

Richard McLaughlin¹

**“Some Thoughts on William T. Burke’s Contributions to the
Marine Law Community”**

Introduction:

*At the 50th anniversary meeting of the Law of the Sea Institute, held at Berkeley in 2015, a featured conference panel was devoted to the history of LOSI, including a paper by Professor Craig Allen of the University of Washington on the career and academic writings of the great ocean law scholar William T. Burke.² An informal comment on Professor Allen’s paper was delivered by Richard McLaughlin, who had done graduate studies under Burke’s direction at UW, in which he provides an important perspective on Burke’s jurisprudential thought—stressing how Burke’s “formalism” was expressed in his robust defense of state practice as the lodestone of legitimacy for a rule of international law unless superseded by formal treaty commitments. McLaughlin’s also offers a fascinating personal remembrance of Burke as teacher and colleague. The LOSI is grateful to Professor McLaughlin for permission to include his Comment in the **LOSI Occasional Papers** series.*

--Harry N. Scheiber, LOSI Director Emeritus

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² Craig Allen, “A Legacy of Stewardship for the Public Order of the Oceans: A Memorial Tribute to William T. Burke,” in *Ocean Law Debates: The 50 Year Legacy and Emerging Issues for the Years Ahead*, ed. H. Scheiber, N. Oral, and M. Kwon (Brill/Nijhoff, 2018).

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I greatly appreciate this opportunity to provide a few more comments about the life and work of Professor Burke. I certainly didn't know him as well or work as closely with him as Craig Allen did. My experience with Bill was as his student and graduate research assistant in the late 1980s. In the years that followed I would ask his advice on various projects; and of course, like all former research assistants, I asked him to provide far too many letters of recommendation for jobs and grants, which he always graciously supplied.

Bill was a very exacting and demanding teacher. He was straightforward and gruff and did not hand out compliments lightly. I remember asking him what he thought about my LL.M. thesis and he said, "I think you did very well, given the material that you had to work with." Thinking back, I thought that was high praise in comparison to some of the things he said to other students in our

seminar group. These comments were not mean-spirited, just honest and reflective of the high expectations that he had of his students.

During the year that I worked as Bill's graduate assistant, I was hired to help him update his International Law of the Sea course materials, which eventually were published in 1992 by Lupus Publications as a case book entitled *International Law of the Sea: Documents and Notes*. In reality, I spent a good chunk of my energy finding ammunition for a feud that Bill had at the time with Professor Louis Sohn over a sentence that Sohn was able to insert into the *Restatement (Third) of Foreign Relations Law*. The Restatement asserted that customary international law provides foreign vessels with a right of access to ports except when the vital interests of the state were jeopardized. Bill thought that this was a gross misrepresentation of state practice and existing law and that port states could prevent access to their ports for any political reason of their choosing, and he wanted me to find evidence to support that conclusion. In the end I provided him what I could, and his dissatisfaction of the Law of the Sea sections of the Restatement found their way into a 1989 *Yale Journal of International Law* article on the topic, "Customary Law of the Sea: Advocacy or Disinterested Scholarship?" as well as in about 4 pages of his 1992 Lupus book.

Interestingly, Burke, because of his education at Yale and co-authorship with Myres S. McDougal of the classic *Public Order of the Oceans* has always been viewed as a member of the New Haven School. While he was a strong proponent of the goals of using law as a tool in improving human dignity, which is the centerpiece of the New Haven School, my own experience with Bill was that he

was really a legal formalist who felt that the best way to protect the less developed states and to promote human dignity was to hold nations to their treaty-based agreements and to require strong evidence of actual state practice before declaring the formation of a customary norm.

In fact, it was these concerns that led to his dispute with Louis Sohn and his later notoriety when he publicly supported the promotion of sustainable whaling and objected to the International Whaling Commission's votes to impose a moratorium on commercial whaling. He made these views crystal clear in his now-classic 1994 book, *The New International Law of Fisheries: UNCLOS 1982 and Beyond*, where he wrote:

This writer believes the harvest of marine mammals should continue to be a permissible activity within the confines of regulations designed to protect against excessive depletion. Societies and cultures supporting complete protection should be free to adopt that policy for their own nationals, but not to impose it on others outside their national jurisdiction. Economic coercion, such as the U.S. embargo of fish products, is not consistent with such a policy when it is used to penalize behavior that otherwise conforms to international agreements. (p. 265)

I personally believe that his primary objective in aggressively promoting a formalistic interpretation of treaty obligations, such as those in the International Whaling Convention, and in the formation of customary law was to prevent what he perceived as cultural imperialism by the western democracies. He opposed the United States' practice of imposing economic sanctions to protect international wildlife under the Pelly Amendment and Endangered Species Act as unbridled attempts to use unequal economic and political power to impose western values on other societies and cultures. His view was that if the United

States wanted to protect whales or dolphins or sea turtles then it needed to negotiate international agreements to that effect rather than unilaterally demanding it through threats of economic sanctions.

Professor Burke made these views abundantly clear to his students, but he never demanded that they accept them. I personally did accept them and was greatly influenced by his skepticism of economic sanctions to conserve international wildlife, which were all the rage in the 1980s-1990s. My doctoral research at UC Berkeley School of Law reflected that skepticism, as have all my writings since.

Whether you agree or disagree with Bill Burke's views regarding the proper role served by the Law of the Sea, no one can dispute the important impact that he had on the hundreds of students, including myself, that he taught over four decades at the Ohio State University and the University of Washington. His extraordinary influence as a teacher was achieved alongside his massive corps of brilliant scholarship—and also his contributions to some of the leading institutions in the field of international marine law, including his seminal work with this Law of the Sea Institute and his role as founding editor of the *Journal of Ocean Development and International Law*, among other contributions. We all owe Bill Burke a debt of gratitude for the foundational work that he provided and for being as Professor Bernard Oxman described him: “the conscience of the Law of the Sea Institute.”