

4-22-2020

Rebel with a Cause: David W. Robertson's Singular Dedication to Legal Excellence

H. Alston Johnson

Bernard S. Johnson

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/lalrev>



Part of the Law Commons

Repository Citation

H. Alston Johnson and Bernard S. Johnson, *Rebel with a Cause: David W. Robertson's Singular Dedication to Legal Excellence*, 80 La. L. Rev. (2020)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol80/iss2/6>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Rebel with a Cause: David W. Robertson's Singular Dedication to Legal Excellence

*H. Alston Johnson**

*Bernard S. Johnson***

We chose this title to introduce this very short rumination on the professional life of Professor David W. Robertson because it seemed to capture the essence of this remarkable academician. Those who knew him personally will fully understand why we think he was a rebel. Bearded before it was fashionable to be, preferring a motorcycle to a car whenever he could, writing superb analytical law review articles using the first person before it was in vogue to do that, composing original songs on his guitar to close the semester with his students—he was undoubtedly ahead of his time. But he also had a cause, and it was excellence in legal thinking, writing, and teaching. He demanded that of himself; he encouraged it in his colleagues; he molded it in his students with his own version of the Socratic method.

He was the quintessential teacher. He had a stint or two in private practice, and he was very good at that, too. But even in practice, he was a teacher, mostly with judges as his students. Thinking back on David's professional life brings to mind the axiom of unknown but possibly Buddhist origin that "when the student is ready, the teacher will appear."¹

Copyright 2020, by H. ALSTON JOHNSON and BERNARD S. JOHNSON.

* H. Alston Johnson is a 1970 graduate of the Paul M. Hebert Law Center at Louisiana State University and the brother of co-author Bernard S. Johnson. He was a member of its full-time faculty for 12 years from 1972–1984 and again from 2012–2013, and he has served as an adjunct professor for about three decades when not serving as a full-time faculty member. He was never a formal student of David Robertson, but he was a younger colleague and, later, a very frequent co-panelist with him on CLE programs too numerous to count. He was thus an informal student under David for almost 50 years. He practices law with Phelps Dunbar LLP in its Baton Rouge office.

** Bernard S. Johnson is a 1977 graduate of the Paul M. Hebert Law Center at Louisiana State University. David Robertson was his torts professor during his first year of law study in 1974–1975. He was the Editor-in-Chief of Vol. 37 of this review and had the good fortune to serve as a law clerk to the legendary Justice Al Tate of the Supreme Court of Louisiana after graduation. He practices law with Cook, Yancey, King & Galloway in Shreveport.

1. This phrase is often linked to another outstanding graduate of the LSU Law School, Alvin B. Rubin, who was to serve as both a federal district judge and

He was patient, whether it was with judges, legislators, faculty colleagues, students, or practitioners, confident that in time the views he expressed would fall on fertile ground. Sometimes, that took years, but inevitably, most of them would.

David was very proud of his LSU roots. Coming from Pollock, Louisiana,² he wasted no time in making his mark in the big city of Baton Rouge. After a year as the Managing Editor of this review and his law school graduation from LSU in 1961,³ he spent one year as an instructor on the LSU Law faculty (1962–1963) and another year as an assistant professor (1963–1964). Thus, even at a young age, he drew the attention of his legal alma mater, though in the few years after that, he received both LL.M. and J.S.D. degrees from Yale Law School and had joined the prestigious law faculty at the University of Texas. When he taught Bernard torts in the fall semester of 1974, he was on what was called a “visit with a view” to LSU, that is, holding a visiting professorship with a “view” toward making it a permanent engagement if both sides thought that would be advantageous.

This visit produced memorable teaching vignettes that Bernard and his classmates remember with affection.⁴ During the early days of the 1974 fall semester, one of the two first-year sections⁵ who had drawn David as their torts professor had their regularly scheduled late Friday afternoon class with him, to be followed by their regular (but unscheduled) visit to one of the elegant, well-known watering holes on Highland Road that law students were known to frequent. David noticed that attendance at the class that day was lighter than usual, and wanting to get to know his students better, decided to look into that establishment after class. Perhaps not to his surprise, he found not only some students who had just been in his classroom

a federal appellate judge in his distinguished career. He, too, was a masterful teacher. Both he and David had a gift for teaching that is rare.

