CRISIS AND PROPOSED SOLUTION:  
HALF A CENTURY OF CORPORATE LAW  

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“Greenmail” refers to purchases, at a premium over the market price, of shares of a corporation’s stock from persons making a takeover bid. Greenmail can be seen as an aspect of the self-regulatory process, the combination of business practices and legal formalities, which defines United States capitalism. The reality of the system characterized by greenmail, however, involves a good deal more than self-regulation.

Since considerably fewer than 51% of the corporation’s shares are involved, payment of greenmail does not itself guarantee retention of control by management. As takeover bids have become more common, therefore, additional techniques have been developed: creation of classes of stock bearing disproportionate voting powers (“super stock”), sale of particularly valuable properties (“crown jewels”) to make the takeover less attractive, and large bonuses available to incumbent management if the takeover succeeds (“golden parachutes”).

The need to deal with these complexities causes a corporation to incur massive fees for investment advisory and legal services to management. Purchase by a corporation of its own stock in a greenmail transaction must be accompanied by a “standstill” agreement halting further purchases by the takeover bidder if the particular payment is to serve its purpose, and the issuance of super stock must be defended as something which does not defraud existing shareholders, a defense that must also be established if the sale of corporate crown jewels and the payment of golden parachute bonuses are to pass judicial muster.

The problems involved in greenmail have been with us since it occurred to someone that a corporation could be controlled by something less than 50% of its outstanding shares. What makes greenmail troublesome today is that nothing in our system either adequately measures the value of control and/or provides legal guidelines for the regulation of the market in which control of a corporation is traded.

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I. Precedential Guides

In *Perlman v. Feldmann*, our legal process addressed the problem being described. The year was 1955, and the Second Circuit, which reversed the district judge's dismissal of the complaint, was at the time recognized as the *de facto* Supreme Court in the area of securities regulation.

Feldmann bought and sold interests in corporations and, during the days leading up to the Korean War, controlled Newport Steel Corporation, a producer with a large war-allocation of steel products. Feldmann's interest was purchased, at a considerable premium, by end-users of steel whose operations were threatened by the shortages of steel produced by the needs of the military. Largely because there was no evidence that the new stockholders were given price discounts, the district judge held that plaintiffs had not stated a cause of action.

On appeal, the Second Circuit Court of Appeals held that the control premium had to be shared with stockholders excluding the purchasers of Feldmann's interest. The decision produced a flurry of academic commentary attempting to fit the decision into the mosaic of existing decisions. The courts were less troubled by the hobgoblins of coherence and consistency. In 1962, in *Honigman v. Green Giant*, the Eighth Circuit Court of Appeals refused to apply the *Feldmann* rationale to a family owning all of the voting stock in a corporation which received a "premium" amount of new stock in exchange for the surrender of exclusive voting control. In that same year, in *Essex Universal Corp. v. Yates*, a three-judge panel of the Second Circuit Court of Appeals, faced with the need to define control, wrote three separate opinions which agreed only that a full trial would have to be held in the district court. The opinion by Judge Clark, the shortest of the three, had a footnote stating that "possible claims under the rule of *Perlman v. Feldmann* and other similar issues are not involved." Judge Clark had authored *Perlman v. Feldmann*.

At the time the *Feldmann* opinion was written, law in the field of securities regulation was centered on private lawsuits seeking

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1 219 F.2d 173 (2d Cir. 1955).
2 309 F.2d 667 (8th Cir. 1962).
3 305 F.2d 572 (2d Cir. 1962).
4 Id. at 580.
to enforce the Securities and Exchange Commission's Rule X-10b-5. That rule governed fraudulent practices in connection with the purchase and sale of securities. Cases brought under the rule subsequently involved issues such as reliance and scienter whose precise delineation was sufficiently technical in nature to preclude the conflicts among circuits that would produce a grant of certiorari by the Supreme Court.

