WHAT NEXT IN THE LAW, The Rt. Hon. Lord Denning, London: Butterworths, 1982. pp xxiii and 352, $24.95.

Lord Denning[1] is no stranger to controversy. His prolific writing career is evidence of this and his latest book, *What Next In the Law* is an enduring testament to that fact.

Lord Scarman has described the last twenty-five years as "the age of legal aid, law reform and Lord Denning". *What Next In the Law* is about all three. To most Commonwealth law students and lawyers, Lord Denning is held in very high esteem. It is for this reason that this reviewer is saddened by the unquieting turn of events caused by this book.

What Next In the Law is the last book that Lord Denning wrote while serving as England's Master of the Rolls. The book had to be withdrawn before it was published because it contained some errors and potentially libelous comments about black jurors who sat in race riot trials.[2] He also questioned the general suitability of blacks doing jury duty. The book generated much commentary and precipitated his retirement.

What Next In the Law can be best categorized as Lord Denning's contribution to law reform and serves as his personal commentary on the legal reformation process. In his own words:

> . . . at my age, I shall not see as much done as I would like, I decided to look into the future and to set down some things — in the hope that they perhaps may be done by those who come after . . . (p. v.).

Lord Denning acknowledges that there are several other mechanisms[3] by which the law can be reformed but he concludes they are not very effective. He notes "some spur is needed . . . My book shall be the spur" (p. vi).

What Next In the Law has two major sub-divisions. There is a cursory overview of five eminent English law reformers. The remaining parts pertain to six areas of the law Lord Denning believes require immediate reform: jury trials; legal aid; personal injury compensation; libel; a Bill of Rights; and ministerial power. Lord Denning maintains the format used in his earlier works, whereby he examines the law from a historical perspective, analyzes the current state of the law, and concludes with a proposal for reform.

Part one contains a brief assessment of five prominent law reformers of English legal history: Henry Bracton, Sir Edward Coke, Lord Mansfield, Sir William Blackstone and Lord Brougham. Although Lord Denning economizes the details about these reformers, one garners much insight about the former Master of the Rolls from the selection of jurists he considered great reformers and by his comments about these five men.

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1. Alfred Thompson Denning; b. 1899; educ., Magdalen College, Oxford (First, Jurisprudence and Mathematics); called to the bar, 1923; K.C., 1938; King's Bench Judge, 1944 - 1948; Lord Justice, 1948 - 1957; Lord of Appeal, 1957 - 1962; Master of the Rolls, 1962 - 1982.
2. *The Economist*, June 5, 1982, p. 36. It is the revised edition that is being reviewed and not the edition that caused the controversy.
3. Lord Denning lists the other mechanisms as being, Royal Commissions, Departmental Committees and Blue Books.

Lord Denning reveals the alchemy of a successful law reformer:

> You will see that each of them relied on the power of exposition — by writing or by speaking. By expounding the law, you pave the way for reforming it. . . . You will see, too, that style plays a great part — the style of writing — the style of oratory — the style of giving judgment. You will see also that, on occasion, when they sought to make the law more just or more equitable, they came under criticism by some of their contemporaries: both Sir Edward Coke and Lord Mansfield did so. So your reformer must be sensitive to criticism but not so as to discourage him overmuch. Else nothing will get done (p. 3).

The author seems to be describing himself; for, of all the present-day judges in England, Lord Denning clearly had the power of exposition as evidenced by his unique style of writing[4] and had an enduring willingness to point our deficiencies in the law which precipitated much criticism by his judicial brethern.[5]

In part two, Lord Denning examines the jury system. It is one of the best chapters in the book. He acknowledges the importance of trial by jury and proclaims that it "is the lamp that shows that freedom lives".[6] He points out weakness in the present jury system: majority verdicts, jury vetting, peremptory challenge, and the method of jury selection.

Lord Denning seemingly laments the halcyon days of trial by jury when they were used frequently and composed of "right-minded" jurors. He emphasizes this point and notes that historically, jurors

> . . . were all householders. They were all male, middle-class and middle aged. Their verdicts did represent the views of right-minded people. The nineteenth century was the golden age of trial by jury (p. 46).

He reinforces this point by stating:

> . . . the English were a homogeneous race . . . They shared the same standards of conduct, the same code of morals, and the same religious beliefs. Above all they adhered uniformly to the rule of law (p. 75).

