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Book Review: Protest: Sacco-Vanzetti and the Intellectuals

Willard D. Lorensen

West Virginia University College of Law

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There the chief found one Boda, who admitting knowing Coacci and who admitted owning a car which was in a garage for repairs. Further investigation showed that both Coacci and Boda had worked for the company whose payroll had been taken. Speculation grew that the Boda car may have been used as a second get away car after the stolen one used in the actual holdup had been abandoned. The Boda car was found at the garage of one Johnson, who promised to inform police when the owner called for it. On the evening of May 5, 1920, four men called to pick up the car but left when the garageman delayed them by raising a question about operating the car with an expired license. Boda and a companion left on a motorcycle while the two others boarded a street car. Phone calls alerted police down the line and the arrest of the two on the street car was accomplished. They were, of course, Sacco and Vanzetti. Each was carrying a pistol at the time of arrest.

Friends brought in Fred H. Moore, a colorful defense counsel who had gained experience in defending unpopular causes in his representation of Wobblies in the West. He mobilized forces sympathetic to the radical movement of the time and injected, according to author Felix, the issue of radicalism into the case by using it to counter the prosecution's "consciousness of guilt" evidence. Thus, the flight from the stalling garageman and evasive and contradictory answers given to police upon their arrest were explained by Sacco and Vanzetti in terms of radicalism. They had, they testified, sought the automobile to retrieve radical literature from various persons so as to relieve them of suspicion that might attach to possession of such material. The famous "Red Raids" of Attorney General Palmer had occurred only a few days before.

After a lengthy trial, which brought forth masses of conflicting testimony, the jury returned a verdict of guilty. Efforts to gain a new trial wore on for six years. Witnesses changed stories. One Mederios (under sentence of death for another crime) confessed participation in the crime and exonerated Sacco and Vanzetti. A state's ballistic expert significantly altered his testimony. But, eventually all defense efforts failed and the sentence was duly executed.

No mere error of justice would have immortalized Sacco and Vanzetti. Sad to say, too many others have suffered erroneous convictions in near anonymity. Sacco and Vanzetti became martyrs

of the first rank because the belief became widespread that they were the victims of prejudice. Their execution thus was widely condemned not merely as an unfortunate error, but as an oppressive, egregious abuse of public trust. To put the conviction and execution in this light, the issue of prejudice had to be made effectively by the protestants. This, according to author Felix, is where the intellectual community ignored the facts and surrendered to sentimentality. To show how the egg-heads were led astray, Felix mounts his counterattack principally against Felix Frankfurter, then a professor at Harvard Law School. Frankfurter's major contribution to the Sacco-Vanzetti legend was a long article published in the prestigious *Atlantic Monthly* in March 1927 which seemed to clinch the case for the intellectual community. This article was later expanded somewhat and published as a book.

Felix devotes chapter 14 to a counterattack on the prejudice issue. A convincing argument here would give credence to his thesis. He identifies and deftly turns aside the manifold complaints that combine to form the conclusion on the prejudice issue. By avoiding "wearisome" detail he gives the impression of subduing not only the Frankfurter criticism but of neutralizing other censures as well. But closer examination will show that his glib, once-over-lightly mode of attack fails miserably to dent the wearisome, detailed and more carefully argued critique of Frankfurter. The muddy complexity involved in unraveling argument and counterargument allows only a couple points to be raised here to demonstrate that the Frankfurter's classic indictment of the Sacco-Vanzetti trial escapes unscathed.

