



BOULDER COUNTY BAR NEWSLETTER

MARCH 2010

THE AMERICAN LAW INSTITUTE WILL NO LONGER ‘TINKER WITH THE MACHINERY OF DEATH’¹ —SHOULD ANY OF US CARE?

BY MARY CLAIRE MULLIGAN

When it happened in October 2009, it wasn't even a blip on the radar to most criminal defense practitioners, let alone lawyers in general. It engendered no publicity until Adam Liptak, New York Times Supreme Court Correspondent, wrote about it in his "Sidebar" column January 5, 2010, calling it "a tectonic shift in legal theory."² "It" was the American Law Institute (ALI) decision to withdraw §210.6—the capital punishment provision of the Model Penal Code—because of questions about whether the American death penalty could ever "meet basic concerns of fairness in process and outcome."³

The ALI is a group of appellate judges, law professors and influential lawyers

who produce the Restatements of Law (remember those from law school?) and the Model Penal Code (ditto). Why would anything the ALI does have relevance to those of us who have already graduated from the halls of academe? Well, its members include three justices of our state Supreme Court, judges from the Tenth Circuit and the glittering names of a number of Colorado's legal power brokers. You also might recognize the names of nine of the more than 4000 other members: Samuel Alito, Stephen Breyer, Ruth Bader Ginsburg, Anthony M. Kennedy, John G. Roberts Jr., Antonin Scalia, Sonia Sotomayor, John Paul Stevens and Clarence Thomas.

According to the ALI's report recommending the withdrawal of §210.6, "The section played an influential role in the evolution of American capital-punishment systems and capital-punishment law over the last half century."⁴ State legislators used the Model Penal Code as a basis upon which to draft their statutes, in an attempt to pass constitutional muster.⁵ The U.S. Supreme Court cited §210.6 as support for the legal premise that adequate capital-sen-

tencing guidelines can be formulated and therefore that imposition of the death penalty was constitutional when it reinstated punishment by death in *Gregg v. Georgia*.⁶

However, the ALI has now recognized that oversight by the courts and guidelines such as those formulated in the Model Penal Code have not been enough to prevent, or even stem, the tragedies of modern American capital punishment. Execution of the innocent and the developmentally disabled⁷ have shocked our collective conscience. Just as horrific is the continued role played by race, economic disadvantage, geography, and incompetent lawyering in the American death penalty. The ALI's final decision was to throw up its hands and pull its support leg away from the wobbly stool of capital punishment jurisprudence.

Our courts must consider "evolving standards of decency" in an Eighth Amendment analysis.⁸ When analyzing the constitutionality of a state's death penalty law, the U.S.

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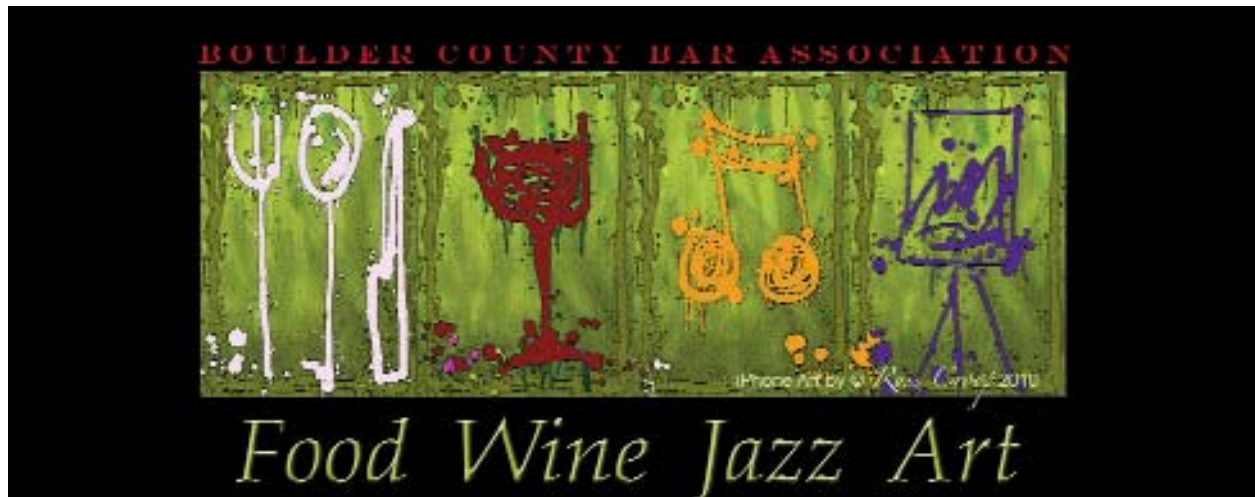
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THE MACHINERY OF DEATH *(continued from page 1)*

