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## Managing *U.S. News & World Report*—The Enron Way

Nancy B. Rapoport\*

There have been a few big law school scandals that are either clear manipulations of data designed to game the *U.S. News & World Report* rankings<sup>1</sup> or are reactions to the pressure of making the *U.S. News* “numbers” and filling a class.<sup>2</sup> That yearly March-April collective decanal shudder or sigh of relief<sup>3</sup> is much like how CEOs and CFOs must feel when they find out whether their quarterly earnings met, exceeded, or failed to meet their projected earnings. Make no mistake: the repercussions that accompany a school’s drop in the rankings (or when companies don’t meet their projected earnings) are ugly. That’s why schools spend so much time playing to the rankings and why companies can find themselves in hot—sometimes felonious—water with unsavory “earnings management” decisions that push a company into outright dishonesty.<sup>4</sup>

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\* Nancy B. Rapoport 2013. Interim Dean & Gordon Silver Professor of Law, William S. Boyd School of Law, UNLV. Special thanks to Jennifer Gross, Nettie Mann, Morris Rapoport, and Jeff Van Niel. The views expressed in this essay are mine alone and not those of the Boyd School of Law or UNLV.

1. See, e.g., Karen Sloan, *Illinois Law Fined \$250,000 For Falsifying Applicants’ Test Scores*, THE NATIONAL LAW JOURNAL (July 24, 2012), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202564243650&Illinois\\_Law\\_fined\\_for\\_falsifying\\_applicants\\_test\\_scores&slreturn=20120706135143](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202564243650&Illinois_Law_fined_for_falsifying_applicants_test_scores&slreturn=20120706135143) (Illinois’s manipulation of its reported LSATs and UGPAs); Elie Mystal, *Early Reactions to the U.S. News Rankings: Deans and the Excuses They Make*, ABOVE THE LAW (March 14, 2012), <http://abovethelaw.com/2012/03/early-reactions-to-the-u-s-news-rankings-deans-and-the-excuses-they-make/2/> (Villanova’s manipulation of its reported LSATs and UGPAs); see also Robert Morse, *Updates on 2 Graduate Schools’ Ranking Data*, US NEWS (March 15, 2012), <http://www.usnews.com/education/blogs/college-rankings-blog/2012/03/15/updates-on-2-graduate-schools-ranking-data> (University of St. Thomas did the right thing and ‘fessed up when it discovered that it had been misrepresenting its placement data).

2. See, e.g., Elie Mystal, *Law School Over-Promises Financial Aid; Will Have \$2.4 Million Shortfall Over Three Years*, ABOVE THE LAW (July 18, 2012), <http://abovethelaw.com/2012/07/law-school-over-promises-financial>.

3. Depending on whether the news is bad or good.

4. See Cynthia Cooper, *Extraordinary Circumstances: The Journey of a Corporate Whistleblower*, in NANCY B. RAPOPORT, JEFFREY D. VAN NIEL & BALA G. DHARAN, ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER 763, 765-66 (2d ed.

The one thing that we know about sentient beings is that they respond to incentives. Whether the subject is Pavlov's dog<sup>5</sup> or a law school dean whose school is ranked 99th in the *U.S. News & World Report's* rankings, people will tend to do that for which they're rewarded. Whether what they do is ethical, though, is another question.

With so many examples of "schools gone wild,"<sup>6</sup> it's difficult for law deans and law faculties to tell their students that lawyers shouldn't lie. The law schools that have misstated their stats are sending the message that lawyers shouldn't lie, unless: (1) lying will make their lives easier; (2) verifying the facts is too much trouble; or (3) the likelihood of getting caught—and punished—is low. That's not the message that we should be sending. So why do law schools misrepresent their stats to *U.S. News*?

We could talk about the pressure that law schools face from their faculty, students, alumni, and university administrators. We could talk about the fact that *U.S. News* asks for very little information that actually reflects the quality of a school's education, or that its ordinal ranking system grossly misstates the differences among schools.<sup>7</sup> We could talk about the increased competition for students in a declining market<sup>8</sup> and about the very real threat that some of the key changes in law practice<sup>9</sup> will force some law schools to close. But what I want to discuss is the ease with which people can find themselves caught in a lie and how our lies affect what we're trying to teach our law students.

