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PERPETUITIES: THE WAIT-AND-SEE
DISASTER—A BRIEF REPLY TO
PROFESSOR MAUDSLEY, WITH A
FEW ASIDES TO PROFESSORS
LEACH, SIMES, WADE,
DR. MORRIS, ET AL.*

Samuel M. Fetters†

*This Article is dedicated to the memory of
Lewis M. Simes (1889-1974).*

The perpetuities reform movement has been in progress for over twenty years now. Wait-and-see, in its variety of forms, has generated more debate than most other proposals intended as cures for the ills (both real and imagined) of the common-law Rule Against Perpetuities. An important by-product of the debate has been an attempt to identify fundamental policy reasons for the Rule. It is not inappropriate, therefore, to review the assumptions, speculations, rationalizations, and conclusions which have been advanced in the progress of the debate before proceeding to the merits of Professor Maudsley's specific proposal.

But even before that, I think it only fair to warn the reader, as Maudsley has done, that my orientation is against wait-and-see in any of its forms so that those who entertain no doubts as to the wisdom of the wait-and-see solution might be spared reading beyond these few words of introduction. My task, it seems, is even more difficult than that of Professor Maudsley. I find myself in agreement with much of his formulation; yet, Maudsley's rationalization of the English statutory variation of wait-and-see appears to accept and to build upon an erroneous perception of the policy behind the Rule. Hence, this reply.

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I

POLICY CONSIDERATIONS I

The two opposing wait-and-see protagonists, the late Professor W. Barton Leach—for, and the late Professor Lewis M. Simes—against, seemed to agree that the Rule Against Perpetuities no longer serves its principal historical purpose (as they saw it) of securing alienability of land for the purpose of productivity—and, as a corollary, it is not required to prevent affected land from stagnation caused by the fetters of dead-hand control. As to the unimportance of the Rule in reference to the alienability of specific parcels of land affected with future interests, whether vested or contingent, Simes' observations and conclusions were not challenged either by Leach and his wait-and-see followers or by members of the opposition camp. Surprisingly, however, both advocates and opponents generally agreed with Simes' view as to the primary purpose for the Rule Against Perpetuities. In the second edition of his comprehensive treatise on the law of future interests,¹ Simes distilled into two short paragraphs his conclusions as to the "compelling reasons for [retention of] the rule against perpetuities." "First," he stated, "it strikes a fair balance between the satisfaction of the wishes of members of the present generation to tie up their property and those of future generations to do the same. The desire of property owners to convey or devise what they have by the use of trusts and future interests is widespread, and the law gives some scope to that almost universal want. But if it were permitted without limit, then members of future generations would receive this property already tied up with future interests and trusts, and could not give effect to their desires for the disposition of the property. Thus," concluded Simes, "the law strikes a balance between [the] desires of the present generation and . . . future generations."²

¹ L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* (2d ed. 1956) [hereinafter cited as SIMES & SMITH].

² *Id.* § 1117, at 13. Professor Simes' previous statement along this line of thought, although quite similar to his statement quoted above, does not emphasize the continued tying up of property by succeeding generations: "First, the Rule against Perpetuities strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property they enjoy." L. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 58 (1955).

Both statements suggest that the Rule Against Perpetuities restricts dead-hand control by freeing the property from the future interests of their creator. If the Rule required vesting in possession rather than vesting in interest within the perpetuities period, both of Simes' statements would be accurate. As it is, both statements in regard to striking a fair

Professor Leach's most recent statement of the rationale for the Rule appeared in *The Rule Against Perpetuities*.³ I think it significant that Leach joined with one of the leading British perpetuities scholars in stating his conclusions as to the present justification for the continued existence of the Rule. It is even more significant that the distillation process employed by Morris and Leach to identify the present rationale for the Rule was to review reasons advanced by other writers, and then to dismiss those reasons out of hand. They made particular note⁴ of Simes' careful analysis in *Public Policy and the Dead Hand*,⁵ and then minimized or disparaged all but his final conclusion quoted above.⁶ "Another reason for the Rule suggested by Professor Simes," Morris and Leach stated, "seems to the present authors far more realistic."⁷ After quoting Simes, the authors concluded: "It is a natural human desire to provide for one's family in the foreseeable future. The difficulty is that if one generation is allowed to create unlimited future interests in property, succeeding generations will receive the property in a restricted state and thus be unable to indulge the same desire. The dilemma is thus precisely what it has been throughout the history of English law, namely, how to prevent the power of alienation from being used to its own destruction. In this

balance between present and future generations should be preceded by the words, "tends to."

Simes offered a second reason: "[O]ther things being equal, society is better off, if property is controlled by its living members than if controlled by the dead. Thus, one policy back of the rule against perpetuities is to prevent too much dead hand control . . ." SIMES & SMITH § 1117, at 13. No one should argue with this; yet, a rule addressed to remote vesting only tends to pass the control of wealth to the living. Until it vests in possession it is, for all practical purposes, still controlled by the dead.

³ J. MORRIS & W. LEACH, *THE RULE AGAINST PERPETUITIES* 13-18 (2d ed. 1962) [hereinafter cited as MORRIS & LEACH].

⁴ *Id.*

⁵ L. SIMES, *PUBLIC POLICY AND THE DEAD HAND* (1955).

⁶ See text accompanying note 2 *supra*.

Leach used this same technique two years earlier in his classic article, *Perpetuities Legislation: Hail Pennsylvania!*, 108 U. PA. L. REV. 1124 (1960). His cavalier, summary dismissal of the American Law Institute's attempted identification of the Rule's contemporary social utility was, in whole, as follows:

The *Restatement* concedes that "the basis or justification of this assumption [that social welfare requires the imposition of restrictions upon the fettering of property] has never been adequately explored and has been seldom discussed." And then, of course, the Reporter [Professor Richard R. Powell, who just happens to oppose wait-and-see (see Powell, *The Rule Against Perpetuities and Spendthrift Trusts in New York*, 71 COLUM. L. REV. 688, 693-94 (1971))] and his advisors (all lawyers, no economists or sociologists) [and two more of Leach's most outspoken wait-and-see adversaries] go right forward with a "rationale" of the whole law of perpetuities upon social and economic bases. Adequate exploration is still for the future.

Id. at 1135 (footnote omitted).

⁷ MORRIS & LEACH 17.

idea of compromise between two competing policies—freedom of disposition by one generation and freedom of disposition by succeeding generations—the Rule against Perpetuities seems to the present authors to find its best justification.”⁸

I apologize to those readers who have patiently stayed with me in rereading statements of others for asking them to read yet another quotation. This one, however, I probably should have reproduced first: “I must begin with apologies for venturing to talk in an area where so much has already been written by such notable scholars.”⁹ Professor Philip Mechem need not have professed such modesty. On the other hand, I feel quite comfortable in adopting his false modesty as the true state of affairs in reference to myself. I was an observer rather than a participant in the reform-movement debate. From that neutral vantage point it appears to me that if there is no more justification for the Rule than that which has been advanced by both “reformists” and “traditionalists,” the Rule should be abolished. As with other property rules, doctrines, and procedures which no longer bear any relevance to contemporary society—*e.g.*, the Rule in Shelley’s Case,¹⁰ the Doctrine of Worthier Title,¹¹ the rule of Destructibility of Contingent Remainders,¹² the rule of *Purefoy v. Rogers*,¹³ the common recovery as recognized in *Taltarum’s Case*,¹⁴ and all the

⁸ *Id.*

⁹ Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation*, 107 U. PA. L. REV. 965 (1959) (footnote omitted).

¹⁰ 1 Co. Rep. 93b, 76 Eng. Rep. 206 (K.B. 1581). For an extensive discussion of the Rule, see 1 AMERICAN LAW OF PROPERTY §§ 4.40-.52 (A. Casner ed. 1952); 3 R. POWELL, THE LAW OF REAL PROPERTY ¶¶ 378-80 (1952); SIMES & SMITH §§ 1541-72.

The Rule in Shelley’s Case is still in force in only five states: Arkansas, Colorado, Delaware, Indiana, and North Carolina.

¹¹ The leading American case on the Doctrine of Worthier Title is *Doctor v. Hughes*, 225 N.Y. 305, 122 N.E. 221 (1919). Although it probably still is in force in a majority of jurisdictions (see 3 RESTATEMENT OF PROPERTY § 314 (1940)), hostility to the doctrine is manifest and its continued survival appears dubious. See, *e.g.*, *Hatch v. Riggs Nat’l Bank*, 361 F.2d 559 (D.C. Cir. 1966).

¹² The doctrine survives intact only in the state of Florida. See *Blocker v. Blocker*, 103 Fla. 285, 137 So. 249 (1931); Fetters, *Destructibility of Contingent Remainders*, 21 ARK. L. REV. 145 (1967).

¹³ 2 Wms. Saund. 380, 85 Eng. Rep. 1181 (K.B. 1670). The Rule of *Purefoy v. Rogers* was stated by Chief Justice Hale as follows: “[F]or where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise . . .” 2 Wms. Saund. at 388, 85 Eng. Rep. at 1192. The effect of this rule was to perpetuate the Destructibility Rule, even after gaps and lapses in seisin were allowed to take effect as executory interests under the Statute of Uses and the Statute of Wills.

¹⁴ Y.B. Pasch. 12 Edw. 4, f. 19b (1472). The common recovery was a fictitious lawsuit, the end result of which was to allow a tenant in fee tail to make himself an owner in fee simple. Not only was the entailed estate defeated, but also destroyed were any future interests limited thereon.

rest of our common-law heritage invented by the courts to promote alienability of land and to limit the pocketing of wealth and power—so too should we abandon the obsolete Rule Against Perpetuities. More than a decade ago, in the heyday of the wait-and-see debate, Professor Mechem mused—“Why not simply abandon”¹⁵ the Rule? Having posed the truly critical question, his answer was, appropriate to his wisdom, “I don’t know, frankly, whether I make that proposal seriously or not.”¹⁶

Professor Jesse Dukeminier, who drafted the “causal relationship to vesting” wait-and-see statute for Kentucky and was the moving force in its eventual enactment, reported that the only substantive objection to the Act voiced on the floor of the Kentucky Senate was that wait-and-see would prove inconvenient.¹⁷ Dukeminier reported that one senator’s “understandable complaint” was that “this is the most complex subject ever brought up in the legislature, and I’m not going to vote for something I don’t understand.”¹⁸ It would be interesting to imagine the colloquy that might have ensued had the senator asked the next logical question which, if adequately answered, might have permitted him to vote for the Act even if he remained somewhat confused as to its details:

SENATOR: Professor Dukeminier, what is the purpose of the Rule, and to what extent does your proposed Act better serve that purpose?

DUKEMINIER: The consensus among those who are recognized today as the leading perpetuities scholars is that the rule “strikes a fair balance between the satisfaction of the wishes of members of the present generation to tie up their property and those of future generations to do the same;”¹⁹ or, put another way, “if one generation is allowed to create unlimited future interests in property, succeeding generations will receive the property in a restricted state and thus be unable to indulge the same desire.”²⁰

SENATOR: I take it that when you refer to tying up property and the creation of future interests, Professor, you mean

¹⁵ Mechem, *supra* note 9, at 968.

