TEACHING INSECURITIES LAW: A VIEW FROM 2012

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I. INTRODUCTION

The title of this article is not a misprint. It is about teaching in the field of securities law. Securities law, also known as securities regulation, is a well-known field of study. The phrase "insecurities law" is less well-known, but this article seeks both to coin a phrase and justify its appropriateness. As this article will show, "insecurities law" is an entirely apposite description of the subject matter.

The article begins with a discussion of legal pedagogy and the teaching of securities law within New Zealand. It then shifts to various considerations which have informed both course design and legal pedagogy in the course in securities law I co-taught in 2012. After setting out these contexts, it moves to the express contexts of this course, including the global financial crisis, finance company collapses, and other considerations. A number of examples then illustrate why "insecurities law" is a useful description of the subject, including losses to investors (who found their deposits were not "secure"); the uncertainty of the law, with important cases being decided while I was teaching; the new term "financial product", which to some extent supplants the notion of a "security" under proposed new legislation; and the changing nature of the subject through law reform. The article concludes by glimpsing into 2013 and beyond.

This article, then, is about "teaching in securities law", and "teaching insecurities law". It is also both about an area of law, and about a university subject. In something of a nod to the Socratic Method,[1] I end this introduction with a question: "Are they the same thing?" Readers will have the length of the article to consider their answer.

II. THE WAIKATO TRADITION OF LEGAL PEDAGOGY

I have argued elsewhere that Waikato Law School (now called Te Piringa – Faculty of Law) was forged in debates about the role, ideals and purpose of legal education, and that this has led to continuing attention from Waikato faculty members as to the nature and practice of legal education:[2] in other words, there is an extensive body of Waikato legal pedagogy. The Faculty

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* Director, McCaw Lewis Hamilton. I would like to thank Brendan Cullen, who co-taught the course with me in 2012, and Professor Nan Seuffert, who taught the course in 2011 and in many other years, and whose structure provided much of the basis for the course. All references to the Financial Markets Conduct Bill 2011 relate to the Bill in place as at the time I co-taught the course (342-1): the Bill has since been revised by the Commerce Committee.

1 See for example PE Areeda "The Socratic Method" (1996) 109 Harv L Rev 911. For a recent examination of the Socratic method within in a New Zealand context, see L Taylor et al *Improving the effectiveness of large class teaching in law schools* (Christchurch, Ako Aotearoa, 2012) <http://akoaotearoa.ac.nz> at 16–17, especially the references.

2 Thomas Gibbons "Waikato Law Review: The First Ten Years" (2002) 10 Wai L Rev 39.

has recently celebrated 20 years since its creation, and the scholarship on the Faculty goes back even further than this.[3]

Broadly speaking, the legal pedagogy scholarship has been of three kinds. There have been publications on the law school itself, considering its origins, mission, and brief history.[4] There have been articles on the methods and practice (and sometimes, purpose) of legal education generally.[5] And there have been articles on specific legal subjects, including Professional Responsibility and the sadly-defunct Law and Societies (subject to a merger, or perhaps an acquisition).[6] At times, there has been considerable overlap between these areas: articles about specific subjects have often – perhaps inherently – considered practices in legal pedagogy, and general articles about the law school have examined the purpose of legal education, which has then inevitably turned attention to the faculty's methods. So these categories cannot be considered entirely discrete. They do, however, provide a useful framework.

Within this framework, I seek to further this rich Waikato literature on law school pedagogy through a consideration of a particular subject, a course formally entitled "Corporate Securities & Finance Law" – LAWS423A in numerical terms – a course more colloquially called "Corporate Securities", or "Securities Law".

III. Teaching Securities Law (or Securities Regulation?) in New Zealand

The subject "Securities Law" has been irregularly taught in New Zealand,[7] but has a longer lineage overseas. In the United States, for example, the Securities Act 1933 and Securities Exchange Act 1934, enacted in the wake of the stock market crash of 1929 and the ensuing Great Depression, led to the establishment of a discrete area of regulatory law. Louis Loss has been described as the "intellectual father" of securities law in the US, publishing a key text on the subject in 1951, and being credited with developing the term "securities regulation", and giving "a name and a shape to a field".[8]

An area of law need not have its own statute to be a university subject – contracts, torts, and property law are all examples of this – but it can help. In fact, modern examples abound,

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3 Margaret A Wilson "Waikato Law School: A New Beginning" (1990) 14 NZULR 103.

4 Margaret Wilson "The Making of a New Legal Education in New Zealand: Waikato Law School" (1993) 1 Wai L Rev 1; John H Farrar "Living with the Waikato Foundation Principles, 20 Years On" (2010) 18 Wai L Rev 83; Margaret Wilson "Challenges to Legal Education: The Waikato Law School Experience" (2010) 18 Wai L Rev 15.

5 See for example Ken Mackinnon "The 'Best Qualified' – for what? The place of affirmative action in a mission-focused New Zealand law school admissions policy" (2000) 4 Yearbook NZ Juris 71; Peter Spiller "Aligning course objectives, assessment and teaching strategy: a teleological approach to teaching law" in Dorothy Spiller (ed) *Narratives from Tertiary Teaching: Giving students a voice* (Pearson Education, Auckland, 2000); Dorothy and Peter Spiller "Teaching Law in the Context of Student Diversity" (2000) 8 Wai L Rev 106.

6 Kaye Turner "Teaching Professional Responsibility: The Waikato Experience" (1994) 2 Wai L Rev 151; Paul Havemann "'Law in Context' – Taking Context Seriously" (1995) 3 Wai L Rev 137; Nan Seuffert, Stephanie Milroy and Kura Boyd "Developing and Teaching an Introduction to Law in Context: Surrogacy and Baby M" (1993) 1 Wai L Rev 27.

7 See for example Victoria Stace *Securities Law in New Zealand* (LexisNexis, Wellington, 2010) vii.

8 Louis Loss *Securities Regulation* (Little Brown & Co, Boston, 1951). See also Mary Ann Glendon "A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming America" (Farrar Straus and Giroux, New York, 1994) 204; and Obituary (15 January 1998) Harvard University Gazette <http://news.harvard.edu/gazette>.

including Employment Law (based on the Employment Relations Act 2000 and its predecessors), Environmental Law (based on the Resource Management Act 1991), and Company Law (based on the Companies Act 1993 and its predecessors). In New Zealand, "securities law" has been based around the Securities Act 1978 and the Securities Amendment Act 1988 (later renamed the Securities Markets Act 1998), and has often been subsumed within "company law", occasionally called "company and securities law".[9] It has often been called "securities regulation", but more recently, the phrase "securities law" has assumed prominence.[10]

An area of law also need not have its own textbook to be a university subject – taxation law has been taught for many years, but I like to call New Zealand's search for a taxation law text elusive[11] – though again, it can help. Victoria Stace's 2010 text noted two points: that this was the first book devoted solely to New Zealand securities law since 1983, and that its preparation was necessary because the course had not been taught for some years.[12] The publication of Stace's text may well help redefine what an LLB course on securities law should cover. It also helps replace and supplant earlier publications that have used "securities regulation". Unlike in the United States, "securities law" seems to have taken hold as the name for the subject in New Zealand.[13]

It was noted above that securities law has often been subsumed within "company law" or "company and securities law", and has not been taught within all law schools in all years. This has perhaps contributed to the phenomenon that there appears to be no formal legal scholarship on teaching securities law in New Zealand. Therefore, this article is not only a contribution to Waikato legal pedagogy scholarship, but also something of a contribution to securities law legal pedagogy scholarship more generally.

