BOOK REVIEWS

JUDICIAL POLITICS: AN INTRODUCTION. By Jerome R. Corsi.[1] Englewood Cliffs, N.J.: Prentice-Hall, 1984. Pp. 372. $17.95.

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For centuries, judicial decisions were seen as drawn directly from neutral and immutable principles of law by keepers of eternal verities. While our professional societies and educational institutions still cling to this vision, we know better now for the most part. While examining an opinion, few among us would argue with the suggestion that something more than pure truth was afoot when its author penned it. Indeed, even where a court declines to hear a case most of us recognize the existence of a political dimension: not to decide is, of course, to decide—to affirm the existing order. But it is more than a matter of semantics. Numerous factors—political beliefs and affiliations, social policy judgments and personal objectives—may be implicated when a court renders its decision. This was the argument of the Legal Realist movement when it emerged earlier this century. It is an understanding that informs many of that group's descendents, including the Critical Legal Studies theorists. Indeed, it has been the grist for innumerable studies of the legal profession conducted by social scientists since the Second World War.

In *Judicial Politics: An Introduction*, Jerome R. Corsi brings together a mass of such research on his way to addressing the question: Why do judges decide cases the way they do? As the title indicates, Corsi finds an answer in what he broadly terms "judicial politics." But it is not as simple as discarding the case law and asking what the judge's politics are (though clearly that is a factor). Rather, the author bids us to consider a context—a hierarchical profession, a highly politicized judiciary and an evolutionary body of law—from which decisions come forth:

> If judicial decision making were simply a matter of law and precedent or simply a product of personality, prejudice and politics, the analysis would be vastly simplified. But modern social science has turned our attention from the traditional view toward a more complete consideration of the role played by truly human factors. What before was conceptualized in terms of jurisprudence must now be more clearly articulated as judicial politics.[2]

So stated, there is nothing earth-shattering about Corsi's thesis. Nor is

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2. J. Corsi, Judicial Politics: An Introduction 258 (1984) [hereinafter Judicial Politics].

there anything remarkable with his ultimate conclusion that judicial decision-making "probably mixes predictable factors with chance." But court-watchers—lawyer and nonlawyer alike—should find *Judicial Politics* useful, for it offers a well-organized and generally engaging overview of the legal profession and its institutions. A political scientist by training, Corsi has assembled decades of intriguing pedagogy under one compact roof. With references to hundreds of works in his own field, as well as history, economics, sociology and law, he has prepared a volume of commendable breadth and minimal tedium. One without the time or the inclination to delve into the primary sources upon which Corsi calls, leaves this work considerably enlightened.

Left political values animate *Judicial Politics* throughout, yet Corsi is hardly doctrinaire. His tone is even-handed, conciliatory, perhaps some might argue a little apologetic. He is plainly cognizant of the litany of left criticisms of the legal system—its racism, sexism, classicism and elitism—and he is, it seems, in general harmony with the critics. But the complexity of the situation as he sees it is unlikely to lead him to attribute a particular holding to racism or class hatred per se. Corsi evidently feels the harsh language employed by some of the system's more radical and less pedantic detractors is, if not misdirected, then focused too narrowly. Acknowledging, for example, "the extent to which economics shapes both the legal profession and the substance of law as judicially decided,"[3] Corsi continues:

> An easy conclusion would be that this economic formulation is basically "wrong." Yet lawyers, like everyone else, must earn a living, and those who would criticize lawyers for seeking economic security must themselves be especially concerned about hypocrisy. The injustices that result from an economically motivated legal system may not simply be injustices of the legal system per se but injustices built far more deeply into the fabric of our society as a whole. This is not to argue that such injustices, when identified, should be tolerated. Rather the argument is that to fix our attention on the economics of the legal system alone is to fix our attention on what may merely be yet another effect.[4]

Even if one places a premium on such things, Corsi's rhetorical reserve, as compared to that of other progressive analysts of the legal system, is a minor concern. The interest here lies in the information, the statistics and the history. (As it happens, the information and statistics tend to support the fundamental contentions of all left observers.) Corsi offers not only hard, factual support for beliefs many of us hold intuitively, but also a meaningful framework within which to view them.

A prime example is Corsi's discussion of legal education, which opens his text. It is, he remarks, "a departure from expected central themes" but an

3. Judicial Politics, supra note 2, at 332.
4. Id. at 332-33.

appropriate one because "throughout, our judicial system presupposes lawyers."[5] In common with other left theorists, notably those of the Critical Legal Studies school, Corsi sees the hierarchical structure of the legal profession as its salient feature.[6] Unlike some, Corsi subdues any outrage he might harbor on the subject[7], but he is clear that the hierarchy exists, that it is a part of judicial politics and that it begins with the admission of first-year law students. Law school is an early gatekeeper in a profession that erects many gates.

