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Perpetuities: Basic Clarity, Muddled Reform

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PERPETUITIES: BASIC CLARITY, MUDDLED REFORM

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This piece is intended to present the Rule Against Perpetuities, including its recent modifications, simply and understandably. Because the Rule's mechanics, even in their neatest and purest form, have seemed beyond average comprehension, the explanation given here largely brushes over minor variants in the common law expression of the Rule and its operation. The goal is to ensure that the real core of the Rule is clearly portrayed.

For all the apparent precision of the Rule in its common law form, it assumed that quality only relatively recently. The modern Rule had its major impetus from the *Duke of Norfolk's Case*[1] in 1682, but as there expressed, it was anything but precise or mechanical. Lord Nottingham, in approving a scheme sure to resolve within a single lifetime, said only that he would draw the line "where-ever any visible Inconvenience doth appear."[2] Then, after 200 years of diffuse and varying development, in 1886 Professor Gray purported to state the law of perpetuities in a single sentence.[3] Today, 100 years later, Professor Gray's formulation is still considered the classic statement of the Rule.

Because of recent statutory modifications, however, the Rule in its modern dress appears quite different from how it appeared some forty

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1. 3 Cas. 1, 22 Eng. Rep. 931 (1682).

Professor Haskins describes the background of *The Duke of Norfolk's Case* in Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities,* 126 U. PA. L. REV. 19 (1977). He emphasizes the principal point of his article in both the title and the text of a later article, Haskins, *"Inconvenience" and the Rule for Perpetuities,* 48 Mo. L. REV. 451 (1983).

2. 3 Cas. 1, 49, 22 Eng. Rep. 931, 960 (1682).

3. "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." J. GRAY, THE RULE AGAINST PERPETUITIES § 201, at 166 (2d ed. 1906).

Whether Professor Gray's statement in fact reduced the law of perpetuities to this single sentence is open to considerable question. There were then and there continued to be decisions that did not fit the Gray mold. Professor Siegel develops the point in Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law,* 36 U. MIAMI L. REV. 439, 449, 461 (1982). Even if we concede, as we should, the mathematical precision in Professor Gray's sentence, he takes several more sentences to explain what it means. The quoted sentence, incidentally, is from his second edition, in 1906; the first edition version was slightly different. J. GRAY, THE RULE AGAINST PERPETUITIES § 201, at 144 (1st ed. 1886).

years ago, in its day of common law purity. Despite that change, the basic Rule remains intact; the modifications essentially build upon or supplement rather than replace the basic structure. One must understand the mechanics of the common law Rule in order to understand its statutory modifications.

Without challenging the need for some control of the dead hand and, indeed, usually without seriously challenging the basic mechanism of the Rule, efforts at reform have been underway for about forty years. The result has been widespread adoption of statutory modifications, and recently the promulgation of a somewhat different approach in both the *Restatement (Second) of Property*[4] and the Uniform Statutory Rule Against Perpetuities[5] promulgated by the National Conference of Commissioners on Uniform State Laws.

This forty-year evolution has taken a bewildering trail, reflecting the difficulties facing those who have led it. Much of the problem has been and continues to be an inability to mesh the steps taken in reform with the mechanism of the common law Rule; yet the efforts at reform have been and continue to be built upon the Rule.

This piece is intended to lead the reader through that evolution, straightening and more clearly marking the trail, finally to see the current law for what it is: a rough and poor solution to the problem,[6] ironically so since a much simpler and better solution has been on hand.[7]

We must begin, as did the reformers, with the common law Rule itself. Only if the mechanism of its operation is understood, really understood, can we precisely identify the part of the Rule that calls for reform, appreciate the critical error of the reformers, including that of the Restaters and of the Uniform Act drafters, and finally perceive the path to true reform.

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4. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) §§ 1.1–1.6 (1983) [hereinafter RESTATEMENT (SECOND)].

5. UNIF. STATUTORY RULE AGAINST PERPETUITIES, 8A U.L.A. 109–38 (Supp. 1988) [hereinafter UNIFORM ACT] (promulgated 1986, adopted ABA 1987).

6. In a recent article, Professor Bloom traces this evolution with breadth, perception, and attention to detail. On the whole he is quite critical. His extensive comments and notes are an excellent guide for those who wish to follow every buffet, every stumble, and every battle along the way to the current state of confusion. Bloom, *Perpetuities Refinement: There is an Alternative,* 62 WASH. L. REV. 23 (1987).

7. The better solution is suggested at several points later. *See, e.g., infra* text accompanying note 66.

I. THE BASICS OF THE COMMON LAW RULE

The Rule Against Perpetuities is regularly presented to law students as a species of the Horrible Heffalump, to be approached if at all with certain knowledge that it cannot be understood. This negative approach is most unfortunate, for the Rule is not all that complicated, and, for those who like precision and internal consistency, it has a charming, almost mathematical quality.[8]

A. The Focus of the Rule

1. A Test for Validity, Not a Rule of Conduct

The first point is simple but easy to forget. The Rule is a requirement for validity, for effectiveness; it is not a rule of conduct. It subjects a person's attempt to create certain kinds of interests in property to a test. In doing so it of necessity looks at the creating instrument at its effective date, and it says then and there that the interests that the instrument purports to create are either good or bad. In this respect, for example, it is similar to the requirement that a will be in writing and witnessed or that a deed be in writing and acknowledged. It differs from these examples in that it is not a rule of formality but a rule of substance. It invalidates, if it does, for the content of what the person has tried to do, not for the procedure or form used in the execution of the instrument.

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8. Professor Gray, in the preface to his first edition, put it this way:

   In many legal discussions there is, in the last resort, nothing to say but that one judge or writer thinks one way, and another writer or judge thinks another way. There is no exact standard to which appeal can be made. In questions of remoteness this is not so; there is for them a definite recognized rule: if a decision agrees with it, it is right; if it does not agree with it, it is wrong. In no part of the law is the reasoning so mathematical in its character; none has so small a human element.

   A degree of dogmatism, therefore, may be permitted here which would be unbecoming in other branches of the law. If the answer to a problem does not square with the multiplication table one may call it wrong, although it be the work of Sir Isaac Newton; and so if a decision conflicts with the Rule Against Perpetuities, one may call it wrong, however learned and able the court that has pronounced it.

J. GRAY, THE RULE AGAINST PERPETUITIES v (1st ed. 1886).

As this article demonstrates, the "degree of dogmatism" has not lessened over the years. In the modern efforts to change the Rule, the assertions seem equally dogmatic but often without the precision to justify the confidence. See the discussion of "wait and see" in the text, *infra* notes 47–60. Also, consider Professor Dukeminier's reference to Professor Waggoner: "The Reporter is stubborn in his view, but he is absolutely wrong." Not just wrong—absolutely wrong. Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo,* 34 UCLA L. REV. 1023, 1059 (1987).

2. *A Concern for the Persistence of Uncertainty*

What is the Rule's concern? To what problem is it addressed? At the root, it controls or limits the creation of uncertainty in the ownership and enjoyment of property, though it does so with remarkable tolerance. With respect to a particular property such as Blackacre the Rule is designed to assure that within a reasonable time after the effective date of an instrument we will be able to point to a person who owns, enjoys, and has the same degree of control over the property as do people generally over property they own.

For example, the Rule will react with some vigor when a testator by will leaves property in trust to pay the income to the children for life, then the income to the grandchildren, with final disposition to the great-grandchildren who are living at the death of the last grandchild to die. Should we let a person set up a scheme whereby it's possible that we will not know the identity of the takers for another ninety years?

The Rule speaks with precision. More than merely expressing a vague concern that an uncertainty might persist for too long, it describes with specificity the uncertainties that are of concern, and it specifies with precision how long is too long.

3. *A Separate Testing of Individual Interests*

In working with the Rule we first look at the scheme that is to be subjected to the test, and we select within that scheme only certain identifiable interests to be tested. For example, in a scheme that contains a life estate to the testator's sister for her life, then a remainder to her first child to receive a law degree, we select for test only the remainder to the child.[9] In this example if there is an alternate remainder to the testator's college if no child of the sister should ever receive a law degree, that remainder to the college would also be tested. Note that the process does not test the will as a whole. Instead, each of these two remainders is tested, and each is tested separately from the other. That one might fail or pass the test does not necessarily mean that the other should do likewise. Each stands or falls on its own merit.[10]

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9. The reason for not testing the life estate to the sister is that it contains no uncertainty of concern to the Rule.

10. As with any other frustration within a will, the fact that one section is invalid or ineffective may lead a court to strike down or alter other closely related provisions or even to strike down the whole will. This action may be taken if the change will come closer to carrying out the decedent's intent than would result if only the specific section were stricken. In the context of the Rule, the reach into otherwise valid and effective sections is called "infectious invalidity."

4. The Vulnerable Interests

Next, how do we know which interests are to be tested? We shall know them by the uncertainties they contain; they turn out to be a fairly small group. The easiest to identify, and the one that we will work with in determining how long is too long, is the contingent remainder. Quite obviously, its uncertainty is the very uncertainty that makes it a "contingent" remainder. Other interests we will work with in more detail later; for now we will merely list them: Executory interests, class gifts, general powers of appointment, special powers of appointment, and honorary trusts. Note that each of these interests contains an uncertainty that, until resolved, leaves us not knowing for sure who will have full enjoyment or ownership of property.

B. How Long is Too Long?

1. The Focus on Possibilities—What May Happen

Now we turn to the more troublesome question: how long is too long for one of these uncertainties to persist? The first step in approaching the question is to recall an important point made at the outset of our discussion: the Rule is a test; it tells us, at the moment the instrument becomes effective, whether a particular interest is effective. The test for that effectiveness is whether the uncertainty inherent in that interest may persist for too long. Standing at the moment in time when the interest would take effect we of course cannot say how long that uncertainty will in fact persist. We would know that only by waiting it out. But we can say how long it is capable of persisting. To use the example of the sister and the sister's child again, a child of the sister could receive a law degree within a few years after the effective date of the instrument. All we know for sure, however, is that the maximum time that the uncertainty can remain unresolved will be for the lifetime of all the sister's children. It is possible that only at the death of the last to die without any of them having received a law degree would we have reached certainty.

The point of these examples is this: the test of the Rule is a test that measures how long the uncertainty may persist in its unresolved state, not how long in fact it turns out later to have persisted. This feature is the inescapable consequence of applying the rule at the effective date of the creating instrument. Put it this way: the Rule is concerned with possibilities, not probabilities, and not with what in fact happens after the effective date.

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2. The Isolation of Particular Chains or Sequences of Possible Events

The next step logically follows: if we are concerned with how long it is possible for the uncertainty to go unresolved, we should start to explore the various ways in which a particular uncertainty might be resolved, then inspect each of those to see whether it offends some measure or standard of our tolerance. At this point we will use, again, a contingent remainder, one much like the sister and sister's child example, but a little different. Suppose we have the following scheme before us to test:

(1) to A for life, then

(2) if at A's death A has a child then living who is twenty-five or older, to that child; if there are more than one of that age, to the oldest;

(3) if at A's death he leaves a child or children surviving him none of whom is yet twenty-five, then to be held until the first of those living from time to time reaches twenty-five and then the accumulated income and the principal to that child; if all should die before any one of them reaches twenty-five, then upon the death of the last survivor, to B.

(4) if at A's death A leaves no child surviving him, to B.

Of the contingent remainders in that scheme, let us select for instructional purposes the remainder to the child of A under clause number (3) and assume that at the effective date A has a one-year-old child also then alive. Here is a contingent remainder, the uncertainty being the identity of the child, if any, as yet unknown, who first reaches the magic age. How long can the resolution of that uncertainty be put off? Only when that is known can we decide whether it is too long. Our first task is to see: how many ways can we think of by which this uncertainty will resolve? Let us try a few.[11] Here are five possibilities:

(1) A dies; then A's first (and only) child lives to twenty-five.

(2) A dies, thereafter A's first (and only) child dies at twenty-four. (Note that this is a rather unpleasant certainty, but it is certain nonetheless, and certainty is our objective, good or bad.)

(3) A's #1 child dies at age fifteen, A thereafter dies without having had further children.

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11. Here we are admittedly selective. Bear with us; the reasons for the selectivity are both pedagogical and practical. They will become apparent shortly.

(4) *A* has another child, #2, born ten years after the effective date; *A* dies; *A*'s #1 child dies at twenty-four; the #2 child thereafter dies at the age of fifteen.

