

The Case of Sacco and Vanzetti
and the Role of Felix Frankfurter

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The trial of Nicola Sacco and Bartolomeo Vanzetti in the 1920's is one of the most controversial in American legal history. Two Italian American immigrants, Sacco and Vanzetti were found guilty and executed for armed robbery and murder. Not only were the circumstances that surrounded their arrests dubious, based on xenophobia, but the trial itself reeked of perjury, judicial bias and prejudice. However, it was not until five years later^[1] when a certain Harvard Law professor, Felix Frankfurter, took notice of the case. His analysis of the case was instrumental in creating the public uproar that saving the two men required. After Frankfurter studied the case, in the end of 1926, he published an extensive review of the trial in *The Atlantic Monthly* in March of 1927, which was one of the chief intellectual publications of the day. It was not until the publication of Frankfurter's article that the public, mostly liberals, "academics and all concerned citizens,"^[2] became fully aware of the series of injustices that led to the conviction of Nicola Sacco and Bartolomeo Vanzetti.

On April 15, 1920, two men shot and killed a paymaster and guard at the Slater Morill Shoe Company in South Braintree, Massachusetts, before escaping with \$15,000. Months earlier, on Christmas Eve, 1919, a similar robbery attempt occurred when an Italian gang, armed with shotguns, tried to rob the payroll truck of the L.Q. White shoe Company in Bridgewater, Massachusetts. The Bridgewater chief of police, Chief Stewart, believed the Bridgewater attempted robbery to have been committed by an Italian gang of "Bolsheviki,"^[3] and, on a hunch, ordered the arrests of Sacco and Vanzetti, a shoemaker and fish peddler, respectively. When arrested, both men were armed: Sacco with a .32 Colt automatic; Vanzetti with a

Harrington Richardson .38 revolver and shotgun shells. In the next few months following their arrest in April, Vanzetti had been found guilty for the Bridgewater robbery and they had both been found guilty for the robbery and murder at South Braintree. For the next seven years up to their execution in 1927, the question of their innocence would plague many, but no one was as influential as Felix Frankfurter.

Frankfurter, a professor at Harvard Law School in Cambridge, was quite liberal for his time. He was not xenophobic and did not act in prejudice towards immigrants like so much of the country Red Scare. He was a firm believer in judicial "restraint,"^[4] as well as in the law as a process that should be followed. Frankfurter published an extensive critique of the Sacco and Vanzetti case in *The Atlantic Monthly* in 1927, the same year that the two were scheduled for execution.^[5] In his article, he argued not that the two were necessarily innocent of the crimes, but that there was much too much doubt in their trial upon which to convict. It was not until his article in *The Atlantic Monthly* that the public actually became aware that the trial of the two men was procedurally flawed.

In the precursor years to the Great Depression, the United States went through a period of bigotry and animosity towards immigrants and leftists. In Frankfurter's article, he quoted John F. Moors, one of the leading bankers and prominent citizens of Boston, who said that the "hysteria against 'the reds' was so great, at the time when these men were convicted, that even the most substantial bankers in this city [Boston] were carried away to the extent of paying for full-page advertisements about the red peril."^[6] Sacco and Vanzetti were not only Reds and anarchists, but

they had been monitored by the Department of Justice and were also "draft-dodgers." Their association with "leading radicals"^[7] and involvement as anarchists, as well as their refusal to fight for America during World War One (WW1), made it hard for the general public to sympathize with them. In fact, as Frankfurter stated, "by systematic exploitation of [Sacco and Vanzetti's] alien blood, their imperfect social views, and their opposition to the war, the District Attorney invoked against them a riot of political passion and patriotic sentiment."^[8] Using this passion against them, the Commonwealth, as permitted by Judge Thayer, began a field of questioning that had no purpose other than to further show Sacco's political views and mount a wave of prejudice from the jury against the defendants. Such questioning, which, according to the Yale Law Journal, "had not the slightest relation"^[9] to the allegations, is not allowed in the court of law. Similarly, it is improper to determine that, based on prior sentiments of the defendant or his character, he *must* have committed the crime. However, Frankfurter concluded that Judge Thayer allowed the line of questioning to proceed because of his personal prejudice and lack of judicial restraint. The allowance of this line of questioning showed not only the public's prejudice against Sacco and Vanzetti, as draft-dodging, immigrant anarchists, but also the court's prejudice. It was this imposition of Thayer's prejudice, most likely, that led Frankfurter to later, as a Supreme Court Justice, to be a proponent of "judicial restraint," a theory that stated that judges should not be able to use their personal beliefs in the courtroom.^[10]

