

Seattle University School of Law Digital Commons

Faculty Scholarship

1981

Fear and Loathing in Perpetuities

John Weaver

Follow this and additional works at: <http://digitalcommons.law.seattleu.edu/faculty>



Part of the [Law and Economics Commons](#)

Recommended Citation

John Weaver, Fear and Loathing in Perpetuities, 48 *WASH. & LEE L. REV.* 1393 (1981).
<http://digitalcommons.law.seattleu.edu/faculty/400>

This Article is brought to you for free and open access by Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Seattle University School of Law Digital Commons.

ESSAY

FEAR AND LOATHING IN PERPETUITIES*

JOHN W. WEAVER**

No interest is good unless it must certainly vest or fail within twenty-one years after some life in being at the creation of the interest.¹

How can so simple a statement present so many problems to virtually everyone in the legal profession?

As law students we first encounter the Rule Against Perpetuities; we struggle with it and make a little headway. Then someone—a text, a professor, another student—tells us about *Lucas v. Hamm*² and we suddenly have an excuse for our shortcomings: Not only does no one understand the Rule,³ no one's really expected to.⁴ That conviction remains with us as we enter practice: We need only know enough to avoid problems by drafting well, always protecting ourselves with a savings clause.⁵ If worse comes to worst, the courts or the legislature may bail us out of our mistakes.⁶

* Apologies to Dr. Hunter S. Thompson.

** Professor of Law, University of Puget Sound School of Law; A.B., Dartmouth College, 1966; J.D., University of Michigan, 1969. I would like to thank my wife Virginia Weaver for her encouragement and relentless editing, and the more than 2,000 first year law students who helped me learn how to teach the rule against perpetuities.

1. GRAY, *THE RULE AGAINST PERPETUITIES* 191 (4th ed. 1942).

2. 56 Cal. 2d 58, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962).

3. Though there are other rules, when law students say "the Rule," they mean this one. Hereafter, that usage will be followed.

4. Notwithstanding *Lucas*, there are perils to not understanding the Rule—malpractice and discipline. *Millwright v. Ramer*, 322 N.W.2d 30 (Iowa 1982), suggests that a lawyer may commit malpractice by drafting a will clause that violates the Rule. Testator died in 1955 and a trust based on the clause was held invalid in 1978. A beneficiary's action was barred by the statute of limitations because the plaintiffs should have known the Rule and discovered the violation in 1955. Thus (*contra Lucas*), even non-lawyers must know the Rule. Because both the Model Code of Professional Responsibility and the Model Rules of Professional Responsibility require competence in an attorney, bad drafting may submit a lawyer to discipline. See *Codiga v. State Bar*, 20 Cal. 3d 788, 575 P.2d 1187, 144 Cal. Rptr. 404 (1978) (finding disciplinable lawyer's failure to correct known ambiguous clause). See also *Body Heat* (Warner Bros. 1981) for other consequences of not understanding the Rule.

5. See, e.g., Leach & Logan, *Perpetuities: A Standard Saving Clause to Avoid Violations of the Rule*, 74 HARV. L. REV. 1141 (1961), or the program described in Finan & Leyerle, *The Perp Rule Program: Computerizing the Rule Against Perpetuities*, 28 JURIMETRICS J. 317 (1988).

6. See, e.g., *In re Estate of Chun Quan Yee Hop*, 52 Haw. 40, 469 P.2d 183 (1970) (involving trust which violated Rule because of 30-year period changed by equitable approximation to 21 years and saved); *Forman v. Troup*, 30 Ga. 496 (1860) (involving interpretation based on Governor's love of state and lack of intention to violate laws). For a statutory attempt to solve problems, see also § 381.216 KY. REV. STAT. ANN. (Baldwin 1942).

Not even judges aided by hindsight, clerks who recently spent some time with the Rule, and learned counsels' briefs seem able to deal comfortably with it.⁷

The misery the Rule causes makes us grateful to those reformers who seek to eliminate it, replace it, or at least trim its claws.⁸ But reform is sometimes worse than the illness. Even attractive reforms may only complicate the matter further.⁹

But help has arrived. Professor Makdisi writes to tell the student and the lawyer how to do a perpetuities problem.¹⁰ Professor Fletcher clarifies the Rule so that we can understand better how to reform it.¹¹ Professor Lynn tells us what we need to know for the next hundred years.¹² Professor Becker contributes a perpetuities methodology close to my own Method.¹³

I fear these authors have missed the bull's-eye. Professor Makdisi's approach is essentially a cookbook for dealing with the Rule and doesn't offer us a general solution.¹⁴ Professor Fletcher's reforming zeal has caused him to question some generally accepted truths about the Rule and to focus upon it from a different angle. As a vehicle for reform this may work, but

7. See, e.g., *Betchard v. Iverson*, 212 P.2d 783, 35 Wash. 2d 344 (1949). The Rule is expanded to three complex sentences and four pages are required to explain why a fairly simple remainder is valid.

