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In re Anastaplo Revisited - A Half Century Later

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Prior to a couple of years ago, I had never even met George Anastaplo.[1] I was familiar with some of his marvelous writings, but the main thing I knew about him was that his daughter had been my wife's best friend in high school. And then, two years ago, I read the majority and dissenting opinions in *In re Anastaplo*, 366 U.S. 82 (1961), and I realized that George Anastoplo is a genuine hero.

Here are the facts. In 1950, George Anastaplo graduated high in his class from the University of Chicago Law School (a class that included, among other notables, Ramsey Clark, Abner Mikva, and Patsy Mink). He was 25 years old, a veteran of World War II and an officer in the reserves, and he was anxious to begin his career. He successfully passed the written portion of the Illinois Bar examination, and then, as required, went before members of the Character and Fitness Committee. During an otherwise routine interview, he was asked "Do you believe a member of the Communist Party should be admitted to the Bar?" This was, after all, at the height of the Cold War (about to get a lot hotter in Korea), McCarthyism was at its peak, and membership in the Communist Party U.S.A. was tantamount to Satanism.

1. This article is a slightly revised version of a talk given by Judge Rakoff at the Third Biennial Literature and Law Conference at John Jay College of Criminal Justice on March 30, 2012.

George Anastaplo, however, had absorbed only too well the lessons he had learned in law school. He actually believed in the Bill of Rights and in the duty of lawyers to be the first line of defense of those rights. He answered that he did not believe that Communist Party membership should automatically disqualify an applicant. This precipitated further questions, culminating in the question of whether he was himself a Communist. He declined to answer that question, but not on the ground of the Fifth Amendment privilege against self-incrimination (there never was any evidence that George Anastaplo had had anything to do with the Communist Party), but on the ground that the question infringed his First Amendment rights of free speech and free association.

The matter then went before the full 17-member Committee, which concluded, although not without some dissent, that George's refusal to answer the latter question obstructed the Committee's inquiry into his fitness to practice law and that he should therefore be denied admission to the Illinois Bar. It is my understanding that the then Dean of the University of Chicago Law School, the famous Edward Levi, privately urged George not to stand on principle but to answer the question, so as not to sacrifice his career. But, terribly painful though it must have been, George, like the war veteran he was, stuck to his guns and continued to refuse to answer the question on First Amendment grounds.

Eleven years of litigation ensued. George, though not admitted to the bar, was able to represent himself *pro se*, and, in the process, probably got more appellate experience than most lawyers get in their lifetimes. Finally, the case reached the Supreme Court, and, in a 5-4 decision rendered in April 1961, the Court rejected George's appeal.

Reading the Court's opinions now makes one remember how even the Court that gave us *Brown v. Board of Education* and so many other liberal opinions was still, in 1961, so deathly afraid of the Evil Empire (which now included nearby Cuba) that it tarred with that brush any person or organization that espoused what could be considered a pro-Communist point of view. The majority, in an opinion by Justice Harlan (among the more thoughtful of the conservative judges on that Court) argued that since there was reason to believe that the Communist Party advocated the violent overthrow of the Government, and since this was antithetical to the rule of law, the Character and Fitness Committee had a legitimate basis for inquiring into whether someone seeking the privilege of admis-

sion to the bar had ever been a member of an organization that held such illegitimate views. Or, to put it more starkly, when it came to any association with the Communist Party by someone seeking to practice as a lawyer in the State of Illinois, guilt by association overrode freedom of association.

The dissenting opinion, written by Justice Black, was eloquent, inspiring, even poetic. Indeed, part of it was read at the Justice's funeral. I hope I will be forgiven, therefore, if I note that it largely misses the mark. A good deal of the dissent was devoted to describing what a good guy George Anastaplo was and how well fit for the practice of law. All true, but irrelevant. If there is a First Amendment right not to answer the question about membership in the Communist Party—because the question chills free speech and free association and is therefore unconstitutional—that right is as equally available to bums and hacks as to paragons of virtue like George Anastaplo.

