THE RELIABILITY OF CITATION COUNTS IN JUDGMENTS ON PROMOTION, TENURE, AND STATUS

Experience has shown, and a true philosophy will always show, that a vast, perhaps the larger, portion of the truth arises from the seemingly irrelevant. —Edgar Allan Poe *

Arthur Austin**

I. INTRODUCTION

Scholarship is the door to promotion, tenure, and salary increases.[1] The difficulty of making qualitative judgments on scholarship makes passage through the door unpredictable.[2] Evaluations are becoming even more problematical with the appearance of new forms of writing such as storytelling[3] and ideological advocacy.[4] In close cases, when evaluators need something to tip the balance, they look to the "margins" of the scholarship game. The most accessible factor from the margin is the citation: all the evaluator has to do is count how often and where the candidate's scholarship has been cited.[5]

II. EXPERIENCE FROM THE SCIENCES

Cite counts are an accepted way of life in the sciences.[6] It is considered a

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* EDGAR ALLEN POE, *The Mystery of Marie Rogêt*, *in* THE UNABRIDGED EDGAR ALLEN POE 781, 781-82 (Tam Mossman ed., 1983).

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1. "Whatever the reason, it seems clear that demonstrated achievement in scholarship as a requirement for tenure is becoming more significant and widespread." Elyce H. Zenoff & Lizabeth A. Moody, *Law Faculty Attrition: Are We Doing Something Wrong?*, 36 J. LEGAL EDUC. 209, 221 (1986).

2. *See* Stephen L. Carter, *Academic Tenure and "White Male" Standards: Some Lessons from Patent Law*, 100 YALE L.J. 2065 (1991);Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113 (1981).

3. *See* Kim L. Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989).

4. The advocacy style is favored by the crits. *See, e.g.*, Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).

5. A citation index counts the frequency that an article is cited. "It is constructed by a purely clerical and computer process, whereby all reference lists for a selected set of journals are fed in, sorted out, and then reversed, so to speak, so that each cited article is listed by first author, subsuming all citing articles." Janet B. Bavelas, *The Social Psychology of Citations*, 19 CANADIAN PSYCHOL. REV. 158, 158 (1978). "Citations are signposts left behind after information has been utilized and as such provide data by which one may build pictures of user behavior without ever confronting the user himself." Linda C. Smith, *Citation Analysis*, 30 LIB. TRENDS 83, 85 (1981).

6. "[Indexing] is being used to do such things as evaluate the research role of individual

reliable way to gauge the influence of an article or an author.[7] "It has been proposed that the *Citation Indices* offer a more thorough and, more important, more objective means of assessing scholarly impact than by consensus."[8] Scientists know that an impressive cite count improves the chance of getting grants. "[C]itations are like home runs, citation rates like batting averages."[9]

Nevertheless, cite counts are not universally endorsed. Thorne calls them a "shell game." "One of the most amazing pseudoscientific popularity contests has surfaced in the form of citation indices, which are supposed to yield estimates of the validity and enduring worth of scientific contributions."[10] Among the manipulative ploys, he identifies "[h]at-tipping citations" (citing prominent people "to gain respectability by association"),[11] "[o]ver-detailed citations" (citing everything, no matter how trivial), and "[c]onspiratorial cross-referencing"[12] (citing a friend's research).

There are even other more questionable motives: citing only recent works to "show how up-to-date they are ...;"[13] or citing the article "because it happened to be on the citer's desk rather than because it was the ideal paper ...."[14] "How often," Kaplan asks, "are the works of others cited without having been read carefully?"[15] "How often are citations tacked on after the paper is completed as an afterthought and window dressing?"[16] And, of course, there is always the last refuge for the uncited: cite yourself.[17]

Even peer review, which should impose discipline on citation usage by compelling authors to delete irrelevant or obviously political cites, may be less effective than assumed.[18] Some editors will defer to the writers' preferences,

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journals, scientists, organizations, and communities; define the relationship between journals and between journals and fields of study; measure the impact of current research; provide early warnings of important, new interdisciplinary relationships; spot fields of study whose rate of progress suddenly begins accelerating; and define the sequence of developments that led to major scientific advances." Eugene Garfield, CITATION INDEXING: ITS THEORY AND APPLICATION IN SCIENCE, TECHNOLOGY, AND HUMANITIES 62 (1979).