Corsi the historian reports that law schools weren't always this way. In a thumbnail history of American legal education, he recalls that things went so badly for the fledgling Harvard Law School (established in 1817 with one student) that it was forced to abolish all of its entrance requirements. As one commentator has observed, "This meant not only that college education was unnecessary, but that the beginning law student need not even be qualified for admission to college."[8] We can rest assured, however, that Harvard won't face such ignominy in the near future. The number of students taking the LSAT examination rose by nearly 300 percent between 1965 and 1980, while the number of aspirants unable to gain admission to law school increased eightfold over roughly the same 15-year period.[9] Put another way, the ratio of LSAT administrations to first-year law school admissions, which stood at 1.63:1 in 1963, had exceeded 3:1 by 1971.[10]

Corsi's research leads him to conclude that the law school serves another purpose, i.e., "as the predominant modern means of socialization to prepare students for the professional practice of law[,]. . . the law school experience trains prospective lawyers to practice law according to values amenable to the business world rather than those reflecting reformist or social welfare concerns."[11] Corsi cites studies documenting a decline in "humanistic" concerns as students proceed through school[12] and a heightened interest in law careers with business orientations. One study, performed at the University of Wisconsin Law School in 1976, recorded a dramatic transformation in student views regarding tax matters and estate planning between the student's first and second years. "Although the tax course is not required, the cues are so strong the

5. Id. at 7.

6. Id. at 2. See generally D. Kennedy, Legal Education and the Reproduction of Hierarchy: A Polemic Against the System, Cambridge, AFAR (1983).

7. Kennedy writes: "This hierarchy is illegitimate (it is neither socially necessary nor in accord with any kind of merit) and it is also sick." Judicial Politics, supra note 2, at 36.

8. Id. at 11, citing Currie, The Materials of Law Study, 3 J. Legal Educ. 331, 363 (1951).

9. Id. at 17, citing Evans, Applications and Admissions to ABA Accredited Law Schools: An Analysis of National Data for the Class Entering in the Fall of 1976, Report No. LSAC-77-1, in Law School Admission Council, Report of LSAC Sponsored Research: Vol. III, 1975-1977 551, 564 (1977).

10. Id. at 19, citing American Bar Association Section of Legal Education and Admissions to the Bar, A Review of Legal Education in the United States, 1981-1982 54 (1982).

11. Id. at 36.

12. Id. at 33, citing T. Shaffer & R. Redmount, Lawyers, Law Students and People 41 (1977).

students feel it would be a mistake to leave law school without taking it," one of the study's authors stated.[13]

Law students, current and former, may take some comfort in these studies, which confirm quantitatively what we know viscerally. In a similar vein, Corsi's discussion of research conducted by Robert Stevens—based on the study of three graduating classes at eight law schools[14]—had a familiar ring.

> Students were surveyed on a variety of questions, including items such as "hours per week spent studying" and "interest in school work." Generally, the measures of student involvement showed a sharp decline after the first semester and a general decline as students progressed through law school . . . . Nearly 75 percent of the first-semester students reported completing at least 80 percent of their assignments on time, and almost 90 percent attended 80 percent of their classes. By the fifth semester only 30 percent reported completing 80 percent of their assignments on time, and less than half attended 80 percent of their classes . . . . By the fifth semester, many students had "the equivalent of a two-day work week and [discussed] their studies rarely, if at all." By this time, Stevens reports, law school "appears to be a part-time operation."[15]

The stratification that occurs with law school admissions continues into the classroom and proceeds into the professional arena. "Given the limited research on the bar as a whole, it is difficult to identify precisely the relevant strata,"[16] Corsi writes, but there is "a distinguishable gradation from top to bottom in the profession."[17] Most studies have evaluated the hierarchy in terms of content of practice and size of firm: one who possesses an esoteric and business-related specialty is more highly esteemed than the criminal or domestic relations attorney, while an employee of a top corporate firm enjoys greater status than a solo practitioner. To illustrate the point, Corsi examines four distinct subgroups within the profession: Wall Street lawyers, Washington lawyers, criminal lawyers and black lawyers. Again, his findings lend credence to popular impressions of the American bar: the largest Wall Street and Washington firms are overwhelmingly white, male and Protestant[18]; the criminal bar—despite a significant reduction in size over the past 25 years—remains disproportionately Jewish and Catholic[19]; all but 3 percent of practicing attor-

13. Id. at 35, citing Erlanger & Klegon, Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns, 13 Law & Soc'y Rev. 11, 25-26 (1978).

