

# Toward a New Pedagogy

*Fundamentals of Securities Regulation.* By Louis Loss. Boston: Little, Brown & Co., 1983. Pp. xxvii, 1309. \$42.50.

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Early in 1943, prompted by an urgent call from a regional office, the five members of the Securities and Exchange Commission hastily convened in Washington to confront what had become a minor crisis in the federal securities laws. Milton Freeman, then Assistant Solicitor of the S.E.C., who drafted Rule 10b-5 in response to the crisis, recalls the story best:

I . . . received a call from Jim Treanor who was then the Director of the Trading and Exchange Division. He said, "I have just been on the telephone with Paul Rowen," who was then the S.E.C. Regional Administrator in Boston, "and he has told me about the president of some company in Boston who is going around buying up stock in his company from his own shareholders at \$4.00 a share, and he has been telling them that the company is doing very badly, whereas, in fact, the earnings are going to be quadrupled and will be \$2.00 a share for this coming year. Is there anything we can do about it?" So he came upstairs and I called in my secretary and I looked at Section 10(b) and I looked at Section 17, and I put them together, and the only discussion we had there was where "in connection with the purchase or sale" should be, and we decided it should be at the end.

We called the Commission and we got on the calendar, and I don't remember whether we got there that morning or after lunch. We passed a piece of paper around to all the commissioners. All the commissioners read the [proposal for Rule 10b-5] and they tossed it on the table, indicating approval. Nobody said anything except Sumner Pike who said, "Well, . . . we are against fraud, aren't we?" That is how it happened.<sup>1</sup>

Also at that meeting was Freeman's assistant, a young S.E.C. lawyer named Louis Loss. Since then he has been intimately involved in virtually every major official movement within the field of securities regulation.<sup>2</sup>

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1. *Conference on Codification of the Federal Securities Laws*, 22 *BUS. LAW.* 793, 922-23 (1967).

2. Professor Loss was the principal drafter of the Uniform Securities Act, *UNIFORM SECURITIES*

His contributions to the study of securities regulation have been immense. Professor Loss has long been acknowledged as having written "the authoritative treatise in this field."<sup>3</sup> If for no other reasons than these, his latest book, *Fundamentals of Securities Regulation*,<sup>4</sup> demands attention.

But Professor Loss' book deserves notice on its own as a valuable contribution to legal scholarship. It is the most important example of a new genre of law books<sup>5</sup> that offer law students and teachers an alternative to the recently criticized vehicle of traditional legal instruction—the case method.<sup>6</sup> The book is designed not only for use as a general classroom text, but also as a basic reference by the practitioner.<sup>7</sup> One might expect that, just as a servant cannot serve two masters, a book as ambitious as *Securities Regulation* is bound to disappoint at least one of its audiences. Happily, however, the book attends to the needs of both groups.

The book's success is at least partially attributable to an elegant style, which presents this highly technical and detailed area of the law in a way that is both crisp and engaging. For a book as comprehensive as *Securities Regulation* to be coherent, however, it needs either a unifying theme or at least some statement of the author's own views on the policy implications of the legal rules described. Unfortunately, the book does not provide any such perspective for its readers. This is the book's greatest failing.

## I. SECURITIES REGULATION: LAW VS. THEORY

The rapidly changing nature of the subject matter creates inherent difficulties for books such as *Securities Regulation*. Events can quickly overtake even a recently published work in this field. For this reason, a more theoretical approach to the subject is often helpful. Such an approach provides the reader with a basis for analyzing the rules described, and enables readers themselves to evaluate newly developed rules.

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ACT (1981) (current version appears at BLUE SKY L. REP. (C.C.H.) ¶¶ 5512.05-5559), which has been adopted or substantially adopted by 39 states. He is perhaps best known for his authoritative, multi-volume treatise, L. LOSS, *SECURITIES REGULATION* (2d ed. 1961 & Supp. 1969). More recently, Professor Loss was the reporter and principal drafter of the proposed Uniform Federal Securities Code, see A.L.I. *FEDERAL SECURITIES CODE* (1980).