7. "The value of a scientific paper can be measured by the influence it has on others, and citation indexing provides, as a by-product, a measure of the impact of articles, authors, and journals." J. Margolis, *Citation Indexing and Evaluation of Scientific Papers,* 155 SCIENCE 1213, 1214 (1967).

8. Bavelas, *supra* note 5, at 159. *See* Nancy L. Geller, et al., *Lifetime-Citation Rates to Compare Scientists' Work,* 7 SOC. SCI. RES. 345 (1978).

9. Jon Wiener, *In the Magazines Footnote—or Perish,* 21 DISSENT 588, 589 (1974).

10. Frederick C. Thorne, *The Citation Index: Another Case of Spurious Validity,* 33 J. CLINICAL PSYCHOL. 1157, 1157 (1977).

11. *Id.* at 1159.

12. *Id.* at 1160.

13. Terrence A. Brooks, *Evidence of Complex Citer Motivations,* 37 J. AM. SOC'Y FOR INFO. SCI. 34, 35 (1986).

14. Smith, *supra* note 5, at 88.

15. Norman Kaplan, *The Norms of Citation Behavior: Prolegomena to the Footnote,* 16 AM. DOCUMENTATION 179, 181 (1965). "Nevertheless, the data give some indication that almost one-half of all sources cited were used by authors in a peripheral manner." Chandra G. Prabha, *Some Aspects of Citation Behavior: A Pilot Study in Business Administration,* 34 J. AM. SOC'Y FOR INFO. SCI. 202, 203 (1983).

16. Kaplan, *supra* note 15, at 181. *See* Robert N. Broadus, *An Investigation of the Validity of Bibliographic Citations,* 34 J. AM. SOC'Y FOR INFO. SCI. 132 (1983).

17. "From the viewpoint of the citation indexers, this is perfectly kosher; for all the computer knows, another person with your name is citing you." Wiener, *supra* note 9, at 590.

18. "The idea that journals and referees will prevent such [citation count] abuses is no more realistic than the notion that they do so now." Kenneth O. May, *Letter,* 156 SCIENCE 890 (1967).

especially if the subject is adequately covered with the mainstream citations. Moreover, referees often have their own biases and motives,[19] and thus may exploit their influence to set a cite agenda for authors.

Professor Janet Bavelas raises the ultimate question—so what? What does a cite count actually prove? "The single most glaring omission in discussion of citation counts is the failure to define carefully 'scholarly impact' and to make a strong case for the measurement of this concept by this method, that is, to connect idea and data convincingly."[20]

III. LEGAL SCHOLARSHIP

Analysis of cite counts in legal scholarship has focused on the most cited authors[21] and law journals.[22] Implicit in these studies is a growing interest in the use and influence of citations.[23] None of these profiles are as advanced as those in the sciences. They do not, for example, address the appropriate criteria for use of cite counts in decisions on promotion and status. Likewise, they ignore the unique problems posed by legal scholarship that are not encountered in the sciences. This Article seeks to fill these gaps.

The most unusual characteristic of legal scholarly publishing is the near total absence of peer review.[24] Under peer review, the decision to publish is made with the advice and critique of "referees," who are anonymous to the author.[25] The second difference is the number of journals—a list that grows yearly.[26] These two factors have produced a ripple effect of citation idiosyn-

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19. Which may be less than laudable. "Often the basic requirement is publication in a 'refereed' journal, even though, at their worst, such journals can be like an old boys' clique, taking care of each other's career in a narrowly defined specialty, and (like some Ph.D. committees) encouraging insiders' careers while knowingly blocking those of outsiders." Harley L. Sachs, *The Publication Requirement Should Not Be Based Solely On 'Refereed' Journals,* Chron. of Higher Ed., Oct. 19, 1988, at B2. For a study that confirms the bias of refereed journals see Michael J. Mahoney, *Publication Prejudices: An Experimental Study of Confirmatory Bias In The Peer Review System,* 1 COGNITIVE THERAPY & RESEARCH 161 (1977).

