Darwin, Donations, and the Illusion of Dead Hand Control

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DARWIN, DONATIONS, AND THE ILLUSION OF DEAD HAND CONTROL

JEFFREY E. STAKE*

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“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.” Students have struggled with the Rule against Perpetuities, and scholars and practitioners urge simplification, but deep in the Rule lies a beauty, part of which stems from the very complexity and intricacy many bemoan. The Rule merits


4. The Rule has been associated with complexity since its creation. The modern Rule derives from The Duke of Norfolk’s Case, 3 Ch. Cas. 1, 2 Swanston 454, 22 Eng. Rep. 931
one more charitable look before rejection or reformation, lest that beauty be appreciated too late.\(^5\)

Though the Rule has attracted much scholarly attention, Professor Casner, the reporter for the Restatement, has noted that "[t]he basis or justification for the assumption that social welfare requires the imposition of restrictions upon the interference with the alienation of property has never been adequately explored and has been seldom discussed."\(^6\) The first goal of this Article is to extend that exploration, explaining how the Rule enhances economic well-being by improving the allocation of assets, collecting enjoyable packages of rights, and hastening the appreciation of interests.\(^7\) More generally, the primary purpose is to identify and explain the three types of economic benefits that might be generated when the Rule against Perpetuities changes an intended transfer of rights into a transfer different from that intended and to determine which of those three benefits accrues in each of the basic patterns in which the Rule may work a redistribution. This analysis takes the doctrine as a given, classifies the theoretical operation of the Rule into a few paradigms identified by use of examples, and examines each paradigm to determine what economic benefits might accrue in

\(^{(H.L. 1682)}\). See A. Simpson, An Introduction to the History of the Land Law 211-16 (1961). In that case the House of Lords struggled to deal with a complex estate planned by the ingenious Sir Orlando Bridgeman. \(\text{id.}\)

\(^5\). Twenty-two states have modified, by statute or opinion, the Rule against Perpetuities. Three states have enacted the Uniform Act, which effects simplification by setting a fixed 90-year period and adopting the wait-and-see approach. Minn. Stat. § 501A.01-.07 (West Supp. 1989); Nev. Rev. Stat. Ann. §§ 111.103-.1035 (Michie Supp. 1987); S.C. Code Ann. §§ 27-6-10 to -80 (Law. Co-op. Supp. 1988). The common-law Rule has been modified statutorily to a wait-and-see approach in 11 more states. See Haskell, supra note 3, at 546 n.1 (including Alaska, Iowa, Kentucky, New Mexico, Ohio, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, and Washington). Five state legislatures have enacted limited wait-and-see statutes. See \(\text{id.}\) (including Connecticut, Florida, Maine, Maryland, and Massachusetts). Judicial decisions indicate the wait-and-see approach would apply in three more states. See \(\text{id.}\) (Mississippi, New Hampshire, and North Dakota). In five of the remaining twenty-eight states, legislation calls for reformation, and in two more, judicial opinions endorse that particular mode of perpetuities reform. See \(\text{id.}\) (California, Hawaii, Illinois, Missouri, New York, Oklahoma, and West Virginia). Patchwork reforms (involving, for example, the fertile octogenarian) have appeared in three additional states. See \(\text{id.}\) (Delaware, New Jersey, and Tennessee). That leaves, at most, 20 states in which the common-law Rule remains entirely intact.

\(^6\). Restatement (Donative Transfers), supra note 3, at 8.

\(^7\). Scholars often critique a rule by reference to the degree to which it accomplishes the purpose for which it was adopted. This Article avoids the historical question of why the Rule was adopted and, instead, identifies the beneficial consequences flowing from the Rule, regardless of whether they were intended. From this perspective, whether the Rule accomplishes its original purpose is unimportant.
cases of that type. The attempt is to reach logical, rather than empirical, conclusions such as "In Example 1-type situations, such and such economic benefit obtains."

In the course of identifying benefits of the Rule, this Article demonstrates that evolutionary theory provides reason to resist the presumption that transferors will attempt to divide their gifts so as to maximize the benefits derived by their donees. That Darwinian critique of donative behavior offers some theoretical basis for societal interference with the intent of transferors. In arguing that the law distributes rights more appropriately than do private parties, this Article takes a position disagreeable to many economists. This Article does not start with the common assumption that the donors' intended distributions of rights are the most efficient and then attempt to justify the Rule's regulation of donative dispositions on the basis of some externality, such as the high administrative costs paid by society in the process of honoring the intention of grantors. Instead, this Article attempts to undermine the initial assumption that the donors do what is best for society or, even, for their donees.

Identification of the ways in which the Rule's rejection of some intended dispositions works a benefit is the first, but not the only, objective of this Article. Acknowledging that few gains come without costs, a second goal must be to identify unhappinesses, inefficient incentives, and some of the unfairnesses caused by the Rule. A third goal of this Article is to point out that some of the very defects urged by critics as justifications for reform—the traps for the unwary, the complexity, and the Rule's remorseless operation—combine, perversely, to reduce the negative side effects that ordinarily accompany governmental redistributions of rights. Because of the circumstances in which the Rule often operates, it can redistribute rights and enhance efficiency without causing the usual damage resulting from governmental interference with private decisions regarding distribution.

8. The costs of determining remote heirs and other costs incidental to the administration of estates that vest far in the future might not be borne fully by the testator and the remote heirs. Since those costs are external to the donor, they possibly outweigh the marginal benefit of adding remote donees. I thank Judge Posner for this point.

9. Professor Leach indicates dissatisfaction with the remorseless operation of the Rule in Leach, Perpetuities: The Nutshell Revisited, 78 HARV. L. REV. 973, 974 (1965) ("Throughout [Gray's] massive tome you can find no hint of protest at ... the 'remorseless' (his word) construction of wills and trusts to slaughter dispositions that never had an outside chance of violating any precept of public policy.").
In identifying potential costs and benefits of the Rule, this Article provides a framework for (1) analyzing the merit of particular applications of the Rule, (2) evaluating which modifications, if any, would work improvements, and (3) determining whether the Rule is worth keeping. Although the Article presents considerations for and against the Rule, it reaches no conclusion about the merit of the Rule or any of the proposed reforms. Following the discussion of economic effects, the penultimate section raises, without resolving, some of the ethical questions posed by the common-law Rule against Perpetuities.

In addition, the Article will make, by example rather than discussion, two broader points relating to donative transfers in general. One point is that market transactions can serve as a standard against which donative transfers can be compared or measured. The second point is that important differences between the results of donative and market transfers, unless explainable by market imperfections, ought to be considered to be consumption by the donors.

Four warnings are in order. Readers should be aware that the Article presents the issues lying at the heart of the Rule with a few fairly simple examples. These examples were not chosen because they represent the most common actual transfers, but rather because they illustrate the basic theoretical ways in which the Rule works. Furthermore, the discussion of the examples ignores many recent legislative and judicial modifications of the common-law Rule. Different results may obtain in many jurisdictions. The analysis also ignores some of the factual complications that can lead to different results even under the common-law Rule. Nevertheless, the discussion here should assist in the analysis of any variant, traditional or modern, of the Rule against Perpetuities. Third, the Article does not purport to determine the purposes for which the Rule was originally adopted. The inquiry here proceeds free of historical blinders, scanning broadly for any beneficial consequences of the Rule without regard to whether they were intended originally.

Fourth, and finally, this Article stops short of answering the ultimate question whether a common-law version of the Rule, a

10. For an informed illustration of the different results that may obtain upon slight changes of circumstantial facts, see Lynn, supra note 2, at 223-24.

11. Professors Gray and Leach indicate that the Rule was originally intended to prevent the removal of property from the stream of commerce. See J. Gray, supra note 1, § 119; Leach, Perpetuities in a Nutshell, 51 Harv. L. Rev. 638, 640 (1938).
modified Rule, or no Rule against Perpetuities should constrict transfers of property. One reason for not reaching a bottom-line conclusion is that the magnitude of many of the positive and negative economic effects might be better guessed by persons having years of practical experience with donative dispositions than by those that understand the Rule only through appellate opinions and scholarly writings. Furthermore, because the economic theory helps to identify the potential costs and benefits, but not to determine their size, a conclusion even as to the economic advisability of the Rule is beyond the scope of this Article. Still another reason for inconclusiveness is that economic effects do not tell the whole story. The Article assumes that economic consequences ought to be considered in determining the fate of the Rule, but it does not presume to assign more weight to those considerations than to others, such as justice and liberty. In addition, though the Article touches briefly on a few ethical points, it does not attempt to analyze all such issues. Because the Article does not purport to discuss all important considerations and does not propose a system for balancing ethical losses against economic gains, it cannot claim a solution. Concerning the Rule against Perpetuities, the point here is only to further the economic analysis of the Rule and to make a few other comments, not to urge one program over another. Thus, unlike the traditional article proposing reform (or, less often, defending the status quo against reform), this Article does not reach or even attempt to reach that sort of normative conclusion.

I. The Operation of the Rule

A. A Basic Prohibition

The Rule against Perpetuities prevents the creation of certain future interests in land and personalty, the sort described by Professor Gray’s classic statement quoted above. As his statement indicates, the Rule proscribes certain contingent interests. An interest is contingent if it is not vested in interest, which

12. Though utilitarian considerations obviously may form the basis of a system of ethics, “ethical” as used here refers to nonutilitarian considerations.
13. This brief summary is not intended to encapsulate all important aspects of the Rule's operation. For more complete explanations of its workings, see generally J. Gray, supra note 1; Dukeminier, supra note 3; Leach, supra note 11.
14. See supra text accompanying note 1.
15. The time at which an interest vests is possession is irrelevant to the operation of

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occurs when the holder is unidentifiable or when the interest is subject to an unsatisfied condition precedent. A future interest given to "Smith's heirs" is contingent while Smith is alive because his heirs cannot be ascertained or identified until Smith dies. A future interest created in 1990 with language such as "but if two inches of rain accumulate in the summer of 1991, then to Jones" is also contingent at the time of its creation, because the interest is subject to an explicit condition precedent. Not until sometime in the summer of 1991, if ever, can the interest vest. No matter which sort of contingency, the Rule prohibits the creation of the interest if it might vest too late.

B. The Effects of the Rule's Operation

The penalty for failure to heed the proscription is nullification of the violative interest. The common-law Rule against Perpetuities nullifies ab initio interests that do not conform to its strictures. The prohibited perpetuities never existed and will never exist because the clauses purporting to create them are legally ineffective. Nevertheless, the rights associated with an invalid interest in Blackacre do not simply disappear. The law strikes down only the offending interest itself. The effect of the Rule when applied to an invalid interest, then, is to redistribute rights of future control or benefit of Blackacre from one person (the person that would have taken an interest but for the Rule)

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17. Determining whether a condition is a condition precedent can be difficult. See A. Casner & W. Leach, Cases and Text on Property 295-96 (3d ed. 1984).
18. "Too late" is more than 21 years after the deaths of all persons alive at the time the interest was created. The example just given would not violate the Rule because it will vest or not vest (the rain will either accumulate or not) within two years of its creation.
19. Dukeminier, supra note 3, at 1873; Leach, supra note 11, at 652 example 28.
20. See Leach, supra note 11, at 656 ("Where an interest is void under the Rule against perpetuities, it is stricken out; . . . the other interests created in the will or trust instrument take effect as if the void interest had never been written.").
21. "Person that" will be used in preference to "person who" whenever the clause following "person" further defines the person. This usage has the advantage of allowing two different words ("that" and "who") to serve two different purposes (introducing defining and nondefining clauses, respectively). See H. Fowler, A Dictionary of Modern English Usage, 701-02 (E. Gowers 2d. rev. ed. 1983). Further, it fits better with the legal sense of "person," which includes corporations to which "who" seems somewhat inappropriate.
to another person. Who that other person is depends upon the language of the conveyance.

In some cases, the transferor, having failed to convey all of her interest, retains the rights that she apparently intended to transfer.

Example 1: O conveys Blackacre "to A and his heirs so long as no liquor is sold on the premises, and in the event liquor is sold on the premises, then to B and his heirs." Because the critical event, the sale of liquor on Blackacre may occur long after everyone alive at the time of the transfer has been dead for twenty-one years, the interest subject to that condition precedent violates the Rule against Perpetuities. By the Rule, B's interest is void, A's interest remains a fee simple determinable, and O retains a possibility of reverter. In this instance, the Rule against Perpetuities redistributes to the transferor, O, the rights associated with the sale of liquor on the premises.

In other cases, such as the following example, the rights associated with the nullified interest pass to the prior transferee in the instrument.

Example 2: O conveys Blackacre "to A and his heirs, but if the premises shall be used for the sale of liquors, then to B and his heirs."

For the same reason as in Example 1, the future interest violates the Rule. But the result of that invalidity differs because of the different phrasing. In Example 2 the Rule against Perpetuities redistributes, from B to A, the rights in Blackacre associated with the contingency that liquors are sold, with the result that A takes a fee simple absolute. Thus, who receives the rights associated with the interest voided by the Rule depends on the lan-
language creating the preceding interest, that is, the nature of the preceding interest. This large difference in result has been criticized as unjustified by the small difference in language used. 28

The parade of horrible results attributed to the Rule also includes the unborn widow defect. Suppose that O, intending that Smith’s wife, Grace, should take possession after Smith dies, makes the following transfer.

Example 3: O devises the homestead “to Smith for life, then to his widow for life, then to the children of Smith then living.” 29

The final interest described may not vest in any child of Smith until Smith’s widow dies. Because Smith might marry a woman born after O’s death and she might die more than twenty-one years after the deaths of everyone alive at the time of the transfer, the Rule voids the interest in the children of Smith. If O uses “Grace” instead of “his widow,” the interest in the children is valid. This and other traps for the unwary have inspired critics to call for modification of the Rule. 30

C. Calls for Reform

W. Barton Leach started the push for reform by proposing

28. Whether the criticism is well-founded depends upon factual issues. The critical question is whether the small difference in language signals a large difference in intent. It is, of course, always dangerous to speculate as to what a transferor would have wished had she known that her intended transfer could not be achieved. Nevertheless, as evidenced by the cy pres doctrine, courts often attempt to effectuate the closest permissible transfer to that intended by the transferor. Presuming that a court is trying to follow the intent of the transferor as closely as possible, the different results might be appropriate. The objective ought to be to achieve what the transferor would have considered to be her second choice, given that her first choice would not be allowed. Possibly, the transferor in Example 1 considered the primary goal to be that of depriving A of the land when liquor is sold, and her secondary goal, in the event of A’s ouster, was to specify to whom the land should next go. The Example 1 transferor, if told that her intent to put B in possession after A would not be accomplished, would respond that she wanted A off the land in any event. The transferor in Example 2 could well have considered the primary goal to be that of getting the land into the hands of B upon the sale of liquor. A necessary consequence of that goal would be that A would be deprived of the land, but that consequence was not an independently desired goal. Upon being told that her primary goal would not be achieved, the Example 2 transferor would respond that A should keep the land. There is no reason to criticize the difference in results that obtain upon the usage of the two different forms of language unless there is evidence that the two different results do not as a matter of fact approximate the intended second choice of the transferor more closely than any other rule with equally low costs of application. In short, the simple rule adopted by the courts could be the best approximation that is easy to apply.

29. See Leach, supra note 11, at 644 example 12.

30. Critics using this example rarely admit even the possibility that O actually meant what she said, that Smith’s widow (whoever that might be) should take after Smith.
the wait-and-see approach,\textsuperscript{31} which he hoped would ameliorate the harsh effects arising from the "abstruse" nature and "superfluous technicalities and complexities of the Rule"\textsuperscript{32} without sacrificing "the general policy against withdrawal of property from commerce."\textsuperscript{33} Some states responded to the call for reform by adopting a wait-and-see approach.\textsuperscript{34} Other states have adopted more limited, piecemeal amendments aimed at eliminating some of the traps for the unwary while leaving the common-law Rule intact.\textsuperscript{35} While states have experimented with various revisions, scholars have clashed over the period for determining violations of the wait-and-see version of the Rule. For instance, Professor Dukeminier advocates the variable common-law period, whereas Professor Waggoner champions the fixed period embodied in the Uniform Statute.\textsuperscript{36} Professor Fetters eschews wait-and-see, the

\begin{itemize}
  \item \textsuperscript{31} Under the traditional common-law Rule, an interest is void if, at the time the creating instrument becomes effective, there is any possibility (no matter how unlikely) that the interest might vest too late. Haskell, \textit{supra} note 3, at 545. The wait-and-see approach is a more forgiving test that does not invalidate the interest as long as it is still possible for it to vest in time. This often leaves the status of a questionable provision in doubt for a considerable time.
  \item \textsuperscript{32} Leach, \textit{Reign of Terror, supra} note 3, at 722-23.
  \item \textsuperscript{33} Leach, \textit{supra} note 11, at 640. Professor Simpson has expressed this policy somewhat differently:
  
  \begin{quote}
  [A]nd in the eighteenth century this was well realized—so much so that lawyers saw in all the rules directed against perpetuities a single policy and a single principle—that the power to dispose of the fee simple in possession of a parcel of land ought not to be put in abeyance for a longer period than was normal in the traditional strict settlement, which is a period of a life in being plus twenty-one years.
  
  \textit{A. Simpson, supra} note 4, at 216.
  
  
  
  \item \textsuperscript{36} See generally Dukeminier, \textit{A Final Comment by Professor Dukeminier}, 85 \textit{Colum. L. Rev.} 1742 (1985); Dukeminier, \textit{A Response by Professor Dukeminier}, 85 \textit{Colum. L. Rev.} 1730 (1985); Dukeminier, \textit{Perpetuities: The Measuring Lives}, 85 \textit{Colum. L. Rev.} 1648 (1985); Dukeminier, \textit{The Uniform Statutory Rule Against Perpetuities:}
fixed period in gross, and other reform proposals that extend the perpetuities period. Rather, he argues for a stricter Rule requiring vesting in possession and the total elimination of extraneous measuring lives.\(^\text{37}\) Finally, and in contrast, Professor Epstein has recently weighed in with a radically unrestrictive approach calling for total abolition of the Rule against Perpetuities, partly on the ground that it is inefficient.\(^\text{38}\)

Though their criticisms have merit, commentators advocating change have failed to inventory fully the benefits conferred on society by the common-law Rule. The policy of guarding against the removal of property from commerce, which Gray identifies as the source of the Rule,\(^\text{39}\) is recognized frequently and is reviewed again in the following section dealing with improved resource allocation. Without attempting to decide the efficiency of the Rule in its common-law form or otherwise, this Article furthers the debate by elaborating the traditional justification and by enumerating other items to be weighed in the economic balance.

II. THREE WAYS IN WHICH THE RULE FACILITATES THE USE AND ENJOYMENT OF RESOURCES

A. The First Benefit: Improved Resource Allocation

By reducing the barriers to exchange, the Rule against Perpetuities increases the likelihood that assets will be put to their most productive uses. The Rule permits hopeful buyers to purchase land and other assets more easily by reducing the number of owners and by putting interests in the hands of persons who can sell their rights. Conversely, the Rule makes it easier for persons holding rights in assets to sell their rights by collecting the rights into packages that are more desirable to buyers. By improving purchasability and marketability,\(^\text{40}\) the

\(^\text{37}\) See Reply, supra note 3, at 388-407; see also Haskell, supra note 3, at 558-64.

\(^\text{38}\) Roundtable, supra note 3, at 842 ("It tends to queer all sorts of transactions, slow people up, get them apprehensive and nervous for no particular gain. So strike the rule down.").

\(^\text{39}\) See J. Gray, supra note 1, § 119; Leach, supra note 11, at 640.

\(^\text{40}\) When people speak of purchasing Blackacre, they ordinarily mean to acquire all of the privately held rights associated with Blackacre, i.e., a fee simple absolute. Therefore, as used in this Article, "purchasability" refers to the ease with which a nonowner can
Rule facilitates the transfer of assets\textsuperscript{41} to persons that will put the assets to their best use.

