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## Law Deans in Jail

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### Law Deans in Jail

*Morgan Cloud\* and George Shepherd\*\**

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\* Charles Howard Candler Professor, Emory University, School of Law. We are grateful for comments received from many individuals. They include Kirk Brown, William Buzbee, Katherine Cloud, Reuben Guttman, Orin Kerr, Brian Leiter, Wayne Logan, Tom Morgan, Ellen Podgor, Charles Reid, Brooks Seay, and Chris Slobogin. We also thank the participants in faculty colloquia at Florida State University School of Law and Emory University School of Law for their helpful comments. The students in Professor Cloud's Criminal Law and White Collar Crime courses also offered many valuable comments and criticisms. Cameron Fraser, Samantha Kevitch, Molly Parmer, Jessica Seares, and Jason Vaupen each provided excellent research assistance.

\*\* Professor of Law, Emory University School of Law.

- A. *The Absence of Probability Sampling*
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*A most unlikely collection of suspects – law schools, their deans, U.S. News & World Report and its employees – may have committed felonies by publishing false information as part of U.S. News’ ranking of law schools. The possible federal felonies include mail and wire fraud, conspiracy, racketeering, and making false statements. Employees of law schools and U.S. News who committed these crimes can be punished as individuals, and under federal law the schools and U.S. News would likely be criminally liable for their agents’ crimes. Some law schools and their deans submitted false information about the schools’ expenditures and their students’ undergraduate grades and LSAT scores. Others submitted information that may have been literally true but was misleading; for example, misleading statistics about recent graduates’ employment rates. U.S. News itself may have committed mail and wire fraud. It has republished and sold for profit data submitted by law schools without verifying the data’s accuracy, despite being aware that at least some schools were submitting false and misleading data. U.S. News refused to correct incorrect data and rankings errors and continued to sell that information even after individual schools confessed that they had submitted false information. In addition, U.S. News marketed its surveys and rankings as valid although they were riddled with fundamental methodological errors.*

## I. INTRODUCTION

*I hereby certify that the information provided within is a complete and accurate representation of this law school.<sup>1</sup>*

*[I]t is our responsibility to provide accurate information to our readers.<sup>2</sup>*

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1. AMERICAN BAR ASS’N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, FALL 2011 LAW SCHOOL ANNUAL QUESTIONNAIRE – DEAN’S SIGNATURE PAGE (2012) [hereinafter *Annual Questionnaire*], available at [http://www.americanbar.org/cotent/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governan cedocuments/2012\\_aq\\_dsp.authcheckdam.pdf](http://www.americanbar.org/cotent/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governan cedocuments/2012_aq_dsp.authcheckdam.pdf) (last visited Jan. 31, 2013).

A most unlikely collection of suspects – law schools, their deans, *U.S. News and World Report* (*U.S. News*) and its employees – may have committed felonies by publishing false information as part of *U.S. News*' annual ranking of law schools. The possible felonies under federal law include mail and wire fraud, conspiracy, racketeering, and false statements. Employees of law schools and *U.S. News* who committed any of these crimes can be punished as individuals, and under federal law their employers likely will be guilty of the crimes as well.<sup>3</sup>

For more than a decade, reports published in the news media, legal journals, and blogs have detailed the tactics law schools have employed to improve their positions in the annual *U.S. News* rankings, sometimes by manipulating or even falsifying data that the magazine has solicited from them.<sup>4</sup> These reports of the law school rankings scandals often link these acts to the schools' deans, and on occasion, individual schools or deans have publicly

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2. Robert Morse, *U.S. News Urges Law School Deans to Improve Employment Data*, U.S. NEWS & WORLD REPORT, MORSE CODE BLOG (Mar. 9, 2011), <http://www.usnews.com/education/blogs/college-rankings-blog/2011/03/09/us-news-urges-law-school-deans-to-improve-employment-data> [hereinafter Morse, *U.S. News Urges Law School Deans to Improve Employment Data*] (quoting Letter from Brian Kelly, Editor, U.S. News & World Report, to Law School Deans).

3. See, e.g., UNITED STATES ATTORNEYS' MANUAL (USAM) § 9-28.200(B), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/28mcrm.htm#9-28.200](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.200) ("In all cases involving wrongdoing by corporate agents, prosecutors should not limit their focus solely to individuals or the corporation, but should consider both as potential targets.")

4. The *U.S. News* methodology has made such manipulation easy, and this has been discussed widely for years. See, e.g., Brian Leiter, *The U.S. News Law School Rankings: A Guide for the Perplexed*, BRIAN LEITER'S LAW SCH. RANKINGS (May 2003), <http://www.leiterrankings.com/usnews/guide.shtml>. Almost a decade ago Brian Leiter, an early and persistent critic of the *U.S. News* rankings, pointed out the predominance of factors that could be manipulated. See *id.* Even putting aside the fact that this formula, with its various weightings, is impossible to rationalize in any principled way, the *really* striking fact about the *U.S. News* methodology is surely the following:

. . . More than half the criteria – over 54% – that go in to the final score can be *manipulated* by the schools themselves, either through outright (and undetectable) deceit, or other devices (giving fee waivers to hopeless applicants, employing graduates in temp jobs to boost employment stats, etc.).

*Id.* Another early criticism was Stephen P. Klein & Laura Hamilton. See ASS'N OF AM. LAW SCHS., *THE VALIDITY OF THE U.S. NEWS AND WORLD REPORT RANKING OF ABA LAW SCHOOLS* (1998). In 2006, the *Indiana Law Journal* devoted an entire volume to the rankings. Symposium, *The Next Generation of Law School Rankings*, 81 IND. L.J. 1 (2006).

acknowledged their involvement.<sup>5</sup> *U.S. News* has admitted that it has continued to publish these rankings despite its knowledge of these schemes.<sup>6</sup>

These facts are neither new nor unknown. Lawyers, judges, legal academics, and law students have complained about the rankings “fraud” for so long that even members of Congress have begun to intercede.<sup>7</sup> The current crisis in legal hiring has contributed to the outcry, and civil litigation against specific schools has begun to trickle into the courts. However, the profession has seemed blind to the possibility that some law schools, *U.S. News*, and their respective employees may have committed crimes for profit.

These are not victimless crimes. Hundreds of thousands of students have attended law schools since *U.S. News* began publishing its rankings. No one disputes that for many years the *U.S. News* rankings have influenced many students’ decisions about which schools to attend and convinced them to pay dearly for the privilege. If the rankings are based in part upon false data, then those who are responsible may be guilty of federal crimes.

We know that some schools have submitted false data because they have confessed publicly. In 2011, for example, Villanova University and the University of Illinois both admitted that for several years they had produced and submitted false information about their law students’ median undergraduate grade point averages (GPAs) and Law School Admission Test (LSAT) scores, both important components of the *U.S. News* formula.<sup>8</sup> Six years earlier, the Dean of the University of Illinois College of Law confessed publicly that the school had lied about the school’s expenditures.<sup>9</sup> These all appear to be examples of falsehoods that could constitute mail and wire fraud.

Rather than simply falsifying data, other schools appear to have constructed schemes designed to “game” the *U.S. News* methodology by submitting information that arguably was “true,” but was so partial or incomplete that it created a deceptive picture of the institution, its students, and their job prospects after graduation.<sup>10</sup> Statements that are literally true can be criminally fraudulent if they are designed to deceive.<sup>11</sup> We place “game” in quotes to emphasize that providing misleading data to *U.S. News* is not a game, but instead may be a federal crime.

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5. See *infra* notes 118-25 and accompanying text.

6. See *infra* notes 133-35 and accompanying text. After earlier drafts of this paper began circulating in early 2012, *U.S. News* changed its policy and began to remove from the rankings schools that had submitted false information. See *infra* notes 168-72 and accompanying text.

7. See, e.g., Letter from Senator Barbara Boxer to William T. Robinson III, President, Am. Bar Ass’n (Oct. 6, 2011), available at <http://boxer.senate.gov/en/press/releases/100611b.cfm>.

8. See *infra* notes 118-25 and accompanying text.

9. See *infra* notes 346-47 and accompanying text.

10. See *infra* Part III.A.3.D

11. See *infra* notes 83-88 and accompanying text.

Law schools' misleading claims about their students' success at gaining post-graduate employment after graduation are the best known, and most widely criticized, example of the publication of "facts" that are deceptive even if they are arguably literally true. Since 2008, the legal profession has been mired in the worst employment recession – many would argue it is a depression – in at least a generation.<sup>12</sup> Yet schools continue to report, and *U.S. News* continues to publish, employment data that would make any reasonable reader conclude that attending some law schools is almost a guarantee of highly paid professional employment after graduation.

Consider these "facts" published in the 2012 *U.S. News* rankings (first sold in March 2011) in the important category "Graduates Known to Be Employed Nine Months after Graduation."<sup>13</sup> The magazine gave a numerical (ordinal) ranking to 143 law schools, and more than 40% of these schools (59) reported an employment rate of 90% or greater at the 9 month date.<sup>14</sup> Twenty-five of these schools reported employment rates exceeding 94%, and eight actually claimed rates above 97%.<sup>15</sup>

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12. See David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 8, 2011, <http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all>.

13. One way that *U.S. News*' methodology is misleading is that these data are not for the most recently graduated class. See *Schools of Law*, U.S. NEWS & WORLD REPORT, BEST GRADUATE SCHOOLS, 2012, at 69-72 [hereinafter 2011 U.S. News Rankings]. For example, the April 2011 rankings cite alleged employment numbers for the class of 2009. *Id.* *U.S. News* is providing data for students who graduated almost two full years before the rankings are published. This would matter less if the magazine prominently warned its customers that these data are so dated, but one must search within the issue to discover that fact. See *id.*

14. See *id.* Another forty-five law schools received numerical scores by *U.S. News* but were not placed within the numerical (ordinal) rankings. See *id.* Instead, they were listed in alphabetical order following the ranked schools. *Id.* Of this unranked group, three (Atlanta's John Marshall, Phoenix School of Law, and Southern University) reported nine-month employment rates exceeding 90%. *Id.*

15. *Id.* The fifty-nine schools, in reverse order from the *U.S. News* rankings, are:

- 132. Florida International University (90.7%);
- 117. University of Baltimore (92.8%);
- 113. Willamette University (91.5%), University of Missouri – Kansas City (91.3%), Albany Law School (90.3%);
- 110. University of Tulsa (95.2%);
- 107. Quinnipiac University (91.8%);
- 100. University of Louisville (93.8%);
- 95. Michigan State University (90.9%);
- 84. Rutgers, Newark (90.5%), Hofstra University (91.2%);
- 79. University of New Mexico (92.0%), University of Indiana, Indianapolis (94.4%);
- 71. University of Oklahoma (90.3%), University of Nevada – Las Vegas (94.3%), University of Kentucky (93.3%), Northeastern (91.4%);
- 67. University of Richmond (91.5%);
- 61. Seton Hall University (94.2%), Georgia State University (90.3%);

A reasonable person not conversant with the vagaries of the *U.S. News* methodology (and how it permits schools to manipulate data) could easily be deceived by these data. To a reasonable consumer, the claim of postgraduate employment for more than 90% of new law school graduates likely indicates that graduates had secured fulltime permanent employment in the legal profession or at least jobs requiring a law degree. But the *U.S. News* methodology has allowed schools to employ very different criteria when compiling employment rates for recent graduates.<sup>16</sup> Schools have been able to count as employed graduates with part-time, minimum wage jobs, even those jobs not

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56. University of Tennessee, Knoxville (91.4%), University of Houston (92.7%);
  54. Loyola Marymount University (93.4%);
  50. Florida State University (90.9%);
  42. University of Utah (92.5%), University of Maryland (94.3%), Brigham Young University (93.3%);
  40. George Mason University (96.1%);
  39. Wake Forest University (90.1%);
  35. Ohio State University (92.7%);
  30. University of North Carolina, Chapel Hill (90.7%), Fordham University (91.5%);
  27. University of Iowa (91.7%), College of William & Mary (93.7%), Boston College (94.3%);
  23. University of Notre Dame (93.4%), University of California, Davis (95.8%);
  22. Boston University (94.4%);
  20. University of Minnesota (94.1%), George Washington University (97.5%);
  18. Washington University, St. Louis (95.5%), University of Southern California (93.3%);
  16. Vanderbilt University (93.7%), University of California, Los Angeles (93.1%);
  14. University of Texas – Austin (92.8%), Georgetown University (92.3%);
  13. Cornell University (97.4%);
  12. Northwestern University (95.0%);
  11. Duke University (95.4%);
  9. University of Virginia (97.8%), University of California, Berkeley (95.6%);
  7. University of Pennsylvania (97.7%), University of Michigan (96.4%);
  6. New York University (97.0%);
  5. University of Chicago (99%);
  4. Columbia University (97.8%);
  3. Stanford University (95.6%);
  2. Harvard University (97.5%);
  1. Yale University (96.5%).

*Id.*

16. See Robert J. Morse, *Making Sense of Law Schools' Job Data*, U.S. NEWS & WORLD REPORT, BEST GRAD SCHOOLS, 2013, at 68.

requiring legal training or a law degree.<sup>17</sup> Some schools have gone even further, creating temporary jobs programs for hiring their own unemployed recent graduates.<sup>18</sup> The jobs typically end shortly after the *U.S. News* reporting dates.<sup>19</sup> We doubt that many people reading the *U.S. News* rankings imagine that when a school reports that more than 90% of its graduates are employed this statistic includes lawyers who are waiting tables or working at temporary jobs created by the law school to coincide with the *U.S. News* reporting dates. By creating a deceptively optimistic picture of the job prospects for a school's graduates, these temporary, part-time jobs programs could, in fact, create liability for schools under the mail and wire fraud statutes.

For people conversant with the actual job opportunities for law school graduates since 2007, the employment numbers published by law schools and *U.S. News* might seem laughable if they did not influence fundamental life decisions made by prospective law students. Perhaps claims that more than 90% of a school's graduates are employed contributed to a rise in law school enrollment during the recent recession in legal employment.<sup>20</sup> These claims are not mere commercial "puffing." Many prospective students consider the professional job opportunities of a school's graduates as important information. We believe that few students would expend years of effort, in the process accumulating \$100,000 or more in non-dischargeable debt, in order to secure unskilled or minimum wage jobs after graduation. Most people pursue a professional education to become professionals. Deceiving consumers about post-graduate employment opportunities could be fraud.<sup>21</sup>

Under federal law, if a school's deans and other employees committed crimes, the schools also face liability under the doctrine of *respondeat superior*.<sup>22</sup> This doctrine would apply to *U.S. News* and its employees as well.

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17. *See id.*

18. *See infra* Part III.A.3.D.

19. *See infra* notes 234-63 and accompanying text.

20. *See, e.g.*, AM. BAR ASS'N, FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER 1947-2011, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/jd\\_enrollment\\_1yr\\_total\\_gender.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf) (total enrollment in ABA-approved J.D. programs increased from 145,239 in fall 2009 to 147,525 in fall 2010).

21. Law schools, their deans, and even *U.S. News* undoubtedly will protest that these data are accurate – within the oddly permissive rules of the magazine's ranking formula. *See* Robert Morse & Sam Flanigan, *Methodology: Law School Rankings*, *U.S. News & World Report* (Mar. 12, 2012) [hereinafter *Methodology*] (describing the methodology used to calculate the rankings), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2012/03/12/methodology-law-school-rankings>. But literally true data can be so misleading that it is fraudulent. *See infra* Part III.A.2; *see also infra* Part III.A.6 (presenting a detailed examination of how the *U.S. News* "rules" permit schools to manipulate employment data to create misleading pictures of post-graduate employment).

22. *See infra* Part II.A.



The magazine's public statements confirm that it is aware that some schools have submitted false or misleading data.<sup>23</sup> Despite this knowledge, it has continued to publish this deceptive information, and the rankings based in part upon it, without effectively warning its customers. Knowing publication of false information could make the magazine, like the schools and deans who supplied the false information, guilty of mail and wire fraud.<sup>24</sup>

We openly acknowledge, indeed we emphasize, that our assertions are *contingent* and *not conclusive*. Although numerous published reports supply information suggesting that crimes may have been committed, as professors we lack the resources and authority either to conduct nationwide criminal investigations or to prosecute white-collar crimes. Such responsibilities belong to others, and in this situation these responsibilities rest most obviously with the Department of Justice (DOJ).<sup>25</sup> What academics can do is examine the widespread reports of lying by law schools and their administrators, and the publication of these fabrications by *U.S. News*, and explain how the reported conduct could constitute federal crimes. That is the task we undertake in this Article.

We begin, in Part II, by discussing the federal *respondeat superior* rule that imposes a species of strict liability on organizations for crimes committed by their employees and agents. This rule creates risks for law schools, their home universities, and for *U.S. News*. We then discuss the DOJ guidelines for charging organizations under the theory of *respondeat superior*. These guidelines emphasize that both the individual and the organization can be tried, convicted, and punished for crimes committed by the organizations' agents and employees.

In Part III we examine the possibility that some law schools, *U.S. News*, and the relevant employees of those organizations may have violated federal statutes criminalizing mail and wire fraud, conspiracy, and racketeering. We also explore how some law schools and their employees may have committed the felony of making false statements by submitting false information to the Section on Legal Education of the American Bar Association (ABA), the sole accrediting agency for law schools recognized by the federal Department of Education (DOE).

Finally, Part IV examines the integrity of the *U.S. News* rankings methodology. Criticisms of the magazine's methods for compiling its ordinal rankings are not new. Almost fifteen years ago the Association of American Law Schools commissioned a study of this methodology, and the published report identified serious defects.<sup>26</sup> In the ensuing years scholars have contin-

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23. See *infra* notes 133-35 and accompanying text.

24. See *infra* Part III.A.

25. See *infra* note 28 and accompanying text.

26. Klein & Hamilton, *supra* note 4.

ued to identify shortcomings in the methodology.<sup>27</sup> The analysis here concludes that the magazine's methods are so fundamentally flawed that selling ordinal rankings constructed from them may itself create liability under the federal mail and wire fraud statutes.

We expect that some readers will find the idea that American law schools and their deans, together with *U.S. News* and its relevant employees, could be guilty of these serious felonies is implausible, perhaps even preposterous. We also expect, however, that after reading this Article even these skeptics will acknowledge the possibility that these organizations and individuals have committed crimes affecting the lives and careers of thousands of people.

## II. CRIMINAL LIABILITY FOR INDIVIDUALS AND ORGANIZATIONS

Our focus in this Article is federal criminal law, which creates criminal liability for corporations and other organizations, as well as for individuals. Department of Justice policies stress the utility of prosecuting both individuals and the organizations for which they work. "Where a decision is made to charge a corporation, it does not necessarily follow that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation."<sup>28</sup>

Individuals are liable under traditional principles of Anglo-American criminal law. Title 18 of the United States Code begins by proclaiming that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."<sup>29</sup> This language reflects the twentieth century movement to eliminate common law distinctions between principals and accomplices, allowing those who assist in the commission of offenses to be punished as if they were the principals who committed the crimes. This Article focuses upon a limited set of potential individual defendants: law school administrators and the individuals who direct publication of the *U.S. News* law school rankings. Under federal law, people who have committed fraudulent acts face liability as principals, and the individuals who have aided and abetted the principals can be equally culpable and face the same punishments.

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27. See, e.g., Symposium, *The Next Generation of Law School Rankings*, *supra* note 4; see also Paul L. Caron & Rafael Gely, *Dead Poets and Academic Progenitors: The Next Generation of Law School Rankings*, 81 IND. L.J. 1, 2 (2006) (describing the undertaking as "the first scholarly conference on law school rankings").

28. UNITED STATES ATTORNEYS' MANUAL (USAM) § 9-28.200(B), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/28mcrm.htm#9-28.200](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.200).

29. 18 U.S.C. § 2(a) (2006). Accessories after the fact are treated separately, as was typical at the common law. See *id.* § 3.

Culpable individuals and institutions also could be liable for violating the federal conspiracy statute. A criminal conspiracy exists “[i]f two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy.”<sup>30</sup> Given the nature of the actions needed for a law school to compile and distribute false test scores and undergraduate GPAs for their students, to concoct and distribute inflated and misleading data about graduates’ employment prospects, or simply to lie about the funds the school spends on each student’s education, it seems unlikely that any of these schemes were carried out by a lone employee. If two or more people were involved, the schemers may be guilty of a criminal conspiracy. If employees conspired illegally, then the employer institutions, and not merely the culpable individuals, are likely guilty of the separate crime of conspiracy for crimes committed by any co-conspirator that were both foreseeable and within the scope of the conspiracy.<sup>31</sup>

The employer’s liability follows directly from the employee’s crimes. The source in federal law for the organization’s liability is the doctrine of *respondeat superior*.

#### A. The Federal Respondeat Superior Rule

Federal law is unequivocal: corporations and other organizations can be criminals and are culpable for crimes committed by their employees under a rule of vicarious liability imported from agency law. The rule is both expansive and harsh:

Corporations are ‘legal persons,’ . . . capable of committing crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent’s actions (i) were *within the scope of his duties* and (ii) were intended, at least in part, *to benefit the corporation*.<sup>32</sup>

Although the government must prove both of these elements to establish corporate liability, federal courts have interpreted the application of these elements broadly, creating expansive liability for organizations. For example, an employee can be acting *within the scope of his corporate duties* even when his acts violate corporate rules and policies. The test for whether an employee is acting within the scope is “whether the agent is ‘performing acts of

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30. *Id.* § 371.

31. See *Pinkerton v. United States*, 328 U.S. 640, 647 (1946).

32. USAM § 9-28.200(B) (emphasis added).

the kind which he is authorized to perform,' and those acts are 'motivated – at least in part – by an intent to benefit the corporation.'<sup>33</sup>

In one well-known case, the employer was held liable for antitrust violations committed by a hotel-purchasing agent who violated corporate policies while making purchasing decisions.<sup>34</sup> Those persons unfamiliar with federal criminal law may be surprised that the company was convicted. The employer had a strict, clear, well-known policy that its employees should refrain from the precise conduct for which the corporation was convicted.<sup>35</sup> Nonetheless, the company was liable because its purchasing agent was acting within the scope of the duties the company had assigned him. The company had placed him in the position of making purchases and,

a corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or *apparent authority*, and for the benefit of the corporation, even if . . . such acts were against corporate policy or express instructions.<sup>36</sup>

If the apparent authority granted to a purchasing agent can bind an organization, then surely the official acts of the leader – a law school dean or the director of the *U.S. News* rankings – will suffice. If a school submitted false data with its dean's approval, then the dean's crime is attributed to the school as well. The fact that the school or magazine had general policies forbidding these crimes will not absolve the organization.<sup>37</sup> "Even a specific directive to an agent or employee or honest efforts to police such rules do not automatically free the company of liability for the wrongful acts of agents."<sup>38</sup>

A school will be liable even if its miscreant dean was motivated in part by personal ambition. Although an employee who acts solely for personal gain does not create criminal liability for his employer, an actor who is merely self-interested may create liability.<sup>39</sup> A dean acting to raise his school's position in the rankings might hope that this "success" would garner

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33. *United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006) (quoting *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982)).

34. *See United States v. Basic Constr. Co.*, 711 F.2d 570 (4th Cir. 1983) (per curiam).

35. *See id.* at 573.

36. *Id.*

37. The existence of active and effective corporate compliance programs can reduce criminal sentences and may even influence charging decisions, but they do not provide a safe haven from prosecution. *See* USAM § 9-28.500(A). This is true even where the organization informed employees of its rules against specific types of crimes. *See, e.g., id.* § 9-28.800(B).

38. *Potter*, 463 F.3d at 26.

39. *See supra* note 32 and accompanying text.

pay raises or professional advancement.<sup>40</sup> However, guiding the school's climb in the rankings also constitutes acting on behalf of the organization, the second prong of the *respondeat superior* rule.<sup>41</sup> Even if the dean's efforts failed – the school did not “profit” from the crimes by attaining a higher position in the rankings – both the individual and the organization are still liable for the crimes.<sup>42</sup>

None of this liability discussion would matter if organizations were not a target of federal law enforcers. However, they are.<sup>43</sup>

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40. Conversely, some deans have been penalized, even fired, when their schools' positions in the *U.S. News* rankings decline. See, e.g., Segal, *supra* note 12 (“As absurd as the rankings might sound, deans ignore them at their peril, and those who guide their schools higher up the U.S. News chart are rewarded with greater alumni donations, better students and jobs at higher-profile schools.”).

41. See, e.g., *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985) (affirming conviction of corporation that argued its employee was motivated by his “ambitious nature and his desire to ascend the corporate ladder,” in part because his crimes also benefitted the company because he would only advance within the corporate hierarchy if the company was successful and avoided difficulties with federal regulators); *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982) (affirming corporation's conviction although its agents' crimes produced significant personal benefits because the fraudulent scheme funneled money through the company's treasury and resold inventory obtained by fraud to the corporation's customers in the corporation's name).

42. See, e.g., *Automated Med. Labs., Inc.*, 770 F.2d at 407 (“[B]enefit is not a ‘touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact.’ Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which may be *inimical* to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.”).

43. See, e.g., Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Dep't Components, United States Attorneys, on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at [http://www.justice.gov/dag/cftf/corporate\\_guidelines.htm](http://www.justice.gov/dag/cftf/corporate_guidelines.htm).

As the Corporate Fraud Task Force has advanced in its mission, we have confronted certain issues in the principles for the federal prosecution of business organizations that require revision in order to enhance our efforts against corporate fraud. While it will be a minority of cases in which a corporation or partnership is itself subjected to criminal charges, prosecutors and investigators in every matter involving business crimes must assess the merits of seeking the conviction of the business entity itself.

### B. Federal Guidelines for Prosecuting Organizations

At least that is the official position of the DOJ. Its *Principles of Federal Prosecutions of Business Organizations* in its U.S. Attorney's Manual (USAM), announce that the "prosecution of corporate crime is a high priority for the Department of Justice . . . [that] promotes critical public interests . . . [including] protecting consumers, investors, and business entities that compete only through lawful means."<sup>44</sup> Possible frauds affecting thousands of consumers of legal education, and also potentially harming those schools attempting to compete for students, resources, and jobs for graduates without cheating, would seem to be subjects of interest for those operating under these guidelines.<sup>45</sup>

This conclusion is supported by other passages in the USAM dictating principles to be followed when federal prosecutors make charging decisions. The importance of prosecuting and punishing organizations, as well as individuals, is a theme throughout the guidelines. Additionally, several of the policy arguments in favor of prosecuting organizations appear to be particularly relevant to possible frauds committed by the educational institutions that serve as the gateway into the legal profession. "Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes."<sup>46</sup> Attempts to "game" the *U.S. News* rankings seem to have become so systemic within U.S. law schools<sup>47</sup> that the need to change this institutional culture appears to be a relevant and important goal for the mission of the DOJ. It is likely that institutions of higher legal education might be particularly responsive to the threat of prosecution. As the USAM notes, "corporations are

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*Id.* (emphasis added).

44. UNITED STATES ATTORNEYS' MANUAL (USAM) § 9-28.100, available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/28mcrm.htm#9-28.200](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.200).

45. The USAM's list of factors for prosecutors to consider when making charging decisions include several implicated by the published reports of misconduct in relationship to the *U.S. News* law school rankings. These include the "nature and seriousness" of the offense, "including the risk of harm to the public," *Special Policy Concerns*, USAM § 9-28.400; the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management, *Pervasiveness of Wrongdoing Within the Corporation*, USAM § 9-28.500; "the corporation's timely and voluntary disclosure of wrongdoing" and its willingness to cooperate in the investigation of its agents, *The Value of Cooperation*, USAM § 9-28.700; the existence and effectiveness of the corporation's pre-existing compliance program, *Corporate Compliance Programs*, USAM § 9-28.800; and "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance," *Factors to be Considered*, USAM § 9-28.300(A)(8).

46. USAM § 9-28.200.

47. See *infra* Part III.A.3 (including skewing the admission numbers, employment averages, average GPAs, average graduate salaries, etc.).

likely to take immediate remedial steps when one is indicted for criminal misconduct that is pervasive throughout a particular industry, and thus an indictment can provide a unique opportunity for deterrence on a broad scale.”<sup>48</sup>

The effects of prosecuting individuals may not only deter future crimes by individuals, but may also produce positive changes in the behavior of law schools and media outlets seeking profits by publishing rankings. As the USAM asserts, “[b]ecause a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing.”<sup>49</sup> Therefore, the DOJ has strong policy reasons to target law schools for prosecution.