IV. Teaching Securities Law in Context

It was noted above that Louis Loss helped define a field in the US over 60 years ago. More recently, global events have been described as "the best of times, [and] the worst of times" for securities law teaching and scholarship.[14] That is:[15]

> As we sit here in the midst of a global financial recession, many of us seemingly are seeing—even experiencing—the worst of times, at least from a financial point of view. For many in the faculty

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9 See for example John Farrar and Susan Watson (eds) *Company & Securities Law in New Zealand* (Wellington: ThomsonBrookers, 2008).

10 Compare John Farrar and Mark Russell *Company Law and Securities Regulation in New Zealand* (Butterworths, Wellington, 1985), and Gordon Walker and Brent Fisse (eds) *Securities Regulation in Australia and New Zealand* (Oxford University Press, Auckland, 1994); with Farrar, above n 9, and Stace, above n 7.

11 In 1976 *Molloy on Income Tax* was published: AP Molloy *Molloy on Income Tax* (Butterworths, Wellington, 1976). This treatise primarily referred to the Land and Income Tax Act 1954, which was replaced in the year of publication by the Income Tax Act 1976. In 1994 another text was published: J Prebble *Income Tax Law: Concepts and Cases* (Butterworths, Wellington, 1994). This text primarily referred to the Income Tax Act 1976, which was again replaced in the year of publication by the Income Tax Act 1994.

12 Stace, above n 7.

13 See above n 10.

14 Joan Macleod Heminway "The Best of Times, The Worst of Times: Securities Regulation Teaching and Scholarship in the Global Financial Crisis" (2010) 5 Jnl of Business and Technology Law 59.

15 At 59–61.

> sector, there are lower or non-existent travel budgets, hiring freezes, no raises, and fewer dollars for adjuncts and visiting instructors. Our graduating students are having a tougher time finding employment, or if they have found desirable, private-firm jobs, they are being told not to bother to come to work on their originally scheduled start dates at the firm. Many are not being compensated for these delayed start dates. Others, less fortunate yet, are even having their employment offers rescinded. Our friends and family members are losing—or have lost—their jobs and the compensation and benefits (including health insurance) that those jobs provide. The worst of times.
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> Yet (and not to gloat), like a Phoenix rising from the ashes, those of us who research, write about, and teach law — especially business law — now have more salience, more status in the wake of the current economic crisis. We have the opportunity to participate in debates about what went wrong and how to fix it, and we are in the scholarly trenches and in the classroom with others doing the same. We can help relate the facts, analyze the issues and problems, and forward solutions. It is perhaps not "the best of times" for corporate and securities law professors, but it nevertheless is an exciting time to be engaging in business law scholarship and teaching.
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> Securities regulation is a particularly relevant area for inquiry and analysis, for obvious reasons. Securities markets around the world have been both players in and victims of the global financial crisis.

Not all of Heminway's points are entirely congruent to New Zealand circumstances, but many are. The global financial crisis has had a terrible impact on many people's lives, including those inside and outside the legal profession and universities. Further, Heminway continues, Socratic style, by asking a series of questions, including "Are our regulators up to the task?", "Is effective regulation possible in a constantly evolving, innovative, entrepreneurial market?", "Is new regulation necessary?", and "Do we need more regulation, or can the market provide adequate checks?"[16] All of these questions – and many others – are relevant to securities law teaching in the US, New Zealand, and elsewhere, and highlight the sense of excitement that the current financial, economic, and regulatory contexts – including, in particular, law reform and the rapidly changing legal environment – provides for the field of securities law.

A. My Own Context

I will return to this broader context. First, however, I want to provide some information on my own background, as this has informed a number of elements of the course I taught in 2012; including particular choices as to teaching style, context, and the requirements of students. To paraphrase, via a legal academic, a former Court of Appeal judge "[lecturers] are, fortunately, human":[17] they are not automatons, and background matters in that it can inform teaching and pedagogy, both covertly and overtly.

Returning to matters of Waikato pedagogy, in the discipline of education studies, for example, Sue Middleton has emphasised the importance of one's own "life-history".[18] Middleton uses art from her childhood and university years, anecdotes from her own experience, as well as broader patterns of educational and social change that affect her family and those around her to emphasise how an individual's background circumstances influence the educational process.

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16 At 61–67.

17 *M v Y* [1994] 1 NZLR 527, 537, per Hardie-Boys J, cited in Peter Spiller "Principles of Professionalism in Law Teaching and Judicial Practice" (2010) 18 Wai L Rev 26, 38.

18 Sue Middleton *Educating Feminists: Life Histories and Pedagogy* (Teacher's College Press, New York, 1993).

Reading her book as an undergraduate law student, among courses in jurisprudence, administrative law, and corporate entities, I found her analysis of the importance of individual, *personal* background to the education process fascinating. But perhaps I should not have been so surprised about the role of individual circumstances in shaping various phenomena: shortly before reading Middleton, I would have read about the American legal realists in jurisprudence, and some forms of realism allow individuals (judges in particular) significant influence in the development of the law.[19] And in teaching, perhaps, we *can* all be realists now.[20]

For reasons of space, I will not say as much about myself as Middleton does, but a number of these background considerations have been set out in an earlier essay, "A Realistic Professionalism: The Next Step".[21] This was written for a celebratory purpose: a special edition of the *Waikato Law Review* commemorating 20 years of the law school. But it was also an invitation and opportunity to reflect on what brought me to law school, the development of my career since then, and how both my law school experience and private practice experience informed my teaching, for I was at the time co-teaching securities law for the first time. I enjoyed my time at law school, though at times found it challenging and alienating. I have also enjoyed practice as a lawyer more than I thought I would, perhaps because I did not fully comprehend the extent to which practical lawyering is really about *helping people*. This makes it an enjoyable and rewarding exercise. Being a lawyer can be a difficult job, and I felt I was not fully prepared for the challenges by either law school or the subsequent professional training. "On the job" apprentice-style training is essential to a lawyer's development, and a university law school cannot fully prepare graduates for the exigencies of practice.