Prior to the suit brought by Perlman, Feldmann's transaction had been attacked under the provisions of Rule X-10b-5. The Second Circuit Court of Appeals upheld dismissal of that suit, *Birnbaum v. Newport Steel Corp.*, by focussing on the provision of the Securities Exchange Act of 1934 that prohibits corporate insiders from retaining profits earned from short-swing (6-month) purchases and sales:

Section 16(b) . . . expressly gave the corporate issuer or its stockholders a right of action against corporate insiders using their position to profit in the sale or exchange of corporate securities. The absence of a similar provision in Section 10(b) strengthens the conclusion that that section was directed solely at that type of misrepresentation or fraudulent practice usually associated with the sale or purchase of securities rather than at fraudulent mismanagement of corporate affairs, and that Rule X-10b-5 extended protection only to the defrauded purchaser or seller.

A Rule 10b-5 claim could be stated under *Birnbaum* simply by alleging that acts of fraudulent mismanagement had an impact on the price of a corporation's securities. That allegation, as later cases made clear, would be sufficient for a claim of fraud in federal court in connection with the purchase or sale of the corporation's securities. The basis for this distinction between "purchase" fraud and "management" fraud was recognition of the fact that it was the law of the states, and not of the federal government, which was charged with the task of regulating acts of fraudulent mismanagement. The *Birnbaum* decision was therefore accepted by the bar as an example of the politically necessary doctrinal distinctions required by the coexistence of dual state and federal sovereignties in our federal system.

It took little more than a decade to expose the problems of the *Birnbaum* distinction. In 1968, the Second Circuit rendered an en
banc opinion in SEC v. Texas Gulf Sulphur Co.⁸ that was read by the bar as an attempt to clarify and settle the law of Rule X-10b-5. Profits from trading in the corporation’s stock had been made by persons who were aware of drilling results that indicated a mineral “strike.” The district judge, on the basis of undisputed expert testimony, had held that knowledge of those results was not “material” in terms of providing a basis from which the magnitude of the “strike” could be extrapolated. The Second Circuit Court of Appeals reversed on the basis that “insider trading activity, which surely constitutes highly pertinent evidence and the only truly objective evidence of the materiality of the . . . discovery . . . was apparently disregarded by the court below in favor of the testimony of defendants’ expert witnesses . . . .”⁹

This holding about trading demonstrating materiality, by merging the purposes of Section 16(b) and Rule 10b-5, made impossible the careful delineation of elements of fraud that had represented the response of the Second Circuit Court of Appeals to Kardon v. National Gypsum Co.,¹⁰ the decision which in 1947 first discovered that the Securities and Exchange Commission’s Rule X-10b-5 had created a cause of action for persons who brought or sold a corporation’s shares.

Kardon had been made possible by the fact that Rule X-10b-5 could be read to cover any case in which information was concealed in a transaction involving corporate securities. The year was 1947, and because more than a decade had passed since 1934, it did not seem relevant that the Securities Act of 1933 had focussed on the issuance of new securities and the 1934 Securities Exchange Act on the trading of securities. The idea that the purchase and sale of securities was a sufficient basis for federal jurisdiction only insofar as it had occurred in connection with one of those processes was a bit of statutory construction that, in 1947, seems not to have occurred to anyone.

The jurisdictional and venue provisions of the 1934 Act, moreover, gave federal courts the power to right wrongs which formerly could not be the subject of trial because the defendant had left the state. Consequently, the federal courts, after 1947, as in Perlman v. Feldmann, became the favored forum even where

⁸ 401 F.2d 833 (2d Cir. 1968).
⁹ Id. at 851.
the cause of action most likely to succeed involved state corporate law.

