2006

Ariadne's Thread: Leading Students into and out of the Labyrinth of the Rule against Perpetuities

Maureen E. Markey
Thomas Jefferson School of Law

ARIADNE'S THREAD: LEADING STUDENTS INTO AND OUT OF THE LABYRINTH OF THE RULE AGAINST PERPETUITIES

MAUREEN E. MARKEY[1]

[1]Professor of Law, Thomas Jefferson School of Law. I would like to extend my sincere gratitude to all the Property and Wills and Trusts teachers who responded to my letter. I also want to thank my colleagues, Steven Semeraro and Aaron Schwabach, and my former colleague, Colin Crawford, for their valuable comments on earlier drafts of this Article; and Lacynda Hill and Edward Miller for timely and excellent research assistance.

I. INTRODUCTION

Several years ago, I began this article as a search for something that I realized would be elusive. What I did not realize is that it would be impossible. I wanted to find a shortcut or a very simple, straightforward way of teaching the Rule Against Perpetuities (hereinafter RAP or Rule) to first-year Property students that would enable the students to understand the Rule and that would enable me to teach the Rule without consuming three weeks of class time when there are so many other important topics to cover in Property.[2] I had my own organized approach to teaching

[2]An email inquiry to the PropertyProf listserve by Maura Flood crystallizes this elusive quest: "Each time I cover future interests and the RAP in class, I think there must be an easier and better way to do it. I've discovered some things that help, but wonder if I'm missing anything that is particularly good at simplifying and clarifying this subject for students. Any suggestions?" Posting of Maura Flood, Associate Professor of Law, Gonzaga University School of Law, Mflood@lawschool.gonzaga.edu, to PropertyProf@lists.washlaw.edu (Dec. 3, 2002, 18:36:00 PST) (on file with author). Maura's question resulted in an extensive interchange of ideas and suggestions by a number of Property and Wills and Trusts teachers. Their responses confirmed what I had already discovered in my early research for this Article.

the Rule, which, over fifteen years of teaching it, has been refined every year. I think my technique works generally, but my frustration is with the amount of time it takes to enable students to understand the Rule.

Others teaching this difficult and arcane Rule share many of my observations and insights in various ways. Are we brilliant minds running along the same track, or does misery love company? I am not sure, but we do seem to encounter many of the same obstacles in attempting to enhance student understanding of what is perceived by many law students and lawyers as the most difficult thing they ever had to learn in law school.[3]

To begin the project, I sent a letter to every professor teaching Property and/or Wills and Trusts in the United States.[4] I solicited input on whether they taught the Rule, and what methods they used. I received many responses, many of them quite detailed, outlining various approaches for teaching the Rule. Many of these responses provided very useful information on techniques to help students understand the Rule and apply it, but none provided the elusive thread I was looking for: A shortcut that would achieve positive results in significantly less class time.[5]

There are lots of good ideas out there for how to teach this material effectively, but there is no alchemy that will render this very difficult, complicated material easy and quick.

[3]Alan Medlin recounted a humorous anecdote about the adoption of the Uniform Statutory Rule Against Perpetuities (USRAP) by the South Carolina General Assembly. He asked the Senator who sponsored the bill how he explained to his colleagues what it did. "The Senator, a very able and intelligent lawyer, told me he got on the floor, looked around the chamber, and said, 'Ladies and gentlemen, this is a good thing.' Whereupon, he sat down. The bill passed soon thereafter." E-mail from Alan Medlin, Professor of Law, University of South Carolina School of Law, to author (Feb. 25, 2003, 11:33:00 PST) (on file with author). This story illustrates the insurmountable task of explaining this concept simply to non-law trained individuals—which is what Property students are at the beginning of their first semester of law school, when the Rule Against Perpetuities is traditionally taught. Lucy McGough said she had the only anxiety attack she ever experienced when she shifted to Trusts and Estates and first taught the Rule—and at that time she had been a law professor for nearly ten years. She added that she has now taught it for almost twenty years and she loves it. E-mail from Lucy McGough, Professor of Law, Louisiana State Univeristy Law School, to author (Mar. 11, 2003, 12:19:00 PST) (on file with author).

[4]Unless otherwise indicated, the sources cited in this Article are from responses to my letter (via telephone, letter, and, mostly email). I am very grateful to all those who responded, especially to those who included detailed analyses of their techniques. I have endeavored to credit all ideas other than my own.

[5]Among the responses I received was advice to drop the article. First, because it has been done numerous times, beginning with W. Barton Leach. Second, because of dubiety about "articles having to do with teaching, which often do not qualify as scholarship." And third, because the Rule is on its way out. E-mail from Adam Hirsch, Professor of Law, Florida State University College of Law, to author (Feb. 25, 2003, 17:47:00 PST) (on file with author). It is true that a number of articles about the RAP have been done over the years, but I was unable to locate any article like the one I contemplated. I realize the second point is true at some schools, but there is substantial value in many pedagogical articles. I also suspect that some pedagogical articles may be more frequently read than many theoretical articles. Several respondents actually applauded the focus on teaching. E-mail from Lloyd T. Wilson, Associate Professor of Law, Indiana University School of Law, to author (June 15, 2002, 11:25:00 PST) (on file with author); e-mail from Jean Zorn, Professor of Law, CUNY School of Law, to author (Mar. 13, 2002, 18:12:00 PST) (on file with author). As far as the death of

Despite the universal response that there is no way to make this very arcane Rule simple, the responses provided a sufficiently wide variety of techniques and tools that various people use to teach the Rule that I thought it would be worthwhile to collate that material into an article describing the various approaches and techniques.

This Article focuses partly on my own approach to teaching the Rule Against Perpetuities, but it addresses the approaches of others based on the survey responses. Although I have developed a method that works fairly well for my classes, I am always open to suggestions from others for modifying and improving that approach. Of course, a single method, no matter how good it appears to be, will not work for everyone. Therefore, I have incorporated a number of approaches into this Article so that those wanting to develop or improve their teaching of the Rule can pick and choose among the various approaches to find whatever combination works best for them.

Teachers of Property (and Trusts) confront a difficult decision whether to include coverage of RAP.[6] RAP is "undoubtedly one of the most difficult and despised elements of the first-year property course"; apparently this is universally true for law school students in the United States and England.[7] One source of the frustration for teachers is that teaching the common law Rule properly requires a substantial commitment of class time, perhaps more than the Rule's importance warrants.[8]

---

the Rule, this may be more wishful thinking than fact. Although there have been reforms in the Rule and several states have abolished it, it seems to be alive and well in some form in most states. *See infra* notes 12-13 and accompanying text. As my colleague, Steven Semeraro, observed, the death of the other special rules in the courts has not led to their death in the classroom or on the bar exam, so it is doubtful the common-law RAP is going anywhere anytime soon. E-mail from Steren Semeraro, Associate Dean and Professor of Law, Thomas Jefferson School of Law, to author (Feb. 26, 2006, 14:13:00 PST) (on file with author) [hereinafter Semeraro email 1].

[6]Roger Andersen's response to Maura Flood's inquiry, *see supra* note 2, was that he had struggled with how much of future interests to teach in both Property and Wills and Trusts. Posting of Roger W. Andersen, Professor of Law, The University of Toledo College of Law, RAnders3@UTNNet.UToledo.Edu, to PropertyProf@lists.washlaw.edu (Dec. 4, 2002, 13:24:00 PST) (on file with author). He had for several years covered the basic estates in Property but had ignored the RAP, largely on the rationale that you can teach only part of it anyway, since "getting into class closing rules is more than most of us want to do and powers of appointment are way out on the fringe for a first year course." *Id.* Lately, he has gone back to teaching the common-law RAP, an approach that "gives Property students some sense of closure on the topic and T&E students some background for when we cover the whole show." *Id.*

[7]Daniel Bogart, *Rule Against Perpetuities Handout*, e-mail from Daniel B. Bogart, Professor of Law, Chapman Univeristy School of Law, to author (Sept. 18, 2002, 12:21:00 PST) (on file with author). Even the names of the articles about the RAP suggest fear and dread. *See, e.g.*, Angela Vallario, *Death by a Thousand Cuts: The Rule Against Perpetuities*, 25 NOTRE DAME J. LEGIS. 141 (1999); John Weaver, *Fear and Loathing in Perpetuities*, 48 WASH. & LEE L. REV. 1393 (1991).

[8]"The basic idea it is to get in and out of RAP quickly." Telephone Interview with David Crump, Professor of Law, University of Houston Law Center in Houston, Tex. (June 20, 2002). This is great advice, but the prevailing question is: How? "It's not central, so get on to more productive stuff, but I think the students ought to learn it." *Id.* This of course states the problem succinctly, but does not provide that elusive "quick in and out" solution.

There simply is no quick, easy way to enable students to understand this complicated Rule. Furthermore, even when it is taught properly, there are some students who will never get it. Although coverage of the common law Rule would be included in any definition of a "traditional" Property curriculum, contemporary Property teachers respond to the dilemma in a number of ways. These range from not teaching the common law Rule at all[9] to extensive coverage,[10] and many variations in between.[11] The responses evidence some tendency to the extremes: Avoid teaching RAP completely, or dive in head first with way too much detail for first-year students to handle.

II. TEACHING THE RULE AGAINST PERPETUITIES

A. Justification

Although it appears at first blush that modern reforms might render the common law Rule irrelevant and unnecessary, quite the opposite is true. During the last fifty years most states have reformed the common law Rule to enable conveyancers to avoid the myriad traps for the unwary for which the common law Rule has been justly famous. The majority of the alternatives to common law RAP now used in various states, however, still retain some version of the Rule in its common law

---

[9]The justifications for not teaching the Rule are varied. *See infra* Part VII.

[10]Full coverage includes all of the following: all of the background material in the estates and future interests area, a thorough understanding of which is essential to an understanding of the Rule; the common law Rule; and modern reforms of the Rule.

[11]Some teach just the policy without the mechanics, some the mechanics without much policy, and some teach both. Daniel Bogart has "come to the conclusion that the RAP is best presented in an almost mechanical manner." Bogart e-mail, *supra* note 7. Some teach the Rule as a contemporary drafting problem, including the use of a savings clause. Ira Bloom stresses the importance of using a savings clause. E-mail from Ira Bloom, Professor of Law, Albany Law School Union University, to author (Mar. 11, 2003, 12:48:00 PST) (on file with author). But Roger Andersen emphasizes the danger of feeling safe with a savings clause. E-mail from Roger Andersen, Professor of Law, The University of Toledo College of Law, to author (Aug. 19, 2002, 11:09:00 PST) (on file with author) [hereinafter Anderson email 1]. In his three-unit Wills and Trusts course, Edward Henneman does not do a great deal with future interests other than powers of appointment, and then only to explain where the Rule has been and that problems can be avoided easily by drafting savings clauses. E-mail from Edward Henneman, Associate Professor of Law, Washington and Lee University School of Law, to author (June 27, 2002, 08:15:00 PST) (on file with author).

Jeffrey Pennell, Harvey Feldman, and Howard Erlanger focus on avoiding RAP violations by careful drafting and client counseling, including the use of a savings clause. E-mail from Jeffrey Pennell, Professor of Law, Emory School of Law, to author (Mar. 9, 2003, 04:08:00 PST) (on file with author); e-mail from Harvey Feldman, Associate Dean, The Pennsylvania State University Dickinson, School of Law, to author (July 3, 2002, 05:39:00 PST) (on file with author); e-mail from Howard Erlanger, Professor of Law, Unviersity of Wisconsin Law School, to author (Mar. 9, 2003, 09:33:00 PST (on file with author). This approach to teaching the RAP as a planning problem rather than an intellectual puzzle or a litigation issue avoids some of the complications usually associated with measuring lives, lives in being, validating lives, etc., but Roger Andersen's point about over-reliance on a savings clause to avoid having to really understand the Rule is well-taken.

form.[12] That is, if the common law test is satisfied, the interest survives. The newer approaches operate to reform only those interests that violate the common-law test. Therefore, to apply modern statutory forms of wait and see, it is clear that the ability to apply the common law test remains relevant. It is necessary to understand *both* the traditional common law approach to RAP and the modern version. Although modern reforms may save many practitioners from malpractice, from the teacher's perspective, the uniform Rule and other reforms have made the task much more complex. Because the uniform Rule gives conveyancers a choice of whether to apply the traditional or the new Rule, now students—and practitioners—must understand both.[13]

Because the Rule is difficult and time consuming to teach, there is a temptation to dispense with it altogether. Even those students who like Property generally tend to dislike having to learn the Rule. If you spend the substantial amount of time to cover the Rule in the depth required for even rudimentary comprehension, and students still

---

[12]Although there are only a few states that still follow the pure common law Rule, *cy pres* and USRAP states often incorporate common-law analysis. Note, *Understanding the Measuring Life in the Rule Against Perpetuities*, 1974 WASH. U.L.Q. 265 (1974); Carolyn Burgess Featheringill, *Understanding the Rule Against Perpetuities: A Step-By-Step Approach*, 13 CUMB. L. REV 161, 162 (1982). For example, some jurisdictions have adopted a common-law approach to wait and see, rather than simply adopting a fixed period of time such as sixty or ninety years. The Uniform Statutory Rule Against Perpetuities (USRAP), adopted by many states, creates a *choice* for conveyancers between the common law and a ninety-year wait-and-see approach. In other words, you must be able to ascertain whether a clause violates the common-law Rule before you can take advantage of the alternative provision.

[13]This is a point made by several respondents, including Steve Semeraro, Semeraro email 1, *supra* note 5, e-mails from Steven Semeraro, Associate Dean and Professor of Law, Thomas Jefferson School of Law, to author (Mar. 1, 2003, 15:18:00 PST) (on file with author), [hereinafter Semeraro e-mail 2]; David Thomas, Letter from David A. Thomas, Professor of Law, J. Reuben Clark Law School, Bringham Young University, to author (July 16, 2002) (on file with author), e-mail from Colin Crawford, Associate Professor of Law, Georgia State University College of Law, to author (Mar. 1, 2003, 8:42:00 PST) (on file with Author), Diane Klein, e-mail from Diane J. Klein, Assistant Professor of Law, Thurgood Marshall School of Law, Texas Southern University, to author (Apr. 5, 2003, 19:18:00 PST) (on file with author), and Nicholas White, letter from Nicholas L. White, Professor Emeritus, Cecil C. Humphreys School of Law Univeristy of Memphis, to author (July 17, 2002) (on file with author). In his article, *If You Think You No Longer Need to Know Anything About the Rule Against Perpetuities, Then Read This*, 74 WASH. U. L. Q. 713 (1996), David Becker makes a good argument, based on practical, practice-oriented considerations, for the advantages to lawyers (and students) of understanding the common-law Rule. Most wait-and-see provisions neither completely abandon the common-law Rule nor provide retroactive application of the wait-and-see provision. Some wait-and-see statutes are directly tied to the common-law time period of life in being plus twenty-one years, and USRAP allows ninety years *or* the common-law validation. Rather than relying on the prolonged uncertainty of a wait and see statute, lawyers are better advised to practice "preventive perpetuities compliance," so an interest can be immediately validated under the common-law Rule. Despite *Lucas vs. Hamm*, it is also the "professionally responsible way to practice law." *Id.* at 719. Because gifts to the grandchildren of a living person with conditions regarding age and survivorship are very popular, lawyers frequently end up drafting problematic RAP provisions. Attractive to clients because of the elasticity and flexibility they provide to admit or reject members in the future, open class gifts "reflect the natural dispositive proclivities of clients." *Id.* at 726.

do not understand it, your teaching evaluations are likely to reflect their frustration. As Pat Randolph observes, at some schools

> the pressure for spoon feeding is immense. Some faculty, despairing of ever reaching the bottom end of the class, forsake everything else to lead that group through the material. The problem is that this establishes a standard by which all faculty are measured. Making students happy in this way may prevent tenure problems, but [it] won't equip those students to deal with courts, employers, or even clients in the real world . . .. It is unfair to the students to try to make everything 'fun.' Some material is difficult to master, and that's just the way it is.[14]

Investing in the time and hard work it takes (yours and theirs) to ensure your students understand the Rule Against Perpetuities may not guarantee student happiness or the highest teaching evaluations, but it will enhance the probability of turning out skilled practitioners who know how to handle the thorniest legal challenges.

One of the justifications for not teaching the Rule in the Property course is that unless students intend to pursue a probate and estate planning practice, they do not need to know the Rule. Some recent developments may have weakened that reasoning. The long-held perception, and apparently what was being told to students by many bar review courses several years ago, was that RAP was tested in only a few MBE[15] questions and was not worth worrying about.[16] In 1999, the California Bar Exam sent shock waves through the state, Property teachers, and certainly the students taking the exam when it included a performance section[17] that was based entirely on the Rule Against Perpetuities. Although the problem involved a statutory version of RAP, it would have been impossible to work through the problem without some understanding of the common law Rule as well. Although RAP is traditionally thought of as an estate planning issue, the few contemporary cases that deal with the

---

[14]Posting of Patrick Randolph, Professor of Law, University of Missouri-Kansas City School of Law, randolphp@umkc.edu, to PropertyProf@lists.washlaw.edu (Dec. 4, 2002, 06:43:00 PST). Professor Randolph added, "No, I don't get the highest evaluations on the faculty, and, yes, I wish I did. But some things are more important." *Id.* Of course, what Pat Randolph addresses is not a problem only with teaching future interests, but with teaching in general. There is some indication that his comments were right on target, as he received a number of responses agreeing with his observations on teaching.

[15]Multistate Bar Examination, the multiple-choice section of most state bar exams.

[16]A former colleague, Colin Crawford, warned students about following some commercial bar exam prep courses that advise applicants that RAP does not merit their study because it is very rarely tested. "Thousands of California applicants ended up regretting this advice when question B on the performance exam for the July 1999 California Bar Exam included a RAP issue." Colin Crawford, *Real Property Law*, in THOMAS JEFFERSON SCHOOL OF LAW BAR EXAMINATION HANDBOOK 124, 129 (Spring 2005). This is but one of the traps for the unwary on the bar exam—possibly the only place most students who do not pursue a probate and estate planning practice will encounter RAP.

[17]California has a three-day Bar Exam, consisting of essay questions, MBE questions, and a full day performance component, where students are given a legal problem to solve by use of a closed library of materials.

Rule have arisen in connection with real estate options,[18] a business rather than an estate planning context.

It is decidedly unwise to think one can fail to learn the intricacies of the Rule and then rely on the likes of *Lucas v. Hamm*[19] for salvation from malpractice. Thirty years ago, the California Supreme Court, in *Lucas*, decided that because the Rule is so arcane and complicated, it was not malpractice for an attorney to violate it. Never has a decision been so thoroughly ridiculed and criticized. Not surprising, because probably nowhere else has a court actually decided it was not malpractice for an attorney not to know the law! *Lucas* is simply unsupportable. It is widely believed that if the same issue was presented to the Court today, it would be decided differently and *Lucas* would be overruled. Students, however, love the case.[20]

B. Teacher Attitudes

Of those who teach the Rule Against Perpetuities, some common attitudes and perceptions prevail.

1. Time-consuming

Some approaches to teaching the Rule may be clearer than others, but it seems there is no quick way. If you want the students to understand the Rule and to be able to solve even basic problems that involve the Rule, you simply have to take the time. Mark Fenster, relatively new in the profession, related a typical experience of frustration in teaching the Rule for the first time. He took on the idea of teaching the Rule with hesitancy, and a desire to move through it fairly quickly. He struggled with his students, spending two and one-half days until they had an understanding of even the most basic problems. He thought they would grasp the basics and some complexities but found in the end the basics were pretty much all he could hope for. He abandoned trying to teach both the common law and statutory reforms for want of time.[21]

Professor Fenster's expectations and the reality are fairly commonplace for anyone teaching the Rule for the first time. Because of the Rule's complexity, we approach it with hesitancy; and because of the Rule's relative importance in the vast array of property topics, we wish to cover it quickly. The hesitancy is appropriate, as this Rule is one of the most challenging topics to teach in Property or any other subject. The desire to cover it quickly is universally frustrated. As reported by most

---

[18]*See* Symphony Space, Inc. v. Pergola Properties, Inc., 669 N.E.2d 799 (N.Y. 1996).