8. Or perhaps a clause or two.

9. See Fletcher, *Perpetuities: Basic Clarity, Muddled Reform*, 63 WASH. L. REV. 791 (1988).

10. Makdisi, *How to do a Perpetuities Problem*, 36 CLEV. ST. L. REV. 95 (1988).

11. See Fletcher, *supra* note 9.

12. Lynn, *Perpetuities Literacy for the 21st Century*, 50 OHIO ST. L.J. 219 (1989).

13. Becker, *A Methodology for Solving Perpetuities Problems Under the Common Law Rule: A Step-by-Step Process That Carefully Identifies All Testing Lives in Being*, 67 WASH. U.L.Q. 949 (1989). See also Featheringill, *Understanding the Rule Against Perpetuities: A Step-by-Step Approach*, 13 CUMB. L. REV. 161 (1982). These methods, like Makdisi's, resemble the one I use. See also Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867 (1986) for a less problem-solving approach. Proposals for reform also have proliferated. See, e.g., Haskell, *A Proposal for a Simple and Socially Effective Rule Against Perpetuities*, 66 N.C.L. REV. 545 (1988); Bloom, *Perpetuities Refinement: There is an Alternative*, 62 WASH. L. REV. 23 (1987); and Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157 (1988). The Rule even generates poetry. See Sirico, *Future Interest Haiku*, 67 N.C.L. REV. 171 (1988).

I specifically disclaim any real originality in the analysis (such as it is) of the Rule and the method of dealing with its problems. See *infra* note 54. It's also unlikely that my way of teaching is unique. My goal in this article is to begin a discussion of teaching method, not to prescribe any substantive content. I began before Professor French's tribute to her father, French, *Perpetuities: Three Essays in Honor of My Father*, 65 WASH. L. REV. 323 (1990), which discuss his teaching methods (especially "Ending the Rule's Reign of Terror" at 325-332). The title seems ironic since we teachers kill off descendants and parents (see notes 15-16 and accompanying text) at a rate most Jacobins would envy.

14. A general solution may be beyond our grasp. But if found, it will be the simplest, easiest and most satisfying method. In any event, the search for a general solution will generate new and interesting ideas. See O'Brien, *The Analytical Principle: A Guide for Lapse, Survivorship Without Issue, and the Rule*, 10 GEO. WASH. L. REV. 383 (1988). This attempts at least a general approach, if not a general solution.

it will spread confusion if adopted as a method of analyzing the existing Rule. I am almost as alarmed at his killing off of lives in being and determining lives¹⁵ as I was when I first read Professor Fetter's general slaughter of the living population in his reply to Professor Maudsley.¹⁶ Professor Lynn's approach is somewhat like Makdisi's, though without a step-by-step approach to solution.

While these offerings are useful and valid, they don't get to the heart of the problem. The Rule presents its greatest challenge to those who should know it best—law professors. If law professors can teach the Rule to the future judges, lawyers, and legislators who deal daily with the Rule, then mistakes will not be made and reform will succeed.

We need to look at how we teach the Rule and how we may teach it more successfully. In this essay, I make bold to present a method that I have developed for teaching the Rule. While some of it is no more than a general application of normal law school methods, I think it is sufficiently different—because it treats the Rule—to deserve full exposition. The Rule presents unique teaching problems:

1. Students initially fail to grasp the Rule's significance. It appears to have some things in common with the Rule in Shelley's Case and the Doctrine of Worthier Title.¹⁷

2. When taught in the first year, it comes at the end of a set of peculiarly difficult materials.¹⁸

15. Fletcher, *supra* note 9, at 797.

16. Fetters, *Perpetuities: The Wait-and-See Disaster—a Brief Reply to Professor Maudsley, with a Few Asides to Professors Leach, Simes, Wade, Dr. Morris, et al.*, 60 CORNELL L.Q. 380, 390-91 (1975).

17. Powerful as those rules once were, they haven't the Rule's sweep or power. Shelley's case is no longer the king to be aimed at. C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 150 n.3 (2d ed. 1988).

18. The Rule necessarily follows the introduction to estates and future interests. These are probably the first or second toughest property materials in a first-year course. (Covenants is the other. See E. RABIN, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* 480 (2d ed. 1982) (stating law of covenants is "an unspeakable quagmire" from which none emerge unscathed).) Even in a second-year course, the Rule will come with a unit on future interests, which will include even more complexities than first-year courses usually cover. Most first-year property books cover the Rule, and most deal with it at least relatively early. The following unsystematic survey indicates, roughly, the placement and extent of coverage in a number of texts.

Text	Where Rule Covered	Total Pages of Text
HAAR & LIEBMAN (1985)	611-648	1474
BROWDER, CUNNINGHAM, NELSON, STOEBUCK & WHITMAN (1989)	246-249	1376
DUKEMINIER & KRIER (1988)	250-277	1260
BRUCE, ELY, BOSTOCK (1989)	283-291	944
DONAHUE, KAUPER & MARTIN (1983)	550-551	1341
CASNER & LEACH (1982)	335-351	1315
KURTZ & LOVERCAMP (1987)	318-333	1290

3. The Rule is, let's admit it, not especially easy.

4. The Rule disrupts the teaching methodology that is in place. Few of us can teach the Rule with a dialogue/Socratic approach; even the usual problem method has difficulties.¹⁹

5. The Rule seems self-contained and unconnected to the rest of the material.²⁰

6. Student lore (and to some extent faculty treatment) causes a shift in attitude. By the time you are finished with the Rule, it has gained a significance well beyond its inherent value as a rule of law, a teaching device, or even an intellectual exercise.²¹