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2009); see also Cynthia Cooper, *Extraordinary Circumstances: The Journey of a Corporate Whistleblower* (Part 2), in *id.* at 1205-06.

5. See Lotta Fredholm, *Pavlov's Dog*, NOBELPRIZE.ORG (May 15, 2001), <http://www.nobelprize.org/educational/medicine/pavlov/readmore.html>.

6. Cf. Mireya Navarro, *The Very Long Legs of 'Girls Gone Wild,'* NEW YORK TIMES (April 4, 2004), <http://www.nytimes.com/2004/04/04/style/the-very-long-legs-of-girls-gone-wild.html?pagewanted=all&src=pm>.

7. See Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L.J. 359, 360-61 (2006). I do, though, want to put in a plug for how receptive to dialogue *U.S. News's* ranker-in-chief, Bob Morse, has been. He often doesn't agree with schools' suggestions, but he is unfailingly polite about hearing us out.

8. For a wonderful discussion about law schools and *U.S. News*, see BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012).

9. See, e.g., Bill Henderson, *Connecting the Dots on the Cultural Shift in the Legal Market*, THE LEGAL WHITEBOARD (Aug. 3, 2012), <http://lawprofessors.typepad.com/legalwhiteboard/2012/08/connecting-the-dots-on-the-structural-shift-in-the-legal-market.html>; Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 102 (2011).

In several articles, I've harped on the types of cognitive errors that humans make:<sup>10</sup> cognitive dissonance, diffusion of authority, social pressure, and anchoring bias all contribute to a law school administrator's<sup>11</sup> decision to fudge the numbers. I'm willing to bet that none of the administrators who have fudged the data actually set out to lie. They didn't wake up saying, "today, I'm going to trick a whole lot of potential law students into enrolling in educational programs that they can't afford and that won't get them where they want to be." They didn't rub their hands together gleefully, Snidely Whiplash-style,<sup>12</sup> to celebrate "putting one over" on the *U.S. News* folks. They may not even realize quite what they did when they entered the wrong numbers. Mind you, that's not an excuse for lying; they don't get a free pass for submitting bad numbers. But it's important to realize that people can find themselves caught in a lie long before they realize what they've done. Let's do a quick walk-through of how these four cognitive errors can play out in responding to *U.S. News*.

Cognitive dissonance (the subconscious rationalization of two competing moral views) is easy to spot in fudging the rankings. Someone who thinks of herself as honest and who still, say, plays with her school's placement figures to make them look better than they really are is subconsciously justifying her "creativity"<sup>13</sup> by deciding that *U.S. News's* questions are so bogus that she shouldn't have to take them seriously. If she's not sure that her answers are accurate, she can always assume that someone else will catch her mistake (diffusion of authority). She can reason that, because other schools are hiding their bad placement numbers by hiring their own graduates, her school should do the same (social pressure). When schools let the *U.S. News* rankings drive their own admissions decisions (e.g., preferring LSATs over work experience

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10. See Nancy B. Rapoport, *Swimming with Shark*, in *LAWYERS IN YOUR LIVING ROOM! LAW ON TELEVISION* 163 (Michael Asimow, ed., 2009); Nancy B. Rapoport & Jeffrey D. Van Niel, *Dr. Jekyll & Mr. Skilling: How Enron's Public Image Morphed from the Most Innovative Company in the Fortune 500 to the Most Notorious Company Ever*, in *ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS* 77 (Nancy B. Rapoport & Bala G. Dharan eds., 2004); Nancy B. Rapoport, *Changing the Modal Law School: Rethinking U.S. Legal Education in (Most) Schools*, 116 *PENN ST. L. REV.* 1119 (2012); Nancy B. Rapoport, *The Curious Incident of the Law Firm That Did Nothing in the Night-Time*, 10 *LEGAL ETHICS* 98 (2007) (reviewing MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004)) [hereinafter *Curious Incident*].

