of interest groups operating through the legislature, while other political forces operated through the "reform" governors of the Progressive era, gives the reader much of the feel of actual political life, and illustrates graphically the way law emerges as the result of the clash of social, economic and political pressures, both long-run and more immediate.

This brief summary of the contents of The Legal Process inadequately suggests the richness of the materials and the intelligent way that they have been combined and strengthened by the authors' introductory essays and editorial comments. It is a challenging book that calls upon students and their instructor to make a full commitment to the process of learning. But as the reviewer, who used an earlier offset edition of this work, can testify, students will become intellectually engaged, because the subject is made to appear not only important, but exciting. Law appears as a vital element of the governing process, one that affects every man in his daily life in an almost endless variety of ways. Widely used, The Legal Process should serve as an admirable corrective of the spotty, misleading conception of law held by most liberal arts graduates, due in substantial measure in the past to the lack of a suitable text. Perhaps it is unfair to label this a "text"; its richness of insights, the unique quality of much of its material, and the sophisticated approach of its authors surely requires a more generous description. In its skillful blending of theory and useful data, in its stimulating examination of legal method and reasoning, and in the effective depiction of the relationship of law and the legal process to the wider society, it represents an important contribution to the literature of the law.

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This is an admirable book: the product of wide and deep experience, enriched by sound scholarship, spiced with wit and sagacity.

In his preface Mr. Johnson states a self-defense which he need not have pleaded: "It is fashionable in responsible quarters to belittle the use of form books and even to question their right to exist at all. I think it is time someone came to their defense." Puffing in publishers' blurbs is commonplace—but the dust jacket does not puff in describing this book as a source of new ideas and a check on old ones.

Drafting is an exercise in organized intelligent uneasiness—writing for hostile, not for friendly, readers. The mechanical transcriber of forms, who perpetuates past errors and commits fresh ones, will not be helped by this or any

1 P. vii.
other book. To be intelligently uneasy one has to know about what to be uneasy. This book shows what are the trouble-spots, and tells "what to do."

Every morning the mail is full of "sales and promotional literature" about wills and trusts. It is particularly useful therefore to have the discussion that this book gives about the difficulties that can be caused by some of the "estate plans" produced by our glib camp followers.

There are sage observations on the choice of trustees and on the possible consequences of empowering beneficiaries to remove their trustees. There are neat suggestions to facilitate administration: that sometimes it is better to provide for distributions during the life of the settlor of a revocable trust, not by formal instruments of revocation, but by provisions like the author's Form 921; and to amend by testamentary appointment instead of inter vivos instruments. The result is thus to eliminate a mass of inter vivos documents which have to be part of the trust records.

There is ammunition for the younger lawyer who has the temerity to suggest to his betters that a direction to pay the testator's debts is unnecessary and may be unwise.

Part I contains excellent expositions:

1. On draftsmanship and planning in general: Sound principles are tersely stated and overblown linguistic monstrosities are punctured. There are others who can demonstrate that a draftsman who puts his mind on the job can make nine words do more than forty-one words spouted for the same purpose by a journeyman scrivener. But how often does one read epigrams like Mr. Johnson's, neat and sharp enough to be stitched on a sampler by the granddaughter of a fat prolix lawyer and hung on his office wall: "Prolixity is much like obesity: in order to achieve a cure, each mouthful must be watched." This appeals particularly to the reviewer, who has struggled with both sins, and who suggests that the task of the little girl who makes the sampler be lightened by omitting "much" and "in order".

2. On tax considerations: The expositions of the rules of federal estate, gift, and income taxation are succinct—written primarily for the draftsman. For example, Mr. Johnson dissects what is stated backward in Section 674 of the Internal Revenue Code and then neatly rearranges the segments so that the draftsman has a working chart. The discussions of powers of appointment and taxes, and of taxes and discretionary powers, are first-rate. Throughout the discussion of taxation, dangers not readily apparent, even to experienced practitioners, are plainly flagged.

Part II contains twenty complete instruments, with detailed commentaries, suggestions for variance, and cross references to alternative provisions set forth in Part III.

3 Pp. 556-57. 5 Ibid.
Part III includes a wide variety of individual administrative and dispositive forms, with further suggestions for adaptation in different circumstances.

It is now fashionable to insert in a laudatory review (and I intend this to be very laudatory) some criticism—to show that the reviewer has really read the book. So, I offer a few suggestions.

