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Book Review

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Book Review: The Limits of High Trees - Lord Denning: The Judge and the Law, by  
J. L. Jowell and J. B. W. B. McAuslan (eds)

# THE LIMITS OF HIGH TREES

*Lord Denning: The Judge and the Law.* By J.L. Jowell and J.B.W.B. McAuslan, eds. London: Sweet & Maxwell, 1984.

*Reviewed by Reuben Hasson.\**

I opened this book with some misgivings. Too much has been written in the Commonwealth about the judiciary, especially Lord Denning, to the neglect of other law-making bodies, both formal and informal. By the time I had finished the book, however, I was convinced that the enterprise had been worthwhile. Seven of the ten essays — those on substantive areas of the law — range from good to superb. The others are disappointing.

## I. THE GENERAL ESSAYS

These three disappointing essays attempt to write about Denning in the round. This may be beyond any legal scholar bound by the format of a single essay. Thus, Professor Heuston, writing about the life and times of Denning, paints an incredible picture of the 1930s when Denning was at the Bar. In those days, we are told, “civil liberties, demonstrations, police harassment, racial and sex discrimination, one-parent families, legal action groups, [and] neighbourhood law centres” were unknown.<sup>1</sup> Yet Professor Heuston, an accomplished constitutional scholar, cannot be unaware of the Black Shirt movement, the *Public Order Act*,<sup>2</sup> the *Incitement to Disaffection Act*,<sup>3</sup> and the police harassment of the Unemployed Workers’ Movement. Perhaps he is suggesting that Denning was unaware of all this, but even this seems unlikely. Later, Professor Heuston writes of the picket at Blackwell’s bookshop in 1980 when Denning was supposed to have signed copies of his book *The Due Process of Law*.<sup>4</sup>

Heuston also points out that MPs and even a section of the Press had begun to criticise Denning.<sup>5</sup> He makes it appear that these attacks

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<sup>1</sup> R.F.V. Heuston, “Lord Denning: The Man and His Times” in J.L. Jowell & J.P.W.B. McAuslan, eds, *Lord Denning: The Judge and the Law* (London: Sweet & Maxwell, 1984) 1 at 9 [hereinafter *The Judge*].

<sup>2</sup> *Public Order Act, 1936* (U.K.), 1 Edw. 8 & 1 Geo. 6, c. 6.

<sup>3</sup> *Incitement to Disaffection Act, 1934* (U.K.), c. 56.

<sup>4</sup> See Heuston, *supra*, note 1 at 17.

<sup>5</sup> *Ibid.*

were 'bolts from the blue'. Leaving aside such trifles as his attack on the welfare state when he was awarded an honorary doctorate at the University of Western Ontario, one cannot blame people for getting very angry when they read that

[i]n recent times England has been invaded — not by enemies — not by friends — but by those who seek England as a haven. In England there is social security — a national health service and guaranteed housing — all to be had for the asking without payment and without working for it. Once here, each seeks to bring his relatives to join him. So they multiply exceedingly. . . .<sup>6</sup>

One cannot write like a Monday Club member and evade the ensuing anger. In fact, Denning was treated sympathetically for his final indiscretion — the allegation that those accused of riots in Bristol had been acquitted because the jury contained some blacks.<sup>7</sup>

The most disappointing essay in the book is by Professor A.W.B. Simpson, who omits to write about Lord Denning at all. He doubts whether we will ever again have any great jurists like Paul, Ulpian, Coke, and Blackburn, for "[t]here seems today to be no field of private law which is regarded as immune from departmental and legislative interference. . . ."<sup>8</sup> So, only private lawyers can be great jurists. This means that judges of the calibre of Atkin, Wright, and Wilberforce (to say nothing of Brandeis and Black in the United States) must be regarded as second rate since most of their work involved the construction of statutes. The notion that one has to be a private lawyer to be a great jurist tells us a great deal about Professor Simpson's legal education and attitudes and little else. Professor Simpson ends with an attack on Douglas Hay's essay in *Albion's Fatal Tree*,<sup>9</sup> which is described as a "cult book,"<sup>10</sup> and John Griffith's *Politics of the Judiciary*.<sup>11</sup> Since it is impossible to do justice to these books in two pages, one wonders what Simpson is up to. My guess is that he feels anger at two of the books that have questioned the status of the "great jurist." But if Professor Simpson will not, or cannot, tell us whether Denning was a great jurist, Professor Waddams, giving a "Commonwealth perspective," is prepared to put Denning ahead of Paul, Ulpian, Coke, and all comers. In an outrageous passage, he compares Denning to Newton: "To say that Lord Denning has influenced