(5) *A*'s #2 child is born; *A* dies; *A*'s #1 child dies at twenty-four; the #2 child reaches twenty-five.

There are, of course, other sequences of events that similarly would bring about the certainty that we seek, but these five will suffice for our purposes. Let us now look at them with a judgmental eye. Does their long persistence offend us? At this point we use not our own personal standard of judgment but that of the common law judges who over a period of many years developed the standard of the Rule. It is a standard that has a three-phase or three-step quality.

3. *Three Steps in Testing*

Step One: From each sequence, eliminate the extraneous people

The first step may startle you, for we express it in unorthodox terms. You must imagine the worst catastrophe, the worst people-killing and people-maiming disaster, that could occur. By this disaster every person alive at the effective date of the instrument is killed at the next instant, but with an exception. And it is obviously the exception that is most important. The exception is that, separately for each sequence that is before you, the disaster does not kill those people whose continued lives after the effective date are necessary to make that particular sequence run its course. The disaster not only kills, it also maims. That is, even of the people who are permitted to live after the effective date, they are permitted to live only long enough to cause the events in the particular sequence to happen.

When we apply this ultimate cruelty to all the peoples of the world, our five sequences will of course look quite different. This de-population will reduce each of them to the following:

(1) Only *A*'s #1 child survives the disaster, and this child lives to twenty-five.

(2) Again, only *A*'s #1 child survives the disaster; this child dies at twenty-four.

(3) Here both *A* and the child survive the disaster, but the #1 child dies fourteen years later, and *A* dies immediately thereafter.

(4) (This one is tricky; remember that we are interested only in seeing that the #2 child dies, after the death of #1 child, at the age of fifteen. To reach this point it is not necessary that the #1 child survive the disaster—this reduces the sequence to:) *A* (and *A*'s mate) live

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only long enough to get the #2 child born. They both then die. The #2 child lives to fifteen.

(5)   This is very like #4 except that the #2 child lives to twenty-five.

Isn't it unreal to speak of a world in which, as in sequence (1), only one person, a one-year-old child, is allowed to survive and thereafter live to be twenty-five? Of course it is, but remember, the entire test mechanism is quite unreal; its only function is to furnish a workable measure of how long is too long.

What, then, is meant when we say that the disaster permits only those "necessary" to survive? Surely it is an extremely narrow or strict usage of the word. Almost always its application is directed to people-biology—who is born and who dies. For example, in sequences (4) and (5) we keep A (and A's mate) alive long enough to produce the #2 child, but no longer than that. From the moment of its birth that child is on its own—alone in a very strange world. We can resist the temptation to let extraneous people survive the disaster (or if they must survive, to let them do so longer than they are useful) by applying this simple double-check: take them out of the sequence; then see whether the particular resolution of the uncertainty that is reached in that sequence would still be reached without them. If so, get rid of them.

Step Two: Evaluate each de-populated sequence

Having de-populated these sequences in this very severe way, we ask the truly judgmental question, separately as to each sequence. Does it take too long to reach certainty? Here is the test: it will not be too long if, and only if, the certainty finally reached in that sequence is reached within the lifetime of a person alive at the effective date or within twenty-one years after the lifetime of a person alive at the effective date. In applying this test, remember, we are confined in each sequence to only those people who survived the disaster, unless we can find certainty within twenty-one years of the effective date.[12] Again, let us look at each sequence:

(1)   Sequence #1 clearly passes, for certainty is reached in the lifetime of the #1 child, and that child was alive at the effective date.

(2)   This sequence also passes, for certainty is again reached in the #1 child's lifetime (actually, at the end of that lifetime), and the #1 child was alive at the effective date.

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12. Standing alone, this 21-year period is called the "period in gross." *See infra* text accompanying notes 45-46.

(3)   This sequence also passes, but by virtue of quite different facts. In this sequence, certainty is reached when A dies, and to reach that point we can use the lifetime of A since A was alive at the effective date.

(4)   This sequence also passes, but by virtue of still different facts. In this sequence, the lifetime of the #1 child is useless, but the lifetime of A is useful, for certainty is reached only fifteen years after A's death, and the test we apply allows us twenty-one years after the lifetime of a person alive at the effective date. Thus, since we had to keep A alive long enough to get the #2 child born, and certainty is reached fifteen years thereafter, we have a passing sequence.   ·

(5)   By now you have seen it coming: this sequence fails. A's lifetime is not equal to the task, for A is unnecessary to us as soon as the #2 child is born; nor is the lifetime of the #1 child useful since that child was killed in the disaster; and certainty is not reached until twenty-five years after A's death.

Step Three: The consequence of failure: failure of one means failure of all

The third and final step is perhaps not so dramatic as the disaster of the first step, but it is equally shocking when you think about it. The third step is this: since we have now found one way—one sequence of events, only one out of possibly thousands—that fails the test, we strike down not just that one but all sequences. In other words, by virtue of having one possible way in which the uncertainty would take too long to resolve, we say that the contingent remainder in its entirety is ineffectively created. This consequence emphasizes, again, that the Rule is concerned with possibilities.

And now you know why we chose the five sequences we did, for all we really have to do, as it turns out, is to point to just one sequence that fails the test, and we establish invalidity for the entire interest. It doesn't matter that we could point to ten or a hundred other possible sequences that would also resolve the uncertainty and would all pass the test. Isn't this crazy?

C.   The Rule as a Test for Invalidity; The Challenge and Defense Mechanism

At this stage you know all there is to know about the basic mechanics of the Rule. It turns out to be fairly simple if you will but follow the three steps faithfully and carefully. In doing so it will help to know, as you do now, just how drastic the third step really is. That is, all you need to do as a challenger is to find one sequence of events that

is possible under the contingent remainder that you are testing that will resolve the uncertainty but that cannot be defended under step two.

Notice that the process of testing is a sort of challenge and defense game. The attacker goes first, puts up for test the worst possible case—a sequence that will resolve the uncertainty but take a very long time to do so. Then the defender takes over, but note that the defender must take the facts as given by the challenger (to be sure, de-populated as required by step one). If the defender can find a life within which, or within twenty-one years after which, the challenger's sequence runs its course by reaching certainty, the defender wins. But, of course, the defender wins only this round, for the challenger may try another sequence. If the defender keeps winning, we conclude that the Rule has not been violated. But note: all we really know is that this particular challenger has not been able to come up with an indefensible sequence. This quality of the Rule—that its use is to prove invalidity—is of importance in the analysis of the "wait and see" modifications.[13]

II. IS JUST ANYTHING POSSIBLE? THE RULES OF THE GAME

As we have seen, the challenger, bent on establishing invalidity, need come up with only one sequence of events that will postpone the resolution of the uncertainty to a time that cannot be defended. To repeat, the Rule deals with possibilities, not probabilities, and clearly not with what actually happens after the effective date.

A. The Specific Rules

We are faced with this question: by what measures of human experience, or by what measures of scientific knowledge, is the challenger to be governed in imagining and posing the fatal sequence? Fortunately for simplicity, but ridiculously for result, the rules are easy to state and easy to apply, but they defy all common sense. Take these as established:

(1) A person, if male, may impregnate a female person and a person, if female, may give birth to a child at any age regardless of physical or mental condition.

(2) A person may marry, become divorced, adopt another person at any age regardless of physical or mental condition.

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13. *See infra* Section VII(C).

(3) A person may engage in conduct that is illegal.

(4) That an event is highly unlikely to occur is no barrier to the challenger.[14] Although this point hasn't been tested to the limit, how would a court view "when the sun no longer sets in the west"?

B. The Consequences of Unreality

We can see now just how absurd some of the applications of the Rule can be, for the challenger gets the full reward—invalidity of the contingent remainder in its entirety—by being able to come up with just one wildly improbable sequence of events under which the resolution of the uncertainty is postponed to an indefensible time. Wouldn't it have been more rational for the Rule to have provided that the interest is ineffective only insofar as it would dispose of property under indefensible circumstances, leaving it otherwise effective?

1. The Swath of the Rule Aggravated by the Unreality

This two-ingredient quality of the Rule—complete invalidity if only one sequence cannot be defended and tolerance of extremely unlikely possibilities—was the inspiration for Professor Leach's funny-people world. By now we have all heard of the precocious toddler, the fertile octogenarian, the unborn widow, and the magic gravel pit.[15]

2. The Embarrassment When the Passage of Time Has Demonstrated the Unreality

An even more aggravating feature of the Rule, also flowing from this two-fold quality, is that often a challenge to a disposition is not in fact made at or near the time the instrument goes into effect, but much later. The typical scheme involves one or two life estates, then distribution to people somewhere down the generational line. If those people had been described in contingent terms, especially if they are two or more generations away such as grandchildren, it may well be that the remainder to them is invalid for violation of the Rule because of the possibility of afterborn children or grandchildren. But suppose no one raises the point until the time the trustee is ready for final distribution after the death of the last life tenant. By now, of course, the passage of time has sorted out the sequences that at the effective date

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14. For example: A gravel pit may be inexhaustible, a dog or cat may live to any age.

15. Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror,* 65 HARV. L. REV. 721, 731 (1952). Professor Mechem had no love for Professor Leach's "cute" labels, as he called them, and he called Professor Leach's attack on the Rule "little more than reiterated castigation of a few freak cases." Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation,* 107 U. PA. L. REV. 965, 967 (1959).

could have led to certainty, some of them defensible. And, the passage of time has proved that the unlikely sequence that poses the birth of another grandchild (to parents in their 60's) was indeed very unlikely, for it did not happen. Nevertheless, the remainder is invalid.

How would you explain to your clients (the grandchildren who were not afterborns) that just because their parents could have had another child born to them, they take nothing under their grandparents' trust? This embarrassing state of the law led Professor Leach to invent still another term: he called the Rule "the might-have-been rule,"[16] not a very complimentary label.

C. A Grain of Common Sense: Rules of Gestation

In only two situations has the Rule put any common sense limits on the challenger, both involving the phenomenon of gestation.

First, it is necessary to thwart the clever challenger who would take advantage of the time lag occurring in posthumous birth. Quite without intending any religious or philosophic commentary, the Rule defeats the challenger with two specific rules: First, a challenger cannot establish invalidity by using the fact of posthumous birth to make the life of the posthumous child unusable in defense; the child so born is considered alive at the death of the parent. Second, a challenger cannot establish invalidity by using the interval between the death of the parent and the birth of a posthumous child to cause the period after the lifetime of a person alive at the effective date to exceed twenty-one years; the interval is excluded in counting the twenty-one years.

The classic case is this: X gives property by will to his youngest child (call him A) for life, then to that child's first child to reach twenty-one (call him B); and if none reaches twenty-one, upon the death of B's last child to die (call him C) then to C's child or children who survive him.

The challenger poses that X, a male, has only one child, a son A, born posthumously; that A dies having had only one child, a son B, born six months posthumously; that B dies two months short of reaching twenty-one, having only one child, C, born six months posthumously.

Applying the special rules to this sequence, the successful defender says that A was alive at the effective date and that B's child C was identified as the sole taker within twenty-one years of A's death.

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16. Leach, *supra* note 15, at 728.

Second, the advent of artificial insemination or implanting, if recognized by the Rule, would create havoc with its mechanics. You can imagine what possibilities could be ahead for an imaginative challenger. But, as far as we know, no court has allowed a challenge posing delayed or "test-tube" births, and there seems little likelihood that any will.[17]

III. CASTING OUT A FEW DEMONS

Now that we have described the basic mechanics of the Rule, we are in a position to flaunt our knowledge by describing in painful detail a few very common misunderstandings about the Rule. These are the direct result of a failure to perceive these basic mechanics as you now know them. You must recognize these mistakes if only to avoid them; they have caused great harm and may continue to do so. Perhaps if your number grows over time and if your voices are heeded, correction can be made. Take heart.

A. Error Number One: Searching for Those Ephemeral "Measuring Lives"

Having been led astray by the Great Authorities, most people seem to believe that at the outset, upon initial inspection of a dispositive scheme, one can identify a group described as "measuring lives."[18] This cannot be done in any meaningful way; it is misleading to try and may well defeat serious attempts to understand the Rule.[19]

1. Only One Life is Important; It Does Not "Measure"; It Does Not "Validate"; It Defends

We have already explained the function of a life in the Rule's mechanics. For a particular posed sequence to pass the test, the

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17. Here, too, Professor Leach's humor has added to the lore, with the delicate title, "en ventre sa frigidaire." Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 A.B.A. J. 942, 943 n.3 (1962). Actually, the "frigidaire" phrase is not Professor Leach's. It had been suggested by one of his students. He relegates it to a footnote, apparently preferring the "fertile decedent," which he uses in his title.

