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Contents

Introduction

by Andrew von Hirsch*

No more important subject exists for penology than the politics of law reform. When sweeping changes in criminal policy are occurring as they now are in many jurisdictions, we need to comprehend better the political dynamics of legal change – so we can understand what we are doing today, avoid the mistakes of yesterday, and (it is hoped) avoid new mistakes tomorrow.

There are, however, few good historical analyses of the politics of law reform in the area of penology. Perhaps the two best – and best known – are works by an American, and a Canadian author respectively. I am referring to David Rothman's *The Discovery of the Asylum* and Michael Ignatieff's *A Just Measure of Pain.* These books deal chiefly with adult offenders, and address the Anglo-American experience in law reform. We need to know more about the politics of reform in the juvenile area, where historical writing to date has tended to be more polemical than reflective – as witness Anthony Platt's *The Child Savers.* We need also to know something about the European, as well as the Anglo-American, experience.

This makes timely Professor Tove Stang Dahl's remarkable book *Child Welfare and Social Defence.* The book addresses the intellectual trends and the political events and currents that led to the enactment of the Norwegian Child Welfare Act of 1896.

The author, Dr Dahl, is a member of the faculty of the Department of Public and International Law at the University of Oslo, Norway. She has written extensively on penology, as well as on women's issues. The original Norwegian language version of this book was extensively and favourably reviewed throughout the Scandinavian countries,[1] and was strongly commended to me when

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I visited Norway in 1981. Its translation makes this valuable book accessible for the first time to American and other English-speaking readers.

Several things make the Norwegian experience of particular interest. The first is that Norway's Child Welfare Act was virtually the first comprehensive juvenile statute, enacted well before Illinois's juvenile court act in the United States. The second is that the act typifies the juvenile delinquency statutes, and family court statutes, which were to be developed in the next years throughout Europe and America. All the familiar elements are there: the rehabilitative emphasis, the sweeping discretion granted to confine youths for past as well as for expected future delinquency, the jurisdiction over dependent and neglected children, and the absence of substantial due process constraints. The Norwegian Act, like so much legislation which followed, provided the state with virtually unfettered freedom to pursue the supposed 'best interests' of the child. The final element that makes the Norwegian experience worth studying is the visibility and comparative simplicity of the developments in that country. Norway is a small country with a limited number of actors and groups that have been in a position to influence public policy. Under Dr Dahl's expert guidance, the reader can identify the intellectual currents underlying the reform, the principal proponents of the new law, and the positions of the influential political groups. It is helpful to try to understand change in such a setting before seeking to analyse the larger and more confused political environments with which, say, American law reform was faced.

The story of the Norwegian Child Welfare Act is, in Dr. Dahl's hands, a fascinating one. Briefly, she begins by describing how child welfare was *introduced* as an ideology in Europe during the nineteenth century. Next, she deals with how this ideology was *reproduced* in Norway by certain influential people. Finally, Dr Dahl explains how the ideology was *accepted* as a practical measure by conservatives and liberals alike, leading to the enactment of the Child Welfare Act. Within this framework, she outlines the following developments.

(1) Dr Dahl traces the history of the European child-saving movement as it evolved from an elitist movement organized by a few philanthropists and run by private charities in the first half of the nineteenth century, to a public system of child welfare in the cent-

ury's closing decades. She notes that while the movement changed in character with the increased involvement of the State, (becoming, for instance, more professionalized), the aim of the public child-savers was essentially the same as that of their predecessors: namely, protecting society through prevention. The philanthropists had witnessed the decline in morality which accompanied urbanization and industrialization, and had used 'child-saving' – removing depraved and delinquent children from the corrupt influences of their lower-class environment and teaching them how to live and work correctly – as a means of protecting society against those juveniles who were, or threatened to be, disruptive to the social order. The State simply became, through its later involvement, the coordinating instrument for such concerns of social control.