¹⁶ *Id.*

¹⁷ Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 KY. L. REV. 3, 57 (1960); J. DUKEMINIER, PERPETUITIES LAW IN ACTION: KENTUCKY CASE LAW AND THE 1960 REFORM ACT 73 (1962) (book reprints article in revised form).

¹⁸ *Id.*

¹⁹ See note 2 *supra*.

²⁰ See MORRIS & LEACH 17.

in reference to private family trusts rather than specific parcels of land?

DUKEMINIER: Yes, sir. The practice of creating legal life estates and remainders in land is uncommon today. And even then, there generally are judicial methods for freeing the affected lands from such divided ownership.²¹

SENATOR: Now, Professor Dukeminier, would you consider it grossly unfair if I, a lawmaker, yet a layman, were to characterize the "best justification" for the Rule today somewhat as follows?: That it is concerned with trust beneficiaries unfairly and capriciously being denied the same right which their ancestor, who built the original fortune, had in exercising dead-hand control. And further, we are not talking about the deprivations of those unfortunate trust beneficiaries who were the immediate objects of the settlor's bounty and whom he knew or might have known personally, but of those remote beneficiaries whose only memory of him, if any, is vicarious, having been communicated to them through the family Bible, picture album, or the repetition of ancestral folklore. If it is this class of persons we are concerned about, and if the Rule does not contribute to the common good by striking a reasonable balance between the free right of testation and the prolonged pocketing of wealth, then it certainly does not deserve the amount of scholarly, legislative, and judicial time it has consumed and continues to consume. I'm sorry, Professor, to have pejoratively framed my question and apologize further for then answering my own question. But if, as Morris and Leach contend, the Rule is designed "to prevent the power of alienation from being used to its own destruction,"²² then if the rich foolishly so use it, so be it. The rich and the super-rich need no special laws to protect them from their own folly so long as it does not hurt the rest of society. So, let them attempt to tie up their property in perpetuity and let their fortunes be dissipated by each successive remainderman selling out for a pittance to escape his ancestor's dead-hand control.²³

²¹ For a thorough review of the subject of freeing land from future interests in England and in the United States, see L. SIMES, *supra* note 2, at 32-54.

²² MORRIS & LEACH 17.

²³ In this country, there appears to be no established, conventional, commercial market for the purchase and sale of future interests. A rare glimpse of the actual market for such transactions was afforded by the protracted litigation in *Matter of Vought's Estate*, 57 Misc. 2d 396, 293 N.Y.S.2d 34 (Sur. Ct. N.Y. Co., 1967), *aff'd*, 30 App. Div. 2d 805, 292 N.Y.S.2d 991 (mem., 1st Dep't 1968), *aff'd*, 25 N.Y.2d 163, 250 N.E.2d 343, 303 N.Y.S.2d 51 (1969).

While I still have the floor, I would like to return to the second part of my very first question to you, Professor. And that is, "to what extent does your proposed Act better serve the purpose of the Rule," assuming, for the time being, that the balance which it seeks to strike is one which should concern this legislative body? More specifically, have conditions so changed since Gray first articulated the Rule²⁴ that it no longer strikes this proper balance? If so, which way is it leaning?

DUKEMINIER: Well, Senator, the proposed Act does not address that issue. Under the common-law Rule, a person who wants to tie up his estate and has a competent attorney may create a spendthrift trust which might last for well over a

See 76 Misc. 2d 755, 351 N.Y.S.2d 816 (Sur. Ct. N.Y. Co., 1973). In this case, the trust corpus beneficiary, whose remainder interest was indefeasibly vested, made assignments which purported to transfer to the assignees his entire interest in the trust corpus. Within a two-year period, some four years prior to his death, the trust remainderman executed four instruments purporting to be bills of sale and assignments of his remainder interest. The first three of these, in stated dollar amounts, totaled \$1,100,000.00. The fourth and final assignment purported to quitclaim whatever might remain of his interest in trust principal. At the time of the assignments, the market value of the remainderman's interest in trust principal was \$90,000.00. Six years later, when the life tenant died, the value of the remainderman's interest was \$1,857,876.20. The court found that, at most, a total sum of \$54,000.00 was paid for the assignments and that the assignor probably received \$29,500.00 with \$24,500.00 paid directly to his creditors and \$2,000.00 paid for attorney's fees in these transactions.

It eventually turned out that the future interests merchants came up empty handed. They had, no doubt, speculated that the spendthrift clause in reference to Chance's interest in trust principal was invalid. To their great dismay, the Court of Appeals held otherwise. Furthermore, the surrogate court denied them relief in their attempt to enforce their claim against Chance's estate. All of which prompted Craig B. Smith, a senior law student at Syracuse University, to capture the essence of the whole matter in appropriate doggerel:

There once was a spendthrift aptly named Chance.
Who assigned his remainder well in advance.
His assignees chortled on their way to probate,
Having cheaply acquired young Chance's estate.
But an attorney of wit had dexterously contrived,
And Chance's father's great wealth so cleverly devised,
That the assignees learned to their sorrowful rue,
Young Chance had had his cake and eaten it too.

For an excellent discussion of practical alienability of future interests—what the trust beneficiary experiences when he attempts to exercise his legal right to alienate his future interest, see *Bullock v. Becker*, 52 Misc. 2d 698, 276 N.Y.S.2d 213 (Sup. Ct. 1965), *aff'd*, 27 App. Div. 2d 647, 277 N.Y.S.2d 119 (1st Dep't 1966), *appeal denied*, 19 N.Y.2d 581, 226 N.E.2d 708, 279 N.Y.S.2d 1027 (1967).

In England, there has been for many years an established auction market for future interests. Kessler, *Future Inheritances Auctioned at Discount for Cash Now; Then the Buyers Sit and Wait*, Wall St. Jour., May 10, 1971, at 1, col.4 (reprinted in O. BROWDER, JR., L. WAGGONER & R. WELLMAN, *FAMILY PROPERTY SETTLEMENTS* 66 (2d ed. 1973)).

²⁴ J. GRAY, *THE RULE AGAINST PERPETUITIES* (1st ed. 1886).

century. On the other hand, the Rule is in disrepute because it operates as a trap for the unwary, causing perfectly reasonable dispositions to fail. This Act should save reasonable dispositions from aberrational applications of the common-law Rule.

SENATOR: Thank you, Professor Dukeminier. I may be wrong, but I think you have just stated another reason for total abolition of the Rule Against Perpetuities. In short, it does not prevent unreasonable and anti-social dispositions, but may strike down perfectly reasonable ones. Why should we attempt to salvage such a singularly worthless rule? Let's just rid ourselves of it.

Without attempting, at this point, to catalogue public, as distinguished from private, policy reasons for the Rule Against Perpetuities in contemporary society, let us assume "that social welfare requires the imposition of restrictions upon the fettering of property"²⁵ and upon the pocketing of wealth. This basic assumption is not rejected entirely by the "reformers" but is substantially minimized. Graduated income, estate, and inheritance taxes, it is argued, more effectively curb man's dynastic instincts,²⁶ if indeed twentieth century man still retains such primitive drives.²⁷ The

²⁵ 4 RESTATEMENT OF PROPERTY Part I, at 2123 (1944).

²⁶ "Graduated estate and income taxes have largely eliminated any threat to the public welfare from family dynasties built either on great landed estates or on great capital wealth." Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 727 (1952). "It would seem, however, that succession and estate tax laws can more effectively cope with the problem, and, indeed, are now doing so." SIMES & SMITH § 1117, at 12-13.

Professor Leach has indicated that the Rule is intended to remove the "threat to the public welfare from family dynasties built either on great landed estates or on great capital wealth." But, as he points out, that threat is rather effectively removed by our income and estate taxes. I am disposed to agree with him. Indeed, I feel that undue concentration of wealth is an evil which can best be combated by tax legislation, rather than by perpetuities rules.

L. SIMES, *supra* note 2, at 56-57 (footnote omitted).

²⁷ The family-dynasty mentality flourished in the eighteenth century and reached a fine fruition in the will of Peter Thellusson The Stately Homes of England reified the ambitions of the great English families in the nineteenth and early twentieth centuries. At that time the Rule Against Perpetuities still served a useful purpose in countering the urge to family aggrandizement. But the taxation following two world wars has put an end to the era of the Stately Homes.

. . . It does no harm to continue the Rule as a restraint on the whims of an occasional refugee from the nineteenth century

Leach, *supra* note 26, at 726-27.

First, I must point out that the long trust question is not at issue in discussion of these [wait-and-see] statutes. The reason is this (and I have said it time and again and it has never been answered): *In all cases that have arisen in this century where the gift has failed under the Rule, the instrument could have been so drafted as to be unchallengeable under the strictest perpetuities doctrine unaided by legislation.* Furthermore, I and my reform colleagues, and all the anti-reformists too, would have so drafted the instrument if they had been advising the donor. Thus, the type of legislation I

Rule, so states Leach, is an important adjunct of our estate and inheritance tax system, and prevents the intervals at which the wealth of the community goes through the tax wringer from being too long.²⁸

II

IS THE COMMON-LAW PERPETUITIES PERIOD TOO LONG?

To determine whether the common-law perpetuities period is too long, just right, or too short, it is necessary to understand how to ascertain common-law measuring lives. Anyone who ever has come into contact with the Rule will, no doubt, agree with Professor Simes that the perennial question of all students when first introduced to the Rule is: "How do you determine who is the life in being?"²⁹ or, put another way, "Who are the measuring lives?" The answer to that question, of course, is important in understanding the Rule and in applying it to the almost limitless variety of dispositive provisions incorporated in family property settlements. But it also is critically significant in evaluating the reform legislation.

Professor Maudsley states: "The measuring lives at common law are those persons within 21 years of whose death the interest must vest, if it vests at all; that is to say, the lives which *validate* the gift."³⁰ Professor David Allan agrees³¹—and so do I. Prior to the preparation of this Article, I must confess that I thought there was no disagreement at least on that issue. And I must confess further that I read the English and Commonwealth texts and law review articles, and especially the writings of Dr. Morris and Professor

advocate will not extend the period of the Rule; it will simply give to the donor who happens to choose a nonspecialist as his counsel the same advantage as if he had gone to an experienced specialist.

Leach, *supra* note 6, at 1134. See note 101 and accompanying text *infra*.

Is there any tendency among the wealthy to produce trusts which exceed the period of perpetuities? In thirty-five years of practice, largely connected with estate work, I have never found a testator or settlor who had any wish to exceed the limits of the Rule in its most severe application.

Leach, *supra* note 6, at 1140. See notes 97-100 and accompanying text *infra*.

²⁸ Leach, *supra* note 6, at 1141.

²⁹ L. SIMES, *FUTURE INTERESTS* 265 (Handbook 2d ed. 1966).

³⁰ Maudsley, *Perpetuities: Reforming the Common-Law Rule—How to Wait and See*, 60 CORNELL L. REV. 355, 373 (1975) (emphasis added).