While the result reached in *Texas Gulf Sulphur* may have clarified the law of Rule 10b-5, the guidelines enunciated, because they were based on policies derived from Section 16(b) of the Exchange Act, as well as those underlying Rule 10b-5 promulgated under the Securities Act, clearly covered situations which Rule 10b-5 was not intended to reach. That realization came in 1975, in the case of *Blue Chip Stamps v. Manor Drug Stores*, where the Supreme Court stated:

We quite agree that if Congress had legislated the elements of a private cause of action for damages, the duty of the Judicial Branch would be to administer the law which Congress enacted; the judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability. But as we have pointed out, we are not dealing here with any private right created by the express language of section 10(b) or of Rule 10b-5. No language in either of those provisions speaks at all to the contours of a private cause of action for their violation. However flexibly we may construe the language of both provisions, nothing in such construction militates against the *Birnbaum* rule. We are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question. Given the peculiar blend of legislative, administrative, and judicial history which now surrounds Rule 10b-5, we believe that practical factors to which we have adverted, and to which other courts have referred, are entitled to a good deal of weight.

Thus we conclude that what may be called considerations of policy, which we are free to weigh in deciding this case, are by no means entirely on one side of the scale. Taken together with the precedential support for the *Birnbaum* rule over a period of more than 20 years, and the consistency of that rule with what we can glean from the intent of Congress, they lead us to conclude that it is a sound rule and should be followed.\(^\text{12}\)

Searching their law for aids in the task of giving content to *Blue Chip*, circuit courts rapidly discovered that "precedential support for the *Birnbaum* rule" was, to put it politely, somewhat

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\(^{11}\) 421 U.S. 723 (1975).
\(^{12}\) *Id.* at 748-749.
unclear. In the Second Circuit, for example, at the time *Blue Chip* was decided, the status of *Birnbaum* was that "although some courts have held that a private party not a purchaser or seller, seeking *injunctive* relief, may have standing to assert a Section 10(b) violation . . . and another has suggested the elimination of the purchaser-seller requirement . . . it is still the rule in this circuit that the requirement be satisfied in a suit for damages."  

*Blue Chip* can thus be read either as mandating a return to the standing requirements delineated in *Birnbaum* or simply as drawing to a halt the expansion of Rule 10b-5 federal jurisdiction.

The relevant question, however, is not the precise holding of *Blue Chip*, but the significance of that opinion’s opacity for the problems raised by greenmail. It could be argued that the law reviewed above is simply irrelevant to the problem under consideration since takeover bids are governed by the detailed provisions of the Williams Act.  

However, the guideline courts have derived from the Williams Act is that neither the target management nor the takeover bidder was intended to be favored when Congress promulgated this regulatory code. Such a rule might appear obvious and fair, but such a conclusion simply does not address the problems raised by the process which the legislation is intended to govern. The question arises, therefore, as to whether and to what degree the judicial attitude toward securities legislation embodied in *Blue Chip* has precedential significance for takeover bids.

II. PROBLEMS POSED BY GREENMAIL

It is tempting to characterize *Blue Chip* as a conservative, backward-looking decision, and leave matters at that. It is tempting but dangerous, as ideological designations always are, because they reduce the complexity of an obdurate reality to simple terms which permit an uncomplicated emotional response. The rule of *Birnbaum*, which *Blue Chip* declared law, represents an attempt to accommodate the dual sovereignties of a federal system. To define that rule, therefore, requires an appreciation of developments in the federal system during the years since *Birnbaum* was handed down.

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The implementation of Brown v. Board of Education\(^{15}\) by the federal judiciary produced a response: state authorities utilizing their law-making powers to preserve the segregationist status quo. The mechanism utilized by the federal courts to counteract this response was the "federalization" of United States law — findings that state law was pre-empted because of possible conflicts with federal legislation and expansive readings of jurisdictional grants in federal statutes. The legal community inevitably became aware of this phenomenon, and began to express concern. It was Herbert Wechsler who became associated with the phrase "neutrality," in terms of which this concern was expressed. Strikingly, however, it was also Herbert Wechsler, this time in collaboration with Henry Hart, who provided the rationale that made it possible to live with this concern. It was Hart and Wechsler's The Federal Courts and the Federal System\(^{16}\) that elaborated for the profession a view of law as process, that habituated a generation of lawyers to a perception of the legal structure as nothing more than a system to be operated efficiently.

