

## BOOK REVIEWS

THEORY OF NATIONALISATION. BY KONSTANTIN KATZAROV.  
The Hague: Martinus Nijhoff, 1964. Pp. viii, 392. Gld. 59.

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This book, the fourth study of nationalization to appear in English during the past dozen years,<sup>1</sup> is a slightly revised edition of a book first published in French in 1960 and subsequently translated into Spanish.<sup>2</sup> (P. iv.) Its author, a Professor of Law in the University of Sofia from 1931 to 1956, believes firmly that nationalization is a panacea for the social, economic and political ills of the world. While this reviewer disagrees with Professor William A. Robson's prefatory remarks in which he calls the volume "a book of outstanding importance which will for long be a landmark in the literature of a movement of worldwide significance," (P. vi.), the book is undoubtedly the most comprehensive study of nationalization from the Marxist point of view yet published in English. For that reason alone, it deserves to be read by international lawyers everywhere.

The author's thesis is simple and doctrinaire. He contends that of the two social forces which are an integral part of man's nature, the instinct of appropriation until recently prevailed over the social instinct. (Pp. 2-3.) "The first concepts of law are based on the idea of property," he acknowledges, "which appears as the fundamental principle of the most primitive system of law." (P. 3.) According to the author the absolute character of property, which had changed only slightly in 4000 years, (P. 105.) has been attacked in this century by countries which have sought "to lessen or abolish inequality between classes, to hold private interest in check and to end man's exploitation of man." (P. 248.) Nationalization, for which the author uses the traditional definition of the transfer to the community of the means of production and exchange for use in the interests of the community, (Pp. 1, 13.) has been the main weapon in this attack. This twentieth century doctrine began with the Russian Revolution of 1917, (P. 34.), and is based above all on "the desire to achieve peace and social justice and to overcome differences and social conflicts." (P. 2.) Indeed, the

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<sup>1</sup> See FOIGHEL, NATIONALIZATION AND COMPENSATION (1964); WHITE, NATIONALISATION OF FOREIGN PROPERTY (1961); WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW (1959); FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW (1953).

<sup>2</sup> For a highly critical review of the French original edition, see Wortley, Book Review, 10 INT'L & COMPARATIVE L.Q. 370 (1961).

author concludes that nationalization is the fruit of a moral effort by all mankind, (P. 18.)

While the author apparently prides himself on his ability to reach beyond the law "as it exists" to the influences of other disciplines, (P. 16.), his knowledge of them, economics in particular, appears rudimentary at best. Viewing capitalism through the eyes of Marx and Engels, (P. 9.), he apparently believes that this system still accords individuals an absolute right of private property, (P. 15.), as if it ever did. "It should never be forgotten," the reader is warned, "that between those who exploit their property rights and the thousands of citizens who carry on the activity of production and distribution, a deep gulf has been inexorably fixed under an economic structure based on private property." (P. 14.) Stock purchase plans, profit sharing arrangements, the guaranteed annual wage and even the government's substantial tax bite on corporate profits are devices which have been developed during this century to bridge the gulf between capital and labor, but all are ignored by the author. Thus, despite the fact that he admits when it suits his convenience that the right of property has been limited in the public interest, (Pp. 107-16.), he generally makes the "absolute and superlative conception of property" the strawman for his arguments. (P. 104.)

The author divides his work into four parts. The first part "The Achievement," consists of an introductory section tracing the development of the concept of nationalization from 1917 through the interwar period (Pp. 21-41.); a longer section covering in great detail the instances of nationalization throughout the world from 1944 to 1960 (Pp. 42-73.); and a short section giving his "general and systematic conclusions" (Pp. 74-81.), the most important of which is that in nationalization "we are faced with a new stage in the evolution of law, and not merely with temporary reversals of accepted legal ideas."<sup>3</sup> (P. 79.) Throughout this part (*E.g.*, pp. 30, 37, 57, 75, 76.) and elsewhere (*E.g.*, pp. 85, 133, 137, 142-47.) the author reiterates that nationalization is a new legal institution distinct from classic expropriation. "This finding," he states, "makes it impossible to hold that the problems connected with nationalization can necessarily be considered and solved in the same way as those arising out of expropriation, or by analogy therewith." (P. 147.)