³¹ Allan, *The Rule Against Perpetuities Restated*, 6 U. W. AUSTL. L. REV. 27, 43-46 (1963). Allan, *Perpetuities: Who Are the Lives in Being*, 81 L.Q. REV. 106 (1965), is devoted entirely to responding to Morris' and Wade's criticism of Allan's identification of common-law measuring lives. See Morris & Wade, *Perpetuities Reform at Last*, 80 L.Q. REV. 486, 499-501 (1964).

Wade, without appreciating that their description of common-law measuring lives included some lives which did not necessarily validate the interest. I was, therefore, surprised when I read Professor Maudsley's statement that some of the English perpetuities scholars included some nonvalidating lives as common-law measuring lives. A more careful reading of their writings convinced me that Maudsley was correct in asserting that there was, indeed, disagreement even as to measuring lives at common law.³²

³² The truth is, we submit, that there is a perfectly clear distinction between lives which restrict the period for vesting and lives which do not restrict it; that this distinction is inherent in the Rule against Perpetuities at common law; and that it enables the appropriate lives in being to be identified, whether the gift succeeds or fails. *To argue that the common law rule cannot identify lives in being which do not save the gift at common law is to confuse the law as to the length of the available perpetuity period with the question whether the gift is bound to vest (or, under the new law, does in fact vest) within that period.* Accordingly the shift to "wait and see" should raise no new problems as to lives in being.

Morris & Wade, *supra* note 31, at 501 (emphasis added).

It is interesting to compare the corresponding "Lives in Being" sections of W. LEACH & O. TUDOR, *THE RULE AGAINST PERPETUITIES* § 24.13 (1957) [hereinafter cited as LEACH & TUDOR] (Leach & Tudor, *The Common Law Rule Against Perpetuities*, in 6 *AMERICAN LAW OF PROPERTY* § 24.13 (A. Casner ed. 1952)) and MORRIS & LEACH 60. The text of these two corresponding sections is almost identical. Understandably, there are fewer citations from this country in the British publication and an expanded number of American citations in the American publication. But the illustrative cases which identify common-law measuring lives are most interesting if (1) you believed, as did I, that there was no difference between England and the United States in the structure of the common-law Rule; and (2) you realized—as everyone does—that the co-author of both books was the same W. Barton Leach, whose campaign to sell wait-and-see was not confined to this country.

LEACH & TUDOR § 24.13:

Case 14. S transfers stock and bonds to a trustee in trust to pay the same "to such of my grandchildren as shall reach the age of twenty-one." This gift is bad under the Rule In this instance S's children cannot be taken as the lives in being, for more children can be born to him between the creation of this trust and the time of his death.

(*My comment:* S's children cannot be taken as the lives in being or measuring lives because they do not necessarily validate the gift to grandchildren.)

MORRIS & LEACH 62:

Illustration 10. T bequeaths property on trust for such of the grandchildren of A as shall attain twenty-five. If A is alive when T dies, A and A alone is the measuring life; A's children cannot count as measuring lives because he may have more children after T's death; and the gift is too remote, because a grandchild may attain twenty-five more than twenty-one years after A's death. If A is dead when T dies and any of his children are alive, those children are by implication the measuring lives (though not mentioned in the will); but at common law the gift to the grandchildren is still too remote, because a grandchild may attain twenty-five more than twenty-one years after the death of A's children. . . . If A and all his children are dead when T dies, the grandchildren are then measuring lives; and the gift is valid, because they must attain twenty-five (if at all) within their own lifetimes.

(*My comment:* I wonder why Professor Leach did not insist upon a dissenting footnote as, on other occasions, he and his other co-authors were wont to do. See, e.g., Professor Leach's Dissenting Preface in A. CASNER & W. LEACH, *CASES ON PROPERTY*, at xi, xii (1st ed. 1950), and Mr. Tudor's dissenting footnote in LEACH & TUDOR § 24.29 n.6a (Leach & Tudor, *The*

I suspect Morris' and Wade's erroneous identification of common-law measuring lives is a product of their wait-and-see, causal relationship to vesting, orientation.³³ There are no judicial decisions on either side of the Atlantic or "Down Under" which support their analysis.³⁴

A. *Measuring Lives at Common Law*

But how do you determine whether the life you have selected is one which necessarily validates the interest and thus may be considered a "measuring life" at common law? If you go out looking for measuring lives, the danger is that you might just find some one or more persons whose continued life would serve to validate the interest in question, or whose death would cause the interest to fail. Once you have found a life in being by this erroneous process of analysis, you will find it difficult, if not impossible, to extricate yourself from a line of reasoning which usually leads to an erroneous conclusion. Rather than look for measuring lives, first focus upon the interest which is suspected of violating the Rule, and then ponder whether the event or contingency upon which the interest is to vest, or takers are to be ascertained, might occur after the death of every person living at the beginning of the perpetuities period. If the contingency or ascertainment of takers might occur more than 21 years after the death of every person alive at the effective date of the creating instrument, there is a perpetuities violation; otherwise there is not.

Because you will be looking to see whether the interest in question might vest or fail to vest more than 21 years after the deaths of all persons living at the inception of the perpetuities period, it will be necessary that you hypothesize their deaths immediately thereafter. It soon will become apparent that the deaths of the vast majority of people living at the inception of the perpetuities period bear no relationship to the interest under scrutiny. But, by hypothesizing everyone's death, you will avoid dwelling upon the continued life of any one person and thus will

Common Law Rule Against Perpetuities, in 6 AMERICAN LAW OF PROPERTY § 24.29 n.6a (A. Casner ed. 1952)).

³³ See notes 31 & 32 *supra*.

³⁴ It would, of course, be impossible to find *case authority* for the analysis that a measuring life might be one which did not validate the interest. Why should a court trouble itself with identifying measuring lives only to hold the interest in question nonetheless invalid? If the measuring life which one party to the litigation advances is irrelevant to the outcome of that litigation, could that party object to his adversary's advancing an equally irrelevant life, but one which is totally unrelated to vesting? The fact of irrelevancy is germane to the litigation. The reason for irrelevancy itself is irrelevant.

discover whether the suspected interest might vest remotely. Likewise, by this process you will discover whether it is certain that the suspected interest must necessarily vest or fail to vest within the life of any one person (or 21 years after his death) who was alive at the creation of the interest, in which case, the interest is good. Only where you discover that an interest must vest or fail to vest during the life or 21 years after the death of any one person can you say that *that* person is a measuring life for purposes of the Rule. Hence, if you are worried about whether any person might serve as a "life in being" or as a "measuring life," simply get rid of him and then examine what effect, if any, his death might have upon the interest in question. If the ultimate taker could be a descendant of this person, be sure that you allow him sufficient time to have one or more children before he is removed from the scene. If you are still worried that you might have neglected a "measuring life," you can test your conclusion in any given case by allowing everyone on earth to have an afterborn child and then die. If it is now certain that the interest in question must vest or fail to vest within 21 years of this massive exchange of world population, the interest is good. If there is still the slightest possibility that it may vest beyond this period, it is bad.

Several elementary examples should help to demonstrate the thought process required to solve perpetuities problems. Suppose that *T* dies devising certain property "to my youngest male descendant, whenever born, who shall be living 21 years after the death of the survivor of my children, *A*, *B*, and *C*." *T* is survived by his widow, *W*, three children, *A*, *B*, and *C*, his mother, *M*, and two brothers, *X* and *Y*. Are all of these persons lives in being? Certainly. There is nothing in the Rule Against Perpetuities which requires you to deny the existence of a person who in fact is alive. There also are plenty of other people around who are "lives in being." But who are the "measuring lives?" In this example, the answer appears simple. *T* has specifically provided for the ascertainment of his beneficiary to be made 21 years after the death of the longest liver of three named persons, all of whom were alive at the inception of the perpetuities period. At this point, you might be tempted to say that it is easy to identify which lives out of all others are measuring lives, and that such identification might be made directly rather than by contemplating the deaths of other persons. Maybe so—but let's wait and see.

Who would be the lives in being in the above example if *T* had provided a 25-year period after the death of the longest liver of *A*,

B, and *C* for determining who might be his youngest descendant then living? Is it now correct to say that *A*, *B*, and *C* still are measuring lives because so designated, but the interest is void because the ultimate taker cannot be ascertained within 21 years of their deaths? The answer is no. The Rule requires certainty of vesting within any life in being and 21 years. Here the interest is void, not because it is incapable of vesting within 21 years of the deaths of *A*, *B*, and *C*, but because it is not certain to vest within 21 years of anyone's death. *T*'s children could have two or more children born to them after *T*'s death. The youngest survivor or more remote descendant of these children might not be determined within 21 years of the deaths of *A*, *B*, *C*, or anyone else. And while it is possible that *W*, *M*, *X*, or *Y* might be alive when this determination is made, the creating instrument does not require such determination to be made within 21 years of their deaths or anyone else's death. It is possible, therefore, that the interest might vest remotely, and this is enough to run afoul of the Rule.

Two more examples will be considered. Suppose there is a devise of certain property by *T* "to my youngest child who shall be living 21 years after the death of my surviving widow." *T* dies survived by his wife, *W*, two brothers, *X* and *Y*, and three children, *A*, *B*, and *C*. Again it appears to be an easy case for identifying *W* as the "measuring life," because she has been specifically so designated. *T*'s youngest surviving child, if any, necessarily will be ascertained no later than 21 years after *W*'s death. Now suppose that *T* had provided for his property to go "to my youngest child who shall be living 25 years after the death of my surviving widow." It is now impossible for the interest to vest within 21 years of *W*'s death, whether she dies immediately or many years later. If you have identified *W* as the measuring life, you must conclude that the interest is void—and you will be wrong. Let us now approach the problem correctly. If we suppose that *X* and *Y* should die immediately after *T*'s death, we will see that their lives are irrelevant to the interest under scrutiny. Their after-born progeny likewise are irrelevant. *W*'s continued life or death, on the other hand, is very much involved as *T* has stated specifically that his devisee shall be ascertained 25 years after her death. The only other relevant people alive at *T*'s death were his children, *A*, *B*, and *C*. Should these children die immediately after *T*'s death, the gift necessarily would fail because no one could meet the description of *T*'s "youngest child who shall be living 25 years after the death of my surviving widow." What if *T*'s widow lived for another

75 years? If one or more of *T*'s children survived *W*, the interest might vest in one of them 100 years after *T*'s death. Yet the interest is good because it is certain either to vest or fail within the lives of *T*'s children's own lives, and they were "lives in being at the creation of the interest."³⁵

These elementary examples, selected to illustrate the thought process involved in solving perpetuities problems at common law, do not represent typical dispositions. More commonly, the transferor establishes a trust to pay the income therefrom to certain beneficiaries or a class of beneficiaries for life, and at the expiration of all life estates directs his trustees to deliver trust principal to a class of corpus beneficiaries composed of his lineal or collateral kindred or to certain designated charities. Each disposition thus selects its own measuring lives, and does so in a way which severely restricts its number—excluding as irrelevant most lives not involved as trust beneficiaries. For example, *T* dies devising a fund in trust to pay the income to his widow for life, then to pay the income to his children for life, and upon the death of each child to pay that child's share of income to that child's children, and in default of such issue, to pay the income to *T*'s then-surviving children, and upon the death of *T*'s last-surviving child, to deliver trust principal to such of *T*'s grandchildren as shall attain the age of 21 years, the child or children of any grandchild who dies under the age of 21 to take his parent's share *per stirpes*. Here, only *T*'s children living at his death are measuring lives. *T*'s widow is not a measuring life even though she is a beneficiary of the trust. Likewise, living grandchildren or great-grandchildren, if any, are not measuring lives even though they ultimately might share in the gift of trust principal.

