

## BOOK REVIEWS

PROTEST: SACCO-VANZETTI AND THE INTELLECTUALS.  
 BY DAVID FELIX. Bloomington and London: Indiana University Press,  
 1965. Pp. 265. \$5.95.

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On August 22, 1927, Nicola Sacco and Bartolomeo Vanzetti were executed by the Commonwealth of Massachusetts. They had been convicted in 1921 of murdering one Berardelli in the course of an armed robbery of a shoe company paymaster at South Braintree. The defendants were Italian immigrant anarchists. The era was that of Babbity, xenophobia, Harding-Coolidge "normalcy" and Attorney General Palmer's raids against radicals. In the six year interval between trial and execution, there gathered about Sacco and Vanzetti an extraordinary assembly of vindicators, including Felix Frankfurter, Walter Lippmann, Dorothy Parker, Edna St. Vincent Millay, Arthur Schlesinger and John Dewey. Those of us who were arriving at the age of political awareness in the summer of 1927 will not forget the tensions of that frenzied final week of efforts to save two lives. Vibrations emanating from world-wide massive protest demonstrations electrified the political atmosphere. I can still see the protesting poster in the shop window of an Italian cobbler on the main street of our town.

Were they in fact guilty? The question seems almost irrelevant four decades after their death. The continually relevant questions are: Does our system of justice work as well as is humanly possible? Should capital punishment be abolished in a regime of justice so long as there is an irreducible margin of human error?

The theses of David Felix' book include the following propositions: The evidence was convincing of Sacco's guilt and persuasive of Vanzetti's. They had a fair trial despite the fact that the trial judge, Webster Thayer, was a political reactionary. The liberals of the Twenties came (belatedly) to the support of these alien defendants because the liberals themselves felt alienated in the Harding-Coolidge society, and found identity in the role of protestants. The innocence of Sacco and Vanzetti was elevated to the status of an article of faith, and Vanzetti to the role of saint in a secular hagiography created by American writers of the Thirties.

More than one of my liberal friends find Felix' theses so repellent that they refuse to read the book; and some of the reviews—*e.g.*, that of Pro-

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fessor Bickel of Yale Law School in the *New Republic*<sup>1</sup>—have a quality of anguished defensiveness about the sacred “myth,” as Felix characterizes the Sacco-Vanzetti case.

Central to any reconsideration of the case is the ballistics testimony. Did the gun, which was incontrovertibly Sacco’s, fire the bullet which incontrovertibly slew Berardelli? Felix and Bickel agree that the testimony of ballistics “experts” on both sides left much to be desired. But Felix emphasizes the jury’s own comparison, under microscope, of markings on the fatal bullet with markings on a bullet test-fired from Sacco’s gun, and his own inspection of matched photographs prepared by a technique developed since the Sacco-Vanzetti trial:

For anyone who would derive his own understanding independent of other men’s interpretations, the best, the densest, the grittiest truth of the vast rubbish of the Sacco-Vanzetti case lies buried in the Harvard Law Library. Showing both bullets and shells, it is a series of enlarged photographs of the Goddard test made with a comparison microscope. In one plate, Goddard reproduces the bullet enlarged to about four by one and one-half inches; this is actually a composite of the nose of the fatal bullet and the base of a test bullet. Like the others, this photograph had been taken through the single eyepiece of a comparison microscope, with the two projectiles being viewed by the two microscope barrels, the eyepiece splitting the images and joining the halves to form the one image that appears in the photograph. It is impossible to distinguish the two halves; one would think one were looking at an ordinary bullet in magnification if the photographer had not sketched in a broken line to indicate the invisible line of jointure.

The various markings are very distinctive; they look like tracks on a muddy road. Imagine photographs of two *different* muddy roads and imagine trying to join halves of those two photographs: there would be an abrupt line where the tracks—differing in width, depth, and darkness—of the one half would begin and those of the other half would end. You have no better chance of matching photographs of bullets fired in two different weapons than of matching pictures of any two different rutted roads. The Goddard photography is clear and precise; the viewer’s recognition of the similarity is absolute. (Pp. 127-28.)

