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Book Reviews

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Book Reviews

FAIR FIGHTS AND FOUL, A DISSENTING LAWYER'S LIFE. By Thurmon Arnold. Harcourt, Brace & World, Inc. 1965, Pp. 292. \$5.95.

I cannot remember when it was so much fun to read a book. This is a thinly autobiographical work—a stimulating story, made the more so, by persistent refusal of the author to take himself too seriously. Arnold has written a delightful treatment of his life in the law on a decidedly light note. This is not a technical book but a light-hearted treatise without smothering jargon. Born of a lawyer father at Laramie, Wyoming, in 1891, the story opens with some charmingly rustic anecdotes about his ancestry and early youth in the open spaces of the wooly west. He defied the advice of his time and became a rarity by going east to Princeton and Harvard. His war experiences are absolutely hilarious. The most useful information is that if you are called on a pick and shovel detail, pick a pick and not a shovel. After a short practice in Laramie he again went east to become Dean of the West Virginia Law School.

Infused into every page is a constant background theme that law is only part of the larger science of human relations. He sees cross-currents of economics, morality, and psychology working upon it. Taking law out of its vacuum, the treatment makes our whole legal system infinitely more revealing. Just as Aquinas freed the Catholic Church of blind adherence to ancient formulas, he views the Supreme Court as having opened up the law and the Constitution to cope with the needs of the Twentieth Century. He thinks that the long view of the Supreme Court in the last twenty years will be favorable. The current uproar over the Court is placed in focus.

In the days that big business combines were sacrosanct, he was appointed head of the Anti-Trust Division of the Department of Justice. In character, he speaks at length of the cases that he lost. He seems to think that the threat of the future to our competitive system comes not from big business but from big labor.

Joining the many who have had their fling at analyzing the Sherman Anti-Trust Act, he believes the government's success in the Northern Securities Case (an attempt to combine the Great Northern and Northern Pacific railroads) of 1904 as the signal case that prevented a pattern of cartels in American industry.¹ His chapter on the start of the federal farm programs in 1933 holds special interest for North Dakota. The author has a talent in reducing complex economic notions and programs down to a "shucks, this is how it is" touch. The most scathing chapter is on the public abuse of governmental officials—a concern about the impediments to the choice of government service by our best young brains.

Arnold comes through as a humble man but not so humble that he pulls much of his criticism. He hits at such diverse sacred cows as Civil Service and patriotism. The hitting is not the wild punch type—he strikes the target with sound reasoning and actual example and he makes suggestion for improvement. Who would imagine that between these covers would appear some of the finest legal satire since Peter Finley Dunn's, *Mr. Dooley*. This is not a prying, ghost written, gossipy, confessional type autobiography. Rather, an autobiography of a thought process in relation to the society in which it finds itself. The polish of his writing hides the abrasion of his thought.

In 1943 Arnold was appointed as a judge of the United States Court of Appeals for the District of Columbia and resigned three years later thinking himself an advocate and not a judge. Judicial opinion need not be dry tomes as testified by a reprinting of the author's full opinion in an obscenity case. A brief that he wrote in private practice on the issue of obscenity is an absolute classic. A happy blending of high comedy, hard logic, and classical allusion; it is the type of brief that lawyers and judges are no longer comfortable with. Arnold's experience has been mainly with corporate law but the long jump to pornographic law is made with charm and ease.

In 1946 Arnold founded the firm that was to become Arnold, Fortas and Porter.² He abhors the trend to impersonalize the practice of law by large firms but sees no possibility of change. The list of cases that his firm has handled reads like legal landmarks: *Gideon v. Wainwright*; *Durham v. United States*; *Lattimore v. United States*. Happily for the lay reader he has a sense for what is readable and relates not the cases from his corporate practice but from the civil rights arena.

There are incisive comments on the era of the McCarthy

1. It is ironic that the merger of the Great Northern and Northern Pacific should now be so imminent.

2. The Fortas is Abe Fortas, the most recent appointee to the United States Supreme Court.

hearings. Naturally, he thought they were an outrage. In attempting to give perspective on the hearings, he, for the only time in the book, allows his own nearness to the scene get in the way. One of the genuine heroes of his book is an ex-governor from Minnesota, Judge Luther Youngdahl.

Arnold is not a conventional thinker. Ideas often meet with resistance. I found myself rereading and upon a second (and sometimes third) reading the logic became impressive. He is what he called F.D.R.—an innovator. One of the important conclusions of his book in the area of crime is that society must spend whatever is necessary to rehabilitate the criminal and remove environmental causes of crime. It is an economic and social myth to do otherwise. This is not a particularly shocking or new piece of advice except that his arguments are so convincing.

His great sense of humor (the special quality of this book) even carries over to his presumably serious moments. Who could read the ponderous Chapter 10 or 11 headings without a feeling that someone is being facetious. Chapter 10 is, "The Fundamental Economic Principles That Were The Basis for Political Action During the Administration of President Eisenhower." Chapter 11 is, "The Power of Private Credit Organizations to Provide Consumer Purchasing Power, Which Started With the Wildcat Banks at the Time of Andrew Jackson, Has Not Since the Depression Been Sufficient to Absorb the Productive Capacity of the Twentieth-Century Revolution."

The most thoughtful part of his book is devoted to comparisons of the English and American legal systems. In spite of his conclusions that the English system would not work out in America, it has all the better of it. I have never read a better insight into the causes of delay in justice. In England there is almost a complete reliance upon oral argument in deciding cases and almost all decisions are given immediately from the bench. American appellate procedures have emasculated oral argument. English judges cannot delay decisions until they have forgotten what the case is about. His deft touch of humor destroys the logic of the case system for study as nothing has ever done before.