In this perfectly reasonable disposition, various factors unconnected with validity or invalidity under the Rule will, no doubt, contribute to a relatively early resolution of dead-hand control. Trusts to provide for three or more generations (widow, children, grandchildren, and possibly great-grandchildren) are not usually created unless the initial trust res is substantial. Unless the creator of the trust is passing on inherited wealth, he probably has accumulated a good number of years of life while accumulating his wealth. Putting aside for the moment "fertile octogenarians"³⁶ (male and

³⁵ For the past 15 years or so I have explained measuring lives somewhat as described here. I reduced this explanation to writing some years ago. The explanation in the text, with minor editorial changes suitable to this Article, appears in S. FETTERS & J. SMITH, *SIMES' CASES ON FUTURE INTERESTS* § 15.02 (3d ed. 1971).

³⁶ See *Jee v. Audley*, 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787).

female), Lolita-type marriages to "unborn widows,"³⁷ and the like, chances are substantial that *T*'s widow will be well along in years and that his children will not be infants. Hence, when the survivor of his children dies, it is likely that all grandchildren then living already will have attained the age of 21 and the trust will terminate. If, in the development of the Rule, the courts had restricted the measuring lives to persons beneficially interested in the gift, or, at least, had excluded extraneous measuring lives, the outer limits of the common-law perpetuities period occasionally might stretch beyond society's notion of legitimate dead-hand control. But this would be exceptional and hence tolerable. We would not (or should not) overreact to aberrational anomalies to the destruction of an otherwise functional rule. But, through the use of wholly extraneous lives, whether they be British royal ones, or a dozen healthy babies selected at random as suggested by Professor Leach,³⁸ property can easily be tied up in trust for well over a century. Not only has the reform movement failed to address itself to this issue, but in its efforts to save reasonable dispositions from the destructive wrath of the Rule, it has succeeded in supplying the skilled draftsman with yet another gimmick for extending the perpetuities period, as will be shown later.³⁹

B. *The Problem of Extraneous Lives*

The English Law Reform Committee considered many proposals for eliminating extraneous lives altogether, but, in the end, abandoned the effort because of the difficulty in fashioning a definition of measuring lives which would not add new complexities to the common-law Rule.⁴⁰ The difficulty in dealing with extraneous measuring lives under the English statute⁴¹ is understandable. The statutory list of wait-and-see lives⁴² was carefully selected so as to include all of the lives ordinarily involved in family gift transactions. But the wait-and-see lives are to be used only if the gift violates the common-law Rule. Hence, the precision which the wait-and-see schedule attempted to achieve might be offset by

³⁷ See text accompanying notes 61-77 *infra*.

³⁸ In 1938, Leach suggested the use of "nine healthy babies selected at random." Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 642 (1938). By 1952 Leach had increased his healthy babies to "a dozen or so." LEACH & TUDOR § 24.12. He stayed with the dozen or so in MORRIS & LEACH 62.

³⁹ See notes 61-77 and accompanying text *infra*.

⁴⁰ LAW REFORM COMMITTEE, FOURTH REPORT, CMND. No. 18, at ¶ 5 (1956) [hereinafter cited as FOURTH REPORT].

⁴¹ Perpetuities and Accumulations Act 1964, c. 55.

⁴² *Id.* § 3(4)(a).

destroying the precision inherent in common-law measuring lives. Professor Maudsley's criticism of the English legislation in failing to abolish the common-law Rule when enacting wait-and-see is fully justified in this respect. He would have a schedule of finite, ascertainable measuring lives which would, for all cases, constitute the only relevant lives in being.⁴³ For such a list to *include* additional extraneous lives, the statutory list would have to include a provision which would permit the transferor to designate any other persons (not too numerous) as measuring lives. On a policy basis, it is doubtful that this addition would be made.

In this country, wait-and-see statutes are all variations of the formula which retains the common-law perpetuities period but tests validity by "actual rather than possible events."⁴⁴ The consensus of wait-and-see enthusiasts is that the best formula is the one which restricts measuring lives to those bearing a "causal relationship to vesting."⁴⁵ Professor Maudsley concurs—yet correctly observes that the causal relationship formula "is not sufficiently self-evident to produce . . . precision."⁴⁶ Professors Philip Brégy,⁴⁷ Jesse Dukeminier,⁴⁸ and Robert Lynn⁴⁹ have written extensively about the application of reform statutes to particular dispositions. Their analyses and conclusions should prove immeasurably helpful after we have waited for a century or so to see whether the courts concur in their interpretations. Maybe a great perpetuities case, rivaling *Palsgraf v. Long Island Railroad Co.*,⁵⁰ will divide judicial opinion on "causal relationship" as did *Palsgraf* on "proximate cause." As no-fault insurance takes over in the torts arena, perpetuities litigation might, at last, emerge dominant and, in the process, effect an equitable distribution of previously pocketed wealth among members of the probate bar. Although it is presently inconceivable, there might even be a flood of student petitions demanding a course offering in Future Interests. But alas, no one will possess sufficient knowledge to teach it, save only a handful of legal historians who might view the current "reform" movement as just another chapter in the age-old struggle between the haves and the have nots—between those who would tie up

⁴³ Maudsley, *supra* note 30, at 376-78.

⁴⁴ PA. STAT. ANN. tit. 20, § 301.4 (1950).

⁴⁵ KY. REV. STAT. ANN. § 381.216 (1974).

⁴⁶ Maudsley, *supra* note 30, at 375.

⁴⁷ P. BRÉGY, *INTESTATE WILLS AND ESTATES ACT OF 1947* (1949).

⁴⁸ J. DUKEMINIER, *supra* note 17.

⁴⁹ R. LYNN, *THE MODERN RULE AGAINST PERPETUITIES* (1966).

⁵⁰ 248 N.Y. 339, 162 N.E. 99 (1928).

wealth and those who would set it free. And I venture to say, they will view *this* "reform" as a significant swing of the pendulum in the direction of the haves.

But there is no need to argue anew the issue of whether general wait-and-see statutes do or do not supply certainty in identifying measuring lives. That debate is a matter of history.⁵¹ A review of the literature generated by the debate should convince everyone that nothing new can be said. And even if an original idea were conceived, or a more convincing argument advanced, it would not convince anyone whose allegiance already is with the opposition camp. My point is this: If the perpetuities scholars, all with equally impressive credentials and scholarly achievements, are in such fundamental disagreement as to identifying measuring lives under wait-and-see statutes, might not their disagreement constitute a fairly accurate barometer of divided judicial opinion when these statutes eventually surface in the courts of construction? Might they at least agree that their disagreement will persist? In fact, one of the basic arguments in reply to those who find no statutory guidance in ascertaining wait-and-see measuring lives is an expression of confidence in the courts to confine the lives to those "reasonably related to the gift,"⁵² and reject those lives that are so "patently frivolous as to violate the [court's] standard of dignity"⁵³ In other words, wait-and-see advocates clearly foresee litigation at the end of the road, but have faith in a just and impartial judiciary "staying the slaughter of the innocents,"⁵⁴ but with dignity, intelligence, and above all, sensibility. That confidence—whether warranted or not in the context of determining lives "causally related to vesting"—is indeed warranted in the context of excluding extraneous measuring lives.

If the reformers truly see no difficulty in identifying measuring lives under general wait-and-see statutes, why not a general statutory provision to the effect that "extraneous measuring lives

⁵¹ For examples of the affirmative argument, see Dukeminier, *supra* note 17; Leach, *supra* note 6. For examples of the opposing argument, see Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation*, 107 U. PA. L. REV. 965 (1959); Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 MICH. L. REV. 179 (1953); Sparks, *A Decade of Transition in Future Interests*, 45 VA. L. REV. 493 (1959).

⁵² "[P]hilip Brégy . . . has clarified the matter by saying that lives may be used that are 'reasonably related to the gift'—whatever that may mean." Mechem, *A Brief Reply to Professor Leach*, 108 U. PA. L. REV. 1155, 1156 (1960).

⁵³ Leach, *supra* note 6, at 1144; Mechem, *supra* note 52, at 1156.

⁵⁴ Leach, *Perpetuities: Staying the Slaughter of the Innocents*, 68 L.Q. REV. 35 (1952).

included in any dispositive instrument to extend the perpetuities period shall be disregarded?" The English Law Reform Committee was fearful that such a provision might induce the draftsman to introduce "shadowy beneficial interests to persons who otherwise would not be beneficiaries at all, merely with the object of bringing them within the ambit of the definition of permissible lives in being."⁵⁵ I dare say, the courts would have far less trouble identifying and striking out spurious lives than identifying wait-and-see lives. There is a vast body of law, not confined to trusts and estates, which pierces the veil of form to reveal and address itself to the substance of corporate, commercial, and property transactions. A court, understandably uncomfortable in the esoteric perpetuities arena, might feel quite confident in identifying colorable measuring lives. Any draftsman who chooses extraneous lives, whether they be Leach's dozen or so healthy babies, British royal lives, or Peter Thellusson's⁵⁶ issue, knows something about the Rule Against Perpetuities. He and his client are not likely to be potential victims of the Rule's hidden traps, which the reformers so worry about. It is dubious, indeed, that such a draftsman would attempt to create "shadowy beneficial interests" in order to introduce otherwise extraneous lives. And if his client is willing to pay the price, let him buy the lives at full market value. The practice of lighting extra candles soon would be snuffed out.⁵⁷

Even Professor Leach (with Mr. Tudor) acknowledged that the recognition of extraneous measuring lives at common law solely for the purpose of extending the perpetuities period was "unjustified."⁵⁸ Yet, neither he nor his followers ever advanced reform legislation to correct this type of perpetuities imbalance. Mechem correctly observed: "Not within living memory has the proposal been made to make the rule more strict."⁵⁹ Leach's prescription, which Maudsley readily endorses,⁶⁰ for exorcising the "unborn widow" trap from the Rule's all-possibilities formula, supplies yet another mode for extending the perpetuities period beyond all endurable limits.

⁵⁵ FOURTH REPORT ¶ 8.

⁵⁶ Thellusson v. Woodford, 11 Ves. Jun. 112, 32 Eng. Rep. 1030 (Ch. 1805).

⁵⁷ "[L]et the lives be never so many, there must be a survivor, and so it is but the length of that life; (for Twisden used to say, the candles were all lighted at once) . . ." Scatterwood v. Edge, 1 Salk. 229, 91 Eng. Rep. 203 (K.B. 1699).

⁵⁸ LEACH & TUDOR § 24.16 (Leach & Tudor, *The Common Law Rule Against Perpetuities*, in 6 AMERICAN LAW OF PROPERTY § 24.16 (A. Casner ed. 1952)).

⁵⁹ Mechem, *supra* note 51, at 968.