3. R. JENNINGS & H. MARSH, *SECURITIES REGULATION CASES AND MATERIALS* 35 (5th ed. 1982).

4. L. LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* (1983) [hereinafter cited by page number only].

5. See, e.g., D. BELL, *RACE, RACISM AND AMERICAN LAW* (2d ed. 1980); B. BITTKER & J. EUSTICE, *FUNDAMENTALS OF FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS* (1980); R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977).

*Fundamentals of Securities Regulation* is the first securities regulation textbook designed for use as a primary classroom tool that relegates cases to secondary status.

6. See Bok, *A Flawed System*, HARV. MAG., May-June 1983, at 38 (reprinting *President's Report to the Board of Overseers for 1981-82*); Margolick, *The Trouble with America's Law Schools*, N.Y. Times, May 22, 1983, § 6 (Magazine), at 20.

7. P. xix.

For example, on March 3, 1982, the S.E.C. approved temporary Rule 415, which permits registration of securities "for the shelf."<sup>8</sup> Shelf registration permits corporations for the first time to make delayed or continuous offerings and sales of securities.<sup>9</sup> The temporary rule represents a radical step in the way large companies sell securities. Although shelf registration may eliminate some of the waste inherent in forcing large companies to go through the tedious and costly registration process each time they wish to issue stock, it raises some important questions about the registration process.<sup>10</sup>

Professor Loss describes Rule 415 in the engaging style that characterizes the whole book.<sup>11</sup> He raises a number of practical considerations that might prove of value to a practitioner with little experience in the area. For example, he advises that "the issuer that wants to offer debt securities must qualify an indenture that is 'open ended'; . . . and issuers must also make their peace with the state blue sky administrators."<sup>12</sup>

Perhaps it would be futile to attempt a more detailed treatment of such issues within the confines of a single volume, but one can immediately see that a practitioner who must actually *use* Rule 415 will need a good deal more help than this book provides. Although the detailed footnotes direct the reader to such assistance—the relevant S.E.C. releases<sup>13</sup> and periodical literature<sup>14</sup>—the discussion of Rule 415 in *Securities Regulation* will only permit the practitioner to begin to evaluate the possibility of using shelf registration.

What is lacking, then, is some sort of theoretical model, not only of shelf registration under Rule 415, but of the registration process generally.<sup>15</sup> Professor Loss informs the reader of the 1983 expiration date and

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8. Sec. Act Release No. 6383, 24 S.E.C. Doc. (CCH) 1262, 1288-94 (Mar. 3, 1982). The text of the rule is at 17 C.F.R. § 230.415 (1983).

9. Sec. Act Release No. 6423, 26 S.E.C. Doc. (CCH) 2, 8 (Sept. 22, 1982).

10. See Ferrara & Sweeney, *Shelf Registration Under S.E.C. Temporary Rule 415*, 5 CORP. L. REV. 308, 312-21 (1982) (discussing potential for Rule 415 to alter traditional underwriting practice).

11. Pp. 140-46.

12. P. 145.

13. Pp. 144-45 nn.53, 55-59.

14. Pp. 142 n.43, 144 n.54.

15. If the Securities Act of 1933, 15 U.S.C. § 77a (1982), has an underlying theory, it is that full disclosure in the registration and offering process is the key to achieving the twin goals of reducing fraud and enabling investors to make an informed choice concerning securities offered for public sale. See R. JENNINGS & H. MARSH, *supra* note 3, at 40. The full disclosure philosophy has come under powerful attack on both fronts.

First of all, critics argue, the '33 Act does little to reduce fraud because the registration statement has become a stylized document in which certain ritualistic incantations take the place of meaningful disclosure. As a result, "the common or even the moderately well informed investor is almost as much at the mercy of the issuer as was his pre-SEC parent." *Feit v. Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544, 565 (E.D.N.Y. 1971).

