denning fought a rear-guard action against the House of Lords over the property rights of wives. Section 17 of the *Married Women's Property Act* 1882[13] gave a judge in a dispute between husband and wife over title to property 'to make such order with respect to the property in dispute as he thinks fit'. Lord Denning seized upon this as a means of recognising a woman's equity in matrimonial property, notwithstanding that legal title was in

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8 *The Family Story*, note 7 above, at p 94.

9 [1975] QB 326.

10 *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936.

11 [1951] 2 KB 164.

12 In *Hedley Byrne & Co v Heller* [1964] AC 465.

13 45 & 46 Vict c 75.

the husband's name.[14] In the end, his efforts were, as he put it, 'finally scotched' by the House of Lords when it held that section 17 was merely procedural in nature,[15] but they helped in no small way to galvanise the tide of public opinion which led to the eventual recognition by Parliament of spousal contributions in the *Matrimonial Proceedings and Property Act* 1970.

Lord Denning also stood behind some of the most important steps in countering the power of private organisations to prevent others from exercising their will to work. In *Abott v Sullivan*,[16] it was Lord Justice Denning's (as he then was) dissent which laid the foundation for the holding of the House of Lords in *Bonsor v Musicians' Union*[17] that a wrongfully expelled member of the trade union had a right of legal redress. Similarly, in *Nagle v Fielden*[18] it was Lord Denning who wrote the judgment holding it illegal as being contrary to public policy to discriminate in offering employment opportunities on the basis of gender. And in *Race Relations Board v Charter*,[19] he held it illegal for a private social club to discriminate against an applicant for membership on the basis of race (though he was later overruled in this respect by the House of Lords).[20]

If Lord Denning's religious creed and his respect for industriousness are apparent in the disadvantaged persons cases, the third of his trilogy of virtues, ie his love of country and his desire to preserve 'Englishness', is also manifest in his judicial work. On one hand, of course, is the amusing material with which most are familiar: cases like *Miller v Jackson*,[21] in which he spoke in romantic terms of the importance that cricket plays in English village life and *Re Weston's Settlements*, in which he held that an application to vary a deed trust should be denied on the basis that it would deprive an infant beneficiary of the good fortune of being brought up in England.[22]

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14 See, eg *H v H* (1947) 63 TLR 645; *Rimmer v Rimmer* [1953] 1 QB 63; *Hine v Hine* [1962] 1 WLR 1124.

15 *Pettit v Pettit* [1970] AC 777.

16 [1952] 1 KB 189.

17 [1956] AC 104.

18 [1966] 2 QB 633.

19 [1972] 1 QB 545.

20 See [1973] AC 868.

21 [1977] QB 966.

22 *In Re Weston's Settlements* [1969] 1 Ch 223 at 245: 'The court should not consider merely the financial benefit to the infants or unborn children, but also their educational and social benefit. There are many things in life more worthwhile than money. One of these things is to be brought up in this our England, which is still "the envy of less happier lands"'.

But on the other lies what he once described as his most important case,[23] namely his work on behalf of the Crown in the form of chairmanship of the Profumo Enquiry. In June 1963, Lord Denning was requested by Harold Macmillan, the Prime Minister, to conduct the official inquiry into the events leading up to the resignation of John Profumo, the Secretary of State for War. Profumo, it will be remembered, had been having an affair with Christine Keeler, who at the time was alleged also to be carrying on an intimate relationship with Captain Eugene Ivanov, a Soviet Naval Attaché in London. Working with a dispatch that seems scarcely imaginable today, Denning received his commission on Friday 21 June and started work on Monday 24 June. He began taking evidence the very next day, and over the following forty nine days, he heard one hundred and sixty nine witnesses. He submitted his final report[24] (which, incidentally, became a best-seller) on 16 September, less than three months later!

