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Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools

Nancy B. Rapoport
University of Nevada, Las Vegas -- William S. Boyd School of Law

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NANCY B. RAPOPORT*

"We want to be one of the schools that are in the 'top 50.' How can we be among the elite if we don't look like—and act like—the other elite schools?"

"Let's reward the high-achievers without demoralizing the bedrock group. If we set post-tenure review standards low enough, no one loses. We get the administration off our back without anyone telling us what we have to do. After all, tenure means never having to say 'yes, sir' again."

"We want to be recognized for how good we are. We just don't want to have to sell ourselves publicly in order to do it."[1]

With underlying beliefs like these, how do law schools ever change?

For the past eighteen months, the University of Houston Law Center has been working its way through what has variously been called a "strategic plan," a "benchmarking process," and a "futile attempt at a new and unreachable vision." The timing for the planning process was deliberate: we started two years before our self-study was due and just as our university was beginning discussions about its next comprehensive campaign. The goal was to be able to take stock of where we were in relation to other schools with which we wanted to compare ourselves. Among our other aspirations, we sought to determine our relative strengths and advantages before we made many new resource-intensive decisions. Not only were the obvious resources involved—money, time, and space—but also other resources, such as vacant or new faculty lines and the allocation of fundraising efforts, were implicated.

Even I have had my doubts about the success of any strategic planning over these many months, and the process is far from over. But our exercise, dubbed Project Magellan[2] by our Vice Dean, Seth Chandler, is useful for two reasons. First, we have learned a great deal about ourselves and about our various benchmark schools.[3]

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* Nancy B. Rapoport, Professor and Dean of the University of Houston Law Center, The opinions expressed in this article are mine alone and not those of the faculty or administration of the University of Houston Law Center or of the University of Houston. I am grateful to Professor Spencer Simons, who is the Director of our O'Quinn Law Library, Adrienne Cobb, and Marshall Stagg for their research assistance, and I particularly want to thank Richard Chait, Lonny Hoffman, Tom Oldham, Morris Rapoport, and my husband, Jeff Van Niel, for brainstorming with me about these ideas and commenting on earlier drafts. This article is dedicated to the memory of my mother, Shirley Bard Rapoport, who showed me that embracing change and becoming an early adopter of trends, rather than a trend-follower (or, worse yet, a late bloomer), was worth the risk of failure or embarrassment.

1. The remarks in italics are a mélange of comments that I've heard over the years at various law schools.

2. Pete Wentz, formerly of New Vistas Consulting and now at APCO Worldwide (pwentz@apcoworldwide.com), has guided Project Magellan quite ably.

3. We chose the following law schools as our benchmarks: Alabama, Baylor, Chicago-

Second, the process has brought to light some of the quirks of academia that make both strategic planning and day-to-day operations more difficult. It is the interaction between those quirks and the rankings that I will address in this Commentary.

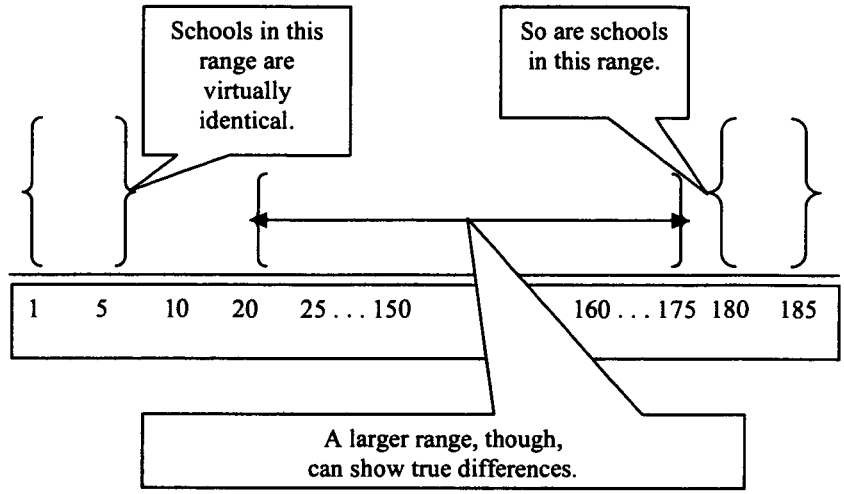
As we focus on the rankings in this symposium, let's not forget what it is that rankings are supposed to signify—an ordering of quality from best to worst.[4] That may well be what various rankings (and especially the *U.S. News & World Report* ("*U.S. News*") rankings) *try* to signify, but they don't do a very good job of it. Any differences among schools in the top 5 (or the top 10, or the top 25) are so minuscule as to be meaningless. The same holds true for *any* grouping of five, ten, or twenty-ish schools along the rankings continuum. It's only when a grouping encompasses a large number of schools that the differences in various metrics start to become meaningful. The actual number assigned to any school in the rankings is not nearly as meaningful as the company that the school keeps in that particular ranking system.[5] I've tried to illustrate this principle in the diagram below.

Kent, Cincinnati, University of California–Davis, UCLA, Fordham, George Washington, Minnesota, Northwestern, Pittsburgh, Southern Methodist University, University of Texas, and Washington University in St. Louis. We chose Northwestern as our aspirational private school because its innovations, both in the composition of its entering classes and in its teamwork assignments in several courses, intrigued us. We chose Alabama and Chicago-Kent for their dramatic increases in the rankings. We chose Cincinnati, UCLA, Fordham, George Washington, and Pittsburgh as big-city peers. We chose Minnesota and UC–Davis as aspirational public schools, and we chose the three other Texas schools because of our perceived closeness to their programs and because of certain similarities in some funding sources.