What a university law school can do, however – particularly at fourth-year level – is to seek to inculcate the importance of *professionalism*. This was the point of "A Realistic Professionalism", which combined an outline of my own background with some points on requiring professionalism, and student experiences of law school. This analysis, of course, requires a teacher to decide what professionalism is, and how it should be inculcated. In that article, I drew on professional services author and consultant David Maister's illustration of a professional as someone who does an outstanding job, goes the extra mile, has the client/customer in mind, and who uses his or her knowledge in a particular way.[22] The opposite of a professional, Maister notes, is not an amateur, but a technician.[23]

Drawing on my own background as a practising commercial lawyer, with some academic interests, I wanted to be up front about my philosophy of teaching and my requirements of the students. The importance of the latter was emphasised in some of the ideas in "A Realistic Professionalism" and in aspects of the course, as discussed below. The importance of the former has been reinforced to me in other contexts: as a school trustee involved in interviewing school staff for management roles, I was struck by the degree to which school teachers emphasise their

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19 There are a range of sources on legal realism. See for example William Twining *Karl Llewellyn and the Realist Movement* (London, Weidenfeld and Nicolson, 1973); Neil Duxbury *Patterns of American Jurisprudence* (Clarendon Press, Oxford, 1995) at ch 2; Richard A Posner *How Judges Think* (Harvard University Press, Cambridge, 2008) at 112–114 and following.

20 See the comments of Laura Kalman *Legal Realism at Yale 1927–1960* (UNC Press, Chapel Hill, 1986) 229; but in the New Zealand context compare Jim Evans "Questioning the Dogmas of Realism" [2001] NZ L Rev 145.

21 Thomas Gibbons "A Realistic Professionalism – The Next Step?" (2010) 18 Wai L Rev 72.

22 At 75–76.

23 David H Maister *True Professionalism* (Free Press, New York, 1997).

own philosophies of teaching in those interviews. This was a common theme in those interviews. But I have also interviewed lawyers for legal jobs and we do not generally ask lawyers what their own philosophy of lawyering is. On reflection, this seems odd, as I clearly have an idea of what it means to be a good lawyer – probably all lawyers do – even if it often goes unexpressed.

So in setting out the requirements of the course in the first lecture, I emphasised to students the importance of preparing them for professional careers, even if not all would enter private practice. In doing so, I was able to refer to "A Realistic Professionalism", as setting out my own approach to teaching and the requirements of students in completing the course. Being a practising lawyer with some academic interests did not merely lead to a strong belief that professionalism is something that should be required of law students. Being a practising lawyer also helped emphasise certain considerations in the substantive aspects of my law teaching. To take an example, the Securities Act 1978 often applies in situations where businesspeople don't expect it to, such as attempts to raise relatively small amounts of capital from friends. New Zealand securities law generally requires an investment statement and prospectus to be prepared and available before an offer of securities is made to the public;[24] but there are a number of exemptions and exceptions to what constitutes "the public".[25] These include relatives, close business associates, and more recently "eligible persons". However, the nature of these exceptions and exemptions is often uncertain, and they have been criticised for being hard to understand, hard to apply, and lacking in certainty,[26] but why would anyone want to avoid the investment statement/prospectus regime? Well, because of compliance costs. Having a prospectus prepared is an expensive exercise, and many clients wish to avoid this expense, and so fall within an exception or an exemption – in some cases, one of the general or specific exemption notices promulgated through regulations.[27] These are important parts in the toolbox of a working securities lawyer, but are easily ignored unless a practical focus is taken.

There can of course be advantages and disadvantages to practical experience. I taught as a contract lecturer, perhaps – depending on definition or description – a visiting lecturer or adjunct. I continued in full-time legal practice, while co-teaching the course with a colleague. The extract from Heminway, cited above,[28] noted the difficulties that sometimes fall on adjunct teachers, and others have also observed this.[29] Being a practising lawyer means a greater knowledge of practice, but also generally a lesser knowledge of theory, a lesser knowledge of the broader literature and ideas of the subject. Diligent reading (and writing and research) can overcome this to some extent, but not entirely. On the other hand, practical matters – such as arranging course materials and examination questions – were not unduly challenging.

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24 Securities Act 1978, s 33.

25 See Securities Act 1978, ss 3 and 5, and Shelley Griffiths "Regulating Private Offers of Securities: Time for a Major Rethink" (2009) 15 NZBLQ 105.

26 Griffiths, above n 25; Thomas Gibbons "The Securities (Disclosure) Amendment Act 2009 and 'the public'" [2009] CSLB 124.

27 See for example Securities Act (Real Property Proportionate Ownership Schemes) Exemption Notice 2002; Securities Act (Venture Capital Schemes) Exemption Notice 2008.

28 Heminway, above n 14 and accompanying text.

29 See Madeleine Schachter *The Law Professor's Handbook* (Carolina Academic Press, Durham NC, 2004) at 29–30 (noting that adjuncts may be treated as "second-class teachers"); Rachel A Van Cleave "A Primer for Teaching Law as an Adjunct Professor" (2011) *Publications*, Paper 240 <http://digitalcommons.law.ggu.edu/pubs/240>.

B. A Note on Expectations and Assessment

One's background cannot be avoided, but the choices that one makes can still be deliberate. Applying my practical knowledge was perhaps inevitable (and perhaps somewhat pointless if I had avoided doing so), but expressly seeking professionalism was not.

The course stipulated a 40 per cent exam, with 60 per cent internal assessment. Previously, this had meant a 10 per cent proposal, a 15 per cent presentation, and a 35 per cent research essay. I reduced the marks for the presentation and essay by 5 per cent each, and shifted these marks to a 10 per cent participation grade. This was aimed at achieving class engagement in the subject matter, allowing me to ask questions and expect answers, and also encouraging students to ask questions of each other in their presentations. It was also aimed at professionalism, as I know well that graduates can be asked tricky questions in law offices – both in client meetings and in tearooms – and need to be able to express themselves clearly, both with colleagues and with clients, to order to advance their careers. With a class of just over 30 students, I made sure there were regular exercises such as "discuss this question with your neighbour, and then we'll feed back as a group". At times, it was necessary to prompt students with "remember, there's a grade for participation". This often helped.[30]

I believe the regular opportunities to participate created a strong class culture, which manifested most obviously in the high quality of the student presentations. While others may bemoan "death by powerpoint",[31] the vast bulk of presentations were clear, succinct, thoughtful, and well-researched. I believe undergraduates deserve more opportunities to "speak in front of the class", as public speaking and clear oral communication is again part of many lawyers' careers, as well as careers in many other fields. The level of engagement between students in each other's presentations was also a highlight.

V. TEACHING: INTRODUCTIONS AND CONTEXTS

A. Topicality

I began the first lecture with some topical images: the Lombard directors, the Bridgecorp directors,[32] the intended sell-down of shares in state-owned enterprises, and the Facebook IPO. These allowed me to illustrate the topicality of the subject-matter.

Following the point that it is important to engage with students by learning their names,[33] I had students introduce themselves, and talk about what they had done over the summer: some had worked in legal or accounting firms; some had worked elsewhere; some had travelled; and some had studied. I then outlined the assessment, including the importance of active participation in class (because of the grade for participation). Highlighting the importance of professionalism,

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30 This brings to mind the "law and economics" notion of responses to incentives, but that deserves separate attention. See generally Richard A. Posner *Economic Analysis of Law* (4th ed, Little Brown & Co, Boston, 1992); Rt Hon Ivor Richardson "Law and Economics – and Why New Zealand Needs It" (2002) 8 NZBLQ 151; Cass R Sunstein (ed) *Behavioral Law & Economics* (Cambridge University Press, New York, 2000). Obviously some contributed more than others, and this was able to be reflected in their grades.