In the remaining sections of this Article we examine how individuals working for some U.S. law schools and for *U.S. News* may have committed crimes, and in the process created liability for themselves and their employers. Part III begins by discussing mail fraud and wire fraud.

### III. FEDERAL CRIMES

#### A. Mail and Wire Fraud

##### 1. Federal Jurisdiction

If those individuals involved in the law school ranking scandals committed federal crimes, mail and wire fraud are the analytical starting points. Law school administrators have used both the mails and interstate wire communications to convey false information to prospective students and others.<sup>50</sup> *U.S. News* has used the same means of communication to sell both that false data and the law school rankings that were constructed in part from the false data.<sup>51</sup> These actions satisfy the jurisdictional requirements of the two crimes. This jurisdictional finding is important because Congress lacks the power to punish all frauds. Congress has the power to create and punish individuals for crimes committed only by the use of mails and interstate communications.

Federal jurisdiction to criminalize mail fraud, located in 18 U.S.C. section 1341,<sup>52</sup> arises under the Constitution’s Post Office Clause.<sup>53</sup> The stat-

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48. USAM § 9-28.200(B).

49. *Id.*

50. See *Methodology*, *supra* note 21.

51. See, e.g., *U.S. News Law School Compass & Guidebook*, U.S. NEWS & WORLD REPORT, [http://www.usnews.com/usnews/store/law\\_school\\_compass.htm?src=ldata&ref=/best-graduate-schools/top-law-schools/law-rankings](http://www.usnews.com/usnews/store/law_school_compass.htm?src=ldata&ref=/best-graduate-schools/top-law-schools/law-rankings) (last visited Feb. 19, 2013) (selling a hard copy of the rankings for \$9.99).

52. 18 U.S.C. § 1341 (2006, Supp. 2009) provides:

ute's scope was recently extended to include private and commercial interstate carriers.<sup>54</sup> Like wire fraud, proscribed in 18 U.S.C. section 1343,<sup>55</sup> this

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Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

53. U.S. CONST. art. I, § 8, cl. 7 (Congress shall have the power to "establish Post Offices and post Roads").

54. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 250006, 108 Stat. 1796 (1994).

55. 18 U.S.C. § 1343 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or



jurisdiction is grounded in the Commerce Clause.<sup>56</sup> The mails or interstate wires need not be the specific means used to commit fraud or defraud the victims. It is sufficient if their use was “incident to an essential part of the scheme.”<sup>57</sup>

In the law school rankings scandals, the mails and interstate wire communications have been essential tools both for the law schools and for *U.S. News*. To be included in the rankings, law schools must submit their data to *U.S. News*. If they use the mails, jurisdiction exists under section 1343. If they submit data digitally, it is likely that their wire communications travel across state lines. In fact, the geography of the internet makes it likely that messages travel across state lines, and perhaps across even national borders, even if the origin and destination sites are in the same state. Similarly, if packages are sent by private courier, the hub systems used by the leading companies makes it likely that packages traverse an interstate itinerary. Because knowledge of the bases for federal jurisdiction is not necessary under these statutes, the sender need not intend or even know that the email or package has crossed state lines.

Law schools’ use of the data submitted to *U.S. News* can trigger federal jurisdiction in another way. Many schools include the data submitted to *U.S. News* in the promotional materials they distribute by mail and post online in their efforts to recruit new students. If the data is false, once again the use of the mails and interstate wire transmission of this information is sufficient to create jurisdiction under the mail and wire fraud statutes.

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promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation . . . affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

56. U.S. CONST. art. I, § 8, cl. 3 (Congress shall have the power to “regulate Commerce . . . among the several States”). This clause also provides authority for the expansion of section 1341 to include those who “deposit[] or cause[] to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier.” See 18 U.S.C. § 1341.

57. *Pereira v. United States*, 347 U.S. 1, 8 (1954).

## 2. Substantive Elements

### a. *The Expansive Definition of Fraud*

The current crime of wire fraud is modeled on the earlier mail fraud statute and courts interpret the substantive elements of the two statutes *in pari materia*.<sup>58</sup> The federal courts, led by the Supreme Court, have adopted an expansive definition of frauds prohibited by these statutes. Pared to its basics, the breadth of the criminal prohibition is remarkable.<sup>59</sup> Just as it was more than a century ago, today it is a crime to devise or participate in any scheme with the intent of committing a fraud, and to use the mails (or interstate wire communications) as part of that scheme.<sup>60</sup>

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58. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 20 (1999):

Although the mail fraud and wire fraud statutes contain different jurisdictional elements ([section] 1341 requires use of the mails while [section] 1343 requires use of interstate wire facilities), they both prohibit, in pertinent part, “any scheme or artifice to defraud” or to obtain money or property “by means of false or fraudulent pretenses, representations, or promises.”

59. *See, e.g.*, *United States v. Bishop*, 825 F.2d 1278, 1280 (8th Cir. 1987) (alteration in original) (quoting *United States v. States*, 488 F.2d 761, 764 (1973)):

The crime of mail fraud is broad in scope . . . .  
The fraudulent aspect of the scheme to “defraud” is measured by a nontechnical standard . . . . Law puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the “reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general business life of the members of society.” This is indeed broad. For as Judge Holmes once observed, “[t]he law does not define fraud; it needs no definition. It is as old as falsehood and as versable as human ingenuity.”

60. *See, e.g.*, *Neder*, 527 U.S. at 20 (“Although the mail fraud and wire fraud statutes contain different jurisdictional elements [the use of the mails or interstate wire facilities], they both prohibit . . . ‘any scheme or artifice to defraud’ or to obtain money or property ‘by means of false or fraudulent pretenses, representations, or promises.’”); *United States v. Hawkey*, 148 F.3d 920, 924 (8th Cir. 1998) (conviction requires proof of “(1) the existence of a scheme to defraud, and (2) the use of the mails . . . for purposes of executing the scheme.” (quoting *United States v. Manzer*, 69 F.3d 222, 226 (8th Cir. 1995))).

Materiality is one of the elements of a fraud claim. Although materiality is not required by the statutory language, in *Neder v. United States*,<sup>61</sup> the Supreme Court reaffirmed that materiality is an essential element that prosecutors must prove to convict someone of mail or wire fraud. “It is a well-established rule of construction that ‘[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.’”<sup>62</sup> The Court concluded (and the government conceded) that when the mail and wire fraud statutes were enacted by Congress, “actionable ‘fraud’ had a well-settled meaning at common law . . . [that] required a misrepresentation or concealment of *material* fact.”<sup>63</sup>

In *Neder*, the government argued against a materiality requirement, apparently in an effort to lessen the government’s burden of proof in mail and wire fraud cases.<sup>64</sup> Under the definition of materiality adopted in *Neder*, however, it is unlikely that proving materiality would be difficult in prosecutions based on the issues discussed in this Article. The Supreme Court adopted the definition of *material* found in the Restatement of Torts, which provides that a matter is material if:

(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or

(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.<sup>65</sup>

This two-part definition of materiality is well established in federal case law. A material lie is one that “has ‘a natural tendency to influence, or [is] capable of influencing, the decision’” of “a reasonable person in deciding whether to engage or not to engage in a particular transaction.”<sup>66</sup> Conversely, a lie not capable of misleading a reasonable person is still material if a victim is so gullible, guileless, or incompetent that he actually believes it.<sup>67</sup>

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61. 527 U.S. 1.

62. *Id.* at 21 (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)).

63. *Id.* at 22.

64. *See generally id.*

65. *Id.* at 22 n.5 (quoting RESTATEMENT (SECOND) OF TORTS § 538 (1977)).

66. *Preston v. United States*, 312 F.3d 959, 961, 961 n.3 (8th Cir. 2002) (quoting *Neder*, 527 U.S. at 16); *see Lustiger v. United States*, 386 F.2d 132, 140-41 (9th Cir. 1967).

67. *Lustiger*, 386 F.2d at 136, n.3 (citing *Lemon v. United States*, 278 F.2d 369, 373 (9th Cir. 1960)).

The law school rankings scandals warrant scrutiny by federal prosecutors under this definition of materiality precisely because the false information concocted by law schools and published by *U.S. News* influences prospective law students' decisions about what law schools to attend. Law schools have published false information precisely because deans and administrators know that prospective students reasonably regard that information as important. People hoping to get a professional job after graduation – certainly a high percentage of prospective students – will be attracted to schools reporting very high rates of employment among their graduates. Students interested in attending law schools inhabited by students with high LSAT scores and undergraduate GPAs will search for those programs. Applicants who want to study in well-funded academic programs may be influenced by the size of expenditures on academic programs. Moreover, the prospective students interested in the bottom line – a school's ultimate ranking – will emphasize a school's position in the *U.S. News* ordinal rankings, a position dictated in no small part by the data schools submit.

The rankings, and perhaps the underlying data, are material even if consumers do not obtain the information directly from the law schools, but instead from *U.S. News*. After all, obtaining this information is the reason people spend money to purchase the rankings in the first place. *U.S. News* not only knows that law students rely on the rankings, but actually encourages prospective law students “to regard the” magazine's law school rankings “as important in determining” whether and where to pursue a legal education – satisfying the definition of materiality in the Restatement of Torts.<sup>68</sup> In this context it seems unlikely that proving materiality will substantially increase the government's burden of proof. Even if it does, the Supreme Court has eased the burden by expunging other traditional elements from these statutory crimes and, more importantly, by freeing prosecutors from having to prove that a defendant's acts fit within one of the traditional categories of criminal fraud.

The Supreme Court's *Neder* opinion, for example, joined a long line of cases confirming that the mail and wire “fraud statutes did not incorporate *all* the elements of common-law fraud.”<sup>69</sup> A unanimous Court reaffirmed that the “common-law requirements of ‘justifiable reliance’ and ‘damages’ . . . plainly have no place in the federal fraud statutes.”<sup>70</sup> In other words, “the government does not have to prove actual reliance upon the defendant's mis-

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68. RESTATEMENT (SECOND) OF TORTS § 538; Robert J. Morse & Samuel Flanigan, *About the U.S. News Rankings*, U.S. NEWS & WORLD REPORT, BEST GRAD SCHOOLS, 2013, at 13 [hereinafter Morse & Flanigan, *About the Rankings*] (“It's important that [the reader] use the rankings to supplement – not substitute for – careful though and [individual] inquiries.”).

69. *Neder*, 527 U.S. at 24-25.

70. *Id.* (emphasis added).

representations” by a victim.<sup>71</sup> The statutes can be violated even if the potential victim was not deceived.<sup>72</sup> Unlike civil fraud litigation, where a plaintiff must prove damages, that requirement “has no application to criminal liability.”<sup>73</sup>

An even more important deviation from the common law rules involves the definition of the frauds criminalized by the mail and wire fraud. For more than a century, the Supreme Court has categorized frauds violating the mail and wire fraud statutes more expansively than the more categorical definitions of the common law frauds. The 1999 opinion in *Neder*, for example, relied upon the 1896 decision in *Durland v. United States*.<sup>74</sup> *Durland* argued that he was not guilty of mail fraud because longstanding common law rules limited the scope of the crime of false pretenses to frauds based on lies about past and present facts, but excluded from its reach promises about future actions and events.<sup>75</sup> This defense might have been effective in an Anglo-

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71. *Id.* at 25 (quoting *United States v. Stewart*, 872 F.2d 957, 960 (10th Cir. 1989)) (internal quotation marks omitted).

72. *Lustiger*, 386 F.2d. at 136.

73. *Neder*, 527 U.S. at 25 (quoting *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932) (L. Hand, J.)) (internal quotation marks omitted).

74. *See id.* at 24-25; *Durland v. United States*, 161 U.S. 306 (1896). The statute in question was Revised Statute section 5480, as amended by the act of March 2, 1889, c. 393, 25 Stat. 873, which provided in relevant part that

If any person having devised or intending to devise any scheme or artifice to defraud . . . to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the post office establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet or advertisement, in any post office, branch post office, or street or hotel letter-box of the United States, to be sent or delivered by the said post office establishment, or shall take or receive any such therefrom, such person so misusing the post office establishment shall, upon conviction, be punishable . . . .

*Durland*, 161 U.S. at 306.

75. The defense argued “that the statute reaches only such cases as, at common law, would come within the definition of ‘false pretenses,’ in order to make out which there must be a misrepresentation as to some existing fact, and not a mere promise as to the future.” *Durland*, 161 U.S. at 312. This traditional rule would absolve the

American common law jurisdiction that required prosecutors to charge and prove that defendants had violated a specific category of fraud: larceny by trick or false pretenses were the most important examples. However, the court found this defense was not effective in a criminal fraud case.

After describing this issue as one of “vital importance,” the Supreme Court rejected these defense arguments and held that the text of the statute defined a crime broader in scope than its common law antecedents. The Supreme Court explained:

The statute is broader than is claimed. Its letter shows this: ‘Any scheme or artifice to defraud.’ Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. Punishment because of the fraudulent purpose is no new thing.

. . . In the light of this the statute must be read, and, so read, it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.<sup>76</sup>

*Neder* confirms the continued vitality of this expansive application of fraud concept under the contemporary mail and wire fraud statutes. As was true in 1896, today it is a crime to devise or participate in any scheme with the intent of committing a fraud, and to use the mails (or interstate wire communications) as part of that scheme.<sup>77</sup>

And the heart of the crime, the scheme to defraud, continues to defy definitional limitations. “To try to delimit ‘fraud’ by definition would tend to reward subtle and ingenious circumvention and is not done.”<sup>78</sup> Indeed, rather than constrict the statutes’ reach, the federal courts have frequently extolled their purpose, which “condemns conduct which fails to match the ‘reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.’”<sup>79</sup> No one is likely to confuse law schools’ manipulation of facts in pursuit of higher *U.S. News* rankings with the moral uprightness demanded by the law.

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defendant because the indictment asserted “nothing but an intention to commit a violation of a contract . . . [and] [i]f there be one principle of criminal law that is absolutely settled by an overwhelming avalanche of authority, it is that fraud either in the civil courts or in the criminal courts must be the misrepresentation of an existing or a past fact, and cannot consist of the mere intention not to carry out a contract in the future.” *Id.* at 312-13.

76. *Id.* at 313.

77. See 18 U.S.C. § 1341, 1343 (2006).

78. *Foshay v. United States*, 68 F.2d 205, 211 (8th Cir. 1933).

79. *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967) (emphasis added) (quoting *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958)).

*b. True Lies*

Law schools will not be able to defend against criminal fraud charges by arguing that their statements were literally true. The mail and wire fraud statutes require that a defendant make a false statement,<sup>80</sup> that he knew was false, “with a specific intent to deceive someone, ordinarily for the purpose of causing some financial loss (or loss of property rights) to another or bringing about some financial gain to one’s self” or another to the detriment of a third party.<sup>81</sup> One way the federal courts’ expansive interpretation of these elements<sup>82</sup> increases the risk of criminal prosecutions for law schools and their administrators is that it negates one of the arguments likely to be raised in defense of their actions. We should not be surprised if those accused of wrongdoing try to justify false claims about graduates’ employment rates, students’ LSAT scores, and the schools’ academic expenditures by asserting that the statements were literally true – even if they were misleading.

Under the mail and wire fraud statutes, literally true statements can be criminal lies. The best-known case is *Lustiger v. United States*.<sup>83</sup> Lustiger’s

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80. See *Preston v. United States*, 312 F.3d 959, 961 (8th Cir. 2002) (“A statement or representation is ‘false’ when it is untrue when made or effectively conceals a material fact.”).

81. *United States v. Starr*, 816 F.2d 94, 106 (2d Cir. 1987). *Durland* also emphasized, in terms relevant to judicial construction of sections 1341 and 1343 today, the significance of a defendant’s intent, the irrelevance of the scheme’s practicality or actual success, and the use of the mails:

*The significant fact is the intent and purpose.*

The question presented . . . [is] not . . . whether the business scheme . . . was practicable or not . . . . The charge is that, in putting forth this scheme, it was not the intent of the defendant to make an honest effort for its success, but that he resorted to this form and pretense . . . that he or the company would ever make good its promises. It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed; and it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a promise.

*Durland*, 161 U.S. at 313-14; see also *McNally v. United States*, 483 U.S. 350 (1987); *United States v. Ervasti*, 201 F.3d 1029, 1035 (8th Cir. 2000).

82. For example, courts have held that reckless indifference may satisfy the knowledge requirement. See, e.g., *United States v. Marley*, 549 F.2d 561, 563-64 (8th Cir. 1977).

83. 386 F.2d 132 (9th Cir. 1967).

company used the mails to market building lots in a real estate development called Lake Mead City located in the Arizona desert south of Las Vegas.<sup>84</sup> The printed marketing materials contained factual statements about the development that may have been literally true but were ultimately misleading because they omitted other facts needed for an accurate description of the property.<sup>85</sup> For example, the marketing materials stated that Lake Mead City was only five miles from Lake Mead, a major recreational site.<sup>86</sup> The Ninth Circuit used this as an example of a literally-true statement that contributed to the fraud:

It is true, measured by a straight line, Lake Mead is only five miles from the boundary of Lake Mead City. However, Lustiger did not reveal that by existing roads Lake Mead is fifteen miles from the nearest and forty miles from the farthest Lake Mead City unit. Moreover, most of the units did not have access presently available by ordinary motor vehicles. Thus, a purchaser may in fact have a long, if not impossible, route to travel to enjoy the benefits of Lake Mead.<sup>87</sup>

Lustiger was guilty of fraud because “the fact that there is no misrepresentation of a single existing fact is immaterial. It is only necessary to prove that it is a scheme reasonably calculated to deceive . . . .”<sup>88</sup> Under this test, a law school’s intentional omission of facts necessary to explain the types of jobs its graduates had secured, or to reveal the limited and misleading scope of the test scores and undergraduate GPAs it reported, seem calculated to produce a story that could and would mislead reasonable people.

Following the Supreme Court’s decision in *Neder*, some defendants in fraud prosecutions have argued that the materiality requirement conflicts with *Lustiger* and other decisions like it. For example, in *United States v. Woods*,<sup>89</sup> the defendants contended “that *Neder* required the government to prove a specific material false statement on which the jury unanimously agreed.”<sup>90</sup> The Ninth Circuit rejected the argument, holding that “[p]ost-*Neder* decisions confirm that *Lustiger* and its related cases remain good

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84. *Id.* at 134.

85. *Id.* at 136-37.

86. *Id.* at 136.

87. *Id.*

88. *Id.* at 138 (citing *Irwin v. United States*, 338 F.2d 770, 773 (9th Cir. 1964)); *Lemon v. United States*, 278 F.2d 369, 373 (9th Cir. 1960); *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958); *Kreuter v. United States*, 218 F.2d 532, 535 (5th Cir. 1955); *Silverman v. United States*, 213 F.2d 405, 407 (5th Cir. 1954)).

89. 335 F.3d 993 (9th Cir. 2003).

90. *Id.* at 998.



law.”<sup>91</sup> “Under the mail fraud statute the government is not required to prove any particular false statement was made.”<sup>92</sup> Rather, there are alternative routes to a mail fraud conviction, one being proof of a scheme or artifice to defraud, which may or may not involve any specific false statements.”<sup>93</sup> After *Neder* the rules remain unchanged:

The key lesson from *Lustiger* was that, “[i]f a scheme is devised with the intent to defraud, and the mails are used in executing the scheme, *the fact that there is no misrepresentation of a single existing fact is immaterial*. It is only necessary to prove that it is a scheme reasonably calculated to deceive, and that the mail service of the United States was used and intended to be used in the execution of the scheme.” . . . “[S]chemes are condemned which are contrary to public policy or which fail to measure up to the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.” . . . These holdings, which squarely foreclose Defendants’ argument, were in no way undermined by *Neder*.<sup>94</sup>

Therefore, under federal criminal law, literally true statements can be fraudulent.

It might seem, nonetheless, that not every potential student who purchased the rankings or who attended a law school that published false data is a victim of fraud. Some students might have paid these sums regardless of a school’s published numbers or ranking. Some people’s lives are constrained geographically. That is, they are able to attend school only in certain locations. Some people can afford to attend school only if they receive financial aid from a school, or pay in-state tuition at a public school, and will attend whatever school offers those options. For other students, family traditions or personal commitments to specific schools might dictate a student’s decision to enroll in a particular school. In those circumstances, we might conclude that a school’s lies were not material, or that a student did not rely on unreliable rankings based upon invalid data. The difficulty of establishing precisely what factors led a specific student to select a particular school helps clarify why the federal test of materiality is important. A lie is material if it proffers “facts” of the sort likely to influence a reasonable person’s deci-

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91. *Id.* at 999. The *Woods* opinion emphasized that “*Lustiger* comports with the common-law meaning of fraud, which was to be incorporated into the mail and wire fraud statutes as much as possible.” *Id.*

92. *Id.* (internal citations omitted) (quoting *United States v. Munoz*, 233 F.3d 1117, 1131 (9th Cir. 2000)).

94. *Id.* (internal citations omitted) (quoting *Lustiger*, 386 F.2d at 138; *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980)).

sion.<sup>95</sup> The scheme is fraudulent because it is designed precisely for influencing prospective students' decisions.

Of course, the quality of students' "objective" academic records, the amount a school spends on a student's education, and employment prospects for graduates are material for reasonable people trying to pick a law school to attend. Students who selected a school because they relied upon false data distributed by the school or the school's ordinal ranking by *U.S. News*, or some combination of the two, appear to be victims of fraud under federal law. They may be entitled to seek civil damages. But, in addition, the schools and their employees who participated in the crimes, and a magazine who knowingly profited from these lies (and its employees who participated), all would appear to be subject to prosecution for their crimes.

But, as we now discuss, not all lies may give rise to criminal liability under the mail and wire fraud statutes. These frauds must relate to some property right.

### c. Property Rights

In order to constitute criminal fraud under federal law, the fraud must affect a property right. Long established definitions of mail and wire fraud decree that they are "limited in scope to the protection of property rights."<sup>96</sup> The Supreme Court has emphasized that "the words 'to defraud' in the mail fraud statute have the 'common understanding' of 'wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'"<sup>97</sup> Intangible as well as tangible property rights are protected, but inducing a victim to pay money is a core example of a property transfer contemplated by the statute.<sup>98</sup>

Prosecutors should have little difficulty establishing that *U.S. News* and law schools obtained money from law students. Purchasers of the magazine's rankings pay money to purchase them. Law school applicants typically pay application fees for the privilege of having the school consider them as possible enrollees. Most significantly, students pay tens of thousands of dollars in tuition and fees to attend any accredited law school. For many private and public law schools, the total amount a student pays for three years of tuition and fees exceeds \$100,000.<sup>99</sup> The loss of property by the victims and the corollary gains by schools and *U.S. News* are indisputable.

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95. See *supra* notes 66-67 and accompanying text.

96. *McNally v. United States*, 483 U.S. 350, 360 (1987).

97. *Carpenter v. United States*, 484 U.S. 19, 27 (1987) (quoting *McNally*, 483 U.S. at 358).

98. See *id.* at 25, 27.

99. ABA COMM'N ON THE IMPACT OF THE ECON. CRISIS ON THE PROFESSION AND LEGAL NEEDS, THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL 1 (2009),

### 3. Law Schools and *U.S. News* May Have Committed Federal Crimes

The next question we must ask is, did law schools and *U.S. News* employ criminal schemes to defraud? The unfortunate, and extremely distressing, answer appears to be yes.

#### *a. The Importance of the U.S. News Rankings*

Law schools have an overwhelming incentive to present themselves in the most favorable way possible to *U.S. News*. The *U.S. News* rankings of law schools have attained unprecedented influence in legal education, affecting not only how students choose which schools to attend, but also the behavior of schools and their administrative leaders.<sup>100</sup> One way schools have reacted is by allocating their scarce resources to enhance the elements of legal education included in the rankings, often at the expense of others not considered by the *U.S. News* methodology, even if the effect is to degrade the overall quality of the institution.<sup>101</sup> The rankings apparently influence behavior even at schools always positioned near the top of the *U.S. News* rankings. As Stanford's dean admitted, "[y]ou distort your policies to preserve your ranking, that's the problem."<sup>102</sup>

Efforts to secure a higher ranking can succeed, in part because the *U.S. News* methodology (1) relies upon unverified empirical data the individual schools supply<sup>103</sup> and (2) produces ordinal rankings in which schools are closely packed.<sup>104</sup> The rankings of closely-ranked schools can change by improving or manipulating minor – and perhaps statistically insignificant – differences in the data used to classify the schools. That is, if a school can

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<http://www.americanbar.org/content/dam/aba/migrated/lsl/legaled/value.authcheckdam.pdf>.

100. As Phillip J. Closius, the dean of the University of Baltimore School of Law, stated, "I said 'I can talk for 10 minutes about the fallacies of the *U.S. News* rankings,' but nobody wants to hear about fallacies. There are millions of dollars riding on students' decisions about where to go to law school, and that creates real institutional pressures." Segal, *supra* note 12.

101. See Alex Wellen, *The \$8.78 Million Maneuver*, N.Y. TIMES, July 31, 2005, [http://www.nytimes.com/2005/07/31/education/edlife/wellen31.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2005/07/31/education/edlife/wellen31.html?pagewanted=all&_r=0) ("In the prelaw community, *U.S. News* rankings are gospel, so law school deans find themselves under tremendous pressure to adopt policies to improve their standing.").

102. *Id.* (quoting Stanford Law School Dean Larry Kramer). See generally Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229, 242-44 (2006).

103. Stake, *supra* note 102, at 260.

104. See *id.* at 250.

improve its self-reported numbers in one of the formula's categories even a little, the small changes can improve the school's position in the *U.S. News* rankings.<sup>105</sup>

Compounding the problem, *U.S. News* has not adopted methods to verify the accuracy of the data it has solicited from the schools.<sup>106</sup> Instead, the magazine has disclaimed any responsibility for verifying the accuracy of the data comprising a majority of the weighted values it uses to compile its rankings.<sup>107</sup> From the magazine's perspective, this measure is likely a cost-effective approach. The expense of establishing data verification systems would reduce the publication's profits unless it could pass the costs along to its customers. Whatever its motives, the magazine has failed to employ effective mechanisms for confirming the accuracy of the data it sells.<sup>108</sup>

This system has created an opportunity for law school administrators to try to improve their schools' rankings by submitting false information. Some administrators have been unable to resist the temptation, especially because even small changes in the schools' data can lead to large changes in their overall rankings.<sup>109</sup> As previously suggested, because schools' indicators are so closely clustered, even modest changes have a large impact on a school's overall rankings. This affect is demonstrated by the large changes in the overall ranking of the University of Texas Law School that resulted from a modest change in the school's employment statistics.

In the 1997 rankings, Texas was ranked eighteenth overall.<sup>110</sup> That year, it reported a placement rate nine months after graduation of 90%.<sup>111</sup> The next year, 1998, apparently because of a reporting mistake, Texas' nine-month employment rate fell to 84%.<sup>112</sup> The school's overall ranking plummeted from eighteenth to twenty-ninth.<sup>113</sup> That is, a reported 6% decline in Texas' job placement rate caused the school to drop eleven rungs in the rankings.<sup>114</sup> In 1999, Texas reported a robust 96% nine-month employment rate, an im-

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105. See *infra* notes 110-14 and accompanying text.

106. Morse, U.S. News *Urges Law School Deans to Improve Employment Data*, *supra* note 2 ("[I]t is not our role at *U.S. News & World Report* to be any sort of regulatory body over law schools or anyone else. We are a journalism company that gathers and analyzes information useful to our readers.").

107. See *id.* ("It is not our role to be setting industry standards nor enforcing them.").

108. First Amendment freedom of the press does not preclude criminal punishment for publishing fraudulent information. See, e.g., *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939).

