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Book Reviews

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BOOK REVIEWS

JURISPRUDENCE: REALISM IN THEORY AND PRACTICE. By Karl N. Llewellyn. Chicago: University of Chicago Press, 1962. 531 pages. $8.95.

Writing a review about a posthumously published book is difficult since the atmosphere is understandably infused with sentiment and feeling. One's tendency is to write with generous restraint and marked respect, avoiding polemics and issues. However, Karl Llewellyn reflected little restraint and sentiment in his academic pursuits and, whatever the circumstance, would not have liked them applied professionally to him and his works. He would have wanted a reviewer of this, his last book, to ride his charge as he did, straight for the brush and the bramble bushes.

Although we might be inclined toward this view, are we at this time capable of objectively evaluating Llewellyn's jurisprudential thoughts? Are we not presently too close and too much a part of them for intelligent appraisement and proper assessment? Is it not more fitting that we leave such careful evaluation for the later time when we are not stirred by feeling, form or setting? Suffice it, therefore, to acknowledge that this review will be more expositive than the situation would ordinarily warrant.

In his introduction, Professor Llewellyn notes that the book is not a general collection or a selection of representative articles. Instead, it asserts a unital theme of Jurisprudence, Llewellyn's brand of American legal realism.

Structurally, the book is divided into four main sections: (1) realism; (2) institution, rules and craft; (3) controlling behavior: how and why; and (4) men.

The first unit consists of such well-known jurisprudential articles as "Realistic Jurisprudence: The Next Step" and "Some Realism about Realism."

The second division is more discursive, covering a wider range of less familiar topics, such as, "The Bar's Troubles, and Poultices—and Cures?," "Law and the Social Sciences—Especially Sociology," and "The Study of Law as a Liberal Art."

"Law Observance Versus Law Enforcement," "The Anthropology of Criminal Guilt," and "What Law Cannot Do for Inter-Racial Peace" are examples of the articles contained in the third division.

Llewellyn's tributes of Hohfeld, Pound, and Holmes conclude the volume.

The range of the papers is even wider than this sampling suggests. The book, as noted, includes some of his less known articles, which cover such subjects as the significance to Jurisprudence of intensive study of the crafts and of craftsmanship, analytical evaluation of the nature of an institution and of its functions, and an introduction to the study of legal esthetics. Llewellyn's work, as distinguished from that of some other realists, gives prominence to psychological theories of the judicial process and to the function of intuitive, albeit artistic, preceptions in the law.

Llewellyn regrets two lacks in the coverage of the book. Firstly, there is no considered development of the theory of Justice, which he interstitially views as being not an attainable or definable subject but a quest. He admits that the concept of Justice is determined initially by each quester's view of the Universe and secondly by the essence of scarcity, a disparity created by the world's inability to satisfy *justified* desires and demands.

The second omission which he enumerates is a paper which would explore the need in the "criminal" field for a real double standard. By this he means a standard for the individual, a criterion of total personal responsibility, juxtaposed to a standard for the legislator or administrator which pertains to the offender. He sees the latter policy as being largely affected by genetic forces and social conditioning.

Realism developed as a movement in the United States, where, influenced by our pluralistic setting, the discrepancies between the law in action and in theory are easily recognizable. Law is viewed in relation to social ends, as Llewellyn explains, but its shadow is cast behind and not in front of the institutions it controls. Realism's distrust of traditional legal rules, to the extent that they describe what the courts really do, is well-known. To reduce this uncertainty, certain procedures are recommended by the realists. With this ob-

jective in mind, Llewellyn dresses his methodology in new terminology and word-symbols, such as "law-government," "law-jobs" and "law-stuff."

It is characteristic of Llewellyn that he functionally applies these new labels to institutions and to his study of some legal subjects, such as commercial law. However, he does not approach all substantive concepts with the same rapier movement. For example, although he recognizes the distinction between substantive, derivative and moral rights under behavioral and legal analysis, he makes no semantic distinctions which would avoid possible confusion in the descriptive use of the general term "right" (p. 21). Perhaps here, where radical departures seem most needed, his writing displays recognizable orthodoxy and standard description. One even detects this same conformity and conventionality beneath a florid, dramatic style in his *Common Law Tradition.*

However, the reader should not be misled into thinking that Llewellyn is primarily concerned with definition, because he is not. To illustrate, he objects to circumscribing the law to peripheral limits by defining "it" (law). As he sees the issue, the ever-increasing emphasis is on observable behavior with ever-decreasing emphasis on words. Thus he includes in the field of law "everything currently included, and a vast deal more" (p. 40).