14. Id. at 34, citing Stevens, Law Schools and Law Students, 59 Va. L. Rev. 551, 652-53 (1973).

15. Id. at 34-35, citing Stevens at 652-53.

16. Id. at 91.

17. Id.

18. Id. at 69, citing E. Smigel, The Wall Street Lawyer: Professional Organization Man 37 (1964).

19. Id. at 79, citing Cohen, Introduction, in P. Wice, Criminal Lawyers: An Endangered Species (1978).

neys in 1980 were white.[20] Nor is help on the way; blacks constituted only slightly above 5 percent of all first-year law students in the academic year 1981-82.[21] Equally distressing are the results of an employment survey conducted by Harvard University of 490 of 545 firms interviewing at the law school, including some of the nation's top corporate firms. Out of a total of 11,370 partners in the firms, only 27 (0.24 percent) were black. Of a total 12,529 associates, 249 (1.99%) were black.[22]

Corsi next directs his attention to the recruitment of state and federal judges. Here, the winnowing process continues to favor the male children of high-income, white, Protestant families.[23] But it is also at this point that professional specialization and party affiliation become important. Prosecutors with strong party ties are overrepresented in the judiciary, a paradox in that prosecutors typically are afforded lower status than corporate attorneys; Corsi suspects that comparatively low judicial wages explain the situation. In any case, the result is to further limit the pool from which judges and their decisions may be drawn:

> While judicial decisions may vary, for instance, in their degree of liberal versus conservative interpretation of the law, the range of variance may itself be constricted by the judicial recruitment and selection processes. Thus a selection process that tends to favor only particular types of lawyers may also narrow the differences between judges in interpreting law and deciding cases.[24]

One need go no further than the morning newspaper to know how thoroughly partisan politics pervade judicial selection. The plethora of statistical evidence Corsi offers on this point might lead one to despair; the connection is that certain. Yet, Corsi adopts a posture of Zen acceptance and his argument makes convincing good sense. No selection method ever devised, including nonpartisan election, gubernatorial appointment, and so-called merit systems, has been immune to the machinations of the major political parties and bar associations. Chasing the rascals out of the court house is like chasing them out of city hall, Corsi suggests; they'll be back in a jiffy.

> Choosing judges in America is a political process with a political result. . . . [W]e should never expect that our judges will be "value free." The motive behind reform movements designed to change judicial selection mechanisms can often be reduced to a claim that the judges currently being selected are objectionable—politically objec-

20. Id. at 82, citing L. Berkson & S. Carbon, The United States Circuit Judge Nominating Commission: Its Members, Procedures and Candidates 179 (1980).

21. Id. at 84-85, citing American Bar Association Section of Legal Education and Admissions to the Bar, A Review of Legal Education in the United States, 1981-1982 50 (1982).

22. Id. at 84-85, citing report in J. Seligman, The High Citadel: The Influence of Harvard Law School 194-95 (1978).

23. Id. at 132, citing J. Schmidhauser, Judges and Justices 41-104 (1979).

24. Id. at 103.

> tionable to the reformers . . . . By keeping our attention on the result sought rather than on the debate over procedure, we can often cut to the heart of the matter more quickly.[25]

For his part, Corsi praises the Carter administration's unparalleled record in appointing nonwhites and women to the federal bench. Ominously, he notes that of the first 86 Reagan appointees:

> All but . . . two were Republicans; all but six were white men; the majority were wealthy, with over half reporting net worths in excess of $400,000 and almost 25 percent in excess of $1 million; and many had established conservative legal and political credentials.[26]

For Corsi though, the standing villain in the judicial selection process is the American Bar Association. Next to the FBI and high officers of the major parties, no group has had as great an influence in the selection of federal judges as the ABA's Committee on Federal Judiciary. Considering the racial and ethnic composition of this rarefied body, you might imagine that it had sought to cast the federal judiciary in its own image and it did, with one exception. Corsi details the results of a study of ABA committee members between 1946 and 1962, showing that 80 percent of members were senior or managing partners of their firms during the period—a time when only 24 percent of attorneys nationally were employed in firm practice.[27] Thus, committee members were in the main individuals whose careers focused more upon pecuniary matters than did attorneys practicing in the public service/public interest sector. Not surprisingly, not a single committee member during the period practiced in criminal or family law; 43% of the committee was over 60 years old while 90% was over 50, both considerably higher than the median age; and solo practitioners, who in 1946 made up only 5.9% of the membership, actually made up 61.2% of the profession. Lest anyone suppose the Committee's prejudice was solely occupational, Corsi discloses:

> While there are indications that the committee has broadened its contacts in recent years, its viewpoint overall has been conservative. Through the mid-1970s, there had never been a black, Spanish-speaking, or female member. The first black was appointed in September 1976, when there was still no female on the committee.[28]

In fact, the ABA's racial prejudice is longstanding. Corsi details one ironic episode that occurred in 1911 when three blacks were accidentally elected to ABA membership; other members were apparently unaware of the candidates' race. The ABA Executive Committee hastily moved to undo the mistake, voting to rescind the three individuals' membership in light of "the settled prac-

25. Id. at 153.
26. Id. at 132.
27. Id. at 124, citing J.B. Grossman, Lawyers and Judges: The ABA and the Politics of Judicial Selection 82-113 (1965).
28. Id. at 126.

tice of the Association . . . to elect only white men as members thereof."[29] When U.S. Attorney General George Wickersham lodged his protest (one of the disenrolled members had been his assistant at the Department of Justice), he was rebuked by the Association's secretary for "discourteous and dogmatic criticism."[30]

