Domicile Dismantled*

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INTRODUCTION

In 1971, a young married couple named Judy and Jean Paul Mas discovered that their landlord, a man named Oliver Perry, had been secretly watching them through two-way mirrors he had installed in their bedroom and bathroom.[1] The resulting litigation in federal court ended in victory for the Mas couple. The case, however, has interested scholars and teachers of law not for the tort claim on which the couple prevailed but because of the contested question of Judy Mas's domicile. Because the case concerned state, not federal, law, the only avenue for federal jurisdiction was diversity jurisdiction, and for that to exist, the plaintiffs needed to be "diverse" from the defendant—citizens of different states.[2] The test in 1971, as it is now, for state citizenship for diversity purposes was domicile. Domicile requires more than mere residence; a person's domicile is the last state in which one resided which one intended to make one's permanent home.[3]

In *Mas v. Perry*, which was litigated in federal district court in Louisiana and then appealed to the Fifth Circuit Court of Appeals, the defendant, Oliver Perry, was

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1. Mas v. Perry, 489 F.2d 1396 (5th Cir. 1974).
2. 28 U.S.C. § 1332(a)(1) (2012).
3. 489 F.2d at 1399; *see also* Sun Printing & Publ'g Ass'n. v. Edwards, 194 U.S. 377, 383 (1904) (holding that "it is elementary that, to effect a change of one's legal domicil, two things are indispensable: First, residence in a new domicil; and, second, the intention to remain there. The change cannot be made, except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change." (italics in original)).

clearly a domiciliary of Louisiana. Jean Paul Mas was a citizen of France, and thus diverse from Perry under the applicable statute.[4] The domicile of Judy Mas, however, was less clear. There were essentially three roads the court could choose. It could hold that she had established her own domicile in Louisiana by moving there for graduate school. If that were the case, then she shared the same domicile as Perry, and her suit would be dismissed for lack of diversity. Alternatively, it could hold that her domicile followed that of her husband, a citizen and domiciliary of France. If that were true, then she could not bring the case in federal court, because the federal statute offered no option for U.S. citizens domiciled abroad. Rather than choose a course that would have required dismissal of her suit, the court chose the third way, finding that her domicile remained with Mississippi, where she had been born and raised.

This third way seems obvious in retrospect. Indeed, civil procedure casebooks frequently use *Mas v. Perry* to explain how domicile operates in diversity jurisdiction cases.[5] But in the moment in which *Mas v. Perry* was decided, the law was much less clear. This Article argues that *Mas v. Perry* was decided during an important turning point in the courts' use of domicile for a variety of matters, not only federal diversity jurisdiction but also state court jurisdiction over other types of cases as well as access to state-funded programs such as welfare and in-state tuition. The judges that addressed Judy Mas's domicile had to grapple with two important social trends, each of which has radically altered the predictability and continuity of people's lives. As the onset of social adulthood began to stretch beyond the teenage years into the twenties and thirties, it became more and more difficult for young adults as a group to change their domiciles by choosing a new place of permanent residence. Simultaneously, the women's rights movement challenged traditional gender roles, and courts began to treat married women as autonomous individuals capable of establishing their own domiciles. Taken together, this Article argues, these two trends undermined traditional notions of domicile. The resulting judicial confusion over this doctrinal shift is apparent in the Fifth Circuit's opinion in *Mas v. Perry*, and has continued to the present day, as courts continue to rely on antiquated notions of the capacity required to form the intent to reside somewhere indefinitely.

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4. 28 U.S.C. § 1332(a)(2) (conferring diversity jurisdiction on cases involving "citizens of a State and citizens or subjects of a foreign state").