4. I disagree with the idea that the rankings signify anything like a real continuum of quality. *See* Nancy B. Rapoport, *Ratings, Not Rankings: Why* U.S. News & World Report *Shouldn't Want to Be Compared to* Time *and* Newsweek—*or* The New Yorker, 60 OHIO ST. L.J. 1097 (1999); *see also* Michael Ariens, *Law School Branding and the Future of Legal Education*, 34 ST. MARY'S L.J. 301 (2003); Richard Schmalbeck, *The Durability of Law School Reputation*, 48 J. LEGAL EDUC. 568 (1998); David A. Thomas, *The Law School Rankings Are Harmful Deceptions: A Response to Those Who Praise the Rankings and Suggestions for a Better Approach to Evaluating Law Schools*, 40 HOUS. L. REV. 419 (2003); David Yamada, *Same Old, Same Old: Law School Rankings and the Affirmation of Hierarchy*, 31 SUFFOLK U. L. REV. 249 (1997). *But see* Mitchell Berger, *Why* U.S. News & World Report *Law School Rankings Are Both Useful and Important*, 51 J. LEGAL EDUC. 487 (2001); Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403 (1998).

5. Because the actual number itself has no absolute meaning, to me, the quest to be back in the "top 50" begs the question of what a "top 50" school does differently from what we do. Do the professors in the top 50 schools teach differently from the way we teach? Do they teach different subjects or teach them better than we do? Do they write appreciably better articles, or just place them in better journals? Do they serve on different committees, go to different conferences, or get quoted in different newspapers? Ascribing an absolute meaning to a ranking is akin to believing that one's amplifier is louder if the numbers on its dial go up to eleven instead of ten:

> NIGEL TUFNEL. The numbers all go to eleven. Look, right across the board, eleven, eleven, eleven and . . . .
>
> MARTY DIBERGI. Oh, I see. And most amps go up to ten?
>
> NIGEL TUFNEL. Exactly.
>
> MARTY DIBERGI. Does that mean it's louder? Is it any louder?
>
> NIGEL TUFNEL. Well, it's one louder, isn't it? It's not ten. You see, most blokes, you



The rankings served as the focus of many of our discussions in the Magellan meetings. For many committee members, the rankings were a talisman of membership in the group of the best law schools (the "top 50"), and there was a real sense of yearning to be back in that group and to stay in the top 50 for good. For some of the committee members, being in the top 50 was the sine qua non of Magellan's mission: once we achieved "top 50-ness," we were done. Other committee members wanted what the top 50 designation would represent: the ability to be recognized for the quality of our program and a concomitant ability to chart more of our destiny within our university and within the world of legal education.

We embarked on Magellan in part to learn what our benchmark schools were doing that we weren't doing (or what they had that we didn't have).[6] We still have to answer the question of whether we want to (or can) make those changes to be more like our

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know, will be playing at ten. You're on ten here, all the way up, all the way up, all the way up, you're on ten on your guitar. Where can you go from there? Where?

MARTY DIBERGI. I don't know.

NIGEL TUFNEL. Nowhere. Exactly. What we do is, if we need that extra push over the cliff, you know what we do?

MARTY DIBERGI. Put it up to eleven.

NIGEL TUFNEL. Eleven. Exactly. One louder.

MARTY DIBERGI. Why don't you just make ten louder and make ten be the top number and make that a little louder?

NIGEL TUFNEL. [*pause*] These go to eleven.

THIS IS SPINAL TAP (MGM 2000 re-release), *available at* http://www.imdb.com/title/tt0088258/quotes.

6. Most of what they have that we don't is money, and lots of it. Many of them have private foundations with large endowments. That additional money enables them to pay larger salaries to professors, to buy more students with scholarship funds, to have larger library collections, to hold more conferences, etc. Five years ago, I did a back-of-the-envelope correlation study between rankings and size of endowment, and the correlation coefficient for the 50+ schools in the top 50 was .88.

benchmark schools. Even if we do change, though, does that mean that an increase in our *U.S. News* ranking will automatically follow, or will the "top 50" designation continue to stay just out of our reach?[7] More important, should we change anyway, even if our ranking never goes any higher?

I. STRATEGIC PLANNING IN THE "IVORY TOWER"— WOULD JACK WELCH RUN A LAW SCHOOL THAT COULDN'T BE #1 OR #2 IN THE "BUSINESS" OF LEGAL EDUCATION?[8]

At cocktail parties and in town hall meetings with students, I hear a constant refrain: "Why can't you run the law school more like a business?"[9] My colleagues in the "real

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7. We have been doing many things well over the past few years—hiring talented new faculty members, increasing our admissions "numbers," continuing to have a high bar passage rate—and yet we're still not back in the top 50. According to our records, our 1994 *U.S. News & World Report* ranking was 49, our 1995 ranking was 42, our 1996 ranking was 46, our 1997 ranking was 49, our 1998 and 1999 rankings were 50, our 2000 ranking was 58, our 2001 ranking was 51, our 2002 ranking was 50, our 2003 ranking was 53, our 2004 ranking was 69, and our 2005 ranking was 59. Part of the problem appears to be our placement rates for the past few years, starting immediately after Tropical Storm Allison devastated our school in the summer of 2001. As our placement rate goes up, I expect that our overall ranking will, too—assuming that the schools ranked higher than we are either stay "flat" in their numbers or lose ground. But none of the current schools in the top 50 have indicated their willingness to step aside to make room for us. I'm not sure we can leapfrog over many of them, at least not without a large infusion of financial resources.

8. Jack Welch, the former CEO of General Electric (GE), once speculated in a speech:

> On the other hand, where we are not number one or number two, and don't have or can't see a route to a technological edge, we have got to ask ourselves Peter Drucker's very tough question: "If you weren't already in the business, would you enter it today?" And if the answer is no, face into that second difficult question: "What are you going to do about it?"

ROBERT SLATER, THE GE WAY FIELDBOOK: JACK WELCH'S BATTLE PLAN FOR CORPORATE REVOLUTION 195 (2000); *see also* JAMES W. ROBINSON, JACK WELCH AND LEADERSHIP: EXECUTIVE LESSONS OF THE MASTER CEO 184–85 (2001).