First, Felix brands as groundless Frankfurter's allegation that the charge of Judge Thayer to the trial jury was prejudiced. Felix asserts that Frankfurter complained of biased, pro-prosecution treatment of the crucial ballistics evidence. The charge is groundless, according to Felix, because (a) Frankfurter overlooked a lengthy admonition by Judge Thayer on fairness given as a part of the jury charge; and (b) because Thayer in fact "reviewed both sides of the ballistics testimony at equal length and carefully left the judgment to the jury" ¹ Felix so completely misrepresents the nature of Frankfurter's criticism that his counterargument is largely irrelevant. Frankfurter did complain that the trial judge's

¹ p. 144.

charge was prejudicial and did "play on the emotions of the jury." This complaint was founded on (a) Judge Thayer's unnecessary discourse on "loyalty" after he had allowed a wide ranging cross examination of the defendants' beliefs in the doctrine of anarchy, and (b) Judge Thayer's allusion to the duty of the jurymen to act as soldiers though the defendants' flight from the country to avoid military service in World War I had been brought out at length at the trial. Frankfurter's discussion about the reference to the ballistics evidence in the charge of Judge Thayer goes to quite a different matter that author Felix would lead one to believe. Frankfurter was incensed because at the trial, Judge Thayer put emphasis on the significance of the ballistics testimony (no slanted emphasis, but simply emphasis) yet the same Judge Thayer belittled the importance of this evidence when confronted with a change in testimony by one of the prosecution's two expert witnesses. This witness, Proctor, had testified at trial that a bullet taken from one of the victims was "consistent with" being fired from the pistol taken from Sacco at the time of arrest. After the trial, Proctor signed an affidavit that (a) he could not identify similarities between test bullets fired from Sacco's pistol and slugs taken from the victim; (b) the prosecution knew this and (c) his testimony was carefully prearranged to allow him to use a misleading double negative, *viz.*, that he testified in effect that he could *not* say that the death bullet was *not* fired from Sacco's pistol. Frankfurter's reference to the ballistics charge was advanced to castigate Judge Thayer for refusing to grant a new trial on the basis of the Proctor affidavit.

Second, and more importantly, Felix seeks to avoid the Frankfurter analysis by labeling it as "a legal brief [which] anticipates the exaggerations of opposing counsel by its own one sided arguments"² In support of this position he advances an argument that is astounding for its naivety: "Frankfurter's book uses as its authority . . . not the official case record . . . but the *Defendants' Exceptions*"³ This, chortles Felix, accounts for Frankfurter's giving an inaccurate account of what Judge Thayer said to the trial jury in regard to the ballistics question. Mr. Felix takes considerable straightening out at this juncture: First, he misrepresents what Frankfurter said about the ballistics charge—as noted above; Second,

² p. 159.

³ *Ibid.*

the total charge of Trial Judge Thayer is set out in the *Defendants' Exceptions* so there was obviously no possibility of a warped view arising from the cause assumed by Felix; and Third, the only record that was in any sense "official" at the time Frankfurter wrote was the *Defendants' Exceptions*. This was the only record then or since certified to be accurate by the trial judge and the prosecuting attorney. The silly assumption that there is a built in bias resulting from Frankfurter's citation of *Defendants' Exceptions* raises a grave doubt as to whether the author had an adequate appreciation of the material he was dealing with at this crucial point. What is even more shocking, though it is not expressly stated in the book, is that by necessary implication Felix must brand Frankfurter either a liar or a dupe. Frankfurter, in the introductory paragraph of his *Atlantic Monthly* article said: "The aim of this paper is to give in the briefest compass an accurate resume of the facts . . ." ⁴ This assertion of an impartial review was expanded when the material was put in book form to read as follows: "Obviously, to tell the story within limited space requires drastic compression. The necessary selection of material has been guided by canons of relevance and fairness familiar to every lawyer called upon to make a disinterested summary of a protracted trial. . . ." ⁵ Frankly, Frankfurter is much more convincing on the point than Felix. There really is not much of a contest.

It is rather a shame that Felix's book comes apart at such a crucial point. He is an adroit writer. He has gathered within the modest size of the book a moving, panoramic view of the case, the interesting personages around it and the fascinating legend that grew from it. *Protest* is fun to read, but obviously, it cannot be taken too seriously.

Willard D. Lorensen*

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⁴ Frankfurter, *The Case of Sacco and Vanzetti*, ATLANTIC MONTHLY, March 1927, at 409.

⁵ FRANKFURTER, THE CASE OF SACCO AND VANZETTI 3 (Grosset & Dunlap ed. 1962).

*Professor of Law, West Virginia University.