Part two of the book entitled "The Legal Structure," considers various legal aspects of nationalization under a socialist legal order. (Pp. 83-161.) Since "the right of property no longer concerns solely the proprietor and the thing, but also the social surroundings from which it makes its existence," (Pp. 120-21.) all legal questions, especially that of compensation, are permeated by this principle of social function. Hence, according to the author, "the social function of property theoretically justifies, in the case of nationalization, the possibility of establishing a certain scale of compensation (*e.g.* complete, equitable, limited or even nil)." (P. 122.)

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<sup>3</sup> (Emphasis omitted.)

It is "unacceptable even in principle to assimilate nationalization to confiscation on the sole ground of the absence of compensation." (P. 150.) Since property which is merely expropriated serves a lesser social function, compensation may be proper. (P. 122.) However, since the state is apparently the sole judge of what degree of social function, in effect it has the unlimited right to decide when it should pay compensation for the taking of property and the amount, if any, of this compensation.

The book's third part covers the "Operation" of nationalized enterprises and contains much interesting data on the form of nationalization, the place and function of nationalized enterprises in the socialist legal order, and the impact of the state plan upon the enterprises and economic life in general. (Pp. 163-282.) For this reviewer, the most surprising point in this part is that following his paeans of praise for the concept of nationalization, the author reveals that he finds it "difficult to make an objective assessment of the *practical success* of nationalization."<sup>4</sup> (P. 168.) The reader is told that the "neglect of the consumer will ultimately influence any appraisal of nationalization, perhaps even its fate" (P. 226.); that the "achievements of planning have not always been brilliant" (P. 250.); and that "personally, we consider the moment too early for a definitive verdict." (P. 239.) Furthermore, the author attempts to render criticism impossible, stating that "the success of nationalization cannot be assessed in figures, as if it were a commercial transaction; among the many relevant factors are, as we have seen, moral, social and ideological aspirations towards establishing the reign of social harmony and peace in the bosom of society." (P. 168.) Indeed, at one point he specifically enjoins the reader *not* to look at the record.

Obviously, the system of planning, like the system of utter economic freedom, has its advantages and its drawbacks; it would be irksome, if not futile, to compare them without regard for less obvious distinctions. It is unwise to contrast them mechanically or merely to compare the quantity and quality of their respective records; we should reckon with two other factors: a) the distant objectives which each has set itself; and b) the repercussions that their introduction has on individuals, especially on their social situation. The latter factor can be assessed with reference either to the present or future state of affairs.<sup>5</sup> (Pp. 250-51.)

The fourth and final part of the book considers nationalization from the viewpoint of "International Law." (Pp. 283-373.) The author, after correctly pointing out that there have been few studies on the concept of property in public international law, (P. 284.), stresses the fact that "the rules governing property and the transactions to which it may be subject

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<sup>4</sup> (Emphasis in original.)

<sup>5</sup> Notice the dichotomy in the first sentence between a system of planning and one permitting "utter economic freedom."

have been borrowed until very recently from municipal private law and accepted without any reservations in public international law." (P. 285.) Thus international law, like municipal law, considered private property to be inviolable. (P. 292.) However, "the new conceptions of the content of property, . . . the 'social function' attributed to it and, above all, the considerable increase in the extent of public ownership, are factors which exercise an equal influence on the position of property in public international law." (Pp. 300-01.) Since the right of property is not a fundamental human right, (Pp. 296-98.) its content, scope and nature can be modified in international as well as municipal law. (P. 303.)

In words which remind one of Mr. Justice Harlan's opinion in *Banco Nacional de Cuba v. Sabbatino*<sup>6</sup> the author states that "judgments relating to the international validity of nationalization could only usefully be placed together under one head if a common international notion of property existed. But this is not the case, and less so today than at any other time."<sup>7</sup> (P. 309.) Anticipating the legal conclusions in Mr. Justice Harlan's opinion, the author finds further that "the most serious differences concern the principle of the compensation due for the deprivation of property." (P. 309.) The traditional rule providing "for full compensation has undergone essential modifications. Although it cannot be claimed that a new custom is already established, it must nevertheless be recognized that this customary norm of the past is today being transformed." (P. 343.) In words more familiar to international lawyers in the United States, the lack of consensus on the compensation question permits countries to take the property of foreigners upon a payment of much less than complete compensation.<sup>8</sup> Factors which affect the amount of compensation to be paid include the nature of nationalized property, the expediency and social necessity of the nationalization, the nationalizing country's capacity to pay, and finally the way in which the property was acquired. (Pp. 354-56.) Hence the postwar nationalizations which have provided for partial compensation have not run afoul of international law, despite the fact, neatly tucked away in a footnote, that "in none of the countries of Eastern Europe has even this limited compensation been paid to the owners." (P. 332 n. 66.)