Of course, not everything that Jack Welch did was laudable, and he has his detractors. *See, e.g.*, Diane Brady, *Trashing CEO Tomcats*, BUSINESS WEEK, May 10, 2004, at 26 (book review) (discussing Welch's affair with Suzy Wetlaufer, the former editor of *Harvard Business Review*); Del Jones, *SEC Says GE Broke Law, but Doesn't Penalize It: Outline of Welch's Perks Too Vague*, USA TODAY, September 24, 2004, at 4B (discussing what happened to Welch's perks at GE after his ex-wife used his perks as leverage in their divorce); Mark Shanahan, *Saying Their Vows and Still in Spotlight*, BOSTON GLOBE, April 24, 2004, at E1 (discussing Welch's marriage to Wetlaufer). But his idea (or, for that matter, Peter Drucker's idea) about not staying in businesses in which one has no comparative advantage is still a good idea.

9. The business model [of strategic planning] is generally top down, although it is still necessary to get the support and involvement of people in the company. Because of the importance of shared governance in university management, faculty's involvement [in strategic planning] is key, and building consensus right from the beginning becomes essential . . . . University faculty can't be "directed" (i.e., command authority) in the same way as employees in a company, because

world" outside academia marvel at such novelties as tenure and shared governance, musing about the apparently cushy life of a professor. There's no question that life for a tenured professor at a research university has to be one of the all-time best deals in the world: as long as the university can afford to keep running (or at least running the unit in which the professor has tenure),[10] the freedom that the professor has is unparalleled. No boss can dictate to the professor what her field of research should be; most of the time, the professor teaches in areas that complement her research interests; and the service components of the job are often interesting, if occasionally time-consuming. Even another one of the all-time great jobs—that of an Article III federal judge—pales in comparison. The lifetime tenure is the same, but the cases before the judge somewhat dictate the issues that the judge gets to consider during his normal business hours.

And yet there are real business pressures in academia: there are budgets, deadlines, and audits (sometimes in the guise of accreditation standards, and sometimes actual financial audits). For the most part, faculty members are sheltered from the day-to-day pressures of running an academic unit in the same way that associates at a law firm are sheltered from the day-to-day pressures of keeping the law firm's doors open.[11] Certainly, professors know when the "business" of the law school is threatened, such as by a decline in enrollment, a serious drop in bar passage rate, or certain accreditation issues. But the tools that a company might use to deal with changed circumstances—retooling, layoffs and firings, selling off divisions, or bankruptcy—are not tools that the academy uses, except in extraordinary circumstances. Only the extremely rare "financial exigency" situation allows for wholesale cuts in academic programs.[12] Most

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"centralized power" at universities is not very strong.

Alexandra L. Lerner, Unique Aspects of Strategic Planning in Higher Education (1999), www.des.calstate.edu/uniqueaspects.html.

10. Consider the recent effects of Hurricane Katrina on Tulane University's resources. Scott Cowen, Tulane's President, had this to say about Tulane's chances for survival:

> I don't see how any university can be essentially out of business for one year and hope to recover from it in any shape or form of what they looked like before," says Mr. Cowen. "We will be back in the spring. We've got to be ready. If not, we might as well close all the doors and walk away. I mean, how long can New Orleans be closed?

Jeffrey Selingo, *Putting a University Back Together: Tulane's President, Working 350 Miles from the Campus, Says Reopening by Spring Is Essential*, CHRON. HIGHER EDUC. (Sept. 16, 2005), *available at* http://chronicle.com/weekly/v52/i04/04a01801.htm. If that's not financial exigency, then I don't know what is—and the Tulane professoriate had better be hoping for Tulane's survival if they want to keep their own jobs.

Not all of the other universities affected by Hurricane Katrina are in such dire straits. For example, our own law school is hosting Loyola's law school so that Loyola can teach its own students directly. *See* University of Houston Law Center Home Page, University of Houston Law Center to Host Loyola University New Orleans School of Law, http://www.law.uh.edu (last visited Oct. 11, 2005).

11. As a matter of fact, being a dean of a law school has a lot more in common with being a managing partner of a law firm than it does with the actual "work" (teaching, research) of academia. Both deans and managing partners have to deal with issues of human capital, and both have considerably more "carrot" than "stick" with which to persuade their colleagues to change course. But there's precious little "carrot" in either academia or law firms.

12. *See supra* note 10. *Cf.* Report on Financial Exigency, Academic Governance, and Related Matters (2004), http://www.aaup.org/statements/REPORTS/Financial.htm.

of the time, the business of the law school runs, for better or worse, as it has always run, with its usual curriculum, its usual faculty-student ratio, and the usual competitive pressures lurking in the background. Thank goodness that thousands of people every year want to become lawyers. But for that level of desire, the 180+ ABA-accredited law schools would have to do much more to justify their existence.

Magellan forced us to consider possible measures of quality. There are other measures, beyond the rankings, that will tell us if we're doing a good job. One can measure a successful law school program in much the same way that one can measure a successful business. Instead of the number of widgets produced, there is the number of graduates who have jobs at graduation[13] or the percentage of graduates who pass the bar on the first try.[14] Instead of market dominance, there is the national visibility of the faculty.[15] Instead of the number of existing warranty claims, there are alumni giving rates and employer satisfaction surveys. These measures aren't perfect, but they are some indications that a school is doing what it should be doing.[16] The ABA Standards

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Richard Chait puts it best:

> Academic programs seem difficult to prune and virtually impossible to eliminate. . . . At a time when resources are scarce and the skills of faculty are not always well matched to the preferences of students, these limitations [of academia] make little sense to large numbers of trustees and many administrators. Companies regularly shed product lines. Pepsico divested Taco Bell, KFC, and Pizza Hut; Woolworth's, now Venator, exited the "five and dime" business. Why can't colleges restructure, trustees asked? For fiduciaries and managers, more often than not, tenure was a critical obstacle. Dennis O'Brien (1998), president emeritus of the University of Rochester and Bucknell, maintained that tenure should be "attenuated" in order to change institutional mission and programs or to preserve "the *best* faculty" when a college has to downsize. "Tenure artificially constrains the choice" because tenured senior faculty enjoy precedence over untenured colleagues, irrespective of relative abilities or organizational priorities.

Richard P. Chait, *Why Tenure, Why Now?*, *in* THE QUESTIONS OF TENURE 6, 13 (2002) (emphasis in original) (citations omitted).