Llewellyn is sensitive to beauty in the law, but he sees beauty as either slighted or distorted. For him, law's beauty extends beyond its literary counterpart, the turn of phrase or imagery. This he sees as being in bold isolation of the social moorings to which the words are attached. Thus, Llewellyn identifies, as Pound distinguished them, three style-periods in legal writing, reflecting predominant social influences. In the formative era, the later 1830's and earlier 1840's, authors possessed a vigorous style in coping with new developments requiring strength of purpose. Legal writing in that period had the flare of the Gothic-in-growth. The next style in our legal order is characterized by authoritarian, formal, logical manifestations in the period of "maturity of law."

A third style prevails today, mirroring the complexities of modern life, the inadequacies of the earlier legal techniques to meet with problems, and a range of other factors. The

essential feature in the new style is a conscious, patent concern with policy (p. 188).

Llewellyn cautions that he is not proposing the exaggerations and extremes of "functionalists" in architecture who consider no form or ornament to be esthetically acceptable which is not a working portion of the object. In this reviewer's opinion, he correctly identifies functional esthetics with purpose so that "whatever expresses purpose expresses also an inherent part of function." To this end, the Gothic cathedral, sculpture and glass painting, while structurally unessential, satisfy a function as well as man's love of beauty.

The counterpart of this analysis by Llewellyn relates to the Good in Law (p. 197). He identifies the crucial question as that of the ethical or moral neutrality of the inevitable and of the impossible. This, of course, requires elucidation. In law, the inevitable and the impossible are identified by him as ethically neutral, "as setting given conditions and given limits of action." Work in law is encompassed by limited ranges of conduct. To the judge, the Good is circumscribed by the need to stay within the limits of his official duties. Good, as it relates to legislators, is limited by their duty to the Constitution. However, this description by Llewellyn of the limitations of judicial and legislative conduct relates to process and provides no basis for the choices we make in law. To that extent his formulations are of no direct utility in identifying or implementing the Good.

The criminal lawyer and sociologist will find of special interest his discussion on behavioral control. Llewellyn identifies the conflict between law observance and law enforcement as centering around three basic propositions: (1) that law observance is a matter of the formation of folkways rather than being a question of legal rules, (2) that law and folkways constitute varieties and specifics in accordance with group and other interests and (3) that for group control, the issue of law enforcement is directed at individuals whose conduct is affected or altered. In essence, he views law observance dimly. He conceives of law enforcement as a technical problem of inducing law observance which he says is impossible. He sees society as consisting of numerous groups and individuals as group members, each embracing group

folkways "in block," whereas societal concern is in re-educating dislocated persons. He is content to leave undisturbed the economic and cultural schemata which create artificial desires and frustrations in individuals. Llewellyn concludes that repressive measures of control are mere temporary expedients, whose weakness rests in the very affectiveness of the instrument used. Finally, law, as seen by him, is not a good but an evil—"a thing to regret" (pp. 399-400).

The latter concept is derived from the Lockeian doctrine that government, even minimum government, is evil. Here Professor Llewellyn stops short of observable truth, as other philosophers have done, by intermingling fact with preference. To describe the law as either good or bad, in this context, is a departure from realism.

This pronouncement by Llewellyn, which identifies law as a prescriptive control, also fails to take into account the vast range of technical and generative law of modern society whose primary functions are either to provide ordered system or to implement social policy. To this extent, the law transcends the rudiments of force and prohibition and assumes helpful and ameliorative roles. Therefore to describe it solely in relation to its prescriptive elements is to ignore or to overlook its broadened scope.

When the Karl Llewellyn philosophical story finally is told, the degree of his conformity to social and legal processes will be significant. Nonetheless, his philosophy contains much originality and is singularly provocative. In vouchsafing recognizable patterns in human behavior and relating legal control to them, rather than the opposite, he emphasizes the primacy of institutions. In the final analysis, one can predict that he will be ranked among the foremost legal thinkers of this generation.