20. Bavelas, *supra* note 5, at 162–63.

21. Fred R. Shapiro, *The Most-Cited Law Review Articles,* 73 CAL. L. REV. 1540 (1985). *See also* Ira M. Ellman, *A Comparison of Law Faculty Production in Leading Law Reviews,* 33 J. LEGAL EDUC. 681 (1983); Fred R. Shapiro, *The Most-Cited Articles from The Yale Law Journal,* 100 YALE L.J. 1449 (1991).

22. Richard A. Mann, *The Use of Legal Periodicals By Courts and Journals,* 26 JURIMETRICS J. 400 (1986); Louis Sirico & Jeffrey Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study,* 34 UCLA L. REV. 131 (1986); Edd D. Wheeler, *The Bottom Lines: Fifty Years of Legal Footnoting in Review,* 72 LAW LIBR. J. 245 (1979).

23. The historical origin of indexing can be traced to law. In 1873, Frank Shephard initiated a system that made it possible to trace the citation history of Illinois decisions. Shapiro, *The Most-Cited Law Review Articles, supra* note 21, at 1540. *See also* articles collected in Shapiro, *The Most-Cited Articles from The Yale Law Journal, supra* note 21, at 1456 n.41.

24. Arthur D. Austin, *The "Custom of Vetting" as a Substitute for Peer Review,* 32 ARIZ. L. REV. 1 (1990).

25. This is a sharp contrast to law: "There is no peer review or even blind refereeing. Hence, faculty members often fail to obtain qualified, objective criticism of their ideas." Syllabus, Susan K. Boyd, *Speakers' Opinions on Legal Scholarship Vary,* Vol. 20, No. 2, June 1989, at 3.

26. *See* Mike Antoline, *The New Law Reviews—a burst of specialty alternatives,* STUDENT LAW., May 1989, at 26; Jennifer A. Kingson, *Legal Publications: A New Growth Industry,* N.Y. TIMES, Aug. 19, 1988, at B5.

crasies.[27]

Under the law journal system authors have total discretion over their citation agenda. Student editors are more interested in playing mind games with the latest edition of the Bluebook than looking at the relevance and content of cites. Even if they wanted to evaluate, they lack the expertise.

The proliferation of journals has had two effects. Many of the newer journals are "alternative" ideological publications whose editors have no interest in citation quality control. In fact, they may have a bias against acceptable standards.[28] In addition, these journals provide new sources for citations and thereby help to create the biggest universe for cites known to academe.

Without a screening system, determination of an author's citation motivation is impossible. Ideology, academic politics, fun, sycophancy—any motivation is possible.[29] For law professors, the most insatiable motives are numbers and density.

Give a reprint to a colleague and he will immediately look to the last page to check on "how many" cites. One explanation is that the higher the count, "the more authoritative will be the article."[30] Maybe, but I think that something else is involved. Law professors do not view citing in the conventional sense as a reference to other relevant research. To them, citing is a game, a contest, "airing it out" for numbers.[31] Where else but law does one encounter hundreds of footnotes attached to articles?[32]

Then there is the "density" game for the cite yuppie. Density is "the quotient derived by dividing the number of lines of footnotes by the total number of text and footnote lines."[33] When one gets cited to enhance density, the motive has nothing to do with scholarship, instead the objective is to get above the magic ratio of fifty percent.[34]

With a blurred and shifting landscape of motivations, the importance or significance of a citation is a mystery. There is still another problem: what about so-called "citation plagiarism:" cites being lifted without being read by the author?[35] I suspect that the chances of this occurring are very high. But

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27. And criticism, especially of student-edited journals. "Student-edited journals are the scandal of legal publishing ...." Patricia B. Gray, *Harvard's Faculty Stirs a Tempest with Plans for New Law Journal,* WALL ST. J., May 28, 1986, at 37.

28. *See infra* note 48 and accompanying text.

29. For discussion of factors that motivate writers of law reviews see Arthur D. Austin, *Footnotes as Product Differentiation,* 40 VAND. L. REV. 1131 (1987); Arthur Austin, *Footnote Skulduggery and Other Bad Habits,* 44 U. MIAMI L. REV. 1009 (1990); Arthur Austin, *Political Correctness is a Footnote,* 71 OR. L. REV. 543 (1992).

30. Thorne, *supra* note 10, at 1159.

31. According to Mr. Bernie Kosar, Cleveland Browns quarterback, "airing it out" means a long pass. Austin, *Footnotes as Product Differentiation, supra* note 29, at 1141 n.47.

