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# THE PARABLE AS LEGAL SCHOLARSHIP

G. Edward White\*

TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND. By Robert Burt. Berkeley: University of California Press. 1988. Pp. 165. \$19.95.

In this decade of theoretical and interdisciplinary scholarship, it is not unusual to find law professors writing on subjects not traditionally regarded as "legal," or expressing themselves in significantly different modes from those characteristically employed by earlier generations. It is therefore hardly startling, given the current tendencies of legal scholarship, to note that Robert Burt has written a book whose emphasis is far more on history, sociology, and psychology than on legal doctrine, and whose orientation is far more towards speculative theory than conventional legal analytics. And yet Burt's book, *Two Jewish Justices*, can be seen as unusual even in the scholarly universe in which it appears. In *Two Jewish Justices* Burt has pushed the wide-ranging speculative orientation of current scholarship one step further. He has written an extended parable: a work that, while making use of the conventional trappings of scholarship, simultaneously tests the orthodox limits of that term.

## I

Parables are highly personal stories, told by a storyteller who intends the stories to impart a piece of wisdom to the audience. The question any parable necessarily raises is whether those to whom it is addressed should accept the wisdom that it offers as truth, and, implicitly, regard the storyteller as wise. Burt is aware of this: he believes that the "theme" of his parable "casts some light on the contemporary status of all Americans" and provides "an intensified illumination of the truth" (p. 4).

But on what is this hope based? Here one confronts the peculiar status of the parable when presented as legal scholarship. At times in *Two Jewish Justices*, Burt seems to be making quite a modest scholarly claim. He admits that his story of the lives of two prominent Supreme Court justices, Louis Brandeis and Felix Frankfurter, is "speculative and selective in its emphasis," and while he believes that his reading of the justices' careers is "not contradicted by other aspects of their

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lives," he does "not undertake to prove [his] proposition by exhaustive citation" (p. 3). Rather, Burt is concerned with a theme which, he appears to suggest, has been vital in his own life; he has projected this theme onto the lives of Brandeis and Frankfurter; and he has drawn lessons from the lives of those justices that have enriched his own. Thinking that his theme has wide applicability, he invites the rest of us to engage in a comparable exercise. This tone seems consistent with an invitation to read *Two Jewish Justices* as an idiosyncratic, but nonetheless evocative, interpretation of the lives of two resonant figures in the history of American law.

But at other times Burt takes a much more ambitious tone. At the same point in his narrative when he underscores the selective and speculative nature of his account, he states that the experiences of Brandeis and Frankfurter have "contemporary meaning" and "direct relevance" to "issues confronted today by all judges in America, and by all Americans, whether Jews or gentiles" (p. 3). He asserts that the central meaning of "Jewishness" in America has been "outsider status" and "homelessness," and that outsider status "is pervasively experienced in American society today — not simply among those groups customarily conceived in this way, such as blacks or Jews, but generally" (p. 3). He attempts to provide conventional academic documentation for these assertions in the course of his narrative.<sup>1</sup> And he concludes that the careers of Brandeis and Frankfurter teach all of us a lesson: that "the distinction between denizen of a safe haven [insider] and despised outcast [outsider] is not invariably and assuredly settled." "[N]o one in America," he claims, "can avoid acknowledging this lesson, this starting place for charting a social and personal course" (p. 128).

At this point one can begin to grasp how intensely parables test the boundaries of contemporary legal scholarship. Read in its more ambitious form, Burt's book becomes an example of theoretical and speculative scholarship so exalted in its claims as to become incapable of evaluation within the conventional parameters of scholarly discourse. In this fashion, the author's persona in *Two Jewish Justices* becomes the persona of the omniscient law professor, passing off "selective" speculation for scholarship and equating arrogance with competence. One need not adopt that reading; one can treat Burt's contribution as a parable in the more modest sense of the term. But then one is left to wonder what purpose the scholarly apparatus of *Two Jewish Justices* serves.

## II

Burt's parable begins with his arrival as a law student at Yale in

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1. E.g. pp. 68-76.

1962, where he "felt somehow that [he] had found a home." One reason for this feeling, he later concluded, was that "there were a considerable number of Jews among my classmates." Burt was "startled," but at the same time comforted, "by this sudden experience of being so much surrounded by Jews in a place other than a synagogue." Six years later, when Burt entered law teaching, he "felt almost at once that this career choice was the right one," and again "noticed the considerable concentration of Jews among my teaching colleagues." Eventually, in 1976, Burt returned to Yale as a faculty member, and "was particularly struck by the fact that almost half my colleagues . . . were Jewish" (p. 1). By the time he came to write the lectures that developed into *Two Jewish Justices*, Burt had resolved "to try to understand why I and so many other Jews of my generation have found a home in America as lawyers, and in particular as law teachers" (p. 2).

The lives of Brandeis and Frankfurter came to be bound up in that effort. To Burt, they represented "two Jews who attained great prominence at a time when the American legal profession generally was inhospitable to Jews" (p. 2). But the cultural atmosphere in which Burt undertook his examination of Brandeis and Frankfurter was one, he felt, in which "Jews . . . are much more welcome in the profession"; indeed one in which Burt found an "unprecedented hospitality to Jews in the legal profession generally, and in law teaching specifically" (pp. 2-3). Burt thus came to ponder the fact that "the example of [Brandeis and Frankfurter] did not immediately translate . . . into an understanding of the contemporary role of Jews in the legal profession" (p. 2).

