

## William Wirt & the Invention of the Public Lawyer

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**I**N A HABEAS CORPUS CASE he decided in 1919, the distinguished federal judge Joseph C. Hutcheson, Jr., quoted at length from a century-old memorandum written by Attorney General William Wirt. Hutcheson used Wirt's "able and exhaustive opinion" to establish the proposition that only an express statement by Congress justifies the conclusion that the legislature has deprived members of the armed services of the right of trial by jury. In Hutcheson's view, Wirt's opinion was legally sound and displayed Wirt's legal erudition in a manner "characteristic of that great and able lawyer."<sup>1</sup>

A well-known jurist who served on the

bench for half a century,<sup>2</sup> Hutcheson is now remembered for a single piece of writing, an essay he published in 1929 entitled "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision." In that essay Hutcheson gave an arresting, and controversial, description of how he decided cases that are "difficult or involved [or that] turn upon a hairsbreadth of law or of fact":

I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch – that intuitive flash of understanding which makes the jump-spark connection between question

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- 1 *Ex parte Jochen*, 257 F. 200, 203 (S.D. Tex. 1919), quoting Cadets at West Point, 1 Op. Att'y Gen. 276 (1819).
- 2 Hutcheson was United States District Judge for the Southern District of Texas (1918-1930), and a member of the Fifth Circuit (1930-1968; Chief Judge 1948-1959). Among his extrajudicial writings were the William H. White Lectures he gave in 1936 at the University of Virginia, published as *Law as Liberator* (1937), and a set of occasional pieces that he collected under the title *Judgment Intuitive* (1938). See also the recent study of Hutcheson by Professor Charles L. Zeldon, "The Judge Intuitive: The Life and Judicial Philosophy of Joseph C. Hutcheson, Jr.," 39 S. Tex. L. Rev. 905 (1998).

and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.<sup>3</sup>

The doctrinal and logical arguments laid out in the opinion announcing his decision were, Hutcheson explained, an after the fact explanation. "And more," Hutcheson continued, "'lest I be stoned in the street' for this admission, let me hasten to say to my brothers of the Bench and of the Bar, 'my practice is therein the same with that of your other worships.'"<sup>4</sup> Intuition and imagination are "essential," according to Hutcheson, "to great advocacy and great judging."<sup>5</sup>

To Hutcheson himself, emphasizing the intuitive element in legal thought entailed no denial of the value of legal reasoning; his aim instead was to identify the proper relationship between technical reasoning and the pursuit of substantive justice that Hutcheson believed to be the ultimate goal of law.<sup>6</sup> Hutcheson's admiration for Wirt's extensive knowledge of law thus involved no paradox or self-contradiction: for Hutcheson, Wirt's erudition and his deeply imaginative and emotional nature were both crucial elements of what made Wirt a "great and able lawyer."

For Wirt himself, in contrast, it was much less obvious that the head and the heart can be partners in creating greatness in the law, and the resulting tension is one of the many aspects of Wirt's life that are captured in miniature in Henry Dowling's 1898 sketch of Wirt. Thanks to the *Green Bag*, Dowling's revealing essay is now readily available to a new generation of lawyers who, like Wirt, confront the question of how to relate reason and imagina-

tion, thought and emotion, in the practice of law.<sup>7</sup>

As Dowling at various points intimates, Wirt stood at the intersection of a number of cross-cutting forces in the development of American law and American society more generally. In a recent and important study of Wirt's personal life, Professor Anya Jabour has situated his marriage to Elizabeth Gamble in the context of a complex and self-contradictory image of marriage widely held in the early nineteenth century.<sup>8</sup> Like many of their contemporaries, Elizabeth and William Wirt strove to combine an ideal of marriage as a relationship between affectionate and essentially equal companions with an increasingly rigid definition of the roles of men and women in society. Wirt's professional and public life was similarly conflicted. He was a leading member of the first generation of American lawyers whose experience of the profession was entirely shaped by the culture and politics of the post-Revolutionary Republic. As a consequence, Wirt came to experience the law as primarily a means of making a living, often a demanding and tedious one, that was usually divorced from the great moral and political issues which he saw as the focus of his professional predecessors. Politics, on the other hand, recurrently tempted Wirt throughout his adult life as an avenue to the greatness that he saw and admired in figures such as Jefferson, Madison and Monroe; but just as recurrently, involvement in public affairs (other than litigation) provoked in Wirt a swift recoil from what he saw as the tawdriness and bitter partisanship

3 14 Cornell L.Q. 274, 278 (1929).