13. In a very generous email commenting on an earlier draft of this Commentary, Anthony Ciolli correctly points out bow easy it is to manipulate the placement rate at graduation, and he suggests that a more precise measure would be what percentage of graduates were able to work at their "first choice" type of job. His first cut at such a measure is available at http://www.autoadmit.com/studies/ciolli/. Email from Anthony Ciolli to Nancy B. Rapoport, Dean of the University of Houston Law Center (April 24, 2005) (on file with author).

14. The analogy can be carried too far: students are not "customers" in the sense of being passive purchasers of the commodity of an education, for all of their talk about wanting better service from the staff in their schools. Even though students aren't "customers," though, common sense suggests that a more streamlined bureaucracy will leave them with more time for their studies.

15. Brian Leiter's ranking of law schools on the basis of faculty reputation is more finely tuned to academic reputation than is *U.S. News & World Report*'s "reputational" score. At least in Leiter's instrument, participants have to rank schools based on the reputation of each school's individual faculty members. *See* Leiter's Law School Rankings, http://www.leiterrankings.com (last visited Nov. 18, 2005).

16. Stock prices are also measures of a business's success, of course. Not to put too fine a point on things, but just as stock prices reflect market perception or market manipulation as much as they may reflect market reality (see Enron), rankings are affected by perception, too. After all, *U.S. News & World Report* bases 40% of its law school rankings on surveys testing a

that cover such issues as curriculum and bar passage rates[17] are trying to ensure that students choosing ABA-accredited law schools are receiving a proper legal education.

But not everything that's good in a business (or in a law school) can be counted and measured.[18] Good companies also have a buzz, an ambiance: look at the thousands of books that try to capture what makes a truly good business stand out.[19] It is possible to count the number of peanut packages served on Southwest Airlines and still miss the climate that encourages a flight attendant to sing the FAA instructions at the beginning of a flight. Put another way, Harvard and the other truly top law schools do the same things that schools do lower down in the pecking order,[20] but there's *something* different about the very top schools, and not all of that difference can be explained through the numbers that *U.S. News* sifts through for its annual rankings issue. Does Harvard's (or Yale's, or Stanford's, etc.) reputation create the difference, in a sort of self-fulfilling prophecy, or does some true difference account for that reputation in the first place?

If we really wanted law schools to behave like the very best businesses, we'd have to be willing to do what Jack Welch once proclaimed: if we can't be #1 or #2, we shouldn't be in the business at all.[21] To some extent, those schools recognized primarily for their specialties—environmental law or trial advocacy or the like—are following Jack Welch's advice. They're focusing their resources on those areas in which they stand out.

Most schools are in that great undifferentiated middle, though, and but for the current demand for legal education, they don't have any particular reason for existing. They have solid programs, but nothing unique. Perhaps these middle-tier schools

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school's academic reputation and its reputation among judges and lawyers. I'm sure that the halo effect of a school's position in the *U.S. News & World Report* rankings helps to perpetuate that relative ranking over time. Next year's rankings will be instructive, as the University of Illinois College of Law restates some of its data. *See* Alex Wellen, *The $8.78 Million Maneuver*, N.Y. TIMES, July 31, 2005, § 4A, at 18.

17. *See* SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2005–2006 (2005), *available at* http://www.abanet.org/legaled/standards/2005-2006standardsbook.pdf [hereinafter ABA STANDARDS].

18. Take, for example, the accounting category of "goodwill."

19. Even a partial listing of such books would strain the pages of this symposium issue to its limit. These books include JIM COLLINS, GOOD TO GREAT: WHY SOME COMPANIES MAKE THE LEAP . . . AND OTHERS DON'T (2001) and THOMAS J. PETERS & ROBERT H. WATERMAN, IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES (1982). The related genre—how to be a great manager—includes such books as MARCUS BUCKINGHAM & CURT COFFMAN, FIRST, BREAK ALL THE RULES: WHAT THE WORLD'S GREATEST MANAGERS DO DIFFERENTLY (1999). I still remember the out-of-body experience I had when I visited with Marcus Buckingham at a retreat at the University of Nebraska. He had just presented his research on FIRST, BREAK ALL THE RULES, which really does do a good job of explaining how managers can encourage their employees, and I watched his expression deflate when I told him that his research didn't really mesh with the faculty-dean relationship, as very few faculty members really thought of the dean as their boss. This view is not mine alone. *See, e.g.*, HENRY ROSOVSKY, THE UNIVERSITY: AN OWNER'S MANUAL 163–64 (1990) ("Another critical virtue of academic life—I am thinking of tenured professors at, say, America's top fifty to one hundred institutions—is the absence of a boss.").

20. *See supra* note 7 and accompanying text.

21. *See supra* note 8 and accompanying text.

wouldn't exist if Jack Welch ran them (or ran their universities). Perhaps Welch would find new niches for them. The question remains: why don't more law schools use strategic planning principles to stand out from the pack?

Part of the reason that law schools don't try to stand out from the pack is that they can't. The tight regulation that comes from the ABA Standards and university accreditation standards sets outside limits on experimentation.[22] The ABA Standards regulate everything from the number of minutes of instructional time to the requirement of class attendance.[23] University accreditation standards provide an overlay of additional regulation. Non-ABA-accredited schools have more freedom, just as privately held companies do, but the graduates of those schools don't have nearly as much flexibility in terms of bar admissions or employment opportunities.

Even if law schools did have more leeway for experimentation, though, would more of them choose to innovate, or would they behave the way that most businesses do and stick with the tried and true rather than the truly unique? There's innovation at some schools, from Northeastern's rotation of academic and internship semesters[24] to Northwestern's use of teams in coursework and its quest for an entering class with at least two years of work experience before law school.[25] But there's very little innovation at the core of legal education. We're still playing Christopher Columbus Langdell's song—not his song of innovation in legal education,[26] but the monotonous refrain of education in the form of Socratic classes and case law.