109. See *infra* notes 110-15 and accompanying text.

110. U.S. News *Won't Rethink UT Ranking*, AUSTIN AMERICAN-STATESMAN, Mar. 13, 1998, at B2.

111. See *id.*

112. *Id.*

113. *Id.*

114. *Id.*

provement of 12% over the prior year. Texas' overall ranking rocketed fourteen spots higher to fifteenth in the *U.S. News* rankings.<sup>115</sup>

We examine three types of deceptive schemes that law schools have used to elevate their position in the rankings. Each of them may well constitute mail or wire fraud. They include the following: (1) submitting false or misleading data about the LSAT scores and undergraduate GPAs of their J.D. students; (2) using "part-time programs" to create misleading data about the grades and LSAT scores of a school's students; and (3) publishing false or deceptive information about their graduates' employment rates. Each of these examples will be discussed in turn.

*b. LSAT Scores and Undergraduate Grade Point Averages*

Law schools' false reporting of these "objective" data about students enrolled in their J.D. programs offer some of the most surprising and disturbing examples of possible violations of the mail and wire fraud statutes. Median LSAT scores and undergraduate GPAs of a school's first-year class are two of the most important components in the overall rankings by *U.S. News*. These two items account for 12.5% and 10% respectively of a school's overall score.<sup>116</sup> Thus by "improving" these numbers, a school can alter the data used to calculate almost one-quarter of the rankings' weighted score.

Schools have artificially improved these numbers in different ways. Some schools have simply reported inaccurate numbers. One egregious example involves Villanova University School of Law, which has admitted that it knowingly reported false, inflated information to *U.S. News* about its students' LSAT scores for several years.<sup>117</sup> Over the course of a half-decade – from 2005 through 2009 – Villanova reported that the median LSAT scores for its entering classes were two to three points higher than the actual scores.<sup>118</sup> In a letter to students and alumni, the law school's new law dean

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115. Angela Shah, *UT Law School is Rated 15th, Magazine Says*, AUSTIN AMERICAN-STATESMAN, Mar. 19, 1999, at B9.

116. *Methodology*, *supra* note 21.

117. Elie Mystal, *Villanova Scandal Watch: More Cryptic E-mails from the Dean*, ABOVE THE LAW (Feb. 7, 2011), <http://abovethelaw.com/2011/02/villanova-scandal-watch-more-cryptic-emails-from-the-dean/>; Elie Mystal, *Villanova Law 'Knowingly Reported' Inaccurate Information to the ABA*, ABOVE THE LAW (Feb. 4, 2011), <http://abovethelaw.com/2011/02/villanova-law-school-knowingly-reported-inaccurate-information-to-the-aba/>; Robert Morse, *Villanova Law School Certifies Accuracy of New Data*, U.S. NEWS & WORLD REPORT, MORSE CODE BLOG (Feb. 17, 2011), <http://www.usnews.com/education/blogs/college-rankings-blog/2011/02/17/villanova-law-school-certifies-accuracy-of-new-data> [hereinafter Morse, *Villanova Law School Certifies Accuracy of New Data*].

118. Memorandum from John Y. Gotanda, Dean and Professor of Law, Villanova Univ. Sch. of Law to Villanova Law School Alumni, *reprinted in* Elie Mystal, *Villanova Might Need a Kiss from Mommy Since the ABA Slapped their Wrist Wreally Wreally Whard*,

stated that “a small group of employees who had responsibility for admissions were responsible for the reporting of inaccurate data. Those employees asserted that former senior Law School administrators directed the misreporting activity.”<sup>119</sup> Identifying the employees who participated in the scheme is necessary if prosecutors want to charge culpable individuals, but under the doctrine of *respondeat superior* either the employees or the former senior administrator were capable of creating institutional criminal liability for the school.<sup>120</sup>

Six months later, the University of Illinois (Illinois) announced that its law school had engaged in a similar pattern of exaggerating its students’ academic records. In September 2011, Illinois announced that its

[I]nvestigation into the past 10 years of College of Law test scores and grade point averages (GPA) . . . determined that inaccurate data were reported for four of those years. The findings indicate inaccurate data were entered that improved the Law School Admissions Test (LSAT) and GPA information describing the enrolled classes of 2011 through 2014.<sup>121</sup>

In three of the years, the false data were reported to *U.S. News*.<sup>122</sup> In two of the years, the school reported median LSAT scores of 166, when the correct score was 165.<sup>123</sup> During the third year the school reported the accurate LSAT score (which was 167), but claimed that the median GPA was 3.8, when in fact it was 3.6.<sup>124</sup> The impact of even these small falsehoods on the schools’ *U.S. News* rankings is unknown. The authors are unaware of any effort by *U.S. News* to alert its customers and the public of these errors, or how the errors might have improperly elevated the law school’s rank (which would inevitably lower the ranking of one or more other schools). Because even small changes in these numbers can be amplified by the magazine’s methodology, the possible impact on each year’s ranking, and its effect on students’ decisions about which school to attend, cannot be discounted.

Illinois’ announcement highlights the importance of external verification of each law schools’ self-reported statistics. After admitting that the law school had disseminated erroneous “[m]edians for both Law School Admis-

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ABOVE THE LAW (Aug. 15, 2011), <http://abovethelaw.com/2011/08/villanova-might-need-a-kiss-from-mommy-since-the-aba-slapped-their-wrist-wreally-wreally-whard/#more-89941>.

119. *Id.*

120. *See supra* Part II.A. (discussing the doctrine of *respondeat superior*).

121. News Release, Univ. of Ill., College of Law Profile Data Inquiry Identifies Discrepancies in Three Additional Years (Sept. 28, 2011) [hereinafter Univ. of Ill. News Release], available at <http://www.uillinois.edu/our/news/2011/sept28.law.cfm>.

122. *Id.*

123. *Id.*

124. *Id.*

sion Test (LSAT) scores and grade point averages (GPA) . . . for the classes of 2011 through 2014,” Illinois provided what it labeled as “[t]he *accurate, verified median data* . . . .”<sup>125</sup> Unfortunately, it appears that law schools and their administrators cannot be trusted to report even “objective” data accurately and honestly. We must question whether any ranking system affecting important interests that relies, even in part, on self-reported data can be trusted if it does not verify the accuracy of the data it employs.<sup>126</sup>

Another statement in the University of Illinois’ press release demonstrates that publication in *U.S. News* is not the only way that law schools marketing inaccurate or falsified LSAT and GPA numbers may be committing mail and wire fraud. The University admitted:

For the Class of 2014, the information was disseminated through College of Law promotional materials though not reported to the ABA or rankings organizations. The 2011-2013 data had been shared both with the ABA and with *U.S. News & World Report*. The University has been in contact with the ABA and *U.S. News*, which ranks law schools.<sup>127</sup>

The law school’s promotional materials falsely claimed that the class of 2014 (the class entering law school in the fall of 2011) had a median LSAT score of *168* when the actual median score was *163*.<sup>128</sup> A discrepancy of this magnitude undoubtedly would affect the school’s *U.S. News* total score.

The University’s intervention may – or may not – have prevented 2011’s inaccurate number from being used by *U.S. News*.<sup>129</sup> However, the University confirmed that its law school already had included the false numbers in its printed promotional materials and had posted them on the school’s website.<sup>130</sup> This conduct illustrates another basis for charges of mail and wire fraud. The printed and digitized promotional materials were very likely distributed by mail and interstate wire communications to the people, including prospective students, who visited the school’s website or received these promotional materials. Of course, the same possible liability exists for other law schools that have included false information in promotional materials mailed to prospective students or posted on the school’s website.<sup>131</sup>

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125. *Id.* (emphasis added).

126. The University of Illinois reported that after learning of “possible inaccuracies in class profile data,” it “immediately began an inquiry with the assistance of outside legal counsel, the law firm Jones Day, and forensic analysts Duff & Phelps.” *Id.*

127. *Id.*

128. *See id.*

129. *See id.*

130. *See id.*

131. Misreporting of data is not limited to law schools. For example, Emory University submitted false data to *U.S. News* for its college rankings. *See Questions*

*U.S. News*' responses to public admissions of wrongdoing by the University of Illinois and Villanova University raise further issues regarding the magazine's potential criminal liability for publishing these false data. In February 2011, Villanova informed *U.S. News* that the LSAT and grade information that it had submitted and that *U.S. News* was currently selling were false, deceptively inflating its students' median LSAT scores and undergraduate grade point averages.<sup>132</sup> *U.S. News* publicly acknowledged that, even if it had not yet received complete information about Villanova's misconduct, the false information submitted by that school had likely affected the rankings that *U.S. News* was selling at the time.<sup>133</sup> Shortly after Villanova's disclosure, Robert Morse, veteran director of the magazine's rankings program, explained how the falsehoods affected the rankings:

How does the rankings data for the J.D. class entering in 2010 compare to the previous year's? The difference is significant enough between the older and newer data to have a meaningful negative impact on Villanova's upcoming ranking: For the fall 2009 entering class, Villanova reported inaccurately a median LSAT score of 162 and median undergraduate GPA of 3.44. For the fall 2010 entering class, Villanova certifies its median LSAT score was 160 and its median undergraduate GPA was 3.33.<sup>134</sup>

This passage contains two critical admissions: *U.S. News* knew (1) it was publishing false data about Villanova law students' test scores, and (2) *U.S. News*' current ranking of the school was invalid. At the time Morse made these admissions, *U.S. News* was selling that invalid ranking online and in its printed guides.

The responsibility of the magazine in this situation seems obvious: it should have taken reasonable action to protect its customers from the harms posed by the invalid information *U.S. News* knew it had published. Its failure to do so constituted mail or wire fraud. Like other companies that have sold defective products, *U.S. News* had options. It could, for example, have "re-called" the printed hard copies of the rankings and replaced them with new versions that corrected these known errors. *U.S. News* was unlikely to do this, if only because its next edition was to be published in only a few weeks. With this in mind, the magazine could claim that the costs of replacing the printed versions of the magazine so late in its publication cycle were unjusti-

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*and Answers About Data Reporting*, EMORY NEWS CENTER, [http://news.emory.edu/special/data\\_review/q\\_and\\_a.html](http://news.emory.edu/special/data_review/q_and_a.html) (last updated Aug. 19, 2012). Emory submitted false information about its undergraduates' SAT/ACT scores and their high-school GPAs. *Id.*

132. Morse, *Villanova Law School Certifies Accuracy of New Data*, *supra* note 117.

133. *See id.*

134. *Id.*



fied – which might or might not be a defense to liability for mail or wire fraud. Even if not accomplished by replacing the printed versions of the magazine, correcting the rankings was, of course, still possible. *U.S. News* could simply have removed Villanova from the rankings, and published new rankings online. As another alternative, *U.S. News* also could have replaced the false data with the corrected lower scores and GPAs (assuming they were available), recalculated the rankings, and included Villanova in revised rankings published online.

But these were not the magazine's only options. The magazine could easily have alerted its customers by placing prominent warnings on its website pages, and printing warnings in any printed publications marketed until the next year's rankings were published. *U.S. News* is in the business of communicating with its customers online and in its publications. Furthermore, as a publisher on a national scale, *U.S. News* has the ability to communicate to its customers in ways not available to companies that produce other kinds of goods. The nature of its business organization and functions provide it with tools for alerting its customers about defects in its published rankings, and with the means of distributing revised rankings to correct the known problems.

It is worth noting that even in February 2011, a robust warning campaign would have been timely for some, perhaps most, students who had relied upon the rankings published over the previous months to choose a school to attend the following fall semester. Matriculating law students often do not make their final decisions about which schools to attend until the spring or summer before the students enroll. Had *U.S. News* taken aggressive action to announce the defect in its current rankings – perhaps as aggressive as its efforts to sell these rankings – the likelihood of students being deceived by the magazine would have been reduced. This might have reduced U.S. criminal liability.

A similar reasonable response by *U.S. News* would have been to add prominent warnings in its next set of rankings (those published in the spring of 2011) alerting customers that because some schools had acknowledged submitting false or misleading data in the past, the data and the rankings themselves could be unreliable. Because it is unlikely that *U.S. News* knows with certainty which schools are guilty in a given year, but it is aware that some likely will submit false or misleading data, *U.S. News* would seem to have a responsibility to warn customers of the dangers that some of the published data are false, and therefore that the rankings may be inaccurate.

After Villanova notified *U.S. News* that it had submitted false numbers, the magazine took none of these steps.<sup>135</sup> It did not revise the current rankings. It did not publish prominent disclaimers informing its customers of

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135. See *id.*

these problems. Instead it unilaterally declared that it would do nothing to correct the known errors in its data and rankings.<sup>136</sup>

In his blog at the *U.S. News* website, Robert Morse, director of research for the rankings, instead confirmed the magazine's commitment to the existing rankings. He announced that "*U.S. News* has given careful consideration to this issue and *has decided we will not change our long-standing policy of not revising previously published rankings.*"<sup>137</sup>

*U.S. News'* intransigence is particularly troubling because it has often admitted that law schools submit false and misleading data, data that inevitably alter schools' positions in its rankings. In 2011, for example, Morse repeatedly criticized law schools for submitting false or misleading statistics about their students' post-graduate employment, posting several criticisms before publication of the current 2012 Best Law Schools rankings.<sup>138</sup> Also before those rankings were published, *U.S. News* Editor Brian Kelly, in a letter sent to law school deans, complained about the misleading employment data submitted by law schools.<sup>139</sup> Kelly began by noting that "there have been some *serious questions raised about the reliability of employment data reported by some schools of law* to the American Bar Association and other sources."<sup>140</sup> Kelly then confirmed *U.S. News'* knowledge that prospective students rely on its law school rankings and that the past and present rankings have included inaccurate data submitted by some schools.<sup>141</sup> Kelly's letter deserves attention, and we quote at length from it here:

But I think we can all agree that it is not in anyone's interest – especially that of prospective students – *to have less than accurate data being put out by law schools.* It's creating a crisis of confi-

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136. *Id.*

137. *Id.* (emphasis added).

138. See Morse, *U.S. News Urges Law School Deans to Improve Employment Data*, *supra* note 2; Robert Morse, *ABA May Revise Law School Job Reporting*, U.S. NEWS & WORLD REPORT, MORSE CODE BLOG (Mar. 17, 2011), <http://www.usnews.com/education/blogs/college-rankings-blog/2011/03/17/aba-may-revise-law-school-job-reporting>; Robert Morse, *U.S. News Again Urges ABA to Improve Jobs Data*, U.S. NEWS & WORLD REPORT, MORSE CODE BLOG (June 9, 2011), <http://www.usnews.com/education/blogs/college-rankings-blog/2011/06/09/us-news-again-urges-aba-to-improve-jobs-data>; Robert Morse, *Keeping an Eye on the Upcoming ABA Law School Survey*, U.S. NEWS & WORLD REPORT, MORSE CODE BLOG (July 7, 2011), <http://www.usnews.com/education/blogs/college-rankings-blog/2011/07/07/keeping-an-eye-on-the-upcoming-aba-law-school-survey-->.

139. See Morse, *U.S. News Urges Law School Deans to Improve Employment Data*, *supra* note 2.

140. *Id.* (emphasis added) (stating that the letter had been mailed earlier in the month and quoting the letter's complete text).

141. See *id.*

dence in the law school sector that is unnecessary and we think could be easily fixed.

Specifically, employment after graduation is relevant data that prospective students and other consumers should be entitled to. Many graduate business schools are meticulous about collecting such data, even having it audited. The entire law school sector is perceived to be less than candid because it does not pursue a similar, disciplined approach to data collection and reporting.

At *U.S. News*, we work to make meaningful and fair comparisons, based on industry-accepted data. We provide a great deal of information to prospective students and serve an important function as an intermediary between them and schools such as yours. *We have become popular because people value the information we provide, and many schools have benefitted from the exposure our coverage has given them.*

To accomplish this, we rely on a certain amount of goodwill and ethical behavior from the various institutions that we survey, and our experience has been that the vast majority of them behave ethically. . . . *To eliminate some of the gaming that seems to be taking place*, we have changed the way we compute employment rates for the rankings due out March 15. In addition, we will also be publishing more career data than we have in the past in an effort to help students more completely understand the current state of legal employment. We think more still needs to be done.<sup>142</sup>

This brief passage contains several statements relevant to possible criminal liability: (1) law schools “put out” rankings information that is “less than accurate[;]”<sup>143</sup> (2) information about post-graduate employment “is relevant data that prospective students and other consumers should be entitled to[;]”<sup>144</sup> (3) methods for improving data reliability, including audits by independent third parties, are available; (4) the *U.S. News* rankings are “popular” with “people” because they “value the information we provide,”<sup>145</sup> and with law schools because “many schools have benefitted from the exposure our coverage has given them;”<sup>146</sup> (5) “gaming” of the rankings by schools is so bad that *U.S. News* has been forced to change how it calculates “employment

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142. *Id.* (emphasis added).

143. *Id.*

144. *Id.*

145. *Id.* (emphasis added).

146. *Id.* (emphasis added).

rates for the rankings” and the quantity of “career data” it publishes,<sup>147</sup> and (6) these steps are insufficient and “more still needs to be done.”<sup>148</sup>

All of these statements are relevant to, and appear to satisfy, the mens rea elements of the mail and wire fraud statutes.<sup>149</sup> Together with Morse’s blog post, they confirm not only that *U.S. News* continues to publish its rankings despite knowing they contain falsehoods affecting their validity, but also that the magazine refuses to fix these problems despite the fact that it has had, and continues to have, the chance. One possible conclusion is that by admitting that *U.S. News* knows that schools “game” the rankings and that “many schools have benefitted” from them, Kelly also has described an informal conspiracy between *U.S. News* and the law schools to commit mail and wire fraud. At the very least, Kelly’s statements accentuate the need for government investigations of the behavior of both law schools and *U.S. News*.

Nothing underscores this need more than *U.S. News*’ repeated denials that it bears any responsibility for selling false information to thousands of customers. Kelly’s letter makes it clear that if permitted to do so, *U.S. News* will continue its past behaviors. After admitting that it knowingly sells un-audited, unreliable information received from law schools, Kelly denies that his employer has any responsibility for misleading the public with this information. Instead, Kelly argues that the schools and the ABA are to blame:

[I]t is not our role to be setting industry standards nor enforcing them. However it is our responsibility to provide accurate information to our readers. . . .

The main responsibility to gather data and implement quality standards lies with the ABA, which also accredits law schools. For whatever reason, it appears that some schools do not treat the ABA reporting rules with the seriousness one would assume. We understand that the ABA is working toward the creation of tighter, more meaningful standards, which seem promising.<sup>150</sup>

No one is likely to disagree that schools trying to game the rankings are responsible for any false data they generate, but *U.S. News* chooses to publish this unverified information. Even non-critics of the ABA’s role in accrediting schools<sup>151</sup> would likely agree that it should have acted long ago to forestall

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147. *Id.*

148. *Id.*

149. *See supra* Part. III.A.2.

150. *Id.*

151. *See generally* George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103 (2003); George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091 (1998).

this misconduct, but the ABA does not sell data in a commercial venture – *U.S. News* does. *U.S. News* likely would prefer to publish data that are reliable and rankings that are valid, but that is irrelevant in evaluating its potential criminal liability.

*U.S. News* created the rankings as a profit-making venture. It designed the methodology it uses.<sup>152</sup> It decided to solicit information from schools, and selected the data to be analyzed in its rankings formula.<sup>153</sup> *U.S. News* decided both to publish unverified, unaudited data and to incorporate them into the formula used to calculate each school's ranking.<sup>154</sup> The magazine, not the schools nor the ABA, decided to continue to use these unreliable data even after it knew that law schools have “gamed” the rankings by submitting false and misleading information.<sup>155</sup> *U.S. News* alone refused to repair its corrupted rankings even after receiving specific information about specific falsehoods submitted by specific schools.<sup>156</sup>

No one forced *U.S. News* and its employees to take these actions. No one prevents them from requiring that law schools submit audited data. No one prevents *U.S. News* from establishing its own systems to verify the data it solicits from the schools. The magazine alone has chosen to adopt its current methods.

One explanation for each of the magazine's decisions is obvious and simple – they increase profits. The magazine would incur costs if it acted to ensure the validity of its rankings. For example, establishing and operating its own data-verification system would have costs. Revising the rankings and correcting false data after learning that a specific school had lied would add costs to the undertaking. Likely these increased costs reduce the magazine's profits.

An additional factor helps to explain why *U.S. News* would use unreliable data, and so risk distributing criminally misleading information. The decision to accept unaudited data may have played an even more important role in the commercial success of the rankings venture. To maximize consumer interest in purchasing the magazine, it likely was essential to collect data about and assign rankings to all ABA-approved law schools. This seems particularly important for a methodology dependent upon the schools' donation of data. If some schools refused to participate, the rankings would have suffered commercially. Yet no school was, or is, required to gather data entirely at the schools' expense so that *U.S. News* could sell it. If the magazine required schools to incur additional costs by having the data verified by pro-

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152. See Morse, *U.S. News Urges Law School Deans to Improve Employment Data*, *supra* note 2.

153. See *id.*

154. See *id.*

155. See *id.*

156. See Morse, *Villanova Law School Certifies Accuracy of New Data*, *supra* note 117.

fessional audits, the added cost and inconvenience might have deterred schools from participating voluntarily. Making participation as attractive, easy, and costless as possible provided incentives for schools to participate. Ironically, the magazine's decision to accept unaudited data may have created a more perverse incentive to participate. Those willing to "game" the rankings by manipulating data to improve their schools' ranking would, of course, benefit from an unregulated system that permitted deceptive behavior to succeed.

*U.S. News*' Kelly accused law "schools [of] not treat[ing] the ABA reporting rules with the seriousness one would assume."<sup>157</sup> One might reach the same conclusion about *U.S. News* and its attitudes about its customers and about federal criminal law. Not only has the magazine refused to repair invalid rankings and warn its readers when it had the chance, it appears committed to continue to seek profits by using the same techniques in the future.

The magazine's intent to defraud is suggested by its continued marketing of the rankings as a reliable source of facts, while not warning customers of the known defects. For example, some *Morse Code* posts that criticize law schools for submitting unreliable jobs data (and the ABA for failing to curtail this misconduct)<sup>158</sup> are followed immediately by an advertisement that encourages prospective students to rely on the *U.S. News* rankings containing precisely the same misleading jobs data. A regular advertisement, which contains a link to the rankings webpage, tells potential customers: "Searching for a law school? Get our complete rankings of Best Law Schools."<sup>159</sup>

Finally, it is important to recall that LSAT and GPA data are not the only false information schools have provided to *U.S. News*, nor even the first. As we discuss elsewhere in the paper, in 2006, the New York Times reported that the University of Illinois Law School had exaggerated the amount it spends on its students' educational resources.<sup>160</sup> In 2011, Villanova confessed that it had exaggerated student LSAT scores and undergraduate GPAs.<sup>161</sup> Only a few months later, Illinois confessed that it also had submitted inaccurate test scores and GPAs to *U.S. News*.<sup>162</sup>

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157. Morse, *U.S. News Urges Law School Deans to Improve Employment Data*, *supra* note 2.

158. *See supra* note 138 and accompanying text.

159. Robert Morse, *ABA Falls Short in Efforts to Improve Law School Placement Data*, U.S. NEWS & WORLD REPORT, MORSE CODE BLOG (Sept. 1, 2011), <http://www.usnews.com/education/blogs/college-rankings-blog/2011/09/01/aba-falls-short-in-efforts-to-improve-law-school-placement-data>.

160. *See infra* notes 345-46 and accompanying text.

161. *See supra* note 132 and accompanying text.

162. Robert Morse, *University of Illinois Law School Admits to Submitting Inflated Admission Data*, U.S. NEWS & WORLD REPORT, MORSE CODE BLOG (Oct. 5, 2011) [hereinafter Morse, *University of Illinois Law School Admits to Submitting Inflated Admission Data*], <http://www.usnews.com/education/blogs/college-rankings->

As discussed earlier, the Illinois confession about false grades and test scores provided *U.S. News* with its second chance in only six months (Villanova had confessed six months before) to meet its self-proclaimed “responsibility to provide accurate information to our readers”<sup>163</sup> about the admissions statistics it had published. But once again *U.S. News* refused to correct the false information embedded in its published rankings<sup>164</sup> and instead continued to encourage prospective law students to rely on the admissions data it sells. At its website, for example, the magazine still urges potential law students to start their legal careers by “finding the school that fits you best. With *U.S. News*’ rankings, narrow your search by location, tuition, school size, and test scores.”<sup>165</sup>

Federal law does not require that a person or organization intended to violate the law to be guilty of crimes; they need only have intended to commit acts that did so. There can be no doubt that *U.S. News* and its employees intended to publish its annual rankings. The magazine’s own statements seem to preclude claims that it did not know that some of the essential data were false.<sup>166</sup> Given the law and the apparent facts, it appears that by selling its law school rankings, *U.S. News* may have committed mail and wire fraud.

After an initial draft of this Article appeared on the internet and attracted much attention in blogs and other media,<sup>167</sup> *U.S. News* dealt differently with a

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blog/2011/10/05/university-of-illinois-law-school-admits-to-submitting-inflated-admission-data-.

163. Morse, *U.S. News Urges Law School Deans to Improve Employment Data*, *supra* note 2 (emphasis added).

164. *See supra* note 137 and accompanying text.

165. *Best Law Schools*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited Feb. 15, 2013) (emphasis added).

166. This element of the crime has been interpreted to prohibit publishing material false information not only with knowledge of its falsity, but also with reckless indifference to its truthfulness. *See, e.g.*, *United States v. Marley*, 549 F.2d 561, 564 (8th Cir. 1977).

168. Earlier drafts of this paper have been discussed in many blogs, including ABOVE THE LAW, LEITER’S LAW SCHOOL REPORTS, and many others. *See, e.g.*, Christopher Danzig, *Non-Sequiturs: 2.18.12*, ABOVE THE LAW (Feb. 28, 2012, 6:50 PM), <http://abovethelaw.com/2012/02/non-sequiturs-02-28-12/>; Brian Leiter, *Everyone Knows the U.S. News Rankings Are Criminally Unreliable . . .*, BRIAN LEITER’S LAW SCH. REPORTS (Feb. 29, 2012, 3:00 AM), <http://leiterlawschool.typepad.com/leiter/2012/02/everyone-knows-the-us-news-rankings-are-criminally-unreliable.html>. It has received almost 1,900 downloads from the Social Science Research Network. *See* Morgan Cloud & George B. Shepherd, *Law Deans in Jail*, SOCIAL SCIENCE RESEARCH NETWORK, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1990746](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990746) (last visited Feb. 15, 2013) (“paper statistics” box on the right side lists 1,898 downloads). Major media have also shown interest. *See, e.g.*, Elizabeth G. Olson, *Law School Fuzzy Grad Jobs Stats: A Federal Offense?*, FORTUNE MAGAZINE, Mar. 16, 2012, <http://management.fortune.cnn.com/2012/03/16/law-school-fuzzy-grad-jobs->

school that had submitted false information. In 2011, St. Thomas School of Law (Minnesota) submitted incorrect information to *U.S. News*.<sup>168</sup> *U.S. News* no longer enforced its “long-standing policy of not revising previously published rankings,”<sup>169</sup> as it had with Villanova and Illinois. Instead, it dropped St. Thomas from the rankings, placing it in the unranked category.<sup>170</sup> This is one of the alternatives that our draft Article had suggested to *U.S. News* as an alternative to publishing rankings that it knew were distorted by false information.<sup>171</sup> This new approach reduces exposure for future criminal liability that *U.S. News* might otherwise incur if it had posted a ranking for St. Thomas that was based on incorrect information from the school.

*c. Part-Time Programs*

Simply submitting false numbers is a rather crude and unimaginative technique for “gaming” the *U.S. News* rankings. Some schools appear to have used a more subtle and complex scheme that produced deceptively high LSAT scores and GPAs without baldly lying about the numbers. They relied upon a defect in the *U.S. News* methodology that allowed schools to avoid reporting the test scores and grades for many of their lower performing students while still collecting tuition from them.

For many years, *U.S. News* did not require schools to include part-time students in their calculations of these numbers.<sup>172</sup> *U.S. News* now claims that some schools used this loophole to permit them to report only the test scores and grades of their students with higher numbers.<sup>173</sup> Although it had been aware of such schemes for years,<sup>174</sup> *U.S. News* did not act to halt the practice

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stats-a-federal-offense/#more-9743; Carl Bialik, *Law School Jobs Data Under Review*, WALL ST. J. THE NUMBERS GUY BLOG (Mar. 16, 2012), [http://blogs.wsj.com/numbersguy/law-school-jobs-data-under-review-1126/?mod=google\\_news\\_blog](http://blogs.wsj.com/numbersguy/law-school-jobs-data-under-review-1126/?mod=google_news_blog).