1. Division of Rights

The estate system divides rights in land along a temporal dimension, from the infinite fee simple absolute to the short-term leasehold. Covenants, equitable servitudes, easements, and profits divide rights in land as to usage. Though the law fixes and limits categories of rights into which divisions can be made, it does permit extensive division of rights. As a result, what is commonly identified as a single physical thing may be owned by many persons.

In connection with such basic rights as the right to control a particular use of land for a particular period of time, other rights exist, including the rights to divide, sell, and give away the basic rights.\textsuperscript{42} The law leaves most decisions as to whether and acquire all the rights in a thing, or at least all the rights normally associated with the most complete form of ownership recognized by our law. Purchasability is increased by reducing the sum of the transaction costs of obtaining a fee simple absolute. By way of contrast, alienability and marketability as used here are terms that take the seller's standpoint instead of the buyer's. Alienability refers to the degree to which an owner of an interest is limited by the law in the ways she can transfer or dispose of the interest. See J. Gray, supra note 1, at 3 ("[S]peaking accurately, a future interest does not render a present interest inalienable. The present owner has less to convey than he would have if the future interest did not exist; but all that he has he can convey freely."). Marketability, or salability, refers to the degree to which an owner of an interest is limited by the market (the desirability of the asset to others) in the ways she can transfer or the amount she can get for the interest. See P. Goldstein, Real Property 474 (1984) (carefully distinguishing marketability from alienability). The advantage of this lexicon is that the use of a single term identifies the perspective (buyer's or seller's) and the source of the restraint on acquisition or disposition (legal or market). If the Blackacre of Example 2 were completely alienable by \(O\), the result of the conveyance would be a division of rights that would reduce the purchasability of Blackacre which in turn would probably, but not necessarily, reduce the marketability of \(A\)'s determinable fee. For more on the connection between alienability and marketability, see infra subpart II(D).

As the term is used here, the Rule does little today to improve alienability. In the past, the Rule improved alienability by eliminating contingent interests which could not, as a matter of law, be transferred inter vivos. But today, contingent interests can be sold in most jurisdictions and, even in those states adhering to the common law, contingent interests may be transferred (1) by release, (2) for valuable consideration in equity, and (3) through the application of estoppel by warranty deed. See J. Dukeminier & J. Krier, Property 222 (2d ed. 1988).

In contrast to the meaning of "asset" in accounting, in which it includes money and other intangibles, the word asset, in this Article, refers to physical things like land, paintings, and factories.

These rights relate to the basic rights and, in a sense, rest one level above the basic rights because they are rights about rights. A person who holds basic rights usually holds the next level of rights as well, but transferors can use spendthrift trusts to create basic
how rights will be divided and subdivided to the individual holders of those rights. The rights to divide and transfer are important parts of our concept of private property. Because our property system recognizes finely divided rights in things and leaves decisions to subdivide to individual owners, a significant legal potential exists for a broad spreading of rights in assets.

2. Reaggregation of Divided Rights

Broad dispersion of rights in a resource creates a problem for persons whose intended use of that resource requires ownership of all the rights. All else being equal, the more owners of Blackacre, the more difficult it is to round up the interests. The Rule makes assets more purchasable by reducing the number of persons holding interests in the asset.

As seen above, the Rule redistributes rights from an intended transferee to some other recipient, either a prior transferee or the transferor. When the prior transferee receives the redistributed rights, the application of the Rule against Perpetuities always improves the purchasability of the resource by reducing the number holding interests. In Example 2, for instance, the Rule makes land easier to purchase because the whole bundle of rights ends up in the hands of one person, A, instead of two, A and B. Furthermore, this gain increases when the void language of the instrument names multiple transferees. By eliminating a set of transferees, the Rule reduces the negotiations needed to acquire Blackacre. While this benefit of the Rule's operation is, in a sense, fortuitous because the Rule does not invalidate all transfers to multiple transferees, the effect ought to be counted among the benefits wrought by the Rule.

rights that are unaccompanied by the rights to sell and divide. See Alexander, The Dead Hand and the Law of Trusts in the Nineteenth Century, 37 STAN. L. REV. 1189, 1197 n.19, 1202 (1985). The creation of marital and concurrent estates also generates rights to which the right of alienation does not attach. See id. at 1205 (marital estate rights not alienable by wife); see also Sawada v. Endo, 57 Haw. 608, 561 P.2d 1291 (1977) (rights under tenancy by the entirety not alienable by husband).

43. Despite the mechanical nature of the Rule, a Rule violation may lead to litigation, which could reduce purchasability until the court decides the case. But because a prospective purchaser can, even during litigation, buy out the same parties asserting interests as would have held interests in the absence of the Rule, litigation possibly will not interfere with the purchase even temporarily.

44. Example 2a: O devises Blackacre "to A and his heirs, but if the premises shall be used for the sale of liquors then to B's children and their heirs."

45. For further elaboration of some of the ways in which multiple parties make transactions difficult, see, e.g., Stake, Toward an Economic Understanding of Touch and Concern, 1988 DUKE L.J. 923, 936-37.
That some transfers to multiple holders escape the Rule does not diminish the benefits accruing when the Rule strikes others down.

The application of the Rule to cases like Example 1, in contrast to those like Example 2, does not automatically reduce the number of interest holders. In Example 1, both the recipient and loser of the redistributed rights are single, not multiple, persons. In such cases, the Rule merely substitutes one interest holder for another. There are, however, cases similar to Example 1 in the wording of the contingency, but different in number of persons, some involving multiple transferees and some involving multiple recipients of the redistributed rights.

Example 4: O grants Blackacre "to A and his heirs so long as no liquor or tobacco is sold on the premises, and in the event liquor is sold then to B and his heirs, and in the event tobacco is sold then to C and his heirs."

If, as in this example, the instrument specifies a group or a class of transferees and the rights are redistributed from the group back to the transferor or to a single successor, then the Rule improves purchasability by reducing the rights holders with whom a purchaser must negotiate. If, on the other hand, a will specifies one remote transferee and the Rule redistributes the rights to a group of successors of the transferor, the Rule operates to make the resource less purchasable by increasing the holders. Whether, in redistributing interests back to the transferor, the Rule tends more often to increase or decrease the size of the group holding the rights is difficult to determine.46

Although the Rule might or might not improve purchasability by redistributing rights from a transferee back to the transferor, it always reduces the number of interest holders when it redistributes rights to prior transferees. Thus the Rule improves purchasability in some cases by reducing the number of persons holding interests, which reduces the number of per-

46. Brown v. Independent Baptist Church, 325 Mass. 645, 91 N.E.2d 922 (1950), provides an example of the difficulties that can arise on both sides of the issue. Because the court held the gift to be valid, the numerous successors to the 10 specified legatees owned the land. Id. at 648, 91 N.E. 2d at 924. If the gift had been declared invalid under the Rule, an even greater number of successors to the testatrix's 25 heirs would have taken.

Careful empirical study might reveal which effect is more common and the degree to which purchasability is diminished in such situations. Without such study it is difficult to tell whether the Rule increases or decreases the number of interest holders in cases when the rights automatically return to the transferor. However, under a system of primogeniture the Rule would usually result in improved purchasability in these situations.
sons with whom a buyer must negotiate. Many scholars have recognized this benefit in stating that the Rule improves alienability.  

3. Giving Rights to Identifiable Persons

Another way the Rule improves purchasability is by taking rights from the unborn and unidentifiable and giving them to persons that are alive and ascertainable. The law does not limit ownership to persons that can be identified. And, curiously enough, it allows people that have not been born to hold important rights. (Although these rights are contingent, no common-law rule categorically prevents the unborn from holding property interests.). Obviously, a purchaser can more easily acquire a resource if she can identify all who hold outstanding interests than if she cannot identify the holders. Likewise, the purchaser has an easier time negotiating with living persons than persons waiting to enter the world.

The following example illustrates how the Rule improves purchasability by redistributing rights to identifiable persons.

Example 5: 0 grants Blackacre "to A and his heirs so long as no liquor is sold on the premises, and in the event liquor is sold then to B's widower and his heirs."

Suppose X wishes to buy Blackacre after the transfer. Were it not for the Rule, X would be unable to purchase the fee because the contingent executory interest following A's fee simple is not held by any identifiable person; B's widower cannot be ascertained until B dies. The Rule saves the day by moving the rights X hopes to purchase from B's widower to 0, who can be identified immediately. In such situations, the Rule improves purchasability by redistributing rights from an unknown person to an identifiable person with whom X can bargain. Although the operation of the Rule in this case is fortuitous (since the unidentifiability of B's widower is not the fundamental reason that the Rule strikes down the interest), the Rule does improve the situation in terms of purchasability. This class of improvements should fall among the benefits of the Rule's operation.

If, instead, the transfer above is made in a will rather than

47. But cf. supra note 40 for the meaning of alienability as used in this Article.
48. This phrasing of the point is not intended to express any view on whether the unborn and unconceived are persons for any other purposes.
49. The Rule can be especially helpful when it redistributes an interest from an unidentifiable intended transferee to a prior transferee that is identifiable.
inter vivos, the same benefits will accrue only sometimes. Although the successor to $O$’s interest may often be immediately identifiable, such is not always the case. If $O$’s will specifies a particular person as the recipient of the residue, $O$’s successor can be identified at $O$’s death and any of the Rule’s redistribution to $O$ will place the rights in an identifiable person. If the residuary clause itself creates a future interest in an unidentifiable person, however, then only some of $O$’s successors are identifiable at $O$’s death. For example, the residue might be left to “my wife for life, then to my friend $B$’s widow,” in which case $B$ is still alive. Nevertheless, the Rule will tend to improve matters because the transfers from one unidentifiable person to another will do no harm to purchasability, and the redistributions from an unidentifiable person to someone who can be ascertained will make the underlying resource more easily purchased.

Situations similar to Example 5 can also arise without a condition precedent.

Example 6: $O$ grants Blackacre “to $X$ in trust to pay the income to $A$ for life, then to pay the income to the children of $A$ for their lives, then to be transferred to the children of such children.”

Here, too, the effect of the Rule is to redistribute rights from a group of persons who are unidentifiable to a person that a hopeful purchaser might be able to locate. Yet this example illustrates another aspect of the Rule’s redistributions as well. The grandchildren of $A$ are unidentifiable because they are not yet alive. The Rule redistributes their interest to a person, $O$, who is alive. This aspect of the Rule’s operation is not merely fortuitous. The Rule operates on the interest in the grandchildren precisely because they might not become living beings for too long a time.

Considering all the above cases together, the Rule improves the purchasability of complete ownership in resources when it collects interests into fewer hands and when it redistributes

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Example 5a: $O$ devises Blackacre “to $A$ and his heirs, but if the premises shall be used for the sale of liquors then to $B$’s widower and his heirs.”

50. This analysis presumes that interests not effectively transferred because of the Rule pass instead under a valid residuary clause.

51. See Leach, supra note 11, at 643 example 11.

52. “Resources” in this Article is synonymous with assets and denotes physical things, such as land and factories. See supra note 41.
interests to persons that can be identified and can speak and deal for themselves.

4. Marketability

Improved purchasability should lead to better use of assets because the person that can maximize use encounters fewer transaction costs in buying the assets. That conclusion (that the Rule furthers efficient allocation) does not, however, follow automatically. The aggregation of rights may impede market transfers because fee simple ownership is not always the best grouping of rights. Though division reduces purchasability, breaking rights into smaller packages can make the rights more marketable, that is, capable of bringing a higher total price on the market. Regarding land, whether a geographical division (into smaller parcels) or a temporal division (into the various "estates") or a usage division (e.g., into profits) increases or decreases the total desirability of the sum of the interests in a parcel depends on the best use or uses of the land. If the best use of one quarter of a city block in Manhattan were high-rise, low-income, residential apartments, then the market value of that parcel, before the apartments were built, might be decreased by bundling it with the remaining three quarters of the block since the resulting package might be priced beyond the means of the most efficient developer of the quarter-block. Likewise, once the low-income apartments were built, the market value of the realty would be reduced if the fee could not be split into present possessory terms of years followed by reversions. In this respect

53. This view is the conclusion reached with some hesitation in the Restatement: "[T]he rule against perpetuities probably contributes to the increased use of the wealth of society. . . . This it does by prohibiting those categories of future interests which would make either impossible or improbable sales of land for long periods of time." RESTATEMENT (DONATIVE TRANSFERS), supra note 3, at 9.

54. See supra note 40. Interests in land or other assets are more "marketable," as used in this Article, when the interests are more desirable to prospective purchasers. If one person would pay $10 for the mineral rights to Blackacre and another would pay $91 for all of the rights to Blackacre except the mineral rights, and if no one would pay more than $100 for complete title to Blackacre, then the divided rights to Blackacre are more marketable than the fee. "Marketable" here does not carry with it any specific degree of marketability, as it does in the marketable title context.

55. "Market value" of an asset, as used here, refers to the amount of dollars all the rights in an asset would bring if offered for sale by the owner for a given period of time.

56. Less well-heeled buyers could purchase the whole parcel and divide the usage, but the costs of those transactions decrease the amount they would be willing to pay for the land itself. The quarter-block parcel is also less purchasable if it has already been broken into smaller parcels held by different persons.
determinable fees and life estates are not, as a matter of logic, different from the term of years. Such divisions may increase marketability by breaking ownership into present and future interests, which are more desirable than the fee. Whether physical and temporal divisions will maximize the market value of a resource depends upon the best use of the resource and the capital available to the best users.

Economically, the story told here is a simple one. Rights in land and other assets are items (factors) of production and, like any other items of production, those rights can be combined like the bricks of a house to produce a larger item or divided like a tree into toothpicks to produce smaller items. This act of production (some products do sell at a loss) may make a product that has more value than the sum of values of the inputs. The production process here involves only legal labor, the collecting or dividing of rights in a particular physical thing that already exists.

Notwithstanding the possibility that the reaggregation of rights may make the packages of rights less desirable, the Rule's tendency to aggregate rights should lead to improved allocation of assets for two reasons. First, the costs of disaggregation and aggregation are asymmetrical. It is comparatively easy to divide the bundle of rights if divided rights would generate more wealth than would a single fee simple. Conversely, due to the problems of locating multiple holders and the possibilities of strategic bargaining such as holding out, it is much more costly to reaggregate rights if a fee simple would generate more wealth. Since private transactions are thus more difficult in one direction than private transactions going the other way, the Rule can be expected to reduce transaction costs by leaving the parties in the position that is more easily changed (by private negotiations) should such position turn out to be incorrect.

Second, there is empirical evidence that the packages of rights resulting from the operation of the Rule are more desirable to the market than the packages intended by the transferor. By packaging rights more attractively, the Rule enhances the likelihood that assets will be moved in the market to better uses. Some evidence for this proposition that the Rule makes the packages of rights more attractive to the market is discussed in subpart D, below.
B. The Second Benefit: Enhanced Enjoyment of Interests

Another economic gain flows from reaggregation of interests in assets. Collected rights may generate more enjoyment than do divided rights. Consider the following example.

Example 7: O conveys Blackacre “to A and his heirs, but if the price of soybeans drops below the current level then to B and his heirs.”

Assume that A gets fifty utils of happiness from ownership of the determinable fee, but would get sixty from a fee simple, and that B gets nine utils of happiness from ownership of the contingent remainder. The Rule accomplishes redistribution that increases the enjoyment of the rights in Blackacre. The amount of increase is limited by the amount the parties would have to spend to arrange the same transfer privately, but those transaction costs can be quite high. The enjoyment of the whole set of rights is greater than the sum of the enjoyments of the subsets of rights. The same example can illustrate, for comparison, the improved allocation benefit. In addition suppose that someone else, X, could make much better use of Blackacre than could either A or B. By collecting the rights together, the Rule increases the probability that X will be able to purchase Blackacre and reallocate it to better use. Unlike improved allocation, the enjoyability benefit accrues regardless of whether the redistribution of rights actually increases the likelihood that the market will switch the asset to a better use or to a more appreciative user. The Rule increases wealth by reducing risk. Subpart D, below, presents some evidence that the aggregated rights are

57. The ways in which the contingency will affect the enjoyability of the defeasible interest might depend on, among other things, the degree to which the contingency is outside the control of the person holding the defeasible interest.

58. Readers that notice that B could sell his interest to A are urged to assume, in addition, that the paperwork would amount to two utils.

59. One of the interest holders may have difficulty locating others (especially if they are not yet alive), and bilateral monopoly problems may impede negotiations even when the other party can be found.

60. The allocation and enjoyment benefits may seem to be one and the same, but they should be considered separately. The second benefit, enhanced enjoyment, can be recast as an improved allocation of rights from one person to a more appreciative person. However, to describe it thus would lead to confusion with the first benefit, which relates to improved allocation of the assets themselves, rather than the rights. The Rule improves the allocation of resources by collecting rights into bundles that move easily from the grantees to other persons that have a better use for the assets. If the collected rights to the asset are not purchased by someone else, the improved transferability yields no actual gain in resource allocation. In addition to easing the transfer to persons other than the grantees, the Rule improves the enjoyment of assets by the grantees themselves by collecting rights
more enjoyable than the disaggregated rights upon which the Rule operates.

C. A Darwinian Reason to Doubt the Efficiency of Donative Distributions

Why would a grantor knowingly reduce the value derived from an asset by its holders? Arguably, any sensible donor would wish to maximize the value of the asset in the hands of her transferees and would therefore avoid any suboptimal divisions of rights. If that claim is generally correct, the law should uphold grantor intent on the presumption that grantors attempt to maximize value and that courts will do no better. Some market evidence against this argument is presented below, but the empirical evidence may make more sense if preceded by a theoretical reason to doubt the presumption. The theoretical reason offered here is based on the distinction between altruism and selfishness. Briefly, evolutionary theory explains how behaviors that appear to be altruistic may instead be self-serving from a genetic point of view. To the extent that donative transfers result from a naturally selected helping gene rather than true altruism, the presumption that donors maximize their own utility by maximizing that of their donees is undermined.

There is no claim here that a donor's inclination to help others stems primarily from her genes. In comparison to the forces of education and socialization, genetic proclivities might account for only a tiny portion of what we see as altruism. By explaining why behaviors appearing to be grounded in altruism might not be, however, the analysis that follows offers a reason to question the assumption that a donor's assets will be divided among recipients so as to maximize the total value to the group of donees.

Donative behaviors, like other helping behaviors, seem economically irrational because they fail to maximize the giver's

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61. The division might be optimal once the donor's enjoyment is factored into the equation. See infra notes 135-36 and accompanying text. The purpose here is to explore that preference from the sociobiology perspective.

62. The discussion here relates to what one might call the true cause of the donative behavior or proclivity, not the thoughts or reasons running through the head of the donor. More specifically, this Article in no way attempts to discuss or determine what thoughts accompany or precede apparently altruistic behavior. The mentalistic reasons in the minds of most or all donors are irrelevant to this discussion.
wealth or physical well-being. Richard Dawkins (among others) has explained apparent altruism in the biological context as behavior that is selfish from a genetic point of view.\textsuperscript{63} Successful genes perpetuate themselves.\textsuperscript{64} A gene can do this by replicating itself in the next generation of offspring. A gene can also perpetuate itself by saving the life of the same gene in another being, such as an identical-twin sibling. In terms of a gene's survival, it is beneficial for the gene to cause its host to risk anything less than a certainty of death to save the life of the host's identical twin. A gene that predisposes its carrier to a mild degree of self-sacrifice for an identical twin will have an advantage that makes it more numerous in the population and will be, therefore, a better survivor than a gene that does not include such a predilection.