In his efforts to free nationalizing countries from the restraints of any legal sanctions whatsoever, the author has some difficulty with the numerous lump sum compensation agreements by which communist

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<sup>6</sup> 376 U.S. 398, 429-30 (1964); see LILICH, *THE PROTECTION OF FOREIGN INVESTMENT: SIX PROCEDURAL STUDIES* ch. II (1965).

<sup>7</sup> (Emphasis omitted.) "A universally accepted rule synthesising the attitudes and practice of the international community is therefore indispensable. In view of the present divisions on this subject within the international community, this synthesis may be extremely difficult to achieve." (P. 344.)

<sup>8</sup> The author adopts the national treatment argument with no serious discussion of the diplomatic protection of aliens abroad. (Pp. 308-09, 313, 356.) In similar conclusory fashion, he states that nationalization decrees must be given extraterritorial effect. (P. 357.)

countries have paid partial compensation for the taking of property of foreigners.<sup>9</sup> At first, calling them "financial and commercial compromises," he states that "they avoid adopting a position of principle with regard to the juridical basis of compensation in international law." (P. 342.) Later, he reiterates that these settlements "are agreements by way of compromise, which do not necessarily carry with them the recognition or the creation of a new law and do not constitute precedents that may definitely lay down the direction of future developments." (Pp. 365-66.) Yet he acknowledges that "in the present circumstances, it is impossible to assert that these agreements will exercise no influence on the development of international law," (P. 366.), and even goes so far as to suggest that "the conclusion of so many agreements must be held to be a phenomenon beneficial to international relations, since this is a prior condition of the establishment of an international rule of nationalization." (P. 365.) It is unfortunate that the author did not see fit to develop his position on these lump sum settlements more fully, especially in view of the United States-Bulgarian Claims Agreement of 1963.<sup>10</sup>

In conclusion, it should be apparent from the tenor of this review that the author, albeit ably, has presented his readers with little more than a partyline approach to nationalization. In addition to the doctrinaire quality of the book, its overemphasis of the somewhat unique Eastern European nationalizations, and its omission of other relevant data (such as United National Resolution 1803)<sup>11</sup> which point to a much wider consensus on the key question of compensation, the book fails to recognize the impact of the numerous new nations, who certainly will participate in the shaping of the author's proposed new international law of property and whose interest in a stable international economy would hardly be best served by the adoption of doctrinaire positions in dealings with capital exporting countries. However, as an antidote to the euphoria which the Hickenlooper amendment standard of compensation has caused among international lawyers in the United States,<sup>12</sup> and a reminder that the concept of property in international law needs substantial and immediate clarification the book serves a useful purpose. It should be read in conjunction with Dr. White's *Nationalisation of Foreign Property*,<sup>13</sup> easily the most valuable source book on contemporary nationalization practice yet published.<sup>14</sup>

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<sup>9</sup> These agreements are the subject of an extensive study by the Procedural Aspects of International Law Institute at Syracuse University College of Law.

<sup>10</sup> Agreement With Bulgaria, July 2, 1963 [1963] 14 U.S.T. & O.I.A. 969, T.I.A.S. No. 5387; see Lillich, *The United States-Bulgarian Claims Agreement of 1963*, 58 AM. J. INT'L L. 686 (1964).

<sup>11</sup> U.N. GEN. ASS. OFF. REC. 17th Sess., Supp. No. 17, at 15 (A/5217) (1962), reprinted in 57 AM. J. INT'L L. 710 (1963); see Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty Over Natural Resources*, 49 A.B.A.J. 463 (1963).

<sup>12</sup> See generally Lillich, *op. cit. supra* note 6, at 130-32.

<sup>13</sup> Cited note 1 *supra*.

<sup>14</sup> See Lillich, Book Review, 12 J. PUB. L. 228 (1963).

RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM.  
 BY RONALD GOLDFARB. New York: Harper & Rowe, 1965. Pp. 265.  
 \$5.95.