168. Letter from Thomas M. Mengler, Dean and Ryan Chair in Law, Univ. of St. Thomas, to Bob Morse (Mar. 26, 2012) [hereinafter Letter from Mengler, Univ. of St. Thomas], available at <http://www.stthomas.edu/law/news/an-open-letter-to-bob-morse-from-dean-mengler-.html>.

169. Morse, *Villanova Law School Certifies Accuracy of New Data*, *supra* 117.

170. Letter from Mengler, Univ. of St. Thomas, *supra* note 168.

171. See *supra* text after note 134.

172. See Wellen, *supra* note 101.

173. Robert Morse, *Changing the Law School Ranking Formula*, U.S. NEWS & WORLD REPORT, MORSE CODE BLOG (June 26, 2008), <http://www.usnews.com/education/blogs/college-rankings-blog/2008/06/26/changing-the-law-school-ranking-formula> [hereinafter Morse, *Changing the Law School Ranking Formula*].

174. *Id.*



until 2010, when it finally included both full-time and “part-time” students in its formula.<sup>175</sup>

Here is how such a scheme might work: a law school would place admitted students with lower LSAT scores and undergraduate GPAs in a “part-time program,” and ask them to take a small number of course hours during the summer preceding the start of the academic year.<sup>176</sup> Accumulating even a small number of course hours in the summer enabled the “part-time” students to take fewer credit hours than the minimum required for “full-time” first-year students during the following two semesters.<sup>177</sup> The schools then could omit the lower median test scores and grades for the “part-time” group from the calculation of median numbers for the entering class.<sup>178</sup> This scheme produced numbers that were higher than the actual median for all of the first-year students.<sup>179</sup>

These higher numbers would be misleading because the “part-time” students were functionally regular first-year students. Except for the small number of hours taken during the summer, the “part-time” and full-time students took essentially the same courses during the two regular academic semesters of the first year. The modest line separating the two groups then could be erased. After the first year, the law school would invite the “part-time students” to apply for admission into the full-time academic program, then admit them for the final two years of law school. The “part-time” students could earn their J.D. degrees in three academic years (plus part of a summer) along with the rest of their entering class. Such a program would permit a school to continue to recruit and admit as many tuition-paying students as they had in the past, and admit new classes whose aggregate scores were the same as they had been in previous years, yet be able to report only the higher numbers of the “full-time” first-year students to *U.S. News*.

By 2008, growing concerns about the use of part-time programs to “game” the rankings prompted Robert Morse to describe the problem in his blog at the *U.S. News* website. Morse wrote:

More ideas have come in on ways to improve the US News law schools rankings. *U.S. News* is seriously studying these two ideas for implementation in the upcoming rankings. Please weigh in with your views.

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175. Ashby Jones, *Here It Is: The 2009 U.S. News Law-School Ranking*, WALL ST. J. LAW BLOG (Apr. 22, 2009, 11:59 AM), <http://blogs.wsj.com/law/2009/04/22/here-it-is-the-2009-us-news-law-school-ranking/> (emphasis added).

176. Wellen, *supra* note 101.

177. *Id.*

178. *Id.*

179. *Id.*

The first idea is that *U.S. News* should count both full-time and part-time entering student admission data for median LSAT scores and median undergraduate grade-point averages in calculating the school's ranking. *U.S. News*' current law school ranking methodology counts only full-time entering student data. Many people have told us that some law schools operate part-time J.D. programs for the purpose of enrolling students who have far lower LSAT and undergrad GPAs than the students admitted to the full-time program in order to boost their admission data reported to *U.S. News* and the ABA. In other words, many contend that these aren't truly separate part-time programs but merely a vehicle to raise a law school's LSAT and undergrad GPA for its *U.S. News* ranking. We have used only full-time program data because we believed that the part-time law programs were truly separate from the full-time ones. That no longer appears to be the case at many law schools. So, it can be argued that it is better analytically to compare the LSAT and undergrad GPAs of the entire entering class at all schools rather than just the full-time program data.<sup>180</sup>

A year later, Morse described the problem even more frankly. "In the past, we'd just used full-time. . . . *But some schools we think were gaming the system. There were some part-time programs that were set up just for US News reporting purposes.*"<sup>181</sup>

Even if these programs were employed for pernicious reasons, proving that this amounted to fraud may pose challenges for prosecutors. This problem will be most difficult for "part-time programs" that were established before *U.S. News* law school rankings were created. But even where deans admit using programs in pursuit of higher rankings, evidentiary problems could exist. Consider, for example, the justifications offered for the part-time program at the University of Toledo College of Law (Toledo) by Phillip J. Closius, its former dean. At Toledo, he employed various strategies that led to a remarkable improvement in the school's *U.S. News* ranking – it rocketed from number 140 (of about 200 schools) up to number 83 in only a few years.<sup>182</sup> One strategy Closius and the school employed to achieve that improvement was to move about forty students with lower LSAT scores into a part-time program.<sup>183</sup>

Dean Closius candidly admitted trying to use the rankings formula to his school's advantage, but has defended his efforts as not merely permissible but as exemplary.<sup>184</sup> His argument illustrates one claim deans and schools are

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180. Morse, *Changing the Law School Ranking Formula*, *supra* note 173.

181. Jones, *supra* note 175.

182. Segal, *supra* note 12.

183. *Id.*

184. *See id.*

likely to repeat in defense of their use of part-time programs in ways that allowed them to report only the higher test scores and grade point averages for the subset of the schools' students enrolled in the full-time programs. "You can call it massaging the data if you want, but I never saw it that way."<sup>185</sup> Instead, Closius has argued that Toledo's part-time program benefited weaker students by allowing them to take lighter course loads yet remain in school.<sup>186</sup> "In [Closius'] estimation, a dean who pays attention to the *U.S. News* rankings isn't gaming the system; he's making the school better."<sup>187</sup>

It is possible, however, that schools could have operated part-time programs that benefitted students enrolled in them, while at the same time publishing student admissions numbers that were misleading to prospective students, employers, donors, and others influenced by the schools' rankings. The two possibilities are not mutually exclusive. A program could have value yet be used in ways that deceive future consumers of the schools' programs.

Toledo was not alone in recognizing how a part-time program could affect a school's ranking both before and after the magazine's 2010 change in methodology to include part-time students' admissions numbers in its rankings formula.<sup>188</sup> In the years before the change in methodology, for example, Rutgers University Law School, Camden, reduced the size of its full-time division while increasing its "part-time" division for seven consecutive years.<sup>189</sup> In addition, the recent change in *U.S. News* methodology caused dramatic fluctuations in George Washington University's *U.S. News* rankings over the course of three years.<sup>190</sup>

George Washington University Law School (GW) created its part-time program about a century ago, and maintained a significant program through-

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185. *Id.*

186. *Id.*

187. *Id.*

188. In the 2012 edition of the *U.S. News* rankings, which now include part-time as well as full-time student numbers, Toledo is not ranked as number 83 or even number 140. See *Schools of Law*, *supra* note 13, at 70. In 2011, it fell out of the numerical rankings entirely, and was one of the 53 unranked law schools. *Id.* We do not mean to suggest that this means that this law school has declined precipitously in quality. We do suggest that this demonstrates the unreliability of these rankings. See *infra* Part IV. And the vagaries of the *U.S. News* methodology have consequences for those who relied upon them. For someone who chose to attend Toledo because *U.S. News* declared that it was one of the top 83 law schools in the nation, and who now holds a degree from a school that was not even ranked in the 2011 top 143 institutions, the impact might be devastating. Employers who also trust the rankings, might decide not to hire this lawyer, choosing instead someone who graduated from a "better" school.

189. Wellen, *supra* note 101.

190. Ashby Jones, *Unhappy With its U.S. News Ranking, GW Law Trims Night Program*, WALL ST. J. LAW BLOG (Oct. 6, 2009 11:25 AM), <http://blogs.wsj.com/law/2009/10/06/unhappy-with-its-us-news-ranking-gw-law-trims-night-program/>.

out the years that *U.S. News* allowed GW to exclude its part-time students from the calculation of median scores and grades. The final year in which *U.S. News* excluded part-time students' scores from its formula, *U.S. News* ranked GW in the twentieth position.<sup>191</sup> The next year when *U.S. News* began including part-time students in its calculations of grades and test scores, GW immediately fell eight places in the rankings.<sup>192</sup>

GW officials rushed to explain that the drop from twentieth to twenty-eight was not because the school was in decline.<sup>193</sup> The cause of the drop was the change in the *U.S. News* methodology.<sup>194</sup> The school had admitted so many tuition-paying part-time students that when their LSAT and undergraduate GPA numbers were added to the mix, the school's entire ranking was affected – dramatically.<sup>195</sup>

One might assume that a century old academic program would be more important to a school than a single magazine's rankings. That was not the case with GW. Rather than affirming its commitment to a program that for 100 years had served the needs of people unable to attend school full-time, GW reacted by reducing the size of its part-time program, simply admitting fewer part-time students and thus avoiding inclusion of their lower LSATs and GPAs.<sup>196</sup> The following year, GW rocketed back to twentieth in the rankings.<sup>197</sup>

There may be no example that better illustrates both the arbitrary nature of the *U.S. News* rankings and their remarkable influence on legal education. It is possible, of course, that the rankings were valid. That is, that one year GW was the twentieth best law school in the country, and the next year the institution had declined so precipitously that it fell to twenty-eight, yet in a few short months GW was able to improve just as dramatically, becoming once again the nation's twentieth best law school. One must conclude that it was the rankings, not the school, that were inconstant.

Regardless of what one thinks about GW's decision to change an established academic program to move up in the *U.S. News* rankings, GW's response is unlikely to surprise anyone familiar with the influence of this particular ranking system in legal academia. The *U.S. News* rankings are now so important in the competition for students, money, prestige, and jobs for graduates that a fall in the rankings can be perceived by a law school, its con-

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191. *Id.*

192. *Id.*

193. *Id.*

194. Matt Rist, *Law School Drop in Ranking Prompts Admissions Change*, GW HATCHET, Oct. 5, 2009, <http://www.gwhatchet.com/2009/10/05/law-school-drop-in-ranking-prompts-admissions-change/>.

195. *See id.*

196. *Id.*

197. Ashby Jones, *The 2010 U.S. News & World Report Law School Rankings*, WALL ST. J. LAW BLOG (Apr. 15, 2010), <http://blogs.wsj.com/law/2010/04/15/the-2010-us-news-world-report-law-school-rankings/>.

stituents, and its home university as unacceptable. To many, GW's decision was not merely logical, it was inevitable.

Responding to these rankings by launching, or slashing, an academic program represents a fundamental intrusion by a commercial endeavor into the very structure of legal education throughout the country. The willingness of administrators, and perhaps their faculties, to alter the structure of a school's academic program to climb up the rankings strikes the authors as one of the most troubling developments we have studied while working on this project. But, however odious this development might seem to the authors, the more important question for this Article is whether law schools deployed these programs in ways that created misleading profiles of their J.D. student body. If they did, they may be guilty of mail and wire fraud.

Consider again the description offered earlier in this discussion, which outlined how a part-time program might be designed to permit a school to admit a class of students whose aggregate test scores and undergraduate GPAs were the same as they had been in previous years. Using the pre-2010 rules, however, the school could report only the higher numbers earned by the "full-time" students. We can anticipate that schools and deans alike would disclaim any wrongdoing by arguing that the numbers they reported to *U.S. News* were literally true and complied with the magazine's instructions. This argument may fail.

Whatever the obligations a school has to *U.S. News*, they are distinct from the duty not to defraud prospective students, employers who may hire their graduates, potential members of the faculty, possible donors, and others for whom these data concerning the full student body is important information. People in each of these groups might reasonably rely upon the data published in *U.S. News* when deciding whether to enroll, hire a graduate, join the faculty, or make a donation. Law schools that did not submit the admissions numbers for their part-time students could be confident that *U.S. News* would not warn readers that the loopholes in its methodology might create a deceptively positive impression of the schools' admissions numbers. These same schools might have demanded that *U.S. News* take steps to ensure that anyone reading the rankings would understand that the rankings supplied only a partial description of the actual student body. Or the schools might have refused to submit the data, knowing that *U.S. News* would publish them in a misleading way. As far as we know, the schools did neither.

The same analysis applies to data posted on the school's website or distributed in promotional materials. If a school published the partial scores and grades without making clear that they described only part of the school's student body, this could be a false, material statement distributed by the mails or interstate wires.<sup>198</sup>

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198. Admitting upper class transfer students is another device law schools have used to raise revenues from students with admissions numbers they need not report to *U.S. News*. Wellen, *supra* note 101. *U.S. News* does not require schools to include

*U.S. News* cannot claim it is the innocent victim of law school prevarication here. The schools' justification for excluding data for part-time students rested upon *U.S. News*' own criteria, which the magazine maintained until 2010, years after it had learned of how this part of its methodology was being used to deceive potential students.<sup>199</sup>

*d. Post-Graduate Employment*

During the current recession in the legal profession, the claims that schools have made about their graduates' employment have generated more controversy than any other component of the *U.S. News* rankings formula.<sup>200</sup> Critics have focused upon how schools have deceived prospective students rather than upon the impact of these data on the schools' *U.S. News* rankings.<sup>201</sup> However, *U.S. News*' flawed methodology has helped schools to produce misleading data and to defraud their students.

Per *U.S. News*' request, each law school reports the percentage of its graduates employed at graduation and nine months after graduation.<sup>202</sup> Taken together, these two figures supply 18%, or almost one-fifth, of a school's overall ranking score, contributing 4% and 14% respectively.<sup>203</sup> Because of their importance in the rankings scheme, and perhaps because they have been so easy to manipulate, it appears that many schools have tried to "game" the

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upper class students in their LSAT and undergraduate-grade medians. *See Methodology, supra* note 21. The medians submitted by schools and published by the magazines are only for each year's incoming first-year students. *See id.* A revenue-neutral strategy for increasing the admissions numbers reported to *U.S. News* is to reduce the size of the first year class then recoup lost income by admitting students with lower LSAT scores and undergraduate GPAs.

We cannot opine about the internal policies of the nation's hundreds of law schools, but statistical evidence suggests that the behavior of at least some schools is consistent with this strategy. For example, Columbia University has increased the number of second-year transfers from the equivalent of 11% of its first-year students in 2007 to 20% in 2011. Brooks Seay, *A Cross-Case Analysis of Top-25 U.S. Law Schools in the U.S. News & World Report Rankings From 1998-2012* 41-42, tbls. 4-7 (Emory Public Law Research Paper No. 12-184, 2012).

Other highly ranked schools admit even larger relative percentages of transfers. In recent years, the law schools at Illinois, Washington University, and Northwestern have admitted second-years transfers equivalent to 21%, 23%, and 25%, of their first-year classes respectively. *Id.* If these transfer students in fact have lower admissions numbers than those for students admitted in the first-year class, the admission of large numbers of transfer students provides a deceptive picture of these schools' student bodies.

199. *See supra* notes 180-81 and accompanying text.

200. *See, e.g., supra* notes 12-21 and accompanying text.

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

202. *See, e.g.,* 2011 *U.S. News* Rankings, *supra* note 13, at 69.

203. *Methodology, supra* note 21.

rankings by reporting misleading employment statistics.<sup>204</sup> The problem has become so severe that the ABA has taken steps to ameliorate it. Even *U.S. News* has complained publicly about the flawed employment data that schools have reported and has begun to disclose more detailed information about post-graduate employment.

As discussed earlier, before the release of the 2011 rankings, *U.S. News* Editor Brian Kelly wrote a letter to law school deans chastising them for submitting inaccurate employment statistics and asking them to provide more accurate information.<sup>205</sup> Kelly described “serious questions raised about the reliability of employment data reported by some schools of law,” and warned that “it is not in anyone’s interest – especially that of prospective students – to have less than accurate data being put out by law schools.”<sup>206</sup>

Recent economic conditions have aggravated these concerns. It is no surprise when school enrollments increase during economic downturns, and it is similarly predictable that in such times students would gravitate to professional schools reporting that more than 90% of their graduates find work within months of graduation. But luring students to enroll and to pay tuition is far from benign if the employment statistics are false or misleading. Indeed, several specific instances of such conduct could constitute federal mail and wire fraud.

As discussed at the beginning of this Article, in the midst of the recent recession in legal employment, more than 40% of the 143 schools given a numerical position by *U.S. News* in its 2012 rankings reported post-graduate employment rates exceeding 90%.<sup>207</sup> Those 59 schools ranged from numbers 1 to 132 in the *U.S. News* rankings.<sup>208</sup> And the apparent recession-era employment bonanza for law school graduates was not limited to the “top” 143 schools. Three of the schools whose overall scores placed them in bottom quartile of the *U.S. News* rankings also reported employment rates of at least 90% for their recent graduates.<sup>209</sup>

Readers of the *U.S. News* rankings would reasonably understand these statistics to refer to “law jobs,” full-time permanent positions for which a law degree is required or preferred. School administrators who generate these numbers cannot plausibly dispute this understanding. No reasonable person reading a law school’s published statistics about its graduates’ success at obtaining employment would expect that data to include graduates employed at unskilled jobs in the fast food industry; or in temporary jobs created by the

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204. See *supra* notes 16-19 and accompanying text.

205. See Morse, *U.S. News Urges Law School Deans to Improve Employment Data*, *supra* note 2; *supra* notes 139-42 and accompanying text.

206. Morse, *U.S. News Urges Law School Deans to Improve Employment Data*, *supra* note 2.

207. See *supra* note 14 and accompanying text.

208. See *supra* note 15 and accompanying text.

209. See *supra* note 14.

school to provide employment for graduates at the times measured by the *U.S. News* rankings; or that the percentage reported – say 90% – is not measured against all graduates, but only against a small fraction of a school's graduating class. Unfortunately, that reasonable reader would be wrong.

Other organizations that republish false data from law schools may also be liable. Professor Paul Campos has analyzed the data published by the National Association for Law Placement (NALP), the organization selected to compile the employment data that each law school must submit to the ABA.<sup>210</sup> That is, the NALP data are averages of the data that law schools present to *U.S. News*.<sup>211</sup> If the schools' individual data that make up the averages are misleading, then so too are the averages that NALP publishes. Moreover, if the NALP data are misleading, then not only the schools may be criminally liable, but also NALP and *U.S. News* for republishing the schools' misleading information.

Campos has concluded that a realistic interpretation of recent NALP data is that law-school graduates have had lower employment rates than published in the *U.S. News* rankings.<sup>212</sup> Although NALP's most optimistic statistics approach the 90% level, closer examination of the underlying data led Campos to conclude that full-time legal employment was found by a much smaller number of graduates.<sup>213</sup>

Last year, for example, NALP reported that "88.2 percent of all law school graduates are 'employed' within nine months of graduation."<sup>214</sup> However, that number is fundamentally misleading because it included graduates employed in non-legal and part-time jobs.<sup>215</sup> When those jobs are excluded from the data, the NALP employment rate plummeted to 62.9%.<sup>216</sup>

Campos argues that even this lower number creates a deceptive picture of employment in full-time legal jobs.

While it excludes non-legal jobs and part-time work, it does not exclude people in temporary positions. So it seems worth asking: How many of the graduates who report doing full-time legal work have *permanent* jobs – in the employment law sense of permanent – as opposed to doing temp work, such as being paid \$20 an hour

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210. Paul Campos, *Served: How Law Schools Completely Misrepresent their Job Numbers*, THE NEW REPUBLIC (Apr. 25, 2011), <http://www.newrepublic.com/article/87251/law-school-employment-harvard-yale-georgetown#>.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *See id.*

216. *Id.*



to proofread financial documents in a warehouse, or \$12 an hour to do slightly glorified secretarial tasks?<sup>217</sup>

To try to determine how including temporary jobs affects employment statistics, Campos studied the specific employment data reported by one “top 50” law school and concluded that only about “45 percent of 2010 graduates of this . . . school had real legal jobs nine months after graduation.”<sup>218</sup>

The ways that NALP and *U.S. News* have reported this data has made it all but impossible for the reasonable consumer to actually determine what level of employment opportunities really exist – creating a criminal scheme to defraud. For example, *U.S. News* has not published any employment data excluding non-legal and part-time jobs, and NALP has only published the number for all schools and has not supplied the numbers for individual schools.<sup>219</sup> Similar defects have existed for NALP’s treatment of temporary jobs. Although NALP collects information about the number of permanent and temporary jobs, it does not distinguish “between the two in the information it publishes.”<sup>220</sup>

To reach his inference that less than 50% of students received permanent, full-time legal jobs, Campos examined “employment data drawn from 183 individual NALP forms, in which graduates of one top-50 school self-reported their employment status nine months after graduation.”<sup>221</sup> He concluded that one-third of graduates who had reported full-time law jobs had secured only temporary positions.<sup>222</sup> This analysis led him to conclude that the employment rate for full-time, permanent legal jobs was well below 50%.<sup>223</sup> It would be a mistake to assume that such a discrepancy exists at only one school. Schools have employed various devices to exaggerate their graduates’ success at finding law jobs.<sup>224</sup> In the past, the rules that the ABA and *U.S. News* have adopted for reporting data have permitted the following techniques.

*Counting Non-Legal Jobs.* Schools have counted graduates as employed who were not employed in legal jobs.<sup>225</sup> Some schools may even have counted as employed their graduates who had failed to find a job in the legal profession and who had been forced to take temporary jobs working at manual labor.<sup>226</sup>

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217. *Id.* (emphasis added).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *See id.*

225. *See id.*

226. *See id.*

*Excluding Unemployed Students Who Were Not Seeking Work.* Some schools have excluded from their calculations graduates who reported that they were unemployed but not seeking work.<sup>227</sup> Thus graduates who had given up even trying to find a job were not counted as unemployed.<sup>228</sup>

*Counting Part-Time Work.* Other schools have counted as employed graduates who had been able to land only part-time jobs.<sup>229</sup> For example, a graduate working as a file clerk in a law firm for an afternoon each week would be counted as employed.<sup>230</sup>

*Counting Temporary Work.* Schools have also counted as employed graduates who were doing temp work.<sup>231</sup> They may have had full-time jobs, but the jobs were temporary, including temp work as secretaries and at other low-paying, non-professional jobs.<sup>232</sup>

*Hiring Their Own Graduates or Paying Others to Hire Them.* In the past few years, almost half<sup>233</sup> of the country's law schools have increased the employment statistics that they report by either hiring their own unemployed graduates temporarily or paying private employers to hire them temporarily.

Many schools hire their own unemployed graduates temporarily as research assistants and interns and report the graduates to *U.S. News* as employed.<sup>234</sup> For example, the University of Indiana School of Law's program to hire its unemployed recent graduates for short-term legal research positions appears to have helped produce a higher *U.S. News* ranking for the school.<sup>235</sup> The former Dean of the Northwestern University Law School has conceded that the school hired unemployed graduates for short internships.<sup>236</sup> UCLA funds unemployed graduates for ten weeks for twenty hours per week.<sup>237</sup> It is

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227. *Id.*

228. *Id.* Other schools with low at-graduation employment rates may have artificially increased their at-graduation employment rate as used by *U.S. News* by purposefully failing to report their at-graduation numbers. Until 2010, if a school failed to report its at-graduation employment rate, *U.S. News* would use the school's 9-month employ rate to "imputed" – that is, guess – the school's at-graduation rate. *Seay*, *supra* note 199, at 47. A school might choose not to report its at-graduation rate if its actual rate were lower than the imputed rate. This strategy would intentionally mislead students about the school's true at-graduation employment rate.

229. Campos, *supra* note 210.

230. *See id.*

231. *Id.*

232. *Id.*

233. *See infra* note 256 and accompanying text.

234. *See infra* note 256 and accompanying text.

235. Wellen, *supra* note 101.

236. *See id.*

237. Elie Mystal, *Employment Statistics Shenanigans Open Thread: Which Schools Are Juking their Stats?*, ABOVE THE LAW (May 16, 2011), <http://abovethelaw.com/2011/05/employment-statistics-shenanigans-open-thread-which-schools-are-juking-their-stats/>.

surely not a coincidence that these temporary law school jobs typically are available at times that coincide with the dates when schools must report their graduates' employment data.

Schools predictably have defended their temporary jobs programs by asserting that they benefit graduates who otherwise would be unemployed. Professor Jeffrey Stake of Indiana University has asserted, for example, that “[t]he general attempt by the law schools to make sure that their students get jobs is a good thing . . . .”<sup>238</sup> Northwestern’s former dean, David Van Zandt, has argued that these programs are not “unethical if you’re giving some value to your students.”<sup>239</sup>

These temporary jobs programs may, in fact, help the graduates they employ, even if the jobs exist only briefly. Unfortunately, these are not the only people affected by a school’s claims about employment of its graduates. By exaggerating the number of graduates employed after graduation, schools inevitably create a misleading picture of their graduates’ prospects. This misleads potential students who are considering enrollment in the schools. Even if a school successfully argued that its employment numbers were literally true because these graduates were employed, these data can be sufficiently misleading to justify the conclusion that they are part of a “scheme reasonably calculated to deceive.”<sup>240</sup>

In addition to hiring their own graduates, some law schools have created programs to induce employers to temporarily “hire” the schools’ graduates. The schools either pay these outside employers to “hire” their graduates, or the schools pay their graduates directly, permitting employers to obtain free use of the schools’ graduates’ services. We need not speculate about the existence of these programs because information is publicly available, often from the schools themselves.

For its graduating classes of 2008 and 2009, which were the first to suffer the effects of the current recession, Duke Law School reported that 100% of its graduates were employed not only nine months out, but also at graduation.<sup>241</sup> Having every graduate employed would be a noteworthy achievement in any economic setting, but given the collapse in employment of new graduates, this statistic becomes even more remarkable.

However, Duke simply paid graduates who had not secured jobs on their own to work for outside employers. The school has stated that its dean made “a total commitment . . . to making sure that every graduating student who wants a job has one.”<sup>242</sup> This admirable commitment to the success of its graduates was limited, however. Duke gave all students who were unem-

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238. Wellen, *supra* note 101.

239. *Id.*

240. *Lustiger v. United States*, 386 F.2d 132, 138 (9th Cir. 1967).

241. *100% Employment: Meeting a Lofty Goal*, DUKE LAW (Apr. 14, 2010), <http://law.duke.edu/news/4826>.

242. *Id.*

ployed at graduation an eight- to twelve-week “fellowship” grant of approximately \$3,000, which supported the students while they worked for free for law firms and other legal employers.<sup>243</sup> Although the employers paid the students no salaries or wages, Duke reported them all to *U.S. News* as employed.<sup>244</sup> This was a large program. In 2010, for example, approximately thirty students received a “fellowship,” almost 15% of the graduating class.<sup>245</sup>

The jobs program at the University of Miami School of Law was more generous to the school’s graduates, paying a larger monthly stipend for a longer period of time. The school provided its unemployed graduates with “fellowships” of \$2,500 per month for six months for work at various employers.<sup>246</sup> Miami could technically count these students as employed, although the “jobs” lasted only a few months and the employers did not pay the graduates.

As another example, SMU Dedman School of Law has created an even more intricate arrangement. Instead of paying a modest stipend directly to its graduates, SMU transferred \$3,500 a month, but only for two months, to employers who would accept its graduates.<sup>247</sup> The employers were required to redirect the \$3,500 to the graduates whom they had “hired.”<sup>248</sup> In the program’s first year, forty-eight SMU students, about 20% of the 2010 graduating class, participated.<sup>249</sup> Most worked at law firms.<sup>250</sup> SMU could count these graduates as employed even though the “employers” did not pay their wages and the “jobs” were only for two months.

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243. *Id.*; see also Kashmir Hill, *The Secret to ‘100% Employed at Graduation’: Duke’s Bridge to Practice*, ABOVE THE LAW (June 10, 2010, 10:40 AM), <http://abovethelaw.com/2010/06/the-secret-to-100-employed-at-graduation-dukes-bridge-to-practice/>.