When it comes to matters of *this* nature, matters in which he felt that the nation's security might be in peril, Lord Denning's judgment had an altogether harder edge to it. As Freeman puts it, Denning's reputation 'as the defender of the "little man" require[s] some qualification: where the security of the state was concerned, where disorder threatened or economic and social well-being were at risk, the individual took second place' (p 347). This explains his reaction towards trade unions - particularly the militancy of British trade unionism of the 1960s and 70s. When they openly flouted the law (as they did in *Gouriet v Union of Post Office Workers*[25] when they refused to deliver the Royal Mail to South Africa), much more was at stake in Lord Denning's view than the issue sub judice. As Denning saw it, the cornerstone of English Society - the English 'heritage of freedom'[26] - was being held up to ransom, and the courts had to react accordingly.[27]

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What is one to make of all this? Of a judge who refuses to countenance someone interfering with the playing of cricket on the basis that it would be to infringe one of the traditional liberties upon

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23 *Landmarks in the Law* (Butterworths, 1984) p 351.

24 Cmnd 2152 (1963).

25 [1978] AC 435.

26 *Freedom Under the Law* (Stevens and Sons, 1949) p 1.

27 Although see *Conway v Rimmer* [1967] 1 WLR 1031, in which he held in dissent that the Attorney General could not invoke Crown privilege as a means of avoiding production of documents in a wrongful dismissal case. In this instance, Denning's view was vindicated by the House of Lords on further appeal (see [1968] AC 910).

which English democracy was founded, yet who was willing to dictate to an elected member of government how he should carry out his duties, as he in effect did in *Gouriet*? Of a judge who was fond of quoting from Tennyson that England is a 'land of settled government ... where freedom slowly broadens down from precedent to precedent';[28] yet who not only openly defied the House of Lords but also suggested that he felt that the courts actually had the right in some circumstances to look behind the workings of Parliament?[29]

The key to understanding Lord Denning's jurisprudence is first to appreciate the nature of his view of the rule of law. Denning was obviously not a constitutionalist of the Dicey school - no one who was as ready as was he to engage in judicial activism could be. No, Denning was an activist - an *unrepentant* activist, as the House of Lords remarked on more than one occasion[30] - but he was at the same time a firm believer that settled law and respect for authority lay at the root of British justice. 'There is a simple moral obligation to maintain order', he once said, for 'without law the country will collapse and everyone will suffer'.[31] On the other occasion, he said that 'if the independence of the judges is the keystone, then the certainty and justice of the law is the structure on which the rule of law depends'.[32]

Yet it is clear that more than anything else, he defined his own role according to the second leg of the structure. As he saw it, his job was not to apply law, or even to 'find' law, but rather to do justice. He was not a jurisprudential positivist. Respect for the law should be an instinctive thing, in Lord Denning's view. In a published collection of his addresses entitled *The Road to Justice*,[33] he wrote that '[t]he people of England do not obey the law simply because they are commanded to do so; nor because they are afraid of sanctions or of being punished'.[34] Quite the contrary: 'They obey the law because

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28 From 'You Ask Me, Why?'. Denning quoted it at least four times in his extra-judicial writings: see *The Discipline of Law*, (Butterworths, 1979), p 291; *What Next in the Law* (Butterworths, 1982), p 6; *Gems in Ermine* (his 1964 Presidential Address to the English Society), p 1; and *From Precedent to Precedent* (his 1959 *Romanes Lecture*), p 1.

29 See *Pickin v British Railways Boards* [1973] QB 219 (rev'd [1974] AC 765).

30 See, eg the speeches of Lord Simonds LC in *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at 398 and *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446 at 467-468. See also the speech of Lord Diplock in *Davis v Johnson* [1979] AC 264 at 325.

31 *The Road to Justice* (Stevens & Sons, 1955), p 3.

32 *The Changing Law* (Stevens & Sons, 1953), p 5.