Second, commentators such as Professor Homer Kripke contend that compulsory disclosure is un-

concludes only that "[a]t this writing one can only speculate about the impact of Rule 415 on capital formation and investment banking practices."<sup>16</sup> A discussion of the general costs and benefits of registration would better equip the reader, whether student or practitioner, to analyze Rule 415 and the changes it is sure to undergo this year. The book does not completely lack such a theoretical perspective, but the treatment is spotty.

Professor Loss' treatment of the landmark Rule 10b-5 case, *Dirks v. SEC*,<sup>17</sup> further illustrates the difficulty of producing a treatise of lasting value to students and practitioners. The Supreme Court had granted certiorari,<sup>18</sup> but had not yet decided the case when this book was sent to the publisher. The Court reversed the D.C. Circuit's decision and held that Raymond Dirks, an investment analyst, did not violate Rule 10b-5 when he disclosed information about the Equity Funding scandal to his firm's clients.

Loss cites the *Dirks* case five times for several propositions,<sup>19</sup> but nowhere does he examine the holding of the case in a thorough, systematic way.<sup>20</sup> The absence of a broad theoretical treatment of the issue raised in *Dirks* may leave the reader with the uneasy feeling that the book presents a purely static, although panoramic, treatment of securities regulation. Examination of the troublesome policy questions regarding insider trading would provide some perspective on the yet unforeseen problems that will surely arise in this area.

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necessary. The market, they reason, provides an adequate incentive to disclose any information that will enhance the stock price. See H. KRIPKE, *THE SEC AND CORPORATE DISCLOSURE—REGULATION IN SEARCH OF A PURPOSE* 117-33 (1979) (anti-fraud provisions of securities laws would prevent companies from making *misleading* disclosures even if companies were not required to disclose facts that would have negative impact on stock prices). Indeed, until recently, the '33 Act prevented the very form of disclosure that investors should value most highly—management's forward-looking projections. See S.E.C. Act Release No. 6084, 13 S.E.C. Doc. (CCH) 1048 (July 10, 1979). It is difficult to predict how, if at all, these criticisms will affect the rules regarding disclosure. Still, Professor Loss should have apprised readers of competing points of view and of the kind of analysis that goes into the ultimate investment decision.

16. P. 145.

17. 103 S.Ct. 3255 (1983), *rev'g*, 681 F.2d 824 (D.C. Cir. 1982).

18. P. 816 n.71.

19. The case is cited to illustrate the close relation between S.E.C. fraud concepts and common law deceit, p. 816 n.71; to illustrate that securities analysts must respect the disclose-or-refrain-from-trading obligations of their corporate sources, pp. 841 n.62, 843 n.67; to illustrate the Supreme Court's "invitation" to lower courts—extended in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976)—to determine whether mere recklessness, as opposed to actual scienter, is sufficient to establish civil liability under § 10b and Rule 10b-5, p. 885 n.104; and to illustrate that Rule 10b-5 applies to broker dealers "along with everybody else," p. 946 n.1.

20. An example of a more general, theoretical analysis of the issues in the regulation of insider trading appears in Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 337-39 (judicial treatment of insider trading depends on "a multitude of considerations and more than a few guesses about the costs of different rules").

The spectrum of opinion in the debate surrounding *Dirks* ranges from the view that insider trading is generally desirable<sup>21</sup> to the view that it is wholly undesirable,<sup>22</sup> and encompasses various opinions in between.<sup>23</sup> Advocates of considerable stature have advanced arguments for each of these positions,<sup>24</sup> further demonstrating the complex theoretical nature of the problem. There is no sure way to predict how the insider trading rules will evolve; certainly *Dirks* is not the last word.<sup>25</sup> To have produced a book that would not quickly become outdated, Professor Loss should have provided a structure from which to analyze and judge future developments. Pure description, regardless of its quality, is not enough.