⁶⁰ Maudsley, *supra* note 30, at 358-59.

III

THE UNBORN WIDOW TRAP: IS THE CURE WORSE
THAN THE DISEASE?

A favorite hypothetical case posed by Professor Leach to scandalize the unborn widow trap contemplates a bequest by a father, *T*, to his 45-year-old son and the son's immediate family. The son, *A*, has a wife and three grown children. "*T* leaves property in trust 'to pay the income to *A* for his life, then to pay the income to *A*'s widow, if any, for her life, then to pay the principal to the children of *A* then living.'"⁶¹ Invalidity of the gift of principal to the children is based upon the unlikely possibility of future progeny being born of a union between a man who, after death or divorce of his present wife, marries a woman at least 45 years his junior. That the Rule should strike down this perfectly reasonable disposition indeed is shocking. It is so shocking that the reformers are unwilling to wait and see whether the one extremely remote possibility upon which invalidity could be predicated in fact occurs. This obnoxious trap deserves special attention. A general wait-and-see statute apparently is not adequate to the task of slaying this monster. Leach to the rescue: "The remedy is to eliminate the 'absolute certainty' requirement and substitute a requirement of 'reasonable probability'; also to specifically eliminate the Unborn Widow cases by declaring that the spouse of a life-in-being is automatically deemed to be a life-in-being."⁶² Professor Maudsley agrees.⁶³ And so did the legislatures in California,⁶⁴ New Zealand,⁶⁵ and Western Australia.⁶⁶

⁶¹ Leach, *supra* note 38, at 644; LEACH & TUDOR § 24.21 (Leach & Tudor, *The Common Law Rule Against Perpetuities*, in 6 AMERICAN LAW OF PROPERTY § 24.21 (A. Casner ed. 1952)); MORRIS & LEACH 72; W. LEACH, PROPERTY LAW INDICTED! 74 (1967) (same example, but here increased son's age from 45 to 50).

⁶² Leach, *Perpetuities: What Legislatures, Courts and Practitioners Can Do About the Follies of the Rule*, 13 KAN. L. REV. 351, 352 (1965).

⁶³ Maudsley, *supra* note 30, at 358-59.

⁶⁴ In determining the validity of a future interest in real or personal property . . . an individual described as the spouse of a person in being at the commencement of a perpetuities period shall be deemed a "life in being" at such time *whether or not the individual so described was then in being*.

CAL. CIV. CODE § 715.7 (West Supp. 1974) (emphasis added).

⁶⁵ "The widow or widower of a person who is a life in being for the purpose of the rule against perpetuities shall be deemed a life in being . . ." New Zealand Perpetuities Act § 13 (1964).

⁶⁶ Law Reform (Property, Perpetuities and Succession) Act 1962 § 12 (W. Austl.). The language of the Western Australian legislation is identical to that of the New Zealand Act, *supra* note 65. Professor Simes speculated that this language would treat the surviving spouse as a life in being even if it turned out that such person was unborn at the inception of the

I certainly do not propose to defend the common-law Rule either in its application to unborn widows or to similarly exaggerated cases which Professor Leach identified, labeled, publicized, and ridiculed as absurdities. Likewise, even opponents of wait-and-see might find his specific and direct cure for the unborn widow case particularly appealing. It is free from ambiguity and applies without exception to all such cases. But remember, the universal prescription for cure always followed the same hypothetical case.⁶⁷ The disease and the cure had a common creator.⁶⁸

We should, therefore, consider the unborn widow in the context of other possible fact situations. *T*, at age 68, is widowed and has three married children, 29, 30, and 33 years of age respectively. Between them, the children have a total of 9 children all of whom are under the age of 10. One of the children has a child *en ventre sa mere* who is born in due course after *T*'s death. *T* dies devising a substantial fund in trust "to pay the net yearly income *per stirpes* to such of my lineal descendants, as shall from time to time be living, until 21 years after the death of the survivor of all my children and all my grandchildren living at my death or 'born in due time afterwards,'⁶⁹ and to continue to pay the net yearly income as aforesaid until 21 years after the death of the survivor of all of the spouses, if any, of such children and grandchildren, whether such spouses be alive at my death or born thereafter, and 21 years after the death of the survivor of all such children, grandchildren, and spouses of such children and grandchildren, to pay the net yearly income therefrom to such of my lineal descendants then living for their respective lives, with cross remainders for life, and upon the death of the survivor of such lineal descendants, to deliver trust corpus to the State of New York, in trust, to establish a professorial chair bearing my name (but this shall not constitute a condition to the gift and is intended

perpetuities period. Simes, *Reform of the Rule Against Perpetuities in Western Australia*, 6 U.W. AUSTL. L. REV. 21, 26 (1964).

⁶⁷ See note 61 *supra*.

⁶⁸ The late Professor Joseph H. Beale is described in A. CASNER & W. LEACH, *CASES ON PROPERTY* 82 (2d ed. 1969), as "a master dialectician." "Among his students it was common talk that you could occasionally beat Beale in an argument, but never if you let him state the question." *Id.* I have no way of knowing, but strongly suspect Professor Leach authored that note—and further, that he described a talent and reputation which he admired and rightly claimed for himself.

⁶⁹ This was the language over which the litigants argued in the famous (infamous) *Thellusson v. Woodford*, 11 Ves. Jun. 112, 32 Eng. Rep. 1030 (Ch. 1805). The court found that the testator did not intend to include after-born issue, but was referring to children *en ventre sa mere* at his death.

as precatory only) in an appropriate College or University in the State of New York, if such State be then in existence, otherwise to a political entity most nearly resembling the State of New York, devoted to the study of the Rule Against Perpetuities and its contribution, if any, in preventing the prolonged pocketing of family wealth and in limiting dead-hand control."

Former Dean James K. Logan considered how *the* Henry Ford could have tied up his wealth through the use of trusts and special powers of appointment. Given the facts extant at Henry's death (he was 83, with four grandchildren, 40, 38, 25, and 23, and several great-grandchildren all under the age of 6) Logan calculated that Henry could have tied up his wealth in his family for about 100 years, and, "with luck," postponed the next application of the "tax wringer" for more than 130 years.⁷⁰

There is no need to make a similar calculation for the case here postulated; a brief reverie should suffice. With a little luck, at least one of the 10 grandchildren will pattern his matrimonial life-style in a fashion resembling that of a Charlie Chaplin, a Pierre Trudeau, or a William O. Douglas. Vesting in interest might thus be postponed for 150 years, with the ultimate life estates and cross remainders for life lasting another 50, 60, or more years. With a little bit of luck, the trust might last 200 years or more.⁷¹ And what about the ultimate charitable remainder? By then, the Rule Against Perpetuities will be completely dead, if it is not so already. But this should cause no trouble. An appropriate *cy-pres* solution, such as the study of ancient legal history, should do.

⁷⁰ W. LEACH & J. LOGAN, *CASES ON FUTURE INTERESTS AND ESTATE PLANNING* 734 (1961). Leach acknowledges this to be the work of Logan in W. LEACH, *supra* note 61, at 71 n.88. The same acknowledgment is made by the co-authors in their preface. W. LEACH & J. LOGAN, *supra*, at xiii.

⁷¹ It is believed that all of the interests in this trust would be valid under an "unborn widow statute" of the California variety set out in note 64 *supra*. Prior to the expiration of 21 years after the death of the survivor of children and grandchildren living at *T*'s death and their respective spouses, whenever born, it makes no difference whether some of the secondary life estates are classified as vested or contingent. All persons who meet the description of issue of *T* at the time of any income distribution must meet that description within the perpetuities period. At the expiration of the specified period, *T*'s lineal descendants, if any be then living, will be ascertained and this class will not be subject to further increase or decrease beyond the perpetuities period. That the trust might, and probably will, last long beyond the period is of no moment. Because the number of life income beneficiaries necessarily is determined within the perpetuities period, the cross remainders for life among this class of income beneficiaries vests at the same time. The charitable remainder to the State of New York vested immediately at *T*'s death. That it probably will not become possessory until long beyond the perpetuities period is, according to standard doctrine, irrelevant.

IV

EXTRANEOUS LIVES SURVIVED BY UNBORN WIDOWS

Proposals for the elimination of extraneous measuring lives cannot be accomplished by statute, we are told, because "in the end they founder on the difficulty of evolving a definition."⁷² The dozen or so cases which have bubbled to the surface over the course of the past 300 years and struck down reasonable dispositions because the draftsmen fell into the unborn widow trap lead us now to measure by lives not in being. And, of course, we must wait and see even though a goodly number of perpetuities experts who are perfectly willing to wait for the interest to vest or fail, do not now know how long they must wait nor what to look at so as to see. The Rule Against (I am unable to find a suitable word to complete the name, although I do know one word that is wholly inappropriate, *i.e.*, "Perpetuities") can now be stated somewhat as follows: "*No interest is bad until it becomes certain that it will not vest within 21 years of the death of the widow or widower of any person [reasonably related to the gift]*"⁷³ *living at the creation of the interest; provided, however, that the number of lives in being and not in being at the creation of the interest are not so numerous as to make proof of their end unreasonably difficult to determine.*" I doubt that this formulation will give Professor Gray's classic statement of the Rule the slightest competition, but, I submit, it is literally accurate under some of the wait-and-see-unborn-widow type statutes,⁷⁴ and, for all practical

⁷² FOURTH REPORT ¶ 8.

⁷³ See note 52 *supra*. In my proposed statute, the modifying phrase is enclosed in brackets because it makes no difference which of the various forms of modifying phrases is used to identify wait-and-see lives. All of them are equally ambiguous or at least ambiguous enough to generate litigation. Possibly, the statute might incorporate by reference the profusion of explanations advanced by Leach, Lynn, Dukeminier, et al. See notes 47-49 *supra*. Leach modestly advanced the idea that his perpetuities saving clause could be incorporated by reference in wills and trusts. Leach & Logan, *Perpetuities: A Standard Saving Clause to Avoid Violations of the Rule*, 74 HARV. L. REV. 1141 (1961). Why not go all the way and make his and his reform followers' explanations law?

⁷⁴ The California statute applies only to those situations where the dispositive provision makes specific reference to the spouse of a living person. See note 64 *supra*. The New Zealand Act does not appear to be so limited:

Unborn husband or wife—The widow or widower of a person who is a life in being for the purpose of the rule against perpetuities shall be deemed to be a life in being for the purpose of—

- (a) A disposition in favour of that widow or widower; and
- (b) A disposition in favour of a charity which attains, or of a person who attains, or of a class the members of which attain, according to the terms of the disposition, a vested interest on or after the death of the survivor of the said person who is a life in being and that widow or widower, or on or after

purposes, accurate under some of the others.⁷⁵

In any event, if the skilled draftsman is unable to tie up property for at least 150 years, it simply will be a case of bad luck. He will have selected the wrong royal progenitor or his dozen babies will prove unhealthy or marry older or fragile spouses.