Out of Burt's efforts to link the lives of two Jewish justices to his own experiences as a contemporary Jew emerged the central theme of his parable. Brandeis and Frankfurter, he concluded, associated Jewishness "with outsider status, with homelessness." They were examples of the "paradigmatic diaspora Jew," engaged in a "quest for a home, some secure resting place" (p. 5). For his own generation, Burt concluded, the lesson of that vision is centered in the place of "homelessness," or "outsider status," in contemporary America:

I came to the conclusion that outsider status, homelessness, is pervasively experienced in American society today — not simply among those groups customarily conceived in this way, such as blacks or Jews, but generally; and that this generalized experience both explains the easier contemporary acceptance of Jews in America and points to possible future dangers for Jews, for blacks, for other minorities, for all Americans.  
[p. 3]

Already, at this very early point in Burt's story, the structure of the parable is in place. Jews, a dispossessed people, are defined by their homelessness, their perpetual outsider status. Brandeis and Frankfurter, being Jewish justices, necessarily were forced to come to terms with their outsider status and to engage in a quest for a profes-

sional home. Burt, however, is conscious of not having had to engage in such a quest. He has "found a home" as a law student and a law professor, in important part because of his sense that many of his peers are Jewish and thus that the profession of law teaching is hospitable to Jews.

But in Burt's view this "hospitality" has not principally been a product of "the relevance of the Jewish talmudic tradition" to law teaching or to "the special reliance by [the] parents and grandparents [of Jews] on professional education as a vehicle for assimilation in America" (p. 2). Nor does he suggest that the hospitable climate is a consequence of increased tolerance on the part of non-Jews or a product of the revulsion toward anti-Semitism in the face of the example of Hitler's Germany. Instead, the hospitality is a product of the realization among many contemporary Americans that they are themselves "homeless" outsiders. Identification with "homelessness," then, becomes the explanatory theme that links the lives of Brandeis and Frankfurter with that of Burt, and indeed with those of all of us.

With his structure established, Burt ranges through biography, history, sociology, and constitutional doctrine, all in the service of his homelessness theme. He begins with a characterization of Brandeis. Brandeis is portrayed as "standing alone at the margin of his society," accepting his Jewishness (principally through a commitment to the Zionist movement), but eschewing "opportunities . . . to find some comfortable communal affiliation and an 'insider's' status" (p. 9). Burt finds "this solitary stance" to be "a defining characteristic of virtually every facet of Brandeis' life" (p. 9), from his definition of his professional role as an attorney ("a position of independence — between the wealthy and the people, prepared to curb the excesses of either"<sup>2</sup>) to his effort as a Supreme Court justice to occupy "the boundary between [insider and outsider], speaking as advocate for the outsider and working to dissolve the boundary" (p. 36).

In pursuit of this characterization of Brandeis, Burt stresses the "identification with the oppression and suppressed rage of homeless Jews" that allegedly motivated Brandeis to "instinctively underst[and] and identif[y] with . . . oppressed outsiders" (p. 34). In support of these claims he quotes extensively from an unpublished dissent in *Coronado Coal Company v. United Mine Workers*<sup>3</sup> in which Burt finds "a passion and a biting anger on behalf of the disfavored outsiders" (p. 29). At the same time, however, Burt maintains that Brandeis "was obviously separated from outsiders by his wealth and status. In this

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2. P. 10. This language is from an address Brandeis delivered in 1905, reprinted in L. BRANDIS, BUSINESS — A PROFESSION 337 (1917).

3. 268 U.S. 295 (1925). Upon reargument, the Court unanimously adopted the position Brandeis had argued in dissent prior to rehearing. Brandeis' original unpublished dissent is reprinted in A. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 84-91 (1957).

sense . . . he was neither insider nor outsider, but occupied a singular social space between the two" (p. 35).

Later in his narrative Burt returns to Brandeis, and adds an additional dimension to his portrait. Brandeis' sense of social marginality, Burt suggests, translated itself into a "generalized principle" of conduct for Supreme Court justices. That principle was to use the judicial power "to obviate [the] social distinction between insider and outsider" in American society (pp. 85-86). In Burt's view:

Brandeis tried, though without explicit acknowledgment, to carve a different social space for himself that confounded the distinction between insider and outsider. He did not thereby attempt to become an insider. Nor did he accept the continued existence of the social status of outsider . . . . Brandeis implicitly sought instead to dissolve the distinction. When Brandeis saw an outsider as such, he would strive to interpret this outsider's needs and concerns to the insiders of the day, to dissolve social boundaries by inspiring sympathy and fellow feeling on both sides. His role . . . was to stand at the boundary of insider status and work toward its dissolution. [p. 87]

In Burt's analysis Brandeis' role as a Supreme Court justice became a projection of his role as a Jew: a homeless, marginal individual who becomes an "insider," but rather than identifying with his new status, seeks to undermine it by dramatizing the existence of other "homeless" groups in society and suggesting that their outsider status is fortuitous and ephemeral.

One can readily see how this portrait fits the larger structure of Burt's parable. Brandeis, being an immigrant Jew, was one of the numerous individuals who were "homeless" in American society. But he eventually exchanged his "outsider" status for affluence, professional success, and eventually historic prominence as the first Jew to sit on the Supreme Court. In this sense Brandeis became a quintessential "insider." Yet far from subordinating himself in his acquired "insider" status, he remained a person at the margin of social respectability, something of a maverick on the Court.<sup>4</sup> He regarded his mission, according to Burt, as one of dissolving the boundaries between insider and outsider status by awakening insiders, such as his fellow Justices, to the plight of outsiders (p. 36).

Two preliminary comments about Burt's interpretation of Brandeis seem in order at this point. First, there is something overly neat about the fit between Burt's interpretation of Brandeis' response to "homelessness" as a justice and Burt's interest in underscoring the pervasive "homelessness" in contemporary American society. One has the sense that complexities are being swept away in the pursuit of a single-minded theme. Second, in the passage quoted above in which

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4. Burt cites a conversation in which Brandeis, after noting that the *Coronado Coal* case had been reargued and that the Court had adopted Brandeis' position, said to his confidant Felix Frankfurter, "They will take it from Taft but wouldn't take it from me." P. 32.