(2) Dr Dahl traces the rise of scientific positivism in criminology in the decades preceding the enactment of the Norwegian law. Some of this story – the contributions of Ferri, von Liszt, Tarde and others – should be familiar to readers in our profession. What is striking, however, in Dr Dahl's description is the extent to which positivism succeeded in becoming a powerful intellectual force. Despite doctrinal disagreements among the positivists, it is plain that well before the enactment of the Norwegian law, there was agreement that a scientific approach – similar to that used in the area of physics and biology – could readily be transferred to the area of crime and its control. By means of this 'scientific' method, the positivists believed, the causes of criminality could be discovered and offenders – especially juvenile ones whose characters were as yet not fully established – could be rehabilitated. Like the child-saving movement, which preceded it, the rise of positivism was aimed at providing solutions to the problem of social disorder. Only it did so by purportedly mobilizing the extraordinary powers of science.

One thing that comes out so strongly in her description is that the 'scientific' aura of the new positive criminology was seen to give it almost magical powers. In a recent Columbia University lecture, David Rothman has described how the prestige of science can give to certain kinds of claims to intervention – in medicine, as well as in criminology – an appearance of infallibility that well outstrips doctors' or criminologists' actual ability to solve problems. In Dr Dahl's description, one sees the force of this magic. The criminology of the time had few if any successes in being able actually to identify

dangerous criminals, and still fewer successes in being able to rehabilitate them. Nevertheless the prestige of the biological sciences was enough to give assurance that, if cures could be found for disease (or *some* diseases), the accurate prediction and successful cure of youthful criminality was just around the corner.

(3) The third element that Dr Dahl describes is the role of the intellectual entrepreneur. In Norway, one could expect a small group of proponents for change, simply because the country at the time had a small elite that tended to dominate law reform. What is striking, however, is that the Norwegian Child Welfare Act was essentially the work of a single man. Bernhard Getz, then professor of criminal law at the University of Oslo, was essentially responsible for importing into Norway the ideologies that had originated in Central and Southern Europe, and initiating the process of enacting the law. Professor Getz had attended the great criminological and criminalistic conferences in Europe in which Ferri, von Liszt, and others had participated, and had become an enthusiastic adherent to the new doctrines of positivism. In Norway, Getz saw the opportunity to enact a new law that would implement the ideology of positivism. It is clear from Dr Dahl's description how crucial a role Professor Getz played. It was he who persuaded his Norwegian colleagues of the merits of criminological positivism, drafted the law, prepared the commentaries, and maintained interest in the proposal until its passage. Without his ability to import positivist doctrine and its aura of science into Norway, it is unlikely that such an ambitious proposal could have been enacted.

(4) Fourthly, Dr Dahl describes the statute. What is surprising about the statute, or might have been surprising to an observer at the time had he known nothing about criminological trends, is the sweeping character of the law. The law established the institution of the Child Welfare Board – a court-like local administrative body which included a judge and other notables of the locality – and invested it with powers similar to the powers which the family court later acquired in the United States. This agency was permitted to adjudicate juvenile offenders convicted of acts which would be crimes for an adult to commit. It was also, however, entitled to remove from the custody of parents, and institutionalize if necessary, juveniles who had committed no criminal act and who merely (in the agency's view) threatened, or promised to cause trouble at a later time. It had also comprehensive powers of dealing with ne-

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glected and dependent children. In all of these powers – which curtailed the rights of the individual juvenile as well as the rights of his or her parents – few legal safeguards were provided either to the child or to the parent. The Norwegian Child Welfare Act gave the agency the same sweeping power, unfettered discretion, and freedom from due process constraints that the American family courts had prior to the U.S. Supreme Court's *Gault* decision in 1967.

What is interesting, of course, is how such an extraordinary statute could have been enacted in Norway. Dr Dahl points out that the immediate problem facing Norway with respect to the criminality of children was a rather modest one. There was some rise in juvenile crime accompanying the gradual urbanization of the country, but the problem was not of such dimensions as to lead one necessarily to expect that a comprehensive new law would have to be enacted. Nor was Norway notably a reactionary or an authoritarian country: there was a strong liberal party whose influence was increasingly being felt at that time. Norwegian liberals, moreover, did not necessarily share the kind of unrestrained optimism about the solubility of social problems generally that characterized Progressives of that era in the United States.[2] One might thus have expected the liberals, at least, to have protested such sweeping governmental powers. Why then, was a statute of this breadth, and with this lack of protection of individual rights, able to pass in Norway?