Let's begin with a typical young teacher of property law.²² We will indulge the presumption that he (the autobiographical "he") knows something about the Rule in its most basic form.²³ He begins with the literature. Early on he finds *Perpetuities in a Nutshell*²⁴ and *The Nutshell Revisited*.²⁵

19. Most first-year teachers teach, in addition to substantive material, something that they call "thinking like a lawyer," case analysis, legal analysis, legal problem-solving or the like. This usually involves reading cases, finding and applying doctrine, and analyzing doctrine to discover its "policy" basis. See Mudd, *Thinking Critically About "Thinking Like a Lawyer,"* 33 J. LEGAL EDUC. 704 (1983). The approach to estates and future interests, especially when interpretation is left to advanced courses, is essentially operational and manipulative. The system is not critically examined; it is explored, if at all, historically. It is because it is (*cf.* Exodus 3:14). This approach leaves little scope for "legal thinking." It usually has right/wrong answers (at least within limits); it thus may create some false sense of certainty that betrays students in the long run. See Hayden, *On "Wrong" Answers in the Law School Classroom,* 40 J. LEGAL EDUC. 251 (1990), on right and wrong answers. The Rule is of a parcel with this. You can point to results it achieves and suggest reasons for its continued vitality, but it doesn't yield easily to case analysis, either for itself or as a vehicle for teaching legal thinking. The Rule is best mastered with an appreciation of the reasons justifying its continued utility. Not all textbooks do this. HAAR & LIEBMAN and DUKEMINIER & KRIER (*see supra* note 18) are two that do a good job with this.

20. Because we cannot explore all of the Rule's complexities and applications in a first-year course, *see infra* notes 45-49, the Rule is an end. It punctuates the unit on future interests and doesn't lead to new areas. In addition, it can't be used (as can, for instance, adverse possession) to throw light in new areas. I use adverse possession as a lens for all the subsequent areas where possession is an issue. The concept of use (as opposed to possession) is developed in landlord tenant (though talked of earlier) and used through the year.

21. Students eventually seem to come to regard mastering the Rule as something like Euclid's bridge of asses. This was a particularly difficult proof, one where the wise might err and the foolish not even see a problem. See D. PEDOE, *GEOMETRY AND THE LIBERAL ARTS* 153-56 (1976). Sometimes professors encourage this reverence. The Rule is just one doctrine among many. It's important, to be sure, but only one specialty has daily contact with it and, in most cases, even an estate planner won't have a provision that the Rule affects in every will.

22. In 1978, more than 80% of property teachers taught the Rule, though more than half spent two hours or less. See Humbach, *What Is Taught in the First Year Property Course?*, 29 J. LEGAL EDUC. 459, 465 (1978).

23. Though this may be very basic knowledge. The teacher coming from practice probably relied on a well-established savings clause when drafting and may not have encountered a real perpetuities problem since law school.

24. Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938) [hereinafter *Nutshell*].

25. Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973 (1965) [hereinafter

This is the first source; he works backwards, finally worshipping at the altar of John Chipman Gray. Ultimately he will obtain his own copy of the bible of perpetuities—*The Rule Against Perpetuities*.²⁶ He will probably even read the Duke of Norfolk's Case.²⁷

Soon our young teacher is immersed in ancient learning, spending time with the fertile octogenarian and the unborn widow. He amasses much learning and lore and tries to give all of this to his students. He also begins to delve into the revisionist literature and look at solutions beyond simply applying the Rule. He tries, as I say, to give all of this to his students. The perpetuities unit of the course stretches out much longer than he thought it would.²⁸ The students begin to pay entirely too much attention to the Rule. The method of teaching, largely lecture, disrupts his general methodology.²⁹ He overwhelms the students; they get too much too fast, and they care very much too much about the Rule.³⁰

As time passes and our teacher gains experience, he develops a different approach. He drops details that are superfluous to the main flow of the doctrine; but the lectures become more formalized and, with repetition, more mechanical. The classes tend to become demonstrations that the teacher can tell good from bad interests. The instructor carries the entire burden of the class. Lectures are polished and refined; wit is added. Yet the students don't seem to get it.³¹ An experienced property teacher can spot an invalid contingent remainder at thirty paces and know that there will be a violation before the student's question is completed. A few really experienced pros can tell students that a conveyance is going to be invalid before all the supporting life estates are listed.³² The teacher has also internalized the Rule so well that it is difficult to come up with a bad conveyance on the spur of the moment. The teacher is the perfect drafter for whom the Rule is a rule of conduct.³³

This demonstrative method may work with gifted students who catch on quickly. But it requires endless repetition of examples and lectures and

Nutshell Revisited]. You might add Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867 (1986) to the Nutshells; it might have been titled "Perpetuities in a Nutshell Reprised."

26. The edition doesn't really matter since all you tend to get are additional cases and some modern reforms as editions change. See Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 U. MIAMI L. REV. 439 (1982) for some discussion of Gray's impact on legal thinking.