Despite the lack of a theoretical framework, the author's towering command of the subject matter and laborious attention to the development of the law since 1969 (when the last supplement of his multi-volume treatise was published) will be valuable to students and practitioners who need either a concise treatment of a highly complex field or an excellent historical view of how the subject has evolved since 1933.

One example of the mastery with which the book conveys information about the securities laws is Professor Loss' introduction to the complex statutory pattern of the Securities Act of 1933.<sup>26</sup> The problem for any student or practitioner confronting the material for the first time--as well as for any teacher or writer trying to convey it—is that the statute, standing without administrative gloss, is inherently unworkable. In Professor Loss' words, "[I]t required four administrative inventions—monuments to the vaunted flexibility of the administrative inventions [the Red Herring Fiction, the letter of comment, the price amendment, and the acceleration of the effective date of the registration statement] to make the Act work."<sup>27</sup>

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21. See H. MANNE, *INSIDER TRADING AND THE STOCK MARKET* (1966) (insider trading results in no significant injury to long-term investors and is the only practical means of compensating certain executives).

22. Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322, 345-48 (1979) (insider trading rules should bar transactions where one party has informational advantage that public investors may not lawfully overcome).

23. Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1, 55 (1980) (knowingly trading on insider information may be morally "bad" but costs of enforcement frequently outweigh benefits); Easterbrook, *supra* note 20, at 310 (insider trading addresses question of whether an individual who creates new knowledge possesses a property right in the knowledge and can use it to advantage in subsequent transactions).

24. See *supra* notes 20-23.

25. In *Dirks*, while holding that a tippee-investment adviser did not violate Rule 10b-5 by disclosing material inside information, the Court nonetheless concluded that "[t]he need for a ban on some tippee trading is clear." *Dirks v. SEC*, 103 S.Ct. 3255, 3263 (1983). The tippee-investment adviser was not liable because the tipper, an insider, did not benefit personally from his disclosure and therefore did not violate any fiduciary duty to the company. *Id.* at 3265-66. Difficult and yet unanswered questions concern how to determine whether an insider benefits personally from a transaction. See *id.* at 3266-67.

26. Pp. 92-96, 125-40; see pp. 97-139.

27. P. 126.

Taken together, these enable firm commitment underwritings to take place, although not without considerable confusion<sup>28</sup> and controversy.<sup>29</sup>

Before Professor Loss presents this material, he warns the reader that the statutory "scheme of involuted drafting does not facilitate comprehensibility."<sup>30</sup> Having said this, however, he goes on to explain the statutory framework of the '33 Act clearly and concisely. The book thus fulfills its promise of offering the reader a "coherent and smoothflowing treatment of the basics of the entire field."<sup>31</sup>

Unfortunately, those sections of the book that Professor Loss has left to others do not come across quite as clearly. The most noticeable example is the treatment of legislation directing the creation of a National Market System (NMS). Professor Loss delegates the entire coverage of this important subject to Professor Norman Poser, a former Executive Vice President of the American Stock Exchange and a former Assistant Director of the S.E.C.'s Division of Trading and Markets. Loss merely reprints most of a long article by Poser,<sup>32</sup> which describes in detail the structure of the existing securities markets and Congress' National Market System proposal. The article also analyzes and explains the S.E.C.'s failure to implement Congress' directive to develop a national market system. Professor Poser concludes first that this failure is the result of several factors: the S.E.C.'s "traditional regulatory orientation, its lawyer-dominated staff, and the limited authority provided to it by Congress to take the lead effectively in a restructuring of the stock markets;"<sup>33</sup> and also that "the basic premise of the NMS proposal [that a national market will encourage price competition among market makers and specialists] is open to serious question."<sup>34</sup>

Professor Loss' only reaction to this controversial conclusion is contained in his brief introduction to the National Market System portion of the book. He comments obliquely that "one does not tamper lightly with

28. For example, the '33 Act's definition of "offer" is much broader than the standard definition found in the context of contract law. Section 2(3) defines "offer" to include "every attempt . . . to dispose of" as well as "every . . . solicitation of an offer to buy, a security."

