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OF MEN AND LAWS: MURPHY, CORNFORD,
ARNOLD, POTTER, PARKINSON, PETER,
MACCOBY, AND GALL

MELVIN J. SYKES*

*This article was an after-dinner speech at a meeting of the Rule Day Club in Baltimore on October 10, 1977. Founded in 1932, the Rule Day Club is one of the many famous Baltimore law clubs dedicated to intellectual discussion and conviviality among its members. The history of Baltimore law clubs goes back to the 1850's when the Friday Club and the Temple Club were organized. Although their existence was cut short by the Civil War, the idea of the law club was revived in 1911. Since that time the monthly dinners and speeches of law clubs have become a Baltimore tradition.***

In the last half century the number of new fields of study has vastly increased. One of the most notable new fields is the systematic study of systems, called systems theory or systems analysis. An important branch of this field is "systemantics," which is concerned with why and how systems fail.¹

For a long time it has been well known that things in general don't seem to work very well, or at least don't seem to work the way they are supposed to. Only recently, however, has there been a systematic effort to study the ways in which things in general don't work very well and why things don't work better.

I would like to outline briefly the development of systemantics and then to give some idea of the rich possibilities for application of this new approach to law and government. In this outline of the development of systemantics I will review the scholarly literature on the subject and discuss current applications and examples which are more readily at hand and include applicable articles from newspaper-

* Member and former Pooh Bah of the Rule Day Club. The author acknowledges with deep appreciation the work of members of the Maryland Law Review staff in editing the text and supplying most of the footnotes, which seem to be an inescapable requirement for publication in a learned journal. The author, moreover, takes no responsibility for the contents of the article, except to warrant that he has attempted faithfully to convey the substance of the sources cited.

** For a general description of the Baltimore law clubs, see Keefe, *The Trial Table Law Club — Neither Gone nor Forgotten*, 62 A.B.A.J. 525 (1976); Keefe, *Baltimore: The Law Clubs that Cheer*, 62 A.B.A.J. 138 (1976).

1. Systems theory is a ponderous discipline which deals with systems design in a futile effort to develop systems that will not fail. A knowledge of higher mathematics is indispensable to the study of systems theory. One of the leading works on the subject is L. VON BERTALANFFY, *GENERAL SYSTEMS THEORY* (1968), and there are also a number of highly abstruse works on applied game theory and operations research. I will not comment any further on general systems theory because in this case, the part, systemantics, is much greater than the whole.

ers and magazines which I have encountered in the regular course of my reading. Because of space limitations, I have included a very limited sample in this discussion. It is my modest hope that after you consider these examples in the light of systemantics the world will never look quite the same.

Systemantics is a virtually all-encompassing science because systems include almost everything: a system can be defined broadly as a set of parts coordinated to accomplish a set of goals. Each part which consists of at least two subparts is called a subsystem; and subsystems are made up of sub-subsystems, and so on. In short, *anything* divisible into two or more parts which function together is a system with respect to its parts.

The earliest inkling of modern systemantics which I know of is a little work of Francis Cornford entitled *Microcosmographia Academica Being a Guide For the Young Academic Politician*.² This book is not an exposition of systems, but a manual intended to teach academics how to further their careers. In a broader sense, it is truly a practical guide to systems based on the assumption that academic institutions are systems and therefore do not and cannot work the way they are supposed to. Furthermore, Cornford perceived that the academic system is only one species of a much broader genus of systems, namely, all systematic organizations of human beings. Of course, later work has validated these assumptions, but to Cornford goes the honor of being the pioneer whose intuition divined that the assumptions were well worth making. Consequently, as a practical manual for navigating about *academia* and other political systems, Professor Cornford's work has withstood the test of time well.

Cornford pointed out that success in academic politics depends on how completely one can reject the premise that in a system dedicated to Reason, the most "reasonable" approach to problems should be persuasive. Precisely because academic institutions are ostensibly the Temples of Reason, the academic politician must carefully study prejudices and pursue the political motive, which is the desire to get ahead of the other fellow before he shoves you out of the way to get ahead of you.³ True academic ability of course has little to do with success as an academician.

2. F. CORNFORD, *MICROCOSMOGRAPHIA ACADEMICA BEING A GUIDE FOR THE YOUNG ACADEMIC POLITICIAN* (1923).

3. *Id.* at 4-5. Cornford's Principle of Sound Learning is one example of a situation in which success depends upon a rejection of the "rational" approach. According to Cornford,

[t]he Principle of Sound Learning is that the noise of vulgar fame should never trouble the cloistered calm of academic existence. Hence, learning is called sound when no one has ever heard of it; and "sound scholar" is a term of praise applied to one another by learned men who have no reputation

Cornford's greatest contribution (next to his observation that the most potent tool of political persuasion — in his day — was port wine) was to show how to use Reason to buttress prejudices and the political motive and to achieve success. For example, a principle can be developed which is in fact a rule of inaction. In any particular case a principle can "state a valid general reason for not doing . . . what to [an] unprincipled instinct might appear to be right."⁴ Cornford stated two great principles that justify doing nothing and insure continued success — the principle of the Wedge and the principle of the Dangerous Precedent. The principle of the Wedge prescribes "that you should not act justly now for fear of raising expectations that you may act still more justly in the future — expectations which you are afraid you will not have the courage to satisfy."⁵ By definition this principle is necessary only when there is a possibility that the proposed action may in fact be just. When an act is clearly *not* just, the principle of the Wedge is superfluous.

The principle of the Dangerous Precedent is "that you should not now do an admittedly right action for fear that you, or your equally timid successors, should not have the courage to do right in some future case, which, *ex hypothesi*, is essentially different but superficially resembles the present one."⁶ Like the Wedge, the principle of the Dangerous Precedent is only necessary when there is a possibility that the proposed action is right.

From the Wedge and the Dangerous Precedent principles, it necessarily follows that nothing new should ever be tried. Every action which is not customary is wrong, or, if it is right, it is governed by either the Wedge or the Dangerous Precedent Principle.⁷ This conclusion is reinforced by two ancillary arguments: the Fair Trial Argument ("give the present system a fair trial")⁸ and the Unripe Time Principle ("the time is not ripe"),⁹ and by two diversionary tactics: pointing out that "the present measure would block the way for a more sweeping reform,"¹⁰ and proliferating alternate proposals, thereby making it difficult to obtain a majority

outside the University, and a rather queer one inside it. If you should write a book (you had better not), be sure that it is unreadable; otherwise you will be called "brilliant" and forfeit all respect.

Id. at 23.

4. *Id.* at 8.

5. *Id.* at 31.

6. *Id.* at 31-32.

7. *Id.* at 32.

8. *Id.* at 33.

9. *Id.*

10. *Id.* at 35.

for any particular proposal.¹¹ Clearly, Cornford had an intuitive grasp of how to be an effective systems person.

The next significant development in systemantics was the work of Thurman Arnold in the 1930's. Like Cornford, Arnold did not discuss systems in general but concentrated on individual organized systems of human beings. Arnold's most significant contribution to systemantics was to point out that the real purpose of a system is often different from and even the direct opposite of the ostensible purpose. In *The Folklore of Capitalism*,¹² he asserted that the real purpose of the legal order may be more symbolic or mythological than practical. The function of the legal order, as Arnold saw it, is to establish myths and to implement symbolism in a dramatic ritual form, that is, a solemn ceremony that solves no problems but reassures and comforts the faithful. As a result, all inquiry into the real underlying problems of society is prevented.

According to Arnold, American mythology in the 1930's promulgated a belief that government was decided upon by a democratic choice of the common people, who thought for themselves and applied reason to social problems. It did not matter that this concept of government could not explain or describe contemporary events; the very existence of this American creed prevented the public from looking beyond it.¹³ At the same time Americans believed in a science of law and economics with a hierarchy of learned scholars who really had "the answers" to the hard questions. In practice, however, no answers could be found.¹⁴ Other mythological or symbolic beliefs included the belief that we should accept the answers of the Chief Scholars, for example, the Supreme Court, because they know best;¹⁵ that corporations should be treated like individuals and given the same kinds of rights and liberties under the law as your next-door neighbor;¹⁶ that the practical problems of our society are best solved by manipulation of abstract concepts such as efficiency, bureaucracy, democracy, dictatorship,

11. *Id.* at 37.

12. T. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937).

13. *Id.* at 9.

14. *See id.* at 57-58.

15. *See id.* at 64.

16. When confronted with the fact that these developing corporations were not individuals, Americans had to revert to the traditional symbolism of Thomas Jefferson and transform the corporate entity into an individual, with all the rights and duties of other American citizens. Thus corporations could be accepted into society with open arms. Because not all individuals are good, the existence of a bad

socialism, and communism;¹⁷ that social problems are soluble by passing a law; and that individuals and corporations are the private sector, and good, while government is evil, and should be restricted¹⁸ — except where it would cost money, in which case even the mythology calls for sovereign immunity.

Arnold's theory that society takes comfort in symbols and myths without regard to realities explains many American problems. It can be used to describe why the platforms of both major political parties tend to be very much like each other and very much unlike the actual program of either party when it gets into power; why criminal penalties will never stamp out prostitution; why antitrust law enforcement has been notable for a loud voice and a little stick; and why token ritualistic enforcement of the prohibition experiment satisfied the need for both virtue and whisky, that is, until the craving for virtue was sufficiently diluted so that the experiment could be ended. In each case important needs are fulfilled in practice while the law comforts us by institutionalizing hypocrisy, which after all represents a tribute of vice to virtue.