27. 2 Swans. 454, 36 Eng. Rep. 690, 3 Chan. Cas. 40, 22 Eng. Rep. 955 (1682). See Haskins, "Inconvenience" and the Rule for Perpetuities, 48 MO. L. REV. 451 (1983) for a discussion of the case.

28. See *supra* notes 18 & 22 (discussing coverage and effect of Rule).

29. See *supra* note 19.

30. See *supra* note 21.

31. See Finkel & Monk, *Teachers and Learning Groups: Dissolution of the Atlas Complex*, in *LEARNING IN GROUPS* 83-85 (C. Bouton & R. Garth eds. 1983).

32. Maybe it's some form of ESP or the student's expression gives her away.

33. Fletcher, *supra* note 9, at 793, for the view that it is not a rule of conduct.

consumes an inordinate amount of class time even when "minor" aspects of the Rule are deleted.

Some teachers supplement or replace this by handing out lots of problems and working through them in class. This is valuable, but it consumes class time and is either another form of demonstration (if the teacher gives the solutions) or the blind (or one-eyed) leading the blind, when the students do the problems.

I developed the process (or Way)³⁴ which follows over about fifteen years teaching a course in basic property. This course covers adverse possession, servitudes, conveyancing, landlord-tenant, some land use controls, and estates and future interests. It thus serves as the foundation for advanced courses in both real estate and trusts and estates. The estates material is usually taught in the first semester to a class with half just beginning their legal education and about half with one semester of criminal law.

Having gone through the stages of teaching listed, I finally decided that the best way to teach my students how to solve perpetuities problems was to begin by describing (at least to myself) the process by which I solved them. This turned out to be harder than I first thought. I found some problems with the traditional vocabulary I was using.³⁵ When I tried to write down my thought process, I found gaps in it. Even with my experience and study, I needed to refresh my learning before I could teach. I wanted a method that allowed my students to learn the Rule even when I wasn't there to help them.³⁶

THE FOLLOWING PROCESS IS PRESENTED AS IS AND IS USED. IT CARRIES NO EXPRESS OR IMPLIED WARRANTY OF MERCHANTABILITY, BUT I HAVE FOUND IT USEFUL.³⁷

My Way of teaching the Rule is based on simple principles:

1. Build to the rule.
2. KISS—Keep It Simple, Stupid.
3. Shake hands with the unborn widow.
4. The Method.
5. Clean up.

34. A Way is more than simply a method. A Way is an approach to a goal in which all steps are grounded in an understanding of the true spirit of the activity and directed to achieving the goal. See M. MUSASHI, *A BOOK OF FIVE RINGS* 34 n.1 (V. Harris trans. 1974).

35. See *infra* text accompanying note 60.

36. I have found that if I structure material properly, a lot of learning can take place without my presence. See Finkel & Monk, *supra* note 31. I have also found that writing out what I did and trying to explain it is a great method for examining my own processes, discovering the weaknesses in my ideas, and learning the Rule itself. See Ewing, *Writing as a Mode of Learning*, 28 *COLLEGE COMPOSITION & COMM.* 122 (1977).

37. This Way of teaching has been developed for use with first year law students, most of whom have no more than a half-semester of legal education when initially faced with the Rule. See U.C.C. § 2-316 (1987).

6. PRACTICE, PRACTICE, PRACTICE.

Let me deal with each principle in detail.

BUILD TO THE RULE

Beginning with the first treatment of the division of property interests in time, be conscious of the Rule. Make sure that every conveyance you discuss is valid under the Rule. Student questions or hypotheticals will sometimes present violations of the Rule. Simply tell the students that the conveyance violates the Rule. Don't try to show them why. Explain to them what the conveyance would be if there were no Rule, then state what result the Rule produces.³⁸ This is, of course, perfectly consistent with the generally accepted approach to interpreting the Rule: Read the provision as if the Rule did not exist and then apply it.³⁹ In this connection you need to be careful with class gifts. They are probably the easiest to screw up when you aren't conscious of the Rule. I try to limit my class gift problems to fairly simple ones, and those with no Rule problems.⁴⁰

When we get to conditional interests—executory interests and contingent remainders—I try to get the students to focus on the determining event—the event that will cause the interest to become possessory. We usually call this the contingency—a birth, graduation, survivorship, reaching a given age. At this point, you may simply note in passing that some contingencies, in fact most of them, will become impossible if they haven't occurred by a certain time. I use the idea of “resolving” the uncertainty in describing this phenomenon. Don't dwell on this point; simply show it to them and save it for later development.

In teaching this material, I believe that the best way to spend classroom time is to have the students work through and discuss fairly complex problems. I have had most of my original lectures transcribed, and use them as the basic reading assignments, together with the text material from whatever casebook I am using. I have two types of problems. The first is simple and straightforward. The questions are essentially definitional and the operations that I want the students to perform with them are simple. These are confidence-builders as well as replications of the examples I used in the lectures. I ask students to do these problems, compare their answers

38. For instance, the student suggests a conveyance *O* to *A* for life, then to *B*'s first grandchild, *B* having none. You say, “There's a life estate, a contingent remainder for the grandchild and a reversion. But the contingent remainder is invalid under the Rule Against Perpetuities, so we just strike it. I'll explain later. Therefore, just a life estate in *A*, and a reversion in *O*.”

39. *Nutshell*, *supra* note 24, at 658.