While Corsi's antipathy toward the ABA seems warranted, his uncharacteristically vitriolic attack on one recent innovation in the administration of our courts—the professional court manager—is curious. He concludes his discussion by writing, "The point is not that professional administrators have no place in our federal judicial system; the point is they are not a panacea."[31] This may be so, as may his assertion that little empirical research has been conducted on the benefits of introducing professional administrators into the judicial system, but these claims do not explain the hysterical language that precedes the conclusion:

> Those certain in their theories may be the last to realize that their full implementation of an intuition may in reality only be a costly test, a field experiment posing as proven policy, an undertaking based on well-intentioned assumptions confirmed only in imagination . . . . We have . . . failed to address, debate, refine, and specify the standards against which the performance of the solution will be judged. Not only must we specify what "efficient justice" means, we must also ask how important that end is, especially when compared to alternative goals we might seek in the judicial system.[32]

A social scientist's natural reluctance to "fly blind" may be evident here, but a vogue anti-government sentiment may also be operating. Tucked into Corsi's abstract argument is his view that "we should have learned years ago with the federal bureaucracy [that] an organization once established takes on a life and a survival instinct of its own."[33]

This sort of bluster is aberrant, but easily excused. Corsi's real skill is not making predictions. Rather it is his ability to gather the various materials that do exist and to present them with alacrity. Thus, his discussion of the judiciary's relation to the executive and legislative branches of government—typically an invitation to trot out some stultifying hooey about checks and balances—comes alive simply by its inclusion of some real numbers. We may already know for instance, that the Supreme Court exercises restraint when reviewing federal legislation. We might not know that through 1979 the Court had found but 123 provisions of federal law in violation of the Constitu-

29. Id. at 59, citing Report of the Thirty-fifth Annual Meeting of the American Bar Association 37, 93-95 (1912).

30. Id., citing J.S. Auerbach, Unequal Justice: Lawyers and Social Change in America 65-66 (1976).

31. Id. at 198.

32. Id. at 197.

33. Id. at 198.

tion and this out of a total of over 85,000 laws. Nor might we know that only 950 state laws, local ordinances and state constitutional provisions had failed to pass muster since 1789, out of hundreds of thousands.[34] Deference indeed.

Likewise, Corsi's capsule on the history of legal aid to the poor is a most colorful application of primary sources. Recalling the very lean years prior to the government's entry into the area, Corsi recounts the case made by Orison Marden, chairman of the ABA Standing Committee on Legal Aid Work. Writing in 1949, Marden proposed that legal aid societies were in the best interest of private attorneys. Among his arguments: that legal aid takes a "great load from those members of the profession who give so generously of their time" because the legal aid office "eliminates the embarassing need to refuse help"; that legal aid is "a strong case against socialism", because "it eliminates the legitimate resentment of the man who needed a lawyer and couldn't afford to have one . . . . Legal Aid in a city is proof, living proof, that there really is equality before the law for everyone, regardless of financial status, color, creed, or any other factor."[35]

If, as some have argued, fear of socialism helped pave the way for the federal government's grand arrival on the poverty law scene (with its appearance the capital invested in legal aid "increased eightfold over the level it had taken the legal aid movement 90 years to reach"[36]), it was fear of socialism that subsequently tempered the government's warm impulse. Corsi quotes one eloquent spokesperson from the era that saw Legal Services defanged, Spiro Agnew:

> We are not discussing merely reforming the law to rectify old injustices or correcting the law where it has been allowed to be weighed against the poor. We are dealing, in large part, with a systematic effort to redistribute societal advantages and disadvantages, penalties and rewards, rights and resources.[37]

Ronald Reagan, Donald Rumsfeld, Frank Carlucci and a host of other heavies responsible for the Legal Services retrenchment walk through these pages and spout ingloriously, presaging their future intentions with chilling candor.

Judicial Politics has many other fine moments. While I wouldn't fault anyone who chose not to read it in one sitting (it can be a little dense), it is an outstanding book, and possibly a better one for being written by one who is not a lawyer. Certainly, Corsi's "lay" status does not hinder his work. There is, however, something unsatisfying about his final discovery:

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34. Id. at 285, citing H.J. Abraham, The Judicial Process: An Introductory Analysis of the Courts of the United States, England and France 296-97 (4th ed. 1980).

35. Id. at 231, citing Marden, Legal Aid, the Private Lawyers and the Community, 20 Tenn. L. Rev. 757-62 (1949).

36. Id. at 234, citing E. Johnson, Justice and Reform: The Formative Years of the OEO Legal Services Program (1974) (Russell Sage Foundation, New York).

37. Id. at 239, citing Agnew, What's Wrong with the Legal Services Program, 58 A.B.A.J. 930-32 (1972).

> Past decisions and expressed views may help narrow the likely range within which a given jurist will be likely to see a case; but the specific facts and issues of a case may trigger an idiosyncratic reaction useful only in refining our notions of what that judge did in the past or may do in the future. [38]

For Corsi,

> Perhaps the most frustrating point of all is that judges can be surprising. Who was more surprised than Dwight Eisenhower when his conservative California Republican Court-appointee, Earl Warren, began to move the court in a strongly liberal direction?[39]

How does a judge decide a case? We cannot predict, Corsi says, but we can have an articulable suspicion. And, in the case of the Robert Borks of the world, we can always hope that our suspicions will be wrong.