18. The famous "Nutshell," authored by Professor Leach, is a major contributor to this fallacy, for Professor Leach starts his list of excellent examples by saying we must first identify the "measuring lives," but then he does not tell the reader how to do so. Indeed, nowhere in the article does he say how to identify them, because he can't. The best he can do is give his examples of the Rule's application to different situations. Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938).

19. As we shall see later, many of the wait-and-see reformers thought they had to define the "measuring lives" in order to say how long to wait; since, understandably, they could not define the group, they were and have been unable to say how long to wait. *See infra* section VII(C)(4).

certainty it reaches must be reached within the life of a person neces-
sary to its occurrence who was alive at the effective date or within
twenty-one years after that life. Only one life is of any significance in
the successful defense of any one sequence posed by the challenger,
and that life is identified only after a particular sequence is posed and
de-populated so that it contains only those people who are essential to
make it happen.[20]

There are no other lives in the slightest way involved in the Rule. It
is futile and dangerous to look for them. Yet for generations students,
scholars, and judges alike have looked for them, seeing that search as
the necessary first step in applying the Rule.

2. The Search For "Measuring Lives" Reverses the Rule

The search for "measuring lives" reflects a fundamental misunder-
standing of the Rule. The Rule is a rule to determine invalidity. The
first move is from a challenger, whose only burden is to pose a possible
sequence that cannot be defended. Then, and only then, the defender
looks for a life to use to defend against the particular challenge. Those
who start by looking for "measuring lives" have in effect turned the
Rule around, to operate backwards. They look for the defensive life
before there has been a challenge. No wonder they can't find it, for its
identity depends on the details of the particular challenge, and that
challenge hasn't yet been posed.[21]

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20. I have said this before. "[O]nly the life of that person whose continued existence is
necessitated by the events of a challenger's possible sequence can be used to defend against the
challenge." Fletcher, *A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting,* 20
STAN. L. REV. 459, 461 (1968).

  Somewhat the same idea appears in a 1974 student Note suggesting the phrase "validating
life." Note, *Understanding the Measuring Life in the Rule Against Perpetuities,* WASH. U.L.Q.
265, 273 (1974). By 1983 Professor Waggoner had adopted the term. Waggoner, *Perpetuity
Reform,* 81 MICH. L. REV. 1718, 1722 (1983). In the third edition of their coursebook,
Professors Dukeminier and Johanson offer the term "validating lives," but they abandon it
because they think "measuring lives" too firmly entrenched. J. DUKEMINIER & S. JOHANSON,
WILLS, TRUSTS, AND ESTATES 785 (3d ed. 1984). Later, however, Professor Dukeminier does
use the term, this time in the singular, in his explanation of the mechanics of the Rule.
Dukeminier, *Perpetuities: the Measuring Lives,* 85 COLUM. L. REV. 1648, 1650 (1985). Finally,
the Uniform Act, for which Professor Waggoner acted as Reporter, uses "validating life" in the
comment. UNIFORM ACT, *supra* note 5, § 1 Part B: comment to § 1 (1986).

21. In none of the uses of the "validating life" described *infra* note 54 and accompanying text,
is that life used defensively. Rather, as a first step, Professor Dukeminier would "assemble a pool
of causally-connected lives." Dukeminier, *Perpetuities: The Measuring Lives,* 85 COLUM. L.
REV. 1648, 1652 (1985). Professor Waggoner would first look at the life (or death) of "each
person connected with the transaction." Waggoner, *supra* note 20, at 1722. From there, if they
find a satisfactory life, they decide that they have proved the interest valid. But these two
eminent professors, while differing in language, commit the same error—they work the rule
backward, seeking to find the life, if there is one, that proves validity. The Rule simply does not

3. If "Measuring Lives" Exist At All, They Are a Useless, After-the-Fact Lot

We can, if pressed into doing a useless act, come up with a list of people whom we could logically call "measuring lives." We do so here only because the error of its usage will become even more apparent.

The only possible sense to the term "measuring lives" can be derived as follows:

We take an interest to be tested under the Rule, say a contingent remainder. This time we, too, will try to work the Rule in a backward direction in the sense that we now, erroneously, will treat the Rule as a test for validity, not invalidity. Our first step is to think of all the ways in which the contingency may resolve itself that are possible when one stands at the effective date and looks forward to the future. After we have spelled out each of them, each with its separate sequence of particular events that may possibly occur, we apply the test of the Rule separately to each sequence. If all of them pass the test, we conclude that the contingent remainder is effectively created.

If we have a valid interest, we then look again at each of the sequences that have been tested and successfully defended, this time not to establish validity—we have already established that—but to make up a list of people. At this point it is important to remember that the testing process required us, separately as to each sequence, to remove from it all extraneous people. This we did with the technique of the "disaster" by which we allowed only those people whose continued life was necessary to cause the particular sequence to run its course to survive, and we allowed them to survive only long enough to serve their purpose. Now, in each of these de-populated sequences, we note the identity of the person whose life we used in successful defense, ignoring those sequences in which we used the twenty-one-year period in gross. Now, we have a list of people. Call them the "measuring lives," if we must have a label. It's a rather useless list, isn't it? We have already successfully defended every sequence we could think of, and we have already concluded that the interest was validly created. What earthly use is there to be made of such a list?

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work that way. To repeat, the particular life is useful only in successful defense to a particular sequence. It is necessary and useful only if there is a challenge, and a poor challenge at that. If we conclude there is validity, we do so because we can think of no challenge that would be successful, not because we have posed all possible sequences and have been able to defend each one.

To repeat, we did not need to go through this long process of finding passing sequences. The Rule asks only that one failing sequence be posed; if it cannot, the interest is valid. Why list all those that pass?

Notice that those who believe their first task to be a search for "measuring lives" and who then actually find them must have made up their list in the manner we have described. There is no other way. But the lives they have collected have already outlived their usefulness, for each, individually in its own separate sequence, has proved adequate for defense. Do these people now list the lives just to memorialize them? If they try to do more, such as use these lives to dimension some kind of abstract "period,"[22] they merely reflect and promote confusion and misunderstanding.

B. Error Number Two: The Belief That the Rule Limits the Size of this Useless Group

An outgrowth of Error Number One has been an occasional assertion by some that the number of measuring lives cannot be unreasonably large.[23] Again, the error is in the assumption that there is such a group.

Believing there is such a group, these people then try to analyze *In re Villar*[24] in terms of "measuring lives." But this case does not even suggest a perpetuities problem except in the broadest terms of social policy; as far as the mechanism of the Rule is concerned there is clear validity. The testator called for delivery of the property to those of his issue who should be living twenty years after the death of all those of Queen Victoria's descendants who were alive at the testator's death. There is no way for a challenger to defeat that scheme, for the twenty years in every possible sequence was to run from the death of a person alive at the effective date. There was even a year to spare.[25]

C. Error Number Three: The Belief That There Is a "Period" of the Rule

Again an outgrowth of Error Number One, the assumed existence of a group of "measuring lives," has led to a conception that there is a "period" of the Rule that has some independent existence. That

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22. The effort to do so has been painfully counterproductive in trying to specify how long to "wait and see." *See infra* section VII.

23. *See, e.g.*, Leach, *supra* note 18, at 640.

24. 1 Ch. 471 (1928).

25. It was possible, of course, (and this is what the judge was concerned about) to strike down this scheme for its impracticability, and it probably should have been so treated, but the court tolerated it.

people who believe this have had difficulty defining its duration in terms any more specific than "measuring lives plus twenty-one years" is quite understandable, for the group doesn't exist. There is no "period of the Rule" in this abstract sense. To repeat, now in tedious number, the only use for a life is to defend a particularized sequence drawn by a challenger who must work with the particular property disposition scheme up for test. And, the life, if any, that can be used for defense is limited to only those people in the resolving sequence that the challenger puts up in the attempt to establish invalidity.

D. Error Number Four: Seeing the Rule as a Rule of Conduct

Occasionally, in litigation brought after the passage of time has sorted the possible sequences for resolving the uncertainty, i.e., where certainty has been reached by one of them, the court will say something like, "As it turned out, the Rule was not violated."(!) Of course it was violated. What the court is saying is that the sequence the challenger can use (or could have used) to establish invalidity did not in fact occur. We have discussed this situation before, for it furnishes the classic opportunity to talk about the Rule as the "might-have-been Rule."

What the court should be able to say, if the Rule's reformers would but see it, is: "Since under our enlightened modification of the Rule a dispositive scheme is invalid under the Rule only insofar as it purports to dispose of property under circumstances that would fail the test, and since the claimants here do not claim under such a failing circumstance, the disposition to them is effective."

IV. THE VARIOUS APPLICATIONS OF THE RULE

Our approach so far has emphasized the basic mechanics, using a contingent remainder as the structural component of the property disposition to be tested for validity. The contingent remainder is well suited for the purpose because both its uncertainty and the necessity to pose particular sequences to resolve that uncertainty are so readily apparent.

The Rule is of course also directed at other uncertainties, again as contained in certain types of interests in or powers over property. We previously briefly mentioned the list—executory interests, class gifts, powers of appointment, and honorary trusts. We now look at these in some detail.

First, however, we should note that the list of interests that are vulnerable to the Rule leaves untouched many other interests that are, to

one extent or another, also uncertain. Why this should be is probably more a matter of history than of logic or policy, but for our purposes we will here not quarrel with the status quo.[26]

Prominent among those that are beyond the reach of the Rule are the grantor interests that complement a determinable fee and a fee subject to a power of termination. Also, the fact that an interest is subject to divestment does not bring it within the reach of the Rule. A vested remainder, for example, is immune even though it is subject to a condition subsequent. Similarly, that an interest can be divested by the exercise of a power to appoint (or to invade principal, as in a trust for the benefit of the income beneficiary) does not bring the interest within reach.

A. Executory Interests

For our purposes we may define an executory interest as an interest created in someone other than the grantor that is complementary to either a determinable fee or a fee on a condition subsequent.[27] Occasionally an executory interest may not entail any uncertainty, as in a conveyance to A "fifty years from now." In this instance, although A has an executory interest, its certainty makes it immune from the Rule.[28] Subject to this exception, we say of an executory interest that for purposes of the Rule its very existence is an uncertainty with which we are concerned. Certainty will come only when the executory interest ceases to exist, whether by outright extinction or by transformation into another type of interest such as a fee interest.

An easy example is a disposition by X to A for life, then to A's youngest child then living; if, however, that child later dies without leaving a child or children then surviving, to C. C's interest, being an

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26. I have not included options to purchase or lease property or leases to begin in the future as within reach of the Rule despite authority indicating vulnerability. I do so out of conviction that these interests ought not to be vulnerable to the Rule; since most of these are arm's-length generated, relief for unconscionability should be available in appropriate cases. *See generally,* L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 1243–1246 (1956).

27. Examples: (1) X to A Church as long as it uses a particular prayer book; when that use ceases, to B. (2) X to A Church but if it ever ceases to use a particular prayer book, then to C. These two structural settings for the executory interest often occur in quite different factual settings; consider: (3) X to A for life, then to B as long as B remains in good standing as a member of the bar, and when B ceases to do so, to C; and (4) X to A for life, then to B but if B dies without leaving then surviving children, to C.

28. Professors Simes and Smith express some doubt on this point, saying only that "[i]t would seem that the rule against perpetuities should not be applicable. . .," and indicating a lack of authority. L. SIMES & A. SMITH, *supra* note 26, at 141. The *Restatement (Second)* asserts that this type of interest contains no uncertainty. RESTATEMENT (SECOND), *supra* note 4, § 1.4 comment m, illustration 18.

executory interest, must be tested. The challenger's task is to pose a sequence that keeps C's interest alive as an executory interest as long as possible, to a time that cannot be defended. The fatal sequence should be apparent: A has a child born after the effective date (call him B); upon A's death B is the youngest child of A then living; B dies twenty-five years later leaving no child surviving. No life is adequate to defend, for C dies in the disaster, and B's parents die as soon as B is born. Thus C's executory interest is ineffective.

