Understanding the Rule Against Perpetuities in Relation to the Lawyer's Role—To Construe or Construct†

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This article is about the common law rule against perpetuities and the confusion that exists with respect to the life in being concept. This article observes that one common and very important pronouncement about the rule, that the life in being can be anyone or any group of people, is really a precept for the creation of interests and not for the interpretation of existing limitations. It observes further that, because the interpretive function is essential to comprehensive and effective planning and drafting, this precept is not enough to create dispositive designs and interests which both achieve planning objectives and satisfy the common law rule.

INTRODUCTION

This article is about the rule against perpetuities; it is not about reform of the common law rule but about the original rule itself, the prevailing rule in the United States.[1] It is a rule that is widely misunderstood by students, practicing lawyers, and judges.[2] But

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1. *See* 5 R. POWELL, THE LAW OF REAL PROPERTY § 761 (P. Rohan rev. ed. 1982).

2. *See, e.g.*, J. GRAY, THE RULE AGAINST PERPETUITIES xi (4th ed. 1942) ("few lawyers . . . have not at some time . . . fallen into the net which the Rule spreads for the unwary . . . ."); Leach, *Perpetuities Legislation, Massachusetts Style*, 67

it is a rule which must be comprehended and mastered before it can be applied in jurisdictions in which it still obtains; before it can be reformed; and, perhaps, even before any revised rule can be applied in jurisdictions in which it has already been changed.[3] This article, then, is an effort towards a clearer understanding of the common law rule against perpetuities both in concept and in application.

Lawyers perform many tasks and assume various roles. Although the work they perform cuts across a variety of substantive areas that can be readily categorized,[4] their roles fall into two general categories: dispute resolution and dispute avoidance. Sometimes these roles involve tasks that require the interpretation of documents or writings, and at other times they might involve tasks that require their creation. Lawyers must construe to

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HARV. L. REV. 1349 (1954) ("The Rule . . . is a dangerous instrumentality in the hands of most members of the bar."). *See also* Lucas v. Hamm, 56 Cal. 2d 583, 592, 364 P.2d 685, 690, 15 Cal. Rptr. 821, 826 (1961) (the California Supreme Court found that an attorney who drafted a dispositive instrument that violated the common law rule did not fail "to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise.")

Finally, consider these comments of Samuel M. Fetters.

> Perhaps the Supreme Court of California was correct after all. If it takes over eight hundred pages to explain a one-sentence, twenty-seven word rule, and that explanation was written by a legal scholar who devoted a lifetime of study to it, then maybe the rest of us should not be held accountable for knowing little, if anything about it. . . . There is no question that the reports are full of lawyer errors, compounded by judicial blunders, in the field of perpetuities law.

Fetters, *The Perpetuities Period in Gross and the Child En Ventre Sa Mere in Relation to the Determination of Common-Law and Wait-And-See Measuring Lives: A Minor Heresy Stated and Defended*, 62 IOWA L. REV. 309, 334-35 (1976). It should be noted that, despite the difficulties that have existed in mastering the common law rule by bench and bar alike, Fetters believes that it can be understood with a proper method of analysis; indeed, it is not something too difficult to grasp. *Id.* at 311, 335.

3. Obviously, the common law rule against perpetuities must be understood and satisfied in all situations in which it applies. Similarly, questions that arise concerning reformation of the common law rule, both as to need and substance, cannot be resolved adequately without a prior understanding of the common law rule itself. However, it would appear that comprehension and mastery of the common law rule might become unnecessary when reformation occurs and some form of a wait-and-see test replaces it. Nevertheless, it may be argued that compliance with the common law rule should not be ignored or dismissed in any jurisdiction—even those that adopt a wait-and-see test. *See infra* pp. 754-61.

4. Indeed, estate planning itself may involve several substantive areas. For example, consider the many areas of law that are involved in planning the estate of a major stockholder in a family-owned business. A dispositive plan might begin with rearrangements of ownership made during the estate owner's lifetime. This might require an understanding and application of the law of corporations, contracts, taxation, and, depending upon the composition of the estate, real property. Further, it might culminate with dispositive instruments that require an understanding and application of the law of trusts, wills, and taxation. Although law school courses are predominantly organized by single subjects of law, seldom, if ever, is a transaction restricted to just one substantive area of law.

litigate; they must also construe to avoid litigation. Lawyers must draft to resolve disputes; they must also plan and draft to avoid them.[5] While these roles and tasks have much in common, they also have much that distinguishes them. Dispute resolution that reaches the stage of litigation usually occurs within a fixed framework, fixed in terms of events and documents that give rise to the dispute. Quite differently, dispute avoidance that is accomplished by planning usually occurs within a framework that needs to be created or shaped. All too often, one overlooks the fact that these different roles and tasks demand somewhat different skills and understanding. This oversight is not unusual when it comes to understanding the common law rule and the life in being concept.

The common law rule is taught mainly by posing examples and then explaining answers.[6] Although many commentators stress the relevance of the common law rule to planning and drafting, and even make specific suggestions towards the creation of valid interests,[7] the general emphasis of most is on learning to construe fixed limitations and to discern whether violations exist.[8] Generally, this makes sense. Even though the tasks are not the same, if one can construe and interpret properly, one should be able to

5. For example, lawyers plan and draft wills and trusts to implement an estate owner's dispositive scheme, and, quite obviously, they must do this in a manner that avoids subsequent disputes as to estate ownership. Somewhat differently, lawyers may draft settlement agreements and prepare instruments of transfer to facilitate the resolution of existing disputes.

6. For example, the original nutshell on perpetuities, upon which generations of law students have been weaned, contains propositions about the common law rule that are each followed by examples with explanations. *See* Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938). *See also* L. SIMES, SIMES ON FUTURE INTERESTS § 109 (1951); R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 42-47 (1966); J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, AND ESTATES 980-83 (2d ed. 1978).

7. *See, e.g.*, Sparks, *Perpetuities Problems of the General Practitioner*, 8 U. FLA. L. REV. 465 (1955); L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 1293-97 (2d ed. 1956 & Supp. 1973); R. Lynn, *supra* note 6, at 152-53; Leach, *supra* note 6, at 669-71; Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 985-86 (1965). These commentators make suggestions with respect to various potential problem areas such as class gifts, powers of appointment, and age requirements.

8. *See, e.g.*, S. FETTERS & J. SMITH, SIMES' CASES ON FUTURE INTERESTS §§ 15.02-15.06 (3d ed. 1971); R. MAUDSLEY, THE MODERN LAW OF PERPETUITIES 42-56 (1979); L. SIMES & A. SMITH, *supra* note 7, §§ 1222-92; R. LYNN, *supra* note 6, at 33-141; Leach, *supra* note 6, at 640-69. Even though Simes and Smith, Lynn, and Leach make specific suggestions towards the creation of valid interests, it should be observed that their discussion of the common law rule is nearly always within the context of interpreting existing limitiations.

construct a valid limitation as well. If one can understand and apply the rule correctly within a framework of fixed facts and existing instruments, one should be able to do so when the task is to create and shape. However, a special difficulty arises with regard to the common law rule and the life in being concept. Many pronouncements are made with respect to that concept, usually without specific reference to the lawyer's tasks of interpretation or creation.[9] These pronouncements often occur within the context of particular examples and the task of interpretation. However, some of these pronounced principles are readily understandable only within the context of creation, and become confusing when applied to the task of interpretation. Pronouncements about the life in being concept should be carefully explained in terms of the lawyer's specific role and task. Yet, even when properly explained, it is not always clear that an understanding of the life in being concept developed with respect to the creative task of planning and drafting is sufficient. Such a focus may not furnish or facilitate the comprehensive mastery of the common law rule needed to construe limitations correctly. This article illustrates the confusion engendered when the common law rule is not properly explained. More specifically, this article will demonstrate that one common and very important pronouncement about the life in being concept is really a precept for creation, not for interpretation. It will further demonstrate that this precept and the understanding it affords for creative planning tasks is not only inappropriate to interpretive tasks, but it is also ultimately insufficient even for planning and drafting.

THE LIFE IN BEING CAN BE ANYONE OR ANY GROUP OF PEOPLE: A PRECEPT FOR THE CREATION OF VALID INTERESTS

The common law rule against perpetuities provides that:

> No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.[10]

This often quoted statement is John Chipman Gray's short-hand

9. *See, e.g.*, L. SIMES, SIMES ON FUTURE INTERESTS 370-73 (2d ed. 1951); Leach, *supra* note 6, at 640-42. Both Simes and Leach explain the life in being concept with principles followed by illustrations. Primarily, they seem concerned with recognizing or determining the validating life in being and, accordingly, they seem preoccupied with the task of interpretation. Nevertheless, within this same discussion, they refer to how many lives may be "used" or "selected" to measure the valid period. Their use of these terms suggests another context, that of creation. Whichever context they might intend, interpretation or creation, they do not make the distinction between the two either explicit or clear. To be sure, if they do intend such a distinction, it undoubtedly escapes most students who are attempting to understand the rule.