33 Note 31 above.

34 Id p 2.

they know it is a thing they *ought* to do'.[35] A balance between the content of the law and the expectations of society was therefore a prerequisite to the rule of law:

> Habit is not, however, by itself sufficient to explain the respect of the English for the law. Moral obligation plays a large part ... But most important of all is the moral quality of law itself. People will respect rules of law which are intrinsically right and just and will expect their neighbours to obey them, as well as obeying the rules themselves: but they will not feel the same about rules which are unrighteous or unjust. If people are to feel a sense of obligation to the law, then the law must correspond with what they consider to be right and just, or, at any rate, must not unduly diverge from it. In other words, it must correspond, as near as may be, with justice.[36]

Therein lies the explanation for his readiness to engage in activist law reform: he thought that the balance had been lost. '[H]owever suited to social conditions of that time', he wrote, 'the principles of law laid down by the judges in the nineteenth century ... are not suited to the social necessities and social opinion of the twentieth century'.[37] When seen this way, the situation was clear: if Parliament would for whatever reason not act, it fell to him and his colleagues on the Bench to correct the mis-match. According to *this* understanding, judicial creativity was no frolic - *the rule of law depended on it!*

Lord Denning's judgments leave no doubt that he considered that he had a good deal of latitude in determining how the balance should be struck, but there is one philosophical imperative that overrode everything else save the security of Britain itself, namely that the liberty of the subject be maintained. In his vision, the spirit of the British constitution - and hence the sprit which had to animate the judiciary - was 'a sense of the supreme importance of the individual and a refusal to allow his personality to be submerged in an omnipotent state'.[38]

It sounds paradoxical to state it this way given his liberal view of the place of the state vis-a-vis the individual and his insistence on maintaining judicial independence at all costs (even to the point of refusing to vote at general elections), but in many ways, in carrying out his mission, Denning cast back more to the authoritarianism of Bacon than the whiggishness of Coke, even

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35 Ibid (original emphasis).

36 Id p 3.

37 Lord Denning, *The Discipline of Law* (Butterworths, 1979), p v.

38 'The Spirit of the British Constitution' (1951) 29 *Can Bar Rev* 1180 at 1182.

though he frequently referred to the latter in his judgments. Bacon, it will be remembered, was an enthusiastic Lord Chancellor; a champion of equity - of individual justice - being done, provided it was done in the King's name. Denning had a similar view of partnership between himself and the Crown. He saw himself as the personal agent of his sovereign for the purposes of meeting justice. It was thus that in his Presidential Address to the English Association, he said:

> Now the judgments of Her Majesty's judges are the judgments of the Queen herself. They are her delegates for the purpose. By this oath [ie the Coronation Oath, in which the Sovereign vows that she will 'cause Law and Justice, in Mercy, to be executed'], they must in her name execute, not law alone, but 'law and justice': and they must do so 'in Mercy'....[39]

Yet Denning is no sentimental fool in his feelings. On the contrary, he had a considerable amount of worldly pragmatism about him. Despite, for example, the fact that he was a devout Anglican who viewed the sanctity of marriage as one of the most important elements of the social contract, it was he who, as chairman of the Lord Chancellor's Committee investigating the administration of divorce law, first recommended many of the changes which have subsequently reduced the procedural complication of getting a divorce.[40] It was also Denning - the staunch defender of Englishness - who first awarding damages in a foreign currency (and in the course of so doing openly defied precedent).[41] In his reasons, he made clear his awareness of how England's position in the world had changed. At one time, he said, sterling 'was a stable currency which had no equal'. But 'things are different now' - 'sterling floats in the wind', changing 'like a weathercock with every gust that blows'. His awareness of the realities of modern commercial practice were also apparent in his fashioning of the now indispensable remedies of the Mareva injunction[42] and the Anton Piller order.[43]

Nor was Denning blind to the future. At a time when others in Britain still assumed that, in 1972, they had just joined an expanded customs union, Denning saw clearly the fundamental changes that were in store: the Treaty of Rome, he said, was 'like an incoming tide.

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39 *Gems in Ermine*, note 28 above, at p 14.

40 See Freeman pp 173-175.

41 *Schorsch GmbH v Hennin* [1975] QB 416.

42 See *Mareva v International Bulk Carriers* [1975] 2 Lloyd's Rep 509 and *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093.

