WRITTEN
IN
WATER
Frederick Bernays Wiener in his study, Phoenix, ca., 1979
WRITTEN
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WATER

AN
EXPERIMENT
IN
LEGAL
BIOGRAPHY

PAUL R. BAIER

with

JACOB A. STEIN
I think one of the best things an older man can do for younger men is to tell
them the encouraging thoughts his experiences have taught him. It is better
still if he can lift up their hearts—if after many battles which were not all
victories, the old soldier still feels that fire in him which will impart to them
the leaven of his enthusiasm.

—Oliver Wendell Holmes, Jr.

Some time later, it was agreed that the two should collaborate in a book.
Benson had already suggested that they should live together in adjacent
cottages, not meeting till 2:30 p.m., the hour when he became tolerant and
tolerable. The subject decided upon for collaboration was St. Thomas of
Canterbury, who was to be the theme of a romantic history contrived by Rolfe's
favorite artifice of transcribing from a pretended contemporary chronicler.

—A. J. A. Symons, The Quest for Corvo:
An Experiment in Biography (1934)

I propose that the story be told by a monk. That the book is written at the
command of the King, in the old age of the monk. That the monk has strong
and vivid artistic perceptions and is occupied by his community in some branch
of handicraft. That we get the vignette scheme by giving extracts only from his
book—not many footnotes—but a good deal of chronicle of our own words.
This will enable us to concentrate all our attention upon descriptive word-
painting. We can write the historical interludes in a sharp breezy way. My
theory in all this is that the artistic object is shown up through the coloured
lights of the various personalities. In this way we shall get at least three, the
monk's, yours, and mine.

—Robert Hugh Benson to Frederick Rolfe,
May 10, 1906
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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

SAPIENT LAW REVIEW ARTICLES
Some Makers of English Law (1939)
The Human Comedy in Legal History (1969)
American Law for the Coffee Table—
An Impossible Dream (1975)

PEPPERY BOOK REVIEWS
Silas Bent, Justice Oliver Wendell Holmes (1932)
James M. Beck, Our Wonderland of Bureaucracy (1932)
Mattie E. Treadwell, The Women’s Army Corps (1955)
Fleming et al., Law in American History (1973)
Levy, Against the Law:
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LEARNED LETTER TO THE EDITOR
Wiener on Sanctuary (1983)

FERVENT NACHRUF
Felix Frankfurter (1965)
WRITTEN IN WATER: An Experiment in Legal Biography

“THe UNUSUAL AND THE GRAND have always fascinated me, and always will.” This is what Alphonse James Albert Symons wrote to his ex-wife late in life. A. J. A. Symons’s *The Quest for Corvo: An Experiment in Biography* captures as odd a human being as ever lived, one Frederick William Serafino Austin Lewis Mary Rolfe, in a biography like no other. “All I can tell you about the book, my dear fellow, is that it will be unlike any other biography ever written.”

Jacob A. Stein sent this book to the LSU Law Center with a letter. “Paul, here is a book that may give us an idea of how to write a bio of someone who is odd.” Our subject is another Frederick, one Frederick Bernays Wiener, Brown University, 1927, Harvard Law School, 1930. While alive, Fritz Wiener fascinated both of us. He seems to have stepped out of a Shakespeare play set in the Old Hall of Lincoln’s Inn. He admired Justice Holmes. Stupidity was not his strong suit. He faced death during the Battle of Okinawa. He was odd, yes, but extraordinary in the annals of legal history, military law, constitutional advocacy, the Selden Society. His treatise *Effective Appellate Advocacy* was so popular it was literally stolen off library shelves.

In time, society passed him by. Colonel Wiener realized he was an artifact of the law. The Warren Court was too much for him. “New King, new law, new Justices, new masters, et cetera.”—Yearbook, 5 Edward II (1311). He turned in his morning coat. His friends threw a big party for him at the Army Navy Club. He packed his bags and moved way out West.