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38. Id. at 270.
39. Id. at 269.

RIGHTS OF PHYSICALLY HANDICAPPED PERSONS. By Laura F. Rothstein.[1] Colorado Springs, Colorado: McGraw-Hill, Inc., 1984. Pp. xvi, 487. Appendices, various indices. $75.00.

INTRODUCTION

Though the period from the late 1960s to the present has been a particularly progressive era for all Americans, perhaps no group of underprivileged or underrepresented persons has made as much progress in that period as have the physically handicapped.[2] A combination of political activism, federal statutes,[3] and judicial decisions has created significant momentum for the "handicapped movement." However, not all the rights of physically handicapped persons have been addressed, and of those rights that have been addressed, not all have received adequate treatment. Litigation has not clarified the remaining obscure areas, and there has been only a handful of cases before the Supreme Court regarding the rights of the handicapped.[4] Some federal regulations are clear and have been interpreted, yet others are vague and without interpretive judicial analysis. It is this state of relative disarray that Laura F. Rothstein addresses in *Rights of Physically Handicapped Persons.*

Rothstein's work is an attempt to synthesize judicial decisions in the lower and appellate courts with statutory and regulatory developments concerning the physically handicapped. The author's underlying purpose is to aid the reader in evaluating the probable direction of various branches of the handicapped movement.

Currently, Rothstein sees two trends in the area of handicapped rights. While the courts have recently begun to interpret consistently the statutes and regulations promulgated over the past fifteen years, the Reagan administration has increased its deregulation efforts in this area.[5]

Notwithstanding the latter trend, the author claims that important policy questions must be raised before the legal issues can be adequately addressed. If the legal advances are influential, how will the issue of prioritization be dealt with? There is little doubt that the existing resources are insufficient to accomodate all physically handicapped persons. Moreover,

1. Professor of Law, West Virginia University. B.A., University of Kansas, 1971; J.D., Georgetown University Law Center, 1974.

2. Rothstein notes that "While there is some debate about which term is more correct or less stigmatizing [between "handicapped" and "disabled"], the term handicapped has been chosen, primarily because most of the federal and state statutes use that term." L. Rothstein, Rights of Physically Handicapped Persons 2 (1984). I prefer the term "impaired." Personal experience dictates that neither "handicapped" nor "disabled" are labels with which impaired persons are comfortable. However, for the purposes of this piece, "handicapped" will suffice.

3. These statutes will soon be discussed in greater detail.

4. L. Rothstein, supra note 2, at 9.

5. Public outcry has stemmed these efforts, at least temporarily. At this time, the priority given to federal enforcement efforts remains unclear. Id. at 10.

should courts, regulatory agencies, or legislative bodies be primarily responsible for making these decisions?

Rothstein does not directly answer these difficult questions, but suggests that they will be resolved in one of two ways. Either society will be made accessible to the maximum number of physically handicapped individuals through the promotion of independent living, or the community will impose upon the handicapped more traditional, custodial-type care. The author believes that the approach chosen will reveal how society views not only the physically handicapped, but human beings in general.

The book covers a wide array of topics relating to the physically handicapped, ranging from education and employment to less obvious concerns such as telecommunication access and the right to family. Each issue is dealt with on four levels: the relevant substantive law, procedural aspects, available remedies, and practical suggestions. Federal law is the primary substantive area, due to its prominence in the area of handicapped rights. Most relevant state laws, such as human rights and architectural barrier statutes, are relatively undeveloped, and thus, only occasionally cited.

Rothstein's text is replete with footnotes in which specific reference is made to the regulations and cases that interpret the laws governing handicapped rights. Generally, the source of interpretive authority is the set of regulations formed pursuant to federal statutes, rather than the statutes themselves. The major regulatory provisions to which the author refers are included in an appendix to the text. Other appendices contain a glossary of common acronyms and abbreviations, and definitions of frequently used terms. Also included is a compilation of federal and state agencies where one can acquire further information about particular areas of interest. Examples of such resources are the National Organization for the Handicapped, and the state agencies with jurisdiction over discrimination laws. Finally, the author provides all of the major cases, statutes, regulations, books, and law review articles concerning the physically handicapped.

Before examining Rothstein's work in more detail, it is important to point out the relevant issues that the book addresses sparingly, or does not address at all. Although the rights of the physically handicapped often overlap with those of the mentally handicapped, the author does not fully address this overlap. For example, compare the treatment afforded children with different handicaps under the Education for All Handicapped Children Act (EAHCA).[6] Both physically and mentally handicapped children are covered by EAHCA, but the two types of handicapped children receive different educational placement. This comparison makes clear that Rothstein's treatment of the rights of the physically handicapped can be applied analogously to is-

6. 20 U.S.C. §§ 1401-61 (1975) (grant statute providing substantial federal funding to those states that establish a free and appropriate education for handicapped children in the least restrictive environment).

sues affecting the mentally handicapped, and vice versa, but only if done so with care.