Genetically beneficial self-sacrifice need not limit itself to helping identical-twin siblings. Genes in mothers, for example, will tend to be more plentiful in the next generation if they cause their hostess to make some sacrifice for her offspring. Too much sacrifice would reduce the chances of gene survival, but some sacrifice will increase gene numerosity. How much sacrifice is genetically appropriate depends upon, among other things, the degree of relatedness of the recipient of the help. Because the chances of a gene of the mother's appearing in the offspring are one out of two, the gene should not cause its hostess to risk more than a fifty percent chance of death to save the life of one descendant.\textsuperscript{65} Any gene carrying a higher proclivity for helping behavior while the mother is still able to produce offspring will tend, over time, to be eliminated from the gene pool. Similarly, second generation descendants are each only worth a twenty-five percent chance of death.\textsuperscript{66} This analysis can be applied to any degree of relatedness to determine the maximum level of risk.

\textsuperscript{63} R. Dawkins, The Selfish Gene 4-7, 95-116 (1976); see also J. Brown, Helping and Communal Breeding in Birds: Ecology and Evolution ch. 4 (1987). Selfish behavior is, in this view, behavior that redounds to the benefit of the actor (or would have a positive expected value from an ex ante perspective), regardless of the character of the actor's reasoning or even the existence of any reasoning.

\textsuperscript{64} Dawkins uses "gene" to refer to all copies of a replicating DNA molecule. R. Dawkins, supra note 63, at 37. It is hoped that the looser use here will aid readability.

\textsuperscript{65} Fifty percent is the largest chance of death that ought be taken by a fertile mother. If the offspring might not survive without the mother or if the offspring might not survive to the age necessary to reproduce, the largest tolerable chance of death is even lower. On the other hand, if the mother is beyond the reproductive age, the mother can sensibly (genetically speaking) take risks larger than 50%.

\textsuperscript{66} The grandchild would be worth more if the grandparent is close to death anyway.
acceptable to the helper.\textsuperscript{67}

The preceding explanation employs examples of the most extreme sort, ones involving high probabilities of death. The genetic view applies also to helping behaviors of less dire consequence. Jerrome Brown demonstrates how a gene causing female stripe-backed wrens to stay at home for a year to help their father and stepmother raise their next clutch could result in greater "fitness" than a gene causing them to breed a clutch of their own.\textsuperscript{68} We need not attribute the observed helping behavior of such birds to altruistic thoughts on the part of the birds. The wrens help because they are built from a gene that carries a helping behavioral strategy.\textsuperscript{69}

The discussion above shows the theoretical possibility of nature selecting in favor of helping genotypes. It is also reasonable to believe that such selection has occurred in the human gene pool. If it has, such a genetic proclivity could well manifest itself as donative behavior. If a helping genotype were to show itself through donative behavior, what pattern of donative transfers would be expected?

Before answering that question, it might be best to answer the objection that donative transfers are not similar to the sacrificial helping behaviors favored by natural selection. Donative behavior does not usually involve the same degree of sacrifice as in the case of wrens choosing to help rather than mate, for example. Indeed, a testamentary disposition involves no sacrifice for the donor at all; it is a little too late to do anything to increase her chances of reproduction. The point, however, is not that humans contain a gene that causes them to make out wills in certain ways. Far too few generations have passed for nature to

\textsuperscript{67} Quickly the analysis gets complicated. It makes no genetic sense, for example, for a mother to sacrifice herself to save her offspring if the offspring are too immature to survive without her. Therefore, the likelihood of the offspring surviving to produce a second generation of offspring must be included as a factor in determining the degree of sacrifice that is genetically appropriate.

Similarly, it would be counterproductive for a gene to cause its host to sacrifice for the host’s parents if the parents are beyond the reproductive years and the host is capable of reproduction. Moreover, without the aid of modern science, a gene can never be sure that another body holds the same gene. Nonetheless, mothers and, to a lesser degree, fathers can be fairly sure that certain individuals are their offspring. Like mothers, older siblings witnessing the birth of younger siblings can be reasonably sure of their relatedness. The appropriate degree of sacrifice depends on the degree of confidence in relatedness as well as the degree of relatedness.

\textsuperscript{68} J. BROWN, supra note 63, at 53-54.

\textsuperscript{69} “Behavioral strategy” should not be read to mean that the individual wren has thoughts that would qualify as what we think of as a strategy.
have selected that specific behavioral strategy. The helping genotype suggested here does not focus on any particular kind of helping behavior; it is much more generalized. Rather, the gene tells its host to give help and aid as the situation requires. Although such a genotype might have been selected in the context of many decisions involving substantial self-sacrifice, the element of large sacrifice need not be present for the helping urge to swell.

In what pattern of transfers might a helping genotype show itself? First of all, a gene for helping that had survived natural selection would likely be one that tends to prefer closer relatives, such as parents and children, to more distant kin, such as grandparents and grandchildren. Such a gene should also be one that tends to prefer younger recipients to those that have passed their reproductive years, for example, children over siblings and grandchildren over grandparents. In other words, an evolutionary model of donative transfers would predict a general preference for closer and younger relatives.

One might ask why it would not be best for one's genes to leave all wealth to the most closely related person, or group of persons, rather than spreading the wealth to a broader network of relatives, as often happens. The rational gene could respond that the apparently altruistic act has a diminishing marginal utility to the donee. At some point, additional beneficence will improve the chances of survival of the genes in that recipient significantly less than the same wealth would improve the chances of survival of the genes of a less related person. Because there is a smaller chance that the gene in question exists in the less related person, the amount of survival benefit has to be reciprocally larger for the donation to the less related person to improve survival of the gene. If, for example, a $1000 gift would improve the lot of a child of the transferor by eight utils, then the transferor should choose to give to a grandchild only if the utility to the grandchild would be greater than sixteen utils since the child is twice as likely to have the gene carrying the helping behavioral strategy. Nevertheless, as long as the marginal sur-

70. A behavioral strategy here includes no component of conscious planning. See supra notes 62 & 69. A behavioral strategy is a genetic proclivity toward a certain type of behavior, with or without any accompanying thought.

71. Indeed, as the discussion above suggests, a finely tuned helping gene would cause its host to engage in more help if the sacrifice were low.

72. Of course, any well-selected gene will also account for the factors mentioned supra note 67. The important criterion might be expressed as the expected genetic utility of
vival utility of money diminishes, there will always be a point at which it does one's genes more good to stop giving to the closer generation and start giving to the more distant.\textsuperscript{73}

Donors should therefore be expected to favor more closely related beneficiaries. Yet, because the marginal utility of income diminishes,\textsuperscript{74} very wealthy transferors should also be expected to wish to spread their gifts out some distance into the future. Once the transferor has settled a million or two on a child, further beneficence is unlikely to result in greater likelihood of survival of her genes. The next million will do more good for her genes if she donates to her grandchildren, even though they are more distantly related.\textsuperscript{75} It is likewise with further generations. Therefore, for the very wealthy, it is genetically natural to attempt to provide life sustaining wealth to distant, unborn descendants and other gene carriers.\textsuperscript{76}

The question of when it becomes genetically beneficial to shift the focus of donation to the next generation is further complicated by the incapacity of minors. Because he might spend the money foolishly, it may often be better for the survival of a

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the gift, which would be defined as the utility of the gift to the recipient (in terms of enhancing the recipient's chances of producing offspring and raising them to maturity) multiplied by the likelihood that the recipient carries any particular gene of the donor (as adjusted for the confidence that the recipient is indeed related as supposed).

The apparently greater distribution of gifts to children than to siblings, two groups that have the same chance of carrying the donor's helping gene, can be explained by reference to the critical fact that one's siblings are much more likely than one's children to be beyond the childbearing age and thus unable to help replicate the gene carrying the helping behavior. The structure of the income and death tax laws also adds incentives for some to pass assets down to the next generation, but such laws cannot explain the behavior of persons whose assets are too meager to reach the taxable level.

\textsuperscript{73} That there is such a point does not mean that all, or even many, of us will achieve enough wealth to reach it.

\textsuperscript{74} There is a large body of literature on this point. See generally, e.g., Bailey, Olson & Wonnacott, The Marginal Utility of Income Does Not Increase: Borrowing, Lending, and Friedman-Savage Gambles, 70 AM. ECON. REV. 372 (1980); Friedman & Savage, The Utility Analysis of Choices Involving Risk, 56 J. POL. ECON. 279 (1948). This Article assumes those arguing that marginal utility of income declines have the better of the argument.

\textsuperscript{75} This theory does not, however, support all grantors' attempts to constrain the ways remote grantees use their assets.

\textsuperscript{76} This argument suggests an empirical study. One could examine wills probated to determine whether gifts to related individuals varied in size as would be predicted by genetic relatedness combined with an assumption that the marginal utility of gifts to the recipients declines. In addition, one might be able to determine the points at which donors tend to switch from one donee to another. To test the diminishing marginal utility hypothesis more particularly, the study might attempt to match wills on all criteria except wealth of donees. If perceived marginal utility diminishes, the donors should tend to spread the wealth among fewer recipients if the recipients are poor.
minor (and his ancestor's genes) to give money to his parent with precatory language and a hope that the parent will spend it for the benefit of the child rather than to give it to him directly.\footnote{Another reason to give money to the parent instead of an unborn child relates to the financial strategies of trustees. Because trustees have less incentive to maximize the return on a investment and because they operate under legal duties that may interfere with maximization, a gift via a parent possibly will grow more than one in trust.} Eventually, however, as the amount of money increases, additional amounts given to the parent will do little good, whether or not the parent heeds the donor's wishes, and the donor should at that point choose to give further amounts of money to the minor (via a trust if necessary) to account for the chance that the parent will not heed the precatory utterance.

The most obvious conclusion from this genetic analysis is that donations are not necessarily tailored to achieve an optimal distribution of rights from the societal point of view. Some might say that it is obvious, without any theoretical analysis, that donations do not maximize societal benefits. But such a statement depends on a willingness to make interpersonal comparisons of utility. The theoretical point made here offers a reason to question the donor's distribution of rights that does not depend on any presumption regarding interpersonal utilities.

The more subtle conclusion to be drawn from the genetic analysis is that, even if consideration is limited to the subset of society chosen by the donor, the distribution of rights chosen by the grantor will not maximize the welfare of the grantees. Rather, the donor's intended distribution will maximize the benefit to the donor's genes.\footnote{More precisely, the distribution should maximize the benefit to the gene or genes carrying the proclivity to helping behavior.} If the historical environment has selected in favor of a helping genotype in humans, we can expect the helping behaviors resulting from that genotype to be distributed in accordance with the genetic relatedness of the recipients to the helper.

Of course, not all donations stem from selfish motivations, genetic or otherwise. The point is not that biology is or ought to be the whole story. Gifts can be explained by a mentalistic reference to the donor's thoughts. Yet gifts can also be explained, in part, by reference to a gene for helping, and the evolutionary perspective provides one model for predicting the pattern of donative transfers. By offering an alternative to the simpler utility-from-helping-others model, the evolutionary model of activ-
ties that appear to work to the detriment of the actor and to the benefit of others casts large doubt on the presumption that the donor designs a donative transfer so as to maximize the welfare of others. To whatever degree helping behavior stems from genetic behavioral strategies, we should not assume that helping decisions made by transferors are the best distributions of rights within society or even within the group identified by the helper as objects of her charity.

Even allowing that the transferor's genetic inclination could deviate from society's and the heirs' needs, an economist might respond to this point by noting that in a market free of monopoly or externality problems, private exchanges can correct this genetic misdirection. The argument would be that if the immediate grantees (or any others) value the rights granted by the donor to the remote grantees more highly than do those remote grantees, they can pay the donor to alter her disposition.\textsuperscript{79} The nature of a perpetuity, however, usually prevents this market solution.

Violations of the Rule often occur in wills. When, as is often the case, testators keep their dispositions secret from the beneficiaries, the information costs confronting the immediate grantees are practically insurmountable. If grantees do not know of the will, they cannot negotiate to have it changed. Even if immediate grantees know the terms of the will, the contingent nature of the will makes its alteration by mutual agreement a bit difficult. The grantees will not wish to pay for changes that can be undone (or made pointless) by a subsequent will and the gran tor will often not wish to sell her right to change her mind, one of the attractive features of a will. These problems can be overcome with a contingent agreement, but the need for and expense of such an agreement throw more transaction costs in the way of a market solution. It seems unlikely that the assets held by persons of moderate means would justify the transaction costs of the mutually negotiated solution.\textsuperscript{80}

For those donors holding assets for which the transaction costs would be relatively small, mostly the wealthy donors, a different problem impedes the market solution. The donors

\textsuperscript{79} There may be a monopoly problem. Often the donor is the only potential source for the future interest the donee hopes to obtain.

\textsuperscript{80} The information costs alone may be prohibitive if the parties do not know it would be possible to draft an instrument that transfers title as of the death of the donor, as would a will, but which the donor cannot change during her life.

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motivated by a genetic proclivity to create interests in remote heirs may have little use for more money other than to give it away. Without the freedom to dispose of it as they wish, they may not value money. Therefore, offers of monetary compensation for changing the disposition will fall on deaf ears. Take the simple example of a donor who wishes to leave all her millions to two grantees, one immediate and one remote. Because of the donor's wealth, all the compensation offered by the immediate grantee would flow to the beneficiaries under the donor's will. If the donor accepts the immediate grantee's offer of $1,000,000 to eliminate the remote beneficiary, she gets nothing and the immediate beneficiary loses nothing, in that he gets it all back when she dies. This admittedly extreme example illustrates a major difficulty confronting grantees wishing to eliminate other takers under a will or an inter vivos gift from a wealthy donor. These impediments to market solutions make it inappropriate to conclude from the absence of a market redistribution of rights that the donor's distribution is efficient.81

D. Market Evidence Indicating Enhancement of Marketability and Enjoyability

Under the conventional criticism that legal contingent interests impede marketability lies the assumption that the sum of the values of the contingent and vested interests in Blackacre is lower than the value of a fee simple in Blackacre.82 From this we can conclude that, at least in the experience of those who write about the Rule, the combination of a contingent future interest and a vested estate differs critically from a reversion following a leasehold in that the contingent interest package is less desirable. Some evidence supports this conventional wisdom.

81. The immediate grantee may offer goods or services to the donor that she could not get elsewhere. He might offer to go to law school, for example, in return for the elimination of the remote beneficiary's interest. There are, however, impediments to this private negotiation as well. The immediate grantee might be afraid that if he suggests such an exchange, the donor will reverse the tables and require that he go to law school to get the immediate interest. Nevertheless, there may be some situations in which the immediate beneficiary is able to negotiate the transfer of a complete interest.

82. In this Article, the value of a bundle of rights (an interest) in an asset refers to the currently realized value to the holder. In other words, it is the cash amount one would have to pay the holder of that bundle in order to take away the bundle without his complaint. "Value" thus used is idiosyncratic, particular to the person holding the rights being valued. Because many of the rights important to this Article are themselves contingent or risky, the term value when applied to those rights or interests necessarily incorporates the risk aversion of the holder.
Contingent interests rarely arise out of mutual bargains. If vested-estate-plus-contingent-interest combinations were the most efficient division of rights, we should see reported cases in which the contingent combination was created in a market exchange, one person buying a possibility of gaining possession and the other suffering the possibility of losing possession, with monetary compensation flowing from the former to the latter. But the market rarely creates such combinations. At the very least, market transactions eliminate many more contingent interests than they create, indicating that such interests more often decrease than increase the value of land.

83. Little empirical research exists on whether any transferee ever pays a transferor to create a contingent future interest other than an option. A preliminary attempt to survey practitioners was terminated after the first five Indianapolis lawyers, who were questioned by telephone, responded that they had never seen such an interest and hinted that the very search for such interests was a waste of time. The Restatement's treatment of the subject also offers some indirect support for the conclusion that interests that violate the Rule tend to be created in gifts. Though Professor Casner (the reporter for the Restatement) acknowledges appropriately that the Rule applies also to commercially created future interests, the extensive discussion of the Rule against Perpetuities doctrine can be found under the heading of “Donative Transfers.” Restatement (Donative Transfers), supra note 3, at 1.


84. For purposes of this Article, the value of an asset is the sum of the amounts all holders of rights in that asset would have to be paid for society to take their rights without their complaint (to an economist this amount is the sum of the individuals' equivalent variations). Under this definition, the value of an asset identifies the societal wealth attributable to that material thing. See also infra note 92.

The Restatement recognizes the reduction of value occurring upon division of rights, but then takes that fact in a different direction, using it to support the conclusion that the Rule aids current owners:

The division of ownership into successive interests tends to lessen the sum realizable upon a sale of the separate interests, and thus diminishes the total
It is possible that divisions into combinations of vested and contingent interests maximize value but bargaining problems prevent the market from making such allocations. Bargaining problems do present difficulties. It would be hard for the group of persons that might become Smith's heir to get together to buy an interest and to agree upon the amount each would contribute to the purchase price. It is harder yet for unborn persons to negotiate for an interest. Thus bargaining problems seem an adequate explanation for market transactions not creating interests in unidentified persons. Yet bargaining hurdles fail to explain why market transactions so rarely create interests that are contingent solely because they are subject to a condition precedent. If such interests are worthwhile, one would expect to see them created in market transactions. Instead, they are quite hard to find. This absence of examples suggests that the purchasing power of the wealth represented by the thing in which such divided interests have been created. To whatever extent such diminution occurs, the responsiveness of these assets to the needs of their current owners is diminished.


85. "'Worthwhile' here means that the division into present and future interests increases the value of a piece of land or other asset.

86. Many contingent interests of the type stricken by the Rule may be created in market transactions, but they remain undiscovered because cases involving such interests never reach the courts of appeals. However possible, it seems unlikely that disputes involving such interests would be so consistently free from appealable issues.

87. See supra note 83. "In this country, there appears to be no established, conventional, commercial market for the purchase and sale of future interests," Reply, supra note 3, at 385 n.23, much less such a market for contingent future interests, not to mention a market for the creation of contingent interests. Careful study of the English future interests market might reveal the degree of discount attributable to the risk factor that accompanies contingent interests. The development of a market in contingent interests may be prevented by buyers' suspicions that sellers have control over or knowledge of the critical conditions precedent.

The buyer of an ordinary option to purchase land does not create a risky contingent interest because the condition precedent to the transfer of rights is wholly within his control. The purchase of the option may be a gamble (more likely a hedge), but whether rights pass to him or not depends ultimately only upon his own election, not fate. The purchaser of an option might use the option as a means to capture the positive externalities...
donative creation of contingent interests tends to reduce the value of assets.

E. Two Possible Counterexamples from the Market

One might argue that the popularities of casualty insurance and gambling show that contingent interests are worthwhile. Neither example, however, compels the conclusion that the sorts of contingent interests stricken down by the Rule are desirable.

1. Casualty Insurance

Although buyers in market exchanges infrequently create contingent interests in land or other resources, they often create contingent future interests in money. In casualty insurance contracts, for example, two persons voluntarily create a contingent future interest in cash. Why should this not be taken as conclusive evidence that the creation of contingent interests in an asset can increase its value? Unlike contingent interests, which create possibilities of loss where none need exist, casualty insurance merely transfers risk; it does not increase risk.88

Indeed, the popularity of casualty insurance confirms the hypothesis that the creation of contingent interests is harmful. In a contract of insurance, the insured purchases a contingent interest in money, the condition precedent to which is an event that causes a loss to the insured. The insured attempts to combine the payoffs associated with the event in such a way that substantial variations in his income are prevented.89 Insurance enhances certainty and stability for the insured. Thus the example of insurance supports the notion that, unless the contingency is specifically designed to counteract some other fortuity, a contingent interest will by decreasing certainty also decrease value.

of his development upon adjoining lands. In that way, an option in gross eliminates disincentives to development, contrary to the position taken by Leach, supra note 11, at 661. The seller of the option, on the other hand, does create a possibility of losing an important asset. But there is an important difference from the possibilities of loss associated with the usual form of defeasible interest. Unlike the holder of the defeasible interest, the seller of the option is compensated for the loss of the land, if and when it occurs, by the amount of the agreed purchase price. The optionor does not risk losing the entire value of the asset upon the event terminating his interest.