Significantly, Arnold trained his biggest guns on the antitrust laws — perhaps the biggest myth of all. After the *Folklore of Capitalism* was published, Arnold was put in charge of antitrust enforcement, and became known as a vigorous trust buster. He was not at all embarrassed by having spilled the beans and given away the "secret" of the whole enterprise before he was appointed to head the Antitrust Division of the Department of Justice. Arnold was particularly qualified for the job not so much because of his legal background but because he knew just what he was supposed to be doing. Because he understood the mythology and the ritual nature of

corporation would not shock the society. As Arnold noted, this myth produced some practical problems:

[S]ince individuals are supposed to do better if left alone, this symbolism freed industrial enterprise from regulation in the interest of furthering any current morality.

. . . It created the illusion that we were living under a pioneer economy composed of self-sufficient men who were trading with each other. In that atmosphere the notion of Thomas Jefferson, that the best government was the one which interfered the least with individual activity, hampered any control of our industrial government by our political government. We were slower, therefore, in adopting the measures of control of industrial organization than a country like England.

Id. at 189.

17. These concepts, of course, bore no relationship to the social organization of the day. See *id.* at 45.

18. According to Arnold, a future historian "will observe men refusing benefits obviously to their practical advantage when tendered by the Government, because they violated current taboos." *Id.* at 47-48.

his job, he could better live up to his priestly role and to societal expectations with a sense of accomplishment rather than frustration. Like the rest of society he could take comfort in the myth of trust busting even if few trusts were busted.

The practical result of Arnold's argument was to help the New Deal clear the way for a sharp increase in the scope of governmental activity. He argued against what he called the myth of the inherent malevolence of government. Arnold scoffed at the idea that new government programs were not the way to solve social problems. This pioneer observer of systems underestimated the systemantics of government, and therefore never got beyond what may be called a special or incomplete theory of systemantics. It remained for others to develop the general theory, which, as will be seen, demonstrates that Arnold was often fundamentally wrong for the right reasons.¹⁹

The next contribution to the field was made by Alfred Korzybski in his *Outline of General Semantics*.²⁰ Korzybski assumed that all human systems are flawed, but he felt that the universal reason for social SNAFU was a general failure in communication due to imperfect understanding of the vagaries of language. Like Arnold's thesis, Korzybski's view was also incomplete, for the dynamics of SNAFU go far beyond mere language.

The first general theory of systemantics was formulated by Murphy, whose first name and middle initial are anonymous.²¹ All we know about him is that he was a contemporary of the legendary Kilroy, and that he is not related to the Chief Judge of the Maryland Court of Appeals. Murphy's law, or more accurately Murphy's laws, are the first principles which were claimed to be applicable to all systems. They are as follows:

- (1) If anything can go wrong, it will.²² (Nothing is as easy as it looks.)

19. The major problem with Arnold's theory was that it failed to recognize that the government, just like any other organization, indulges in those solemn ceremonies which comfort constituents but solve no problems.

20. A. KORZYBSKI, *Outline of General Semantics*, in GENERAL SEMANTICS. PAPERS FROM THE FIRST AMERICAN CONGRESS FOR GENERAL SEMANTICS (H. Baugh ed. 1938).

21. Any definitive work Murphy ever wrote — if, in fact, he ever did write a book — in which these laws were set out, has long been forgotten. One place in which these laws do appear is a small, yet profound volume known as *Systemantics*. J. GALL, SYSTEMANTICS (1975) [hereinafter cited as SYSTEMANTICS]. Throughout this discussion I will be making references to the ideas presented in this work, which I consider to be an ingenious description of the general theory of how systems fail.

22. SYSTEMANTICS, *supra* note 21, at 5. I should say a word about O'Toole's Commentary on Murphy's Law, which is that "Murphy was an optimist." O'Toole maintains that everything must inevitably go wrong. I think O'Toole is too pessimistic. There are certain simple systems that on the whole function reasonably well. Take, for example, a button and buttonhole. Likewise, automatic elevators, which, on the whole, provide good service.

- (2) Left to themselves, things will get worse. (Nature always sides with the hidden flaw.)
- (3) The more innocuous a modification appears to be, the more far reaching it is likely in fact to be. (Everything takes longer than you think.)

Various refinements have been proposed, but they are not so much true scientific laws (as Murphy's are), as somewhat waspish, if clever, overstatements of the truth. I offer them here only for the sake of scholarly completeness:

- (1) Everything goes wrong at the same time.
- (2) If there is a possibility of several things going wrong, the one that will go wrong is the one that will do the most damage.
- (3) If everything seems to be going well, you have overlooked something.
- (4) In any collection of data, the items which are obviously correct and absolutely need no checking contain the errors.
- (5) Once you open a can of worms, the only way to recan them is to use a larger can.
- (6) The other line always moves faster.
- (7) The phone call you are waiting for will come if you go to the men's²³ room.
- (8) Jellybread always falls with the jelly side down²⁴ and the chance of its falling increases in proportion to the cost of the carpet.

Until just recently, the important studies of systemantics after Murphy have dealt with human systems. Working in the 1950's and 1960's, Stephen Potter developed the theories of gamesmanship,²⁵ lifemanship,²⁶ and one-upmanship.²⁷ Potter's theories focused on how to manipulate people and subsystems within social systems so as to obtain the outcome most favorable to yourself. They addressed the question: How can we make social systems go wrong in order to work the greatest advantage to ourselves? Gamesmanship teaches

23. Or women's.

24. SYSTEMANTICS, *supra* note 21, at 4.

25. S. POTTER, GAMESMANSHIP (1950).

26. S. POTTER, LIFEMANSHIP (1950).

27. S. POTTER, ONE-UPMANSHIP (1951). Potter's works are collected in S. POTTER, THE COMPLETE UPMANSHIP (1971).

how to use gambits and ploys to unnerve one's opponent and to compensate for lack of mere skill. This theory is not only applicable to games in the usual sense of the term, but to all aspects of life involving ploys and other elements of gamesmanship that may not be superficially apparent, such as travel, art, literature, politics, military affairs, love, conversation, and other human relationships. Lifemanship teaches how to be "one-up," that is, how to appear successful and make the other fellow feel "one-down," or feel that somehow something has gone wrong and you have bested him. A classic example of one-upmanship occurred in 1956. When the United Nations was in a position to register its moral disapproval of the Russian massacres in Hungary, it spent five times as much time condemning France, England, and Israel for the Suez campaign as it did condemning the Soviet Union for the Hungarian massacres. One-up for the Russians on that one. Later commentators have pointed out that to the extent Potter's precepts enable people to substitute competence in moving up the hierarchy for competence in doing a job, these precepts have contributed significantly to system failure.

After Potter's publications, William H. Whyte, Jr., published his seminal work, *The Organization Man*,²⁸ which focused on individuals in the corporate structure. In this work, Whyte showed how business organizations satisfy the needs of their members, change the characters of the people who work for them, and ultimately become ends in themselves in a manner that hampers the fulfillment of their ostensible purpose. Whyte demonstrated the change both in the mythology and in the organization of business since Arnold's time — the replacement of the Protestant individualist ethic by a social or group ethic which emphasizes "belongingness," security and fringe benefits, techniques, committee work, group dynamics, and bureaucratization. All of this leads to lack of creativity, personality distortions, alienation from general social problems, fungibility and standardization of people, rootlessness, a reliance on techniques to cover up a lack of substance, and a tyranny of a majority that emphasizes the social virtues.

Because these problems are caused by the system, Whyte suggested that the system be changed to emphasize creativity, to require rigorous fundamental schooling, to let scientists work without requiring them to have an immediate practical purpose in view, and to find room in the system for creative people. To this latter point, he devoted a whole essay on how to cheat on personality

28. W. WHYTE, JR., *THE ORGANIZATION MAN* (1956).

tests,²⁹ which is the only way a truly creative person can get over the hurdle of the personnel department. Whyte, however, did not deal with the question of why a truly creative person would want a job in the system in the first place. Beyond the obvious answer that one has to eat, this question remained unanswered. Moreover, while Whyte ably and richly documented how a particular system at a particular time tended to go wrong, he did not expressly relate his work to the more general approach of Murphy. In the history of systemantics, Whyte's work is an important documentation of the application of Murphy's laws at a particular time in American society, but it does not attempt to formulate a general theory of system failure.

The next major works in the field, those of Parkinson³⁰ and Peter,³¹ also deal only with human systems. Parkinson, of course, is C. Northcote Parkinson, Raffles Professor of Public Administration at the University of Malaya, who managed to attain a position with a title that sounds as if it had been written by Stephen Potter. In *Parkinson's Law*, Parkinson formulated the first concise and detailed elaboration of Murphy's laws applicable to organizations of human beings. These principles are as follows:

(1) *All work takes as much time as is available.*³² On the basis of this law, Parkinson argued that adding personnel does not make the organization produce more output or take less time. The reason why organizations grow — and they always do grow — is independent of the amount of work that needs to be done. This leads to the very important insight that any attempt to beef up an organization is not going to improve the end product. According to Parkinson, the real reason for organizational growth is that in order to build empires, organization officials multiply subordinates who in turn make unnecessary work for each other. Of course, there must be at least two subordinates in every organizational level so that each may be kept in check out of fear that the other will be promoted. This conspiratorial theory of systems growth is now discredited,³³ but the basic law is sound.