Not only was the overwhelming prejudice towards the defendants an issue, Frankfurter argued, but there were also gaping holes in the evidence provided by the Commonwealth as well

as flaws in the testimonies of the witnesses. First, the evidence by which an arrest was sought by the Bridgewater police was entirely circumstantial and questionable. Because the holdup in Bridgewater was "somewhat similar,"^[11] the police deduced that the two crimes were committed by the same people: a gang of Italians. The Italians were, allegedly, seen by the eyewitnesses driving from the Bridgewater crime scene in a small car towards Cochesset. Based on the evidence, a detective concluded, both crimes could be solved "by finding an Italian with a small automobile in Cochesset."^[12] One Italian man named "Boda" fit this description: his "small automobile" was in a shop being repaired in Cochesset. After Boda and three other Italians went to pick up the car, police arrested all four on charges of murder and robbery. "[Boda] and one of his friends were released... the other two [who were not released] were Sacco and Vanzetti."^[13]

Frankfurter, then, questioned the validity of the eyewitnesses who placed "a gang of Italians [at the scene in Bridgewater] in a small automobile heading to Cochesset." Fourteen months after the incident, the eyewitnesses presented by the Commonwealth were able to positively identify Sacco and Vanzetti as participants in the crime. According to Frankfurter, "the credibility of [these] witnesses [was] impeached (1) by the obvious impossibility of accurate observation; (2) by proof of their inability, immediately after the crime, to identify the defendants [as participants in the crime]; (3) by the fact that the witnesses contradicted each other as to important matters; (4) by the seemingly convincing alibis of the defendants."^[14] The "obvious impossibility of accurate observation" referred to by Frankfurter was the place and viewpoint of the eyewitnesses – some fifty yards away from the car as it left the scene. While Frankfurter

recognized that it was "highly possible that the witnesses *did* see a gang of Italians in a small car,"^[15] he argued vehemently that it was entirely impossible that those eyewitnesses were able to see the faces of the people in the car with enough clarity as to remember them fourteen months later. What makes the credibility of the eyewitnesses even more dubious is that, when questioned by police immediately following the crime, the witnesses were unable to provide even enough of a description for a police sketch. Yet, *fourteen* months later, they were able not only to describe the participants, but positively identify them as Nicola Sacco and Bartolomeo Vanzetti. Finally, even after they were able to identify the two defendants, the eyewitnesses contradicted each other on such things as the make and color of the car and even the number of participants.

The third piece of evidence that the Commonwealth used against the defendants and that Frankfurter disputed was ballistics evidence based on the four bullets found in the victims of the South Braintree murders. According to the Commonwealth's experts, three of the four bullets, numbers 1, 2 and 4 (the bullets were labeled 1, 2, 3, and 4, respectively), could not have come from either man's pistol. However, according to expert testimony from Captains Proctor and Van Amburgh, bullet number 3 *had* come from Sacco's pistol. Captain Proctor testified that, on the question of whether or not the third bullet had come from Sacco's pistol, his expert opinion was "that it [was] consistent with being fired from [Sacco's] pistol."^[16] According to Frankfurter, the "government placed chief reliance on [Captain Proctor's] expert testimony."^[17] In fact, the District Attorney said, in his closing remarks, that the jury "might disregard all the identification testimony, and base [its] verdict [entirely] on the testimony of [those] experts." But

Judge Thayer may have committed the most egregious error of all when he misrepresented the significance of Proctor's opinion. Addressing the jury, Judge Thayer purported to summarize Captain Proctor's opinion when he said in "it was **his [Sacco's] pistol that fired the bullet** that caused the death of Berardelli (one of the two victims)."^[18] (Emphasis added).

However, it was later discovered that Captain Proctor not only believed in the defendants' innocence, but did not believe that the third bullet actually came from *Sacco's* gun. It was for that reason that, in his expert testimony, he stated that the bullet was merely "consistent" with being fired from Sacco's pistol. Essentially, Captain Proctor stated that the bullet could have come from a gun *like* Sacco's, and not that, as the court interpreted, it *did* come from Sacco's gun. It was the intentional misleading of the jury by the district attorney and Judge Thayer that originally prompted Frankfurter to become involved in the case.