88. The legal prerequisite to an insurance contract that the insured have an insurable interest ensures that the contract exchanges risk rather than increasing risk.

89. Options to purchase land, stocks, foreign currencies, and commodities operate to spread and reduce risks associated with future events in much the same fashion as insurance. Purchases of outstanding contingent interests, to obtain a fee, also reduce risks and, therefore, do not undermine the proposition that contingent interests reduce value.
There are, of course, two parties to an insurance contract. While the insured decreases risk by the contract, the insurer increases the number of risks it bears. Obviously, neither the probability nor the magnitude of loss decreases upon the transfer of risk to the insurance company. The negative expected return of that risk remains the same. The risk is less obnoxious to the insurer at least in part because it has a greater endowment; for the insurer the loss is only a drop in the bucket.

2. Gambles

Many people, like insurance companies, take small gambles. They buy lottery tickets or play roulette or slot machines. This ordinary gambling, unlike the insurance hedge for the insured, does increase risk and uncertainty. But most adults, like insurance companies, do not risk a substantial portion of their wealth on one event. In fact, many of those who play lotteries also insure their cars and houses. The possibility of a rela-

90. The existence of insurance may actually increase the probability of loss. For a discussion of this moral hazard problem and some ways to deal with it, see R. COOTER & T. ULEN, LAW AND ECONOMICS ch. 2 app. (1988).

91. Economists often explain the willingness of insurers to take on the risks of others by reference to the law of large numbers. By pooling the risks of a broad sample population, the story goes, the risk becomes more certain and more certainly centered on the true population mean.

92. In this Article, a person's wealth is the amounts he would have to be paid in exchange for all his rights in assets, to acquire those rights without his complaint, and his money.

93. The oft heard phrase, "I wouldn't bet the farm on it," expresses the notion that acceptable odds become unacceptable as the amount at risk increases.

94. Friedman and Savage explain this fact with the hypothesis that the utility of income function is both concave and convex. Friedman & Savage, supra note 74, at 287-97. If marginal utility of income declines, a mathematically fair gamble will always have a negative expected utility. Therefore, they concluded, marginal utility must sometimes increase. Others dispute the conclusion that marginal utility of income increases. Bailey, Olson & Wonnacott, supra note 74, at 372; see also R. POSNER, ECONOMIC ANALYSIS OF LAW 11 (3d ed. 1986). That many persons play lotteries when the expected return is negative could be explained in at least four other ways. First, players might buy hope. (Are lotteries a modern opiate of the masses?) Second, the stimulation associated with small doses of uncertainty is itself worth buying. Third, as in the Friday night poker game, the costs of small uncertainties are outweighed by the benefits of the larger enterprise (sport) within which the gambling occurs. See generally R. HERMAN, GAMBLERS AND GAMBLING (1976) (classifying gambling into four types, only one of which attributes benefits to the risk itself). Fourth, classical conditioning studies in behavioral psychology suggest that gambling behavior acquired under a random, intermittent reinforcement schedule that appeared to reflect a positive expected return will be difficult to extinguish even after it should be clear the expected return is negative. Fifth, and closely tied to number four, people may become addicted to gambling. See N.Y. Times, Oct. 3, 1989, at 1, col. 1.
tively small decrease in endowment is acceptable, but the possibility of a large decrease causes much uneasiness.95 Once the amount in jeopardy causes enough discomfort, a person will pay to be free of the possibility of loss. And one for whom the amount of loss is small enough will gladly take payment to assume the risk. Whenever a possible negative change in income would matter a great amount to one person and less to another, the former should be willing to pay the latter to bear the risk of that change.

The question for future interests is whether they generate the sorts of anxieties against which people prefer to insure or the sorts of excitement for which people will pay. Some contingent interests voided by the Rule would be held by persons who would enjoy holding their interests just as bettors enjoy holding lottery tickets. On the other hand, some contingent interests voided by the Rule would be held by persons that do not enjoy the risky nature of the asset.96 The holders of the contingent interests are, however, only one part of the story. In creating future interests that are contingent by reason of a condition precedent, transferors also create defeasible estates.97 These defeasible estates may make up a large part of the recipients' financial endowments.98 The more important the asset to the recipient, the more likely the possibility of losing it exceeds the recipient's threshold of discomfort. Thus the pervasiveness of gambling does not undermine the conclusion reached above from the rarity of market creations of contingent future interests: when

95. If marginal utility of income declines, the loss of a large asset will always result in a disproportionately greater decrease in happiness than the loss of a small asset. In other words, declining marginal utility explains why a person would insure against the possibility of loss of large assets but not against the possibility of loss of small assets. See R. Posner, supra note 94, at 11.

96. This is not to say that the transferee is worse off as a result of the transfer. The transferee's risk aversion may reduce the value of the interest, but probably not below zero.

97. See Example 2, supra notes 27-28 and accompanying text. By creating the contingent interest in B, O makes A's estate defeasible. Of course, one could create a contingent future interest without making the previous interest defeasible, but to do so will mean that some other interest becomes defeasible. For example, if O transfers "to A for life, then to B and his heirs if he reaches 21," O creates a life estate in A followed by a contingent remainder in fee simple in B. O's creation of B's interest does not detrimentally affect A, but it does detrimentally affect the successor to O's interest because what would have been a reversion in O that would automatically follow A's death becomes a reversion that is, in effect, defeasible. (That does not, however, make the reversion subject to the Rule.) The creation of any contingent interest will necessarily leave in a state of doubt the complementary interest as well.

98. For purposes of this Article, a person's "endowment" is defined as the set of rights in assets and money held by the person. Endowment is the same as riches or means.
transferors carve contingent future interests and complementary defeasible estates out of important real and personal assets, the resulting uncertainties and attendant anxieties probably reduce the societal wealth⁹⁹ attributable to the underlying asset.¹⁰⁰

Even if one assumes the existence of gambling indicates that the creation of contingent interests sometimes increases the value of large assets, that example offers little support for the conclusion that the creation of the type of contingent interests invalidated by the Rule against Perpetuities similarly increases wealth. The contingent interests created by gamblers will vest or fail in a short time, and usually on or before a known date. Few make bets that might not be resolved within their expected lifetimes. Even gamblers want to know when they will learn whether they have lost or won the bet. By contrast, the Rule strikes down interests that might remain contingent for a long, long time. Because market transactions rarely create contingent

⁹⁹. "Wealth," when used in this Article without qualifier or in conjunction with "societal," refers to the sum of the values of all assets held by society. See supra note 82 (definition of value). This meaning adopts the second half of the definition of wealth that Judge Posner adopted. For him, wealth "is measured by what people are willing to pay for something or, if they already own it, what they demand in money to give it up." Posner, Utilitarianism, Economics, and Legal Theory, 8 J. LEGAL STUD. 103, 119 (1979). Because Posner's definition of wealth values assets according to what anyone would pay for them, a mere exchange, although beneficial to both parties, does not increase wealth unless the act of exchange increases (by wealth effects or otherwise) someone's valuation of at least one of the assets exchanged. But see id. at 120. The thesis of this Article calls for a term that reflects improvements in societal well-being due to beneficial redistributions of rights in things. The meaning given wealth here captures that concept without stretching too far the ordinary sense of the term. Because individual wealth includes money and social wealth does not, see supra note 92, the sum of the wealths of all persons in a society is not the same as societal wealth. Since the Rule against Perpetuities applies to interests in land and other resources, this Article uses the term wealth only to refer to material goods, though nonmaterial wealth such as human capital is, obviously, also important. For a succinct overview of some of the intractable problems involved in defining the wealth of nations, see Heilbroner's entry on wealth in 4 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 880-82 (J. Eatwell, M. Milgate & P. Newman eds. 1987).

¹⁰⁰. The creation of future interests that are contingent because they are held by an unidentifiable person has a detrimental effect similar to, but likely less than, that attending the creation of interests following a defeasible estate. The spouse of a person whose widow is to receive an interest might equivalently be considered to be holding an interest that is subject to the condition precedent that she remain alive and married to the identified person until he dies. The difference is that the creation of an interest in an unidentifiable person does not require that the previous estate be defeasible. It does, however, require that some interest become defeasible. See supra note 97.

The creation of interests that are vested subject to open also diminishes enjoyment, albeit possibly to an even lesser degree. The creation of a future interest in great-grandchildren would leave those who have already attained that status open to the possibility that they would have to share their asset with others that might come along later. This risk of partial loss would probably reduce value.
future interests in relatively important assets and even less often create interests that might not vest for decades, we can conclude that the creation of contingent interests in Blackacre, especially contingent interests of uncertain duration, will probably reduce the value of Blackacre.\textsuperscript{101}

The Rule against Perpetuities increases societal wealth in some cases by extinguishing contingent future interests that reduce the value of the underlying asset. These cases include all of those like Examples 2 and 2a in which the Rule redistributes rights from a purported transferee to the immediately preceding estate holder. When the Rule merely redistributes rights from a purported transferee to the transferor, as in Examples 1, 3, 4, 5, and 6, the Rule generates none of this beneficial effect because it redistributes the interests without reducing uncertainties caused by risk of loss.\textsuperscript{102}

\textbf{F. The Third Benefit: Accelerated Enjoyment}

Examples 3 and 6 (if it is changed from a grant to a devise) illustrate the third type of beneficial effect generated by the Rule: hastened enjoyment. The redistributions accomplished by the Rule in those examples enhance wealth by taking the contingent interest from someone that is not yet alive and placing it in the hands of a person that is alive and, therefore, able to enjoy the ownership. The point here is not that possession will occur earlier for the recipient than for the loser of the redistributed rights. (The date of possession, of course, will not change because the Rule does not change the event that causes a change of possession.) Rather, the point is that the recipient is alive and, for that reason, will enjoy and value the rights in a way that the loser cannot. Because the rights redistributed are contingent, they might not be worth much. Nevertheless, they are worth something.\textsuperscript{103} They are certainly worth more now to a person that is alive than to one that is not because the living recipient can enjoy the knowledge that he owns those contingent rights.

\textsuperscript{101} The point applies equally to other resources.

\textsuperscript{102} A redistribution like that in Example 5 (see supra notes 49-50 and accompanying text) may reduce the detrimental effects of uncertainty by making a number of contingencies important to only one person. Whether one person enjoys the ownership of two contingent interests more than two persons would enjoy separate ownership of the two contingencies remains a matter of speculation.

\textsuperscript{103} A contingent future interest that has a 20\% chance of becoming possessory 100 years from now should be worth nearly 2\% of the current market value of the land. This figure assumes a 5\% long-term inflation rate and a 7.5\% long-term interest rate.
That appreciation, from the time the Rule operates until the purported transferee would have become aware of his rights, represents a direct gain in happiness. In short the Rule tends to redistribute rights so they can be enjoyed sooner.

So the Rule has three closely related, beneficial effects, some or all of which may obtain in any given case. First, as recognized by most authorities, the Rule makes more likely the efficient use of resources by collecting rights into bundles more easily exchanged, which facilitates market reallocation to the best use and best user. Second, the Rule increases wealth by sorting rights into packages that generate more enjoyment for the holders, irrespective of whether those packages of rights, those interests, are subsequently reallocated in the market. Third, the Rule accelerates enjoyment by redistributing rights from persons that are not yet alive and cannot possibly appreciate their interest to persons that are alive and able to enjoy their rights.

Although the Rule against Perpetuities may generate substantial benefits, it will not necessarily do so—even in the sorts of cases discussed above. For example, though "A's widower" is technically unidentifiable while A lives, A's widower is for practical purposes identifiable if A is ninety-years old and on her death bed. In such a case, a purchaser can negotiate with A's husband with some confidence that he will turn out to be her widower. Any redistribution by the Rule to the transferor, such as in Example 5, does little to improve purchasability. The argument here, to the extent there is one, is that the Rule may generate at least three different sorts of economic gains. This Article does not contend that it always does so.

Some scholars have criticized the Rule because it does not apply in many situations in which improved resource allocation would accrue from its application. The Rule does not apply to possibilities of reverter, for example. If such interests were subject to the Rule, some of them would be invalidated, leaving fewer interest holders and, thus, improving purchasability.

104. This argument does not depend upon any discounting of future happiness to present value. The argument here is that happiness (from knowledge of ownership) for a long time is better than the same happiness for a short time. By definition, the future utils are worth just as much as the present utils derived from awareness of ownership of the contingent interest. The acceleration benefit simply adds some current utils to the future utils; it does not weigh one against the other.

105. For a specific example of a situation in which none of the enumerated benefits accrues, see infra subpart II(H).
While this criticism serves the useful purpose of causing us to inquire into whether the scope of the Rule ought to be expanded, it does not justify restricting the scope of the Rule or eliminating it entirely.

So far, this Article has discussed only the redistributions of rights actually wrought by operation of the Rule. The Rule also causes a similar private redistribution of rights from remote transferees to less remote ones by informing some transferors, those that learn of the Rule, that their intended transfer will not be honored. In such situations the transferors themselves redistribute the rights to avoid the Rule. Because there are many ways to avoid the Rule, such private redistributions (via redraftings) of individual parties are much less predictable than the Rule’s redistributions. Nevertheless, transferors probably will redistribute rights in ways similar to those worked by the Rule: from remote to less remote persons and from unidentifiable to identifiable persons. Thus the Rule may create the same benefits of improved allocation and accelerated enjoyment when it acts as a barrier between intent and effectuation as it does when it nullifies language expressed by a grantor. The enhanced enjoyment benefit seems less likely to accrue from private redistributions designed to avoid the Rule than from the operation of the Rule. The transferor probably will not choose to eliminate the contingency to avoid the Rule, but the Rule itself may eliminate the contingency entirely.

Transfers that avoid the Rule with a saving clause will have the same tendency to redistribute rights from remote and unidentifiable persons to nearer persons identified in the saving clause. Unlike the redistribution accomplished by the Rule, however, this shifting of rights via a saving clause only redistributes a portion of the rights of the remote and unidentifiable persons. Those persons stay in the picture along with the saving clause recipient(s), the two holding essentially alternative contingent interests. Private redistributions accomplished by a saving clause, therefore, should be expected not to achieve the same degree of benefit as those accomplished by the Rule. Indeed, one

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106. The word "redistribution" here refers to the change the transferor makes in her intention and the operative instrument to avoid the Rule. The redistribution is from one person who would have gotten the rights if the transferor could have accomplished her original intent, but for the existence of the Rule, to another person who receives the rights under the document as drafted to avoid the Rule.
should question whether the purchasability and enjoyability benefits accrue at all when a saving clause is used to avoid the Rule.

G. Explaining Two Applications of the Rule with these Three Benefits

1. Trusts

The failure to identify the benefits flowing from the reduction of risk and hastening of enjoyment accomplished by the operation of the Rule against Perpetuities and an undue preoccupation with the purchasability rationale may have led some observers to conclude that, were it not an aid to the imposition of death taxes, the Rule ought not to apply to interests in trust. When the legal title to an asset (land or otherwise) is held by a single entity, a trustee, there is no barrier to the transfer of the asset to another person who might put the resource to better use. The existence of equitable perpetuities would not impede the efficient allocation of the asset by the market. Because the improved allocation benefit does not obtain in cases involving trusts, it might be said, equitable interests ought to be free from the remorseless application of the Rule.

The courts have not followed that approach, however. They have instead applied the Rule to equitable and legal future interests alike. That insistence on applying the Rule can be explained and might be justified by the other two benefits of the Rule: reduction of risk and acceleration of enjoyment. The psychological harms caused by risk of loss reduce the value of beneficial interests just as they do to the value of legal interests. Hence, the Rule against Perpetuities can increase the value of equitable interests in assets just as it increases the value of legal interests, by eliminating the risk of loss. Deferred awareness of an equitable interest diminishes its enjoyment just as it diminishes the enjoyment of a legal interest. Application of the Rule can accelerate, and thereby increase, the enjoyment of the inter-

107. See Restatement (Second) of Property § 1.1(3) reporter's note (1983) (suggesting that preservation of death taxes is the reason for applying the Rule to beneficial interests; the note does not say that is the only reason, but it suggests no other).

108. See id. at 9. The efficient allocation rationale also has some difficulty explaining the application of the Rule to intangibles. As noted by Professor Casner, "[R]estrictions operable as to . . . shares or bonds would in no way hamper the utilization of its assets by the issuing corporation." Id.

109. See Ninety Years in Limbo, supra note 36, at 1075-76.

est. These two benefits provide at least a rationale for including trusts within the ambit of the Rule, and may be enough to vindicate such application of the Rule to beneficial interests.

A different argument sometimes offered in support of the application of the Rule to trusts possibly misses its mark. This position maintains that the Rule against Perpetuities serves, beneficially, to frustrate a wealthy transferor's attempt to create a dynasty by taking control of assets out of the hands of succeeding generations. Assuming the Rule does keep a tycoon from creating trusts that would prevent excessive consumption by more flamboyant members of her family, because of the Rule the spendthrifts will have greater ability to consume their endowment. And, at least in the settlor's view, her successors will likely exploit that power, consuming more than they would be allowed to consume by a trustee. Thus the Rule reduces the likelihood that the dynasty will survive.

What is open to doubt is not the consequence of the Rule, but the desirability of that consequence. Dynasties may be bad for a number of reasons. The concentrated economic power may be used to concentrate political power in the few, subverting the political process. They may reduce happiness by generating envy and a sense of inequity. Furthermore, economic dynasties may be criticized as being simply unfair because some live so well without having to do anything to earn their keep. For all of these reasons, the Rule's tendency to interfere with the creation of dynasties could be beneficial.

Dynasties might also be attacked on the ground that they represent bad distributions of wealth. To the extent that this is the problem with dynasties, the Rule reaps no gains. The consequence of the Rule is not to redistribute wealth from persons that do not need it to persons that do. The consequence of the Rule, as seen above, is to enhance the ability of the tycoon's heirs to spend and consume the wealth. To be sure, their consumption reduces the familial coffers, reducing the longevity of the dynasty. At the same time, their spending reduces societal wealth. The wealth is not transferred to the poor. It is consumed.\footnote{111. Some may note that consumption can create jobs. But investment creates jobs plus a little bit more for the rest of society. (Savings are investment via a middleman.). The difference between the societal effects of consumption and investment can be illustrated with a simple example. Assume that a rich beneficiary of a trust buys a Cadillac. Such a car might be consumed in joy-riding or, more respectfully, in vacation transportation.}

Allowing the transferor to perpetuate her dynasty
would probably increase the allocation of resources to productive enterprises,\textsuperscript{112} generating riches for the family and generating wealth for the rest of society in the process.\textsuperscript{113}

Whether the Rule ought to be applied to trusts to prevent dynasties depends on one’s reasons for disliking dynasties. Sensible political and social reasons favor the destruction of dynasties. But the price paid for such destruction is the consumption by the rich of assets that might have been allocated to production. If the primary desire is to augment the wealth of the poor and the other reasons for disliking dynasties stated above are of little importance, destruction of dynasties does not constitute a sound justification for applying the Rule to trusts.

There is, however, a related benefit that might help to justify subjecting trusts to the Rule against Perpetuities.\textsuperscript{114} Leaving aside the consumption issue, the Rule could change the pattern of investment of the familial riches not consumed. Fiduciary duties constrain trustees to make conservative investments. If the beneficiary, because of risk aversion or for any other reason, would make similarly conservative investments, the trust does not operate to bias investment.\textsuperscript{115} But in cases in which the beneficiary would purchase correctly more risk than the trustee,\textsuperscript{116} the existence of the trust skews investment toward safety, inter-

\textsuperscript{112} It is possible, however, that the assets will be invested unwisely.