ERVIN H. POLLACK*

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THE COMMITTEE AND ITS CRITICS. By William F. Buckley, Jr. and the Editors of National Review. New York: G. P. Putnam and Sons, 1962, 352 Pages. $4.95.

This book is what its eleven authors say it is, namely, a calm review of the House Committee on Un-American Activities. The main task of any intelligent discussion of this controversial subject is to keep it "calm." These editors of National Review have done that and the end result is a valuable and informative volume that should be readily available to all people, and particularly to college students who wish to *think* as well as talk about Congressional investigations of Communism.

William F. Buckley, Jr., Editor of National Review and ten of his editorial colleagues have each described and evaluated a part of the accomplishments, practices, projects and general history of the Committee's work since 1945. The main criticisms of the Committee are carefully considered and balanced against the conditions as well as the theories with which the Committee must contend. The investigating Congressmen are given their day in court and so too are their critics. The verdict for the Committee is unanimous but there are cautionary and remedial remonstrances for the improvement and expedition of future hearings which are friendly but nevertheless firm. All in all, the authors have planted a crop of truth in an area that has become a weed patch of deliberate misrepresentation.

In the last ten years, due to the apathetic indifference of the patriotic public and the epithetic cunning of the Communists, the words "House Committee on Un-American Activities" have been fashioned into a firecracker of emotion designed to explode in the face of any public speaker who deigned to speak of freedom in the general context of anti-Communism. This tactic has been employed most effectively on college campuses where the jeer leaders are trained to lead their howling squads into noisy ridicule whenever a speaker dares to say a good word about Congressional investigations of Communist activity.

In my own college days, Woodrow Wilson once said to me and others present that attempts to refute emotions with

logical argumentation would serve merely to deepen misunderstanding on all sides. Since they are psychological rather than logical, emotions are not refutable. Fact and argument simply serve to enflame the emotions to which they are directed. The people whose vital interest it is to deride the H.U.A.C. know this very well indeed. They manage, therefore, to load all discussion of the Committee with combustible materials of hate, fear and blind prejudice. The resulting smoke chokes off reason and obscures whatever logical point has been involved. The emotional flares that go up immediately when the H.U.A.C. is discussed picture "free speech," "freedom of association" and the "right of privacy" as all under siege by the tyrannical inquisitors of the all-powerful state. The ironic fact that these rockets are fabricated by the agents of the most tyrannical all-powerful force in history, namely, Communism, is well obscured by the time they are passed into the hands of the naive innocents who fire them at anti-Communist speakers. The targets are thus immediately on the defensive as agents of the evil force they are trying, in fact, to destory.

Appropriately, therefore, in the first chapter of the subject book, William F. Buckley, Jr., makes haste to say:

"another premise shared by the contributors to this volume is this; that the state wants constant watching because it is, notoriously, the principal instrument for the oppression of free men. . . The contributors to this volume . . . have in recent years resisted with a consistency they would match up against that of any other half-dozen persons, the accumulation of power in the Government of the United States. Their deliberations on the matter of the H.U.A.C. should be viewed in this light. We are, every one of us, disposed to resist the accumulation by the state of any power which is unnecessary to the insurance, by reasonable measures, of the survival of our society. "

It is precisely with the survival of our free society that the H.U.A.C. is concerned.

Emotional flares to one side, what the Communists have induced the impassioned critics of the Committee to contend for is the right of Communist agents to infiltrate American institutions, including the Government and its defense establishment, without danger of their exposure as object lessons calling for more adequate legislation to shore up the

defenses of our nation in time of war. This fact of our present war to the death with Communism has been declared repeatedly by J. Edgar Hoover, the Director of the Federal Bureau of Investigation, to whom many critics of the House Un-American Activities Committee would assign all of our concern over the alleged menace of Communism.[1] Congress has found, as a matter of fact, and the Supreme Court has finally affirmed that Communism is a clear and present danger to the safety of the country.[2] In war as it is fought by the Communists, the detection and exposure of subversion is the first requisite of national defense. Without the House Un-American Activities Committee, the disclosures that it has made, and the alarms that it has sounded since 1945, the state of our defenses, bad as they are now, would be immeasurably worse. "It is nothing short of preposterous willingly to tolerate an active conspiracy in our midst, and if the Constitution is not, as presently understood, resilient enough to cope with the contemporary requirements of survival, then the Constitution should be modified, as it has been before." (p. 33).