244. See *100% Employment: Meeting a Lofty Goal*, *supra* note 241.

245. Hill, *supra* note 243; *Duke Law School’s Bridge to Practice Fellowship Program Likely to Grow in 2010*, CLEAR ADMIT (June 14, 2010), <http://law.clearadmit.com/2010/06/duke-law-schools-bridge-to-practice-fellowship-program-likely-to-grow-in-2010/>; Karen Sloan, *Law Schools Helping to Pay the Price for Students’ Firm Employment*, NAT’L L.J. (Mar. 10, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202485405358>.

246. *Miami Law Legal Corps*, UNIV. OF MIAMI SCH. OF LAW, <http://www.law.miami.edu/career-development-office/legal-corps.php?op=4> (last visited Feb. 16, 2013).

247. *Test Drive – Learn About the Program*, SMU DEDMAN SCH. OF LAW, <http://www.law.smu.edu/Career-Services/Employers/Test-Drive---About-the-Program.aspx> (last visited Jan. 29, 2013) [hereinafter *Test Drive*]; Robert Wilonsky, *SMU’s Paying Would-Be Employers to Take their Law School Grads on a “Test Drive”*, DALLAS OBSERVER BLOGS (May 19, 2010, 1:10 PM), [http://blogs.dallasobserver.com/unfairpark/2010/05/smus\\_paying\\_would-be\\_employers.php](http://blogs.dallasobserver.com/unfairpark/2010/05/smus_paying_would-be_employers.php).

248. *Test Drive*, *supra* note 247; see Wilonsky, *supra* note 247.

249. Sloan, *supra* note 245.

250. See *Test Drive*, *supra* note 247; Wilonsky, *supra* note 247.

Harvard Law School's jobs program pays for even longer placements. In 2010, Harvard awarded twenty-seven unemployed graduates one-year "Public Service Fellowships" of up to \$35,000.<sup>251</sup> Priority was given to graduates who were otherwise unemployed.<sup>252</sup> The fellowships permitted Harvard to report to *U.S. News* that the graduates were employed both at graduation and at nine-months after graduation. Again, the school, and not the employers, paid the graduates' salaries.<sup>253</sup>

Like temporary "fellowships" in which graduates work directly for the law school, these jobs programs may offer some benefits to unemployed graduates. At the very least, unemployed graduates receive some money from the schools. At most, some individuals might ultimately secure more permanent jobs with their temporary "employers."

However, these positive effects should not conceal the programs' negative impact: schools can use the programs to obtain a higher *U.S. News* ranking by manufacturing deceptively high employment rates for recent graduates. The jobs programs present a misleading picture of the employment prospects for the law school's graduates. The "jobs" that the programs offer are not really jobs at all. The normal understanding of a job is a permanent employment relationship in which the employer pays for the worker's effort. The dictionary definition of "job" is, "[a] regular activity performed in exchange for payment, especially as one's trade, occupation, or profession."<sup>254</sup> By this accepted definition, these are temporary unpaid internships, not jobs with the employer because the "employer" effectively pays the worker no wage or salary. Nonetheless, schools have reported these graduates as being just as employed as graduates who have obtained real permanent employment.<sup>255</sup> As with the paid internships, these programs are helpful for the students who receive them. However, it is misleading for the schools to report the recipients to *U.S. News* as "employed."

The jobs programs have had an important impact on schools' reported employment statistics and on the overall *U.S. News* rankings. NALP reports

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251. *Harvard Law School Awards 27 Fellowships for Post-Graduate Public Service Work*, HARV. LAW SCH. (May 13, 2010), [http://www.law.harvard.edu/news/2010/05/13\\_fellowships.html](http://www.law.harvard.edu/news/2010/05/13_fellowships.html); *New Strategies for a Changing Job Market*, HARV. LAW SCH. <http://www.law.harvard.edu/alumni/networking/new-strategies.html> (last modified Mar. 22, 2010).

252. "Applicants for the Holmes Fellowships should be prepared to show their efforts in securing private sector and/or public sector jobs. (The Holmes Fellowships are not available for students who have accepted other jobs with deferred start dates.)" *OPIA Public Service Fellowships*, HARV. LAW SCH. (Jan. 29, 2010), <https://www.law.harvard.edu/current/careers/oldopia/secure/2009/10/31fellowshipsjan29.html>.

253. See *New Strategies for a Changing Job Market*, *supra* note 251.

254. *Job*, THE FREE DICTIONARY, <http://www.thefreedictionary.com/job> (last visited Feb. 16, 2013).

255. See, e.g., *100% Employment: Meeting a Lofty Goal*, *supra* note 241.

that in recent years, law school “jobs programs” have grown “explosively.”<sup>256</sup> By 2010, 42% of law schools had these programs,<sup>257</sup> providing illusory employment sufficient to affect employment statistics for all schools. These law school jobs programs accounted for 2.7% of all jobs reported for the class of 2010, 1200 jobs in total.<sup>258</sup>

The effects were much greater for the schools that deployed these programs. Because these “jobs” were reported by only 42% of law schools, those schools were able to inflate their employment statistics by an average of approximately 6.4%.<sup>259</sup> NALP reports that “these jobs programs can account for 50, 60, or even 70 jobs on a single campus.”<sup>260</sup>

For example, a recent article indicated that “it appears that significant numbers of top-tier law schools are subsidizing the employment of significant numbers of their recent graduates.”<sup>261</sup> The article continued by citing several examples:

Washington & Lee (*US News* rank 24): The school (and *US News*) report 89.4% of the class of 2010 employed at graduation, and 90.2% employed 9 months post-graduation. But according to W&L’s own website, a full 41% (yes, 41%) of the graduating class held temporary positions funded by the law school at graduation, and 10% of the class still did 9 months later. Take out the temporary positions funded by the law school, and the actual employment numbers are 48% at graduation and 80% at nine months.

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256. James Leipold, *The Legal Job Market for New Graduates Looks a Lot Like it Did 15 Years Ago (Only Worse)*, NALP (June 2011), <http://www.nalp.org/perspectives2011commentary> [hereinafter Leipold, *The Legal Job Market for New Graduates*].

257. James Leipold, NALP Exec. Dir., 2010 NALP Annual Education Conference Panel: The State of the Legal Economy and the Legal Employment Market (information included in slides for presentation), reproduced in part in Elie Mystal, *NALP 2010: NALP Executive Director James Leipold Talks to ‘Lost Generation’*, ABOVE THE LAW (May 3, 2010, 1:48 PM), <http://abovethelaw.com/2010/05/nalp-2010-nalp-executive-director-james-leipold-talks-to-the-lost-generation/>.

258. Leipold, *The Legal Job Market for New Graduates*, supra note 256.

259. A 2.7% increase spread across all schools is approximately equivalent to a 6.4% increase if the increase is focused only 42% of the schools. The 6.4% figure is only approximate because it assumes that all schools have graduating classes of equal size.

260. Leipold, *The Legal Job Market for New Graduates*, supra note 256.

262. Bernie Burk, *A Stunning but Largely Unnoticed Anomaly in Recent Employment Outcomes Data Suggests that Things May Be Even Worse Out There than We Imagined*, THE FACULTY LOUNGE (Mar. 19, 2012), <http://www.thefacultylounge.org/2012/03/a-stunning-but-largely-unnoticed-anomaly-in-recent-employment-outcomes-data-suggests-that-things-may.html>.

Vanderbilt (*US News* rank 16): The school (and *US News*) report 89.6% of the class of 2010 employed at graduation, and 91.6% employed 9 months post-graduation. Over 20% of the class of 2010 held temporary positions subsidized by the law school at graduation, and 11% still did 9 months later. Take out the temporary subsidized positions, and the actual employment numbers are 68% at graduation and 80.6% at 9 months.

University of Minnesota (*US News* rank 19): Reports 91.9% of the class of 2010 employed at 9 months. 14.1% of those were in positions funded by the law school (2.4% of those in what the school describes as “long-term” positions). The actual employment number at 9 months is 78-80% depending on how you count the “long term” school-funded placements.

Notre Dame (*US News* rank 22): Reports 91.3% of the class of 2010 employed at 9 months. 12.2% of the class held temporary positions through a school-funded “Public Service Initiative.” The actual employment number at 9 months thus is 79.1%.

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Even mighty NYU (*US News* rank 6) reports 96.6% of the class of 2010 employed, but 7.6% of the class held temporary “postgraduate grant positions.” The actual employment number is 89% (with some lack of clarity about when some portion of the grant recipients found permanent employment).<sup>262</sup>

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263. *Id.* The statistics are from the schools’ own web sites: *Washington and Lee University School of Law Employment Data 9 Months After Graduation*, WASH. & LEE UNIV. SCH. OF LAW, <http://law.wlu.edu/admissions/ninemonthdata.asp> (last visited Jan. 30, 2013); *Recent Graduate Employment*, VAND. LAW SCH., <http://law.vanderbilt.edu/prospective-students/recent-graduate-employment/index.aspx> (last visited Jan. 30, 2013); *Career Facts & Statistics – Class of 2010*, UNIV. OF MINN. LAW, <http://www.law.umn.edu/careers/career-facts-and-statistics.html> (last visited Jan. 30, 2013); *Employment Summary*, UNIV. OF NOTRE DAME LAW SCH., [http://law.nd.edu/assets/91627/employmentsummary\\_2010.pdf](http://law.nd.edu/assets/91627/employmentsummary_2010.pdf) (last visited Jan. 30, 2013); *Employment Data for Recent Graduates*, NYU LAW, <http://www.law.nyu.edu/careerservices/employmentstatistics/index.htm> (last visited Jan. 30, 2013). Similar statistics are now available from the ABA. *Section of Legal Education*, ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR [hereinafter ABA Placement Summary], <http://placementsummary.abaquestionnaire.org/PlacementReport.aspx> (click “Generate Report”); see also Karen Sloan, *Data Trove Reveals Scope of Law Schools’ Hiring of their own Graduates*, NAT’L L.J. (Apr. 16, 2012), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202549157393>.

Other schools hired the following percentages of their own graduates: Emory (8%); Georgetown (11%); UCLA (12%); Boston University (13%); Fordham (15%); University of San Francisco (17%); University of the Pacific (18%); City University of New York (19%).<sup>263</sup>

These numbers likely affected the overall *U.S. News* rankings. Because employment rates account for almost 20% of each school's overall score (4% at graduation plus 14% nine months later),<sup>264</sup> and because of the compression of the schools' reported data (particularly concerning employment rates), a 6.4% increase in a school's employment rate could propel it past competitor institutions both in the published employment rates for graduates and in the overall *U.S. News* rankings. We can see this increase from how one law school's comparable decline in employment percentages produced a precipitous fall in its overall ranking. The University of Texas Law School plummeted eleven places in the *U.S. News* rankings after its reported employment rate fell by 6%.<sup>265</sup> A jobs program that increased employment by an equivalent 6% might be expected to increase the school's ranking a similar number of places.

It is no wonder that, in a competitive market for qualified tuition payers, so many schools have jobs programs. But pursuit of competitive advantage does not protect organizations and individuals from criminal liability if they knowingly market false or deceptive information. The use of schemes that produce false or misleading employment data has become so rampant that both the ABA and *U.S. News* have been forced to change their methods for classifying this information.

In 2012, for the first time *U.S. News* implicitly recognized the distortion of its employment statistics caused by the jobs programs. *U.S. News* and the ABA now require each law school to reveal the number of graduates who are employed in "law school funded" positions.<sup>266</sup> The changes in methodology adopted by the *U.S. News* and the ABA confirm that law schools have tried to "game" the rankings by creating misleading data about their graduates' employment rates – and that *U.S. News* knew about it.

Even if it is technically or literally true that a student is "employed" if she works briefly at a temporary job created by the law school to coincide with *U.S. News* reporting dates, this may not serve as a successful defense to criminal charges. Recall that even literally true statements can violate the mail and wire fraud statutes if they are likely to deceive the reasonable consumer. "[T]he fact that there is no misrepresentation of a single existing fact is immaterial. It is only necessary to prove that it is a scheme reasonably

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263. ABA Placement Summary, *supra* note 263; Sloan, *supra* note 263.

264. See *supra* note 204 and accompanying text.

265. See *supra* notes 110-15 and accompanying text.

266. U.S. News & World Report, Survey Data Form, 2012 U.S. News Law Schools Statistical Survey, Questions 159-161, 171-173; 2012 ABA Annual Questionnaire, ABA, Section 9, Part 25(b).



calculated to deceive,”<sup>267</sup> and “the concealment of material facts [can be] actual fraud violative of the mail fraud statute.”<sup>268</sup> Recall that in *Lustiger*, a literally-true statement that land was only five miles from Lake Mead City was fraudulent because it failed to disclose that the actual driving distance was fifteen to forty miles.<sup>269</sup>

Many law schools have, likewise, intentionally concealed material information from their consumers. They have reported high graduate employment rates without disclosing the material facts that these numbers included graduates working only part-time, at temporary jobs, at jobs manufactured and funded by the law schools to coincide with *U.S. News* reporting dates, or at non-legal jobs, including unskilled labor jobs. *U.S. News*’ own statements confirm that it has known of these practices yet has sold this same false information to its customers. Under federal law, these acts could violate the mail and wire fraud statutes.

### B. Conspiracy

Conspiracy has long been the federal prosecutor’s darling,<sup>270</sup> and if federal law enforcers seek indictments based on the conduct described earlier in this Article, conspiracy undoubtedly will be among the crimes charged. The dangers posed by group action supply the justification for criminalizing conspiracy. Groups can carry out more sophisticated and destructive crimes than can a single individual, and group dynamics make it more likely the co-conspirators will not abandon their plan.<sup>271</sup>

The relevance of these justifications to the law school ranking scandal is apparent. No individual could produce the *U.S. News* rankings acting alone. The steps involved in creating and operating a law school program for “part-time” students, or in producing and distributing deceptive statistics about post-graduate employment or student LSAT scores and GPAs, make it all but certain that none of these schemes were implemented by a solitary employee. The combined efforts of two or more people were required to make such schemes possible.

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267. *Lustiger v. United States*, 386 F.2d 132, 138 (9th Cir. 1967); see also *Lemon v. United States*, 278 F.2d 369, 373 (9th Cir. 1960); *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958); *Kreuter v. United States*, 218 F.2d 532, 535 (5th Cir. 1955); *Silverman v. United States*, 213 F.2d 405, 407 (5th Cir. 1954).

268. *Lustiger*, 386 F.2d at 138 (citing *Cacy v. United States*, 298 F.2d 227, 229 (9th Cir. 1961)); *Williams v. United States*, 368 F.2d 972, 975 (10th Cir. 1966)).

269. *Lustiger*, 386 F.2d at 136.

270. See, e.g., Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and Practice*, 65 GEO. L.J. 925, 947 (1977).

271. *Iannelli v. United States*, 420 U.S. 770, 778-79 (1975).

Effort of two or more people is the foundational element of the crime. The general federal conspiracy statute, 18 U.S.C. section 371,<sup>272</sup> adopts the traditional plurality rule declaring that it takes two or more individuals to conspire. The agreement itself is the core actus reus of the crime.<sup>273</sup> Under section 371 the agreement can be either (1) to commit an offense under United States law or (2) to defraud the United States.<sup>274</sup> Both clauses are interpreted expansively. The offense clause is satisfied by an agreement that one conspirator will commit acts that violate a federal law, which typically means transgressing statutes, like 18 U.S.C. sections 1341 and 1343. The offense clause has also been applied successfully when conspirators violated not a statute but only a presidential executive order, albeit one backed by statutory authority.<sup>275</sup> The defraud clause has been interpreted even more broadly and has been held to reach not merely conspiracies to commit traditional frauds, but also acts that interfere with the government's ability to function properly.<sup>276</sup>

In all likelihood, a prosecutor would charge any defendants in the law school rankings scandal with conspiring to commit the offenses of mail and wire fraud. Additionally, it is possible that some law schools and administrators could be charged under either clause, or both, for violating the federal

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272. 18 U.S.C. § 371 (2006), Conspiracy to Commit Offense or to Defraud United States, provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

273. *United States v. Shabani*, 513 U.S. 10, 16 (1994).

274. *See* 18 U.S.C. § 371.

275. *United States v. Arch Trading Co.*, 987 F.2d 1087, 1091 (4th Cir. 1993).

276. *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1926) (“To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.”).

false statements statute.<sup>277</sup> However, the fraud charges seem to have the broadest application here, making the offense clause the likely basis for any conspiracy indictment.

Each of these attributes of the crime and its proof is particularly relevant to conspiracies existing within organizations, where important actions may require the efforts of more than one individual. In other words, conspiracies are particularly likely to exist where employees of organizations commit crimes. The group nature of conspiracies dovetails with the collective nature of organizational methods of operation. In the context of expansive organizational liability under federal law (e.g., *respondeat superior*), this characteristic has produced doctrines under which organizations can be charged as co-conspirators along with their culpable employees. The corporation can be guilty of conspiring with the individuals who work for it, at least if two or more employees participated in the conspiracy.<sup>278</sup>

Prosecutors favor the conspiracy statute because it offers a number of advantages atypical in substantive criminal law. A number of these benefits are relevant here. First, conspiracy is an inchoate crime, which means that it is punishable long before the conspirators have achieved their goals, and even if the conspiracy is unsuccessful. The conspiracy's purpose defines when it begins and ends, who its members are, and the scope of the conspirators' liability for substantive crimes. It also makes success unnecessary for the crime to have been committed. Once two or more people have agreed to join together to pursue their goals, the crime is complete. In the law school rankings scandal, for example, the shared goal of a law school's employees may have been to improve their school's position in the rankings. Even if their efforts failed, their agreement and efforts in pursuit of that goal constitute the completed crime of conspiracy.

A second advantage is that conspiracy is a distinct crime, separate from any other substantive crimes committed by the conspirators. For some inchoate crimes, like attempt, if the criminals are successful, the crime of attempt "merges" with the target crime, and is not charged. The "no merger" rule permits conviction and punishment of the conspirators both for the separate crime of conspiracy and for other substantive crimes they committed. Thus, law schools and *U.S. News*, as well as their employees, could face increased charges and penalties for violating section 371.

Third, conspiracy creates vicarious liability for members of the conspiracy. Under the *Pinkerton* rule, co-conspirators are liable for all crimes committed by any other conspirator that are both within the scope of the agreement and reasonably foreseeable.<sup>279</sup> This rule means that all members of the conspiracy can be convicted and punished for the crimes committed by any of the conspirators. This outcome applies to both individual and organizational

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277. See 18 U.S.C. § 1001 (2006); *infra* Part III.D.

278. *United States v. Hughes Aircraft Co.*, 20 F.3d 974, 978-79 (9th Cir. 1994).

279. *Pinkerton v. United States*, 328 U.S. 640, 645-46 (1946).

defendants. For example, it is easy to imagine a situation in which a group of administrators agreed to try to improve the school's ranking by taking advantage of the *U.S. News* methodology. Part of the group would be responsible for creating and distributing false or misleading LSAT scores and undergraduate GPAs. Other participants would be responsible for crafting deceptive data about students' post-graduate employment. A third group might take no action, despite having joined in the agreement. Under *Pinkerton*, all of the conspirators could be liable for all of the crimes committed by each person who had joined in the agreement.

Prosecutors also must prove other elements of the crime. These elements raise no insuperable hurdles. Section 371 specifies that for the conspiracy to be complete, one conspirator must commit an overt act that furthers the conspiracy.<sup>280</sup> Proof of such an overt act was not part of the traditional common-law crime, but this additional element rarely prevents a prosecution, and would not be a barrier in the matters discussed here. The overt act need not be criminal; it can be almost any act related to achieving the conspirators' goals. By the time law enforcers possess sufficient evidence to intervene, overt acts satisfying the rule will have been committed, at least by one of the co-conspirators, which is sufficient to bind all conspirators.<sup>281</sup> In the law school rankings scandal, countless overt acts – mailing information or magazines, posting information online, gathering information and completing the *U.S. News* questionnaire – have been committed.

Finally, the statute requires proof of two levels of mens rea: (1) the intent to agree and (2) the intent to achieve the conspiracy's goals.<sup>282</sup> The traditional understanding of intent in this context precludes liability if the evidence demonstrates that a defendant only possessed knowledge of the conspiracy. Nevertheless, proof of knowledge can satisfy the mens rea requirement if other facts are proven.

The possible substitution of knowledge for intent is particularly significant in the context of conspiracies within legitimate organizations, like law schools, that have relatively formal structures for allocating duties and authority, most commonly in hierarchical arrangements. This hierarchy makes it possible to identify the individuals for whom knowledge may establish culpability. For example, a high ranking official who learns that the organization's employees are engaged in a criminal conspiracy, and whose position gives him authority to stop the crimes, may be deemed to have joined the conspiracy if he fails to do so. The official can be found to have knowingly participated in the conspiracy, particularly if he stood to benefit from its success<sup>283</sup> or he had some stake in the success of the criminal venture.<sup>284</sup>

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280. *United States v. Shabani*, 513 U.S. 10, 14 (1994).

281. *Salinas v. United States*, 522 U.S. 52, 64 (1997).

282. *United States v. Blair*, 54 F.3d 639, 642-43 (10th Cir. 1995).

283. *United States v. Misle Bus & Equip. Co.*, 967 F.2d 1227, 1236 (8th Cir. 1992).

Law enforcers can prove the existence of a criminal conspiracy in a variety of ways. Testimony by co-conspirators and the fruits of electronic surveillance can establish the conspiracy's existence and the co-conspirators' criminal conduct. Under the "co-conspirator declaration rule," conspirators' statements may be admissible even if they would otherwise be excludable hearsay.<sup>285</sup> The conspirators' mental fault and the existence of the actus reus, the agreement, also can be inferred from the co-conspirator statements and surveillance.

In the law school rankings scandal, intent to agree and to achieve the goals of the agreement can be inferred from the actions of individuals and organizations discussed in the previous Parts of this Article. It would not be surprising if law enforcers were successful at obtaining cooperation from employees who may have been members of conspiracies at organizations like law schools and *U.S. News*.

Just as acts that violate the mail and wire fraud statutes could provide the basis for conspiracy charges, the acts also could trigger liability for law schools, *U.S. News*, and their employees under a much harsher statute. It is the federal racketeering statute.

### C. Racketeering

The Racketeering Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. sections 1961-1968, is designed to punish criminal enterprises and those persons who work for them. Under this law, organizations and individuals involved in the law school rankings scandal may be racketeers.

The complexity of the RICO statute has been dissected in countless law review articles and judicial opinions, and a lengthy exegesis is not warranted here. Our purpose is only to outline how the organizations and institutions involved in the rankings scandal may have violated the racketeering statute.

RICO defines four crimes in section 1962; two are relevant here.<sup>286</sup> Section 1962(d) makes it a crime to conspire to commit any of the other three

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284. *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940).

285. FED. R. EVID. 801(d)(2)(E).

286. The other two prohibited activities defined in 18 U.S.C. § 1962 are:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of,

substantive RICO crimes.<sup>287</sup> Except for the limited scope of the crimes that can trigger liability, the analysis of the elements of a RICO conspiracy mirrors the discussion of the general conspiracy statute in the preceding section of the Article, and need not be repeated.<sup>288</sup> The remaining provision, section 1962(c), outlaws operating or managing an enterprise by use of racketeering acts, and it is relevant to this discussion.

The statute makes it a crime “for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity . . . .”<sup>289</sup> Even without studying the statute, we could infer that in the law school rankings scandal, the conduct of the dean of a law school or the director of the *U.S. News* law school rankings would satisfy this test.

The “operation and management” test crafted by the Supreme Court to interpret section 1962(c) also can be violated by lower- level employees exer-

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any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

287. Section 1962(d) provides that “[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.” *Id.* § 1962(d).

288. *See, e.g.*, *Salinas v. United States*, 522 U.S. 52 (1997). Like most conspiracy statutes, the RICO conspiracy statute differs from 18 U.S.C. § 371 by not requiring proof of an overt act. *Compare* 18 U.S.C. § 1968 (2006), *with* 18 U.S.C. § 371.

289. 18 U.S.C. § 1962(c).

cising authority over a part of the enterprise's activities.<sup>290</sup> Thus, administrators at law schools and at *U.S. News* could join their superiors in the organizational hierarchy as persons who violate the statute. The crime must be committed by a "person." This term is defined with the expansiveness typical in the RICO statute as "any individual or entity capable of holding a legal or beneficial interest in property."<sup>291</sup> Obviously this includes "natural" people like deans, the director of the *U.S. News* rankings, as well as their subordinates.

The person(s) must conduct the "enterprise's affairs through a pattern of racketeering activity."<sup>292</sup> RICO lists both mail and wire fraud as racketeering acts.<sup>293</sup> The Supreme Court has declared that the statutory definition of a pattern is necessary but rarely, perhaps never, sufficient to demonstrate the kind of ongoing activity reached by the statute.<sup>294</sup> The Court's solution, known as the "relatedness and continuity" test,<sup>295</sup> would be easily satisfied by fraudulent conduct of the law schools and *U.S. News*.

Under the relatedness test, the acts committed on behalf of the law schools are "related" because they employ similar methods (producing false or misleading information distributed through the same channels), for similar purposes (moving up in the rankings), with the same victims (prospective law students).<sup>296</sup> *U.S. News*' acts are related because the rankings are sold for the same reason every year (collecting money from customers), with the same methods (selling magazines in print and online), and with the same general target audience (prospective students).<sup>297</sup>

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290. *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993):

In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs. Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required. The "operation or management" test expresses this requirement in a formulation that is easy to apply.

291. 18 U.S.C. § 1961(3).

292. *Id.* § 1962(c).

293. *Id.* § 1961(1)(b).

294. *See id.*

295. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 237-242 (1989).

296. *See id.* at 239-40.

297. *See id.*

The Supreme Court also requires continuity among the racketeering acts.<sup>298</sup> This continuity can be open-ended, meaning that the acts may continue in the future unless stopped by external forces.<sup>299</sup> The decades of behavior by *U.S. News* and the law schools competing for rankings give us every reason to believe that the magazine will continue to publish the rankings even if they contain false information, and law schools will continue to try to “game” the process. Continuity can also be close-ended.<sup>300</sup> This means that the enterprise’s activities have been ended (perhaps by being exposed), but a number of acts were committed over a significant period of time exceeding weeks and perhaps even months.<sup>301</sup> The most important RICO expert has concluded that perhaps two years is necessary.<sup>302</sup> Each year that a law school distributed false or misleading data, arguably thousands of acts of mail and wire fraud occurred, which would offer more than enough racketeering acts to satisfy the test. If a school only committed these acts during one year, arguably this period is too short to constitute close-ended continuity. *U.S. News*, on the other hand, easily satisfies this requirement, because it has published its rankings for far longer than two years.

A RICO enterprise “includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”<sup>303</sup> Obviously this definition includes formally organized entities like *U.S. News*, law schools, and universities. With this concept in mind, one of the most difficult tasks in applying RICO to the law school rankings scandal would be determining whether the relevant enterprise was instead an informal grouping of employees, which also could be the enterprise by which the school’s employees carried out their schemes.

Two final considerations confirm that RICO could be applied to the law school rankings scandal. First, although the law schools generally are units of non-profit corporations, their not-for-profit status will not defeat prosecution under a statute originally intended to provide tools needed to destroy the financial foundations of organized crime. An economic motive is not a necessary element of a RICO claim or prosecution.<sup>304</sup> But even if it were, the economic motives driving both *U.S. News* to publish its magazine and the law schools to manipulate the data the magazine uses would satisfy that requirement.

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298. *Id.* at 240.

299. *Id.* at 241.

300. *Id.*

301. *Id.*

302. G. Robert Blakey, *Enterprises and Patterns: Practical Advice About Bringing and Drafting Civil RICO Complaints* 9, in INSTITUTE OF CONTINUING LEGAL EDUCATION IN GEORGIA, RICO, PROGRAM MATERIALS (2007) (on file with authors).

303. 18 U.S.C. § 1961(4) (2006).

304. *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 252 (1994).



Finally, Congress made it clear that RICO is to be liberally interpreted to achieve its purposes.<sup>305</sup> The federal courts, particularly the Supreme Court, have embraced this interpretive mandate, and repeatedly have applied the statute to enterprises far removed from the statute's original target: organized crime.<sup>306</sup> This rule of construction could well lead prosecutors to attempt to apply the RICO statute to the acts of both *U.S. News* and law schools.