Having been a judge, a teacher, and a government official he becomes a knowledgeable iconoclast of all three. The subtitle of his book is misleading. It is not his life in a literal autobiographical sense. Arnold is a wise commentator on all that he views. One has the feeling that he is inviting disagreement on most everything he says but this is his skillful tool to provoke thought in the reader. When you don't agree with Arnold you are at least shaken from your smugness. The only discordant note is an occasional flippancy in dealing with great moral and social issues. Any other negative

comments would be wasted. Perhaps of no consequence; Mr. Arnold says he does not read Law Reviews.

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PROTEST: SACCO-VANZETTI AND THE INTELLECTUALS, by David Felix. Bloomington: Indiana University Press, 1965. Pp. 274, \$5.95.

Basing his book primarily on six volumes of more than 6,000 pages of the *transcript of the record of the trial of Nicola Sacco and Bartolomeo Vanzetti and the Bridgewater Case*, David Felix devotes over half of his space to a review of the evidence presented in the case with brief biographical sketches of the principal lawyers, witnesses, and others intimately involved. Particularly arresting are the comments he makes about Judge Webster B. Thayer, who was accused of prejudice, and Fred Moore, the former attorney for the I.W.W. and from 1920 to 1927 the chief defense counsel. In the latter and, for most readers, the more interesting part of the book, Mr. Felix comments on the role played by Felix Frankfurter and a number of intellectuals in their attempt to save the lives of the two condemned men.

The thesis of the first part of the book where the evidence is reviewed is that Sacco and Vanzetti were not betrayed in the courts. Felix Frankfurter, who is identified as being the earliest and ablest of the defenders, charged in an article appearing in the March, 1927, issue of *The Atlantic Monthly*, that Judge Thayer displayed prejudice in his charge to the jury by emphasizing the statements of the prosecution witnesses and ignoring the testimony of the defense experts. Mr. Felix, however, asserts that "the transcript shows that Thayer reviewed both sides of the ballistics testimony at equal length and carefully left the judgement to the jury."¹

Another accusation made by the defenders of Sacco and Vanzetti was that the general prejudice in the community made a fair trial impossible, but, here again, the author maintains that the "charge of an active anti-radical prejudice in the community remains unproven."² In fact, Mr. Felix concludes the first part of his book with the contention that the Supreme Judicial Court and the Governor

1. Felix, *Protest: Sacco-Vanzetti and the Intellectuals* 149 (1965).

2. *Id.* at 151.

of Massachusetts “had no alternative but to uphold the verdict” of the jury.³

Arranging his account of events in a chronological order, Mr. Felix finally turns to the role the intellectuals played in the last year of the case. Here he points out that the case gave the intellectuals a “hard, definable issue” from which they could express their general protest against the entire society. Vanzetti cried that he was suffering because he was a radical; the intellectuals could say they were suffering because they were intellectuals. Noting that the intellectuals first made the Sacco-Vanzetti case into a *legend* of innocence betrayed, Felix says that they then extended it into a *parable* about a wider betrayal in all of American society. “Were they not all—accused and defenders—outcasts, astray in the villages, spoken against?”⁴

It is this part of the book that will be most valuable for the general reader. Contending that the intellectuals came to their belief in the legend of innocence betrayed “through a burst of revelation,” Felix charges that they then “applied their best intelligence” to prove the truth of the legend. Here the intellectuals displayed that they could be “as unjust as corporation presidents” in their simplification of the case in order to maintain the purity of the legend. Here, too, Felix develops the thesis that the intellectuals won their greatest accomplishments in a “creative reworking of the case in verse, novels, and the drama.” He has read widely, as the bibliography indicates, and he has made some exciting generalizations about how the creative artist in his work reacted to and actually reshaped the case. Of particular interest to North Dakota readers is Felix’s analysis of Maxwell Anderson’s *Winterset*. Telling “the simple story of innocence betrayed” and “offering something for everybody, Anderson was able to stir a wide range of emotions. . . . [H]e perfected the Sacco-Vanzetti legend. . . . The legend became part of American folklore.”⁵

But, according to Felix, the legend was false as well as commonplace. However, he says that the legend did have its valuable uses, doing “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. . . . Through the intellectuals, it forced itself on the nation when Americans wanted to sleep in the static promise of 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

3. *Id.* at 157.

4. *Id.* at 240.

5. *Id.* at pp. 245—247.

criticism was widely off the mark does not negate its value. Progress often requires the grossest of stimuli."⁶

On the book jacket, Mr. Felix is identified as a liberal intellectual and a specialist in intellectual history with a B.A. from Trinity College and a M.A. from the University of Chicago. His former experience as a news service correspondent in Paris and a U.S. government information officer in Vienna obtrudes in his style which will undoubtedly annoy a lawyer expecting a professional review of the evidence as recorded in the official transcript of the trial. His mixing of journalistic and legalistic terms and his self-conscious shifting of tenses to achieve dramatic intensity will not satisfy the purist. And his occasional lapses into stereotypes such as "a Boston lady is a special case"⁷ and "Europeans have the greatest difficulty with the simplest events"⁸ will put any serious reader on his guard. Whatever the limitations of the book may be, it is a provocative work in that it contradicts the popular view of the Sacco-Vanzetti case and insofar as the charges made by the defenders became a condemnation of American society and particularly of judicial procedures in the United States, it is a book that neither students of American culture nor the legal profession will want to ignore.

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6. *Id.* at 247.

7. *Id.* at 6.

8. *Id.* at 170.

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