Detailed discussion of two major issues affecting the physically handicapped is conspicuously absent from the text. Those issues are institutionalization[7] and benefit programs.[8] Rothstein does not cover these areas precisely because they are "major." Although both institutionalization and benefit programs have a significant impact on the physically handicapped, adequate treatment of those issues is left for another book.[9]

CRITIQUE

For the most part, Rothstein succeeds in her attempt to synthesize the judicial, legislative, and regulatory developments concerning the rights of the physically handicapped. The author gives her readers not only a sense of the direction of the handicapped movement, but also a genuine understanding of the more difficult issues affecting the physically handicapped, and a wealth of practical information as well. Nonetheless, the text is not without its shortcomings. Most notably, the effects of stigmatization are not adequately addressed.

Rothstein's introductory section puts into perspective the breadth and depth of the handicapped movement. In a demographic overview of physically handicapped persons in America, the author notes that "[a]lthough accurate statistics are . . . difficult to obtain, . . . [p]robably more than 30 million Americans have chronic health conditions which limit them in some way."[10] This section is also enlightening in its presentation of preliminary definitions, both legal and non-legal. For example, Rothstein points out that one can fall under the legal definition of "physically handicapped," yet not be a "qualified handicapped person" for purposes of determining entitlement to the protection of a particular statute or regulation.[11] In this book, the term "handicapped" refers generally (non-legally) to "persons who either because of a real or perceived difference in terms of physical makeup are subjected to discrimination."[12] Rothstein uses epilepsy as an example of a perceived physical handicap. Although the epileptic may be seizure-free, and may find life's activities not physically difficult to carry out, social prejudice towards epileptics may prevent that person from obtaining employment.[13] Throughout the text,

7. Here, institutionalization refers to commitment to a treatment facility, the right to treatment, and the right to refuse treatment. L. Rothstein, supra note 2, at vi.

8. For example, social security, supplemental security income, and workers' compensation. Id.

9. One final caveat is in order. Rothstein reminds her readers that the text concerns itself with a "fast changing area of law." At printing, the book was current on all major developments through August 1, 1983. However, readers of *Rights of Physically Handicapped Persons* should be certain to refer to the supplemental pocket parts. Id. at v.

10. Id. at 4 (footnote omitted).

11. Id.

12. Id. at 2.

13. Id.

illuminating examples similar to the epilepsy hypothetical greatly enhance the reader's ability to understand such subtle distinctions as that between "genuine" and "perceived" handicaps.

The core section of the book conforms to the basic analytical structure outlined by Rothstein in the preface to her work. In the text following the introductory section, the author presents a basic concern of the physically handicapped, and then examines the treatment of that basic concern by addressing the relevant substantive law, procedural issues, available remedies, and practical suggestions. The following five areas are addressed in this core section of the book: elementary and secondary education (Chapter Two), higher education (Chapter Three), employment (Chapter Four), architectural barriers (Chapter Five), and transportation (Chapter Six). This book review will examine closely only Chapter Two, which is exemplary of the four chapters that follow it.

Chapter Two focuses on the issue of education at the elementary and secondary levels. It contains a comprehensive review of the substantive law including the leading cases,[14] the guiding statutes,[15] and the relevant regulations.

In the area of procedural rights, Rothstein describes the processes of evaluation, placement, and maintenance. Beginning with the evaluation of the handicapped child, and the implementation of a legislatively mandated Individual Education Program (IEP), the author traces in detail the procedural rights available to an aggrieved handicapped child and her family. For example, if at any point there is a disagreement between the educational agency and the parents of a handicapped child regarding that child's educational program, a due process hearing is available. Rothstein not only delineates the specific rights at the parents' disposal in the administrative hearing, but also compares these rights with those available in the civil courts, where many such cases arrive on appeal. The author then points out that any records of the handicapped child relating to evaluation, placement, and maintenance are accessible during the due process hearing. Another procedural issue addressed by Rothstein is the status of the child while a dispute between the parents and educational agency is being resolved. If the disagreement between the parents and the agency occurs before the child is placed in an educational program, the child is sent to public school until the dispute is resolved. On the other hand, if the disagreement occurs after the child has been placed in an IEP, she will remain in the program pending resolution of the dispute.

The remedies available to wronged children vary widely. Federal funding to a program may be cut off; injunctive relief may be available. However,

14. See, e.g., Brown v. Board of Educ., 347 U.S. 483 (1954) (state education programs must be provided on an equal basis); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972) (describing constitutionally mandated procedures for the education of handicapped children).