10. J. GRAY, THE RULE AGAINST PERPETUITIES 191 (4th ed. 1942).

summary of his monumental synthesis of the common law of perpetuities as it had developed over several centuries. Stated in this fashion, the common law rule has an appealing simplicity. Yet beneath this simplicity lies a rule that has bedeviled generations of law students. Inevitably, they ask: Who is this life in being by which one determines that an interest is valid? They ask this question because the identity of the validating life in being is usually the major concern of students trying to comprehend the common law rule and apply it to specific examples.[11] Typically, some guidelines of pronouncements are offered about the validating life in being. Students are then provided examples and instructed to follow along when given the correct answers and explanations. With experience, they are expected to "catch-on" and soon be able to solve these problems by simple inspection as the validating life in being becomes evident.[12]

The instructive guidelines given to students about the validat-

11. *See, e.g.*, L. SIMES, *supra* note 9, at 370; J. DUKEMINIER & S. JOHANSON, *supra* note 6, at 981; Allan, *Perpetuities: Who Are the Lives in Being?*, 81 L.Q. Rev. 106, 106-07 (1965); Note, *Understanding the Measuring Life in the Rule Against Perpetuities*, 1974 WASH. U.L.Q. 265. Students have other concerns as well. Beyond the life in being concept they frequently preoccupy themselves with the application of the common law rule to class gifts, powers of appointment, options, charitable gifts, revocable trusts, rights of entry, and possibilities of reverter, and also with the assumed possibilities that the rule requires. Each of these areas of concern is discussed adequately in articles and treatises, especially in the classic treatment of the rule by Leach, *supra* note 6. Although students may scoff at the presumption of fertility that the rule indulges and at the cases of the "unborn widow" or the "administration contingency," they have little difficulty grasping them and integrating them into their understanding and application of the common law rule.

12. *See* Allan, *supra* note 11, at 106-07. Allan reduces the mechanics of the common law rule to a formula and also stresses that the validating life in being is always mentioned in the limitation, expressly or impliedly. He also adds that some examples would soon clarify the life in being and the proof required by the rule. *See also* R. MAUDSLEY, *supra* note 8, at 4-5, 94-101. Maudsley contends that the only lives in being recognized under the common law rule were those that actually validate an interest, and that these lives always select themselves. *See also* Fetters, *supra* note 2, at 309-11, 334-35; S. FETTERS & J. SMITH, *supra* note 8, at 640-42. Fetters acknowledges that the common law rule has been taught and understood in such a manner that perpetuities problems are solved largely by simple inspection. However, he decries this practice. Fetters maintains that a method of analysis is required, which he develops and explains. Perhaps it is possible to reduce application of the common law rule to a precise methodology. Nevertheless, one might observe that the legal method itself is, in the main, taught experientially and without equations that lead directly to correct answers and solutions. For example, a student might ask: "How do I discover the issue?" The instructor might respond: "Follow along while we read cases, ask questions, discuss them; you'll understand in time."

ing life in being usually include: the life in being can be anyone or any group of people, not unreasonably large or unreasonably difficult to trace; the person need not be the recipient of any interest within the limitation or within the dispositive instrument itself; and the life in being need not be explicitly mentioned in the dispositive instrument.[13] Typically, students find these guidelines confusing when asked to construe and interpret a given limitation and to determine its validity. Frequently they respond: If the life in being can be anyone, even someone not mentioned in the instrument, then why isn't the life in being anyone who was actually alive and why can't anyone be used to validate the interest? Although the answers to these questions seem obvious to those who have mastered the common law rule, they are neither apparent nor easily understood by most students.[14]

This particular difficulty with the life in being concept, concerning the pronouncement about the validating life being anyone or any group of people, can be illustrated. Consider this devise by *A* of Blackacre: "To *B* in fee simple; however, if Blackacre is ever used for the manufacture or distribution of alcoholic beverages, then to *C* in fee simple absolute." Ostensibly, *A* has created a defeasible fee simple in *B* subject to an executory interest in fee simple absolute in *C*. Does *C*'s contingent interest violate the common law rule against perpetuities? In making this determination, an initial concern of students is with the identity of the life

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13. The rule simply is that any living person or persons may be the life or lives in being for the purposes of any limitation; provided only that if the settlor or testator expressly selects the life in being for the purposes of a limitation, he must not select so many nor such unrecognisable persons as the lives in being that it is impracticable upon evidence available to the court to ascertain the date of the death of the last one.

R. MAUDSLEY, *supra* note 8, at 42. Maudsley later qualifies this broad statement by indicating that the only lives of any use are those in which vesting cannot possibly occur beyond twenty-one years of their deaths. *Id.* at 43. Nevertheless, it typifies the kind of broad and unqualified statement that students seize upon in their attempt to understand and apply the common law rule. *See also* 6 AMERICAN LAW OF PROPERTY § 24.13 (A.J. Casner ed. 1952); Leach, *supra* note 6, at 641-42. *Cf.* R. LYNN, *supra* note 6, at 43.

14. The answer to these questions is in two parts. First, these guidelines are misleading. They are primarily precepts for the creation of valid interests. Virtually anyone or any group of people can be used to create a valid interest under the common law rule. However, this statement does not apply to interests already created which must then be tested in terms of the rule. These pronouncements are really precepts for creation and not interpretation, and a student has good reason to be confused if he is attempting to apply them to an existing limitation for the purpose of determining its validity. *See infra* note 18 and accompanying text. Second, because the common law rule is a possibilities test, it is absolutely clear to those that understand the rule that, when it comes to interpretative application, the validating life in being cannot be anyone and that the proof required by the common law rule immediately limits the potential pool of lives in being that might be used to validate. *See infra* note 16.

in being by which the period of the common law rule must be measured. Can the validating life in being be anyone at all, even someone not mentioned in this limitation? The answer to this question is no. The usual explanation might begin with the observation that the common law rule is a possibilities test. An interest is valid if there is no possibility that it might vest beyond the period of the rule[15]—a life in being plus twenty-one years. An interest is valid if it must vest, if at all, within twenty-one years of its creation. If this cannot be proven, then the interest is valid only if one can identify some person in being when the interest is created and prove that there is no possibility whatsoever that the interest can vest beyond twenty-one years of that person's death. Neither of these proofs can be made in this instance, and, as written, the executory devise given to *C* violates the common law rule. Students frequently wonder: What about *B* and *C*; are they validating lives in being? And so the explanation would continue. *C*'s interest is contingent, but it is also transmissible at *C*'s death. By its terms, it will vest in *C*, or *C*'s successors, whenever the requirement as to land use is breached. The condition itself extends beyond both the lives of *B* and *C*; it can endure indefinitely just the same as the interests in fee simple given to them. One cannot prove that the executory interest must vest or fail within twenty-one years of its creation, nor can one prove that it must vest or fail within twenty-one years of either *B*'s or *C*'s death. The condition can be violated generations beyond their deaths. The defeasible fee simple in *B*'s successors would then be divested in favor of *C*'s successors, none of whom were in being

15. This statement of the common law rule differs in form from the test offered by Gray, and used by most exponents of the rule. *See supra* text accompanying note 10. Nevertheless, this different form is used at various points within this article to avoid a mistake commonly made even by experts. Gray's test is that an interest is valid if it must vest, *if at all*, within the allowed time period. Unfortunately, most commentaries on the rule overlook at one point or another the "if at all" requirement in their descriptions of the test. "The proper question to ask is: Can I point to some person or persons now living and say that this interest will by the very terms of its creation be vested in an identified individual within twenty-one years after that person dies?" Sparks, *supra* note 7, at 470. This oversight is critical because, without the "if at all" requirement, one could never prove that a contingent interest must vest within any period and, therefore, all contingent interests would violate the rule. By definition, a contingent interest is not certain to vest. See J. DUKEMINIER & S. JOHANSON, *supra* note 6, at 980-82. The common law rule does not require that an interest must become possessory within the allowed time period, nor does it require that it must vest within such period. It does, however, forbid all interests that might possibly vest beyond twenty-one years after the deaths of all lives in being at the creation of such interest.

at A's death. Therefore, B and C are not lives by which the executory interest can be validated. The same can be said about any life in being extraneous to the devise itself. For example, what about the *President of the United States* who is in being at A's death? Once again, the condition can last indefinitely and it is totally unrelated to the *President's* life. The condition as to land use can be breached generations beyond his death. One cannot prove that the executory interest must vest or fail within twenty-one years of his death. The *President* is not a life by which the interest can be validated. If a validating life in being is to be found, it must necessarily be someone whose life plays a part in either the timing of the condition or the fulfillment or breach of the condition.[16] No such person can be found with respect to this

16. For many who understand the common law rule, this conclusion is too obvious to require any discussion. Nevertheless, it requires careful attention and explanation. To begin with, the rule requires a proof that there is no possibility whatsoever that vesting can occur beyond twenty-one years of the death of some life in being. If a proof is to be made and all possibilities eliminated, simple logic dictates that this can only be accomplished with someone *connected to the issue of vesting*. It is impossible to make the required proof with respect to anyone totally unconnected to vesting; therefore, these unconnected lives must be irrelevant to application of the rule. All agree that potentially the required proof can only be made with someone within a cluster of connected lives in being. However, all do not agree as to how this cluster should be defined or refined.