As the reformers surely must know, the unborn widow trap can effectively be removed without introducing lives not in being into the perpetuities formula. There is no insuperable drafting obstacle. As part of its package of perpetuities reform legislation, New York law now provides that "[w]here an estate would, except for this paragraph, be invalid because of the possibility that the person to whom it is given or limited may be a person not in being at the time of the creation of the estate, and such person is referred to in the instrument creating such estate as the spouse of another without other identification, it shall be presumed that such reference is to a person in being on the effective date of the instrument."⁷⁶ Illinois has a similar statutory provision.⁷⁷

V

A LIST OF LIVES

By now the reader, no doubt, has anticipated the basic and fundamental objection to a wait-and-see schedule of measuring lives, whether that schedule be in substitution for the common-law Rule as proposed by Professor Maudsley⁷⁸ or in addition to the Rule as enacted under the English statute.⁷⁹ But first, I must

the death of that widow or widower, or on or after the happening of any contingency during her or his lifetime.

New Zealand Perpetuities Act § 13 (1964). Although the legislative purpose of both the California and New Zealand Acts probably is the same, *i.e.*, to abolish the unborn widow trap, the New Zealand Act could be read so as to make the surviving spouse a measuring life in all dispositions contingent upon survivorship of the named spouse.

⁷⁵ If the intent is to maximize the perpetuities period, the knowledgeable draftsman who adds extraneous lives obviously will include extraneous spouses.

⁷⁶ N.Y. EST., POWERS & TRUSTS LAW § 9-1.3(c) (McKinney 1967).

⁷⁷ ILL. REV. STAT. ch. 30, § 194(c)(1)(C) (Supp. 1974). The 1969 "Statute Concerning Perpetuities" is a comprehensive restructuring of Illinois perpetuities law and is unique in its thrust to save reasonable dispositions and, at the same time, limit the duration of trusts. For an excellent article exhaustively reviewing the entire legislative package, see Schuyler, *The Statute Concerning Perpetuities*, 65 Nw. U.L. REV. 3 (1970). For another sensible proposal to reform the Rule by limiting trust duration in the process of excising the traps, see Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 683 (Pt. I), 887 (Pt. II) (1958).

⁷⁸ See Maudsley, *supra* note 30, at 370-73, 375, 378, 379.

⁷⁹ Perpetuities and Accumulations Act 1964, c. 55, § 1.

express my complete agreement with Professor Maudsley in his criticism of the English Act for failing to abolish the common-law Rule when enacting wait-and-see.

Whether the Act is formidably complex, as its critics claim,⁸⁰ or is simply a long and complex piece of legislation by any standard, it is abundantly successful in combining the worst features of both the common-law Rule and wait-and-see. That is, if one believes that there is a need to retain the word "against" in the perpetuities rule.

It has something for everyone who wants to tie up wealth for an extended period of time. The lazy estate planner who finds making lists boring, and maintaining them a time-consuming nuisance, can settle for an 80-year period in gross.⁸¹ But those estate planners who are accustomed to using royal lives clauses but fear that the last batch of royal progenitors produced descendants who appear to be poor candidates for longevity, and prefer not to search the maternity wards of the Cambridge-Boston hospitals for a dozen or so healthy babies, can fall back on all of those statutory lives as a viable alternative for maximizing the perpetuities period.

I think we have come to believe that people and candles are truly the same. So long as there is no inconvenience in keeping track of them, we care not how many there be.⁸² Back in the days of Twisden,⁸³ I will bet most candles did burn out at the same rate—and maybe most people did too. But even in the days of shorter life expectancies, it took no quickness of mind to figure out that the more lives there were, the greater were the chances of the longest liver of the expanded group living longer than if the initial group was restricted in number. And further, the rich have a better chance of living longer than the poor (no citation needed). That fact of life (and death) abideth forever.

What basically is wrong with a statutory list of wait-and-see lives is the impossibility of constructing one which sufficiently

⁸⁰ Morris & Wade, *supra* note 31, at 501.

⁸¹ Perpetuities and Accumulations Act 1964, c. 55, § 1.

⁸² Perpetuities and Accumulations Act 1964, c. 55, § 3(4)(a) provides as follows: [W]here any persons falling within subsection (5) below [which gives the schedule of wait-and-see lives] are individuals in being and ascertainable at the commencement of the perpetuity period the duration of the period shall be determined by reference to their lives and no others, but so that the lives of any description of persons falling within paragraph (b) or (c) of that subsection shall be disregarded if the number of persons of that description is such as to render it impracticable to ascertain the date of death of the survivor.

Thus the drafters recognized that the wait-and-see lives might expand the number of measuring lives dramatically. Their only concern, however, was one of convenience in determining when the last of the candles goes out.

⁸³ See note 57 *supra*.

restricts the number of lives and, at the same time, permits sufficient flexibility to enable those who so desire to create varying schemes of reasonable wealth transmission. Even wait-and-see enthusiasts recognize these shortcomings. Thus, Dr. Morris and Professor Wade criticized the English statute for casting "its net so widely in order to cover every conceivable case that many quite inappropriate lives are included" resulting in an extension of "the 'wait and see' period beyond what anyone contemplated and beyond what wise policy would seem to dictate."⁸⁴

My criticism of Professor Maudsley's thesis is the same criticism which can be leveled at every variety of wait-and-see statute. The underlying theory is unsound. In the end, all of them tend to extend the perpetuities period. Maudsley argues again and again that "since a disposition which must vest, if it ever does, within the period, *will* vest, if it ever does, within the period, every case can be determined on the basis of wait and see."⁸⁵ We had to wait and see whether valid gifts vested or failed to vest at common law. So now we wait and see, continues Maudsley's argument, just as we did at common law, except gifts void at common law are treated for the time being as valid, and we wait and see whether they vest, in fact, within the period.⁸⁶ This form of argument is intended to lead one to believe that the difference between wait-and-see and the common-law Rule is the difference between tweedledum and tweedledee. Not so! The statutory list of measuring lives enacts into law extraneous measuring lives and makes them a part of each dispositive instrument. Extraneous measuring lives are drafted into instruments only by those who intend thereby to maximize dead-hand control. To select the outer limits of an already too long perpetuities period as the standard measure makes about as much sense as fixing automobile speed limits at just one mile per hour under that speed which statistically is determined to be involved in the greatest percentage of fatal automobile accidents.

There are several other basic problems that I have with Professor Maudsley's formulation—or, should I say, his defense of the basic approach of the English perpetuities legislation. His thesis is that if we are to have wait-and-see, it is essential that we get it right; that the measuring lives be appropriate to the new rule of wait-and-see. He states:

[C]ommon-law lives will not do, even if it were possible to de-

⁸⁴ Morris & Wade, *supra* note 31, at 502.

⁸⁵ Maudsley, *supra* note 30, at 379. *See id.* at 365, 371, 378.

⁸⁶ *Id.* at 364-66.

lineate a category of common-law lives, including some who did not validate the gift. There is no assurance that they will be the *right* lives for wait-and-see. Wait-and-see is a new concept in the law of perpetuities. There is no reason to suppose that common-law lives would be appropriate to this new era. One needs to take a fresh look at the whole situation and ask: Who ought to be a measuring life under wait-and-see?⁸⁷

But how do you determine "who ought to be a measuring life under wait-and-see?" Maudsley's answer is that it is "a policy decision."⁸⁸

I think Maudsley's article gives us some insight into his present conception of the nature of that policy question. He states:

The list [under the English statute] includes a number of persons connected in one way or another with the disposition. The question to ask, when considering a candidate for inclusion is: if the interest vests within 21 years of that person's death, would I wish to uphold the gift? It is important to get this question right, and to get away from outdated concepts of including only lives who were "relevant" in the context of the common-law Rule.⁸⁹

He also observes: "There is no a priori qualification for inclusion since the selection of the statutory lives is a matter of policy."⁹⁰ But if we test the appropriateness for inclusion of a life in our list by answering the question, "would I wish to uphold the gift" if it vests within 21 years of that person's death, have we not, thereby, also answered the policy question? I am inclined to believe that we have; and have done so in a way which simply avoids any serious consideration of perpetuities policy.

There is one more basic disagreement that I have with Professor Maudsley's formulation. Toward the end of his article he suggests that the English list *does* include all of the common-law lives *except* two categories of lives.⁹¹ I agree with his earlier and more cautious observation that "common-law lives will not do,

⁸⁷ *Id.* at 375.

⁸⁸ *Id.*

Professor Maudsley and I have corresponded on the subject of measuring lives at some length. He has agreed that many of the matters which troubled me have proved troublesome under the English statutory list, that "a mass of points have arisen on the English list—which no one seems to have noticed." Letter from Professor Maudsley to the author, September 17, 1974 (on file at the *Cornell Law Review*). Professor Maudsley acknowledged the complexity of these matters, but considered a detailed discussion of the English legislation beyond the scope of his present article. *Id.*

⁸⁹ Maudsley, *supra* note 30, at 377.

⁹⁰ *Id.*

⁹¹ *Id.* at 377-78.

even if it were possible to delineate a category of common-law lives . . ."⁹² Although most of the perpetuities fact patterns have recurred with great frequency, I think it is impossible to delineate all of the common-law lives. And furthermore, I think any attempt at such a definition introduces more complexity into this area of the law than already exists.

Again, the genesis for the thesis that reform is essential because a basic understanding of the perpetuities formula is too complex for the average practitioner is traceable to Professor Leach. This theme Leach struck in his first attack on the Rule in a 1952 law review article with such statements as it "is so abstruse that it is misunderstood by a substantial percentage of those who advise the public."⁹³ To prove beyond cavil that it is beyond the reach of all but a handful of perpetuities scholars, Leach suggested that even he had difficulty with the Rule. In his foreword to Dukeminier's *Perpetuities Law in Action*, Leach said of the work: "As an argument for perpetuities reform, it is overwhelming, though I confess to some predisposition to being overwhelmed on this subject."⁹⁴

Professor Maudsley echoes this same discouraging thesis,⁹⁵ the design of which is not only to reduce perpetuities to a level of understanding for the unsophisticated estate planner, but to guarantee that even the para-legal or clerk-typist shall not fall victim to its complexities. The Rule Against Perpetuities is not difficult because of the thought process which must be employed to solve perpetuities problems. It is difficult because it is part of a difficult and complex body of law known as future interests. The difficulties are generated by the degree of flexibility which this branch of the law permits in property transmission. But that is the genius of this branch of the law. It permits one whose life's work has generated a substantial quantum of wealth to devise a scheme of disposition for future generations that is appropriate to his particular situation and desires—so long as he keeps it within due limits, that is, within the confines of the perpetuities period. If simplicity is the end object of reform, simply abolish the law of future interests. Require that outright gifts be given. That will take care of the whole mess. Another way of solving the problem is simply to tax the fortune out of existence at the testator's death.

⁹² *Id.* at 375 (emphasis added).

⁹³ Leach, *supra* note 26, at 722.

⁹⁴ Leach, *Foreword* to J. DUKEMINIER, *PERPETUITIES LAW IN ACTION*, at v (1962).

⁹⁵ Maudsley, *supra* note 30, at 361, 364, 376, 379.

Provide that property left at death which exceeds X dollars in value shall become the property of the United States and the state of the decedent's domicile. Why mess around with perpetuities reform legislation which requires volumes of esoteric writing to explain? Forget it. No more cases will arise; no more law review articles will be written.

