

WRITTEN
IN
WATER

An Experiment in
Legal Biography

PAUL R. BAIER

with

JACOB A. STEIN

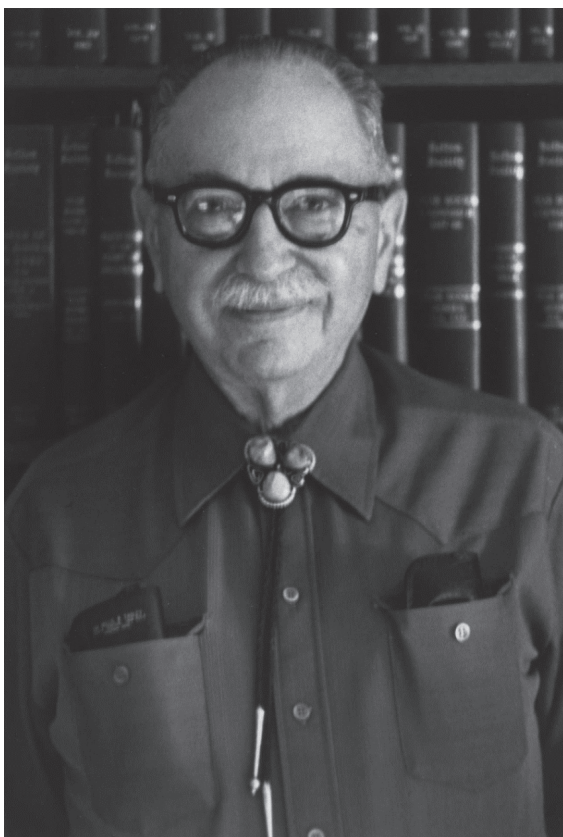


Photo by Paul R. Baier

Frederick Bernays Wiener in his study, Phoenix, Dec. 1978

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XII

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To the memory of Jacob A. Stein

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February 15, 2012

Personal

Paul R. Baier, Esq.
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Re: Colonel Frederick Bernays Wiener

Dear Paul:

Here is a book that may give us an insight on how to write the bio of someone who is odd. I also enclose my review.

Sincerely,



JAS/rr

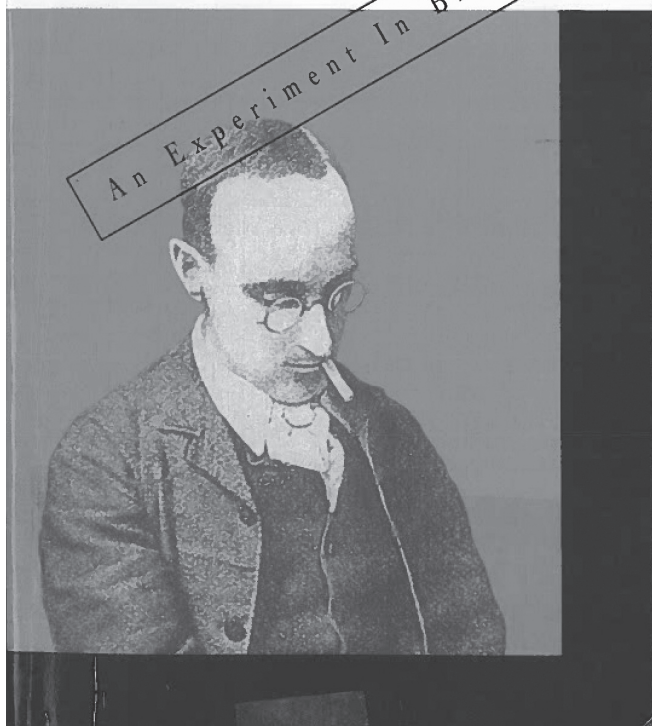
Enclosures: Symons, A.J.A. The Quest for Corvo.
Hopewell, NJ: The Ecco Press, 1934, 1997.

My review: "Literary Charlatanism." The American Scholar, Summer 1988.