1. The dust jacket states that the book "employs an ingenious and effective system of modules, or interchangeable parts, so constructed as to fit together both stylistically and functionally. These modules are systematically keyed, and may be readily assembled into complete wills and trust instruments to serve all varieties of estate planning objectives." But modules cannot be expected to fit automatically. Directions for assembling and fitting them have to be supplied. And to serve the needs of tyros, the directions become detailed and repetitious, and irritating to sophisticated draftsmen. In a section like 231, fewer specific variations and more general commentary would perhaps better serve the draftsman, experienced or inexperienced.

2. Mr. Johnson makes no attempt to provide for dispositions under community property law, and suggests that users of the book in community property jurisdictions will have to add their own special provisions. But domiciles are frequently changed, and now many residents of common law states have interests in community property. A few suggestions in respect to community property held by residents of common law states might be included in a book intended for national use.

3. Legislatures grind out new statutes every session, changing the substantive and adjective law involved in this book. The state statutory material which is reproduced or summarized in the book is professedly derived from secondary sources. It might have been more useful to give the user of the book fewer statutory details and more general advice as to what points are covered by statutes, with warnings to have at hand a looseleaf service that keeps the statutory material up to the minute. For example, New York Real Property § 179-a, effective April 12, 1960, gives the answer to the problem referred to in footnote 7 on page 451. But some of the references to local law are very useful. For example, footnote 3 on page 118 refers to a peculiar New York problem concerning the exercise of old powers of appointment of which many New York practitioners are unaware. While the tax discussions are splendid, the user must be sure to have the latest rulings. For example a practitioner might carefully heed what is written in the text concerning the deductibility of charitable remainders and fall into trouble by not heeding Revenue Ruling 385, 1960–2 Cumulative Bulletin 77.

4. In granting powers of appointment exercisable by deed as well as by will, Mr. Johnson suggests that deed appointments be by their terms revocable or irrevocable. But what if the scrivener of the deed appointment says nothing about revocability or irrevocability? I would suggest that a deed appoint-
ment should be deemed revocable unless the deed appointment specifically declares that it is to be irrevocable.

5. When a surviving spouse does not exercise her general power of appointment under a marital deduction trust, it is sometimes inequitable to burden her estate with the death taxes attributable to the appointive property. Form § 111.1 Note (3)(b) meets this by providing that the appointive property shall bear a proportionate part of the death taxes falling due on the death of the donee of the power, and by having the donee exercise the power to that extent. But it may be more equitable to have the appointive assets bear, not a proportionate part of the death taxes falling due on the death of the donee of the power, but the "increase" in amount of such taxes which results from the donee having the power of appointment. And sometimes it is preferable to provide in the instrument by which the power is granted, that in default of appointment the appointive assets shall bear such "increase." Some think that the widow will be encouraged to let the power lapse if it is provided that on her death the appointive assets are to be used not only to pay such "increase," but also to pay her debts, funeral expenses, last income tax, and the expenses of her last illness. I am not persuaded by guesses as to what widows will or will not do, but such provisions in default of appointment are sometimes fair and wise.

6. Mr. Johnson likens formula marital deduction clauses to antibiotics. I have compared such clauses to bottles of patent medicine, and have observed that the usual warnings against careless use resemble labels describing the wonderful cures and saying in tiny type that sometimes (but with no clues as to when) the medicine may be harmful.6

My objection to the clauses is even stronger if they are considered to be antibiotics, whose improper use is more dangerous than excessive use of Lydia Pinkham. I do not accuse Mr. Johnson of stating his warnings in tiny print. But I observe that he devotes only about half a page7 and occasional subsequent sentences to warn against use of the clauses. Some of the pages devoted to summarizing state statutes from secondary sources, with the risk of omitting the latest statutory texts, and some of the detailed and varied directions for assembling the modules might well have been used to play down the general utility of formula clauses and to emphasize their dangers. It would be useful, for example, to describe the litigation resulting from commonly used clauses.8 At the moment questions are being raised (which are not even understood by most of the everyday users of formulae) concerning the possible loss

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7 P. 67.
8 See Durand, Marital Deduction Litigation, 101 TRUSTS & ESTATES 8 (1962), and the observations of the Supreme Court of Pennsylvania concerning the draftsmanship of such clauses in In re Althouse's Estate, 404 Pa. 412, 172 A.2d 146 (1961).
of the marital deduction by granting power to distribute assets at their estate
tax values in satisfaction of the marital deduction shares.9

Most users of formula clauses do so in the mistaken notion that the clauses
must be used to obtain the maximum marital deduction. The real function of
the clauses is not to achieve such maximum, but to avoid having more than
the maximum, for the purpose of diminishing the taxable estate of the sur-
viving spouse, and that is often not very important. Time after time draftsmen
of wills which I have to review confess that they used the clause without any
need therefor. Too many practitioners are prescribing these antibiotics as if
they were household remedies like aspirin. To indulge in one more medical
analogy: I have suggested that to encourage such practitioners to use the
clauses is like urging inexperienced physicians who have not yet acquired the
“feel” of a scalpel to undertake brain surgery.