2. A very small place in Grant Parish in central Louisiana with a 2010 population of fewer than 500 people. *Pollock, Louisiana Population*, CENSUS VIEWER, <http://censusviewer.com/city/LA/Pollock> [<https://perma.cc/KYU4-H3CT>] (last visited Feb. 22, 2020).

3. One could surely provoke a lively debate about the most outstanding graduates of the LSU Law School in its history from 1906 to the present. Everyone’s list of the top three would include Judge Alvin B. Rubin. There would be very strong support for putting David Robertson in that group as well. We leave it to the readers to consider their own candidates for the third person on that list—a process certain to provoke friendly controversy.

4. They also produced vigorous racquetball games between Alston and David and others, pursued with the same intensity with which David attacked academic endeavors. He was a tenacious opponent in all of his undertakings.

5. The section number is omitted here to protect the guilty.

but several others who had spent the class hour at the establishment's happy hour instead. He made a point to introduce himself to those miscreants, one of whom was the offspring of a law classmate and friend of David's, and shared a round or two with them (at their expense). Despite the fact that he seemed to have forgotten when the grades came out the close bonds that were forged during that experience, both those and all of the other students from that year continue to attest that the opportunity to be a student of David's was one of the very best highlights of their careers as students at any level.

Although he was no Andres Segovia or Eric Clapton, David could strum the guitar to accompany lyrics he composed and sang to his classes, sometimes about torts and sometimes about life's vicissitudes. Bernard's classmates remembered the refrain to one of his standards, although the verses are lost to history: "Sorrow on the rocks, bartender; Sorrow on the rocks will do; I gotta lotta trouble, so make mine a double; Boo hoo hoo hoo!" It is to damn with faint praise this performance to say that it was the best guitar concert by a professor that any of these lucky freshman law students ever attended, since it was the only such performance. Nevertheless, all who heard it would concur that it was among the most remarkable musical spectacles they had ever witnessed. The combination of his genuine effort to connect with his students on a personal level and his ability to explain and illustrate the intricacies of the duty/risk analysis made David a singular teacher.

The mere fact that David was visiting with a view in 1974 was a remarkable thing in itself. Dean Paul Macarius Hebert (for whom the law school is aptly named after his almost 40 years of service as its dean) had engineered the invitation because he recognized the talent of this young professor. But they were about as far apart on the spectrum of model law professor as two people could be. Dean Hebert had come of age through the day of coats and ties for students in classes, students standing (!) to recite in class, and a formality to legal education and the legal profession which has vanished.⁶ Let us just say that this young professor did not necessarily agree with all of that. But the two—Mac and David—shared a vibrant commitment to academic excellence. And each appreciated that trait in the other more than they could perhaps have admitted at the time.

This was made clear by an incident that speaks volumes about David Robertson. In the end, the visit with a view did not result in a position on

6. Older members of the profession will remember that Dean Hebert would occasionally invoke "Rule 44(b)" when he felt that a student lacked proper decorum. No one was ever able to find "Rule 44(b)" or to recite its contents, which seemed polymorphic. But no one had any doubt what it meant when cited.

the LSU Law faculty, perhaps because his law school at the time was quite unwilling to relinquish its hold on him. Just a couple of years later, Dean Hebert died suddenly one afternoon in early February 1977, literally in the midst of a budget presentation before a committee. At the time, David had returned to the faculty at the University of Texas Law School, where he would spend many fruitful years. Dean Hebert's death was a devastating blow to the law school, the legal community, and the state as a whole. Just a few days later, as the funeral was about to begin at Sacred Heart Catholic Church in Baton Rouge, a solitary figure entered the parking lot on a motorcycle and walked toward the church. It was David, who said he had ridden through the night to get to the funeral. It was a poignant gesture from one generation to the next, one academician to another, one superb legal scholar to another. Dean Hebert had given David his start in teaching, and thus had given David's teaching talent his early imprimatur. David took it from there, with a vengeance, but he never forgot where his teaching career began.