To this, Professor Bickel responds:

[T]his test was made forty years after the bullet was fired. It was made by comparing the ancient bullet, which had passed through so many hands, with a new one fired through the rusty

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<sup>1</sup> Bickel, *Book Review*, *New Republic*, Apr. 2, 1966, p. 23.

barrel of the equally ancient and peripatetic gun. The old bullet was admittedly corroded, and Sacco's pistol had first to be fired a few times to blast out rust in the barrel before test shots could be fired for comparison purposes.<sup>2</sup>

One would think that these circumstances rendered even more remarkable and persuasive the congruity which Felix reports (see photograph opposite P. 39), between half-images of the fatal and test bullets.

Aside from its actual bearing on the question of Sacco and Vanzetti's guilt, Felix' chapter 11 on the ballistics controversy is worth the price of the book for students of criminal law who want to experience the slipperiness of expertise, the flexibility of the ethics of prosecution and defense, the exquisite uncertainties of guilt, the mystery of "beyond a reasonable doubt" and the full flavor of Pilate's tantalizing question about "truth," in John 18:38.

On the question of freedom of the trial from political or racial prejudice, Felix emphasizes that the criticism of Judge Thayer rests largely on one intemperate statement of his belief in defendants' guilt, *made out of court*, not on any judicial misbehavior in the conduct of the trial. He points out that at an earlier trial, in which Vanzetti had been convicted of another armed robbery in Bridgewater, prior to the fatal incident at South Braintree, there was absolutely no mention of radicalism. The press gave the affairs only the scant notice of a bit of routine thuggery. Arthur S. Nickerson, a surviving Bridgewater trial juror interviewed by Felix, indignantly denied racial or religious prejudice in the jury, citing the fact that he had an Italian brother-in-law. He asserted that he had voted to convict Vanzetti reluctantly, supposing at the time that he was voting against a poor devil whom he had known casually in the plant where they both worked. When he returned to work and found his fellow-worker still there, Nickerson realized that he had made a mistaken identification. Only then did he perceive that the prosecution witnesses whom he had heard and believed might also have been mistaken in identifying Vanzetti at the scene of the robbery.

At the subsequent murder trial, it was the defense, not the prosecution, which made an issue of the defendants' politics. This was partly because the defense had to explain away some very damaging facts: that the defendants were heavily armed when arrested, and that they gave a demonstrably false explanation for their possession of the weapons. The explanation proffered by the defense was that, being anarchists, Sacco and Vanzetti were fearful of and prepared for violent attacks against themselves. Felix, however, suggests another reason for the prominence which the political issue gradually assumed. He focuses on the enigmatic character of Fred H. Moore, the chief defense counsel at the trial. Felix limns him with zest: successful railroad attorney who walks out of the office one day

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<sup>2</sup> *Id.* at 24.

to defend a labor union acquaintance and never comes back; long-jawed Westerner who takes his shoes off in a "well-buttoned" Massachusetts courtroom; notable womanizer; wandering quixotic defender of Wobbly dynamiters; friend of union and A.C.L.U. leaders. Was Moore a better publicist than lawyer, more interested in the "cause" than the client? After the trial, Moore was succeeded by other counsel who attacked the conviction partly on the basis of Moore's deficiencies.

The case moved to the appellate courts. There was controversy over the scope of review by the Supreme Judicial Court of Massachusetts. There was controversy over whether the requirement of due process was satisfied when Judge Thayer, accused of bias, sat as judge to determine his own integrity. There was controversy over the weight to be given to new evidence implicating "the Morelli gang," brought forward after the trial.

Ultimately the matter was before the Supreme Court of the United States on petition for certiorari. It was summertime. The Supreme Court was not in session and would not meet until October. The Governor of Massachusetts declined to postpone execution long enough to enable the Supreme Court to pass on the contentions of the condemned men. The defense lawyers petitioned Mr. Justice Holmes of the United States Supreme Court to stay execution. He had power to do so while the Court was on vacation, but declined, saying:

I do not consider that I am at liberty to deal with this case differently from the way in which I should treat one that excited no public interest and that was less powerfully presented. I cannot say that I have a doubt and therefore I must deny the stay.<sup>3</sup>

And so, the defendants having died on August 22, 1927, the Supreme Court dismissed the petition for certiorari on October 3. The case was "moot."