40. I don't teach problems of closing classes in the first year course. The only classes I use are ones that, though subject to open, will close at death of any life tenant—e.g., to *A* for life, then to *A*'s children. Other classes will be contingent until the life tenant's death, then vest or fail completely—e.g., to *A* for life, then to my children then living. See L. SIMES, *FUTURE INTERESTS* § 632 (2d ed. 1956) for a discussion of class closing problems.

to the ones I provide on an answer sheet, and come to class prepared with any questions. There are few questions since the problems are simple and I explain the answers on the answer sheet. But there is always a little confusion to clear up.⁴¹

The second type of problem is more complex and designed to give even the quickest students some difficulty. Some problems allow reasonable disagreement over the identification, and hence the operation, of the interests.⁴² The problems are also longer. These I discuss in class, asking students first to respond, and then discussing how they reached their answers. I see if there is disagreement with their colleagues, and try to resolve or explain the disagreements. When I use these, I try to call on a lot of students, or I may survey the class with a question about the result they reached. This feedback makes sure that all of the class is on the same page. I want to get my students to the threshold of perpetuities without real problems. I am always worried if it seems that all of the students I call on are on track and have no problems. It may be deceptive. Because I teach this fairly early on in the first semester, I don't necessarily have any really good feeling for who are the quickest students.

I try to work my students through the full range of estates and future interests before I come to the Rule. I don't think this is unusual, but I can see some reasons for excluding the base (determinable) fees from consideration.⁴³

Then, having given my students some basis in the area of estates and future interests,⁴⁴ one bright morning I introduce them to the Rule Against Perpetuities.

KISS—KEEP IT SIMPLE, STUPID

In Building To The Rule, I have avoided class gifts that might eventually be a problem with the Rule. I try to adhere to this notion of simplicity throughout the unit on the Rule. There are a number of problems with the Rule that are fascinating to the average estate and gift tax, trust and estates,

41. Students today have such a wide variety of study guides, helps, programs, cards and the like that there is bound to be some disagreement in both terminology and doctrine, both among the aids and between you and your text and aids. In addition, mistakes more than occasionally creep into the various study guides. One might be able to build an entire test based on all of the mistakes found in various guides. But that would be wrong; at least, it wouldn't be very fair.

42. My approach is to teach the operational aspects of future interests. I generally leave interpretive questions to those who teach more advanced courses. But some questions of interpretation will always arise and some examples I use are deliberately ambiguous so that two interpretations and hence two sets of operations are possible. For example, I use a conveyance to "A for life, then to B or her heirs."

43. They can screw up the Rule, of which more later. See *infra* notes 63-66.

44. I have begun to use an in-class, noncounting pop quiz to test their grasp of the basics before going on to the Rule. I have the students mark the wrong answers and I then review the papers simply to see if there is any pattern to their mistakes; if there is, I can re-teach that area.

or real property teacher. For instance, how do you deal with classes that are open and have no members at the death of a life tenant? Does the combination of the rules of convenience and the purpose of the Rule make sense?⁴⁵ Can a court *cy pres* a private trust gift to conform to the rule and avoid invalidity?⁴⁶ And what about problems of options and leases to begin on completion? How far should we go in borrowing the period of the Rule as a basic test of reasonability in cases where restraints on alienation exist?⁴⁷

As fascinating and interesting as these are, they have a mind-numbing effect on students. I don't deal with double contingencies where one is good and one is bad. I defer consideration of the executory interest (if that is what it is) that will certainly vest, but only after a fixed time period.⁴⁸ I also put over the consideration of fees on an executory limitation, fees simple determinate, and fees on conditions subsequent. And I simply don't deal with the possible application of the Rule to options. I've simplified class gift problems.

Some complications are unavoidable. Sooner or later some student recognizes the problem of the child *en ventre sa mere*; at that point I explain how the Rule deals with that child.⁴⁹

This sounds very matter-of-fact, but it requires work. If you use outside materials, you have to edit them or list the parts students should not read. I have a carefully edited version of *Perpetuities in a Nutshell* placed on reserve. You also must become familiar with the various aids that your students may use so that you can tell them simply to ignore certain problems. Finally, you must work through all your own material so that no problems beyond the scope of your limited endeavor are presented.

45. *Nutshell*, *supra* note 24, at 648.

46. *Nutshell Revisited*, *supra* note 25, at 982-83.

47. See *Tombari v. Blankenship-Dixon Co.*, 19 Wash. App. 145, 574 P.2d 401 (1978) (Rule not applied because restraint of alienation held unreasonable on its face).

48. In my treatment of estates I explain that *O* to *A* in 20 years might be treated three ways:

- (1) Estate for years in *O*, vested remainder in *A*;
- (2) Fee simple absolute in *A*, subject to an estate for years in *O*; or
- (3) Fee on an executory limitation in *O*, executory interest in *A*.