Burt characterizes Brandeis' "principle" of conduct as a Justice, he notes that Brandeis pursued his goals "without explicit acknowledgment" of them. Burt, in short, is not offering any direct evidence that Brandeis believed in the goals Burt attributes to him. The relationship between interpretation and evidence in *Two Jewish Justices* requires further discussion, but such discussion seems best postponed until the remainder of Burt's narrative is set forth.

Burt next turns to Felix Frankfurter. He introduces his analysis of Frankfurter's career with the statement that "Brandeis[ ] self-conscious marginality is not the only social role conceivable for an American Jew or for a Jewish justice on the United States Supreme Court" (p. 36). For Burt, Frankfurter represents a vivid example of another role, that of the outsider who immerses himself in the values and trappings of insider status, seeking thereby to disengage himself from his "homeless" past. Burt claims that Frankfurter, who unlike Brandeis was raised as a practicing Jew and for whom "Jewishness was inextricably linked to the immigrant world in which he had been raised," needed "to separate himself from his immigrant past" in order to "become a full-fledged American" (p. 39). As a result Frankfurter vigorously embraced the English language, "national institutions" such as the Supreme Court, public education, Harvard, Franklin Roosevelt, American citizenship, saluting the flag, and democratic theory (pp. 39-44). In the terms of *Two Jewish Justices*, Frankfurter "derived a mandate zealously to protect the values and status of insiders, such as he had become" (p. 46).

But "as much as Frankfurter strove to portray himself in this insider's status," Burt argues, "it was never comfortably his" (p. 48). Burt points to Frankfurter's becoming "unaccustomedly isolated" on the Supreme Court, partly as a result of the unwillingness of his colleagues to accept his views and partly from his own "perverse willfulness" in responding to disagreement with a "vitriolic anger toward his brethren" (pp. 48-49). He also points to two incidents in which Frankfurter, despite his apparent acceptance into elite "insider" circles as a visiting professor at Oxford and a Supreme Court justice, was embarrassed at his initial encounters with his new colleagues because he had not dressed properly. "Here was Frankfurter, at last eligible to dress up," Burt comments, "and he wore the wrong outfit" (p. 61). For Burt the incidents are evidence that "[s]omewhere in this intricate minuet, Frankfurter had lost his bearings" (p. 61).

Thus Frankfurter appears, in the parable of *Two Jewish Justices*, as one who in "[h]is wish to achieve insider status, to find a home and an end to his personal exile, . . . lost an essential aspect of his judgmental capacity; he became too singleminded, an overeager apologist for the existing order" (p. 60). He is portrayed as the classic "*parvenu*": "always charming, cajoling, seducing the widest possible circle of admir-

ers, but never quite successful in finding the right chord, always somewhat strident, always a bit gauche" (p. 62). Having been summed up, Frankfurter virtually disappears from Burt's narrative, reappearing only briefly as a holdout against the Warren Court's concern with protecting minorities, a judge who "was prepared to see himself as the obedient instrument of national power" and who rejected any alternative conception of judging that "demand[ed] an independent — that is to say alienated, outcast — perspective on all exercise of authoritative power" (pp. 101-02).

Here again this interpretation of Frankfurter seems too monolithic and too neatly complementing Burt's general thesis. Frankfurter is the foil for Brandeis: the homeless Jew who, in his desperate search to find a home, loses his bearings, and becomes an apologist for an insider status he never quite achieves — a *parvenu*. Just as Brandeis' aloofness and dogmatism<sup>5</sup> appear as a "rigor[ous] stance alone and apart from others" (p. 13) or "an extraordinary self-confidence in one's own rectitude and disinterestedness" (p. 10), qualities in Frankfurter that others described as "overflowing gaiety and spontaneity which conveyed the impression of great natural sweetness"<sup>6</sup> appear as "cajoling, . . . always somewhat strident, always a bit gauche." The reader of the parable is supposed to admire Brandeis for his "rigorous solitude" and his "conception of himself as . . . speaking as advocate for the outsider and working to dissolve the boundary" (pp. 35-36), and to feel contempt for Frankfurter's futile "struggle[ ] against acknowledging his outcast status" (p. 129).

The characterization of Brandeis and Frankfurter offered in Burt's narrative engenders suspicion not only because of its one-dimensional qualities, but also because it is not based on the kind of evidence conventionally associated with efforts to recreate the attitudes of historical figures. With rare exceptions, Burt does not base his interpretation of Brandeis' and Frankfurter's different attitudes toward their ethnic heritage, or their different conceptions of their role as judges, on their own direct testimony.<sup>7</sup> His technique is rather to present indirect evi-

5. Dean Acheson, one of Brandeis' law clerks, described an incident in which Brandeis lectured Professor Manley Hudson on the "unbroken, continuous, and consistent" nature of morality, which Brandeis felt was the equivalent of "truth." Acheson commented that "if some of [Brandeis'] admirers knew him better they would like him less." D. ACHESON, MORNING AND NOON 95-96 (1965).