#### D. False Statements

Like mail and wire fraud, this crime is triggered by lies, but the victims of this crime are not students, they are agencies of the federal government. The statute, 18 U.S.C. section 1001, commands that

*Whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry,*<sup>307</sup>

commits a felony.

The crime of false statements is committed when a person or entity submits a false statement to any branch or agency of the federal government (Agency).<sup>308</sup> In recent years law schools have submitted some of the same information not only to *U.S. News*, but also to the Section on Legal Education and Admissions to the Bar of the ABA, the only organization authorized to accredit law schools for the U.S. Department of Education (DOE).<sup>309</sup> In these overlapping categories, if a school submitted false information to *U.S. News*, then it also submitted a "false writing or document" to the accrediting agency.

The ABA serves as the DOE's official accrediting agency for law schools in the United States. As may be expected of a lawyers' organization, the ABA emphasizes the federal regulatory sources of its authority to establish standards with which law schools must comply to be accredited in the eyes of the DOE.

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305. See, e.g., *United States v. Turkette*, 452 U.S. 576, 587 (1981) ("Section 904(a) of RICO, 84 Stat. 947, directs that '[t]he provisions of this Title shall be liberally construed to effectuate its remedial purposes.'").

306. See, e.g., *Scheidler*, 510 U.S. 249.

307. 18 U.S.C. § 1001 (emphasis added).

308. See *id.*

309. See Morse, *U.S. News Urges Law School Deans to Improve Employment Data*, *supra* note 2.

Under Title 34, Chapter VI, §602 of the Code of Federal Regulations, the Council and the Accreditation Committee of the ABA Section of Legal Education and Admissions to the Bar are recognized by the United States Department of Education (DOE) as the accrediting agency for programs that lead to the J.D. degree. In this function, the Council and the Section are separate and independent from the ABA, as required by DOE regulations.

The Council of the Section promulgates the Standards and Rules of Procedure for Approval of Law Schools with which law schools must comply in order to be ABA-approved. The Standards establish requirements for providing a sound program of legal education. The law school approval process established by the Council is designed to provide a careful and comprehensive evaluation of a law school and its compliance with the Standards.<sup>310</sup>

The DOE confirms that the ABA, like the accrediting agencies for other types of educational institutions, performs functions integral to the DOE's mission.

The U.S. Department of Education does not accredit educational institutions and/or programs. However, the Secretary of Education *is required by law* to publish a list of nationally recognized accrediting agencies that the Secretary determines to be reliable authorities as to the quality of education or training provided by the institutions of higher education and the higher education programs they accredit.<sup>311</sup>

A false statement submitted directly to the DOE concerning any of these issues would trigger federal jurisdiction under section 1001 because the DOE "has the power to exercise authority in [the] particular situation" in which the false statement arose.<sup>312</sup> But the falsehoods at issue here were not submitted directly to the DOE. Instead they were submitted to a private organization, the ABA. That anomaly will not defeat federal jurisdiction. Federal jurisdiction can exist even if the defendant did not make the false statement directly

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310. AM. BAR ASS'N, THE LAW SCHOOL ACCREDITATION PROCESS 3 (2010) [hereinafter THE LAW SCHOOL ACCREDITATION PROCESS], [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2012\\_accrreditati\\_on\\_brochure\\_web.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2012_accrreditati_on_brochure_web.authcheckdam.pdf).

311. *The Database of Accredited Postsecondary Institutions and Programs*, OFFICE OF POSTSECONDARY EDUC., <http://ope.ed.gov/accreditation/> (last visited Jan. 31, 2013) (emphasis added); see also *Financial Aid for Postsecondary Students: Accreditation in the United States*, U.S. DEP'T OF EDUC., <http://www.ed.gov/admins/finaid/accred/index.html> (last updated Feb. 12, 2013).

312. See *United States v. Rodgers*, 466 U.S. 475, 479 (1984).

to the relevant federal agency.<sup>313</sup> Jurisdiction can exist even if the defendant submitted the information to a private entity<sup>314</sup> or a state government agency.<sup>315</sup>

The relationship between the ABA and the DOE seems consistent with the cases finding jurisdiction in these circumstances. The DOE has neither the legal authority nor the resources to develop and implement accreditation standards for the many hundreds of post-secondary schools and educational programs in the United States. The accrediting agencies upon which the DOE relies, including the ABA, perform essential functions that must be performed by someone or some group if the DOE is to have any chance of fulfilling its core mission of promoting “student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.”<sup>316</sup>

In pursuing this mission, the DOE “engages in four major types of activities.”<sup>317</sup> The ABA’s work is relevant to all four, but here we will focus on only one, “[c]ollect[ing] data and oversee[ing] research on America’s schools.”<sup>318</sup> This set of tasks is itself essential for the DOE to succeed at its other major tasks, which it defines as establishing policies related to federal funding of education, identifying and focusing on important educational issues, and enforcing anti-discrimination laws in programs receiving federal funds.<sup>319</sup>

Once again history helps explain how the DOE’s mission to collect data is relevant to possible crimes under the false statements statute. As noted earlier, the contemporary statute, 18 U.S.C. section 1001, was promoted by the first Franklin Roosevelt administration, which argued that neither the existing federal administrative agencies nor the new ones emerging from the New Deal could fulfill their institutional mandates unless they could collect reliable information upon which to base rules, actions, and policies.<sup>320</sup> If people and organizations could prevaricate when submitting data requested by an agency or department, the government could not function properly.

Secretary of the Interior Harold Ickes used his Department as an example when he lobbied both the House and Senate Judiciary Committees for an expanded false statements law.<sup>321</sup> Ickes argued that the Supreme Court’s

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313. See *United States v. White*, 270 F.3d 356, 363 (6th Cir. 2001).

314. See *United States v. Yermian*, 468 U.S. 63, 65 (1984).

315. See *United States v. Wright*, 988 F.2d 1036, 1038 (10th Cir. 1993).

316. *What We Do*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/what-we-do.html> (last updated Feb. 10, 2010).

317. *Id.*

318. *Id.*

319. *Id.*

320. See *United States v. Yermian*, 468 U.S. 63, 80 (1984) (Rehnquist, J., dissenting).

321. *Id.*

narrow interpretation of the 1918 Act created a gap in federal criminal law that would diminish his agency's effectiveness.<sup>322</sup>

In particular the Secretary was concerned that there were at present no statutes outlawing, for example, the presentation of false documents and statements to the Department of the Interior in connection with the shipment of 'hot oil,' or to the Public Works Administration in connection with the transaction of business with that agency.<sup>323</sup>

Armed with the knowledge that the central purpose of the modern false statements law is not to prosecute false claims for money or property,<sup>324</sup> but instead is to punish those who do not submit to federal departments and agencies the accurate, honest information needed for effective governance, we can understand how gathering information from law schools, as is required by the ABA's accreditation and approval standards, fits squarely within that legislative purpose (along with the Department's other fundamental purpose, "fostering educational excellence").

The DOE confirms the importance of the recognized accrediting agencies and these agencies' authority to set standards for the schools they accredit.

The goal of accreditation is to ensure that education provided by institutions of higher education meets acceptable levels of quality. Accrediting agencies, which are private educational associations of regional or national scope, develop evaluation criteria and conduct peer evaluations to assess whether or not those criteria are met. Institutions and/or programs that request an agency's evaluation and that meet an agency's criteria are then "accredited" by that agency.<sup>325</sup>

The statements and actions of the ABA and the DOE confirm the most logical understanding of the ABA's role in accrediting law schools: in this realm the ABA is a federal agency within the meaning of section 1001.

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322. *Id.*

323. *Id.* (citing S. REP. NO. 1202, at 1 (1934); H.R. REP. NO. 829, at 1-2 (1934); 78 CONG. REC. 2858-2859 (1934)).

324. The false statements statutes originated in the Civil War to punish false claims. See *Yermian*, 468 U.S. at 70 n.8 (majority opinion). In 1948, Congress separated false claims from false statements, a concept that had been expanded both in 1918 and 1934, and enacted a new statute criminalizing false claims submitted to the government. See Act of June 25, 1948, ch. 645, 62 Stat. 698 (1948) (codified at 18 U.S.C. § 287 (2006)); *Yermian*, 468 U.S. at 79-82 (Rehnquist, J., dissenting).

325. *The Database of Accredited Postsecondary Institutions and Programs*, *supra* note 311.

Although this interpretation seems the most logical interpretation of the law and facts, we have not found any judicial or administrative decisions reaching that conclusion. To apply the statute to information submitted to the ABA by law schools would be a new development in the long history of this statute. But it is a development that seems justified by the statute's history, its text, and the relevant facts. Because the statute's evolution and interpretation over the past century are relevant to understanding why it might apply to the current discussion, we begin by looking at the text and its history.

Like the crimes discussed earlier in the article, the false statements statute is applied expansively. The text is rife with words and phrases demanding broad application: *whoever, any matter, any trick, scheme or device*.<sup>326</sup> And the statute's expansive words have been amplified by amendments confirming Congress' intent to apply the statute expansively and to all branches of government.<sup>327</sup>

Indeed, the nearly 150-year history of the statute is defined by repeated expansion of the statute's scope by Congress. The statute originated in a Civil War statute that prohibited submitting false claims to the federal government.<sup>328</sup> In 1918, another great war produced a significant broadening of the statute, making it "[t]he first federal criminal statute prohibiting the making of a false statement in matters within the jurisdiction of any federal agency . . . ."<sup>329</sup> In 1926, the Supreme Court interpreted the statute more narrowly than its new language suggested, holding that it applied only to "the fraudulent causing of pecuniary or property loss" to the federal government, and did not criminalize false statements submitted to the government for other purposes.<sup>330</sup>

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326. See 18 U.S.C. § 1001.

327. For many years, section 1001 criminalized the making of false statements concerning "any matter within the jurisdiction of any department or agency of the United States," language that the Supreme Court once construed to encompass all three branches of government. *United States v. Bramblett*, 348 U.S. 503, 504 n.1, 509 (1955), *overruled by* *Hubbard v. United States*, 514 U.S. 695 (1995). In 1995, however, the Supreme Court overruled *Bramblett*. See *Hubbard v. United States*, 514 U.S. 695 (1995). In *Hubbard v. United States*, it held that this language did not cover the judicial branch. *Id.* at 715. Congress responded quickly. The following year it revised the statute to emphasize that the language did cover all three branches, although not without some qualifications. False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459 (1996) (codified at 18 U.S.C. § 1001(b)-(c)).

328. *Yermian*, 468 U.S. at 70 n.8 (the earliest statute "limited its criminal sanctions to false claims made by military personnel and presented to 'any person or officer in the civil or military service of the United States.' The Act was extended in 1873 to cover 'every person' – not merely military personnel – who presented a false claim to an officer or agent of the United States." (internal citations omitted)).

329. *Id.* at 70.

330. *United States v. Cohn*, 270 U.S. 339, 346-47 (1926).

However, early in the New Deal the it was concluded “that the 1918 Act, as thus narrowly construed, was insufficient to protect the authorized functions of federal agencies from a variety of deceptive practices,”<sup>331</sup> and the Roosevelt administration asked Congress to overrule the Supreme Court’s narrow interpretation by amending the statute to expressly apply to false statements not made to obtain money or property from the government.<sup>332</sup> Eventually Congress complied, and the new statute not only rejected the property limitation adopted by the Supreme Court, it also reduced the government’s evidentiary burden under the law.<sup>333</sup>

The 1934 Act “evidenced a conscious choice not to limit the prohibition to false statements made with specific intent to deceive the Federal Government[.]”<sup>334</sup> or “with *actual knowledge* that false statements were made in a matter within federal agency jurisdiction.”<sup>335</sup> The result was to relieve the government of the burden of proving that defendants possessed knowledge of the facts creating federal jurisdiction. Today “[b]oth the plain language and the legislative history establish that proof of actual knowledge of federal agency jurisdiction is not required under section 1001.”<sup>336</sup>

But even if such knowledge were an element of the offense, prosecutors would have little difficulty in establishing that deans and other high ranking administrators know of the ABA’s role as the federal government’s accrediting agency for law schools. After all, complying with the ABA’s dictates is a significant responsibility for law school administrators. Moreover, becoming an “ABA-approved” institution is critical for law schools, and not only because of the connection to DOE accreditation. Most states require that people seeking admission to the practice of law have graduated from an ABA approved school.<sup>337</sup>

Therefore, almost all law schools seek ABA approval, and once they have it, work to retain it. The initial process of obtaining ABA approval takes several years and a significant commitment of institutional resources. Once a school has been approved, the ABA demands that it undergo a “site visit”

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331. *Yermian*, 468 U.S. at 71.

332. *Id.* at 72.

333. *Id.* at 72-73.

334. *Id.* at 71.

335. *Id.* at 73 (emphasis added).

336. *Id.* at 75. In *Yermian*, the majority rejected defense arguments that the government must prove knowledge of federal jurisdiction to convict under section 1001. *Id.* at 74 n.14. The majority left open the possibility that some lesser degree of mens rea might be required but did not decide the issue. See *id.* at 76 (Rehnquist, J., dissenting).

337. AMERICAN BAR ASS’N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, 2012-2013 ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS iv (2012) [hereinafter ABA STANDARDS & RULES OF PROCEDURE], [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2012\\_2013\\_aba\\_standards\\_and\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf).

every seven years.<sup>338</sup> During this process, the Section on Legal Education and Admission to the Bar – the same entity recognized by the DOE as the nation’s sole accrediting agency for law schools – conducts an intensive study of the school, its people, and its resources.<sup>339</sup> A school must pass this review to retain its approved status.<sup>340</sup>

Finally, the ABA requires every school to complete a lengthy annual questionnaire asking for detailed information about the school, its physical facility, its administration, faculty, students, and expenditures.<sup>341</sup> This annual reminder of the ABA’s role makes it almost impossible to imagine a law school dean pleading ignorance of the ABA’s role as the accrediting agency for the federal DOE.

In sum, although a federal prosecutor would not be required to prove that law school administrators (and therefore the schools, as well) knew they were submitting information to a federal agency when complying with ABA regulatory requirements, we can anticipate that a prosecutor would do just that as part of the government’s trial strategy. If prosecutors can prove the other elements of the crime, they will have no difficulty in persuading any jury the defendants knew they were submitting materially false statements to an agency of the government.

The annual questionnaire each law school submits to the ABA is a statement, writing, or document within the meaning of the statute. Of course, simply making a statement to a federal department or agency is not a crime. For it to be criminal, the statement must be “materially false, fictitious, or fraudulent.”<sup>342</sup> For some schools, there can be little question that they submitted false statements to the ABA when they completed the ABA’s annual questionnaire, and that precisely is how some deans and their schools may have violated section 1001.

The recent public admissions by the University of Illinois provide an example. In its press release admitting that its Law School had distributed false information about incoming students’ LSAT scores and undergraduate GPAs, Illinois also admitted that for at least three years this false “data had been shared both with the ABA and with *U.S. News & World Report*.”<sup>343</sup> Illinois is not alone. It is likely that the other law schools that have reported false data to *U.S. News* in recent years submitted the same information to the

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338. *Frequently Asked Questions*, A.B.A., [http://www.americanbar.org/groups/legal\\_education/resources/frequently\\_asked\\_questions.html](http://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions.html) (last visited Jan. 31, 2013).

339. See ABA STANDARDS & RULES OF PROCEDURE, *supra* note 337.

340. *Id.* at 3. For information about the accreditation and approval processes, see generally *id.*; THE LAW SCHOOL ACCREDITATION PROCESS, *supra* note 310; *Accreditation Overview*, A.B.A., [http://www.americanbar.org/groups/legal\\_education/resources/accreditation.html](http://www.americanbar.org/groups/legal_education/resources/accreditation.html) (last visited Jan. 31, 2013).

341. *Annual Questionnaire*, *supra* note 1.

342. 18 U.S.C. § 1001 (2006).

343. Univ. of Ill. News Release, *supra* note 121.

ABA. As Robert Morse noted in his blog, “*U.S. News* asks law schools to report the same data as they report to their accrediting body, the ABA, so we assume they are reporting accurately. This was not the case for the University of Illinois College of Law.”<sup>344</sup>

Unfortunately, this is not the first time that Illinois has submitted such false data. Earlier this decade it admitted that it had submitted false data to *U.S. News* concerning another component of the overall *U.S. News* ranking formula: expenditures per student.<sup>345</sup> As with the median LSAT scores and undergraduate GPAs, expenditures per student are important to the overall ranking. Together, the various categories of expenditures per student account for 11.25% of the overall ranking.<sup>346</sup> Submitting false data about these expenses to *U.S. News* could violate the mail and wire fraud statutes in the ways discussed earlier.

Because similar data is required by the ABA, a school submitting the same information to the ABA and to *U.S. News* also might commit the felony of submitting false statements.

In 2006, *The New York Times* reported that:

Like all law schools, Illinois pays a flat rate for unlimited access to LexisNexis and Westlaw’s comprehensive online legal databases. Law students troll them for hours, downloading and printing reams of case law. To build user loyalty, the two suppliers charge institutions a total of \$75,000 to \$100,000 a year, far below per-use rates.

But in what it calls a longstanding practice, Illinois has calculated a fair market value for these online legal resources and submitted that number to *U.S. News*. For this year’s rankings, the school put that figure at \$8.78 million, more than 80 times what LexisNexis and Westlaw actually charge. This inflated expense accounted for 28 percent of the law school’s total expenditures on students, according to confidential data filed with *U.S. News* and the bar association and provided to *The New York Times* by legal educators who are critical of rankings and concerned about the accurate reporting of data.

These student expenditures affect only [a small] percent of a school’s *U.S. News* ranking, but this is a competition where frac-

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344. Morse, *University of Illinois Law School Admits to Submitting Inflated Admission Data*, *supra* note 162.

345. See Wellen, *supra* note 101.

346. *Methodology*, *supra* note 21.



tions of a point matter. In this year's survey, the magazine ranked Illinois No. 26 of 179 accredited law schools.<sup>347</sup>

The news story focused upon the implications for the *U.S. News* rankings, and the analysis is one of the early signs that law schools efforts at "gaming" the rankings might, in fact, be criminal. But if during the same period of years, the school was submitting the same false data to the ABA, then the distinct crime of submitting false statements is implicated, as well.<sup>348</sup>

Determining whether Illinois and other schools have violated section 1001 is not easy. For example, the false statement must be material.<sup>349</sup> We can expect that a respected law school like Illinois will argue that its accreditation would not be affected by submitting these kinds of false numbers. We cannot know if this conclusion is correct at present. The ABA is finally showing signs of responding to the rankings scandal, and it is impossible to predict how it would deal with a school that had systematically lied in its annual reports over a period of years. Ethical misconduct of the sort admitted by Illinois and Villanova could prompt some punitive response by the ABA.

However, this type of argument misses the point of the statute. The issue is not whether the schools' reporting of exaggerated student admissions numbers and expenditures could lead to the ultimate punishment available to the government agency. The question is whether the data could affect the agency's performance of its responsibilities. One of the ABA's essential duties in this realm is to gather accurate data about each of the schools it studies, approves, and accredits.<sup>350</sup> Submitting false statistics about important aspects of a school – its students' academic characteristics and its graduates' employment in the profession – strikes at the heart of that mission.

On this point the law is clear: the statute requires that statements made to the federal agency must be truthful and accurate, or the agency cannot carry out its duties effectively.<sup>351</sup> Thus, the question of materiality is not whether the ABA would take away a school's accreditation but whether the "fraud in question have a natural tendency to influence, or be capable of af-

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347. Wellen, *supra* note 101.

348. The Annual Questionnaire that all ABA approved law schools and their deans must complete and submit to the ABA contains a Dean's Signature Page. *Annual Questionnaire*, *supra* note 1. The Fall 2005 form, which was the most recent Questionnaire at the time of the *New York Times* story detailing how Illinois had falsified its actual Lexis and Westlaw expenditures, required deans to certify the accuracy of the information submitted to the ABA. The ABA required each dean to sign this statement: "I hereby certify that the information provided within to be a complete and accurate representation of this law school." *See id.* The ABA continues to require this certification of accuracy. *Id.*

349. *United States v. Brittain*, 931 F.2d 1413, 1415 (10th Cir. 1991).

350. *See* ABA STANDARDS & RULES OF PROCEDURE, *supra* note 337.

351. *See supra* notes 319-20 and accompanying text.

fecting or influencing a governmental function.”<sup>352</sup> The government agency does not have to be actually deceived nor do false statement have to actually influence the actions of the government agency,<sup>353</sup> and a statement can qualify as material even if the defendant did not derive a pecuniary or economic benefit at the expense of the government.<sup>354</sup>

Again, we cannot reach a conclusion about whether schools have violated the false statement statute. Our function is to raise the issue, in the hopes that federal prosecutors will investigate the behavior of these institutions to make that determination.

#### IV. THE *U.S. NEWS* METHODOLOGY

*U.S. News* may have committed criminal fraud because it falsely represented that its rankings, and the surveys that contribute a great deal to the formulation of the rankings, were sound and worthy of reliance. However, these surveys ignore even the most basic requirements for legitimate survey research. *U.S. News*' failure to conduct viable surveys invalidates the entire overall rankings. *U.S. News* advertised and sold its rankings as a house with a strong foundation. Instead, an inspection shows that it is a termite-infested dump. At first glance, it might seem that imposing criminal liability on a publication for what it publishes raises issues under the First Amendment. However, as the Supreme Court noted in *Schneider v. State*, the Constitution does not protect fraudulent speech.<sup>355</sup> The *Schneider* decision concluded, “[f]rauds may be denounced as offenses and punished by law” without thereby abridging the freedom of speech and the press.<sup>356</sup> The actus reus of many traditional crimes involves spoken or written speech – solicitation, conspiracy, making terroristic threats, and blackmail – are well known examples. Fraud is another. Such speech is not insulated from criminal prosecution by constitutional or statutory privileges. If *U.S. News* in fact violated the fraud statutes by knowingly publishing false information, the First Amendment will not prove to be a bar to prosecution.

*U.S. News* advertises that its rankings are valid and reliable.<sup>357</sup> It promotes the value of its rankings in various ways, including promotional state-

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352. *United States v. Markham*, 537 F.2d 187, 196 (5th Cir. 1976).

353. *Id.*; see also *United States v. Diaz*, 690 F.2d 1352, 1357 (11th Cir. 1982); *United States v. Hassoun*, 477 F. Supp. 2d 1210, 1215 (S.D. Fla. 2007).

354. *United States v. Campbell*, 848 F.2d 846, 852-53 (8th Cir. 1988) (finding it unnecessary to prove statement intended to provoke pecuniary loss to government or gain to defendants).

355. 308 U.S. 147, 164 (1939).

356. *Id.*

357. See, e.g., Robert Morse, *Best Graduate Schools Rankings Coming March 12*, U.S. NEWS & WORLD REPORT, MORSE CODE BLOG (Feb. 14, 2013), <http://www.usnews.com/education/blogs/college-rankings-blog/2013/02/14/best-graduate-schools-rankings-coming-march-12> (“Prospective students can use the Best

ments prominently displayed at the beginning of *Morse Code/Inside the College Rankings*, an online column posted by Robert Morse at the *U.S. News*' website.<sup>358</sup> *U.S. News* promotes its rankings as the best available analysis, in part by touting Mr. Morse's work:

Robert Morse is director of data research for *U.S. News & World Report* and has worked at the company since 1976. He develops the methodologies and surveys for the Best Colleges and Best Graduate Schools annual rankings, keeping an eye on higher-education trends to *make sure the rankings offer prospective students the best analysis available*. Morse Code *provides deeper insights into the methodologies* and is a forum for commentary and analysis of college, grad, and other rankings.<sup>359</sup>

For the rankings to "offer prospective students the best analysis available,"<sup>360</sup> the methodology that produces them must be sound. Over the years, critics have argued that the *U.S. News* methodology is fundamentally flawed and have identified a variety of defects.<sup>361</sup> In this Part of the Article we focus on the methodological problems that appear in two of the most heavily weighted elements in the rankings formula: the reputational survey of "lawyers and judges" and the "peer assessment" survey of a school's reputation.

Taken together, the two surveys account for 40% of a school's overall score (15% for the lawyers/judges survey and 25% for the peer assessment).<sup>362</sup> One analysis of the rankings explains the impact that these two elements can have on the results generated by the rankings formula: "the reputational surveys overwhelm the effect of all other factors."<sup>363</sup> As a result, defects in the surveys can undermine the validity of the rankings.

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Graduate Schools rankings and other data to make comparisons of concrete factors such as student-faculty ratios; research expenditures; acceptance rates; undergraduate grade point averages; average scores on the GRE, LSAT, and GMAT; and placement success upon graduation.").

358. See generally Robert Morse, U.S. NEWS & WORLD REPORT, MORSE CODE BLOG, <http://www.usnews.com/education/blogs/college-rankings-blog> [hereinafter MORSE CODE BLOG].

359. *Id.* (emphasis added).

360. *Id.*

361. Various scholars have noted various flaws in the rankings and survey methodology. The most complete catalogue of the flaws of the rankings and surveys is Seay, *supra* note 198; see generally Stake, *supra* note 102; Paul L. Caron, *Did 16 Law Schools Commit Rankings Malpractice?*, TAX PROF BLOG (May 12, 2010), [http://taxprof.typepad.com/taxprof\\_blog/2010/05/did-16-law-schools.html](http://taxprof.typepad.com/taxprof_blog/2010/05/did-16-law-schools.html).

362. *Methodology*, *supra* note 21.

363. Seay, *supra* note 198, at 38. The only other factor whose influence is of the same magnitude of importance is expenditures per student. *Id.* Expenditures per student is the second most important factor behind the surveys. *Id.* at 52. The sur-

To understand the flaws in the *U.S. News* surveys it is not necessary to turn to advanced studies of social science research methods. Even introductory college textbooks about social science research are adequate for this task. That the methodology employed by *U.S. News* does not satisfy even the most rudimentary standards of empirical research taught to students in undergraduate courses demonstrates that the surveys are greatly flawed. The flaws are so basic and obvious that no reasonable professional researcher could claim they provide “*prospective students the best analysis available.*”<sup>364</sup>

Accordingly, as we discuss in the rest of this Part, it becomes obvious that *U.S. News*’ failed methodologies contribute greatly to *U.S. News*’ conducts satisfying all of the elements of mail and wire fraud. It sold its rankings claiming that they were “the best analysis available.”<sup>365</sup> Yet, the rankings that it actually provided to its customers were fundamentally defective. It knew of the defects, or was recklessly indifferent to them.<sup>366</sup> Additionally, it is clear that *U.S. News* intended to deceive readers about the quality of its rankings in order to sell more copies of the rankings.

Finally, the defects satisfy the requirement of materiality. As we will see, less egregious defects led to two of history’s most famous survey blunders: the incorrect predictions that Landon would defeat Roosevelt for the presidency in 1936 and that Dewey would defeat Truman in 1946. *U.S. News* has induced hundreds of thousands of buyers of its rankings to make life-altering decisions based on rankings that the most basic analysis shows are inaccurate and defective.

We now describe the various fundamental flaws in the rankings. After we describe *U.S. News*’ first fundamental flaw, its failure to provide information about its approach, we will then examine several substantive flaws in *U.S. News*’ methods.

#### A. *U.S. News*’ Failure to Explain its Methods.

Before examining the surveys’ substantive defects, it is important to note a basic flaw that pervades the surveys: *U.S. News* fails to explain the details of what it has done. A basic requirement of sound survey research is that the researchers explain specifically what techniques they have used. *U.S. News* fails this requirement.

For example, the leading professional organization of public opinion and survey-research professionals is the American Association for Public Opinion

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veys’ impact on the overall ranking is amplified further by the fact that the surveys are one of the few factors in the rankings where the schools’ scores vary widely. *Id.* at 38.

