ordinary offenders is too high. On the other hand, provision should be made for dealing with the offender who is a persistent violator, a professional, or a dangerously deviated personality. If special provision is made for these offenders, the community will probably be more ready to accept a moderate sentencing structure for the ordinary offender. Mr. Rubin suggests that a judge who feels a penalty in excess of five years is justified be permitted to apply to an appellate bench of judges for an increased penalty (pp. 122–23). This seems unnecessarily awkward. Providing proper criteria are formulated, this is a matter for the trial judge. This is the position of the ALI in its provisions for an "extended term" and apparently has the approval of the NPPA although the latter is currently formulating an alternative "dangerous offender" provision which it believes will be an improvement over the ALI draft.[16]

Reviewers sometimes criticize an author for not writing a book he had no intention of writing. Mr. Rubin's book, as he puts it, is directed mainly toward "an interested layman or student," to enable him "to orient himself to the problems discussed, and to participate, as it were, with the professionals in the things that are the concern of all" (p. iv).

But given this goal, it does not seem captious to wish that he had spent more time in editing, revising, and bringing his materials up to date. It is also hard to excuse his failure to discuss more fully and critically the relevant sections of the Model Penal Code. However, Mr. Rubin has raised enough difficult questions to make both layman and professional uneasy about the state of delinquency, crime and correction in this country. In doing that he has rendered a valuable service.

RICHARD C. DONNELLY*

[16] Turnbladh, A Critique of the Model Penal Code Sentencing Proposals, 23 Law & Contemp. Prob. 544, 547 (1958).

* Professor of Law, Yale Law School.

Freedom To Travel—Report of the Special Committee To Study Passport Procedures of the Association of the Bar of the City of New York. New York: Dodd, Mead Co., 1958. Pp. xxv, 144. $4.00.

Since 1941, an American citizen who wishes to travel outside the Western hemisphere must have a passport in time of war or national emergency. Because the "national emergency" proclaimed by President Truman on December 16, 1950 during the Korean War still exists, we may be reasonably sure that its discontinuance will follow only the demise of the "Cold War." Thus in 1951 the State Department began to assume control over foreign travel by American citizens. Passports were denied to persons suspected of being Communists or of having left-wing beliefs or associations; to persons seeking to attend international congresses frowned upon by the State Department; and, finally, to individuals whose presence abroad was not deemed in the "national interest." To cite one

notorious case, former Federal Judge William Clark, who had been critical of State Department policy while serving in occupied Germany, was denied permission to return to that country.[1]

In addition to the individual restraints effected by the denial of passports to certain American citizens, the State Department also began to use its control over passports as an incident of foreign policy by barring *all* citizens from travel to certain countries, principally those in the Soviet bloc. The ban on travel to Red China is the best known example of such area restraints; however, travel to certain Mideast countries was prohibited during the Egyptian crisis of 1956–1957.

The power of the State Department thus to restrict travel was first challenged in 1952 by a series of court cases which resulted in judicial criticism of State Department procedures and stimulated Congressional appraisal of passport policies. At this juncture, the Fund for the Republic gave the Association of the Bar of the City of New York a generous grant and a free hand to evaluate the system of travel control which had evolved without systematic Congressional or indeed public study. The Association of the Bar appointed a special eight-man committee which engaged Professors Robert B. McKay and Cecil J. Olmstead of the New York University School of Law as its staff, conferred with a great many experts both in out of government and then published the distinguished report, "Freedom To Travel."

"Freedom To Travel" is marvelously concise, yet clear and comprehensive. In 90 pages, the Special Committee surveys our passport history; reviews the leading judicial opinions, including those handed down last term by the Supreme Court;[2] argues persuasively for the need for a change in current passport standards and procedures; and then suggests the principles which should govern the issuance of passports. Whether one agrees or disagrees with these recommendations, the Special Committee deserves commendation for so skillfully illuminating the crucial issues of passport control. The Fund for the Republic, which has made possible distinguished studies of Congressional investigations,[3] popular attitudes on civil liberties,[4] and racial discrimination in housing,[5] has again demonstrated foundation statesmanship of a high order.

The crucial questions posed by "Freedom To Travel" are: first, shall passports be denied to Communists or to those who, in the language of the State Department regulation in effect prior to *Kent v. Dulles* and *Dayton v. Dulles*,[6] seek a passport to "support the Communist movement"; second, should the

[1] See Clark v. Dulles, 129 F.Supp. 950 (1955).

[2] Kent v. Dulles, 357 U.S. 116 (1958); Dayton v. Dulles, 357 U.S. 144 (1958).

[3] American Bar Association, Special Committee on Individual Rights as Affected by National Security, Report on Congressional Investigations (1954).

[4] Stouffer, Communism, Conformity, and Civil Liberties (1955).

[5] Commission on Race and Housing, Where Shall We Live (1958).

[6] Cited note 2 supra.

