The Saturday Review

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Judge Curtis Bok

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"IF WE ARE TO ACT LIKE FREE MEN . . ."

By CURTIS BOK, *Judge of Philadelphia's Court of Common Pleas No. 6 and author of "The Backbone of the Herring" and "I, Too, Nicodemus," who delivered this address at the National Book Award ceremonies in New York City on January 26.*

A YOUNG friend of mine was recently cleared of a murder charge to which he had falsely confessed as the result of police brutality and the violation of everything we know as due process of law. In consequence, he served twelve years of a life sentence. When I asked him what he had learned from the experience he had two crisp replies: one, the need for able and honest counsel, and, two, the constant need for due process. He had not known at his trial that he was entitled to either. He said that he and other young men like him believed that society and the law were both against them, and that their only rights were to take the easiest way out of a hard bargain.

In the whole history of law and order the longest step forward was taken by primitive man when, as if by common consent, the tribe sat down in a circle and allowed only one man to speak at a time. An accused who is shouted down has no rights whatever. Unless people have an instinct for procedure their conception of basic human rights is a waste of effort, and wherever we see a negation of those rights it can be traced to a lack, an inadequacy, or a violation of procedure. Hence procedure effectively comes first: the mechanics of argument and discovery are often set up before the rights they serve take full form in practice. Even the common law had its origin in a group of writs drawn for various uses by Henry II. The law was common only in the sense that the writs were uniform throughout the jurisdiction of the King's judges.

The work of Congressional investigating committees is a good example of what happens when there is no procedure. There is no quarrel with the idea that we want dishonesty or Communism in the machinery of our Government no more than we want sand in the machinery of our cars. Both have an abrasive quality that we can do without. But there is a difference between investigating whether there are bears in North Dakota and whether there are Communists there, and hence there is a real question, in terms of human values, of whether the proceeding is essentially exploratory or criminal.

The current committee says that its object is to expose Communists and that it is not a crime to be one. A witness asked if he is one refuses to answer, arguing that since it is a crime under the Smith Act to advocate the violent overthrow of the Government he might incriminate himself if he should admit to membership in a group that does advocate it. In any court proceeding it is the judge's duty to pass on the validity of a refusal to answer. If the committee believes that it is not a crime to be a Communist it should over-

rule the plea of the Fifth Amendment and cite the witness for contempt. But it accepts the plea and thereby lends some weight to the view that the proceedings are essentially criminal. If so what about the witness's right to know the indictment, to have the active aid of counsel, and to be confronted with the witnesses against him? These rights are not given him, and it is little wonder, faced with such a hybrid, that witnesses plead the Fifth Amendment who would need not do so if there were adequate procedure. The result serves neither the Government nor its citizens as well as might be.

It is less important to call particular Senators hard names than it is to belabor Congress to provide proper procedure. After all, the challenge we face is not the issue between Communism and capitalism but the issue between freedom and slavery, and if we are to act like free men we will win by vitalizing our procedures, not by trying to put handcuffs on a gale of wind.

I KNOW that you are primarily interested in the First Amendment, which guarantees freedom of speech and press. This, with freedom of religion, is for the moment in a relatively quiet backwater. The Fourth and Fifth Amendments will be the battleground this year, when Congress considers watering down the Fifth by making witnesses speak, in return for immunity from prosecution, and interprets the Fourth, which secures against unreasonable searches and seizures, to allow legislation making wire-tapping legal.

Aside from desultory sniping in the form of local censoring ordinances, the First Amendment should enjoy an uneasy peace. There is rarely more than one major constitutional battle going on at a time, but when one great right becomes the area of a fighting faith others become sympathetically warm. Who dares to write radically about political and economic subjects today? Nor is the battle joined evenly. A recent effort to regulate sound trucks was met by a loud cry that freedom of speech was in danger. But when the New York newspapers were struck two months ago few people raised the same cry. For ten days the newspapers wanted greatly to speak but could not. Why wasn't this an obvious violation of the First Amendment? The answer lies, I think, in procedure. Labor has the right to assemble, to bargain collectively, and to strike. This form of economic due process has won such wide approval that the newspapers' right to speak went quietly out of the window for ten days.

The great corner columns of our freedom are considered immutable, but they do take different shapes on different occasions, at different times, and under different pressures. You will remember Homer's telling us that Paris's peculiar sin in seducing Helen of Troy was not that he violated Menelaus's wife but that he violated Menelaus's hospitality—a breach of domestic due process that was the more grievous offense in those days. Certainly the difference between the sound truck and the newspaper cases is not one of quality. Speech by sound truck represents little more than the right to open one's mouth at will and bray. Possibly the difference lies in governmental as opposed to private censorship, but—comparing the value of the two media—that falls short of a full answer. The fact remains that public opinion considered labor's right to strike as more important than the incidental burden on the press to keep its mouth shut for ten days. I don't say that this is right or wrong: I do say that you cannot always tell which procedure will come out on top at a given time.

The whole subject is colored by custom and usage more or less temporary in a swiftly moving economy. As a lawman I grasp eagerly at custom. We deal in naked legal rights, and the more naked they are the less they have to do with taste, manners, and decorum. A few years ago I protected nine unpleasant books against the charge of obscenity. I do not remember putting in a more lugubrious six weeks than while reading them. Holding my nose with one hand, I upheld with the other the right of free speech that they represented. For this I got a certain amount of acclaim. Twenty years ago Judge Woolsey got more acclaim for clearing "Ulysses." This only means that "Ulysses" was even naughtier than the books I cleared. The more extreme the book the greater the acclaim, apparently, and this should make one wince a little, unless the whole issue be evaded by defending the stenographic approach to reporting life. Maybe the stenographer's notebook generates an awful power of its own by showing precisely what exists, but except in the rare hands of a master it is only the power of dead weight on the loose, like a runaway freight car.

I want to leave you a picture of judges who do not necessarily enjoy upholding the brave, the wild, and the free. They enjoy forging a taut legal opinion, but they can resent the need to apply their best effort to the products of the dung heap. I have been told, if this sounds condescending, that we should not anchor the law to the preconceptions of the past. That is beside the point. I would anchor the law to the better conception, whether it be past or present, and people know when one idea is better than another, although it may take time to make their choice effective. Where they get in trouble is in creating the means to the end, and

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Your Literary I. Q.

Conducted by John T. Winterich

STAG LINE

Fannie Gross of Asheville, North Carolina, lists on the left ten males who are subjects of biographies by contemporary writers who are by no means all males. In the center column are the titles of the works, on the right the authors. Can you make the double matches? Allowing five points for each correct hitch, a score of sixty is mediocre, seventy is ocre, and eighty or better superocre. Answers on page 51.

1. Benito Mussolini	( )	"The Builder"	( ) Catherine Bowen
2. John D. Rockefeller	( )	"Yankee from Olympus"	( ) Arthur Mizener
3. H. L. Mencken	( )	"The Far Side of Paradise"	( ) Philip Dorf
4. Ezra Cornell	( )	"Good Night, Sweet Prince"	( ) William Manchester
5. F. Scott Fitzgerald	( )	"The Great Man"	( ) Allan Nevins
6. Oliver Wendell Holmes	( )	"Man of Fire"	( ) Eleanor Ruggles
7. George Washington	( )	"Prince of Players"	( ) MacKinley Helm
8. John Barrymore	( )	"Disturber of the Peace"	( ) George Seldes
9. José Clemente Orozco	( )	"Sawdust Caesar"	( ) Howard Swiggett
10. Edwin Booth	( )	"Study in Power"	( ) Gene Fowler