CLARENCE MANION*

MANUAL CONCERNING LEGAL DOCUMENTS FOR THE LAW STENOGRAPHER WITH INSTRUCTIONS AND SAMPLE FORMS. By Evangeline Sletwold. Chicago: The Burdette Smith Co., 2d ed., 1961, 133 Pages. $7.00.[3]

A chart and compass, a level and square, a pitch pipe, a slide rule, and litmus paper illustrate the many tools and devices which promptly, usefully and accurately guide mankind toward accomplishment of certain missions. They are reliable, conveniently available, and immediately responsive. So, too, does Miss Evangeline Sletwold's Manual Concerning Legal Documents for the Law Stenographer with Instruction and Sample Forms serve these functions and fulfill these

1. Speech of J. Edgar Hoover to the American Legion Convention in Las Vegas, Nevada, October, 1962.
2. Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 7 (1960).

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3. The Burdette Smith Co., 111 W. Washington St., Chicago 2, Illinois.

needs in the law office and in the world of the law stenographer.

The second edition of Miss Sletwold's Manual, published after more than ten year's experience in the use of the original publication, reflects maturity, poise and character. It is compact—eight and one-half by eleven inches in size and plastic ring-bound—small enough to be handily used but big enough to contain the essential "know how" and "show how" materials for practically every work demand of the legal stenographer. Obviously the book embodies years of practical law office and teaching experience and much reflective study. No wasted space will be found in the eighteen chapters. Even the Preface is informative and instructive and the thirteen-page index is a real guide to the Manual's contents.

Although the Manual finds many of its roots in the fertile soil of Illinois and Chicago law practice, it has a broad and expansive reach and sweep, useful in any law office in the country. A practical lawyer's examination of the book from the General Information—Reference Books in Chapter I through the Helps in Chapter XVIII will convincingly unfold the kind of practical materials every stenographer must know in order to produce good law office work products. The author not only manifests the "know how" but displays clearly the "show how" in understandable forms and language. Chapter III, for example, on Typing Instructions for Documents, and Chapter XV on Typing Briefs illustrate, explain and simplify many of the problems which are stumbling blocks to the learning legal stenographer and as well to the younger learning lawyer. The eighteen chapters may not provide all of the answers to all law office problems for all legal stenographers, but they obviously provide practical answers for most of the problems confronting most of the stenographers in today's law offices. An experienced senior legal secretary or stenographer may be irreplaceable and indispensable, but Miss Sletwold's Manual will be a most useful substitute when the senior secretary must be away.

The 1962 American Bar Association's The Lawyer's Handbook comments that "Many lawyers complain that they cannot find a highly competent legal secretary." Over two hundred years ago Poor Richard is reported to have written that

"God helps them that help themselves." One of the best ways for a lawyer to help himself to have a competent legal secretary is to have within his stenographer's ready reach a copy of Miss Sletwold's Manual for the Law Stenographer.

STANLEY E. DADISMAN*

LEGAL ASPECTS OF HYPNOSIS. By William J. Bryan, Jr., M. D.‡ Springfield: Charles C. Thomas, 1962. 282 Pages.

Dr. Bryan has the distinction of publishing the first book which covers completely the legal aspects of hypnotism. It is an apparently well researched book, besides being well written, and the author has succeeded in explaining the concept of legal hypnosis as well as illustrating its many practical uses in the field of law.