32. What is the record? Approximately 1247. David A. Kaplan, *The Article in a Law Review That Included the Most Footnotes Is ...,* NAT'L L.J., Mar. 18, 1985, at 4.

33. Wheeler, *supra* note 22, at 248.

34. Another little trick is footnote length. *See* David A. Kaplan & John C. Metaxas, *Longest Footnote,* NAT'L L.J., June 17, 1985, at 4. There is, however, a conservative view. "A rough rule of thumb is that no footnote should take longer to read than the time it takes to open a six pack." Mark Yudof, *From the Dean,* TOWNES HALL NOTES (Univ. of Texas L. School Alumni) Summer, 1989, at 3.

35. "Some critics have gone beyond the questioning stage and have charged that authors are fraudulent in making references to other publications. 'The author selects citations to serve

unfathomable motivation and other ancillary problems are nothing compared to a change in scholarship that renders cite counts worthless: the politicization of legal education and writing.

IV. THE NEW GENERATION POLITICIZES SCHOLARSHIP

Over the past ten years, law schools have been, in varying degrees, co-opted by the political culture that dominates most universities.[36] The preferred ideology is left-liberal with a strong political correctness theme.[37] The theme is a legacy of the radical movement of the 1970s and is controlled by a new generation of faculty who disdain practice,[38] the liberal establishment, and consider legal education and the academy as *the* "location" for change.[39] While the liberals still control the legal education agenda, the crits, feminists, and race theory people are staging a revolution.

They use scholarship to advance their cause. The style is polemical and "trashing" is chic.[40] The substance is a message of value judgments on the perceived deficiencies of the liberal legal establishment. As part of the outsider culture, ideological scholarship speaks in a distinctive "voice" that has thus far "been silenced in traditional legal scholarship."[41] The common enemy is the white male system of patriarchy, hierarchy, and "[t]he tyranny of objectivity."[42] Feminists want nurturing, care, and empathy,[43] crits want altruism,[44] while

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his scientific, political, and personal goals and not to describe his intellectual ancestry.' One consequence ... is carelessness; another is 'plagiarism of other people's citations without having actually used them.'" Broadus, *supra* note 16, at 132 (quoting Kenneth O. May, *Letter,* 156 SCIENCE 890 (1967)).

36. *See* MARTIN ANDERSON, IMPOSTERS IN THE TEMPLE: THE DECLINE OF THE AMERICAN UNIVERSITY (1992); ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND (1987); DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS (1991); ROGER KIMBALL, TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION (1990); CHARLES SYKES, PROFSCAM (1988); CHARLES SYKES, THE HOLLOW MEN (1990).

37. Steven C. Bahls, *Political Correctness and the American Law School,* 69 WASH. U. L.Q. 1041 (1991); "I conclude that Political Correctness is indeed a problem at law schools." *Id.* at 1043. *See also* Arlynn L. Presser, *The Politically Correct Law School: Where It's Right to be Left,* A.B.A. J., Sept. 1991, at 52; David P. Bryden, *It Ain't What They Teach, It's the Way That They Teach It,* 103 PUB. INTEREST 38 (1991).

38. Judge Richard Posner says that law school teaching increasingly recruits those "who for one reason or another are not happy in practice, adapted to practice or interested in practice." Martha Middleton, *Legal Scholarship: Is It Irrelevant?,* NAT'L L.J., Jan. 9, 1989, at 1, 8.

As a Harvard Law student wrote: "Always keep in mind that most professors have had less experience than the average 3L." Alysse MacIntyre, *You Mean You Really Wanted to Come to HLS?,* HARV. L. RECORD, Sept. 12, 1991, at 8.

39. Mark Tushnet, *Critical Legal Studies: A Political History,* 100 YALE L. J. 1515 (1991).

40. "Take specific arguments very *seriously* in their own terms; discover they are actually *foolish* ([tragi]-*comic*); and then look for some (external observer's) *order* (*not* the germ of truth) in the internally contradictory, incoherent chaos we've exposed." Kelman, *supra* note 4, at 293. *See* Alan D. Freeman, *Truth and Mystification in Legal Scholarship,* 90 YALE L.J. 1229 (1981).