(2) *The time spent on any matter is usually inversely proportional to its importance.*³⁴ This is true because the less important the

29. See *id.* at Appendix.

30. C. PARKINSON, *PARKINSON'S LAW* (1957) [hereinafter cited as PARKINSON].

31. L. PETER & R. HULL, *THE PETER PRINCIPLE* (1969) [hereinafter cited as *THE PETER PRINCIPLE*].

32. PARKINSON, *supra* note 30, at 2.

33. See text accompanying note 42 *infra*.

34. See PARKINSON, *supra* note 30, at 24.

matter, the more likely it is to be understandable to the people who deal with it, and people like to deal with what they understand.

(3) *When any organizational entity expands beyond twenty-one members, the real power will be in some smaller body.*³⁵

(4) *The shape and size of a conference table will be crucial to the behavior of the group that will sit around it.*³⁶ It is a tribute to the power of Parkinson's mighty intellect that he was so completely vindicated on this point some ten years after his work when the Vietnam peace negotiations could not begin until this critical question was settled.

(5) *No particular method of selecting officials will produce officers who are best suited for the job.*³⁷ This sentence is probably the most sound and wise single work on the subject of judicial selection I have yet found.

(6) *Organizations that have time to construct perfect organizational facilities are already in a state of decay.*³⁸ As Parkinson noted, Saint Peter's was built after the papacy had passed the peak of its power, and the Palace of the League of Nations was formally opened in 1937. Of course, we all know what happened to the UN after its great building was opened in New York.

(7) *Organizations tend to prevent the rise of persons with ability.*³⁹

Parkinson's work was refined and extended by Lawrence Peter and Raymond Hull in *The Peter Principle*.⁴⁰ Peter's mastery of Potter's one-upmanship theory is evident from the fact that the book is not titled *The Peter and Hull Principle*.⁴¹

At any rate, Peter rejected Parkinson's theory of organizational growth.⁴² According to Peter, organizations do not grow because senior executives conspire to divide and conquer. On the contrary, growth results from a sincere and futile quest for efficiency.⁴³

35. *See id.* at 37-38.

36. *See id.* at 14.

37. *See id.* at 45-58.

38. *Id.* at 60.

39. *See id.* at 78-81.

40. THE PETER PRINCIPLE, *supra* note 31.

41. It is also interesting that *The Peter Principle* is not in the science or social science section of Baltimore's Enoch Pratt Free Library but in the literature section under satire. This is certainly strange, because the book has been most frequently cited and discussed in the serious scholarly literature of political science and public and business administration. The explanation may be, as Parkinson points out, that books on public or business administration are properly classified as fiction. *See* PARKINSON, *supra* note 30, at vii.

42. THE PETER PRINCIPLE, *supra* note 31, at 87.

43. *Id.* at 87-88.

Pervasive inefficiency is the basic phenomenon of our time, and in order to be valid any theory of systems must be able to explain this phenomenon. In *The Peter Principle*, Peter first documented how pervasive inefficiency is in our society. Inefficiency has produced carefully designed, but unsafe, bridges and buildings; hundreds of thousands of automobiles, all thoroughly quality controlled, that must be recalled because of seriously dangerous production defects; schools that do not educate;⁴⁴ and governments that cannot maintain order. Only in a society pervaded with inefficiency could the most powerful nation in the world be forced out of Vietnam by one of the weakest of nations.

The universal explanation for this inevitable inefficiency is The Peter Principle, a simple law of hierarcheology stating that every member of a hierarchy tends to rise to the level of his incompetence, so that in time every post up the line tends to be occupied by a person who is not competent to fill it.⁴⁵ This law explains a number of phenomena only hinted at by earlier investigators. Thus the semanticists' problem focused on by Korzybski is a special application of The Peter Principle stemming from incompetence in the use and handling of language.⁴⁶ Other phenomena illuminated by The Peter Principle include:

(1) *Peter's inversion* — Means become ends in themselves.⁴⁷ Maintaining the rules, rituals, forms, and paperwork of the system becomes more important than the purpose for which the system was designed.⁴⁸ A byproduct of the Peter's inversion is that systems tend to escalate input and diminish the quality and reliability of output. They then measure performance in terms of work done rather than results obtained.⁴⁹

44. Possibly Peter was overreacting. Arnold might argue that here our mythology misleads us because the real purpose of school is to babysit in order to keep young people out of the labor market. Widespread truancy, however, indicates that the schools are not efficient babysitters either.

45. THE PETER PRINCIPLE, *supra* note 31, at 25, 27.

46. Peter made the mistake of exceeding his own competence by trying to move from diagnosis to therapy in THE PETER PRESCRIPTION (1972). This effort broke the promise of his earlier work. He prescribes how to beat the system, but his remedies are ineffective bromides such as: take regular exercise; do what you really like to do; help other people; don't be manipulated by mass media; think for yourself; recognize your level of competence and resist promotion beyond it. I do not know the sales figures of *The Peter Prescription* and the more recent THE PETER PLAN (1976), so I cannot tell how well Peter succeeded if his purpose was to make money rather than to write good books.

47. THE PETER PRINCIPLE, *supra* note 31, at 41.

48. *Id.*

49. *Id.* at 42.

(2) *Hierarchical regression or the failure of success* — Competence always leads to incompetence.⁵⁰ Man's ability to rule nature has led to overpopulation, pollution, excessive interdependence, nuclear warfare, neutron bombs, and assorted physical ills not nearly so prevalent in simpler societies.⁵¹

(3) *The limits of system design* — Because all organizations are riddled with incompetence, no theory, whether sound or unsound, can be put into practice as it was intended to be. Therefore, no choice between theories can rationally be made on theoretical grounds. Police forces and intelligence agencies, for example, tend to act the same way whatever the prevailing theory of government. It is a mistake to argue that a theory such as communism or socialism would work if only it were given a fair chance at the hands of the right people. Because any theory of organization depends on people to implement it, it *cannot* produce its stated objectives; any system will, by its very nature, prevent the achievement of its intended results.

(4) *The system's prerequisites for advancement* — The qualities that produce advancement in a hierarchy are the qualities that tend to disqualify an applicant for doing the job. To the extent that the disciples of Potter succeed, the system as a whole fails.⁵²

(5) *The inevitability of hierarchy* — There is no way to abolish hierarchies. There cannot be a "classless society," because the bureaucracy needed to create it will see that it never occurs. Remember the classic military order in World War II that granted permission to destroy obsolete records provided three copies were made and filed with designated depositories at higher headquarters.

A book published in 1976 closes the field. *The Gamesman*,⁵³ by Michael Maccoby, is a psychological study of executives in high technology companies at the cutting edge of our economy. These people operate on the premise that there is but one sensible reaction to systemantics: because all important questions are so complicated and the results of any course of action are so difficult to foresee that certainty, or even probability, is seldom attainable, we should not worry about whether what we are doing is right or useful, but we should treat objectives like goal posts in a football game and enjoy the pursuit. Maccoby pointed out that our language reflects this leaning. We talk of the "money game," the "marketing game," the "game plan," the "big play," the "need to punt," "letting a man run

50. *Id.* at 27.

51. *See id.* at 158-59.

52. *See p.* 782 *supra*.

53. M. MACCOBY, *THE GAMESMAN* (1976).

with the ball," etc. The gamesman stresses the value of team spirit, the importance of winning, the thrills of risk taking, and the stimulation of challenge and competition. Challenges are risen to like Mt. Everest, because they are "there." The gamesman assumes that hierarchy is part of the rules of the game. He is a combination of Stephen Potter and the Organization Man. He is, however, limited by the organization, which requires his complete absorption and stunts his ability to develop any qualities and interests other than his gamesmanship.

This brings me to the Restatement of Systems Theory, a book by Dr. John Gall, entitled, with poetic simplicity, *Systemantics*.⁵⁴ This volume marks the first time that a truly general theory, one applicable to all systems, has been masterfully set forth. I would like now to outline the fundamental laws of systems that Dr. Gall has formulated, and note typical instances drawn from the *Baltimore Sunpapers*, *The Wall Street Journal*, and other impartial sources of daily news, of how these laws apply to the system that Dean Pound called "the legal order."⁵⁵

In his book, Dr. Gall formulated approximately thirty laws of systemantics. I have been able to group them into ten major laws, of which the other twenty are subparts. In each case I shall set out the law and any of its sublaws, and follow them with a short discussion and some present-day examples of the law.

