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## So What Is a Ruminant, Anyway: Tales of Professor Wex S. Malone

H. Alston Johnson\*

Once upon a time, there was a grizzled old law professor. In a long-ago age before political correctness and fuzzy legal analysis, he waxed eloquent in the classrooms and corridors of many law schools, most noticeably LSU. He was reputed to recite ribald ripostes, regaling generations of law students with factual scenarios that could not possibly have happened—or could they? With what some took to be a wicked gleam in his eye, he was said to single out the very few female members of the law class of the era for recitation on cases involving what would today felicitously be termed sexual harassment. He was a master of the subject of torts, a subject so inherently interesting and titillating for the first-year student that the professor used to say that if the student did not like the subject, it was the professor's fault. He was a gifted teacher, the likes of which we see only rarely. He trained many other teachers, who still labor to achieve the clarity and precision that he seemed to convey so effortlessly.

Such was his classroom persona. His law review persona was usually quite different. As easy as his classroom repartee was, his writing was careful, studied and crafted in every detail. His drafts of law review articles, often scrawled in pencil on legal pads, showed evidence of words marked out and their replacements marked out again, until their precision and their brilliance shone like diamonds. To the minds of many, he was the best legal writer ever to grace the pages of this law review. He was almost certainly the most influential legal writer in Louisiana. As is now commonly said in another arena, when he wrote, judges listened.

This long-departed but not forgotten colleague, of course, was Wex S. Malone, Boyd Professor of Law and nationally-recognized legal scholar, to whom the editors of the *Louisiana Law Review* have dedicated the revised version of the faculty symposium. With the other giants of his time such as Leon Green, William Prosser, John Wade and others, he crafted the Restatement of Torts, Second, clearly the most influential of the American Law Institute's volumes restating and reshaping American law. And along the way in a career spanning almost fifty years, he wrote. He wrote books. He wrote monographs. He wrote book reviews. He wrote tributes. He wrote symposia articles. And, of course, he wrote lead articles.

And often, in those lead articles, he would not just write, he would "ruminate." There is a complete list of all of his publications in an earlier volume of this review.<sup>1</sup> Suffice it to say here that he published "ruminations" on a wide variety of subjects, from Civil Code Article 2317 to contributory

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1. *Bibliography of the Writing of Wex S. Malone*, 48 La. L. Rev. 1069-72 (1988).

negligence, from duty/risk to relational interests, and from cause-in-fact to the role of fault in the history of common law. It was his most frequent choice for a title, figuring in no fewer than seven lead articles in four different law reviews.

The dictionary tells us rather graphically that "ruminate" comes from the latin verb *ruminari*, literally meaning "to chew the cud" or to "muse upon," a word itself drawn from another Latin word which might have meant "gullet." Thus it has come to mean in English "to chew again what has been chewed slightly and swallowed" and "to engage in contemplation," synonymous with "to reflect" or "to ponder." We can thus see why it is so perfectly appropriate that Wex would have termed his work thus, and that future faculty symposia writers should be exhorted to so shape their work. For Wex Malone, no topic could simply be covered in a reportorial fashion. A topic was to be considered, examined, reconsidered and re-examined. Words were to be mined for every nuance; concepts were to be fashioned for efficient use in the resolution of controversies and for the planning of the legal structure for the resolution of future disputes. In short, rumination on a topic meant more than simply writing about it.

This is the standard to which the board of editors is now asking its faculty writers to adhere. Judges need more guidance from academic writers than a simple description of what the judges have done. If that were sufficient, an exceptional first-year law student could probably write the articles by expanding the equivalent of a classroom brief on the case into turgid prose. To the contrary, judges need analysis of what they have done. They need to know why they are deciding cases as they are, even if they have no present awareness of those reasons themselves. They need to know what the consequences of their decisions will be, either elsewhere in that particular subject matter or elsewhere in the law. In some instances, they need to be told that their decisions appear to be wrong, and that they have for whatever reason been led down the wrong trail by a shortsighted desire to achieve a given result.

This is a tall assignment, one that will no doubt challenge future writers in this symposium. But in no other way will Wex Malone's legacy be properly served. He was a relentless scholar, always striving for just the precise word, just the right concept, that would bring order and predictability to the law. He was a restless seeker of the meaning of legal decisions and their proper role in the administration of justice.

This is all quite high-sounding, and well it should be. But to those who did not know him personally, this may convey a misleading image of a rather severe personality, unable to laugh at himself or to take himself in any other fashion than most seriously. Nothing could be further from the truth. I will relate two vignettes that will make the point, poking fun both at himself and at his fellow teachers and students in the field of torts. The first is commonly told about him, though I never heard him say it myself. And I was an eyewitness to the second incident and have written about it previously. But it bears repeating.

Every professor has probably experienced something like the first incident. It is said that Wex was a guest at a dinner party, location unknown. It was one

of those rather stuffy affairs that Wex roundly disliked; it was entirely too confining. He was introduced to someone who obviously had some idea who he was, and this person chose to make conversation with the seemingly innocuous opening observation that she understood that he “taught torts at the law school.” Ever the sharp wit, Wex responded that this was inaccurate. He observed that he “met classes in the subject on a very regular basis,” but that whether he was actually teaching anyone anything was beyond his control. History does not record what his dinner companion may have said in response to that.

The other incident was very personal but also quite revealing. As Wex’s eyesight diminished in his sunset years, and on a number of mornings when his devoted wife, Helen, needed to be relieved of the short drive to drop him at the law school, he would ask that I stop by in the mornings to pick him up. This required him to ride with me and my four-year-old to the pre-school program elsewhere on the campus before Wex and I repaired to the friendly confines of the law school. (Wex always regarded this ride as a great imposition on his younger colleague. Little did he know that I cherished the fact that he would ask, and was extremely flattered that he was willing to spend this time with me.)

Our son, quite verbose then and now, some eighteen years later, naturally wanted to know what “Professor Wex” taught. I will pick up the story from my earlier rendition:

Torts, came the answer. But what are torts, was the persistent rejoinder. A rather detailed Malonian answer unfolded, one which centered on “when people are hurt.” Undaunted, and reaching for the only parallel in his young world (bandages), my son said, “You mean, when people are hurt, you put torts on them?” Wex’s laughter filled the car, on that morning and many more.

So let it be with these ruminations, and those in the future. Let them be fulsome and analytical, digested and reconsidered, precise and succinct. But let them also be enriched with Wex’s wit, his wisdom and his warmth. He would want nothing less, and this should always be the goal.

Let the series begin.