[19]Lucas v. Hamm, 364 P.2d 685 (Cal. 1961). Diane Klein said someone in the class has usually heard of the *Lucas* case. To counterbalance any false sense of security, she reminds them not to take refuge in that. Klein e-mail, *supra* note 13.

[20]Michelle Travis does not teach Property, but the Rule came up in her Torts class under professional malpractice because one of the note cases is *Lucas*. She called *Lucas* "a wonderful note case that students absolutely adore"; her students have actually applauded when they cover the note case in class. E-mail from Michelle Travis, Assistant Professor of Law, Lewis & Clark Law School, to author (Mar. 13, 2002, 17:39:00 PST) (on file with author). Adore it they might; just do not let them rely on it as an excuse for not understanding the Rule Against Perpetuities.

[21]E-mail from Mark Fenster, Associate Professor, Levin College of Law, University of Florida, to author (Aug. 7, 2002, 12:20:00 PST) (on file with author).

of the experienced teachers who still teach the Rule, it simply takes a lot of time.[22] The not very satisfactory solution to this dilemma is to resign oneself to the time commitment or to skip any treatment of the Rule that will result in real student understanding and the ability to apply it.

2. No Magic Bullets

Because Gray's statement of the Rule is formulaic and because application of the Rule begins with a formula (lives in being plus twenty-one), students tend to think the entire process is formulaic. Students need to understand that there is no magic formula to solving perpetuities problems.[23] Even though the Rule can be *stated* in a formulaic fashion, the resolution of any problem under the Rule can never be

[22]Roger Andersen spends about six hours in Trusts and Estates on the RAP. He is not sure it is worth the time, but he has tried doing less and the students just don't get it. Andersen e-mail 1, *supra* note 11. John Mixon spends about three weeks on the subject and thinks that students end up with a pretty good technical understanding of future interests and the Rule. E-mail from John Mixon, Professor of Law, University of Houston Law Center, to author (Aug. 19, 2002, 11:46:00 PST) (on file with author). According to Rob Natelson, it takes two to four weeks for students to understand the Rule, depending upon the cleverness of the students. If student predictors are not high, it is more like four weeks, which hardly seems worth the time. But at some schools it is closer to two weeks. E-mail from Rob Natelson, Professor of Law, University of Montana School of Law, to author (July 1, 2002, 07:22:20 PST) (on file with author). Ira Shafiroff takes about three class sessions of ninety minutes each. E-mail from Ira L. Shafiroff, Professor of Law, Southwestern University School of Law, to author (July 8, 2002, 13:00:00 PST) (on file with author).

[23]If there was one, I think someone among us would have discovered it by now. Joseph Singer said there are no real tricks, just a technique in his casebook that explains the Rule and then gives twelve examples and explains how the Rule applies in those cases. E-mail from Joseph Singer, Professor of Law, Harvard Law School, to author (July 15, 2002, 13:23:00 PST) (on file with author); *See* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES (3d ed. 2002). Stephen Munzer feared his reply would disappoint me. He has taught the basic Property course for more than two decades, and he has not discovered "any shortcuts or special techniques that simplify the Rule or make it notably acceptable or comprehensible to today's students." Letter from Stephen R. Munzer, Professor of Law, Univeristy of California, Los Angeles, to author (June 24, 2002) (on file with author). Thomas Reed's response was typical: There is "no magic bullet to make estates in land and future interests simple and easy," so one must rely on drill with continuous heavy use of problems and examples. E-mail from Thomas Reed, Professor of Law, Widener University School of Law, to author (June 11, 2002, 05:58:00 PST) (on file with author). Robert Flores sent a detailed class handout with a set of very precise steps that students must follow to identify and solve RAP problems—but he expressed skepticism that I would find a shortcut or "formula for miraculous success." He said to let him know if I did. E-mail from Robert Flores, Professor of Law, University of Utah College of Law, to author (June 19, 2002, 15:47:00 PST) (on file with author). James Jones goes through the material in the Dobris and Sterk casebook slowly, and the students say they understand what they didn't understand in Property. He wonders if it's anything special he did or just that if they hear something twice it makes more sense the second time around. E-mail from James T.R. Jones, Professor of Law, Louis D. Brandeis School of Law, University of Louisville, to author (Feb. 25, 2003, 14:23:00 PST) (on file with author); *See* JOEL C. DOBRIS, STEWART E. STERK, & MELANIE B. LESLIE, ESTATES AND TRUSTS (2d ed. 2002). I am sure that hearing it twice contributes to students' increased comprehension. In addition, by their third year (when most students are taking Wills and Trusts), they are undoubtedly more sophisticated legal thinkers.

formulaic. It requires reasoning at a fairly complex, sophisticated, and sustained level. I explain to my students it requires focusing concentration that, if it is lost for even a second, can force you to start all over again. I analogize it to the juggler who is trying to keep five balls in the air at once. If the juggler loses concentration for a split-second, everything comes crashing down and she must start over. Keeping track of everything that one needs to in resolving a perpetuities problem, all at the same time, requires a similar level of concentration.

3. Student Difficulty

To avoid despair on the part of conscientious students, I always warn my students before we cover the Rule that this will likely be the most difficult concept they will encounter in law school—but, like countless generations of law students before them, they will somehow get through it. I tell them if they went to a street corner in downtown San Diego and interviewed twenty-five lawyers, asking them what was the most difficult thing they had to learn in law school, twenty-three would say, "The Rule Against Perpetuities." For the other two, if you then said, "What about the Rule Against Perpetuities?" they would probably respond, "Oh yes, you're right; I forgot about the Rule Against Perpetuities!"[24] To avoid dropping out for two or three weeks by the less conscientious students, I always wait until *after* we have covered the Rule to explain its relative importance in the panoply of property topics and concepts. If you teach the Rule, it is wise to admit that you will probably never reach everyone in the class.[25] If you do not teach the Rule, the fact that too many students find it not just difficult, but impossible, is likely one of the justifications.[26]

---

[24]"[I]t's part of the law school mystique. Every student comes to Property I filled with anticipation, if not outright dread, of the Rule. It's the one thing that they will have heard about before they take the class, or even start law school. Think how many students have told you that their boss/parent/spouse or other attorney of their acquaintance has said 'Oh, you're taking Property... that means you'll have to face the Rule Against Perpetuities!'" E-mail from Aaron Schwabach, Professor of Law, Thomas Jefferson School of Law, to author (Sept. 2, 2004, 23:19:00 PST) (on file with author).

[25]There are some students who cannot even figure out that all of the testator's children will be living when the testator dies. E-mail from Martin Fried, Professor of Law, Syracuse University College of Law, to author (June 24, 2002, 07:39:00 PST) (on file with author). This is a more realistic than negative view of students' understanding of and difficulty with these concepts. For Thomas Reed, RAP, estates in land, and future interests "have always been the downfall of both [Property and Wills and Trusts] courses [because] the students . . . have a terrible time with the conceptual relationships and operations." Reed e-mail, *supra* note 23. According to David Thomas, no matter what you do, "in the end, however, always some get it and some don't." Letter from David A. Thomas, Professor of Law, Brigham Young University Law School, to author (July 16, 2002) (on file with author). Timothy Jost uses PowerPoint slides to lay out the Rule and lots of problems, and then posts the PowerPoint slides and answers on the Web site after class so students can review. Despite this effort, "[u]nfortunately, none of this seems to work well; they remain bewildered." E-mail from Timothy Jost, Professor of Law, Washington and Lee University School of Law, to author (June 25, 2002, 06:47:00 PST) (on file with author).

[26]*See infra* Part VII discussing the reasons some teachers choose not to teach the Rule.

4. Step-by-step Method Essential

There are many different variations on the exact steps and the order, but everyone agrees there must be some structured, step-by-step approach that is repeated and reinforced with every example and problem the students encounter.

5. Problem Method: Drill, Repetition, and Exercises

Everyone makes extensive use of problems to teach RAP, with many excluding the use of cases entirely. Although rote memorization and repetitive exercises are usually denounced as ineffective tools for learning the law, they have their place in learning to solve RAP problems.[27]

6. Humility: An Appropriate Pedagogical Virtue

Although law professors are not generally known for their humility, that virtue is appropriate and prevalent among Property teachers who attempt, with varying degrees of success, to teach the Rule Against Perpetuities.[28] Understandably, those new to teaching it are often fearful of it.[29] But teaching RAP tends to be a humbling experience, at one time or another, for most of us.[30] No matter what method one

---

[27]"Rote memorization, for all the bad odor it has come into, is sometimes appropriate, and this is a good example." Natelson e-mail, *supra* note 22.

[28]In teaching the Rule, modest expectations are probably realistic. Harvey Feldman does not try to get students to master the Rule. Instead, he focuses on the Rule's "arithmetical ruthlessness," so students develop an appreciation of the Rule's rigidity, and avoidance of violations by sensible drafting and client counseling. Feldman e-mail, *supra* note 11. Diane Klein encourages students to use outside supplements because students need to "find someone who speaks their language" and she cannot be that for everyone, no matter how creative she tries to be. Klein e-mail, *supra* note 13. Stewart Sterk says, "There are some students that I never reach, but I think that would be true no matter what method I used." E-mail from Stewart Sterk, Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva Univeristy, to author (June 24, 2002, 12:14:00 PST) (on file with author).

Pat Randolph notes that his second semester evaluations are always higher than his first semester evaluations. The students comment that he "must have read their first semester evaluations and made changes. That's not true; they just start to catch on." Randolph posting, *supra* note 14. The latter point is consistently true. The students think you have changed, when it is they who have changed. For the ultimate success, he says that if the students trust you to be a serious professional who cares about their learning, then they will follow you further. At the end of two semesters with the students, he is comfortable that those who followed have learned. He admitted he would be lying if he said that he hooked them all, but he feels he managed to help most of them. *Id.*

[29]There were many expressions of distinct discomfort with the Rule and the difficulty of teaching it, particularly from those who were new to teaching or had taught the Rule only a few times. Roberta Mann said she taught it for three years and never felt really comfortable with it, but she gave it only cursory coverage. E-mail from Roberta Mann, Associate Professor of Law, Widener University School of Law, to author (July 26, 2002, 11:47:00 PST) (on file with author).

[30]Of the many responses I received, only one indicated that teaching the Rule was not a problem because his students had little difficulty. Because that response is so atypical, I am inclined to think it says more about the teacher's self-perception than it does about the actual difficulty the students encounter.

uses, some students simply never get it. Even experienced teachers acknowledge the difficulty of the Rule and emphasize the importance of a thorough knowledge of the estates system in order to answer student questions with assurance.[31] Fielding perpetuities questions from a class also requires the same focused concentration that students need in solving perpetuities problems. But some who have taught the Rule for years actually have learned to enjoy it.[32]

III. BACKGROUND

A. Historical and Theoretical Context Before Covering the Rule

For the Rule to make any sense when students first encounter it, it is important to create a historical and pragmatic context long before you get to RAP, then review it in connection with RAP. Most of us who teach this material believe strongly in the importance of enabling students to see the relevance of what they are studying. Students are more willing to learn the material and it is more easily learned if they can see the big picture, the context in which these rules become important and the very pragmatic policies underlying what sometimes appear to be nonsensical or incomprehensible rules.[33] It is not effective to start talking about the history,

---

[31]Calvin Massey encourages students to posit variations on the hypotheticals he uses, but he warns, "[t]o do this effectively, you must know future interests 'cold' and be able to think quickly as students throw you an unexpected wrinkle." E-mail from Calvin Massey, Professor of Law, Hastings College of Law, University of California, to author (Feb. 28, 2003, 08:00:00 PST) (on file with author). I have found that students really like this interactive, somewhat informal approach, but you really do have to be completely comfortable with your own understanding of the material.

[32]Those who teach it year after year become more comfortable with their own understanding, and, ultimately, with their ability to teach it. But it never becomes easy. Alice Kaswan has come to enjoy teaching the Rule. She has no shortcuts; she just spends the time that it takes, which is "much more rewarding than spending too little time for them to understand." E-mail from Alice Kaswan, Professor of Law, University of San Francisco School of Law, to author (June 10, 2002, 06:53:00 PST) (on file with author). After nearly twenty years of teaching the Rule, Lucy McGough loves it. McGough e-mail, *supra* note 3. After fifteen years of teaching it, I cannot say I love it. I am, however, comfortable with it and more or less willing to spend the time it takes.

[33]Allan Axelrod finds that developing the policy premise behind the Rule is the most important part of teaching the Rule. E-mail from Allan Axelrod, Professor of Law Emeritus, Rutgers School of Law Newark, Rutgers University, to author (June 27, 2002, 07:08:00 PST) (on file with author). He appropriates the caution that "perpetuities fight against God" from the *Duke of Norfolk's Case*, 22 Eng. Rep. 931 (1681), to make the argument against dead-hand control:

> A person is a fool who thinks he can today decide to give property to A and at the same time thinks that the world will be necessarily improved if he specifies today circumstances under which many years after his death the property ought to be turned over to B, a presently non-existing person conjured up out of his imagination—and there is no reason for the future society to honor the instruction.

Axelrod e-mail, *supra*. Ira Bloom also thinks "the overriding perspective should be on policy." Bloom e-mail, *supra* note 11.

Pat Randolph focuses on theory and history and skips most of the cases. He uses this material to introduce students to the historical origins that underlie many modern legal relationships. The sense of historical derivation gives the students insight into why we do

purpose, policy, and relevance when one first encounters RAP. A basic understanding of the relevance of all the rules in regard to estates in land and future interests must have been achieved a significant time before. Throughout estates in land (actually, throughout Property), I repeatedly emphasize the overarching theme of the historical tension between wealthy landowners, who want to keep the property in the family forever,[34] and the government[35] that wants to keep the property alienable.[36] We discuss the government's focus on alienability of land and why that

---

things "this way" rather than "that way." Randolph posting, *supra* note 14. His students also must work out the basic problems so they have the opportunity to appreciate the need for discipline in language. At the same time, he tries to show the students that courts often "fudge" on the discipline to reach certain results. *Id.* This leads to a discussion of when this is legitimate and when not. As they move through the other materials in the course, he reminds them when situations come up in which the RAP might be a problem, such as options. The last point is probably what "rescues" him with the students. *Id.* It makes students realize that the concepts are not just puzzles for exams, but actually have application in real law practice. *Id*. The sooner the students begin to see the web of related legal concepts, rather than isolated, monolithic legal principles, the more the law will make sense to them and the easier it will be to learn it.

For Michael Newsom, it is really important to get students to focus on the difficult policy issues that the Rule straddles, even though it does so in a clumsy manner. E-mail from Michael Newsom, Associate Dean for Academic Affairs and Professor of Law, Howard University School of Law, to author (June 27, 2002, 4:32:00 PST) (on file with author). The students must understand *why* the law cares about contingencies. In a unique approach to placing the Rule in context, he teases out three analytical categories: form vs. function, family and personal relationships, and institutional competence. *Id.* This approach is very focused on jurisprudential considerations, including the place of narrative. His is an interesting approach but it seems incredibly complicated, particularly for Property students. It may work better with Trusts students who are in their third year of law school. He admits his students probably do not get all of this: "This is tough stuff, analyzing law essentially as a problem of narrative or the legitimacy of narratives or the clash of narratives." *Id.* But he wants them to think of the Rule as a problem of narrative, so he keeps hacking away at it. In his first year Property course, "a mishmash of this and that," he has given up trying to make any sense of the materials he teaches except that he crunches form and function and takes a pass at institutional competence. *Id.* He uses the first year course as a way to begin the discussion about narratives and the problem of narratives. He cannot teach the Rule in isolation and expect his students to get anything out of it. He has to put it in context and generate some questions that will "make the Rule come alive, not in some technical, draftsman sense, but in the sense of one who gets to decide what the law perhaps should be." *Id.*

[34]Characterized as dead-hand control or freedom of testation, depending on your perspective.

[35]The Courts, the Parliament, the Congress, the Legislature, or the Crown; it depends upon the time and the jurisdiction.

[36]I am far from alone in this approach. John Martinez's class handout begins with a short introduction setting forth the theoretical underpinnings: freedom of testation, the countervailing policy that RAP represents, and the limits on the policy that are the exceptions to the Rule (charitable trusts, future interest in the grantor, etc.). E-mail from John Martinez, Professor of Law, S.J. Quinney College of Law, University of Utah, to author (June 30, 2002, 16:15:00 PST) (on file with author). Even teachers who do not cover the Rule in depth focus on this central theme in the development of Property law. Diana Sclar simply informs students of the existence of the Rule and of the recent state statutes abolishing or modifying the Rule. E-mail from Diana Sclar, Associate Professor of Law, The School of Law-Newark,

is important, why it fits into a larger picture of a functioning economy. Not just the real estate aspect, but the fact that the entire economy is based on a lively and open real estate market in a capitalist society. We explore the essential connection between alienability of land and the problem of uncertainty and how uncertainty can hinder alienability.

Thus, by the time we get to the Rule Against Perpetuities, this should be a familiar theme. From the outset, students can see the relevance of the Rule, with its emphasis on avoiding future interests that remain uncertain for too long a period of time. We approach RAP as a necessary attempt to balance the competing and equally legitimate goals of the landowners and the government in the struggle for decisionmaking power in regard to land. The compromise the Rule represents allows *some* uncertainty in regard to time, but no more remote than lives in being plus twenty-one years, which of course is the RAP "formula." The Rule will still be difficult for them to understand and apply, but they are less likely to see it as utterly insane. This approach is also useful in convincing the students that with the Rule, we do not care whether an interest vests or fails. What we care about is whether the interest remains uncertain for too long. The students must come to understand the undesirability of *uncertainty* in the law, especially in regard to property interests.[37] Although individuals may care a great deal, society does not care whether individual interests vest or fail, but it does care a great deal about *uncertainty*. And the Rule Against Perpetuities is directed at *uncertainty*, not necessarily at vesting (or failing). Interests that fail and fail quickly do not affect alienability. Those that remain uncertain for too long, even if they might eventually vest,[38] do affect alienability.

Rutgers University, to author (June 27, 2002, 08:15:00 PST) (on file with author). But one of her themes in teaching Property is the

> 'perpetual' efforts by owners to pass wealth at death, inevitably followed by various statutes adopted by Parliament and judicial decisions by the English law Courts that prohibited these efforts, the creative transactions developed by conveyancers to circumvent the prohibitions, the subsequent statutes and judicial decisions that prohibited these circumventions, the Chancellor's efforts to ameliorate these prohibitions and so on and so on over the years right up to the Internal Revenue Code, USRAP, and the other recent state statutes.

Id.

[37]The secret is getting the students to see it in steps. E-mail from Craig Oren, Professor of Law, Rutgers School of Law-Camden, Rutgers University, to author (Mar. 13, 2002, 14:14:00 PST) (on file with author) [hereinafter Oren e-mail 1]. Craig Oren starts with a very simple hypothetical: To the church for use as a church, otherwise to B and his heirs. *Id.* The students must see that this makes the land unmarketable for as long as the interest is contingent, *id.*, that the cloud on title could remain indefinitely, e-mail from Craig Oren, Professor of Law, Rutgers School of Law-Camden, Rutgers University, to author (June 11, 2002, 07:44:00 PST) (on file with author) [hereinafter Oren e-mail 2], and the need for a rule that limits how long an interest can remain contingent. Oren e-mail 1. Thus, RAP could also be called the rule against remote vesting or the rule against lengthy contingencies. Oren e-mail 2. He then hypothesizes a rule that a future interest is void if it might still be contingent more than a century after it is created. *Id.* He shows the students why such a rule requires absolute certainty and why the absolute certainty must exist when the interest is created. Oren e-mail 1.