State Department be empowered to embargo travel to specified countries as an incident of foreign policy; third, should the State Department be authorized to make findings in individual cases on the basis of confidential information not disclosed to the applicant.

The *Kent* and *Dayton* cases decided last June did not reach the constitutional issues; the Supreme Court merely held that Congress had not authorized the denial of passports because of "beliefs or associations." But the Court affirmed that there was a constitutional right to travel and warned that it would be "faced with important constitutional questions" were it to hold that Congress had given such power to the Secretary of State. President Eisenhower thereupon urged Congress to confer "clear statutory authority" upon the State Department to deny passports "where their possession would seriously impair the conduct of the foreign relations of the United States or would be inimical to the security of the United States." He warned that: "Each day and week that passes without it exposes us to great danger."[7] Six weeks later, the House of Representatives passed H.R. 13760 authorizing the denial of passports to any member or ex-member of the Communist Party or to anyone else who had since 1948 knowingly engaged in activities "intended to further the International Communist movement." This bill, however, died in the Senate during the logjam at the end of the session.

In contrast to the criteria for passport eligibility contained in the House bill, the Special Committee report recommends unanimously that no passport be denied because of an applicant's beliefs or associations but only if it could be reasonably anticipated that the passport holder would, while abroad, engage either in transmitting United States "secrets," in inciting "attacks by force" upon the United States, or in inciting hostilities or conflicts that might involve the United States. In practice, the adoption of these recommendations would make the denial of a passport to any individual almost impossible, particularly since a majority of the Special Committee recommended a "full-disclosure" hearing with ex parte evidence forbidden. Nevertheless, civil libertarians may find it difficult to accept even this limitation. For one thing, as the Special Committee itself recognizes, the State Department would have to predicate its denial of a passport upon a prediction of an individual's action and thus a citizen would be denied a constitutional right because of government anticipation that he will engage in proscribed conduct. Secondly, the three dangers sought to be prevented by the recommendations are illusory. Before the State Department could find, on the basis of disclosed evidence, that a person might transmit "security information" abroad he has probably committed enough crimes in the United States to allow his imprisonment here. As for the second danger, that a passport holder might, while abroad incite attacks by force upon the United States, it seems obvious that even in countries where such incitement is considered as anything more than a lunatic's ravings, an American citizen's

[7] N.Y. Times, p. 54, col. 2 (July 8, 1958).

views are hardly likely to substantially influence a foreign government's policy. The third danger, that a passport holder might incite hostilities involving the United States, is no more substantial.[8] It is most unlikely that such "hostilities or conflicts" would arise from, or be exacerbated by, an "incitement" of an American. Furthermore, there is the danger that the State Department may regard as incitement what is actually the expression of a legitimate point of view.[9]

On balance, therefore, the risks of such passport control seem to outweigh any reasonably anticipated dangers. The Senatorial bloc led by Hubert Humphrey expressed that view in a passport bill introduced after the publication of "Freedom To Travel." This bill prohibited the denial of a passport to anyone for any reason with two relevant exceptions: (1) during wartime the President has complete control; and (2) when U.S. forces are participating in hostilities not formalized by a declaration of war, the President may regulate entry into combat areas.[10]

While the Special Committee was unanimous in its recommendations on individual restraints, its eight members split four ways on the type of hearing to be held by the State Department before it denied a passport. Four members (three of whom are associated with eminent and conservative New York law firms and the fourth is counsel for General Electric Co.) would forbid ex parte evidence and allow the applicant full confrontation and cross-examination of opposing witnesses. Two others (the chairman of the Special Committee, a partner of a distinguished law firm, and a member who was former legal advisor of the State Department) part company with the first four only in the extraordinary case of an applicant who has had access to government information which is still "highly classified" at the time of the application. The seventh member would allow the temporary withholding of a passport, but only for a single nonrenewable period of six months, upon the personal certification of the Secretary of State that such action is essential because "security would be jeopardized" by holding a hearing. The eighth member would allow a denial without a hearing upon the certification of the Secretary of State or the Attorney General that otherwise confidential sources of informations might be disclosed. Thus, except in the most extraordinary situations, six of the eight members insist upon a hearing with full disclosure, confrontation and cross-examination.

[8] The illustration of the Special Committee is where an American visits the Near East in order to inflame conflicts between the Arabs and the Israelis.

[9] It would be anomalous to prevent an American citizen from traveling to a country outside the Western hemisphere because such citizen may incite hostilities involving the United States, when he may without a passport visit any Latin American country to urge, for example, the nationalization of property owned by United States corporations.

The Special Committee also recommends two additional grounds for denial of passports, unrelated to national security: (1) when the applicant is a fugitive from justice or under a court restraining order, or (2) when the State Department has previously been called upon to finance the return to the United States of an applicant who is still indebted to the Government

[10] S. 806, 86th Cong; introduced by Senators Humphrey, Anderson, Chavez, Hennings Morse, Neuberger and Symington. 105 Cong. Rec. 1204 (1959).