11. Contrary to allegations, law school administrators are, in fact, human. We even have hearts. I know. I asked my doctor.

12. See Snidely Whiplash, WIKIPEDIA, [http://en.wikipedia.org/wiki/Snidely\\_Whiplash](http://en.wikipedia.org/wiki/Snidely_Whiplash) (last visited Nov. 26, 2012) (If you're too young to remember *Bullwinkle*, see if you can watch some episodes on your computer. That show was the *Family Guy* of its time.)

13. At least I hope that she's doing it subconsciously.

or “striving”<sup>14</sup>) or scholarship awards (buying higher LSATs with full rides plus stipends)—or when schools set the size of their entering classes and transfers solely to keep their LSATs and UGPAs high—those decisions are all perfect examples of anchoring bias (letting the rankings drive all other decisions).

Law schools aren’t the only businesses that fall prey to cognitive errors, of course. Lots of businesses do. Take the recent scandal over the LIBOR manipulations. In one of this past summer’s *New Yorker* essays, James Surowiecki explains the incentives that led bankers to submit spurious numbers:

But, if recent history has taught us anything, it’s that self-regulation doesn’t work in finance, and that worries about reputation are a weak deterrent to corporate malfeasance. To begin with, traders at a bank are typically rewarded according to how much money their trades make, not on whether they enhance the bank’s reputation. Bank C.E.O.s, meanwhile, are now paid so lavishly that even when they wreak havoc on a bank’s good name they can still walk away with immense amounts of money. What’s more, it’s not clear how good the market is at sniffing out and punishing bad behavior before serious damage is done.<sup>15</sup>

Read that quote again, substituting “administrators” for “traders at a bank,” “money” with “rankings,” and “deans” for “C.E.O.s.”<sup>16</sup> You get the idea. If there’s a low risk of being found out and a high reward for moving up even one or two notches in the rankings, no wonder that administrators have been tempted to cheat, and no wonder that some have succumbed.<sup>17</sup>

Law students and alumni aren’t stupid. They can tell when law schools are lying. Advertising a 99% placement rate when every student knows five or six classmates without jobs (or when the “jobless” are working for the school, or on its dime, as a way of counting them as “employed”) is a dead giveaway.

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14. The “striving” factor pays attention to people who have overcome things like coming from a low socioeconomic background or having significant family obligations and who still do decently in school.

15. James Surowiecki, *Bankers Gone Wild: The Financial Page*, THE NEW YORKER, July 30, 2012, at 25.

16. OK, deans don’t often walk away with big severance packages, but they are paid very well. Not “CEO-level well,” but still very well.

17. In the same article, Surowiecki refers to Dan Ariely’s point that “cheating is contagious—when we see others cheating, it makes us more likely to cheat as well. So when institutions tolerate, and even reward, bad behavior, all that self-regulation gets you is bankers gone wild.” Surowiecki, *supra* note 15 (citing DAN ARIELY, THE HONEST TRUTH ABOUT DISHONESTY (2012)); see also *Curious Incident*, *supra* note 10.

When we lie, we're telling our students and alumni that it's ok for them to lie, too.

Or at least we're teaching them to "construe."<sup>18</sup> We already fly pretty close to the precipice in class when we let students "construe" cases or statutes in a way that clearly twists their meaning, just to make an argument. Not all arguments are good ones.<sup>19</sup> Just because you can twist a statute's meaning to make your point doesn't necessarily mean that you should. When we fail to teach judgment in class, we fail to teach an important life lesson to budding lawyers.

"Rankings management" just reminds me too much of the "earnings management" that I followed when I devoured every news article out there about the Enron scandal. I know that Enron is ancient history by now to most people. It's not ancient history to me and to many of my friends who lived through the experience in Houston, in Portland, and elsewhere. But one key factor of Enron's collapse strikes me as relevant today.

Enron hired the best and the brightest, many of them right out of school.<sup>20</sup> For many Enron employees, Enron was their first job.<sup>21</sup> First jobs are tricky things. A new worker learns a lot about how to behave by watching how his bosses and co-workers behave. What conduct gets recognized with bonuses and other rewards? How does the organization deal with hard issues that don't have clear answers? Who gets promoted, and for what type of behavior?