[38]This raises the problem of "remote" vesting. Of course, the next question is: How remote is too remote? In order to avoid confusion, one must repeatedly emphasize the difference between a "failure to vest" (i.e., although the interest is valid under the Rule, it

Once the students understand the relevance of the Rule, the policies behind it, and the context in which it appears, they should be able to move more easily from theory to the formula for RAP, while avoiding the brainless application of mechanical theory.[39]

B. Prerequisite: Thorough Understanding of Estates and Future Interests

It helps your credibility to be frank with students about the relative importance of estates and future interests in the overall scheme of things. It is generally tested on the bar exam, it is essential for probate and estate planning practitioners, and it may be important for a business/real estate practice because of potential RAP issues with options. It helps their perspective if you warn them of the difficulty and time required to learn this area of Property, but reassure them they will get through it—and some may actually end up liking it.[40] It might add to their peace of mind to let them know that many professors who teach the material started out hating or fearing it, but now like it—but that may be admitting too much!

Everyone agrees on the importance of the students' absolute and thorough familiarity with and understanding of all the basic definitions, rules, and patterns for present and future interests in deeds and wills *before* RAP is introduced.[41]

---

ultimately fails to vest within the time period) and "remote vesting" (i.e., the interest is void under the Rule because it might vest—or fail—outside the permissible time period). Klein e-mail, *supra* note 13.

[39]For Allen Axelrod, the interesting thing is how the idea of balancing the tension between dead-hand control and the freedom of testation "becomes incorporated into a formula brainlessly applied where the lives in being do not have to have any connection with the disposition." Axelrod e-mail, *supra* note 33.

[40]I always tell them this before we cover the material—and I invariably get several people who tell me after we finish that they really did like the topic. I have found that those students are usually the "puzzle people" in the class. Students who enjoy solving puzzles (and sometimes those who liked proving those geometry theorems in high school) often find the estates in land, future interest, and RAP problems an interesting challenge.

[41]John Knox emphasizes working a lot of estates and future interest problems *before* introducing RAP so that the students become very good at identifying the different types of estates. E-mail from John Knox, Professor of Law, The Pennsylvania State University, Dickinson School of Law, to author (Aug. 29, 2002, 13:09:00 PST) (on file with author). Most student difficulties come not from failure to understand the Rule, but from failure to understand the nature of the estates it applies to. *Id.* In addition to the many examples and problems we work in class, my students have done two problem sets on their own before we get to RAP. The first set of fourteen problems covers present possessory estates and defeasible estates. The second set of twenty-one problems covers future interests. I cannot imagine the students working out RAP problems if they have not done these preliminary problem-solving exercises. James Durham has taught property for twenty-two years and the major part of his course is estates in land, future interests, and RAP. E-mail from James Geoffrey Durham, Professor of Law, University of Dayton School of Law, to author (July 25, 2002, 09:00:00 PST) (on file with author). He admits his approach is not unique and acknowledges that it does not work for all students, but he says it works for most students who diligently do the work leading up to the Rule. *Id.* That cumulative approach is the critical key: The students who have done the step-by-step preliminary work all the way through the estates in land and future interests area will, with some effort, be able to conquer the Rule. The ones who have not done the work up to that point will probably never understand the Rule. For Professor Durham, the difficulty is not with RAP itself, but with getting students to

Everything students have learned up to this point about future interests is necessary background for RAP. It also helps for them to have done lots of exercises and problems on different kinds of future interests. "They must know that stuff cold."[42] If you lay the groundwork for RAP long before you get to it, the students get into the habit of following a certain set of steps in regard to every problem. If you cover the estates in land and future interest material by requiring the students to approach every problem by following the same set of steps,[43] then, when RAP is introduced, it becomes one more step added to a process that is already familiar. Even though you do not actually discuss RAP until the end of the future interest material, it helps to occasionally allude to it coming up by pointing out the justification for learning or observing certain things in regard to future interests.

Calvin Massey very thoroughly teaches the classification of future interests and recognition of the relevant characteristics of each individual type. He gets a lot of student questions and lets students posit variations on the hypothetical, which works for eighty to ninety percent of the class.[44] This interactive approach is very effective, but as he warns, you must have a complete mastery of the subject because it requires quick and nimble thinking as students throw variations at you.

IV. APPROACHES AND TECHNIQUES

A. Three-step Process

Although the details differ, nearly everyone who teaches the Rule in depth uses some variation of a broad, three-step process that includes explanation, problem-solving, and feedback. The first step is an introductory, non-Socratic lecture[45] that includes all of the following: a review of policy considerations underlying the Rule; the background and history of RAP; an explanation of the Rule with a breakdown into each of the elements from the classic statement by John Chipman Gray; and illustration of the Rule by examples using a step-by-step analytical process.

In the problem-solving step of the process, students do exercises on their own or in groups, following the step-by-step analysis presented in the lecture. The problems can be from the casebook or other sources, adapted or prepared by the professor, and can be presented either in hardcopy or PowerPoint slides.

The feedback step of the process can be accomplished by any or all of the following: a Socratic, in class review of the problems students have worked out on

---

learn future interests and the concept of vesting; if students have mastered those concepts, then the Rule is not that difficult. *Id.*

[42]Natelson e-mail, *supra* note 22. But as Craig Oren points out, "students do not want to learn future interests step-by-step, unfortunately." Oren e-mail 1, *supra* note 37.

[43]I provide students with a formula for analyzing future interests. I have used variations on this formula for so long, that I can no longer remember its origin.

[44] Massey e-mail, *supra* note 31.

[45] Unlike most law school classes, no one uses the Socratic method in introducing students to the Rule Against Perpetuities. Students often experience significant difficulty in understanding the Rule even *after* an organized, clear, detailed, in class explanation. We all seem to understand that it would be both sadistic and masochistic to introduce the topic Socratically. This introduction to the Rule can be enhanced by means of a preliminary handout.

their own; posting answers to the problems on a class web site or a TWEN site; and quizzes or some other testing mode to determine whether students have grasped the material.

1. Part 1: Lecture

a. Background and Policy Considerations

The introductory lecture explaining the background, policy, purpose, and relevance of the Rule Against Perpetuities should be primarily a review of themes already emphasized throughout future interests and estates.[46] If students can understand the *reasons* the Rule exists and why RAP applies only to contingent future interests, then they are more likely to be able to grasp the workings of the Rule.[47] Before launching into the elements of the Rule, it is helpful to do a short review of all the present and future interests and the concepts of "vested" and "contingent"[48] (and class closing rules if your examples under RAP will include class gifts).

Students must understand the difference between vested interests and contingent interests and why the distinction is important. For RAP, some interests that appear uncertain are considered "vested"; and some interests that are labeled "vested" are considered contingent. With good reason, this can seem hopelessly confusing to students. Under RAP, the general rules for "vested interests" are: All present interests are vested. All future interests in the grantor are vested.[49] Some future interests in transferees are vested. At this point, creating two separate lists of interests on the board—those considered vested, to which the Rule does not apply; and those considered contingent, to which the Rule does apply—may help students see the the important difference between the following statements: "RAP does not apply to this interest," and "RAP applies to this interest, but when it is applied, the interest is valid." It also may give them hope when they see that the list of interests subject to RAP contains only three items: contingent remainders; executory interests; and vested remainders, subject to partial divestment.

---

[46]Students learn something about jurisprudence and legal history, as well as the policy considerations underlying the Rule, if they understand that RAP is actually two different rules: one developed in the 18th-century to address executory interests, and one developed in the 19th century to address contingent remainders, which is more deferential to testator intent. Natelson e-mail, *supra* note 22.

[47]Alice Noble Allgire tells her class about recent graduates or student externs who have actually encountered RAP problems, illustrating that it is not just ancient history, but has practical relevance for today. E-mail from Alice Noble Allgire, Associate Professor of Law, Southern Illinois University School of Law, to author (June 17, 2002, 14:38:00 PST) (on file with author).

[48]It is absolutely critical for students to understand what it means for an interest to be "vested" or "contingent" and what it means for a contingent interest to become vested. Ask the students to explain why *each* type of contingent interest is uncertain and what events are required to make that interest "vest" or become certain.

[49]This might be a good time to discuss the nonsensical basis for excluding all future interests in the grantor from consideration under the Rule.

In reviewing vested and contingent concepts, students must be able to identify precisely what will make each type of contingent interest become vested. Because the word "perpetuity" is probably not part of the everyday discourse of most students, a brief explanation of what the word means may help students imagine a future interest remaining indefinite for too long.[50]

Understanding when RAP applies—to which interests—includes understanding when to apply RAP—at what point in the multi-step analytical process. After a complete identification of all the interests created under the deed or will, and a determination that RAP applies to a particular interest, *immediately* apply RAP to the interest, determine whether the interest is void or valid, and then forget about RAP for the rest of that problem. After initially applying RAP and making any necessary adjustments, treat all later events without regard to RAP. Under the common law application of RAP, if the interest is valid when it was created, it will never become invalid thereafter. If the interest was void when it was created, no later event will make it valid.[51]

b. Statement of Rule, Elements, and Definitions

Nearly everyone starts with the classic, twenty-seven-word distillation of the Rule, formulated by John Chipman Gray: No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.[52] The easiest way to present the Rule is to put Gray's statement on the

---

[50]As is often the case with the Rule Against Perpetuities, some extreme examples are apt. Ira Bloom illustrates "perpetuity" by the use of an outrageous astrophysics example. Astrophysicists believe the earth will become uninhabitable in one billion years; next year, there will be 999,999,999 years left. Bloom e-mail, *supra* note 11. Diane Klein encourages students to think of estates in land as divisions of ownership in time rather than in space. Klein e-mail, *supra* note 13. This allows for the development of a healthy appreciation for the ingenuity of lawyers who came up with these arrangements and why. It also makes it possible to introduce and discuss the idea of a "perpetuity" and why they are good or bad things. This leads to a commonsense approach to how long is long enough or too long, so that the general time frame of the Rule begins to make sense. She does not use any tricks or shortcuts other than reminding students that a lot of interests do not implicate the Rule at all. *Id.*

[51]Of course, these statements would need to be modified under a wait-and-see approach or USRAP.

[52]As I tell my students, Gray may have been able to distill the Rule into twenty-seven words, but it took an eight-hundred-plus-page treatise for him to explain it. Although students must understand the difference between vested and contingent interests to understand the Rule, ordinary language is easier to understand in discussing RAP. Therefore, after presenting Gray's formulation, some teachers present an alternative statement of the Rule. Jeffrey Stake simplifies the Gray statement of the Rule even more: "An interest is void if it might vest too late." E-mail from Jeffrey E. Stake, Professor of Law, The Indiana University School of Law—Bloomington, to author (June 29, 2002, 15:11:00 PST) (on file with author). Patricia Wilson also restates the Rule in simpler terms: "Might it vest too late?" If the answer is yes, then there is a RAP problem. E-mail from Patricia Wilson, Professor of Law, Baylor Law School, to author (June 10, 2002, 10:50:00 PST) (on file with author). She then defines each word in the question. "Might" emphasizes the importance of mere possibilities under the common-law Rule. "It" refers to the interest that is subject to the Rule. "Vest" means slightly different things for each of the interests that are subject to the Rule. *Id.* I change "[u]nless it must vest, if at all" from Gray's statement to "[u]nless it must vest or fail" to emphasize the fact that our concern is not failure, but uncertainty for too long. "Might this interest vest too

board or on a slide, in component parts listed as bullet points, and urge the students to simply memorize the statement.[53] The next step is to define and explain each element of the Rule. In addressing each element separately, it also helps to point out how each can create problems.

"No interest is good" emphasizes that the Rule, unlike other special rules such as the Rule in Shelley's Case and the Doctrine of Worthier Title, allows for no exceptions or loopholes when applied to relevant interests.[54]

"Unless it *must* vest" emphasizes that RAP is both a rule of *certainty* and a rule of *proof*. The Rule is fairly obsessed with certainty. We must prove that the interest subject to RAP will be absolutely certain to vest or fail within the perpetuities period for that interest. The degree of certainty required under RAP is certainly way beyond the standard of proof in criminal cases. RAP does not require proof "beyond a reasonable doubt," but beyond *any* doubt—one hundred percent, dead-bang certainty.[55] Under the Rule Against Perpetuities, our goal with an uncertain interest is to prove the interest is either void or valid. RAP is a rule of logical proof, and the analogy to the other standards of proof relevant to other areas of the law may help students' comprehension of the operation of the Rule.

"If at all" emphasizes that it is okay for an interest to fail—as long as it does so within the perpetuities period. Society and the law do not care that a particular interest fails; they care only that the interest may remain uncertain for too long.[56]

"Not later than twenty-one years after" emphasizes the importance of time[57] and introduces the second half of the "formula" for RAP.[58] Because someone invariably

---

remotely" could also become "might this interest remain uncertain for too long." David Thomas teaches "the old Rule in its simplest form," which is Gray's cryptic formulation of the Rule. Thomas letter, *supra* note 25. He goes through it word by word with the students. He also puts on the course web site a series of problems with explanations of each and a document called "basic characteristics of the common-law Rule Against Perpetuities," which lists the features of the common-law Rule that students should remember. *Id.*

[53]Rote memorization, although not usually encouraged in the law, is advisable in this situation. Natelson e-mail, *supra* note 22.

[54]Of course, there are huge loopholes for future interests that may remain uncertain indefinitely, but to which the Rule simply does not apply, such as future interests in the grantor.

[55]"The certainty required is beyond that that sends an accused to the gas chamber." W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938). Harvey Feldman identifies this key issue of as one of the three major areas of confusion for students. Students struggle with what he characterizes as "the Rule's arithmetic ruthlessness." Feldman e-mail, *supra* note 11. Calvin Massey stresses that in concocting proof of invalidity you must be imaginative and ruthless. He uses lots of morbid humor to make the point about possibilities under the Rule. Massey e-mail, *supra* note 31.

[56]Students have difficulty separating the concept of the failure of a gift (which is valid under the Rule), and a violation of the Rule. If you are very methodical and constantly insist on students drawing the distinction between the failure of a gift under the Rule and a Rule violation, students should begin to see this critical distinction. Feldman e-mail, *supra* note 11.

[57] Understanding the importance of time is a critical appreciation here, as in so much of the law. *See infra* note 77 and accompanying text for Peter Wendel's analogy to the statute of limitations of the time restrictions imposed by RAP.

asks, "Why twenty-one years?" This element provides a link back to the policy discussed earlier. The twenty-one years, representing about a generation, begins to answer the question: How long *should* someone be able to exercise influence or control of property after he or she is dead?

"Some life in being" adds the second—actually the first—part of the formula for RAP.[59] The landowner should be permitted to exercise control of property during his or her lifetime, during the lives of anyone alive when the interest was created (the lives in being), and for about one generation beyond those lives (the twenty-one years). These two elements, the "not later than twenty-one years after" and the "some life in being" together create the "perpetuities period": the limited period of time an uncertain interest may remain uncertain and still be valid.[60] A "diagram"of the perpetuities period with a horizontal time line on the board or a slide will graphically illustrate the temporal nature of this two-part formula. Mark each event or time period on the line. The left boundary or goalpost of the time line is the date the interest was created[61](the effective date). The first segment of the horizontal line is the "lives in being" part, and the second segment is the "twenty-one years." The vertical line between the two segments is the "death line" used to signify the death of any life in being who might qualify as a "validating life": one who actually proves the interest is valid. The right boundary or goalpost of the horizontal line is the end of the perpetuities period.[62]

---

[58]Typically for RAP, where the ability to think backwards is a useful skill, the second half of the formula appears before the first half.

[59]Although the perpetuities period can be stated as a "formula" (PP=LIB + 21), the analysis is never formulaic. But students derive some comfort from this modicum of consistency and predictability in what otherwise appears to be a sea of chaos. Students must understand that although we call this a "formula," the first part is always flexible (depending on the facts, the lives in being will vary), and the second part is always fixed (twenty-one years).

[60]Harvey Feldman addresses the concept of a measuring life with a method he calls "the virus from outer space." Feldman e-mail, *supra* note 11. The virus lands on earth one day and over the next five years kills everyone on earth who was alive on that day with absolutely no effect on persons who were not alive on that day. *Id.* Lucia Silecchia casts a wide net for measuring lives, which includes a discussion of class closing rules and the all or nothing rule. Letter from Lucia Ann Silecchia, Associate Professor, The Catholic University of America School of Law, to author (June 6, 2002) (on file with author).

[61]This is a good opportunity to review the different effective dates of deeds and wills.

[62]This is what I call the "drop dead date," the date by which the interest must be certain to vest or fail or be declared invalid. For students, one of the the hardest parts of the Rule is understanding the perpetuities period or the concept of "too late." Patricia Wilson uses a similar timeline to illustrate the concept. Wilson e-mail, *supra* note 52. She picks a particular date in history (e.g., July 4, 1776) to remind students how everyone who was alive on a particular date in history is now dead, and that the world is repopulated with people who were born after July 4, 1776. Besides reminding students that we do not want long-dead people to be in a position to control land by virtue of their earlier deeds and wills, this helps students relate this strange and unfamiliar concept to something they do know and understand. *Id.*

The concept of lives in being is both the most difficult and the most important part of understanding the Rule. We need the lives in being because one of them may supply the critical proof to show that the interest is valid.[63]

"At the creation of the interest" emphasizes first, the difference in effective dates between deeds and wills,[64] and second, the very unnatural temporal stance students must take when analyzing an interest under the Rule. Although with everything else we encounter in the law, we look back to see what did happen, here we must position ourselves at the beginning of the timeline, when the interest was created, and look forward into the future to see what might happen.[65] Of all the strange and difficult aspects of the Rule, this has to be the most difficult for students to understand and to apply, largely because it defies all logic and common sense.[66]

c. Examples: Step-by-Step Approach

The next part of the introductory lecture is to apply all the principles explained above to a few concrete examples, explaining each step as you go. Mastering a few simple examples seems to work better for most students than trying to understand the outrageous intricacies of the unborn widow or the fertile octogenarian. Follow the same set of steps in the same order through each of the examples so students begin to develop a feel for the pattern of analysis under the Rule. Depict visually all of the

---

[63]The lives in being are the critical part of the formula; the twenty-one years is just an "add-on." Bloom email, *supra* note 11. Utter confusion reigns regarding the distinctions among "lives in being" (those who were alive on the date the interest was created), "validating life" (one or more persons who provide the proof that the interest is valid), and "measuring lives" (sometimes used synonymously with lives in being and sometimes with validating life). Because the first two terms are more or less self-explanatory and the third is merely confusing, I use the first two to distinguish between the pool of candidates and the actual proof person, and I avoid the use of "measuring lives" entirely. In any event, it is critical that students understand that a validating life is one who proves the interest to be valid, whereas a life in being is anyone alive at the time the interest was created. *See infra* notes 76-83 and accompanying text for discussion of how we actually find the validating life.

[64]When Malcolm Morris taught the Rule in Property, he found students more readily found the measuring life by paying particular attention to the granting instrument because grants in wills cut off further children of the grantor, but gifts in deeds (or trusts) did not. Letter from Malcom Morris, Professor of Law, Northern Illinois University College of Law, to author (Feb. 19, 2003) (on file with author). When students understand the different outcome for "to the first of my grandchildren to reach 21" in a deed and a will, "they have the RAP mastered. Not that this is all there is to understanding RAP; but it seems that understanding the difference between these two is, for most students, the last of many steps they go through in acquiring an understanding of the Rule." Schwabach e-mail, *supra* note 24.

[65]This projection into the future is rendered even more difficult by the fact that, when the interest is actually being analyzed in real time, that "future" we are looking into may already be "past." We stand in the past and project only what "might happen" in a hypothetical future, including the most outlandish of "possibilities," even though we may know quite well what actually did happen in the real future that came to be, which, of course, we are required to disregard. I tell my students this is analysis straight out of "The Twilight Zone," but it is necessary under common law RAP.

