What Law Should We Teach?

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Adam J. Hirsch, *Teaching Wills and Trusts: The Jurisdictional Problem*, 58 **St. Louis Univ. L.J.** 681(2014).

Law professors strive to stimulate student thinking not only about what the law is but also about law's potential—what the law might or should be. In a conventional doctrinal law school class such considerations are likely to supplement, not supplant, teaching the law as it exists and is applied. But the conventional approach turns out to be surprisingly controversial, at least in the wills and trusts arena. Some wills and trusts professors choose to focus exclusively on model rules, many of which are not widely adopted. Conceived this way, the wills and trusts course is, "to a certain degree, detached from reality." So writes Professor Adam Hirsch, in his concise and pithy contribution to the Saint Louis Law Journal's symposium on teaching wills and trusts law, *Teaching Wills and Trusts: The Jurisdictional Problem*.

Wills and trusts laws, like those in many other areas, are primarily state laws that often vary across jurisdictional lines; a fact that inconveniences lawyers, confuses law students and frustrates law professors. How to deal with this predicament? We cannot, concedes Hirsch, teach the law of all fifty states. And teaching the law of only one jurisdiction, even in the "regional" law school, will not do either. Although students may be well prepared to take the local bar examination, they will suffer in seeking employment outside the jurisdiction, and will take an overly narrow view. And in the "top, nationally-recognized law schools," to teach one jurisdiction's law would be, writes Hirsch, "outlandish." Students attending these (and many, if not most, other law schools) scatter widely upon graduation, making such an approach "pointless and arbitrary."

Model rules are, in some cases, in some jurisdictions, at some times, at least in part, the law. Indeed, Hirsch points out that the model rules in wills and trusts law are generally robust and up-to-date. Yet only a few jurisdictions have adopted the widely taught Uniform Probate Code and most of those jurisdictions have rejected many of its provisions. The Uniform Trust Code enjoys higher rates of adoption but many adopting states omit select provisions or modify them to suit local practices. Given this predicament, Hirsch concludes that "[t]o teach such rules as *law* makes little sense." Finally, while the Restatements are up-to-date, they aspire only to "an authoritative or *recommended* view" of the law, and have recently become more "aspirational."

In light of the above, focusing the wills and trusts course on model rules is, according to Hirsch, "an indulgence." Although at least one casebook takes this approach, most present the majority rules in important areas. This seems minimally essential, as only the majority rules best indicate the law, as it exists, nationally.

Hirsch favors a far more nuanced and (he assumes) "idiosyncratic" approach that focuses on the elusive "national law" by "elaborating—or, when appropriate, briefly outlining—the range of doctrinal options that exists among the states." This means that he chooses to teach the different approaches taken by different jurisdictions, even when there might be three or more approaches, and even if one stands in the clear majority. Where too many alternatives exist, Hirsch has to generalize. But even generalizations can stimulate policy discussion. And statistics about numbers of states adopting particular approaches, when available, can be useful to show students which predominate. If teaching at a school where students expect to be taught the local law, Hirsch provides that as well, but not for examination purposes.

Summative assessments must be designed with this method in mind, of course. Hirsch instructs his students to apply "the principal alternative rule" to the facts given on his exam questions. To minimize complication, where more than

two alternatives exist, none need be applied. Instead, an examination question may include a statutory excerpt “only for the purposes of that problem.”

State laws vary and many disappoint. We must teach the law that is, but we should also strive to stimulate reasoned contemplation and consideration of what might be. Professor Hirsch has given much thought to such considerations, and his essay explains how a wills and trusts professor can accomplish the full range of his or her didactic duties by teaching the law as it is. In Hirsch’s view, teaching minority along with majority rules helps students understand that no law is permanent, alternatives exist, policies should be compared, and some alternatives have yet to be contemplated.

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