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In recent years, the American bail system has come under increasingly heavy attack. Premised on the possession of money as the condition precedent to release, our modern system has caused great hardship to the poor defendant, who often can make bail only by draining his already limited assets and more often cannot make bail at all. Because of the prerequisite of money, many must await their day in court in jail. In *Ransom: A Critique of the American Bail System*, Ronald Goldfarb describes the plight of the poor defendant. With the announced purpose of arousing the American public about the inequities of our bail practices,<sup>1</sup> to force a drastic change in our laws, Goldfarb describes the promising experiments which have been performed in recent years, and which offer, and in fact have provided, substantial relief. Led by the landmark Manhattan Bail Project, projects in scores of communities have demonstrated that strict reliance on money bail is not only unfair but unnecessary.<sup>2</sup> The techniques used by these projects are simple—so simple, indeed, that it seems incredible that so many American courts have gone on so long without applying them. In essence, a bail fact finding agency is established to provide the courts with verified data which is designed to show the trustworthiness of selected defendants. On the basis of this data the court is able quickly to determine the propriety of substituting release on recognition, a decision that the defendant can be “trusted” to appear in court, for a money bond. By showing that factors such as strong community and family ties, a good employment history and the lack of a serious prior criminal record are far better indicia of a defendant’s reliability than money, these experiments have demonstrated that elimination of the money requirement will jeopardize neither the efficient operation of the courts nor the safety of the community. By educating the courts, the prosecutors and the defense bar to the shocking extent to which pretrial detention of demonstrably good risks is caused solely by poverty, bail reformers have shaken many in the legal community from their apathy.

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<sup>1</sup> For another description of this problem see REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963).

For a concise and comprehensive analysis of the American bail system as a whole, see FREED & WALD, BAIL IN THE UNITED STATES: 1964 (Report to the National Conference on Bail and Criminal Justice 1964).

<sup>2</sup> For a recent account of the developments in bail reform, see PROCEEDINGS, NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE (1965); INTERIM REPORT, NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE (1965).

*Ransom* describes the successes of such bail reform with enthusiasm; perhaps, however, with too much enthusiasm. For the conclusion which the author derives from his analysis of the reform movement is that the possibility that the money bail system can be eliminated is already a fact. He apparently concludes that the standards developed by the bail projects for use in cases of the most trustworthy defendants could be met in almost every case. Fully ninety percent of all defendants could be released prior to trial, he says, either on their word alone or in the custody of some third party, preferably an officer of the court. The "few" cases remaining could be handled by a relatively simple procedure, which would permit pretrial detention in necessary cases.

The principal difficulty with this solution is that there is very little factual support for the premise upon which it is based, *i.e.*, that the overwhelming majority of detained defendants are unable to gain their freedom solely because of their poverty, and that they could be safely released from jail after arrest if they were not forced to pay a "ransom." As Goldfarb sees it, the trouble with current practices is not simply that poverty is a factor contributing to unwarranted pretrial detention but that it is the only factor. He thus reasons that money bail allows the "rich and connected" to purchase their freedom and "go home," while the "poor, the friendless and sometimes the innocent are punished by imprisonment." Since Goldfarb states both that the "average bond" is 500 dollars and that "millions of men and women are held in 'ransom' in American jails" through the bail system, he leaves the distinct impression that most detention is the result of the defendants' inability to post even this relatively low bond. However, these factual premises are more than debatable, for there is no way to estimate what *the* average bond is. Nor is there any basis to conclude that millions are being detained for want of money to purchase such a bond. But more important, Goldfarb fails to give adequate consideration to the fact that bail serves more than one purpose in American courts today. Bail is not only an easy alternative to that thorough factual investigation of individual cases which the projects are now beginning to provide; it is also the chief—indeed the only—method which the court has to deal with the defendant whose reliability it questions. Whether consciously or not the courts very frequently use bail to detain or at least make difficult the release of defendants whom they feel pose a danger to the court by way of flight, or to the community by way of future crime.<sup>3</sup> In Goldfarb's exuberance over the findings made by the bail projects as to how the reliable defendant can be discovered, he overlooks the fact that there are many whose reliability cannot be determined by the tests developed thus far, and who for this reason, rather than simply their poverty, are detained on high bail. In truth, no one knows in what proportion the good risk defend-