(1) *The Fundamental Theorem — New systems mean new problems.*

A. *Discussion* — As Dr. Gall has stated, systems are seductive. They promise to do a hard job faster, better, and more easily⁵⁶ than is now being done, if indeed anything is being done at all. The very presence of a system, however, creates a new set of problems.⁵⁷ When you set up a system, you are likely to find your time and effort being consumed in the care and feeding of the system itself. Furthermore, there is only a limited amount of energy in the world available to meet these problems. This energy must be redistributed by the creation of yet other systems so that more and more of the limited energy must be devoted to the problems created by the systems. Despite their problems, these systems must be

54. SYSTEMANTICS, *supra* note 21.

55. See 1 R. POUND, JURISPRUDENCE 13-16 (1959).

56. SYSTEMANTICS, *supra* note 21, at 68.

57. For a summary of the problems systems cause, see SYSTEMANTICS, *supra* note 21, at 68-69.

retained because people tend to become dependent on them, and any breakdown or threatened breakdown magnifies the basic problem manyfold.⁵⁸ This dilemma leads to the corollary that *systems should not be unnecessarily multiplied, or as it was put in more classic, albeit less generalized form, that government is best which governs least.*

B. Examples

1. *Zoning* — Zoning is an example of government regulation which is supposed to protect the general welfare. Like any other form of government regulation, zoning requires a bureaucracy. The *Sunpapers*⁵⁹ and *The Daily Record*⁶⁰ have published articles on the costs of maintaining this bureaucracy. The cost includes not only the salaries of the bureaucrats, but other additional costs which, of course, are all reflected in the increased price of land and buildings. These costs include: the cost of expensive administrative proceedings, the cost of the graft and corruption accompanying any government allocation of scarce resources, and the social costs imposed by the actual results of the system. These social costs include the promotion of urban sprawl which results from the impediments placed on recycling urban residential areas to higher density areas, the consequent waste of energy and drain on transportation resources which accompany urban sprawl, limitation of the supply of resources for land development, increased inflationary pressures, and, often, conformity and dreary dullness in development patterns. The abuses are very difficult to correct because the courts say with a straight face that the zoning boards

58. Dr. Gall describes this problem in the following manner:

In really large and ambitious systems, the original problem may persist unchanged and at the same time a multitude of new problems arise to fester (or ferment) unresolved. [Some] point to garbage collection in large metropolitan areas as an example. Not only does the garbage not get collected, but also armies of striking workers must be fed and clothed, the multitudes of the city must be immunized against diseases of filth, the transportation systems break down because cars and buses cannot get around the mountains of refuse, and things in general quickly go to an extreme degree of disrepair. Granted that some of these effects would have been present to some degree had there never been any garbage-collection system at all, it is clear that they become *much worse* because people had come to rely on the system.

SYSTEMANTICS, *supra* note 21, at 11-12.

59. See Peirce, *Dinosaur of the 70's: Zoning*, *The Sun* (Baltimore), May 30, 1977, § A, at 11, col. 1.

60. See *The Daily Record* (Baltimore), Oct. 3, 1977, at 1, col. 3.

are experts entitled to deference. Houston, Texas, has no zoning.⁶¹ I understand it is at least as attractive as Baltimore City, which has elaborate zoning.

2. *Electronic funds transfer* — Electronic funds transfer is proposed as a solution to the cumbersomeness of the present check system, in which checking account customers, the banks, and credit suppliers expend so much time keeping track of billions of pieces of paper. However, an electronic funds transfer system will produce many new problems: difficulties in proving payment because of absence of cancelled checks, vast opportunities for fraudulent input, alteration of programs to conceal overdrafts, sabotage of the central processing unit, obliteration of fortunes as a result of computer errors, unreliability of evidence, difficulties of proof, and redefinition of theft and related crimes to cover computer fraud in all the richness of the varieties that will undoubtedly develop.⁶² Is it worth going to this new and advanced system?

(2) *Le Chatelier's Principle*⁶³ — *Systems tend to oppose their own proper functions.*⁶⁴

A. *Discussion* — This is true because systems develop goals of their own as soon as they are created. Intrasystem goals come first, and one basic goal of all systems is survival. Hence, the system that performs a certain function will tend to continue to perform regardless of disappearance of the need for its service or of other changes in conditions. The system will keep pushing in the same direction even though the direction ought to be changed.⁶⁵

B. *Examples*

1. *The civil service system* — *The Wall Street Journal* ran a long feature article⁶⁶ on the civil service system which was originally designed to insure merit in government employees. By a series of logical steps this system has done just the opposite. The civil service regulations fill twenty-one volumes and are five feet thick. Among other things, these regulations prevent reassignment

61. See Peirce, *supra* note 59.

62. See *The Daily Record* (Baltimore), Mar. 17, 1977, at 1, col. 2. For a discussion of computer forgery problems, see *Computer Crime: A Growing Corporate Dilemma*, 8 MD. L. FORUM 48 (1978).

63. See H.L. LE CHÂTELIER, LOI DE STABILITÉ DE L'ÉQUILIBRE CHIMIQUE (1888).

64. SYSTEMANTICS, *supra* note 21, at 23.

65. Dr. Gall has referred to this principle as the Newtonian Law of Inertia as applied to systems. SYSTEMANTICS, *supra* note 21, at 57.

66. *Wall St. J.*, Sept. 26, 1977, at 1, col. 1.

according to talent. In 1976, "merit" pay raises were denied to only 600 out of the one million employees entitled to be considered for such raises. Almost every civil service department has what is known as a "turkey farm," a special division to house incompetent workers doing jobs where they can do minimum damage. (Peter calls this the "lateral arabesque").⁶⁷ Firing an employee who resists being fired is almost impossible. The deputy commissioner of the Social Security Administration is quoted as saying that "[t]o fire an employee you've got to be willing to spend most of your time for several months documenting and defending your decision."⁶⁸ If the employee challenges the dismissal, a trial will involve even more time. Appeals take years.

Administrators in general have to work around the system to get anything done. In September of 1977, *The Sun* ran an article⁶⁹ on consultants to government agencies who are paid large fees for doing what government agencies are staffed to do themselves. In the meantime, the government employees spend their time doing "liaison" with the consultants. When asked how many consultant contracts it had and what they cost, government officials didn't even know. The Office of Management and Budget found 34,000 such contracts costing \$1.8 billion. The Civil Service Commission found only 10,700 contracts. When HEW tried to find out how much it spent on consultants, it hired a consultant at \$378,000.⁷⁰ Consultants are also used as a popular means to avoid personnel ceilings, or to "hide" information that would be subject to the Freedom of Information Act if it were left in the government's own files.

2. *Licensing and regulation* — Licensing also tends to eliminate price competition by limiting the number of businesses.⁷¹ Once the field is limited, each business has enough of the market not to be so hungry as to want to threaten market stability by vigorous price competition. It is by now well understood that regulatory

67. THE PETER PRINCIPLE, *supra* note 31, at 38-39.

68. Wall St. J., Sept. 26, 1977, at 27, col. 3. Since this speech was given a new bill has been enacted which promised to revitalize the civil service and redesign it to provide for maximum effectiveness. The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, has, for example, expanded the oversight function of the Merit Systems Protection Board and hypothetically strengthened its ability to prevent merit abuses. Although it is doubtful whether these or any other reforms could solve the problems of the civil service, only time will tell what effect this Act will have on the civil service system.

69. The Sun (Baltimore), Sept. 27, 1977, § A, at 1, col. 1.

70. *Id.* at 11, col. 1.

71. See The Daily Record (Baltimore), Aug. 2, 1977, at 1, col. 2.

agencies turn into protectors of the special interest groups they are supposed to regulate. The Interstate Commerce Commission prevents competition in the trucking industry, and the Civil Aeronautics Board refused to allow lower transatlantic fares, which eventually came about only because the President overruled the Civil Aeronautics Board.⁷²

(3) *The Generalized Uncertainty Principle (GUP).*⁷³

A. *Discussion* — This principle tells us that the essential characteristic of even simple systems is that they behave in incredibly complex and unpredictable ways. *Any complex system will always have unpredicted side effects.* The GUP was foreseen by an early impressionistic observer, who noted that “there be three things which are too wonderful for me, yea, four which I know not: the way of an eagle in the air; the way of a serpent upon a rock; the way of a ship in the midst of the sea; and the way of a man with a maid.”⁷⁴ This principle received more obscure elucidation by the learned Buckminster Fuller in his \$25 volume called *Synergetics*,⁷⁵ a term which he defines as “the behavior of whole systems unpredicted by the behavior of their parts taken separately.”⁷⁶

The GUP has two useful corollaries: (1) “Under precisely controlled experimental conditions, a [system] will behave as it damn well pleases”;⁷⁷ and (2) “a large system, produced by expanding the dimensions of a smaller system, does not behave like the smaller system.”⁷⁸ (What two aspirins will relieve, twenty aspirins will not relieve ten times as fast.)

B. *Examples* — Applications of the GUP abound.

1. *In the natural world* — DDT and other pesticides have created a tremendous and originally unanticipated ecological problem.⁷⁹ Spray cans may deteriorate the ozone layer of the atmosphere.⁸⁰ Birth control pills may cause heart disease.⁸¹ Radium treatments, which were a treatment of choice for enlarged tonsils

72. See *The Sun* (Baltimore), Aug. 31, 1977, § A, at 9, col. 2.

73. SYSTEMANTICS, *supra* note 21, at 19.

74. *Proverbs* 30:18-19.

75. R.B. FULLER, *SYNERGETICS* (1975).

76. *Id.* at 3.

77. SYSTEMANTICS, *supra* note 21, at 19 (initial capitals omitted).

78. *Id.* at 22 (initial capitals omitted).