The *Q*uest for Corvo
A . J . A . S y m o n s

With an Introduction by Nicholas Dawidoff and Preface by Julian Symonds

An Experiment In Biography



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APPENDIX PRINTED IN BLACK INK

*O fearful meditation, where alak,
Shall times best Jewell from times chest lie hid?
O none, unless this miracle have might,
That in black ink my love may still shine bright.*
—The Sonnets of William Shakespeare, No. 65

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Professor Baier's Museum

FOREWORD

JAMES D. HARDY, JR.

Professor of History, Louisiana State University
Founding Associate Dean, LSU Honors College

PAUL R. BAIER, AUTHOR OF THE BOOK you now hold in your hand, is a curator of rare photographs, sound recordings, video tapes, letters, manuscripts, dried red roses, bronze statuary. His office is a museum of historical materials, mostly related to the Supreme Court. The largest collection consists of the papers of Frederick Bernays Wiener, a leading advocate at the Bar of the Supreme Court in the last century. Colonel Wiener argued, and won, cases that set the legal boundaries between the military and civilians, as well as those between what is public and what remains private.

No cases could carry greater social weight; ergo, few collections of papers could be more important. Paul came to know Colonel Wiener well. He produced a television interview with Colonel and Mrs. Doris Merchant Wiener at the LSU Law Center. The thought of a book saving Colonel Wiener for all time followed at the suggestion of Washington, D.C. lawyer Jacob A. Stein, founding partner of Stein, Mitchell & Muse. Jake knew Fritz Wiener from walks on Connecticut Ave.

Books usually do not spring fully from the forehead of Zeus. Part of the writing of *Written in Water* came in the LSU Honors College course in constitutional law. Professor Baier and I taught the course together for eighteen years. Paul is an exceptional teacher who gave all of us (including me) a superb foundation in constitutional law. His enthusiasm rubs off.

Seminars always have ghosts at the table. Paul brought three principal ghosts to our course: Justice Oliver Wendell Holmes, Jr., Justice Benjamin Nathan Cardozo, and the advocate Frederick Bernays Wiener, Esq. We studied Colonel Wiener's major cases, *Reid v. Covert* (military jurisdiction in a civil society) and *Moose Lodge v. Irvis* (limits of public interest in private property). We heard Colonel Wiener's peroration that tilted judicial opinion on rehearing in *Reid v. Covert*. We watched Professor Baier's television interview with Colonel and Doris Merchant Wiener. We caught a glimpse of the role of the advocate and of Justice in the making of constitutional law.

Through the years of our joint seminar, Paul's book on Colonel Wiener moved from mere thoughts in his head to glorious page proof. We shared the excitement of saving Colonel Wiener in black ink.

Written in Water is not the usual legal tome. There is nothing usual about Frederick Bernays Wiener—just as there is nothing usual about Mr. Justice Frankfurter or Frederic William Maitland. Both of whom also appear in these pages. *Written in Water* is a lively celebration of Frederick Bernays Wiener and his times. We experience his “slightly angular personality” and his inimitable legal pursuits.

Colonel Wiener was of the old school: charming, courteous, elegant, learned, witty, generous. True, Colonel Wiener did not suffer fools lightly. He did not suffer them at all. Frederick B. Wiener abhorred stupidity. He and Margaret Thatcher would have enjoyed a London pub together.

Written in Water fulfills both halves of Horace's dictum. It charms; it instructs. And we fortunate readers, will smile as we learn.

—J. D. H., Jr.

PROEME

STONELEIGH COURT; NATIONAL ARCHIVES

WE EACH MET THE SUBJECT of this ramble under different circumstances. This was a long time ago. Jake's meeting was at the corner of Connecticut Avenue and L Street, N.W., Washington, D.C., in front of the old Stoneleigh Court Building (no longer there). Frederick Bernays Wiener, Esq., kept his law office at Stoneleigh Court, at one time the home of Justice Brandeis. Felix Frankfurter, Fritz Wiener's teacher at the Harvard Law School, succeeded Justice Brandeis on the Supreme Court in 1939. Although Jake did not know who Fritz was, he knew he must be somebody. His posture was militarily correct. He wore a cowboy hat that conflicted with his otherwise conservative 1930's double-breasted suit. He sported mustachios in an Oliver Wendell Holmes, Jr., style.