[66]If ever Mr. Bumble was correct that "the law is a ass—a idiot," this must be the time. CHARLES DICKENS, OLIVER TWIST 399 (Oxford Univ. Press 1987) (1838).

examples and as many explanatory details as possible, either on the board, a class handout, or a slide. Remind the students to follow the same steps in the same order for every RAP problem they encounter, whether in class, on problems, on a law school exam, on the bar exam, or in practice. Although the details vary, nearly everyone uses some variation of this step-by-step approach.

i. My Step-by-Step Approach

After much trial and error and yearly revisions and refinements, I have devised a step-by-step approach that works for a majority of my students.[67] The steps, with various rules, principles, and reminders interspersed among them, are as follows: Start with a simple example of a deed or a will with both present and future interests, preferably interests that the students are familiar with from the coverage of future interests and estates in land.[68] First, it is necessary to identify the granting instrument as a deed or a will.[69] Assume the grantor started with a fee simple absolute. If there is anything less than a fee simple absolute, then it is followed by a future interest of some type.[70] Separate the different interests in the deed or will by drawing vertical lines between them.[71] Treat each interest separately, in the exact order stated in the conveyance, always moving from left to right. One should caution students not to take them out of order, and not to skip any.[72]

For each separate interest, classify, [73] identify, define, and explain it, *without*

---

[67]A Checklist for Solving RAP Problems is attached as Appendix A.

[68]Again, the more the Rule can be connected to things the students are already familiar with, the easier this will be for them. Most casebooks provide a wealth of examples, as do many other secondary sources. Charles Rounds uses four hypotheticals from Leach's *Perpetuities in a Nutshell*, which, if students master them, "will prepare a student to tackle almost any common RAP fact pattern." E-mail from Charles E. Rounds, Professor of Law, Suffolk University Law School, to author (Feb. 26, 2006, 07:03:00 PST) (on file with author); Leach, *supra* note 55. Ira Shafiroff, and many others, use the hypothetical problems from the Dukeminier and Krier casebook. Shafiroff e-mail, *supra* note 22. (referring to JESSE DUKEMINIER & JAMES KRIER, PROPERTY (5th ed. 2002).

[69]It is critical to recognize the difference between a will and a deed. When the students get to RAP, they must determine the date the interest was created and the date the instrument became effective.

[70]If you know you must have a future interest and nothing else is stated or implied, then you can assume the future interest is a reversion in the grantor (the future interest default provision).

[71]A visual representation of this process on the board or a slide will connect with more students than a simple verbal explanation will. When for five or six weeks, every conveyance or devise is put on the board or an overhead with the interests separated by vertical lines, students become accustomed to visualizing a deed or will not as a monolith, but as creating separate interests.

[72]Students have a tendency to get ahead of themselves. They want to get through the problem quickly, so they are inclined to skip steps or overlook interests. It helps to show them examples of how mixing up the order or skipping steps can change everything, sometimes to their extreme detriment.

[73]Classify the interest as a present or future interest. The concept of a future interest is based on the idea of consecutive rights of possession, rather than simultaneous rights (as in co-

regard to the Rule.[74] Identify[75] the contingent interest or interests, the ones RAP applies to. In applying RAP analysis, focus on each contingent interest separately, in the order given. For each contingent interest, first explain what event or events will cause this interest to vest.

The next step is to determine whether the interest is valid or void under the Rule by searching for a validating life, if there is one. There are many variations on how to structure the search for a validating life, but everyone agrees that a step-by-step approach works best. It is critical that students understand that they must follow the same set of steps, in the same order, for each contingent interest they analyze under RAP.[76]

ii. Possibles, Probables, and Provers

I begin the search for a validating life with a reminder that we are looking for irrefutable proof that the interest is valid under RAP. Therefore, we can look at the RAP problem to be solved in much the same way a lawyer looks at an evidentiary problem. I analogize our search to "proving" a straightforward legal case, such as an automobile accident. The students can relate to this—even first year law students have some rudimentary understanding of the importance of relevance; and they have watched enough law-related television and movies to have some idea of how a

---

ownership, which most students understand). The difference between present and future interests is only physical *possession*; all holders of present and future interests have an ownership interest *now*. The key question is whether the holder of the interest has *possession* now or in the future. This concept—that a future interest is not an interest in the future, but an interest now, merely with possession delayed until the future—seems to be difficult for many students to grasp; and yet it is essential to an understanding of the entire area of estates in land.

[74]Even though we have followed this procedure with every example and every problem throughout estates in land and future interests, students often want to skip this step and get right to the Rule, not realizing that until you correctly identify every interest, you do not know which ones the Rule applies to. Compelling patience is often quite a struggle. I require the students to take the time to identify each interest, define the identification terms, and tell me how they know that is a correct identification. This functions as a sort of mini-IRAC approach to each interest. The challenge is to get them to do it each time without the repetitive process becoming tedious. Many of them will admit afterward that it was this repetition that enabled the strange and unfamiliar "foreign language" of estates in land to become familiar and comfortable. They also say that when they take their bar review course before they sit for the bar exam, they recall and understand this material better than most of the students they meet from other schools. I remind them that that is why it is called bar "review." They are supposed to have learned it in law school.

[75] By tagging, highlighting, circling, or some other visual, concrete method.

[76]Robert Flores finds it

> useful to give students a set of very precise steps . . . to identify and then solve RAP problems . . . . [T]his is not a formula for miraculous success, but I do think it gives the students some needed structure to focus their thinking, which helps them as they crawl through the fog that RAP seems to create for most newcomers.

Flores e-mail, *supra* note 23. A set of precise steps and insistence that students follow those same steps each time for each problem are necessary if they are going to get through this material.

lawyer develops a case.[77] I make the students describe the step-by-step process of developing the eyewitness evidence that will prove the accident case. At each step, I relate the process to the search for a validating life—the witness we need to prove the RAP case.[78]

After the client has told you the story of the accident, you, the attorney, make a list of everyone who is potentially relevant; that is, everyone you think *might* help your case. This is your list of "possibles." You include anyone who might have been in the vicinity of the accident when it happened and anyone mentioned by anyone else as a possible witness. Similarly, for RAP, you make a list of potentially relevant persons and classes, which includes *everyone* mentioned or implied[79] in the instrument,[80] regardless of what type of interest, if any, they have. These are your "possibles.**"**

As a lawyer, you would then contact everyone on your list of possible witnesses and interview them, looking for those individuals who actually witnessed the accident. Based on the preliminary interviews, you eliminate anyone who was not present or who did not actually witness the accident. With RAP, you also do this

---

[77]One cannot overstate the case for using whatever tools are available to connect this alien concept to something familiar that students can relate to. Peter Wendel uses a technique that helps to demystify the Rule for students. Posting of Peter Wendel, Professor of Law, Pepperdine University School of Law, Peter.Wendel@pepperdine.edu, to Property Prof@lists.washlaw.edu (Dec. 7, 2002 07:58:00 PST) (on file with author). To help them understand the Rule conceptually, he analogizes it to the statute of limitations. He uses an automobile accident hypothetical with the statute of limitations and draws the time line on the board, with the arbitrary points beginning and ending the statute. Wendel introduces the Rule, breaks it down into components, and tells them that instead of a fixed number of years, like most statutes of limitations, RAP uses a formula: life in being plus twenty-one years. He again diagrams this point by putting a time line on the board right below the statute of limitations time line, and indicates the two different components of the perpetuities period. Students quickly see the similarities between the Rule Against Perpetuities and a statute of limitations, and they quickly see some of the differences. The perpetuities period is much longer, and they see the second half of the perpetuities period is fixed, while the first half is open. This sets the stage for the challenging part. The big difference between the Rule and the statute of limitations is that a statute of limitations is a wait-and-see approach, where the court waits and sees if the plaintiff brings the action in time. Under the Rule Against Perpetuities, the court tests the conveyance as of the moment the interest is created. *Id.* "There is so much mysticism built up about the Rule (they[have] all heard stories about how awful it is), it helps to give the students [the necessary] conceptual understanding of the doctrine before you attack the doctrinal components." *Id.*

[78]This always reminds me of the old Marvin Gaye song from the 1960s, "Can I Get a Witness?" I am, however, reluctant to allude to the song in class, as most of my twenty-something students look at me like I am from another planet. We experience enough of that look in teaching the Rule Against Perpetuities without deliberately adding to our burden. When I emailed my colleagues to see if anyone remembered who sang the song, one responded, "You have given a whole new meaning to RAP music."

[79]At this point, I explain that "implied" persons or classes usually refers to a missing generation. For example, the instrument may mention only the grandparent and the grandchildren, but there is obviously the missing generation of parents of the children.

[80]This is sometimes stated as "anyone who can affect vesting," but "anyone mentioned or implied" covers the same territory and is easier for students to relate to.

"first round elimination" by "questioning" your possible witnesses. The questions come in the form of several rules you apply to the list of possibles. Your validating life must come from a group of "lives in being," those alive when the interest was created. Therefore, you must first eliminate anyone who is dead on the effective date of the gift (which always includes the testator if the instrument is a will). You must also eliminate any open classes[81] (including any class whose parent is still alive), and anyone who is not human (corporations, animals, etc.). What you have left after the first round elimination is your list of "probables."

From the list of those witnesses who actually saw the accident, you seek a witness who can "tell the story" your client needs to win. The lawyer will prove the case with the witness or witnesses whose perception corresponds most closely to that of the client. The lawyer will eliminate those witnesses whose version of the case will not provide the proof required. With RAP, you also go through a second round elimination by "interviewing" each person on your list, one at a time. You test each individual and each closed class on your list of probables, seeking a "prover," the one who will "tell the story" of a valid interest, the one who will prove the interest is valid, and you eliminate all those who cannot do what you need.

For each person on the list, you "interview" that person (or the survivor of that class) by plugging him or her into the first part of the perpetuities period formula, the "lives in being" part. The death line in the middle becomes that person's death (or the death of the survivor of the class). You then ask what more you will know at that person's death about when the uncertainty will be removed, or when the contingent interest will vest. Sometimes you will know right then if the interest vests or fails. If you will be certain at that death line whether the interest has vested (or failed), then the interest is valid and that person is your validating life, your prover. If you may not know at the death, but you will know for certain within twenty-one years of that person's death whether the interest has vested or failed, your interest is also valid. But if you may still be uncertain about the interest more than twenty-one years after that person's death, that person cannot prove the interest is valid. You then go to the next person on the list of probables and repeat the process until you find a proverer—the one who enables you to answer, yes, this interest is certain to vest or fail within this person's lifetime plus twenty-one years. You need only one validating life. If you exhaust the list and have not found a prover, you then ask if the interest is certain to vest (or fail) within twenty-one years[82] *of the date it was created*. If you cannot answer yes, then the interest is void. What do you end up with? One or more provers who can prove your case—or maybe no one who can.[83]

---

[81]This addresses the problem of an "afterborn" child. I do not go into detail about an afterborn at this point; for now, I tell them to just follow the rule of no open classes, and I will explain why later.

[82]Sometimes students get so wrapped up in finding the validating life, they forget the other half of the formula.

[83]There are certain patterns that may help to identify the validating life. If the instrument names a person who is not a beneficiary of any gift, that person likely functions as the validating life. If the instrument mentions the survivor of a group of named persons (a closed class), that survivor is likely the validating life. The major pitfall is the gift to an open class, because of the possibility of an afterborn child.

If the RAP analysis proves the interest is valid, the instrument and the interest remain unchanged. If the RAP analysis proves the interest is void, then you must go back to the original language of the deed or will and line out the void interest. Treat the instrument as if the void interest never existed. Read the grant without it and reconstrue all interests that are left as if the void interest was never there.[84] This requires re-identification, definition, and explanation of any interests that were altered or created as a result of removing the void interest. Then proceed through any subsequent events described in the problem, one at a time, in exact chronological order. For each event, describe the effect of the event on each of the interests.[85]

This may require new identification, definition, and explanation, depending on the effect of the event on the interests. With multiple subsequent events, look at the effect of the event being considered only on the interests as they existed immediately before that event occurred. In other words, do not go back to the original conveyance, but only as it was altered by the directly previous event.[86] Continue until you go through all the events described in the problem.[87] Frequently, after the last event, an individual or group once again holds the property in fee simple absolute, but a different individual than the person (the grantor) who held the fee simple absolute at the beginning.[88]

---

[84]Roger Andersen focuses on defeasible fees to illustrate a practical application of the Rule. Andersen e-mail 1, *supra* note 11. He uses an invalid executory interest after fee simple determinable language and after fee simple subject to condition subsequent language to show the dramatically different consequences when the void executory interest is lined out. The determinable language grant becomes a fee simple determinable with the future interest in the grantor, but the conditional language grant becomes a fee simple absolute. *Id*.

[85]Remind students to consider *all* the possibilities for the effect of the application of a special rule or a subsequent event. The possibilities are: the interest and the party holding it stay the same; the interest and the party holding it disappear; the interest stays the same, but the party holding it changes; or the party holding an interest remains, but the interest changes. To illustrate the possibilities, have students make up later events to affect the interests.

[86]To help make sense of this process for my students, I use the analogy to multiple cartoon or photo frames to diagram how, after initial identification, interests can change because of the application of special rules or subsequent events. *See infra* notes 131-32 and accompanying text (describing this analogy).

[87]"Events" often consist of life-defining occurrences, such as births, deaths, marriages, reaching the age of majority, graduating from law school, etc. But they may also be more mundane occurrences, such as selling alcohol on Blackacre or failing to use the property as a church.

[88]Students can visualize starting and ending with a fee simple absolute as "bookends." I tell them to start with a fee simple absolute in the grantor/testator (unless facts indicate otherwise) and do not stop the analysis process until they again get to a fee simple absolute in one person or class. When they reach the point where the property is held once again in fee simple absolute, that is the signal they have reached the end of the problem. A fee simple absolute indicates the gate clangs shut; it cannot be followed by any future interest. This analogy also works with James Kainen's approach to demonstrating the impediments to alienation that uncertain future interests can cause. E-mail from James L. Kainen, Associate Professor of Law, Fordham University School of Law, to author (Sep. 17, 2002, 13:49:00 PST) (on file with author). He uses the hypothetical of an attorney representing a developer who wants to purchase property whose ownership is divided into present and future interests.

We then apply the same step-by-step process to several additional, familiar examples, usually set up in pairs to illustrate contrast and patterns.[89] At every step in this complicated process, there are lots of questions. To see how well the class is tracking the explanation, I both ask and solicit questions as we move through the process. The questions I ask are presented informally to the entire class, rather than to individuals. I want this to be an interactive process, but I do not hold them accountable for knowing this material until after we have gone through the complete process in class and they have had a chance to work problems on their own.

I invite the students to change the subsequent events from the ones I present in my examples or add events, so they can see how the interests can change in a different way. The benchmark photo may be the same, but the subsequent frames are different because of different events. Sometimes we change the details of a hypothetical, one at a time, and then test each change under the same process. This is most effective if you work with pattern pairs or comparative sets of examples: a survival requirement to twenty-one years or to twenty-two years; a future interest to someone's grandchildren under a deed or to the same grandchildren under a will;[90] vesting tied to a person or vesting tied to land;[91] a fee simple subject to executory limitation, created with determinable language, and one created with conditional language.

I also scramble the subsequent events so they can see the risk in treating the events out of chronological order. As a type of redrafting exercise, I invite them to try to change a hypothetical with a violation of the Rule to make it a valid interest, and vice versa.[92] For each modification, we follow the same step-by-step analytical process, and they begin to understand that process.

The lawyer's goal is to take the disparate interests and "reassemble" the fee simple absolute, so the developer can purchase the property at the best possible price. *Id.*

[89]June Carbone focuses on contrasting pairs of examples: one that satisfies the Rule, and one that does not to get the students to focus on the difference. E-mail from June Carbone, Professor of Law, Santa Clara University School of Law, to author (June 21, 2002, 14:55:00 PST) (on file with author). An "anchor point" for mechanical understanding of the Rule is the difference between the inter vivos class gift to the grandchildren (which violates the Rule), and a testamentary gift to the grandchildren (which does not). Axelrod e-mail, *supra* note 33.

[90]I caution students to watch out for certain patterns that usually signal a violation of the Rule, including gifts covering three generations. As Donald Gjerdingen points out, gifts covering two generations are likely to be okay, but gifts covering three generations are very likely to be invalid. E-mail from Donald H. Gjerdingen, Professor of Law, Indiana University School of Law, to author (Mar. 5, 2003, 08:28:00 PST) (on file with author).

[91]This executory interest is sometimes called an "administrative" contingency. Because the phrasing seem to be easier for them to understand, I tell my students to call this a future interest depending on an event without a time limit. Because we have no idea when that event will ever happen, the executory interest is always void (unless, of course, specific language is included in the grant to bring the interest back within the perpetuities period).

[92]Calvin Massey also encourages students to posit variations on his hypotheticals. Massey e-mail, *supra* note 31. After a review of RAP in her Estates and Trusts class, Danaya Wright asks the students to identify all present and future interests and determine whether the Rule has been violated in every case they cover. She then changes the facts of the case to create a violation, so as to bring the Rule into as many cases as she can so the students become comfortable with it. E-mail from Danaya C. Wright, Associate Professor of Law, Levin

d. Other Approaches

Although I have developed an approach that works for my students, there are as many variations of the step-by-step approach to teaching the Rule as there are professors who teach it. Everyone who teaches this difficult material must compile a veritable grab bag of tools, techniques, and methods that work for his or her students. Many respondents to my letter sent me either a class handout or a detailed description of their particular multi-step approach. Several examples of typical approaches follow.

To help students organize their analysis, Alice Kaswan provides them with a two-page "RAP Guide" that lays out six steps—each simply explained. First, classify each interest. Second, determine whether RAP applies to each interest. Third, identify the contingency that must be resolved for each interest subject to the Rule. Fourth, for each relevant interest, identify potential validating lives. Fifth, determine whether the contingency will be resolved within a perpetuities period. Finally, strike out void interests and reclassify the remaining interests.[93]

Stewart Sterk uses a three-step method. Students must first explain when each interest in the grant will vest. They then identify the measuring lives, which must satisfy two criteria: the interest must vest within the person's lifetime plus twenty-one years; and the person must have been a life in being at the time of the grant. The two criteria must be covered in that order because the first criterion significantly narrows the group of potential lives that must be considered. He then works through a lot of problems to test their understanding of the Rule, each time insisting that they go through the same three steps in the same order. His sense is that "for a significant number of students, this method works."[94]

Calvin Massey's approach includes the following steps: 1) Classify the future interest; 2) If ultimate possession is uncertain for any reason, identify all such uncertainties; 3) Prove the validity or invalidity of the interest, making sure that students understand that perpetuities is all about proof—to prove the invalidity of an interest, you must concoct one scenario (and any one will do) in which it is possible for the uncertainty to persist beyond the perpetuities period; and 4) Reclassify the interest after applying the Rule. Although it sounds abstract, he introduces the process bit-by-bit. As students work the problems, they see the applicability of each part of the analytical framework.[95]

College of Law, University of Florida, to author (May 1, 2002, 12:00:00 PST) (on file with author).

[93]Kaswan e-mail, *surpa* note 32. Professor Kaswan kindly included her extensive class notes, as well as three short problem sets that she uses to complement the casebook. Her notes indicate a very thorough, organized method of explaining these concepts to the students before expecting them to do problems on their own. *Id.* This type of detailed, in-class explanation, accompanied by a handout showing the step-by-step process that students can use in working problems on their own, is the best combination to ensure student success in this difficult area.

[94]Sterk e-mail, *supra* note 28. This system works because it forces students to explain when each interest will vest, and it insists that students follow the same steps in the same order each time.