In short, our man of interest is quite a fellow, with Doris Merchant Wiener at his side, and two water turtles, Andy and Lauri, sunning themselves on the windowsill in Arizona sunshine. Ah, retirement. What could be better? “Action and passion,” Colonel Wiener would declaim, following Holmes. Fritz’s stage was the Supreme Court. Oral argument, “emitting the sound effects,” was his strong suit. This is his story—mustachio, cutaway, and all.
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 Wiener’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, 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 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 Reid v. 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,” as Colonel Wiener addressed himself, carried on a correspondence of some fifteen 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.

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 Ivanovitch by poisoning him. They drink from the same glass of 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 Stein and Paul Baier 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 son, Doctor of Science, M.I.T., former commander 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*. 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. “No man but a blockhead ever wrote, except for money.”

† † †
A Nachruf is not meant to be a simple sum and addition of a man’s
days to the very end. It is intended to convey his distinctive qualities,
the achievement of his spirit and his labors.—Felix Frankfurter to
Frederick B. Wiener, Esq., February 11, 1937

There are people you meet who give the impression that they stepped
out of a novel or a play. The way they dress, speak, and pose are
obedient to the character of the author’s creation. Such a person is to
be found in a Somerset Maugham or Graham Green novel. Such a
person is F. B. W. He did not pursue butterflies and Lolitas, a/k/a
Vladimir Nabokov.—Jacob A. Stein to Paul R. Baier, January 11, 2012

I

OUR MAN OF INTEREST

THERE ARE SPECIAL PEOPLE who live a life out of their times. The
novelist Marie-Henri Beyle (1783-1842), better known by his pen
name Stendahl, said he was writing unpopular books, which would be
popular, but a hundred years later. The Red and the Black was first
published in 1830 and it fell dead from the printing press. You can
now get a copy at Barnes & Noble.

Such people are not found among lawyers, usually. The cases they
had in hand which made them famous are now boring to the reader.
Other people lament being born too late. You may remember Miniver
Cheevy from high school English—Edward Arlington Robinson’s
creation.

Remember, “Miniver loved the days of old, When swords were
bright and steeds were prancing.”

It all comes back to you now. Yes, yes, “Miniver sighed for what
was not, and dreamed of Thebes and Camelot.”

Then there are those rare specimens of humanity who are stuck in
the middle, living out of their times, to be sure, but in them as well,
longing for the past, yet hoping to be remembered in the future.

Such a fellow is Our Man of Interest, Fritz Wiener.

What follows in this book of peppercorns are grindings of
Frederick Bernays Wiener, born New York City 1906, died Phoenix,
Arizona 1996.
Cranking the literary mill are a Washington, D.C. trial lawyer and an LSU law professor both of whom Fritz fascinated. What we have in mind is an experiment in legal biography. To be sure, it is a Nachruf as Felix Frankfurter intoned it in a letter to his Harvard Law School student Frederick Wiener, LL.B., 1930, a few days before President Roosevelt announced his fireside plan to pack the Supreme Court, March 9, 1937. Fritz was on the scene at the time. He described himself as an “Eager New Dealer,” working in the office of the Federal Emergency Administration of Public Works. “Down to Washington in August 1933 to help save the Nation, serving as a boy executive, and seeing Mr. Ickes’ manifold shortcomings at first hand—earlier than most.” This was in the Interior Department, where Fritz took notes and reported inside happenings to his professor friend, Mr. Frankfurter, c/o Harvard Law School, Cambridge, Mass. 02138.

But beyond a Nachruf, this book is more. “Inter alia,” as Fritz would say, it is Jurisprudence at Large in the Roscoe Pound sense. We paint a nautical picture of the anchor of the past, as against the sail of the Warren Court. Fritz Wiener knew them both. As Pound taught his students at the Harvard Law School, and Fritz was one of them, the law must be stable, and yet it cannot stand still.

And all the while Our Man of Interest got caught in the middle.

