Surveying the Not Yet Dead: Comment on Hirsch's Empirical Analysis of Revival of Wills

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Hirsch advocates using an empirically grounded presumption when handling the revival of wills problem. The empirical baseline, according to him, should match what most people think (rightly or wrongly) a court would do when the revival problem arises. Hirsch then presents survey evidence on people's expectations in this setting. Hirsch's proposal is completely sensible in principle, and there is no reason it should be restricted to the revival problem. The argument applies throughout the field of wills, trusts, and estates and maybe even the law more generally. In practice, however, defining the relevant population to survey could pose a problem.

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 Professor of Law, University of Pennsylvania; Erasmus Chair of Empirical Legal Studies, Erasmus University Rotterdam. Regardless of how many times I may revoke a will, I hereby declare my expectation that whichever of my sons agrees to have me taxidermied and displayed in his living room throughout his lifetime will receive my entire estate.

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INTRODUCTION

The revival of wills problem occurs when an individual revokes an earlier will when making a later will, but then revokes the later will while remaining silent about resuscitation of the prior will. Should courts uphold the prior will? Should the prior will remain revoked? Should courts randomize[1] allocations so that social scientists can study the effects of wealth shocks?[2] The world may never know.

After noting that courts have historically not provided uniform guidance,[3] Adam Hirsch offers an approach forward that relies on his error minimization idea.[4] He suggests that courts should peg their default rule about whether a prior will should be revived based on what people expect the law to be (rightly or wrongly). Hirsch suggests that such an approach leads to error minimization since such expectations influence what steps a testator is likely to take, if any, when he revokes a subsequent will. If he believes courts will revive an earlier will, and this is not his intention, he is more likely to make other legal arrangements. If this belief is instead consistent with his wishes, he is more likely to be silent on the matter.

Hirsch goes on to suggest that these majority expectations be used to form a court's prior probability estimate as to what the decedent intended. If the majority expectation only commands a slight edge (e.g., 51% to 49%), any case-specific evidence about intent could rebut the default presumption, while more evidence would be required for an expectation held by a super majority of people (e.g., 75% to 25%), and the default would become virtually mandatory as the majority holding an expectation approached 100%. Hirsch suggests expert guidance in Bayesian reasoning should be provided to help fact finders incorporate case-specific evidence with the prior probability to arrive at an accurate posterior probability,[5] which can then be compared to the relevant legal standard.

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[1] *See* Michael Abramowicz et al., *Randomizing Law*, 159 U. PA. L. REV. 929, 933 (2011).

[2] Much of the well-identified literature in this area focuses on lottery winners from countries nobody cares about which obviously limits its generalizability. *See, e.g.*, David Cesarini et al., *Wealth, Health, and Child Development: Evidence from Administrative Data on Swedish Lottery Players*, 131 Q.J. ECON. 687, 687 (2016).

[3] Adam J. Hirsch, *Waking the Dead: An Empirical Analysis of Revival of Wills*, 53 UC DAVIS L. REV. 2269, 2272-77 (2020) [hereinafter *Waking the Dead*].

[4] Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 613 (2009).

[5] This point is not specific to revival rules, but, arguably, should apply to the use of evidence by courts generally. On this point, Hirsch cites Louis Kaplow, *Likelihood Ratio Tests and Legal Decision Rules*, 16 AM. L. & ECON. REV. 1 (2014). *See* Hirsch,

Hirsch goes on to report the results of two surveys where respondents are asked what legal rule they think applies regarding will revival. In the first survey, individuals were asked about the standard case where a first will is revoked when a second will is drafted and then the second will is revoked. Of 1,046 respondents, 74% believed the original will takes effect while the remainder believed no will was in effect. More than half the respondents indicated they based their answer on logical reasoning, while the rest were roughly evenly split between those who claimed to know the law and those who admitted to taking a guess. The second survey asked 1,009 respondents about a codicil that revised a prior will but was then revoked. The results were quite close to those of the other survey: 75% said the original will would be revived. Hirsch suggests that these survey results would imply that courts should require substantial case-specific evidence to rebut a presumption that a previously revoked will should be revived when a subsequent revoking will is revoked.[6]

I. IT'S GOOD TO KNOW WHAT PEOPLE THINK THEY'RE DOING

Hirsch's error-minimizing default approach would appear to be a better approach than the existing approach[7] for the reasons he gives. In fact, as implied in his earlier article, it is probably a good approach across the board. Previous reliance on supposedly efficiency-enhancing defaults was likely misguided (not just with respect to wills but probably with respect to the law more generally) for a host of reasons. Perhaps most important, there is likely to be a huge amount of heterogeneity across preferences and contexts, making it impossible for any particular body to pick a sensible one-size-fits-most rule.[8]

Since expectations will inform what people do (and don't do) in terms of legal decisions, using general beliefs as the default makes it most

Waking the Dead, *supra* note 3. Also on this point, see generally Jonah B. Gelbach & Bruce H. Kobayashi, *Legal Sufficiency of Statistical Evidence* (Geo. Mason Legal Stud. Res. Paper No. LS 18-29, 2018).