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<sup>6</sup> C. Palley, "Lord Denning and Human Rights - Reassertion of the Right to Justice" in *The Judge*, *supra*, note 1, 251 at 303.

<sup>7</sup> See Heuston, *supra*, note 1 at 17.

<sup>8</sup> A.W.B. Simpson, "Lord Denning as Jurist" in *The Judge*, *supra*, note 1, 441 at 444.

<sup>9</sup> D. Hay, "Property, Authority and the Criminal Law" in D. Hay *et al.*, *Albion's Fatal Tree* (New York: Pantheon Books, 1975) 17.

<sup>10</sup> *Ibid.* at 452.

<sup>11</sup> J.A.G. Griffith, *The Politics of the Judiciary*, 3rd ed. (London: Fontana Press, 1985).

the law of contracts is rather like saying that the study of physics owes something to Newton."<sup>12</sup> Waddams seeks to prove Denning's greatness by listing a whole group of cases on contracts, but he fails to explain how any *one* of these cases has been of dramatic importance to the common law. (I think that most of the cases that Waddams cites are either socially harmful or else add little to our jurisprudence: Professor Atiyah demonstrates this in his essay.)

## II. THE SPECIFIC ESSAYS

Professor Atiyah, writing of Denning's contributions to the law of contract and tort, keeps his feet on the ground. I cannot, however, agree with Atiyah's statement that Denning has almost always distinguished between commercial and consumer contracts.<sup>13</sup> This may have been true until 1969, but after *Harbutt's Plasticine Ltd v. Wayne Tank & Pump Co.*,<sup>14</sup> *Photo Production Ltd v. Securicor Transport Ltd*<sup>15</sup> and *George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd*,<sup>16</sup> this statement is no longer tenable. Again I disagree when Atiyah adds that "where he has departed from this approach, it will often be found that his views accord closer with those of the mercantile community than do those of his colleagues."<sup>17</sup> I did not hear any cheering by the business community. I suspect that Professor Atiyah did not hear any cheering either.<sup>18</sup>

Professor Atiyah writes that where Denning was dealing with exemption clauses covering consumer goods, he would take note of insurance. Thus, in *Halbauer v. Brighton Corp.*,<sup>19</sup> Denning concurred in a decision applying an exemption clause whereby the defendants protected themselves from liability for theft of a caravan parked on their premises. Denning felt rightly that the owner should insure. Yet, in *Levison v. Patent Steam Cleaning Co.*,<sup>20</sup> where the plaintiff consumer had insured a carpet for £900 and the cleaners had not returned it, Denning was prepared

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<sup>12</sup> S. Waddams, "Lord Denning: A Commonwealth Perspective" in *The Judge, supra*, note 1, 455 at 456.

<sup>13</sup> P.S. Atiyah, "Contract and Tort" in *The Judge, supra*, note 1, 29 at 29.

<sup>14</sup> (1969), [1970] 1 Q.B. 447, [1970] 2 W.L.R. 198 (C.A.).

<sup>15</sup> (1978), [1978] 1 W.L.R. 856, [1978] 3 All E.R. 146 (C.A.), rev'd (1980), [1980] A.C. 827, [1980] 1 All E.R. 556 (H.L.).

<sup>16</sup> (1982), [1983] 2 Q.B. 284, [1982] 3 W.L.R. 1036 (C.A.), aff'd (1982), [1983] 1 W.L.R. 1, [1983] 2 A.C. 803 (H.L.).