5. *See, e.g.*, RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 191 (Carolina Academic Press 7th ed. 2016) (stating after reprinting *Mas v. Perry* that "the anachronistic notion that a married woman takes the domicile of her husband has eroded today"); JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON & HELEN HERSHKOFF, CIVIL PROCEDURE: CASES & METHODS 271–78 (11th ed. 2013) (reprinting *Mas v. Perry*, without discussing development of derivative domicile doctrine); JOEL WM. FRIEDMAN & MICHAEL G. COLLINS, THE LAW OF CIVIL PROCEDURE: CASES AND MATERIALS 10–12 (4th ed. 2013) (same); GEOFFREY C. HAZARD, JR., WILLIAM A. FLETCHER, STEPHEN MCG. BUNDY & ANDREW D. BRADT, PLEADING AND PROCEDURE: CASES AND MATERIALS 243–45, 251 (11th ed. 2015) (same); RICHARD L. MARCUS, MARTIN H. REDISH, EDWARD F. SHERMAN & JAMES E. PFANDER, CIVIL PROCEDURE: A MODERN APPROACH 932–35, 937 (6th ed. 2013) (reprinting *Mas v. Perry* but stating only that "in an era of bicoastal marriages, spouses do not always share their partners' domicile and the modern cases so reflect"). *But see* BARBARA ALLEN BABCOCK, TONI M. MASSARO & NORMAN W. SPAULDING, CIVIL PROCEDURE: CASES & PROBLEMS 235–37 (5th ed. 2013) (reprinting *Mas v. Perry* and discussing married women's domicile).

Judy and Jean Paul Mas brought their suit during a time of upheaval and change in the social and economic significance of gender and young adulthood. The case illustrates the emergence of these changes and the way in which they have undermined the usefulness of domicile as a legal tool. In this Article, we engage in a close reading of the *Mas* case and use it as an entry point to a broader exploration of the dismantling of domicile as a coherent legal concept that has occurred in the decades since. Ultimately, we conclude that two factors—the move toward gender equality and the increasingly delayed attainment of social adulthood—have rendered young Americans incapable of establishing domicile as traditionally defined, which has in turn rendered domicile an ineffective tool for determining state citizenship and legal status for a large segment of the population.

Traditionally, a person's domicile determined his or her state citizenship. Domicile was the place of a person's "true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom."[6] Thus, domicile differed from mere residence. A person could obtain domicile the very day of a move to a new state, provided the proper mental state of "intent to remain indefinitely" existed; however, absent that intent, that same person would retain her old domicile, despite having changed her physical residence. Today, as numerous scholars have examined in great detail, domicile is still used to determine access to many privileges and rights—just like in the *Mas* litigation, domicile still determines one's right to bring a diversity action in federal court, but also the right to bring a case for divorce or paternity in a state court, or even eligibility for Social Security Survivor's benefits.[7] In contrast, states have largely moved away from domicile in favor of residence to determine state citizenship for voting rights, the right to run for office, and the ability to obtain a driver's license.[8] These changes, we argue, reflect the difficulty of using an intent-based test in an era of impermanence.

Under the traditional rules, not everyone could determine his or her own domicile. Children, for example, took on the domicile of their parents.[9] Under the "derivative domicile" rule, women took on the domicile of their husbands.[10] And even those who

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6. *Mas*, 489 F.2d at 1399 (quoting Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954)).

7. *See* Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1470–75 (2014) (discussing contemporary applications of domicile); William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371 (2012) (explaining use of domicile in determining applicable state law); Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381 (2007) (discussing history of domicile and divorce jurisdiction); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998) (describing the domestic relations exception to diversity jurisdiction); Judith B. Resnik, "*Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1714 (1991) (discussing frequency of diversity jurisdiction in federal cases).

8. Willis L.M. Reese & Robert S. Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV. 561, 562 n.4, 571–74 (1953).

9. Prentiss v. Barton, 19 F. Cas. 1276, 1277 (C.C.D. Va. 1819) (No. 11,384) ("By the general laws of the civilized world, the domicil of the parents at the time of birth, or what is termed the 'domicil of origin,' constitutes the domicil of an infant, and continues, until abandoned, or until the acquisition of a new domicil, in a different place.").

10. *See infra* Part I.B.

were capable of establishing a new domicile had to pass a strict test to do so, as a person maintained his or her original domicile until taking on a new one. This change required much more than simply moving to a new place; the person had to show that he or she did not intend to return permanently to the former domicile and in fact intended to make the new place his or her "permanent home." As a result, the domicile of a person's birth or childhood could in theory remain that person's domicile long after leaving home.[11]