31 Farrar, above n 4, at 85.

32 See "Former Bridgecorp directors face sentencing" (18 May 2012) Newstalk ZB <www.newstalkzb.co.nz>.

33 Spiller and Spiller, above n 5, at 108.

I explicitly made students aware of the expectations of attendance, doing readings before class, meeting deadlines, and producing quality written work. I emphasised to them that at fourth-year level, they needed to be prepared for demanding supervisors and clients, and referred them to my article "A Realistic Professionalism" for further information.[34]

B. Concepts and Actors

I then introduced a number of key concepts for the course, including:

- Finance company collapses
- Capital raising
- The primary market
  - "Offer of securities to the public for subscription"
- The secondary market
  - Insider trading, takeovers, substantial shareholdings
- Why we regulate securities
- Key actors and institutions
- Reform.

These were designed to provide a road-map of key ideas: again, based on experiences as a student where it could be difficult to put discrete components of a course into a complete whole. Further, to illustrate that securities law is based on a specific regulatory and economic regime, and is more than a system of rules, I also introduced a number of key actors, including:

- Financial Markets Authority
- NZX
- Financial advisors
- Sharebrokers
- **Lawyers**
- Auditors
- Company directors
- Serious Fraud Office
- Trustee companies
- Companies.

"Lawyers" was in bold because I noted – again, as part of the emphasis on "professionalism" – that I didn't just want them to read cases to find a "rule". Sometimes, I wanted to focus on particular facts: why issuers or investors behaved a particular way; was this a serious investment opportunity, or the efforts of a "dreamer"? I noted that in some cases, particular attention would be focused on the role of lawyers. This was, I believe, a successful aspect of the emphasis on professionalism, as examples later in this article will show.

I then outlined the main statutes we would be examining in the course, and returned to some themes in greater detail, such as finance companies ("what they did, how they raised money, what went wrong, and what were the consequences"); reform ("what and why?"); the role of

34 That is, I made my own philosophy of teaching express.

lawyers, as noted above; and regulation ("why is securities law different?"). Following the lead of Peter Spiller, one of my own lecturers, I presented a "teleological" view of the course:[35] that is, the key things I wanted the students to get out of it, including an understanding of why we regulate capital markets, the primary market, the secondary market, the key areas of study within each; and when securities law does and does not apply to particular situations. This also underscored my approach to legal pedagogy.

C. *Applied Concepts and the Global Financial Crisis*

In the second introductory lecture, I expanded on these themes, and picked up on some new ones.[36] Globalisation has been a theme of securities law for a number of years: it was emphasised, for example, in the Walker and Fisse text[37] used when I studied the course myself, though aspects of this analysis – including the importance of technology developments – were now somewhat overstated.[38] Perhaps more important in recent years has been the idea of harmonisation, or the extent to which New Zealand securities law should harmonise with other jurisdictions such as Australia. This in turn allowed debate over whether New Zealand should seek to harmonise (that is, be consistent) with Australia; or whether New Zealand should try to attract overseas capital by being more attractive to investment than Australia. Put another way, is it better to have the "best" laws, or the "same" laws – and what does it mean to be "best"?[39] Theories of regulation were also important, including "public choice" and "public interest" theories, which were able to be illustrated by reference to US Presidential debates (where, perhaps more than in any other forum, candidates promise to "get government out of peoples' lives": that is, deregulate). These ideas were able to be concretised by referring to the new – and expanded – powers of the Financial Markets Authority.[40]

Looking to theories of regulation invites us to consider why securities deserve special regulation. There are a range of considerations. It has been argued that there are special historic reasons that securities and capital markets law are specially regulated, based on Western attitudes to the morality of speculation and financial markets, as against more tangible and practical

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35 Spiller, above n 5.

36 I should note that not all of these themes were my own: some were adopted from material used by the course's previous lecturer, Professor Nan Seuffert.

37 Walker and Fisse (eds), above n 10; see also Gordon Walker, Brent Fisse and Ian Ramsay (eds) *Securities Regulation in Australia and New Zealand* (LawBookCo, Sydney, 1998), especially ch 1-2.

38 I called this a "look, wow, the internet!" factor.

39 Compare Jane Diplock, the Chair of the New Zealand Securities Commission, who often emphasised harmonisation: "Jane Diplock, chairperson of IOSCO, says that harmonisation in securities regulation is achievable" (October 2009) The Banking Conversation <http://thebankingconversation.com>; Simon McArley "Securities Markets Regulation: Is being right more important than being accepted?" [2003] CSLB 9 at 9: "If the New Zealand capital markets are perceived by foreign investors to be less safe and fair than the Australian equivalents, we will quickly be passed over in favour of those markets .... To compete in a global market for capital we must, like any business trading in a competitive market, meet the demands of that market"; and Frank Chan "Emerging trends in the trans-Tasman financial an capital markets: harmonisation or assimilation" [2007] CSLB 61 at 67: "The danger of harmonisation ... is that it may distract everyone from what ought to be the continuing long-term focus – the attraction to the New Zealand market of issuers and their capital".

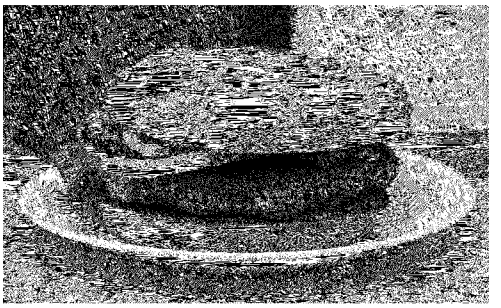
40 See for example Securities Act 1978, ss 43C (consideration of prospectuses), 43F (prohibition of distribution of investment statements), and others introduced by the Securities Markets Amendment Act 2011.

activities.[41] In the recent decision in *R v Moses*, Heath J also emphasised special factors associated with securities law, such as that a purchaser of securities acquires something that is essentially intangible, and the value of the purchase/investment depends entirely on what is subsequently done by the directors of the issuer with the invested money.[42]

At an early stage of the course, it is good to relate concepts to students' lives. Few have invested significant amounts of money, and none will have defended finance company directors, but many will have eaten fast food. An online article from John Kay provided an excellent "teachable moment". I started with a visual, before noting that in comparing the regulation of securities to the regulation of hamburgers, Kay observes:[43]

> Now we don't regulate the sale of hamburgers very much. The main purpose of our regulation is to ensure that poisonous hamburgers are not put on the market. The regulations which we impose are almost entirely confined to that. There is no suggestion that regulation should ensure that the hamburgers we eat are nice. We don't seek to impose regulation to ensure that people buy only hamburgers that are appropriate to their tastes and their state of hunger. We do not in any way regulate the price that people pay for their hamburgers. We would not dream of asking the question whether [people] obtained best, or even good or any advice when they make their decision to purchase a hamburger.