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22. For background information on some of the more intriguing experiments, and their failure to get ABA accreditation, see, for example, Jill Schachner Chanen, *Earn a J.D. on Your Home P.C.: 'Distance Learning' Online Catches on, but Full Accreditation Comes Up Short*, 85 A.B.A. J. 88 (Aug. 1999); Mark Hansen, *Judge Rules ABA Has Right to Accredit: Dean Vows to Appeal the Dismissal of Law School's Suit Challenging Standards*, 82 A.B.A. J. 32 (Nov. 1996) (discussing Massachusetts School of Law's lawsuit against ABA); Herb D. Vest, *Felling the Giant: Breaking the ABA's Stranglehold on Legal Education in America*, 50 J. LEGAL EDUC. 494 (2000).

23. *See generally* ABA STANDARDS, *supra* note 17.

24. *See* Northeastern University School of Law Homepage, http://www.slaw.neu.edu/ (last visited Aug. 26, 2005).

25. *See* Northwestern Law Difference, http://www.law.northwestern.edu/difference/ (last visited Aug. 26, 2005).

26. One of my favorite entries in *Jurist* includes the following passage:

> Consider Christopher Columbus Langdell's introduction of the case method and his efforts to locate legal training *within* the university and to have this training considered a form of *education*. Langdell's innovative methodology resulted not just in a new, optional pedagogical tool, but became the foundational basis for what was to become established conventional practice in American legal education. In these closing years of the 20th century, and the decline of scholarly support for the proposition that law is an autonomous discipline, legal education seems perfectly poised for fundamental change of the sort Langdell initiated. Yet, most law teachers assume that the world of legal education will continue as it is today, and that while the Web is indeed new, it will not be allowed to intrude on our pedagogical complacency and cloistered ways.

James R. Elkins, *The Web and Legal Education: What Kind of Innovation Is It?*, JURIST, Jan. 1999, http://jurist.law.pitt.edu/lessons/lesjan99.htm (emphasis in original). For a history of American legal education, see, for example, ROBERT B. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983); GRANT GILMORE, THE AGES OF

II. THE SYMBOLIC POWER OF THE "TOP 50"

Was that the yacht club
Or just a fishing boat
Was that the leg of lamb
Or was it a billy goat
Was that a snail baby
Or escargot
Why I don't know
I just had to go[27]

If every law school is still playing essentially the same tune that Langdell sang when developing Harvard Law's original curriculum, then why is there such an impassioned quest for "top 50" status at so many schools, including ours? What is it about *being* "top 50" that matters so—to professors, to students, to alumni? There must be something inherent in the symbolism of that august group that drives us to want to be members[28]—but what is that "something"?

Lee Bolman and Terry Deal have described the symbolic frame as one that lets organizations use their myths as a way of differentiating themselves from others.[29] By telling their lore, they set themselves apart and forge a stronger bond among their members. What is the "top 50" lore?

I remember sitting in a class at Stanford Law School during my first year there, listening to a professor tell us that students at Yale were brighter and more motivated than we were. Even within the pecking order of the top *five,* some people could draw distinctions. The "Top 50" lore tells us that students at the better schools are, by definition, brighter, more polite, more comfortable with ambiguity, and more willing to donate to their alma mater. Professors at those schools do better research, teach fewer hours, have university colleagues who defer to them more often, are never burdened with unnecessary committee work, have larger travel budgets, and change the world

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AMERICAN LAW (1977).

27. LYLE LOVETT, *Why I Don't Know, on* LYLE LOVETT (MCA Records 1986).

28. Some of my colleagues have accused me of opposing any actions that would move us into the top 50. I don't think that their criticisms hit the mark. I'm not trying to be Groucho Marx, rejecting any club that would have me as a member. *See* Groucho-Marx.com, http://www.groucho-marx.com (last visited Aug. 26, 2005) ("I sent the club a wire stating, ['']Please accept my resignation. I don't want to belong to any club that will accept me as a member.['']"). I wouldn't mind being back in the top 50. I just don't think that the vicissitudes of any particular ranking schema should drive decisions about educational policy. Moreover, I don't believe that deans alone move schools into—or out of—the top 50. The collective decisions that a law school makes will incrementally affect the rankings, including the school's admissions and financial aid decisions, the staffing of the school's career services department, the faculty's decisions on where to publish, the graduates' decisions on where to practice law, and the alumni's decisions on whether and how much to give to the school. Nonetheless, the Magellan Committee's clear charge is to do what it takes to get us back into the top 50, and as long as "what it takes" doesn't include lying, cheating, or stealing, that's what I'm hoping to do.

29. LEE G. BOLMAN & TERRENCE E. DEAL, REFRAMING ORGANIZATIONS: ARTISTRY, CHOICE, AND LEADERSHIP 239–40 (3d ed. 2003).

more. The facilities of top 50 law schools are always up to date, and alumni from top 50 law schools run the world.

That's the myth. The reality is less glamorous, but it is most assuredly true that graduates of the top schools have, on average, better opportunities open to them. Professors in the top schools have, on average, more offers of acceptance from the top law journals and more professional upward mobility.

When, as part of Project Magellan, our committee said that one of its primary goals was to get back into the top 50, part of the reason must have been the symbolism, and part of it must have been the rewards that top 50 schools get. "Top 50" is shorthand for "I want to be recognized for my talents." That sentiment is perfectly understandable, yet standing alone, essentially without content.[30] Moreover, unless the goal of being a top 50 school is linked with other, more measurable, goals that affect the long-term quality of education at the school, it's also only sustainable on a temporary basis.

Even if all of the schools in the "next 50" (from 51–100 in the rankings) were to get perfect scores on all of the objective *U.S. News* criteria, the rankings of the top 50 schools likely wouldn't budge. Median GPAs of 4.0, median LSATs of 180, and placement and bar passage rates of 100% would just become meaningless data points because they could no longer be used to differentiate among schools. The reputational scores would continue to have paramount importance.[31] As we've learned in our own strategic planning project, the reputational rankings are very hard to change. Changing the reputational rankings means, in part, changing faculty behavior.

