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Laurence Berns

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## TWO OLD CONSERVATIVES DISCUSS THE ANASTAPLO CASE

Laurence Berns†

"Pericles," [Alcibiades said,] "Can you teach me what law is?" ". . . You desire no very difficult matter, Alcibiades," Pericles said. "For all those things are laws which the majority, after coming together and approving, prescribes, declaring what should be done and what not." "Whether they direct good to be done, or bad?" "Good, by Zeus," he said, "my boy, but not bad. . . . Everything which the controlling power of the city prescribes, after deliberating about what must be done, is called law." "And if a tyrant controlling the city should prescribe what the citizens must do, is this also law?" ". . . "Now, Alcibiades, when we were your age we also were terribly clever at . . . and debated about this sort of thing . . ." And Alcibiades said, "Would then, Pericles, I had conversed with you then, when you were most terribly clever about these things."

—Xenophon, *Memorabilia of Socrates*<sup>1</sup>

Lawyers and judges concern themselves, in great part, with settling the problems of those who are not reasonable or self-controlled enough to settle their affairs for themselves. Occasionally, however, a case arises where it seems as if a man has run afoul of the law not because of his insufficiencies but, on the contrary, because of some superiority. Such cases raise troublesome questions. Are we not enlightened enough to lay down rules for controlling and dealing with substandard behavior without at the same time abridging the liberties men of special excellence require for the development of their talents? On the other hand, should not superior men be expected to be reasonable and prudent enough not to try to force the law to so refine itself as to be ineffective, not to force it to decide matters lying outside the province where it is capable of deciding well?<sup>2</sup>

The Anastaplo Case<sup>3</sup> continues to arouse discussion. The issues

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† Tutor, St. John's College, Annapolis, Maryland. Ph.D. 1957, University of Chicago.

<sup>1</sup> I XENOPHON, *MEMORABILIA* Ch. II.

<sup>2</sup> Classical tragedy seems to have concentrated more on the second of these two questions, modern drama on the first. This difference seems to depend on a more fundamental difference of opinion about how much rationality it is reasonable to expect in political and social life. Cf. T. AQUINAS, *Treatise on Law*, in I-II *SUMMA THEOLOGICA*, Q. 97, Art. 2, esp. 1st objection and answer; and L. STRAUSS, *THE CITY AND MAN* 21-22 (1964). See also Berns, *Aristotle's Poetics*, in *ANCIENTS AND MODERNS: ESSAYS ON THE TRADITION OF POLITICAL PHILOSOPHY IN HONOR OF LEO STRAUSS* (J. Cropsey ed. 1964).

<sup>3</sup> *In re Anastaplo*, 3 Ill. 2d 471, 121 N.E.2d 826 (1954), 348 U.S. 446, 349 U.S. 908 (1955) (Justices Black and Douglas, dissenting), 18 Ill. 2d 182, 163 N.E.2d 429 (1959) (Justices Bristow, Shafer, and Davis, dissenting), 366 U.S. 82, (Justices Black, Douglas and Brennan and Warren, C.J., dissenting), *rehearing denied*, 368 U.S. 869 (1961).

it raises are fundamental and will continue to be discussed so long as we possess an alert citizenry and a learned Bar.

The majority opinion in the Supreme Court of the United States has been described as follows:

To what extent, consistently within the protection afforded by [the first amendment], and without forfeiture of the privilege sought, applicants for admission to the bar may withhold information concerning their political affiliations and beliefs has presented another problem which the [Supreme Court of the United States] has not resolved uniformly.

... [In the *Anastaplo Case*,] where there was an absence of independent evidence that the petitioner ever had been a member of the Communist Party, or of any organization which might cast doubt on his loyalty, Illinois authorities were upheld as having been warranted in admonishing petitioner that, according to their established rules, a refusal to answer, albeit on First Amendment grounds, questions pertaining to such membership, would be deemed obstruction of their function of cross-examining him with a view to ascertaining his fitness to practice law, and the basis for denial of his application for admission. These officials acknowledged that they drew no inference of disloyalty or subversion from the applicant's refusal, but maintained that public interest in the character of an attorney overrides the applicant's desire to keep his views and associations to himself.<sup>4</sup>