When I reach this problem at the end of the perpetuities unit, I tell my students that I believe this is best treated as (1) but I recognize that (2) or (3) is more historically "correct." I also note that as long as the time is less than 21 years, or a life and 21 years, the classification doesn't much matter. But if the period is over the period of the Rule, a problem exists. I then don't refer to the problem again and don't test on it. As an aside, I submit that to the extent a fee on executory limitation construction limits *O*'s liability for waste, it may accurately reflect *O*'s intention, but I am not sure that it achieves that reduction. See L. SIMES, *HANDBOOK OF THE LAW OF FUTURE INTERESTS* § 12 (2d ed. 1966); *AMERICAN LAW OF PROPERTY* § 4.56 (1952); Makdisi, *The Vesting of Executory Interests*, 59 *TUL. L. REV.* 366 (1984) for a more complete discussion of this problem. See *infra* note 65.

49. If someone comes up with the child *en ventre sa frigidiaire*, I refer them to the appropriate article, Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Descendant*, 48 *A.B.A. J.* 942 (1962).

SHAKE HANDS WITH THE UNBORN WIDOW

Notwithstanding (how lawyers love to use that word) my earlier, perhaps slighting, mention of the unborn widow and her kin, she does serve a useful purpose; two useful purposes, in fact. First, she demonstrates a truly possible situation. The unborn widow, at least to those of us who may have heard of Peaches Browning, is not an absurd possibility.⁵⁰ Indeed, if she does turn out to exist, she can show how the Rule operates to create an early certainty. The fertile octogenarian and her child (who will undoubtedly turn out to be fecund infants)⁵¹ serve another purpose; they demonstrate how the Rule can operate in an untoward manner to defeat the reasonable expectations of a casual drafter.

These cute names help keep the students from getting too agitated. They also create certain kinds of categories of problems that students can identify. It's a lot harder to be worried about whether or not you understand a Rule when there are some funny ideas associated with it than when all you can think of is the picture of John Chipman Gray on the frontispiece.⁵²

In addition to the process of demystifying by labelling, it is important that the students get some sense of the Rule's currency. I believe that the best approach is to treat the Rule as a method of producing certainty. We can at least fairly demonstrate how some kinds of restraints and uncertainties are likely to place property out of the stream of commerce, and show that the important thing is to resolve the certainty at the earliest possible date while accommodating the reasonable needs of grantors to control the destiny of their property.⁵³

The final aspect of demystification is to give the students a simple step by step approach that they can use to find perpetuities problems, resolve them, and avoid them in drafting. This simple approach is what comes next.

THE METHOD⁵⁴

My method is not all that complicated, though it does involve the adoption of some vocabulary that must be credited to others and an approach that borrows in some ways from a variety of articles.

50. Edward West "Daddy" Browning was about 60 when he married 15-year-old Frances Belle Hennan ("Peaches") in 1926. See E. MORDDEN, *THAT JAZZ* 201-204 (1978). The formerly last surviving confederate widow had married a 75-year-old soldier when she was in her 20s. *Confederacy Widow is Mourned*, Tacoma Morning News Tribune, Oct. 17, 1990, at A-17. See also Waggoner, *In re Lautauf's Will and the Presumption of Lifetime Fertility in Perpetuity Law*, 20 SAN DIEGO L. REV. 763 (1983).

51. See *Atomic Age*, *supra* note 49, for a discussion of young mothers.

52. See Mechem, *Further Thoughts on Pennsylvania Perpetuities Legislation*, 107 U. PA. L. REV. 965, 967 (1959) for a criticism of Leach's "cute labels."

53. Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867, 1868 (1986).

54. Stanislavsky's "Method" was not a new style of acting; rather, it was intended as a codification of the way great actors achieved their success. See 11 *ENCYCLOPEDIA BRITANNICA*

I begin my discussion of the Rule by laying it out in phrases and discussing them one by one. On the blackboard it looks like this:

NO INTEREST
IS GOOD
UNLESS IT MUST VEST OR FAIL
WITHIN TWENTY-ONE YEARS OF SOME LIFE IN BEING
AT THE CREATION OF THE INTEREST.

I don't discuss these in order. I begin with what I regard as the easiest ideas. First, I point out that "no interest" refers only to unvested interests, because the rule depends upon vesting.⁵⁵ Then I skip to "at the creation of the interest." I tell the students that we will deal with wills, where the interest is created at death, and valid *inter vivos* transactions, where the interest is created on delivery, which occurs when we say it occurs.⁵⁶ Then we touch on "is good" and simply deal with the idea that when an interest is bad, it is struck.⁵⁷ I point out that "some Life in Being" is simply that, a life that is in being at the creation of the interest. Finally, I note we have at least talked about questions of vesting or failure, and we know that some interests will be finally resolved.

I then give a method of dealing with, if not solving, perpetuities problems.

1. Identify all the interests.
2. For contingent (uncertain, unvested) interests, identify and state the contingency.
3. If the contingency is a personal contingency, go to 4. If it is an administrative contingency, go to 5.

211 (1990) ("Stanislavsky Method"). My method is similarly a distillation of many ideas.

I claim no originality in my method. See *supra* note 13. The following articles, together with those listed in other notes, have contributed to my thinking. These are articles which I thought enough of to copy and retain:

Note, *Understanding the Measuring Life in the Rule Against Perpetuities*, 1974 WASH. U.L.Q. 265.

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

Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718 (1982).