29. For example, as Professor Loss points out, the Commission uses its power to accelerate the effective date of a company's registration statement to enforce its view that

indemnification of an officer or director (or a person in control of the issuer) against statutory liabilities is unenforceable, however valid the indemnification may be as a matter of state law, because it tends to frustrate the *in terrorem* purpose of individual liability under § 11 for negligent deficiencies in the registration statement.

Pp. 133-34. The S.E.C.'s authority to implement this policy is open to serious challenge.

30. P. 92.

31. P. xix.

32. Poser, *Restructuring the Stock Markets: A Critical Look at the SEC's National Market System*, 56 N.Y.U. L. REV. 881 (1981), reprinted in part pp. 667-76, 749-98.

33. Poser, *supra* note 32, at 957; pp. 797-98.

34. Pp. 957, 798; see Poser, *supra* note 32, at 951-57; pp.797-98.

the guts of the New York Stock Exchange.”<sup>35</sup> He goes on to say that the article is reprinted not because Professor Loss agrees with it, but because it is “an excellent exposition of a technical, complex and vital subject.”<sup>36</sup>

Whether or not one agrees with Professor Poser’s conclusions, *Securities Regulation* should at least summarize some alternative points of view, or better yet, indicate Professor Loss’ own opinions about whether a National Market System is attainable or worthwhile. This issue is fraught with political overtones and special interest group lobbying. An opinion from an unbiased observer such as Professor Loss would be welcome indeed.

## II. THE CASE AGAINST CASEBOOKS

In April 1983, Derek C. Bok, President of Harvard University and former Dean of the Harvard Law School, issued what has been characterized as a “sweeping indictment” of law schools in the United States.<sup>37</sup> Among his criticisms was the medium of the case method,<sup>38</sup> which many consider to be anachronistic and inefficient.

The epistemology of late nineteenth century positivist legal scholars viewed law as science, and the legal system as a way to “find” pre-existing legal principles. Under this view, the case method provided the “marble” at which students could chisel and hammer until the legal principles that lay within finally emerged in recognizable form.

This perspective vanished with the advent of Legal Realism in the 1920’s. The case method survives, however, for a variety of reasons. First of all, it requires little preparation on the part of the law professors who “write” the books (i.e., assemble the cases), and on the part of those professors who use the cases as the basis for the so-called Socratic dialogue which takes the place of the lectures that are commonplace in other parts of the university. Perhaps more important, proponents of the case method contend that it teaches students how to “think like lawyers.” Specifically, they argue that the case method helps students learn to analyze and marshal facts, spot and distinguish issues, and learn and evaluate holdings of law.

Both students and teachers have recently come to criticize the case method, but for opposite reasons. Law teachers increasingly complain that this pedagogical device does not give students the kind of over-arching theoretical perspective that will be of use to students even after the cases

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35. P. 748.

36. *Id.*

37. Margolick, *supra* note 6, at 21.

38. Bok, *supra* note 6, at 45 (new forms of teaching in law schools will address students’ complaints about legal education and provide opportunity to confront defects of legal system).

in the book have been overruled, distinguished away, or reduced to statute. Although the case method retains ardent supporters in legal education, virtually no one would suggest that the device should be the exclusive medium of the law school curriculum. Law students, in contrast, are unhappy with the case method "not because it neglects to raise the larger questions but because it fails to answer the smaller ones." To the students, the greatest shortcoming of the case method is that "it is irrelevant and insufficiently concrete."<sup>39</sup> Their complaints about the case method perhaps cannot be addressed through new written materials, but only through the clinical programs that have become an increasingly important aspect of the law school curriculum in recent years.<sup>40</sup>

Surprisingly, the pedagogical concerns of law teachers have produced few alternatives to the casebook. These concerns, I suggest, evince a strong demand for a teaching device that can overcome the inadequacies of the traditional case method. *Securities Regulation* is the most promising so far.