43 See *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55.

It flows into the estuaries and up the rivers. It cannot be held back'.[44] This being the case, it was the duty of all British people to 'strive to wipe out the discord of the past and do all that we can to build the new Federation of Europe based on a comprehensive community law'.[45] So, too, was it that it was Lord Denning who was asked to chair the 1959-1960 conference on the future of law in post-colonial Africa. Well before Harold MacMillan's 'wind of change speech', it was Denning who said: 'Now is the time to think and do. Africa, like some great giant awakening out of centuries of slumber, stretches its limbs, stands up and looks at the dawn. It is the dawn of its own day it is looking at'.[46]

The language which characterises Denning's speech and style of prose may seem to our eyes and ears incredibly anachronistic, and one could not unconvincingly argue that the England about which Denning spoke - the land in which bluebells flourished every year in Kent[47] and in which village menfolk would gather of a summer evening to play cricket[48] - never existed except in the imagination. But this should not obscure the import of his message. Lord Denning's repeated concern about the abuse of power, whether public or private, is a theme which we see running throughout legal comment today. His recognition of the fact that the extent to which private entities can wield power over the community at large can give rise to a public legal concern must surely be one of the most far-seeing developments in the common law in modern times. When one thinks of its implications in areas like gender equality, environmental law and corporate governance (to name but three), one cannot help but think it a pity that his judgments have been dismissed by so many as little more than a manifestation of upper-class anti-unionism.

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Given their sensationalism, the events leading up to Lord Denning's retirement in 1982 deserve special mention. To recapitulate the story briefly, in July 1981, Denning made a speech at the Lord Mayor's Banquet in London in which he offered some thoughts about the future of the jury system in Britain. In particular, he made reference to the recent acquittal in Bristol of some blacks who had been charged with rioting. On the basis of information he had

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44 *Bulmer v Bollinger* [1974] 3 WLR 202.

45 *What Next in the Law* (Butterworths, 1982), p 301.

46 See 'Foreword', in AN Allott (ed), *The Future of Law in Africa (Record of Proceedings of the London Conference 28 December 1959 - 8 January 1960)* (Butterworths, 1960).

47 *Hinz v Berry* [1970] 2 QB 40 at 42.

48 *Miller v Jackson*, note 21 above.

received from one of the barristers acting in the case, Denning suggested that the right of challenge had been improperly used to obtain a sympathetic jury. Denning followed this with a further discussion of jury reform in his book *What Next in the Law*.[49] He again used the Bristol case in illustration of his point that English people of different ethnic backgrounds 'no longer share the same set or morals ... They no longer share the same respect for the law'.[50]

Not surprisingly, this led to a public outcry and a demand that Denning resign. What followed was, in Denning's words, 'a calamitous fortnight'.[51] When he was advised by a solicitor representing the Bristol jurors that they were considering an action in defamation, he (to borrow Freeman's description) 'knew it was unthinkable that the office of Master of the Rolls should be tarnished by the issue against him of a writ for libel' (p 394). Denning offered to resign immediately, but he was persuaded by the Lord Chancellor to remain until the end of Term (which was eventually extended to September 29). In her discussion of the events, Freeman makes plain the humiliating opprobrium which greeted his remarks, and the almost universal relief with which the news of Denning's decision to retire was met, but she also notes that even those intimately involved in the call for him to quit were in no doubt of his status as a 'great judge'.[52]

The unfortunate thing about Freeman's recounting of the episode - despite its otherwise admirable even-handedness - is that it does no more than tell the story. The same criticism can be levelled at it as the rest of the book: that in her recounting of the Denning saga, Freeman leaves our appetite whet for something which she does not give. One cannot help but feel it a shame that she did not consider the broader context of the controversy. There are other areas of the law, for example, in which the case for reform is predicated on an assumption that groups are not likely to make objective judgments when group interests are at stake. One has little doubt that, after the statements, Denning's judicial fate was quite properly sealed (and Denning himself said that he had been foolish to say what he did)[53] but some thoughts on what this episode says about the degree to which our society reflects an ambivalence concerning the permissibility of group criticism would have been of interest.

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49 (Butterworths, 1982).

50 Quoted in Freeman, at p 392. After the controversy began, these passages were removed from the book (id at p 396).

51 *The Closing Chapter*, note 7 above, chap 1.

52 See pp 395-396.

53 *The Closing Chapter*, note 7 above, at p 9.