Based on the discrepancies and flaws in the trial and the newly discovered evidence, Thompson, one of the appellate lawyers who represented Sacco and Vanzetti, motioned for a retrial. According to Massachusetts state law, in order to receive a new trial, the defendants must petition the judge of the original case; thus, Thompson needed to persuade Judge Thayer of the need for a new trial—even though Judge Thayer seemed to have already made up his mind.

On November 18, 1925, Celestino Madeiros, "a young Portuguese with a bad criminal record,"^[19] confessed to the South Braintree murders of which Sacco and Vanzetti were found guilty. By this time, even prior to the publication of his article, Frankfurter was already very involved. He accompanied Thompson to the Dedham courthouse where Judge Thayer presided.

Because of the apparent "unreliable, untrustworthy and untrue"^[20] nature of Madeiros' confession, Thayer denied the motion for a retrial based on a lack of reliable evidence.

After the motion for a retrial was denied, Frankfurter realized that the only way Sacco and Vanzetti could be pardoned and have a chance at a new, fair trial was if the world knew the injustices that had occurred. It was after Thayer denied the motion for retrial that Frankfurter wrote his article in *The Atlantic Monthly*. His analysis and explanation of the controversy of the Sacco and Vanzetti case created uproar among the masses of intellectuals and liberals, as well as members of the public. In fact, after his analysis was published, Massachusetts Governor Fuller ordered the creation of a committee to review the Sacco and Vanzetti case to see if any wrongdoings occurred or if there was any judicial malpractice. The committee was made up of three people, two of whom are not relevant. The third member, however, was Harvard University President Lowell. Frankfurter, a professor at Harvard Law School, and Lowell did not get along to the point of general animosity.^[21] While the committee did acknowledge that Judge Thayer had acted with judicial bias, it, ultimately, concurred with Thayer's decision to dismiss the motion for retrial.

On August 10, 1927, just thirteen days before Sacco and Vanzetti's scheduled executions, their lawyers began a series of appeals to the United States Supreme Court, hoping that one of the justices would agree to hear their case. Justice Brandeis, a good friend of Frankfurter, was their best hope. However, Brandeis believed that because he was so close to Frankfurter and that his wife and daughter were involved in protesting the execution, he was biased and, therefore, he told

them, unable to have any part in the case. For him, as he told Thompson and Frankfurter on August 22, 1927, such an "intimate connection with one side of the case precluded any sort of judicial participation."^[22] By the next morning, Sacco and Vanzetti had been executed.

Frankfurter's article was the catalyst for American discussion of and protest over the case and its outcome. "The wound left in the American psyche by the Sacco and Vanzetti case was deep and lasting."^[23] For many, Frankfurter's analysis "provided ammunition for all of those... who demanded a new trial for the two men."^[24] Not only did it ignite a burning sympathy for the convicted duo in the hearts of many Americans, but it was primary cause of Governor Fuller's creation of the review committee. As he had hoped, Frankfurter also inspired the top intellectuals and legal scholars. In total, 14 law review/journal articles were written about Frankfurter's *The Case of Sacco and Vanzetti*.^[25] Most of the scholarly responses to his analysis, to Frankfurter's delight, were positive. As C.I. Thompson wrote, "none can read Frankfurter's able brief without an inner conviction that the defendants are innocent."^[26] E.M. Abbot stated that, in regard to Frankfurter's book, "a careful study compels the experienced lawyer to stand aghast at the result obtained under the absolute disregard for the rules of evidence and the conduct of a trial by a jurist who is supposed to be without prejudice or partiality."^[27] In fact, "mobs, mass-meetings, protests, and the hurling of bombs have... been attributed to the feelings aroused by [the injustices of the Sacco and Vanzetti Case as described by Frankfurter]."^[28] However, not everyone read Frankfurter's analysis with an open mind. After the committee wrote its opinion supporting Thayer's decision denying a retrial, Frankfurter was convinced that the committee had

made up its mind before the inquiry began. As he told Thompson, Frankfurter firmly believed in “the utter inaccessibility of their minds to fact and truth.”^[29]