Alston remembers with great fondness a moment more than 30 years ago that uniquely captured David's role as both teacher and advocate. After the 1979 passage of comparative negligence in Louisiana, the United States Court of Appeals for the Fifth Circuit certified to the Supreme Court of Louisiana the question of whether assumption of the risk should be treated as comparative negligence and assigned a percentage of fault as contributory negligence would now be under the new provision, or whether it should serve as an absolute defense to liability.⁷ Since David and Alston had written extensively about this issue after 1979 and traveled the lecture circuit to talk about it and other issues, the respective sides caused competing amicus briefs written by the two of them to be filed. Then, the two respective sides yielded all of their oral argument time to those two advocates. In itself, this concession was unusual, but then so was the ensuing discussion before the court. It was an unfailingly polite but intense analysis of competing ideas at a place where the outcome really would make a difference.⁸ It was perhaps one of the most comprehensive

7. The case is *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123 (La. 1988).

8. The opinion reflects that wide-ranging discussion. In its opinion, the Louisiana Supreme Court quoted from an influential David Robertson article in this review, *Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana*, 44 LA. L. REV. 1341, 1372 (1984). See *Murray*, 521 So. 2d at 1128. It quoted as well from the amicus brief filed on behalf of the defendant. See *id.* at 1134 n.5. A concurring justice assigned additional reasons that, among other things, said the opinion "continues to validate the duty/risk analysis" and did not suggest that a defendant "will be liable in those instances where there is no duty

expositions of the duty/risk analysis that the venerable concept had ever received before the Supreme Court of Louisiana. The two oral advocates who participated in that dialogue entered the Supreme Court that day as friends and colleagues and left as friends and colleagues. It was a remarkable day.⁹

We cannot close these remembrances without commenting on David's record as a legal writer, especially in his chosen fields of tort law and admiralty. It is common to say in pieces like this that a person was a "prolific" writer. Even this word is woefully inadequate to describe David's prodigious work product. Take a moment to peruse his publications list, which covers pages and pages of titles to books, law review articles, and miscellaneous written contributions. Pick one or two of the law review articles and sample his writing style. It is at once scholarly, breezy, provocative, deep, incisive, and probably other adjectives that we cannot even identify. Above all, he was readable *and* influential. Beyond his extensive writings, one can only marvel at the number of his CLE appearances. A CLE card with David Robertson on it was a sure draw for a full house. He was always entertaining, consistently open to other views, and unfailingly polite and gracious. It was always a pleasure and a privilege to share a podium with him for the 40 years that Alston was permitted to do so.

It is also common to say in pieces like this that we will not see the likes of this person for many years, if ever. This is completely true of our departed colleague and friend. He was a free spirit with a first-class legal mind and a twinkle in his eye. A rebel with a cause indeed.

Since we are of the opinion that David Robertson belongs in that pantheon of giants of tort law such as Bill Prosser, Leon Green, and Wex Malone, and also given his affinity for matters of admiralty law as well, it seems fitting to end on the same note that was struck in a similar piece 30 years ago lauding Wex Malone but that we now use to describe a late-arriving member to this august group, David W. Robertson:

to protect against the risk of injury sustained by the plaintiff." *See id.* at 1137 (Cole, J., concurring). These are issues that are still being debated many years after the opinion. *See* Frank L. Maraist, H. Alston Johnson III, Thomas C. Galligan, Jr., & William R. Corbett, *Answering a Fool According to His Folly: Ruminations on Comparative Fault Thirty Years On*, 70 LA. L. REV. 1105 (2010).

9. For those keeping score, Dave's argument mostly prevailed. "Implied" assumption of the risk was held to be the same as contributory negligence, to be quantified and to serve as a reduction in recoverable damages. "Express" assumption of the risk was preserved as a full defense under narrow circumstances.

. . . he has gone . . .
Among the radiant, ever venturing on,
Somewhere, with morning, as such spirits will.¹⁰

10. This is attributed to John Masfield, an English poet and a poet laureate of England, in *On the Finish of the Sailing Ship Race*. He is better known for *Sea Fever*, which every school child learns. It begins, "I must go down to the seas again, to the lonely sea and the sky, [a]nd all I ask is a tall ship and a star to steer her by."