This matter of precise definition becomes especially important under wait-and-see reformations of the common law rule. Once the rule becomes a test of actualities, not possibilities, and once it requires that determinations of validity be delayed for a period of time, the precise contours of this period of time become absolutely essential to the application of the new rule. For most commentators and legislatures, neither everyone alive nor only those that validate under the common law rule makes sense as the new waiting period lives. The former does too much by way of reformation, while the latter does nothing at all. For many, however, a compromise waiting period exists. This compromise period can be forged with the cluster of connected lives from which a proof might be made, and a validating life discovered, under the common law rule. The lives that fall within this cluster of connected lives have been referred to as "limiting lives," "relevant lives," or "causal lives." Beyond the obvious need for some connection to vesting, disagreement has developed as to how these lives are defined and precisely who they are. Stated differently, exactly what kind of connection is required?

Some have defined "causal lives" as those who *restrict the vesting period*. This seems clear enough; nevertheless, there are problems. For example, consider this devise by A: "To W for life, and then, thirty years after his death, to Z in fee simple if then living." Assume that both W and Z survive A. The devise to Z is contingent and the contingency is one that must be fulfilled more than twenty-one years after W's death. Therefore, W is not a validating life in being. Nevertheless, this devise is valid because it must vest, or fail, within Z's own lifetime. Therefore, Z is a validating life in being under the common law rule. Accordingly, Z should be comprehended by any precise definition of the cluster of connected lives that can be used to make a proof under the common law or determine the waiting period under a wait-and-see statute. But, is Z a "causal life" under this definition? What exactly does it mean to say that "causal lives" are only those lives that limit or restrict the time of vesting? With this definition, it would seem that only W qualifies as a "causal life" because the vesting period is directly measured from the time of his death. However, W is not a validating life in being. Be-

limitation. Indeed, *C*'s interest fails *because there is no validating life in being*. Invariably, this latter statement confounds students. They might ask: If the life in being can be anyone or any group of people, why is it that in this example there is no life in being at all; indeed, doesn't there always have to be some life in being? This entire explanation is seldom clear to students initially trying to cope with the common law rule. The interpretive task—applying the common law rule to a given limitation—is not easily accomplished.

Quite differently, students can readily grasp and apply this same pronouncement when asked to construct or create a limitation that does not violate the common law rule. With little difficulty, they understand that the validating lives in being can be literally any reasonable number of people, even those not provided for in the limitation, if the draftsman explicitly requires that vesting must occur, if at all, by the time these people die or within twenty-one years after their deaths. Even if somewhat unclear as to why *C*'s executory interest violates the common law rule, students usually can rewrite the limitation and make *C*'s interest valid. For example, they seldom have difficulty in curing the violation by relating the condition of divestment to the life of *B* or *C*, or both. This can be accomplished by either of these revisions:

> (H)owever, if Blackacre is ever used during the life of *B* or within twenty-one years after his death (is ever used during the life of *C* or within twenty-one years after his death) (is ever used during the life of the survivor of *B* and *C* or within twenty-one years after the survivor's death) for. . . .[17]

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cause *Z* is a validating life, it would seem that this definition of "causal life" is too restrictive. Further, in the illustration under consideration in the text, is either *B* or *C* a "causal life" in being? Does either *B*'s or *C*'s life restrict the vesting period? Unlike *Z*, neither *B* nor *C* is a validating life in being, but do they belong initially within the cluster of connected lives with which a common law proof might be attempted or a waiting period determined? Should "connected or causal lives" be defined or elaborated so as to include them? For a discussion of these matters and, particularly, the problem of "causal lives" at common law and under wait-and-see rules, see R. MAUDSLEY, *supra* note 8, at 87-109; Morris and Wade, *Perpetuities Reform at Last*, 80 L.Q. Rev. 486, 495-501 (1964); Allan, *supra* note 11, at 106; Note, *supra* note 11, at 265; Note, *Measuring Lives Under Wait-And-See Versions of the Rule Against Perpetuities*, 60 WASH. U.L.Q. 577 (1982).

17. None of these variations violates the common law rule. In the first variation, *B*'s interest cannot be divested beyond twenty-one years of the death of a life in being—*B*; if the condition is not breached within that period of time, *B*'s interest becomes absolute in his successors. In the second variation, *B*'s interest cannot be divested beyond twenty-one years of the death of a life in being—*C*; if the

Alternatively, students may readily observe that by using specially selected lives that are extraneous to the particular gifts, the probable period of years in which the condition operates can be extended even further. For example, consider this revision: "(H)owever, if Blackacre is ever used during the life of the survivor of *B*, *C*, *M*, *N*, or *O* or within twenty-one years after the survivor's death for. . ." Assuming that *M*, *N*, and *O* are three healthy babies born just before *A* executes his will, the period of the condition is, in all probability, extended several decades. Nonetheless, *C*'s interest is valid.[18]

In summary, students find this particular guideline—that a validating life in being can be anyone or any group of people—misleading. In reality, the life in being by which an interest is validated cannot be anyone at all with respect to specific interests already created. Once the terms of a limitation have been cast, the lives in being that can potentially validate an interest are fixed. They cannot be anyone at all, and students find it terribly confusing to be told otherwise when they attempt to determine who these lives are. Although this guideline is usually announced within the context of the common law rule as applied to existing limitations,[19] it is not really a useful principle for this interpretive task. Instead, it is a precept for the constructon and creation of interests.[20] Indeed, it is inaccurate to say that the validating life in being can be anyone or any group of people. However, it is quite accurate to say that a planner can select virtually anyone as the life in being needed to create a valid interest. This pro-

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condition is not breached within that period of time, *B*'s interest becomes absolute in *B* or his successors. In the third variation, *B*'s interest cannot be divested beyond twenty-one years of the death of the survivor of two lives in being—*B* and *C*; if the condition is not breached within that time period, *B*'s interest becomes absolute in his successors.

18. Undoubtedly, the period of the condition is extended considerably because of the probability that at least one of the specially selected lives, each of whom is necessarily younger than *B* and *C*, will live longer than both *B* and *C*. Nevertheless, this revision does not violate the common law rule. Presumably, this group of validating lives in being is not unreasonably large or unreasonably difficult to trace for purposes of determining the time of their respective deaths. *See* L. SIMES & A. SMITH, *supra* note 7, § 1223, at 108-12. Therefore, *B*'s interest cannot be divested beyond twenty-one years of the death of the survivor of five acceptable lives in being—*B*, *C*, *M*, *N*, and *O*. If the condition is not breached within that period of time, *B*'s interest becomes absolute in his successors.

19. Usually this particular guideline is explained with illustrations that suggest application of the common law rule within a context of interpretation. Whatever might actually be intended, these explanations seldom clearly differentiate between the tasks of interpretation and creation. *See supra* note 9. *See also* L. SIMES & A. SMITH, *supra* note 7, § 1223, at 108-12.

20. This conclusion is not novel. *See, e.g.*, R. LYNN, *supra* note 6, at 43. Surely it is recognized by anyone who has ever mastered the common law rule. Nevertheless, it is a critical observation that is frequently overlooked or underemphasized.

nouncement about the life in being makes little sense when construing an existing limitation, but it is easily understood and applied when constructing or conceiving a limitation.[21]

APPLYING THE COMMON LAW RULE IN PRACTICE

This Pronouncement About the Life in Being is Not Enough Either to Construe or Construct

It would seem, then, that students and lawyers should have little difficulty satisfying the common law rule with respect to creative tasks; for example, planning for the disposition of estates and drafting instruments that fulfill such plans. This creative function is the most important one in the estate transfer process because

21. Two important observations should be made at this point. First, this pronouncement about the life in being—that the validating life in being can be anyone or any group of people—is fundamentally a precept for the construction and creation of interests. Nevertheless, there is one narrow situation in which it is relevant to the interpretation of existing limitations. It is relevant to limitations which already use a group of people to govern the time of vesting. This group of people must not be unreasonably large or difficult to trace. *See supra* note 13. Accordingly, in determining whether the common law rule has been violated, one must make an interpretive assessment as to whether vesting can occur more than twenty-one years beyond the last of this group to die; and whether this group is unreasonably large or difficult to trace. Second, problems that students have with the interpretive use of the common law rule do not disappear even after they understand that the validating life in being cannot be anyone when applying the rule to existing limitations. For example, whenever an interest violates the common law rule there is no validating life in being; there is no life in being about whom one can say that the interest must vest, or fail, within twenty-one years of his death. Nevertheless, students persist in asking: In finding the interest invalid, who is the measuring life—who is the life in being? *See supra* text accompanying note 16. Their confusion is very real, and it is also very understandable. Some commentators have said that the only lives in being that matter under the common law rule are those that validate, and that these lives always select themselves. *See, e.g.*, R. MAUDSLEY, *supra* note 8, at 87-100. Telling students that there are no lives in being other than those that validate ignores their problem of comprehension. They may understand that interests which violate the rule are without validating lives, but they do not understand how this conclusion of invalidity is reached. The presence or absence of validating lives is not self-evident to the novice. Students search for a process by which they can make their own determinations. To do this, they see a need to establish a pool of lives by which they can test the limitation. For them, there must always be some lives in being—a group of lives by which they can test and apply the rule. Accordingly, they always want to establish, even when there is in fact no validating life, a pool of lives which they can use to confirm their conclusions. It would seem, then, that the guidance they seek and require is as to the composition of this pool of lives by which they can test the limitation. Indeed, it is irrelevant whether these testing lives have been a formal part of the common law rule; inevitably, they are a part of the process of applying it.

it sets the framework by which dispositive goals are to be achieved, assets are to be conserved, and disputes are to be avoided. Consequently, it is here that lawyers first and most frequently encounter the common law rule, and it is here that students must master it. One might wonder: why is there so much concern with the life in being concept? It is a concept readily mastered and applied within the context most important to the practice. And if this is true, why does the common law rule remain such a mystery to most students and lawyers? Further, one might wonder why is the interpretive task emphasized so much in teaching the common law rule when this seems least important?