The visual helped(!)[44]



A further context, still of fundamental importance in 2012, was the global financial crisis of 2008 onwards. While there is an extensive literature on this topic, I drew primarily on a 2011 report of the US Government:[45] this emphasised various issues, including the phenomenon of securitisation, sub-prime mortgages, CDOs, and – interestingly – that a key aspect of the crisis

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41 See Stuart Banner *Anglo-American Securities Regulation: Cultural and Political Roots, 1690-1860* (Cambridge University Press, Cambridge, 1998) at ch 1.

42 *R v Moses* HC Auckland, CRI 2009-004-1388, 8 July 2011, Heath J, at [35].

43 "Why Regulate Securities" (8 June 1999) John Kay <www.johnkay.com>.

44 I have earlier argued that humour can get in the way of professionalism; while I remain of this view, I also believe that humour is a useful part of teaching, and humour and professionalism can co-exist in law classes, as long as professionalism is given an appropriate emphasis.

45 National Commission on the Causes of the Financial and Economic Crisis in the United States, *The Financial Crisis Reference Inquiry Report* (2011).

was "dramatic failures of corporate governance".[46] Problems of governance have also been identified in New Zealand. As I have noted elsewhere:[47]

> The Commerce Committee *Inquiry into finance company failures*, for example, has highlighted how poor governance was an importance factor in finance company failures; … . Jane Diplock, former chair of the Securities Commission, has also suggested that a failure of corporate governance is "at the heart of the financial crisis". … an undue focus on governance can be problematic. There are many things that can make investment successful, and conversely, many factors that can lead to investor losses, as has happened with the finance companies. Among the reasons other than poor governance that led to finance company collapses, we might consider (in various cases) factors such as the global financial crisis, stormy seas in the international economy, individual fraud, a lack of knowledge on the part of investors, poor regulation, and poor enforcement by the regulator.

The various themes of the course were therefore able to be linked. Were the finance company problems caused by poor governance? Or by poor regulation? What is poor regulation – and what is good regulation? Is it guided by public interest theories, or public choice? Is it based on harmonisation – trying to be the same as Australia, or something else – trying to be better than Australia? Was the finance company crisis an example of poor regulation, or good regulation improperly enforced? And what about the role of individual directors, facing criminal penalties for wrongdoing (whether honest or not)? Who is responsible – an ineffective regulator, individual directors, or poor governance? Or perhaps uninformed investors? Or really, did the international stormy seas of the global financial crisis make the collapse of finance companies inevitable?[48]

I believe these "big questions" provided a valuable introduction to enduring themes of securities law, as well as encouraging students to "think for themselves" and help them towards their own positions on these issues. Some may become policy makers, others litigators, and others appellate judges. Fundamentally, then, we should want to encourage students how to approach policy issues, and themes as well as the "rules" of securities law.

VI. Some Brief Comments on Content

I have emphasised these contextual considerations because they often receive too little attention. The most recent New Zealand text,[49] for example, is excellent as a treatise, but has some limitations as a teaching tool (at least for the course I taught) because it gives little space to broader themes and contextual issues of securities law. For me, these included (more generally) theories of regulation, and (more specifically and topically) the global financial crisis and finance company collapses. The substance of securities law is less relevant to this article, but I want to draw on a few teaching aspects I believe may be useful to others.

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46 At xviii.

47 Thomas Gibbons "The Enigmatic Purpose of Securities Law" [2012] CSLB 75, citing Commerce Committee of the House of Representatives, *Inquiry into finance company failures* (2011) 26, 42 (footnotes omitted); "Profile: Jane Diplock" (June 2010) International Federation of Accountants <www.ifac.org>.

48 See for example Scott Colesanti "Laws, Sausages and Bailouts: Testing the Populist View of the Causes of the Economic Crisis" (2010) 4 Brooklyn Jnl of Corporate, Financial & Commercial Law 175 for comment on various causes of economic difficulties overseas, as well as National Commission, above n 45. On the New Zealand economy more broadly, see Brian Easton *In Stormy Seas: The Post-War New Zealand Economy* (Otago University Press, Dunedin, 1997).

49 See Stace, above n 7.

Following the theme of applying concepts to students' experiences, I knew, for example, that few students would have cause to read a prospectus under the Securities Act. But most have read a prospectus of another kind: a university prospectus.[50] This allowed, variously:

- A consideration of what a prospectus is (essentially, some information about an investment or opportunity, but this information is heavily regulated in a prospectus under the Securities Act);
- A discussion about risk (there is risk in any investment; a statement of risks is fundamental to a prospectus;[51] what risks are involved in "investing" in an LLB?); and return (what return might be obtained from an LLB?);
- The consequences of a failure to obtain a return (some American law students were, at the time, suing their law school for misrepresenting employment opportunities arising from completion of a JD degree; though they were ultimately unsuccessful, and I was careful not to encourage students to do the same thing).

An investment prospectus and a university prospectus are not entirely congruent, but neither are securities law and hamburgers; comparative examples like these can help securities law be more "real" to students, particularly at the beginning of a course when they are grappling with a range of new and technical concepts.

Issues of "public choice" versus "public interest" were able to be applied through a consideration of recent reforms to the Securities Act 1978, which had expanded the powers of the key regulator – the Financial Markets Authority. These new powers included the power to review prospectuses, the ability (with some discretion – should a regulator have this discretion or not?) to consider the extent of its review, to require amendment, and to prevent investment while the prospectus is under consideration.[52] Having discussed key themes earlier in the course made it easier to ask the class to evaluate the appropriateness of these reforms.

Finally, I made a conscious choice to seek to teach both the "old" law (that is, the current law, as comprised in the Securities Act 1978, other legislation, and extant cases), as well as aspects of the "new" law (that is, proposals for reform contained in the Financial Markets Conduct Bill). This was part of my emphasis on "professionalism": students should be aware of the proposed reforms, so that they can be ready to apply them if they enter employment under the new legislative regime. What use would it be to be on the job and to know the old law, but not the new? This was particularly useful in some instances, such as comparing the notion of a "close business associate" under s 3 of the Securities Act 1978 (undefined in the legislation, but defined through case law[53]), and the notion of a "close business associate" under cl 4(2) of sch 1 of the Financial Markets Conduct Bill.[54]

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50 See for example University of Waikato *University of Waikato Undergraduate Prospectus 2013* <http://cms.its.waikato.ac.nz>.

51 Securities Regulations 2009, r 36: "A registered prospectus or an advertisement must not state or imply that investment in the securities to which it relates is safe or free from risk."

52 Securities Act 1978, ss 43C-43D, as amended by the Financial Markets Authority Act 2011.

53 See in particular *Securities Commission v Kiwi Co-operative Dairies Ltd* [1995] 3 NZLR 26 at 32 (CA).

54 Section 4 just says "close business associate"; *Securities Commission v Kiwi Co-operative Dairies Ltd* [1995] 3 NZLR 26 (CA) refers at 32 to a requirement for "a degree of intimacy or 'business friendship' in the relationship, though not necessarily a friendship away from business"; while cl 4(2) of sch 1 of the Financial Markets Conduct Bill 2011 (342-1) reads as follows:

VII. The Role of Lawyers

As I mentioned above, as part of seeking to embed "professionalism", I paid particular attention to the role of lawyers in securities law; not just as counsel in reported cases, but also as actors and participants in securities disputes. In this section of this article, I set out some examples of this approach.