Although the uncertainty in identifying B must be tested (it passes since it resolves at A's death), the uncertainty of whether B loses the interest by dying without a child or children surviving him is not even tested, insofar as the validity of B's interest is concerned. That is, as soon as A dies B's interest is a vested fee, to be sure subject to a condition subsequent, but that type of interest is immune to the rule. Isn't B's interest just as uncertain as C's? The only difference is that B, by outliving A, would be sure to have possession thereafter for life. Whether the property will go upon B's death as does B's other property or then go to C makes both the B interest and the C interest at that point equally uncertain.

We can demonstrate an even more puzzling aspect of the anomaly if we look at the Rule's application to alternate contingent remainders and compare its application to a combination of a vested remainder in fee on a condition subsequent plus an executory interest that would produce essentially the same disposition. The Rule would test both contingent remainders, and since they are both dependent upon essentially the same contingency they would either both pass or both fail. On the other hand, if the two interests were in the form of a vested remainder with a condition subsequent followed by an executory interest, only the executory interest would be tested. This may be illustrated by the following examples. (In each example assume that at the effective date A is alive and that the Rose City Golf Club has never admitted women to membership.)

(1) X to A for life, then for life to A's oldest child then living, then to the Rose City Golf Club if by then it admits women to full voting membership; if it does not, to State University. Here we have alternate contingent remainders; both must be tested; both fail.

(2) X to A for life, then for life to A's oldest child then living, then to Rose City Golf Club, but if by then it does not yet admit women to full voting membership, to State University. Here the club's interest is a vested remainder and is therefore not tested. That it is subject to a

condition subsequent does not bring it within reach of the Rule. Only the executory interest to State University is tested. It fails.

Incidentally you might note that the gift to State University is a gift to charity. In one respect, not present in this example, such gifts receive special treatment under the Rule.[29]

B. Class Gifts

The application of the Rule to class gifts is dominated by one dogmatic assertion. A class gift, for purposes of the Rule, is a single gift, not a group of separate gifts, one to each member of the class. This proposition has drastic effect in two types of class gifts: a gift subject to a condition precedent, as in a contingent remainder,[30] and a gift to a class that is subject to open.

1. A Contingent Remainder to a Class.

We will start with this example: a gift to A for life, then to A's widow for life, then to A's children who survive the widow.

Here the identity of the takers will not be known until the death of A's widow. Can the challenger postpone this event beyond defense? Try this: immediately after the effective date, A's two children die; sometime thereafter a girl is born (not a child of A; call her W); A thereafter marries W; A has two children, then A dies; W lives twenty-five more years, then dies, the two children then surviving. This sequence cannot be defended.[31]

But the two children of A who were alive at the effective date object. Although they will concede that as to any share going to afterborn children of A, the gift is indeed invalid, they say that the gift to them should be defensible, for whether they outlive W will be known in their own lifetimes, and since each was alive at the effective date their lives are usable in defense. The two children lose. They lose because they do not have separate gifts. In this example the gift is a single contingent remainder, and the contingency is a characteristic of the class as a whole. It is not several contingent remainders, one to each person in the class. Were it the latter, the argument of A's two children would succeed, for each separate gift, as to children alive at the

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29. *See infra* section V(A).

30. For this purpose, we also view an executory interest given to a class as being subject to such a condition.

31. Ordinarily, you would assume, A would not marry anyone so much younger than he, but as we know, the challenger is not limited to posing only those events that are ordinary. In case you haven't already recognized her, W is the famous "unborn widow," a label attached by Professor Leach. *See supra* note 15.

effective date, would be defensible by the use of the life of that particular child.

2. A Gift to a Class Subject To Open

The other feature of the Rule's application to class gifts is its treatment of class gifts that are subject to open. Change our example slightly: to *A* for life, then for life to *A*'s widow, then to *A*'s grandchildren. By class gift law we know that afterborn grandchildren can join the group as long as there is no need for delivery of possession, that is, until both *A* and *A*'s widow die. If, as is so, we regard the possibility of joining the class as an uncertainty of concern to the Rule, we can defeat the gift to the class (again, treating it as a single gift) by posing the birth of more grandchildren, some of whom are born, not to children of *A* who are now alive, but to a child of *A* born after the effective date. The time that this person joins the group cannot be defended, and the entire class gift fails.

That the Rule should be concerned about this type of uncertainty may seem inconsistent with its failure to be concerned about vested remainders that are subject to a condition subsequent, for what is a class gift subject to open but a variant of this type of remainder? At least if viewed for a moment as a gift to individual class members, the appearance of a new member merely requires the existing members to move over to make room, not to lose their shares, as is the case with a vested remainder subject to a condition subsequent. But the answer to this objection is, again, the flat assertion that a class gift is a single gift, not a collection of separate gifts, and the ownership of that single gift will not be finally known as long as new members may join the class.

C. The Creation of Powers of Appointment

As a preliminary, we emphasize that our concern here is whether the power itself is effectively created. We are not here concerned with the validity of interests created by the exercise of a power. That subject is treated later.[32]

First, we must distinguish sharply between special and general powers, for the Rule treats them quite differently. A power is special if the holder of the power may appoint the property only among a limited group of people. A typical example is a power in *A* to appoint the

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32. *See infra* section V(B).

property only as among A's children. By contrast, a power is general if the holder may appoint to anyone including himself or herself.[33]

1. The Creation of a Special Power

In its application to the creation of a special power of appointment the Rule is of course concerned with certainty, and the very creation of a power does create uncertainty—will the power be exercised? If so, what different scheme of ownership will its exercise bring about? That uncertainty will resolve either when the power is exercised or when it can no longer be exercised. Thus the Rule requires that a special power either be exercised or expire within a time that can be defended. Or, to put the point a little differently, the last time possible for exercise of the special power must be defensible.

For a simple illustration we may use our unborn widow example: a gift to A for life, then for life to A's widow and to her a power to appoint the property as she sees fit among A's children, exercisable either during her lifetime or by her will. The challenger poses the birth of further children to A and the (unborn) widow's exercise in their favor at a time that cannot be defended, say thirty years after the birth of A's youngest child. The special power is not effectively created.

2. The Creation of a General Power

The other type of application is to the creation of a general power, to a quite different result. Here the Rule will be satisfied if the power will become exercisable within a time that can be defended. The difference from the test for the creation of a special power is of course attributable to the much greater dominance enjoyed by the holder of a then-exercisable general power. With some looseness of language we can say that at that stage the holder of the power is the practical equivalent of being the absolute owner, so the exercisability of that power is all that is required.

An illustration is readily at hand if in our example we change A's widow's power from special to general: a gift to A for life, then for life to A's widow, and then to such people as she may by deed or will appoint. This power is effectively created because it will become exercisable at least as early as A's death, and A's life can be used to defend.

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33. Note that this definition of a general power includes power to appoint by will. Further, the discussion in the text assumes that all powers of appointment that are not general are special. This rather heavy-handed classifying is justified here, perhaps, by the fact that most special powers that call for their creator to be alert to the hazards of the Rule are powers to choose among a small, definite, ascertainable group, such as "A's children"; they are not of the type, hard to classify, that calls for a choice among a loose group such as "all my friends."

Indeed, even if the power were not exercisable by the widow until twenty years after A's death (or by her will if she should die before that), the creation of the power would be effective.

D. Honorary Trusts

An honorary trust, that is, the power given by a testator to a person to use certain funds to care for the dog or to carry out a similar non-charitable but tolerable wish, draws the attention of the Rule for its potential to last too long. The concern is not that the testator's dog or cat is likely to live too long; rather, it is that it may be a pet turtle or a parrot that is to be cared for, or that the power may be to do something more enduring, such as to care for a grave. Here, as with a special power of appointment, the uncertainty of concern to the Rule is the potential that the power will be exercised or will continue to be exercised at a time too far distant.

In demonstrating the application of the Rule to honorary trusts we will assume that the power to use the funds is not personal. That is, the testator is not so concerned as to who has the power as he or she is to see that the pet is cared for.[34] Next, we note that the tolerance of the Rule for posing unlikely events permits a challenger to pose that the testator's pet will live to any age. With this interpretation given to the will and with the unreality of an indefinitely long life for the pet, the challenger is able to pose this sequence: the initial power holder dies, the successor is a person born after the effective date, and the pet lives twenty-five years after that.[35] Thus the last exercisability of the power has been postponed beyond a time that can be defended.[36]

V. TWO VARIANTS IN THE RULE'S MECHANICS

In two quite different settings and for quite different reasons, the operation of the Rule is somewhat different from what we have so far learned. The first of these concerns charitable gifts, the second the dispositions created by exercise of a power of appointment.

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34. If the power is personal to someone who is alive at the effective date, its most distant exercise will be defensible by use of the power holder's life.

35. Resist the temptation to use the pet's life to defend; the defensive life must be human. Nice try.

36. Does this mean Fido will starve? He appears doomed, but there may be a way to save him. *See infra* section V(B).

A. *Testing the Effectiveness of a Gift to Charity*

A gift to charity can occur in any type of property interest—an outright gift, a vested remainder, a contingent remainder, or any other. In this respect the fact that it is charitable is of no significance under the Rule. Also, as with other types of gifts, the Rule is concerned with the creation of the same type of uncertainties—the contingency in a contingent remainder, for example. And, with an exception to be discussed in a moment, the Rule tests the creation of those uncertainties in the same way. That is, the challenger poses a sequence that postpones the resolution of the uncertainty as long as possible, and the defender seeks to show that the resolution occurs within a defensible time.

The exception is this: even if the interest given to charity contains an uncertainty vulnerable to the Rule, the Rule does not test that interest if it is immediately preceded in point of time for possession by an interest given to charity that does pass the test of the Rule. The typical example involves an executory interest, such as the following:

A gift to *A* for life, then to *A*'s then surviving children; if none, then to *B* Church so long as the property is used for church services, and when that use ceases, to *C* University.

In this example, the contingent remainder to *B* Church must be tested; it passes. The executory interest given to *C* University, however, does not need to be tested; note that if that executory interest had instead been given to a nephew of *A*, the interest would have to be tested, and it would fail. A shorthand way of putting the charitable-gift exception is to say that "charity to charity" is exempt from the Rule.

The justification for this exception is its encouragement of charitable gifts, despite the potential for extraordinary continuation of uncertainty. Note, too, that almost always in this type of disposition there is no trustee sitting over these interests and thus no one entity with power alone to sell or otherwise deal with the property. Indeed, these long-enduring interests are a clog on title, much as are the corresponding grantor-retained interests, the possibility of reverter, and the power of termination.[37]

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37. With the grantor interests the situation is more aggravated, for they are immune from testing whether the grantor is a charity or not (and usually is not).

*B.   Testing the Effectiveness of Interests Created by the Exercise of a
     Power of Appointment*

*1.   The Continuation of Uncertainty; The Difference
     with a General Power*

A person holding a power of appointment poses a special problem
to the Rule because of the holder's capacity by exercise of the power to
create new uncertainties, for, with one exception, these in a very real
sense are added on to those already existing by virtue of what the crea-
tor of the power did in setting up the original scheme. The result can
indeed be a very long enduring, continuous state of uncertainty. This
point can be made most clearly, perhaps, by first discussing the excep-
tion. The exception involves a general power of appointment.

We have already seen how, in testing the effectiveness of an effort to
create a power of appointment, the Rule treats general and special
powers quite differently. A general power carries such dominance
over the property that the Rule is satisfied if the time of first
exercisability of that power can be defended. By contrast, the last
exercisability of a special power must be defensible. The same concep-
tion of a general power has consequences here, too, where we are con-
cerned not with whether the power has been effectively created but
with whether the interests created by its exercise are effective. In this
context, if the holder of a general power exercises it to create a long
future-interest scheme with the typical uncertainties of contingent
remainders, do we view these as an "add-on" to the uncertainty cre-
ated when the power itself was created? Or do we view the holder of
the general power as sufficiently dominant to consider the chain bro-
ken? The answer is a compromise: If the power was exercisable *inter
vivos* or both *inter vivos* and by will, the continuity is broken. Any
uncertainties created by the original donor have by then been resolved,
and any uncertainties created by exercise of the power are considered
to start fresh. If the power is exercisable only by will, there is no real
break in the continuity.