The book has plenty of cases—forty-six—but has far fewer than the traditional law school text. Over seventy-five percent of the book "comes from [Professor Loss'] own pen."<sup>41</sup> The rest of the book is divided among cases, S.E.C. releases, and miscellaneous periodical literature.

As such, this book constitutes an important tool for securities law professors who want to move away from the limits of the case method. If it is successful it may provide an example for authors in other fields.

Securities regulation, like tax, bankruptcy, and corporate finance, is traditionally taught to second- and third-year law students. These students find such courses difficult, not simply because of the intrinsic complexity of the subject matter, but because they are generally unfamiliar with the underlying business transactions that give rise to the legal problems. Significantly, corporate clients believe that (besides basic professional competence) an understanding of the underlying business transactions is the most important attribute of an effective corporate counsel.<sup>42</sup>

Cases are often unwieldy in courses dealing with the legal aspects of business transactions because, while they may teach students the current state of the law (and perhaps a bit of legal reasoning), they often convey too little about the nature of the underlying transactions. Moreover, law

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39. Margolick, *supra* note 6, at 25.

40. Some law schools, notably Antioch and Northeastern, have traditionally placed clinical training at the center of their programs of instruction. Other schools, such as Yale and N.Y.U., have established clinical programs more recently.

41. P. xix.

42. Donnell, *Reflections of Corporate Counsel in a Two Way Mirror*, 22 *BUS. LAW.* 991, 993 (Table I) (1967).



teachers themselves are frequently ill-equipped to handle this aspect of the course.

Perhaps most important, one's inability to understand the mechanics of a business transaction such as a tax swap, an oil and gas financing, or a corporate merger impedes any kind of subtle analysis. The most enduring legal principles reflect the underlying economic realities of the businesses whose conduct they regulate. An understanding of the economic principles that underlie the legal rules applicable to business transactions is at least as important as the legal reasoning involved.

If the complexity of modern social, business, and economic relations shapes the legal topography beyond the ability of the traditional case method to adjust, law books should provide an alternative. *Securities Regulation* is one that works extremely well, especially when viewed as the first of a kind.

A good example of Loss' novel treatment of the development of one aspect of securities regulation is the difficult subject of defining exactly what constitutes a "security."<sup>43</sup> The issue is of no small moment. As Professor Loss points out, the question has been before the Supreme Court eight times, and each time the Court has reversed the decision below.<sup>44</sup> Yet the two most widely read casebooks in the field give this subject relatively cursory treatment. One covers the subject in forty-six pages,<sup>45</sup> and the other, remarkably, in twenty-four.<sup>46</sup> Professor Loss devotes almost one hundred pages to this eclectic area.<sup>47</sup>

Professor Loss has done a superlative job of organizing and presenting this material. He opens the discussion with *SEC v. Diversified Industries*.<sup>48</sup> While *Diversified* is no jurisprudential landmark, it does an excellent job of marshalling the myriad views embraced by the circuit courts. As the case points out, the Third,<sup>49</sup> Fifth,<sup>50</sup> Seventh,<sup>51</sup> and Tenth<sup>52</sup> Circuits apply an "investment/commercial dichotomy test" to determine whether an investment vehicle is a security. The Ninth Circuit<sup>53</sup> follows a

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43. P. 213.

44. P. 167.

45. R. JENNINGS & H. MARSH, *supra* note 3, at 185-231.

46. D. RATNER, *SECURITIES REGULATION: MATERIALS FOR A BASIC COURSE* 223-47 (2d ed. 1980).

47. Pp. 167-261.

48. 465 F. Supp. 104 (D.D.C. 1979).