[6] I freely offer this sentence to Dave Barry if he ever decides to teach legal writing. *See Dave Barry*, WIKIPEDIA, https://en.wikipedia.org/wiki/Dave_Barry (last updated Jan. 4, 2020, 1:54 AM) [https://perma.cc/DW6G-Q6SM] (describing that at Burger Associates, Barry "taught effective writing to business people. In his own words, he 'spent nearly eight years trying to get various businesspersons to . . . stop writing things like 'Enclosed please find the enclosed enclosures,' but . . . eventually realized that it was hopeless'").

[7] *Id.*

[8] This point has been made in the contracts context. *See* Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523, 1565 (2016).

likely that people's choices will be consistent with their intent. If people know their preferences or situations make them oddballs, they will likely take pains to customize their legal decisions to fit their circumstances. If people think they are ordinary, they will assume that things will work out normally if an off-the-shelf legal rule is applied. So far so good.

Hirsch even provides a demonstration project showing how courts could ascertain what general beliefs exist through his surveys. Hirsch uses Qualtrics, a common survey recruitment platform, to run his surveys. There are a host of other such platforms (e.g., Amazon Mechanical Turk, Reddit, Soapbox, etc. — in fact, if someone wants to go really wild, he can even run a Qualtrics survey through Amazon Mechanical Turk, so options abound) that could cheaply and effectively be used by courts or parties as well on a bespoke basis, so Hirsch's approach is surely feasible. While there may be some quality variance across these platforms, they generally perform as well as more traditional (and expensive) survey sampling approaches.[9]

II. CONFIDENCE IN EXPECTATIONS IS ALSO IMPORTANT

The error minimization intuition relies on a number of implicit assumptions. First, and presumably least objectionable, is that it is not costless to make one's intent known. If it is costless (and people are not indifferent over which rule applies), people would always ensure their intent was known (in which case default rules are not necessary). Conversely, if the cost of making one's intent known is very high, it becomes impossible to presume anything about the relationship between one's preferences and the likelihood an individual will make his intent known. Also, largely unobjectionable is the assumption that at least some people are not indifferent between potential rules. This assumption is not problematic because if it is dropped (i.e., all people are indifferent between rules), it does not matter which rule a court applies.

With those assumptions made, Hirsch's background framework implicitly assumes that individuals hold their beliefs with certainty (or at least high confidence). It makes intuitive sense that any given individual holds the majority's belief. The larger the majority, the more confident we are that the given individual holds the majority's belief. The individual's belief is important in this context because, we presume, the individual made estate planning decisions based on his beliefs. If

[9] *See, e.g.*, Krin Irvine et al., *Law and Psychology Grows Up, Goes Online, and Replicates*, 15 J. EMPIRICAL LEGAL STUD. 320, 322 (2018).

there is a cost to ensuring that intent is known in the will revival context, people who value the outcome in which the non-majority belief applies higher than the outcome in which the majority belief applies will be more likely to make their intent known. If an individual is silent about his intent, then it makes sense to assume he expected and preferred that the majority rule would apply.

However, imagine the admittedly implausible case where every single person believes a given rule will apply, but each individual's confidence in that belief is low (e.g., everyone believes Rule A applies with a probability of 50.1%, while they believe Rule B applies with probability 49.9%). Even assuming non-trivial (and non-infinite) costs of making intent known and non-indifference over which rule applies, many people will rationally choose not to make their intent known even if they would prefer the non-majority expected rule, even (as in this case) if every single person expects the same rule will apply. It is not hard to extrapolate from this that confidently-held individual beliefs should be weighted more highly in Hirsch's framework than less confidently-held beliefs simply because it is those holding their beliefs more confidently, all other things equal, who are more likely to act upon those beliefs.

Luckily, just as it is simple to survey people about their belief with respect to which rule is likely to be applied, it is not much more difficult to also ask them to assign some probability weight to their beliefs. It is this information that should be used in Hirsch's proposed framework. The probability-weighted majority belief should be used for the prior probability. Given this, we should demand the most individual-specific evidence to rebut a presumed approach when a large majority confidently believes that the presumed approach will be applied. Less individual-specific evidence should be required in cases where even a large majority has a certain expectation, if that expectation is held with little confidence.