But implicit in the dissent, nonetheless, was a defense of free association that became more overt a decade later, when the Supreme Court, in 1971, decided a trilogy of cases, of which the most relevant for our purposes is *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971). In the interim, of course, the cases arising out of the civil rights movement had shown that some reality-check was needed before blindly invoking the "rule of law." Thus, the Supreme Court had no problem reversing state convictions for trespassing and the like when the trespassers—civil rights workers engaged in civil disobedience—were upholding the broader, constitutional principle of equal protection. And in the 1969 case of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court went so far as to hold that the First Amendment barred a state from prohibiting a person from advocating, not only the breaking of laws, but even the use of force, unless there was an imminent danger that the advocacy would directly incite such lawless behavior.

By 1971, the chief context of such advocacy was no longer the civil rights movement but rather protests against the Viet Nam war, a context reminiscent of the Cold War battles of an earlier era but involving a much more divided populace. I remember attending a wedding of two antiwar protestors in 1973, at which the religious chapel where their wedding took place was adorned with a large flag: the North Viet Nam flag! Such was the tenor of the time.

Which brings us to *Baird*. Ms. Baird was, like George Anastaplo, a highly-qualified law school graduate who was refused admission to the Arizona bar after she declined, again on First Amendment (not Fifth Amendment) grounds, to answer the question of whether she had ever been a member of an organization advocating the violent overthrow of the Government. A four-Justice plurality of the

Supreme Court, in direct confrontation with the majority decision in *Anastaplo*, held that, where state action was involved (as in the state's determining who should be admitted to practice law in that state), a character committee could not constitutionally inquire about a person's political beliefs and associations, even if those beliefs were about overthrowing the Government, because such inquiries would chill the free exercise of those rights.

If Justice Black had been able to attract a total of five votes in *Baird*, *Anastaplo* would have been overruled, and this story would have a happy ending. But the fifth vote in *Baird*, and in two companion cases decided at the same time and raising similar issues, was provided by Justice Stewart, on much narrower grounds. For example, in *Baird*, Justice Stewart concurred in the result because the Arizona bar examiners asked Baird if she had ever been a member of an organization that advocated the violent overthrow of the Government, whereas, in Stewart's view, the question would only have been proper if it asked whether the applicant had ever belonged to an organization that the applicant at the time *knew* was advocating the violent overthrow of the Government.

The result, regretfully, is that *Anastaplo* has never been overruled. As a corollary, admission to the bar in many states, including New York, is still conditioned on answering questions like "Have you ever…become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or any political subdivision thereof should be overthrown or overturned by force, violence, or any unlawful means?"[2] Such questions, one might hypothesize, still have a potential to chill free speech and free association. For example, one can imagine a member of an Islamic civil rights organization being questioned intently on whether her organization has ties to terrorists. Or, to take a different kind of example, one can imagine a member of an aggressive anti-abortion organization being questioned about whether her group advocates unlawful measures to shut down abortion clinics. Without multiplying examples, the result would be not only to chill free speech and association but also to prohibit perceived "extremists" from joining the Bar.

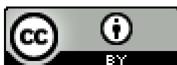
2. See Application for Admission to Practice as an Attorney and Counselor-at-Law in the State of New York, Question 18 (2013).

So why have such questions not been challenged? The most likely reason is that few, if any, recent law graduates feel it is in their interests to jeopardize their entire careers at the outset merely to enhance First Amendment principles. Certainly, when I joined the New York Bar in 1971, I answered all such questions without reservation; so how can I be critical of others doing the same?

It takes a very unusual person to stand on principle in such circumstances. George Anastaplo has been described by some of his critics as “stubborn.” I think a far more accurate term is “courageous.” He remains a genuine American hero.

About the Author

Jed S. Rakoff has served since March 1996 as a United States. District Court (federal) judge for the Southern District of New York. He frequently sits by designation on the 2nd and 9th Circuit Courts of Appeals. His most noteworthy decisions have been in the areas of securities law and criminal law. He is an adjunct professor at Columbia Law School and New York University School of Law and teaches at University of California, Berkeley School of Law and the University of Virginia School of Law. He has written over 180 published articles, 835 speeches, and 1,800 judicial opinions and has co-authored five books. He is a regular contributor to *The New York Review of Books* and the author of *Why the Innocent Plead Guilty and the Guilty Go Free, and Other Paradoxes of Our Broken Legal System* (Farrar Straus & Giroux, 2021).



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