This point may be most clearly shown by an example, in two parts:
First, assume the creator of the power provides a gift to *A* for life plus
a general power of appointment and the remainder to State University.
Note that so far we have not specified when the power is exercisable;
we will use two alternate forms:

(a)   the power is exercisable any time after *A* reaches fifty (and
assume *A* is under fifty at the effective date); or

(b)   the power is exercisable only by will.

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Next we have A exercise the power, to give his wife, Jane, a life estate, with remainder to those of his children who survive Jane.

If we use alternative (a) where of necessity A is fifty or over when he exercises the power, the Rule will test the contingent remainder to his children in the very same way as it would have if it had been a disposition of A's owned property. That is, it will ignore the period between the time the power was created and the time it was exercised. Since there was a period of time in which the general power was exercisable, the fetter imposed by the creation of the power was broken, and the uncertainty created by A starts afresh. By contrast, with alternative (b) there was no such break, for there was no period in which the power was exercisable, only a dimensionless instant. To move from metaphysics to practicality, we should note, also, that there is a difference in reality between having *inter vivos* power by which A, the holder of the power, can exercise the power in his own personal favor, and having a testamentary power where A's only personal benefit is in leaving this life with the satisfaction of having prescribed the terms and conditions under which someone else is to use the property.

An even stronger case for recognition of the continuance of the fetter occurs if A's power is special, for obviously A's dominance is much less, to the point that his function is largely to exercise judgment; any personal satisfaction to A is quite incidental.

Apart from this exception for the *inter vivos* general power, how does the Rule deal with the extended period that results from the exercise of the power of appointment? We now turn to the Rule's special mechanics.

2. The Rule's Special Mechanics for Exercises of Power; Two Significant Differences

a. The Effective Date

Remember, we are now testing the effectiveness of the interests the holder of a power tries to create in exercising the power. That creation may be of any type of interest that contains an uncertainty of concern to the Rule, such as a contingent remainder. The difference between testing this contingent remainder and testing one in an instrument created by the owner of the property, not just a holder of a power over the property, as we have said, arises from that fact that the property has been subject to uncertainty ever since the power was created, and now the power holder is simply adding on to that fetter.

The Rule's response is simple enough: the defender must treat the date the power was created as being the effective date of the instru-

ment by which the power holder exercises the power. Thus, if the defense is to utilize a life, that life must be of a person alive at the time the power was created. This may be quite a burden, for the exercise of the power may itself have produced uncertainties that will resolve only after a long time, even when measured from the time the power was exercised.

b. The Challenger's Perspective

The severity of moving the effective date so much earlier in time is softened somewhat by the other difference from ordinary Rule mechanics. Perhaps not so obvious as moving the effective date but equally logical and eminently practical, the Rule at this point imposes a severe limit on the range of the challenger's imagination. Rather than permitting a challenge based on what could happen when looking forward from the effective date of the instrument creating the power, as you might expect if we were to use the ordinary mechanics of the Rule, the Rule tells the challenger to stand at the time of the exercise of the power and only from that time forward be imaginative in posing the sequence that may establish invalidity. The reason for moving to this time for the exercise of imagination is that there is not even any disposition in existence to be tested until that time. Since by that time history has told us what the facts have been between the effective date of the original instrument and the date of the exercise of the power the challenger must take those as a given. Despite Professor Leach's label, the Rule is not a "might-have-been rule"; it does not permit the challenger to rewrite history. It tests the effectiveness of the exercising instrument as of its effective date by looking forward from there, not backward.

3. The Special Mechanics Stated; An Example Given

So we have this Rule: In testing the validity of an interest created by the exercise of any power of appointment other than an *inter vivos* general power, the challenger stands at the date of the exercise and poses a possibility that the future may at that time hold; the defender can defend the resolution of the uncertainty as reached in that challenge only by demonstrating that it resolves within the lifetime of a person alive at the time the power was created or within twenty-one years thereafter.

We may use our earlier example, where the gift in alternative (b) was a gift to *A* for life plus a general testamentary power of appointment, and remainder to State University. To this we now add that *A*

exercises the power by a gift to his wife, Jane, of a life estate, remainder to those of his children who survive Jane. To make our illustration useful for our purposes assume that when the power was created *A* was alive, unmarried, and childless.

The interest to be tested is the contingent remainder to *A*'s children. This will be resolved only at the death of Jane. What can the challenger pose that will be indefensible? At this stage we need more facts, for the challenger may use only those facts that occurred in the interval between the time the power was created and the time it was exercised. For our purpose we will assume, first, that period of history was as follows: Jane was born after the effective date, and at least one of *A*'s children was alive at the time the power was exercised. The challenger poses that Jane and the child live twenty-five more years, Jane then dies, the child surviving. This resolution of the uncertainty cannot be defended, for the defense must go back to the time the power was created, at a time that neither Jane nor the child was yet alive. Nor can *A*'s life be used, for *A* is useful only long enough to get the child born, and the uncertainty may not resolve until more than twenty-one years later (upon Jane's death). Now consider the alternate: Jane was alive when the power was created. Since the challenger must accept that as fact, the sequence previously posed is not available, and we can think of no other that would establish invalidity.

VI. TO ESCAPE OR AVOID THE RULE; SOME WAYS OUT OR AROUND

A. *Construction of the Instrument*

Critics of the Rule often quote Professor Gray, the Rule's famous early expositor, who describes the Rule as being "a peremptory command." He says that the instrument must be first "construed as if the Rule did not exist," then the Rule "remorselessly applied."[38]

He then acknowledges, as he must, that many times judges indeed do just what he tells them not to do—they construe in such a way as to avoid the Rule. He says of this behavior "that this irregular action of the judicial mind cannot be defined or foretold." Even he, however, approves of resolving ambiguities in favor of validity, if the instrument is "really ambiguous."[39]

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38. J. GRAY, *supra* note 3, at 599.

39. *Id.* at 601.

The fact, of course, is that a judge in a case where the applicability of the Rule has been asserted cannot help but be aware of the Rule's threat when asked to construe the language of the instrument.

Indeed, the very first line of defense in facing a challenge under the Rule is to avoid its application. It will be especially useful in cases where the challenger's success is dependent on showing some wildly unlikely possibility. For example, a contingent remainder to the grandchildren of *A* who survive *A* surely should be construed to refer only to the issue of *A*'s now living children if *A* is a female over fifty. The same approach would avoid the unborn widow, the precocious toddler, and other fanciful people. Other, somewhat different, examples can be seen in honorary trusts. The direction to care for poor old Fido is obviously to be construed as a direction to do so for only a reasonable time, to-wit, not more than twenty-one years.

B. *An Escape Clause in the Creating Instrument*

Lawyers drafting dispositive instruments embodying future interests, almost always in trust, routinely include a provision known as a "savings clause." It is intended to save a disposition that contains a provision that would, in the absence of this clause, be invalid for violation of the Rule.

It would be helpful to the erring or diffident lawyer if such a clause could by simple pronouncement "save" the disposition. But the Rule is not that yielding; the "saving" must be accomplished by changing the scheme so that it does not violate the Rule, not by exempting one's creations from the reach of the Rule itself. In effect, these savings clauses are intended to be confessions of possible error, and they alter the basic scheme to one that the drafter of the instrument more confidently believes does not violate the Rule.

How to draft such a clause poses some difficulty. The problem is that the drafter has already worked out the basic plan (we will call it Plan A), and now believes it necessary to come up with a mechanism (call it Plan B) that will change Plan A and yet still accomplish what was intended to be accomplished in Plan A.

To focus on this problem let us consider an example that contains a Rule violation:

Suppose we have, in Plan A, an *inter vivos* trust calling for payment of income to the donor for life, then income in equal shares to the donor's children for their respective lives (as each child dies, the survivors receive larger and larger shares of income). (This is usually not a desirable scheme; it is used here because of its simplicity.) When the

last surviving child dies, the plan calls for distribution of principal equally to all of the then living grandchildren of the donor. To establish invalidity the challenger need only pose the possibility of birth of another child to the donor, the birth of children to that afterborn child of the donor, and the eventual distribution at the death of this afterborn child of the donor at a time when the only grandchildren of the donor who are then living are the children of this afterborn child.

As a preliminary we should realize that we have made a mistake, and we should correct it. If the client is as old as most people are who like this sort of plan, there is very little prospect of the birth of another child. That being so, the remedy is easy: instead of referring only to "my children"; use "my children, John, Susan, and Judith."[40]

Suppose we somehow miss the error and thus don't correct the drafting. Instead we turn our attention to a savings clause. Now we are in trouble, for if we haven't seen our error and therefore have not corrected our draft of Plan A, we are at a loss in drafting Plan B, for we do not know where to focus our curative efforts. It would be even more difficult if we had not made an error in Plan A and yet wanted to include a Plan B.

If we nevertheless try, we may come up with a quite ill-suited plan. To use our example again, recall first that the error in Plan A is that it permits an afterborn child of the donor to affect the distribution from the trust. Not knowing that, however, we may be tempted to draft Plan B as a revised version of Plan A, differing only in calling for a more limited distribution such as to only those grandchildren who are alive at the time the trust is created. To do this, however, may be quite contrary to the donor's wishes, particularly if more grandchildren are likely to be born after the effective date. Besides, we, too, like Plan A. We believe (erroneously) that we have drafted it without error, and we want it to be the operative plan for distribution.

The solution to the difficulty is to use Plan B not to correct error or even to correct possible error, but to make it possible to use Plan A even if it has error. Is there some way this can be done? The answer to this question is, no, not really, but we can come fairly close. The trick will be to create a period of time, call it "free time," during which, no matter how the uncertainties in Plan A may possibly resolve, the time of the resolution of the most remote will be defensible. As we suggest, we may not be able to assure that every one of

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40. Even if we don't correct our own mistake, we might, when our drafting later gets into trouble, persuade a tolerant court to read our language this way, but we don't really want to invite litigation even if we eventually win, especially if we were the cause of it.

these will be defensible, but we will be able to cover most of them. We will address this objective in two steps.

First, we will draft Plan B with the objective that it be a dispositive scheme that will last a long time before it calls for distribution. (As a second step we will correlate Plan A and Plan B, but we defer that step for a moment.) Since Plan B will have its own dispositive scheme, and we want to be absolutely sure that it will withstand challenge, we will keep it simple. Typical lawyer practice here, for example, is to specify the time for distribution under Plan B as "twenty-one years after the death of the last survivor of all my grandchildren alive at the time this instrument goes into effect." Surely that will be a long time if there are five or six young grandchildren in the group. We might be a little hard pressed to describe a sensible group of people to whom distribution is then to be made, since we have waited until all five of these grandchildren have died, but we could for example call for distribution to great grandchildren, or in their absence, to some charity. The principal point, though, has been accomplished, for now we have a long period, and its farthest distant point is defensible insofar as it determines the takers under Plan B.

As a second step, we must take advantage of that long period in Plan B by making it a necessary ingredient in the distribution scheme of Plan A. Only in that way will we be able to transform what would have been an invalid disposition in Plan A into one that will withstand challenge. And we want to do this with as little change in Plan A as possible.

The solution is simplicity itself. We need only to provide that distribution is to be made according to Plan A or Plan B, depending on which plan in fact arrives at the time for distribution first. If we have made Plan A's scheme one that seems sure to call for distribution before Plan B's does so, we will have assured the use of Plan A in all circumstances except in what we predict will be the highly unlikely event that Plan B's period will run out before Plan A. If the unlikely does happen, of course, we will have distribution under Plan B, but we will have at least assured validity under both plans.[41]

Notice that without this correlation we would have done nothing for Plan A, for just because Plan B is defensible, we would not have affected Plan A at all. To make Plan A effective it must be changed at

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41. You might try to challenge this. Suppose the challenger poses the sequence that would establish invalidity if we did not have Plan B. The presence of Plan B now makes that sequence defensible because the challenger, under the terms of the instrument, cannot reach the point for distribution under Plan A unless the time for distribution under Plan B has not yet arrived, and all points in Plan B are defensible.

least to some extent. The virtue of the type of Plan B that we have used here is that it has accomplished its goal with only very little change in Plan A. That is, Plan B's dispositive scheme, rather than Plan A's, will be used only in the most unlikely circumstances; yet Plan B's effect on Plan A's disposition is enough to assure successful defense to a challenge under the Rule.