6. P. 37. Burt quotes Isaiah Berlin from I. BERLIN, PERSONAL IMPRESSIONS 84 (1981).

7. Burt indicates that he "read through [Brandeis' and Frankfurter's] opinions, their biographies, their extrajudicial writings, and other sources" in researching the book. P. 2. His citations come from a variety of such sources. But none of his citations offers any direct evidence, from the writings of Brandeis or Frankfurter, that the former viewed his role as a judge as breaking down the boundaries between outsider and insider status, or that the latter viewed his role as maintaining and defending the insider/outsider distinction. In addition, none of Burt's citations offers any evidence that Brandeis or Frankfurter identified their status as Jews with the condition of being "homeless." The closest approximation to that kind of evidence Burt presents is a letter Frankfurter wrote to Henry Stimson in 1916 in which he said that "[i]t is not comfortable to be

dence, such as Brandeis' high regard for the value of privacy or his passion on behalf of striking workers, or Frankfurter's deference to legislation imposing compulsory flag salutes or stripping persons of citizenship for military desertions. He then extrapolates from this evidence the judicial roles he attributes to Brandeis and Frankfurter, and then further extrapolates from their differing roles the proposition that Brandeis retained, as a judge, a sense of the marginality and "homelessness" he felt as a Jew, whereas Frankfurter sought to suppress that sense of marginality by embracing "insider" values.

Thus, in the portions of Burt's narrative dealing with the careers of Brandeis and Frankfurter, the reader is presented with a strikingly attenuated scholarly argument. Burt begins with a proposition that Jews, in America and elsewhere, are "homeless" persons. Since Brandeis and Frankfurter were both Jewish, they were necessarily homeless. He then uses the indirect evidence described above in the service of a claim that Brandeis developed a stance toward the question of "insider"/"outsider" interaction in America that placed him in a position of social marginality, neither insider nor outsider, from which he sought to dissolve the distinctions between the two statuses. Using similar sorts of evidence, he then makes a comparable claim that Frankfurter developed quite a different stance, one characterized by social ingratiation, in the manner of a *parvenu*, and by resolute defense, as a judge, of the distinction between insiders and outsiders. The argument is attenuated because Burt not only presents precious little evidence that Brandeis or Frankfurter identified being Jewish with being "homeless," he presents no evidence that they conceived of their role as judges in terms of the "insider"/"outsider" status distinction that Burt posits as crucial to their stances. Moreover, other evidence exists, the presence of which Burt acknowledges, suggesting that on some occasions Brandeis appeared indifferent to outsiders in his opinions, and on some occasions Frankfurter appeared supportive of outsiders.<sup>8</sup> Burt's argument does not, in fact, function as a conven-

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politically homeless." But the sentence preceding that comment read, "I have to be one of those who, by being outside of both camps, is going to pick and choose from election to election," and was written at a time when Frankfurter was more enthusiastic about the Progressive Party, which had run Theodore Roosevelt for President in 1912 and was running a candidate again in 1916, than either the Republican or Democratic parties. Letter from Felix Frankfurter to Henry L. Stimson (Nov. 2, 1916), *quoted at* p. 40.

8. Burt states:

As acute as Brandeis' appreciation was for the predicament of the outsider . . . , and as powerfully as he gave voice to this perspective in his judicial work, Brandeis did not extend this understanding or conceive this judicial role on behalf of black people. On the occasions when the Court addressed the status of blacks, Brandeis remained silent; he joined, for example, in the unanimous decisions reaffirming the constitutionality of segregated education and interstate transportation facilities.

P. 84.

He also concedes that during the Warren Court Frankfurter "[o]ccasionally . . . would join with the majority to advance some increased protection for an 'outcast' claimant," but "never with the passion" of other members of the Warren Court majorities. P. 97. It is hard to know

tional scholarly argument at all, although it bears the apparatus of scholarship. It functions more as an idiosyncratic effort to interpret the career of two prominent justices in terms that the narrator finds personally compelling.

### III

Burt's argument in the remainder of *Two Jewish Justices* proceeds in the same idiosyncratic vein. After advancing his characterizations of Brandeis and Frankfurter, Burt does not seek to offer additional detail that might complicate or deepen his portraits, nor to engage in a detailed analysis of how Brandeis' and Frankfurter's versions of being a "Jewish justice" played out in their opinions. Instead he begins an even more extended extrapolation of his central themes. The effect on a reader seeking to evaluate the book in terms of the ordinary canons of academic scholarship can only be described as breathtaking.

Burt's first step in his extrapolation is to return to the issue of "the current concentration of Jews on American law school faculties" (p. 64). Elaborating on earlier observations, he links this phenomenon not to the "full assimilation of Jews, the virtual ending of their outsider status," but to the "continuation of a special social role for Jews, . . . the high status outsider" (p. 65). American Jews will not "shake loose from outsider status," Burt claims, because "[t]his sense of alien status, of homelessness . . . pervades American social life." Homelessness, then, "has become the only social status truly available in American society," and "Jews are specially sensitized to this status" (p. 67). The reason that Jews have "received such ready entry into American law faculties" in recent times is that an "implicit awareness . . . has grown within the American legal academy that Jews, by virtue of their historic experience, are specially adept at understanding and constructing social rules based on the fundamental fact that insider status is barred to them" (pp. 67-68).

The reader may be perplexed at this point, wondering how one might assemble evidence to confirm or to refute such a proposition. In Burt's argument, hospitality to Jews seems to rest not only on an "implicit awareness" about what Jewish candidates for law teaching would be "specially adept" at, but on the premise that "constructing social rules" from the perspective of the "high status outsider" is what law teachers regard as their chief function. These characterizations of law teaching, and the role of Jews within it, seem novel, at the least, and since Burt offers no evidence, the characterizations are difficult to treat as anything but unsupported assertions.

