

Getting justice wrong: Myths, media and crime

By Nicholas Cowdery QC
Allen & Unwin, 2001

Anyone familiar with Michel Foucault's description of the death of French regicide Damiens in 1757 knows that the administration of criminal justice has advanced a long way in western societies during the past 250 years.¹ Damiens was condemned 'to make the *amende honorable* before the main door of the Church of Paris'. His punishment was to be:

taken and conveyed in a cart [to the church], wearing nothing but a shirt, holding a torch of burning wax weighing two pounds; then, in the said cart, to the Place de Greve, where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds.

As if that sentence was not enough the way it was carried out was badly botched (not surprisingly). The press account of it reproduced by Foucault is not for the faint-hearted.

How advanced is our criminal justice system? Has it regressed recently, due to reactive politicians in search of easy votes, responding to populist ignorance fanned by tabloid journalists and radio 'shock jocks'? These are just two of the questions raised, and partially answered by Nicholas Cowdery QC in his wide-ranging and topical book *Getting Justice Wrong*.

The answers are not always comforting. Cowdery QC quotes the editor of the *Sydney Morning Herald* on mandatory sentencing:³

We have the fact before us that in a case where a light penalty would have satisfied the claims of justice, the judge was prevented from doing what he believed to be right and was compelled to pass a sentence which he believed to be excessive, and therefore unjust, because the rigidity of the law left him no discretion.

The editor might have been commenting on the recent notorious Northern Territory case of an Aboriginal youth who was gaoled for a year for stealing a packet of biscuits.⁴ The shock of realisation lies in the date of the editorial: 27 September 1883. The editor was criticising a scheme of mandatory sentencing introduced in New South Wales in that year which, after media pressure, was abolished the following year because of the injustice it caused. How has it come to pass that governments within Australian society have chosen policies that were rejected as unjust more than a century ago?

Those with the time or inclination to listen to the talkback 'opinion-makers' (whom Cowdery QC frequently castigates in *Getting Justice Wrong*) will not be

surprised at such a turn of events. In a text richly leavened with quotable quotes, Cowdery QC cites the 'opinion-making' of one notorious 'shock-jock' – Howard Sattler – on the deaths of three hapless car thieves:⁵ 'Well, I say good riddance to bad rubbish. That's three less car thieves. I think they're dead and I think that's good.'

The point is enhanced by the juxtaposition of these sentiments with those of Abraham Lincoln on the same page – a polarity of ideas and intelligence about as wide as can be imagined. Lincoln called for 'reverence for the laws' to 'become the political religion of the nation'. No doubt it was the then current crop of media 'entertainers' to whom Oscar Wilde referred when he quipped:⁶ 'By giving us the opinions of the uneducated, modern journalism keeps us in touch with the ignorance of the community.'

One of the primary themes of *Getting Justice Wrong* is that ignorance (in particular, ignorance of the criminal justice system) threatens democratic society under the rule of law.⁷ Eliminating ignorance of how the criminal justice system operates and what it is capable of achieving in a democratic society under the rule of law is the central aim of *Getting Justice Wrong*.

Which came first: democracy or the rule of law? Unlike the chicken and the egg, it is fairly easy to conclude that the rule of law evolved first. It developed from an arbitrary rule to providing the conditions for democracy to grow and flourish. Democracy under the rule of law requires a delicate balance between meeting the wishes of the people, on the one hand, and curbing them on the other. The criminal justice system is the key to striking a successful balance. Its workings should be well known and appreciated. Instead, populist ignorance fed by an elite band of media 'entertainers' create the conditions for the 'law and order auctions' so beloved of politicians seeking office. With one ear to the radio and one eye on the tabloids, politicians are tempted to reach for simplistic 'solutions', such as mandatory sentencing, in a grab for easy votes. The wheel turns. Arbitrariness returns. The rule of law, without which democracy cannot exist, is threatened.

This is the central thesis of *Getting Justice Wrong*. Against this background a number of important topics are considered, including policing crime, the drug problem, crimes involving children, domestic violence, crime prevention, the right to silence, sentencing, the tension between Australian domestic law and international law and whether there should be an Australian Bill of Rights. As we have come to expect, Cowdery QC does not resile from stating his opinions, even if controversial. For example, he advocates the prescription of heroin to confirmed addicts by licensed medical practitioners in order to reduce harm to the users, reduce the commission of crime to support addiction and reduce the demand for illegal heroin.⁸ He also advocates the adoption of a constitutionally entrenched bill of rights.⁹

Getting Justice Wrong does not purport to be a

complete treatment of the topics it addresses. Certainly one must agree with the author that most of the topics could become a book, or a number of books. It would be interesting to hear more detailed suggestions in some of the areas considered, for example, on options to counter the problem of drugs other than heroin or alternate ways of dealing with child sex offenders, without recourse to the criminal law.¹⁰