41. Stephanie B. Goldberg, *The Law, a New Theory Holds, Has a White Voice,* N.Y. TIMES, July 17, 1992, at A23.

42. Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay,* 95 YALE L.J. 1373, 1376 (1986).

43. The boilerplate cite for the proposition that women "speak" in a different "voice" of "care" is CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). Boilerplate means that it is cited but not read. Another boilerplate cite for fems and crits is THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

44. Duncan Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L.

Critical Race theorists want recognition of storytelling as a legitimate form of scholarship.[45]

If what they produce is scholarship, it is not of the conventional variety. Whether it is vocational (what the law is), doctrinal (synthesis of cases and laws), or interdisciplinary (use of other disciplines to explain law), traditional legal scholarship aspires to be objective, rational, and thorough.[46] An author may advance a position but is obligated to recognize and defend against opposing arguments. Ideological scholarship rejects this paradigm. It likewise rejects the accepted rationale that citations are a necessary vehicle to furnish a reference to the knowledge that influenced the author.

Professor Delgado made citations a political issue in *The Imperial Scholar: Reflections on a Review of Civil Rights Literature.*[47] He accused the Imperial Scholars—white males who teach at elite law schools—of purposely not citing minority scholarship in their work on civil rights. Delgado saw a power play: Imperial Scholars wanted to control the substantive politics of the civil rights movement. By focusing attention on citation exclusion he anticipated the ideologicalization of footnotes.

Several years later, Professor Matsuda endorsed the exclusion of politically incorrect citations in "outsider" scholarship.[48] To Matsuda, a citation is a "political act."[49] She advocated "affirmative action scholarship" which involves "making a deliberate effort to buy, order, read, cite, discuss, and teach outsider scholarship."[50] Citing the work of outsiders increases their citation count, thereby improving the chance of their promotion.[51]

The irony is that by politicizing citations to pad citation counts, the ideological scholars have rendered them unreliable as scholarship references and therefore meaningless. The bias is obvious: politically correct footnotes are preferred over politically incorrect notes. Ignore *de rigueur* PC cites and expect exile.[52] Quality and influence of scholarship are irrelevant to ideologues. A piece of babblegab could have an impressive count, exaggerated by its position on the PC spectrum.

REV. 1685, 1713 (1976).

45. Symposium, *Legal Storytelling,* 87 MICH. L. REV. 2073 (1989). *See* Alex M. Johnson, Jr., *The New Voice of Color,* 100 YALE L.J. 2007 (1991).

46. And boring. See the often cited Fred Rodell, *Goodbye to Law Reviews,* 23 VA. L. REV. 38 (1936). For an update see Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure,* 103 HARV. L. REV. 926 (1990).

47. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature,* 132 U. PA. L. REV. 561 (1984). For a criticism of Delgado, see Randall Kennedy, *Racial Critiques of Legal Academia,* 102 HARV. L. REV. 1745 (1989).

48. Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground,* 11 HARV. WOMEN'S L.J. 1 (1988). Outsiders "encompass various outgroups, including women, people of color, poor people, gays and lesbians, indigenous Americans, and other oppressed people who have suffered historical under-representation and silencing in the law schools." *Id.* n.2. Politically incorrect cites are references to any person, organization, or scholarship not part of the politically correct outsider movement.

49. *Id.* at 5.

50. *Id.* at 4. "When writing an article or book, the newly conscious scholar might consider ways in which outsider scholarship could enhance the piece." *Id.* at 5.

51. "Tenure and promotion review committees typically ask whether a candidate's work is cited." *Id.*

52. Austin, *Political Correctness is a Footnote, supra* note 29.

V. THE CITE POWER CHART

Forget about ideology and runaway motivations. Assume the purest of scholarly instincts and ideals. Assume an honest peer review system for law journals. In this untainted world, would cite counts be reliable indicators of scholarly influence? No, no, no.

Candidate Lester P. Bile has been cited by Justice O'Connor. It is a quote in the text of the opinion that is used to support a key point. This is an obvious plus on the cite power chart. But how many points? Candidate Rebecca Styx's article has been cited 10 times—in five top-ranked law reviews by big name "players." Then there is Professor Moot, a specialist in grazing law whose vocational pieces are constantly cited by the Montana state courts. Who gets the most points on the power chart?