\textsuperscript{113} The capitalist cannot capture all the extra value created in production.

\textsuperscript{114} This point, like the traditional argument above, depends on the dubious assumption that the Rule reduces the number of trusts.

\textsuperscript{115} Although possible, it is unlikely that the trustee, even though constrained, would make substantially more risky investments than the beneficiary. Settlors usually use a trust when the beneficiary would, in their view, be insufficiently cautious with money.

\textsuperscript{116} A beneficiary correctly purchases a risky asset when his purchase accurately accounts for his own risk aversion. The assumption that the individual best knows his own aversion is especially subject to question when a trustee has been appointed to exercise his discretion.

Alternatively, the Cadillac might be used in a limousine service or rental agency. In either case, and to an equal degree, the production and maintenance of the car produces jobs and wages for persons other than the beneficiary. But the use to which the car is put makes an important difference to society. If it is consumed, that is the end of the story; the consumption benefits the beneficiary, presumably, but the car will generate no more benefits for the rest of society. If on the other hand it is allocated to production, it provides additional good for society. If it is rented out, the renter accrues some gains from that exchange. If it rolls in a fleet of limousines, someone gains from the exchange of money for limo service, and the driver gains a job. Of course the choice between investment and consumption is more likely to present itself as a choice between a steak dinner and a share of AT&T, but the principle remains the same. The societal advantages of investment and production over consumption by the dynastic rich suggest that the Rule’s encouragement of consumption disserves societal interests.
ferring with the market allocation of resources. By taking control out of the hands of trustees, the Rule frees up the family's endowment for more risky investment.\textsuperscript{117} Freeing capital from investment constraints is one more potential benefit of applying the Rule to trusts.\textsuperscript{118}

2. Charitable Gifts

Just as the second benefit, the reduction of losses accompanying risk, helps to explain the application of the Rule to beneficial interests, it also helps to explain the narrowness of the Rule's exception for gifts to charities. Ordinarily, contingent interests created in charities are treated the same as other contingent interests for purposes of the Rule against Perpetuities.

Example 8: \textit{O} conveys Blackacre "to A and A's heirs, but if A's descendants discontinue residence on Blackacre then to the Methodist Church and its successors and assigns."

Because of the Rule, the Methodist Church receives nothing from this transfer. The contingent interest held by the Church might vest more than twenty-one years after the deaths of everyone alive at the time of the transfer and is, therefore, void. \textit{A} gets a fee simple absolute. But the Rule does not always apply to contingent interests held by charities. Transfers in which both of the transferees are charities are not subject to the Rule.\textsuperscript{119}

Example 9: \textit{O} conveys Blackacre "to the Unitarian Church, but if the Unitarians cease to use the grounds for Church meetings then to the Catholic Church."

Even though the interest in the Catholic Church might vest too late, the interest does not violate the Rule because of this special exception for charities.

The "alienability" (purchasability) rationale often used to justify the Rule cannot explain this difference in the Rule's treatment of Examples 8 and 9. The outstanding contingent interest would impede transfers in both cases equally. To strike down

\textsuperscript{117} The development of relatively low-risk mutual funds in high-risk sectors of the market and other applications of portfolio theory should decrease the degree to which assets held in trust are precluded from reaching the high-risk ventures, further mitigating this benefit of applying the Rule to trusts.

\textsuperscript{118} Given two investments, one with an expected return greater than the other, the trustee might choose the one with the lower expected return because of his obligation to avoid risk. If the forgone investment has a greater expected utility (accounting for the true risk aversion of the beneficiary), the trustee's choice misallocates capital.

the interests in the Catholic and Methodist Churches would in each case consolidate the ownership in the hands of one entity, freeing Blackacre for transfer. Not to void the contingent interest in each case leaves an additional interest to be located and acquired by someone wanting to develop Blackacre.

However, if all three of the above benefits of, or rationales for, the Rule are considered together, both the exception and its narrowness make some sense. The acceleration benefit, to take the easiest case first, cannot be used to justify the application of the Rule to any interest held by an existing charity because both entities are now able to enjoy ownership. If that were the only rationale for the Rule, the exception should extend to all contingent interests owned by charities, preserving them from invalidation by the Rule.

The purchasability rationale, by contrast, supports applying the Rule to all interests held by charities because such application may effect some improvements in purchasability. If the rights held by the charity are redistributed to the prior interest holder, a would-be purchaser can negotiate with one fewer owner. If the rights are redistributed to the grantor, the purchaser can deal with an individual instead of an organization, which might be slow to make the institutional decision to sell. Notwithstanding these enhancements, the purchasability case for applying the Rule is much weaker when a charity holds the interest than when the contingent interest in question is held by an individual or class. Because charities are somewhat easier to locate, have the legal capacity to negotiate for themselves, and rarely die leaving numerous heirs, the existence of a contingent future interest in the hands of a charity might well cause fewer acquisition problems to a prospective purchaser than would the existence of a similar interest in the hands of a human. Furthermore, a redistribution that snaps the rights back to the testatrix would move the interest from a single entity to multiple hands if the residuary clause of her will specifies a group of persons or if there is no such clause and the heirs are many. For these reasons, the purchasability benefit is much more doubtful and, hence, much less important when a charity holds the interest under scrutiny. Nonetheless, the Rule could effect some improved resource allocation.

The weakness of the purchasability rationale and the inapplicability of the acceleration rationale indicate that the Rule ought not to apply to any interest held by a charity. Yet the
exception is not that broad. The exception applies only if both
the contingent future interest and the preceding interest are held
by charities. Nothing in those two rationales explains the nar-
rowness of the exception now found in the law.

Attention to the enjoyability of risky interests, however,
furthers the explanation of the exception by offering a reason to
distinguish between the two examples above. Charities are prob-
ably less bothered by defeasibility because, by their nature and
often by law, charities have more fixed and limited purposes and
goals than individuals or businesses. Their needs and the partic-
ular uses to which they will put assets probably shift less over
time.\textsuperscript{120} If this is so, a limitation attached to an interest that will
terminate that interest upon the occurrence of some specified use
or nonuse will decrease the enjoyment of the asset by the charity
to a lesser degree than a similar limitation would for an individ-
ual or business. In other words, regarding the sorts of risks usu-
ally created by restrictions attached to gifts to charities, the
possibility of losing the asset upon a proscribed use causes a
somewhat less detrimental effect to the
\textsuperscript{121} Assuming
this is true, the enjoyability rationale for applying the Rule is
slightly less persuasive when the interest under scrutiny follows
a defeasible interest held by a charity. Considering only the
enjoyability of interests, then, it could be argued that the Rule
ought not to apply to interests following those in charities.\textsuperscript{122}

\textsuperscript{120} Businesses are often criticized for having only a narrow profit motive. But that
motive, narrow as it is, allows greater freedom of physical movement than the purposes
stated in the articles of incorporation of many nonprofit organizations that are tied to local
communities. That fact alone should reduce the frequency that charities wish to sell their
lands compared to ordinary businesses. In addition, the articles of incorporation of
charities often enumerate purposes that are more circumscribed than general profitmaking.

\textsuperscript{121} This proposition is the same as saying that charities might be expected to be
bothered less by the restriction attached to their use.

\textsuperscript{122} The exception's narrowness might also be explained as a judicial attempt to
avoid creating disincentives for charitable giving. See R. Powell, supra note 119, \textsuperscript{\textsuperscript{2}} 770[1]. Transferors need to be able to create a mechanism for enforcing otherwise
precatory language to be assured that their gift will be used for the desired and expected,
socially beneficial purposes. \textit{Id.} As suggested by Professor Epstein, "Henry Ford would
probably die if he knew what kinds of project that the Ford Foundation sponsors. John
MacArthur might have left it all to his kids if he had known. Keeping the next generation
in line is a lot harder than is often supposed." Letter from Professor Richard Epstein to the
author (Nov. 21, 1988). The defeasible estate provides one mechanism for enforcing the
transferor's intended use of the asset. This rationale has some difficulty, however,
explaining the result of \textit{In re Tyler}, 3 Ch. 252 (1891), which applied the exception although
the shift from one charity to another was intended to insure that some funds would be used
for non-charitable purposes. See R. Powell, supra note 119, \textsuperscript{\textsuperscript{2}} 770[1] \& n.7. The
combination of enjoyability and purchasability rationales better explains the court's result
But, of course, the exception is not that broad either. The exception suspends the operation of the Rule only when all three rationales, acceleration, enjoyability, and allocation, are undermined, which occurs when charities hold both the contingent interest in question and the preceding defeasible interest.\textsuperscript{123}

**H. A Critique of One Application of the Rule**

A reader might at this point ask which of the enumerated benefits justifies the operation of the Rule in cases like Example 1. The common-law Rule takes the future interest from an apparently intended transferee, $B$, and moves it back to the grantor, $O$, or the grantor's successor. What good is that? None. The land is no more purchasable, no more enjoyable, and no more quickly enjoyed than before the application of the Rule. The transfer, and others like it, might just as well be excepted from the operation of the Rule, but it is not. Though this might be justified on the ground that the Rule cannot bear any more complexity, that argument assumes too much about the unattractiveness of complexity—a topic taken up later.

**III. THE BENEFITS OF RECOGNIZING CONTINGENT INTERESTS**

One might conclude from the discussion above that contingent interests ought to be abolished entirely. But that does not necessarily follow. The existence of contingent interests could diminish societal wealth, but refusing to allow contingent interests would also result in losses.

**A. Maintaining Efficient Incentives**

An owner's right to transfer to someone else whatever portions of an asset she pleases inheres in our popular notions of legal ownership.\textsuperscript{124} More specifically, "the right to pass on proper

\textsuperscript{123} When the preceding interest is not defeasible, the enjoyability rationale is undermined whether the preceding interest is held by a charity or otherwise. Under this view, the Rule ought not apply to interests held by charities when the preceding interest is indefeasible. I am not aware of any cases raising this issue. Although the enjoyability rationale helps to explain the exception for charities, it does not completely justify the contours of that exception because the exception supposedly applies even if the preceding interest is not defeasible.

\textsuperscript{124} However, the common law did not consider all rights in land to be alienable.
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Property lies at or near the core of the ordinary notion of property ownership; it has been part of the Anglo-American legal system since feudal times. The right to transfer is fundamental and both mutual exchanges and unilateral transfers serve good economic purpose. Mutual exchanges help, of course, to allocate assets efficiently. As noted above, the market does create and exchange some contingent interests (insurance and options), and it would ill serve efficiency to impede those exchanges with a rule of law prohibiting the creation of all contingent future interests.

A narrower rule disallowing only donative transfers of contingent interests would probably be circumvented too easily to be useful. Even if such a rule could be made effective, and even assuming the rule would have no negative effects on market transactions, it could impair efficiency. Although donative transfers do not warrant the presumption, given to mutual exchanges, that they distribute rights to the most appreciative owner, societal recognition of donative transfers carries other efficiency-enhancing side effects. Allowing owners to give their assets and money to others, whether at death or inter vivos, creates an incentive for productive activities. For some persons that have acquired enough material possessions to care little about further increases in their own power to consume, the opportunity to donate to selected others may add enough reason to produce to cause them to invest their personal efforts or capital in productive activities.

The flip side of the same coin is that a legal prohibition of certain transfers may lead to wasteful consumption by the owner. If the law prevents owners from doing what they wish


126. Donors would attempt to circumvent the rule by making their gifts appear more like exchanges. Courts attempting to distinguish the two situations could mistake small exchanges and other borderline but bona fide mutual exchanges for unilateral gifts. When that mistake occurs and the market gets wind of it, the parties to mutual exchanges will take special (and wasteful) precautions to establish the bona fides of their transaction.

127. Transactions that appear to be mutual exchanges may be in fact partly donative, undermining the assumption that the transferor knew of no more appreciative transferee.


129. Ellickson, supra note 128, at 735-36.
with their money, they might just spend it. The easy availability of annuities has made this problem worse today than it was in the distant past. A testatrix blocked by the law from making her desired gift at death has today a handy means for making sure that her endowment does not pass to anyone else, without jeopardizing her own security. Any rules discouraging donative transfer will increase consumption by persons who have themselves decided that they would enjoy the consumption less than their intended beneficiaries. In addition to causing misallocation of consumption, the prohibition of contingent interests accelerates consumption, causing it to occur sooner rather than later. This too wastes assets because assets saved and put to productive use rather than being consumed will grow so that more can be consumed in the future. Saving now allows greater consumption in the future. Maintaining incentives for efficient behavior by would-be transferors is one good reason, then, to allow gifts of contingent interests.

B. Transfers as Consumption

Maintenance of efficient incentives is not the only reason to allow gifts of contingent interests. Notwithstanding the fact that the creation of a contingent combination reduces value, the act of donating such a combination may itself represent the most efficient use of an asset. When a rich aunt divides her estate among her well-heeled nephews, she passes up an opportunity to give to needy families to whom the gifts would make more difference. She, like most of us, would rather help close relatives and friends a little than help strangers a lot. In other words, she enjoys giving, and the amount of her enjoyment varies with the beneficiary. Too much attention to the efficiency of resource

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130. As a matter of social policy, the efficient and fair balance between present consumption and savings is tricky. Savings now create a reservoir for future consumption. But if those who consume in the future have greater endowments and have similar, declining marginal utility curves, their consumption will generate less happiness than would have the consumption by the original saver.

131. Of course, the Rule will generate few of these inefficient incentives because the Rule easily can be avoided with a saving clause. See infra notes 170 & 172. I only want to mention that incentive effects are one reason for allowing contingent interests. Another reason for allowing such interests is to allow interests to be made subject to the condition of survival until distribution, thus saving any additional probate expenses associated with transfers to recipients that die before distribution.

132. For a possible reason for this taste, see supra subpart II(C).

133. As stated by Cooter, "the donor . . . maximiz[es] the sum of his own utility and the donee's utility." Roundtable, supra note 3, at 851.
allocation after the gift becomes effective obscures that the happiness derived by the donor from the act of giving must also be included in the sum when values are added up. Because benefactors enjoy making gifts, a prohibition on certain gifts could prevent them from squeezing the maximum happiness from their holdings.

The proposition can be stated more generally. In many, indeed most, cases the act of giving is not a form of consumption, or at least not a form of consumption that precludes others from consuming the subject matter of the gift. Yet when a transferor divides the rights in an asset into vested and contingent interests and transfers those rights out to others, the asset so transferred generates less happiness in its holders than if she had given full ownership outright to a sole donee. In the act of giving, the donor has consumed the difference between the value of the resource if solely owned and the value of the resource held in the resulting several interests.

That the transferor forewent the possibility of selling full ownership of the asset is some evidence that the transferor enjoyed making the gift in the form chosen more than enough to make up for the losses in enjoyment caused to her beneficiaries. If anyone, including the intended beneficiaries, prized full ownership more highly than she prized making the gift, he would have purchased from her. The loss of enjoyment to the transferees occasioned by the fragmentation of the gift makes itself known to the transferor not solely through the concern the transferor has for her transferees, but also by the Coasian mechanism of the potential bargain between the transferor and a buyer. In giving a divided gift, she passed up two opportunities: the chance to give an undivided interest and the chance to sell an

134. Professor Andrews has argued, for this reason, that gifts should be deducted from income for purposes of the income tax because gifts are neither savings nor consumption. Andrews, Personal Deductions in an Ideal Income Tax, 86 HARV. L. REV. 309, 348-56 (1972).

135. The amount preclusively consumed by the donor is limited to the cost of consolidating all the interests in one person. When the costs of the transactions necessary to accomplish that result are too high, this theoretical limit frequently has no practical effect.

136. Any argument that the transferor rationally weighs her gains from fragmentation against the losses of the transferees ignores that the donor, when rationally deciding to give, considers only the utility she derives from the enjoyment by her beneficiaries rather than the enjoyment derived by the beneficiaries. The argument here does not assume that the transferor's interest in the donees' enjoyment will cause her to give appropriate weight to their loss of enjoyment from the fragmented gift.
undivided interest. It is the failure to take the latter opportunity that indicates the act of fragmented giving was efficient.

Nevertheless, for several reasons this evidence cannot be considered conclusive on the issue of efficiency. First, the transferor may not have known how much the market was willing to pay for the undivided interests. Second, an insufficient endowment may have prevented those who would have taken more enjoyment from the whole package of rights from making their utilities known through the market mechanism. Third, one of the donees might have prized full ownership more than enough to pay the price needed to keep the donor from breaking up the interests, but he might have avoided the bargain because after paying full price he would get only half an interest more than he would have gotten via the gift for which he would have paid nothing. Despite these possibilities, the transferor’s choice of giving over selling suggests that, once the transferor’s utility is factored in, the donative transfer of divided interests may have enhanced net utility.

Transferors of property have long shown a strong tendency to transfer interests to their descendants. They may simply have “other-regarding” preferences. Or perhaps it pleases them to think that they will be remembered through the centuries as the provider of the family’s financial security. By tying up the assets or by transferring identifiable interests to each successive possessor, the transferor increases the odds that she will get credit for passing down the riches. In thus assuring that she will be remembered, the donor creates a memorial to herself.

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137. This problem of wealth effects may be particularly likely in situations involving recipients of gifts if such persons tend to be more likely than usual to be unable to afford the asset.

138. This disincentive to bargaining would not appear if the donee expected to get, as a gift, the same share of the cash as of the asset. In the same vein, this disincentive would not apply to persons that did not expect to be donees.

139. A recent example of someone having this tendency is Sol Goldman, who died in 1987, leaving an estate of one billion dollars. He had hoped that his real estate empire would be kept intact for his grandchildren’s grandchildren. N.Y. Times, Sept. 25, 1988, § 10, at 1, col. 3.

140. Which others one might expect donors to prefer is explored above. See supra subpart II(C).

141. Lord Kames explains the creation of fee tail estates by reference to this aspect of human nature:

The man who has amassed great wealth, cannot think of quitting his hold, and yet, alas! he must die and leave the enjoyment to others. To colour a dismal prospect, he makes a deed arresting fleeting property, securing his estate to himself, and to those who represent him, in an endless train of succession. His estate and his
Maybe some taste quite different from immortality, such as an antimarket preference, motivates owners of property to break the subsequent ownership into vested and contingent interests. Regardless of the reason for the preference, taking away the power to achieve it would deny owners that form of consumption.

IV. THE RULE'S INFLUENCE ON CONSUMPTION

A. Mediating Intergenerational Conflict

Professor Simes, in his Thomas Cooley lectures at Michigan Law School, recognized this conflict between satisfying the desires of donors and donees and used it to justify the Rule.

First, the Rule against Perpetuities strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property they enjoy. . . . Indeed . . . there is a policy in favor of permitting people to create future interests by will, as well as present interests, because that also accords with human desires. The difficulty here is that, if we give free rein to the desires of one generation to create future interests, the members of succeeding generations will receive the property in a restricted state. . . . Hence, to come most nearly to satisfying the desires of peoples of all generations, we must strike a fair balance between unrestricted testamentary disposition of property by the present generations and unrestricted disposition by future generations.

heirs must for ever bear his name; every thing to perpetuate his memory and his wealth. How unfit for the frail condition of mortals, are such swoln conceptions? The feudal system unluckily suggested a hint for gratifying this irrational appetite. Entails in England, authorised by statute, spread every where with great rapidity, till becoming a publick nuisance . . . .

1 H. Home (Lord Kames), Historical Law-Tracts 218 (1758).

142. Cooter suggests the antimarket preference as one explanation for donor behavior. Roundtable, supra note 3, at 853. Other explanations suggest themselves. In Example 2, see supra text accompanying notes 27-28, the donor might derive satisfaction from the knowledge that B has the power to keep A from selling liquors, not because she cares whether A sells liquors, but because she knows that B cares whether A sells liquors and wants to make B happy. (While alive, B will have that power whether or not B can transfer his interest to A.).

