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JUSTICE LOUIS H. BURKE—A TRIBUTE

by Justice Matthew O. Tobriner*

Justice Louis Burke is a judge who fits into no pre-ordained category. A handsome six-foot-three man whose open features suggest an almost boyish quality, Justice Burke may conjure up visions of an approach to the law that is simple and easily defined, but the record does not confirm any such assumption. Justice Burke's background may give a clue. I am told his mother was a charming, tiny, courageous French woman of high native intelligence; his father, a somewhat gregarious person of Irish background, a practical, conservative man, who rose to some prominence in local Canadian politics. It is not surprising that Justice Burke does not easily fit into the "liberal" or "conservative" stereotype or the Republican or Democratic model.

The record of his ten year span on the Supreme Court (1964-1974) consists of the remarkable productivity of 237 majority opinions, 105 dissents, 37 concurring and dissents, 7 concurring, and 5 by the court, totalling 391. When it is remembered that at least one-half of Justice Burke's time must have been occupied in preparing for weekly conferences for the disposition of an approximate average of 80 petitions for hearings, writs and State Bar matters, as well as passing upon the opinions of his colleagues, the record is even more impressive. Nor does this evaluation take into account the tremendous effort and time Justice Burke devoted to the American Bar Association, the National Center for State Courts and the American Judicature Society. I have written elsewhere¹ of Justice Burke as an administrator of such programs, as a non-judicial man, as the devoted husband of his remarkable wife, Ruth, and as the father of five successful children. Let us look briefly at his illustrious record as a writer of Supreme Court opinions.

Justice Burke's record in the field of criminal law illustrates his independence of a categorical or rigid approach to problems in that area, as well as his open-mindedness and willingness to reexamine previously held positions. The death penalty cases furnish telling examples. His positions in *People v. Goedecke*² and *People v. Nicolaus*³

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1. Tobriner, *A Salute to Justices Burke and Mosk*, 50 CAL. ST. B.J. 14 (1975).

2. 65 Cal. 2d 850, 423 P.2d 777, 56 Cal. Rptr. 625 (1967).

3. 65 Cal. 2d 866, 423 P.2d 787, 56 Cal. Rptr. 635 (1967).

perhaps foreshadowed his ultimate rejection of the harsh sanction of the death penalty. In each of these cases, Justice Burke wrote opinions reducing a first degree murder conviction carrying the death penalty to second degree murder.

The facts of each case, tragically revolting as they were, demonstrated the utter inappropriateness of the death penalty. In *Goedecke*, the court was confronted with a first degree murder conviction of an 18-year old boy who had killed his father, mother, brother and sister after attending a religious meeting. He could not state what was in his mind during the episode except, after its commission, the thought that he should get out of his parents' house. Justice Burke's opinion points out that there was no psychiatric testimony as to the extent to which the defendant could maturely and meaningfully reflect upon the gravity of his contemplated act and therefore Justice Schauer's test in *People v. Wolf*⁴ had not been met.

Similarly, in *Nicolaus*, a father who had been hospitalized in a psychiatric unit and who had considered himself a follower of Hitler and possessed of god-like qualities, killed his three children. Justice Burke wrote the opinion for the court, holding that such a defendant lacked the capacity to understand the enormity of his conduct and could not be held guilty of first degree murder. Thus, Justice Burke courageously followed the doctrine of diminished capacity to avoid inflicting the death penalty on defendants unable to comprehend the quantum of the enormity of their conduct.

The death penalty cases offer another instance of Justice Burke's humanity and insistence that, in the criminal field, the court look to the substance of the cases rather than to inapposite and outmoded rules. In the *first* instance of our court's in-depth adjudication of the constitutionality of the death penalty, *In re Anderson*,⁵ Justice Burke upheld the penalty against the charge that it was a denial of equal protection and due process because the issue of life or death was determined without

4. 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

[T]he true test must include consideration of the somewhat limited extent to which this defendant could *maturely and meaningfully reflect* upon the gravity of his contemplated act.

. . . .

[T]he use by the Legislature of "wilful, deliberate, and premeditated" in conjunction indicates its intent to require as an essential element of first degree murder (of that category) substantially more reflection; i.e., more understanding and comprehension of the character of the act than the mere amount of thought necessary to form the intention to kill.

Id. at 821-22, 394 P.2d at 975-76, 40 Cal. Rptr. at 287-88.

5. 69 Cal. 2d 613, 447 P.2d 117, 73 Cal. Rptr. 152 (1968).

any test, standard or guide-post and hence at the purely subjective and arbitrary choice of the fact-finder. I wrote the dissent in that case, and although I was joined by Justices Traynor and Peters, Justice Burke spoke for the majority.