49. *Lino v. City Investing Co.*, 487 F.2d 689 (3d Cir. 1973).

50. *Bellah v. First Nat'l Bank*, 495 F.2d 1109 (5th Cir. 1974).

51. *C.N.S. Enter. v. G. & G. Enter.*, 508 F.2d 1354 (7th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975).

52. *McGovern Plaza Joint Venture v. First of Denver Mortgage Investors*, 562 F.2d 645 (10th Cir. 1977).

53. *Amfac Mortgage Corp. v. Arizona Mall*, 583 F.2d 426 (9th Cir. 1978).

“risk capital” test, and Judge Friendly, speaking for the Second Circuit,<sup>54</sup> uses a “literal approach.”

Professor Loss also provides an important historical perspective.<sup>55</sup> Before the inflationary era that began in the 1950's, the distinction between an insurance policy and a security was relatively clear. People selling securities had to register them under the provisions of the Securities Act of 1933, and people selling insurance policies did not. In the mid-1950's, however, insurance companies became justifiably concerned about losing business to mutual funds because inflation was rendering traditional fixed rate term insurance an unattractive investment.

Insurance companies invented the variable annuity in response to this problem. A variable annuity does not offer a fixed amount of money at the maturity date as does a traditional annuity. Instead, a variable annuity pays the holder the market value of his share of a portfolio of securities. The value of the holder's share fluctuates monthly as the market value of the underlying portfolio changes. Those who believe interest rates will rise will prefer variable annuities because the monthly return will rise along with the market. Needless to say, this invention shares many features with a security, such as a mutual fund share, and only a few with an insurance policy.

Without background information regarding the context of legal definitions of “insurance” and “security,” it would be impossible fully to understand and evaluate seminal cases such as *SEC v. Variable Annuity Life Ins. Co. of America*<sup>56</sup> (*VALIC*). In *VALIC*, the Supreme Court, by a vote of 5-4, held that a Washington, D.C. life insurance company which sold nothing but variable annuities must register them as securities under the '33 and '34 Acts. *Securities Regulation* provides a unique approach to variable annuities. The book does not print the *VALIC* case, but summarizes the lower court's opinions as well as that of the Supreme Court, in less than one page.<sup>57</sup> The most important material, the background information, is conveyed in purely expository form.

But Professor Loss does not stop with this concise exposition of the background and disposition of the *VALIC* case. Rather, he challenges the reader to imagine the full implications of the Court's decision, because “the *VALIC* case inevitably left a number of both conceptual and practical problems in its wake.”<sup>58</sup> From here he guides the now seasoned reader through a number of even more esoteric hybrids, including flexible fund

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54. *Exchange Nat'l Bank v. Touche Ross & Co.*, 544 F.2d 1126 (2d Cir. 1976).

55. Pp. 214-17

56. 155 F. Supp. 521 (D.D.C. 1957), *aff'd*, 257 F.2d 201 (D.C. Cir. 1958), *rev'd*, 359 U.S. 65 (1959).

57. P. 216.

58. P. 217.

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annuities, group annuity contracts (popularly known as Keogh plans), variable life insurance policies, and tax deferred annuity contracts, among others.

Today, insurance hybrids are being invented faster than the regulators can evaluate them, and far faster than the traditional casebook can incorporate them with adequate analysis of their social and economic implications. The approach that *Securities Regulation* takes to this problem—just one example of many in the book—triumphs over the traditional case method. Professor Loss leaves the student with a map of the intellectual possibilities of structuring future payments for present investments:

[I]n the last analysis, there is no escaping the fact that there is a continuous spectrum from a one-year term life insurance policy, which is pure insurance, through the various forms of straight life and endowment policies, to annuities and life insurance, both fixed and (in varying degrees) variable, to mutual fund shares and ultimately common stock, which represent pure investment.<sup>59</sup>

Within this framework the student can evaluate the developing new forms of insurance, and the legal problems they create. In addition, Professor Loss exposes the student to far more information about the underlying business realities that produce legal problems than does the traditional case method.