143. Professor Harry Pratter, of Indiana University—Bloomingston School of Law, has captured the irrelevance of the reasons underlying preference in the following Cartesian suggestion for an economist's maxim: "I prefer; therefore, I am right." Harry Pratter, Professor Emeritus, Indiana University—Bloomingston School of Law (Fall 1988) (comment in faculty lounge).

144. L. Simes, supra note 3, at 57-58. The quote continues: "In a sense this is a policy of alienability, but it is not alienability for productivity. It is alienability to enable
The law does not, however, generally restrain consumption of chattels, or otherwise restrain consumption of realty. If a person likes to see Rolls Royces plummet from cliffs, she will not be stopped from rolling her own cars off her own cliffs, regardless of the losses her descendants will suffer, as long as the rest of her behavior stays close enough to social norms to prevent a declaration of incompetency. With regard to disposition of private property, the common law does not generally engage in balancing the interests of present and future generations of people to do what they please at death with the property which they enjoy in life.” *Id.* at 59. The Restatement also recognizes this dimension of the Rule:

"The rule against perpetuities provides an adjustment or balance between the desire of the current owner of property to prolong indefinitely into the future his control over the devolution and use thereof and the desire of the person who will in the future become the owner of the affected land or other thing to be free from the dead hand."

RESTATEMENT (DONATIVE TRANSFERS), *supra* note 3, at 8. The third purpose identified by the Restatement as being served by the Rule, that of aiding current owners in responding to exigencies, *see supra* note 84, might best be understood as a further elaboration of this general balancing between generations.

This struggle between generations does not manifest itself as such in the courts. Judges often hear cases between living persons whose generations cannot be compared because they are not related to each other. One party in the case argues for less restricted alienability, and another argues more restricted alienability. It is the rules by which they trace their claim, not their generation, that will determine their perspective.

145. One possible exception involves instructions (in a will) to destroy private papers. Nevertheless, the law (in particular the application of income taxes to corporations) has, at times, been criticized for favoring consumption over savings. *See generally* THE UNEASY COMPROMISE: PROBLEMS OF HYBRID INCOME-CONSUMPTION TAX (A. Aaron, H. Galper & J. Pechman eds. 1988).

146. It is not a common-law crime to burn down one's own house. *People v. Dewinton*, 113 Cal. 403, 404-05, 45 P. 708, 709 (1896); *State v. Keena*, 63 Conn. 329, 329-30, 28 A. 522, 522 (1893); *Brown v. Rouillard*, 102 A. 701, 703 (1917); *State v. Haynes*, 66 Me. 307 (1876); *Bloss v. Tobey*, 19 Mass. (2 Pick.) 320 (1824) (indicating that it is not slander to state that a person has burned his own store as to do so is not a criminal act); *Haas v. State*, 103 Ohio St. 1, 1-2, 132 N.E. 158, 158 (1921); 1 M. HALE P.C. *568*, 2 East P.C. 1022 (1803) (not arson at common law to burn one’s own house); *cf. People v. George*, 109 P.2d 404, 406 (Cal. Dist. Ct. App. 1941) (conviction of owner of statutory crime of maliciously burning house affirmed against constitutional challenge).

Although the law does not impede the consumption of realty by living persons, it does stop some forms of consumption after death. Courts have ordered executors not to destroy realty after the death of the testator despite express orders to do so. *See National City Bank v. Case W. Reserve Univ.*, 7 Ohio Op. 3d 100, 104-05, 369 N.E.2d 814, 814-19 (1976) (demolition of testatrix’s home allowed to prevent “desecration” by conversion to nursing home or business); *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 214 (Mo. Ct. App. 1975) (trustee enjoined from demolishing house as per orders in will); *Board of County Comm’rs v. Scott*, 88 Minn. 386, 93 N.W. 109 (1903); *cf. I.R.C. § 280B* (1982) (disallowing a deduction for the loss of structures demolished by the owner).

147. A declaration of incompetency is the legal way to restrain consumption by owners.
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adults;\textsuperscript{148} the balance is usually struck in favor of whatever the owner decides to do with her asset.\textsuperscript{149} The law of future interests fits this framework; it allows owners, should they wish to do so, to consume a portion of the value of their assets by dividing ownership among beneficiaries in ways that reduce the value of the resources.

Perhaps the law should restrain current consumption for the benefit of future generations. That it does not is no argument that it ought not. Maybe fairness requires that the unborn be protected against the sins of their parents.\textsuperscript{150} If those alive now have a moral obligation to conserve assets so that future generations may be assured sufficient ability to consume, legal doctrines like the Rule against Perpetuities serve that moral purpose. One could argue, on the other hand, that it is immoral to force a transfer of rights from one person or group to another even if an overall increase in wealth is guaranteed. Under that view, the Rule works across moral purposes.\textsuperscript{151}

The proposition that the law should restrain consumption is more difficult to justify on utilitarian grounds. The increased potential for consumption-based happiness arising from the growth of savings over time will be offset if those who consume in the future have more assets to consume. Assuming that the assets of society are increasing and will continue to do so, and assuming that those that follow will have the same marginal utility curves as those that live now, and assuming that those curves slope downward, a person that consumes an asset in the future

\textsuperscript{148} The law does require that parents support the next generation during its minority, but no further. The intergenerational issue is a major question, however, in the allocation of publicly provided goods (health care rationing, for example) and in the resolution of maternal-fetal conflicts (as in use of drugs during pregnancy), see generally 2 Bio Law § 5-2.4, at U:675-79 (1987).

\textsuperscript{149} One might argue that we should treat land differently from other assets because it is finite. Even assuming the supply of land itself is inelastic, however, perpetuities consume interests in land rather than the land itself. The interests, as distinguished from the land, may be recreated by labor just as Rolls Royces may be recreated by labor. The consumption of land here involved is limited by the cost of collecting the interests into one person's hands, a cost measured in terms of human services rather than land resources.


\textsuperscript{151} This Article does not pursue these two moral questions. For an essay on the practices and incentives that should help to insure that the next generation gets its "fair share," see Epstein, Justice Across the Generations, 67 Tex. L. Rev. 1465 (1989).
will get less utility from that consumption than one that lives now would get from consuming the same asset. Whether the compounded return on the invested asset will create enough additional consumption to overcome the diminished benefit from consumption is pure speculation. The question is who should do the speculating. Should it be judges, legislatures, churches, individuals or someone else? For purposes of efficiency, the law ought not interfere with the timing of consumption determined by the market; efficiency will be maximized by letting the market strike the balance between generations.\footnote{152}

One could argue that consumption of land resources is more harmful than consumption of other assets. A limitation on an interest may cause the holder of the interest not to develop the land or to develop it in a way different from what he would choose if there were no limitation. This underdevelopment or misdevelopment is visible to the public more often than misutilization of chattels. Because some people are bothered by the knowledge of wasted assets and awareness is more likely to be triggered when the misuse is visible, misuse of land may cause more harm than a financially equivalent misuse of some other asset. In other words, misuse of land carries negative externalities not generated by misuse of chattels.\footnote{153} The inappropriate development signals its consumption by an earlier generation and makes that consumption a little more obnoxious. That the so-called misuse of land may be more harmful than misuse of other assets does not, however, compel the conclusion that land transactions should be treated differently. Efficiency ought still to be enhanced by allowing the market to allocate between future and present consumption.

B. Avoiding the Conflict Between Generations

Professor Simes viewed the Rule against Perpetuities as a

\footnote{152}{Demsetz, \textit{Toward a Theory of Property Rights}, 57 AM. ECON. REV. 347, 347-57 (1967). This conclusion might not follow when there is a difference between the social and private discount rate. For discussion of some of the circumstances in which decision-makers may insufficiently account for the preferences of future generations, see Williams, \textit{Running Out: The Problem of Exhaustible Resources}, 7 J. LEGAL STUD. 165, 199 (1978). See also Solow, \textit{Intergenerational Equity and Exhaustible Resources}, 1974 REV. ECON. STUD. 29 (1974); Sterk, \textit{supra} note 150, at 634-41.}

\footnote{153}{The costs of multiple negotiations and the free rider problem may prevent those bothered by the misuse from helping the restricted owner to buy his way free from the restriction. On the other hand, the sight of misused land may cause happiness in people who take glee in seeing assets go to waste.}
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judicial attempt to improve upon the market balance of the competing interests of successive generations. From that vantage point, the Rule, by preventing or increasing the cost of certain forms of consumption, preserves assets for consumption by future generations. The Rule against Perpetuities need not, however, be seen only as an attempt to improve that intergenerational balance by shifting happiness from the present to the future. In some situations the Rule operates far more elegantly. Rather than striking a balance between the successive generations, it finesses the situation by allowing both generations to achieve the happiness derived from consumption. Because of the Rule, the living misperceive their rights and powers; they have the impression that they can create and transfer the interests they desire, consuming as they wish. Then, after they die, the Rule voids interests and redistributes the rights, resurrecting assets and allowing the next generation to consume. In more general terms, after the consumer has taken enjoyment from consuming but before society has suffered the loss from that consumption, the Rule steps in to sever the usually ineluctable connection between the two. Beautiful.

C. The Role of Complexity

The intricacy of the Rule is an essential ingredient of this beneficial misapprehension. The Rule cannot do its job as well if the public is aware of its operation, and the public will not

154. See supra note 144 and accompanying text.

155. Of course the Rule does not finesse the situation entirely. The finesse only works if the transferor does not learn of the Rule's restrictions. To the extent that transferors become aware of the Rule and conform to its restrictions, it operates in the manner suggested by Simes, defining a limit upon the degree of future control that can be exercised by transferors.

156. The assumption that people continue to make mistakes about things that matter to them bothers many economists. But the collective experience of lawyers and law professors indicates that the Rule occasionally does snare important dispositions.

157. That the Rule has the effect of misleading transferors does not imply that it has that purpose or that anyone intends for transferors to be misled.

158. Obviously, this finesse does not work if the transferor learns of the workings of the Rule before dying.

159. Professor Dan-Cohen makes a similar point in philosophical terms and in the context of the criminal law. Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 HARV. L. REV. 625 (1984). His phrase "acoustic separation" refers to the isolation of the decision rules addressed to judges from the rules of conduct addressed to the general public. Id. at 627, 630.

160. The beauty perceived here, that of having cake and eating it too, is an economic one. There is no claim here that allowing transferors to misperceive their rights is ethically beautiful. On the ethics of secrets, see S. BOK, SECRETS: ON THE ETHICS OF
remain unaware if the Rule is easily understood and communi-
cated. Because it is complex and confounding, the Rule may 
redistribute rights to improve efficiency without presenting inef-
cient incentives to owners and without precluding certain 
forms of enjoyment by owners. Even Professor Gray's classic 
statement of the Rule serves the goal of misperception without 
sacrificing precision or determinacy. "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." The use of the 
triple negative, "no," "unless," and "not," in addition to the 
intangible phrase "life in being," works to confuse the lawyer 
trying to apply the Rule to his facts. The law could adopt 
an equivalent but simpler configuration for its classic statement 
of the Rule. For example: An interest is void if it might vest 
more than twenty-one years after the deaths of all persons living 
at its creation. But such an adoption would reduce the 
number of times transferors mistakenly believe they have ex-
cuted an effective instrument. The simpler version would dimin-
ish the Rule's capacity to allow transferors and their successors 
to enjoy logically incompatible consumption.

The use of the triple negative and the existence of plentiful 
exceptions to the Rule increase the opportunities for mistakes in 
application of the Rule, but those complexities do not make the 
Rule less determinate. Professor Gray described the opera-
tion of the common-law Rule as remorseless, an attribute that 
precludes considerations such as equity and justice that tend to 
fuzziness and indeterminacy when applied to particular cases. 
Proper analysis yields correct answers. The Rule is a laby-

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161. J. Gray, supra note 1, § 201.
162. A number of scholars have summarized the Rule using similar language, 
Dukeminier, supra note 3, at 1913; Haskell, supra note 3, at 545, yet somehow the classic 
statement lives on.
163. The morality of this method of increasing wealth is another question. See infra 
subpart VI(C).
164. An analogy to a long and complicated statement of arithmetic equivalence might 
make the point more clear. Difficult operations combined with many numbers will cause 
many to err in calculating. But regardless of the frequency of error, the statement can be 
proved true or false; there is no grey area.
165. J. Gray, supra, note 1, § 629. For argument against the remorseless 
construction of the Rule, see VI AMERICAN LAW OF PROPERTY § 24.44 (A. Casner ed. 
1952).
166. The Rule is so mechanical that Professor Dukeminier reports he and a student 
have succeeded in writing a computer program to solve some perpetuities questions and
rinth that may be negotiated with axioms and logic,\textsuperscript{167} not an indeterminate doctrine calling for hunches, guesswork, determinations of reasonableness, or a weighing of considerations.

Many articles on the Rule assume that it is intended to prevent specified, undesirable behaviors and that it contains its own specific penalty for failure to conform to its restrictions. In other words, society has implemented or continues to implement the Rule for the purpose of dissuading transferors from making the proscribed transfers, thus guiding donative behavior much as traffic laws are designed to guide vehicle operation. This perspective carries with it an assumption that society does not want people to disobey the Rule's implicit command. Yet a wholly different standpoint is possible. One could argue instead that it does not matter what transferors do; as long as the Rule exists, it will clean up the transfers that have highly detrimental societal consequences. If the Rule is seen as a curative rather than preventative measure, its complexity and the concomitant misperceptions serve to reduce some of the harmful effects that ordinarily attend legal constraints on behavior. Its complexity allows the Rule to mitigate the detrimental consequences of transferor behavior without unduly constraining the behavior.

V. SOME HARMFUL EFFECTS OF OBSTRUCTION AND REDISTRIBUTION

The Rule may be beautiful,\textsuperscript{168} but it is not perfect. The obstruction of transferors' intentions and redistribution of interests in land and other assets by means of the Rule against Perpetuities can have harmful effects on the transferor and purported transferees of those interests and might also have an effect on others who are less involved. The economic benefits identified above must outweigh these harmful effects for the Rule to yield a net benefit. The harms fall within familiar categories: elimination of incentives for productive behavior, preclusion of certain forms of transferor consumption, diminished happiness due to redistribution of rights, costs of administering and resolving disputes, costs of attempts to avoid the Rule, and unhappiness or demoralization engendered in transferors and the public when they learn of governmental refusals to honor transferor intent.

\textsuperscript{167} Dukeminier, \textit{supra} note 3, at 1867-68.
\textsuperscript{168} See \textit{supra} note 160.
Rather than dividing the harms along those lines, the following discussion of harms is organized according to who suffers the harm.

A. Harms to Transferors

One group of persons that comes immediately to mind when considering harms wrought by the Rule is transferors. The potential negative effects on transferors can be divided according to whether the transferor learns of the restrictions imposed by the Rule before making the transfer.

1. Transferors that Learn of the Rule

To a transferor that learns of the Rule's restrictions before she executes the transfer documents, the Rule acts as a barrier between intent and effectuation. The Rule restricts an owner's powers of alienation by making it impossible to accomplish certain transfers. Hence, the Rule qualifies as a restraint on alienation. Two considerations, however, mitigate the severity of this restraint. The Rule may be circumvented in many situations and, where it cannot be, it does not deny terribly important sorts of transfers.

a. Avoidance is often easy

If a potential transferor learns that the Rule will make inoperative certain language that she had planned to use, she may often accomplish her goals by using a different form of transfer. Suppose, for example, that a transferor desires to accomplish what appears to be the goal of the transfer in Example 2 above, a fee in A that will terminate automatically upon the sale of liquor, followed by a future interest in B pursuant to which B may take possession in fee once liquor is sold. Under the common law, the transferor, O, may accomplish this end by the simple process of executing a deed "to A and his heirs until liquor is sold on the premises," and in a separate, subsequent transaction executing a deed of all her interest (the possibility of reverter) "to B and his heirs." Because similar avoidance maneuvers are often avail-

169. L. Simes, supra note 3, at 71. This scheme will not work when the possibility of reverter is not alienable. See Ill. Rev. Stat. ch. 30, para. 37(b) (1969). Professor Dukeminier describes another indirect way of accomplishing this result. Dukeminier, supra note 3, at 1906. In some states both schemes will fail because statutes apply the Rule, or some other durational limitation, to possibilities of reverter. See id. at 1907 nn. 139-40. Whether such statutes work an improvement over the common-law Rule is an issue not
able to circumvent the Rule's restrictions, many of the experts in the field share the opinion that the Rule acts as an absolute bar to only a very few goals.  

Transferors can often circumvent the Rule, and they can do so at low societal cost. The formulaic aspect of the Rule reduces the transaction costs associated with avoiding the rule. As put by Professor Dukeminier, "[t]he essential thing to grasp about the Rule against Perpetuities is that it is a rule of logical proof." The lawyer that spots a questionable interest can determine mechanically whether the interest violates the Rule. As a result, little legal effort is wasted in the process of learning that a new form of transfer is needed. After finding the problem, the same lawyer who knows enough to spot and resolve the Rule against Perpetuities issue will, in the usual case, also know enough of the standard avoidance tactics to be able to draft around the Rule to accomplish his client's ends. The perpetuities saving clause, for example, stands as a simple means of preserving contingent interests for nearly a century. Because the discussed in this Article. They possibly reduce substantially the amount of enjoyment available to owners without much improvement in collecting interests for the benefit of transferees or the market.

170. "Practically anything a testator is likely to want can be done within the limits of the Rule against Perpetuities." Leach, supra note 11, at 669. "[I]n all cases that have arisen in this century where the gift has failed under the Rule, the instrument could have been so drafted as to be unchallengeable under the strictest perpetuities doctrine unaided by legislation." *Hail Pennsylvania*, supra note 3, at 1134 (emphasis omitted). Professor Fetters correctly warns that this fact is irrelevant to the question of dynastic proclivities, see *Reply*, supra note 3, at 408-09, but Leach's statement does help to show that the Rule completely precludes the achievement of very few donative objectives.

171. Dukeminier, *supra* note 3, at 1880-82. Professor Fletcher makes the same point thus: "[f]or those who like precision and internal consistency, it has a charming, almost mathematical quality." Fletcher, *supra* note 3, at 793. And finally, or originally, Professor Gray said:

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


172. The following example of such a saving clause appears in A. Casner & W. Leach, *supra* note 17, at 351: "Any interest under [this] instrument that has not vested within 21 years after death of the survivor of [name a reasonable number of individuals now in being] shall terminate and the property in which such interest existed shall be indefeasibly vested in [name takers]." See also Haskell, *supra* note 3, at 557 n.42. Once such a clause is inserted into the instrument, all the interests created by the instrument survive the application of the Rule because they are sure to vest, if they will ever vest,
mechanical nature of the Rule facilitates avoidance, society wastes little legal labor on the circumvention of the Rule. Moreover, the costs of avoidance should further diminish in the future as entrepreneurs bring computer software to the aid of estate planners. The mechanical nature of the Rule assures low cost elusion.

For the same reasons, the Rule should not raise large uncertainties in the minds of transferors. Any uncertainty felt by a transferor that has no lawyer can be, if it is worth it, resolved by consultation with a lawyer. Unless the legal services necessary to calm a worried transferor's nerves on a perpetuities issue are perceived to cost a lot, it is unlikely that the Rule creates substantial unresolved uncertainties in the minds of transferors without lawyers.

b. Transfers prohibited are not terribly important

Skirting the Rule, however, is not always possible. One example of a disposition that cannot be accomplished or even approximated is one to "the first descendant of Smith to be born after 200 years from the date this transfer becomes effective." Although assessing the magnitude of the loss caused by this and similar unattainable goals is difficult, those losses must be included in the costs flowing from the existence of the Rule. This category of costs imposed on transferors contains both the losses from goals actually prevented and the losses attributable to lawyers erroneously telling clients that they cannot make a desired disposition because of the Rule. Would-be transferors suffer equally whether the Rule actually prevents the transfer or whether they are merely convinced that it does.\[174\]
The losses flowing from preclusion and apparent preclusion of some transferor goals include both possible incentives for inefficient behavior and loss of consumption value. Some observations suggest that these losses are not large. If this and other forms of consumption prohibited by the Rule were important to a large segment of society, popular calls for reform would arise and probably succeed.\textsuperscript{175} It is thus reasonable to presume that no large segment of society has a substantial desire to make those rare dispositions absolutely precluded by the Rule.