Nonetheless Burt plunges ahead, next maintaining that "insider

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how Burt is able to divine Frankfurter's lack of passion for outsiders merely from the fact that he joined majority opinions.

status in America" has been "eroded" (p. 68). He recapitulates American history from the "founding days of the Republic" (p. 68) to the 1980s, taking up relations between blacks and whites, men and women, and other groups whose interplay demonstrates for him that despite efforts on the part of various "insiders" to cement or to preserve their status, "no one in America today is able to perceive himself or herself in social terms except as a homeless outsider" (p. 77). It follows from this historical survey that "what had seemed exceptional, even paradoxical, in Brandeis' or Frankfurter's time . . . has . . . now become the rule" (p. 77). No matter that this survey is remarkably swift and assertive, or that it could also be read to look less like the inexorable erosion of insider status than the successive emergence in American society of minorities whose claims are taken seriously by majorities at different points in time. The latter reading would suggest that *insider* status has endured, although the attitudes of insiders to specific groups of outsiders may have changed. But Burt is not inclined to linger over such complexities.

Having concluded that "outcast" status has become the norm, Burt then shifts his focus from the history of minorities to the jurisprudence of the Warren and Burger Courts. He finds, consistent with his claim that "the outcast in power is the modal embodiment of authority in our time" (p. 77), that the Warren Court majority was a "Jewish" Court — a Court that sought, in decisions such as *Brown v. Board of Education*,<sup>9</sup> "to repudiate the pattern of social authority based on the rigid imposition of insider/outsider status" (p. 93). The examples Burt provides for this characterization of the Court's throw his methodology in *Two Jewish Justices* into sharp relief. He suggests that the Warren Court majority "reiterated Brandeis' general stance" toward judging, and he points to two "specific links to Brandeis' position" (p. 97). The first of these is the Court's discovery, in *Griswold v. Connecticut*,<sup>10</sup> of the constitutional right of privacy, whose common law version Brandeis had embraced earlier in his career.<sup>11</sup> For Burt this action of the Warren Court signifies its "embrace of Brandeis' [commitment to] 'retreat from the world . . . [for] solitude and privacy'" (pp. 97-98). The second link is, for Burt, "less overt, but of more pervasive significance" (p. 98). It is the Court's decision in *Trop v. Dulles*,<sup>12</sup> invalidating on eighth amendment grounds a federal statute stripping of citizenship any member of the armed forces convicted of wartime desertion.

The first "link" is somewhat cryptic, since the "Brandeisian per-

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9. 347 U.S. 483 (1954).

10. 381 U.S. 479 (1965).

11. Burt cites Brandeis' celebrated article, written with his then law partner Charles Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

12. 356 U.S. 86 (1958).

spective" Burt finds "dominant in the work of the Warren Court" (p. 103) is not simply a mirroring of Brandeis' interest in standing apart from others in the world, but an affirmative embrace of the claims of "outcasts" and outsiders. It is hard to see how enhanced attention to privacy values has anything to do with dissolving the boundaries between insider and outsider status; a concern for privacy would seem to extend to that of insiders as well as outsiders. The "link" Burt cites seems to be more revealing of the attenuated quality of his arguments than of anything else.

The second "link," involving *Trop v. Dulles*, calls forth a more extended discussion from Burt and, as such, provides more clues into his methodology. He begins by claiming that the "Court majority" in *Trop* "not only excoriated state imposition of outcast status; it did so on the basis of a virtually explicit empathic identification with the oppressed status of European Jews" (p. 98). He then suggests that "none of this [identification] was openly avowed in *Trop*," although "it seems to have been clearly understood . . . by all of the justices writing in the case" (p. 98). The basis of this suggestion is Chief Justice Warren's statement, in his plurality opinion, that when citizenship is stripped from a person "the expatriate has lost the right to have rights."<sup>13</sup> Warren relied for that proposition, according to Burt, on "an analysis by Hannah Arendt of the German legal regime that led to the extermination of the Jews" (p. 98).

Burt documents this reliance on Arendt in the following fashion. He admits that Warren "did not cite [Arendt's] work as such" (p. 98). He argues, however, that Warren relied on Arendt because his opinion in *Trop* cited a dissenting opinion by Chief Judge Charles Clark of the Second Circuit, whose decision in *Trop* the Supreme Court had reviewed. Clark's opinion had cited a 1955 student Comment in the *Yale Law Journal*<sup>14</sup> that had characterized expatriation as "a loss of the right to have rights," quoting Arendt. Having thus satisfied himself that "the provenance of [Warren's] phrase is . . . clear," Burt then considers why Arendt remained "unacknowledged" by Warren. "It is as if," Burt suggests, "Warren were unwilling directly to draw the links that he saw between the challenged congressional act [in *Trop*] and the Nazi treatment of Jews" (p. 99).

Burt's analysis of the Arendt reference is characteristic of his approach to the relationship between evidence and argument throughout *Two Jewish Justices*. Having advanced a broad characterization — in this example, the Warren Court majority as a "Jewish Court" linked to Brandeis in its sympathy for outcasts — Burt then offers evidence that at first glance appears to be of a conventional sort, treated in a conventional fashion, such as passages from Supreme Court opinions

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13. 356 U.S. at 102.

14. Comment, *The Expatriation Act of 1954*, 64 YALE L.J. 1164 (1955).

whose text is cited. But on further examination neither Burt's evidence nor his interpretations of it are conventional. Indeed, the *Trop* example offers no direct evidence that Warren relied on Arendt at all. Warren cited only Clark's dissent, making no reference to the student comment, let alone Arendt. Burt, however, finds significance in this omission. In Burt's interpretation Warren is fully conscious of Arendt and fully conscious of the parallels between congressional treatment of wartime deserters and Nazi treatment of Jews, but suppresses making the parallel explicit because "the parallel would not sit comfortably with the members of Congress who voted for the expatriation measure" (p. 99). For Burt, not only is the "linkage" between Warren's opinion and the Arendt analysis of the extermination of the Jews "plainly there," even if "partially hidden, encoded" (p. 99), but the link between the Warren Court's stance in *Trop* and Brandeis' general stance as a judge is also plain.