† † †

Now, let us get on with our story of Fritz.
II

DRAMATIS PERSONAE

IN NO PARTICULAR ORDER of appearance:

Aristotle; Frederick Bernays Wiener; Felix Frederick Wiener, born of Berlin; Lucy Lea Bernays, “Who proves after all these years, that a boy’s best friend is still his Mother”; Edward L. Bernays, “Publicity in a dignified sense”; Sigmund Freud—yes the Sigmund Freud; M. C. Weir, Brown University; Samuel Williston (“Master of the Socratic Method”); Thomas Reed Powell; Roscoe Pound; Felix Frankfurter; Theodore Plucknett; Frederick Maitland; Johanus Seldenus; Henry M. Hart, Jr.; Learned Hand; James Clark McReynolds; William H. Moody; Oliver Wendell Holmes, Jr.; Franklin D. Roosevelt; Robert Jackson; Harold Ickes; Francis Biddle; Ben Cohen; Stanley Reed; Tomoyuki Yamashita; Charles Evans Hughes; Harlan Fiske Stone; William O. Douglas; Frank Murphy; Wiley Rutledge; Earl Warren, William J. Brennan, Jr., Henry J. Friendly; Archibald Cox; Mark Howe; Sam Thorne; Erwin Griswold; Woodrow Wilson; Clarice B. Covert; John Marshall Harlan II (Grandson of Justice John Marshall Harlan I, “the Great Disenter”); Hugo L. Black; Richard Nixon; Spiro Agnew; Daniel Inouye; Doris Merchant Wiener; Thomas Freud Wiener;

—And a host of other characters to be encountered on the stage of this off-Broadway Fritz Wiener Show
“The impulse for success at the School is ambition, not terror”—this from the diminutive and dear Harvard Law School Professor Arthur E. Sutherland (The Law at Harvard: A History of Ideas and Men, 1817-1967). Professor Sutherland’s sesquicentennial dictum is certainly true. Ambition drives students upward at Harvard Law School. Not all of them, mind you, as loafing is never out of style.

But intellectual ambition in its pristine form—we mean the black ink of publication—was Fritz Wiener’s driving force. Success followed ambition for F. B. W. at Brown University, its Daily Herald, thereafter upwards to Cambridge, Massachusetts, to Harvard Law School, to the editorial board of the Harvard Law Review, Vols. XLII and XLIII, 1928-29, 1929-30.

Terror meant nothing to Fritz, but success a Bernays imperative—from Vienna, to Berlin, to New York City, to Cambridge, Massachusetts, to Providence, Rhode Island, to Washington, D. C.

We invite you to delight in Edward L. Bernays’s centennial celebration, his 100-year life. He is preserved on YouTube.

Vide:— https://www.youtube.com/watch?v=HfcNP_PwIAQ.

Henry M. Hart, Jr., whom Fritz introduced to you earlier on, Ch. vii (“The name of the practitioner is written in water”) was Fritz Wiener’s boss as president of the Harvard Law Review, Vol. XLIII, No. 1, Nov. 1929. Fritz was note editor.

When Frederick Bernays Wiener arrived at Harvard Law School in the fall of 1927, his first stop was Langdell Hall. He read Christopher Columbus Langdell’s declaration of faith on the two hundred and fiftieth anniversary of Harvard College, November 1886: “Law is a science; all the available materials of that science are contained in printed books.”

Good thing, forty years on, that Fritz Wiener proved himself an ambitious bookworm in Langdell Hall.

Earlier still, John Henry Wigmore and fourteen other high-achievers co-edited the first number of the Harvard Law Review. It appeared on April 15, 1887.
John Henry Wigmore’s name is widely known to the academy, to
the judiciary, to virtually anyone with a modicum of legal learning by
virtue of his monumental treatise EVIDENCE IN TRIALS AT COMMON
LAW, otherwise known to law students as WIGMORE ON EVIDENCE. It
first appeared in 1904 and 1905. “It is hardly too much to say,” wrote
Professor Joseph H. Beale in his review, “that his is the most complete
and comprehensive treatise on a single branch of our law that has ever
been written.” Fritz Wiener owned the third edition, published in 1940.
“It cost me $150 in 1953.”

And woe unto Harvard Law Professor John T. McNaughton, who
revised volume 8 of Wigmore’s treatise in 1961.