Domicile has always been a legal fiction; it has never perfectly described how people actually live. But this Article argues that in the last fifty years, the legal fiction of domicile has become increasingly unmoored from the reality of people's lives. This change has less to do with increased mobility—although for some social classes, mobility has increased—and more to do with two factors that we think have been unappreciated in legal scholarship. The first is the rise of gender equality. As women entered the workforce in increasing numbers and gained access to higher education, their mobility and autonomy increased. Simultaneously, they began to delay marriage, or to forego marriage altogether, and those who were married were less likely to reflexively adopt their husband's domicile and were more inclined to make domiciliary choices for themselves and their families. This put the derivative domicile rule under pressure, and the result has been a softening of the rule, where marriage is a factor in determining domicile for both men and women but no longer the sole determinant for either.[12] The second is the increasingly long time it takes young adults to become financially and emotionally self-sufficient and independent from their parents. This so-called phenomenon of "emerging adulthood," identified by psychologists as a new phase of life that sometimes lasts into a person's thirties, has made it more difficult for young adults to establish a new domicile. Courts—including the court in *Mas v. Perry*—have thus increasingly relied upon a person's domicile of origin in making these determinations, even where there is little chance that the party will ever return there. Because of these two trends, the concept of domicile is no longer capable of doing the legal work it is supposed to do.

Domicile has survived two sets of attacks in the last fifty years, the first occurring during the inception of "interest analysis" in conflict of laws scholarship,[13] and the

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11. *See* White v. Tennant, 8 S.E. 596 (W.Va. 1888).

12. For a more detailed history of changes in the derivative domicile rule, see Kerry Abrams, *Citizen Spouse*, 101 CAL. L. REV. 407 (2013).

13. *See, e.g.*, Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 408–10 (1980); John Bernard Corr, *Interest Analysis and Choice of Law: The Dubious Dominance of Domicile*, 1983 UTAH L. REV. 651, 665 (1983). *But see* Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 255, 261–70 (1992). Diversity jurisdiction itself has also survived extensive critical scorn. *See, e.g.*, Robert H. Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 236–37 (1976) (advocating abolition of diversity jurisdiction); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 510 (1928) (same); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 319 (1977) (advocating that Congress adopt a "local option" plan, under which each federal district court would have freedom to curtail diversity jurisdiction in its own court). *But see* John P.

second arising from the problems domicile-based citizenship caused for married same-sex couples[14] prior to the Supreme Court's ruling in *Obergefell v. Hodges.*[15] But the incoherence of domicile as a concept in the complicated twenty-first century leads us to question its ongoing viability, not only for same-sex couples but more broadly. This Article joins the growing number of voices questioning traditional domicile rules by returning to the seminal *Mas v. Perry* case and identifying two strands of judicial reasoning in the case—anxiety about the derivative domicile rule resulting from increasing gender equality and a renewed reliance on a party's childhood domicile, even when the party has moved away and has no intention of returning home. Domicile may have made sense as a basis for jurisdiction in an era when adulthood began at twenty-one. Today, however, habitual residence is proving to be a more satisfying means of determining membership in a particular state or community. This standard is increasingly being adopted internationally, and we argue that it would make better sense for determining access to federal court under diversity jurisdiction or state courts for other matters than domicile currently does.[16]

Part I of this Article discusses the legal and factual background of *Mas v. Perry*. This narrative reveals how the case reflects both the changes in American society that were beginning to occur at that time and the struggle of the concept of domicile to keep pace with those changes. Part II traces the development of the fundamental shift in gender roles that began several years before *Mas* was decided. This section argues that the growing number of women attending college, embarking upon careers, and forming two-career marriages increased the difficulty of measuring domicile, while undermining the efficacy of a gendered presumption such as the one embedded in the derivative domicile rule.

As Part III will demonstrate, these changes in gender norms occurred in tandem with broader changes in the lives of young Americans. Even as the legal age of majority decreased in the early seventies, the actual age at which young people began to reach the markers of adulthood began to increase. Both women and men began to seek higher education, to delay marriage, and to wait longer to establish homes, families, and careers—and, consequently, to establish any permanent intentions regarding domicile. This newfound period of "emerging adulthood" served to further undermine the usefulness of domicile as a legal tool.

Part IV shows how the new legal age of majority, in combination with shrinking state budgets and the articulation of the right to interstate travel, led to a new focus on the legality of tuition residency requirements. It demonstrates that although the Supreme Court struck down durational residency requirements in other areas of the

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Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 (1963) (opposing 1968 American Law Institute proposal to curtail diversity jurisdiction).

