BOOK REVIEWS

PROBATION AND RELATED MEASURES. United Nations, Department of Social Affairs, New York, 1951. Pp. 407. $3.00.

The publication of this report by the Department of Social Affairs of the United Nations is a much needed and welcome contribution to the literature of criminology and criminal law. It is undoubtedly the most comprehensive study currently available of the development of probation as a concept of individualization in the administration of justice in those countries influenced by the traditions of the English Common Law as well as in the countries of continental Europe, Latin America, Asia, and Africa. The major portion of the report, however, is devoted to the presentation of the legal bases, the growth, development, and present status of probation in the Anglo-American countries, particularly the United States, England, and the other countries of the British Commonwealth.

American readers, however, will be especially interested in the chapters on the legal origins and the development of probation in the United States and England and in the present day application of the principles of probation. Students of criminology and criminal law, in an effort to discover historical continuities, often trace the origins of probation to such sources of judicial practices as the plea of "benefit of clergy," the "judicial reprieve," and the principle of recognizance with or without sureties. Whether there is any actual parallel between these early practices and probation today, it is true that both English and American courts did exercise the authority to suspend either the imposition or the execution of sentence. While there was considerable question as to whether the courts had the power to suspend sentence indefinitely without specific legislative authority, the practice was so widespread and generally accepted that many state legislatures enacted such permissive legislation. In fact, the first federal probation law was passed in 1925, about nine years after the Supreme Court decided that the federal courts in the absence of legislation by Congress lacked the authority to suspend sentences except temporarily.

Although many of these early attempts by the courts to mitigate the mechanical application of a repressive criminal law undoubtedly plowed the way for the establishment of probation as a correctional principle, probation is essentially an American contribution, having its origin in the pioneer statute of Massachusetts in 1878 which provided for the appointment of a paid probation officer and for the application of probation to all types of offenders. The impetus to the acceptance of probation by other states did not come until about 1900 when the first juvenile court law was enacted in Illinois. Since then, probation in one form or another and in many instances limited to certain types of offenses and certain classes of offenders, is recognized in practically every state. The struggle today is not so much that of the acceptance of the idea of probation as it is to improve its organization and administration and its coordination as an integral function of a broad correctional system.

The value of probation to the administration of an individualized system of criminal justice and to the correction of the offender lies in the care exercized by the courts in the selection of the probationers and in the skill and quality of the probation officer. However, in spite of fifty years of development, progress has been slow and there is still a great gap between precept and practice. Many states and local jurisdictions have no trained probation officers, political appointments are common and standards of selection and training are low. Where the system is most highly developed, probation is granted only after careful investigation and supervision is maintained by trained persons selected to give guidance and friendly assistance, thereby achieving the purpose and the spirit of the law.

In this connection, the final chapter of this U. N. report is an excellent statement on the content of probation, the problems of personnel, supervision and the organization and administration of a probation service. In addition, the report includes, as appendices, extracts from the original Massachusetts statute on probation of 1878 and from the Illinois Juvenile Court Statute of 1899, as well as two model laws on adult probation prepared by the National Probation and Parole Association. The report will undoubtedly be found useful for many years as a basic source for information on probation.

James V. Bennett †

ECONOMIC EFFECTS OF SECTION 102. A Questionnaire and Panel Investigation conducted under the direction of the Panel Committee of the Tax Institute, Incorporated, Princeton, New Jersey, 1951. $5.00.

"I'm not very hungry but my company may be liable under Section 102 so let's go the whole way and have the sizzling steak." That is an imaginary quote from the president and principal stockholder of X corporation as he eats dinner with the customer of his corporation while on a business trip towards the close of the corporation's taxable year. The president had presumably decided that if he ate a $10 steak dinner he would at least get approximately $10 worth of economic value inside his stomach tax-free, whereas if he ate a vegetable platter costing $1.00 (which was all he really wanted) most of the $9.00 saving would not only disappear because of taxes but would, if retained by his corporation, increase the risk of the corporation being held liable to the penalty on corporate accumulations imposed by Section 102 of the Internal Revenue Code.

How often and to what extent do corporation presidents and directors eat steak they do not want, build plants they do not need, pay dividends they should not pay, buy goods they can not sell, borrow money they are not going to use, and sell businesses they would otherwise keep—because of Section 102? Nobody knows; but the present volume is directed at finding an answer.

Most lawyers will recall that Section 102 imposes a penalty surtax on the undistributed income of any corporation "availed of for the purpose of preventing the imposition of the surtax upon its shareholders . . . through

† Director, Federal Bureau of Prisons.

the medium of permitting earnings or profits to accumulate instead of being . . . distributed." The Section also contains a presumption in favor of liability to the penalty if "the earnings or profits . . . are permitted to accumulate beyond the reasonable needs of the business."