There is a risk in all of this. By denying us the use of a fixed time—the 100 years we would like to use—the Rule makes us use a period that we can only hope will last a long time. It may not. Suppose all five of the grandchildren alive at the effective date are killed in a plane crash or a boat capsizing shortly after the effective date. Now, instead of Plan B serving merely to assure Plan A's validity, it determines the distribution of the property. Its terms may be highly inappropriate—awkward and ill-suited—for the circumstances.

This risk can also take on an ironic tone. Suppose we change our example only slightly, to make it a disposition by will instead of an *inter vivos* trust, in all respects the same except the provision for income to the donor. Now there is no violation of the Rule in Plan A. Do we still include Plan B? We not only do not need it, but as we have just seen it might prove harmful, for we might even have to use it, and we do not like its results. In practice it is likely to be there, for this type of clause is virtually boilerplate, inserted in every dispositive instrument.

It is ironic that a clause put into an instrument to protect against violations of the Rule can turn out to distort a Plan A that is perfectly good. Perhaps Plan B should confess fallibility and call for some kind of change only if a Rule violation is actually present in Plan A.[42]

The principal lesson in this discussion of savings clauses is to draft Plan A so that it is free from error. Savings clauses may be useful, but they are potential for trouble. Just hope yours is never put to use.

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42. Professors Leach and Logan have proposed a form of savings clause that calls for the drafter to acknowledge at least the possibility that a person might mount a perpetuities challenge to the drafter's competence. They would, however, use this clause only as a supplement to one of the Plan A - Plan B type, by giving a corporate trustee power to appoint the property to others in the event of a challenge. The new scheme to be effected by exercise of the power would presumably not violate the Rule; indeed they would require the appointive disposition to be within "clearly permissible limits." In practical effect the result would be the rough equivalent of reformation by a court, but it would rest on a different doctrinal base. Leach & Logan, *Perpetuities: A Standard Saving Clause to Avoid Violations of the Rule,* 74 HARV. L. REV. 1141, 1142 (1962).

C. The Presence of a Power To Revoke or of a General Power of Appointment

We have already seen that, in the creation of a general power of appointment, the Rule is satisfied if the time of its first exercisability is defensible. The dominance of the power holder who can then exercise the power is so strong that at that time there is really no dead-hand fetter on the property.

The mere presence of a general power, or of its cousin, a power to revoke, also changes the operation of the Rule when it tests other types of interests, such as a contingent remainder. Here, too, the dominance of the power holder allays the concerns of the Rule. Let us consider first an example that does not contain such a power; then we will add a power to see its effect.

Example in first form: X creates an *inter vivos* trust, with income to X for life, then to X's widow for life, then to X's grandchildren.

As with our other "unborn widow" examples, the challenger is in a strong position. The challenger poses X's marriage to a woman born after the effective date, the birth of another child to X (call this one A), X's death, then twenty-five years later the birth of a child to A while the widow still lives. This cannot be defended. The challenger wins; the remainder to the grandchildren is invalid. Now add a power to revoke:

Example in second form: X creates an *inter vivos* trust, with income to X for life, then to X's widow for life, then to X's grandchildren; he also reserves a power to revoke the trust exercisable at any time.

The mere presence of X's power prevents invalidity, for we view X's position, after the effective date and until he dies, as so dominant as not to raise any concern under the Rule. In other words the Rule considers the property fettered only from the moment of X's death, when the power can no longer be exercised. By that time in the challenger's sequence A (the child of X born after creation of the trust) had been born, so A's lifetime is available for defense, and A's child (X's grandchild), born late, will enter the class within a defensible time. To put the point in a shorthand way we can simply say that for the purposes of the Rule the effective date is the date when the power to revoke can no longer be exercised. The same proposition holds true if X has reserved a general power of appointment, if that power can be exercised *inter vivos*.

In this example we have used the common situation of the grantor having the power. The special treatment, of postponing the effective date, is not so confined. If the first life income beneficiary in a trust set

up by will has an *inter vivos* general power of appointment the effect is the same.

D. Gifts That Look Like Class Gifts but Are Not

The destructive effect of treating a class gift as a single gift to the group instead of as separate gifts to each member can be avoided by recognizing certain gifts that may, at first sight, appear to be class gifts, but are not. These are of two types.

Preliminarily, note that the typical true class gift is of a single corpus—the assets of a trust, a specified sum of money, a specific piece of property. The share of any class member has a shifting relationship to that single corpus, decreasing if new members join the class, increasing if some drop out (e.g., because of failure to meet a requirement to survive the life tenant).

For the first of the two types we look at a quite different scheme. Consider a gift of a specific amount or corpus to each member of a group, such as a gift from the corpus of trust of "$500 to each of my grandchildren living at the death of A." Here each $500 gift stands or falls on its own.

The second type is quite different. It involves a gift that starts out as a class gift, but becomes a group of separate gifts at some later juncture. Consider for example a scheme that gives a life estate to the surviving spouse, then remainder to children but only for life, with remainder ultimately to grandchildren. A serious Rule problem can be introduced if this is set up by *inter vivos* irrevocable trust because the Rule lets a challenger pose the birth of another child to the settlor, who in turn produces grandchildren who enter the class at an indefensible time. But the problem can be avoided: the gift to grandchildren may start out as a true class gift, but it may change with the passage of time. Suppose the instrument specifies that upon the death of the surviving spouse, the trustee is to divide the corpus into as many shares as there are then living children and then deceased children who have children then living. Then, separately as to each share, the instrument provides a life estate to the child and final distribution upon that child's death to his or her then living children. Because of this division of shares at the death of the surviving spouse, we treat each share thereafter as a separate gift. By this treatment, the fact that the challenger can pose the birth of another child to the settlor will establish invalidity only as to that share. And, as is the usual case, that degree of invalidity is of no consequence, for that afterborn child was only the product of the challenger's imagination and never in fact materialized.

VII. MODIFICATIONS OF THE RULE

The modifications of the Rule over the last forty years or so have been of three basic types. Each is treated separately in this section. Common to all of them, however, is that they are modifications of the Rule, not complete abandonment. Either they change only certain features of the Rule, or they leave the Rule intact and come into play only if the application of the Rule in its common law form would produce an invalidity. Most of these modifications have been made by legislatures, not by courts, although a few state courts have been influential.[43]

A. Holding the Challenger in Check

We have seen how, in its remorseless way, the Rule strikes down an interest even though the posed resolving sequence that proves fatal is out of the never-never land. Surely we can bring the Rule back to the real world, and much legislation has done so by providing that the far-out possibilities are not available to the challenger. Thus we say good-bye to those wonderful people—the fertile octogenarian and the unborn widow—and we acknowledge that women over fifty-five will not bear a child. This type of remedy will obviously cure the Rule of some of its more foolish applications.[44]

B. Extending the "Period in Gross"

As we have seen, the defender to a challenge under the Rule can use not only the life of a person alive at the effective date but also a twenty-one-year period after that life to reach the certainty posed in the challenger's sequence. Occasionally an interest has no life in it that will survive the disaster, and yet the interest will be defensible, as in an honorary trust that creates a power to use up a fund in feeding Fido over a period of twenty years. Here the defender successfully draws upon the twenty-one year "period in gross."[45]

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43. *See, e.g.,* Sears v. Coolidge, 329 Mass. 340, 108 N.E.2d 563 (1952).

44. Professor Waggoner discusses changes of this type, with references to illustrative statutes, in Waggoner, *supra* note 20, at 1726-45.

45. The availability of the period in gross can be seen as but a special case of the basic proposition that the successful defender uses a life plus 21 years. In most instances, of course, the life used is of a person who was allowed to live through the disaster. But even if no one is allowed to do so, as in testing the validity of the usual honorary trust, there are always people who lived up to the moment of the disaster; and if we view ourselves as still using the basic test in defense, we can use one of these lives and add the standard 21 years.

A few modifications of the Rule have been to lengthen this "in-gross" period.[46] Choose what you want here—fifty years? One hundred years? Note, however, two important features that are not changed.

The lengthening is available only in the "in-gross" setting, that is, it is not usable to add on to the life of a person who was allowed to live through the disaster. If a defense is to be available only by using the life of a person who lived through the disaster, certainty must be reached within twenty-one years after that life.

Also, even with a lengthened period in gross, if a successful defense cannot be shown by use of the life of a person who lived through the disaster, the defender must show that certainty is reached within that lengthened period.

The result of thus having two different numbers of years—the twenty-one years usable beyond a life and some other number such as fifty, available in gross—is that the defender has a choice of weapons. If it is possible to postpone reaching certainty for more than fifty years, the defender may nevertheless succeed by showing that certainty will be reached within a life plus twenty-one years. Or it may work the other way around, that is, if it is not possible to defend by using a life plus twenty-one years, the defender may succeed by showing that certainty will be reached within the fifty year period in gross.

C. "Wait and See"

By far the most widely adopted modifications of the Rule have embodied some form of the enigmatic, fuzzy idea of "wait and see."[47] At the root of the idea must be some thought that the passage of time will be helpful. This suggests that in some respects at least the nature of the Rule is to be changed. No longer will it be a test for validity but more a rule of conduct. Somehow, as events unfold after the effective date, some things that happen we will recognize as being good and some things we will know to be bad. If the good things happen we will give the property to the good people; if the bad things happen—well, we'll think about it; perhaps we can still give it to the good people—we'll worry about that in a moment.

But how will we recognize a good later-to-occur event when we see it? And even if we know what we are looking for, how long do we wait for it to happen?

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46. The California statute, allowing 60 years, is a good example. Cal. Civil Code § 715.6 (Deering 1971).

47. My English teacher and, I assume, William Safire would correct this to "wait to see."

1. The Common Sense of it All

The connotation of the phrase "wait and see" in ordinary usage is that it is a challenge, rather like saying, "you have said so, now prove it." Or, to suggest a more pertinent reaction, "you have posed that old Mrs. Jones will bear another child; now prove it." Since the best proof of the accuracy of a prediction is to wait it out, we wait until Mrs. Jones either does bear another child or dies without having done so.

This kind of waiting must have been what the reformers had in mind: a kind of proof that the more unlikely challenges, the ones that would prove invalidity under the Rule, were indeed unlikely because the passage of time has demonstrated that they did not happen. With that demonstration we conclude that the interest was not bad after all, and the good people get the property.

To put this homely description into precise, analytically sound, practically useful language is not particularly difficult, but to do so one must fully understand in analytic terms just what the passage of time after the effective date has accomplished.

To do so, think again about the nature of the Rule's test. The Rule in its common law form calls for posing various particular sequences of events possible to occur after the effective date that will resolve the uncertainty. Since the Rule produces invalidity if only one of these cannot be defended, a challenger looks for the one that poses the longest deferment of reaching certainty, one for which no person in that particular sequence, de-populated by the disaster, can be found within whose lifetime or within twenty-one years thereafter that certainty will be reached. Because of the particularity of this process, looking separately at each sequence put up in challenge, and defending it if possible by using only its particular facts, we must be equally particular if we start looking to see what in fact happens after the effective date, if those events are to have some significance in determining validity.

We will start with a disposition for which the challenger has posed one sequence that reaches certainty beyond a time that can be defended and is thus invalid under the Rule. Almost every disposition, however, also contains possible sequences that pass the test. If we are to change the Rule, can we make use of these passing sequences?

Surely we can. We will wait for the passage of time to tell us whether we are following a sequence that passes the test or one that fails. At first, immediately after the effective date, we are in a state of

ambiguity, when both passing and failing sequences are possible.[48] But as time goes on the particular sequence we are in fact following begins to reveal itself, eliminating those events that could have happened but did not. There will come a time at which we will know that, of the facts yet possible to occur as we travel toward the resolution of the uncertainty, all possible routes yet open can be defended, or, conversely, none can be defended. At that point we stop waiting.

To see this in operation let us refer to our original illustration involving a contingent remainder and to pose some possible sequences for the resolution of its uncertainty. You will recall the remainder in that illustrative case: "if at A's death he leaves a child or children surviving him none of whom is yet twenty-five, to the first child thereafter to reach that age." We there assumed that at the effective date A is alive with a one-year-old child also then alive. Let us see how long we should wait.

(1) If A dies, not having had further children, while the #1 child is still under twenty-five, we should stop waiting. We then will know that whether the #1 child reaches twenty-five or dies under that age, we can defend by using the life of that child.