364. MORSE CODE BLOG, *supra* note 358.

365. *Id.*

366. See *supra* note 132-34 and accompanying text.

Research (“AAPOR”).<sup>367</sup> The AAPOR’s Code of Professional Ethics and Practices (“Ethics Code”) “describes the obligations that we believe all research professionals have, regardless of their membership in this Association or any other . . . .”<sup>368</sup> According to the Ethics Code, a central obligation of sound survey research is to reveal the researcher’s methods in detail:

Good professional practice imposes the obligation upon all survey and public opinion researchers to disclose certain essential information about how the research was conducted. When conducting publicly released research studies, full and complete disclosure to the public is best made at the time results are released . . . .<sup>369</sup>

The Ethics Code then lists the specific essential information that the researcher must disclose, by either including it in the research report or by making it immediately available upon release of that report.<sup>370</sup> This information includes:

2. The exact wording and presentation of questions and responses whose results are reported.
3. A definition of the population under study, its geographic location, and a description of the sampling frame used to identify this population . . . . If no frame or list was utilized, this shall be indicated.
4. A description of the sample design, giving a clear indication of the method by which the respondents were selected (or self-selected) and recruited, along with any quotas or additional sample selection criteria applied within the survey instrument or post-fielding. The description of the sampling frame and sample design should include sufficient detail to determine whether the respondents were selected using probability or non-probability methods.
5. Sample sizes and a discussion of the precision of the findings, including estimates of sampling error for probability samples and a

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367. *American Association for Public Opinion Research*, AM. ASS’N FOR PUBLIC OPINION RES., [www.aapor.org](http://www.aapor.org) (last visited Feb. 1, 2013).

368. *The Code of Professional Ethics and Practices*, AM. ASS’N FOR PUBLIC OPINION RES., [http://www.aapor.org/AM/Template.cfm?Section=AAPOR\\_Code\\_of\\_Ethics&Template=/CM/ContentDisplay.cfm&ContentID=4248](http://www.aapor.org/AM/Template.cfm?Section=AAPOR_Code_of_Ethics&Template=/CM/ContentDisplay.cfm&ContentID=4248) (last updated May 2010).

369. *Id.* at Part III.

370. *Id.*

description of the variables used in any weighting or estimating procedures.<sup>371</sup>

Similarly, the most recent edition of a leading introductory-level textbook commands:

In reporting the design and execution of a survey, for example, always include the following: the population, the sampling frame, the sampling method, the sample size, the data-collection method, the completion rate, and the methods of data processing and analysis . . . . The experienced researcher can report these details in a rather short space, without omitting anything required for the reader's evaluation of the study.<sup>372</sup>

Familiar examples of surveys, like the Gallup or Harris polls about politics, include such information.<sup>373</sup>

But *U.S. News*' "methodology" fails to provide much of this essential information.<sup>374</sup> Among other gaps, and as discussed further below, *U.S. News* does not reveal the precise wording of the survey questions. It does not define the population under study. It does not describe the sampling frame – or whether it even uses one. It provides little detail on its methods for sample selection.

Likewise, it provides incomplete information on the sample size and response rate. For example, the methodology lists various groups that were sent questionnaires, such as judges, lawyers, and various groups of law school faculty.<sup>375</sup> However, the methodology does not reveal the numbers of each group, nor the total number of respondents.<sup>376</sup>

Similarly, *U.S. News* provides little information on its data processing and analysis.<sup>377</sup> Moreover, it provides no discussion of the precision of its findings or sampling error. Accordingly, it is impossible to know whether two schools with different rankings are statistically different, or whether they instead are in a statistical tie because they are within the rankings' margin of error. For example, the school ranked twenty may be statistically indistinguishable from, or even inferior to, the school ranked thirty-five.

This fundamental failure to provide basic information, a failure that might lead to a failing grade in an undergraduate survey research class, may

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371. *Id.*

372. EARL R. BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 526 (12th ed. 2010).

373. *See, e.g.*, Lydia Saad, *Perry Leads but Romney Gaining in GOP Favorability*, GALLUP (Sept. 13, 2011), <http://www.gallup.com/poll/149423/Perry-Leads-Romney-Gaining-GOP-Favorability.aspx>.

374. *See Methodology, supra* note 21.

375. *Id.*

376. *See id.*

377. *See id.*

have been merely a negligent oversight. Or it may have been designed to hide flaws in the survey's sample size, data processing, and analysis. Without more information, it is not possible to determine exactly what happened, and why. We now turn to the substantive flaws in the U.S. News rankings.

### B. The Absence of Probability Sampling

#### 1. Sampling Bias

To be valid, a large-scale survey must use "probability sampling." That is, the survey's sample of subjects must be carefully selected to mirror the characteristics of the general population being studied. A leading introductory textbook in social science research notes,

[N]onprobability sampling methods cannot guarantee that the sample we observed is representative of the whole population. When researchers want precise, statistical descriptions of large populations – for example, the percentage of the population who are unemployed, plan to vote for Candidate X, or feel a rape victim should have the right to an abortion – they turn to probability sampling.<sup>378</sup>

Accordingly, the author of the textbook concludes that "[a]ll large-scale surveys use probability-sampling methods"<sup>379</sup> because (as the most recent edition of another standard textbook notes) "[w]hatever the situation, [probability sampling] remains the most effective method for the selection of study elements."<sup>380</sup>

The need for probability sampling is particularly apparent when the results of the research play a role in decision making about important issues. "Accuracy would appear to be most important in large-scale fact-finding studies that provide input for major policy decisions" because a "carefully controlled probability sample is necessary to guarantee a high degree of precision."<sup>381</sup>

This higher-level of accuracy would seem appropriate for the *U.S. News* surveys, which the magazine markets as a reliable tool that people should use in the decision-making process of a specific life-altering decision – i.e., choosing a law school. Indeed, social scientists treat probability sampling as required even for research of much less significance. "For example, if you

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378. BABBIE, *supra* note 373, at 196.

379. *Id.*

380. *Id.* at 224; *see generally* ROYCE A. SINGLETON, JR. & BRUCE STRAITS, *APPROACHES TO SOCIAL RESEARCH* 158-72 (5th ed. 2010) (discussing probability sampling).

381. SINGLETON, JR. & STRAITS, *supra* note 381, at 179.

need to assess opinions about student government among students at your school for the purpose of documenting support for government reforms, a haphazard, poor-quality sample would be inappropriate.”<sup>382</sup>

Probability sampling is necessary to eliminate the fundamental danger of “sampling bias” which would otherwise destroy the survey’s reliability. “The fundamental idea behind probability sampling is this: To provide useful descriptions of the total population, a sample of individuals from a population must contain essentially the same variations that exist in the population.”<sup>383</sup> Only by using probability sampling can the researcher avoid infecting the survey with sampling bias. “In connection with sampling, *bias simply means that those selected are not typical nor representative of the larger populations they have been chosen from.*”<sup>384</sup>

Thus, probability sampling is used to avoid the fundamental defect of bias and to produce a representative sample. “A basic principle of probability sampling is that a sample will be representative of the population from which it is selected if all members of the population have an equal chance of being selected in the sample.”<sup>385</sup> The sample used in the study “is representative of the population from which it is selected if the aggregate characteristics of the sample closely approximate those same aggregate characteristics in the population. If, for example, the population contains 50% women, then a sample must contain ‘close to’ 50% women to be representative.”<sup>386</sup>

Unless probability sampling is used, sampling bias inevitably infects the survey. “This kind of bias does not have to be intentional. In fact, it is virtually inevitable when you pick people by the seat of your pants.”<sup>387</sup> In sum, sampling bias is a significant danger for social science research, but one that can be avoided by careful survey design that includes probability sampling. “The possibilities for inadvertent sampling bias are endless and not always obvious. Fortunately, many techniques can help us avoid bias.”<sup>388</sup> As we will see, U.S. News fails to employ any of these techniques.

If a researcher fails to use probability sampling to select participants carefully, and instead simply includes in his sample those who choose to participate, the survey’s results may be invalid. “The key reason that some polls reflect public opinion accurately and other polls are unscientific junk is how

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382. *Id.*

383. BABBIE, *supra* note 373, at 196.

384. *Id.* at 197 (emphasis added).

385. *Id.* at 198.

386. *Id.*

387. *Id.* at 197. This same text notes how defective sampling and the resulting sampling bias invalidate a type of survey methodology that has been used by magazines and newspapers “that publish coupons for readers to complete and mail in. Even among those who are aware of such polls, not all will express an opinion, especially if doing so will cost them a stamp, an envelope, or a telephone charge.” *Id.* at 197-98.

388. *Id.* at 198.



the people were chosen to be interviewed. In scientific polls, the pollster uses a specific method for picking respondents. In unscientific polls, the person picks himself to participate.”<sup>389</sup>

The *U.S. News* surveys employ methods suffering from several of these sampling errors. In order to produce a sample of lawyers in the United States capable of producing representative results for its opinion survey of schools’ reputations, the sample surveyed would have to be randomly selected from this country’s many varieties of lawyers. The United States has more than a million lawyers.<sup>390</sup> The range of personal characteristics essentially describes the nation’s population of educated people. Our lawyers come from all genders, all economic classes, and all racial classification. They attended every type of law school and consist of all ages beginning with young adulthood. They practice law across the North American continent and beyond, not only in our noncontiguous states and territories but in countries all over the world. Their practices are almost as diverse, ranging from solo practices to international law firms with thousands of employees to government offices and private firms that survive by suing government agencies. They work as teachers, politicians, corporate officers, and novelists.

A valid survey of the ideas on any important topic held by such a diverse population must be carefully designed to produce a random, representative sample of the group. It is more than a little surprising, therefore, to discover that the *U.S. News* methodology does not employ this basic principle of social science research. Based on the magazine’s description of their sample population, it appears that *U.S. News* does not even attempt to survey a truly random sample of United States lawyers.

For its 2012 rankings, *U.S. News* writes that it surveyed “legal professionals, including the hiring partners of law firms, state attorneys general, and selected federal and state judges[.]”<sup>391</sup> Although each of the named groups is a segment of the population of lawyers, it appears that the selection method used was far from random. Only three categories of lawyers are mentioned, and each is representative of only a small segment of the profession. The problems with focusing on such a small segment of the legal profession are obvious. For example, consider the surveying of state attorneys general. No one would reasonably conclude that surveying the sole attorney general in each state would be representative of the entire profession.

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389. *Id.* at A28 (quoting SHELDON R. GAWISER & G. EVANS WITT, TWENTY QUESTIONS A JOURNALIST SHOULD ASK ABOUT POLL RESULTS).

390. In 2011, 1,225,452 lawyers were licensed in the United States. ABA MARKET RESEARCH DEP’T, NATIONAL LAWYER POPULATION BY STATE (2012), [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/2011\\_national\\_lawyer\\_by\\_state.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/2011_national_lawyer_by_state.authcheckdam.pdf).

391. *Methodology*, *supra* note 21. The people selected were asked to rank schools on a 1-5 scale, with the option of opting out for schools for which the respondents lacked sufficient knowledge. *Id.*

Similarly, the polling of “selected federal and state judges”<sup>392</sup> may not meet basic selection criteria. There is no indication as to how many judges were polled, or how many returned completed surveys. Were judges selected because they were elite appellate court judges or did the sample include judges in state and local trial courts? If *U.S. News* polled only judges sitting on federal appellate courts and state supreme courts, it might be that the sample chosen disproportionately included judges who had attended “elite” law schools or had practiced in “elite” law firms or as prosecutors. We cannot know whether the results are biased in these ways, because *U.S. News* does not publish this information.

The final group of lawyers surveyed by *U.S. News* also does not appear to be the product of random selection. Describing the lawyers polled for the rankings published in March 2011), *U.S. News* reports that:

In the fall 2011 lawyer and judge survey, *U.S. News* for the second time surveyed 750 hiring partners and recruiters at law firms who made the 2011 Best Law Firms rankings produced jointly by *U.S. News* and the publication *Best Lawyers*. Their ratings are included in the lawyer and judge survey score.<sup>393</sup>

Rather than survey a *random* sample of lawyers, *U.S. News* identified specific lawyers whose opinions they wanted to obtain. Rather than sample the entire profession, they focused upon a group that we might expect to be disproportionately comprised of white males who attended elite schools and who work at large national or international law firms. What is even more disconcerting is that the choice seems to have been influenced by the opportunity for the magazine to cross-promote another one of its products, its ranking of “Best Law Firms.” Indeed, in the methodology discussion quoted above, *U.S. News* made the title “2011 Best Law Firms” a live link to that product.<sup>394</sup> Clicking on the link takes the reader to the page where she can buy that rankings product.<sup>395</sup>

The sample’s selection bias is apparent, and it is the type of error that could affect the validity of the survey results, and therefore the rankings themselves. One might expect, for example, that lawyers who attended elite law schools and work at large elite firms would be biased in favor of those schools to a degree not shared by the entire profession.<sup>396</sup> Lawyers who rep-

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392. *Id.*

393. *Id.*

394. *See id.*

395. *See id.*

396. In 2000, fourteen per cent of lawyers worked in firms with more than one hundred lawyers. CLARA N. CARSON, AM. BAR FOUNDATION, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000 29 (2000) [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer\\_statistical\\_report\\_2000.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_statistical_report_2000.authcheckdam.pdf).

resent large institutional clients might favor schools with strengths in academic fields relevant to corporate practice over schools with a greater emphasis on advocacy skills. The latter schools might receive higher scores from lawyers like prosecutors and insurance defense lawyers who regularly litigate in the courts.

Although the selection bias is apparent, we cannot know what impact it had on the current *U.S. News* rankings. This inconclusiveness is in part because *U.S. News* withholds essential information about its survey methodology. It reports that only “[a]bout 12 percent of those lawyers and judges surveyed responded”<sup>397</sup> to the fall 2011 survey. But *U.S. News* does not disclose the most fundamental concern: how many lawyers and judges were surveyed. *U.S. News* states that it polled “legal professionals, including the hiring partners of law firms, state attorneys general, and selected federal and state judges.”<sup>398</sup> This statement raises far more questions than it answers. Did all the “legal professionals” it surveyed fit into the three categories listed, or were others polled as well? How many people in each professional category were surveyed and how many responded? Did *U.S. News* poll all state attorneys general or just a few? Did responses from the 750 hiring partners at the “best firms” comprise a tiny portion of all responses, or did they dominate the responses? Again, the list of questions could fill pages, but we have no answers because *U.S. News* does not reveal this basic, necessary information for evaluating the validity of its survey.<sup>399</sup>

The sample for the so-called “peer assessment” survey, made up of a limited number of law school administrators and faculty members, is similarly flawed. Probability sampling would require that the respondents be selected from among all law school faculty members. Once again, *U.S. News* employs a different methodology, sending its survey only to sub-groups of law school faculties: “law school deans, deans of academic affairs, chairs of faculty appointments, and the most recently tenured faculty members[.]”<sup>400</sup>

This sample is not representative of all law faculty members. Instead, it is heavily biased toward administrators and the most senior faculty; three of the four groups are either administrators (deans and deans of academic affairs), senior faculty leaders, or handpicked by administrators (chair of faculty appointments). There is one moderately junior person (the most recently tenured faculty member), but no representation for the great mass of faculty who are either untenured, or are tenured but not senior administrators. Likewise, the sample fails to reach other important faculty groups, such as clinicians, untenured faculty, and adjuncts. Altogether, the sample does not reach

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397. *Methodology*, *supra* note 21.

398. *Id.*

399. *See supra* Part IV.A for a more detailed analysis of the significance of the suppression of this information.

400. *Methodology*, *supra* note 21.

groups that make up most, if not more than three-quarters, of most law school faculties. This is not a *peer* assessment for the following reasons.

The views held by senior administrators and faculty leaders about the quality of various law schools may differ from those held by the law school's rank-and-file faculty. The same may be true of the most recently tenured member of the faculty. There is little reason to conclude that people with that particular status have better information about the quality of law schools than do their more senior or junior colleagues. The changing composition of law school faculties creates another problem. It has become common for law schools to employ contract faculty members to lead clinics, teach legal research and writing courses, and in some cases to teach traditional lecture courses as well. These members of law faculties appear to be unrepresented in the sample groups used by *U.S. News*.

The failure to employ probability sampling produces surveys that appear to violate the most basic rules in social science surveys. But sampling bias is not the only defect that is caused by the lack of probability sampling.

## 2. Unknown Imprecision

The second fundamental benefit that probability sampling provides is that it permits the researcher to know the precision of the survey's estimates – how accurate they are. Because *U.S. News* fails to use probability sampling, it can know neither the size of its ranking's margin of error nor whether many of the law schools that it ranks above or below each other are, instead, in statistical ties.

As the aforementioned leading social science research textbook notes, “[w]ithout random selection, nonprobability samples have two basic weaknesses: (1) they do not control for investigator bias in the selection of units and (2) their pattern of variability cannot be predicted from probability sample theory, thereby making it impossible to calculate sampling error or to estimate sample precision.”<sup>401</sup> As a result,

probability sampling offers two special advantages. First, probability samples, although never perfectly representative, are typically more representative than other types of samples, because the biases previously discussed are avoided . . . . Second, and more important, *probability theory permits us to estimate the accuracy or representativeness of the sample.*<sup>402</sup>

Another leading textbook concurs that only probability sampling permits using probability theory to indicate the accuracy of the findings. To be more precise, “probability sampling permits estimates of sampling error. Although

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401. SINGLETON, JR. & STRAITS, *supra* note 381, at 172.

402. BABBIE, *supra* note 373, at 198 (emphasis added).

no probability sample will be perfectly representative in all respects, controlled selection methods permit the researcher to estimate the degree of expected error.”<sup>403</sup> The text concludes:

This then is the basic logic of probability sampling. Random selection permits the researcher to link findings from a sample to the body of probability theory so as to estimate the accuracy of those findings. All statements of accuracy in sampling must specify both a confidence level and a confidence interval. The researcher must report that he or she is x percent confident that the population parameter is between two specific values.<sup>404</sup>

The routine statement in a legitimate political survey that “[m]argin of error is 3 percentage points”<sup>405</sup> is possible only because of probability sampling. Because it does not use probability sampling, *U.S. News* cannot calculate whether the survey’s margin for error is large or small.

Because the surveys account for 40% of the overall rankings,<sup>406</sup> the failure of *U.S. News* to observe this basic requirement of sound survey research transforms their rankings into ambiguous junk, unworthy of reliance. *U.S. News* creates rankings indicating that schools really are different, and knows that students will rely on the rankings when choosing a law school.<sup>407</sup> It presents these rankings in a manner that seems precise and scientific, inviting readers to obsess about whether a school is ranked twenty-third or twenty-fifth or whether a school has moved a single spot ahead of its rival. However, this seeming precision is illusory.

Without probability sampling, *U.S. News* cannot know whether the twenty-third and twenty-fifth positions are really within the rankings’ margin of error, so that schools are really tied, or whether the twenty-fifth-ranked school is actually better than the twenty-third-ranked school. By ranking two schools twenty-third and twenty-fifth, *U.S. News* suggests that it can know that the two schools are not within its rankings’ margin for error. However, *U.S. News* cannot know the margin of error because it does not use probability sampling. Although *U.S. News* may present the twenty-third and twenty-fifth schools as not being tied, it cannot know whether they really are tied.<sup>408</sup>

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403. *Id.* at 224.

404. *Id.* at 207.

405. See, e.g., *Gallup Daily: Obama Job Approval*, GALLUP, <http://www.gallup.com/poll/113980/gallup-daily-obama-job-approval.aspx> (last visited Jan. 31, 2013).

406. *Methodology*, *supra* note 21.

407. See Morse & Flanigan, *About the U.S. News Rankings*, *supra* note 68, at 13 (“It’s important that [the reader] use the rankings to supplement – not substitute for – careful thought and [individual] inquiries.”).

408. Others have noted the rankings’ fake precision. The rankings, “by transforming insignificant variations into significant consequences, play a clear role in

Indeed, for all *U.S. News* might know, all of the positions from twenty-one to twenty-nine – or even a broader spacing – may be within the rankings’ margin for error, and so are statistically tied. The twenty-first and twenty-ninth schools may really be different, or they may not be, or the twenty-ninth school may be better than the twenty-first. Because it uses flawed methodology, *U.S. News* has no way of knowing.

And yet *U.S. News* creates rankings indicating that schools really are different. And it presents this false precision knowing that students and others will rely on the faux precision,<sup>409</sup> with many students choosing the twenty-first-ranked school rather than the twenty-ninth.

*U.S. News* does include some ties in its rankings.<sup>410</sup> By doing this, *U.S. News* suggests that it can know whether the two schools really are within its rankings’ margin for error. But yet again *U.S. News* cannot know the margin of error because it does not use probability sampling. Although *U.S. News* may present the twenty-second and twenty-third schools as being tied, it cannot know whether they really are tied, or whether all of the schools from twenty-one to twenty-nine really are within the rankings’ margin of error too.

### C. Coverage Error and Defective Sampling Frames

A survey can become fatally biased by coverage error, an additional flaw that is related to the failure to use probability sampling. “Coverage error” occurs when the list, or “sample frame,” of those from whom the sample of respondents is selected is incomplete.<sup>411</sup> As a leading text notes, “[i]f the sample is to be representative of the population, it is essential that the sampling frame include all (or nearly all) members of the population.”<sup>412</sup> That is, the list from which the sample is taken must be the same as the population that you want to study. The following is thus a requirement: “[a] sampling frame, then, must be consonant with the population we wish to study.”<sup>413</sup> For

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creating – rather than simply reflecting – law school quality.” Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools*, 40 *LAW & SOC’Y REV.* 105, 132 (2006); see also Michael Sauder & Wendy Nelson Espeland, *Strength in Numbers? The Advantages of Multiple Rankings*, 81 *IND. L.J.* 205, 214 (2006) (small statistically insignificant differences in factors are treated as statistically significant quality differences); Seay, *supra* note 198, at 59.

409. See *supra* note 407 and accompanying text.

410. See *Schools of Law*, *supra* note 13.

411. DON A. DILLMAN, JOLENE D. SMYTH, & LEAH MELANI CHRISTIAN, *INTERNET, MAIL, AND MIXED-MODE SURVEYS: THE TAILORED DESIGN METHOD* 43 (3d ed. 2009) (“Coverage error results from every unit in the survey population not having a known, nonzero chance of being included in the sample.” (emphasis omitted)).

412. BABBIE, *supra* note 373, at 208.

413. *Id.* at 209.

example, polls that randomly select respondents from sampling frames that are phone books or driver-license lists are viewed as defective. Phone books and license lists disproportionately exclude poor people who lack phones and cars.<sup>414</sup> Using an incorrect sampling frame differs from the failure to use probability sampling, which occurs when the researcher selects subjects from the sampling frame incorrectly.

The sampling frames for both the lawyers/judges survey and the peer assessment survey are defective. To choose the lawyers for its lawyers' survey, *U.S. News* should have obtained a sampling frame that included all lawyers in the United States, and then selected its sample of lawyers from this list. Instead, *U.S. News*' sampling frame included a list of 750 lawyers derived from *U.S. News*' own rankings of best law firms: a list of state attorneys general, and some list of state and federal judges.<sup>415</sup> It is impossible for us to be more precise in describing the sampling frame, because *U.S. News* does not publish the necessary information. It appears that at least one part of its sampling frame was heavily biased toward elite law firms and lawyers, excluding the majority of lawyers who are not members of elite firms.<sup>416</sup> *U.S. News* apparently abandoned sound survey principles in order to promote its rankings of best law firms.

Similarly, for its peer assessment survey, *U.S. News* should have created a sampling frame that included all faculty members at U.S. law schools, and then randomly selected its sample from that list. Instead, its sampling frame was heavily weighted toward deans and senior administrators.<sup>417</sup> Another careful study of the peer assessment survey confirms that its sample is biased: "a disproportionate number of men are likely to be surveyed and it is possible that of the four *U.S. News* surveys sent to each school, males that are 55-years-old or older may hold a disproportionate number of the positions surveyed."<sup>418</sup>

Both surveys thus suffer from substantial coverage error and resulting sampling bias. This flaw violates the most basic requirements of survey research.

The survey responses are also untrustworthy because *U.S. News* has chosen respondents who are subject to bias. The respondents are not neutral observers. Instead, they are likely to "have a horse in the race." For example, virtually all of the respondents graduated from, or work at, one of the schools that they are judging, and thus have an incentive to inflate the scores for their own schools, and to rate their competitor schools poorly.

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414. *Id.* at 210; SINGLETON, JR. & STRAITS, *supra* note 381, at 185.

415. *Methodology*, *supra* note 21.

416. In 2000, only fourteen per cent of lawyers worked in large firms. *See supra* note 396 and accompanying text.

417. *See Methodology*, *supra* note 21.

418. Seay, *supra* note 198, at 36.

Such strategic responses may be pervasive. A hint that this is the case is seen when observing the scores given to the top few law schools. Respondents are asked to rate all of the schools on a scale of one to five, with five being the highest. Because there are approximately 200 total schools, it would seem obvious that elite schools such as Yale, Harvard, Stanford, Columbia, and Chicago would be among the many schools that all respondents rate as five. However, each year, some respondents rate each of these schools lower than 5; none of these schools has ever received a perfect 5.0 rating from all respondents.<sup>419</sup>

Although such strategic voting is visible only at the top of the rankings, it may pervade other levels too. Just as faculty at Harvard may rate Yale a four, to try to dislodge it from its top *U.S. News* spot, faculty at a twenty-fifth-ranked school may strategically rate the twenty-fourth-ranked school a three, in order to harm the twenty-fourth-ranked school's ranking. Such bias corrupts the U.S. News survey.

#### D. Nonresponse Bias

The lawyers/judges survey is also invalidated by large nonresponse bias. The response rate was only 12%.<sup>420</sup> That is, of the lawyers and judges who received survey questionnaires from *U.S. News*, 88% did not fill them in and return them. As we will now see, this stunningly small response rate is inadequate to produce reliable results. Because the lawyers/judges survey is a heavily-weighted component of the overall rankings,<sup>421</sup> the nonresponse bias invalidates the overall rankings too.

Regardless of how well a sampling frame is structured and regardless of whether careful probability sampling is used to select a sample from the frame, a survey will be valid only if a large proportion of the people in the sample actually respond to the survey. If a substantial number fail to respond, then nonresponse bias invalidates the results; the researcher cannot know whether those who responded have different views than those who did not. As a leading textbook notes,

[t]he problem of nonresponse bias arises when, through refusals to cooperate, unreturned questionnaires, missing records, or some other means, the sample turns out to be a fraction of the number of cases originally selected for observation. *The crux of this problem is that nonobservations tend to differ in systematic ways from observations.* Thus, in surveys, mail surveys in particular, highly educated respondents are more likely to cooperate than poorly edu-

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419. *Id.*

420. See *Methodology*, *supra* note 21.

421. "The two most recent years lawyers' and judges' surveys were averaged and are weighted by 0.15." *Id.*



cated ones. *Also, those who feel most strongly about the topics or issues of a study are more likely to respond than those in the middle.*<sup>422</sup>

Or as another leading text notes, “a low response rate is a danger signal, because the nonrespondents are likely to differ from the respondents in ways other than just their willingness to participate in the survey.”<sup>423</sup> Another standard text confirms,

[n]onresponse error occurs when the people selected for the survey who do not respond are different from those who do respond in a way that is important to the study. For example, a survey of voting intentions for a presidential election would be rife with nonresponse error if Democrats were significantly less likely to respond than Republicans.<sup>424</sup>

Until recently, leading commentators indicated that even a modest level of nonresponse invalidated a survey’s results. In 2007, the previous edition of a leading text noted that “[a] review of the published social research literature suggests that a response rate of at least 50 percent is considered adequate for analysis and reporting. A response of 60 percent is good; a response rate of 70 percent is very good.”<sup>425</sup> Likewise, another leading text noted in 2005, “[t]herefore, it is very important to pay attention to response rates. For interview surveys, a response rate of 85 percent or more is quite good; . . . below 70 percent there is a serious chance of bias.”<sup>426</sup>

One scholar has now suggested that even some surveys with response rates that dip below these levels may sometimes still be useful if the researcher diligently evaluates whether nonresponse bias exists and then carefully corrects for it.<sup>427</sup> That is, if a response rate is low, then the researcher must first use sophisticated statistical methods to determine whether the nonresponders differ from those who responded. If they do, then the researcher must be diligent in repairing this bias statistically. Not surprisingly, a leading text notes that nonresponse bias “depends primarily on ‘how strongly correlated the survey variable of interest is with . . . the likelihood of responding.’