In Perlman v. Feldmann, for example, the dissent ends with a complaint about the direct recovery permitted by the majority to the plaintiffs, a holding inconsistent with the "derivative" nature of the injury for which redress was being given: "If a corporate asset was sold," says Judge Swan, "surely the corporation should recover the compensation received for it by the defendants."\(^{17}\) The corporate asset in question, control of the steel produced by Newport, had been acquired on August 31, 1950, by a group of end-users incorporated as Wilport Company. In an agreement dated December 18, 1953, Wilport agreed to transfer its controlling interest in Newport to a corporation controlled by Louis E. Wolfson. The price Wolfson paid was half what Wilport had paid.

In its Petition for Rehearing, Newport argued that "the court erred in ordering the . . . profits to be paid directly to stockholders and a rehearing on this sole issue is requested."\(^{18}\) In a memorandum to the other members of the panel that had decided the case, Judge Clark noted about this petition that:

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\(^{15}\) 347 U.S. 483 (1954).

\(^{16}\) Published in 1953.

\(^{17}\) 219 F.2d 173, 180 (2d Cir. 1955).

\(^{18}\) Petition for Rehearing at 2 (1955).

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This seems to me a properly shrewd move, which I commend on that level; since the lush situation is now deteriorating judicialwise, Newport wants to get back for its crowd of insiders the money paid Feldmann to get its preferred position. But the reasons we gave against this before still stand. Newport’s argument seems confined to the semantic level: “since this is a stockholder’s derivative suite, ergo.” Omit the premise as we should, since it was the other stockholders who were primarily injured, and there is nothing left. Practically our result is the only one which has meaning in any attempt to hold these trade buccaneers to a modicum of morality.19

Judge Swan responded: “As I disagreed with the opinion on this point (last paragraph of my dissent) I naturally think the petition should be granted. But if my brothers deny it I shall make no squawk but prefer not to sign the order,”20 resulting in a *per curiam* order, signed only by Judges Clark and Frank, which denied the petition for rehearing. This judicial action can be characterized as legal realism in action, a refusal to impose on judicial remedies the arbitrary limitations embodied in legal rules. Thus, refusing to permit a derivative form of recovery made it possible to exclude the Newport shares held by Wilport from the class entitled to payment. Wilport, however, no longer held the shares in question, so the issue arose whether Wolfson should be considered, in Clark’s terms, sufficiently a “trade buccaneer” to justify denying him recovery.

It is, of course, difficult to distinguish “trade buccaneers” from effective competitors. Unless we postulate the impossibility of competitive practices that are destructive of a market, however, it is clear that the distinction attempted by Clark must, in theory, be a possible one. And Max Weber, in *The Protestant Ethic and the Spirit of Capitalism*,21 made precisely such a distinction between pirates and entrepreneurs in describing the historical evolution of capitalist institutions:

> [T]he capitalistic adventurer has existed everywhere. With the exception of trade and credit and banking transactions [his] activities were predominantly of an irrational and speculative character, or directed to acquisition by force, above all the acquisition of booty, whether directly in war or

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19 Charles E. Clark memorandum at 1.
20 Thomas W. Swan memorandum at 1.
21 T. Parsons transl., pp. 20, 21, 24 (1946).
in the form of continuous fiscal booty by exploitation of subjects.

But in modern times the Occident has developed, in addition to this, a very different form of capitalism which has appeared nowhere else: the rational capitalistic organization of (formally) free labour.

Now the peculiar modern Western form of capitalism has been, at first sight, strongly influenced by the development of technical possibilities. Its rationality is today essentially dependent on the calculability of the most important technical factors. But this means fundamentally that it is dependent on the peculiarities of modern science, especially the natural sciences based on mathematics and exact and rational experiment.