The third crucial issue of travel control, area restraints, is presently exemplified by the denial of permission to American journalists to visit Red China. The prior justification of such area restraints by the State Department was that they were a protection of American travellers; the present is that the State Department can not issue passports for travel to countries whom the United States does not "recognize." These rationales do not disguise the fact that such denials are based on the desire to use foreign travel as an incident of foreign policy, i.e., as a means of applying political or economic sanctions.[11]

As the Special Committee pointed out, it is a "close question, too often" whether the sanction actually falls upon the foreign government or the people of this country. Nevertheless, the Special Committee approved unanimously the Secretary of State's authority to impose such bans without a public hearing of any kind, with the recommendation that the Secretary of State issue a public statement setting forth his reasons for the ban.

To this writer at least, past experience with such bans is not sufficient to allow the State Department an absolutely free hand in imposing further bans while our country is not at war. In 1935, when Italy invaded Ethiopia, the State Department sought to demonstrate its disapproval by banning travel to the victim rather than to the aggressor. A ban on travel to Egypt, Israel, Jordan or Syria was imposed on American citizens on November 2, 1956, presumably because of potential danger to American travelers, whereas England, France and Canada, with greater reason to fear for the safety of their nationals, allowed such travel.[12]

If, in order to promote our foreign policy, the State Department is allowed a free hand in regulating the activities of American citizens, it could, for example, limit charitable collections by the United Jewish Appeal in order to improve relations with Arab states, or stop agitation in this country to recognize Red China because such agitation undermines the American position in negotiating with the Soviet Union. Certainly no one would suggest such regulations are proper subjects of State Department power. American acquiescence in unbridled passport power is a survival of the days when all foreign policy was the exclusive prerogative of an absolute monarch.[13] The view of the Special

[11] The surprising lack of litigation testing the validity of such bans is probably caused by the State Department's frequent exceptions, except in the case of Red China, for individuals with a legitimate need to visit such blocked off areas.

William Worthy, the Negro journalist whose passport was lifted because he defied the State Department and visited Red China, has sued to recover it. The case is now pending before the Court of Appeals for the District of Columbia; the District Court had dismissed his petition (1958).

[12] My own view is that the ban was imposed as the initial effort at economic sanctions against Israel, whose tourist trade during the 1957 Passover season was disrupted by the prohibition.

[13] There is no "right" to a passport in England, France or Canada, or even to a hearing or statement of grounds for denial; in these countries the issuance of a passport is exclusively an executive prerogative. See pp. 91–99.

Committee that "on balance" this authority is "a necessary instrument to advance the national interest" is beginning to be questioned. It is hoped that this doubt will gain support.

The authors of "Freedom To Travel" obviously did not intend it as a definitive statement of American policy on passport control. What they hoped to do was stimulate an informed and rational discussion of this important public issue. Their admirable report will undoubtedly achieve that purpose.

WILL MASLOW*

* Member of the New York and Supreme Court Bars; General Counsel, American Jewish Congress.

Law and Locomotives: The Impact of the Railroad on Wisconsin Law in the Nineteenth Century. By Robert S. Hunt. Madison, Wisconsin: The State Historical Society of Wisconsin, 1958. Pp. xii, 292. $6.50.

In 1874 Benjamin R. Curtis, of the Massachusetts Bar, stood at the apex of his profession in terms of reputation for legal acumen and individual integrity. Many lawyers and laymen throughout the nation devoutly hoped that President Grant would choose Curtis to succeed Chase as Chief Justice of the United States. That the President did not do so, even after suffering the humiliation of two false starts, was widely regarded as a reflection upon the President and not upon a man who had earlier served with distinction as a member of the Supreme Court and whose solid professional and personal distinctions acquired in that service bore the liberal patina of dissent from the reactionary dogmas of *Dred Scott v. Sandford*.[1]

1874 was also the year in which a frontier legislature in Wisconsin passed, in what it conceived to be the public interest, a statute limiting transportation charges exacted from its citizens by the railroads operating in the state. The statute in question—the so-called Potter Law—was a rudimentary beginning at best on the complex job of economic regulation. In addition to prescribing maximum rates for various classifications of passenger and freight service, it created an administrative body of three commissioners with powers to inquire into operating costs and to reduce, but not to raise, the prescribed rates in certain narrowly defined instances. The sanctions provided by the law were wholly inadequate inasmuch as no authority was given the state to proceed directly against the railroads for violation of the statutory rates.

Mild as this was, at least by reference to the standards of regulation lying just over the horizon, the two major railroads in Wisconsin promptly announced that they would not obey the law when it became effective, and set in motion legal maneuvers looking towards the invalidation of the law in the courts. These included, as a first step, obtaining opinions from prominent law-

[1] 60 U.S. (19 How.) 393 (1857).