(2) If A has another child (#2) born, then dies, the #1 child still under twenty-five, we can stop waiting only when the #1 child reaches twenty-five or dies under that age. If #1 child does reach twenty-five, we stop, for now the #1 child gets the property. If #1 dies under twenty-five, we also stop, for now the possibilities that lie ahead for #2 child are all negative. We know that if #2 child should reach twenty-five, that sequence is indefensible since the disaster tells us that #1 died in the disaster and that A died as soon as #2 was born. We also know that #2's dying before reaching twenty-five is negative; if #2 had by then reached twenty-one, to reach certainty by his death thereafter is indefensible; if #2 had not reached twenty-one, we could use A's life to defend reaching the time of #2's death, but the certainty reached was the certainty of the child's not getting the property.

Having arrived at this significant point where we can stop waiting, what do we do now? The answer depends on where we are.

If we are surely on a passing sequence, we rejoice and call the interest good—the good people get the property. The Rule, as we have

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48. It is possible but highly unlikely ever to be encountered in practice that a disposition will contain no passing sequences at all. Consider for example an eventual distribution "to those of my issue who are born after the effective date of this instrument and who are alive and over the age of twenty-five 100 years after the effective date." With this disposition there is no point in waiting, for the passage of time cannot provide a cure.

modified it, turns out not to have been violated after all.[49] If we are surely on a failing sequence, we could be utterly unyielding, saying that we have invalidity.

And, as we have developed the Rule, that is the indicated result. But, as with many undesirable results, we can try to find a way to alleviate the harm, and immediately the prospect for reformation of the instrument becomes very appealing. Many statutes do indeed call for reformation of the donor's scheme,[50] to bring its disposition within the limits of validity and, although changed from the original, still to be within the donor's general intent.

While we are in a section dealing with common sense, we should ask why we have waited at all. We really didn't need the passage of time to do this sorting for us. We could have done it ourselves at the effective date, by providing simply that insofar as the interest purports to dispose of property under sequences that can be defended it is good; to the extent that it would do so under indefensible sequences it is bad. And, if desired, we could then and there have sought any appropriate reformation. Of course, if invalidity is confined to circumstances in which old Mrs. Jones is to bear another child we would not bother to seek reformation.

2. Pity Pennsylvania, Its Statute Was So Full of Promise . . .

The initial spark for waiting came in a 1947 Pennsylvania statute.[51] Cryptically brief, hopelessly inadequate, it provided simply that the "period" of the Rule was to be "measured by actual rather than possible events" and that at the end of that period any interest "not then vested . . . shall be void."

By its substitution of "actual events" for "possible events" the statute had the virtue of promise. It suggested something of the idea expressed in the previous subsection—that if we wait to see what happens after the effective date we will in many cases prove that the challenger's fatal sequence did not in fact occur, and, indeed, prove that no failing sequence is yet possible, and by statutory prescription establish validity.

Note that in this approach to the Rule, the common law form of the Rule still tells how long to wait, and the common law Rule still imposes the same time limit within which the resolution of uncertainty

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49. Isn't that an odd statement? How can we have a rule that in its initial application says "violation" and yet later says "no violation"? The only way to rationalize is to conclude that the rule is at least partially a rule of conduct, for the happening of events is what produces results.

50. *See* Waggoner, *supra* note 20, at 1755–59.

51. 20 PA. CONS. STAT. ANN. § 6104(b) (Purdon 1975).

must occur. All that differs from the common law is that only those sequences that, if they should occur, would be indefensible are held invalid; different from the common law Rule, their invalidity under a waiting version of the Rule does not also cause the invalidity of sequences that pass.

But that simple, logical thought was not perceived. Instead, the analytic thought of the day (and still the dominant thought) told the experts, as suggested by the Pennsylvania statute, that some "period" had to be waited out, and they bogged down trying to define its length. They did think they knew what they were waiting for—they would wait for certainty. The certainty they wanted is the final resolution of whatever it was that drew the attention of the Rule, such as the contingency of a contingent remainder.[52] If this certainty occurred within this "period," however the period should be defined, the interest would be valid.[53]

Thus they turned their efforts to trying to define the period for waiting. The fact is, as we know, there is no "period" of the Rule except in the most abstract form. The result has been a variety of specifications—all of them illogical, not meshing with the mechanism of the Rule, and usable only because they (some of them) are at least fairly specific and, generally speaking, do not require waiting more than a generation or two. Some say to wait only until the end of the first life estate; some say to wait twenty-one years after the last to die of all those people alive at the effective date who take any interest under the instrument that created the vulnerable interest in question.

3. Professor Dukeminier's Specification for Waiting: Does it Mesh with the Rule?

Of these attempts, that of Professor Dukeminier comes closest to a precise meshing with the Rule. Indeed, although he is not clear, he may have succeeded. In classic fashion he starts by making a list of people, those whose lives are "causally connected" to the resolution of the uncertainty. He identifies these people by inspecting every sequence possible under the disposition that resolves the uncertainty within a defensible time and noting each person who by living after the effective date could have some effect in resolving the uncertainty.

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52. This certainty is a little different from, and may occur later than, knowing at a particular time after the effective date that from that point onward all resolving sequences yet possible are ones that will pass the test or, conversely, that all yet possible will fail.

53. Of course, the certainty can be the certainty of failure, as would occur if it became certain, for example, that the contingency of a contingent remainder was now certain never to happen, as where B's contingent remainder requires B to outlive A, and B dies in A's lifetime.

Which people in fact turn out to have been part of the causal chain will of course depend on which resolving sequence actually occurs. Then, he says, "[i]f the contingent interest vests during the lives on the list or within twenty-one years after the last person has been struck from the list, the interest is valid."[54]

One of his first illustrations is essentially the same as the one we have been using: to the first child of *A* who reaches twenty-five.[55] Professor Dukeminier puts *A* and all of his children living at the effective date on his list. But he does not follow up on his illustration. What would he do with the following?

Suppose at the effective date *A* is alive with a one-year-old child, *B*; that child dies immediately thereafter; then *A* has another child, *C*; and *C* lives to twenty-five, *A* being still alive. Both *A* and *B* would be on Professor Dukeminier's list. Would the fact that *A* was still alive when *C* reached twenty-five make the gift to *C* effective? It should not. Beyond getting *C* born, *A* had nothing to do with *C*'s reaching twenty-five. Only by describing what did *not* happen can we get *A* anywhere near to being in a position of influence—and a negative one at that— such as to say that *C* did *not* die under twenty-five and *A* did *not* have another child born who lived to be twenty-five.

It is not clear that Professor Dukeminier would agree that *C*'s interest is ineffective. He does, however, consider that a person, though useful for a while, can become extraneous. Note his phrase in the sentence quoted above: "has been struck from the list"; he does not say "dies." And later in his explanation he says, "[a] person is removed from the list . . . when the person ceases to be able to affect vesting."[56] So, perhaps he would strike *A* from his list the moment *C* is born.

If Professor Dukeminier is thus rigorous both in determining who gets on his list and in striking people off the moment they have served their usefulness, he will have indeed meshed with the mechanics of the Rule. His backward approach is cumbersome, to be sure, but the net result is that validity will result if the particular sequence as it in fact unfolds is one that passes the test; invalidity will result if it is a failing sequence.[57]

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54. Dukeminier, *Perpetuities: The Measuring Lives,* 85 COLUM. L. REV. 1648, 1662 (1985).

55. *Id.* at 1663.

56. *Id.* at 1673.

57. A recent case purporting to use Professor Dukeminier's approach is Fleet National Bank v. Colt, 529 A.2d 122 (R.I. 1987).

The disposition contained a clear violation of the Rule because of the long postponement in knowing the ultimate taker of a share of the principal of property held in trust. Actually, the scheme had two uncertainties of concern to the Rule. The first, a division of the trust corpus into shares at Roswell's death, one for each of his then living children. This division was valid,

In one respect, however, Professor Dukeminier's backward approach, to list first all the lives that would collectively be adequate to defend all sequences that pass the test, leads him into error, for he needlessly invokes the idea that the number of people on his list cannot be unreasonably large. The way to avoid this difficulty, of course, is not to make the list at all, for it is wholly unnecessary. Consider his analysis of one of his illustrative cases:

G deeds property to *A* and his heirs but if the property is used for nonresidential purposes, to *X* and his heirs.[58]

Different from the usual family-type disposition, in which the uncertainty is a postponed identification of takers or an age attainment requirement, this example is uncertain only in whether the use of the

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obviously, since Roswell was alive at the effective date. The real trouble was in specifying the ultimate disposition of one of those shares, the one for Caldwell, a son of Roswell who was born after the effective date. From this share Caldwell was to receive income for life; then, upon his death, the principal was to be distributed among Caldwell's children. Since the identity of three children would be established only by reference to Caldwell, there was no life useful for defense, and this remainder was thus invalid under the Rule.

By good fortune, Elizabeth, a sister of Caldwell, had been born before the effective date, and she was still alive when Caldwell died, some 50 years after the division into shares at Roswell's death. The court believed that Elizabeth was "causally connected" to the identification of Caldwell's children as takers of the principal of the Caldwell share and, applying Dukeminier-type "wait and see," upheld the gift to the children.

At most, Elizabeth was related to the resolution of only the first uncertainty—the division of shares at Roswell's death. Even here, Roswell's life, not Elizabeth's, is the defensive life. The fact that a class member, such as Elizabeth, happened to be alive at the effective date, is not significant. If, however, we see Elizabeth as significant at Roswell's death, nevertheless she serves no useful function thereafter, and her continued life thereafter should be unusable.

Professor Dukeminier should disapprove of the court's disposition of this case. With respect to the uncertainty in identifying Caldwell's children, Elizabeth is totally useless and should not get on Professor Dukeminier's list; even if he should let her on, he surely would strike her from it the moment Roswell dies.

58. On another point Professor Waggoner is rightly critical of Professor Dukeminier's analysis of this case, challenging his insistence that *X* is "causally connected," for whether *X*, a grantee of the executory interest, lives or dies has no bearing on whether or when the change in use will occur. Waggoner, *Perpetuities: A Perspective on Wait-and-See,* 85 COLUM. L. REV. 1714, 1720 (1985).

Professor Waggoner's criticism is part of an extended debate with Professor Dukeminier over the mechanics of "wait and see." Their interchange, consisting of a long article by Professor Dukeminier followed by answer, reply, rebuttal. and surrebuttal, covers a hundred pages of the *Columbia Law Review.* Dukeminier, *Perpetuities: The Measuring Lives,* 85 COLUM. L. REV. 1713 (1985); Waggoner, *Perpetuities: A Perspective on Wait-and-See,* 85 COLUM. L. REV. 1714 (1985); Dukeminier, *A Response by Professor Dukeminier,* 85 COLUM. L. REV. 1730 (1985); Waggoner, *A Rejoinder by Professor Waggoner,* 85 COLUM. L. REV. 1739 (1985); Dukeminier, *A Final Comment by Professor Dukeminier,* 85 COLUM. L. REV. 1742 (1985).

In major part the length of the debate results from Professor Dukeminier's lack of clarity; this in turn is a result of the cumbersome, obfuscating, backward approach of trying to start by searching for lives. The mechanics are crystal clear if the search for a life is the last step, when the evolving facts have presented a particular resolving sequence to be tested.

property will change. Its only causal connection to people is that if a change is made it will be made by the person who owns the fee at the time (if, indeed, it is a person; it could be a corporation). It is of no concern to the Rule that we do not know the identity of the person who makes the change.

Under the Rule in its common law form, the challenger can easily establish invalidity by posing B's later birth, B's later receiving A's interest by some means such as an *inter vivos* conveyance, and then, twenty-five years later, B's changing the use. The only life that has any potential for use in defense, that of A, turns out to be useless because the challenger has B delay the change in use until more than twenty-one years after A's conveyance to B. (That is, A's lifetime is necessary only long enough to get B into ownership.)

To put the case into the context of "wait and see" we must acknowledge, of course, that there are sequences such as the one posed by the challenger that will not pass the test, but our real inquiry is whether there are any sequences that will pass the test and, if so, then wait to see whether what in fact happens turns out to be one of these passing sequences.

There are three groups of such sequences. One is a group that runs its course within the twenty-one-year period in gross. A second group consists of sequences in which the change in use is made by any person who is alive at the effective date and who, as in the case of A, is the original grantee or who subsequently becomes a successor in interest to A. A third group consists of sequences in which the change in use is made by any person so long as made within twenty-one years of the death of a person in the second group or within twenty-one years of an *inter vivos* conveyance of the interest by such a person, whichever occurs sooner.

