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In Memoriam: Wex S. Malone; Ave Atque Vale

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*This Issue of the
Louisiana Law Review
Is Respectfully
Dedicated to
Professor Wex S. Malone*

IN MEMORIAM

WEX S. MALONE; AVE ATQUE VALE

What a piece of work is a man:
how noble in reason, how infinite in faculties.

—Shakespeare, *Hamlet*, Act II, scene II.

It seems entirely apt that one invoke the Bard to open this commemorative issue for the late Professor Wex Smathers Malone. Each was fond of language; each knew its attributes and its limitations. And this particular selection from among all of Shakespeare's works seems particularly apposite to the life and times of Wex Malone. It is a comment on his own life and his own work—he was indeed a man noble in reason and infinite in his faculties. But it is even more a comment on the confidence that he placed in the men and women of the law. He was ever the one to discourage formulas and checklists as methods for solving difficult legal issues in his most celebrated field—torts. He was always seeking to persuade us that the role of the human judge was paramount; that one could not hide behind words, phrases or shibboleths of arcane ancestry; that there was never a good substitute for the human element of weighing and balancing, comparing the worth of one social policy to another. Out of this dynamic smithy of the law emerged, in his view, justice and rationality.

He always said that his name could be traced to an itinerant minister named Wexler who had married some of his forebears in rural North Carolina, they then honoring the journeyman preacher by naming their first-born after him. This story is no doubt accurate and not without significance. He was himself something of a journeyman preacher, though his subject was rarely religion—unless his fervor for his favorite subject of torts could be defined as an ecclesiastical pursuit.

He came to us from other parts—points east, mainly. He so loved law and its teaching that he began his career as a teacher for no pay at all—living above a physician's office in Oxford, Mississippi during the Depression and accepting the promise of eventual pay contemporaneously with the indulgence of Oxford merchants who were content to be paid when he was paid. It was, he told me many years later, one of the happiest periods of his life (though he was teaching criminal law and not torts).

In those days, he developed his long friendships with the academic giants of that day and this—Green, McCormick, Prosser, Wade and others. They were a merry band, and reading their correspondence

which survives from those days gives one a small inkling of what we are tempted to call the Golden Age of Legal Education. They were young and energetic and largely fearless.

In a few years, he came to his adopted state of Louisiana, and we have been so much the richer for his decision. It is given to only a few persons in this life to so profoundly affect a segment of society that it can be said fairly that their presence was pre-eminent. But so it was with our colleague Wex Malone and Louisiana law.

He revealed to (or tried) several generations of Louisiana lawyers that *res ipsa loquitur* was not a "doctrine" but a simple rule of evidence. He educated us about railroads and their historical importance in tort law; about landowners and their duties, and what that had to do with how the law analyzed risk-inclusion and risk-exclusion; and about a strange brand of tort which he called "damage to relational interests." Finally, and ever so gradually, he taught us that there was a more honest and direct way than "proximate cause" to resolve the societal dilemma which is at the core of the most interesting tort disputes: how far should the law extend its protection of a victim against the vagaries of a wrongdoer?

In an otherwise pedestrian decision of some thirty years ago, *Dixie-Drive-It Yourself System v. American Beverage System*, his thinking and writing finally bore fruit. The Supreme Court of Louisiana announced the so-called duty-risk analysis as a replacement for proximate cause to determine the seminal issue of ambit of protection spread by the defendant's duty. Louisiana tort law would never be the same.

When the courts of appeal seemed not to have taken the message to heart, he reinforced it in this forum in Volume 30 in a lead article whose theme was in turn reaffirmed by the Supreme Court two years later in a non-statutory setting in *Hill v. Lundin*. The writer was a student editor of that volume of the law review, and innocently failed to recognize the great currents of tort law that were at work in this synergy.

Still later, and after his nominal retirement, when he saw the law take a turn which he felt to be erroneous in the interpretations of Civil Code Articles 2317 and 2322, he took pen in hand again in this journal. His remarks—ruminations as he modestly termed them—have not yet been given their proper due. But somehow one knows that they will, carefully crafted and compellingly concise as they are. They are waiting to be discovered by the tort reformers at work as this is written.

Images of Wex as teacher, scholar and friend come rushing to the fore as this is written. What student of Wex could forget that

glint in his eye and that slight smile on his face as he wove a tale of torts that was irresistible? As Professor Howard L'Enfant remarked in his eulogy of Wex, this was "fun," and he wanted us to know it. His enthusiasm and his vigor were contagious.

He was indeed a teacher of teachers, a *primus inter pares* if one ever existed. He was so respected among his colleagues that he was selected president of the American Association of Law Schools (the pre-eminent accrediting entity for law schools and their "fraternity" of faculty) and at an earlier time president of the national Order of the Coif (the honorary society which is the highest academic achievement for students and faculty). He may have been the only professor so honored, and certainly was the only Louisiana professor to hold both offices.

As a scholar, he was as prolific as he was succinct. An author of multiple textbooks and treatises, his hand touched all segments of tort, as well as workers' compensation and relational interests. He was one of the select few who produced the Restatement, Second, of Torts. His writing, contrary to popular belief, was not effortless nor instantly formed in the classic Malone style. He was a relentless editor, whose yellow legal pad pages were always replete with scratch-outs and whose trail of rejected drafts could have been mined for a new edition of a legal thesaurus.

As a friend, he was warm and gentle. I will never forget the mornings that he used to hitch a ride with me to the campus, in the company of my verbose five-year-old. Always curious, my kindergartner wanted to know what "Professor Wex" taught. 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.

Somehow the mind is unwilling to admit that he is not with us. He was not much of a believer in the supernatural, it seems, and perhaps it is heretical even to suggest that he is somehow still hanging around somewhere. But it is not completely far-fetched to look, in our mind's eye, just beyond the pale. Can we not see, as through a glass darkly, Wex and perhaps Bill Prosser, Leon Green, Mark Plant and others, happily discoursing into "endless acres of afternoon" what should be in the Restatement, Third, of Torts?

It is probably accurate to say that no one person has had the influence on modern Louisiana law that Wex Malone had in his lifetime. It is likely that no one will again.

As we bid him farewell, one phrase returns over and over. He was fond of saying, in expressing the balancing process between the risk of harm and the social utility of conduct that was so prominent in a torts inquiry, is the game worth the candle?

I think we now know the answer for the life of Wex Smathers Malone. Yes, respected Professor and dear friend, in your case, the game was clearly worth the candle. We all thank you, and we will miss your wit, your warmth and your wisdom. Godspeed.

. . . he has gone . . .

Among the radiant, ever venturing on,
Somewhere, with morning, as such spirits will.

—John Masfield,
“On the Finish of Sailing Ship Race”

H. Alston Johnson