15. See, e.g., § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1973) (the equivalent of a Civil Rights Act for handicapped persons); see also note 6 supra.

neither of those remedies gives direct relief to the child or her family, and the courts have been inconsistent with regard to money awards to aggrieved parties. Either bad faith on the part of the educational agency or endangerment to the child must usually be proven to receive monetary damage awards. That is, the handicapped child must show clear discrimination, not merely a failure to provide an appropriate education. A novel damages application described by Rothstein is "compensatory education," whereby an education agency must extend the age limit after which it is not required to provide free education by the number of years that that agency wrongly denied a handicapped child her education.

Other substantive legal issues, procedural aspects, and remedies regarding elementary and secondary education are discussed in a well-organized and straightforward manner. The author cleverly uses repetition to sustain clarity and parallel organization in her presentation of sometimes overlapping materials.[16]

As far as the "handicapped community"[17] is concerned, perhaps this book's greatest asset is its practical dimension. Throughout the text, Rothstein treats the reader to what can best be described as "helpful hints." The majority of these advisory comments are directed towards putative advocates of a handicapped client. For example, the author states: "It would not be advisable for advocates of handicapped individuals to argue for equal expenditures in any case, because it costs much more per pupil to educate a handicapped student on the average, than a nonhandicapped student."[18]

In the area of remedies, Rothstein advises cautious use of "decisions granting damages in nonspecial education contexts to support the award of damages in special education situations."[19] The author forewarns advocates to "seek recovery of damages against educational agencies at lower levels where possible . . . [b]ecause the Eleventh Amendment bars damage awards against states and state agencies."[20] Moreover, although the remedies provided by guiding statutes overlap, repeal of certain regulations could result in a "substantial loss of protection"[21] to the handicapped child seeking an education.[22]

Rothstein offers advice to the parents of a handicapped child as well. In Chapter Two, for example, she stresses the importance of having a very detailed IEP:

[T]he IEP may include a requirement that the school will provide

16. See, e.g., L. Rothstein, supra note 2, at 104, 106.

17. This term refers to handicapped individuals, their families, and those representing the handicapped in legal and extra-legal forums.

18. L. Rothstein, supra note 2, at 16 (footnote omitted).

19. Id. at 72.

20. Id. at 77-78 (footnotes omitted).

21. Id. at 24.

22. Advocacy advice appears throughout Rothstein's book. See, e.g., id. at 105, 115, 129, 139-40.

> transportation for the child to and from home. It may be necessary to add that the maximum time in transit should be no more than 15 minutes, or that a qualified aide should be present on the bus at all times. In planning programs for children with certain handicaps, the monitoring of very small steps may be essential to evaluating the effectiveness of a program, and for that reason the IEP should include specific dates on which certain evaluations should be made.[23]

Moreover, the author strongly suggests that program placement should begin at the commencement of the school year, or the handicapped child will suffer. Rothstein warns that "[d]isputes concerning placement decisions can take a great deal of time to resolve, and therefore, it is essential to begin seeking the appropriate placement during the previous school year or during the summer, particularly where disputes are anticipated."[24]

Another example of practical advice to the parents of a handicapped child involves the records kept by education agencies. Parents can have old records destroyed to remove any potential stigmatic consequences. Rothstein notes: "If the public agency no longer needs personally identifiable information, it must let the parents know so that they may request destruction of the records. [However,] [t]he public agency may keep certain basic information regardless of the request to destroy the records."[25] Regarding the destruction of old records, the author advises that "[p]arents should be cautious about destroying records, because although there may be information which parents view as stigmatizing, that same information may be important in later years in obtaining certain social security or other governmental benefits."[26]

Finally, Rothstein informs parents of the expensive, wasteful, and time-consuming nature of due process hearings. Often parents and schools can settle disputes informally. However, the author urges[27] parents not to "compromise their beliefs about the appropriateness or inappropriateness of a particular education program."[28]

Rothstein does address some issues involving the mentally handicapped that are indirectly applicable to the concerns of the physically handicapped. She notes that the validity of certain types of educational/intelligence tests used in the placement of handicapped children "has recently been the subject of much controversy."[29] The standards subsequently set by judicial decisions suggest that regardless of the type of handicap, "placement decisions must be

23. Id. at 55.

24. Id. at 63.

25. Id. at 48 (footnotes omitted).

26. Id. (footnote omitted).

27. Only Chapter Two contains advisory comments directed towards the parents of a handicapped child. This is the case because parents are more involved with the issue of elementary and secondary education than with any other issue affecting their child.