VI

POLICY CONSIDERATIONS II

Let us return to the policy debate. Unfortunately, major policy questions occupied a relatively minor position in the proliferation of writing generated by the "reform" movement. The major debate was devoted to details, which, of course, were related *sub silentio* to questions of policy. But with the passage of time, the debate, with its understandable attention to practical detail, tended to divert attention from fundamental policy matters to the more immediate issues which the variety of new proposals presented. Professor Bertel M. Sparks' observations regarding the nature of the reform debate are even more appropriate today than when he made them over fifteen years ago:

[F]ar too much of the re-examination of the Rule Against Perpetuities has been concerned with technical details relating to the Rule's application and too little with questions of basic policy. . . . Too often attention has been drawn to the way in which the rule frustrates the intent of testators and grantors. This approach has tended to conceal the fact that the very purpose of the Rule is to prevent the effectiveness of certain kinds of intent believed to be anti-social. The frustration-of-intent theme is easy to popularize and has encouraged some legislative enthusiasts to enact statutes tending to enlarge the permitted tying up of property without first inquiring into whether or not this is the policy goal being sought.⁹⁶

One further observation can be made regarding the nature of the reform debate as it related to policy considerations. Most arguments advanced by the reformers minimized the contemporary importance of the Rule's social and public utility. Furthermore, questions were raised as to whether the wealthy desired to exercise prolonged dead-hand control, and, if so, whether our income, estate, and gift tax laws prevented the amassing of vast concentrations of wealth and further prevented diminished concentrations of wealth from being perpetuated in one's family.

⁹⁶ Sparks, *supra* note 51, at 514-15.

A. *Dynastic Interests*

"Is there any tendency among the wealthy," queried Professor Leach in 1960, "to produce trusts which exceed the period of perpetuities?"⁹⁷ His answer: "In thirty-five years of practice, largely connected with estate work, I have never found a testator or settlor who had any wish to exceed the limits of the Rule in its most severe application. Is this atypical?"⁹⁸ Great balls of fire!!⁹⁹ The great estate planner, the twentieth-century Orlando Bridgman,¹⁰⁰ never had a client who wanted to create a trust which would *last* more than 21 years! Have I misread both the question and the answer? The question asks whether there is any desire to produce "*trusts which exceed the period of perpetuities,*" not whether there is a desire to have interests in trust remain contingent or to vest beyond the period. And the answer to this *trust duration* question is that there is no "wish to exceed the limits of the Rule *in its most severe application.*" The most severe application of the Rule of which I am aware is where there are no measuring lives available to validate the interest and the perpetuities period thus is reduced to no more than a 21-year period in gross.

If I have not misread Leach's question and answer, certainly I have misunderstood his general intent. But, from what he said, I must confess my inability to determine his meaning and must, therefore, look elsewhere. In the same law review article in which he supplied us with this remarkable information about his estate practice, Leach further declared

that the long trust question is not at issue in discussion of these [wait-and-see] statutes. The reason is this (and I have said it time and again and it has never been answered): *in all cases that have arisen in this century where the gift has failed under the Rule, the*

⁹⁷ Leach, *supra* note 6, at 1140.

⁹⁸ *Id.*

⁹⁹ Although Professor E. F. Roberts did not originate this exclamation of incredulity, he is recognized here because this was his reaction to several assertions made by Professor Leach in his review of W. LEACH, *PROPERTY LAW INDICTED!* (1967). See Roberts, Book Review, 53 CORNELL L. REV. 163, 164 (1967).

¹⁰⁰ It is clear from the published precedents in conveyancing of this period [the late seventeenth century] that the final evolution of that scheme [the strict settlement] was due largely to Bridgman himself, who, as we have seen, was both the first conveyancer of his day, and an important contributor to the settlement of the modern rule against perpetuities. It is in fact his creation of the modern strict settlement which constitutes his chief claim to be called the "father of modern conveyancing."

7 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 376-77 (1926).

Bridgman's scheme could, for all practical purposes, tie up land in fee tail in perpetuity, despite the availability of the common recovery. For a description of this scheme, see A. CASNER & W. LEACH, *supra* note 68, at 357-58.

*instrument could have been so drafted as to be unchallengeable under the strictest perpetuities doctrine unaided by legislation.*¹⁰¹

I think the reason that no answer has ever been supplied for this non-question is because very few perpetuities scholars would be interested in writing a two-word law review article. The only appropriate response to that profound assertion of fact is: "So what?" Nor are the reporters filled with cases involved with prosecutions for non-criminal conduct, actions against non-tort-feasors, suits against debtors who have faithfully performed their obligations and antitrust suits against the operators of neighborhood family grocery stores. That the reported perpetuities cases might all involve lawyer errors in unsuccessfully attempting to accomplish reasonable dispositions for their clients proves absolutely nothing about that vast number of wills and trusts prepared in Wall Street law offices by expert trust and estate practitioners. Let me pose a question for Leach's wait-and-see followers: *Why did the English Law Reform Committee recommend,*¹⁰² *and the English Parliament enact,*¹⁰³ *an alternative 80-year period in gross to lure English practitioners away from the practice of using "royal lives" clauses?*¹⁰⁴

Professor Leach criticized the *Restatement of Property* for articulating a rationale for the Rule Against Perpetuities on economic and social grounds because its Reporter and his advisors were "all lawyers, no economists or sociologists."¹⁰⁵ He then tried to persuade us, on the basis of empirical research (35 years of his estate practice) and reported perpetuities cases generated by incompetent attorneys, that the nature of man has changed—no longer does the dynastic instinct exist; no longer does man seek to capture immortality by projecting his will into the future. Would it be impertinent to suggest that the opinions of anthropologists, psychiatrists, psychologists, and historians be solicited before we accept the conclusions and recommendations of yet another lawyer?

B. *Taxes and the Rule*

It is to his great credit that Professor Simes never faltered in his resistance to wait-and-see.¹⁰⁶ Had he capitulated, the Rule

¹⁰¹ Leach, *supra* note 6, at 1134.

¹⁰² FOURTH REPORT ¶ 9.

¹⁰³ Perpetuities and Accumulations Act 1964, c. 55, § 1.

¹⁰⁴ "It is necessary to specify a substantial period such as 80 years in order to attract draftsmen away from 'royal lives' clauses" FOURTH REPORT ¶ 9.

¹⁰⁵ See note 6 *supra*.

¹⁰⁶ L. SIMES, LEGISLATORS' HANDBOOK ON PERPETUITIES 36 (1958); L. SIMES, *supra* note 2, at 32-82; L. SIMES, *supra* note 29, at 271-73; Simes, *supra* note 51; Simes, *supra* note 66, at 22.

Against Perpetuities would not be "doomed"¹⁰⁷—it would be dead. As with many another prescription for curing the ills of society, those who resist change must suffer the brickbats of the reformers¹⁰⁸ even though they do not resist reform, per se, but merely the particular prescription of the then reformers.¹⁰⁹ The small anti-reform camp needed a giant, the likes of a Simes, lest it be overwhelmed by sheer numbers, so large did Leach's followers grow as he led them to the promised land of wait-and-see.

But Simes made one critical mistake along the way. He agreed with Leach that "the 'threat to the public welfare from family dynasties built either on great landed estates or on great capital wealth' . . . is rather effectively removed by our income and estate taxes."¹¹⁰ Simes pressed this theme even further, asserting "that undue concentration of wealth is an evil which can best be combated by tax legislation, rather than by perpetuity rules."¹¹¹

If taxes do, or should be made to, break up large concentrations of wealth, there is no need for a Rule Against Perpetuities. I believe not for one moment that our tax laws ever so operated; and, further, do not believe it wise policy to restructure them to accomplish that end. Trusts and future interests are, or only should be, used to perpetuate family wealth where the wealth involved is substantial. If income taxes prevent the accumulation of substantial estates, there will be no need to provide for future generations—outright gifts and bequests will be the only sensible alternative. Likewise, if income tax laws are not confiscatory and allow for substantial accumulations of wealth during life, the use of trusts and future interests at death will become obsolete if estate taxes are, or become, confiscatory. On the other hand, the Rule Against Perpetuities, I think, presupposes a competitive, capitalistic society (not a welfare state)¹¹² which recognizes man's desire to perpetuate his wealth beyond his death, but circumscribes that desire and confines it within due limits. It is designed to strike a balance between the desire of one whom society encourages to be productive and thus reap his just rewards, including a limited

¹⁰⁷ Simes, *supra* note 51.

¹⁰⁸ In Leach, *supra* note 6, although Professor Leach stated in the first portion of his article that he was responding to the writings of Professors Bordwell, Mechem, Simes, and Sparks, it should be apparent to everyone that his main attack was directed at Simes.

¹⁰⁹ Professor Simes favored both *cy-pres* reformation as a substitute for total invalidity under the common-law Rule and also favored what Professor Maudsley, in Maudsley, *supra* note 30, at 358-60, describes as "patching up." See, e.g., Simes, *supra* note 66, at 25.

¹¹⁰ L. SIMES, *supra* note 2, at 56-57. See note 6 *supra*.

¹¹¹ *Id.* at 57.

¹¹² *Contra, id.* at 57-58; Leach, *supra* note 6, at 1137.

degree of dead-hand control, and society's desire to loosen the grip of that dead hand so as to allow once again exposure of that wealth to the rough-and-tumble of the competitive marketplace. In other words, one may postpone, for a limited time, exposure of his wealth to the operation of the natural phenomenon of "shirt sleeves to shirt sleeves in three generations."

But Professor Leach, who was an expert both in the law of future interests and taxation, assured us that the public weal was protected by our tax laws in regard to undue wealth concentration. I think it might be useful to set out, in consecutive order, each of his statements which related to perpetuities and taxation:

1952: Graduated estate and income taxes have largely eliminated any threat to the public welfare from family dynasties built either on great landed estates or on great capital wealth. If there were at this present date no Rule against Perpetuities it seems unlikely that there would be a clamor for such a rule either in the legislatures or in the courts. It does no harm to continue the Rule as a restraint on the whims of an occasional refugee from the nineteenth century, but we should make sure that it is limited to that cautionary function and does not disrupt the prudent dispositions of reasonable men.¹¹³ [*No footnotes follow any sentence in this paragraph.*]

1960: Still and all, I think Wisconsin should have a restriction on future interests . . . for a very practical reason: our present estate and inheritance tax system depends upon the wealth of the community going through the wringer every so often, and in the main it depends upon the Rule Against Perpetuities and its relatives to prevent the intervals from being too long. If Wisconsin stays out of line in this matter, and if some tax-

¹¹³ Leach, *supra* note 26, at 727.

There is particular poignancy to any statement of fact by Leach which is unsupported by a footnote, as is true in the quoted passage. When a person who gained a reputation as a master of the footnote cites no authority nor has anything to say about the assertion by way of footnote elaboration, the silence becomes almost deafening. Leach's footnote reputation was well deserved. Witness the evaluations of others in this regard: "Those who are familiar with the Leach writings realize that he has raised the humble footnote to an art form in legal literature. Connoisseurs of Leachiana frequently run through the footnotes before bothering with the text." Logan, *Foreword* to W. LEACH, *supra* note 61.