Primarily based on Frankfurter’s report, the one thing that most can agree on is that the motion for a retrial should have been granted. Whether Sacco and Vanzetti were actually guilty is a question that will continue to plague researchers as it has over the last 85 years. However, no writer had as great an impact on the proceedings of the case or the public view of the defendants as did Felix Frankfurter. His analysis sparked a fire of public outcry, protest and awareness, and brought the issue of judicial restraint and xenophobia to the center stage.^[30] Indeed, “Sacco and Vanzetti became familiar in all 48 states, not just among the urban left-liberals but in the suburbs and the small towns and the women’s clubs and the little brick Carnegie libraries.”^[31] Frankfurter’s analysis was so convincing, in fact, that Judge Thayer’s house was bombed in reaction to his dismissal of Thompson’s motion for retrial. It seemed as if Frankfurter had convinced almost everyone, except Harvard College President Lowell and his committee and Judge Thayer. After reading his analysis, the Springfield Republican, “never altered its outraged opinion that ‘a dog ought not to be shot on the weight of the evidence brought out in the [Sacco and Vanzetti Trial].’”^[32]

^[1] There were at least 5 unsuccessful appeals over the five years prior to Frankfurter’s involvement.

^[2] Russell, *Case Resolved*, p.204

^[3] Another word for “anarchists”

^[4] “Judicial Restraint” is the concept that judges and courts should not be able to bring their personal beliefs into the courtroom, nor should they be able to determine the true meaning of laws or implement laws in ways which they were either A) not intended or B) never used before.

^[5] His article was entitled: *The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen*. His article as published into a slim book, entitled: *The Case of Sacco and Vanzetti*.

^[6] Frankfurter, *The Case of Sacco and Vanzetti*, p. 43

^[7] Frankfurter, *The Case of Sacco and Vanzetti*, p. 44

^[8] Frankfurter, *The Case of Sacco and Vanzetti*, p. 59

^[9] 36 Yale Law Journal 384, 388.

^[10] Parrish, *Felix Frankfurter and His Times*, 196

^[11] 75 U. Pa. L. Rev. 798 (1927)

^[12] 75 U. Pa. L. Rev. 798 (1927)

^[13] 75 U. Pa. L. Rev. 798 (1927) Chief Stewart’s arrest of Sacco and Vanzetti proved beneficial for the Department of Justice, which was looking for a reason to deport the two for their anarchist views.

^[14] Frankfurter, *The Case of Sacco and Vanzetti*, 62

^[15] 75 U. Pa. L. Rev. 799 (1927)

^[16] Frankfurter, *The Case of Sacco and Vanzetti*, 76

^[17] Frankfurter, *The Case of Sacco and Vanzetti*, 77

^[18] Frankfurter, *The Case of Sacco and Vanzetti*, 77

^[19] Frankfurter, *The Case of Sacco and Vanzetti*, 92

^[20] Thayer, *Transcript of the Record*, 4748

^[21] Some commentators argue the possibility that the animosity between Frankfurter and Lowell had an impact on Lowell’s concurrence with Thayer’s decision to dismiss the motion for a retrial. 75 U. Pa. L. Rev. 799 (1927); Parrish, *Felix Frankfurter and His Times*, 190.

^[22] Urofsky, *Half Brother, Half Son*, 306

^[23] Lash, *From the Diaries of Felix Frankfurter*, 39

^[24] Parrish, *Felix Frankfurter and His Times*, 185

^[25] Torzsay-Biber, *Mr. Justice Felix Frankfurter: A Bibliography*, (Stanford Law Library, 1963), 19

^[26] 75 U. Pa. L. Rev. 798 (1927)

^[27] 18 J. Crim. L. 286 (1927)

^[28] 12 Cornell L. Q. 555 (1927)

^[29] Parrish, *Felix Frankfurter and His Times*, 192

^[30] Frankfurter also helped create a committee to publish the transcript of the record of the case in five volumes and a supplement; he raised part of the amount of necessary money himself. “This publication is now the prime source for all writing about the case.” Mendelson, ed., *Frankfurter: A Tribute*, 110.

^[31] Russell, *Tragedy In Dedham*, 352

^[32] Russell, *Tragedy In Dedham*, 342-343