At this point it should be clear how Burt's methodology presses the limits of conventional legal scholarship. The relationship between the structure of Burt's parable and the evidence he presents in support of his general propositions is a parody of the conventional scholarly relationship between the structure of an argument and the supporting documentation. The evidence Burt presents is so overwhelmed by the structure of his argument that even when he has no direct evidence in support of one of his general propositions, he offers other kinds of evidence, extracts the meaning of that evidence based on its consistency with the propositions themselves, and then argues that the very indirectness of the evidence reinforces the propositions. It is as if *any* evidence will do; what counts is the structure of the parable. Hence the "lessons" of *Two Jewish Justices* are not drawn from evidence independent of the parable's structure: the reader is to treat the parable's narrative as so meaningful that its narrator's interpretations are taken as necessarily plausible.

In the last chapter of *Two Jewish Justices* Burt attempts to gather up the loose ends of his parable to highlight its central message. After suggesting that the Warren Court, for at least part of its history, was a "Jewish Court" of the Brandeisian variety, Burt then claims that after 1967 the Court was motivated primarily by "underlying fears about the widespread urban race riots of the mid 1960s and popular resistance to the Vietnam War" (pp. 106-07). It thus retreated to a "*parvenu*" perspective, one "more fearful of challenges to constituted social authority" and "less confident that [high] social status . . . would receive widespread unforced acknowledgment and deference" (p. 107). He cites as evidence the Burger Court's tentative embrace of, and then retreat from, constitutional invalidation of the death penalty. For Burt those designated for public executions represent an "outcast class" (p. 113), and the Court's eventual validation of death penalty

statutes in *Gregg v. Georgia* and its companion cases<sup>15</sup> signify a decision "to regard the maintenance of distinctly bounded outcast classes as intrinsically justified" (p. 113).

Burt then returns to Brandeis, who he claims "was not deflected by fears of turmoil from his solicitude for outcasts as such" (p. 114). Brandeis' "basic goal" as a judge, for Burt,

was to work toward a resolution of social conflict that would transcend the terms of that conflict, that would render irrelevant the contending parties' self-conceptions as insiders or outsiders. . . . His goal was to resolve social conflict, not to foment it. . . . [H]e was . . . convinced that imposed order would not yield social peace if that order merely ratified the existing, chafing distinctions between insider and outsider. [p. 116]

Having characterized Brandeis as a judge who "persisted in his sympathy for outsiders, notwithstanding either the provocations of their disruptive conduct or the opportunities offered by his own social attainments . . . to define himself as an insider" (p. 117), Burt seeks to remind the reader once again where this perspective of Brandeis originated. The depth of Brandeis' commitment to outcasts, for Burt, was "the meaning that Brandeis forged from Judaism" (p. 117).

At this point Burt is nearly ready to make the lesson of his parable explicit. He has one last step, to underscore the fact that Brandeis, unlike Frankfurter, was from a financially secure and highly educated family and thus "enjoyed a luxury . . . of vicarious, more than direct, experience of alienation" (p. 124). He was a "comfortable" outcast, if an outcast still. His identification with outcast status was thus "vivid, but not daunting"; he "had an unshakable conviction that its difficulties could not only be borne but transcended" (p. 122). Brandeis' experience as a Jew was thus like "the contemporary generation of American Jews," for whom "bondage is a vicarious, rather than direct, experience." Contemporary American Jews, for Burt, are like Brandeis in not having been "scarred by the pervasive anti-Semitism that their parents confronted" (pp. 126-27). Thus, paradoxically, contemporary Jews are in a better position to identify with outcasts, since they have less reason to deny their outcast status in search of acceptance into the community of insiders. They are in a position to elect Brandeis' posture toward their heritage and toward outcasts generally.

But at the same time Burt assigns to contemporary Jews, indeed to "most Americans," the characteristics he found in Frankfurter: a tendency to "idolatrous self-worship," and to "turning away from any identification with outcasts" (p. 127). The lesson of *Two Jewish Justices* is thus to follow Brandeis' rather than Frankfurter's example. In the parable one justice "struggle[s] against acknowledging his outcast

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15. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

status, but vainly," whereas the other "embrace[s] homelessness as his heritage, and . . . [draws] strength from it" (p. 129). Those who are currently comfortable in their roles in American life need to eschew the path of "forced suppression of doubts about the fairness or rationality of the fixed boundary between insider and outcast status" (p. 129). That path "promises no reliable social peace. Nor does it offer personal repose" (p. 129). But because we are all outcasts, we need, with Brandeis, to recognize that fact and act upon it.

#### IV

I have set forth the structure of Burt's parable in some detail, with considerable attention to Burt's own language, in order to underscore how firmly its message rests on the inner terminology and logic of his narrative. The successive generalizations that Burt advanced are so embedded in the parable's structure, and the language he employs so interconnected, that a reader may forget that his crucial terms and concepts — homelessness, insider, outsider, outcast, *parvenu*, "Jewish" and "Jewishness" — each stand for sociological and historical assertions that Burt has himself made, and documented through a highly unconventional use of evidence. Burt has claimed that Jewishness is primarily linked to homelessness; that the maintenance of a shifting boundary between insider and outsider status has been a perpetual theme of American history; that at bottom all Americans are outcasts; that only two social roles exist for Jews, "pariah," or outcast, and *parvenu*, or pseudo-insider; and that a person with a "Jewish" perspective is one who acknowledges an identification with outcast groups. These claims, taken together, yield an inevitable and perhaps powerful lesson, the lesson of his parable. But none of the claims, taken separately, amounts to anything more than speculation. The reader has to grant Burt's speculations a provisional validity to embrace the parable's lesson.