There are three answers to these questions, two that are obvious and a third that is not. First, something can always be said about the importance of learning a whole rule and not just a portion of it. Something seems inherently wrong in concluding that lawyers need not master the entire fabric of the common law rule either because of its complexity or because of its comparative disuse in certain aspects of the practice. Second, even if the creative function of planning and drafting is the prevailing context for applying—and, therefore, understanding—the common law rule,[22] lawyers cannot always control the situations in which they encounter the rule. In every interpretive dispute there are at least two sides. Usually one side is represented by lawyers who participated in drafting the dispositive instrument; those who first faced the comon law rule in performing this creative function and could limit the conditions in accordance with the rule's requirements. Yet there is nearly always one side that is new to the instrument and that enters the case only at the stage of interpretation and dispute resolution. Lawyers frequently decline future interest litigation. It does not behoove the profession for these interpretive causes to go begging to the few who revel in the common law rule or to pass by default to those who lack the integrity or the wisdom to forgo what is beyond them. In short, something seems radically wrong with predicating the breadth of one's understanding upon expectations of selective practice and representation.

Finally as a practical matter, neither lawyers nor their clients formulate dispositive designs with the common law rule foremost in mind. This seems both natural and wise. Estate owners do not

22. It should be noted that for some lawyers the framework for understanding and applying the common law rule may involve primarily the interpretation of existing dispositive instruments. For example, consider the role of lawyers employed full time by corporate executors and trustees. Although these lawyers may conceive and draft will and trust forms for general use, their principal concern is with the interpretation and administration of instruments prepared by others.

normally conceive and elaborate future interests and their attendant conditions in terms of the common law rule's constraints. Future interests and trusts are used for a variety of reasons. They are used, for example, to provide intermediate benefits for particular beneficiaries; to facilitate management and the retention of the estate generally, or with respect to specific beneficiaries; to encumber alienability; to assure appropriate division among family members or units within the family; and to extend dead hand control indefinitely.[23] These kinds of objectives do not naturally lend themselves to time limitations upon vesting other than those needed to fulfill the objective that underlies the use of a particular future interest. For example, estate owners who wish to defer control of principal until respective recipients are capable of enjoying and managing it, naturally think in terms of the criteria and conditions relevant to those objectives. These future interests themselves are not ordinarily designed and developed with the time frame of the common law rule squarely in mind. If time is a factor at all in determining capacity for enjoyment and management, the foremost planning consideration should be the time when particular beneficiaries are most apt to demonstrate these attributes. This time period may or may not fall within the period of the common law rule.

Accordingly, most planning and drafting initially requires the formulation of a design that incorporates those conditions and time factors that best implement the estate owner's particular dispositive goals. If estate owners naturally think first in terms of

23. For example, suppose that *A*, an estate owner, wanted to make certain that his estate was first used to meet the needs of his wife and children, and that he expected the needs of some might be negligible, while the needs of others might be substantial. Suppose, further, that his estate was sizable and that he was concerned with the ability of some to manage and conserve any immediate distributions of principal. Finally, assume that because of these concerns with need, conservation, and management, he wanted to defer ultimate distribution of shares of principal for a considerable period of time—at least until his wife and children had died. And with respect to this distribution of principal, assume that he wanted it to belong to his descendants without regard to family unit. With these objectives in mind, *A*'s lawyer might then devise a plan that involved a trust and future interests. More specifically, he might create a testamentary trust that would provide income, and principal if necessary, to *A*'s wife and children. The trustee might be given limited discretion with respect to income and principal to satisfy any special needs of these beneficiaries. And at the deaths of *A*'s wife and children, the trust might then provide for distribution of principal in equal shares to living descendants per capita. This kind of dispositive scheme would serve *A*'s objectives generally. Elaboration of other priorities, such as saving death taxes, would require an adjustment of these priorities and of the plan itself.

these factors and criteria, it would seem that the same should be true for the lawyers who plan their estates. Because the rule may require some moderation of objectives, it should only be considered after the design which fully accomplishes dispositive goals has been formulated. Intelligent and effective alteration of the design, and if necessary its underlying objectives, cannot—and should not—be done until it is determined which parts of the design violate the common law rule. This technique requires interpretive use and application of the common law rule and the life in being concept. Quite obviously, it makes no sense to modify a dispositive design until it is clear that such modification is needed. Further, it is just as senseless to attempt rectification without a firm grasp of the precise problem and reason for the violation.

In short, although the common law rule and its life in being concept are easily mastered by a planner and draftsman, the creative function itself seldom proceeds to a final product without prior interpretive use and application of this rule. The common law rule should not emerge as part of the creative planning process until after some preliminary design has been sketched. First it is applied within an interpretive context in which the validating life in being cannot be anyone; thereafter, when necessary, it is applied within a creative context in which anyone may be made a validating life in being.[24]

The Planning Process in Action—An Illustration

These observations can be illustrated. Suppose, after some consultation and counseling,[25] it appears that A, an estate owner, has

24. These foregoing observations and conclusions about the planning process derive from personal conjecture and not empirical study. They are made on the basis of the logical demands that flow from a given task; indeed, they are generalizations about what lawyers should be doing when they plan and draft. However, in actuality, lawyers do not always function in the precise manner described. For example, sometimes the preliminary design that is sketched involves a standard form with some modifications. The common law rule is then applied interpretively, with further modifications if necessary. Sometimes, however, these same lawyers ignore the rule completely because of a saving clause that is included in the form. This kind of drafting should border on malpractice. At the very least, it ignores the fact that the saving clause can radically alter a dispositive design in the event of a perpetuities violation, even though that violation could have been avoided with only slight alterations in the final design itself. For further discussion, *see infra*, pp. 754-61.

25. The dispositive priorities and objectives of A, that are described in the text that follows, do not ordinarily emerge all at once. The attitudes and feelings of clients about death, family, and property are exceedingly complex; often, it is difficult for them to identify and express their precise wishes. Lawyers must recognize that these goals frequently cannot be developed without sensitive counseling by them. Although a client initiates the process and knows that he is there

developed certain objectives with respect to the disposition of the bulk of his substantial estate. *A*'s estate consists largely of developed real property that he believes it would be unwise to sell and apportion in the immediate future. *A* is unmarried and has no descendants. He wants to leave his estate first to his much younger sister, *S*, and her family, and then he wants it to belong to the family of his deceased older brother, *B*. More specifically, *A* first wants his estate used to care for *S*, and at her death applied for the benefit of her children. Currently, *S* has one infant child, but she plans to have other children. After *S*'s children die, *A* wants it to pass absolutely to his brother's family. Because *B*'s children are considerably older than *S*'s child and will be even older than the children *S* plans to have, *A* believes that *B*'s children are not likely to survive the deaths of both *S* and her children, existing and anticipated. Accordingly, *A* prefers that a direct gift of the principal ultimately be made to *B*'s current and anticipated grandchildren. Finally, *A* wants *B*'s grandchildren to have the principal for themselves only when they are capable of managing it; he does not want them to dissipate it because of immaturity or inexperience. For this reason, he does not want principal distributed to them immediately or all at once; instead, he wants distribution staggered in several payments beginning at age twenty-five.

With these facts and objectives, a lawyer might typically sketch out a rough dispositive design that attempts to implement each of *A*'s goals in consecutive fashion. For example, a planner might place the bulk of *A*'s estate at his death in trust and provide:

> Income to *S* for life. After she dies, income to her children in equal shares for the life of the survivor of them. After all of *S*'s children die, the principal is to be given in equal shares to each of *B*'s grandchildren, with distribution of each grandchild's respective share as follows: one-third at age twenty-five, one-third at age thirty, and one-third at age thirty-five.

With this rough sketch in mind, *A*'s lawyer can then address

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to talk about transfers that involve death, he may be reluctant to discuss matters that concern his actual death or the deaths of those around him. He may begin with some embryonic thoughts about his estate design, and it then becomes the planner's task to expand and develop these thoughts into a viable dispositive scheme. Lawyers must carefully anticipate these obstacles; they must prepare themselves for a process that requires delicate questioning and elaboration of their clients' ideas. For a discussion of these matters, see T. SHAFFER, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 1-57 (2d ed. 1979); B. BECKER, PSYCHOLOGICAL ASPECTS OF ESTATE PLANNING, ESTATE PLANNING QUARTERLY BOOKLET No. 403, 1-35 (1970).

specific problems presented by both *A*'s dispositive scheme and the particular language used to implement it.[26] As for the common law rule, it would have made little sense to tamper with *A*'s dispositive objectives until they are literally formulated and reduced to actual provisions. Indeed, it is exceedingly difficult to determine whether and why the common law rule requires schematic or language revision until actual interests have been cast against which the rule can be tested. Although some experts on estate planning and the common law rule immediately perceive potential problems with the rule and they can draft initially with it in mind, most lawyers cannot and should not do this. Perhaps even the expert should be wary of compromising the explicit goals of estate owners until it becomes abundantly clear that these particular goals literally cannot be accomplished. In this instance, *A* ultimately wants to provide for all of *B*'s grandchildren after the deaths of *S* and her children and, further, he wants to impose an age requirement upon the grandchildren's respective interests. It is difficult to see how one can readily determine whether these goals must be moderated until they are transformed into actual interests which may or may not violate the common law rule. However, once a rough sketch is made, one should be ready to apply the common law rule, ready to determine whether there is any violation, and also prepared to determine the kind of change that should be made to *A*'s dispositive scheme if a violation exists.