Jake was introduced to Fritz by a friend on a walk along Connecticut Ave. "There is Fritz, I want to say hello to the Colonel." The introduction came off pleasantly. Resuming their walk, Jake asked his friend, "Who is Fritz Wiener?" "Fritz is the leader of the appellate bar. He was in the Solicitor General's Office. When he was with the Judge Advocate General he became an expert on military law."

Later, Jake called upon Fritz Wiener to take the appeal of a client. A meeting at Stoneleigh Court was arranged. Fritz's office had a working fireplace, a large library of law books, bound copies of his appellate briefs, and an assortment of literature heavy on the military and the Revolutionary War. There were comfortable leather chairs.

Fritz lit up a big cigar and analyzed the facts five different ways. He enjoyed astounding Jake, other lawyers, old classmates, friends, adversaries, especially adversaries, with his remarkable memory of the Supreme Court reports, citing cases by name, date, and the U.S. volume and page number. Paul first unearthed F. B. Wiener at 700 Pennsylvania Avenue, home of the National Archives.

The reader probably has seen Robert Aiken's monumental statue, "The Future." A young woman lifts her eyes from the pages of an open book and gazes into the future. She is cut from a single block of limestone weighing 125 tons. She looks out on Pennsylvania Avenue and whispers in the Nation's ear: "What is Past is Prologue."

Paul was at the Archives looking for film footage of the laying of the cornerstone of the Supreme Court Building. Chief Justice Burger wanted it. He sent Paul to find it.

Paul was working at the Supreme Court as a “Judicial Fellow.” The program was new. Nobody knew what it was. It was an experiment. This was 1976, Bicentennial of the American Revolution. His instructions were to write the script for a movie about the Court. He knew nothing about making movies. But his trip to the National Archives was a success. He found the requested footage. More to the point here, he discovered sound recordings of oral arguments in Supreme Court cases housed at the Archives. These recordings enable you to hear Frederick Bernays Wiener, Esq., “emitting the sound effects” (Fritz’s phrase) in what he called “The Murdering Wives Case.”

This is *Reid v. Covert II*—VICTORY, as this title appears on Colonel Wiener’s leather-bound, personal copy of his printed briefs, in gold-leaf on the spine, mind you. Fritz Wiener’s leather-bound leaves of law (there are over 100 volumes) stagger the imagination.

In due course, Paul carried the tapes of Colonel Wiener’s re-argument in Mrs. Covert’s case to Phoenix, Arizona, where Colonel Wiener lived in sunny retirement with his wife Doris Merchant Wiener—“Best Friend and Most Perceptive Critic”—and two water turtles, Andy and Lauri. The Colonel and Doris drove all the way from Washington, D.C., with their turtles to reach their retirement address, 2822 East Osborn Road, Apt. 103, Phoenix, AZ 85016. Everything else was shipped in advance.

Colonel Wiener unloaded crates of books. This irritated him. But his Selden Society Yearbooks and other legal treasures now adorned his Phoenix study. It was a small space, but it suited Colonel Wiener just fine.

Doris was around the corner in the living room. Andy and Lauri bathed themselves in Arizona sunshine in an aquarium set up by a window. What would Colonel Wiener do now, docket-free?

Paul’s tapes were a perfect calling card. They got him across the threshold. He was a complete stranger to Colonel Wiener at the time.

“I only want to hear the peroration in *Covert II*.” Colonel Wiener had made the argument. He had never heard it.