[95]Massey e-mail, *supra* note 31. The advantages of this system are that it emphasizes proof, and it slowly builds the framework so students have time to sharpen their understanding at each stage.

Robert Flores uses a detailed, seventeen-page student handout on future interests, which includes a precise set of seven steps to follow for every RAP problem. He makes the critical point that RAP is not applied until all other rules of law are first considered, including the Rule in Shelley's Case and the Doctrine of Worthier Title. His approach includes: identifying all the interests created by the instrument; applying all the other rules of law; setting aside any interests that are excluded from the coverage of RAP; applying RAP tests of proof to each interest that is subject to the Rule; and revising the identification to eliminate any void interests, and to take into account circumstances that happened after the effective date of the instrument and the consequences of such changed circumstances. The last step is called, "Fixit," where he asks students to explain how the instrument could have been better drafted to avoid a violation of RAP, while carrying out the intent of the grantor as fully as the law allows.[96]

He includes a few tips for applying the Rule, emphasizing that the Rule is a rule of logical proof, analogous to a trial lawyer trying to prove a point critical to a case. As a trial lawyer, you are allowed to use only four categories of admissible evidence, and you must use such evidence if it is relevant to prove your point. The evidence might consist of any combination of the following: the language of the instrument, the circumstances existing at the time of creation (subsequent events are ordinarily irrelevant and so inadmissible), the applicable rules of property law in force in a particular jurisdiction, and the fundamental laws of nature.[97] The standard of proof for the point you seek to prove is not a mere preponderance of the evidence, or clear and convincing, or even beyond a reasonable doubt. The standard is beyond all doubt; that is, certainty. If you are unable, using his categories of evidence, to prove your point with certainty, then the interest is void under the standard, strict common-law version of the Rule and you proceed accordingly.[98]

Patricia Wilson describes a fairly straightforward approach to the Rule with good mnemonic devices. After classifying all interests to determine whether RAP even applies, she briefly explains the validating life method using the Dukeminier and Krier casebook. She invites students to use that method if they choose. Or they can use her own method, which she "lovingly refers to as ICCKY"[99] (as she says, that is

---

[96]Flores e-mail, *supra* note 23. His handout continues with the analysis of a 1998 Utah case, followed by a two-page set of sixteen problems for the students to work, and a treatment of modern statutory and other reforms to the Rule. *Id.* All in all, his handout is thorough and an excellent introduction to the intricacies of the Rule Against Perpetuities, relating it to concepts that all law students, one would hope, would have an inherent interest in: the problem of adducing evidence and proving a point at trial. I have long used the analogy of proving a point at trial, but I had not extended the analogy to include this approach to the questions of evidence. I intend to add this to my presentation of the Rule.

[97]*Id.* Flores points out that mere common sense is *not* the same as a fundamental law of nature; and mere common sense is not ordinarily admissible evidence in a RAP trial. *Id.* Fairly dramatic statements like this allow the students to see in sharp relief the outlandishness of some RAP applications.

[98]*Id.*

[99]Wilson e-mail, *supra* note 52. Do football fans tend to remember the Icky Shuffle, as she says? Not being a football fan, I had no idea what the Icky Shuffle was. As usual with these types of questions, an email to my colleagues produced a response: "The Icky Shuffle is a post-touchdown, end zone dance originated by former Cincinnati Bengals running back Icky

what most students think of the Rule anyway). When they do the "ICCKY shuffle," they go through five disciplined steps, aimed at answering the question: Might it vest too late? The letters of ICCKY are the initials of the process. "I": Identify all lives in being. "C": Consider, legally and factually, what must occur for the interest to vest[100] in general and for this particular grant or devise. "C": Create someone who is not a life in being, but who can affect vesting in some way, with the goal of delaying vesting as long as possible. If no one can be created, then the interest is good and there is no RAP violation. "K": Kill or assume the death of all people identified in the first step as lives in being. "Y": Years, as in twenty-one. Twenty-one years after the death of all lives in being, is it possible that an unvested interest could remain unvested but still be capable of vesting? In other words, might it vest too late? If the answer is yes, then the interest is void under RAP. This is a quick description of an approach that takes several days with lots of examples and a worksheet.[101]

Daniel Bogart provides a handout given to students at the beginning of the year that includes his six-step approach: Focus on each interest created by the conveyance in order from left to right. Make sure RAP applies to the interest you are examining. Pinpoint precisely the conditional event. Determine all possible relevant lives in being. Using each possible measuring life, pinpoint the end of the perpetuities period. Phrase the RAP question: Will the conditional event necessarily occur, if it is going to occur at all, within the perpetuities period; that is, within twenty-one years following the death of the measuring life? For each of the steps, there is a detailed explanation of how the step is applied, followed by a number of hypotheticals.[102]

John Martinez initially restates the Rule: An interest is valid if, viewed from the time of its creation, it will surely vest or fail within the perpetuities period; that is, the lifetime of the measuring life (someone in existence at the creation of the interest) plus twenty-one years. A description of when an interest is valid involves an explanation of how the perpetuities period functions.[103] "Some Hard and Fast Rules" include many of the principles that trip students up, such as: the only facts that can be considered are those existing at the time the interest was created; the measuring lives could be a class instead of an individual; different interests created

---

Woods." E-mail from A. Thomas Golden, Professor of Law, Thomas Jefferson School of Law, to author (Aug. 26, 2004 1:03:00 PST) (on file with author) [hereinafter Golden email 2]. Apparently Icky first shuffled publicly in 1988, and the phrase entered the common parlance sometime thereafter. E-mail from A. Thomas Golden, to author (Aug 26, 2004, 1:03:00 PST) (citing A changed Game: After the Whistle, http://iml.jou.ufl.edu/projects/Fall 03/Dawson/pioneers.html (last visited Aug. 26, 2004)) (on file with author) [hereinafter Golden email 2]. Whether the students remember the Icky Shuffle or not, mnemonic devices to help them keep track of the steps and keep them in the proper order are, of course, very helpful. If you do not provide mnemonic devices, students will often make up their own.

[100]This step reminds students to consider what must occur, for example, for a contingent remainder to become vested. Wilson e-mail, *supra* note 52.

[101]*Id*.

[102] Bogart e-mail, *supra* note 7. The same questions follow each hypothetical, so that the students cannot skip any of the steps. *Id*. Convincing the students to slow down and follow the same set of steps, in the same order, each time is half the battle.

[103]Martinez, *supra* note 36.

by the same document often do not have the same measuring life, etc. He then outlines a four-step process for finding the measuring life or proving that none exists, introducing the difference between a contingent interest that becomes vested and a contingent interest that fails. The four steps are: state the contingencies; identify the tentative measuring lives (this step includes three interpretive facts); determine whether all of the persons found in step two were in being at the time the interest was created; and, construct a counterexample if you are unable to complete steps one through three. He then includes examples where he applies the four steps to various types of future interests.[104]

Mitchell Gans' class handout also includes several steps: Identify the executory interests and contingent remainders. Identify when each one will vest. Make a list of all measuring lives, including everyone mentioned or implied in the instrument and excluding anyone not living at the effective date. As to each person on the list, ask whether it is possible that the particular contingent interest will vest more than twenty-one years after the death of that person. If the answer to that question is yes, then ask the same question with respect to the next person on the list and so on. If the answer is no with respect to any person, then the contingent interest is valid and the analysis is complete. If the answer to the question in step two is yes with respect to everyone on the list, then ascertain whether the question can be answered no with respect to any group of two or more persons on the list. Again, if the answer is no, then the contingent interest is valid. If the answer is yes with respect to every person on the list and every group of two or more persons on the list, then a contingent interest violates the Rule and is therefore void.[105]

When David Favre taught the Rule—as part of a six-unit Property course he developed a student handout that included a short explanation of the Rule, restated in his own words to make it clearer, and a description of the burden of proof, approaching it from two different directions. The first, in order to uphold an interest subject to the Rule, one life in being should be found for which the determination of vesting must be made within the limits of the Rule (life in being plus twenty-one years). The second, to void an interest subject to the Rule, you must show that there is no life in being that will assure the determination of vesting within the limits. These short explanations are followed by a number of examples, each accompanied by a detailed analysis explaining the step-by-step process.[106]

---

[104]*Id*. This is extremely detailed. He includes ten examples of gifts to individuals, going through the four-step process with each example, followed by three examples applying the four steps to gifts to classes. *Id.* Overall, his approach is very thorough and no doubt helpful to students who are willing to take the time. However, I can easily see some of the students getting really bogged down in that amount of detail. Martinez indicates that some of his material is a substantially revised version of Frederic Schwartz's, A STUDENT'S GUIDE TO THE RULE AGAINST PERPETUITIES 28-78 (1988).

[105]Letter from Mitchell M. Gans, Professor of Law, Hofstra University School of Law, to author (Feb. 26, 2003) (on file with author). He defines "implicit measuring lives" as "parents and spouse, if living on the effective date of the gift," of the beneficiary of the contingent interest. *Id.*

[106]Letter from David Favre, Professor of Law, Michigan State University College of Law, to author (June 25, 2002) (on file with author). His approach is interesting. Instead of beginning with a complete explanation and then having the students work the problems, he incorporates the elements of explanation into the analysis under the problems as he presents

John Knox has a clear and understandable explanation that includes a three-step approach to determine whether an interest is void or valid: Identify all interests that the instrument creates. If the interest is covered, then it must have a contingency of some kind that may prevent it from ever taking possession; identify the contingency. When will you know whether that condition will be met? Is that interest certain to vest or fail within twenty-one years after the death of someone alive at the time of the conveyance? If not, then the interest is void.[107]

Colin Crawford's approach is very straightforward and includes the following: the types of future interests that are subject to RAP, what is required for each type of interest to vest, the meaning of lives in being, and the meaning of "at the creation of the interest." His students do a set of nine problems entitled, Perpetuities Made Easy. He provides a checklist to guide students through the thicket of RAP, beginning with identifying the interest as the type to which RAP applies, and concluding with applying the modern wait-and-see types of reforms.[108]

There are many other variations, but everyone follows an organized, step-by-step approach.[109]

---

them. *Id.* Students may absorb this more easily than they would the comprehensive explanation as an in-class lecture.

[107]Knox e-mail, *supra* note 41. Up to this point, he has not even mentioned a measuring or validating life. In a short, subsequent paragraph on who might be eligible as the measuring life, he emphasizes that it can be anyone as long as the life works to prove the interest in question is certain to vest or fail within the period. *Id.*

[108]Colin Crawford, Associate Professor of Law, Georgia State University College of Law, Property class Lecture at the Thomas Jefferson School of Law (Sept. 4, 2002); Interview with Colin Creawford (Sept. 4, 2002). His in-class lecture on RAP reiterates the warning about the bar exam and includes a note on the irrelevance of *Lucas*.

[109]Roger Andersen goes through a three-step process outlined in his textbook, UNDERSTANDING TRUSTS AND ESTATES, 289-93 (3d ed. 2003) (sec. 48 ch. 12). E-mail from Roger Andersen, Professor of Law, University of Toledo, to author (Mar. 14, 2002, 11:05:00 PST) (on file with author) [hereinafter Andersen e-mail 2]. Shubha Ghosh does the basics only, following a simple three-step process: look at the grant, determine lives in being, kill them off as of the date of the grant, and then see if the interest vests within the twenty-one year time. He admits this oversimplifies it, but "it got me through a mire of confusion." E-mail from Shubha Ghosh, Professor of Law, Dedmen School of Law, Southern Methodist University, to author (Mar. 13, 2002, 13:37:00 PST) formerly Professor of Law, (on file with author). Carolyn Featheringill uses the method described in her article. Letter from Carolyn Featheringill, Professor of Law, Cumberland School of Law, Samford University, to author (Feb. 27, 2003) (on file with author); *Featheringill*, *supra* note 12. Alan Medlin included an excerpt from the South Carolina Estate Planning Deskbook with a very simple distillation of the Rule into three steps. Medlin e-mail, *supra* note 3. Although it is only three steps, the statement of the steps is fairly turgid, requiring a thorough understanding of the terms used in describing the steps. *Id.* It might be easier for students to have more steps that were more fully described with less difficult language. Charles Nelson and Peter Wendel use a three-step approach, identified as Create, Kill, Count in their text. CHARLES NELSON & PETER WENDEL, A POSSESSORY ESTATES AND FUTURE INTERESTS PRIMER (1996). Alice Noble Allgire uses alternative approaches in her class, Nelson and Wendel's "Create, Kill, Count," as well as the traditional measuring lives or validating lives approach in order to appeal to different types of students. Allgire e-mail, *supra* note 47. She finds "Create, Kill, Count" more successful with a greater number of students. *Id.* John Mixon covers RAP as a sort of story/system. Mixon, *supra* note 22. He tries to teach pure paradigms that illustrate a half-dozen basic themes: the

2. Part 2: Exercises

After the introductory, non-Socratic lecture explaining the Rule and working through in-class examples to demonstrate its operation, nearly everyone uses exercises or problems the students must work through on their own. These exercises are most commonly assigned as an out-of-class assignment, but they can also be done as a group, in-class project.[110] The real learning of the Rule seems to come only through the drill and repetition of the problem method.[111] There is a plethora of sources for problem sets from the professor's original material to those adapted from the casebook or other secondary sources, such as workbooks or programmed learning exercises. The problems can be as simple or as complicated as one desires.[112] Just as in the in-class demonstration, presenting problems in contrasting pairs helps students recognize patterns and problem areas.

3. Part 3: Feedback

The problem sets students are required to do will be of little value unless they are coupled with some type of feedback mechanism to provide them with correct answers and explanations. The most common feedback seems to be in-class, Socratic discussion of the problems after students have had a chance to work through the exercises on their own.[113] The Socratic approach, which does not work well at the

---

story of remainders, the story of executory interests, conveyances to uses, the Statute of Uses, RAP as applied to executory interests (very little as to contingent remainders), and some statutory modifications. *Id.*

[110]Roger Andersen formerly used a series of problems, which the students worked in groups to solve and then handed in written answers for part of their grade. Andersen e-mail 1, *supra* note 11. He thought it was the most successful method, but the students hated it. So now he just does in-class discussion of the problems after the students have worked through them. *Id.*

[111]"The only way they will get perpetuities is to work through problems." Massey e-mail, *supra* note 31. So he uses lots of hypotheticals in class and distributes more as voluntary exercises. *Id.* He also recommends John Makdisi and Daniel Bogart's book, ESTATES IN LAND AND FUTURE INTERESTS: PROBLEMS AND ANSWERS (4th ed. 2004), for students who want to work on more problems. *Id.* "After analysis of the Rule, it's problems, problems, problems—both in class and out." Natelson e-mail, *supra* note 22. Michael Zamperini provides a handout that almost shadows the lesson plan and provides additional examples/problems. Letter from Michael Zamperini, Professor of Law, Golden Gate University School of Law, to author (Feb. 27, 2003). This method really seems to help with pattern recognition. *Id.* His handout has several good, straightforward examples, including some contrasting examples, as well as the typical stumbling blocks like the magic gravel pits, the unborn widow, and what he calls the "close but no cigar." *Id.*

"[W]hile some class time is essential not to be lynched by the students, they do not learn this effectively from class presentations; and the more they struggle with the Rule on their own the more effective the learning." Carbone, *supra* note 89. The latter point highlights one of the peculiarities of learning the Rule. Although it lends itself well to programmed learning, there is nothing rote about learning to *apply* the Rule. Any genuine comprehension of how the Rule operates will occur only in the students' individual struggles to tame this irascible Rule.

[112]RAP will always present analytical challenges, even with apparently simple problems.

[113]John Knox gives his students a set of ten fairly simple problems ("no fertile octogenarians") to work out on their own. Knox e-mail, *supra* note 41. He hands out the

explanation stage, seems to work quite well at the feedback stage *after* the students have had a chance to internalize the explanation by working through a number of RAP problems on their own. As is generally true with the Socratic method, requiring individual students to explain the solutions to the problems encourages diligent effort and thorough preparation. Posting answers to problems on a course web site or class discussion list is also popular.[114] James Durham favors giving students the problems with the answers at the outset, and then requiring the students to explain in class why the answer is correct.[115] This approach avoids the problem of students inadvertently writing down incorrect answers to the problems. Additionally, simply answering the question whether the interest is valid or void under RAP is never enough. One must also be able to explain the reasons for a particular result.

Other forms of feedback include quizzes and exams.[116] Linda Edwards uses daily quizzing to encourage the students to keep up with each day's new material and enable them to integrate new concepts into material already covered. "If you approach it like a game, they will enjoy it."[117]

---

problems without the answers in advance of the class, has the students explain the answers in class, and then hands out the answers so they can have correct answers for the review. He also gives a mid-term exam shortly after they cover present and future estates, and he is generally satisfied with how well the students have grasped the Rule. *Id.*

[114]Posting answers can be done either in place of or in addition to classroom discussion. Timothy Jost uses PowerPoint slides to lay out the Rule and lots of problems. Jost e-mail, *supra* note 25. He then posts the PowerPoint slides and answers on the Web site after class so students can review. *Id.* Linda Edwards also suggests posting the PowerPoint slides on a course web site where the students can quiz themselves electronically, which they really enjoy. E-mail from Linda Edwards, Professor of Law, Mercer University School of Law, to author (Dec. 4, 2002, 11:30:00 PST) (on file with author).

[115]Durham e-mail, *supra* note 41. Craig Oren also gives the students the answers first; they then must decide why the problems come out the way they do. Oren e-mail 1, *supra* note 37. This actually is a valuable approach. It only seems like Alice in Wonderland: "Sentence first, verdict afterwards!" LEWIS CARROLL, ALICE IN WONDERLAND (1940) (spoken by the Queen of Hearts at the trial of the Knave). This order ensures the students have the right answers, and it forces them to do the difficult analysis to justify the answers.

[116]Richard Collins avoids arcane Rule problems on exams and mainly expects the students to recognize the issue, with little credit for the application step. Email from Richard Collins, Professor of Law, University of Colorado School of Law, to author (Jun. 24, 2002, 13:43:00 PST) (on file with author). Although I agree with avoiding arcane Rule problems on exams, I think expecting students to apply the Rule correctly to a relatively simple problem is not too much to ask. When I test on future interests in an essay question, RAP is usually an issue, although never a major one. I frequently test on RAP in multiple-choice questions, however, and the students perform reasonably well.

[117]Edwards e-mail, *supra* note 114. Stephen Griffin takes a somewhat unusual approach to testing his students' understanding of RAP. His students must turn in their efforts at redrafting the grant in *BODY HEAT*. E-mail from Stephen Griffin, Vice Dean of Academic Affairs and Professor of Law, Tulane University Law School, to author (Sept. 16, 2002, 09:43:00 PST) (on file with author) (referring to *BODY HEAT* (The Ladd Company 1981)). He then reviews their work and picks the best and most interesting solutions to analyze in class. *Id.*

4. Discussion of Reforms

Since the middle of the last century, most jurisdictions have reformed the common law Rule Against Perpetuities. Early reforms simply changed the Rule from a "what might happen" to a "what did happen" perspective, maintaining the common law formula of lives in being plus twenty-one years. For purposes of analyzing a possible violation of the Rule, instead of placing oneself at the time the interest was created and projecting into the future what might happen, one could "wait and see" what actually did happen twenty-one years after the death of everyone relevant who was alive at the creation of the interest. After it became clear the changes were here to stay, a uniform statutory version of wait and see was adopted.[118] In-class coverage of modern reforms to the Rule varies widely, depending to a great extent on time considerations. Ideally, coverage of the Rule should include the common law Rule *and* the modern reforms, the common law providing the underpinnings for modern versions of the Rule, and the reforms providing insight into the current state of the law.[119] The situation, however, is rarely ideal, and often choices must be made whether to cover the common law *or* the modern reforms,[120] rather than both.