79. See generally, R. CARSON, *SILENT SPRING* (1964).

80. See *The Sun* (Baltimore), May 12, 1977, § A, at 1, col. 4.

81. See *The Sun* (Baltimore), Dec. 6, 1976, § A, at 1, col. 4.

and adenoids in the past, are now known to cause thyroid cancer in adult life.⁸²

2. *In the legal order*

(a) *Desegregation* — Although intended to integrate the races, desegregation of the public school system has resulted in the spread of urban school segregation by stimulating white flight.⁸³

(b) *Freedom of Information Act*⁸⁴ — Compliance with the Freedom of Information Act has required the FBI to keep 400 agents busy on FOIA requests at a cost of \$11 million per year.⁸⁵ *The Sun* of May 9, 1977⁸⁶ reports that, in obedience to this law, the FBI made available 970 pages of its hitherto secret manual of agent's instructions to an inmate sentenced to 35 years in an Illinois federal penitentiary for bank robbery and narcotics violations. Included in this information was the type of tear gas used by the FBI, and instructions on how to avoid being incapacitated by it. The tear gas, of course, is the kind used to control prison riots in Illinois.

(c) *Rent control* — Prolonged rent control, a well-motivated scheme of social legislation, has in fact led to urban decay by discouraging new housing supply, reducing the incentive for maintenance and repair, and encouraging abandonment or withdrawal from the rental market. It has often helped people who can afford to pay higher rents, and encouraged older tenants to remain in apartments that are larger than they really need. To this extent rent control has deprived young people of larger apartments that might be available in an open market.⁸⁷

(d) *Property taxation* — High property taxation and current reassessment covering home improvements have discouraged improvements in tenement properties and contributed to the growth of slums.⁸⁸

(e) *The ruling against discrimination by private academies* — In June 1976, the Supreme Court ruled that private

82. See *The Evening Sun* (Baltimore), Jan. 17, 1977, § C, at 2, col. 3.

83. See *New York Times*, Sept. 3, 1976, § IV, at 14, col. 1.

84. 5 U.S.C. §§ 552-552b (1976).

85. *The Daily Record* (Baltimore), Apr. 23, 1977, at 1, col. 2.

86. *The Sun* (Baltimore), May 9, 1977, § A, at 3, col. 1.

87. See Peirce, *Rent Control Pits Landlord Against Tenant as Housing Declines*, *The Sun* (Baltimore), Aug. 8, 1977, § A, at 9, col. 1.

88. Rybeck, *Site Value Taxation*, 9 J. OF HOUSING 454 (1977).

academies may not discriminate on the basis of race.⁸⁹ So far, the only practical effect of the decision has been to hinder integration. The nominally "open" policy which such schools must follow has actually solved their financial problem. These private academies now qualify for tax exemption and federal aid, but except for a few blacks in the schools that were parties in the Supreme Court case,⁹⁰ none of the schools has any black students. Nor must they accept new black students; the Supreme Court decision left the schools free to exclude blacks for reasons other than race. In fact, because the schools are free to teach the desirability of segregation, many black parents have not been anxious to enroll their children in these schools. Nevertheless, because these schools are officially non-discriminatory they may be fully entitled to financial aid.⁹¹

(f) *The minimum wage* — Raising the minimum wage increases unemployment.⁹²

(g) *The ERA* — As a result of the Maryland Equal Rights Amendment,⁹³ husbands are no longer subject to criminal nonsupport liability⁹⁴ and wives are liable for alimony⁹⁵ and support of children.⁹⁶ A federal ERA, if adopted, may make women liable to military draft and combat duty, and sanction a general refusal of men to accept these military duties until women are equally subject to them.

(h) *The Maryland Coastal Facilities Act*⁹⁷ — The Maryland Coastal Facilities Act was designed to protect the Maryland coastal areas against a piecemeal placement of oil refineries by setting up a system of state control over procedures for refinery siting. Although the Maryland government would like to attract oil companies to develop off-shore oil reserves, the *Sunpapers* report that the existence of the Coastal Facilities Act has discouraged oil companies interested in off-shore drilling in Maryland.⁹⁸ Maryland officials say that the companies' fears are unfounded.

89. See *Runyon v. McCrary*, 427 U.S. 160 (1976).

90. See *The Sunday Sun* (Baltimore), June 5, 1977, § A, at 1, col. 4.

91. *Id.* at 7, col. 1.

92. See *The Sun* (Baltimore), Sept. 2, 1977, § A, at 5, col. 3.

93. MD. CONST., Decl. of Rts., art. 46.

94. *Coleman v. State*, 37 Md. App. 322, 377 A.2d 553 (1977) (subject to final ruling by the Court of Appeals).

95. MD. ANN. CODE art. 16, § 3 (Cum. Supp. 1977).

96. *Rand v. Rand*, 280 Md. 508, 374 A.2d 900 (1977).

97. MD. NAT. RES. CODE ANN. §§ 6-501 to 511 (Cum. Supp. 1977).

98. *The Sunday Sun* (Baltimore), Sept. 4, 1977, § K, at 7, col. 1.

Even if this is true, the system set up by the Act nevertheless has resulted so far in frustrating a purpose of the system.

(i) *Sunshine Acts*⁹⁹ — The existence of these laws, which require public agencies to hold their meetings in public, has transferred much agency business to executive session or informal private “pre-meetings.”¹⁰⁰

(j) *Statutory drafting* — Statutory ambiguities are among the most common examples of the GUP. In this case the uncertainty stems from language, one of the most slippery and unpredictable of all systems. For example, a recent bill¹⁰¹ in the Baltimore City Council, which was intended to promote decorum at baseball games, made it a crime to throw anything on the field during a game. It took a while before someone realized the wording of the bill would have made a criminal out of every pitcher; but for every drafting misfortune that is caught before enactment, at least three escape detection.

(4) *The Fundamental Failure Theorem*¹⁰² — *Any large system is going to spend most of its time in failure mode.*¹⁰³

A. *Discussion* — This rule has several corollaries. (1) The true test of system performance is not whether it fails but how gracefully it fails; (2) a fail-safe system can never fail gracefully because it can only fail by failing to fail safe;¹⁰⁴ (3) “[t]he mode of failure of a complex system, cannot ordinarily be predicted from its structure”¹⁰⁵ — the crucial variables are all discovered by accident;¹⁰⁶ (4) the larger the system, the greater the probability of unexpected failures; (5) “success” or function in any system may produce failure in the larger or smaller systems with which the system is connected; and (6) systems fail most gracefully, and sometimes even work, when they are designed to run downhill¹⁰⁷ (*i.e.*, with physical inertia

99. See, e.g., 5 U.S.C. § 552b (1976); MD. ANN. CODE art. 76A, §§ 7 to 15 (Cum. Supp. 1977).

100. See The Daily Record (Baltimore), *supra* note 85.

101. Baltimore, Md., Ordinance 521 (Nov. 7, 1977) (City Council Bill 921, Oct. 31, 1977).

102. “A System Can Fail in an Infinite Number of Ways.” SYSTEMANTICS, *supra* note 21, at 62. This is, it will be seen, a more elegant formulation of Murphy’s Law.

103. See *id.* at 61.

104. See *id.* at 66.

105. *Id.* at 62 (initial capitals omitted).

106. *Id.* at 63.

107. *Id.* at 70.

or human weaknesses) and are loosely controlled.¹⁰⁸ These six principles are so obvious that they need no discussion so I will proceed to the examples.

B. *Examples*

1. *State Health Department Regulation D*¹⁰⁹ — Out of a laudable desire to protect persons in mental institutions, civil rights advocates persuaded the State Health Department to pass Regulation D, which requires that all persons in mental institutions be given a hearing within five days of admission. At this time they must be released unless the hearing officer determines that they are dangerous to themselves or others. Many people are not dangerous, but need care. There are not sufficient group homes, nursing homes, or other facilities for them.¹¹⁰ Their families cannot take care of them and often put them in the institutions in the first place. The vindication of their civil rights has left many unfortunate people out on the streets without the care they need. The system as a whole is operating in failure mode. The success of that part of the system designed to protect civil rights is a contributing factor to the total mental health system failure.

2. *The California dropout law*¹¹¹ — In 1972, California passed a law permitting students sixteen or older to drop out of high school if they passed a graduation equivalency test. The object of this law was to weed out youngsters who were bored with school. In order to discourage dropping out, the tests were designed so that only fifty percent of the normal graduating class would pass. In 1976, another bill was passed which required regular graduates to meet certain proficiency standards. The examinations administered to test proficiency under this law, however, were easier than the dropout examinations because society would not tolerate a fifty percent failure rate which hindered minority students from graduating.¹¹² Thus, in California, when employers want employees with a high school education, they now concentrate their recruiting efforts on dropouts. A compassionate concern with disadvantaged people, and the institution of a rational policy to discourage dropouts have turned the school system as a whole on its head.

