

# More and Better

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Tarunabh Khaitan's [editorial comment in ICON](#) on the perils of letting activist inclinations influence one's scholarship, resulting in an unsavoury "scholactivism" blend, is thought-provoking. Professor Khaitan calls for rigorous adherence to the ethical demands of a search for truth in our research, even as we might, he suggests, become or remain activists for causes we believe in a range of other activities. In my view, however, Professor Khaitan's critique misses the mark. He is asking too much of individuals and not enough of institutions.

Before explaining why, let me highlight some points of agreement with Professor Khaitan. He is right that scholarship demands the use of "appropriate disciplinary tools ... based on a thorough knowledge of extant scholarly literature on the issue, in constant engagement with peers who disagree, and an abiding attitude of revisability in light of new evidence or irrefutable arguments" (3). A fortiori he is right that fraud or wilful concealment of contrary evidence or arguments is unacceptable, and that cutting corners in the hope of getting a weak argument published – as for instance by submitting it to a less rigorous journal than one otherwise would (6) – deserves reproach.

I am sure Professor Khaitan is also right that scholactivism can misfire in the long run. Research first produced in the hope of yielding one outcome may be pressed in the service of a different one (6-7). I am not sure, however, that this matters as much as Professor Khaitan seems to think. Research produced with the purest of scholarly intentions might end up being used for some activist or partisan purpose that will disappoint or even distress its author. We simply cannot foresee the future. And worse: would not an attempt to anticipate the future practical consequences of an article one is thinking about writing, perhaps even abandoning the plan if these consequences are intolerable, not make one into an activist of the sort Professor Khaitan condemns?

This brings me to a broader objection to Professor Khaitan's argument. Any number of issues he finds with scholactivism can also affect scholarship produced with no activist intent. Professor Khaitan laments urgency leading to insufficient reflection, engagement, and revision. These are indeed lamentable. But they are lamentable regardless of whether they are caused by an activist impulse, or a need to meet a deadline for a tenure application, or simple negligence on a scholar's part. Professor Khaitan warns of stubborn refusal to revise one's positions and of holding too fast to ground one has staked out. These are indeed worrisome. But they are worrisome whether driven by activism or by wholly neutral bloody-mindedness and turf-protectiveness.

Is the activism itself a problem, then? It would be more accurate to say, I think, that it is one possible cause of the problems that can bedevil any researcher's work, perhaps an important cause, but it is the specific problems that we really need to

watch out for. We would need to do it even if no scholars were ever tempted to be activists. At the same time, as Professor Khaitan, as I read him, acknowledges, there is no certainty that a given activist scholar, let alone a given research project, will succumb to these dangers, at least to a degree that would condemn the enterprise.

This matter of degree is something Professor Khaitan neglects, unfortunately I think. The issues he raises cut across the two categories of morality Lon Fuller described in *The Morality of Law*, that of duty and that of aspiration. Granted, it is a matter of duty to devote a certain amount of time to a project, to have a draft read by some colleagues, to be amenable to revision in light of criticism. But past a certain, admittedly difficult to define, threshold, the duty is discharged, and it becomes merely desirable, but not necessary, to do more. Indeed, past a further, admittedly difficult to define, point, what was desirable becomes superfluous and, eventually, counterproductive. Submit that paper already! Do not yield quite so easily to majority opinion! It may well be that scholactivists will not go so far into the realm of aspiration as equanimous scholars. But, so long as they do not fail to cross the threshold of duty, they are not acting wrongly.

Let us nonetheless stipulate that activist scholarship will often be more imperfect than scholarship produced by the same or similarly able scholars unaffected by activist intent would be. I'm not sure how true this is, but never mind. The point I want to make is that the solution to this problem is for scholactivists of various flavours to debate and counter each other and expose the inevitable shortcomings of their opponents' work, to the benefit of all. The solution to shoddy scholarship lies not so much in more and better ethical rules as in more and better scholarship

But activism, or indeed any other source of imperfection in scholarship, can only be countered by more scholarship if there are scholars inclined to question the activist. In practical terms, this requires intellectual, and specifically ideological, diversity. It is a trite truth that people who think the same way, and especially co-partisans, will not examine each other's assumptions, and will not challenge each other's conclusions, nearly as well as they will with their opponents.

Yet at present, the English-speaking legal academy is close to an ideological monoculture. A [recent study](#) by Eric Martínez and Kevin Tobia finds that 70-80% of the faculty of the leading US law schools is on the political left; only about 10% are "conservative", although Ilya Somin [suggests](#) that even this is likely an exaggeration, as many of these 10% are likely libertarians rather than conservatives. I am not aware of such data for the UK or Canada, but in the former, a senior public law academic has recently [admitted](#) to "struggle[ing] to think of a single UK public lawyer who is a small government advocate". Canada, the jurisdiction with which most of my own work is concerned, is similar, as far as I can tell.

When one side outnumbered the other by 7 or 8:1 or more, there is every danger that its biases, its shortcuts, its obstinacy, will go unchallenged, if only because their opponents are too few to respond to every problematic argument. There is, indeed, every danger that activist arguments, whether proceeding from questionable but unquestioned premises or relying on imperfect but unexamined evidence will

be taken for neutral, while any argument for the other side, no matter how robustly supported, will appear to be activist.

If the legal academy is concerned about the degradation of the quality of scholarship by activist impulses#and to be sure Professor Khaitan gives us some reasons for concern#then it should try to foster sufficient intellectual diversity to ensure that no one strand of scholactivism becomes dominant, and that all are sufficiently likely to be challenged. To be clear, this is *not* a call for some sort of affirmative action for right-leaning academics. But it is a call on institutions#be they law schools, journals, conferences, etc.#to ask themselves whether they value diversity of this sort, just as they rightly expect themselves to value diversity among dimensions such as gender and ethnicity, not least because it too can help foster the variety of perspectives that the search for truth requires.

I would also suggest that embracing a culture of more and better scholarship as a remedy to scholactivism should make us reconsider some assumptions about what scholarship looks like. Professor Khaitan repeatedly insists on the necessity of peer review (6, 8, 9), and suggests that blogs are an altogether different realm from genuine scholarship (9). I think this is a mistake. An article in a US-style law review, or even a blog post, can be the product of a genuine effort to understand and engage with all the relevant knowledge, and develop a rigorous argument in response, no less than a peer-reviewed publication (and let us not get started on the shortcomings of peer review, and the proverbial perfidy of “Reviewer 2”). (Full disclosure: while I have never published in the US, I am an avid [blogger](#).)

More importantly, though, and really this sums up my disagreement with Professor Khaitan, the point of scholarship is to propose, debate, and refine ideas. Methods and media are in the service of this aim, but they are only accessory to, not constitutive of it. That an idea was proposed in the service of some ulterior aim, or that it wasn’t fully vetted before publication is nowhere near as important or even interesting as whether it adds something to the conversation and holds up against criticism. If scholactivism generates ideas worth thinking about, embracing, or disagreeing with, then, even as we take on Professor Khaitan’s warnings about its inherent dangers, we should nonetheless welcome it # with interest, as well as with debate.