A. Who should certify?

Section 5 of the Securities Act 1978 (as amended in 2004, and then again in 2009) provides that an offer of securities may be made to an "eligible investor" without being required to provide a prospectus or investment statement. An "eligible investor" is one who meets certain requirements as to wealth, experience in investment, or experience in the industry to which the security relates. Depending on the exemption sought, certification is required from a chartered accountant or independent financial service provider.

Clause 39 of Schedule 1 of the Financial Markets Conduct Bill also provides for a definition of "eligible investor", with certification by an authorised financial adviser, a chartered accountant or ... "a solicitor".[55] A certifier must be satisfied that the investor has been sufficiently advised of the consequences of the certification, and must have no reason to believe that the certification is incorrect (or that further information or investigation is required).[56]

I then asked students a series of questions: "Who should provide this certification? Would you? Why a "solicitor", rather than "a solicitor experienced in commercial law" or a similar provision? Should a sole practitioner in general practice – or a resource management lawyer, or a criminal specialist – provide this kind of certification? Should a new graduate? Does it matter who is asking? What if the client puts pressure on the lawyer (an "Uncle Sam wants you" approach)? What liabilities might arise from providing this certificate?" I believe that these kinds of questions help students to consider professional responsibility issues, and how they, as potential securities lawyers, would deal with them.

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(2) A person (*A*) is a close business associate of the offeror if—

(a) A is a director or senior manager of the offeror or of a related body corporate of the offeror; or

(b) A holds or controls 5% or more of the voting products of the offeror; or

(c) A holds or controls 20% or more of the voting products of a related body corporate of the offeror; or

(d) A is a partner of the offeror or of a director of the offeror (under the Partnership Act 1908); or

(e) A is a spouse, civil union partner, or de facto partner of a person who is a close business associate of the offeror under any of paragraphs (a) to (d) or subclause (3); or

(f) A is a child, parent, brother, or sister of a person who is a close business associate of the offeror under any of paragraphs (a) to (e) or subclause (3) (whether or not by a step relationship).

(3) A person (A) is also a close business associate of the offeror, in relation to an offer of financial products, if A has a close professional or business relationship with the offeror, or a director or senior manager of the offeror, that allows A to obtain the information that will enable A to assess—

(a) the merits of the offer; and

(b) the adequacy of any information provided by the offeror and any other person involved in the offer.

Law reform does not always make things simpler!

55 Financial Markets Conduct Bill 2011 (342-1), sch 1, cl 39(1)(c).

56 Financial Markets Conduct Bill 2011 (342-1), sch 1, cl 41(1).

B. Lawyers as Advisers: Managing Legal Risk

R v Rada Corporation (No 2) [57] is a case that predates the global financial crisis and the finance company collapses. It considers the responsibility of an issuer and its directors under s 58 of the Securities Act 1978. Besides the "rule" arising from this case, I used it as an opportunity to consider further issues of professional responsibility.

The law firm in this case produced a checklist of matters for the directors, and then a "draft letter certifying compliance with statutory requirements", which was sent around the directors.[58]

The Court noted that:[59]

> The letter … was careful to point out that … If a statement required to be included in a prospectus would be misleading if additional information were not also included, then that additional information must be given. The letter went on to point out that it is the directors who are primarily liable for the correctness of the prospectus. It was not always possible for solicitors to certify a prospectus as complying with these matters, since relevant information may be outside their knowledge.
>
> This very careful and proper letter from Bell Gully cannot in my view be elevated into approval by the law firm of any omission in the prospectus. The letter drew the directors' attention to the need for there to be no material omissions and placed the responsibility on them.

As part of inculcating professionalism, students can be encouraged not only to read appellate decisions, but also to write "careful and proper" letters.

In the more recent *R v Moses*, Heath J observed that:[60]

> Professionals such as solicitors … Respond to instructions provided by a client. Clients instruct; advisers advise. The quality of any advice is only as good as the information provided to the professional.

But in *Moses*, Heath J took a particular view as to the role and involvement of all parties, with responsibility clearly placed on the directors, rather than anyone else. Lawyers rely on information provided, but "careful and proper" communications from lawyers to clients can both protect the advising lawyer, and help the client understand their responsibilities.

Ministry of Economic Development v Stakeholder Finance Ltd,[61] concerned a prosecution under s 59 of the Securities Act 1978, and is useful for its analysis of s 3(2)(a)(iii) of that Act, relating to what is generally called a "habitual investor". It also provides useful insight into the role of solicitors in determining compliance with the exceptions to the Act. In basic terms, Mr Gale wished to invest as a "habitual investor". In a letter from the issuer's law firm, his application was declined, essentially on the basis that he did not have sufficient investment experience. Mr Gale – who was clearly very keen to invest, at least at this point in the chain of events – then wrote back with further information on his investment experience. The issuer's lawyer then advised Mr Gale that he did meet the threshold for being a "habitual investor". The

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57 *R v Rada Corporation (No 2)* [1990] 3 NZLR 453.

58 At 460.

59 At 460.

60 *R v Moses* HC Auckland, CRI 2009-004-1388, 8 July 2011, Heath J, at [100].

61 *Ministry of Economic Development v Stakeholder Finance Ltd*, DC Auckland, CRI 2007-004-28150, 9 December 2008, Judge PA Cunningham.

judgment indicates that the lawyers were instrumental in determining the scope of the "habitual investor" exception for the issuer, and in determining compliance in specific cases, with the issuer itself largely unaware of the rules being applied by the lawyers.[62] A case like this allows useful discussion on the practical roles securities lawyers may end up playing, at the "front end" (commercial decisions) as well as the "back end" (litigation) of investment matters. It is important that law students do not perceive everything through the prism of appellate judgments.[63]

VIII. INSECURITIES LAW

A. Insecurity

Thus far, this article has provided an account of teaching securities law in 2012. But let us pause to reflect on the phrase "securities law". The *Oxford Dictionaries Online* provide three definitions of "security":[64]

> noun (plural securities)
>
> 1 [mass noun] the state of being free from danger or threat:
>
> the system is designed to provide maximum security against toxic spills
>
> job security
>
> …
>
> • the state of feeling safe, stable, and free from fear or anxiety: …
>
> 2 a thing deposited or pledged as a guarantee of the fulfilment of an undertaking or the repayment of a loan, to be forfeited in case of default.
>
> 3 (often **securities**) a certificate attesting credit, the ownership of stocks or bonds, or the right to ownership connected with tradable derivatives.

Obviously, securities law focuses on the third of these, but it is worth considering the first definition as well: "the state of being free from danger or threat". In this sense, securities law in 2012 is anything but secure, and this section of this article examines three factors which support the appropriateness of the notion of "insecurities law".

