
RESPONSES

RESPONSE TO ROBERT AHDIEH'S *BEYOND INDIVIDUALISM IN LAW AND ECONOMICS*

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In his latest article, Professor Robert Ahdieh takes a broad, open-handed swipe at conventional law and economics' reliance on methodological individualism.¹ He hits solidly and right on point at those many places where the discipline is vulnerable to this critique. But is the critique too expansive? One might read in Professor Ahdieh's article an assertion that methodological individualism has completely blinded, or at least distorted, the view of law and economics scholarship with respect to identity, culture, politics, norms, society, evolutionary processes, and history, among other considerations.² If that is his assertion, a solution for these pervasive problems would seem a hopeless endeavor for the discipline. It is hard to imagine a law and economics framework that adequately addresses these concerns and remains recognizable.

No elastic methodology could possibly encompass all these considerations and retain its disciplinary boundary. Professor Ahdieh does not, of course, argue that law and economics scholarship needs to incorporate every consideration (e.g., identity, history, culture, etc.) across the board, but rather only in those areas characterized significantly by interdependence. His claim is that salient aspects of interaction are lost in law and economics analyses characterized by interdependence, and he is surely correct. But now what? Is the solution found by simply calling for modest changes – a bit more awareness of identity, culture, history and the like – or even a mere acknowledgement of the limits of the conventional model in areas of interdependence? I do not believe that such modesty would satisfy the challenges the piece raises. Satisfaction would require a significant overhaul of the traditional approach, but at what cost? Can law and economics thrive as it has, or even survive, by broadening its reach to accommodate the omissions identified?

Professor Ahdieh identifies four distinct areas of interdependence – involving social norms, network externalities, coordination and common knowledge – where an excessive focus on individualism leads the conventional

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¹ Robert B. Ahdieh, *Beyond Individualism in Law and Economics*, 91 B.U. L. REV. 43 (2011).

² *Id.* at 58-67.

analytic framework astray.³ “Consent” is one of three primary examples used to illustrate the consequences of the basic methodological oversight, which is grounded in insensitivity to human interdependence. “[A]s a matter of *methodology*, it is unclear that indicia of consent are especially relevant to the analysis of settings of interdependence,” argues Professor Ahdieh.⁴ He asserts, “our placement of normative weight on private contracting choices may be unwarranted in such settings.”⁵ I suspect that a number of law and economics scholars would simultaneously concede the point regarding interdependence and still place normative weight on consent (albeit not a fully subjective one) in such settings.

We are touching on matters with some history. Years ago, Jerome Frank observed that the so-called objectivists had dispensed with meaningful consent, in much the same way they look past actual intent to form contracts.⁶ For them, said Frank, “putting too much stress on unique individual motivations, would destroy that legal certainty and stability which a modern commercial society demands.”⁷ The individual, in the objectivist approach, was only a fiction, which of course threatened “a sort of paradox.”⁸ “For a ‘free enterprise’ system is, theoretically, founded on ‘individualism’; but, in the name of economic individualism, the objectivists refused to consider those reactions of actual specific individual,” concluded Frank.⁹ Thus, “[e]conomic individualism’ . . . shows up as hostile to real individualism.”¹⁰ Moreover, the normative weight placed on the economic individualism notion of consent is not necessarily weaker, just differently focused – a notion grounded less in autonomy than it is in efficiency. Theorists made a judgment to establish this focus.

The basic tension between a robust, or real, individualism and an economic one is not easily addressed by modest methodological adjustments. Take, for example, the important work of George Akerlof and Rachel Kranton cited in the article.¹¹ Professor Ahdieh gives a nod to their effort of bringing “identity

³ *Id.* at 58.

⁴ *Id.* at 73.

⁵ *Id.* at 72.

⁶ *Ricketts v. Pennsylvania R.R. Co.*, 153 F.2d 757, 761 (2d Cir. 1946) (Frank, J., concurring); see also JEROME FRANK, *LAW AND THE MODERN MIND* 42 (Anchor Books 1971) (1930).

⁷ *Ricketts*, 153 F.2d at 761 n.2 (Frank, J., concurring).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See, e.g., GEORGE A. AKERLOF & RACHEL E. KRANTON, *IDENTITY ECONOMICS: HOW OUR IDENTITIES SHAPE OUR WORK, WAGES, AND WELL-BEING* 6 (2010); George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 Q.J. ECON. 715, 715 (2000); George A. Akerlof & Rachel E. Kranton, *Identity, Supervision, and Work Groups*, 98 AM. ECON. REV. 212, 212 (2008).

into economic analysis.”¹² Note, however, that Professors Akerlof and Kranton are focused on a particular type of identity: social identity. They introduce an individual’s status as black, white, gay, straight, jock, nerd and the like within their framework.¹³ Even in this more sophisticated model, matters of choice and consent remain elusive. Professor Patricia Williams, for example, recalled in *The Alchemy of Race and Rights*, an interaction with a colleague that made clear the limits of choice over her own social identity: “I was acutely aware that the choice of identifying as black (as opposed to white?) was hardly mine; that as long as I am identified as black by the majority of others, my own identifying as black will almost surely follow *as a simple fact of human interdependency*.”¹⁴ A richer model that incorporates important elements of social identity may be more descriptively accurate, and might even suggest new insights, but the better model still does not tell us the appropriate normative emphasis to place choice and consent. Akerlof and Kranton’s methodological adjustment does not address the problem of placing too much or too little emphasis on the choices of persons.