(5) It is here, in describing how the act came to be accepted, that Dr Dahl's analysis is particularly fascinating. She concentrates on two major political groups, the conservatives and the liberals. The political conservatives of Norway, whose interests were represented largely by the legal profession and especially by the university professors in law, had an understandable interest in the passage of a law like this. The interest was straightforwardly preventive. Neglected, dependent, and delinquent juveniles were seen as disruptive elements in society, and disruptive elements associated with lower classes. It was not a very difficult step, given the conservative ideology, to urge that firm measures be taken with respect to lower-class individuals who were engaged in injurious behaviour or, given their life situations, seemed to be about to be. Given the conservatives' overriding concern about maintaining social order, it is not surprising that they went along with the law, and Dr Dahl suggests how they did.

Much more fascinating, however, is the role of the liberals. In the 1880s, progressive politics were growing stronger in Norway and liberal governments began to be elected. Those governments tended to be identified both with providing social assistance for less privileged persons, and with notions of individual rights. How is it that the liberal party – and the educators that tended to be associated with the liberal party – were able to contemplate, and to support, an act which so clearly involved the potential of repression of young lower-class individuals? What Dr Dahl describes is the almost Faustian bargain which the liberals entered into in supporting the act.

In Norway, the first item on the liberal agenda was the opening of the school to all classes of society. Before the 1890s, education had largely been in private hands and had been strictly segregated along class lines. The liberals felt that social mobility and individual opportunity could come about only in a unified school system – where all citizens regardless of social rank would have access to a common lower school, and where access to higher schooling would depend on academic performance in the common school. Their great interest was to ensure the success of the common school, which they saw as an opportunity to enhance the economic satisfaction and the power of their own constituents and to modify or alleviate the class distinctions existing in Norway. One of the major objections against the common school (voiced in part by the teachers themselves) was, however, that *some* lower-class children were so unmanageable, so dangerous, so unruly, and so uneducable that their presence in the common school would wreck the educational environment of the schools. Somehow, those children needed to be segregated away if the common school was to become an acceptable reform, as it ultimately did. The liberals, according to Dr Dahl, seized upon the Child Welfare Act as a means of accomplishing that segregation. Educable children of the middle and lower classes would be sent to the common school and given the opportunity of social mobility that it provided. The uneducable and refractory children would be segregated away in another institution – namely, the institution created by the Child Welfare Act, the juvenile home. In short, in order to accomplish what was seen at the time as a truly liberal reform for the majority of children, the tiresome children were to be put away.

As Dr Dahl points out, the liberals paid comparatively little

attention to the details of the Child Welfare Act, the powers it granted the Child Welfare Board, or the nature of the reform schools to which children were to be sent. The liberals took for granted the assurances of the penal experts that the segregated children would be both disciplined and educated in these reform schools and with that, turned their attention to what was their more immediate concern: providing the opportunity to the other children to receive an education in the common school. With the coalescing of the crime-prevention interests of the conservatives and the educational interests of the liberals, it is not surprising that the Child Welfare Act was passed.

What lessons are there to be learned from Dr Dahl's account? It is too easy to judge the past by present standards, and one must be careful in criticizing Norwegian liberals of the 1890s for failing to live up to due process standards that modern-day Norwegians (or American liberals) might insist upon. Nevertheless, it seems to me that at least one of the lessons to be learned from Dr Dahl's study is that in the area of penology there is a certain four-fold combination of elements that is likely to speed the passage of potentially repressive legislation – that is, legislation repressive in the the literal sense, of having ambitious social control aims and few protections for those being controlled. That combination of elements can be described as follows: first, a crime-control technique that claims to be based on science. The original impetus of the Norwegian act was the scientific positivism of the nineteenth century – the claim that one could successfully isolate or cure dangerous juveniles according to scientific methods. The second is the presence of the entrepreneur: some individual, such as Professor Getz, who is willing and able to introduce this rationale into the political arena and who through his prestige is able to promise believably that the proposed policy will succeed. The third is a political faction actively interested in social control and not much committed to due process or justice constraints. The Norwegian conservatives were crucial in the passage of the Child Welfare Act, and their willingness to segregate juveniles, without much concern for the interests either of the juveniles or the parents, was important. And the final and critically important element is the liberal bargain that Dr Dahl has described: the willingness of liberals to support essentially repressive legislation in order to do good for some other constituency that would be treated less harshly, or more benignly, as a result of segregation out

of the 'tiresome' individuals.