28. Id. at 56.

29. L. Rothstein, supra note 2, at 53.

made on the basis of more than one type of testing procedure."[30] Another area in which mental and physical handicap arguments converge is higher education, where the extent to which a mental handicap can be taken into account with an individual who is otherwise qualified for a higher education program is now in question.[31]

Following the core section of the text, Rothstein addresses the handicapped individual's "Pursuit of Happiness." Among the subjects covered in this section are: right to family, access to political and governmental systems, access to medical and health services, insurance, and consumer issues. Unlike schooling, a job, and impediments to physical access, these issues are generally considered not to be basic needs of a physically handicapped individual. Nonetheless, the author discusses the relevant substantive law, procedural aspects, available remedies, and practical suggestions as they apply to the physically handicapped community. Although she goes into less detail in this section than in the core section covering education (elementary and secondary), employment, architectural barriers, and transportation, Rothstein covers a tremendous breadth of material in this part of her text.[32]

Because she examines issues not yet addressed by the courts, the regulatory agencies, or the legislatures, Rothstein raises more questions than she answers. Thus, the author offers her own ideas concerning the future direction of various branches of the physically handicapped movement. She suggests that "[a]s handicapped individuals move into the mainstream of society . . . the sellers [of consumer products] will become more accountable for selling products that are dangerous or unusable for a handicapped consumer."[33] Moreover, Rothstein suggests that access to television broadcasting for the hearing impaired may soon be mandated,[34] and she discusses medical protection available to handicapped infants.[35] Finally, the author refers her readers to state law in all instances where federal law has not yet taken shape, for example, regarding the standard of proof for denying custody to a handicapped parent.[36]

The final section of the text can best be described as a "primer" addressed to advocates of handicapped individuals. This section gives advice on how to best represent handicapped clients. One of its numerous practical suggestions is that advocates establish, in advance, whose responsibility it will be to pay for an interpreter if the client is hearing impaired.[37] There is also an overview of tactical considerations, including factors that the advocate should take into account when deciding whether to litigate. Among such factors are:

30. Id. at 54 (footnote omitted).
31. Id. at 83.
32. See generally id. at 183-203.
33. Id. at 202 (footnote omitted).
34. Id. at 200.
35. Id. at 191.
36. Id. at 187.
37. Id. at 204 n.1.

> [T]he possibility of foreclosure of suit through the running of an applicable statute of limitations, the extent to which informal resolution has already been attempted in this or similar cases, the importance of obtaining immediate relief in emergency situations, the amount of time necessary for the preparation of formal pleadings as compared to the likelihood of success in the litigation, the psychological effect of litigation on the client, and the financial resources available to the client.[38]

The potential expense and general counterproductivity of litigation leads Rothstein to conclude that it is "advisable to pursue resolution through negotiation if possible."[39]

As mentioned earlier, a major disappointing feature of this book is that Rothstein did not elaborate upon the role that stigmatization plays in the area of handicapped rights. To the author's credit, *Rights of Physically Handicapped Persons* is written unlike the standard legal texts commonly known as "hornbooks." In fact, Rothstein's somewhat unique approach to the relevant issues, through which she conveys profound personal feelings about handicapped rights, led this reader to believe that the issue of stigmatization would receive treatment in the text commensurate with that issue's effect on the handicapped community.

To many handicapped individuals, being known as "handicapped" may have more negative implications than the actual physical limitations imposed by the handicapping condition. This "extra" burden can result in being discriminated against in the employment context, or in being ostracized by one's peer group, to name just two examples. For when stigmatization is at issue, the handicapping condition belongs not to the physically handicapped individual, but to the *observers* of that individual. This is something over which the handicapped individual has very little control. Greater education about the physically handicapped, as well as more interaction between the handicapped community and its non-handicapped counterpart are necessary to minimize the effect that stigmatization has on the physically handicapped.

CONCLUSION

Laura F. Rothstein's *Rights of Physically Handicapped Persons* effectively integrates accurate factual information with interesting policy considerations and valuable practical advice. Her work not only piques the interest of those concerned generally with the rights of physically handicapped persons, but also gives the reader sufficient information to pursue issues of particular personal relevance. The appendices to the text are just one example of the well-organized and complete presentation of such information.[40]

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38. Id. at 206-07.
39. Id. at 207 (footnote omitted).
40. Note that while the table of contents found at the front of the book does include the

Rothstein conveys the warmth, sensitivity, and insight that reflect intimate familiarity with the concerns of physically handicapped persons. The author intended the book to be read by lawyers dealing with these issues, and perhaps by professionals in education, medicine, and social services. Yet despite the occasional over-emphasis on technicalities,[41] practitioners, scholars, and laypersons alike should find the book surprisingly approachable, and extremely useful as a reference and research tool.

Like all great social advances, the handicapped movement has its roots in political activism. With the foundation of a political mechanism in place, activism continues to play an important role in the success of the movement. Advocates of the physically handicapped must now aggressively pursue the route of legal activism, both in and out of the courtroom. Effective litigation and lobbying efforts towards clearer statutory and regulatory provisions are essential if the handicapped movement is to enjoy continued success. Laura F. Rothstein's *Rights of Physically Handicapped Persons* is an important and timely contribution to that goal.

AMIR ROSENTHAL*

Vocational Rehabilitation Act Regulations, the table at page 209 does not. In fact, the Regulations appear in the text beginning at page 338.

41. See, e.g., id. at 69.

* The author wishes to dedicate this book review to his brother, Yoav, for whom the words "Rights of Physically Handicapped Persons" have special meaning.