<sup>17</sup> See Atiyah, *supra*, note 13 at 29.

<sup>18</sup> In these cases, neither the nominal nor the real plaintiffs could have had much cause for cheering.

<sup>19</sup> (1954), [1954] 1 W.L.R. 1161, [1954] 2 All E.R. 707 (C.A.).

<sup>20</sup> (1977), [1978] Q.B. 69, [1977] 3 W.L.R. 90 (C.A.).

to allow a subrogated action by the insurer against the cleaning company. If it is argued that Denning believed that the subrogation action would deter the careless and the fraudulent, this argument should have prevailed in *Halbauer*. One cannot expect complete consistency from any judge, but some consistency is called for in cases that recur with some frequency.

Of the doctrine in *Lloyd's Bank Ltd v. Bundy*<sup>21</sup> and *Shroeder A. Publishing Co. v. Macaulay*,<sup>22</sup> Atiyah rightly remarks that "any such doctrine is unlikely to go far beyond the effect of existing authorities, as a matter of fact. What is involved in Lord Denning's judgment is a more open acceptance of what is already largely acknowledged law."<sup>23</sup> Atiyah is also correct in being troubled by the fashionably popular decision in *Jarvis v. Swan Tours Ltd*.<sup>24</sup> Atiyah refers to it as a "casual decision" and argues that "[i]f ever there was a case in which policy issues needed to be explored, this was it. . . ."<sup>25</sup> Atiyah is also rightly critical of two other Denning decisions in the field of damages — *Parsons (H.) (Livestock) Ltd v. Uttley Ingham & Co.*<sup>26</sup> and *Lazenby Garages Ltd v. Wright*.<sup>27</sup>

Turning to tort, Atiyah says that "some of Lord Denning's greatest triumphs are to be found in the modern development of the law of negligence."<sup>28</sup> Yet nowhere in his judgments and nowhere in his evidence to the Pearson Commission does Denning indicate whether negligence-based liability is a good or a bad thing. In *Nettleship v. Weston*,<sup>29</sup> he seems prepared to jettison negligence liability in favour of some kind of "risk" liability; but he ignored the writings of some of his brethren who were prepared to adopt a social insurance approach to the accident problem.<sup>30</sup> Professor Atiyah is correct in concluding that Denning displayed his greatest strength in this area of obligations despite his vagaries and inconsistencies. In Atiyah's words, "He has been able to

<sup>21</sup> (1974), [1975] Q.B. 326, [1974] 3 W.L.R. 501 (C.A.); but see *National Westminster Bank Plc. v. Morgan* (1985), [1985] 2 W.L.R. 588, [1985] 1 All E.R. 82 (H.L.).

<sup>22</sup> (1974), [1974] 1 W.L.R. 1308, [1974] 3 All E.R. 616 (H.L.).

<sup>23</sup> See Atiyah, *supra*, note 13 at 40.

<sup>24</sup> (1972), [1973] Q.B. 233, [1972] 3 W.L.R. 954 (C.A.).

<sup>25</sup> See Atiyah, *supra*, note 13 at 51.

<sup>26</sup> (1977), [1978] Q.B. 791, [1977] 3 W.L.R. 990 (C.A.).

<sup>27</sup> (1976), [1976] 1 W.L.R. 459, [1976] 2 All E.R. 770 (C.A.).

<sup>28</sup> See Atiyah, *supra*, note 13 at 54.

<sup>29</sup> (1971), [1971] 2 Q.B. 691, [1971] 3 W.L.R. 370 (C.A.).