The existence of this presumption presents to corporate management the annually recurring problem of disposing of the corporate earnings in such manner as will demonstrate that all amounts retained were required by the "needs of the business." Panel discussions of this problem dominate the book; but some preliminary statistics were necessary. These were obtained by a questionnaire sent to 1700 tax practitioners throughout the United States who were asked to furnish data as to the various economic consequences which their own experience showed to be attributable to Section 102. As might be expected the results were not entirely conclusive. It was generally agreed that the Section has little, if any, effect on the decisions made by the management of corporations whose controlling stock is not owned by a relatively small group, the members of which would be subject to high individual surtaxes on any dividends paid. With regard to the various courses of action which are consistent with "reasonable needs of the business," it is clear that immediate investment of earnings in necessary plant or machinery will avoid the statutory presumption. It is equally clear that retention of earnings in the form of idle cash will normally bring the presumption into play. Between these extremes, however, there is a tremendous twilight zone in which corporate management is forced to fix policies without any definite measure of ultimate tax consequences under Section 102. Both the statistical survey and the Panel discussion suggest that in this twilight zone the threat of liability does frequently cause management to adopt courses of action which may be contrary to its best judgment as applied to the business situation. For example, premature investments in expanded facilities including both plant and machinery are attributable to Section 102. Also a number of instances were found in which a closely held corporation had been sold to competitors having widely held stock out of a fear that if ownership remained concentrated there would be a continuing threat of Section 102 liability. Some data was presented supporting the proposition that the Section tends to accentuate inflationary and deflationary trends. As the survey puts this point, "it tends to speed up expansion plans during good times, but deprives business of an opportunity to provide reserves for future expansion or a cushion with which to maintain employment and dividends during recessions." [1]

While numerous other courses of action appear to have been dictated largely by the presence of Section 102, it is not possible to find in the data developed by the survey any really persuasive evidence that the Section is sufficiently far reaching in its impact to affect materially the national economy. The nearest approach to such an impact would probably lie in the tendency towards concentration of enterprise in the hands of large widely held corporations which because of the diversity of their stock ownership are generally regarded as free from the threat of liability.

1. P. xvii.

Perhaps the most urgent recommendation of the Panel was to favor a change that would fully protect the corporation against liability if it could show that its earnings were retained not for the *immediate* needs of the business, but solely for the purpose of meeting reasonably forseeable *future* needs and contingencies.

This recommendation can hardly be questioned as a matter of general fairness, yet it may well encounter opposition from the Treasury Department because of the difficulty of proving whether the management really retained the earnings for the purpose of meeting future needs or whether the directors were persuaded to rely on the bare possibility of those needs as a justification for a failure to pay dividends.

The present study went to press before the Korean war had gotten under way. Both the members of the panel and the editors of the publication would doubtless concede that the Section has very much reduced application during a period of national emergency. Thus when the Government, itself, institutes a program of expanded production it cannot consistently with that program press too far the threat of Section 102, which in its underlying purpose tends to force distribution of earnings as opposed to retention for possible use in the production process. Also the Government would hardly be expected to impose the tax penalty if earnings are accumulated for the purpose of financing future reconversion to normal peacetime operations when the very necessity for such reconversion originates with the policy of the Government in insisting upon priority for defense production during the emergency. Furthermore, at the present time the Government has both the excess profits tax and the established principle of renegotiation on which to rely as a means of drawing excess corporate surpluses into the Treasury. It may, therefore, be expected that until the end of the present national emergency Section 102 will have little, if any, effect on the policy of most corporations.

When the present emergency ends, however, Section 102 will again become an important factor. The Institute's Survey will thereupon acquire far greater practical significance.

Bernard V. Lentz †

SOCIETY AND THE CRIMINAL. By Sir Norwood East, M. D., F. R. C. P. Charles C. Thomas, Springfield, Ill., 1950, Pp. xix, 437. $8.50.

Society and the Criminal, which was first published in London in 1949, has had its first American printing by special arrangement with the Controller of His Britannic Majesty's Stationery Office.

Knighted for public service in the field of psychiatry, Sir Norwood East first as senior medical officer, then medical inspector and later commissioner and director of prisons, offers to those interested in medico-sociological subjects, thoughts formed and crystallized over forty years of intensive study and treatment of psychiatrically deviated offenders.

† Member, Philadelphia Bar.