4 Id. The quotations are from Rabelais's *Gargantua and Pantagruel*, Book III, c. 39.

5 14 Cornell L.Q. at 288.

6 See, e.g., his address to the 1932 annual meeting of the American Law Institute, "Lawyer's Law, and the Little, Small Dice," 7 *Tulane L. Rev.* 1 (1932).

7 See Henry M. Dowling, "William Wirt," 10 *Green Bag* 453 (1898), reprinted below at pages 303-10.

8 See Anya Jabour, *Marriage in the Early Republic: Elizabeth and William Wirt and the Companionate Ideal* (1998).

of early nineteenth-century politics.

For Wirt, President James Monroe's offer of the office of Attorney General of the United States presented an opportunity to reconcile his clashing interests. The position would lift him at once to the forefront of the national bar while providing his family with financial security. (In the early Republic, the position was viewed as part-time, and Attorneys General were expected to maintain a private practice: "I have no doubt of bettering the situation of our dear children by the move," he wrote his wife.<sup>9</sup>) Furthermore, unlike electoral politics, service as Attorney General would not embroil Wirt in the brutal partisan battles that he found so personally repugnant. (Janet Reno and John Ashcroft might well envy Wirt in that regard.) It was with high hopes, therefore, that Wirt took on the position, in which he served longer than any other incumbent before or since, from 1817 until 1829.

Wirt's aspirations were fulfilled only in part. The position of Attorney General, he quickly discovered, was no sinecure, at least if it was to be carried out as he thought it should. And therein lay his greatest burden, for his predecessors evidently had not viewed the office in the same light as Wirt. "[W]hen I had the honor of receiving the appointment," he wrote the chairman of the House Judiciary Committee a few months later, "I asked for the documents belonging to the office ... but my inquiries resulted in the discovery that there

was not to be found ... any trace of a pen indicating, in the slightest manner, any one act of advice or opinion which had been given by any one of my predecessors, from the first foundation of the federal government to the moment of my inquiry."<sup>10</sup> Wirt found himself



**William Wirt**

Frontispiece, 1 John P. Kennedy, *Memoirs of the Life of William Wirt, Attorney General of the United States* (1849).

essentially creating from whole cloth the office of Attorney General as an ongoing branch of the government. Between establishing a system of records, regularizing the relationship of the Attorney General to other officials and to the public at large, representing the United States in the Supreme Court (which was one of his two statutory duties, the other being to

<sup>9</sup> William Wirt to Elizabeth Wirt (Nov. 13, 1817), in 2 John P. Kennedy, *Memoirs of the Life of William Wirt, Attorney General of the United States* (1849) 32.

<sup>10</sup> William Wirt to Hugh Nelson (Mar. 27, 1818), in 2 Kennedy, at 61.

render opinions to executive officers) and in the lower federal courts (which was not part of his official job, and for which he was recompensed specially) as well as representing other clients, and rendering a body of opinions that today occupy roughly seven hundred pages in the official *Opinions of the Attorneys General*, Wirt was very busy indeed.

The consequences for Wirt's personal life were severe: adopting a phrase that in various forms Elizabeth Wirt used several times in correspondence, Professor Jabour refers to the Wirts' relationship in this period as one of "an almost complete divorce." Jabour's research makes it plain that Wirt's preoccupation with his career subjected his marriage and his family to extraordinary stress: the five years he lived after leaving office were largely devoted to what was in effect a reconciliation with Elizabeth. Furthermore, as Dowling correctly indicates, the fame for which Wirt sacrificed so much time and energy proved ephemeral: despite his historical significance, Wirt has no place in twenty-first-century Americans' general picture of our past, and scarcely any greater prominence among contemporary lawyers. That is a matter for regret, and not merely because we know that it would disappoint Wirt: both in his life and through his legal views Wirt helped to create the legal universe in which we still live. By considering Wirt's problems, successes and failures, we can gain perspective on twenty-first-century American law both as a system of thought and as a mode of human endeavor.