B. Insecure securities – Finance Company Collapses

First, there are the significant losses suffered by investors due to the collapses of a number of finance companies. Their funds were not "secure", though many perhaps thought they were. As the Commerce Committee of the New Zealand Parliament noted in October 2011:[65]

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62 At [52] and [57].

63 See Glendon, above n 8.

64 See Oxford Dictionaries <http://oxforddictionaries.com>.

65 Commerce Committee, *Inquiry*, above n 47, at 7.

> Since May 2006, 45 finance companies in New Zealand have failed, either being placed into receivership or entering into moratorium arrangements with debt holders. These failures have put at risk about $6 billion of investors' deposits, much of which will not be recovered. It is estimated that between 150,000 and 200,000 deposit holders have been affected, and the losses to date have been estimated at over $3 billion. …
>
> We are aware that the collapses have devastated many investors.

"Devastation" is an emotional term. But its use does not alter the reality that significant monies have been lost by investors. All investment involves some risk. But investor funds in finance companies were invested in (debt) *securities*. While the term "securities" can be a clinical and legal one, the underlying word "security" can have considerable emotion attached to it.

The consequences of investor losses were given some attention in *R v Graham,*[66] concerning the sentencing of the directors of Lombard Finance & Investments Ltd, where Dobson J observed:[67]

> The very serious range of consequences for those who relied on the misleading offer documents are graphically illustrated by the 39 victim impact statements that have been completed by people who invested in Lombard between the end of December 2007 and early April 2008. The majority are retired people who were critically reliant on getting their money back, if not the interest they anticipated earning. The crushing impact of the financial losses, and the emotional stresses caused by it, should not be underestimated.

Some of these investors were described as "relatively unsophisticated";[68] as a group, their investments, their "securities", were not secure.

Dobson J also pointed to a further aspect of the insecurity created by the finance company failures:[69]

> On a broader front, there is the harm done in an institutional sense to the New Zealand community's confidence in savings and investment. You cannot be singled out for any responsibility in that regard because loss of confidence is an industry-wide phenomenon. However … Lombard was trusted by many small investors above other finance companies. The greater part that a sense of unjustified reliance on trusted directors plays in losses, the greater the impact in denting confidence in savings and investment generally.

Investments proved to be insecure; so too, as a result, is investor confidence. This is something the Financial Markets Conduct Bill aims to restore,[70] though there may be a long road forward.

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66 *R v Graham* [2012] NZHC 575 per Dobson J.

67 At [9]. Although see Peter Watts "Criminal sanctions for commercial negligence" [2012] NZLJ 103 at 106 on factual uncertainty about investor losses in the *Moses* decision.

68 *R v Graham*, at [10].

69 At [13].

70 See Financial Markets Conduct Bill 2011 (342-1), cl 3: "The main purposes of this Act are to—

(a) promote the confident and informed participation of businesses, investors, and consumers in the financial markets; and

(b) promote and facilitate the development of fair, efficient, and transparent financial markets."

C. *Insecure law*

Second, there is the unsettled state of the law. As mentioned above, securities law is a particularly topical subject, and significant decisions were being made – significant case law was emerging – as the course was taught, including the sentencing of the directors of Lombard Finance (including two former Ministers of Justice) in *R v Graham*[71] and of certain directors of Bridgecorp Ltd in *R v Petricevic*.[72]

The *Moses* decision,[73] though a 2011 judgment, remained insightful through 2012 as it continued to be used and interpreted in other cases, such as the *Graham* and *Petricevic* decisions. *Moses* commented on a range of points, such as the purpose of securities law,[74] the characteristics of a "prudent but non-expert investor";[75] the difference between governance and management;[76] the need for finance company directors to understand financial statements;[77] the importance of "impression" in interpreting a prospectus;[78] the role of lawyers;[79] and the role of other actors in securities law,[80] including the role of directors.[81] Let us consider aspects of uncertainty, or insecurity, for directors.

Roger Moses, the "Moses" in *R v Moses* (referred to above) received a sentence of imprisonment for breach of s 58 of the Securities Act 1978, relating to a misleading statement made in a prospectus.[82] Moses served 8½ months of his sentence, recalling in an interview his "absolute shock" at being sentenced to two years two months behind bars for gross negligence. "I thought it was very unlikely, mainly because the judge emphasised so often that there was no dishonesty involved and, in my case, no self-interest involved, so everyone thought jail was not a likely outcome".[83] His wife – though not an unbiased party – emphasised that there was no dishonesty, no fraud, and that jail time was therefore inappropriate.[84] And other less biased commentators have said the same thing: prominent company law scholar Peter Watts, for example, has emphasised that Heath J expressed the view that he did not believe that any of the directors of Nathans Finance (the company Moses and others were involved in) had been dishonest, and that "it is generally undesirable to imprison people for negligence, even gross negligence".[85] Watts makes a number of criticisms of the decision, including that while we can

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71 *R v Graham* [2012] NZHC 575 per Dobson J.

72 *R v Petricevic* [2012] NZHC 665 per Venning J.

73 *R v Moses* HC Auckland, CRI 2009-004-1388, 8 July 2011, Heath J.

74 At [36]; although see Gibbons above n 47.

75 At [64]–[70].

76 At [74], [434].

77 At [80]–[84], [402]

78 At [207], [421].

79 At [100], [427].

80 At [88], [92] and [97].

81 At [74], [397], [399], [400], [434].

82 *R v Moses* HC Auckland, CRI 2009-004-1388, 2 September 2011, Heath J.

83 Rod Vaughan "Roger Moses tells of disgrace, shock and life in jail" National Business Review, 15 June 2012, 6 at 6.

84 At 9.

85 Watts, above n 67, at 104.

try to be careful, everyone is careless from time to time, and carelessness (unlike dishonesty) does not involve a deliberate choice.[86] The economic harm caused to investors could be rectified through civil remedies or sanctions other than imprisonment, and the extent of the sentence in *Moses* will, in Watts' view, leave the courts little "room for manoeuvre" for cases involving real dishonesty.[87] Further, Watts believes, the Court placed too much emphasis on losses to investors, when these could have been caused by a range of factors, including a failure to read the prospectus and offer documents properly. Ultimately, Watts concludes, "is it not a rather upside-down world where the law takes to terrorising the honest?"[88]

Watts' points have of course been considered elsewhere: there is an extensive literature suggesting that there are better remedies than imprisonment for crimes of this nature,[89] and increasing attention has been paid to the fact that many investors do not read offer documents properly.[90] But the larger point is an important one: that the law in this area is unsettled; that directors may be unexpectedly imprisoned for conduct that is negligent rather than dishonest or fraudulent; and that significant issues of sentencing and personal freedom – are in a state of uncertainty. Unintended consequences are one thing; unexpected consequences are another.