While everyone may draw inferences from the foregoing, it is suggested that the former Master of the Rolls advocates that "white Anglo-Saxon protestants" make the best jurors. Presently in England all citizens are eligible for jury duty. His Lordship records that all citizens are not sufficiently qualified to serve on juries (p. 76).

True to the Denning style, he proposes a method[7] to ensure sensibility and responsibility and emphasizes that such a proposition has historical

4. Professor Gerald Gall has referred to it in this manner: Lord Denning's casual or chatty approach to writing, evident in the quotations from his various decisions and in his narrative, gives rise to a style that is somewhat unusual, if not unique, for judicial writing. (1980) 18 *Alta. L. Rev.* 541.
5. In *Broome* v. *Cassel & Co.* [1972] A.C. 1027 at 1054, Lord Chancellor Hailsham wrote: "[I]t is not open to the Court of Appeal to give gratuitous advice to the judges of first instance to ignore decisions of the House of Lords . . . It is necessary for the lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers . . ." The Lord Chancellor was referring to Lord Denning's refusal to follow a House of Lords precedent. See also the speech of Lord Scarman in *Lim* v. *Camden Health Authority* [1980] A.C. 174 at 182.
6. p. 35. This quote is attributed to Lord Devlin, *Trial by Jury* (London, 1956) p. 164.
7. His lordship suggests potential jurors should apply themselves or be recommended by someone else, always requiring references and conducting interviews; all of which the local magistrate would be responsible for doing. See p. 77.

precedents.[8] In the alternative, Lord Denning suggests the jury be replaced by trial by judge and assessors (p. 77). In light of his earlier encomium for the jury system, it is amazing how he can author such a contradictory alternative suggestion.[9]

In part three the author describes legal aid as being the greatest revolution in the law of the post Second War era (p. 81). In bygone days, "litigants would hesitate long before going to the law" (p. 83) as an unsuccessful plaintiff was not only responsible for his legal fees but those of the defendants as well. This is a fascinating chapter that is particularly worth reading.

According to Lord Denning, legal aid is "a success tainted with menaces" (p. 99).

> Legal Aid has saved us from the 'ambulance chasers' and from any danger of contingency fees — that is much to be thankful (p. 105).

Lord Denning perceptively notes that the two beneficiaries of the legal aid system are the "solicitors (who) have an interest in running up costs — for their own benefit — . . ." (p. 97) and the needy litigant who may (or may not) have a worthy cause of action which is (nevertheless) litigated.

In Lord Denning's eyes, the victim of the legal aid system are the middle class unassisted parties who must pay their own legal fees. A legally aided client is not assessed costs for unsuccessful litigation. His Lordship points out that legal aid is an immense power especially as against another party who is not legally aided.

Lord Denning's solution is to allow legal aid to "persons in the middle range of incomes" (p. 116). He argues the solicitor has a duty to his client and also to the state not to create unreasonable and unnecessary expenses (p. 115). Finally, he advocates that when the legally aided person fails in his action then the state should pay the costs of the unassisted party, just as any other litigant who fails (p. 112). Although Lord Denning appreciates the benefits of legal aid, he questions the way it operates in that it encourages litigation at the expense of the state.

(A review of parts four through six have been omitted due to economy of space and because the substantive legal issues discussed differ from their Canadian counterparts. The chapters are interesting and do provide an informative historical perspective.)

Part seven of the book is devoted to examining a Bill of Rights. It is an informative and appropriate section in light of Canada's newly acquired Charter of Rights and Freedoms. After tracing the development of the ancient British documents of freedom, Lord Denning analyzes modern day human rights legislation[10] and concludes that he is against a new Bill

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8. p. 71. Lord Denning points out that the local sheriffs used to exercise a discreet method of selecting potential juries.
9. The Honourable Mr. Justice Estey of the Supreme Court of Canada harbours views akin to Lord Denning's. In *The National* May 1983 at p. 24 he recognizes the need for juries with "greater sophistication".
10. For example, The Universal Declaration of Human Rights, 1948; The European Convention on Human Rights, 1950.

of Rights for Great Britain (p. 303). He perceives the major weaknesses of a new Bill of Rights as being:

1. The courts would be deluged with "thousands" of new cases, many potentially frivolous and vexatious (p. 276);
2. without a means of enforcing such a Bill, it would be absolutely useless (p. 278);
3. such Bills are broad statements of principle and broad statements of exceptions — which are so broad that they are capable of giving rise to an infinity of argument (p. 291).

