What's wrong with good "scholactivism"?

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Tarun Khaitan's fascinating reflection on the issue of "scholactivism" might not be what you think it is. Rather than railing against normative programs, Khaitan makes the argument that scholactivism is *instrumentally* bad and even counterproductive. It's a provocative argument in the best kind of way. But in this blog post, I suggest two reasons why we should treat Khaitan's intervention with caution.

The Promise and Perils of Academic Incentives

Khaitan's argument is that scholactivist motives can produce bad scholarship. This is because of the scholactivist's incentives. Rather than "truth-telling and knowledge dissemination", the scholactivist will be rewarded by the extent to which her work produces "(material) change". Khaitan paints the picture through the example of Mridula, a scholar who authors an article for the specific purpose of supporting an Equality Act case. The article material impacts the case, which in turn shifts Mridula's incentive structure: she earns esteem, prestige and power precisely because of her activist posture and impact. Khaitan argues that "[s]ince power begets power, this process of embeddedness within the structures of power is self-perpetuating and deepens over time. Her activist motivations strengthen at the expense of her intellectual ones. A scholactivist who is celebrated for her causal role in achieving direct material outcomes rather than her truth-telling is likely to double-down on her activism, and ultimately learn to prize the latter over the former."

As the above quote suggests, Khaitan sees these two objectives as a zero-sum game. One can pursue "direct material outcomes" *or* "truth-telling", but not both. And once a scholar chooses the "scholactivist" track, their incentives will reinforce that initial decision, sending them down a path which will compromise the quality of their scholarship.

Thus, argues Khaitan, scholactivist scholarship is likely to be poor quality scholarship. He doesn't claim that this link is intrinsic, but rather that the pressures and incentives of an activist are not aligned with those of a scholar. This argument, however, perhaps misrepresents what *good* "activist" scholarship is, and the incentives which orient it. An effective legal or scholarly advocate doesn't just stake out a position: they stake out a *persuasive* position. In Khaitan's hypothetical, if Mridula produced a rushed, unreflective article, it would be less likely to persuade the legal community – and ultimately, the judge hearing the case. Rather than having her prestige boosted, poor quality scholarship will likely reduce her standing within the scholarly community. On the other hand, scholarship which anticipates and takes seriously opposing arguments, including those likely to be raised by opposing counsel, will almost always be more valuable as supporting material for parties in litigation or political advocacy.

As I have argued elsewhere, constitutional law scholarship is disciplined by a range of norms developed by what Matthew Palmer has called an "interpretive community" of scholars, lawyers, and judges. A scholactivist seeking change through legal scholarship is still subject to these norms. As Khaitan points out, some of these norms – such as the double-blind peer review process – can be subverted. A scholactivist could choose to publish in a lower-quality journal, avoid sharing their drafts with colleagues or workshops, or direct their intervention to a case where they suspect that the judge is looking for post-hoc rationalizations. But a scholar who chooses these shortcuts opens herself up to the risk of producing scholarship that is less effective: a lower-quality journal is less likely to be cited; a rushed, unread article is less likely to be published; and a poor-quality judgment is more likely to be reversed on appeal. In other words, the scholactivist's first order concern – that is, material

change – will incentivize a *second order* goal of producing scholarship that is likely to persuade the broader interpretive community, who in turn discipline the *effective* scholactivist's activity. An effective scholactivist is incentivized to avoid the pitfalls of poor scholarship.

In a way, this is precisely what Khaitan himself is arguing: that first order normative goals are better achieved through more traditional modes of legal scholarship. But I am not convinced that the pursuit of direct material change is to blame for the feared slippage. An example from United States environmental law is illustrative. In 1972, the Supreme Court of the United States was scheduled to hear the case of *Sierra Club v. Morton*, a case concerning an NGO's right to sue to prevent the development of a Disney ski resort in an environmentally significant area. Christopher Stone, then a law professor at the University of Southern California, rushed to publish an article arguing for a broad approach to standing in environmental matters, and in particular, the right of natural objects to sue for their own protection. Stone's actions closely match Khaitan's Mridula hypothetical. Yet the resulting article, "Should Trees Have Standing? Toward Legal Rights for Natural Objects", is one of the most widely cited in United States environmental law, and has attracted an even larger (and perhaps more impactful) following internationally. Khaitan's general proposition that time and reflection produce better-quality scholarship requires is undoubtedly correct. In many cases, rushed articles will not be of much use to activists or their lawyers. But in this case, Stone's ideas did not emerge from the ether – they were the product of years of reflection, debate and discussion with colleagues, and in particular, his students. The article anticipates and discusses strongly-held opposing views. The case gave him the opportunity to commit his ideas to paper, and no one who has read Stone's article could question its quality or scholarly value. The ideas have stood the test of time: the article remains highly influential 50 years after it was first produced. And they have proved materially transformative in the long run, contributing to legal innovations across the world in the 21st century.

Sharp Labels and Fuzzy Boundaries

My second response to Khaitan concerns the practical distinction between "scholactivist" and "ordinary" scholars. Khaitan doesn't oppose the notion of *normative* scholarship – indeed, his own normative scholarship is among the best in the field. His definition of "scholactivism" is a narrower subset: normative scholarship with "a motivation to directly pursue specific material outcomes". But I would suggest that the line between normative "discursive" scholarship, and that which seeks "specific material outcomes" may be a fine one, and one which is informed by power and preconceptions.

There is a fine line between suspicion based on the *nature* of the motivation (seeking direct material change), and the *substance* of the motivation (commitment to a particular normative position). Once the "scholactivist" label gets thrown around, it may be hard to maintain that distinction. And it is to normative positions which advocate new ideas or change – including those that are reflective or well-considered – to which the label is most likely to attach. Consider my own area, climate change law. Climate change is a legally disruptive challenge. It doesn't fit neatly with our existing ideas about public law, and scholars are yet to agree on its full implications. Suppose a scholar argues that courts in their jurisdiction ought to recognize positive human rights obligations related to climate change. The article is published around the same time as a court is about to hear precisely this kind of challenge. Once the "scholactivist" category is created, there is a real risk that a reader seeing an article of this type will reflexively relegate it to second-tier status. The scholactivist label might lead us to start making troubling assumptions about normative scholarship which pushes boundaries, rewarding stasis over innovation.

Khaitan accepts that his reflection raises questions of academic freedom, and that he is not calling for the banning of scholactivist work. But labels have consequences. Khaitan essentially suggests that in some cases, the motivation of the scholar might be a reason to question the value of their work. Of course,

this is not to say that the scholar's motivation is *never* relevant. We should not discount the potential for bad faith actors to use scholarship to advance dangerous agendas. The growing literature on "abusive constitutional borrowing", while far from unproblematic, should at least alert us to the potential for these kinds of arguments. But we should be careful about the potential of labels to infect our assumptions, particularly when those assumptions will attach to some scholars more than others.

Candidness and Caution in the "Scholactivist" Label

There is much we can learn from Khaitan's intervention. For me as an emerging scholar, his rich description of the ideal scholarly process is a candid look behind the curtain of an accomplished thinker's method. His reflection is replete with helpful advice. One helpful way forward might be to acknowledge a place for scholactivist scholarship (without adopting the label), but that greater candidness may be appropriate. For example, scholarship which seeks to make the best possible case for a particular position currently before a court should signpost its purpose, allowing the interpretive community to read and evaluate it critically and appropriately. As a scholarly community, we collectively discipline and orient the work of our peers, and we should do so responsibly. But good "scholactivist" work should stand on its merits: absent poor quality work, we should be cautious about imputing motivational faults to its author.

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