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<sup>3</sup> Except in capital cases, the law generally assumes a right to be admitted to bail, subject to the posting of required security. See FED. R. CRIM. P. 46(a)(1), (c). The courts in most jurisdictions have no statutory power to use bail intentionally to prevent release.

ant stands to the bad. And the suggestion that the proportion is anything like ninety to ten is, at this stage in our development, mere wishful thinking. It is true that some federal districts, notably the Eastern District of Michigan, seem to be approaching the kind of system which Goldfarb advocates. Indeed, a recent unpublished survey by the Department of Justice shows that the proportion of defendants released on recognizance in this district is approaching ninety percent, and the rest—presumably those considered bad risks—are being detained by high bail. But the federal crime picture with its absence of common-law criminal jurisdiction is radically different from that of the states, and hence the analogy falters. Proof of this appears when the results of this survey in the District of Columbia are compared with those in Eastern Michigan: in the District of Columbia, where common-law jurisdiction is so great a part of the criminal caseload, the “r.o.r.” rate is about twelve percent, and the detention rate about thirty-five percent, with the remaining defendants being released on bond. Certainly the bail projects have never attempted to make a determination as to what proportion of the total criminal population is in the good risk category. These experiments have illustrated only the criteria with which to determine who are the best risks. But the successes of the reform experiments can no more be used to conclude that almost all defendants fit these criteria than to conclude, as some are tempted to do, that all defendants who do not fit them are poor risks. How to separate the truly poor risk from the one whose reliability can simply not be easily ascertained is one of the great problems facing students of the bail system today. Even what little information we have suggests, moreover, that the problem is of far greater dimensions than Goldfarb would have us believe. Data produced by one of the country’s most advanced bail projects, that in the District of Columbia, illustrate this point. The project’s statistics show that during 1964, of a total of 1,676 felony and misdemeanor defendants considered for recommendation for release on recognizance,<sup>4</sup> only 460 qualified under their risk evaluation system.<sup>5</sup> This amounts to about twenty-five percent of all defendants considered. Over seventy-five percent of the defendants failed to qualify, primarily because they had insufficient roots in the community, serious prior felony records, or were out on bond on other charges at the time of arrest.<sup>6</sup> Other projects, including the Manhattan Bail Project, show similar results.<sup>7</sup> It seems, therefore, that notwithstanding the undeniable importance of the reform efforts which have gone on thus far, it is un-

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<sup>4</sup> See McCarthy & Wahl, *The District of Columbia Bail Project: An Illustration of Experimentation and a Brief for Change*, 53 Geo. L.J. 675, 708 (1965). The total number of felony and misdemeanor defendants was 3,393. The 1,617 excluded from consideration were mostly individuals who had posted money bail prior to any possible project recommendation. See *id.* at 709 (Table XVI).

<sup>5</sup> See *id.* at 712.

<sup>6</sup> See *id.* at 710-11 (Table XVII).

<sup>7</sup> See FREED & WALD, *op. cit. supra* note 1, at 62. In three years in Manhattan, 13,000 defendants were considered; 3,000 were excluded on the basis of the crimes with which they were charged, and only 4,000 of the remaining 10,000 were recommended.



realistic to propose basing an entire system on the highly selective criteria for judging risks which they have developed.

This, however, is what Goldfarb has done, making his plan work simply by divining his own percentages of defendants to which to apply it. With this basic flaw in mind, we can turn to his proposal for dealing with the "few" cases which remain. It will be seen that these are almost exactly the same defendants who will fail to qualify for recommendation for release on recognizance under current standards,<sup>8</sup> and who thus might well be detained in the "pure" release-detention system which Goldfarb proposes. It can be seen further from the data produced by the bail projects that this will constitute a sizeable part of the criminal population.

The plan establishes a full pretrial detention hearing, in which the court would be permitted, on the basis of a "strong showing" by the prosecutor that there was a need for detention, to order pretrial detention of the following defendants:

- (1) Those charged with crimes of "extreme violence," or "obviously pathological crimes";
- (2) Those charged in subversion cases "where violence, sabotage or treason were involved";
- (3) Those in whose cases "recidivism or obstruction of justice is reasonably anticipated";
- (4) Defendants in cases not involving these crimes, if they were "uncooperative" during the bail investigation which the plan establishes, or if they were "unknown" and the investigating officer in charge of the case could not ascertain "sufficient facts to administer pretrial supervision."