That few, at most, care even enough to call for reform does not mean that the costs borne by those few, and therefore by society, are small. The few who suffer might suffer greatly. Or, they might not. The kinds of transfers absolutely precluded by the Rule seem not to be those a donor would desire greatly. Since a perpetuities saving clause can be used to accomplish any gift that will vest within about a century, the Rule frustrates only gifts to persons the transferor will not know. For the same reason, the Rule only prevents achievement of antimarket preferences with regard to dispositions more than 100 years in the future. The loss of the powers to transfer to unknown persons and to tie up property beyond 100 years would seem to cause little loss of happiness. Because few persons have a preference to make the sorts of transfers absolutely prohibited by the Rule and the preference is likely to be slight in those that do, the Rule might not cause great harm by virtue of its total frustration of some transfers.

\textsuperscript{175} For centuries, from the Statute De Donis to modern condominium and time-sharing statutes, landholders have turned to legislatures when the common law failed to recognize transfers for which many felt a need. For further discussion of this point, see T. BERGIN \& P. HASKELL, \textit{supra} note 15, at 28-29. The comparison with De Donis may be far-fetched. The better example would be the statutory developments allowing condominiums and time-sharing arrangements. However, any popularity of the wait-and-see reform does not necessarily support the idea that a substantial segment of the population desires to make the kinds of transfers entirely prohibited by the common-law Rule because many of these are also forbidden under the reform.
The experience of specialists supports the conclusion that the immutable prohibitions of the Rule frustrate few desires. Professor Dukeminier reports that transferors rarely tie up property for even the century that is available under current law. It would be an odd antimarket preference indeed that valued highly the right to control a resource in the distant future, but cared little about tying up the asset during the nearer future. It is impossible to know the extent of the losses imposed upon those who are completely prevented from accomplishing their desired dispositions, but in assessing the worth of the Rule those undetermined costs must, somehow, be weighed against the efficiency gains mentioned above.

To enforce an outright prohibition on the creation of contingent interests might destroy incentives to work or save. But the Rule, in its common-law formulation, seems to have little of that effect. Because lawyers know easy ways to avoid the Rule, and because lawyers will advise with confidence (whether well-founded or not), the Rule should not substantially influence work or saving behaviors of clients and should not deprive transferors of much consumption.

c. Transferors obtain some small benefits

Not only do the losses imposed upon transferors appear small, the Rule carries some benefits for those who learn of its operation. The increased scrutiny of critical phrases may cause transferors to reconsider and clarify their intent. A lawyer that sees the “unborn widow” defect in the proposed conveyance “to Smith for life, then to his widow for life, then to the children of Smith then living” ought at once to inquire of his client as to whether the remainder for life in the widow might be changed to a remainder for life in a named person, Grace (the current wife of Smith). Such an inquiry would alert the client to the possibil-

176. Such an “all or nothing” preference remains a theoretical possibility, however. For the benefit of those who believe that possibility is substantial, it might be hoped that one state would abolish the Rule entirely. The expense incurred by those who shift assets and money to that state to be free of the Rule would give some indication of the minimum losses caused by the Rule in jurisdictions in which it is retained. The expenses incurred would give only a rough estimate because some poor donors might greatly desire a precluded disposition, but lack the money needed to accomplish the transfer to the jurisdiction allowing perpetuities. The estimate would also fail to account for the possibility that the preference for perpetuities in land is larger than the preference for perpetuities in movable assets.

177. See Leach, supra note 11, at 644 example 12; see also supra text accompanying note 29 (example 3).
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ity of a subsequent marriage to a much younger wife. The client might then clarify that she meant for the remainder to go to Grace rather than some other person who happens to be the widow at Smith's death. In such a case, the existence of the Rule causes a more careful delineation of the transferor's intent.\textsuperscript{178}

A vague awareness of the restrictions of the Rule might also cause transferors desirous of creating long-term trusts to seek the assistance of lawyers with expertise in drafting trusts.\textsuperscript{179} Such lawyers may then educate their clients to other problems (unrelated to the Rule) which may arise in the future and thus help them to provide more effectively for their families and themselves.\textsuperscript{180} The magnitude of this benefit is inversely related to the degree of demoralization caused by the Rule.\textsuperscript{181} If the public and transferors are generally unaware of the Rule, it creates little incentive to seek legal advice and very little of the benefit described in this paragraph.\textsuperscript{182} If, however, the Rule creates

\textsuperscript{178} This added carefulness will benefit directly inter vivos transferors who learn of the Rule at a later date. It will also benefit society if the more careful language prevents a later dispute and the associated rent seeking costs. See Stake, supra note 45, at 941-42 (discussing rent seeking concept). This Article hazards no guess as to the magnitude of this benefit or that identified in the next paragraph. Whether or not they are important, completeness dictates that they be included here.

The small benefits identified here are not specific to the Rule; they flow from any law that encourages people to reflect carefully before making decisions. If the issue is which variation of the Rule is best, the benefits discussed in this subsection might be presumed to accrue to both variations equally. If, on the other hand, the issue is whether the Rule ought to be retained or eliminated from the law, the fact that other rules might tend equally to sharpen intentions is irrelevant to whether the Rule has a marginal effect. If the question is whether to keep the Rule, the analysis must compare the law with the Rule to the law without it.

\textsuperscript{179} See Ninety Years in Limbo, supra note 36, at 1057. Professor Dukeminier makes the point that the common-law Rule is more likely than the Uniform Act to result in channeling clients desiring to create long-term trusts to lawyers familiar with the problems of rigid long-term trusts.

\textsuperscript{180} Similar or better advice might be available from other sources at a lower cost, but that does not diminish the benefits of the advice given or even suggest that the advice is not worth the fee. One could argue that because these transferors had already made the decision that consultation with a lawyer would not be worthwhile, the Rule causes an inefficient transaction. Of course, the client may have correctly made just such a decision. The point here is that possibly the client was unaware of important considerations known to her lawyer and that the consultation on the Rule provided an opportunity for the lawyer to educate the client. That the client did not, \textit{ex ante}, think that anything the lawyer would say would be worth the fee does not prevent the possibility that the exchange was efficient \textit{ex post}.

\textsuperscript{181} See infra text accompanying note 193.

\textsuperscript{182} It also has little of this beneficial effect if the only people influenced are those who would have sought legal advice for other reasons anyway.
substantial uncertainty in transferors, then the existence of the Rule may also benefit transferors by increasing the chances that they will plan effectively for their own incapacity and, in the few situations in which transferors learn of the efficacy of their plans for others, by improving the effectiveness of their attempts to provide for their families. 183

In sum, the Rule against Perpetuities carries benefits for a few of those transferors that learn of it prior to executing their instruments of transfer and probably does little damage to the others because they become aware in time to modify the terms of their dispositions.

2. Harms to Transferors Ignorant of the Rule

The Rule harms those who are ignorant of its effect even less than those who are aware. Ignorance of the Rule can arise in two types of situations: those in which the transferor writes her own will and those in which the lawyer erroneously advises her that her intent shall be effectuated. Take first the instance of a testatrix that writes her own will. Not knowing of the Rule, she happily writes out some void interest and thereafter remains in that state of ignorant bliss, enjoying fully the consumptive benefits of having created and transferred contingent and defeasible interests. During her last days she lives under the mistaken but desirable notion that she has transferred, or will transfer at her death, her property in divided form to those specified in the instrument. By the time the apparently intended transfer is nullified, she is dead. 184 The Rule does nothing to prevent ignorant

183. There is even a benefit to transferors associated with the very preclusion of certain forms of transfer. The Rule gives those that know of its operation a means of placating hopeful beneficiaries without actually giving them anything. A transferor who wishes to appear to have left an interest to a nagging nephew can write a will that includes an intentionally inoperative clause supposedly leaving a contingent interest to that nephew without having to actually give the nephew anything. (The same result could also be accomplished in this instance by the proper execution of a subsequent, secret will. But then the nephew would blame the transferor, not the law.). By foreclosing a few dispositions, the Rule creates the possibility of illusory dispositions that will accomplish hidden objectives. Thus the Rule both eliminates some modes of disposition and creates new possibilities for those aware of its restrictions. Whether the enlightened transferors gain much is doubtful, but there is no reason to exclude whatever gains are caused by the addition of new forms of transfer.

184. The argument in this Article assumes that nothing harms the dead or, more precisely, that the happiness of the living is all that matters. For an expression of the opposite view, see J. FEINBERG, HARM TO OTHERS 86-91 (1984), reprinted as 1 J. FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW (1986). Feinberg argues that someone who falsely blackens the reputation of a dead person has injured the interests of a
owners from writing their own wills in a way that maximizes their enjoyment and consumption of the asset.

Violations of the Rule sometimes occur in wills, the invalidity of which the transferor will rarely, presumably never, know. A transferor may also make an inter vivos transfer that violates the Rule. This creates no problem in cases where the rights associated with the voided interest remain with the transferor because, upon learning of the defect, the transferor can convey those rights separately to the purported transferee. But there is a loss if the Rule reallocates rights to an unintended transferee and the transferor realizes it too late. These losses of transferor happiness must also be included in the costs of the Rule.

Because of the Rule, some do-it-yourself transferors might hear about wills in which the intentions of the transferor were upset. The existence of the Rule and rumors about its operation could reduce their sense of certainty about their disposition, increasing their anxiety. For those persons, the existence of the Rule would decrease the enjoyment associated with the act of testation. If the uncertainty generated by the existence and application of the Rule were to cause substantial loss of enjoyment in any particular transferor, however, she would probably pay the fee necessary to have a lawyer look at the will and resolve the doubt. The apparent cost of legal advice thus limits the amount of loss caused by uncertainty felt by an individual. In addition, for persons that write their own wills, other defects are far more likely to result in total or partial intestacy. The marginal uncertainty caused by the Rule should be small.

Transferors whose lawyers err fair no worse than transferors that write their own wills since the errant lawyers will convince their clients that their intent will be accomplished by the instrument drafted. To inspire the confidence of his client and gain repeat and referral business, the lawyer will apply his persuasive skills to the task of convincing the client that the document prepared by the lawyer achieves the goals stated by the client. Not only do lawyers have an incentive for persuading living person who is no longer with us. The argument here proceeds on the assumption that the happiness of pre-persons and post-persons ought not to be included in the utilitarian calculus.

185. This is not possible, however, when the voided interest snaps back as a possibility of reverter and the possibility of reverter is inalienable.

186. Of course, lack of financial means could prevent a person from going to a lawyer even though the losses caused by uncertainty were huge. Low cost legal services to the poor help to assure us these losses are small.
clients that their work is effective, the lawyers will be aided in doing so by the nature of the Rule. When the law is indeterminate, lawyers may often be compelled by duty or the possibility of liability to admit that the pertinent rule is unclear. They must qualify their predictions and advice according to the ambiguous nature of the law. But the highly determinate, remorseless nature of the Rule against Perpetuities, owing to its logical essence, allows a lawyer to be confident in his opinion. That confidence allows the lawyer to give his client heartfelt assurances that her goals will be achieved by the language used in the instrument, even when the lawyer is wrong and has created an interest void under the Rule. Whether the goals will in fact be achieved or not, when the lawyer takes the time to become confident and communicates that confidence to the client, the client rests easy with the assurance that her will will be given effect.\(^\text{187}\)

In other words, the client is allowed the consumption associated with having created the desired contingent interests, regardless of whether the lawyer successfully draws up interests that will eventually be upheld. By the time the lawyer’s error is discovered, the client is often, as noted before, dead.\(^\text{188}\)

If a lawyer’s error is discovered before the client dies, a will can be redrafted to avoid the problem. If the defect occurs in an inter vivos transfer, whether the defect can be cured depends on whether the Rule caused the rights to be redistributed to the grantor, in which case the problem might be fixed, or to a prior transferee, in which case it is too late to implement a remedy. In the latter case, the client may be able to recover malpractice damages from the lawyer or his firm, shifting the loss away from the client, the transferor. Nonetheless, whether compensated or not, the diminished transferor happiness must be counted as a cost of the Rule.

B. Harms to Transferees

The existence of the Rule against Perpetuities imposes costs on transferees as well as on transferors. One of the most obvious

\(^{187}\) Whether lawyers do in fact take the time to reach the level of confidence made possible by the determinacy of the Rule is open to speculation. The lawyer working for an hourly fee plainly has a financial incentive to become confident in his opinion. A sense of professional responsibility may compel other lawyers to research the issue (or ask an expert’s advise) until they are confident.

\(^{188}\) “And so,” observes Professor Fetters, “is his incompetent attorney.” Notes on draft returned under cover letter from Professor Samuel Fetters to the author (Feb. 28, 1988).
costs is the legal expense a transferee incurs in determining the validity of his interest. But, like the legal costs of circumvention born by transferors, the legal costs born by transferees should not be overwhelming. The exhaustive explication of its operation, coupled with the continual refinement of computational techniques for mechanical resolution of questions, ought to allow lawyers to determine accurately the validity of interests at reasonable cost.

The Rule against Perpetuities redistributes rights from an apparently intended transferee to someone else. Of course these losses cause some harm to the purported transferees. At this stage of the analysis, the important question is whether the harms suffered by transferees outweigh the benefits to the recipients of the redistributed rights. Because every right lost by one person is gained by another, the operation of the Rule should, at worst, generate no losses of enjoyment from existing resources.

Whether the operation of the Rule decreases the wealth derived from assets depends upon the distribution of bundles of rights as well as the total enjoyability of those packages of rights. The Rule increases the wealth of transferees as a group if it redistributes rights to those who would value them more highly, and decreases wealth if it distributes the rights to those who value them less. There is at least one argument that the group of losers differs systematically from the group of winner transferees as to the valuation of the rights in question. The transferor

189. As with transferors, the relevant datum is the value of the time spent by the lawyer, not the fee charged to the client. See generally supra note 173.


191. See Ninety Years in Limbo, supra note 36, at 1063 n.91; see also Dukeminier, supra note 3. In addition to computational techniques, scholars continue to develop improved methods of approaching the Rule so as to resolve perpetuities questions more quickly and accurately. See generally Fletcher, supra note 3; Lynn, supra note 2; O'Brien, Analytical Principle: A Guide for Lapse, Survivorship, Death Without Issue, and the Rule, 10 Geo. Mason U.L. Rev. 383 (1988). To the extent these efforts result in the Rule being more widely understood, however, they could increase the costs that arise because the Rule precludes some forms of consumption. See supra text following note 176.

192. This conclusion depends upon the analysis in subparts II(C)-(D), supra.

193. If one considers utility in addition to wealth, there is another argument against the Rule. As mentioned above, the Rule tends to reduce the number of holders of rights. Although the effect appears to be negligible, one could argue that the Rule reduces utility by concentrating society's wealth in fewer hands.
truly may know who most needs the rights in question. If the transferor correctly perceives who would value the asset most highly under various sets of events, to upset her distribution will reduce the value of the asset.

A number of observations call into question the common assumption that the owner will in fact allocate the asset to its most appreciative user. First, for donative transfers, the transferor lacks the ordinary financial incentives to maximize the value of the resource. Indeed, as noted above, there are evolutionary reasons to expect that the transferor will try to benefit blood relatives rather than attempting to transfer rights to the persons who would benefit most. Second, in all cases involving an interest that is contingent because it is held by an unidentifiable person, the transferor cannot know who the transferee will be. Hence the transferor has neither insight into the transferee's preferences nor foresight into the events against which the transferee needs protection or insurance. She cannot be sure that he will benefit from owning the asset more than anyone else. Even in transfers where the transferee is named, any interest that violates the Rule does so because it might vest long after the named transferee is dead. In those cases, too, the person that takes possession may be a person unknown to the transferor, a person into whose preferences and insecurities the transferor has little insight.194 Third, the maker of a will obviously has no way to find out if the will succeeded in creating the happiness intended. Because the transfers are made by players who are inexperienced rather than those that the market has selected as proficient actors, the likelihood of error is greater than in the ordinary commercial transaction.195 For these reasons, the law need not treat transferors as reliable determiners of the most appreciative recipient.

Despite the points above, there will be cases in which the transferor, without the aid of a lawyer, correctly evaluates who would most enjoy the property in various circumstances. And in some of those cases, the careless use of a term such as “widow” instead of a person’s name or the careless expression of an upcoming event in terms that suggest no temporal limitation may cause the Rule to undo the efficient distribution of rights. If

194. However, the known transferee would benefit from owning the rights even though he might never take possession.

195. See Stake, supra note 45, at 925, 939-40 (discussing the reduced deference to be accorded the decisions of actors that engage in few transactions).
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such cases are frequent, calls for reform of the Rule are well founded.196 But when transferors' parentalistic efforts are misdirected, redistributions effected by the Rule are no more likely to shift interests from a more appreciative to a less appreciative person than from one less appreciative to one that is more so.

Although all rights lost by some are gained by others, the losses may cause more hurt than the gains do happiness. An unexpected loss may more than offset a larger unexpected gain.197 If a majority of the population responds this way to unexpected changes in endowment, the Rule may net much unhappiness by its redistributions of rights.

On the other side of the balance, the Rule in some situations creates benefits for transferees without making a redistribution of interests. As was noted in the context of benefits for transferors,198 awareness of the existence of the Rule will lead some transferors to seek the aid of lawyers experienced in estate planning who will help the transferors see problems that might arise in the future. Hence transferors may improve their assessments of the needs of their beneficiaries and may improve the quality of their benevolent dispositions. Thus the Rule can operate to the benefit of transferees.

C. Harms to Others

1. The Public

The primary negative effects of the Rule against Perpetuities fall upon the transferor and transferees,199 but persons unconnected with the transfer may also bear a burden. The Rule may demoralize those who hear of its operation, even though they have no interest at stake and no desire to make a

196. It is on this point that those having faith in the efficacy of parentalistic efforts of transferors will think that the Article underestimates the losses caused by the remorseless common-law Rule. Leach seems to have been of two minds on this point. At one point he stated that perpetuities cases deal with persons that have "reasonable plans for the support of their families," but later in the same article he stated that "[m]any determinable fees defeat the very purposes for which they were created." Reign of Terror, supra note 3, at 723, 745. Professor Dukeminier has pointed out that the Rule often nullifies the work of a "thoughtless draftsman" that would have left the testator's descendants in a "straitjacket". Ninety Years in Limbo, supra note 36, at 1037-38.


198. See supra text accompanying note 183.

199. In some instances neither the transferor nor any transferee ever notices the impact of the Rule because no one recognizes that the Rule invalidates an interest. See Thompson v. Bray, 313 Mass. 717, 49 N.E.2d 228 (1943).
prohibited transfer. Though possible, this seems unlikely because few ever hear of it. The absence of public awareness might be explained in part by the difficulties of communication and dissemination stemming from the complexity of the Rule. In any event, before such effects can justify elimination or curtailment of the Rule, empirical study on this point ought to be done to determine the degree to which the Rule demoralizes the public.

In addition to demoralization costs, the uninvolved public bears some of the costs of resolving the legal disputes concerning the Rule for the simple reason that society underwrites the judicial system. The determinacy of the Rule ought to prevent most Rule against Perpetuities questions from reaching the courts, thus keeping the expenditure of judicial efforts to a minimum. Nevertheless, a fair number of cases do reach the courts. More research is needed to determine why these cases get that far.