While the book holds particular interest for the psychiatrist, it should be read by all persons concerned with the administration of criminal justice. This is so not only because of the author's unique oportunity to observe at close hand the mental behavior of thousands of inmates of British prisons and his wide experience with offenders on the administrative level, but also because he brings to his task the humble, searching, indomitable spirit of the true scientist.

In addition to a collection of published papers *Society and the Criminal* contains a number of addresses delivered by the author to psychiatric and cognate societies. The topics are so varied that it is impossible to discuss them all here. It is enough to say that those interested in medico-legal subjects will find in this book a clear exposition of the nature and extent of such problems as prostitution, drug addiction, alcoholism and senility—an exposition made more meaningful by the inclusion of valuable statistical and comparative tables. Factual material as well as the author's own views are illuminated by apt quotations from the professional writings past and present of men everywhere. "For," as the author observes, "the telescope as well as the microscope is an instrument of precision adding depth of vision to detailed information."

Of particular profit to lawyers interested in criminal jurisprudence and prison administration are the chapters, "The Experts' Oath," "The State, the Criminal and the Psychiatrist," "Responsibility and Culpability," "Sexual Offenders," "Psychopathic Personality and Crime," "Milestones of Penology and Psychiatry" and "Degrees of Murder."

In the absence of a more feasible doctrine acceptable to the public, the author finds little fault with the McNaghten Rules. He states without qualification that criminal responsibility is a legal concept which had best be left to the legal profession and exhorts his medical colleagues to be realistic about their own role in the administration of criminal justice.

> "Let us at once recognize the fact that criminal responsibility is a legal concept which the public understands and of which it approves, and that so far psychiatry has not replaced it by anything more precise or practical. Let us remember that the law is applied with elasticity in suitable cases. Let us regard criminal responsibility and the culpability recognized by medical men as two different things, and by leaving the former to the lawyers have more time to study closely the medical conception of culpability, for this is likely to become increasingly important with the crystallization of our knowledge regarding minor mental abnormalities. Perhaps as we approach nearer to the heart of the matter we may be more able to assist the lawyers in reshaping the doctrine of criminal responsibility as set out in the McNaughten Rules."

It will be surprising to most American lawyers to learn that there are no degrees of murder recognized in England, and that public opinion is apparently opposed to the grading of the crime of murder by definition, indictment, judge or jury. While this is not the place to argue the merits

of British criminal procedure it may be said in passing that to a lawyer residing in a jurisdiction where the grading of homicide is traditional, the British practice leaves something to be desired.

However this may be, based on England's experience which he finds satisfactory, the author believes that the question of legal responsibility is properly for the jury while the extent of culpability from a medical standpoint which affects clemency is properly within the exclusive province of the executive. Since there is a systematic and routine investigation made by the Home Office in every capital case he believes that the executive is in a good position to evaluate medical findings and other factors bearing on the degree of culpability and to decide whether the granting of clemency in a given case is consistent with public safety. As proof of the humane manner in which the Home Office has been exercising its clemency function the author points out that between 1929 and 1938 the number of men convicted of murder and reprieved equalled the number convicted and executed.

Sir Norwood East holds no illusions as to the ability of psychiatry to predict future behavior. With characteristic humility he declares:

> "Moreover, we must not promise dividends we cannot pay. The law and the executive may wish for a clear-cut medical solution for dealing with an abnormal criminal, but our knowledge is the result of studying types of offenders with similar abnormalities, and we must often err if we are too insistent in the belief that the individual offender before us will necessarily conform to the usual pattern of his type."

And again:

> "We must also refute the alluring suggestion that the scientific study of crime and criminals can always produce exact results comparable to those arrived at in the physical sciences."

The last chapter of the book, "The End Is Forbidden," should have special meaning for the penologist who frets over the slow and uneven steps of government to reform the penal system, for the psychiatrist who grows impatient with the law's apparent lag, and for the lawyer who demands of psychiatry categorical answers which it is not yet prepared to give.

Says the author in his superb final essay, "We see in medicine, natural science, the exact sciences, law, religion and elsewhere men controlling affairs, directing thought, conducting operations or occupied in research, striving towards ends which, when reached, are only the beginnings of the next advance."

Yet in reflecting upon the uneven progress made in a specialized branch of medicine to which he has devoted his life, Sir Norwood East rejects the philosophy of "persistent discontent."

As one reads these essays he will be impressed with the author's disciplined judgment, learning and humanity. As one lays them down he will regret the fact that he was not among those fortunate enough to see and hear Sir Norwood deliver them.

Herman I. Pollock †

† Defender, Philadelphia Voluntary Defender Association.