V. TOOLS

Those who teach the Rule Against Perpetuities have learned that it takes a number of different pedagogical tools to make the material comprehensible to students who learn in a variety of ways. These tools include structure guides, step-by-step approaches, formulas, visual aids, programmed learning exercises, examples and problem sets, cases, secondary sources, class handouts, and others. A discussion of some of the more common tools follows.

A. Problem Method

The case method developed by Christopher Columbus Langdell at Harvard in the 1870's is a nearly universal method of teaching most law school subjects. Those who teach the Rule Against Perpetuities, however, with rare exceptions, have soundly rejected the case method in favor of the problem method.[121] There are a

---

[118]UNIF. STATUTORY RULE AGAINST PERPETUITIES §§ 1-9 (1990) (USRAP).

[119] Timothy Jost teaches the common law Rule in Property and mentions modern reforms. Jost e-mail, *supra* note 25. If time permits, some discuss reforms and the newer approaches to RAP. Shafiroff email, *supra* note 22.

[120]Michael Sturley uses the Rule mainly as a vehicle to discuss law reform of one of the many ancient doctrines in Property, many of which have been heavily criticized. E-mail from Michael Sturley, Professor of Law, University of Texas Law School, to author (Jun. 26, 2002, 15:11:00 PST) (on file with author). Although states have responded to the criticism of some doctrines by simply eliminating them, that generally has not been the case with the Rule Against Perpetuities, based on a widespread belief that the policies underlying the Rule still have a role to play in our society, even if the Rule itself does not now implement those policies in a way we would prefer. He focuses on how to fix the Rule's problems while preserving its benefits, emphasizing the policies behind property rules, and a sense of how the law develops and how it should develop, rather than a strict technical approach. *Id.*

[121]Sometimes the rejection is adamant. "Teaching the cases alone is a virtually useless exercise." E-mail from Frederic P. White, Dean, Golden Gate University School of Law, Cleveland State University, to author (June 11, 2002, 12:50:00 PST) formerly Professor of

number of reasons for this decision. There are very few modern, useful cases on the Rule,[122] and the old cases are too arcane, obscure, or tangential to be of much value.[123] Therefore, most teachers either supplement or completely replace the

---

Law, Cleveland-Marshall College of Law (on file with author). "Cases are useless." Mixon e-mail, *supra* note 22. Rob Natelson does not know how casebook authors think they can teach Estates by the case method. Natelson e-mail, *supra* note 22. Apparently, not all do. In the fifth edition of their casebook, Jon Bruce and James Ely completely abandoned cases in favor of the continued use of problems and enhanced textual treatment because of the Rule's changing and uncertain status. Letter from Jon W. Bruce, Professor of Law, and James W. Ely, Professor of Law and Professor of History, Vanderbilt University Law School (Nov. 13, 2002) (on file with author) (referring to JON BRUCE & JAMES ELY, CASES AND MATERIALS ON MODERN PROPERTY LAW (5th ed. 2003). Although the Dukeminier and Krier casebook still includes cases, even Jim Krier does not cover the cases in his own casebook when he teaches the Rule. E-mail from Jim Krier, Professor of Law, University of Michigan Law School, to author (June 26, 2003, 06:56:00 PST) (on file with author); (referring to DUKEMINIER AND KRIER, *supra* note 68). He uses the text and the problems, focusing on the common law, and teaches them the tricks of vesting and finding lives in being by lecture and by working through problems. *Id.* The problem method simply appears to lend itself better to this area of Property than the case method.

A few teachers find cases somewhat useful. Keith Sealing uses two Georgia cases, *Pound v. Shorter*, 377 S.E.2d 854 (Ga. 1989), *Smith v. Stuckey*, 503 S.E. 2d 284 (Ga. Ct. App. 1998) (which he has not seen anyone else use); and *Symphony Space, Inc. v. Pergola Props., Inc.*, 669 N.E.2d 799 (N.Y. 1996), a contemporary New York case that appears in the current edition of the Dukeminier and Krier casebook. E-mail from Keith Sealing, Visiting Assistant Professor of Law, Syracuse University College of Law, to author (June 11, 2002, 06:47:00 PST) (on file with author).

[122]Except for those dealing with the application of RAP to options, which most agree is way beyond the scope of a first year Property course. The rare exception may be *Symphony Space*, 669 N.E.2d 799. Jean Zorn makes good use of this rare contemporary RAP case. Considering that Symphony Space is a neighborhood theater in Manhattan (she teaches at CUNY in New York City), this is probably even more relevant and interesting to her students. The people

> at Symphony Space were about to be evicted when they found a smart volunteer lawyer who won them not only a stay of the eviction proceedings, but total fee simple absolute ownership of the whole, multimillion dollar New York City building, complete with lots of shops that paid good rentals, all by using the Rule against Perpetuities. [When the students] see that a volunteer lawyer, working for a community organization, used this Rule to win against the Bad Guys[,] suddenly RAP changes from being that horrid, old-fashioned, confusing, impossible to learn monster, into a thing of beauty.

Zorn e-mail, *supra* note 5. *Symphony Space* is probably unbeatable as far as a relevant, contemporary application of the Rule; and such relevant, contemporary examples are extremely difficult to come by. Although some who have taught the Rule for years profess to enjoy it, Professor Zorn is, to my knowledge, the only person who has ever described RAP as "a thing of beauty." *Id.* Aaron Schwabach agrees that *Symphony Space* "doesn't really fit, but I love that case and so do the students. The brazenness of it all: surely many lawyers have fantasies of helping a client to steal an entire commercial building." Schwabach e-mail, *supra* note 24.

[123]For Frederic White, teaching cases alone is a "virtually useless exercise...because they are so old and arcane, even by the usual property case standard." White e-mail, *supra* note 121. And the new cases are few and far between, so that "even the judges in those cases give up." *Id*. But not everyone agrees. A few teachers find that revered and reviled chestnut of the

casebook treatment of this area with other materials.[124] The problem method is the most popular, and for most, the far superior method.[125] Everyone who teaches the Rule makes some use of the problem method. After some preliminary, non-Socratic explanation of the Rule with illustrative examples, the students use problems to work through and demonstrate an understanding of the Rule. Some teachers create their own problem sets, and some adapt them from other sources. Students may use and complete problem sets in small in-class groups or outside of class. Feedback for these problem sets may be provided in class or on a web site.

B. Visual Aids

Visual representation tends to be very important for contemporary students because of the influence of TV, movies, and video games. For these visual learners, teaching difficult concepts such as the Rule Against Perpetuities can be enhanced by the use of a variety of visual aids, such as pictures, graphics, whiteboard diagrams,[126] flowcharts,[127] overheads, Power Point slides, and Venn diagrams.[128] PowerPoint is

---

Property curriculum, *Jee v. Audley*, 1 Cox 324, 29 Eng.Rep. 1186 (1787), useful in teaching the Rule. Calvin Massey teaches perpetuities mostly out of *Jee* and hypotheticals drawn from the book or of his own making. Massey e-mail, *supra* note 31. He finds this oldest and most arcane of cases "wonderful" for illustrating the particular problems presented by vested remainders, subject to open, and to show that in concocting proof of invalidity you must be imaginative and ruthless. *Id.* "It's still true that if they can understand *Jee vs. Audley* thoroughly[,] they will have grasped the common law Rule Against Perpetuities." *Id.* Byron Cooper seems to agree. He teaches *Jee* "almost to death." Email from Byron Cooper, Professor of Law, Mercy School of Law, University of Detroit, to author (Jun. 11, 2002, 10:21:00 PST) (on file with author). Nicholas White, on the other hand, probably represents the more common view. He does not assign *Jee* because it takes too much time to treat the case properly. Letter from Nicholas White, Professor Emeritus, Cecil C. Humphreys School of Law, University of Memphis, to author (Jul. 17, 2002) (on file with author). I used to teach *Jee*, but abandoned it for that reason; but I do think it is useful to highlight the absurdity of some results under the common law Rule.

[124]A number of teachers (using several different casebooks) expressed dissatisfaction with the casebook treatment of the Rule.

[125]Nicholas White finds the problems in the Dukeminier and Krier casebook to be very helpful, which he supplements with problems that require the students to compare the results under the common-law Rule and the uniform Rule. White letter, *supra* note 123 (referring to DUKEMINIER & KRIER, *supra* note 68).

[126]As noted by a number of people, a whiteboard diagram or overhead slide illustrating the perpetuities period can be helpful. After a traditional statement of the Rule, immediately followed by an alternative statement of the Rule and guidelines, Stephen Griffin illustrates the perpetuities period with a chart of lives in being plus twenty-one and a familiar example. Griffin e-mail, *supra* note 117.

[127] Robert Laurence and Pamela Minzner include numerous charts in their workbook. *See* ROBERT LAURENCE & PAMELA MINZNER, A STUDENT'S GUIDE TO ESTATES IN LAND AND FUTURE INTERESTS (2d ed. 1993). I provide students with a class supplement that includes separate charts for each of the following: all present and future interests; defeasible estates; remainders and executory interests; a step-by-step formula for future interest problems; and a checklist for RAP analysis. In addition to the three problem sets the students are required to do on their own, many students say that the charts are the most helpful tool in learning and understanding the estates area.

wonderful for introductory lectures, for putting up prototypical examples for lecture, and for necessary problems for discussion.[129]

Visual analogies are also effective, as illustrated in John Makdisi's effective use of the train metaphor in his workbook.[130] I use the analogy of cartoon frames to diagram how, after initial identification, interests can change because of the application of special rules or subsequent events. The first frame (or benchmark photo) on the board is the identification of all present and future interests as of the effective date of the deed or will, the second frame is the interests after application of the Rule Against Perpetuities,[131] the third frame is the interests after the first subsequent event, and so on.

Just as in a cartoon, with each new frame, students look only at the preceding frame to determine the changes and not back to the original interests created by the deed or will. Each subsequent frame is changed somewhat either by the application of a special rule, or by a subsequent event. Each frame, however, still has some features in common with the preceding frame. The difference between the first frame and the final frame may be dramatic, but the difference between one frame and the next is incremental. This can be illustrated on the board or an overhead by putting the names of the parties and the interests each holds at a given point in time in a box or frame, followed by a new box for each event that affects any of the interests. Besides providing a visual analogy they can understand,[132] this approach imposes a structure which can render manageable even very complicated instruments with multiple present and future interests.[133] Because we begin doing the frames in boxes on the board as soon as we start future interests, the students are familiar with the approach by the time we get to RAP. Thus, it also allows the students to see how RAP fits into the overall scheme of present and future interests.

---

[128]ROGER ANDERSEN, JOHN GAUBATZ, IRA BLOOM & LEWIS SOLOMON, FUNDAMENTALS OF TRUSTS & ESTATES 389 (2d ed. 2002); Andersen e-mail 2, *supra* note 109.

[129]Linda Edwards's book, ESTATES IN LAND AND FUTURE INTERESTS: A STEP BY STEP GUIDE (2002), comes with a complete set of PowerPoint slides. It covers the material incrementally and has self-correcting exercises at the end of each chapter. The same exercises are on the PowerPoint slides, so these can be used in class as well. Timothy Jost uses PowerPoint slides to lay out the Rule; he then posts the slides and the answers to the problems on his website after class so students can review later. Jost e-mail, *supra* note 25.

[130]MAKDISI & BOGART, *supra* note 111. Frederic White finds the Makdisi trains and the charts in LAURENCE & MINZNER, *supra* note 127, help students to visualize the problems. White e-mail, *supra* note 121.

[131]I do not cover the Rule in Shelley's Case or the Doctrine of Worthier Title, but the application and effect of these rules could be illustrated in a frame or frames between my first and second frames.

[132]I presume some of them understand how old-fashioned cartoons were created in the pre-digital age, with each separate frame drawn by hand illustrating only minute changes from the preceding frame. But to be on the safe side in this era of digitally produced cartoons, I explain the process briefly before I put the succession of frames on the board.

[133]Keith Sealing uses a snapshot analogy to identify the lives in being at the creation of the interest. Sealing e-mail, *supra* note 121. One of the tutors in our ASP program, Gregg Miller, uses an analogy to a gumball machine to illustrate the Rule's operation. Interview with Greg Miller, writing lab Coordinator, Thomas Jefferson School of Law (Fall 2002).

C. Written Handouts

Written handouts for students,[134] explaining the Rule and how it works, as well as problem sets and other materials, can be distributed for reading before the Rule is discussed in class or after the Rule is covered, or they can be included in supplemental readings provided at the beginning of semester.[135]

D. Humor

Judiciously used, humor can be a very effective tool in just about any aspect of teaching, but particularly so in teaching the Rule Against Perpetuities. The Rule is difficult and intimidating for almost any student, but it can be downright terrifying for students who are barely into their first month of law school. They tend to be a fairly stressed-out group under any circumstances, so a little comic relief is welcome. It also helps to keep their attention. And the Rule, with all its potential absurdities, offers rich opportunities for humor and mockery. The range of outrageous hypotheticals based on the fertile octogenarian, the unborn widow, the precocious toddler, the magic gravel pits, and other such absurdities is endless if one is imaginative. And to really appreciate the outer limits of the application of the common law Rule, one must certainly be imaginative.[136] You can inject humor (often morbid) into the hypothetical fact patterns for your examples: by casting them as supermarket tabloid newspaper headlines;[137] by using TV and movie characters, the Dean, other professors, or other familiar figures as the parties;[138] or by simply creating outrageous facts.[139]

Because the students are so stressed out, in teaching the traditional Rule, Keith Sealing has developed a lighthearted, four-step approach to the Rule: "Take a

---

[134]John Martinez included detailed materials that he has used for a number of years. Sometimes he hands them out, and sometimes he just uses them as notes and leads the students through them without handing them out. Martinez e-mail, *supra* note 36. Alice Kaswan included attachments, class notes, and a "RAP guide" she gives to students to organize their analysis. E-mail from Alice Kaswan, Professor of Law, University of San Francisco School of Law, to author (June 10, 2002, 18:53:00 PST) (on file with author).

[135]Daniel Bogart uses a handout that is part of the supplemental readings provided to students at the beginning of the year. Bogart e-mail, *supra* note 7. I include all the charts, problems, and other handout materials in a supplement that students purchase at the beginning of the semester.

[136]Calvin Massey emphasizes to the students that in concocting proofs of invalidity, they must be both imaginative and ruthless. Massey e-mail, *supra* note 31. They must imagine unborn children who will never exist (for the fertile octogenarian) and highly unlikely spouses—the 90 something widower marrying the 16-year-old Lolita (the unborn widow). *Id*.

[137]Ira Bloom presents the fertile octogenarian problem with the headline: "84 Year Old Granny in Nursing Home Pregnant!" Bloom e-mail, *supra* note 11.

[138]Michael Zamperini uses identifiable people, including students, to provide a familiar context; for example, "To Fred, but if the dean of students bungee jumps off the Golden Gate Bridge, then to Helen." Zamperini Letter, *supra* note 111.

[139]"To A, but if a member of the Taliban is elected president of the United States, to B." Ira Bloom email, *supra* note 11.

snapshot, have some babies, kill 'em all, and wait twenty-one years."[140] Michael Zamperini tries to treat RAP and future interests in general in a mocking, humorous way. Such an attitude lets students know that these are old doctrines, some of which have been abolished, but which are still understandable.[141] Ira Shafiroff adopts the deadpan approach: He starts by simply reciting the Rule and then asking, "Any questions?" which elicits nervous laughs from students.[142] There are several imaginative approaches to encourage the students to memorize the Gray statement of the Rule. David Crump has two thirds of his students chant a rhyming version of the Rule, while the other one third performs as the rhythm section;[143] and apparently at least one professor wears a T-shirt to class with the full Rule stated on it.[144] Sherri Burr uses a game that she invented called "future interests jeopardy," where she divides the students into three-person teams, with each team supplying one representative to answer questions about the subject.[145]

E. Popular Culture References

Everyone agrees that *Body Heat*[146] is a sexy movie, but of little use except to pique student interest. The movie is used by a few teachers, not because of its penetrating insight but because it is so rare to have a mainstream movie with a plot that centers on the Rule Against Perpetuities.[147]

---

[140]Sealing e-mail, *supra* note 121.

[141]Zamperini letter, *supra* note 111.

[142] Shafiroff e-mail, *supra* note 22.

[143] E-mail from David Crump, Professor of Law, University of Houston Law Center, to author (June 20, 2002, 18:47:00 PST) (on file with author). He says, "it doesn't sound very good"—but at least the students can state the Rule correctly on an exam. *Id.*

[144]Rob Natelson thought the professor was at Loyola, Chicago. Natelson e-mail, *supra* note 22. Professor Natelson and others think the T-shirt should have been a "vest."

[145]Letter from Sherri L. Burr, Professor of Law, University of New Mexico School of Law, to author (Feb. 19, 2003) (on file with author). The winning team gets a prize—a University of New Mexico pen or cup. She says they have fun while learning the subject, and playing a game cements their knowledge. Of course, the "fun" aspect of learning can be overstated. *See* note 14 and accompanyting text for Pat Randolph's response to Maura Flood's inquiry about teaching the Rule. He is concerned that efforts by many faculty to make the classroom experience less stressful for both themselves and the students can create an expectation in the students that it is not their job to learn. He has his "set of jokes, stories, bits, and entertainments," but he also tells students that he expects them to learn by reading, that his job is to build upon what they have read, not to tell them what they have read. He also reminds them that if all of this were really easy, no one would pay them to do this in law practice. Randolph posting, *supra* note 14.

[146]BODY HEAT (The Ladd Company 1981) (written and directed by Lawrence Kasdan, starring Kathleen Turner and William Hurt).

[147]E-mail from Carl Oppendahl, Adjunct Professor of Law, University of Denver Law School, to author (Mar. 13, 2002, 14:32:00 PST) (on file with author). Frederic White tells his students, somewhat facetiously, to rent *BODY HEAT*, but warns them that the movie still doesn't get the application of the Rule right. White e-mail, *supra* note 121. Adam Scales admits that the movie is pretty peripheral and that it misstates RAP, but says no article would be complete without it. He adds, "and Kathleen Turner rocks." E-mail from Adam F. Scales, Assistant

Stephen Griffin shows a clip from *Body Heat*, and then challenges the students to construct a grant that fits the facts of the movie but does not violate the Rule. The students must turn in their efforts, which he analyzes and then chooses the best or most interesting solutions to discuss in class. This approach guarantees that students will remember the Rule because they like movies, and at least begin to grapple with the intricacies of the Rule.[148]

Other popular culture references appear to be rare,[149] but I can imagine some good hypotheticals based on some of the absurdities that seem to occur regularly on contemporary television reality shows.

F. Secondary Sources

Because of time constraints, it is simply not possible to spend as much time on the Rule in class as many students want or need. Therefore, many teachers recommend additional resources for students who want to better understand the Rule.[150] The classics among these recommendations are the old Barton Leach Harvard articles,[151] which many teachers still find valuable.[152] More current

---

Professor of Law, Washington and Lee University, to author (Mar. 13, 2002, 15:07:00 PST) (on file with author). In what I must assume is a tongue-in-cheek response, Bob Verchick said that he thought the most important reason for understanding RAP is that it is the only way to appreciate the plot twists in "that great whodunit film, *Body Heat*." Posting of Robert R.M. Verchick, Professor of Law, University of Missouri-Kansas City School of Law, verchickr@unkc.edu, to PropertyProf@lists.washlaw.edu (Dec. 4, 2002, 09:46:00 PST). He actually shows a scene from the film in class, but "that is only for dessert." He makes them "eat the spinach first." *Id.* Pat Randolph has another take on the film. He mentions the film and at one time had it running on the TV in the back room when he invited the class to his home for parties. Randolph posting, *supra* note 14. But he wonders about the political correctness of the film in the modern era; there are persons of both genders who would find the film offensive with its "stereotypes of the femme fatale and the testosterone helpless male." He wonders if assigning the film today would constitute harassment. *Id.*

[148]Griffin e-mail, *supra* note 117. He says the one thing they remember is the movie.