Examining, then, the interests tentatively created by *A*, no perpetuities problem arises with either of the life estates created in *S* or her children. *S*'s infant child has a vested remainder for life that is subject to open. Nevertheless, this class gift to her chil-

26. Important questions and problems remain, matters that become more apparent as a result of this rough sketch. For example, should *S* receive only so much of the income as is necessary to maintain her? If so, what should be done if the income exceeds what is needed to maintain her? What if the income is insufficient to meet those needs? After *S*'s death, what should happen when the first of her children dies? To whom should that deceased child's share of the income belong? The final distribution of principal to *B*'s grandchildren suggests requirements of survivorship. *See infra* notes 29 and 33. More specifically, does *A* intend that *B*'s grandchildren must survive the life tenants and the designated ages? Further, after the death of the life tenants, but before complete distribution of a grandchild's share, what should be done with the income generated by the corpus that remains in trust? The answers to these questions are critical. *A*'s lawyer must probe further to discover and elaborate *A*'s objectives and to refine his dispositive design. These revelations never come all at once. Often preliminary drafts must be made before a viable plan can be crystallized. For a description and discussion of this evolutionary process, see D. Becker, *Future Interests and the Myth of the Simple Will: An Approach to Estate Planning*, 1973 WASH. U.L.Q. 1, 1-7; D. Becker, *Broad Perspective in the Development of a Flexible Estate Plan*, 63 IOWA L. REV. 751, 810-15 (1978).

dren is contingent for purposes of the common law rule until the class membership is fully determined.[27] However, there is no violation because it will fully vest under the rule when the class membership is fixed at the time of her death.

As to the class gift given to *B*'s grandchildren, there would seem to be problems at the outset, which the tentative draft clarifies. *B*'s grandchildren—including those currently alive—have a class gift which is contingent for purposes of the common law rule because the maximum membership will not be determined until *B*'s children die or until the time for first distribution, if it occurs before *B*'s children die.[28] It may also be deemed contingent because of the age requirements and, perhaps, because of an implied requirement that they must survive the life tenants.[29]

27. The common law rule imposes special requirements on class gifts. Class gifts are contingent under the rule until the membership is fully determined. Stated differently, the common law rule treats class gifts as a unit; if any possible member's interest violates the rule, then the entire class gift also violates the rule. And this includes even those class members whose interests must clearly vest, or fail, within the period of the rule. For a class gift to be valid, the interests of all eligible members must vest, or fail, within the allowed time period; none can vest beyond it. *See* L. SIMES & A. SMITH, *supra* note 7, §§ 1265-1270 at 195-206; R. MAUDSLEY, *supra* note 8, at 39-42. Accordingly, because *S* is ascertained and her interest is vested, her life estate does not violate the common law rule. Further, her children's life estate does not violate the rule because their class gift will be fully determined by the time of *S*'s death, and she is a life in being. Stated differently, no possible class member's interest can be ascertained, and therefore vest, beyond *S*'s death.

28. The gift of principal to *B*'s grandchildren alive at *A*'s death may or may not be contingent upon their surviving the life tenants and the designated ages; however, the gift to them is contingent under the common law rule because the class gift is subject to open until *B*'s children die or until the time for first distribution, if it occurs before *B*'s children die. *See infra* note 34.

29. Conceivably, a court might find these conditions and requirements of survivorship because it believes *A* must have intended them. *See infra* note 33. Further, a court might reach these same conclusions because of the language used in the preliminary provision itself. To begin with, principal is not given to *B*'s grandchildren until the life tenants die, and then it is to be shared by them equally. Some courts have reasoned that if a gift—particularly a class gift subject to open—is not made until a future time, then such gift is future in substance and contingent until that time. And this contingency involves survivorship to the time at which the gift is made or distributed. This principle is sometimes embodied in a rule known as the "divide-and-pay-over rule," a rule that does not always require exact language of divide-and-pay-over. For a discussion of this principle and rule, see L. SIMES & A. SMITH, *supra* note 7, §§ 593, 654-655, 657-658. *See also In re* Blake's Estate, 157 Cal. 448, 108 P. 287 (1910); *In re* Estate of Campbell, 250 Cal. App. 2d 576, 58 Cal. Rptr. 723 (1967). Therefore, because principal is not given immediately to grandchildren in this preliminary provision, some courts might find their interest contingent until their gift is made; more specifically, contingent upon survival of the life tenants. Additionally, courts have found that gifts "at," "when,"

Without a prior sketch, many lawyers who perceive a potential perpetuities problem might attempt to avoid a violation by paring down the age requirements, or by eliminating them altogether, and by making the maximum number of eligible grandchildren referable to persons alive at *A*'s death. For example, they might explicitly select *S* as the validating life and, thereby, limit the maximum class membership to *B*'s grandchildren born within twenty-one years of *S*'s death. Nevertheless, this might be unnecesary. Because *B* is dead and all of his children are lives in being,[30] no grandchildren can be born beyond *B*'s children's deaths and, therefore, beyond the period of the common law rule. The maximum membership is clearly determined within the common law rule because it is circumscribed by the deaths of lives in being, lives not explicitly mentioned in the rough sketch. *B*'s children, who are neither given an interest nor mentioned in this rough draft, obviate the need to close the class prematurely. Nevertheless, the tendency of at least some planners and draftsmen would be to limit maximum class membership with reference to the deaths of named beneficiaries who are alive at *A*'s death.[31] Yet this may be unnecessary. By sketching out a tenative limitation that fully articulates *A*'s dispositive goals and construing and interpreting it in terms of the common law rule, it becomes apparent that any problems with the rule lie in the age requirement and any other implied survivorship requirements, and not with the time[32] in which the maximum number of *B*'s grandchildren is

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or "if" a specified age is attained, without an interim gift of income to such recipients, imply a condition of survival until such age. *See* L. SIMES & A. SMITH, *supra* note 7, §§ 586, 656. Because distribution of principal to *B*'s grandchildren in the preliminary provision is to occur "at" specified ages, some courts might find these gifts contingent upon survivorship of these respective ages.

30. This assertion must be qualified. It assumes that all of *B*'s children will survive *A* and become lives in being at *A*'s death. Obviously, a planner cannot know that *B*'s children will actually survive *A* and, therefore, he cannot make this assumption when the dispositive instrument is drafted and executed. Nevertheless, because *B* is dead he does know that *B*'s children cannot increase in number after the death of *A*—that the procreators of the class of grandchildren who ultimately take cannot consist of lives born after the instrument becomes effective. Therefore, a planner can properly assume that the maximum number of grandchildren will be fixed at *A*'s death—assuming all of *B*'s children predecease *A*—or will be determined no later than the deaths of lives in being at *A*'s death—assuming one or more of *B*'s grandchildren survive *A*.

31. For example, a planner might limit class membership to those grandchildren born within twenty-one years of the later of the deaths of *S* and her children who are alive at *A*'s death. For another illustration of this technique, see *infra* note 36 and accompanying text. Also, compare the similar technique used in saving clauses. *See infra* notes 39 and 51.

32. To be sure, the maximum number of *B*'s grandchildren must necessarily be determined within the period of the common law rule. And, without more, it can be said that no problems under the rule exist with respect to this determination. However, if a requirement is imposed that grandchildren must survive either

fixed.

With respect to these age and implied survivorship requirements, *A* has said that he wants to delay distribution of principal until *B*'s grandchildren can enjoy and manage it; accordingly, he wants distribution to them staggered, beginning at age twenty-five. Both *A*'s direction and the specific language of the tentative provision suggest a possible survivorship requirement, namely, that each particular distribution of principal depends upon a grandchild actually attaining the designated age. They also imply an additional survivorship requirement quite apart from age, that is, that distribution of principal should be made to only those grandchildren who survive *S* and her children.[33] These possible survivorship requirements are the major sources of a potential perpetuities violation.

Indeed, either of these survivorship requirements will, without more, cause a violation of the common law rule. For example, if principal is limited to *B*'s grandchildren alive when all prior interests terminate, the common law rule is violated because the gift may vest in a group who might not be lives in being at a time that might be beyond the period permitted by the rule. Once again, the common law rule requires that all possibilities be considered. *B*'s children may have additional children after *A*'s death, and they may become the only grandchildren thereafter to survive and qualify for principal. *S* may also have additional children after *A*'s death, and they may outlive all who were in being at *A*'s death by more than twenty-one years. Because the gift of princi-

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the life tenants or the designated ages, it can be said that a problem exists with respect to the determination of the maximum number of *B*'s grandchildren eligible to take. Or at least it can be said that a violation of the common law rule can be averted by closing the class of grandchildren to further members much earlier—immediately at *A*'s death. If the determination of the maximum number of *B*'s grandchildren is altered in this fashion, there would be no violation because the gift to all grandchildren must vest, or fail, within the lives of a group that was in being at *A*'s death. *See infra* note 37.