3. *Negotiated bids for public architectural and engineering contracts* — The evils of negotiated bids for architectural and

108. See *id.* at 71.

109. Code of Md. Regs. 10.21.01 (1977).

110. See *The Sun* (Baltimore), Feb. 5, 1977, § A, at 7, col. 1.

111. CAL. EDUC. CODE (Reorg.) §§ 51420–51427 (West 1978).

112. See *The Sun* (Baltimore), Mar. 17, 1977, § A, at 3, col. 5.

engineering contracts with public agencies are well known. Not long ago, Maryland enacted a statute requiring competitive bidding in all such cases.¹¹³ However, the new system has put smaller firms at a disadvantage. It has promoted wrangles over whether the quality of work of the low bidder would be adequate and has delayed projects whose bids are argued over, and projects sometimes have to be rebid. In 1977, the Maryland Senate enacted a bill to repeal the compulsory competitive bidding statute as an unworkable law,¹¹⁴ but the bill was killed in the House.¹¹⁵ Neither the old system nor the new is entirely satisfactory. Yet neither system really matters; we will chug along on half our cylinders in failure mode whatever system we adopt.

4. *Right to work laws* — Section 14(b) of the Taft-Hartley Act¹¹⁶ permits the states to pass right-to-work laws, prohibiting compulsory union membership. Unions have opposed such legislation around the country and have been strong enough to block it in most states. However, in the sunbelt states, from Arizona to Florida, where organized labor is weakest, such laws have been passed as part of a successful effort to lure businesses from the industrialized north and east.¹¹⁷ The Congressmen philosophically in favor of right-to-work laws include many Republicans from industrial states who, by voting to retain section 14(b), actually help their own states lose businesses. Whether these Congressmen vote their consciences or their constituents' wishes, they inevitably operate in failure mode.

5. *Police emergency vehicles* — A recent *Sunpapers* article¹¹⁸ reports that several years ago, sirens were removed from Baltimore City police cars because it was shown they contributed to accidents. Tall city buildings created a canyon effect that cancelled out the sirens of two police cars answering the same emergency. As a result, police vehicles travelling at high speeds tended to collide. When a police car travels without a siren, however, state law prohibits it from speeding or going through red lights, even in emergencies.¹¹⁹ Our police emergency system is operating in failure mode.

6. *The Kennedy assassination* — To date, one of the most interesting theories of the Kennedy assassination is that of a

113. MD. ANN. CODE art. 78A, § 7 (Cum. Supp. 1977).

114. See *The Sun* (Baltimore), Apr. 6, 1977, § C, at 1, col. 4.

115. See *The Sunday Sun* (Baltimore), Apr. 10, 1977, § B, at 1, col. 6.

116. 29 U.S.C. § 164(b) (1976).

117. See *The Evening Sun* (Baltimore), Feb. 25, 1977, § A, at 11, col. 3.

118. *The Sun* (Baltimore), July 16, 1977, § B, at 18, col. 6.

119. MD. TRANSP. CODE ANN. § 21-106 (1977).

Maryland gun expert.¹²⁰ This expert contends that there was more than one gun, and that the fatal bullet came from a gun of a secret service man who accidentally discharged it while trying to protect the president. The merit of this theory has yet to be shown; however, its consistency with the Fundamental Failure Theorem of systemantics surely enhances the theory's credibility.

7. *The judicial system* — The judicial system is overloaded. This seems to be Chief Justice Burger's main preoccupation at the moment. Courts cannot keep up with their workloads. They have responded to this dilemma by trying to get rid of cases without deciding them, and when they do decide cases, they act less and less like courts. The courts have resorted to such techniques as blessing plea bargaining, giving a greater role to law clerks, and drastically curtailing or even eliminating oral argument. They have taken to deciding cases in unpublished opinions which are of no precedential value and which Maryland lawyers are even prohibited from citing.¹²¹ Their published opinions are not much more help; they are so muddy and verbose that the simplest research is incredibly time consuming and expensive. In New York, I am told, the rule of thumb is that if a matter involves less than \$100,000, it just does not pay to litigate it.

Paradoxically, however, as anxious as the courts seem to be to stem the tide of cases, they are at the same time launching into vast new areas, providing broad affirmative remedies, assuming almost executive powers in public interest litigation, and subordinating the litigants' cases to broader interests of judicial policy making.¹²² Their work is multiplied by some 150,000 new laws and regulations a year, each of which is a possible source of new questions.¹²³ The new issues are "polycentric," that is, not focused on whether judgment should be given for plaintiff or defendant, but on what is the best solution to a complicated problem; and the decisions are much

120. Reppert, *Kennedy Assassination: A Different View*, The Sunday Sun (Baltimore), May 8, 1977, (Magazine), at 12, 14.

121. Md. R.P. 891(a)(2).

122. See, e.g., *Blonder-Tongue Lab., Inc. v. University of Ill. Fdn.*, 402 U.S. 313 (1971) (doctrine of res judicata took precedence over plaintiff's rights to maintain a valid, unfringed patent); *Mapp v. Ohio*, 367 U.S. 643 (1961) (application of the exclusionary rule prevented the State of Ohio from convicting a criminal); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (imposing state law in a diversity case deprived injured plaintiff of his recovery). It is worth noting that the Supreme Court decided *Mapp* and *Erie* on grounds other than those raised by the victorious party in each case (although *Mapp* was decided on a basis urged by an amicus curiae. *Id.* at 646 n.3.).

123. See NEWSWEEK, Jan. 10, 1977, at 43.

harder to implement and require much more supervision.¹²⁴ Cases today are bigger, slower, and more expensive. Some examples are school desegregation cases which in effect legislate how the school system shall be run, cases which legislate how the prison system should be run, and cases which legislate how mental institutions should be run. The problem has arisen in typical bureaucratic fashion. In the words of one commentator, "although no single feature of most of this litigation constitutes an abrupt departure, the aggregate of features distinguishes it sharply from the traditional exercise of the judicial function The tendency is not idiosyncratic but systemic."¹²⁵

8. *The Federal riot insurance program*¹²⁶ — The Federal riot insurance program was designed to encourage the reestablishment of ruined businesses located in riot areas by providing liberal insurance for reestablished businesses. The program is so good that it has encouraged organized crime to offer a complete insurance-fraud-and-arson package, which includes obtaining the insurance at inflated values, burning down the building, and collecting and dividing the proceeds. According to a recent report, Senator Percy has called for an investigation.¹²⁷ The chief failure of this system is too much success.

(5) *The Laws of Growth* — The basic rule is, *systems tend to persist and grow*.

A. *Discussion* — Subrules of growth are: (1) any system tends to grow at the rate of five or six percent per year (somewhere near the general inflation rate)¹²⁸ regardless of the amount of work to be done; (2) any system tends to expand and encroach until it is stopped either by a system expanding in the opposite direction or by a miracle; and (3) the growth of any system is stimulated by the presence of agencies established to promote system reduction and simplification.

B. *Examples*

1. *Government reorganization* — The first immediate effect of President Carter's effort to reorganize the government has been

124. Nelson, *The Courts Are Moving Into New Areas*, *The Sunday Sun* (Baltimore), Feb. 6, 1977, § K, at 2, col. 1.

125. Horowitz, *Are the Courts Going Too Far?*, COMMENTARY, Jan. 1977, at 37, 39. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

126. 12 U.S.C. § 1749bbb (1)-(21) (1976).

127. See *The Sun* (Baltimore), Aug. 30, 1977, § A, at 6, col. 6.

128. SYSTEMANTICS, *supra* note 21, at 9. As the general inflation rate grows, the five or six percent rise for system growth may be too low.

an increase in the White House staff to work on reorganization and to answer all the mail that reorganization plans have encouraged on the subject.¹²⁹

2. *Growth necessary to explain simplification* — *The Daily Record* of June 4, 1977, published the following notice:

Maryland State Comptroller Louis L. Goldstein announced that many State income taxpayers will be affected by provisions of the new Federal Tax Reduction and Simplification Act regarding sick pay exclusions. "Maryland will now honor sick pay exclusion claims which were not allowed prior to the recent change in Federal law. If you are eligible for a sick pay exclusion, you should obtain a revised Federal Form 2440 and submit a copy of it together with an amended Maryland income tax form (502X)," Mr. Goldstein said.

The Comptroller noted that many Marylanders had requested extensions of time to file their State income tax returns in expectation of the change in Federal law. "If you received an extension, you should file an original Form 502, together with a copy of the Federal Form 2440," he said.

Taxpayers who are retired on disability and elected to recover their pension contribution costs on their 1976 Maryland income tax return, believing that the sick pay exclusion would not be available to them, should recompute their 1976 State income tax using the newly reinstated sick pay exclusion. It may be more beneficial to the taxpayer in the long run to file an amended Maryland income tax return for 1976, claiming the sick pay exclusion, and recover the annuity costs in next year's State income tax return.

Additional information and assistance may be obtained by telephoning 269-3116 in the Baltimore-Annapolis area, or any branch office of the Maryland Tax Division listed in local telephone directories.¹³⁰

3. *A happy counter-example* — On rare occasions, a system can be stopped in its tracks by sheer force of character. When Paul (Red) Adair arrived at the scene of the North Sea oil fire he was hired to fight, he was approached by a government supervisor armed with a rule book. Adair walked off the job and refused to go back until the bureaucrat left.¹³¹ Because the system needed Adair so

129. See *The Sunday Sun* (Baltimore), June 5, 1977, § A, at 3, col. 5.

130. *The Daily Record* (Baltimore), June 4, 1977, at 1, col. 1.