Fritz Wiener condemned McNaughton and his student research
staff’s revision of volume 8 in an acerbic book review, saying, “The
‘vicious method’ of adding to and subtracting from Wigmore’s text,
without anything to show the nature or extent of the changes made, is,
I submit, highly improper, quite inexcusable, and done throughout as
it is here, utterly outrageous.” And more (Book Review, 74 Harvard
Law Review, 441, 446, 453 (1961)):

I suggest that McNaughton’s second basic difficulty stems from the fact
that he did not adequately check the drafts that his staff prepared for him. One
of Professor Wambaugh’s wisest comments—and he was a truly wise man—
concerned “the famous advice whispered by a dying teacher as a last and
precious gift to his favorite pupil: ‘Verify citations.’” All too obviously, the
 citations and references in this revision were not adequately checked, and the
internal evidence of stylistic inconsistencies strongly suggests that the several
 chapters were farmed out to different committees of the staff. All collaborative
effort, to be sure, requires the services of the organization man, but there comes
a point in legal scholarship, just as in litigation, when the rugged individualist
must take over for the final formulation of doctrine, the final consistent
rewriting, the final personal check, and the final argument in the court of last
resort.

Here in his review of McNaughton, we have a self-portrait of Fritz
Needless to say, Fritz Wiener’s review of McNaughton caused quite a stir—behind closed doors—among the Harvard Law School faculty.

While in the law library of Langdell Hall when he first arrived, Fritz Wiener picked up Vol. I, 1887-1888, of the Harvard Law Review—“just to see what things were like at the beginning.”

This is the historian in Frederick Bernays Wiener, nurtured by his Brown University history professor Verner Crane.

Volume I contained Articles, “The Anarchist’s Case before the Supreme Court of the United States” (fascinating); Cases, “What is a claim against the government?”; Correspondence, “Columbia Law School” (lectures and textbooks governed), “not selected cases, as is the method at Harvard”; Lecture Notes, prepared by students; Notes from the editorial board, “Yet we are not without hopes that the Review may be serviceable to the profession at large”; and Reviews, “Bracton’s Note Book, Edited by Maitland,” which sparked in Frederick Wiener an abiding interest in the history of English law.

The Harvard Law Review was an innovation—a journal of legal scholarship in a professional school edited by students. The editorial work done by students on the Review is an outstanding part of their legal education. From its founding, to Fritz’s day, to the present, membership on the editorial board of the Harvard Law Review guarantees a lifetime of hard work, as Wall Street lawyer, Southern Poverty Law Center president, Yale Law School professor, Supreme Court justice, president of the United States.

Justice Louis D. Brandeis, who entered Harvard Law School in 1875, considered his law school career among “the happiest years of my life.” Why is that?

“I worked.”

Over 500 students matriculated with Fritz in the fall of 1927. Over one-third received letters instructing that they were not to return to the Law School.

“The struggle for survival was exhausting. The competition for grades fierce.” More from Arthur Sutherland.

And from Fritz Wiener, this:
Q. “You were on the Harvard Law Review?
A. “Yes, second and third years. I was rather hard up financially at the time and I remember I didn’t go to the first Harvard-Yale game, which through my college years had been sort of the absolute crowning glory of the football season. The reason I didn’t go to the Harvard-Yale game was because the tickets cost five bucks and I couldn’t even afford an extra five bucks to see a football game, so I worked because I had nothing else to do. In the Spring when classmates blossomed out in new cars, I suppose it was a sour grapes attitude on my part, when I would see the cars and say to myself, “Well, there’s another competitor eliminated,” because he would go out driving his car and I would be cramming and studying for the exams. But that’s the way it turned out.

Because in those days there was no pass-fail. Everything was on grading and the law review didn’t pick you on the basis of personality or literary aptitude. They took the list of numerical grades that they had from the dean’s office and they picked the people off the top. And it made no difference who you were, what your name was, or what you looked like or whom you knew, selection was right on the numbers.”

Fritz survived, and then some.

Frederick Bernays Wiener’s name appears last on the listing of editorial board members on the masthead of VOLUME XLII, 1928-1929. The editorial board had grown to 32 members; the November issue featured a lead article The Supreme Court under the Judiciary act of 1925 by Felix Frankfurter and James Landis.

Members of the editorial board are expected to proof-read lead articles, to check grammar and punctuation, and to assist with citations. This is the usual grunt work of Harvard Law Review acclaim. As a junior member of the editorial board, Fritz Wiener was also expected to write a “note,” a scholarly essay on some point of law, in competition with other second-year board members. The officers of the Review selected the best notes for publication.