14. *See, e.g.*, Abrams, *supra* note 12, at 429–42; Appleton, *supra* note 7, at 1468–69; Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1678–79 (2011).

15. 135 S. Ct. 2584 (2015). Because they were married in one state but not another, domicile often played a decisive role in determining whether same-sex couples could obtain federal benefits, or even whether they could divorce. *See* United States v. Windsor, 133 S. Ct. 2675, 2685–96 (2013) (federal benefits); Abrams, *supra* note 12, at 434–38 (divorce).

16. For a discussion of how habitual residence is being used internationally, see C.M.V. CLARKSON & JONATHAN HILL, THE CONFLICT OF LAWS 229–30 (4th ed. 2011).

law, it maintained a dismissive attitude toward student capacity to form domiciliary intent. This attitude, however, did little to stem the wave of litigation that began in the 1960s and has continued into the present day. The cases decided during this period of litigation reveal the interaction of gender changes, emerging adulthood, and domicile.

The Article concludes that the confusion over domicile that has emerged in the last fifty years makes it an increasingly unwieldy and unhelpful legal concept. As university regulations and the courts' convoluted and conflicting reasoning demonstrate, the changes that developed during the era of *Mas v. Perry* and continued into the present day have made it difficult, if not impossible, to measure domiciliary intent in any consistent, equitable, or meaningful way. Using residence, or residence with additional requirements, is a more sensible and accurate way to handle jurisdictional questions.

I. THE MOMENT OF MAS V. PERRY

Our story begins with the case of *Mas v. Perry*, perhaps the most famous domicile case and a frequent excerpt in civil procedure and choice of law casebooks. The *Mas* case, we argue, highlights the important changes in gender relations and social adulthood that were occurring during the early 1970s. Its convoluted jurisdictional reasoning reflects judicial confusion over how to understand the ability of married women and adult students to form domiciliary intent—a confusion that is unresolved today.

A. The Hole in the Wall

Judith ("Judy") Russell Mas was born in Atlanta and grew up and attended college in Jackson, Mississippi.[17] She met Jean Paul Mas, a French citizen,[18] upon moving to Baton Rouge to pursue her graduate studies in French. In November of 1970, they were married at Judy's parents' home in Jackson, and then returned to Baton Rouge to resume their studies and their positions as teaching assistants at Louisiana State University (LSU).[19] Judy also taught part time at a local elementary school.[20] At the time of their marriage, Judy was twenty-two, and Jean Paul was approaching thirty.[21]

In many ways, Judy's life reflected the changing gender norms of the decade. She was a young bride, but one who was pursuing a high level of education alongside her

17. Answer to Interrogatories Propounded to Complainants by Defendant at 1–2, Mas v. Perry, No. 71-114 (E.D. La. May 31, 1972), *aff'd*, 489 F.2d 1396 (5th Cir. 1974) [hereinafter Interrogatory Answers].

18. He had only been in the United States for about a year, meaning he was not yet eligible to file for citizenship. Trial of the Merits at 102:10–15, Mas v. Perry, No. 71-114 (M.D. La. Aug. 15, 1973) [hereinafter Trial Transcript] (testimony of Jean Paul Mas).

19. Trial Transcript, *supra* note 18, at 95:15–20, 96:15–22 (testimony of Jean Paul Mas).

20. Trial Transcript, *supra* note 18, 105:10–15 (testimony of Judy Mas); Deposition of Dr. Curtis Steele at 22:1–3, *Mas*, No. 71-114 (M.D. La. June 22, 1972) [hereinafter Steele Deposition].