33. *See supra* note 29. With respect to *A*'s directions, he has not provided for *B*'s children because he anticipates that they will not survive the life tenants. If they are eliminated completely because they will not, in all probability, be alive, one might assume that *A* would have the same intention with respect to *B*'s grandchildren who do not survive the life tenants. Additionally, *A* has delayed distribution of principal to *B*'s grandchildren until they can enjoy and manage it. Therefore, one might assume further that *A* would not want any share of principal to belong to grandchildren unless they are able to enjoy it personally. And this might translate into a requirement that they survive the ages designated for distribution of the shares of principal.

pal can vest in a group who are not lives in being at the deaths of a group who also are not lives in being, and because this can happen more than twenty-one years after the deaths of all who were in being, the rule is violated. The maximum membership of the class gift to grandchildren is determined within the common law rule, but not the minimum and full (actual) membership. And the common law rule requires that the class be fully determined within the allowed period. Further, even without this particular requirement that grandchildren must survive the life tenants, a direction that grandchildren must actually attain age twenty-five, thirty, or thirty-five violates the common law rule. And this would be true even if one or more of *B*'s grandchildren had already attained age thirty-five by the time of *A*'s death. In this situation, the minimum class membership would be fixed immediately at *A*'s death at the number of grandchildren already age thirty-five, while the maximum class membership would be determined thereafter, at the latest, when *B*'s children die. Because *B* is already dead and because his children become lives in being, both points in time are clearly within the period of the common law rule. However, the full membership might not be determined until after the perpetuities period has elapsed. Once again, what remote possibilities exist? While *S*'s children are still alive, one of *B*'s children might have an additional child shortly before that child of *B* dies. Because such grandchild is born before the time for first distribution, he becomes eligible to join the class if he thereafter satisfies the age requirements.[34] All others who were in being at *A*'s death might also die before this grandchild's birth, or shortly thereafter, so that the only people who continue to live are *S*'s afterborn children, *B*'s afterborn grandchildren, and any others born after *A*'s death. Because it is possible, then, that such afterborn grandchild may attain the required ages, and do so more than twenty-one years after the deaths of all lives in being

34. Generally, a class gift is assumed to include all who might possibly join the class. In this instance, it would include all of *B*'s grandchildren whenever born. However, if a conflict exists between the time for first distribution and the time in which additional members become impossible, then the class is closed and the maximum membership is determined when first distribution occurs. Accordingly, because a grandchild of *B* has already attained the designated ages by the time of *A*'s death, first distribution must occur at the termination of the previous life estates in *S* and her children. *B*'s grandchildren born thereafter would be excluded. Somewhat differently, if none of *B*'s grandchildren have satisfied the age requirements by the time of *A*'s death, then the class will close at the latest when *B*'s children all die. However, it may close before then at the time of first distribution. This would be when the life tenants die or when a grandchild attains age twenty-five, whichever occurs last. For a discussion of the rules governing the determination of maximum class membership, see L. SIMES & A. SMITH, *supra* note 7, §§ 634-651.

at *A*'s death, there is a violation of the common law rule. More specifically, because the afterborn grandchild may attain the required ages more than twenty-one years later—more than twenty-one years after everyone in being at *A*'s death has died, the grandchild's interest may vest beyond the period of the common law rule; therefore, the entire class gift must fail.

These particular perpetuities problems arise because of the survivorship requirements, but they can be avoided with some moderation of *A*'s objectives. For example, they can be rectified by eliminating any requirement that *B*'s grandchildren must survive the life tenants and by making the age designations not a survivorship requirement but a direction as to the time for actual distribution to either the grandchild himself or his estate.[35] Or they can be cured by imposing an outer time limit on these survivorship requirements that is well within the common law rule, for example, within twenty-one years of the later of the deaths of *S*, *S*'s children alive at *A*'s death, *B*'s children alive at *A*'s death, or *B*'s grandchildren alive at *A*'s death.[36] Or, if these survivorship requirements are retained, the common law rule can be avoided by restricting the class of *B*'s grandchildren to those alive at *A*'s death.[37] In this instance, because all of the grandchildren become

35. This can be accomplished by a statement that clearly negates these survivorship requirements and directs that principal must be given to the grandchildren themselves or their successors in interest (including their estates) at the appointed times for distribution. It may also be accomplished by language and provisions that overcome the "divide-and-pay-over rule" and the survivorship implications of a class gift subject to open or a gift "at" a specified age. *See, e.g.*, L. SIMES & A. SMITH, *supra* note 7, §§ 586, 588, 655-658. However, the latter techniques are not entirely reliable because of the disparate results courts have sometimes reached in these situations. *Id.*

36. For example, after setting out the survivorship requirements as to the life tenants and the designated ages desired by *A*, the limitation might provide further that the principal will vest fully in those grandchildren alive within twenty-one years of the death of the last to die of the specified group if this event occurs before the deaths of all of the life tenants or before each of the age requirements is satisfied. Because the specified group consists exclusively of those in being at *A*'s death, and because they are reasonable in number and not unreasonably difficult to trace, the gift of principal to *B*'s grandchildren satisfies the common law rule. Further, because at least one of *B*'s grandchildren or *S*'s children alive at *A*'s death is likely to live to within twenty-one years of the life tenants' deaths and to within twenty-one years of the last of *B*'s grandchildren to attain age thirty-five, this outer time limit is not likely to eliminate any of *B*'s grandchildren, nor is it likely to abridge the age requirements desired by *A*.

37. There would be no violation because the gift to grandchildren must vest, if at all, within their respective lives and each is a life in being at *A*'s death. Even though possession and vesting may be deferred well beyond the deaths of other

lives in being, their interest must necessarily vest or fail within the lives of those who are in being and, accordingly, their interest is valid. Only the last of these choices affects the maximum class membership and curbs *A*'s desire to include all of *B*'s grandchildren. Once again, it should be apparent that without some rough sketch or tentative provision for *A*'s explicit dispositive objectives, followed by an interpretive application of the common law rule, it is difficult to discern perpetuities violations and the precise reason for them. Consequently, without this prior step, it is hazardous to take remedial action and, at the same time, expect to create interests that comply with the common law rule and achieve the estate owner's objectives.

CONCLUSION

This article stresses the importance of interpretive understanding and application of the common law rule against perpetuities when lawyers either construe or construct instruments disposing of real property interests. In reply to this thesis, some lawyers might contend that compliance with the common law rule has become irrelevant in most creative planning situations. They might argue that compliance is surely unnecessary in jurisdictions in which the common law rule has been replaced with some form of a "wait-and-see" rule.[38] Further, they might add that it is even unnecessary in jurisdictions where the common law rule obtains. Saving clauses exist, and they have become commonplace in the

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lives in being—such as *S* and her children alive at *A*'s death, it is impossible for the gift of principal to ever vest beyond the death of grandchildren, each of whom is a life in being.

38. In the last several decades, the common law rule has been reformed in a variety of ways that can be classified. Some of these reforms involve "patching-up" specific problems that arise under the common law rule, while others give courts a *cy pres* power to rectify violations of the rule consistent with the estate owner's dispositive design. Other reforms have been more profound. Most prominent among these reforms have been the various wait-and-see rules. These latter reforms dispense with the common law rule's test of possibilities; validity is, therefore, determined on the basis of actual events. In essence, they all derive from a slight variation of Gray's summary of the common law rule "No interest . . . . is valid unless it vests, if at all, not later than twenty-one years after some life in being at the creation of the interest." R. LYNN, *supra* note 6, at 203. Despite this similarity among these wait-and-see rules, there are important differences among them. Some are accompanied by a judicial power of *cy pres*, while others are not. Some specify the lives in being by which the waiting period is measured, while others do not. Further, some rules that specify these lives do so with statutory lists of acceptable lives, while others do so with "causal lives" formulae. For a discussion and classification of these reforms see J. DUKEMINIER & S. JOHANSON, *supra* note 6, at 1051-76; R. LYNN, *supra* note 6, at 181-215; Note, *supra* note 16, at 586-89, 592-600. For a classification and illustration of these statutory reforms, see R. MAUDSLEY, *supra* note 8, at 247-56.

forms most lawyers use.[39] These saving clauses successfully avoid or rectify perpetuities violations. Compliance with the common law rule, therefore, may be deemed an unnecessary complication that only skews a dispositive scheme.

Why, then, should a planner bother with mastering the task of complying with the common law rule? In the first place, a planner cannot always guarantee that the wait-and-see test of his jurisdiction will govern the interests created by the dispositive instruments he drafts. A planner can control neither his client's place of residence nor the situs of real property that comprises the client's estate.[40] In addition, both wait-and-see rules and saving

39. Nearly all forms for wills and trusts contain perpetuities saving clauses. Several different kinds of clauses have been used over the last several decades. Generally, these saving clauses redirect vesting or the distribution of the subject matter after certain events have occurred. Accordingly, they can be distinguished on the basis of the events involved and the methods for redirection.