The relevance of the transition from pirate to entrepreneur is demonstrated by the significant changes that have occurred on the business scene since Perlman v. Feldmann was handed down. Thus, both Feldmann and Wolfson shared the characteristic of being known as purchasers and sellers of controlling interests in corporations. In the past quarter-century, however, the corporate conglomerate, the combination by means of controlling stock interests of a number of corporate entities engaged in a variety of businesses, has become a relatively commonplace phenomenon. The result has been that the market has frequently valued such entities as the equivalent of incorporated mutual funds. ITT, for example, one of the pioneers in making the conglomerate form acceptable, did not perform noticeably better than the stock market average during the tenure as chairman of its architect, Harold Geneen.

Simultaneously, public relations campaigns by stock exchanges advertising the benefits of investments in corporate securities, combined with the growth of such institutions as pension plans and mutual funds, created a vastly larger group of persons sophisticated about the trading process. It became increasingly difficult, as time went on, to distinguish between the speculator whose activities had been the target of New Deal securities legislation and the investor to whom Kardon permitted a federal cause of action on allegations of fraud committed in connection with the purchase or sale of a corporate security. Expansion of the class of persons who do not need and might abuse the possibility of access to the legal process makes inescap-
able the question of the advisability of seeking a legal solution to the problems posed by greenmail.

III. Problems Posed By Super Stock

Since takeover bids are directed at securing control of the board of directors, the Williams Act is technically part of Section 14, the provision of the 1934 Exchange Act granting authority to the Securities and Exchange Commission over the proxy process, the rules governing the ballots, and communications on the basis of which shareholders cast their votes. The fact that corporate securities normally grant to the holder a right to vote makes the problems of greenmail inevitable. Thus, where the vote is crucial, the security can be seen as a political instrument, whose use must be assessed in terms of compliance with legal norms, whereas in the ordinary case the security is viewed by an investor simply as an economic instrument, the value of which may most effectively be determined by the play of market forces.

The nature of the problem is made clearest by considering the super stock takeover defense, where a security carrying voting power disproportionate to its value in terms of contribution to the corporate’s capital structure has been created on behalf of earlier shareholders. Such a defense is usually justified with the argument that existing shareholders, the persons whose securities might decline in value, can complain only if the market for their shares is adversely affected. In theoretical terms, this is, of course, the argument that corporate stock is properly perceived solely as an economic good, and that the function of corporate law is to regulate the operations of the market which creates a value for it.

Thus, if one wishes to oppose the issuance of super stock, one argues that the transaction tilts the balance established by the Williams Act in favor of target management. The argument being made is that the market, when it is not interfered with by “anti-competitive” devices such as super stock, is in fact disciplining management by assigning a value to management’s efforts as represented by the market price of all outstanding securities, and that the courts should utilize the powers granted by the Williams Act to prevent interference with the workings of the marketplace.

through the issuance of stock whose function is preservation of
the status quo.

Balancing the values inherent in preservation of the status quo
against the policies which prohibit interference with profitable
sales by existing shareholders is a matter that involves considera-
tion of the interests both of the corporation and of the society it
serves. Long-range considerations of this type have historically
been undertaken in our legal system by state courts applying
fiduciary principles of conduct to corporate affairs as a justifica-
tion for requiring strict compliance with statutory provisions.
Since 1947 and *Kardon*, however, that law-making activity has
increasingly been transferred to federal courts as in *Perlman v.
Feldmann*.

In the case of super stock, for example, it is clear that most
state corporate statutes no longer place effective limitations on
the provisions of a share of common stock. Until recently, bodies
like the New York Stock Exchange imposed requirements such
as voting rights, but even these limitations are becoming increas-
ingly ineffective as competition for new business among ex-
changes increases. If the problem of corporate control is to be
analyzed, therefore, the relevant question is how the rule of *Birn-
baum* can be made effective.