Changing faculty behavior, in turn, is related to both (1) the understanding of how individual faculty members' choices (e.g., on the number, quality, and placement of publications) can affect a law school's "academic reputation" score over time and (2) the willingness by the faculty as a whole to undertake such changes. Delegating the task of changing the academic reputation score to the dean—"just fix our publications so that we look better to other schools"—is unlikely to work, as every law school dean is quite aware of the publications war created by the rankings, and every law school dean calibrates her school's publications accordingly. What *will* change a school's academic reputation score over time is *more* high-quality research published in *more visible, high-status* journals, so that the high-quality research can be used (found, read, and cited) by more academics at other institutions.[32] At best, a dean can create

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30. It's like "going to eleven," but with *U.S. News* groupies, rather than with aging rock star sound systems. *See supra* note 5.

31. The reputational scores, based on responses to surveys sent to various academics, judges, and practitioners, are the largest single contributory factor to a school's ranking. At the end of the day, though, the reputational scores just provide opinion data that suffer from the halo effect of the various schools' previous rankings. *See, e.g.*, STEPHEN P. KLEIN & LAURA HAMILTON, THE VALIDITY OF THE U.S. NEWS AND WORLD REPORT RANKING OF ABA LAW SCHOOLS (1998), http://www.aals.org/validity.html (report commissioned by the Association of American Law Schools); Paul L. Caron & Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEXAS L. REV. 1483, 1521 n.221 (2004) (reviewing MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME (2003)).

32. To be fair, research is much more findable than in years past. Not only are most law reviews available on Westlaw and Lexis, but the Social Science Research Network (SSRN) has also proven invaluable in finding finished research and works in progress. Therefore, the decision of where to publish should not be as important now as it was just a few years ago.

incentives for such behavior. The dean can't force the research or the publication choices.[33] The structure of governance in academia thus makes that sort of fundamental behavior change very, very difficult.[34]

III. THE LIGHT BULB JOKE AND ACADEMIA

How many psychiatrists does it take to change a light bulb? One, but the bulb really has to want to change.

A. Shared Governance and the Boundaries of Change

We are discussing several different types of tradeoffs in Project Magellan: being a national law school versus being a top-notch regional law school; paying primary attention to "the numbers" in admissions or to other, non-quantifiable indicia of academic success (or to the desires of various constituencies); rewarding scholarship in the top journals more than we reward other types of scholarship; allocating various "perks" based on seniority or on merit;[35] focusing placement efforts inside Texas or outside Texas; and rewarding scholarship more than rewarding teaching or service. Many of these tradeoffs would make the University of Houston Law Center a very different place.[36] Possibly, some changes would help us to improve in the rankings.

Nonetheless, the prestige of the journal still connotes a certain pecking order for scholarship, and the higher the status, the more likely that—all else being equal—the scholarship gets noticed.

33. Just as losing weight requires taking in fewer calories than one expends, improving academic reputation requires a combination of hard work and savvy dissemination of that work. Our top-rated Health Law & Policy Institute and our top-rated Intellectual Property & Information Law Institute both demonstrate the link between hard work and savvy dissemination, and several of our other scholars (inside and outside our institutes) have also been exceptionally good at both. Sometimes I wonder if we are doing the academic equivalent of deciding not to lose those "last few pounds" because we think that the additional effort isn't worth the additional benefits.

34. A friend of mine at another law school has developed his own maxim about shared governance. The Lawless Maxim states that "Any issue of faculty governance is decided by the faculty members with the most time on their hands." Conversation with Bob Lawless (Aug. 15, 2005). One of my colleagues here has added a corollary: "Those faculty members involved in faculty governance will not approve any changes that would decrease the amount of their available free time." I have promised not to "out" this colleague.

35. When those rewards include perks such as named professorships, a peculiar hybrid (neither seniority nor merit) rears its ugly head at many law schools. Those who are unhappy with the allocation of named professorships to faculty members more junior than they don't really argue for a true seniority-based allocation. Such an allocation might result in the named professorships going to those even *more* senior professors who are not as prolific as they once were—and who might be much less prolific than the actual recipients of the named professorships. Nor do they want the professorships allocated on the basis of, say, the number and quality of citations, because they say that such a measure is easily manipulated. (They're right, of course, but what other measures are there?) I am not sure what the hybrid model for allocating perks can tell deans. All I know is that certain perks—and named professorships are among them—are not necessarily positive motivators, because they can engender more jealousy than satisfaction.

36. Ironically, although they would make the University of Houston Law Center a different

Certainly we'd be setting up more of a zero-sum game of reward structures than we have now. In order for our law school to move forward on changes this significant, our faculty has to agree that those changes are worth the sacrifice of our current, more egalitarian system of rewards.

One of the differences between academia and business is that, in business, the executives determine the strategic direction and develop measures designed to move the business toward that direction. In academia, very few of the strategic decisions are administrative or executive.[37] The faculty has the primary responsibility for setting admissions policy, even though the administration has the responsibility for carrying out that policy. The faculty has the primary responsibility for selecting faculty hires, even though the administration has the responsibility for sealing the deal. The faculty has the primary responsibility for setting the curriculum, even though the administration has the responsibility for ensuring that the curriculum meets ABA and university standards. The administration has no responsibility for directing the research efforts of the faculty, although it does have responsibility for ensuring that, for example, grants are properly administered and any research on humans uses the appropriate IRB protocol. The work of a law school is done primarily by its faculty; the administration keeps the school running so that the faculty can do its work.[38]

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place, these changes would actually make it *more* like the elites that we're trying to chase in the rankings. We're struggling with ways to innovate in order to improve, and yet our innovations take us closer to the norm for the top 25 schools. As Dick Chait noted in an email to me:

> [There is] a nagging problem, which is the single paradigm for respect, whether at the university or professional school level. Status rides on imitation, not invention.
>
> The more one looks like the best, the more one's perceived as among the best. Schools can experiment a bit, but revolution would be suicide. (And your problem's compounded by ABA restrictions.) In industry, one can succeed by imitation (at lower costs); Japan did that for years and knock-off street vendors do it all the time. But the real success stories are the rule-breakers, not the rule-takers. Think Wal-Mart, Southwest, CNN, Apple, USA Today. Everyone redefined and captured a market. In higher education, everyone apes Stanford or Harvard, mostly to no avail.