Any article or text cited in any article I cite here or elsewhere is also a potential source of ideas as are those cited in them. Wilson Mizener is supposed to be the first to have said, "If you steal from one author, it's plagiarism; if you steal from many, it's research." Lindey, *Plagiarism and Originality* 204 (1952). But he probably got it from someone else. I did much research and would like to individualize credit, but I fear I cannot.

55. I save the problems of rights of entry/powers of termination and possibilities of reverter until later. I note they are historically not subject to the Rule, though logic and policy tell us they should be. See *infra* text accompanying note 63.

56. This eliminates trust problems, which we presently don't deal with when delivery can be said to occur in difficult cases.

57. As you will recall, my method eliminates the problems of alternative interests where one is bad, and invalid interests are followed by good interests. This means that there will be simply a striking of the bad interest, leaving those that remain as valid.

4. Find all the determining lives. Check to find a validating life. If you can't find a validating life, go to 5.

5. See if resolution of the contingency is certain within 21 years.

I realize that this is not a terribly complicated process for most law professors. But, for unusual law professors, or perhaps for students who want to know how we think, I'll go through it in a little more detail.

1. Identify the interests. This builds from our prior work and problems with the system of estates and future interests. I use a pigeonhole method of identifying interests and I work with the students to use a common vocabulary based on the *Restatement of Property*. At this point, you note that the Rule deals only with some interest that must vest if at all within a certain period. Thus, you can throw out any interest that is already vested. Any present interest is safe; any vested remainder is safe.⁵⁸ Tell your students that for reasons which make little sense historically and even less functionally, possibilities of reverter and rights of entry (powers of termination) are not subject to the common law Rule Against Perpetuities.⁵⁹ Put these over to the Cleanup Period.

2. For contingent interests, identify and state the contingency. Again this shouldn't be terribly complicated, especially since I have dismissed the double contingency problem, or at least laid it over to the second-year teachers. I suggest that there are, on one hand, what we might call personal contingencies—birth, death, life, identity, achievements of a particular person or one of a group—and on the other, what I continue to refer to as administrative contingencies—those unrelated to a particular individual or group—a Notre Dame victory in the Rose Bowl or a Whig's election as President.

With personal contingencies, it is possible to find a resolving or determining life. I have chosen to adopt the terms "determining life" (or "resolving life") and "validating life" instead of "life in being" and "measuring life." The term "measuring life" confuses students because they usually associate it within a life estate, and in a number of cases there may not be a life estate involved (clearly with executory interests) or the person whose life determines (or measures) simply has no interest. As to "life in being," there are simply too many lives in being in the real world for me to use that phrase to designate the life in being that validates an interest.

A "determining life" is a life that will remove the uncertainty involved in the contingency. Begin by figuring out what event will resolve the uncertainty.⁶⁰ Usually there will be alternatives—either the contingency will be met (or an identification will be made) or someone will die. If the contingency will be resolved before a certain person's death, or within

58. Partially vested remainders aren't dealt with. See *supra* note 40 and accompanying text.

59. *Nutshell*, *supra* note 24, at 664.

60. The most common types of personal contingencies and resolving lives can be easily

twenty-one years of that person's death, then you have a determining life. An easy example—I am a determining life for the birth of my first son. I am also a determining life for whether my son graduates from high school before he is 21. He is also a determining life for those events, but not a validating life because he is not yet born.

It is possible that there will be more than one determining life. This leads to the next step—seeing if any of the determining lives are validating lives. This brings us to the correct usage of “life in being.” If there is a determining life which is certainly a life in being, it is a validating life and the interest it determines is valid. When the determining lives are all identified individuals, this is pretty easy. The major problem that my students, at least, seem to have with this aspect of the Rule is the situation where the determining life is one of a group, and the group has members who are lives in being but to which unborn lives may be added. I think that the problem may have at least part of its roots in a psychological tendency to try to save the interest—that it, to make it valid—and this leads to the conclusion that a conveyance to “my first child to graduate from college” is valid. It will happen within the lifetime of a child and I have some children alive, so therefore the conveyance will be made certain during a life in being.

My suggestion in this regard is to demonstrate repeatedly why this situation is an invalid conveyance and then to explain again that you can't be certain that the first child to graduate will be one who is presently living.

This is probably a good point at which to re-emphasize the Rule's use of possibility and not probability.

As a final check on whether there are determining and validating lives, I give the students the atomic explosion method. One posits that everyone in the world has a child and then dies. Twenty-one years then pass. If the interest is still unvested but has not yet failed, it is invalid.⁶¹ There are

listed. This makes it easy for students to work through problems initially, and gives them examples that allow them to deal with other contingencies. “Person” refers to the individual who must reach the age, or achieve, or survive.

<u>Contingency</u>	<u>Determining Life/Lives</u>
Birth	Parents
Survivorship	Person
Reaching age 21	Person
Reaching age over 21	Those the person must survive
Achievement or status e.g. marriage, passing bar	Person to reach age 21
Death in certain statute	Person's parents
Widow/widower	Person
Having a child	Person
	Person's spouse
	Person

61. See Fletcher, *supra* note 9, at 797 and Fetter, *supra* note 16, at 390-91 for their expressions of this idea.

those for whom this is the basic metaphor for dealing with lives in being and the validity of the Rule. But I find that it is difficult to make this method work and, probably for that reason, difficult for my students to use it. I let them have the method, however, just as I encourage them to use a variety of materials in dealing with estates and future interests in the earlier stages. (I find that what works for some doesn't work for others; and even for those who get the idea right away, another perspective will be unlikely to be confusing and likely to give a better grasp.)