No doubt we shall see if Lord Denning's opinions are justified as the Supreme Court of Canada goes about interpreting the Canadian Charter of Rights and Freedoms.

The concluding chapter is taken from the Richard Dimbley Lecture which Lord Denning delivered on English television. It examined the misuse of power by the state, ministers of the crown, judges, unions, and the media. Although this part had the potential of being the outstanding section of the book (no doubt Lord Denning could make many suggestions on how to reform the law in order to prevent abuses of power) it suffers greatly. It reads like a legal smorgasbord. Several concepts are quickly raised and never developed nor explained. It is an interesting topic, particularly his examination of constitutional conventions, but his superficial treatment is disappointing.

With regards to Lord Denning's style in *What Next In the Law*, it is lucid and easy to read. At the same time, it is "chatty" and has the tendency to be "staccato".[11] It does not suffer, as perhaps did his earlier books, from excessive quotations from judgments and other literary works. However, one will note from *Gems in Ermine*[12] or *The Independence of the Judges*[13] his early style was more lyrical and more poetic than his latest book. *What Next In the Law* is well sub-divided and for that reason makes comprehension quicker and clearer.

Although Lord Denning is able to master legal precedent and legal history to his advantage, his constant reference to them raises a continuous nagging query in the reader's mind. As with any historical interpretation or ancient legal decision one wonders whether the passage of time or the quoter of such decisions has not moulded the interpretation or decision to achieve a desired result.

What Next In the Law deserves to be read in its entirety. The individual chapters by themselves are interesting but lack depth, especially when the book is treated as his Lordship's seminal book on the subject of law reform. Only when examined as a whole does one garner the messages he wishes to give about law reform.

Unfortunately Lord Denning did not explain why he chose the seven topics he wrote about nor does he share with the reader why reforms in these areas is urgently required.

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11. See Lord Denning, *The Family Story* (London: Butterworths, 1981) at 207; as well as the comments of Gordon Bale in (1981) 7 *Queen's Law Journal* 164.
12. Lord Denning, *Gems in Ermine*, The English Association, Presidential Address, 1964.
13. Lord Denning, *The Independence of the Judges*, The Holdsworth Club Presidential Address, 1950.

There is evidence of Lord Denning being excessively "waspish". As described earlier, he believes in juries composed of "right-minded" people. He also editorializes that poor people are excessively litigious who seek "to make money out of misfortunes" (p. 114).

Lord Denning's book raises the philosophical question whether a sitting judge should actively criticize previous attempts to reform the law and actively advocate law reforms and do so in the manner employed by his lordship. Lord Denning critically commented upon the governments refusal to adopt an earlier reform proposal by Lord Pearson as "scurvy treatment by an ungrateful Government" (p. 157). Lord Denning's closing comment is "In this book I have stood the law on its head — in the hope that you may help to get it the right way up" (p. 336). It may be that Judges should do this and undertake such tasks by writing books but should this be done very often?

The reader must remember that some of the problems described by Lord Denning have no Canadian counterpart. For instance, legal aid in Alberta is granted with the understanding that the needy litigant will eventually reimburse the legal aid fund — unlike the British system which is largely gratuitous.[14] However, the differences in the substantive law do not detract from the book, in fact, it serves to raise questions about our own legal system.

Lord Denning notes in the final pages of *What Next In the Law* that the legal changes with which he has been identified are not his contributions alone. They belong to the Court of Appeal. And Lord Denning states simply: "My brethern in the Court of Appeal are at least equal to the members of the House of Lords. Most of them will get there themselves before long" (p. 333). He seems to be saying this: "Look here, you may poke fun at me and my legal thinking but I have influenced the new generation of judges who one day shall become the Law Lords of the United Kingdom." If this be so, then it is hoped that they have well learned their lessons from the former Master of the Rolls.

What Next In the Law is a provocative and tantalizing book well worth taking time to read. It is equally of interest to students and practitioners; to professors and judges. The importance of this book cannot be understated as it can be read for three purposes: for the ideas raised about law reform; for the contents and what they reveal about Lord Denning; for the historical insight and information provided. Whoever the reader and for whatever purpose it is read, one will not be disappointed for having taken the time to read this intriguing tome.

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14. See Legal Aid Act, 1974 statutes (U.K.), 1974, ch. 4, sec. 4 and 9.