Fritz Wiener made the cut. His note, Reversals in Illinois Criminal Cases, was published in 42 Harv. L. Rev. 566 (February 1929).

At the time of Fritz’s tenure on the law review, Professor Felix Frankfurter was engaged in a project called a “Survey of Crime and Criminal Justice in Greater Boston.” This followed Frankfurter and Dean Roscoe Pound’s 729-page report of research findings on Criminal Justice in Cleveland.
Frankfurter may have inspired Fritz Wiener’s Illinois survey, as Professor Frankfurter often suggested research topics to bright students, and Fritz’s survey of reversals in Illinois criminal cases certainly fit Professor Frankfurter’s empirical interests.

Fritz opened his second-year law review note by writing: “A recent advance sheet of the Northeastern Reporter discloses fifteen criminal cases passed upon by the supreme court of Illinois, of which eleven were reversed and remanded. Such an extraordinary percentage of reversals in a jurisdiction where crime is prevalent prompts an investigation, particularly in view of the significant discrepancy between the consistently high mortality rate in criminal appeals in Illinois, and the much lower ones in other states.”

Four footnotes to these two sentences recited 15 Illinois Supreme Court criminal cases; 1212 murders in Chicago during the years 1919 to 1923; statistical reviews of the work of the Illinois Supreme Court; and a comparison to the New York Court of Appeals, Massachusetts, and California reversals in criminal cases. In other words, staggering research and citations are evident in Fritz’s 1929 Harvard Law Review note, a forecast of his lifetime workways.

Dean John Henry Wigmore of Northwestern University Law School in Chicago, Illinois, was so impressed when he read Fritz’s 1929 note, published anonymously as was the practice, that he called the President of the Harvard Law Review and asked, “Who wrote that note on reversals in Illinois criminal cases?” “Who wrote it?” “Frederick Bernays Wiener wrote it.” This exchange is reported in a brief biographical sketch of Colonel Wiener, published in the Yale Biographical Dictionary of American Law (Roger K. Neuman ed. 2009), p. 587.

It happens that this Yale University pencil sketch is Professor Baier’s first effort at “Saving Colonel Wiener.”

It is ironic that Frederick Bernays Wiener’s remains are interred in a Yale University mausoleum. Colonel Wiener considered the Yale Law School faculty “too fuzzy.”
The officers of Volume 42 were likewise impressed with Fritz’s 1929 note. They voted him Note Editor of Volume 43 of the Harvard Law Review.

This moved Frederick Bernays Wiener up from the bottom of the alphabetical listing of editors, to the top of the 1929-1930 masthead, just under the name of Henry M. Hart, Jr., President.

Remember, achievement was a Bernays imperative. Fritz achieved. And what did he do as note editor of volume 43?

VOL. XLIII, No. 6, April 1930 featured Fritz Wiener’s Note, “Aftermath of the Supreme Court’s Stop, Look, and Listen Rule.” It was first in line after the masthead, which announced that Judge Learned Hand was a contributor to the April issue. Keep this in mind; we will recur to Judge Hand’s article momentarily.

In Fritz’s note, he took it upon himself to prove Justice Holmes wrong in laying down an ironclad standard of care that should govern all automobile drivers approaching railroad track crossings for all time. The driver is absolutely obliged to stop, get out of his car, look up and down the railroad track, and listen for the sound of an approaching locomotive.

Mr. Goodman did not do so. He was atomized by a locomotive. The widow Goodman sued for damages. Holmes, J., reversed a jury verdict in her favor. “When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train for him.”

It was plain to Holmes that Nathan Goodman was responsible for his own death. “But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts.” Baltimore and Ohio Railroad Company v. Goodman, Administratrix, 275 U.S. 66 (1927).

Fritz Wiener’s note was a succinct survey of whether “the Courts” had in fact followed Holmes’s stop, look, and listen rule, and whether “the pronouncements of the federal courts on matters of ‘general jurisprudence’—an elastic term—will be followed or at least accorded great deference in state court.” The empirical answer was no.
It was Mr. Justice Holmes himself, it seems, who fell off the juridical track. Homer nodded. This Note Editor Frederick Wiener proves in a six-page, tightly written, *Harvard Law Review* note, vol. 43, p. 926, another triumph of Fritz’s scholarship—with 44 tightly packed 8-point footnotes at the bottom of each page—“where they belong!” Fritz railed against the discombobulation of endnotes.