Like George Orwell's *Animal Farm*, some cites are more equal than others.[53] It all depends on who is calling the shots. Consider the following cite power chart hierarchy:

A) A citation in a law review article will beat a cite in a court opinion. In today's law academy, status comes from recognition by academic colleagues. "Increasingly out-of-touch"[54]law professors write to law professors, not judges and practitioners who are deemed irrelevant to the new scholarship.[55] But, on the other hand, it can be argued that this is a misdirected priority; until recently, the conventional role of law professors has been to advise and guide the bench and bar. Hence the argument can be made that citations that influence the decision makers be given the most weight.

Let's go back to Professor Moot who is cited frequently by the state courts of Montana. In explaining his decision to exclude court cites from his cite index, Shapiro says: "Counts of citation to articles in cases ... would tend to spotlight articles of parochial importance that repeatedly are cited by the courts of a particular state."[56]

Nevertheless, one has to acknowledge that Moot has been cited, thereby indicating some level of influence, albeit within the narrow field of grazing law. Why should he be penalized for not writing grand theoretical antitrust or constitutional law articles? Moreover, what about the author who writes in a

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53. "All animals are equal. But some animals are more equal than others." GEORGE ORWELL, ANIMAL FARM 123 (Signet 1946).

54. United States v. $639,558.00 in United States Currency, 955 F.2d 712, 722 (D.C. Cir. 1992).

55. The former dean of Yale Law School complains that "law professors today are more concerned with intellectual currents among their colleagues in the arts and sciences and less concerned about law practice and the output of the bench." John Metaxas, *Two Justices, Self-Congratulation Mark Harvard Anniversary Bash*, NAT'L L.J., Sept. 22, 1986, at 4. He subsequently wrote that they "do not venture outside the ivy-covered walls, scorn the practicing lawyer and his work ... and look for rewards only from within the universities," Harry Wellington, *Challenges to Legal Education: The "Two Culture" Phenomenon*, 37 J. LEGAL EDUC. 327, 329 (1987).

Judge Harry T. Edwards says: "Too many law professors are ivory tower dilettantes ...." Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992).

56. Shapiro, *supra* note 21, at 1545 n.27. "For example, Calvert *'No Evidence' and 'Insufficient' Points of Error*, 38 TEX. L. REV. 361 (1960), has been cited 547 times by the courts of Texas, but not once by any other jurisdiction." *Id.*

field "less frequented by law reviews?"[57] One way to help Moot and the disadvantaged is to use a relevant market analysis.[58]

The relevant market for his work is scholarship on grazing law in the Western states. Moot's influence would be determined by calculating his "market share," i.e. a comparison of his cite count with the total cites in the relevant market. The higher Moot's share of the market, the greater his influence.

There are some problems in using the relevant market concept. As every antitrust lawyer knows, a relevant market definition is a slippery question of fact subject to manipulation and gerrymandering. Grazing law articles could, for example, be thrown into a much broader relevant market of natural resources law.[59] The result would be a significant reduction in Moot's influence rating. It all depends on who is defining the market—friend or foe.

The second problem gets us back to square one: how does Moot's relevant market rate on the power chart of all relevant markets? It's another version of the rating game. Those who write the theoretical pieces to influence colleagues and have a bias against vocational writing would give the grazing law relevant market a low rating and, since their judgments dominate legal education, Moot is stuck at the bottom.

B) Once we get into rating, it is necessary to devise a sub-market power chart, i.e., the establishment of rankings within a category. We can start with the rational assumption that federal courts should be given more weight than state courts and that a cite by the U.S. Supreme Court is *the* big prize. But suppose one can produce a cite by a prestigious state court comparable to the Traynor-Tobriner-Mosk California Supreme Court of the 1950s.[60] Some would argue, with justification, that under these conditions it would be an even draw.

The same problem could come up within the federal hierarchy. For example, how would a cite by Richard Posner compare with a Supreme Court citation? Clearly a cite by Judge Learned Hand would have been given equal status.