<sup>30</sup> See, for example, in the United Kingdom, Lord Parker C.J., "Compensation for Accidents on the Road" (1965) 18 *Curr. L. Prob.* 1; Lord Kilbrandon, *Other People's Law* (London: Stevens, 1966); in Canada, Chief Justice McRuer, "The Motor Car and the Law" in A. Linden, ed., *Studies in Canadian Tort Law* (Toronto: Butterworths, 1968) 303.

give full rein to his policy orientations without having to contend with the often different policy orientation of Parliament."<sup>31</sup>

Professor Michael Freeman contributes a valuable essay on Denning's work in family law. Instead of delving immediately into the cases, Freeman begins with a quotation from Denning's 1960 lecture on the equality of women:<sup>32</sup>

We ought to remember that there has been one time previously in the history of the world when women achieved a considerable measure of equality. It was in the Roman Empire, and it should serve as a warning of the dangers to which equality may give rise. . . . This freedom . . . proved to be disastrous to the Roman society. Morals decayed. The marital tie became the laxest the Western world has seen. Bertrand Russell has expressed the position in a sentence: "Women, who had been virtuous slaves became free and dissolute; divorce became common; the rich ceased to have children." This decay of morality was indeed one of the factors in the fall of the Roman Empire. Let us look upon this and take heed.<sup>33</sup>

Denning took heed of all this, as his decision in *Peake v. Automotive Products Ltd*<sup>34</sup> shows. In that case, women working in a factory were allowed to leave at 4:25 p.m. and men at 4:30 p.m. When a man complained that this was a breach of the *Sex Discrimination Act 1975*,<sup>35</sup> Denning thought that that statute must be read in light of the principles of chivalry and courtesy which mankind were expected to give womankind. In *Ministry of Defence v. Jeremiah*,<sup>36</sup> Denning rejected his chivalry rationale but defended his decision in *Peake* on the basis of *de minimis*.<sup>37</sup> Of course, this is using another rubric to justify inequality. Professor Freeman says that "Sir James Fitzjames Stephen recognized that protection and submission were correlatives. It may be doubted whether Lord Denning does."<sup>38</sup> In my opinion, Denning does see these as correlatives, and he is prepared to extend protection to women who are prepared to accept a degree of submission.

All this is spelt out in one of his decisions on the wife's right to stay in the matrimonial home. In *Guarasz v. Guarasz*,<sup>39</sup> he made this clear:

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<sup>31</sup> My ignorance in the field of trusts and equity prevents me from commenting on Mr. Hayton's essay on Lord Denning's contributions in that field. Suffice it to say that it is a well written and scholarly piece.

<sup>32</sup> *The Equality of Women* (Liverpool: University of Liverpool Press, 1960) at 3-4. See M.D.A. Freeman, "Family Matters" in *The Judge, supra*, note 1, 109 at 110.

<sup>33</sup> See Freeman, *ibid.*

<sup>34</sup> (1977), [1978] Q.B. 233, [1977] W.L.R. 853 (C.A.) [hereinafter *Peake* cited to Q.B.].

<sup>35</sup> *Sex Discrimination Act 1975* (U.K.), 1975, c. 65.

<sup>36</sup> (1979), [1980] Q.B. 87, [1979] 3 W.L.R. 857, [1980] I.C.R. 13 (C.A.).

<sup>37</sup> *Ibid.* at 25 ("the only sound ground" for *Peake* was "*de minimis*").

<sup>38</sup> See Freeman, *supra*, note 32 at 114.

<sup>39</sup> (1969), [1969] 3 W.L.R. 482, [1969] 3 All E.R. 822 (C.A.).

Some features of family life are elemental in our society. One is that it is the husband's duty to provide his wife with a roof over her head and the children too. So long as the wife behaves herself, she is entitled to remain in the matrimonial home. . . . This is a personal right which belongs to her as a wife. It is not a proprietary right. So long as she had done nothing to forfeit that right the court will enforce it.<sup>40</sup>

It is the phrase "so long as she behaves herself" that is chilling. In the first place, it is language that is designed to stress the unequal status of the wife in the relationship. It is the language of parent and child rather than the language used to describe the status of equals. Second, there is a vagueness about 'behaving oneself'. Usually, this will mean the absence of an adulterous relationship, but it is, of course, not limited to that.