As a forthrightly independent New South Wales Director of Public Prosecutions since 1994, Cowdery QC is no stranger to controversy. He has drawn from a deep well of experience and knowledge to create a text that manages to be entertaining, despite the serious nature of its subject matter. With the twin aims of dispelling ignorance and promoting debate, the author has eschewed a densely footnoted scholastic approach in preference for a lucid work, which should be accessible to a wide readership. That said, there are facts and figures enough to whet the appetite for more detailed research. The book's topicality, for instance in the consideration of DNA evidence in the final chapter on 'Future Directions', was highlighted by the recent case of Frank Button.¹¹ On 10 April 2001 the Queensland Supreme Court released Button after DNA testing ordered by the court confirmed his innocence of a charge of rape of a minor on which he had earlier been convicted. Button had served 10 months of a six-year sentence for a crime he did not commit.

Whether this book succeeds in its stated aim of silencing the 'shock jocks' and closing the bidding in the law and order auctions remains to be seen. However, *Getting Justice Wrong* is an educative work that takes a big step in that direction. All with an interest in criminal justice should read it.

To return to Foucault, after enduring unimaginable pain and torment, during which six horses tethered to his limbs failed to quarter his body, Damians told the executioners gathered around him 'not to swear, to carry out their task and that he did not think ill of them' and 'begged them to pray to God for him.'¹² His torments continued until his trunk and hacked off limbs were tossed upon the fire. That one human can show mercy in such extreme circumstances inspires hope that it might become a more common quality. Perhaps then more will ask if the punishment fits the criminal and our society, not just whether it fits the crime.

Reviewed by Christopher O'Donnell

- 1 Discipline and Punish – The Birth of the Prison, Penguin (London) 1991 pp 3-6.
- 2 Ibid, p 3.
- 3 Sydney Morning Herald, 27 September 1883 cited in *Getting Justice Wrong*, Allen & Unwin (Sydney), 2001, p 108.
- 4 *Getting Justice Wrong*, op. cit., p 109.
- 5 Ibid., p 1.
- 6 Ibid., p x.
- 7 Ibid., p ix.
- 8 Ibid., p 37-42.
- 9 Ibid., p 136.
- 10 Ibid., p 63.
- 11 R v Button (unreported, Queensland Supreme Court, 10 April 2001 per de Jersey J).
- 12 Discipline and Punish – The Birth of the Prison, op. cit. p 5.

Hell has harbour views

By Richard Beasley

Pan Macmillan Australia, 297pp, \$26.00

This novel - by member of the Sydney Bar - is about life in one of the mega law firms whose lights blaze late into the billable hours, high above the waters of the Harbour.

The firm, Rottman Maughan and Nash and its truly grisly cast of characters, is brought to life through three pieces of litigation: an investment fund fraud where many millions of dollars are at stake; a personal injury case in which a child has suffered terrible injuries; and a partnership distribute within the firm itself. Our hero and narrator, Hugh Walker, is a senior associate with the firm. His position in the hierarchy is indicated by the fact that his office has View No. 3. The partners - and would-be partners - are studies in egotism, pomposity, vindictiveness and - above all - greed.

Early in the book, there is a sharp sketch of the firm's internal conflicts:

Like wars, large law firms spawn special and unique hatreds. There are factions within factions. The corporate people hate the less profitable litigators and their costly overheads. The commercial litigators sneer at insurance litigators. The professional indemnity insurance litigators say they really are commercial litigators. The information technology people think they're superior to everyone. There are North Shore factions, Eastern Suburbs factions, gay factions, WASP factions, Sydney club factions, ethnic factions, establishment factions and poor-made-good factions. They conspire against each other with the constancy of Caesar's will.

Our hero shows scant respect for his colleagues. One partner is described as 'a black belt in time-sheet fraud.' It is hard, however, to go past the senior insurance partner - Brian Owen - who emerges as a wonderfully repellent character. Bearing a considerable resemblance to Jabba the Hut in *Star Wars*, Owen is a menacing mass of malice, spilling out of his food-stained clothes and slobbering over any female office worker who comes within reach of his pudgy fingers.

As for the trust fund litigation, it is given the firm's standard treatment:

Millions of documents had been read and databased. There had been interlocutory fights over discovery and subpoenas and timetables. Witness statements had been drafted and redrafted. Forty monthly bills had been sent to the group of insurers we acted for. Like every big case I had ever seen, it was one part farce, one part drama and 98 parts lawyers' super fund.

This kind of exuberant cynicism is somewhat reminiscent of Tom Wolfe's *Bonfire of the Vanities*. It is not easy to sustain but Beasley manages to carry it through most of the book. There are also some similarities with Shane Maloney who has written a number of novels about the world of politics, journalism and crime in Australia. It is true that all these books tend to be thin on plots but their real purpose is to capture a slice of contemporary life, if often with a slightly over-the-top style designed to sweep the reader along.

The Bar does not escape unscathed in this cavalcade of legal monsters. Giles Taffy QC is briefed