Consider the relationship between reasoning and intuition with which I began. Unlike Judge Hutcheson, Wirt saw a sharp distinction

between these two modes of thought and decision and (unhappily) believed that the law required the exaltation of reason and research at the expense of imagination and emotion. The realization, as Wirt saw it, that his chosen profession demanded the suppression *pro tanto* of his literary and imaginative impulses came early: in a letter written in 1806 he described a conversation in which he had criticized himself for "laxity of intellect," by which he meant his tendency to follow many different ideas rather than stick to a precise line of argument. The person to whom he was speaking

doubted whether [this tendency] ought to be lamented as a defect, suggesting that the man in whose imagination these meteors were always shooting, bid much fairer both for fame and fortune than the dry and rigid logician, however close and cogent.

Not for a lawyer, Wirt replied, for there the model

is John Marshall, whose mind seems to be little else than a mountain of barren and stupendous rocks, an inexhaustible quarry from which he draws his materials and builds his fabrics, rude and Gothic ... a fellow who would not turn off a single step from the right line of his argument though a Paradise should rise to tempt him ... yet who, all dry and rigid as he is, has acquired all the wealth, fame and honor that a man need to desire. There is no theorizing against facts: Marshall's certainly is the true road to solid and lasting reputation in courts of law.<sup>11</sup>

Years later, at the height of his professional career, Wirt held to this view and to the self-castigation and contradiction it stirred in his highly intuitive and emotional character. For instance, in an 1824 letter Wirt recounted a

<sup>11</sup> William Wirt to Benjamin Edwards (May 6, 1806), in 1 Kennedy, at 145-46. Dowling quotes this letter in part without (I think) fully perceiving how ambivalent Wirt was about the character he was "eulogiz[ing]." For Wirt, Marshall's dry logic was indeed "the only true method" for success in appellate-court practice, but that did not endear it to his heart: "If I had my choice," he admitted, "I would much rather have my son a Mirabeau [a French statesman famous for his passionate eloquence] than a Marshall." Id. I leave to one side for present purposes the question of whether Wirt was altogether fair to Marshall in this character sketch.

conversation with John C. Calhoun (then Secretary of War) in which Calhoun urged him “to study less and trust more to genius.” While Wirt conceded the advice “may do very well in politics,” he thought it inapposite to the law, where “the labor of the profession” lies in activities that Wirt himself often found tedious drudgery.<sup>12</sup>

Contemporary American law, I suggest, is at least as reflective of the split between head and heart that Wirt experienced as it is of Hutcheson’s proposed reconciliation of the two. The current high reputation of the second Justice Harlan is a good example. A great many academic lawyers and judges purport to admire him greatly despite or rather because of his perceived willingness to cast his votes in accord with the dictates of precise, even technical legal reasoning even in difficult constitutional cases. At the same time a great many academic lawyers (expressly) and judges (implicitly) reject as self-defeating and even naive such an approach to judging. Unlike Wirt, we tend to be unsure about how to evaluate the relative contributions of head and heart (Holmes’s famous logic and experience) to law; like him, we suffer from their separation.

Wirt’s personal life also seems eerily similar to that of many contemporary lawyers. For most of his professional career, Wirt worked long and hard hours that took a toll on his health and his relationships. Financial worries, the need to take just one more case to bolster his income, loomed large for him. His correspondence is full of laments over the combination of drudgery and anxiety that law often posed for him, but at the same time it is clear that he took great pleasure in his professional accomplishments. The law, and his success as a lawyer, were central to Wirt’s self-image and self-esteem even as he told himself that he valued other matters (family, marital love,

religious faith) far more. The practicing bar of the early twenty-first century is notoriously riddled with dissatisfied, unhappy men and women: in William Wirt we see the origins of some of that unhappiness.