Certainly we cannot pretend that *Blue Chip* simply returns us
to the days of *Birnbaum* and *Perlman*. Federal courts could not
long in good faith maintain, as Judge Clark did in *Perlman v.
Feldmann*, that they are promulgating common law interpreta-
tions of fiduciary principles established by state law as opposed
to expansive readings of federal legislation. The question, there-
fore, in connection with greenmail, is whether an effective fed-
eral statutory provision can be designed. The difficulty with
designing such a provision is the intimate connection between
the source of greenmail payments and the market mechanism.

IV. LIMITS OF THE LAW

Greenmail in the normal course is produced by a gap between
the value of a corporation's assets which can be sold and the
current market value of the corporation's outstanding shares. Dif-
ferent market mechanisms, in other words, are producing differ-
ing valuations. Neither mechanism is infallible, since both
valuations are the product of historical events, accounting con-
ventions, and predictions about the future. The issue here is whether a statutory mechanism could produce a more useful result. Thus, as demonstrated in the case of ITT, it appears that the market itself deals with such situations if permitted to operate.

It is difficult to fashion a legal rule governing greenmail because of the existence of the business judgement rule, which requires judicial deference to people in control of corporate activities whenever the actions taken could even arguably have been supported by business considerations. Section 531 of the Internal Revenue Code, on the other hand, penalizes unreasonable accumulations of profits by a corporation, an accepted business motive for the purpose of sheltering that income from additional higher personal taxes when paid out to shareholders as dividends, by taxing such profits at a prohibitive rate. The analogy suggested is that transactions entered into for the purpose of dealing in corporate control be subject to a prohibitive tax. In both cases, the inquiry turns on the intent underlying the corporate transaction, primarily a question of fact, and reference has been made to such a provision as Section 531 solely to establish that courts have proven themselves capable of administering a factual determination of intent.

Should the takeover bid be made to holders of 100% of a corporation’s securities, no tax would be levied. In any other situation, however, a finding that control was being sought primarily for the purpose of short-term profit maximization would permit a tax on the corporation in an amount equal to the gap in values that provides the basis for greenmail.

The most likely objection is, of course, the draconian nature of the remedy. Not only is the tax punitive, but such a remedy, it can be argued, fails to deal with most of the practices that make what we have been calling greenmail a problem, such things as super stocks, and the purchase and sale of desirable and undesirable corporate assets. This argument could be buttressed by reference to the anti-greenmail tax legislation introduced by Senate Finance Committee Member John Chafee, which would deny deductibility to the expenses of producing greenmail and alter
the tax treatment of interest on debt and stock purchases entered into as part of a merger in a hostile takeover situation.\(^{23}\)

Unlike the Chafee bill, which simply uses the tax law to make a given practice more expensive, the provision suggested attempts to deal with the problem rather than its manifestations. What is being proposed is the prohibition of a given transaction, the drawing of a legal line and declaration that behavior falling outside that line should not be permitted to take place. The response to the argument about the draconian nature of the remedy, in other words, is that what Chafee would accomplish is simply to adjust the market, to raise the price of control.

The rationale of the provision being proposed, on the other hand, is to bar resort to the market mechanism, on the ground that the transaction violates the agreement entered into by the corporation when its charter was granted by the state. It is stock market arbitrageurs, not corporations, who are in the business of short-term profit maximization in connection with purchases and sales of corporate securities.

Such questions as whether the corporation could recover the tax from the persons making the takeover bid and/or from persons who accepted that bid need not be addressed by the proposed statute. If the control premium is an asset that can, under proper circumstances, be claimed by the government that makes the corporate system possible, then the impact of that claim on interactions among constituent elements of the corporate system — managers, stockholders, directors, and the entity itself — can be left to general principles of corporate law. One may ask, however, why this remedy, even assuming that courts would be capable of administering it, should be regarded as the best way of forcing consideration of the value ignored in the pursuit of short-term profit maximization. Let us put to one side the possibility that states will authorize charters permitting corporations to have as a purpose short-term profit maximization in connection with purchases and sales of their securities. Law can never