But Professor Dukeminier is not willing to list any grantee from A and would thus restrict the scope of potential validity. He does so because there are too many to list, since the potential grantees from A are virtually limitless.

We can agree that there are too many to list, but there is no need to make such a list. All we need to do is to watch the unfolding events. If the change in use occurs within twenty-one years of the effective date we don't care who did it. If it occurs later, all we need to do is to determine whether the person who changed the use fits within the second group; and if not, we then ask whether what happened fits within the third group. If the sequence is thus justified, X's interest is valid; if the sequence falls in none of these groups it is invalid.

4.   *The* Restatement (Second), *Perpetuating Error, Uses Extraneous People as "Measuring Lives"*

The *Restatement (Second)* keeps the common law Rule intact, invoking its version of waiting only if the Rule in its common law form would produce invalidity.

Before explaining the *Restatement (Second)* version of waiting we must pause to note the manner in which it states the common law Rule, for in drafting the waiting portion the re-staters make use of the language by which they state the common law Rule. In that language, blinded by misconception, they recite the errors of the past. They describe the test of the Rule in terms of "measuring lives," and they prescribe a "period" of the Rule, dimensioning it by "measuring lives."

As we explained earlier, the term "measuring lives" has no useful meaning. At most it is an after-the-fact listing of the lives that have been found useful in defending. It serves no useful purpose, and it leads to the pernicious idea that it somehow defines a "period" of the Rule. To repeat, in studied iteration, there is no such period.

Yet, the restaters purport to make use of these terms in defining the Rule. First, in *Restatement (Second)* Section 1.3 they say that if the interest is valid under the common law Rule, the lives within which or within twenty-one years after which the interest "will necessarily vest" are the "measuring lives." As we know from earlier discussion, this group of people, we must assume, has been derived from an after-the-fact scrutiny of the process that determined validity. To make up such a list one must use the Rule backward determining validity rather than invalidity, by the cumbersome process of listing all the passing sequences that can be thought of, rather than to determine invalidity (or absence of invalidity). Under the proper use of the Rule one concludes that an interest is valid by the failure to pose a sequence that fails the test. This difference is not tautological, for the proper method does not require a largely useless list of all the sequences that pass; it requires only a failure of the challenger to come up with one that fails. Then, in the grand tradition, the restaters see something useful in defining the "period" of the Rule, much as the Pennsylvania statute speaks of the "period," and they specify that its length is to be "twenty-one years after lives in being (the measuring lives)."[59]

Why they should bother, in speaking of the common law Rule, to speak of a "period" to be dimensioned by a useless list of "measuring

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59. RESTATEMENT (SECOND), *supra* note 4, § 1.4 comment e.

lives," whose identity will be known only after validity has already been established, is beyond understanding. It certainly has no utility even in the most muddled formulation of the Rule in the common law form.

On the other hand, for the restaters to speak of a "period" at least suggests their intention to use some "period" in prescribing how long to wait if the Rule in its common law form would produce invalidity.

As noted, the restaters propose to wait only if the Rule in its common law form would produce invalidity. Having so far conceived of "measuring lives" as existing only if the interest passes the test of the common law Rule, they now believe they must come up with another list to which they can attach the same label if they are to deal with interests that are invalid under the Rule. They do so in order to tell us how long to wait. They are quite uninhibited, using a long list of people including, among others, the donor, the beneficial takers of any interest in the affected property, their parents and grandparents, and just anybody the donor may specify if the donor doesn't specify too many. They then label these people as additional "measuring lives." This label then ties in with their definition of the "period" of the Rule, so that, for the purpose of waiting, the "period" becomes the lives of these people (that of the last survivor?) plus twenty-one years. Thus their term "measuring lives" refers to something different, depending on where they use the term. In their recited version of the common law Rule it refers to the useless after-the-fact list described above; in their specification of how long to wait it refers to the list of additional people here described; in their definition of the "period" it refers to the composite of the other two. How awkward!

But we must note here that these people have no necessary connection with or part in the mechanism of the common law Rule's test, for they need not be people who would survive the "disaster" in any sequence that would lead to resolving the uncertainty to be tested. Since they are not so related, what sense was there in using people, especially if their number is so large? It would have been a lot simpler and probably just as well-suited to pick a certain number of years such as sixty or ninety.[60]

The final touch is to say what is to happen in this now defined period. It is fairly easy: the interest that would fail the Rule is given a chance, a long-lived chance, to become good. It will become good if the unfolding facts resolve the uncertainty within that time. It may

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60. *Compare* UNIFORM ACT, *supra* note 5. Note, however, that there may be some merit, but not much, in using lives, not years.

resolve favorably to those who take under the affected interest, or it may resolve unfavorably to them. Reformation of the dispositive scheme is called for if the uncertainty does not resolve within the allowable period.

Notice how closely this approach approximates that used in a typical savings clause, where Plan B's principal purpose is merely to furnish a very long time for resolution of the uncertainties in Plan A.

5. *The Uniform Act Takes the* Restatement (Second) *One Step Further*

The Uniform provision, promulgated in 1986 by the National Conference of Commissioners on Uniform State Laws,[61] basically accepts the approach of the *Restatement (Second)*, but it does not adopt its language, its drafting technique, or its specification of how long to wait. And on the whole it is much better.

It first adopts the Rule in its common law form as a test for invalidity, then specifies a waiting test as an alternative should the interest fail the test of the Rule. It assumes that its users can work with the Rule in its common law form, speaking of "twenty-one years after the death of an individual then alive. . ." without elaboration and without mentioning either a "period" of the Rule or "measuring lives." Three cheers![62]

Then, by the practical device of using a flat term of ninety years, it avoids all the cumbersome and useless detail of the *Restatement (Second)*. It recognizes all of those extraneous lives listed by the restaters for what they are, that is, they are but a means for marking time, having little or no relation to the defensive use of a life as it is used to test for validity in the application of the common law Rule. Since the last survivor of a large group of young people is likely to die about seventy years later, just add twenty-one and come up with ninety years. This is a nice round number. Let's wait that long, if necessary, but no longer.

Like the *Restatement (Second)*, the Uniform Act waits, if necessary, to the end of its specified period for the uncertainty in the affected interest to resolve. If it does not do so within that time, reformation is available.

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61. UNIFORM ACT, *supra* note 5.

62. We would have added a gold star if sequence-sorting had been articulated.

6. *A Comment on Both the* Restatement (Second) *and the Uniform Act*

In their dealing with interests that fail the test of the Rule in its common law form, both the *Restatement (Second)* and the Uniform Act carry the day by confession and avoidance. That is, they are at least unwilling, if not unable, to use the mechanism of the Rule to say how long to wait and so go to a different, almost wholly unrelated measure.

We know that the time to wait is not to be measured by lives at all, but is to be determined by watching the facts as they unfold, to catch the point in time when it can be told that the particular sequence then revealing itself, when considering what may yet happen, is one that is then sure to resolve within a time that is defensible or is sure not to resolve within a time that is defensible. ·

Not perceiving this to be the function of the passage of time, or at least not being willing to take advantage of the perception, both the re-staters and the Uniform Act drafters ducked the problem. It's hard to blame them for doing so, given the utter confusion of the prevailing misconception about "measuring lives" and the efforts, destined for failure, to apply that misconception to an interest that fails the test of the common law Rule. If their choice, then, was whether to try to define something that has no meaningful existence or to devise a period whose chief virtue is that it will last a long time, it is clear that they made the right choice—look for something that will take a long time.

In dimensioning that long period, however, the two take different approaches. The *Restatement (Second)* uses a list of lives; the Uniform Act uses a fixed period of ninety years. As between the two, the *Restatement (Second)* can at least claim a somewhat closer relation-ship to the affected disposition. That is, most of the people on the *Restatement* list have at least something to do with that disposition, so that the ultimate length of the time actually waited has some likeli-hood, give or take twenty or thirty years, of marking the time that the common law Rule would have allowed under a properly drawn ver-sion of the donor's scheme.

The Uniform Act, on the other hand, is based on a statistically determined life expectancy, then adds twenty-one years, without try-ing to relate the length of the time to the terms of the affected interest. Thus it is possible under the Uniform Act to provide a scheme that will contain uncertainties that will not resolve for two or even three

generations, so long as within ninety years. Should we permit the dead hand to reach this far?[63]

We have already noted that the typical savings clause performs in much the same way as does the *Restatement (Second)*. That is, it merely provides a very long time, measured by lives, for the principal scheme (Plan A) to reach certainty, finally providing substituted takers if the savings plan (Plan B) comes into operation to effect distribution before Plan A does so. The difference, of course, is that the lives used in the savings clause are in fact usable for defense under a challenge made under the Rule in its common law form. But their use is usually not very sensible in providing a mechanism for determining the takers, because their lives are not part of the basic Plan A dispositive scheme. In other words, their lives are being misused, just as the *Restatement (Second)*'s lives are being misused. Their lives are merely a substitute for a very long time.

How would the *Restatement (Second)* and the Uniform Act affect a scheme with such a savings clause? Answer: not at all. The scheme is not invalid under the common law Rule, and the wait period of both the *Restatement (Second)* and the Uniform Act comes into play only if there is a violation of the common law Rule. This means that the beneficiaries will be stuck with the ill-suited scheme of distribution called for by Plan B, the savings clause, rather than receive the benefits of the reformation called for by both the *Restatement (Second)* and the Uniform Act. This is not a particularly desirable result, for reformation would include much wider ranging possibilities for disposition because they will be directed at the source of the difficulty.[64]

Should lawyers abandon their use of savings clauses, at least those of this type?[65]

VIII. CONCLUSION

The principal purpose of this article has been to state the Rule clearly and simply. The clue to that clarity is to see that the Rule focuses on a particular chain of events—"sequence" is the term used in the article—that resolves the uncertainty contained in the interest to

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63. Professor Dukeminier is highly critical, asserting that the Uniform Act will greatly relax the limits on dictation from the grave. Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023, 1077–81 (1987).

64. Even with reformation, the *Restatement (Second)* and the Uniform Act postpone the availability of reformation for a very long time. Evidence will be sketchy and unreliable; affected people will not be able to plan, and the opportunity to effect a substantial shortening of the time for certainty will have passed.

65. *See supra* section VI(B).

be tested. In its common law form the Rule calls for a challenge, to see whether there can be posed a particular sequence that cannot be defended. The mechanism for that defense is the life, or portion of the life, of a person alive at the effective date whose continued life, or portion of life, is necessary to make this particular sequence run its course.

The most severe fault of the Rule is its overkill in producing invalidity of the entire interest if only one possible sequence is indefensible. The problem is not that the Rule has been too strict.

Yet neither the *Restatement (Second)* nor the Uniform Act deals with the problem in these terms. Rather, their approach is merely to give the dispositive scheme a long time to work itself out. Indeed, under both the *Restatement (Second)* and the Uniform Act, donors would be permitted to dispose of property far beyond what the Rule in its common law form allows. Is there any justification for this extension? Neither the restaters nor the Uniform Act drafters offer this as a justification. Should we let them resort to their mechanism when it is so ill-suited to deal with the real problem?

Even if the lawyers, by their savings clauses, are able to stay within the mechanism of the Rule to accomplish the same purpose, aren't they violating the spirit of the Rule? There is no reason for them to be able to use such a long time when they use it not for the disposition in their Plan B but to give time for their Plan A, with its violation of the Rule (if standing alone), to take effect. The adage that two (actually three) wrongs do not make a right surely applies.

And this is so sad, for the cure is simplicity itself. Go back to basics. See the Rule as directed to particularized resolving sequences, let it operate to invalidate only those that are indefensible. Wait if we must for the passage of time to sort them out. But, of course, there is no need to wait; we can sort them ourselves. We need provide only that the interest is nevertheless good insofar as it disposes of the property under circumstances that can be defended; and that if the interest is to any extent invalid, those adversely affected, including a trustee, may obtain or effect reformation of the instrument.[66]

Under such a cure, most dispositions will effect distribution under the instrument as drawn, and if there should be need for reformation it can be obtained at any time.

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66. This proposal is the message of Fletcher, *A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting,* 20 STAN. L. REV. 459 (1968). Readers of that article will recognize that in at least skeletal form it established the basic analysis used in this article, describing both the mechanics of the common law rule and the only logical mechanism for "wait and see."