5. Finally, if there is no determining life, or if the determining lives are not lives in being, we are left with the gross period of the Rule.⁶² This is really an application of the atomic explosion method. If you can't find a determining life that validates the interest, we can be certain of the operation of the Rule only if the contingency will be resolved within 21 years, period. If so, it is certainly within 21 years of every life in being at the creation of the interest.

CLEANUP

The cleanup stage is a time for dealing with issues that you deferred early on. For instance, the historical anomaly of possibilities of reverter and rights of entry not being subject to the Rule is treated here. You demonstrate the different result between a fee simple determinable and a fee on an executory limitation at this point.⁶³ Another problem to be dealt with here is the executory interest on an event certain to happen. As we know, there is an argument available that a conveyance *O* to *B* in 20 years creates an executory interest in *B*.⁶⁴ There is no problem with the conveyance to *B* since the executory interest is certain to vest within 21 years and hence is valid. But if the time period exceeds 21 years, this gift to *B* can be seen as invalid.⁶⁵ There are ways to save the invalid interest. One is to view the gift over to *B* as the fee and define the grantor as retaining an estate for years in the second, or looking at the first in much the same way. Another way would be to view the interest in *B* as a vested remainder. This makes a certain amount of sense.⁶⁶ My point is simply to make sure students are aware of this potential problem.

62. I am aware of the suggestion that in fact there is no period of the Rule. But this is the best way I know of describing the situation when the administrative contingency must be resolved. Fletcher, *supra* note 9, at 806-07.

63. The traditional result is that "*O* to *A* for as long as a church, then to *B*" leaves *A* with a fee simple determinable and *O* with a possibility of reverter. "*O* to *A* but if not used as a church, then to *B*" leaves *A* with a fee simple absolute. See *Nutshell*, *supra* note 24, at 656. One problem with this, of course, is that the difference in result is not justifiable on any rational basis. Sometimes you get courts having to stretch doctrines or use alternatives to reach the result they want and which is rational. See, e.g., *Metropolitan Park District v. Unknown Heirs of Rigney*, 65 Wash. 2d 788, 399 P.2d 516 (1965).

64. See *supra* note 48.

65. *Nutshell*, *supra* note 24, at 648 n.26.

66. I suppose that there is some potential problem with the doctrine of waste under

Usually here, if not earlier, the *en ventre sa mere* problem is brought up.⁶⁷

PRACTICE, PRACTICE, PRACTICE
(OR, HOW DO YOU GET TO CARNEGIE HALL?)

One of my basic tenets in dealing with estates and future interests is drawn from my experiences in studying foreign languages. Much of what we deal with in this area involves new terms and of course new ideas. The terms can be well and truly understood only if there is a real grasp of the ideas, but on the other hand the ideas can be grasped only by understanding the terms. I sometimes wish that I could use some form of hypnopedia to get the terms into my students' heads.⁶⁸ I think that perhaps when I lectured at length that was what was going on.

When dealing with perpetuities, I lay out the problems along the lines of the method that I am trying to teach. It isn't profitable to give examples and ask if they are good or bad, at least not initially. I ask the students to identify the type of interests involved in each example, whether the interests are vested or contingent. For contingent interests, students then state the contingencies and identify determining life or lives. Finally, they see if the determining lives can validate the interests. We go through this entire process with all problems.

Finally, I test what I have taught. In my exams, some of the questions are fill-in-the-blanks where students are asked to identify the interest subject to the Rule, or the determining lives, or to tell me if certain people can be said to be lives in being. Some simply seek a determination of the validity of the interests.⁶⁹

This is obviously not the only Way to teach the Rule. Professor French refers to her father's methods.⁷⁰ I am sure there are methods that work better for others. My premise in writing this article is that teaching methods are as important in resolving the difficulties presented by the Rule as are reforms or attempts to explain it. I do not want to prescribe any method of teaching or of looking at the Rule. I present my Way of teaching in the

either view of the conveyance. The grantor may still view herself as having a fee and thus free to use and exploit the property as she will. This could be solved by reading the conveyance as creating the interest as I suggest but creating no liability for waste.

67. *Nutshell, supra* note 24, at 648. See *Atomic Age, supra* note 49 (discussing child *en ventre sa frigidaire*).

68. The problem is that you can't really understand the future interests until you've got the present estates down clearly. Yet only by having a firm grasp of the future estates will you really understand the present estates.

69. I try to test on all aspects of what I've taught. Thus I may tell students that all interests are good and ask them to identify the contingent interests and their validating lives. Another question gives five conveyances, tells them two have invalid interests and asks them to identify those interests.

70. French, *supra* note 13.

hope that it will stimulate discussion of teaching the Rule and teaching generally. I welcome comments, criticisms and comebacks of any sort.⁷¹

71. Professor John Weaver, University of Puget Sound School of Law, 950 Broadway Plaza, Tacoma, Washington 98402-4470, (206) 591-2222 or FAX (206) 591-6313.