With the highly speculative character of Burt's arguments in mind, one might advance the following analysis of the various propositions that link Burt's narrative. Robert Burt, a person of Jewish antecedents who had encountered comparatively little sense of professional or social discrimination, was given the occasion, by virtue of an opportunity to lecture on the role of Jews in American law, to reflect on why he and "so many other Jews of my generation" had "found a home" in law teaching. His reflections were predicated on this feeling of being comfortable, of not being excluded from the "insider" status of holding a chair on the Yale Law School faculty by virtue of his being Jewish. In the course of his reflections Burt considered the careers of Brandeis and Frankfurter, Jews who had also held high status positions in the legal profession, but whose careers had taken place in a

period in which Jews were much more likely to be barred from high status positions solely because of their roots.

In reconstructing their careers, Burt came to conceive the two men as representing contrasting attitudes toward the relationship between their ethnicity and their success. Frankfurter's attitude seemed excessively obsequious towards traditional American insiders and excessively preoccupied with the defense of insider attitudes and traditionalist institutions. Burt found it embarrassing in its apparent abandonment of ethnic identity and the lack of self-esteem that it reflected. Brandeis' attitude, by contrast, struck Burt as exceptionally preservationist of Brandeis' sense of self, strikingly detached from insider culture, and, on examination, deeply mindful of ethnic origins and the outcast status that linked Brandeis, as a Jew, to other outsiders. Burt, in short, admired Brandeis, was offended by Frankfurter, and chose to identify his own career progression with that of the former rather than the latter.

Given Burt's posture, it was no accident that he was offended by Frankfurter's persistent embrace of insider values and traditionalist institutions, as well as by his self-conscious disclaimers of the relevance of his ethnic identity to his role as a judge. Burt's more positive reaction to Brandeis was perhaps less inevitable, given evidence that Brandeis was selective in his solicitude for outcast groups and that Brandeis' temperament precluded his demonstrating any overt emotional attachment to others. But Burt was attracted to Brandeis in any event, and was able, through attention to Brandeis' discovery of Zionism in his middle years and the "passion" on behalf of outcasts expressed in one of Brandeis' unpublished dissents, to make Brandeis a foil for Frankfurter.

Having established Brandeis as an alternative to Frankfurter, Burt then set out to confirm the superiority of Brandeis' example. He asserted that since all Americans see themselves at bottom as outcasts, dissolving the boundaries between insider and outsider status is a policy of paramount importance. He enlisted the Warren Court in this quest, and identified the quest with Brandeis and with a rediscovery of the central meaning of Jewishness. He recalled Brandeis' rediscovery of his ethnic heritage in connection with Zionism, and compared the "comfortable" position from which Brandeis engaged in that rediscovery with the comfortable position of most contemporary Jews. In short, Burt confirmed the patterns and choices of his own career. He and Brandeis did not let their high status blind them to their roots or to the position of outsiders in American life. He and Brandeis did not lose sight of their homelessness despite having found a home. He and Brandeis were aware that the possession of insider status did not obviate the fact that they, and all Americans, remained in a profound sense outsiders. He and Brandeis thus engaged in a joint effort, separated

only by the incidental features of time and professional role, to dissolve the boundaries between insiders and outsiders.<sup>16</sup>

In this fashion, *Two Jewish Justices* becomes not only a parable, but a self-confirmatory one: a story whose central lesson for the reader is to choose the path of the narrator. Such a reading, of course, is based on very little evidence independent of the reader's intuition that Burt structured his examination of Brandeis and Frankfurter in the fashion outlined above. But since Burt's own examination of those careers can itself be reduced to a series of propositions resting essentially on intuition, the reading does not seem inconsistent with the spirit in which Burt's parable is presented.

One could, however, eschew the above analysis and read Burt's effort as a more informal, speculative venture, designed to provoke, intended to be a sort of personal memoir in which Brandeis, Frankfurter, and the Warren and Burger Courts are enlisted. A parable is, after all, just a tale. But this reading of *Two Jewish Justices* runs up against two persistent features of the book. First is the tone of high moral seriousness, suggested in such phrases as "idolatrous self-worship," "escalating dynamic of repression and fear," "social peace," and "personal repose" (pp. 127-29). In such language Burt conveys an impression that his claim that "different attitudes toward outsider status and homelessness have direct relevance to the issues confronted today by . . . all Americans, whether Jews or gentiles" (p. 3), is a claim of great prescience and import. Second is the scholarly apparatus of *Two Jewish Justices*, which I have taken some pains to explore. Despite Burt's unconventional use of evidence, that apparatus is intended to suggest to the reader that Burt's parable is not merely impressionistic, but authoritative. The narrator of the parable is to be taken not only as engaging and provocative, but as wise.

## V.

Thus *Two Jewish Justices* ultimately asks its readers to consider the sources of authority in the contemporary community of legal scholars. By treating the absence of evidence, imaginatively interpreted, as the

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16. Burt had previously identified the parables of the New Testament with a methodology designed to "convert[ ] all into needy outsiders by confounding insider and outsider and then offering hope for ultimate protection by mapping a path back inside for everyone." Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455, 471 (1984). He described the method of the parables as

first to command the attention of people who conceive themselves as safely inside some protective flock; then to persuade these people that they are no different from others visibly outside, even others whom they believe they have excluded from their own safe superiority; and finally, having provoked in these once-smug insiders feelings of vulnerability and consequent emphatic identification with the old outsiders, to show how this empathy in itself can serve as the route for membership in a community that promises a more reliable, more secure haven.

*Id.* at 478.

equivalent of evidence; by treating a highly structured story as the equivalent of history; by treating complex human actors as archetypes and foils; and by treating the parable as the equivalent of legal scholarship, Burt raises the question of where "authoritative" readings of texts, of events, and of the lives of historical personages can be said to derive their authority. That question is particularly pressing for contemporary legal scholarship, which is increasingly perceived as taking place in a universe of discourse characterized by radical uncertainty and disagreement about the appropriate methodological groundings of scholarly work.