Here was a breathtaking venue of treasured books, wide acquaintances, and glorious table talk. Imagine seeing Colonel Frederick Bernays Wiener, “U.S.A. Retired,” sitting at his desk in his cozy study—leaning back in his slightly angular fashion—captured in a Karsh portrait that welcomes you into his world. Colonel Wiener took his admirer back fifty years to the Harvard Law School as he knew it, 1927-1930. Roscoe Pound, Samuel Williston, Thomas Reed Powell, Felix Frankfurter, all came alive in Frederick Bernays Wiener’s verbal portraits.

Thereafter “Uncle Fritz” carried on a correspondence of some twenty years with his LSU law professor friend. It blossomed into a literary project between a seasoned Washington, D.C., trial lawyer—“The Legal Spectator”—and a teacher of the Constitution in Baton Rouge, Louisiana. Jake and Paul play leading roles in a play about Edward Douglass White, sometime Confederate soldier boy, later Chief Justice of the United States (1910-1921). Jake plays Justice Oliver Wendell Holmes, Jr. The play is entitled “Father Chief Justice.” Paul wrote it. He directs it. Via Google (“Father Chief Justice”) and YouTube, you can see Jake and Paul side by side on the stage of the Coolidge Auditorium in the Library of Congress. They have theater in common with their man of interest, F. B. W.

F. B. Wiener stars as Alexis Alexandrovitch in a Brown University Dramatic Society (“BUDS”) production of “The Game of Chess,” a one-act play by Kenneth Sawyer Goodman.

Fritz is a sell-out thespian. He plays a Tsarist Russian who outwits Boris Ivanovitch Shamrayeff, a Bolshevicki who is out to assassinate him. Fritz literally turns the tables on Boris by poisoning him. They drink from the same glass of poisoned wine; Boris cringes up, wondering why the poison is having no effect on Alexis. Boris Ivanovitch dies stiff on the floor. You can read about this Sock and Buskin production in the *Brown Daily Herald* for October 1, 1926—Fritz on the front page. Frederick Bernays Wiener was all over the pages of the *Brown Daily Herald* during his Ivy League, Brown University, baccalaureate stage. Fritz as Alexis lives on.

So does Fritz’s strength over his adversaries, ultimately reaching the Supreme Court of the United States, a stage of ultimate forensic production. Fritz’s role as Alexis Alexandrovitch in “The Game of Chess” forecast his future in “The Game of the Law and Its Prizes” (Benjamin Nathan Cardozo, Albany Law School, 1925).

Back to Paul and Jake. In 2004, the American Bar Association published a revised edition of Frederick Bernays Wiener’s classic guide *Effective Appellate Advocacy*, originally published in 1950, a book that was so popular it was literally stolen off library shelves. A law book rarely survives fifty years, much less enjoys a resurrection thereafter. This event brought Jake and Paul together for the first time. Jake wrote the revised edition’s preface, “There Was a Giant in the Land.”

After Frederick Bernays Wiener’s death at age 90 (1906-1996), his legal papers were excavated, culled, thrown together, and shipped to the LSU Law Center with the permission of Mrs. Doris Merchant Wiener and Thomas Freud Wiener, Colonel Wiener’s eldest son, Doctor of Science, M.I.T., sometime chief engineer of a Navy nuclear submarine.

“What kind of biography do you have in mind?” Jake asked Paul. “I don’t know,” replied “Boswell Baier” (Doris’s term of endearment). “Maybe I can help you.”

Thereafter Jake sent Paul a copy of A. J. A. Symons’s *The Quest for Corvo: An Experiment in Biography* (1934). Paul read it. Ideas filled his head. Jake was Paul’s muse.

This book is the result. Jake calls it a ramble. Paul rather thinks of Boswell’s *Life of Johnson*. Whatever the reader’s judgment, both of us agree that that Frederick Wiener, LL.B., and Samuel Johnson, LL.D., would get along just fine.



Photo by Barbara Baier, taken on 18 May 2016

Jacob A. Stein and Paul R. Baier