A reviewer must of course always bear in mind the admonition that he or she not review a book that the author did not intend to write, but it *is* a great shame that Freeman chose to discuss so little of the broader context in which Lord Denning lived and worked. To put it cynically, his life spanned the decline and fall of Britain as a great power. Denning was born a subject of Queen Victoria, and the Empire over which London presided covered a quarter of the globe. By the time he had retired, Victoria's great-great-grand daughter was on the Throne and London had given over to Brussels by the Treaty of Rome. Similar observations can be made about the common law: when Denning read for the Bar, *Donoghue v Stevenson* was not to be decided for another ten years. His appointment to the Bench coincided with the *Beveridge Report* and the introduction of the collectivist legislation which ushered in the welfare state. When he left, the process of 'Europeanisation' of the English common law was in full swing.

When thought about this way, one cannot help but feel it a great pity that Freeman did not choose to do more than tell Denning's life story. What is at best a solid businesslike effort could instead have been a provocative analysis of the role played by one person in an era of massive social change. William Manchester's life of Churchill stands as a shining example of the sort of thing that can be done with political biography[54] - this could easily have been a judicial companion piece.

One suspects that, in part, the problem is that Freeman was not sure whether she was writing for a legal or a lay audience. But either way, she falls short of the mark. If the former, the book is too simplistic in its discussion of many of the cases in which Denning delivered judgment. If the latter, the lack of broad context becomes even more stark. In so far as no person is an island, and that at the end of the day, 'greatness' is nothing more than a measure of the degree to which we affect the lives of those around us, Lord Denning's life story is almost meaningless without some consideration of how he touched the lives of those of us who live in the common law world.

In point of fact, Lord Denning touched the lives of Australians and Australian lawyers a good deal. Directly, of course, his decisions have a continuing effect in the development of the Australian common law.[55] More broadly, though - and perhaps ultimately more

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54 *The Last Lion* (2 vols) (Little, Brown & Co, 1983).

55 Some recent examples of cases in which Lord Denning's judgments have played a substantial role in influencing the reasoning of the High Court of Australia include: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 (discussing the applicability of the doctrine of promissory

interestingly - is what one might term the 'liberating' effect that Lord Denning's work had on Australian judges. In the British context, even if he himself considered that his best work had been thwarted,[56] Denning legitimised curial activism.[57] So if, as so many have argued, the predominant characteristic of the Australian judiciary until recent times has been the tendency to slavishly imitate its English counterpart, is it not reasonable to suppose that had it not been for the model of result-oriented creativity provided by Lord Denning, the High Court's newly-found spirit of activism would have been less likely to emerge? To pose the question another way, could it have been precisely the tendency to follow English trends of judicial conduct that provided the means for escaping from the tendency?

Indeed, one wonders whether even Justice Murphy - that judicial iconoclast who demanded upon moving into his chambers that the set of *English Reports* be thrown away in favour of a set of the United States *Supreme Court Reports*[58] - would have felt so comfortable in agitating for change from the Bench had Lord Denning not come before him. Certainly, one *can* say that in its directness and simplicity, Justice Murphy's judgment-writing style bears much more similarity to that of Lord Denning than it does to the often obtuse philosophical ramblings of the modern American Supreme Court Justices. Moreover, his willingness to assert a law reforming role for the judiciary parallel to, rather than below, Parliament was something that he shared with Denning.[59] Either way, it is plain that the implied

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estoppel); *Jackson v Sterling Industries* (1987) 162 CLR 612 (discussing the use of the Mareva injunction); and *Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225 (discussing the applicability of *Hedley Byrne* liability in Australia). In light of the recent re-emergence of interest in the events of 1975, and the role played therein by Sir Garfield Barwick, people might also be interested in Denning's views on the appropriateness of judicial advisory opinions. See *Landmarks in the Law*, note 23 above, at p 41.

56 In *The Discipline of Law*, note 37 above, at p 315 he wrote: '... I feel that many of my endeavours have failed - at any rate so far'.