In the introductory chapter the author points up that hypnosis is an "extension of concentration of the mind", (p. 5), and by its application it is possible to ascertain not only what the mind is subconsciously concentrated on, but further to direct the concentration to a particular matter (the latter applied with caution depending on the subject). By analogy the principles of hypnosis and suggestion are used in the advertising business, in religion,[1] and even in court rooms since it must be admitted that no successful trial lawyer will attempt to influence a jury solely by means of reasoning processes alone, but will employ emotional argument since "emotion concentrates the mind." (p. 7)

Next the author discusses legislation which has evolved to regulate hypnosis. One of the first statutes enacted to control hypnotism was passed in England, and this was aimed primarily at stage hypnotism.[2] There are some state statutes recognizing the use of hypnosis in medicine and dentistry, but the author feels that with the "coming of age of hypnosis as a medical tchnique" there is a need for clarifying

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1. See WILLIAM J. BRYAN, JR., RELIGIOUS ASPECTS OF HYPNOSIS, 1962.

2. Great Britain's Hypnotism Act. 1952.

legislation to establish rules for meeting the real legal problems involved in hypnosis. An extensive section is devoted to a discussion of "Previous Court Decisions On Hypnosis." The author treats in full an American Law Reports article,[3] and then discusses many previous court decisions, starting as early as the 1600's to the present time. The earlier cases uniformly rejected evidence derived from hypnosis, drugs or other medical techniques. Evidence obtained through hypnosis is still rejected today,[4] while other medically obtained evidence, including that derived from drugs, may, at least in some jurisdictions, be admitted where it is not offered for the purpose of proving the truth of the matter asserted.[5] The author feels that this same test should be applied to statements taken under the state of hypnosis, since hypno-analysis is a medical technique similar to "truth serums", "sodium pentathol, or other medical devices." (p. 73)

Dr. Bryan devotes 75 pages to the detailed analysis of a psycho-killer. This was an actual case in which he was involved in California, and in which the trial court refused to allow him to testify as to his opinion of the defendant's sanity, when the "opinion (was) based in part on an examination conducted while the patient was in a hypnotic trance." (p. 152) The author has in detail very convincingly treated the case history of this defendant, and the results of these medical-hypnotic tests indicate that the subject-defendant may have been mentally insane at the time he committed the murders. Without the benefit of this opinion testimony the jury brought in the death sentence. The Supreme Court automatically reviewed the case, but refused to reverse the conviction on the above evidentiary question.[6] If Dr. Bryan's diagnosis is correct, one wonders whether all of the pertinent facts were given to the jury so that they could mete out proper justice.

One chapter discusses hypnosis and crime and covers both crimes committed on hypnotic subjects, and crimes com-

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3. Annot. "Physiological and Psychological Truth and Deception Tests", 23 A.L.R.2d 1306 (1952).
4. **But cf.** Cornell v. Superior Court, 52 Cal. 2d 99, 338 P.2d 447 (1959), where in a landmark case the court decided that the defendant's right to counsel includes the right to be hypnotized for the purpose of calling forth facts which the defendant is unable to recall because of retrograde amnesia.
5. See People v. Jones, 42 Cal. 2d 219, 266 P.2d 38 (1954).
6. People v. Bush, 16 Cal. Rpt. 898, 366 P.2d 314 (1961).

mitted by hypnotic subjects. Several famous cases are raised in detail discussing alleged sex offenses. The conclusion points up that hypnosis is generally a poor device to use in committing any sort of crime. Another chapter is devoted to "Winning Cases Through Hypnosis", in which possible ways of using hypnosis in general law practice are discussed. A sampling of the areas covered includes: the relaxation of the nervous witness; the use of hypnosis in retrograde amnesia; improving faulty memory through hypnosis; and influencing the jury by means of hypnotic techniques (this is not advised, but is discussed since a degree of hypnosis is used whenever an emotional situation is created). Each of these sections is thoroughly covered and illustrated by actual experiences and cases.

The use of hypnosis in law enforcement is treated in two sections: safety and the interrogation of criminals with hypnosis. There is a chapter on "International Law and Hypnosis" in which "brainwashing" and "powerization" are discussed. The latter term was devised by Dr. Bryan after the recent U-2 incident, and is distinguished from brainwashing in that there is emotional rather than physical intimidation, which can bring about a complete change in the "victim's mentality and emotional structure". (p. 256-58)

The author concludes the book with a short chapter on the use of hypnosis in penal institutions and another on mass hypnotism. The last chapter illustrates how hypnotic devices may be used by world leaders and politicians.