As Dowling amply shows, however, Wirt’s natural disposition was affirmative and playful. He was an affectionate, empathetic and sociable person who prized the creation and maintenance of warm human relationships. Wirt’s inability to undertake sustained political activity was in large measure due to his deep dislike of personal conflict and animosity. At the bar, in contrast, Wirt usually found it possible to remain on friendly terms even with lawyers against whom he litigated; his unusually prickly relationship with the distinguished lawyer and former Attorney General William Pinkney, which at one point almost led to a duel, probably stemmed from Wirt’s sense that Pinkney allowed professional controversy to spill over into personal intercourse.

Wirt’s amiable personality influenced his understanding of the substance of law in ways that he himself, with his firm distinction between reason and imagination, probably did not recognize. Wirt began his public career during the administration of John Adams, a period racked with disagreement between Federalists and Republicans, in which the law, and especially the fundamental law of the Constitution, functioned more to divide than to unite. Wirt’s first important appearance on a public stage was as one of the Republican defense counsel in *United States v. Callender*, a prosecution under the notorious Sedition Act of 1798.<sup>13</sup> After repeatedly wrangling with Justice Samuel Chase over the power of the jury to consider the question of the Sedition Act’s constitutionality, Wirt and the two other defense attorneys dramatically picked up their papers and walked out of

<sup>12</sup> See, e.g., William Wirt to Dabney Carr (Feb. 1, 1824), in 2 Kennedy, at 164.

<sup>13</sup> 25 F. Cas. 239 (C.C.D. Va. 1800).

court, incidentally leaving the defendant to the mercy of Chase and the jury, which promptly convicted him. Wirt's nineteenth-century biographer interpreted his behavior in *Callender* as a deliberate attempt to incite the jury against Federalist Justice Chase and so obtain the defendant's acquittal by a "theatrical incident": at that time Wirt, like many others on both sides of the partisan divide, saw the law as a weapon to be used without excessive nicety or concern for the consequences of doing so.<sup>14</sup> As time went on, however, Wirt found this instrumental understanding of law, and especially of the Constitution, increasingly unattractive.

Wirt's mature view of the role of law in American society is encapsulated in a letter he wrote to President Monroe in 1823, urging that the Republican Monroe consider appointing the distinguished New York judge – and well-known Federalist – James Kent to the United States Supreme Court. Wirt conceded that Kent's appointment "would, at first, produce considerable excitement" (by which he plainly meant protest by Republicans offended at the choice of a Federalist) but argued that the short-term cost was far outweighed by the

long-term advantage to the nation of appointing a judge of Kent's stature and character to the high Court. "The Constitution is the public property of the United States," Wirt reminded Monroe, not the instrument of a political faction, and in addressing issues of constitutional moment "a President of the United States should look to the good of *the whole country, to their great and permanent interests.*"<sup>15</sup> This concern for the law as a means of expressing and safeguarding political community pervades Wirt's legal opinions as Attorney General as well and distinguishes his understanding of public law from the more adversarial views that seem predominant today.

William Wirt's bid for lasting fame failed, at least in the most obvious sense. For the reasons I have suggested, I think there are good reasons to revisit Wirt's life and career, not necessarily to marvel at him (although my own sense is that he was, as Dowling says, a lovable if also flawed human being) but to learn from him and his experience. There is little currently in print that makes that possible,<sup>16</sup> and for that reason I welcome the *Green Bag's* republication of Henry Dowling's profile of Wirt.



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<sup>14</sup> 1 Kennedy, at 80.

<sup>15</sup> William Wirt to James Monroe (May 5, 1823), in 2 Kennedy, at 153, 154. Monroe ultimately appointed his Secretary of the Navy, Smith Thompson, a prominent New York Republican (and former student of Kent) who Wirt agreed would be the least controversial choice.

<sup>16</sup> Kennedy's 1849 *Life* is, within the limits of the nineteenth-century life and letters genre, an excellent (if opinionated) book, but it is long out of print. Gregory K. Glassner has recently published a brief popular biography of Wirt, see Glassner, *Adopted Son: The Life, Wit & Wisdom of William Wirt, 1772-1834* (1997), and I have already mentioned Anya Jabour's fine book. Wirt's own 1803 bestseller, *The Letters of the British Spy*, is also available in a photographic facsimile of a later edition. I am currently engaged in preparing a biography of Wirt.