\(^{23}\) On July 8, 1985, the Financial Accounting Standards Board of the Financial Accounting Foundation, released for public comment Proposed FASB Technical Bulletin No. 85-e, whereby (i) greenmail premium payments by a corporation are to be excluded from the cost of the treasury shares acquired, (ii) amounts attributed to a "standstill" agreement may not be capitalized, and (iii) costs incurred by the corporation to defend itself from a takeover attempt, costs attributed to a "standstill" agreement, and premiums paid for treasury shares in excess of current marked price, may not be classified as extraordinary items — Ed.
successfully prevent something society wants even after people have been made aware of all possible objections, and no statute can succeed if the society for which the legislation is drafted sufficiently strongly supports what the drafters of the statute see as an abuse. The question that should be answered, therefore, is why a statutory solution which might be ignored should be supported when one has the alternative of accepting the Chafee approach of “raising the ante.” The answer is that judicial “raising the ante” — acceptance of a view of law as something that can deal only with manifestations of a problem rather than addressing the problem itself — is the phenomenon that underlies the transition from Birnbaum to Blue Chip.

In 1954, in *Brown v. Board of Education*, the Supreme Court of the United States was confronted with the question whether to overrule *Plessy v. Ferguson*, which established the “separate but equal” rule in connection with the Fourteenth Amendment. In addressing that issue, *Brown* first quotes the “intangible considerations” on the basis of which earlier Supreme Court opinions had forced Negroes admitted to white graduate schools to be treated like all other students rather than being separated. Noting that “such considerations [of ways in which separation solely on the basis of race generates feelings of inferiority] apply with added force to children in grade and high schools,” the *Brown* Court quotes a factual finding about the detrimental effects of segregation by a lower court which nevertheless had followed *Plessy*. The Supreme Court then concludes as follows:

Whatever may have been the extent of psychological knowledge at the time of *Plessy* v. Ferguson, this finding is amply supported by modern authority. [n. 11 citing sociological and psychological authorities]. Any language in *Plessy* v. Ferguson contrary to this finding is rejected.

The *Brown* Court knew it was making law. It was presumably in an effort to appear authoritative that the Court did not overrule either *Dred Scott* or *Plessy*. Only language was overruled, and scientific evidence was relied on to justify a shift in position. The “all deliberate speed” formula coined in *Brown II* sounded

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25 163 U.S. 537 (1896).
27 Id. at 495-496.
both judicious and authoritative, and the decision to spell out
details of implementation rather than simply remanding the
cases before it for resolution in accordance with the law as it now
stood can be seen as no more than a realistic approach to the
work done by the judiciary. Similarly, the group of theorists
known as Legal Realists — and Judge Clark, who wrote Perlman
v. Feldmann, was one — would no doubt have applauded the
psychological and sociological citations in note 11 as signifying
an unwillingness on the part of the Brown Court to continue to
feel itself constrained by older, more technical approaches to the
tasks of legal reasoning.

The fact remains, however, that legal opinions are precisely
rationalizations of results reached on the basis of "intangible con-
siderations." The question raised by the Realists is whether opin-
ions should continue to attempt to persuade the reader about the
correctness of a judge's application of the older "science of law," a
determination of the placement of the line between the right
and the wrong, or whether courts should implement the law by
applying to legal controversies the results of studies utilizing the
mathematical and social sciences as part of a process of changing
social behavior in accordance with the findings of such studies.

It is easy, but dangerous, to persuade ourselves that these two
ways of looking at the law amount to the same thing, a descrip-
tion of what judges do in fact. The result of such an equation, I
suggest, has been in the past half-century an era in which both
integrationists and corporate reformers have learned about the
limits on what law can accomplish. Refusing to accommodate
those limits, moreover, will make law less, rather than more,
effective in the future. It is realistic not to demand of the law
more than it can do.