131. See *The Sun* (Baltimore), May 11, 1977, § A, at 5, col. 1.

badly, the bureaucrat left. Needless to say, in that instance the system worked.

- (6) *Functionary's Falsity or Korzybski's Semantic Anomaly — "People in systems do not do what the system says they are doing."*¹³²

The systems analogue to this law is the operational fallacy: "the function performed by a system is not operationally identical to the function of the same name performed by a man. In general, a function performed by a larger system is not operationally identical to the function of the same name performed by a smaller system."¹³³

Discussion and Examples — Kings don't rule. University scholars don't do much creative thinking. The People's Republic of China is not the People's nor is it a republic. The Communist experiment in Russia has not produced a classless society or the withering of the state. And despite the American's creed, the states of the United States are not sovereign.

The Social Security system, which was designed to provide old age and survivors' benefits in the nature of insurance, has recently been shown to provide far less social security than if the monetary contributions had been invested in a plain savings bank passbook account.

Perhaps the most touching example of Functionary's Falsity is a recent elaboration of the bankruptcy system. This system is supposed to give relief to poor people overburdened by debts. The Supreme Court has recently held that a person who was so broke he could not pay the bankruptcy petition filing fee could not have the benefit of the Federal Bankruptcy Act.¹³⁴

- (7) *The Fundamental Law of Administrative Workings (FLAW)*¹³⁵ — *The system treats what is reported to it as real: the outside reality is immaterial.*

A. *Discussion —* As Dr. Gall stated, "the bigger the system, the narrower and more specialized [are its contacts] with individuals."¹³⁶ This leads to Functionary's Fault, "a complex set of [hallucinating] malfunctions induced in a Systems-person by the

132. SYSTEMANTICS, *supra* note 21, at 33 (initial capitals omitted).

133. *Id.* at 35 (initial capitals omitted).

134. *United States v. Kras*, 409 U.S. 434 (1973). See generally Schwartz, *Locking the People Out of the Federal Courts*, *The Sunday Sun* (Baltimore), Jan. 23, 1977, § K, at 3, col. 1.

135. See SYSTEMANTICS, *supra* note 21, at 39.

136. *Id.* at 42 (emphasis omitted).

System itself, and primarily attributable to sensory deprivation."¹³⁷ The specialist sees things only from the perspective of his specialty. It is these hallucinations rather than simple incompetence that cause the strange behavior of systems-people. The ultimate result of the FLAW is known as a systems-delusion, or the hallucination that the system is really doing what it is supposed to be doing.¹³⁸ This can happen when the system claims credit for outcomes it really has nothing to do with (manager's mirage),¹³⁹ or equates input with output (Peter's inversion, also called Orwell's inversion).¹⁴⁰ Furthermore, systems tend to attract the people most prone to these systems delusions. The only exception to this rule is that systems also attract clear-headed people who become parasites on the system; they become comfortable accomplishing little and drawing a salary.¹⁴¹

One form of systems delusion is Functionary's Pride,¹⁴² which Shakespeare called the "insolence of office."¹⁴³ Take the example of "judicial electricity" provided by Wisconsin Judge Archie Simonson who lost a recall election held because of his provocative remarks on sexual provocation.¹⁴⁴

B. Examples

1. *Functionary's Fault, or Specialist's Myopia*¹⁴⁵ — Systems tend to break problems down into very narrow segments, and then deal with the segments one at a time. Here are two examples of specialist's myopia:

(a) The Food and Drug Administration is supposed to see that our food and drugs are pure and safe. It recently proposed a regulation to allow dairy products in ice cream to be replaced by milk derivatives, including a cheap import, sodium caseinate. Opponents claimed that this action would result in less use of surplus

137. *Id.* at 43.

138. *See id.* at 45.

139. *Id.* at 46.

140. *Id.*

141. *See id.* at 47-48.

142. *Id.* at 44.

143. W. SHAKESPEARE, *HAMLET* Act III, sc. i, l. 73.

144. The recall election was prompted by Judge Simonson's suggestion that the rape of a young high school girl in a high school stairwell might merely have been a normal reaction to the general sexual permissiveness and provocative style of dress prevalent in today's society. This viewpoint led Judge Simonson to sentence the fifteen year old assailant to court supervision at home. *See The Daily Record* (Baltimore), Sept. 19, 1977, at 1, col. 3. Judicial electricity, incidentally, is a kind of Functionary's Pride that was defined by the late Paul Berman as a highly positive charge generated by prolonged contact between an ass and a bench.

145. SYSTEMANTICS, *supra* note 21, at 43.

dried milk and would require increased milk price subsidies by the Department of Agriculture, costing the taxpayers a great deal more money. The FDA Commissioner responded that those considerations are "beyond the reach of the FDA's statute. We are caught up in a chain of events that no single agency can address."¹⁴⁶

(b) *Malpractice and products liability* — In making their decisions courts look essentially to the things that they can deal with comfortably, that is, statements made by other courts and other legal sources or authorities. They also break problems down into small units. A legal mind, in fact, has been defined as a mind capable of treating inseparable things as if they were totally distinct from one another. The malpractice and products liability problems, much in the news recently,¹⁴⁷ illustrate this FLAW. Step by consistently logical step, the liability law has developed to a point where the total effect is itself a serious problem not considered whole by those dealing with its parts. The overall result has been the evaporation of insurance opportunities; the tremendous increase in the cost of any available insurance; the practice of defensive medicine, including the proliferation of x-rays, which have their own dangers;¹⁴⁸ a great increase in cost of services and products; a greater number of uninsured products and manufacturers; and withdrawal of medical and scientific professionals in some areas, such as California, where the problem is most acute. Salvation, however, is at hand. The U.S. Interagency's Task Force has released a 1,500-page study of the problem.¹⁴⁹

2. *Systems delusion* — On October 5, 1977, *The Sun* carried an interesting story of a speech given by Leonid Brezhnev in which he defended the Soviet Union against charges that it has failed to achieve the Marxian objective of withering away of the state. He said the Soviet Union had achieved "developed socialism," a "legitimate stage in the development of the State born of the October Revolution" and an "indispensable element . . . a relatively long stretch on the path from capitalism to communism," which will come "in a future that does not lie beyond the limits of the present."¹⁵⁰ This system does not believe in failure, so it pronounces its failure as success, and may succeed in deluding its constituents that what the system is producing is what the constituents really want.

146. *The Sun* (Baltimore), Aug. 3, 1977, §A, at 1, col. 1.

147. *See, e.g.*, *The Daily Record* (Baltimore), Jan. 22, 1977, at 1, col. 5.

148. *See, e.g.*, *The Evening Sun* (Baltimore), *supra* note 82.

149. *See The Daily Record* (Baltimore), Apr. 12, 1977, at 1, col. 1.

150. *The Sun* (Baltimore), Oct. 5, 1977, §A, at 6, col. 1.

The Russians are often one up on us in this kind of thing. Why didn't we declare that we won the Vietnam war and pull out a long time before we did?¹⁵¹

3. *Peter's inversion*¹⁵² — Peter's inversion and systems delusion combine to produce an interesting result in the case of legal fees. Consumerism has convinced clients that the real output they should be paying for is the input of the lawyers they employ. Thus, clients are much happier to pay a high legal bill duly itemized by hours and hourly rates than to pay a lump sum bill for less. This is true even though the itemized bill may be higher only because a relatively incompetent lawyer had to spend more time than was necessary on the matter. The Peter's inversion and systems delusion have produced a real consensus that people should be paid for time and effort rather than results; output has been completely confused with input.

(8) *Administrator's Anxiety — Pushing on the system to make it work is counterproductive.*¹⁵³

A. *Discussion* — "Big systems either work on their own or they don't."¹⁵⁴ You can't make them work, any more than you can make an elevator come faster by leaning on the call button. Hence, a working system (and by happy accident, systems sometimes work) should be left alone. However, if a system is not working, immaterial changes can always be made because the illusion of purposeful activity is comforting.

B. *Examples*

1. *Code revision* — The Maryland Code Revision Commission, of which I am a member, has been working very hard to simplify and purify the statutory law of Maryland. The total cost of this effort will run into the millions of dollars, not to mention the untold hours of volunteer time. The result will be to make a great deal of extra work for everyone who finally mastered the old law, and double the work for anyone trying to work with the new law. This is because changes in language of a recodification are presumed not to change the meaning of the prior law, and therefore

151. Paul Berman, by the way, had a pithy definition of systems delusion: it is the capacity to believe the system when it tells you that the water it is making in your face is really rain.

152. See text accompanying note 47, *supra*.

153. SYSTEMANTICS, *supra* note 21, at 50.

154. *Id.* (emphasis omitted).

no matter what the new statute appears to say, the old statute must also be consulted in order to be sure of what the new statute means. Furthermore, in accordance with the Fundamental Theorem and the Generalized Uncertainty Principle, the recodification will necessarily produce new mistakes and ambiguities all its own.