[149]Blake Watson's one attempt to provide a shortcut for RAP met with puzzled looks. His shortcut involved an allusion to a song that was a "one-hit wonder" in 1969 by ZAGER & EVANS, *In the Year 2525, on* 2525(EXORDIUM & TERMINUS) (RCA Records 1969). With the exception of one older student, the students did not get the musical reference. So he changed the shortcut to the 900-year rule: If it can vest 900 years from now, it violates RAP. E-mail from Blake Watson, Professor of Law, Dayton School of Law, to author (June 10, 2002, 10:38:00 PST) (on file with author). Anyone who has been teaching for a while can certainly relate to his experience with pop culture references from the 1960s and the mystified looks from contemporary students.

[150]A short bibliography of secondary sources recommended by various teachers is attached as Appendix B.

[151]Leach, *supra* note 55. The Leach article is "tough going for some [but it] is still a solid introduction to the field." White e-mail, *supra* note 121. The sequel, W. Barton Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973 (1965), is also useful.

[152]Gail Frommer required her students to read Leach's classic law review articles. E-mail from Gail Frommer, Professor of Law, Whittier Law School, to author (Feb. 27, 2003, 12:11:00 PST) (on file with author). Although John Strong's coverage of the Rule was minimal, he did use some simple examples from Leach's article. E-mail from John Strong,

secondary sources that were mentioned by a number of teachers are the future interest workbooks by John Makdisi and Daniel Bogart;[153] Robert Laurence and Pamela Minzner;[154] Charles Nelson and Peter Wendel;[155] Linda Edwards;[156] and Frederic Schwartz,[157] respectively.[158] Several people also found Carolyn Featheringill's article on her step-by-step approach to the Rule helpful.[159]

Because everyone seems to agree that the best way to learn RAP is by problems, exercises and drill, some teachers have moved away from detailed, in-class coverage of RAP and future interests and toward a programmed learning approach, such as CALI.[160] Although programmed learning would not be the best approach to many law school subjects, it seems to work reasonably well for learning the Rule Against

---

Professor of Law Emeritus, James E. Rogers College of Law, University of Arizona, to author (July 1, 2002, 14:44:00 PST) (on file with author); Leach, *supra* note 55. Robert Parella does not teach the Rule at all in Property, but rather in the Trusts and Estates course, where he uses Leach's original article as the primary source. E-mail from Robert E. Parella, Professor of Law, St. John's University School of Law, to author (June 24, 2002, 09:21:00 PST) (on file with author). Besides the two Leach articles, Lucia Silecchia suggests her students read Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV.1867 (1986). Silecchia letter, *supra* note 60. Craig Oren also suggests the Dukeminier article as an excellent reference. Oren e-mail 2, *supra* note 37. Although I have never required the class to read law review articles on the RAP, I found both of the Leach articles, as well as the Dukeminier article, extremely valuable for my own understanding when I first began teaching the Rule.

[153] MAKDISI & BOGART, *supra* note 111. Pat Randolph has used several different workbooks, and he finds Makdisi [he referred to an earlier edition, authored by Makdisi alone] the most accurate. The text has lots of examples and very condensed text. Although it is difficult for students to get through the text the first time, the text and problems together are much easier to review and study later**.** Randolph posting, *supra* note 14.

[154]LAURENCE & MINZNER, *supra* note 127. Lawrence Nolan does not teach the Rule in his Wills class because of time constraints, but he assigns his students a chapter a week out of Laurence and Minzner's guide. E-mail from Laurence C. Nolan, Professor of law, Harvard University School of Law, to author (Mar. 13, 2002, 08:48:00 PST) (on file with author).

[155]NELSON & WENDEL, *supra* note 109. Thomas Reed uses Nelson and Wendel as a "supplemental problem text" for all future interests and estates in both Property and Wills and Trusts. The book is "very simply (but excessively wordily) written" and includes examples and problems with answers to every problem in the back of the book. Reed e-mail, *supra* note 23. James Durham likes Nelson and Wendel (they "cover the subject with a skimpy but clear text and lots of examples") because they provide some examples with answers and reasons, and some problems with just answers, thus requiring students to supply the analysis and reasons. Durham e-mail, *supra* note 41.

[156]EDWARDS, *supra* note 129.

[157]SCHWARTZ, *supra* note 104. Of all the student guides he reviewed, my research assistant found this text the most helpful.

[158]Diane Klein encourages her students to use "any and every supplement" without endorsement because students need to find someone who speaks their language. Klein e-mail, *supra* note 13.

[159]Featheringill, *supra* note 12.

[160]CALI: Lessons for Law Students, Center for Computer-Assisted Legal Instruction CD-ROM, 17th ed. 2004.

Perpetuities.[161] Programmed learning exercises can be used in conjunction with, or in place of, in-class coverage of the Rule.[162] The CALI exercises seem to be most effective if they are assigned *after* present and future interests (and the other special rules) are covered, but *before* in depth class discussion of RAP.[163]

VI. AVOIDING COMMON SOURCES OF STUDENT CONFUSION

Potential sources of confusion for students when they first encounter the intricacies of the Rule Against Perpetuities are legion. Many of the common ones have already been mentioned, but a checklist of pitfalls is useful. Among many others, these include the initial determination of whether to apply RAP; the all or nothing analysis required for a class gift; the difficulty of determining the perpetuities time period for a given interest; what it means for different types of interests to vest; the irrelevance of the common law Rule to events that actually occur after the creation of the interest; the difference in meaning between lives in being, measuring lives, and validating lives; how to determine a validating life; the significance of an afterborn child; the medical and biological impossibilities that the Rule forces us to accept; and too much complexity in explanation or examples.

A. Application of RAP

Students often confuse the following three statements: "RAP does not apply"; "RAP applies, and the interest is valid, but it fails"; and "RAP applies, and the interest is void." These statements are not synonymous or interchangeable, as students sometimes assume. "RAP does not apply to this interest" means because the interest is not a contingent future interest, there is no RAP issue at all. "RAP

---

[161]Rob Natelson uses his own programmed learning system (similar to CALI), which has vastly increased comprehension. Natelson e-mail, *supra* note 22. Believing students must be able to work through the elements at their own pace with feedback (which works best outside of class), June Carbone developed a simple computer program designed to take the students through the analysis. Carbone e-mail, *supra* note 89. She focuses on Dukeminier and Krier's examples and problems. *See* DUKEMINIER & KRIER, *supra* note 68. She thought their material was too difficult when she first started teaching, but once she understood the material better herself, she realized their problems effectively cover the terrain. Carbore email, *supra* note 89. She now supplements by greater explanation but not different assignments. *Id*.

[162]Richard McLaughlin replaces in-class discussion of RAP by requiring the students to learn the topic in the computer lab with the CALI exercises. E-mail from Richard J. McLaughlin, Lecturer and Associate Professor of Law, University of Mississippi Law Center, to author (June 11, 2002, 08:06:00 PST) (on file with author). He gives the students an introduction to the basics in class, and then gives them two days off to do the computer exercises. The students like the fact that they can work at their own speed and review sections of the tutorial if they find it necessary. He then answers any questions they have in his office, which is less intimidating for most students than asking questions in class. *Id.* Byron Cooper, on the other hand, uses the CALI exercises in conjunction with detailed, in-class analysis of the problem sets he has created. Cooper e-mail, *supra* note 123. Most of his students find the CALI exercises very helpful. "[T]he middle range students really seem to understand the Rule better after they have done the exercises." *Id.* After trying several approaches to teaching the Rule, Harvey Feldman now assigns the CALI exercises before covering his own problem sets with his students. Feldman e-mail, *supra* note 11.

[163]It may be most useful to assign the CALI exercises at the beginning of the coverage of the Rule, perhaps after a brief, in-class explanation.

applies to this interest, and the interest is valid, but it fails" means the interest is a contingent future interest, which must be analyzed under RAP. When it is analyzed, it does not violate the Rule because it is certain to either vest or fail within the required time, but the interest then ultimately fails to vest. "RAP applies, and the interest is void" means the interest is a contingent future interest, which must be analyzed under RAP. When it is analyzed, it does violate the Rule because it is not certain to either vest or fail within the required time.[164]

B. Too Much Complexity

Because you can rely on the fact that every student's first exposure to the Rule Against Perpetuities will be confusing, it makes sense to keep the presentation in Property simple and organized and stick to the basics in examples and problems.[165] Avoid complicated, obscure applications of the Rule, which should generally be left to upper-level courses like Wills and Trusts.[166] Therefore, avoid examples and problems involving options, powers of appointment, class gifts,[167] or all of these. The classic but obscure hypotheticals[168] are most useful in emphasizing the absurdity of results under the common law Rule, or in demonstrating the ruthlessness and imagination required in applying the common law Rule. Because it is very easy to miss the forest for the trees when first encountering RAP, it is wise to avoid too much detail at the preliminary explanation stage. You can always add complexity at the feedback stage or in response to questions after students have spent some time working problems on their own.[169]

---

[164]Students often have trouble separating failure of a gift from a violation of the Rule. Feldman e-mail, *supra* note 11.

[165]Jeffrey Stake uses a very simplified, straightforward approach that works well for him and his students. Stake e-mail, *supra* note 52. He rewords the Rule to state, "an interest is void if it might vest too late." He then breaks that statement down into each element, focusing on the fact that RAP is a matter of logical proof and the importance of searching for an "invalidating scenario" to show that the interest is void. *Id.* The virtue of this approach is simplicity. Anything that can simplify the Rule and streamline it for students is apt to work more effectively than otherwise.

[166]Singer e-mail, *supra* note 23. Professor Singer does just basic applications in first-year Property, focusing on executory interests because they are easier to understand and apply the Rule to than contingent remainders. He also includes a problem that requires doing policy analysis and legal argumentation rather than rigid application of the Rule. *Id.*

[167]In Property, Roger Andersen teaches the Rule in regard to defeasible fees, but does not even touch class gifts because without knowing the class closing rules, students get lost easily. Andersen e-mail 2, *supra* note 109. Several others, however, do cover class gifts. The dilemma regarding class gifts is that you can simplify your presentation considerably if you avoid class gifts, but focusing on class gifts enables you to show much more easily how an afterborn child can invalidate a gift to an entire class. No such problem presents itself in regard to options and powers of appointment. With a possible exception for inclusion of *Symphony Space*, 666 N.E.2d 799, the Rule as applied to options and powers of appointment is and should be beyond the scope of most first-year Property courses.

[168]Of the unborn widow, the fertile octogenarian, and the precocious toddler ilk.

[169]When teaching the mechanics, Donald Gjerdingen sticks to the basics and the classic traps. You can always make it harder, but students can learn eighty-five percent of what they need to know by studying just a few basic problems. Gjerdingen e-mail, *supra* note 90.

It is also helpful to students to use ordinary language in explaining the concepts. Although they certainly need to know the proper technical terms, overuse of jargon in the explanation will likely lose them. By the time students can mentally process what you mean by a turgid, jargon-laden, but correct statement—"you should identify one life in being for which the determination of vesting must be made within the perpetuities period, or, if you cannot, you must show that there is no life in being that will assure the determination of vesting within the perpetuities period"—you will be several paragraphs beyond in your explanation, but they will not be with you. If you lose them at this early stage, then you may never get them back.

C. Measuring Lives, Validating Lives, Vesting, and Afterborns

Any discussion of the Rule necessarily involves a focus on what it means for a contingent interest to "vest." The contingent interest must be certain to vest or fail within the time limit: the lives in being plus twenty-one years. Most approaches to teaching the Rule involve a discussion of the concepts of vesting and of measuring/validating lives. But because the concept of measuring or validating lives is so confusing for many students, some teachers avoid discussion of validating lives entirely and focus only on vesting.[170] Carolyn Featheringill's article on her step-by-step approach to the Rule adopts a four-question approach that avoids measuring lives language entirely and focuses instead on vesting.[171] She deliberately avoids the term measuring lives because it is a major contributor to the complexity inherent in the Rule and a primary source of student confusion. "For many students, knowing which members are measuring lives requires an application of the Rule before it is fully understood."[172] As she notes, the result is often chaotic.

A variation of this approach is to delay the search for validating lives. Because it is very hard for students to understand the concept of a measuring life if they focus first on who is alive at the creation of the interest (that is too broad a group to get a sense of who should be considered), Robert Wilcox focuses first on those who were

---

[170]The cornerstone for the Rule is a sound understanding of the concept of vesting. Diane Klein does not emphasize measuring lives, which is hopelessly confusing to most students. Klein e-mail, *supra* note 13. Instead, she focuses on attempting to generate a situation that will result in remote vesting and invalidation. Students must always be reminded at every stage of the difference between failure to vest and remote vesting. She presents numerous formulations of the Rule including "must vest, if at all" and "must vest or fail." Her approach to generating counter examples usually involves killing everyone in the world (often except for a pregnant woman), so students can imagine cutting off all the lives in being at once. *Id.*

Greg Smith focuses on vesting and the perpetuities period. Letter from Gregory N. Smith, Professor of Law, Louisiana State University, to author (Apr. 3, 2003) (on file with author). Once an interest has been identified that implicates the Rule, he asks, when will vesting happen, if ever? Once that question is answered, he asks if the vesting is certain to be resolved within the perpetuities period. He emphasizes that the Rule does not require vesting; it requires certainty. In discussing the perpetuities period, it is impossible to avoid some discussion of people who are alive at the effective date of the gift. But without referring to measuring or validating lives, apparently some confusion is avoided. "It is kind of fun, really, once you get the hang of it." *Id.*

[171]Featheringill, *supra* note 12.

[172]*Id*. at 167.

alive at vesting.[173] Calvin Massey tells students not to start looking for validating lives as the first order of business. They will find all the possible validating lives or absence thereof when they start thinking about when the identified uncertainties will be removed, inasmuch as validating lives must be germane to the grant.[174]

Steven Semeraro avoids discussion of validating or measuring lives by using a three-step approach that focuses on the concept of an afterborn child.[175] After identifying all contingent interests, ask whether the contingent interest could vest in an afterborn child. If the answer is yes, then ask if the contingent interest could vest more than twenty-one years after the birth of the afterborn. In order for the students to see how this works, they must of course assume that when the afterborn is born, everyone else who was alive at the effective date of the instrument then dies. As long as students understand what an afterborn is, and that they must kill off everyone who was alive at the effective date of the instrument as soon as the afterborn is born, this approach does simplify the Rule somewhat as it avoids the confusion of measuring lives, lives in being, and validating lives.

---

[173]E-mail from Robert Wilcox, Professor of Law, University of South Carolina, to author (June 28, 2002, 06:54:00 PST) (on file with author). There are several key areas that cause students problems. First, they often fail to start by making sure they understand exactly why an interest is not fully vested. Second, they identify the latest vesting event in a way that does not suggest to them all possible measuring lives. Third, they are confused by the twenty-one-year part of the Rule. To address these concerns, Professor Wilcox makes the students identify the exact nature of the interest they are considering for RAP, including stating the event that will cause the interest to vest. He then makes them identify the latest possible vesting time and asks who will be certain to be alive at the latest event or a moment before and who else, if anyone, will be alive twenty-one years prior to the latest possible vesting date. Then he asks if any of the people identified in the previous two questions are alive today at the creation of the interest. Students "still make plenty of errors," but this works fairly well for him. *Id.* By focusing on the people who affect vesting and thus will be alive at the end of the period, he reduces the number of people to consider as measuring lives. When students experience difficulty as things become more complicated, he goes back to a few very basic examples that he knows the students will get right. When nearly all of them give the right answers, he points out that they obviously know the law. The difficulty is not their understanding of the law. It is their understanding of the facts and their ability to answer the questions correctly. This seems to give them some hope that they will get it eventually. *Id.* His is an interesting approach, but my concern is that there is so much illogic in this Rule to begin with; having the students go through it backwards may just add to the confusion.

[174]Massey e-mail, *supra* note 31. For the perpetuities period, Craig Oren asks the students: What is the least you would have to do to prove that the interest would not be contingent too late? Oren e-mail 1, *supra* note 37. The answer is to find a person in existence at the time the interest was created, about whom you can say that the interest cannot possibly vest more than twenty-one years after that person's death. Students then realize that that person must be someone logically related to whether or when vesting occurs. *Id.*

[175]Steven Semeraro, Associate Dean and Professor of Law, Thomas Jefferson School of Law, Property class Lecture at the Thomas Jefferson School of Law (Mar. 5, 2002); Interview with Steven Semeraro (Mar. 5, 2002). An afterborn, of course, is someone born after the effective date of the gift. The problem of an afterborn child usually comes up anyway, often in response to a student question or an explanation of why a student response is wrong. The afterborn problem illustrates that if the members of a class are to be used as validating lives, then the class must be closed.

D. The Rule Is Inconsistent and Defies Legal Common Sense

The Rule Against Perpetuities has been excoriated as illogical, inconsistent, needlessly complicated and confusing, hopelessly rigid, defying common sense, and subject to brainless application. It is no wonder students have difficulty with it. Although perhaps overstated, all of these criticisms have some merit.[176]

Donald Gjerdingen developed his own supplemental materials to teach the Rule because no existing materials worked for him. None of them addressed the most obvious source of students' trouble with the Rule—it goes against the legal commonsense of other law school courses. Too many people focus on the mechanics of the Rule (which should be the *second* part of the discussion) without first talking about why the students have such trouble with it. When he addresses the sources of the confusion first, the mechanics become much easier.[177]

For Aaron Schwabach, "It's just math—a little bit of logic, a littler bit of arithmetic. The problem is that [in Gray's statement of the Rule] the logical premises are hidden and not intuitively obvious–not common sense."[178] After looking at *Jee v. Audley* and some of the problems, he sets these premises out for the students: Every person alive can always get married (or divorced). Every person alive can always have children. Every person alive can die at any moment.

For Robert Flores, one of the more illogical aspects of RAP is the separation between fundamental laws of nature and mere common sense. You may rely on the former, but you may not rely on the latter. For example, it is a law of nature that you cannot make or bear children before you are born or after you die, but it is mere common sense that you cannot make or bear children when you are very young or very old.[179]

---

[176]Dennis Karjala mentions the Rule only to point out its inconsistencies, particularly the fact that it does not apply to future interests in the grantor, which may be of extremely long duration. E-mail from Dennis S. Karjala, Professor of Law, Sandra Day O'Connor College of Law, Arizona State University, to author (June 26, 2002, 11:24:00 PST) (on file with author). This area of property law is in mass confusion; two categories are barely distinguishable analytically, but their characterization has important real world effects. However, he is mystified about the trend to abolish the Rule. "I can understand the desire to make the Rule less complicated and less of a trap . . . but surely there was good policy underlying the Rule, and I don't know why we're pitching that out." *Id.*

[177]Gjerdingen e-mail, *supra* note 90. His lengthy handout includes both a checklist and a clear explanation of all the ways in which the Rule defies legal common sense—those traditional stumbling blocks that are the source of many of the problems for students in understanding the concepts of the Rule. It includes all manner of questions from students about the complexities of the Rule. This is not simply a series of steps, but actual explanations. His observation about the difficulty of learning material that does not comport with logic and common sense is right on point. You can analogize this aspect of the Rule to other concepts in Property where common sense does not prevail and the concomitant difficulty students have with those areas; for example, the recording acts. His materials are an excellent and understandable summary, but perhaps a little too much detail for any but the most intrepid student.

[178] Schwabach e-mail, *supra* note 24.

[179]Flores e-mail, *supra* note 23. But as my colleague Aaron Schwabach noted, "The laws of nature are undergoing revision—every time I've taught RAP, a student has brought up the frozen-embryos problem." Schwabach e-mail, *supra* note 24. When my students bring up the

The greatest conceptual difficulty for my students is actually being in the present, but having to artificially position themselves in the past and look into the future (which probably ends up being the actual present). This is neither logical nor natural nor what we usually do as human beings or lawyers. This is as great a challenge to common sense as anything about the Rule.