One of the central areas of methodological debate among contemporary scholars involves the relationship between evidence and interpretation. Reduced to its lowest terms, that debate centers on the question of whether it is possible to treat the evidence offered by a given scholarly interpretation as having any meaning independent of that interpretation. If evidence has no such independent meaning, a subsidiary question arises: how can one assess the worth of scholarly contributions other than by acknowledging the prominence of the interpreter or by noting the concordance, or lack thereof, between the interpreter's views and those of the reader? In a scholarly community of widely differing attitudes about methodological and substantive issues, are there any common evaluative standards for assessing interpretations? In particular, is there any common understanding of the role of evidence as a constraint on interpreters?

Burt's presentation of evidence through the parable genre forces a reader to confront such questions. Burt's use of evidence, as noted, is highly unconventional, given the received expectations of post-World War II generations of scholars that evidence in a scholarly work should provide an independent basis on which to evaluate the interpretations advanced in that work, as distinguished from being overwhelmed by the work's interpretive framework.<sup>17</sup> It may be that in this age of radical disagreement about the appropriate relationship between "texts" and "interpreters," such expectations no longer exist, and it may be that the epistemological premise on which those expectations rest — that evidence is capable of having an objective meaning that can be detached from the interpretive frameworks in which it is presented — is unintelligible. If one cannot say with confidence that evidence is a constraint on interpretation, then one of the principal bases for evaluating the worth of scholarly interpretations — was evidence "fairly" presented; did an interpretation "conform to" rather than "distort" that evidence — disappears.

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17. This expectation has been communicated in the form of a "falsifiability principle": the propositions contained in a scholarly interpretation must rest on evidence that contains the seeds of their prospective "falsification" or revision. See K. POPPER, *CONJECTURES AND REFUTATIONS* 215-17, 228-31, 312-14 (3d ed. 1969).

At that point, with the evidence constraint rendered problematic, criteria for evaluating the worth of interpretations appear to locate themselves primarily in the "promise" of the interpretation itself. If, in the collective judgment of some relevant interpretive community, the questions in a work are stimulating, the answers provocative, and the discussion of issues presented in accessible and resonant language, the interpretation can be regarded as "promising" and thus worthy of attention. Given this community standard, the parable genre of interpretation, as employed in *Two Jewish Justices*, would seem to contain considerable "promise." The questions Burt asks and seeks to answer are stimulating, his narrative is crafted in accessible and sophisticated prose, and the lessons of his parable are invested with a tone that conveys a sense of urgent moral seriousness. In a universe of scholarly discourse in which the possibility is taken seriously that interpretations necessarily overwhelm their "texts," who is to say that a parable, even if at bottom an impressionistic, idiosyncratic tale, has less claim to scholarly promise than any other genre?

The last question seems capable of being addressed, if perhaps not definitively answered. There is something disquieting about an interpretative effort that, while cloaking itself in a conventional scholarly apparatus, reveals itself, on closer inspection, to be employing that apparatus as so much window dressing. There is something troubling about the assumption that highly personalized readings of history and of contemporary culture can be offered as candidates for authoritative status when the sources of their authority appear to rest solely on the intuitions of the author. In this vein, *Two Jewish Justices* is a book whose methodology not only conveys something about its author but about the scholarly universe in which he writes. It is as if the tacit message of the book is that, since there are no longer any intelligible criteria by which one can assess the validity of interpretations advanced in a work of scholarship, *any* interpretation — no matter how broad, no matter how unsubstantiated — is potentially promising. What counts in determining the worth of a scholarly work, in the end, is the stature of the scholar writing it and the stimulating quality of the narrative's prose, not the relationship between the interpretations offered in it and the evidence on which these interpretations rest.

Had *Two Jewish Justices* appeared at a different point in the history of twentieth-century legal scholarship, its place in the scholarly universe might have been far easier to discern. Were different working definitions of scholarship present, with clearer expectations about the "proper" relationship between evidence and interpretation in a scholarly work, *Two Jewish Justices* could be treated as a parable without scholarly pretense. It could be regarded as an effort that makes no claim of authoritativeness and that offers only an interesting tale, some provocative reflections, and, if one is engaged by the tale and the reflections, a lesson worthy of contemplation. But in the current world

of legal scholarship *Two Jewish Justices* appears as a much less modest, indeed a pretentious effort, that seeks authoritativeness in spite of its disclaimers, that employs a conventional scholarly apparatus in pursuit of that authoritativeness, but abuses that apparatus in the process, and that ultimately asks to be regarded as authoritative simply because of the stature of its author and the inherent interest of the issues it addresses.

*Two Jewish Justices*, in sum, is a parable presented as legal scholarship. As such it not only invites a consideration of the current sources of scholarly authority among contemporary legal academics, it raises an awkward series of questions that emerge from such consideration. Is it the case that in a profession marked by significant stratification and by a close relationship between status and the "influence" of ideas, high status "insiders" such as Burt are able to claim, and perhaps to secure, the status of authorities merely because of who they are? Have we reached a point in legal scholarship where, because of the obvious lack of coherence about what constitutes "good" scholarship or "appropriate" genres for scholarly communication, any ruminations on any subjects, so long as conducted by high-status persons, deserve attention? If so, it would seem that the parable genre can be regarded as the equivalent of any other scholarly genre, and that the "promise" of an interpretation and the status of the interpreter can be regarded as the touchstones for assessing authoritativeness and prominence. By inviting the possibility of such a conclusion, *Two Jewish Justices* holds up to those of us engaged in contemporary scholarship a disturbing image of ourselves.