2. *The Indiana milk regulations* — Indiana health authorities have issued a regulation which requires warm fresh milk to be cooled to fifty degrees Fahrenheit within two hours. Forbidden by their religion to use electricity, Amish farmers use ice or cold water for cooling, which ultimately cools the milk as well as electricity but cannot bring the temperature below seventy degrees in two hours. In the past, there has never been any trouble with Amish milk. Being law abiding people without much political power, the Indiana Amish have responded to this legislation by selling their cows and getting out of the dairy business.¹⁵⁵

(9) *The Functional Indeterminacy Theorem*—

“In complex systems, malfunctions and even total nonfunction may not be detectible for long periods, if ever.”¹⁵⁶ Moreover, the larger and more complex the system, the more difficult, if not impossible, the system becomes to evaluate.¹⁵⁷

Discussion and Examples — The complexity of both the human body and the ecological system make it impossible to predict many of the problems that ultimately result from present actions. In fact, long periods of time may elapse before we can even tell that things we do are causing malfunctions. Unwanted side effects do not appear until after the damage is done, and then interested groups can produce sufficient confusion about its causation to paralyze any effort at correction. And even after the evidence is clear, the malfunction may be preferred to any alternative. Millions of people, for example, are still heavy cigarette smokers.

The legal system is a seamless web that is at least as complex as the human body or an ecosystem. There is no way to measure the effects of a statute or a decision until it has been in operation for some time. By that point its effect mingles with a lot of other causes and effects and cannot be isolated. For example, it took a long time for people to see that government programs have been damaging family life. Welfare and social security regulations have discouraged marriage. Military families have been moved every two or three

155. See *The Sun* (Baltimore), Jan. 1, 1977, § A, at 3, col. 3.

156. SYSTEMANTICS, *supra* note 21, at 55 (initial capitals omitted).

157. See *id.* at 56-57.

years, making it impossible for them to strike roots. Effective parental authority has been diminished by lowering the age of majority.¹⁵⁸ Systems become so lost among the trees that they lose sight of the forest.

- (10) *The Problem Theory*¹⁵⁹ — *Systems represent someone's attempt at solution to problems, but they do not solve problems; they produce complicated responses.*

A. *Discussion* — Solutions usually come from people whose qualifications would never satisfy a system selection committee. Great advances rarely come out of systems designed to produce great advances. Systems do not solve problems because each system is confined by existing conceptualizations, and real-world problems are solved by radical innovations, which, in turn, it must be admitted, produce new problems.

Individuals, and not crash programs discovered penicillin, radium, and the principles of relativity. Individuals invented the steam engine, the steamboat, the electric light, and the airplane. As William Whyte put it, while committees searched for improvements in pistons and propellers someone else invented the jet engine.¹⁶⁰

There are at least two laws of systemantics that Dr. Gall does not deal with. While they are not entirely original with me, they are important enough to be mentioned to round out Dr. Gall's systematic restatement of the field. They are as follows:

- (11) *The Devil-Take-The-Hindmost Syndrome* — *Individuals in a complex system will act for immediate gain even if the sum of such actions is in the long run a loss to the system as a whole and to all those who are a part of it — including the individuals in question.*

A. *Discussion* — The American system was set up on the theory that if every individual is free to promote his own interest, the common interest will be promoted. This, for instance, is the philosophy of collective bargaining, economic strikes, and much of our labor and business law. This assumption may be correct, insofar as life under any other system might be worse, but it is wrong in the sense that the substantive choices made by the individuals promoting their interests do not in fact add up to the best choice for the system and all interests within it.

158. See *The Sun* (Baltimore), Apr. 6, 1977, § A, at 5, col. 1.

159. SYSTEMANTICS, *supra* note 21, at 73-75.

160. W. WHYTE, JR., *THE ORGANIZATION MAN* 223 (1956).

B. *Examples*

1. *Labor and business costs* — The result of collective bargaining and economic strikes has been monetary inflation which endangers the whole society by shifting jobs and capital to places where business and labor do not threaten to price themselves out of the market.¹⁶¹ This is not to criticize labor or business. Why should they show more restraint in promoting their own interests than government employees or Congressmen?

2. *Oil refineries* — Right now the United States needs more oil refinery capacity on the east coast. To date there have been more than twenty attempts to build a refinery since this undisputed need has become apparent. In each case, however, the effort was defeated by determined local opposition which did not dispute the need, but insisted that it be met somewhere else "not near me."¹⁶²

3. *The rewards of achievement* — To many people it seems unfair that anyone should have rewards that others cannot possess. For example, it is undemocratic that only the elite have college diplomas or professional degrees. Therefore, colleges and professional schools should be open to all students who demonstrate a bare minimum of competence. The end result is that a diploma no longer is the certificate of competence it used to be, and many people find that they have invested sweat and tears in a piece of paper that represents a disappointed hope.

Indeed, this leveling process is not limited only to academic systems. All bureaucracies tend to give all the incompetents certificates of competence, so real competence becomes either meaningless or a threat to the system. The larger the system, the more openings for mediocrity. To the mediocre, mediocrity is merit. Senator Roman Hruska, for example, called for the confirmation of the nomination of Judge Carswell to the United States Supreme Court because the democratic ideal required that mediocrity be represented on that Court. Senator Hruska was a prophet ahead of his time.¹⁶³

161. See, e.g., *The Evening Sun* (Baltimore), *supra* note 117.

162. See *The Washington Post*, Feb. 22, 1977, § A, at 16, col. 1. See generally *The Washington Post*, Oct. 27, 1977, § C, at 2, col. 3 (Chesapeake Bay Foundation opposes proposed refinery in Baltimore harbor). *But see* *The Washington Post*, Dec. 15, 1977, § C, at 1, col. 1 (environmentalists and federal agencies oppose locally supported refinery project in Portsmouth, Va.).

163. *The New York Times*, Mar. 17, 1970, at 21, col. 1.

As Gilbert and Sullivan put it, if everybody is somebody then nobody is anybody.¹⁶⁴ But that has yet to stop people from trying to get these paper certificates before they are issued to everybody else.

4. *The behavior of Congress* — An article in *The Sunday Sun*¹⁶⁵ analyzed how institutional interests in Congress make it difficult for Congress to perform its main job of legislating and overseeing administrative policy. Members of Congress are concerned with being reelected.¹⁶⁶ The premium is on noncontroversial constituent service and pork-barreling rather than on taking a stand on controversial matters likely to make some voters angry. It is therefore not surprising that the solution to most problems is to increase bureaucracy. These increases mean more money for some district or state, more power for the Congressmen, and more opportunity for "constituent service" in dealing with the expanded bureaucracy. The public interest in good legislation is altruistic and diffuse, while the interests on the other side are selfish and immediate. Given these choices, the Devil-Take-The-Hindmost Syndrome is a fundamental basis for predicting how the institution will behave.

- (12) *The "Something for Everyone" Principle* — *Systems try to satisfy all needs of their people, and if they cannot do so in fact they try to do so with noble words.*

Discussion and Example — Because systems grow as their memberships increase, the needs of individual members are more likely to conflict. The system needs a unifying creed that will reconcile conflicts. Arnold recognized the symbolic value of such a unifying creed¹⁶⁷ and suggested that in order to fulfill its function as a unifying creed, the Constitution had to be vague enough to command the general assent of the conflicting interests in our society. The decisions of the Supreme Court *must* be obscure and

164. W. GILBERT & A. SULLIVAN, *GONDOLIERS* Act II.

165. Nelson, *Why Carter and the Congress Can't Agree*, *The Sunday Sun* (Baltimore), Aug. 7, 1977, §K, at 1, col. 1.

166. Election in a democratic society, especially to higher office, almost always requires qualifications which make for incompetence to perform the job. To get elected one usually needs the support of special interest groups and/or the silent majority. Moreover, query as to the soundness of mind and judgment of anyone who agrees to put himself through what must be undergone to be elected president. And is a person of such questionable competence and judgment the kind of man we want to be president? Because the president is a top man in an important system, Peter says the answer must be "Yes." In fact the election requirement guarantees that the Peter Principle will operate.

167. See T. ARNOLD, *THE FOLKLORE OF CAPITALISM* 25 (1937).

arcane so as to leave the justices ample leeway to reach an "acceptable" result in later cases as they arise; to let each contending interest believe that it has won something and that there is hope that in the next case it may win more; and to dramatize the apparent reconciliation of conflicting values, thereby keeping peace and assuring the community that objective and impartial answers to the hard questions are being supplied by experts.¹⁶⁸ The system must permit all the contenders to be able in good faith to appeal to the Constitution and to cite plausible precedents on their side. This perception explains why opinions are often written as if general principles do decide concrete cases.¹⁶⁹ They make the conflict between myth and reality disappear in a fog of learning.

Arnold overemphasizes the symbolic function of the Constitution at least a little. Some things do get settled, and some Supreme Court decisions are clear. When that happens, however, either the question has already been settled within the system and the Court decision is superfluous, or as in the *Dred Scott* case,¹⁷⁰ and the first income tax case,¹⁷¹ the Court has misconceived its function in American society and incurred what Chief Justice Hughes called a "self-inflicted wound."¹⁷² It has impeded its effectiveness by its own action. To the extent Arnold is right in stating that the existence of the adversary process is merely a myth, that trial by litigation really replaces the old notion of trial by battle, the system still succeeds in keeping the peace. Is this a small achievement?

168. *See id.* at 62-64.

169. Notwithstanding Justice Holmes. *See* Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870), reprinted in 44 HARV. L. REV. 725 (1931).

170. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

171. *Pollack v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

172. C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 50 (1928).