The opinion of the Court, written by Justice Harlan, has been criticized by the dissenting justices and by Anastaplo for its refusal to acknowledge the extent to which Anastaplo had been penalized because of his opinions on the Declaration of Independence's principle of rightful rebellion. Indeed, Anastaplo has characterized the opinion of the Court as presenting a brand new case against him, a case never argued in a court of law.<sup>5</sup>

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This bar admission case began in November, 1950, before the Committee on Character and Fitness sitting in Chicago. See Weissman, *Heresy and the Bar: The Cases of Leo Sheiner and George Anastaplo*, 19 *LAWYERS GUILD REV.* 64, 65 (1959); Weissman, *The Case of George Anastaplo*, *id.* 126, 143.

Anastaplo, born in St. Louis in 1925, an American Air Force volunteer, served as a flying officer during the Second World War. He received his J.D. (1951) and Ph.D. (1964) from the University of Chicago. He is currently Lecturer in the Liberal Arts, The University of Chicago; Professor and Chairman in the Political Science Department, Rosary College; and Professor of Politics and Literature, The University of Dallas.

For the standard that seems to have guided his conduct as counsel *pro se* see Anastaplo, *Human Being and Citizen: A Beginning to the Study of Plato's Apology of Socrates*, in *ANCIENTS AND MODERNS*, *supra* note 2, at 39-40 n.26.

<sup>4</sup> THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 908-09 (1964).

The "public interest" in the last sentence quoted is balanced against the applicant's "desire," not (as Anastaplo saw it) against his "right and duty," and not even (as the opinion itself has it) against his "private interest."

<sup>5</sup> See, in Anastaplo's *Petition for Rehearing*, Supreme Court of the United States,

The following conversation took place several years after the Supreme Court of the United States had ruled on the case. The discussants, who shall be referred to as *A.* and *B.*, had been talking about a recent Supreme Court decision on a first amendment case. *B.* brought up Anastaplo's interpretation of the first amendment.<sup>6</sup> When *B.* defended that interpretation by referring to the events in the Anastaplo Case itself, the following argument began:

*A.* What I deplore is the substitution of liberal dogmatism for constitutional doctrine, the insistence that the rights of individuals, selfish rights, even a right to selfishness, come before anything else, and that our duties as citizens count for so little. Anastaplo's efforts, his case as a whole, seem to me to further that trend.

*B.* But his interpretation of the Declaration of Independence's right to revolution stresses that there are *principles* in terms of which an individual can oppose himself to public opinion, that—

*A.* That is precisely what we do not need, examples of individuals setting themselves, as being of ultimate importance, against society, as if there were some right to be idiosyncratic, no matter what the cost.

*B.* Being idiosyncratic is not the point. I deplore that shallow substitute for heroism as much as you do. Perhaps Anastaplo does too. The point I was making is that there are rational principles, moral principles, in virtue of which a man can oppose an irrational public opinion, or an intellectual fashion or a tyrannical government.

*A.* It seems to me that the last things we need now are public demonstrations of the unnatural grounds of our conventions.

*B.* What we need are public reminders of the natural, or rational, grounds of our conventions, reminders that our conventions are not mere conventions, guided and determined solely by selfish in-

October Term, 1960, No. 58 (1961), his moving farewell to the legal profession. See also Anastaplo, *The Declaration of Independence*, 9 ST. LOUIS U.L.J. 390, 399 n.20 (1965); "Thus the Court was moved to repudiate the primary cause of the applicant's exclusion, without correcting the exclusion itself: the Declaration of Independence finally came into its own, but not its stubborn defender . . ." See also Berns, *In re Anastaplo*, *Transcript of the Record*, Supreme Court, October Term, 1960, No. 58, at 493-97.

<sup>6</sup> See G. ANASTAPLO, *THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT* (to be published in 1969 by the Southern Methodist University Press, Dallas, Texas); Anastaplo, *supra* note 5, at 390; Anastaplo, Book Review, Jaffey, *EQUALITY AND LIBERTY: THEORY AND PRACTICE IN AMERICAN POLITICS*, 41 N.Y.U.L. REV. 644 (1966); and especially Anastaplo, *Freedom of Speech and the First Amendment*, 42 U. DET. L.J. 55 (1964).