Professor Leach indisputably is second to none in the effective use of footnotes—his are read; and often more carefully than his text. Depending upon which side of the issue one finds himself, and whether he is on the giving or receiving end of the Leachian barb, the notes to this article [Leach, *supra* note 6] reach a "high" point in this art form.

S. FETTERS & J. SMITH, *SIMES' CASES ON FUTURE INTERESTS* 794 n.60 (3d ed. 1971). So that there may be no need to speculate, I was the author of the latter compliment.

payers or even just a couple of big ones, abuse the privilege for a supposed tax advantage, the Internal Revenue Code will be amended to eliminate the abuse, and the amendment may well do harm outside, as well as inside, Wisconsin. Special provisions of the Code were enacted to eliminate tax advantages in the Delaware statute, and these have been a nuisance to everyone.¹¹⁴ [*Only the last sentence is footnoted—to the Internal Revenue Code and A. Casner, Estate Planning (2d ed. 1956).*]

1961: It is sometimes said that the Rule prevents an undue concentration of wealth in the hands of a few. This may have been true in past times, but the existence of graduated income tax, surtax, and death duties renders the Rule (if this is its sole object) quite unnecessary today.¹¹⁵ [*No footnotes follow this paragraph.*]

1965: There has been considerable scholarly debate as to the social and economic justification for the Rule, summarized in current literature.¹¹⁶ [*The footnote to that sentence: "See Leach & Logan . . . in which Dean Logan and I have quoted most of the experts who hold views opposing our own. At 108 U. Pa. L. Rev. 1124, 1133-42 (1960), I have attempted to answer those opposing views."*¹¹⁷ *That fairly well republishes Leach's perpetuities tax statements of 1960.*]

1967: From what I have said heretofore you might gather that I would like to abolish the Rule Against Perpetuities. If I have created this impression I apologize for being ambiguous. I think it desirable that some limitation be put upon men and women who, in their folly, want to tie up their wealth indefinitely. Among other things, the estate tax laws are based upon the assumption that the wealth of the country shall go through the tax wringer every so often, and this is as it should be. There is one state of the Union where, for all practical purposes, there is no Rule against Perpetuities or anything like it. This is Wisconsin, and Delaware is not far behind. . . . I don't like this and, although no "visible inconvenience" (I am quoting Nottingham) has yet occurred, it is of the essence of human nature that some unwise person of wealth, unwisely advised, sometimes will do something very foolish. In South Africa there is no Rule against Perpetuities or equivalent and

¹¹⁴ Leach, *supra* note 6, at 1141-42.

¹¹⁵ MORRIS & LEACH 15.

¹¹⁶ Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 977 (1965).

¹¹⁷ *Id.* at n.25.

there are instances in which South African real estate has been (successfully) tied up for over a hundred generations [*sic!*]. Something will inevitably be done about this in that unhappy land, and it may well be worse than anything we have now.¹¹⁸ [*There are no citations to the tax wringer, but in the same book Leach states: "As a practical matter this permits a skilled lawyer to control a testator's property for about a century after the testator's death and also to keep this property immune from estate taxes as presently applied by the Internal Revenue Code and various state statutes."*¹¹⁹ *To this last sentence, there is a footnote*¹²⁰ *which refers the reader to Cases on Future Interests where Logan goes through the academic exercise of showing how to prevent the tax wringer from being applied for over 130 years.*¹²¹ *Also, the reader, no doubt, has detected that at least in South Africa, the nature of man has not changed, and, unlike Leach's clients, there is a tendency to want to tie up property there for more than 21 years.]*

I shall not insult the reader by subjecting him to a detailed analysis of these spurious, self-serving, and contradictory statements. That Professor Maudsley has deemed it appropriate to associate himself with Leach's statements regarding U.S. tax policy, I am sorry.¹²² Had Professor Leach lived to witness the tax revela-

¹¹⁸ W. LEACH, *supra* note 61, at 75-76.

¹¹⁹ *Id.* at 70-71.

¹²⁰ *Id.* at n.88.

¹²¹ W. LEACH & J. LOGAN, *supra* note 70. See note 70 and accompanying text *supra*.

¹²² See Maudsley, *supra* note 30, at 362-63.

I know far less about tax law and policy than I do about perpetuities law and policy. Nonetheless, I feel free to indulge in assertions of fact and opinions in regard to the former supported by an equally abundant quantum of authority as both Leach and Simes: United States tax laws favor big business and the wealthy. Graduated income taxes tax most severely the wage earner, rather than the taxpayer whose income is derived primarily from invested capital. The estate tax wringer can be avoided for over a century after its first application (here I cite LEACH & LOGAN) and the first application can be substantially reduced by the marital deduction which became law between the time Leach first made his statements concerning perpetuities *vs.* taxes and his more recent statements. Also, the tax loopholes have proliferated rather than been plugged, and these loopholes are available primarily to the wealthy, not the middle income wage earner.

Although the following text with its accompanying statistics is not derived from a scholarly journal, the reader might, nonetheless, find it of some interest and relevancy to the issue of whether our system of graduated income taxes (combined with an "estate tax wringer" applied every one to two hundred years) effectively prevents undue concentrations of wealth and, hence, renders the Rule Against Perpetuities obsolete in this regard:

On January 17, 1969, just three days before the Johnson Administration left office, outgoing Treasury Secretary Joseph Barr attracted nationwide attention when he told Congress that in 1967, 155 Americans with incomes of \$200,000 or more had paid not a penny of Federal income taxes. Twenty-three of those fortunate individuals had contrived to enjoy incomes of a million dollars or more, without paying any tax whatever.

tions of the "post-Watergate era," I doubt that he would have been at all shocked to learn that persons with annual incomes in excess of one to six million dollars sometimes pay no federal income tax and that the grandchildren of one of the great Robber Barons still retain wealth valued in excess of 1.3 billion dollars at a time when their holdings have suffered severe paper losses due to depressed stock market conditions.¹²³ Would Professor Leach be shocked to learn that most of that family's wealth still is tied up in trust—and that the trusts were created in New York when that State labored under its overly restrictive, and much maligned, two lives rule against suspension of trust duration? I doubt it.¹²⁴

CONCLUSION

Jurisdictions that have adopted wait-and-see should abolish it. That might be difficult politically. But where it has not yet become law, but is being considered by the legislature, it should not be voted out of committee. The first case to reach the Supreme Court of Pennsylvania involving that Commonwealth's unfortunate wait-and-see legislation, which Professor Maudsley criticised as an ex-

As mentioned in Chapter 1, the taxlessness among the very rich of which Barr spoke was a rapidly growing phenomenon. Here, once again, are the figures:

Income* Group	Number in Group Who Paid No Tax in		
	1960	1967	1969
Above \$1,000,000	11	23	56
Above \$500,000	23	63	117
Above \$200,000	70	167	301
Above \$100,000	104	399	761

* These figures understate the extent of tax avoidance among the very rich. For one thing, "income," as used here, means "adjusted gross income" (AGI), which is computed *after* a person deducts from his total income his business deductions, including "paper" deductions in the case of real-estate investors (see p. 175). Thus AGI can be vastly less than a person's real income. (One wealthy real-estate investor had total income of \$1,433,000—but an "adjusted gross income" of zero!)

For another, the figures in the above table deal only with those wealthy people who achieved *total* taxlessness. They omit the "near misses"—affluent persons who paid a pittance in taxes (e.g., an actual taxpayer cited in a Treasury Department study who had total income of \$1,284,000 and paid just \$274 in taxes).

In revealing these figures, Barr talked of "the possibility of a taxpayer revolt"—and not without reason. As Barr observed, "millions of middle class families and individuals" were paying taxes "based on the full ordinary [tax] rates." But even more striking, the same tax law that was levying no tax on hundreds of millionaires was, at the same time, extracting *some* taxes from 2,200,000 Americans who were living below the officially designated "poverty" level.

P. STERN, *THE RAPE OF THE TAXPAYER* 67 (2d ed. 1973).

¹²³ See, e.g., Wall St. Jour., Sept. 24, 1974, at 34, col. 1; N.Y. Times, Sept. 29, 1974, § 3, at 1, col. 1; N.Y. Times, Sept. 24, 1974, at 1, col. 5; N.Y. Times, Sept. 8, 1974, § 3, at 1, col. 3; TIME, Sept. 2, 1974, at 14-23.

¹²⁴ It is stated in W. LEACH, *supra* note 61, at 80-81, however, that the overly restrictive New York Perpetuities Law caused men of wealth to establish inter vivos trusts outside of New York, causing a "flight of capital" from the Empire State.

ample of how not to wait and see, should not go unnoticed as an example of the defective nature of wait-and-see in any form.¹²⁵ First, the testator (albeit without the aid of competent or incompetent counsel) attempted to create a trust to pay income to his collateral kindred and their issue ad infinitum, in perpetuity, with the remainder to go to certain designated charities. Second, the *first round* of litigation was prosecuted to the State's highest court. Third, the court refused to make a determination as to whether the ultimate gift to charity was vested or contingent, or, in other words, whether it was valid in its creation. Such a determination, declared the court, would violate the spirit of the wait-and-see statute.¹²⁶ Fourth, although the parties in interest must wait and see in reference to the validity or invalidity of their respective interests, they need not wait and see whether further time consuming and money consuming litigation will occur somewhere down the road. They know that right now—and know it will occur to a moral certainty.¹²⁷

Would a schedule of lives as proposed by Professor Maudsley work any better? I doubt it. If the Pennsylvania court's judicial attitude is typical, and is so permeated with wait-and-see that it refuses even to classify an interest as valid irrespective of future events, what help is there in knowing, for the time being, which lives will measure the period of uncertainty? I guess the answer is, we will know when to litigate. Without a list, we must first litigate to determine when next to litigate. Well, there is something to say for the list. But I doubt that it says enough to warrant salvaging an otherwise worthless rule—that is, the Rule of Wait-And-See, not that rule known as the Rule Against Perpetuities.

¹²⁵ *In re Estate of Pearson*, 442 Pa. 172, 275 A.2d 336 (1971). See Maudsley, *supra* note 30, at 367-69.

¹²⁶ The court below, in derogation of both *Quigley's Estate*, 329 Pa. 281, 198 Atl. 85 (1938), and the "wait and see" statute, proceeded to a determination of the legality of all the future interests *upon testator's death*. The lower court's rationale was the necessity to pass on the eligibility of the charities to take under the will since the extent of their taking will affect the tax liability of the estate. It may be true that cases such as *Carter Estate* [citation omitted] exemplify this Court's recognition of the necessity, occasioned by the federal estate and state inheritance tax laws, for a prompt determination of questions concerning future interests; however, owing to the ever-increasing extent of estate tax liability, to recognize this principle in this context would emasculate the "wait and see" rule. We cannot adopt the rationale of the court below The remainder over to charity may or may not be valid depending upon (1) whether the interest is contingent; and (2) even if contingent whether any of the preceding interests run afoul of the Rule Against Perpetuities. In accordance with both *Quigley's Estate* and the "wait and see" rule, we will not now determine the validity of the interest to charity.

Id. at 287-88, 275 A.2d at 342-43.

¹²⁷ *Id.*