C) Moreover, the members of the U.S. Supreme Court are not "equal" in status. This is an issue that throws the power chart into the Byzantine politics of

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57. Shapiro, *The Most-Cited Articles from The Yale Law Journal, supra* note 21, at 1460. "Ashbel G. Gulliver's and Catherine J. Tilson's *Classification of Gratuitous Transfers,* for example, is a classic article in the law of trusts, but its citation count is modest because the volume of law review literature on trusts is modest. The list of the thirty most-cited *Yale Law Journal* articles leans heavily towards public law, particularly constitutional law; about a dozen of the articles may be categorized as constitutional in focus. No topical area other than constitutional law has more than three representatives." Shapiro, *The Most-Cited Articles from The Yale Law Journal, supra* note 21, at 1460 (footnote omitted).

58. This is a concept borrowed from antitrust where the objective is to determine whether a firm has market power. *See* LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 40–74 (1977). Here the objective is to determine a scholar's "cite power," *i.e.*, the degree of recognition that a scholar has within a relevant market.

59. Scholarship relevant markets could be composed of subjects that have cross-relationships, such as federal regulation (antitrust, regulated industries, patent, trademark) or have an historical fit (landlord-tenant, future interests, zoning).

60. James R. McCall, *Roger Traynor: Teacher, Jurist, and Friend,* 35 HASTINGS L.J. 741 (1984); *The Supreme Court of California, 1981-82 In Memoriam - Roger John Traynor,* 71 CAL. L. REV. 1037 (1983).

legal education. We are now dealing with an ideological power chart. For example, some professors would consider a cite by Chief Justice Rehnquist a negative, especially if it is a favorable reference. In crit circles, for example, it would bring a fit of trashing against the author.[61] On the other hand, a Rehnquist criticism of a crit's work would be a definite plus, something to crow about over an expensive glass of wine. A conservative (whose presence in legal education is even more threatened than the spotted owl) would stand proud to get a cite by Justices Scalia, O'Connor, or the Chief Justice.[62] The problem is that everyone else, including the promotion and tenure committee, would disagree.

D) Being cited in an article beats citation in student commentary. This should be conclusive; how can anyone in their right mind compare a cite by a fellow professor with that by a lowly *student*? But suppose the note cite is in the California Law Review and the article cite is in the Number 194 ranked law review? Suppose the note has been cited frequently? Who wins?

E) The above points to another problem—how relevant is the status of the law journal? The instinctive reaction, conditioned by elitism, is to give more weight to a Stanford cite than to a cite in a "middle" rated journal. One solution, obviously intuitive, is to give equal status to "top 10" reviews—or "top 20"—or "top 30"—or ....

Moreover, how does one determine the "top" schools? By reference to Goumans, U.S. News and World Report, by reference to the most cited journals,[63] or some other self-serving method.[64] Remember, until one's school gets a respectable rating, ratings are said to be meaningless.[65]

F) There wouldn't be much disagreement over the positive weight of having one's work quoted in the text of the article—and even more points if analyzed or criticized by the author. On the other hand, the lowest form of cite is inclusion in a string cite—which involves the risk of being thrown in with the dirty linen of student commentary. Everyone knows that the only purpose of a string cite is to enhance the density ratio.

G) Finally, there is the ubiquitous author's note, a device whose ostensible purpose is to identify people who have vetted the article. I know people who consider getting mentioned in an author's note as tantamount to a cite. It is

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61. Kelman, *supra* note 40.

62. During the Warren Court era, conservative antitrust scholars dreaded the prospect of a Douglas cite.

63. *See* Shapiro, *The Most-Cited Law Review Articles*, *supra* note 21.

64. Northwestern University School of Law used the number of pages of published papers by faculty to jump from U.S. News and World Report's ranking of sixteenth to seventh. *A Law School Does Its Own Rankings*, WALL ST. J., Feb. 15, 1989, at B1. On Northwestern's page counting, Professor Banzhaf says: "But that's exactly the kind of half-truth that keeps many of my colleagues legal eunuchs, unwilling to use (and incidentally to test) their legal abilities in the real world where they can advance the public good, rather than simply accumulate page counts and pad resumes." *Letters*, NAT'L L.J., April 3, 1989, at 16 (Letter from John F. Banzhaf III).