Why all this detail of doings in Fritz’s third year?

Remember, Judge Learned Hand contributed the lead article to the April 1930 number. The article was the text of Judge Hand’s address delivered in Langdell Hall, March 20, 1930, at the presentation to the Harvard Law School of Charles Sydney Hopkinson’s portrait of Mr. Justice Holmes. “I have the honor to present to the School the portrait of Holmes, of the Class of 1866.” We have no doubt that Fritz Wiener heard Judge Hand’s address live in Langdell Hall. No five-bucks required, and Hand was a giant.

Judge Learned Hand’s address and Sidney Hopkinson’s great portrait (the frontispiece of *Vol. XLIII*) immortalize Justice Holmes. But this is the very same jurist that Fritz Wiener debunks in his railroad crossing note—in the same April 1930 *Harvard Law Review*! Pure Fritz Wiener.

Holmes would congratulate Fritz. Learned Hand would welcome him into the Society of Jobbists (“Are you a member of the Society of Jobbists, or do you know the guild?”)

This is quite enough of F. B.W.’s 1929-1930 doings.

Next, the reader is treated to the great Hopkinson portrait of Holmes. It faces Ch. X, “Holmes’s Ninetieth Birthday,” another highlight of this experiment in legal biography.
I have spoken,—you have heard,—the case is in your hands,—pronounce your decision—Aristotle’s Rhetoric, Bk III, Chap. XIX

Colonel Wiener resumes his lecture:

I was surprised, deeply surprised, at the depth of my own emotions; I had difficulty in proceeding, my voice began to break, I sipped water from the glass on the counsel table. The delays were fine, because I did not want to conclude before the red light at the lectern signaled the end of the session. But the need to retain control presented an extremely difficult problem. The courtroom was absolutely silent, dropping the proverbial pin would have sounded like a thunderclap, and I sensed the members of the court actually leaning forward by way of encouragement, to help the words come out. Here is what I said:

If Your Honors please [sips water], I’ve tried to argue this case with some degree of objectivity. I’ve tried to put out of mind as nearly as I can the callous and somewhat obtuse cruelty with which these two women were treated because I felt that I could best discharge my duties to this Court [sips water], as well as my duty to them, by dealing with this as a question of constitutional law, which calls for research and reflection and cogitation.

But I cannot conceal my concern over the seriousness of what is involved, because this, this is about as fundamental an issue as has ever come before this Court, and certainly more vital and fundamental in the constitutional sense than any that’s been here for some years.

And it is fundamental and vital because it poses in stark immediacy the question of how far we may properly brace ourselves to withstand assault from without, and yet perhaps sow the seeds of our own disintegration from within.

Because we have here, I think for the first time, a question involving the impact on the one hand of the supposed needs of the garrison state, upon, on the other, “The immutable principles of a free nation.”

That is a quotation—“The immutable principles of a free nation”—not from the writings of some cloistered libertarian philosopher, but from the Institution of the Order of the Cincinnati, which was founded in 1783 by the Revolutionary officers who had pledged their lives and shed their blood that this country might be born.
And I think [sips water] we will be aided in the resolution of that problem by considering two sentences from the late Mr. Justice Cardozo’s immortal classic, *The Nature of the Judicial Process*:

“The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith.”

If Your Honors please, I have been enrolled among the body of defenders. I hope this Court will keep the faith.

* * *

Despite my best calculations, there were two to three minutes still left when I sat down. The atmosphere was, almost literally, electric; it could be felt; and if I had been on the other side I should not have attempted to talk against it. But Mr. Rankin barged right in, and when the clock reached 4:30 the Chief Justice did not call for an adjournment; he held the Solicitor General’s nose to the grindstone and made him continue—and run down—until his time expired at 4:40. Then, and only then, was the court adjourned.