Email from Richard Chait, Professor of Higher Education, Harvard Graduate School of Education, to Nancy Rapoport, Dean of the University of Houston Law Center (March 11, 2005). It would be really interesting to see what we could do differently from what Harvard and Stanford do in order to improve legal education. But before we can take those risks, we have to be in Harvard and Stanford's neighborhood—and that neighborhood is both overcrowded and very, very pricey.

37. *See, e.g.*, DANIEL JAMES ROWLEY & HERBERT SHERMAN, FROM STRATEGY TO CHANGE: IMPLEMENTING THE PLAN IN HIGHER EDUCATION 164–65 (2001).

38. The faculty of a college or university in the United States has sole responsibility for developing and delivering the campus's research agenda and academic program. . . . Shared governance issues arise when administrators question the academic program or unilaterally decide to alter or eliminate a particular program. In a perfect world, change in academic programming should begin with the faculty and then go through the academic and administrative channels to the governing board for approval. Sometimes, however, administrators might make a decision on a given academic program based on program review, concerns expressed by board members, budget-related concerns, or perhaps even the precepts of the campus strategic plan. The result is predictable—resistance from the faculty and charges of

Strategic planning for a law school, then, focuses less on the traditional concepts of market, niche, and opportunity because those concepts are not part of the typical focus of the faculty. The implementation of the plan may import concepts of market, niche, and opportunity, so that the administration can carry out the faculty's goals, but the plan itself tends not to look particularly "business-y."[39] But that's not the biggest difference between strategic planning in business and strategic planning in academia. The biggest difference is that managers in business can order their employees to focus on the business's strategic priorities. If an employee refuses to follow the executive's directives, then that employee can find himself out of a job. The corollary is that if the executive orders an employee to do something that is not in the best interests of the business, the executive may find himself out of a job.[40]

In academia, though, faculty members cannot bc ordered to change. Instead, the power of persuasion is the dean's primary tool.[41] The power of the purse is still available in the form of differential raises and available funds for faculty projects, but in a climate of scarce financial resources (resulting in average raises of 1% or 2% a year), persuasion carries more clout.

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violation of shared governance by administrators.

> When policy is imposed on faculty, the trust relationship between faculty and administration suffers. What is lacking is a thorough understanding by everyone involved regarding the nature and level of power the two groups actually have. In an environment of shared governance, the faculty has power over academics and the administration has power over the general well-being and management of the campus, yet both parties need to develop effective forums for communicating with each other and coming to consensus on issues that impact both areas. Without this, implementing a strategic plan can become nearly impossible.

ROWLEY & SHERMAN, *supra* note 37, at 153. Rowley and Sherman also point out that there are some areas of academia in which business tactics can work, but these areas involve support programs, such as enrollment management, rather than "the academic side of the house." *Id.* at 164–65.

39. Northwestern's strategic plan, however, does look a great deal like a business's strategic plan. *See* The Strategic Plan for Northwestern University School of Law, http://www.law.northwestern.edu/depts/communicate/dean/Strategic_Plan2_01.pdf (last visited Aug. 26, 2005). Like any good business, Northwestern has followed up with annual reports that reference its strategic plan. *See* Northwestern University School of Law's Annual Reports, http://www.law.northwestern.edu/difference/annualreports/ (last visited Aug. 26, 2005). I credit Dean David Van Zandt with the businesslike nature of Northwestern's plan (and with its vision), and I also credit Pete Wentz, who was instrumental in the development of that plan.

40. Sometimes there is a very long lag between a bad business decision and an executive's termination, and sometimes the punishment for making bad business decisions is a lucrative golden parachute. The comparison between business and academia isn't a perfect one. But for most businesses, the power to make changes and the responsibility for the results of those changes are linked. In shared governance, the power to make changes and the responsibility for the results of those changes are not always linked. In my more cynical moments, I think of this comment by Dean Tom Read: "True to the human condition, those constituencies who share power generally accept no responsibility for the result, but they frequently want to dictate or control the decision-making process." Frank T. Read, *The Unique Role of the Law School Dean in American Legal Education,* 51 J. LEGAL EDUC. 389, 390 (2001).

41. *See supra* note 11 and accompanying text.

B. Reward and Punishment in Academia

Persuasion is especially important in negotiations with tenured professors, especially full professors. Such faculty members have an almost unsurpassed type of job security. Unless a tenured professor engages in serious malfeasance or nonfeasance, he or she is protected from discharge in all but the most extreme financial circumstances. Moreover, tenured professors, especially at research universities, have significant authority and leverage when it comes to governance.[42]

I know that the leverage is not all on the faculty's side. I've heard horror stories from faculty colleagnes at other institutions who talk of deans and department heads who regularly bully professors or retaliate against those who have opposed certain decisions, and I'm sure that those horror stories are true. But I have to believe that retaliation by administrators is the exception, not the rule, at the best institutions.[43] An administrator who has the best interests of her school at heart can't afford the folly of taking things personally or retaliating when people oppose her ideas.

What I've learned as part of Magellan, though, is that not all of my colleagues exercise the same level of restraint when it comes to retaliation. The debates in Magellan have involved matters of deeply held principles, and there has been real heat in our discussions. In fact, on more than one occasion, one committee member's passionate advocacy of his position took on the appearance of a personal vendetta.[44]

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42. The weight of evidence decidedly supports the proposition that the presence of a tenure system provides a reliable indicator of greater faculty voice in governance. On balance, colleges with tenure exhibited more properties of shared governance, and the faculties there had more sway than colleagues at institutions with contracts. . . .

> None of the tenured faculties in this study, however, enjoyed the degree of power or influence associated with the faculty of a research university or a prestigious private college. Any number of organizational analyses of these institutions highlighted the formidable and ingrained tradition of faculty authority and self-regulation. This power often precluded, thwarted, or at the very least confounded centralized initiatives.

Richard P. Chait, *Does Faculty Governance Differ in Colleges with Tenure and Colleges without Tenure, in* THE QUESTIONS OF TENURE 69, 77 (2002) (citations omitted).