Justice Burke, however, continued to give the matter grave and serious thought; he often discussed the issue with me, explaining that he believed the death penalty might serve a function as a deterrent to the would-be murderer. The issue became a matter of friendly but sincere debate in which Justice Burke and I engaged over the years. Yet I shall never forget the day when at lunch he told me that I should be happy indeed because he had finally reached the conclusion that the death penalty could probably not be constitutionally sustained. And thus in *People v. Anderson*,⁶ Justice Burke joined the majority in holding that the death penalty violated the California Constitution as an infliction of cruel or unusual punishment. His vote marked him as an open-minded, sensitive jurist, and as an independent thinker willing to re-evaluate a long-accepted rule in light of changing times.

But Justice Burke also held a strong belief that sometimes our court erred on the side of the criminal defendant in over-emphasizing an error that might have occurred in the course of a trial and overlooking the mandate of Article VI, section 13 of the California Constitution, which provides that the error does not require reversal unless it is prejudicial. He particularly believed that the failure to inform a defendant of his right to counsel under the doctrine of *People v. Dorado*⁷ and *Miranda v. Arizona*⁸ should be tested in the crucible of the prejudicial error rule rather than compel automatic reversal, as our court has, indeed, held.⁹ In this respect Justice Burke finds present support in the thoughtful and erudite book of Justice Flemming, *The Price of Perfect Justice*.¹⁰ I presume that this issue will continue to intrigue judges and to evoke conflicting responses for many years to come.

In the field of constitutional law Justice Burke contributed many decisions of outstanding significance. There are too many to analyze in detail but I shall emphasize some that unquestionably influenced the progression of the law in this vital area.

When Justice Burke served as the presiding justice for the Court of

6. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

7. 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965).

8. 384 U.S. 436 (1966).

9. *People v. Doherty*, 67 Cal. 2d 9, 429 P.2d 177, 59 Cal. Rptr. 857 (1967).

10. M. FLEMMING, *THE PRICE OF PERFECT JUSTICE* (1974).

Appeal, Second Appellate District, Division Three, he recorded his deep aversion to racial discrimination in the important case of *Abstract Investment Co. v. Hutchinson*.¹¹ There he held that in an unlawful detainer action a defendant tenant must be permitted to show, as a special defense, that his eviction had been sought wholly on the ground that he was a Black. Such discrimination, wrote Justice Burke, would bar court-ordered eviction since the resulting state action would violate the California and Federal constitutions. This holding was one of the first expressions against racial discrimination that one can find in the California law books; it anticipated, and to some extent, inspired our 1966 ruling in *Mulkey v. Reitman*,¹² which, in invalidating Proposition 14, relied in part on the *Abstract* case.¹³ Justice Burke had the satisfaction of joining with the majority in *Mulkey*.

Justice Burke's decisions have recognized that the criminal defendant should not be treated as a penal statistic but as a human being entitled to the possibility of rehabilitation and the protection of the Constitution. In *In re Foss*,¹⁴ he struck down as cruel and unusual punishment for repeated offenders a provision of the California drug laws which mandated a minimum 10-year sentence without possibility of parole. Justice Burke pointed out that "even though the offender may have suffered a second conviction because of his addiction, once he has been able to overcome that addiction or show a real promise of rehabilitation and of being able to remain free of further narcotic usage he may not be tried under parole supervision but must still remain in prison until the expiration of the mandatory 10-year period." He concluded that "by hindering the Adult Authority's ability to tailor the punishment to fit the rehabilitative progress of the particular offender, the provision precluding parole consideration increases the cost to the society of the offender's incarceration both in terms of the dollar cost of a longer imprisonment and in terms of the ill effects suffered by offenders from unduly long periods of imprisonment."¹⁵

In similar recognition that the defendant as a human being should not be shunted off to a state hospital without the opportunity to stand trial within a reasonable time to show recovery from illness, Justice Burke

11. 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962).

12. 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966), *aff'd* 387 U.S. 369 (1967).

13. *Id.* at 538, 413 P.2d at 831, 50 Cal. Rptr. at 887.

14. 10 Cal. 3d 910, 519 P.2d 1093, 112 Cal. Rptr. 649 (1974).

15. *Id.* at 924, 925, 519 P.2d at 1081, 1082, 112 Cal. Rptr. at 658, 659.

wrote the opinion in *In re Davis*.¹⁶ There he held that a person charged with criminal offenses and committed to a state hospital solely because of his incapacity to stand trial may not be confined more than the reasonable time necessary to determine whether there is a substantial likelihood of his recovery in the foreseeable future.