III. SURVEYING THE RIGHT GROUP

The logic of Hirsch's survey approach only works assuming we have identified the correct or relevant population for the survey. Although he does not provide much information about the sampling filters used, it seems likely the sample was either a pure convenience sample (i.e., whoever happened to respond to the Qualtrics survey) or was collected in a way that approximates the U.S. population using a number of characteristic filters (e.g., age, race, sex, education, income, etc.). Either way, the sample is unlikely to match the underlying population that is actually of interest.

That is, the relevant expectation in Hirsch's framework is not that of the total population (or, in the case of a convenience sample, the idiosyncratic Qualtrics group). Instead, at a minimum, it is important to condition on the subset of people who actually have a will. If people with wills are a random subset of the general population, a nationally representative sample is relevant. However, there is no reason to believe that those with wills are a random subset. In fact, having a will at all is not particularly common, according to survey results.

For example, a 2016 Gallup poll of 1,025 people found that less than half had a will.[10] Having a will might correlate with education or socio-economic class, or a host of other observable and unobservable characteristics. There may be a correlation between these characteristics and someone's expectation of what legal rule will be applied, either because of differences in actual legal knowledge or differences in logical reasoning. To implement Hirsch's approach, one should ask people if they have a will and filter the sample accordingly (i.e., only ask about what rule applied to the group of respondents indicating they had wills). Even though Hirsch's survey found something on the order of 75% of respondents believing a particular rule would be applied, this is the unconditional probability. If we condition on having a will (which might give a subsample that is less than half of the total), it could be the case that less than half of the relevant sample expects the same rule as the unconditional majority.[11] In any event, the overall majority might be misleading when it comes to the relevant group.

Whether people with wills is the right population to target for the survey or whether this group should be further filtered is a harder question to answer. Perhaps, even within the set of people with wills, how fastidious people are varies. Very fastidious individuals will likely make their intent known by either formally reviving the older will, formally disavowing it, or drafting a new will altogether. In these cases, the will revival problem does not arise, and the expectations of these individuals are irrelevant to the problem Hirsch is trying to solve.

[10] Jeffrey M. Jones, *Majority in U.S. Do Not Have a Will*, GALLUP (May 18, 2016), https://news.gallup.com/poll/191651/majority-not.aspx [https://perma.cc/5WHR-ST6M]. The poll asked: "Do you have a will that describes how you would like your money and estate to be handled after your death?" *Id.* Forty-four percent of respondents replied that they did have a will. This was down from the 51% that Gallup found about a decade earlier. *Id.*

[11] Assume 44% of the sample has a will. In the extreme, if every person without a will expects Hirsch's majority rule (which accounted for 75% of the total sample), only 43% (i.e., 0.19/0.44) of the will-having subsample would have agreed with the overall majority. That is, it is more likely than not that a given person with a will would not agree with the overall majority.

Instead, we want to know the expectations of those fastidious enough to have wills in the first place, but not fastidious enough to ensure their intent is known.

From a surveying standpoint, this raises a largely insurmountable problem. It is entirely plausible that a person's fastidiousness will correlate with their expectations about what rule will be applied.[12] Unfortunately, fastidiousness, a largely unobservable variable, is not something on which an analyst can reliably filter a sample.[13] In the end, it may only be possible to filter samples on variables relevant to the question at hand (e.g., whether someone has a will). But for Hirsch's proposal to be attractive, we need to be reasonably convinced that the survey sample used represents the relevant population.[14]

CONCLUSION

In principle, Hirsch offers an attractive framework for handling the will revival problem. Absent other concerns, it makes sense to derive legal rules from people's expectations since people base decisions on those expectations. Surveying a representative sample of people about their beliefs provides a sensible prior probability about what any given person likely believes. That said, it may also be important to query respondents about their confidence in those beliefs. Courts should use this prior probability, in conjunction with case-specific evidence, to generate a posterior estimate of what a given testator intended. But in practice, it may be difficult to determine what kind of sample is representative in a given case.

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[12] *See, e.g.*, David Hedengren & Thomas Stratmann, The Dog that Didn't Bark: What Item Nonresponse Shows about Cognitive and Non-Cognitive Ability (Dec. 28, 2012) (unpublished manuscript), https://ssrn.com/abstract=2194373 [https://perma.cc/3TQD-T7T4]. The article shows strong relationships between fastidiousness in task completion and measures of cognitive ability. Presumably, cognitive ability is related both to one's awareness of the law and how one reasons logically in the absence of knowledge about the law.

[13] Imagine the survey question: "On a scale of 1-10, how fastidious are you?" For the record, I am a 2.16.

[14] In addition to sample filtering, one might also consider adjusting for characteristics that could influence (or at least be correlated with) an individual's belief about what legal rule will apply through standard regression techniques. The survey data (including both the survey responses regarding beliefs about the legal rule and characteristics of the respondents) can be used to estimate a regression model that could then be applied to the testator's characteristics to yield a best estimate or prediction of the testator's legal expectation.