See also Anastaplo, *Human Being and Citizen: A Beginning to the Study of Plato's Apology of Socrates*, in *ANCIENTS AND MODERNS*, *supra* note 2, at 16; Anastaplo, Book Review, Levy, *LEGACY OF SUPPRESSION—FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY*, 39 N.Y.U.L. REV. 735 (1964); Anastaplo, *On Civil Disobedience: Thoreau and Socrates*, S.W. L. REV. 203 (Spring 1969).

terest or the convenience of those living under them, that there are moral principles, principles of justice, that any government, law or constitution must measure up to. If that task is left neglected the feeling grows, as our liberal doctrinaires teach, that now we know "there are no absolutes," so that the field of principles guiding human behaviour is left to selfish or idiosyncratic principles or to the vagaries of public opinion. It wasn't accidental that this ruling dogma of relativism was invoked by the Supreme Court to open up the way for the suppression of political speech.<sup>7</sup>

*A.* One doesn't need relativism to prove that learning to hold one's tongue can be salutary.

*B.* Surely, holding one's tongue at the right time, before the right people and in the right way, but teaching discretion is a task for teachers, for sages, for poets; it's far too delicate a task for government. The wrong kind of silence is not what we want.

*A.* Certainly, the regulation of political speech in a republic is a particularly delicate problem, but some control there must be. Self-control is obviously preferable. The need for political control, one might say, varies inversely with the self-restraint of the citizenry, the press and the leaders of public opinion.

*B.* And the probability that such a power will be abused varies inversely with the intelligence and self-control of the governors—and they have police powers at their disposal.

*A.* Of course we can hope that such a power could be dispensed with, and one can argue that perhaps, with the exception of emergency situations, it should be dispensed with, but then again—there are quite a few people who need the help of the fear of punishment to learn how to control themselves, to acquire even a modicum of discretion. It's hardly higher education, but the educative functions of the penal law are not inconsiderable.

But what has what you were saying before got to do with the Anastaplo Case?

*B.* There is no more dramatic way to remind people of the principles which should guide and govern political life than a properly, that is, carefully, qualified assertion of the right to rebel, to remind them that no group of men, no government, no work of merely human hands is in itself sacrosanct. The whole case revolved around his stand on the right to revolution. He qualified his arguments very carefully, citing the Declaration of Independence and Thomas Aquinas as authorities, stressing that the possession of a right does not automatically license the possessor to exercise the

<sup>7</sup> *Dennis v. United States*, 341 U.S. 494, 508 (1951).

right, that the circumstances for a prudent and justifiable exercise of that right do not now exist and are not, in his opinion, likely to exist in this country in the foreseeable future—but that the higher principles justifying such a right must not be lost sight of, if our polity is not to lose its soul.

A. Yes, but most men—and that means a lot of men prone to abuse or to misunderstand what they hear—will hear only “right” and “revolution”; they will never grasp, or care about, the careful qualifications. The public are well enough aware of their rights as individuals. They don’t need to be reminded of them. What is needed is a reaffirmation of the virtues of orderly discipline, the kind of orderly discipline that will enable us to fulfill our obligations as members of society, to fulfill our civic duties. Certainly, two or three friends sitting together in someone’s living room, or some people sitting together in a classroom can properly discuss the natural and unnatural grounds of our conventions. What else does philosophy mean? But public discussions of such matters is not, especially now, what we need.

B. Those people who voted against him, certainly, did not seem to appreciate the careful qualifications. I think we are closer to agreement at this point.

What seems to have happened is that the majorities on the Character and Fitness Committees and the Supreme Court of Illinois, untutored in or forgetful of their country’s political principles, and too susceptible to that demagoguery which so magnified the internal dangers from communist subversion, simply recoiled from the abysses his remarks about the right to revolution opened up before them.

A. Whatever made him think they would act in any other way? But, before you answer that, by “abyss” do you mean the sort of thing that caused Anytus to leave the scene in Plato’s *Meno*?

B. Yes, or what leads Socrates in the *Gorgias* to declare himself the only statesman in Greece. Or simply the problem faced by everyone who speculates about the fundamental principles of government: that he who speculates about the fundamental principles justifying all government is in that very act speculating about principles which would justify the alteration or abolition of any government which does not measure up to those principles.