VII. REASONS FOR NOT TEACHING THE RULE

When faced with the dilemma of teaching the Rule Against Perpetuities, the solution for some is simply not to teach the Rule at all in the introductory Property course.[180] By necessity, this is generally true for the schools where the Property course has been reduced to three or four credits. Even in a six-unit Property course, a number of people did not consider teaching RAP worth the time that it takes to do it well when there are so many other property topics that are more important to a practice in real estate law.[181] Some said that because the Rule is so difficult for first-year students, they simply leave it to the Wills and Trusts professors to teach the Rule to third-year students.[182] Although this may work some of the time, I noticed in the responses that some of the Wills and Trusts professors do not teach the Rule in those courses because they assumed the students learned it thoroughly in Property. The problem, of course, is that if both attitudes exist at the same school, then students are not learning the Rule at all because each group of professors assumes (or hopes) the other will cover it.[183]

---

intersection of RAP with cutting edge legal issues, I usually tell them that until the courts and legislatures resolve these difficult questions, they would make great law review articles.

[180]"So few instructors bother with the Rule any longer." Pennell e-mail, *supra* note 11. Although coverage is certainly not universal, based on the responses I received for this article, this is a bit of an overstatement. Pennell indicates that RAP is found on the Aspen Publishing website rather than in the text of the Roadmap Series for Property that he co-authored with Alan Newman because they wanted to keep the text of manageable size and RAP was not considered as important as other topics. *Id.*

[181]At St. John's, they do not teach the Rule to first-year students because they have a required upper-level course in Trusts and Estates and they have moved coverage of the Rule to that course. E-mail from Robert Zinman, Professor of Law, St. John's University School of Law, to author (July 7, 2002, 03:22:00 PST) (on file with author). Even though the first-year Property course is six credits, it does not include the Rule. *Id.*

[182]Michael Zamperini has an advantage in teaching RAP in Wills and Trusts rather than Property because he can put off until the eleventh week of a fourteen-week semester the conceptual issue of documents executed now that have an effect in the future. Zamperini Letter, *supra* note 111. Students at this point understand the concept because they have been through many cases and situations, whereas first-year students at the beginning of their law school education have little experience with anything about future interests. *Id.*

[183]Of course, the opposite situation exists also. At some schools, students are exposed to the Rule in both Property and Wills and Trusts. Wright e-mail, *supra* note 92. Danaya Wright finds that her goals in Property are very different from those in Estates and Trusts. In Property, she wants "them to know why it is an important Rule, what happens if it is violated, and the cues for identifying the most likely problems," so she spends a day explaining how it works. The next day they do some problems "so they begin to see how open classes following open classes are likely to violate the rule." *Id.* They do a few cases which are helpful mainly to show that a violation of the Rule "can upset many expectations." *Id.* In Estates and Trusts, on the other hand, she does "a quick review in 1 day that combines what [she] covered in

There are a number of legitimate justifications for covering the Rule in advanced courses rather than in the first year Property course. Not the least among them is that it seems counterproductive as well as counterintuitive to cover what is possibly the most difficult Rule students will ever learn in their first semester of law school.[184]

The explanations for not covering the Rule run the gamut, with some tendency to extremes; for example, too many students never get it, or too many students spend an inordinate amount of time on it.

A. Lack of Student Comprehension

Jeffrey Pennell does not cover traditional RAP at all in his class because only about fifty percent of the students seem to get it, even when you devote a lot of class time to it. Therefore, teaching it is of dubious pedagogical value even when done right.[185] Thus, he discusses only the contemporary approach to the Rule, a little policy, and how proper drafting can avoid its application. Thomas Reed does not teach the Rule in Property because "the students seem totally unable to understand the Rule and to apply it."[186] William Stoebuck's experience has shown him that teaching the Rule to first year students "more confused than illumined the students. So, my advice is, do not do it at all unless you can do it rightly."[187] For years, Roger Andersen skipped the Rule entirely for fear that a little knowledge might be more dangerous than none in Property.[188]

---

property in the first 2 days." *Id.* Then she spends "2-3 more days with cases that are far more helpful in picking out the problems because they are from wills with funny and complex devises." *Id.* She focuses on identifying the present interest and the future interests, asking whether the Rule is violated, and then changing the facts in many of the cases to create a violation, so she can actually bring the Rule into as many cases as possible "just so they become comfortable with it." *Id.*

[184]John Mixon thinks that "teaching future interests in the first month or two of law school is crazy." Mixon e-mail, *supra* note 22. He reserves it until the middle of the second semester. *Id.*

[185]Pennell further explained:

> Experience tells me that either you get it or you don't. Perpetuities requires that your head work a certain way and you either 'see it' (after being shown) or you don't, and for some people an unlimited measure of effort can be invested and still the light will not go on—not because of ignorance, lack of brainpower, or poor pedagogy, but simply because those hard workers are not wired for this thinking. Period. And for them trying to push this string up that hill is the most frustrating of experiences—for little academic benefit.

Pennell e-mail, *supra* note 11.

[186]Reed e-mail, *supra* note 23.

[187]Letter from William B. Stoebuck, Professor of Law Emeritus, University of Washington School of Law, to author (July 5, 2002) (on file with author).

[188]Andersen e-mail 1, *supra* note 11. Lately, however, he has started doing a simple introduction. His goal is only to pave the way so it is easier when they get to Trusts and Estates. *Id.*

B. Insufficient time

A common curriculum change at many law schools during the last quarter century has been to reduce the basic, required, first-year Property course from the traditional six units to three or four units. With such a reduction comes the question of which topics should be retained in the abbreviated first-year course and which should be left to upper-level electives. Although this debate has not yet been completely resolved, it seems that for schools where the Property course has been reduced to three or four credits, many teachers have severely curtailed or eliminated coverage of future interests and RAP in order to cover the many other property topics that are more important to a practice in real estate law.[189] Even in the schools that retained a six-unit Property course, a number of people did not consider teaching RAP worth the time that it takes to do it well.[190] The Rule Against Perpetuities comes with a lot of baggage. A decision to cover RAP is necessarily a decision to also cover the entire system of estates in land and future interests; without a thorough understanding of its underpinnings, one can never hope to fathom the complexities of the Rule.[191]

---

[189]Doing a basic cost-benefit calculus, David McCord excluded RAP and most of the system of estates from his four-unit course, although he might have decided differently if he had five or six credits. E-mail from David McCord, Associate Dean and Professor of Law, Drake Law School, to author (June 17, 2002, 09:26:00 PST) (on file with author). Other, more practical topics that were of greater importance to students "were being shortchanged or left out entirely when [he] spent the needed time on the system of Estates and RAP." *Id.* Sheryll Cashin never teaches estates and future interests to first-year Property students, but tells "them enough about the subject so that they can decide for themselves whether to take a course in Wills and Trusts." Letter from Sheryll D. Cashin, Professor of Law, Georgetown University Law Center, to author (June 6, 2002) (on file with author). "[W]ith a one semester property course, it is impossible to give this subject sufficient attention." *Id.* Edward Henneman gives estates in land and future interests very cursory treatment and does not touch the Rule because he has only a three-unit Property course. Henneman e-mail, *supra* note 11. David Favre now teaches a four-unit course, so he cannot justify the class time. Favre letter, *supra* note 106.

[190]Gail Frommer has not taught the Rule for years, but when she did "it took so many class hours for students to understand it, she decided that the harm (what I wasn't covering) outweighed the benefit of teaching the Rule." Frommer e-mail, *supra* note 152. John Robinson stopped teaching RAP ten years ago "because there is so much more important material to cover in Wills and Trusts law." Letter from John Robinson, Associate Professor, Notre Dame Law School, to author (Feb. 24, 2003) (on file with author).

[191]David McCord thought he was probably "singular" in that he does not teach RAP at all in the basic Property course because it takes a really long time to teach well both because of the complexity of the Rule itself and the common law estates system that is the necessary precursor. McCord e-mail, *supra* note 189. He might be surprised to learn that he is not so singular at all. John Applegate avoids the issue in first year Property because it cannot be done in the limited amount of time that its relative importance in that course justifies. Email from John Applegate, Executive Associate Dean for Academic Affairs and Professor of Law, Indiana University School of Law, to author (June 10, 02, 12:31:00 PST) (on file with author). Thus he spends an hour explaining what the Rule is, what it is intended to accomplish, its basic elements, and a few warning signs. *Id*. Deborah Tussey also does not teach the Rule in Property, but merely "issues a warning to students that if they plan to practice property law[,] they should check the [Rule] in their particular states." Email from Deborah Tussey,

C. Lack of Relevance: Modern Reforms

The relevance of the common law Rule has been questioned because of the many reforms to RAP that have occurred over the last fifty years.[192] Likewise, the relative importance of the common law Rule in the Property curriculum has also been questioned.[193] Although I would argue that the common law Rule is still relevant to an understanding of the modern reforms, the choice to eliminate coverage of RAP from the Property course, especially from an abbreviated Property course, can be justified on pragmatic grounds.[194]

D. Reliance on Upper Level Courses for Coverage

Many professors who do not cover RAP in the first year Property course rely on upper level courses to cover the Rule. As discussed above, time is at a premium in Property where there are so many other topics to cover. In addition, such a difficult concept may be better addressed when the students are more sophisticated legal thinkers and problem solvers and the Rule may be more relevant in contexts other than general property.[195] Although this could be perceived as simply an avoidance strategy, there is some justification for postponing detailed coverage of the Rule to later courses. Most of those who rely on upper level courses to cover the Rule relegate it to Wills and Trusts,[196] although a few schools apparently offer a separate,

---

Associate Professor, Oklahoma City University School of Law, to author (June 14, 2002, 14:20:00 PST) (on file with author).

[192]Adam Hirsch warned me that, "The Rule Against Perpetuities is on its way out!" Hirsch e-mail, *supra* note 5. As this Article demonstrates, I respectfully disagree.

[193]Anne Emanuel used to cover the Rule in Wills and Trusts, but has ceased to do so since Georgia adopted USRAP. E-mail from Anne Emanuel, Associate Dean and Professor of Law, Georgia State University College of Law, to author (Feb. 24, 2003, 11:09:00 PST) (on file with author). But she did say RAP is still covered in Property. *Id.* In the last few years, Richard McLaughlin has deemphasized all aspects of future interests so he can devote more time to topics more relevant to modern practice. McLaughlin e-mail, *supra* note 162. Both his colleagues and bar examiners share the de-emphasis on estates and RAP because there are so few reported RAP cases in recent history. *Id.*

[194]Jeffrey Pennell cannot justify the class time required to address the Rule, given that a number of states have abolished the Rule or adopted some form of relief to minimize the impact of the Rule. Pennell e-mail, *supra* note 11. Because Wisconsin has abolished the Rule, Lawrence Church simply notes the statement of RAP, its expansive interpretation, and its implications for most jurisdictions, which takes only a small portion of class time. E-mail from Lawrence Church, Professor, University of Wisconsin-Madison Law School, to author (June 24, 2002, 17:45:00 PST) (on file with author). He spends ever less time on the whole common-law history of arcane rules and terminology, but instead teaches students to be wary of the old rules and to know how to look up the details if they are confronted with them. He focuses much more on contemporary issues in property. *Id.*

[195]David McCord's estate planning colleagues convinced him that virtually all RAP problems nowadays arise in the context of trusts and the logical place to study RAP for those students who really need it is in the trusts construction course. McCord e-mail, *supra* note 189.

[196]John Applegate explains RAP very briefly, does not test on it, and leaves it to the Wills and Trusts course. Applegate email, *supra* note 191. Shelley Saxer does not teach RAP in Property because the Wills and Trusts professors teach it in required upper division courses.

upper level elective on Future Interests.[197] Not surprisingly, Mark Fenster found that teaching RAP to first year Property students was time-consuming and frustrating for both him and the students. After consulting with faculty at his school and other places, he decided not to teach it in Property, but to leave it for the required Trusts and Estates course.[198]

E. Inordinate Investment of Student Time

A number of professors expressed the concern that full coverage of RAP in the Property course consumed an inordinate amount of class time that could be better spent on other topics. Only a few, however, mentioned the problem that first year students would overdose on the Rule at the expense of other, more pressing, modern matters.[199]

VIII. CONCLUSION

The Rule Against Perpetuities may be inconsistent, illogical, needlessly complicated, and often brainlessly applied—but it serves a purpose. Abolishing the

---

Email from Shelley Saxer, Associate Dean, Pepperdine University School of Law, to author (July 17, 2002, 18:28:00 PST) (on file with author). Stephen Munzer generally teaches the rudiments of the Rule in one class session and tells students they will do much more detailed treatment of the Rule in the Wills and Trusts course. Munzer letter, *supra* note 23. Although his Property casebook contains material on RAP, Richard Chused has not taught the Rule for many years to first-year students and does not think that anyone at Georgetown does; it is covered only in upper-level courses. E-mail from Richard Chused, Professor of Law, Georgetown University Law Center, to author (June 24, 2002, 07:39:00 PST) (on file with author) *See also* R.H. CHUSED, CASES, MATERIALS, AND PROBLEMS IN PROPERTY (2d ed. 1999). But Malcolm Morris merely mentions the Rule in Trusts because it has been covered thoroughly in Property. Morris letter, *supra* note 64.

[197]William Stoebuck covered the Rule when he taught a separate, upper-division course called Future Interests, but in teaching the first-year Property course, there is too little time. Stoebuck letter, *supra* note 187. Edward Henneman does not teach the Rule in either his three-unit Property course or his three-unit Wills and Trusts course. Henneman e-mail, *supra* note 11. He really gets into the Rule only in a stand-alone, two-unit, future interests course, focusing on drafting issues, which deal with requirements of survival, definitions of class membership, death with or without issue, and creation and exercise of powers of appointment. He spends about three or four weeks on the common law Rule and modifications, including considerable time on the Rule as applied to commercial transactions, seeing that as more relevant for students who can picture themselves writing options and leases more readily than they can see themselves drafting dynastic trusts. The responses he has received from former students regarding perpetuities problems in practice have arisen in documents drafted in a commercial or corporate practice rather than a trusts and estates practice. *Id.* In both Trusts and Estate Planning, Malcom Morris gives the Rule only passing mention, but references students to the number of statutes abolishing the Rule. Morris letter, *supra* note 64.

[198] Fenster e-mail, *supra* note 21. But the policy considerations behind RAP, such as restricting dead-hand control, are important and he will continue to teach those rather than the intricacies of the Rule itself. *Id.*

[199]Strong e-mail, *supra* note 152. David Favre has been teaching Property for twenty-five years; for the first ten, he taught RAP, but then he quit teaching it because students spent too much time on it when he wanted them to grasp other critical components of the course. Favre letter, *supra* note 106.

Rule or avoiding it is not the solution. There is good policy here. To the extent there is a solution to teaching the Rule, it is to streamline and simplify the presentation of the Rule so as to avoid ridiculous applications. My guidelines for following my own advice are as follows: Keep in-class explanations and examples simple, especially in Property. Emphasize relevance, context, and connections. Liberally use analogies to familiar concepts and situations. Minimize outrageous examples, except as illustrative of absurdity. Use the whiteboard, slides, power point, diagrams, graphics, and any other visual aids you can think of to help your students. Develop a step-by-step process that fits your style and your students. Give your students plenty of problems (required, optional, or both), so they can practice. Provide some method of feedback so they can gauge their level of understanding. Finally, keep a sense of humor and hope your students do the same.

I have searched valiantly for a shortcut through the labyrinth of the Rule Against Perpetuities. Alas, my quest for that particular holy grail has been in vain. But what I have discovered is a wealth of valuable suggestions from many teachers, whose combined years of teaching experience numbers in the many hundreds. In this Article, I have tried to set forth some of those ideas so that anyone teaching this Rule can pick and choose from them. Each of us must weave our own Ariadne's thread that will help our students through this impossible maze without being gobbled up by this Minotaur of the Property curriculum.

IX. APPENDICES

APPENDIX A

The Rule Against Perpetuities Checklist

A step-by-step process for students to follow from initial identification to recharacterization after an invalid interest is declared void. It is critical to follow the same set of steps, in the same order, for each contingent interest analyzed under RAP.

1. Identify the instrument as a deed or a will so you know the date the interests are created.
2. Draw vertical lines to separate the different interests created by the deed or will.
3. For each separate interest, identify, define, and explain it, without regard to the Rule.
4. Treat each interest separately, in the exact order stated in the conveyance, always moving from left to right. Do not to take them out of order, and do not skip any.
5. As to each interest, ask: Is this a contingent remainder, an executory interest, or a vested remainder subject to partial divestment?
6. If the answer is no as to all interests, then RAP does not apply and that is the end of the RAP issue.
7. If the answer is yes to any of the interests, then RAP applies to that interest and you must analyze it under RAP. Flag it.
8. As to each flagged interest, ask, what event or events will cause this interest to vest?
9. When will that event happen?
10. To determine whether the interest is valid, search for a validating life, the witness we need to prove the RAP case. You need only one prover.
11. List everyone relevant to the contingent interest. This includes everyone mentioned or implied in the instrument, regardless of what type of interest, if any, they have. These are the possibles.
12. Eliminate all open classes and anyone not alive (dead or not yet born) when the interest was created. Anyone left is a life in being, a probable.
13. Draw a perpetuities time line, with a vertical line for the creation date on the left, a horizontal line for the lives in being, a vertical death line in the middle, a horizontal line for 21 years, and a vertical line for the drop dead date on the right.
14. For each person or closed class on your list of probables, plug them into the left side of the equation (life in being), put that person's death on the death line in the middle, and ask, what will I know at the death of this person (or the last surviving member of this class) about when this interest will vest? (Am I any closer to resolving the uncertainty?)
15. Will I know for certain at this person's death whether the interest has vested or failed?
16. If yes, the interest is good (valid), and that person is the validating life because that person proves the validity of the interest (a prover).

17. If no, then go on. Ask, will I know within 21 years after this person's death whether this interest has vested or failed?
18. If yes, the interest is valid, and that person is the prover, and the RAP analysis for that interest is complete.
19. If no, then go through the same process with each remaining person or closed class on your list of probables and ask the same questions.
20. If the answer is no to all the questions asked of each person, then there is no validating life (no prover) and the interest is void.
21. If the RAP analysis proves the interest is valid, the instrument and the interest remain unchanged.
22. If the RAP analysis proves the interest is void, then you must go back to the original language of the deed or will and line out the void interest.
23. Read the instrument as if the void interest was never there. This may require re-identification, definition, and explanation of any interests that were altered or created as a result of removing the void interest.
24. Proceed to analyze any subsequent events described in the problem, one at a time, in exact chronological order. For each event, describe the effect of the event on each of the interests.

APPENDIX B

*Bibliography of Secondary Sources**

CALI: Lessons for Law Students, Center for Computer-Assisted Legal Instruction CD-ROM, 17th ed. 2004.

Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL.L.REV. 1867 (1986).

LINDA EDWARDS, ESTATES IN LAND AND FUTURE INTERESTS: A STEP BY STEP GUIDE (2002).

Carolyn Burgess Featheringill, *Understanding the Rule Against Perpetuities: A Step-By-Step Approach*, 13 CUMB. L. REV 161 (1982).

ROBERT LAURENCE & PAMELA MINZNER, A STUDENT'S GUIDE TO ESTATES IN LAND AND FUTURE INTERESTS (2d ed. 1993).

W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV.L.REV. 638 (1938).

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

JOHN MAKDISI & DANIEL BOGART, ESTATES IN LAND AND FUTURE INTERESTS: PROBLEMS AND ANSWERS (4th ed. 2004).

CHARLES NELSON & PETER WENDEL, A POSSESSORY ESTATES AND FUTURE INTERESTS PRIMER (1996).

FREDERIC SCHWARTZ, A STUDENT'S GUIDE TO THE RULE AGAINST PERPETUITIES (1988).

* This list includes sources recommended by individuals other than the author of the work.