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422. SINGLETON, JR. & STRAITS, *supra* note 381, at 185 (emphasis added).

423. BABBIE, *supra* note 373, at 272.

424. DILLMAN, SMYTH & CHRISTIAN, *supra* note 411, at 17.

425. EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 262 (11th ed. 2007). Other citations in this paper are to the twelfth edition, from 2010. See BABBIE, *supra* note 373.

426. ROYCE A. SINGLETON, JR., & BRUCE C. STRAITS, *APPROACHES TO SOCIAL RESEARCH* 145 (4th ed. 2005). Other citations in this paper are to the fifth edition. See SINGLETON, JR. & STRAITS, *supra* note 381.

427. See Robert M. Groves, *Nonresponse Rates and Nonresponse Bias in Household Surveys*, 70 *PUB. OPINION Q.* 646, 668-69 (2006).

*This makes it incumbent on the survey researcher to consider variables that might be related to responding and to seek data that can be used to estimate and reduce nonresponse effects.*<sup>428</sup> Identifying and correcting for possible nonresponse requires persistence. “As response rates decline, researchers face a growing obligation to mount nonresponse bias studies in order to inform the evaluation of survey estimates. Because of the diverse properties of the techniques above, it is wise to study nonresponse biases using multiple methods simultaneously.”<sup>429</sup> As another leading text notes, “it’s important to test for nonresponse bias wherever possible.”<sup>430</sup>

The federal government’s requirements for all federally sponsored surveys mirror this analysis. In any survey that the U.S. government supports financially, the researchers must undertake “nonresponse bias analysis” whenever the response rate is below 70%.<sup>431</sup> Moreover, the government recognizes that, if the response rate falls too far, then no amount of corrective analysis can rescue the study. Accordingly, “overall response rates less than 60% are generally considered unacceptable.”<sup>432</sup>

Buried deep in its methodology, *U.S. News* concedes that the response rate for its lawyers/judges survey was only 12%.<sup>433</sup> This response rate is far below the minimum standards for reliability. This tiny response rate may be sufficient to invalidate the study by itself, regardless of any analysis that competent researchers would have done to investigate nonresponse bias. For example, the 12% rate is far below the recommended 50% or 60% minima suggested above. And, if the U.S. government had sponsored the study, the low response rate would have been below the 60% minimum, and would have caused the study to be rejected.

It does not appear that *U.S. News* has conducted any of the statistical procedures that these norms require for any study with a response rate below 70% – much less below 15%. We have found no evidence that it conducted the diagnostic analysis and corrective measures that can sometimes rescue a study with more moderate levels of nonresponse, such as a nonresponse bias analysis designed to determine whether bias exists. Such analysis would be required for U.S. sponsored studies. We can reasonably infer that if *U.S. News* failed even to attempt to identify whether response bias existed, it took no measures to correct any bias that was discovered.

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428. SINGLETON, JR. & STRAITS, *supra* note 381, at 185 (alteration in original) (emphasis added) (quoting Groves, *supra* note 428)).

429. Groves, *supra* note 427, at 657.

430. BABBIE, *supra* note 373, at 273.

431. OFFICE OF MGMT. & BUDGET, STANDARDS AND GUIDELINES FOR STATISTICAL SURVEYS 8 (2006) [hereinafter OMB, STANDARDS AND GUIDELINES], available at [http://www.whitehouse.gov/sites/default/files/omb/inforeg/statpolicy/standards\\_stat\\_surveys.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/statpolicy/standards_stat_surveys.pdf), cited in DILLMAN, SMYTH & CHRISTIAN, *supra* note 411, at 382.

432. DILLMAN, SMYTH & CHRISTIAN, *supra* note 411, at 383 (citing OMB, STANDARDS AND GUIDELINES, *supra* note 432).

433. *Methodology*, *supra* note 21.

Observance of such normal professional standards would have required *U.S. News* to discard the lawyer/judges survey. Instead, *U.S. News* not only published the survey results, but also based 15% of its overall rankings on the survey.<sup>434</sup> Because the measures for the schools in the overall rankings are so closely packed, the large errors potentially introduced by the lawyers/judges survey cause the overall rankings to be unreliable too.<sup>435</sup> Nowhere does *U.S. News* reveal to consumers that such a low response rate creates dangers of unreliability. Instead, *U.S. News* has marketed its rankings to unsuspecting consumers, urging them to rely on the rankings when making life-changing decisions.

Although the response rate for *U.S. News*' peer-assessment survey is somewhat higher, the magazine's use of the survey still fails to comply with basic statistical requirements. The response rate of "about 63 percent"<sup>436</sup> is minimally acceptable, but low enough to raise serious concerns. As noted earlier, if this survey were funded by the federal government, a response rate as low as 63% would require *U.S. News* to conduct a "nonresponse bias analysis."<sup>437</sup>

Again, we have seen no evidence that *U.S. News* conducted any analysis to test for nonresponse bias or to correct for it, as would be required for any government-funded survey with a nonresponse rate below 70%.<sup>438</sup> Thus, we cannot know whether the 37% of the sample that failed to respond was randomly distributed among the three groups of faculty administrators and one group of junior faculty. Of course, it is possible that the nonresponse was instead concentrated in senior faculty or junior faculty, or among faculty from lower-ranked schools. The pattern of nonresponses may have biased the results substantially. Corrective measures might have been able to cure any biases. However, *U.S. News* apparently failed both to test for bias and to correct for it; its methodology mentions no such efforts.

Complicating the matter and further demonstrating the problem of non-response bias, many glaring flaws also infect the "Best Law Firms" survey. This survey is relevant to the *U.S. News* law-school rankings, because *U.S. News* used the law-firms survey to choose its sample for the lawyers/judges survey.<sup>439</sup> If the Best Lawyers survey is flawed, then so too is the lawyers/judges survey on which it is based. And if the lawyers/judges survey is flawed, then so too is the overall law school rankings, of which the lawyers/judges survey is a major component.

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434. *Id.*

435. For an explanation of how even small changes in the survey results can cause large swings in the overall rankings, see *supra* notes 103-05 and accompanying text.

436. *Methodology*, *supra* note 21.

437. See OMB, STANDARDS AND GUIDELINES, *supra* note 432, at 8.

438. See *id.*

439. *Methodology*, *supra* note 21.

To create its Best Law Firms ranking, *U.S. News* used two surveys. First, it created a “sample” of 43,900 lawyers in some unspecified way;<sup>440</sup> this is a tiny 3.5% fraction of the more than 1,225,452 lawyers in the United States in 2011.<sup>441</sup> The sample was not representative of all lawyers. Instead, *U.S. News* indicates only that the sample included all of the lawyers that it had identified as “[b]est [l]awyers.”<sup>442</sup> These are almost certainly skewed toward elite lawyers – highly-paid lawyers in big firms.<sup>443</sup> It seems to include neither average lawyers nor not-so-good lawyers. There is no indication that this 3.5% sample is at all a probability sample of all lawyers.

After *U.S. News* sent the survey instrument to the 43,900 lawyers, *U.S. News* received responses from only 8842 lawyers, an abysmal 20% response rate.<sup>444</sup> There is no explanation of the pattern of nonresponse. Were the respondents elite lawyers? Low-level lawyers? Men? Women? Caucasian? Minority group members? In sum, we have a biased sample, a stunningly low response rate, with no assurance that the responders were typical even of the biased sample.

The second survey that *U.S. News* conducted in order to create its Best Law Firms ranking was even less consistent with professional standards. And again, it flaws infected the law school survey because it was used to create the sample for the lawyers/judges survey. The second survey was a survey of clients. *U.S. News* somehow – it does not explain how – created a list of 52,480 clients and sent them surveys.<sup>445</sup> This is a tiny fraction of the total number of clients in the United States, and would seem unlikely to constitute a representative sample of all law firm clients – perhaps not even of the clients of large, elite law firms.

The response rate was even worse than for the survey of lawyers: 9514, or 18%.<sup>446</sup> It seems that the responses were heavily slanted to large companies. The methodology says that the responses included “every Fortune 100 company and 587 of the Fortune 1000 companies.”<sup>447</sup> Again, *U.S. News* conducted no nonresponse bias analysis.

The flaws in the Best Law Firms ranking directly contaminate the law-school rankings. The Best Law Firms ranking was used to create the sample

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440. U.S. NEWS & WORLD REPORT AND BEST LAWYERS, METHODOLOGY FOR U.S. NEWS – BEST LAWYERS “BEST LAW FIRMS” RANKINGS (2010) [hereinafter BEST LAW FIRMS], available at [www.sseg-law.com/dloads/USNewsRankings.pdf](http://www.sseg-law.com/dloads/USNewsRankings.pdf).

441. See *supra* note 390.

442. BEST LAW FIRMS, *supra* note 440.

443. See *id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

for the lawyers/judges survey, which in turn made up a large part of the overall law-school rankings.<sup>448</sup>

*U.S. News* may have recognized some of the flaws in its fall 2010 lawyers/judges survey. Buried deep in the discussion of its methodology, the magazine notes: “[t]he two most recent years lawyers’ and judges’ surveys were averaged and are weighted by .15.”<sup>449</sup> *U.S. News* does not explain why it averaged the results for two years for this survey. It may be, for example, that the results produced by the lawyers/judges survey were so inconsistent and variable from year to year that reporting them would have revealed the defects. If that is the case, then reporting an ad hoc moving average of the current and previous year’s ratings for each school would permit the magazine to avoid reporting the large variations from year to year, making the values seem more consistent from year to year. There could be other explanations, but, *U.S. News* has withheld that information.

Using a two-year moving average in this way would be misleading and would conflict with the magazine’s claims about the currency of its data. In its marketing and promotional materials, for example, *U.S. News* indicates that its rankings are for the current year.<sup>450</sup> Such an indication is not true because of the use of a moving average. Although most of the information that makes up the rankings is from the current year, 7.5 % of it is from the previous year.<sup>451</sup> The lawyers/judges survey is weighted as 15% in the overall rankings, and half it is from the previous year.<sup>452</sup>

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448. The Best Law Schools and the Best Law Firms surveys share characteristics that demonstrate *U.S. News*’ flawed, misleading approach to survey research. Both exhibit serious methodological defects, but *U.S. News* marketed both as reliable information. Indeed, in the Best Law Firms methodology, *U.S. News* indicated that the eighteen per cent response rate for its lawyers survey was excellent, rather than unacceptable: “The level of response from this vast group exceeded our most optimistic expectations[.]” *Id.* *U.S. News* failed to indicate that the number of responses is irrelevant if the sample from which they come is biased. *See id.* As a leading textbook notes, “Never be fooled by the number of responses . . . . Even if 500,000 calls are tallied, no one has any real knowledge of what the results mean. If big numbers impress you, remember that the Literary Digest’s non-scientific sample of 12,000,000 people said Landon would beat Roosevelt.” BABBIE, *supra* note 373, at A28 (quoting SHELDON R. GAWISER & G. EVANS WITT, TWENTY QUESTIONS A JOURNALIST SHOULD ASK ABOUT POLL RESULTS).

449. *Methodology*, *supra* note 21.

450. *Compare Top Law Schools*, U.S. NEWS & WORLD REPORT (advertising “2013 Best Law Schools”), <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools>, with *Best Law Schools*, U.S. NEWS & WORLD REPORT (stating that the schools were “[r]anked in 2012”), <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings>.

451. *Methodology*, *supra* note 21.

452. *Id.*

The moving average makes the survey even less accurate than it would otherwise be. For example, suppose that lawyers' perceptions of a law school improved markedly from the previous year to this year. The current year's overall rankings would not fully reflect the school's improvements. Half of the lawyers/judges rating would be based on the previous year's lower perceptions. The moving average created a façade of consistency and reliability that, while concealing the survey's unreliability, actually caused the survey to become less accurate. *U.S. News* sacrificed actual accuracy in order to create a false appearance of accuracy. This is unacceptable.

### *E. Missing Values*

The actual response rate for evaluations of many individual schools was substantially smaller than the overall 12% and 63% response rates for the two surveys.<sup>453</sup> In its methodology, *U.S. News* indicates that even in the questionnaires that were returned, the respondents indicated "don't know" about a substantial number of schools.<sup>454</sup> In calculating each school's rating, *U.S. News* then disregarded these missing values.<sup>455</sup> This means that, although 12% of judges and lawyers returned their questionnaires, the response rate for any given school was substantially lower than even that small fraction. The response rate was probably especially low for schools in the lower part of the rankings; it is possible, if not probable, that many respondents knew little about lower-tier law schools outside the respondent's home state. For example, few outside Georgia would know much about John Marshall Law School.

Perhaps 20% of those who returned questionnaires indicated "don't know" about some lower-tier schools. Perhaps 80% did. We cannot know which it is, because *U.S. News* fails to divulge the fraction of "don't know" missing values. *U.S. News*' failure to provide this basic information may merely be a negligent mistake. Or perhaps it is an attempt to conceal an inadequate number of responses for many schools. Regardless, it is possible that the ratings for many schools have been determined by a tiny, biased sample of a handful of people.

Moreover, *U.S. News* did not indicate that it conducted any of the standard statistical tests and corrections that are appropriate for dealing with missing values.<sup>456</sup> Even introductory undergraduate textbooks suggest meas-

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453. *Methodology*, *supra* note 21.

454. *See id.*

455. *See id.*

456. *Id.*; *see, e.g.*, BABBIE, *supra* note 373, at 171-73 (discussing methods for addressing missing values); SINGLETON, JR. & STRAITS, *supra* note 381, at 516 (same).

ures for dealing with this serious statistical problem.<sup>457</sup> *U.S. News* did none of it.<sup>458</sup>

### F. Inadequate or Unknown Sample Size

Even if *U.S. News* had done everything else right – used probability sampling and an appropriate sampling frame, and had avoided nonresponse bias – the survey still would have been fatally imprecise because the sample size for one of its surveys is unspecified, but appears to be tiny, and the other is larger, but still inadequate. Even in a survey that is correctly conducted, the survey’s precision depends upon the number of responses. If the sample is small, then the survey will be imprecise. Only if the sample is large, will the survey yield precise, reliable results.<sup>459</sup> Even if the researcher does everything else correctly, a sample size of at least 400 is necessary to produce accuracy of plus or minus 5%: “if you want to be 95 percent confident that your study findings are accurate within plus or minus 5 percentage points of the population parameters, you should select a sample of at least 400.”<sup>460</sup>

Because there are so many law schools and they are so tightly grouped, much greater precision would be necessary for the *U.S. News* survey. With precision of only plus or minus 5%, scores of law schools would be statistically indistinguishable. To obtain greater precision, plus or minus 2.5%, a sample of 1600 would be necessary.<sup>461</sup> This is why the government uses large samples – 50,000 or more – in surveys where much is at stake and high precision is necessary.<sup>462</sup> In political polls, where the researcher is attempting to rank several candidates’ popularity, sample sizes of at least 1000 are normal.<sup>463</sup>

*U.S. News* has failed to provide adequate information about sample size for both its lawyer/judges survey and its peer assessment survey.<sup>464</sup> The methodology indicates only that various lawyers, judges, and faculty were contacted, but not precisely how many of each.<sup>465</sup> The absence of this information prevents understanding of the level of accuracy of the survey’s results. Even if the survey did not suffer from the other defects already discussed, the

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457. See *supra* note 456.

458. For a related discussion of *U.S. News*’ failure to deal with missing values appropriately, see Tom W. Bell, *Whence Come the Median LSATs and GPAs Used in the Rankings?*, AGORAPHILIA (May 28, 2006), <http://agoraphilia.blogspot.com/2006/05/whence-come-median-lsats-and-gpas-used.html>.

459. BABBIE, *supra* note 381, at 206.

460. *Id.* at 207; see also DILLMAN, SMYTH & CHRISTIAN, *supra* note 411, at 55-60; SINGLETON, JR. & STRAITS, *supra* note 381, at 181-83.

461. BABBIE, *supra* note 373, at A27.

462. SINGLETON, JR. & STRAITS, *supra* note 381, at 183.

463. Saad, *supra* note 373.

464. See *supra* note 372 and accompanying text.

465. See *Methodology*, *supra* note 21.

absence of information on sample size would prevent confirmation that *U.S. News* can legitimately claim that a school that it ranks ahead of another really is statistically different from the second school.

The hints from the *U.S. News*' Methodology on sample size are not reassuring. The only specific information on sample size is for part of the lawyer/judge survey; there is no specific information about the sample size for the peer assessment survey, and there is nothing specific about the sample size for the judge component of the lawyer/judges survey.<sup>466</sup> As for the lawyer component of the lawyer/judges survey, the Methodology indicates that *U.S. News* "surveyed 750 hiring partners and recruiters at law firms who made the 2011 Best Law Firms rankings produced jointly by *U.S. News* and the publication *Best Lawyers*. Their ratings are included in the lawyer and judge survey score. About 12 percent of those lawyers and judges surveyed responded."<sup>467</sup> This tells us little, other than the extremely low response rate.

Beyond that, it is impossible to know what really comprised the sample. Assume for example, that the only lawyers surveyed were 750 hiring partners at elite firms and all 50 of the states' attorneys general. If that were the full sample surveyed, then it would seem that only 112 lawyers – 14% of 800 – responded to the survey. Even absent the survey's other defects, a sample size of 112 would permit only imprecise conclusions, with estimates accurate only to within plus or minus 10%.<sup>468</sup> It could be that *U.S. News* may have relied on a mere 112 people, not selected randomly, to estimate the preferences of the country's more than one million lawyers. That number is grossly insufficient to create valid estimates with the necessary precision. Is that what happened? We cannot know until *U.S. News* publishes this important information.

Because of the problem of missing values, the number of people who evaluated any given school was probably much lower. Moreover, because substantial numbers of the respondents may have indicated "don't know" about various schools,<sup>469</sup> some schools may have been evaluated by only a handful of people.

Although *U.S. News* does not provide enough information to evaluate conclusively the sample size for the peer assessment survey, this sample size also appears to be inadequate. Although the methodology is not entirely clear, it seems to suggest that peer assessment surveys were sent to 4 people at each of the 190 law schools, for a total of 760 surveys.<sup>470</sup> *U.S. News* then

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466. See *id.* *U.S. News* indicated that, for its lawyer/judges survey, it also contacted some state attorneys general. *Id.* However, *U.S. News* nowhere indicates how many it contacted nor how many, if any, responded. See *id.*; see also Seay, *supra* note 198, at 34 (noting small sample size for lawyers/judges survey).

467. See *Methodology*, *supra* note 21.

468. BABBIE, *supra* note 373, at A27.

469. See *supra* note 454 and accompanying text.

470. See *Methodology*, *supra* note 21.



indicates that “[a]bout 63 percent of those surveyed responded”<sup>471</sup> for a total of 479.

Although greater than the possible total of 112 responding lawyers, the 479 responses for the peer assessment survey are far fewer than the more than 1000 that would be needed to achieve anything even approaching the required precision. Moreover, because it is likely that at least some of the 501 answered “don’t know” for some of the schools, the sample size for these schools could have been even lower than 479.

### G. Methodological Flaws and Material Inaccuracies

The statistical concerns that this Article has noted are not merely hyper-technicalities around the edges of a basically sound survey. Instead, the flaws cause both the surveys and the overall rankings of which they are the largest part to be materially inaccurate and unreliable. The flaws may cause many of the rankings to be off by five, ten, or even more positions. This is seen by examining how less-egregious flaws have caused other surveys to be grossly inaccurate.

Surveys of political opinion are the main area where survey researchers can check their work. The eventual election will reveal whether an earlier survey of political opinion was accurate; the election will expose the accuracy of the survey’s prediction that a candidate would win by a certain amount.

This ability to verify is unlike the *U.S. News* surveys. Any mistakes in the *U.S. News* rankings remain hidden. If a properly conducted survey would have ranked a school twentieth, but the flawed *U.S. News* survey instead ranked it thirty-fifth, nobody will know. There is no eventual election that would allow us to see whether the great mass of judges, lawyers, and law professors really rank schools in the order that *U.S. News* predicts that they do.

A review of various political surveys shows how surveys that comply with the basic rules of survey research are accurate. For example, after examining seventeen polls that were conducted shortly before the 2004 presidential election, a leading textbook noted, “[d]espite some variations, the overall picture they present is amazingly consistent and was played out in the election results.”<sup>472</sup>

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471. *Id.*

472. BABBIE, *supra* note 373, at 188. Likewise, another leading text notes, “The characteristics of millions of people can be estimated with confidence, then as well as now, by collecting information from only a few hundred or thousand respondents selected randomly from carefully defined populations. To estimate within 5 percentage points the preferences of 100 million U.S. voters, one needs only to survey 400 randomly selected voters. Or, if one wants greater precision, for example 3 percentage points, about 1,150 voters need to be surveyed, as is commonly done for predicting the outcomes of national elections.” DILLMAN, SMYTH & CHRISTIAN, *supra* note 411, at 1.

In contrast, even relatively modest flaws can cause pre-election surveys to be grotesquely inaccurate. For example, in the 1920s and 1930s, *Literary Digest*, a popular newsmagazine, increased its circulation by conducting surveys – much like *U.S. News* has done.<sup>473</sup> Like *U.S. News*, it was well known for its polls on public issues and enjoyed considerable prestige.<sup>474</sup> In 1936, it conducted a survey to attempt to predict the outcome of the presidential contest between Alf Landon and Franklin Roosevelt.<sup>475</sup> The magazine obtained a huge sample size of millions of respondents.<sup>476</sup> However, the survey had several flaws that resemble the flaws in the *U.S. News* survey. Like the *U.S. News* survey, the response rate was low. It was 24%, which, although higher than the 12% response rate for the *U.S. News* lawyers/judges survey, was still stunningly low.<sup>477</sup> Like *U.S. News*, the magazine did nothing to correct for nonresponse bias.<sup>478</sup> Likewise, like the *U.S. News* survey, the sampling frame for the election survey was defective: the magazine selected its sample from telephone books and driver's license lists, biasing the sample away from the poor and toward people who could afford phones and cars.<sup>479</sup>

These defects caused the results of the survey to be shockingly wrong. The survey predicted that Landon would upset Roosevelt by a 57 to 43 percent landslide.<sup>480</sup> Instead, just the opposite occurred. Roosevelt, not Landon, won by a landslide, 61% to 39%.<sup>481</sup>

Likewise, in 1948, the three major survey organizations, including Gallup and Roper, all predicted that, in the presidential election, Dewey would defeat Truman with 50% or more of the popular vote.<sup>482</sup> However, the sampling frames that the organizations used were biased, including more Republicans and rural people than were present in the general population.<sup>483</sup> The surveys' flaws, which were much more minor than those in the *U.S. News* surveys, caused the surveys to go awry. Instead of Dewey winning as the surveys had predicted, Truman won, with Dewey receiving only 45% of the vote.<sup>484</sup> A famous picture shows Truman holding aloft a newspaper

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473. See SINGLETON, JR. & STRAITS, *supra* note 381, at 153.

474. *Id.*

475. *Id.*

476. *Id.*

477. *Id.*

478. *Id.*

479. *Id.*; see *supra* notes 413-14 and accompanying text.

480. BABBIE, *supra* note 373, at 190.

481. *Id.*

482. SINGLETON, JR. & STRAITS, *supra* note 381, at 153; see also BABBIE, *supra* note 373, at 190-91, 194.

483. SINGLETON, JR. & STRAITS, *supra* note 381, at 153-54; see also BABBIE, *supra* note 373, at 190-91.

484. SINGLETON, JR. & STRAITS, *supra* note 381, at 153.

whose headline, based on the surveys' predictions, indicated that Dewey had won.<sup>485</sup>

Because the pervasive flaws in the *U.S. News* surveys are much larger than the flaws in the Landon and Dewey surveys, the errors in the results of the *U.S. News* surveys are undoubtedly also much larger. Just as the results in the Landon and Dewey surveys were wrong, it is likely that the even greater flaws in the *U.S. News* surveys invalidate their results. We have seen how even modest changes in a school's nine-month employment statistics can cause changes in its overall ranking of more than ten places.<sup>486</sup> However, the overall rankings weight the nine-month employment statistic only 14%, compared to 40% for the two surveys discussed here.<sup>487</sup> We can only imagine how much more the inaccuracies in the surveys have distorted the overall rankings – perhaps by ten, twenty, thirty places or more.

This inaccuracy is a tragedy because the *U.S. News*' survey's flaws harm countless innocent people and organizations. *U.S. News* has invited students, faculty, the law schools themselves, and many other groups, to rely on the surveys in making important decisions.<sup>488</sup> The surveys, and rankings on which they are based, may have induced some students and faculty to pick the wrong law schools, and may have helped some law schools thrive by gaining unfair advantages over their competitors, while others may have declined or even failed.

The discussion earlier in this Article of federal crimes, including mail and wire fraud, conspiracy, and racketeering, need not be repeated here. Whether the creation, use, and marketing of the survey methodology discussed in Part IV could trigger liability under any of those statutes is a question we cannot answer here. But an examination of the flaws in the survey methodology, the deviations from normal professional practices, and the marketing of the results suggest that this is a question that should be asked.

## V. CONCLUSION

*“Beanbag. A small bag filled with beans, used esp. in children’s games.”*<sup>489</sup> *“Law school rankings ‘ain’t beanbag.”*<sup>490</sup>

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485. BABBIE, *supra* note 373, at 191.

486. *See supra* notes 110-15 and accompanying text.

487. *Methodology*, *supra* note 21.

488. *See supra* note 159 and accompanying text.

489. SHORTER OXFORD ENGLISH DICTIONARY (6th ed. 2007).

490. This phrase is adapted from Finley Peter Dunne's classic comparison of politics and a children's game. *See* FINLEY PETER DUNNE, MR. DOOLEY: IN PEACE AND WAR xiii (1898) (“‘Politics,’ he says, ‘ain’t bean bag. ‘Tis a man’s game; an’ women, childher, an’ pro-hybitionists’d do well to keep out iv it.”).

For years many law schools have approached the *U.S. News* rankings as if they were a game whose rules could be manipulated to gain an advantage over competitor institutions. When discussing schemes designed to improve a school's rank by manipulating the rules or data or both, one of the most commonly used words is *game*.<sup>491</sup> Some deans and professors say they are simply trying to *game* the *U.S. News* rankings when they deploy schemes to produce false, misleading, or partial data in an effort to improve their school's position in the rankings. We hope that the analysis in this Article helps people in the legal education industry recognize that competing for higher rankings is serious business, as serious as a federal prison.

Decades of complaints lodged from within and from outside of the legal education world have failed to halt deceptive manipulation of data by schools. Decades of complaints about the flaws in the *U.S. News* rankings methodology have failed to induce the magazine to correct many of the most serious flaws in its ranking formulas. For decades, prospective law students have been deceived into thinking that the *U.S. News* rankings are valid, and that the data supplied by the schools can be trusted. For decades, none of the participants seem to have realized that their conduct might be criminal.

Law schools, their deans, *U.S. News*, and its employees may have committed felonies by publishing false information as part of *U.S. News*' ranking of law schools.<sup>492</sup> The possible federal felonies include mail and wire fraud, conspiracy, racketeering, and making false statements. If any employees of law schools and *U.S. News* committed these crimes, they can be punished as individuals. Further, under federal law, the schools and *U.S. News* would likely be criminally liable for their agents' crimes.

Like the law schools, it is possible that *U.S. News* may have committed acts of mail and wire fraud under federal law. Despite being aware that at least some schools were submitting false and misleading data, the magazine has continued to sell that data, and rankings based upon that data, without verifying the data's accuracy. Even when schools have openly confessed to submitting false information, *U.S. News*, until drafts of this Article first appeared, refused to correct these known defects in its rankings and continued to sell the invalid data. Moreover, the fundamental invalidity of the surveys that make up 40% of the *U.S. News* overall rankings may itself create criminal liability.

It could be that none of these acts are crimes. However, the evidence of possible crimes is sufficiently compelling, the relevant federal statutes have been applied so expansively, and the harm done for many years to thousands of people has been so severe, that investigations by federal authorities to determine whether crimes have been committed is clearly warranted. This is not a game.

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491. See *supra* notes 142-48 and accompanying text.

492. See *supra* Part III.