A final example of conditioning rights on "good behaviour" is to be found in cases such as *Re L. (Infants)*.<sup>41</sup> In that case, Denning reversed the decision of the trial judge who gave care and control of two small girls, who were wards of the court, to the mother. She was solely responsible for the breakdown of the marriage and was committing adultery. Denning would have none of this. He wrote:

It would be an exceedingly bad example if it were thought that a mother could go off with another man and then claim as of right to say: "Oh well, they are my two little girls and I am entitled to take them with me. I can not only leave my home and break it up and leave their father, but I can take the children with me and the law will not say me nay." It seems to me that a mother must realize that if she leaves and breaks up her home in this way she cannot as of right demand to take the children from the father.<sup>42</sup>

All this moralism diverts the judge's mind from what should be the crucial issue in the case — what is in the best welfare of the children.<sup>43</sup>

The limitations of Denning's reforms are well brought out in an incisive passage by Professor Freeman:

His is the sort of reform which improves the position of some women while at the same time perpetuating the view that domestic labour has no economic value and rights generally are dependent on moral proprieties. It is as well to remind ourselves of this for Lord Denning has often been seen, and has seen himself, as a harbinger of reform. There has been legislative reform to recognize the value of domestic labour and to preserve maintenance conduct; but these, it must be stressed, were reforms to reverse trends effectuated by Lord Denning.<sup>44</sup>

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<sup>40</sup> *Ibid* at 824.

<sup>41</sup> (1962), [1962] 1 W.L.R. 886, [1962] 3 All E.R. 1 (C.A.).

<sup>42</sup> *Ibid* at 3-4.

<sup>43</sup> See *S.(B.D.) v. S.(D.J.)* (1975), [1977] 2 W.L.R. 44, [1977] 1 All E.R. 656, [1977] Fam. 109 (C.A.); and *Re K.* (1976), [1977] 2 W.L.R. 33, [1977] 1 All E.R. 647, [1977] Fam. 179 (C.A.).

<sup>44</sup> See Freeman, *supra*, note 32 at 118.



In what is, in my view, the best essay in the book, Professor McAuslan shows how Denning uses his version of "abuse of rights" in the areas of landlord and tenant, slum clearance, the interpretation of the *Housing (Homeless Persons) Act 1977*,<sup>45</sup> and other areas in the field of planning and property law. McAuslan demonstrates in meticulous detail how the notion of "abuse of rights" (like notions of "good faith" and "unconscionability") can be used to achieve almost any object the judge wishes to achieve. Thus, the idea of "abuse of rights" can be used as a weapon against, for example, squatters.<sup>46</sup> The most bizarre uses that Denning made of the notion of "abuse of rights" are his decisions under the *Housing (Homeless Persons) Act 1977*. The most startling judgment here must be *De Falco v. Crawley District Council*.<sup>47</sup> The plaintiffs were held to be intentionally homeless because they voluntarily left Italy where they had a home and came to England where they did not. Both common sense and the *Code of Guidance*, which seemed to give the plaintiffs a clear right, were ignored. Instead, their claim was defeated by the unreasonable burden the De Falcos were placing on "true born Englishmen."<sup>48</sup> Finally, "[T]here were all sorts of benefits to be had whenever you are unemployed. And best of all they will look after you if you have nowhere to live."<sup>49</sup>

Finally, Denning seemed to have little sympathy for tenants living in poor local authority housing. Thus, in *Liverpool City Council v. Irwin*,<sup>50</sup> despite the admittedly deplorable conditions that Mr. Irwin and his family lived in, Denning held that the local authority was not in breach of any contractual or statutory duty to effect repairs. The justification for this remarkable result was to be found in the fact that

[i]t is remembered too that these tower blocks are occupied by council tenants at very low rents. They are allowed in practice virtual security of tenure so long as they pay their rent. If they were to recover damages for the discomfort and inconvenience they have suffered, the amount of such damages could be offset against their rents. That does not seem to me to be right, especially when they are all in a sense responsible for the deplorable state of affairs.<sup>51</sup>

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<sup>45</sup> *Housing (Homeless Persons) Act 1977* (U.K.), 1977, c. 48.