A. It has been argued that such speculations should not be exposed unduly to the view of men unequipped to deal with them reasonably, that they should be confined to the councils of the learned. Why did he expect his examiners to face these arguments with equanimity?

B. I suppose, as your question suggests, because he, as a young

man might, esteemed his chosen profession a bit too highly. He insisted upon and expected, or at least hoped, that the legal profession would act as a "learned profession." From the very beginning of the case I argued that he was overestimating the learning, intelligence and virtue of the lawyers and the courts, that they were not up to appreciating his arguments and should not be expected to be, that he did not realize the extent to which contemporary relativistic social science had undermined the moral foundations of the rule of law in America, that the proper place for what he was trying to do was an educational institution, not the open forum of the courts.

But he maintained that the legal profession in this country was always supposed to be a learned profession, that from the beginning they were regarded as the guardians or custodians of the American system of ordered liberty.

A. Surely, Burke and Tocqueville thought that too, but in their day lawyers who wanted to educate themselves nourished their minds with classical Greek and Latin literature, the Bible, Shakespeare, Plato, Aristotle, Locke and Montesquieu. Nowadays they don't even read a philosophic lawyer like Blackstone. They are confused by the psychologists, demoralized by the novelists, and shunted away from the older thinkers who could really help them by the historical relativism and naive scientism pouring out of the universities. They're trained to be technicians and are babes in the woods as far as competence in dealing with the principles which should be guiding their techniques is concerned. He's flattering them and fooling himself if he really thinks they are a learned profession.

B. Surely not all, or perhaps even most, lawyers were ever learned in the most serious sense of the term, but I don't think it's altogether unreasonable to expect a learned leadership to be able to exert a controlling influence.

But there's a more important ground for his expectations, one that people like us and our political science friends, he argues, are not sufficiently aware of. Lawyers, he maintains, because of their law school training, because of the techniques they learn to work with in the exercise of their craft, develop a certain sensitivity about fairness and unfairness of procedures, a practical sense of justice, that should make them more aware and more appreciative of principles of justice than members of the other learned professions. Non-lawyers, he argues, including those who write about the law, usually fail to understand how rules of law develop and work in practice. By training and experience, lawyers, he maintains, are more appreciative of the blessings of the rule of law and of the inherent justice built into the system.

*A.* It's a pity they're so unexplicit about it.

*B.* That's the problem. When it comes to clarifying and making explicit the principles of their own decency, their own virtues, the virtues of rationality, they don't know where to go.

*A.* Does Anastaplo still think it was worth it?

*B.* The record of the case, I think, justifies itself. It's a remarkable collection of documents, something like a report of a ten year long experiment to find the place of moral and intellectual excellence in the American scheme of government. It often reads like a drama, an intellectual drama: it sometimes seems too well planned to be a verbatim record. The Platonic dialogues seem most to have influenced his style, the style of his deeds as well as his words.

At the beginning of the case I think he thought he had little choice. He was too honorable and too intelligent to behave much differently. We were in the middle of the McCarthy episode, before things began to turn against McCarthy. The atmosphere created then made him feel obligated to act as he did. The demagogic use of political power to silence debate, especially intelligent debate, seemed to him to strike at the heart of the American scheme of government. If that hadn't been the case, he might have been able to swallow the foolishness of his first examiners. They had been aroused, you know, by what was almost a word for word quotation from the Declaration of Independence. Acquiescence would have meant to him contributing knowingly to what for others was an unwitting subversion of the animating principles of constitutional government in this country. To derive personal profit from what he thought was a disservice both to his country and to his principles must have been utterly repugnant to him.

He admits he might be wrong about his high expectations for lawyers. But if so, is that the profession to which he ought to belong? As one gets into that record, which he so largely shaped, one begins to wonder whether the real issue was his fitness to become a member of the Bar, or the Bar's fitness to be associated with men like him. Although he has done, and continues to do his best to encourage, if not goad, the profession to return to what he regards as its better self, the case, especially near its end, begins to look like the story of one rather uncommon man's search to find out where he rightly belongs.

He certainly has been able to educate himself in a way that he might never have been able to do as a practicing lawyer.

*A.* It's a funny way to get an education.