Some saving clauses forbid vesting or the continuation of a trust beyond the period permitted by law or beyond a life in being and twenty-one years, without identifying such life. *See, e.g.*, R. NEUHOFF, STANDARD CLAUSES FOR WILLS § 27.13 (3d ed. 1962); *In re* Lee's Estate, 49 Wash. 2d 254, 299 P.2d 1066 (1956). However, most saving clauses are more specific and, therefore, do not present the risk of invalidity because of uncertainty. These kinds of saving clauses vary. Some require vesting within twenty-one years of the death of the survivor of named lives in being. *See, e.g.*, W. SCHWARTZ, FUTURE INTEREST AND ESTATE PLANNING § 6.32 (1965 & Supp. 1972). Most clauses terminate trusts within twenty-one years of the death of the survivor of designated beneficiaries who are lives in being. *See, e.g.*, A.J. CASNER, A PROPOSED ESTATE PLAN FOR MR. AND MRS. RICHARD HARRY BLACK III 255-59 (1979); R. WILKINS, DRAFTING WILLS AND TRUST AGREEMENTS—A SYSTEMS APPROACH §§ 15.20, 15.21, 15.20W, 15.21W (1980). Finally, other clauses redirect distribution or reform interests in the event of a perpetuities violation. Some do so only in the event of an actual violation. *See* Leach, *supra* note 7, at 986. Others do so when an interest is simply challenged under the common law rule or some associated rule. *See* Leach & Logan, *Perpetuities: A Standard Saving Clause to Avoid Violations of the Rule*, 74 HARV. L. REV. 1141 (1961).

The methods for redirection also vary. Some are vague, for example, "to the persons herein named who would be entitled to take distribution thereon upon termination of the trust." *In re* Lee's Estate, 49 Wash. 2d 254, 299 P.2d 1066, 1067-68 (1956). Others empowered either a court or a corporate fiduciary to reform the provision or appoint the assets in a manner that most closely approximates the estate owner's dispositive design and also satisfies the requirements of the rule. *See* Leach, *supra* note 7, at 986; Leach & Logan, *supra*, at 1174. However, most clauses are more specific. Some simply exclude those beneficiaries whose interest does not vest within the required time period. *See* W. SCHWARTZ, *supra*, at § 6.32. Finally, most saving clauses today redirect principal to beneficiaries then entitled to income when the trust is actually terminated within twenty-one years after the death of the survivor of designated lives in being. *See* R. WILKINS, *supra*, at §§ 15.20, 15.21, 15.20W, 15.21W; L. SIMES & A. SMITH, *supra* note 6, § 1295.

40. For a discussion of what perpetuities law governs, *see* AMERICAN LAW OF PROPERTY *supra* note 13, § 24.5A.

clauses make critical actualities, not possibilities. Wait-and-see rules accomplish this directly, while saving clauses achieve this indirectly by setting an absolute time limit as to vesting, or to a trust's duration, that falls within the common law rule.[41] Both delay ultimately dispositive determinations.[42] If vesting or a failure to vest, or sometimes the distribution and possession of principal itself,[43] does not actually occur within the permitted period of time, then the interest either fails or remedial action is directed.[44]

41. Wait-and-see rules and most saving clauses are fundamentally similar. Both set time periods beyond which interests cannot vest. The wait-and-see period either is vaguely referable to a life in being and twenty-one years or is fixed more specifically by a statutory list or formula. *See supra* note 38. The saving clause period is determined by the clause itself, and the period formulated is one that satisfies the common law rule. *See supra* note 39. Because wait-and-see rules expressly allow for actualities and because saving clauses insure that no interest can vest beyond the period of the common law rule, both legitimize a waiting period during which it can be seen whether interests actually vest or fail. More specifically, saving clauses create delay to ascertain whether the subject matter passes to those entitled to take if the interests vests within the specified period, to those entitled to take if it fails to vest within the specified period, or to those who take if it neither vests nor fails within the specified period.

Nevertheless, there are important differences between wait-and-see rules and saving clauses. Saving clauses always expressly provide for those who are to take if the interest neither vests nor fails within the designated time period that satisfies the common law rule. *See id.* Wait-and-see rules often allow for a *cy pres* reformation of interests that actually do not vest or fail within the allowed time period, but sometimes they do not. The various statutes are discussed in the articles cited *supra* note 38. Furthermore, although the waiting periods under wait-and-see rules and saving clauses both fall within a life in being and twenty-one years, they are not usually the same waiting period. The waiting period allowed by saving clauses is often more restrictive. Also, usually the waiting period is clearly delineated under both, but sometimes it is not. Finally, wait-and-see rules require that interests vest or fail within the allowed time period. Interests that actually vest within the period are valid and are preserved. Quite differently, most saving clauses today do more than set a time limit to vesting. They terminate trusts and distribute principal when this has not happened within the prescribed time period. In short, they require that interests do more than vest within the time period; they require distribution and ultimate possession of principal within a time frame that satisfies the common law rule's requirements for vesting. *See supra* notes 38 and 39.

42. Wait-and-see rules and saving clauses permit interests to vest or fail at any time within the time period allowed by the rule or prescribed by the saving clause. They create delay for a period of time to see what actually happens. Therefore, they delay the dispositive determination to see whether the subject matter will belong to those who take if the condition is fulfilled or belong to those who take if it is breached. However, if the condition is neither breached nor fulfilled within the time period allowed, these clauses and rules also delay the dispositive determination to see who should ultimately take pursuant to the direction of the rule or the saving clause.

43. Under many saving clauses currently in use, trusts created within the instrument must terminate within a specified period of time. Stated differently, if final distribution and possession of principal does not occur within twenty-one years of the death of the survivor of specified lives in being, the trust is terminated and principal is then distributed, usually to those currently entitled to income. *See supra* notes 39 and 41.

44. Some wait-and-see statutes do not provide for remedial action. If the in-

Therefore, both the wait-and-see rules and saving clauses invite initial uncertainty.[45] More importantly, they invite disputes, and possibly litigation, as to when the permitted period has elapsed[46]

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terest actually neither vests nor fails within the permitted period of time, it violates the rule and is void. In the event of a violation, other wait-and-see statutes give to the court a *cy pres* power to reform the limitation, within the limits of the rule, in a manner that effectuates the estate owner's dispositive design. *See supra* note 38.

Saving clauses, however, necessarily incorporate remedial action. By definition a saving clause must save, and this cannot be accomplished without explicit provision for some remedial course of action. Accordingly, some clauses save by redirecting the time of vesting or distribution of principal, usually by giving principal to those then entitled to income. (This latter technique may produce unintended and undesirable dispositive consequences. *See infra* note 51.) Other clauses save by empowering a corporate fiduciary or a court to reform the limitation, within the limits of the common law rule, in a manner that effectuates the estate owner's dispositive design. *See supra* note 39.

45. The common law rule, wait-and-see rules, and saving clauses have in common these questions and, therefore, these uncertainties. Will the subject matter belong to those who take if the condition is fulfilled, and, if so, when will this be known? Will the subject matter belong to those who take if the condition is breached, and, if so, when will this be known? Will the subject matter belong to those who take if the interests presents a perpetuities violation and (sometimes), if so, when will this be known? Finally, if a violation exists, specifically to whom will the subject matter belong?

Even under the common law rule, if an interest is valid, there is a wait, and with it uncertainty, to see whether the interest actually vests or fails. And this delay may last for the full period of the common law rule. *See* R. MAUDSLEY, *supra* note 8, at 82-84. Nevertheless, even though these rules and clauses always present the foregoing questions, there are differences. Presumably, the common law rule requires an immediate resolution of the last two questions. It can be determined, without delay, whether a perpetuities violation exists and, if so, who is entitled to take the subject matter. Wait-and-see rules, however, delay these determinations until the end of the permitted waiting period. Only then will it be known whether the subject matter belongs to those who take in the event of a violation, and specifically who should take if an interest actually neither vests nor fails in time. The same conclusions can be reached with respect to most saving clauses that introduce actualities and achieve wait-and-see indirectly. *See supra* notes 39 and 41, and *infra* notes 46 and 47.

Accordingly, these rules and saving clauses all present the same substantive questions and uncertainties. The common law rule, however, offers immediate resolution of some of these questions, while the others do not.

46. There has been much debate as to how the period under a wait-and-see test is, or should, be measured. Most of it concerns the uncertainty involved in determining when the time for waiting has elapsed. More specifically, it concerns the identity of the lives in being by which the waiting period can be determined. *See supra* note 38. *See also* R. MAUDSLEY, *supra* note 8, at 87-109.

Many commentators maintain that, except for the statutes that include a statutory list of measuring or waiting lives, the actual duration of the waiting period is not always self-evident. Undoubtedly, most would agree that the waiting period is uncertain when the statute is completely silent as to the selection of measuring lives. To be sure, if there is uncertainty, there will be litigation.