<sup>46</sup> See, most notably, *Southwark London Borough Council v. Williams* (1970), [1971] 2 W.L.R. 467, [1971] 2 All E.R. 175 (C.A.); *McPhail v. Persons Unknown* (1973), [1973] 3 W.L.R. 71, [1973] All E.R. 393 (C.A.); and *Metropolitan Police Receiver v. Smith* (1974), 118 S.J. 583 (C.A.).

<sup>47</sup> (1979), [1980] Q.B. 460, [1980] 2 W.L.R. 664 (C.A.).

<sup>48</sup> *Ibid.* at 473.

<sup>49</sup> *Ibid.* at 472.

<sup>50</sup> (1975), [1976] Q.B. 319, [1975] 3 W.L.R. 663 (C.A.).

<sup>51</sup> *Ibid.* at 332.

Writing of Denning's positive use of "abuse of rights" McAuslan writes:

[H]e played a vital and important role in the transition of land law from a mainly private law to a mainly public law subject over the last forty years and that even where his contributions appear now to be discarded, they remain available to be resurrected in the future by enterprising counsel and unorthodox judges.<sup>52</sup>

But McAuslan also sees the negative side of Denning's work in this area:

The picture then that emerges is that of the comfortable, reasonably well-meaning, country gentleman with not too much understanding of, and, as he grew older, not too much sympathy, for the problems of urban life outside suburbia. His most typical judgments concern the countryside; his most censorious, urban poverty.<sup>53</sup>

First, while Professor McAuslan's evaluation of Denning's work is fair, Professor Jowell's review of Denning's contributions in the field of administrative law is far too generous. Professor Jowell approves of Denning's liberal view of standing because it provides "a welcome opportunity to keep executive action in its place and to assert the rule of law."<sup>54</sup> This right of challenge can be asserted by any member of the public except the proverbial "busybody," or "meddlesome interloper."<sup>55</sup> Second, I do not think that actions like *Gourlet* can deal with the non-enforcement or under-enforcement of the law. The idea that one can improve factory safety, say, by such actions strikes me as being fanciful. Third, since I do not think that the "rule of law" is an unqualified good, I am happy to see departures from it on occasion. Thus, when an amnesty is proclaimed for illegal immigrants who have been in the country for a period of time, I am happy, and I shed no tears.

Professor Jowell also pays high tribute to Denning's contributions in the field of natural justice and fair procedure. However, Denning's record was erratic:

Some cases do exist where he shows uncharacteristic deference to official decisions. Where national security is involved, he admits this. Immigrants are sometimes treated less favourably than citizens; but not always. Prisoners and others who may have forfeited the court's sympathy by past misdeeds are often not afforded rights of fair hearing eagerly granted to others.<sup>56</sup>

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<sup>52</sup> J.P.W.B. McAuslan, "Land, Planning and Housing" in *The Judge, supra*, note 1, 161 at 207.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.* at 215.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.* at 250.

It can be argued that his brethren did no better, but, unlike Denning, they did not claim to be "Atkin men,"<sup>57</sup> nor did they, through their extra-judicial writings, profess great concern for civil liberties.<sup>58</sup>

Finally, I am in strong disagreement with Professor Jowell's support of the decision in the *Bromley* case.<sup>59</sup> In the first place, the notion of a fiduciary duty owed to ratepayers as opposed to the electorate seems to me to be ridiculous. Second, the kind of judicial review that Denning (and Jowell) approve of goes beyond judicial review in any country with a written *Bill of Rights*. The *Bromley* case would strike an American or Canadian student of the *Bill* (or *Charter*) of *Rights* as startling.<sup>60</sup> Jowell points out that Lord Diplock was prepared to go even further in striking down local authority decisions, but this hardly qualifies as a defence for an outrageous decision. Next, Professor Jowell relies on the idea expressed by Denning in *The Changing Law* that promises made in a party manifesto were not sacred. In Denning's words:

Some people vote for [a member] because they approve of some of the proposals in his party's manifesto, others because they approve of others of the proposals. Yet others because, while they do not really approve of the proposals, they disapprove still more of the counter-proposals of the rival party, and so forth. It is impossible to say therefore that the majority of the people approve of any particular proposal, let alone of every proposal in the manifesto.<sup>61</sup>

I cannot see why what is (or is not) in the manifesto should affect the legality of a local authority's decision. To be fair, neither could Lord Denning, for he wrote a few lines later in *The Changing Law* to the effect that elected leaders were under a constitutional duty to govern in the interests of all and not in the interests of their party: "But this is not a duty which can be enforced by law — the only real check on their power is the force of public opinion."<sup>62</sup>

Professor Claire Palley contributes a scholarly essay on Denning and Human Rights. Professor Palley traces the largely dismal record from now-forgotten judgments, such as *Ross-Clunis v. Papadopoulos*,<sup>63</sup>

<sup>57</sup> Professor Heuston quotes Denning as saying after the decision in *Liversidge v. Anderson* (1941), [1942] A.C. 206, Atkin's dissent was "after my own heart." *Ibid.* at 5.

<sup>58</sup> Denning's professed concerns for individual liberties were stated in a number of books and articles beginning with *Freedom Under the Law* (London: Stevens & Sons, 1949) and ending with his Dimpleby lecture, *Restraining the Misuse of Power* (London: Wildy, 1981).

<sup>59</sup> *Bromley London Borough Council v. Greater London Council* (1981), [1982] 2 W.L.R. 62, [1982] 1 All E.R. 129 (C.A.) [hereinafter *Bromley* cited to W.L.R.].

<sup>60</sup> In my view, a decision such as *Bromley* goes at least as far as the much criticised decision in *Lochner v. New York* (1905), 198 U.S. 45.

<sup>61</sup> Sir A. Denning, *The Changing Law* (London: Stevens & Sons, 1953) 9.

<sup>62</sup> *Ibid.* at 10.

<sup>63</sup> (1958), [1958] 1 W.L.R. 546, [1958] 2 All E.R. 23 (P.C.).

through to better-known cases, such as *Soblen*,<sup>64</sup> *Chic Fashions (West & Wales) Ltd v. Jones*,<sup>65</sup> *Ghani v. Jones*,<sup>66</sup> and beyond. The most devastating passage in the essay is to be found in Professor Palley's description of Denning's attitude towards prisoners' rights:

So far as prisoners were concerned, Denning effectively limited their rights to protect their reputations by libel actions, limited their rights to civil jury trial, conferred immunity on their barristers, conferred immunity in suits by them against police officers who extort, or may have extorted, confessions from them by violence, refused to uphold even those limited rights to respect for correspondence enjoyed by them, impeded their rights of access to the European Commission of Human Rights . . . denied them the right to legal representation in disciplinary proceedings, conferred immunity on boards of visitors should they in disciplinary proceedings wrongfully deny a prisoner remission, and cut down the time and manner within which the prisoners may sue to challenge administrative decisions affecting them.<sup>67</sup>

However, Professor Palley's statement that Denning was "a champion of freedom of expression"<sup>68</sup> does not square with her own findings:

Again, except in *Burmah*, Lord Denning did not wish governmental internal decision-making to be exposed and criticised, a contention substantiated by *Lonrho*, *Harman* and his sarcasm in *Air Canada* about "the advocates of open government." Pharmaceutical companies, casinos, shady business practices and the misbehaviour of pop stars were the proper topics for investigative journalism, rather than Home Office administration of prisons, and possible misdeeds by Ministers in breach of international obligations.<sup>69</sup>

This does not seem to be the record one would expect of a "champion of free speech." Professor Palley states that Denning was a "reformer, not a redeemer."<sup>70</sup> On the evidence that she herself has provided, Denning was a reactionary at least as often as he was a reformer.