65. "Everybody knocks rankings as unscientific, but everybody reads them, too." Edward A. Adams, *Rankings Are Problematic In Determining the 'Best,'* NAT'L L.J., Dec. 29, 1986, at 20. *See also* Roy M. Mersky, *Gourman's Scholastic Rankings Lack Source, Merit*, LEGAL TIMES, Oct. 25, 1982, at 9.

recognition that one is a "player."[66]

Author's notes are at best irrelevant and at worst manipulative. There is no need to publicize vetting, especially if the objective is to give the impression of peer review. The danger comes from an endless parade of non scholarly motives: sucking up to the "big players," citing friends in exchange for reciprocal references, using a long list of vetts to influence student editors into acceptance, citing tenured colleagues to get promotion votes, citing well known people who never read the piece, etc.[67] It often devolves into name aggrandizing.[68]

VI. CONCLUSION

"To paraphrase Thomas Hobbes: to be cited regularly, is felicity; to be cited most, bliss; and not to be cited at all, death."[69]

Professor Bavelas' question will not go away: what do citations really mean? In the sciences they may serve as credible "signposts" of influence and history. Science is a closed community in which scholarship discipline is strict. Despite Christopher Columbus Langdell's efforts, law is not a science.[70] Moreover, legal scholarship is in a constant state of flux, balkenized by different visions of what law is about. Faculty and practitioners no longer communicate.[71] Balkenization has been exacerbated by the political scholarship of crits, feminists, and critical race theorists.[72]

In this chaotic environment citations are the consequence of a variety of motivations, most of which are not scholarly.[73] Footnote gamesmanship is the persistent theme. When referring to legal scholarship, the answer to Bavelas'

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66. A variation of the author's note is the "conversation cite," *i.e.*, a citation acknowledging the verbal suggestion or idea of a colleague. An example: "Bernie Kosar, Cleveland Browns' quarterback, told me that he gets an 'emotional high' from airing it out." Arthur D. Austin, *Footnotes as Product Differentiation, supra* note 29, at 1141 n.47 (1987) (Note: another self-cite.).

Here the motivation is that the citator is able to associate his work with a well-known figure, thereby enhancing his status. The big question is whether Mr. Kosar can use the reference in his cite count.

67. *See id.* at 1145–47.

68. *See, e.g.*, Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 614 (1988) (thirty-five names).

69. Wiener, *supra* note 9, at 588.

70. Eugene Wambaugh, *Professor Langdell—A View of His Career*, 20 HARV. L. REV. 1 (1906).

71. *See supra* note 55.

72. Judge Richard Posner says of law schools: "I think of an enterprise that is distinctly weak ... on its scholarly side; an enterprise vulnerable to fads, prone to verbosity and occasionally to sheer gibberish." Ken Myers, *At Conference, Posner Lambast Academics for Weak Scholarship*, NAT'L L.J., Jan. 21, 1991, at 4.

73. As one of the most cited authors in *The Yale Law Journal* said: "Before saying something about the current relevance of what I attempted to do in the article, I wish to say that ranking by citation counts could become an invidious virus in the world of scholarship. It bears no relationship to scholarly merit. It is nondiscriminating in its discrimination. It is not even a reliable indicator that the work cited was read, let alone understood by the citer. But I suppose that at a time when law schools are ranked, like Miss Americas, by a national periodical, it should come as no surprise that in partial celebration of its 100th Anniversary *The Yale Law Journal* ranks its articles by the numbers." Joseph Goldstein, *Commentary*, 100 YALE L.J. 1485 (1991).

question is: "We don't know."[74]

Nevertheless, as Hobbes and Professor Moot would say, being cited means something. This is the point that promotion and tenure committees have to ponder. Evaluate citation counts with caution and reservation. Do not take them seriously. The bottom line is still scholarship, not citations.[75]

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74. The only sure answer would be to put citation to a market test. I have written an article in which, instead of providing citations, I put a price on each reference. If the reader wants the cite, he has to pay me. Arthur D. Austin, *Why Haven't the Crits Deconstructed Footnotes?*, 17 NOVA L. REV. 725 (Winter 1993).

75. The definition of scholarship will be even more blurred if law schools accept an AALS recommendation that non-traditional forms of scholarship be considered for promotion and tenure. "The school should commit itself to avoiding prejudice against any particular methodology or perspective used in teaching or scholarship. When evaluating any work embodying innovative or less widely pursued methodologies or perspectives, the standard should be neither higher nor lower than the standard used for evaluating more traditional work." *Report of the AALS Special Committee on Tenure and the Tenuring Process*, 42 J. LEG. EDUC. 477, 505 (1992).