After the argument, there was no longer any question of winning; everyone in the courtroom, Government lawyers included, had seen—and heard—the indelible and clearly marked handwriting on the wall. The only questions were when—and how.

Answers became available on 10 June, just 364 days after the first opinions [Reid v. Covert I, 351 U.S. 487 (1956); Covert II, 354 U.S. 1 (1957) (on rehearing)].
Mr. Justice Black, for himself, the Chief Justice, and Justices Douglas and Brennan, announced the judgment of the Court that withdrew the earlier opinions and set both women free.

(Interestingly enough, the interim dissents the year before had been announced by the Chief Justice.) Mr. Justice Frankfurter limited his concurrence to a situation involving dependents charged with capital offenses, as did Mr. Justice Harlan, who in addition set forth with unusual candor the reasons why he had changed his earlier view.

Mr. Justice Clark, joined now only by Mr. Justice Burton, dissented, adhering to his previously announced opinion.

I was able to send Mrs. Covert a telegram, “Unpack for good,” when the session concluded.
We should not break faith with this Nation’s tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution. The philosophy expressed by Lord Coke, speaking long ago from a wealth of experience, is still timely:

“God send me never to live under the Law of Convenience or Discretion. Shall the Souldier and Justice Sit upon one Bench, the Trumpet will not let the Cryer speak in Westminster-Hall.”

In No. 701, Reid v. Covert, the judgment of the District Court directing that Mrs. Covert be released from custody is

Affirmed.
EPILOGUE

WE LEAVE THE LAST WORD TO DORIS MERCHANT WIENER.

As an appellate pair, as well as husband and wife, Frederick and Doris rehearsed every argument that was on Colonel Wiener's Supreme Court docket, including the reargument in Reid v. Covert. But Colonel Wiener did not rehearse his peroration in Covert II with Doris. She heard it for the first time while seated in the Supreme Court chamber with her eye on the Court and her ear on Frederick's reargument. She later told Paul that she was upset with her husband because he had not practiced his peroration with her. Here's the story as Doris and Fritz tell it in their LSU video memoir, "Experiences in Advocacy." Paul asked Doris, "Were you in Court when the Colonel delivered his peroration?" "I was." "What was it like?"

DORIS: Well it was a complete surprise to me because, although he had rehearsed everything else of that argument, he did not rehearse that with me because he wrote it, thought it up and wrote it, or made notes for it, after he left for the office that morning.

FRITZ: Yes. In those civilized days the Court convened at Noon. And that meant you didn't have to be in rush between breakfast and getting to Court at ten o'clock. You could go to your office, you could pack your briefcase, and you didn't have to be there until about 11:45. And I had some time left and I was greatly wound up and I walked in circles around the carpet in my office and I formulated what is contained in the peroration. And that's the story of it. And I was myself amazed by the emotional state in which I had worked myself and I had great effort controlling my voice. And as you listen to the peroration you can hear the noises, well that's the speaker sipping water to try to regain control. The courtroom was absolutely silent, the proverbial pin would have sounded like a bombshell, and they were sort of all leaning forward to catch what was being said.

* * *
For the benefit of readers who turn to the last pages of a book first, Colonel Wiener insists we repeat his arresting peroration on rehearing.

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* * *
If reading this you are not moved, you should hear it. If hearing it you are not moved, you are not a lawyer.

The last question in their video memoir was directed to Mrs. Frederick Bernays Wiener:

PAUL: “What was your reaction after you had heard it, Doris?”

DORIS: “Well, I was stunned. I was surprised and stunned, and I knew then, from watching the Court, that this time we had won.”

† † †

Frederick Bernays Wiener was of the Old School. Written in Water catches its precepts. It is an anguished cry for the dear dead days when all was better.

Presidents come a go, but the Court endures—reshaped from time to time by those same Presidents.

Welcome, Mr. Justice Gorsuch.

As the curtain falls, a final soliloquy. We hear our Man of Interest Fritz Wiener quoting Holmes one last time: “I think one of the best things an older man can do for younger men is to tell them the encouraging thoughts his experiences have taught him. It is better still if he can lift up their hearts—if after many battles which were not all victories, the old soldier still feels that fire in him which will impart to them the leaven of his enthusiasm.”

CURTAIN.