In the United States, we see that pattern emerging again quite recently. As American criminologists know, there has been a renewed interest in this country in 'selective incapacitation': in basing sentences and other criminal-justice decisions on predictions of dangerousness. We see there much of the same elements. First, new studies of 'scientific' prediction – promising a much-improved ability to spot dangerous offenders, and to reduce the incidence of serious crimes through use of predictive strategies.[3] Second, a group of entrepreneurs – individuals having high visibility and considerable credit with public officials – who are willing to provide assurances that such techniques really will be helpful in diminishing crime.[4] Third, of course, is the desire of law-and-order constituencies to accomplish precisely what the program proposes, namely, to isolate individuals who are thought to be dangerous and to subject them to substantial disabilities beyond that necessarily warranted by the seriousness of their crimes. The question is whether the last element is going to be present also: the support of liberals. Sometimes I hear the same kind of bargain urged by certain American liberals as one heard in Norway at the time. Why shouldn't we identify and isolate offenders who are deemed dangerous and lock them up for long periods of time? If only we did so, the argument runs, then we can develop community alternatives – milder ways of dealing with our primary constituency of non-dangerous offenders.[5] In my judgment, this bargain would be even worse today than what the Norwegian liberal educationalists agreed to a century ago in order to get their common school. I fear that it could lead to much longer terms of imprisonment for 'dangerous' persons, without significant reduction in severity for other convicted persons. And I fear that this kind of bargain, if subscribed to, could cause liberals to overlook important ethical issues concerning the fairness or the appropriateness of basing punishments on future behaviour. Fortunately, there already is some awareness of those hazards[6] – but reading Dahl's book would help put the problem in historical perspective.

Whether I am right or wrong about characterizing the new predictive sentencing movement in America the way I have, I still think that Dr Dahl's book provides an important lesson. It is one of the very few books that offers much insight into why different political groups decided to support a drastic change in law such as the one

that occurred in Norway's juvenile delinquency legislation at the end of the nineteenth century. As such the book is a model for analysis which every person interested in criminal law reform can benefit by reading.

Notes

1 A thoughtful English-language review of the original Norwegian version of the book has been written by Dr Annika Snare in *Contemporary Crises*, vol. 3, pp. 441–454 (1979).

2 For a discussion of progressive optimism in the United States and its influence on juvenile court legislation, see David J. Rothman, *Conscience and Convenience: The Asylum and its Alternatives in Progressive America* (Boston: Little Brown, 1980), chs. 6–8.

3 See particularly, Peter W. Greenwood, *Selective Incapacitation* (Santa Monica, Cal.: Rand Corporation, 1982).

4 For a useful summary of the recent debate over selective incapacitation, see John Blackmore and Joan Welsh, 'Selective Incapacitation: Sentencing According to Risk', *Crime and Delinquency*, vol. 29, pp. 504–528 (1983).

5 The strategy is hardly new. In the early 1960s, the National Council on Crime and Delinquency proposed the Model Sentencing Act, a document strongly urging alternatives to incarceration for most offenders. To pave the way for community penalties for the non-dangerous defendant, however, the Act proposed prison terms of up to *thirty years* for individuals deemed to be high risks.

6 For critical comments by some liberals on selective incapacitation, see Blackmore and Welsh, op. cit. (note 4). My own doubts about selective incapacitation are set forth in two articles, one addressed mainly to empirical issues and the other to ethical ones. Andrew von Hirsch and Don M. Gottfredson, 'Selective Incapacitation: Some Queries about Research Design and Equity', *New York University Review of Law and Social Change*, vol. 12, no. 4 (1984); and Andrew von Hirsch, 'The Ethics of Selective Incapacitation: Observations on the Contemporary Debate', *Crime and Delinquency*, vol. 30, no. 2 (1984).

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Tove Stang Dahl

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