*Securities Regulation* provides a glimpse of what may become the standard law school textbook style of the future. The appellate decision will not disappear—it will continue to play an important role, particularly in the first-year curriculum where the emphasis is on the structure of the common law and on development of basic analytical skills.

Later in law school, as attention shifts from the common law to the analysis of statutes, new problems of pedagogy arise. Law schools may continue to categorize these problems into discrete subjects such as securities regulation, corporations, and taxation, but students, if they are to become competent practitioners, must recognize and develop an understanding for the business environment in which all these subjects arise and operate. The same holds true for practitioners moving into a new area of practice. *Securities Regulation* is a superb tool for accomplishing both goals.

One other, perhaps more important goal for a book of this sort is a bit more elusive. It is difficult to describe and difficult to achieve. That goal is to provide students with the theoretical and analytical skills necessary to

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59. P. 224.

adapt to a rapidly changing legal and regulatory environment. In another day this was described as "teaching students to think like lawyers."

The challenge faced by legal educators is remarkably similar to that faced by the cadre of philosophers and computer scientists currently exploring the frontiers of artificial intelligence. Their goal is not merely to program the computer to act pursuant to a large set of pre-programmed instructions. Rather, it is to develop a program that creates new instructions in response to new situations; that can, in other words, "form its *own* rules."<sup>60</sup> The program can then function on its own in reaction to new stimuli without further input from the programmer. The machine is thus liberated from its teacher—the programmer. The goals of legal education are essentially the same. What is a first-rate education, other than a two-step process of data assimilation and then liberation from the shackles that the data has imposed? The successful student is the one who reacts quickly to new rules and new problems and is comfortable in a world of constant change. This student, in the words of Justice Traynor

comes to realize how essential it is, . . . that he be intellectually interested in a rational outcome. He cannot remain distorted forever, his mind suspended between alternative passable solutions. Rather than to take the easy way out . . . he can strive to deepen his inquiry and his reflection enough to arrive at last at a value judgment as to what the law ought to be and to spell out why.<sup>61</sup>

*Securities Regulation* offers precious little guidance for developing the kinds of value judgments that Justice Traynor described as "essential" for the successful student. The reader of this book will come away with a clear view of what the law is, but without the skills to evaluate what the law should be or what it is likely to become.

#### CONCLUSION

It is no surprise that *Securities Regulation* demonstrates a consummate mastery of the field. The book provides a valuable service to students and practitioners, as well as a welcome change of pace to teachers whose pedagogical burden will be greatly eased by the book's engaging prose and careful exposition. For this alone, Professor Loss deserves "the rush that

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60. Gleick, *Exploring the Labyrinth of the Mind*, N.Y. Times, Aug. 21, 1983, §6 (Magazine), at 23, 26 (quoting L. Shank, head of artificial intelligence laboratory, Yale University) (emphasis in original).

61. "The Mind Counts," address by The Honorable Roger J. Traynor, 47th Annual Meeting of the American Law Institute (May 22, 1970) (on file with the *Yale Law Journal*).

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occasionally comes from doing something very well which is very hard to do at all.”<sup>62</sup>

In addition, the book should be of interest to legal scholars, as it is the most important alternative to the casebook yet to appear on the market for classroom use. Its success, one hopes, will encourage even bolder forays into the domain of the casebook. Particularly promising is the prospect of a book that will help to provide students with a basis for independent thought, a theoretical structure for determining what the law should be.

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62. Leff, *Afterword*, 90 YALE L.J. 1296, 1296 (1981).

*The Editors dedicate this issue to Professor Brown for his long and distinguished career on the faculty of the Yale Law School. His patience, civility, and quiet dignity have touched generations of Yale students.*



**RALPH BROWN**

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