Possibly the greatest waste of human capital caused by the


201. However, a recent movie, Body Heat, used the Rule as a central plot device. Body Heat (Warner Bros. Pictures 1981). Of course the purpose of putting the Rule against Perpetuities violation in Body Heat was theater, not pedagogy. The movie did not clearly identify the type of transfer that is prohibited. "Everything's in order up to there. The problem comes in the language of the bequest to Heather. It's a technical matter. In writing the will I'm afraid Mr. Racine violated what's known as the Rule against Perpetuities. It forbids an inheritance to be passed down indefinitely for generations." Id. In addition, the Florida court should have applied the wait-and-see variation of the Rule, rather than the common-law approach. (According to Professor Dukeminier, this error crept in when the setting in the movie was changed from New Jersey to Florida. Letter from Professor Jesse Dukeminier to the author (Mar. 1, 1989)). Nor did the movie correctly calculate the consequences of a violation. The result in the movie was that the whole will was invalidated. "It means, I'm afraid, that Edmund's will is invalid. Edmund Walker died intestate, as though there were no will at all." Body Heat, supra. Moreover, Professor Dukeminier points out that if the entire will was invalid, the doctrine of dependent relative revocation might have permitted the probate of the earlier will. Dukeminier letter, supra. Notwithstanding these shortcomings, the movie might have raised public awareness of the Rule's existence.

202. If the public is generally unaware of any constraints on transfer of interests, and believes that when a transferor makes a transfer of property the intended transferee gets the property, the Rule causes no demoralization. The first step in a study might ask a few simple questions aimed at those two issues. If, on the other hand, the public shows some awareness of limitations on transfers of interests, a more careful study would be needed to determine whether the Rule is a partial cause of that awareness and whether that awareness causes any demoralization.

203. A Westlaw search for "Rule against Perpetuities" returns a response of over 2,000 cases in the "Allstates" file.
Rule is the inordinate devotion of scholastic effort to the question of whether and how the Rule ought to be reformed. Not only has the Rule absorbed the attention of extremely able minds for decades, it continues to command a week or more of study from thousands of law students every year. These costs certainly help to justify the call for elimination, or possibly simplification, of the Rule.

2. Lawyers that Commit Malpractice

Lawyers too bear costs arising from the existence and complexity of the Rule. Lawyers that favor reform may do so not only out of genuine concern for the interests of clients (and resentment arising from the difficult study of the Rule), but also out of fear of malpractice liability. As long as the possibility of malpractice looms large, the bar will remain uncomfortable with the Rule. It is not clear, however, that lawyers ought to be subject to malpractice for errors in applying the Rule against Perpetuities. The Rule depends upon the persuasive efforts of the bar for its ability to redistribute and repackage rights in resources efficiently without burdening transferors with the frustration of being unable to dispose of their endowment as they wish. It is by the illusion of allowing the purported disposition that the Rule manages to achieve its benefits for future generations without sacrificing the happiness of the transferor.

The lawyer serves his client by convincing her that her intentions will be accomplished. When the lawyer’s failure to actually achieve those goals is discovered after his client is dead, his malfeasance does her no harm. Likewise, the imposition of malpractice liability carries no benefit to the transferor. Indeed, to make the lawyer liable for his Rule against Perpetuities error creates an incentive to expend extra effort at his client’s expense without generating any additional benefit for her.

Lawyering that serves the best interests of the transferor does not always serve the interests of the transferees. To the

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204. For relevant commentaries, see supra note 3.
205. Any damage award paid by a lawyer to a successful plaintiff qualifies only as a transfer payment, not as a societal cost of the Rule above and beyond those costs felt by the transferor and transferees. But the lawyer found to have committed malpractice may suffer other injuries to reputation and self esteem which are not offset by an increase in the welfare of someone else.
206. Professor Dukeminier has seen malpractice liability as a powerful engine of property law reform. Dukeminier, Cleansing the Stables of Property: A River Found at Last, 65 IOWA L. REV. 151, 159-60 (1979).
transferees, the effectiveness of the purported transfer always matters. Unless, however, the lawyer has accepted the job of protecting the transferees' interests as well as the transferor's, unwisely ignoring the attendant conflict of interests,\textsuperscript{207} the lawyer ought to have no duty to the transferees. To the benefit of society, the complexity of the Rule against Perpetuities keeps transferors uninformed as to the actual effect of their instruments of transfer. Since an essential part of the smoke screen is the inadvertent and unknowing complicity of the average lawyer, he ought not to be penalized for or discouraged from playing his part.

Generally, lawyers should be protected from malpractice liability to persons other than their clients for errors relating to the Rule. Courts have reached this result on varying theories. The privity doctrine traditionally has prevented purported transferees from recovering from the lawyers that drafted the defective instruments.\textsuperscript{208} Even a court willing to discard the privity barrier has shielded the lawyer. In a much criticized decision,\textsuperscript{209} \textit{Lucas v. Hamm},\textsuperscript{210} the court found that, because the extreme complexity of the Rule against Perpetuities is beyond the understanding of the average lawyer, the defendant lawyer could not as a matter of law be liable for malpractice in failing to negotiate successfully the contours of the Rule. Thus the common-law

\textsuperscript{207} The corollary here is that courts ought to consider the interests of transferors and transferees to be in conflict.


\textsuperscript{209} Dukeminier, \textit{supra} note 3, at 1912 ("It is hard to explain to the public how a court can, in good conscience, invent a complicated rule, foist it on the public, yet exempt lawyers from knowing it."); Megarry, \textit{supra} note 208, at 481 ("[I]t is to be hoped that on the standard of professional competence \textit{[Lucas v. Hamm]} will prove to be a slur on the profession which, like the mule, will display neither pride of ancestry nor hope of posterity.").

privity barrier and the *Lucas* rule both avoid results that would create incentives for wasteful lawyer behavior that generates no additional happiness for clients. Contrary to the indication of the *Lucas* opinion, however, lawyers should not be protected from suits by their own client if the client discovers the lawyer's error. In such cases the lawyer's error causes harm to his client which is unmitigated by a benefit to anyone else. By a carefully cabined immunity, the law would go a long way toward reducing the costs of the Rule imposed upon the bar. By a carefully cabined immunity, the law would go a long way toward reducing the costs of the Rule imposed upon the bar.

This prospect raises a question for legal educators. If failures to understand the Rule are not penalized, why bother to teach the Rule to new lawyers? The answer is that the societal costs of avoiding the Rule, advising regarding the Rule, and determining disputes involving the Rule can be kept low only if the Rule remains reliably determinate. And the Rule can remain unperceived by transferors only if it remains devilishly complex. In order to preserve the predictability of the Rule without compromising its complexity, a cadre of experts must be maintained. Law schools continue to provide those experts.

VI. A FEW ETHICAL ISSUES

Though the purpose of this Article is to examine economic costs and benefits of the Rule against Perpetuities, three ethical questions deserve mention. The first, the ethics of deliberately ignoring the expressed intent of transferors (especially dead transferors), is an intractable problem. The second, the disparate treatment of rich and poor, partially disappears under careful scrutiny. And the third, whether misunderstandings of transferors might be considered beneficial, raises an issue similar

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211. Failing to provide immunity against suits from clients will not wholly undercut the advantage, discussed above, of eliminating incentives for lawyers to be too careful for two reasons. First, because perpetuities cases sometimes arise after the death of the transferor, liability to transferees adds substantially to the lawyer's incentives toward caution. In other words, liability to transferees should have a large marginal affect on lawyer behavior. Second, in many of the cases in which a scrivener's violation is discovered before the transferor dies there is no substantial damage because the document (often a will) can be superseded with a new instrument.

212. Reduction of malpractice liability would also diminish any existing tendency of lawyers to err on the side of caution, advising clients that the Rule prohibits a desired disposition when it does not.

This proposed insulation from malpractice liability to beneficiaries need only extend to misapplications of the Rule against Perpetuities. A broader immunity might become generally known to transferors, upsetting them with the thought that their devise might not succeed and creating the inefficient incentives identified above. *See supra* subpart III(A).
to the ancient question whether it is acceptable to lie for the benefit of one's audience. 213

A. Ignoring Intent

The Rule against Perpetuities invalidates clear expressions of transferor intent. In so doing, the Rule occasions the economic costs identified above. But more than that, the Rule works injustice. By taking the clearly expressed wishes of owners of property and ignoring those wishes, the Rule treats transferors unfairly. In redistributing rights the Rule also works an injustice on intended transferees. The owners made transfers intending certain transferees to have rights, but those rights are nullified by the Rule. These injustices to transferors and transferees strike a deeply dissonant chord in many who study the law, students and professors alike. 214 Perhaps it is this sense of injustice that spurs generation after generation of Perpetuities scholars to propose reform. But on this aspect many of the proposed reforms will help little. The Rule may be made less unfair by restricting the frequency of its operation, but justice will suffer as long as the Rule survives.

Some might argue, along lines parallel to those set out by Simes, that injustices to disappointed transferees are offset by reduced injustice to prior transferees. The Rule does enhance the marketability of interests and sometimes frees such interests from burdensome restrictions, but these improvements do not reduce injustice. But for the Rule, the transferees would get exactly the rights the transferor intended them to receive, no more, no less. That those rights would not be particularly useful or marketable is no injustice to the prior transferees who often get the rights for nothing. Their lot is made better by the Rule,

213. The issue is similar to that of the ethics of lying to a person for her own benefit, but not the same. Inaction that allows misperceptions to continue may be less morally reprehensible than lying that intentionally causes a misperception. See SECRETS, supra note 160, at xv ("Lying and secrecy differ, however, in one important respect. Whereas I take lying to be prima facie wrong, with a negative presumption against it from the outset, secrecy may not be. Whereas every lie stands in need of justification, all secrets do not."). The advantages of double consumption occasioned by the misperceptions of transferors are available without anyone having to lie.

214. One of my strong early impressions of injustice arose when I heard that the dying request of a local Scrooge, Dirty Ernie (water was too valuable to be used for bathing), would be ignored. Ernie had requested on his deathbed or in his will, I am not sure which, that an apartment building not be put on his vacant lot (he had cut the grass of the lot with scissors). Though my memory may have squeezed events together, it seems that ground was broken before his body was cold.
but not more just since there was nothing unjust about receiving restricted rights in the first place. The Rule, therefore, cannot rightly be defended as merely choosing between injustices.

One could also argue that, despite its interference with private distribution decisions, the Rule works justly if everyone, winners and losers, would, *ex ante*, choose to live under the Rule. If all would agree in advance of any application of the Rule that the Rule should be enforced, that *ex ante* consent could estop any *ex post* claim of injustice. But if one maintains that the right of free disposition is fundamental and that the government cannot, consistent with fairness, redistribute rights for purposes of efficiency without the actual consent of the losers, the Rule works unjustly.

**B. The Disparate Treatment of Rich and Poor**

The varying abilities and performances of lawyers with respect to Rule against Perpetuities issues raises a question of fairness between rich and poor. The redistributions of rights wrought by the Rule do not fall on rich and poor alike. There is a disparate impact: those who spend more to draft their wills and other documents of transfer more likely will accomplish their stated purposes. In other words, the rich, or persons that hire the lawyers of the rich, are more likely to actually consume their assets in the way they intended, leaving less to their beneficiaries. Assuming the same donative aspirations as the rich, transferors that lack the assets to hire the best lawyers are more likely to violate the Rule, resulting in their leaving relatively more of the potential value of their rights to their successors because their attempted consumption failed. In that light, but without discounting for the diminished frequency of potentially violative transfers by poorer persons, the Rule might do more to

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215. See generally Michelman, supra note 200.

216. A criticism of the Rule raised by some scholars falls partly under this ethical point. It has been argued that the Rule should apply to reversionary interests and rights of entry retained by grantors as well as remainders and executory interests created in grantees. As a matter of economics, that is no reason to eliminate or water down the Rule; it is better to have half a loaf than a quarter or none at all. But it does raise a fairness issue. It may be arbitrary to take away future interests from some for the good of society when similar future interests are held by others. Whether the Rule ought to apply to interests held by grantors is beyond the scope of this article, but that question directly implicates the issue of transferor intent briefly discussed supra in note 28.

217. Some might argue that the poor and lower middle class are highly unlikely to violate the Rule. If that is so, the argument that the Rule is unfair to the less wealthy is moot.
augment the wealth and happiness of those unable to afford counsel than those rich enough to get good advice.\textsuperscript{218}

Even ignoring that the successors of the poor fair better than the successors of the rich, the operation of the Rule might be characterized by the remark that the rich are allowed to consume more than the poor, a fact inherent in the idea of private property. The Rule does seem to exacerbate this commonplace inequality, though, by allowing the rich to consume a greater percentage of their already greater endowment. The poor are prevented from consuming all of what little they have. This criticism ultimately fails, however, because the existence of the Rule does not reduce the value the poor derive from their property. They have fewer rights, but they do not know that. The Rule does not deprive the poor of the happiness they would achieve by successfully dividing up their rights. They get the same happiness allowed the rich. The difference is that their happiness is built upon a mistaken belief as to the course of future events whereas the happiness of the rich arises from a belief that will be confirmed by subsequent events.\textsuperscript{219} The Rule does not treat rich and poor equally, but regarding happiness\textsuperscript{220} it treats the poor no worse than it does the rich. The unavoidable injustice discussed above, however, does fall disproportionately on the poor.

C. \textit{The Ethics of Celebrating Misperceptions}

Any reliance upon the misperceptions of grantors as an excuse for the complexity of the Rule also moves the discussion toward the ethical arena. By continued application of the Rule, judges perpetuate a system of legal rules that will not be fully communicated to transferors. Owners believe they have the right to dispose of their property as they wish, but the legal reality is different. Modes of disposal are limited by the Rule against Perpetuities, which continues to survive despite awareness by the bar and bench that some members of the public misconceive their rights. Not only does the law condone this state of misinformation, it condones the fact that the misinformation will

\textsuperscript{218} Professor Fetters points out this irony in his entertaining hypothetical conversation between Professor Dukeminier and a state legislator voting on a perpetuities reform bill. \textit{Reply}, supra note 3, at 385.

\textsuperscript{219} In theory, the poor will also be less able to circumvent the rule. That they actually feel frustrated by the constraints of the Rule remains doubtful, however.

\textsuperscript{220} This Article assumes that happiness founded on a never-to-be-exposed illusion is of equal worth as an emotionally equivalent happiness founded in reality. Happiness is, in this view, an emotional condition entirely within the individual.
more likely be disseminated to those persons, generally the poor, who happen not to hire sufficiently astute lawyers. Because of the Rule's complexity, the detrimental economic consequences that would ordinarily accompany a restriction of powers of alienation are diminished. The ethical question raised by this economic oddity is whether we should seek to simplify the Rule to reduce misperceptions or whether we should instead celebrate the complexities and convolutions that fool individuals into being happier than they could be, and less consumptive than they would be, if they were aware of the limits on their rights.

Simplification has its points. For one thing, it reduces the societal and private costs of determining the answers to questions raised by the Rule. The question then is whether the confusion generated by the Rule's complexity with its concomitant reductions in inefficient incentives and increases in happiness ethically can be urged as a reason to avoid simplification. If it is wrong to count the confusion of transferors and the resulting double consumption as a benefit, the Rule should be simplified, as long as that can be done without compromising too much the advantages of improved allocation, heightened enjoyability, and hastened enjoyment of assets. If, on the other hand, celebrating the confusion of transferors does not offend ethical precepts, simplification for the sake of simplification should be resisted. Which conclusion one reaches depends on the answer to the question of whether it is acceptable to fail to inform misinformed people for the sake of their own happiness.

VII. CONCLUSION

The Rule both accomplishes beneficial redistributions of rights and facilitates beneficial reallocations of resources. In this it is not unique; food stamps and housing programs also combine redistribution with a dose of paternalism that takes the form of a prescribed allocation of resources. Yet it is interesting to find a rule of common law that accomplishes both. The Rule is also a

221. Answering the ethical question by reference to informed consent presents a difficulty. Would a person, if fully informed and in the *ex ante* position, agree to a law that could have the effect of unravelling his testamentary dispositions? The answer from the fully informed person might well be "no." But that same person might add: "but if you can now return me to my state of ignorance, I will say yes." As expressed by Bob Seger in *Against the Wind*, "I wish I didn't know now what I didn't know then." Seger, *Against the Wind*, on AGAINST THE WIND (Capitol Records 1981).

222. *See supra* note 213.
rarity in that it accomplishes beneficial redistributions without systematically shifting rights from the wealthy to those less so.

The Rule against Perpetuities strikes down a variety of attempted transfers. Each class of attempts can and should be analyzed to determine whether nullification would generate any benefits. Three sorts of benefits may accrue from the operation of the Rule against Perpetuities—improved allocation, enhanced enjoyability, accelerated enjoyment—and all three must be explored before one concludes that the Rule ought not to apply to a given set of transfers. If those three benefits combined do not suffice to justify the Rule's application, then the transfers in question ought to be excepted from the operation of the Rule. Although such exceptions would add complexity, that fact does not automatically justify resistance to the refinement. As long as the improvements are mechanical, such embellishments should cause only small increases in the legal costs of dealing with the Rule. Moreover, the complexity of the Rule may allow it to work its beneficial redistributions without fully triggering the negative consequences for incentives and consumption that ordinarily accompany governmental redistributions of property. Because the Rule is already quite complex and because complexity could be considered a virtue instead of a vice, additional complexity ought not bar refinements of the Rule that would make its operation conform more closely to the rationales on which it must rest, the three benefits identified above.

The costs and benefits identified herein need not be confined to use in tinkering with the Rule; they can be used for a more global assessment of the Rule's economic desirability as well. On the negative side of the economic balance are (1) the losses of transferor consumption; (2) elimination of incentives for productivity caused by total preclusion of certain forms of transfer; (3) the difference, if any, between the loss felt by losers and the gain felt by winners; (4) the costs of administering and resolving disputes revolving around the Rule; (5) the legal costs of attempts to avoid the Rule; (6) the unhappiness engendered in transferors that learn of the redistributions; and (7) the demoralization

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223. One might argue that the Rule could be recast in terms of those benefits, allowing courts to decide whether any of the three benefits would accrue if the interest in question were stricken. A Rule determined on such a case-by-case basis would, however, greatly increase uncertainty and rent seeking compared with the current overinclusive, underinclusive, and complex, but highly determinate, Rule.

224. The reader is reminded again that no attempt is made here to suggest the weight to be given economic considerations in the final analysis.
caused by public awareness of governmental refusals to honor the intent of transferors. On the other side of the balance and in favor of the Rule are (1) improved allocation of assets due to improved purchasability; (2) enhanced enjoyability due to reduction of risk; (3) accelerated enjoyment of interests; (4) release of assets from trusts into more risky investment; and (5) channeling of transferors to lawyers who might provide informed guidance regarding problems (unrelated to the Rule) associated with the proposed disposition. These factors may be applied to determine the worth of the Rule or any of its suggested replacements.

On a larger scale, there exist plausible reasons to expect that donative behavior may maximize the benefit derived by the transferors’ genes rather than the benefits derived by the donees. Therefore, all sorts of donative transfers, not just those implicating the Rule, should be examined carefully to see whether any of the resulting distributions of rights are dissimilar to all bundles of rights the market creates. Categories of results foreign to market transactions ought to be considered suspect and subjected to greater scrutiny. If the absence of similar market transactions can be explained by identifiable market imperfections or cognitive imperfections, there is no need for the law to correct a problem—there is no problem to correct. But if the absence of market transfers cannot be explained away, one should look for some loss of efficiency that might result from the donative transfer. Of course such efficiency losses do not automatically call for a legal remedy, but they do demand that the donative transfer be considered consumption of the transferor. Likewise, any restrictions on the structure of donations should be seen as interferences with transferor consumption, which can create undesirable incentives. Such a perspective should help us to analyze what grounds might justify and what harms might flow from interfering with donative intent.

225. See generally Ulen, supra note 197.