This would not happen today.<sup>4</sup> Governors and Supreme Court Justices now take a different view of the relation between law and life.<sup>5</sup> The country which in the Twenties and Thirties was executing between 150 and 200 people a year in the name of public safety, executed only 7 last year.<sup>6</sup>

<sup>3</sup> MICHAEL & WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 1231 (1940).

<sup>4</sup> See *Rosenberg v. United States*, 346 U.S. 273 (1953). The defendants had been convicted and sentenced to death for conspiring to violate the Espionage Act by communicating atomic secrets to the Soviet Union. On June 16, 1953, a day after the Supreme Court adjourned for the summer, the defendants petitioned Mr. Justice Douglas for a stay of execution. Convinced that a substantial question of law had been raised, he granted the stay. The Attorney General then applied to the Court, asking that a Special Term of Court be convened and the stay vacated. The Court was convened on June 18, the case was argued for several hours and on June 19 the Court vacated the stay. The Special Term was adjourned, executive clemency was denied and the sentence of death was carried out.

<sup>5</sup> Mr. Justice Douglas, in granting the stay in the *Rosenberg* case, *supra* note 4, at 321, said: "It is . . . important that before we allow human lives to be snuffed out we be sure—emphatically sure—that we are within the law. If we are not sure, there will be lingering doubts to plague the conscience after the event."

<sup>6</sup> FEDERAL BUREAU OF PRISONS, DEP'T OF JUSTICE, NATIONAL PRISONER STATISTICS BULL. No. 16 (1957); N.Y. Times, Feb. 18, 1966, p. 14, col. 1.

Whether or not the "martyrdom" of Sacco and Vanzetti be "myth," Felix' account of the reflection in art of these real, earth-shaking deaths is an absorbing and illuminating exercise on the borderlands of politics, law, sociology and literary criticism. He takes up one by one the novels and plays that wove themselves about the case and helped build the myth. In the end, he acclaims the myth, regardless of its verity:

One of the finer ironies of the case is that it did more good than harm, whatever encouragement it gave to nonsense. In the first place, it taught tolerance for foreigners and strange ideas. Moreover, it made people think. It was the only significant intellectual occurrence in the United States between the first World War and the depression. Through the intellectuals, it forced itself on the nation when Americans wanted to sleep in the static promise of a perfected capitalism. Something was wrong, and the questions raised by the case were helpful in attacking the failures in the national leadership. The fact that the criticism was widely off the mark does not negate its value. Progress often requires the grossest of stimuli. . . .

Like other legends it was called into life to fill a need. Religions have the miraculous lives of saints and martyrs to strengthen faith. Military units tell stories of courage and sacrifice to give men a reason for attacking or holding on when there is no good reason. In American history, the legend of the Alamo fitted into our expansionist policy. Closer to the problem of justice, compare the history of John Brown's raid on Harper's Ferry with the legend of John Brown. The man was a fanatic who murdered innocents to carry out his arbitrary justice. But his legend told a great truth about the crime of slavery in a free country. We might very well regret the passing of the Sacco-Vanzetti legend.

Nevertheless, its sentimentality and childlike character are no longer appropriate to the way the nation thinks and feels about the issues it raised. Having got through the depression, World War II, and two decades of the postwar period, we have learned to live more comfortably with irony; we have learned to qualify many of our absolutes. We have seen the disadvantages of union militancy and the uses of economic royalists in organizing a war industry to defeat the Axis powers. Afterward, we discovered that the enemy became a useful ally against the ally turned into our most dangerous enemy. By now we are learning to live with Soviet Russia while taking note of a possibly more dangerous enemy over its shoulder. To master our situation we need a better guide than a parable teaching that the underdog and irresponsible ideas have a unique virtue. The truer Sacco-Vanzetti story, a lesson in con-

traditions and disorder, should serve our understanding better today.

About other issues, however, we are not obliged to reject the values of militancy and uncompromising action. The civil rights struggle will need its heroes and martyrs. Perhaps we should believe them absolutely, at least until that battle is won. Afterward, we can try to understand with the help of irony. (Pp. 247-49.)

Felix is a civilized man trying to understand. He takes us on a difficult path between the thought-numbing certainties of the right and left, but does not fall into action-numbing vacillation of the middle. He sees the tragic necessity for decision despite dubiety, but action to which he summons us would not be cruel, irrevocable or neurotically fixed upon a single goal when humanity knows only plural goals.

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