D. "Securities Law" or "Financial Products Law" (Or Financial Markets Law)?

Third, securities lawyers and law students will no longer be dealing with a "Securities Act". Rather, they are likely to be dealing with the "Financial Markets Conduct Act" in future.[91] This replaces the "cornerstone" definition of a security[92] with a new definition of "financial product":

> **7 Meaning of financial product**
>
> (1) In this Act, *financial product* means—
>
> (a) a debt security; or
>
> (b) an equity security; or
>
> (c) a managed investment product; or
>
> (d) a derivative.
>
> (2) If an interest or a right is declared by regulations not to be a security for the purposes of this Act, the interest or right is not a financial product for the purposes of this Act.

We can see that the notion of a "security" has not disappeared entirely. In particular, equity securities and debt securities will still exist, both in fact and in terminology. But the notion of a

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86 At 105.

87 At 105.

88 At 106.

89 See for example Richard A Posner "Optimal Sentences for White-Collar Criminals" (1980) 17 Am Crim L Rev 409.

90 See for example Jenny Chen and Susan Watson "Investor Psychology Matters: Is a Prescribed Product Disclosure Statement a Supplement for Healthy Investor Decisions?" (2011) 17 NZBLQ 412.

91 Presently the Financial Markets Conduct Bill 2011.

92 See Peter Fitzsimons "The Investment Advisers (Disclosure) Act 1996 and the Securities Act 1978: the Cornerstone Definition of 'Security'" [1997] CSLB 67.

"participatory security" – a catch-all term in the Securities Act 1978[93] – will disappear, to be replaced by the notion of a "managed investment product". Under the Securities Act 1978, a "participatory security" was defined as meaning:[94]

> any security other than—
>
> (a) an equity security; or
>
> (b) a debt security; or
>
> (c) a unit in a unit trust; or
>
> (d) an interest in a superannuation scheme; or
>
> (e) a life insurance policy

Understanding the term "managed investment product" in the Financial Markets Conduct Bill, on the other hand, requires considerable analysis. The term is defined in cl 8 of the Bill as follows:

> *managed investment product*—
>
> (a) means a right to participate in, or receive, financial benefits from a managed investment scheme, whether the right is actual, prospective, or contingent and whether it is enforceable or not; but
>
> (b) does not include—
>
> (i) an equity security; or
>
> (ii) a debt security.

This then requires us to understand the notion of "financial benefits", which is fortunately defined briefly in cl 9(1) to mean "capital, earnings, or other financial returns"; and the notion of a "managed investment scheme". It is here that matters become much more complicated:

> **9 Definitions of financial benefit and of managed investment scheme**
>
> (1) In this Act,—
>
> ...
>
> *managed investment scheme* means a scheme to which both of the following apply:
> (a) the purpose or effect of the scheme is to enable persons taking part in the scheme (*scheme participants*) to contribute money to the scheme as consideration to acquire rights to financial benefits produced principally by the efforts of another person under the scheme; and
> (b) the scheme participants do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions).
> (2) However, a *managed investment scheme* does not include—
> Scheme only involves management of direct interests in underlying property
> (a) a scheme under which the scheme participant takes part in the scheme only by holding 1 or more interests in property if—

93 See Securities Act 1978, s 2; see also *R v Smith* [1991] 3 NZLR 740 at 748-749; *DFC Financial Services Ltd v Abel* [1991] 2 NZLR 619 at 625; *Hickman v Turn and Wave Ltd* [2011] 3 NZLR 318 at [314].

94 Securities Act 1978, s 2.

(i) it is an interest in separately identifiable or traceable property; and
(ii) the scheme participant either holds both the legal and beneficial interest in the property or the legal interest in the property is held on a bare trust for the scheme participant; and
(iii) the value of the interest is not substantially dependent on contributions being made by other scheme participants or the use of other scheme participants' contributions:

Discretionary investment management services

(b) a discretionary investment management service provided by a DIMS licensee or another person permitted to provide that service under sections 17 to 20 of the Financial Advisers Act 2008:

Insurance contracts

(c) a scheme that would be a managed investment scheme only because it involves pure risk contracts of insurance:
(d) a scheme that would be a managed investment scheme only because it involves life insurance policies (within the meaning of section 2(1) of the Securities Act 1978) that were issued before this section comes into force.

(3) In subsection (2), *pure risk contract of insurance* means a contract of insurance—
(a) for the payment of money on the happening of a contingency, other than a contingency dependent on the continuance of human life; and
(b) that does not, and never will, have a value on its cancellation or surrender that is greater than the value of an unexpired premium relating to a period after the date of cancellation or surrender.

This definition is presumably not intended to be deliberately obfuscatory. However, phrases such as "purpose or effect", "acquire rights", and "benefits produced principally by the efforts of another person" invite further judicial enquiry. How do we determine the purpose of a scheme? What sort of rights must be acquired? Contingent rights? Beneficial rights? Absolute rights? And an adverb like "principally" invites a court to say something like "principally means substantially, but not completely", adding other words by judicial gloss. Similarly, in the requirements for a scheme involving interests in property, phrases such as "separately identifiable or traceable property", and "not substantially dependent" will invite further enquiry as well. It is useful to invite students into these kind of discussions.

As a subject, securities law is both concept-based – dealing with particular concepts that may well be unfamiliar to students; and analytical – breaking down phrases such as "offer of securities to the public" into individual statutory and judicial definitions of "offer", "securities" and "public". There will be rich analytical teaching material in a definition like "managed investment scheme", but there may not be a lot of certainty.

IX. Conclusion

In the law classroom, content matters. Context matters. And pedagogy matters. Professionalism is not just about asking students to stand and recite the facts of *Payne v Cave*:[95] it is much broader than that. This article has provided an account of an attempt to emphasise

95 Or *R v Moses* HC Auckland, CRI-2009-004-1388, 2 September 2011, Heath J - tempting as that is, the judgment being lengthy (and so challenging for students), providing an overview of many aspects of the primary market, and being rich in insight on a range of issues touching on securities law. On *Payne v Cave* (1789) 3 TR 148, see for example Steve Sheppard (ed) *The History of Legal Education in the United States: commentaries and primary sources* (Salem Press, Pasadena, CA, 1999) at 27-28.

professionalism in a law class and teach a subject in a unique state of transition. I have looked at both my own context, the broader context, and matters of practical content. The approach taken has emphasised professionalism in a range of ways: what is expected of students, what they can expect in practice, and the role of lawyers in securities law.

In 2013 and beyond, securities law will be both the same and different. For the next few years at least, securities law will be about "the worst of times": finance company collapses, finance company director prosecutions, investor losses, and the impact of the global financial crisis. But it will still be about how we regulate capital markets, public offerings, and insider trading. Even in a topical subject, there is both constancy and change.

If I were to teach again in 2013, would I be "teaching in securities law" or "teaching insecurities law"? The latter seems more appropriate, as in recent times, many investments have been lost, been proved "insecure". Directors have found themselves imprisoned for negligent (not dishonest) behaviour, and the Securities Act is likely to be repealed and replaced by the Financial Markets Conduct Bill, which favours the term "financial products" over "securities". For those engaging with the subject, it may be "the best of times" in securities law in 2013 and beyond.