The author gives us no hint as to what would constitute a "strong showing" of the need for detention. He passes off the problem posed by the recidivist as if we know how to "reasonably anticipate" who he might be. And he tells us nothing about what facts concerning the defendant would be "sufficient" to enable a supervising officer to administer a release program. Under this plan the courts would be able to act no more intelligently than at present, except to the extent that they are provided with fact finding agencies to ferret out the low risk defendant. And it must be stressed that the existence of such an agency has not ended the detention problem. Far from it. My own study of the courts in the District of Columbia where bail is set in most cases indicates, for example, that over one-third of all defendants are detained prior to trial, notwithstanding the presence of the District of Columbia Bail Project. These detainees, moreover, appear to be precisely those persons whom the court believes it can "reasonably anticipate" will commit future crimes,<sup>9</sup> or

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<sup>8</sup> See *id.* at 57-59.

<sup>9</sup> For example, of 150 defendants in detention charged with felonies, nearly 70% were charged with crimes of violence. The average bond set in these cases was \$4,700.

about whom the Bail Project failed to produce sufficient positive facts to warrant a positive recommendation for release on recognizance. Ironically, the fact that more are not detained results from their ability to post money bail. Goldfarb would eliminate the availability of release on money bail, and thus it might well be that pretrial detention would increase under his plan, notwithstanding his conclusion that it would release the "mass" of defendants. This conclusion in no way proves the ultimate value of the money bail system. It does, however, suggest that a far more sophisticated set of criteria for risk determination is required before the "play" is taken out of current procedures.

Moreover, *Ransom* overlooks the significant point that apart from the limited experience of the bail projects, no progress has been made in accurately predicting either the risk of flight or of future criminal acts. Whatever the precise dimensions of this problem, it clearly is still of utmost concern to persons trying to keep the reform movement growing. The bail projects either do not provide the ultimate answers or have not presented sufficient evidence. To resolve this problem it must be demonstrated that in fact there is only a minimal danger that defendants who are released will commit crime or flee; or, if the danger is not minimal, that there are accurate ways to predict which defendants will engage in illegal acts. *Ransom* does not provide an answer.

Poised in the background of any discussion of bail reform are a number of constitutional questions of the greatest importance. *Ransom*, which the author describes as intentionally not a "fully documented legal treatise," suggests the two major areas of concern but elaborates on neither. The first is the propriety of making money bail a condition of release for the indigent. The issue has been raised by Mr. Justice Douglas, sitting as a Circuit Justice in *United States v. Bandy*: "Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom"?<sup>10</sup> A very compelling "no" has been suggested by Professor Caleb Foote in a recent article which stands as the only serious work in the area to date.<sup>11</sup> Professor Foote believes that the equal protection argument suggested in *Bandy* is on much the same footing as that announced by the Court in *Griffin v. Illinois*.<sup>12</sup> In *Griffin* the Court forbade the denial of appellate review to indigents simply because they were financially unable to furnish the appellate court with a transcript of the trial proceedings.<sup>13</sup> The analogy is clear.

Far more difficult is the second major question involved in the "crisis" in the law of bail: that is, whether pretrial detention of a defendant on the grounds of dangerousness or the risk of flight would be constitutional.

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<sup>10</sup> 81 Sup. Ct. 197, 198 (Douglas, Circuit Justice 1960).

<sup>11</sup> Foote, *The Coming Constitutional Crisis in Bail: I & II*, 113 U. PA. L. REV. 959, 1125 (1965).

<sup>12</sup> 351 U.S. 12 (1956).

<sup>13</sup> *Id.* at 546-47. See also Foote, *supra* note 11, at 1153-57.