Enron, at least after Rich Kinder left, was a harsh place.<sup>22</sup> It was the home of Jeff Skilling's rank-and-yank, which lopped off the bottom ten percent of workers every six months or so.<sup>23</sup> (That might not seem so bad until you realize that pretty much all of Enron's employees were smart and hard-working.<sup>24</sup> Rank-and-yank was a lot like curving the grades in a law school course composed entirely of law review editors and other top-ten-percenters.) Although Enron said that it espoused the values of "Respect, Integrity,

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18. Illinois has had more than one run-in with the rankings. At one point, it had construed the value of the free Westlaw and Lexis services to its students as counting toward the "student expenditures" factor for *U.S. News*. See Alex Wellen, *The \$8.78 Million Maneuver*, N.Y. TIMES, July 31, 2005, § 4A, at 18.

19. Just ask my husband.

20. BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM* 57, 120 (2003).

21. *Id.*

22. ENRON: *THE SMARTEST GUYS IN THE ROOM* (Magnolia Home Entertainment 2005) (23:53).

23. *Id.* (22:43).

24. *Id.* (25:10).

Communication, and Excellence,”<sup>25</sup> in fact, it encouraged its employees to be über-aggressive, even to the point of rewarding its traders who figured out ways to sell electric power at higher rates by encouraging short-term shortages at power plants.<sup>26</sup> In the end, Enron rewarded the individual over the team, rewarded short-term (and sometimes fictional) profits over long-term gains, and rewarded the brash and assertive over the quiet and thoughtful.<sup>27</sup> It got exactly what its incentives rewarded.<sup>28</sup> And so has *U.S. News*.

When schools focus on chasing the *U.S. News* rankings, they’re not doing so because they really believe that what *U.S. News* measures is what law schools should be doing. They’re doing so because higher rankings have positive ripple effects. Higher rankings mean getting applicants with better and better “numbers” each year, which in turn leads to yet even higher rankings. Higher rankings increase the odds that a graduate of that school will have better job opportunities. Higher rankings also increase the odds of a faculty member placing her article in a “better” law review. And, of course, higher rankings make the lives of deans, associate deans, assistant deans, and other administrators much easier. Those effects are nothing to sneeze at, and so people push as hard as they can to move up the ladder.<sup>29</sup>

But cheating at the rankings also imprints a school’s students and graduates. The same administration that is stressing adherence to an honor code and the importance of professionalism and ethics may be the one “construing” its answers and developing very delicate loopholes. Bad LSATs? Move those students to the part-time program! Part-time program LSATs now being counted in the rankings? Cut the entering class and admit lots of transfers! Placement low? Hire graduates as research assistants, unless they’re not good enough to do that type of work (in which case, hire them to do filing)!

Don’t think that deans aren’t aware of these options. We are. Then we wrestle with our “blush factor”: which decisions are legitimate “lawyering” decisions (what we’re teaching our students to do), and which ones are desperate attempts to keep from sliding a tier down? Everyone reaches a different blush-factor decision. I’ve made my peace with mine.

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25. Enron’s R-I-C-E code of ethics, a copy of which I bought on eBay, always ticked me off. For many people who dealt with their counterparts at Enron, respect and integrity weren’t part of the equation, and the communication part was often not very nice. Remember when Jeff Skilling called a financial analyst an “asshole” on a conference call? *See id.* (1:00:42).

26. *Id.* (1:09:23-1:10:58).

27. *Id.* (1:07:02).

28. *Id.* (1:23:45).

29. Why else do schools still spend money on hard-copy “law porn” mailings before the *U.S. News* reputational ballots come out each fall?

The decision about where to draw the line is hard. Lots of important things are at stake. But it's also important for us to remember that we—administrators and law professors—are modeling the behavior that we want our students to adopt. Whether we like it or not, we're role models. Therefore, what we're actually teaching our students when we fudge is that a zealous advocate stops at nothing to achieve her client's objectives, even when those objectives aren't very worthwhile. Once we teach our students that, we've created another generation of liars. No ranking is worth that.