Supreme Court traditionally compares the statutory schemes in place in the remaining states.⁹ That those schemes were largely built on the foundation of the Model Penal Code, now withdrawn because of the impossibility of a fair or just system of capital punishment, calls into question the viability of the death penalty in America.

How does this affect us here? A bill to abolish the death penalty in Colorado lost by one vote in the state legislature last year. There are

two young men on our death row and a third for whom a jury has imposed death and who is awaiting the judgment of sentence. All three were under the age of 21 at the time of the crimes for which they were convicted, all three were prosecuted in Arapahoe County, all three were and are represented by court-appointed counsel and all three are African-American. Is it sufficient to throw our hands up, as the ALI did, and back away from the mess? Or should we uphold the constitutional oaths we took when we were sworn in as lawyers, all those years ago or

just last October, and demand justice for the condemned?

FOOTNOTES

1. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).
2. "Group Gives Up Death Penalty Work," Adam Liptak, *The New York Times*, January 5, 2010.
3. Report of the Council to the Membership of The American Law Institute on the Matter of the Death Penalty, April 15, 2009, p. 5.
4. *Id.*, p. 4.
5. *Id.*, Annex B: Report to the ALI Concerning Capital Punishment, Carol S. Steiker and Jordan M. Steiker, November 2008, p. 2.
6. 428 U.S. 153, 193-194 (1974).
7. *Atkins v. Virginia*, 536 U.S. 304 (2002), held that it is now a violation of the Eighth Amendment proscription against cruel and unusual punishment to execute the "mentally retarded," overturning *Penry v. Lynaugh*, 492 US 302 (1989).
8. *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958).
9. See, e.g., *Penry*, supra.



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PRESIDENT'S PAGE

THE NEW FOUR HORSEMEN: JINGOISM, BOMBAS, BELITTLEMENT AND VITRIOL

By KARL KUMLI



I wish I could say that “it didn’t always use to be this way.” But ‘tain’t so.

Uncivil political discourse and with it sometimes, violence has been around for centuries.

There is a reason that there are “sergeants at arms,” whose duties are “to preserve order and arrest offenders,” in legislative bodies. Power and politics beget passion. Julius Caesar was famously cut down as he entered the Roman Senate. Physically violent episodes have erupted in the United States Congress in the 18th, 19th and 20th centuries.

Nor is violence limited to the legislative branch. While it may seem quaint to recount that California’s fourth Supreme Court Chief Justice, David S. Terry, stabbed one man, killed another in a duel and was shot dead attempting to kill a sitting United States Supreme Court justice in 1889, the number of lawyers, judges and litigants killed in court or in connection with their

case, is great. Colorado lawyers and witnesses have been murdered in connection with cases in which they have participated in the recent past.

The executive branch is no stranger to violence, of course, with four presidents killed in office and a fifth nearly so. Attempted assassinations against occupants, or former occupants of the Oval Office may number nearly two dozen. Nor are American chief executives the only ones so honored (as Mark Twain might have said). Foreign heads of state, popes, bishops and lamas have all been killed because of who they are or what they have accomplished or threatened to do while in office.

But violence or our awareness of it has grown immeasurably. Now, in my 29th year of practice, I can recall a time when you didn’t have to go through security to get into a Boulder courtroom and when security checks at the nation’s Capitol, much less in statehouses, were perfunctory at best.

Politics and the law are, in a sense, all about passion. Making and administering society’s rules is the crucible of conflict. But is there a link between vituperative speech and physical violence? I suspect some would differ over this question. And while the law provides

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PRESIDENT'S PAGE *(continued from page 5)*

what we always hope is a nonviolent alternative for dispute resolution, there is an interesting question as to whether angry, even inflammatory, speech provides an outlet for and alternative to violence, or whether it risks legitimizing it.