43. One of my earlier articles may express my naiveté here. *See* Nancy B. Rapoport, *"Venn" and the Art of Shared Governance*, 35 U. TOLEDO L. REV. 169, 173 n.11 (2003) ("My only advice is the advice that Tom Read gave me at the American Bar Association's New Deans' School in 1998. Tom gave us two rules: (1) don't take things personally, because they rarely are meant personally; and (2) don't ever retaliate. Rule #1 is sometimes difficult; rule #2 is (surprisingly) not at all difficult. If you have the best interest of your school at heart, it's easy to overlook the fact that you don't like a person or a program, if the person or program is doing good things and deserves funding."). Even when particular colleagues have behaved very poorly, I have resisted the urge to penalize their programs. The problem with resisting that urge, though, is that I have no effective means of dealing with their abusive behavior.

44. There is no remedy in academia for such disruptive behavior—at least if the person engaging in that behavior is a tenured full professor. Deans can't tell their faculty colleagues to cease and desist any overly aggressive behavior, because the aggressor is likely to simply seek cover under the First Amendment (and justifiably so). We can ask our colleagues to be considerate, but we can't require our colleagues to "play nice." At best, we can hope that the miscreant's peers can impress upon him the need to keep his discourse on a professional level.

I've asked myself whether, in other professions, there's this type of no-holds-barred behavior among repeat players. Surely there must be. For example, I know that partners at law firms aren't always polite or deferential to each other, let alone kind to their managing partners or to their associates. And yet managing partners probably have more ways of expressing displeasure than deans do.[45]

The point is that, out of honest disagreement or just pure cussedness, a faculty member can resist change and even rally some of his colleagues to resist change as well. Sometimes, that resistance is healthy for the institution.[46] Not all change is good. But only time will tell whether resistance at a particular point in a school's history was good or bad for the school.

Magellan is raising important issues and forcing us to make some hard choices. Some of what we might want to do will be barred by practical considerations (including a lack of ready cash) or by conflicting university policy. To the extent that good-hearted people are getting together to hash out very complicated issues, we're already way ahead of the game. In our last few brown-bag discussions, we've talked about making some changes that may, over time, improve our rankings—at least as long as every *other* school above us in the rankings doesn't make these changes at the same time that we do. Most of those changes (to improve placement, to reconsider how we award financial aid, to change the curriculum slightly, and to encourage different choices for placement of articles by faculty) are likely to make our school better than our rankings will demonstrate.[47] If we, as a faculty, decide to make changes that result in a better experience for our students and a better community for our professors and our staff members, that change will be worthwhile even if we don't see our rankings improve. I count our Magellan discussions as a positive experience no matter what happens. But, like the light bulb joke at the beginning of this section, we will only change if we want to change.

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45. If I'm wrong, my friends who are managing partners will happily tell me so.

46. Bob Kegan's research tells us that complaints and grousing are symptomatic of an underlying passion about a topic—that people only grouse about that which they care deeply. *See* ROBERT KEGAN & LISA LASKOW LAHEY, HOW WE TALK CAN CHANGE THE WAY WE WORK: SEVEN LANGUAGES FOR TRANSFORMATION (2001). I'm sure that's true. But, for the most part, the life of a tenured full professor is a life without negative consequences for bad behavior, as long as that behavior doesn't rise (sink?) to the level of malfeasance or nonfeasance. This lack of consequences can be, at its worst, a shelter for knaves and fools.

Most of the time, though, the lack of consequences is irrelevant. On a day-to-day level, professors do their jobs because they enjoy them, not from fear of punishment. Most scholars write because they have something that they want to say. Most teachers teach because they enjoy helping students learn. Most faculty members willingly serve on committees not from a fear of being fired if they don't serve but because they understand how that service makes their school stronger. The lack of consequences only becomes relevant if someone violates the group's norms of behavior. But the lack of consequences can make strategic planning that much more difficult.

47. For example, we're having a very healthy debate about whether we should focus more on entry-level faculty hires with impeccable credentials or on candidates who have been at other schools for a few years and who have actual teaching evaluations and actual publications. For an interesting analysis of this issue of predicted ability versus actual demonstration of ability, see Caron & Gely, *supra* note 31.

The rankings have given law schools some reasons to want to change, and, certainly, law schools have already changed in response to the rankings. We send out more written materials, and our publications are timed to coincide with the *U.S. News* ballots. We spend more time—some say far too much time—worrying about median LSATs and GPAs. We harp at our career services directors to make sure that every graduate has returned her questionnaire, and we squint hard at the answers to those questionnaires to make sure that we've wrung every possible positive interpretation out of ambiguous responses. And each March, we gulp as the month's end nears, knowing that decisions that we made three years before will haunt us in the current year's rankings.

I can't help but wonder whether the schools at the very top of the pecking order spend the same amount of time worrying about the rankings that we do, or whether they spend more time thinking about where legal education will be in the next decade or so. My fantasy is that the top schools have more time for reflection because they aren't scrambling to get ever-higher rankings, and that those top schools spend some of their time thinking about where legal education *should* be ten years from now.

It seems to me that we have several choices when it comes to dealing with the rankings. We can choose to compete by imitating the top schools, but that choice is doomed to fail because it doesn't change the current ordering of law schools. We can choose not to compete at all and to focus on maintaining a solid, traditional form of legal education, using all of the resources (human and financial) available to us. That choice may leave us roughly where we are in the rankings (plus or minus a few places),[48] or it may cause our rankings to decrease over time, if other schools are gaming the rankings and we opt out of participation in such a game. We could, on the other hand, choose to rethink the type of legal education that our particular law school can offer. One result of that choice might be that coveted reordering of the rankings in our school's favor (over time).

In the world of business, the truly great companies chart their own course and wait for the rest of the world to follow.[49] Shouldn't law schools do the same?

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48. Entropy is not a happy state of affairs. According to TheFreeDictionary.com, one of the less scientific definitions of "entropy" is "[t]he tendency for all matter and energy in the universe to evolve toward a state of inert uniformity." *See* The Free Dictionary, http://www.thefreedictionary.com/entropy (last visited Aug. 26, 2005).

49. Yes, I know—the difference between charting a *good* new course and a *bad* new course can be the difference between good timing (the world is ready to accept that change) and bad, or between luck and insanity. Still, nothing ventured, nothing gained.