The question subsumes two issues: first, whether the "excessive bail" clause of the eighth amendment implies an absolute right to bail, and therefore makes denial of bail impossible; and second, whether the due process clause of the fifth (and fourteenth) amendment prevents the imprisonment of a person on the basis of a prediction of future misconduct. Neither question has been authoritatively decided. *Carlson v. Landon*,<sup>14</sup> the most recent statement by the Supreme Court on the meaning of the eighth amendment, suggests a rather limited right to bail. In *Carlson*, the Court compared the right contained in that amendment with its British counterpart<sup>15</sup>—and in England bail has always been considered a matter of judicial discretion not of right. However, *Carlson* involved an alien, and the decision of the Court in upholding the denial of bail was based upon Congress' plenary power over aliens, not on a precise definition of the eighth amendment. Professor Foote is probably correct in stating that the right to bail is broader than that suggested in *Carlson* and extends to a "broad category" of cases.<sup>16</sup>

This may be as definite an answer as the eighth amendment can yield; and thus it seems possible that the preventive detention issue will ultimately be decided on due process grounds. Such a suggestion was made in *Stack v. Boyle*,<sup>17</sup> a case involving the imposition of extremely high bail on a group of Communist defendants. The Court observed that there was a "traditional right to freedom before conviction," which "permits the unhampered preparation of a defense, and served to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence . . . would lose its meaning."<sup>18</sup> This language would appear to present a rather solid obstacle to any preventive detention scheme. But the *Stack* case must be interpreted in the light of present bail practices, many of which appear to be inconsistent with the implications contained in the broad language of *Stack*. Thus it has never been considered illegal to impose bail in an amount greater than a person could meet,<sup>19</sup> notwithstanding that the denial of pretrial freedom is quite the same for such a defendant as if bail were denied outright.<sup>20</sup> Nor has the right to deny bail in capital cases,<sup>21</sup> or even

<sup>14</sup> 342 U.S. 524 (1952).

<sup>15</sup> "[E]xcessive bail ought not to be required . . . ." Bill of Rights, 1689, 1 W. & M., c. 2, § 10.

<sup>16</sup> Foote, *supra* note 11, at 989.

<sup>17</sup> 342 U.S. 1 (1951).

<sup>18</sup> *Id.* at 4.

<sup>19</sup> *White v. United States*, 330 F.2d 811, 814 (8th Cir.), *cert. denied*, 379 U.S. 855 (1964). See also *United States v. Rumrich*, 180 F.2d 575, 576 (2d Cir. 1950) (*per curiam*) (*dictum*).

<sup>20</sup> Note also that the imposition of bail involves a prediction of future conduct; that this conduct, flight, is a crime in many places (*e.g.*, 18 U.S.C. § 3146 (1964) (federal bail jumping statute)); and that hence the very act of setting bail in some sense defeats the "presumption of innocence." Query what remains of it when the defendant is unable to post bond.

<sup>21</sup> This has been expressly permitted in federal law since the Judiciary Act of 1789, 1 Stat. 91.

in some instances during the trial but prior to conviction<sup>22</sup> been questioned on the constitutional grounds suggested in *Stack*. All defendants in these cases presumably would be said to have the same need to prepare a defense and the same right not to be punished prior to conviction. And it would be extraordinary to suggest that they were not entitled to a presumption of innocence. Additional clarification, therefore, seems warranted.

*Ransom* contains a recognition of the due process problem, but the author's attempt to meet it falls short. If his detention plan is held unconstitutional, the author contends that he would substitute a "one bite rule" to deal with the recidivist. This would permit the detention of a defendant after indictment for a second charge while on release pending trial of the first. Whether this would avoid the basic constitutional problem—imprisonment prior to conviction—is doubtful. Also dubious is his suggestion that a "daytime release" plan for high risks of flight would solve that problem. This practice, used now in post-conviction cases,<sup>23</sup> still would involve pretrial detention, and thus is open to the same due process attack.

However, such speculation about the legality of preventive detention seems somewhat premature. Until more is known about how to administer a wholly revamped bail system which includes a preventive detention scheme, a better solution might be to continue along the present path and chip away at inequities as they are discovered.

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<sup>22</sup> See *Carbo v. United States*, 288 F.2d 686 (9th Cir. 1961) (defendants committed after key government witness was assaulted and threatened); *United States v. Bentvena*, 288 F.2d 442 (2d Cir. 1961) (bail revoked after threats to witness, tampering with the jury, and flight of one defendant). The action of the district court in *Bentvena* was upheld by Mr. Justice Harlan, sitting as Circuit Justice, notwithstanding the defendant's "presumptive right . . . to remain on bail until conviction." *Fernandez v. United States*, 81 Sup. Ct. 642, 644 (Harlan, Circuit Justice, 1961).

<sup>23</sup> See, e.g., Gwyn, *WORK, EARN AND SAVE* (1963).