In my own work on racial restrictive covenants – i.e., agreements among property owners to prohibit sales, rentals, use or occupancy of their properties to persons of specified races, religions, ethnicities or nationalities – the limits of modeling adjustments are apparent.¹⁵ A long-standing debate in the literature on restrictive covenants circled around whether they were effective in maintaining segregation before 1950. The noted historian Arnold Hirsch, for example, claimed they had little impact because courts would often not enforce them: covenants “served as little more than a fairly coarse sieve, unable to stop the flow of [the] black population when put to the test.”¹⁶ The renowned economists Gunnar Myrdal took the opposite view, saying that if the U.S. Supreme Court ruled covenants unenforceable – which it did in 1948¹⁷ – “segregation in the North would be nearly doomed.”¹⁸ Despite their differing conclusions, notice that both Hirsch and Myrdal treat legal enforceability of covenants as the linchpin to their effectiveness. Yet, we know that even after the 1948 ruling, lawyers continued to write these restrictions into deeds;

¹² Ahdieh, *supra* note 1, at 59.

¹³ AKERLOF & KRANTON, *supra* note 11, at 11-16.

¹⁴ PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 10 (1991) (emphasis added).

¹⁵ Richard R.W. Brooks, *Covenants Without Courts: Enforcing Residential Segregation with Legally Unenforceable Agreements*, 101 AM. ECON. REV. (PAPERS & PROC.) (forthcoming May 2011) (on file with author).

¹⁶ ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960*, at 30 (1983).

¹⁷ The Court found judicial enforcement of restrictive covenants unconstitutional under the Equal Protection Clause, *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948), but that such agreements between private parties alone do not violate the constitution, *id.* at 13.

¹⁸ GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 624 (1944).

insurers, banks, and even the Federal Housing Administration continued to reference them; title companies continued to report them; and registries of deeds continued to record them.¹⁹ The effectiveness of covenants did not exclusively hinge on their legal enforceability; rather, covenants were signals that coordinated the behavior of a variety of private individual and institutional actors – signals that remained effective despite their later legal unenforceability.²⁰ By thinking of covenant as tools in a coordination game, additional equilibria emerge. Concerns of methodological individualism remain in my slightly adjusted game, however, most apparently in the common knowledge assumptions that support these new equilibria.²¹ Similarly, recent work on social norms have improved significantly upon simpler models that preceded it,²² but comes nowhere near reaching a comprehensive response to the problems Professor Ahdieh raises.²³

Professor Ahdieh's article identifies the pervasive omissions that continue to characterize law and economics analyses, my own included, that take for granted a certain methodological individualism and its trappings. The question unanswered, it seems to me, is whether these omissions are oversights – possibly subject to incorporation into a richer methodological framework – or whether the omissions are intended to be excluded in order to advance the approach, albeit at some cost. Just as the objectivists were cognizant of the compromise they struck (abandoning “real individualism” for the sake of tractability), so too are many law and economics scholars aware of compromises made to achieve certain results. Efficient breach might be one such case of acknowledged compromise. The idea advocated by some scholars that contract promises are merely options with a strike price set by expectation damages²⁴ may fairly characterize the beliefs of commercial transactors (although I seriously doubt that, but let's proceed *arguendo*). Among these advocates, normative weight might be placed on a regime consistent with, or even encouraging, breach when it can be done so profitably. The advocates, of course, recognize that everyone does not share this normative view, but for the sake of efficiency the view of contract as option, rather than contract as

¹⁹ Brooks, *supra* note 15.

²⁰ *Id.*

²¹ Professor Ahdieh addresses the problem of common knowledge and methodological individualism. Ahdieh, *supra* note 1, at 66; see also HERBERT GINTIS, *THE BOUNDS OF REASON: GAME THEORY AND THE UNIFICATION OF THE BEHAVIORAL SCIENCES* 146-63 (2009).

²² See, e.g., AKERLOF & KRANTON, *supra* note 11, at 7 (recognizing that “economists have had neither the language nor the analytical apparatus . . . to describe [social] norms and motivations”).

²³ See Ahdieh, *supra* note 1, at 60 (observing that “Akerlof and Kranton do not explicitly challenge methodological individualism”).

²⁴ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else.”).

promise – as Charles Fried famously put it²⁵ – may represent an acknowledged trade-off between competing normative aims of autonomy and efficiency.

Professor Ahdieh's comprehensive and thoughtful critique has highlighted all of the costs and compromises struck as a consequence of the discipline's tight embrace of methodological individualism.²⁶ It is unclear which of these consequences are inessential results of mere oversight, and which are necessarily dragged along by larger normative pulls or are desired by proponents of the traditional law and economics approach. Certainly, for the former (those omissions that are mere oversights) Professor Ahdieh's article makes a compelling case for reevaluation of the pervasive assumption of methodological individualism in law and economics. For omissions that are part of the model, Professor Ahdieh's article has made clear the costs. Now the onus is on the advocates to demonstrate the benefits.

²⁵ CHARLES FRIED, *CONTRACT AS PROMISE* 1-2 (1981).

²⁶ Ahdieh, *supra* note 1, at 70-82.