The same can be said for some saving clauses as well. Most saving clauses used

and what curative action can and should be taken.[47]

The initial uncertainty and potential for disputes can be considerably reduced by complying with the common law rule.[48] Wait-and-see rules are satisfied by interests that comply with the common law rule. Validity can be established at the outset, and in most instances with ease and without substantially impairing dispositive objectives.[49] By eliminating the inherent delay of wait-and-see rules and saving clauses, and the possible need for remedial action that accompanies such delay, compliance with the common law rule affords considerable clarity and secures dispositive objectives. In short, the common law rule continues to be ex-

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today clearly specify the lives which measure the period incorporated into the clause; therefore, these provisons should not present this kind of problem. Nevertheless, this is not true for all saving clauses, particularly those that authorize reformation by a court or corporate fiduciary under the common law rule if an interest is actually invalid or is challenged under the common law rule. *See supra* note 39. In these instances, because the existence of a violation or a challenge may be unclear, there may be litigation as to whether and when remedial action is authorized.

47. If a wait-and-see statute does not include *cy pres* powers, presumably an interest that does not actually vest or fail within the permitted waiting period violates the rule. And in this situation, there should be at least the same potential for disputes and litigation, concerning the consequences of a violation, as under the common law rule itself. The major difference is, of course, that such litigation must be delayed until the end of the waiting period; only then can it be known whether the interest actually violates the rule. For a discussion of the consequences of a violation under the common law rule, see L. SIMES & A. SMITH, *supra* note 7, §§ 1256-1264. If, however, a wait-and-see statute includes a *cy pres* power, there should be disputes as to the substance of the reformation itself; more specifically, there should be disputes as to what plan of disposition, that complies with the rule, best approximates the original estate design. As long as a court has discretion, disputes would seem to be inevitable. This particular potential for litigation should also exist with respect to saving clauses that give the same curative discretion to either a corporate fiduciary or a court. However, it should not arise under saving clauses that afford remedial action by distributions to clearly identifiable beneficiaries.

48. Attempted compliance with the common law rule will diminish, but not erase, these problems. If the rule is in fact satisfied, there should be no uncertainty or disputes as to perpetuities violations. Nevertheless, actual compliance with the common law rule may be open to dispute and uncertainty. It should be noted, however, that this particular uncertainty can and should be resolved at the outset. Assuming that the common law rule is satisfied and that no interest can vest beyond the permitted time period, there is always a measure of uncertainty as to whether these interests will actually vest or fail. In short, there is always a measure of uncertainty as to whether the subject matter will belong to those who take if the condition is fulfilled or belong to those who take if it is breached.

49. With careful planning and drafting, the common law rule should never present any serious obstacle in effectuating an estate owner's dispositive design. *See, e.g.*, 6 AMERICAN LAW OF PROPERTY, *supra* note 13, § 24.13; L. SIMES & A. SMITH, *supra* note 7, §§ 1296-1297; Leach, *supra* note 6, at 669-71; Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 723 (1952). For illustrations of how the common law rule can be satisfied without substantially impairing dispositive objectives, see *supra* notes 17, 18, 36 and accompanying text.

ceedingly important.[50] Reliance upon wait-and-see rules and saving clauses should not replace drafting that complies with the common law rule; these wait-and-see rules and saving clauses function best as safeguards, not as substitutes for careful drafting that assures validity from the outset.[51] Accordingly, the common law rule must be understood, mastered, and satisfied by planners everywhere.

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50. Because the common law rule can be readily satisfied without jeopardizing important dispositive objectives, some commentators maintain that planners should continue to comply with the common law rule even in jurisdictions that have changed the rule to a wait-and-see test. *See, e.g.*, R. LYNN, *supra* note 6, at 151-52.

51. Some commentators recommend that saving clauses are either unnecessary or should be avoided if dispositive provisions are drafted in compliance with the common law rule. *See, e.g.*, L. SIMES & A. SMITH, *supra* note 7, § 1295; R. WILKINS, *supra* note 39, §§ 15.20, 15.20W. There are at least two reasons for not including these saving clauses, even as a precautionary safeguard against miscalculation. First, these saving clauses can conceivably terminate a trust and force a distribution of principal before the time appointed by a valid dispositive provision. Typically, these saving clauses require that all trusts be terminated within twenty-one years of the death of the survivor of all beneficiaries of the trust alive when such interests were created. *See supra* note 39. However, depending on the terms of the conditions, the dispositive provision may already be valid because vesting cannot occur beyond twenty-one years of a life in being who is not a beneficiary. Accordingly, if the validating life in being—a non-beneficiary—lives well beyond the deaths of beneficiaries identified in the saving clause, the trust may be terminated unnecessarily. More specifically, if such a saving clause was added to the illustration given earlier in the text beginning at page 746, *B*'s children would be excluded from the saving clause's measuring period even though they might serve as validating lives in being under the terms of the dispositive provision itself.

Second, these saving clauses usually provide that, when the trust is terminated by the requirements of the clause itself, principal should be distributed to those beneficiaries currently entitled to income. And this may effect a deviant distribution of principal by giving it to a group that was not ultimately intended to have principal at all. Once again, with respect to the illustration given earlier in the text, such a saving clause could prematurely terminate the trust and give principal to *S*'s children and not *B*'s grandchildren. Assuming that all potential conditions of survivorship were eliminated and that *B*'s children became validating lives in being, if *S* had afterborn children who lived more than twenty-one years beyond the deaths of all beneficiaries alive at *A*'s death, the trust would terminate and give all of the principal to *S*'s living children. And this would happen even though *B*'s grandchildren's remainder had vested under the rule many years earlier when the last of *B*'s children had died.

It should be noted that this potential for a deviant distribution of principal arises not only because validating lives have been excluded from the measuring period allowed by the saving clause, but also because such clause sets a time limit to possession and not vesting. These kinds of saving clauses terminate trusts after a period of time, and they do so even when all interests have vested previously and also when all interests fully comply with the common law rule which focuses on remoteness of vesting and not possession.

Mastery of the common law rule cannot be accomplished without a firm grasp of the life in being concept. Once again, who is the life in being by which one determines that an interest is valid? The broad assertion that the validating life in being can be that of anyone or those of any group of people is inadequate and misleading. Indeed, the validating life in being cannot be that of anyone unless as a part of the creative and drafting function, the opportunity exists to make anyone's the validating life. This broad assertion, then, constitutes a precept for planning only. However, it is not enough even for the planner. Within the context of the planning function this kind of discretion to designate the validating life in being nearly always exists, but it may be both unnecessary and inconsistent with an estate owner's underlying objectives to add just anyone as a validating life. Despite the ultimate choice of lives that the creative planning process offers, these choices should not be considered or exercised without some prior elaboration of precise and full dispositive objectives followed by interpretive application of the common law rule. Mastery of the rule in practice cannot be accomplished without both creative and interpretive skills. Ultimate and final creative efforts demand interpretive facility with the common law rule.

The important question that remains is: If for interpretive purposes the validating life in being cannot be just anyone, then who is this life in being? Typically, explanations have been by example, and have failed to distinguish carefully betwen lives used to *test* and lives found to *validate*. These explanations assume that eventually the validating life in being will evidence itself and a solution will somehow materialize. Some students master the common law rule in this fashion, but most surrender in a state of confusion. Something more is needed.[52] Learning by experience

52. Because of a need to establish a viable measuring period under wait-and-see reformations of the common law rule, much more has been said about the life in being concept in recent years than in the past. *See, e.g.*, Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 KY. L.J. 3, 11-14 (1960); Morris and Wade, *supra* note 16, at 495-501; Note, *supra* note 11, at 281-85; Fetters, *Perpetuities: The Wait-And-See Disaster—A Brief Reply to Professor Maudsley, With a Few Asides to Professors Leach, Simes, Wade, Dr. Morris, et al.*, 60 CORNELL L. REV. 380, 390-94 (1975). These articles do not assume that the validating life in being automatically selects itself for students struggling with the common law rule. Indeed, they recognize that solutions can be reached and ought to be taught with a method of analysis. Solutions by inspection are not enough. Nevertheless, these articles may fall just short of the mark. Most student difficulties reflect a need to find a group of lives by which the limitation can be tested in terms of the common law rule. Those who understand the rule do not usually think in these terms; they intuitively proceed to the relevant lives and then to a solution. The novice needs direction for the purpose of trial and error testing, especially when a validating life appears to be absent.

Fetters, for instance, is not clear enough as to which lives can be used to test the

that culminates in solutions by intuition and simple inspection will not suffice. Inevitably, the responsibility for something more belongs to those who must teach the common law rule.

interests created. He focuses on the condition imposed and asks whether it might happen more than twenty-one years after the deaths of *all* lives in being. He then presupposes the unlikely deaths of everyone around, especially ancestors of those who are given interests, after time enough for them to have another child. To be sure, this approach is sound; because it comprehends everyone, it cannot overlook potential validating lives. Nevertheless, students generally want more direction; in a sense, they might view these broad suppositions, concerning *all* lives in being and momentary turnovers in world population, as no direction at all.

Quite differently, the other commentaries are more specific; they focus on relevant lives, those causally related to the condition. These are the only lives that can possibly validate; therefore, these are the lives to be examined and tested and a proof determined. Apart from definitional problems that concern causality (*see supra* note 16), this method fails to recognize that although non-causal lives in being cannot possibly validate, they are invariably present and prominent in limitations. This method likewise fails to recognize that students are never satisfied with a finding of invalidity until these non-causal lives are tested. In short, it is exceedingly important to recognize that a method of analysis must satisfy the student's need to exclude as well as include possible validating lives. Students seem more secure when they can exclude possible validating lives by actual testing; reliance upon vague principles of causality often leaves them uneasy about their conclusions.