Justice Burke, indeed, recorded his sensitivity to the rights of the individual as against the powerful institution of government, whether the individual was the subject of government snooping, or an individual indigent, or an individual prosecuted in the justice court. Thus, in *People v. Edwards*,¹⁷ he upheld, as an alternative to the rigid "open fields" test in search and seizure cases, the "reasonable expectation of privacy" standard, in order to prevent unreasonable governmental intrusions into one's personal privacy. In *Ferguson v. Keays*,¹⁸ he held that an indigent civil litigant should have the right to be relieved of statutory filing fees in the event that he could not afford to pay them. Moreover, in *Gordon v. Justice Court*,¹⁹ he held that criminal trials which could result in the defendant's imprisonment, conducted by non-lawyer judges, did not meet the standards of due process of law. He held that so-called "police judges" must at least be qualified lawyers.

Justice Burke has given us outstanding decisions in the field of workers' compensation cases. They are characterized by his adherence to the statutory mandate of liberal construction and resolution of all doubts in favor of compensability.

Thus, probing into the "going and coming" rule which has already undergone considerable erosion, Justice Burke carved out further limitations. In *Le Febvre v. WCAB*,²⁰ the record showed that the employer required a volunteer fireman to travel to evening fire drills. Justice Burke held that workers' compensation to the wife of the fireman who died in a car accident while en route to the drill was not barred by the "going and coming" rule; the fireman was compelled to undertake this additional risk and exposure to accident as an incident to employment. Likewise, in *Dimmig v. WCAB*,²¹ an employer encouraged an employee to attend night college classes; the employer paid part of the tuition because the instruction afforded to the worker benefitted the employer.

16. 8 Cal. 3d 798, 505 P.2d 1018, 106 Cal. Rptr. 178, cert. denied, 414 U.S. 870 (1973).

17. 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969).

18. 4 Cal. 3d 649, 484 P.2d 70, 94 Cal. Rptr. 398 (1971).

19. 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974).

20. 69 Cal. 2d 386, 445 P.2d 319, 71 Cal. Rptr. 703 (1968).

21. 6 Cal. 3d 860, 495 P.2d 433, 101 Cal. Rptr. 105 (1972).

Justice Burke held that the employee, who was injured while returning home from such a night college class, could not be barred from recovery by the "going and coming" rule.

Justice Burke's recognition of the statutory mandate of liberal construction and the importance of the referee's role in determining credibility of witnesses finds illustration in a number of cases. *Evans v. WCAB*²² and *Kerley v. WCAB*²³ attest his enforcement of the liberal construction rule; *Garza v. WCAB*²⁴ shows his implementation of the referee's function. The latter is a most important case, for there Justice Burke held that in view of the referee's competence to decide matters of credibility and other questions of fact, his findings are entitled to great weight. The findings are not subject to rejection by the board in the absence of contrary findings strongly supported by substantial evidence. Nor should the findings be upset by mere speculation and surmise. Justice Burke concluded: "[T]he denial of compensation benefits cannot rest upon the board's mere suspicion or surmise, in view of the policy of the law to resolve all reasonable doubts in the employee's favor."²⁵

The list of Justice Burke's contributions could go on endlessly; I have omitted whole subject matters of the law in which he has written important decisions. I cannot, of course, discuss some 391 opinions. Suffice it to say, the ones that I have noted show that, despite the occasional assertion that Justice Burke is a "conservative," the designation simply does not fit. In any event, classifications of that nature do not accurately describe appellate judges; I would submit, for whatever it is worth, that Justice Burke could as appropriately wear the mantle of "liberal." I cite to you the comment of the writers in the March, 1974 issue of the *California Law Review*, analyzing the work of our court, who conclude that Justice Burke's "so-called conservative outlook includes a passion for fairness and due process."²⁶ The record at the least bears out this appraisal, and, indeed, establishes more.

When we regard Justice Burke as a man, we see a rugged simplicity that marks him as one who works beautifully in wood, paints sensitive pictures, builds fences at his farmlike home, and wields an expert hammer as a carpenter. When we look at him as a judge we find a

22. 68 Cal. 2d 753, 441 P.2d 633, 68 Cal. Rptr. 825 (1968).

23. 4 Cal. 3d 223, 481 P.2d 200, 93 Cal. Rptr. 192 (1971).

24. 3 Cal. 3d 312, 475 P.2d 451, 90 Cal. Rptr. 355 (1970).

25. *Id.* at 319, 475 P.2d at 456, 90 Cal. Rptr. at 360.

26. *Forward: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court*, 62 CALIF. L. REV. 303, 363 (1974).

record that is by no means simple. There are interesting angles, intellectual nuances, unexpected originality and warm acceptance of human need.

And so when Lou Burke announced that he would retire from the Supreme Court, I suspected that I would miss him—miss his warmth, his stories of the building of his home at Necassio, Marin County; and of the vicissitudes of tending ducks, geese, cats and a dog, fending off racoons, and similarly marvelous tales on a myriad of other subjects. (He is a superb raconteur.) I would miss his counsel, his appraisal of the cases, his contributions to our court. I must say in all honesty that those fears of loss have borne out; I miss him deeply.