Finally, there is an excellent essay by Messrs. Davies and Friedland on Denning's contributions in the field of labour law. They document his increasing intervention into internal union affairs culminating in his opinion in *Cheall v. APEX*<sup>71</sup> where he was prepared to set aside an expulsion even though this would violate the *Bridlington* principles. The authors then document Denning's more activist role in industrial conflict beginning first in *Stratford (J.T.) & Son, Ltd v. Lindley*<sup>72</sup> and *Torquay*

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<sup>64</sup> *R. v. Governor of Brixton Prison Ex parte Soblen* (1962), [1963] 2 Q.B. 243, [1962] 3 W.L.R. 1154 (C.A.).

<sup>65</sup> (1967), [1968] 2 Q.B. 299, [1968] 2 W.L.R. 201 (C.A.).

<sup>66</sup> (1969), [1970] 1 Q.B. 693, [1969] 3 W.L.R. 1158 (C.A.).

<sup>67</sup> See Palley, *supra* note 6 at 307.

<sup>68</sup> *Ibid.* at 361.

<sup>69</sup> *Ibid.* at 346.

<sup>70</sup> *Ibid.* at 366.

<sup>71</sup> (1983), [1983] 1 All E.R. 1130, [1983] I.C.R. 398 (H.L.).

<sup>72</sup> (1964), [1964] 3 W.L.R. 541, [1964] 3 All E.R. 102 (H.L.).

*Hotel Co. v. Cousins*.<sup>73</sup> In those cases he was still using (although redefining) existing torts. By the end of his career, he was prepared to use any legal weapon, including *Magna Carta*<sup>74</sup> and the *European Convention on Human Rights*.<sup>75</sup> Some might call this judicial creativity, but it is a good example of abuse of the judicial process.

Davies and Friedland find that Denning is more sympathetic when dealing with individual employment cases. Even here, however, he was not progressive. The authors point out in *Richardson v. Koefod*,<sup>76</sup> a wrongful dismissal case now only of historical importance, that he uses the words "trial," "guilty," and "freshly discovered misconduct." They also point out that he was sympathetic to the *Redundancy Payments Act*,<sup>77</sup> but he limited the scope of the *Act* by invoking common law concepts.

### III. CONCLUSION

The attempts made over the years to thrust greatness on Lord Denning fail. From 1970 until his retirement in 1982, I do not think he deserved even to be called a good judge. On Denning's own admission, his strength lay in the field of contract and tort; but even in these areas his main function was to show that policy choices had to be made. Even *High Trees*<sup>78</sup> will not come to be regarded as a major breakthrough. In my view, the confusion created by that case will ultimately have to be cleared up by legislation. But common-law litigation constitutes a minute fraction of the modern judge's work. In the fields of administrative law, labour law, social security, and civil liberties, his record can only be termed — at best — indifferent.

Unlike decisions in cases such as *High Trees*,<sup>79</sup> the decisions in these areas of the law affect millions of people. I think that it is in these fields that Denning's quality as a judge has to be decided. In my view, he fell considerably short of the stature of a great judge (or jurist).

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<sup>73</sup> (1968), [1969] 2 W.L.R. 289, [1969] 1 All E.R. 522.

<sup>74</sup> See *E.M.A. v. A.C.A.S.* (1979), [1979] I.C.R. 637.

<sup>75</sup> See *U.K. Association of Professional Engineers v. A.C.A.S.* (1980), [1981] A.C. 424.

<sup>76</sup> (1969), [1969] 1 W.L.R. 1812, [1969] 3 All E.R. 1264 (C.A.).

<sup>77</sup> *Redundancy Payments Act* (U.K.), 1965, c. 62.

<sup>78</sup> *Central London Property Trust Ltd v. High Trees House Ltd* (1946), [1946] 1 All E.R. 256, [1947] K.B. 130 [hereinafter *High Trees*]. Everyone seems to applaud this decision; the only difficulty is that nearly everyone places a different interpretation on it.

<sup>79</sup> *Ibid.*