It would have been better if Mr. Johnson had devoted about twenty pages
of the 694 (it cannot be done in less, even by a man of his great talent) to de-
scribe the “minor adjustments” which in his words will produce entirely satis-
factory results instead of loading wills with federal prose,10 and if he had in-
cluded stronger warnings against general use of formula clauses and given
some examples as to when and why and how they should be used. Even a
warning that the clauses may be desirable for testators like Calvin Coolidge
who gave all to Grace, but not always desirable for testators who have chil-
dren of a prior marriage, would be useful.

While Mr. Johnson is ready to use antibiotics to achieve marital deduction
precision, he dismisses the possibility of postmortem planning by way of dis-
claimers as an “over-refinement.”11 If one tries for precision, the opportunity
may be greater when the body is cold and the actual inventory is in hand—
though there are some troublesome questions as to the effect of disclaimers.
Also, if one is really earnest about achieving precision, it should be directed
that, so far as is equitable and practicable, items in respect of which there are
credits for foreign death taxes, and in respect of which income and estate
taxes are payable, should be allocated to the non-marital deduction share of
the residue.

This book was not written by an ordinary practitioner, but by a man of
great talent, and it is therefore all the more regrettable that he has not done
more to discourage—and has thereby really encouraged—inadvisable use of
the marital deduction formula. But he is, alas, not the only spreader of this
heresy.

As I was finishing this review, I received a letter from a lawyer who said
that he needed a collection of legal forms to serve him as a guide in drafting

9 See Casner, The Marital Deduction And a Fiduciary’s Powers, 40 TRUST BULL. 50 (April
1961); Juhl, Executor should have power to choose assets for marital deduction bequest, 15
J. TAXATION 335 (1961).
10 P. 67.
11 P. 575.
BOOK REVIEWS


Mr. Rourke has written a useful, sane, and modest book about an exciting theme. The theme is the increased role of modern democratic government, in the field of communication and in the formation of public opinion. More specifically, he charts three developments: (1) the increase in official secrecy; (2) the increase in the use of official publicity as a sanction; and (3) the increase in the use of publicity, or propaganda, on behalf of government and its policies. Since there is a presumption in a democracy against official secrecy, official propaganda, and extra legal sanctions, he sees secrecy and publicity, as his title makes evident, as twin dilemmas for a democracy.

Moreover, by the time the concluding chapter is reached, he appears willing to push seriously a suggestion he plants early in the essay, namely, that this increased reliance in democracies on the moulding of public opinion is narrowing the gap between democratic and totalitarian societies, whatever the formal legal arrangements may be.

Mr. Rourke thus lays claim to a theme of major importance, and his essay by linking official secrecy and official publicity invites the reader to note and reflect on what could prove to be a decisive shift in the basic organization of his society, as portentous perhaps as the so often noted shift in the role of government in the economic sphere. We appear to be invited to think "big" about the society we live in. Yet in the end I was unclear as to just how seriously Mr. Rourke was taking his big theme and I found the essay so sane and modest as, paradoxically, to be somewhat disappointing. I should like to explore a few of the reasons for my reactions to the theme and to the essay.

First, the theme to remain exciting must involve some assessment of a departure from a model of proper government communication activity in a democracy. Mr. Rourke cites no such model. He recognizes at many points, to be sure, the normative aspects of his problem, but his chief interest lies in describing what is going on and in inventorying the current balances of power in the political process. Perhaps this is inevitable since there is certainly no traditional model of democratic free speech which covers his issue, and he

wills and trust agreements; that he realized the limitations on the use of forms; but thought that they served a useful purpose. (He said that he wanted a work limited to forms for wills and trust agreements, and which did not include everything like labor and retirement agreements.) My unhappiness with Mr. Johnson's treatment of marital deduction formulae will not deter me from telling my inquirer that Mr. Johnson's book is exactly what he needs and that it is the best of its kind.

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