This book is extremely interesting reading, and though it is not an exhaustive coverage of the legal problems of hypnosis, it is comprehensive and will serve to stimulate thought on the legal aspects of hypnotism. The book is recommended to all lawyers, politicians, all levels of law enforcement officers, judges and laymen. It is recommended particularly to the layman, for in Dr. Bryan's words: "Once the 'average man' understands something of the true facts concerning the phenomena of hypnosis, the law which regulates and protects him must follow in turn, both recognizing and utilizing the value of medical hypnosis for the betterment of our people." (p. xvii)

JOHN F. STONE

FACTORS OF GROWTH IN A LAW PRACTICE. By Roy A. Redfield. Chicago: Callaghan and Company, 1962. 248 pages.

The author's main purpose in this work is to discuss the ramifications of a successful law practice and present suggestions for expanding and improving the quality of a law practice.

Initially he discusses some attributes necessary to success in law, among which are clarity of expression, appreciation of legal reasoning, and industry. He goes on to discuss partnerships in contrast to the lone practice; giving as advantages of the partnership the following: greater volume, opportunity for consultation, continuity of the firm, plus greater income.

Chapters three through eleven deal with the manner whereby a law practice may be improved. The author states that the most significant clientage is that resulting from commercial and business connections. He continues that the lawyer must continually be aware of the need to build up the volume of business in order to become more selective in accepting work. Specific ways in which to increase a lawyer's acquaintances are through social contacts, such as civic groups where the people associated with may well become recommenders, although not clients themselves.

Reputation as the most important factor is discussed in terms of professional excellence and personality. The author suggests public speaking as an excellent means of promoting oneself in the law profession if the lawyer has the ability and desire to do so. Not to be forgotten is the wife who through her own social acquaintances can make new contacts for her husband and help further his acquaintances and friendships. A conclusion drawn at this point is that the promotion of a law practice can be successfully done only through the lawyer's own presence and personality. Services assisting the lawyer such as listings and ratings are discussed as necessary aids in today's complex and fast moving society. Reference is made to the Bar as a partially controlled monopoly, which nonetheless is overcrowded, permitting many to eke out only a meager living.

In chapter twelve Mr. Redfield considers the improving

climate of public opinion toward the Bar. He cites the services performed by the "Legal Aid" and "Lawyer's Referral Service" of great value in promoting the standing of the Bar, in addition to creating contact with lawyers by the public.

Chapters thirteen through fifteen deal with somewhat different factors in the development of a law practice than those mentioned earlier. Specialization is discussed as a more significant thing today than in the past, although limited according to a few general types, and limited primarily to metropolitan centers. The advantages of less time required and greater income from specialization are considered. Taxation is mentioned as an increasingly important field of specialization for which a demand exists. The author contends that politics and the practice of law do not ordinarily mix well. The public tends to think of one engaging in politics as primarily a politician rather than a lawyer.

Chapter seventeen and eighteen deal with successes and failures in the legal profession with brief biographical sketches of successful lawyers and statesmen. Mr. Redfield draws the conclusion that one common denominator shared by all was the element of general good character, personality and perseverance. As to those who fall by the wayside, he finds several reasons, such as: health and finances, lack of resolution, lack of aggressiveness, and those having unacceptance traits or eccentricities. Confidence, self-assurance, and leadership are suggested as indispensable qualities for success.

Chapter nineteen is devoted to beginners. The question of where and how to practice is raised. The suggestion put forth is that an analysis ought to be made on the basis of social and economic factors. Again the consideration of specialization is raised with the idea that one so interested might be wise to seek employment in the desired area in order to be able to offer such experience to a law firm. The author suggests that those who expect to establish a private practice eventually take the plunge immediately on completing law school. He concludes the chapter stressing the need to work diligently, act with dignity, and above all to know the "Rules of Evidence."

In the final chapter Mr. Redfield ponders the need of maintaining a balance among all activities in order to lead

a vital and happy life. He suggests the need for physical activity and adaptability to worry so that a lawyer may continue to do his best.

My conclusion after reading Mr. Redfield's book is that it is to be recommended to those lawyers who have been in practice only a few years, to those lawyers just beginning practice and to those persons soon to become lawyers. The book does provide a valuable insight into many aspects of and circumstances relating to the legal profession perhaps not often considered.

ROBERT P. GUST