The Norman Rockwellesque town meeting, where a gentle soul stands up from the crowd and, hat in hand, and softly begs to offer a closely-held belief as a guide to communal behavior, seems an almost ludicrous anachronism today.

Instead, while we mourn the passage of that gentle time of coveted memory, seemingly only a couple of generations ago, we should note that passion and violence have been hallmarks of the American political experience since well before the Revolution.

So what are we to make of the proliferation of pugnacious pundits nowadays? Are they really “cancers spreading ignorance and hate”? Or are they inevitably part of the American political fabric?

It seems to me that passion in politics is a thirst that we, as a society, have never had slaked. We want to know “where the beef” is. We want to hear the zinger that puts down those with whom we disagree: “You’re no John Kennedy”; “There you go again.” We want to believe that extremism in the defense of liberty is no vice and moderation in the pursuit of justice is no virtue, as long as we ourselves get to define where liberty and justice reside.

That is, of course, the rub. We are all ready to cheer the sentiments with which we viscerally agree. We

are quick to condemn thoughts which seem foreign, unusually packaged or at variance with “cherished values” -- whatever those may be.

Therein lies the danger, I think. Passion has a tendency to obscure critical thought. What often seems to happen now is that passion and spectacle, especially the emotional spectacle of the political soapbox, obscure the search for meeting ground, for moderation, for coexistence.

Jingoism, bombast, belittlement and vitriol may make for ratings on “reality television” (whatever that is) or radio. But they are not the warp and weft of social fabric. The social fabric or social contract emanates from common interests bridging, not causing, ideological divides. Even among sworn enemies there may be shared concerns. Songwriter Jackson Browne once asked whether the Russians (the enemies of the day) loved their children too. The jingoist, in the heat of bombast, may be tempted to belittle the adversary by suggesting, in dripping vitriol, which they don’t. A moment’s quiet reflection, however, might suggest otherwise.

Finding that quiet moment is one important aspect of the search for justice.



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PRO BONO PAGE

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Thank you to mediators who took a case in January:

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Tuesday, March 9
Employment Law

The Genetic Information Non-Discrimination Act – New Limits for Employers Beginning November, 21, 2009
Presenter: Carmen Danielson
Noon at Caplan and Earnest
1 CLE \$20, \$10 new/young lawyers
Lunch \$10 (turkey, veggie, beef, salad)

Wednesday, March 10
Solo/Small Firm Happy Hour
5:00 PM at The Rib House

Thursday, March 11
Intellectual Property
Annual PCT Update
Presenter: Carl Oppedahl
Noon at Hutchinson Black and Cook
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Thursday, March 11
Raising the Bar Mentor-Mentee Relationships with Clients and Other Parties
Noon-1:30 at Boulder County Justice Center
Courtroom F Brownbag lunch
1 ethics and 1 general CLE

Friday, March 12
Availability of Legal Services
Noon Brownbag lunch at BCLS office
315 W. South Boulder Road, Suite 205

Tuesday, March 16
Business Law
Tax Aspects of Entity Formation and Operations
Presenter: Jeffrey D. Cohen, Esq., C.P.A.
Noon at Hogan and Hartson
1 CLE \$20, \$10 new/young lawyers
Lunch \$10 (turkey, veggie, beef, salad)

Tuesday, March 16
Paralegals and all lawyers
Open Meetings and Open Records
Presenter: Shelley Bailey

Noon at Caplan and Earnest
1 CLE \$20, \$10 new/young lawyers
Lunch \$10 (turkey, veggie, beef, salad)

Wednesday, March 17
Taxation, Estate Planning and Probate and Real Estate Law
Tax Benefits for Conservation Easement Donations
Presenter: Ariel Steele of Tax Credit Connection Inc.
Noon at Hutchinson Black and Cook
1 CLE \$20, \$10 for new/young lawyers
Lunch \$10 (turkey, veggie, beef or salad)

Thursday, March 18
Bankruptcy Lunch
Noon at Turley's

Thursday, March 18
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5:30 PM at Jill's in the Hotel St. Julien

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