57 When his retirement was announced, Hugo Young wrote in the *Sunday Times*: 'when all the raucous headlines have been forgotten, and the last regrettable calamity has passed insignificantly into the dustbin, Denning's great works will endure forever. To anyone who believes the law should liberate, not enslave, he is a beacon. He discovered that young, as a poor student, in the 1920's. He is just about the only octogenarian who has never forgotten it' (*The Sunday Times*, 30 May 1982).

58 See The Hon M Kirby, 'Lionel Murphy and the Power of Ideas' (1993) 18 *Alternative Law Journal* 253 at 255.

59 Compare the following two descriptions of the appropriate role for the Court in making new law:

rights cases[60] and *Mabo*[61] owe a good deal more to the creativity of Lord Denning than they do to the legalism of Sir Owen Dixon.[62]

Lord Denning was a man of another time and generation. The things which he held most dear: patriotism, religious faith and industriousness, no longer seem as important to us. And the prejudices he held - for as Cardozo said, all judges have prejudices[63] -

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' ... I do not think we need wait for statute. We are well able to imply [a missing term] now in the same way as judges have implied terms for centuries. Some people think that now that there is a Law Commission the judges should leave it to them to put right any defect and to make any new development ... I decline to reduce the judges to such a sterile role. They should develop the law, case by case, as they have done in the past: so that the litigants before them can have their differences decided by the law as it should be and not by the law of the past'. (*Liverpool City Council v Irwin* [1967] 1 QB 319 at 332 per Lord Denning MR).

'When it becomes clear that an error of principle has occurred by judicial decision, the error should be corrected judicially. The courts can continue then the inductive process which is the method of the common law. The law can be adapted to previously unforeseen situations and to changing social needs. This is the daily task of judges. When there is an abdication of judicial responsibility by clinging to a settled principle that is no longer appropriate, the only recourse is legislative intervention. This often leads to unfortunate results as it has in this instance'. (*Dillingham Construction Pty Ltd v Steel Mains Pty Ltd* (1975) 132 CLR 323 at 334-335 per Murphy J).

60 *Nationwide News Pty v Willis* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

61 (1992) 175 CLR 1.

62 Contrast the statements of Lord Denning and Justice Murphy on the role of the judge as law reformer in note 59 above, with the following passage from Sir Owen Dixon: 'It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience. The former accords with the technique of the common law and amounts to no more than an enlightened application of modes of reasoning traditionally respect in the courts ... The latter means an abrupt and almost arbitrary change'. ('Concerning Judicial Method', in *Jesting Pilate and Other Papers and Addresses* (Law Book Co, 1965) at p 159).

63 'There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other

are in many cases now quite out of step with social mores. But it would be wrong either to condemn or dismiss him on that basis. We should instead regard him in the light of his own day. If we do this - if we consider him in the only setting in which a person should be judged - a far different picture emerges. We then see a man who, through the sheer dint of hard labour, rose from a modest beginning to become one of the most influential people not just in his own country, but in the entire British Commonwealth. A man, moreover, who was acutely aware of the extent of his power - Denning's judgments and books leave no doubt of that - but who never used it for personal gain. On the contrary, we see a man all of whose judicial efforts were directed at helping the powerless. In this sense, Lord Denning's was a life that transcended class prejudice. To be sure, from time to time he made mistakes, but there can be no gainsaying the fact that more than any other judge of his time, Lord Denning reflected the needs and aspirations of ordinary people.

Did he succeed at his self-appointed task? Is Great Britain - *is the common law world* - a better place for his judicial activism? What have been the effects of his judicial style on our system of parliamentary democracy and the rule of law? These are all questions on which Australians should ponder as they consider the behaviour of their own High Court. For those who may not be familiar with his career, *Lord Denning: A Life* is a relatively quick way to learn more about 'one of the few geniuses of the English common law', as Lord Scarman once described him.[64] But for a definitive analysis of his work, we will have to wait for another day.

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mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of "the total push and pressure of the cosmos", which, when reasons are nicely balanced, just determine where choice shall fall'. (*The Nature of the Judicial Process* (Yale University Press, 1921) p 12).

64 *The Guardian Gazette*, 27 February 1977 (quoted in Freeman, p 405).