21. Trial Transcript, *supra* note 18, 114:13–14 (testimony of Judy Mas).

husband.[22] She did not abandon her career upon her marriage to become a homemaker; rather, she and Jean Paul both continued to pursue their careers. Moreover, her pursuit of higher education, and particularly of a graduate degree, reflected the changing ideas of adulthood that began to emerge in the 1970s. She, like many other young Americans, was pursuing a longer course of education, thereby delaying some of the traditional markers of adulthood, such as marriage, children, or financial self-sufficiency.[23]

Upon returning to Baton Rouge, Judy and Jean Paul moved into an apartment in a converted single-family home owned by Oliver Perry, a man in his forties who owned several apartment buildings in the city.[24] The house had been subdivided into three apartments, one that Perry rented to the Mases, one that he rented to two single female students, and the third of which Perry testified he was in the process of renovating to make it rentable.[25] The two finished apartments were divided by a walled-off hallway and by the unfinished apartment.[26] Each of the apartments contained several mirrors, which, it turned out, were no ordinary mirrors but were "two-way" mirrors that allowed someone in the sealed-off hallway or unfinished apartment to observe what was happening in the occupied apartments.[27]

The Mases did not suspect that the mirrors in their apartment were being used to spy on them. Instead, it was their neighbors, Linda Bourgeois and Colleen Pilley, also students, who made the discovery. When the young women initially rented the apartment, Mr. Perry came by and insisted on installing mirrors. According to testimony at trial, "He said young girls like to look pretty and . . . look in the mirrors."[28] Linda Bourgeois's mother, who was with the young women when they rented the apartment, testified that she told Perry that additional mirrors were unnecessary.[29] Nevertheless, the next time she visited them, a new mirror had been installed in the living room, which one of the women was using as bedroom.[30]

Colleen and Linda didn't like the mirror, so they covered it with the largest poster they could find—a picture of the actor Robert Redford.[31] At trial, Linda Bourgeois testified that when Perry arrived to pick up their rent check he asked "if we like[d] Robert Redford better than the mirror and I said yes."[32] At the time, Redford had just

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22. In 1960, the median age of marriage was twenty-two for men and twenty for women. By 2009, the median age at marriage was twenty-eight for men and twenty-six for women. Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817, 1834–36 (2012).

23. *See id.* at 1835 (describing how the national median marital age began to rise as "[m]ore young people began staying in school into their early and mid-twenties to complete their educations, and more postponed marriage and parenthood").

24. Interrogatory Answers, *supra* note 17, at 1; *see also* Trial Transcript, *supra* note 18, at 76:2–4 (testimony of Officer John J. Landry).

25. Trial Transcript, *supra* note 18, at 8:4–12 (testimony of Oliver B. Perry).

26. *Id.* at 8:13–22.

27. *Id.* at 47:21–48:22 (testimony of Officer Kenneth C. Hanson).

28. *Id.* at 14:18–19 (testimony of Mary Louise Bourgeois).

29. *Id.* at 14:19–22.

30. *Id.* at 15:2–9.

31. *Id.* at 15:17–18; *id.* at 39:14–20 (testimony of Colleen Pilley Melancon).

32. *Id.* at 26:21–22 (testimony of Linda Bourgeois); *see also id.* at 39:21–40:2 (testimony of Colleen Pilley Melancon).

starred in the hit film *Butch Cassidy and the Sundance Kid*,[33] which made him a major star, and was likely the subject of the poster the young women used to cover the mirror. In that film, Redford and his co-star Paul Newman portrayed members of the "Hole-In-The-Wall-Gang"—a coincidence likely lost on the young women, who were completely unaware that they were using the poster to obstruct a hole in their wall.

One day, Bourgeois's fiancé and Pilley's boyfriend were visiting the apartment, and Bourgeois's fiancé commented that one of the mirrors "looked funny,"[34] "like a two-way mirror."[35] According to Linda, he used a penny to unscrew "the little plastic things that hold them on."[36] On the other side of the mirror was a hole in the wall, covered with paneling, which led to the unoccupied apartment.[37] The students called the police, who arrived and took down the bedroom mirror as well.[38] Behind that mirror they found a door that opened into the closed-off hallway, and in the hallway were other doors, unlocked, leading to two-way mirrors installed in the bathroom and bedroom of the apartment rented by Judy and Jean Paul Mas.[39] Several witnesses testified that they could see clearly through the mirrors into the Mas apartment.[40] A police officer also testified that he found cigarette butts in the empty apartment, from which he concluded "someone had definitely or probably been standing there looking through the mirror smoking cigarettes and putting them out on the floor."[41] The police investigation revealed that the cigarettes were the same type Perry smoked.[42] In a nearby closet in the vacant apartment, police found pornographic magazines, a pillow, sheets, and a bedspread.[43] Police then searched all of the other apartments owned by Perry in Baton Rouge and discovered at least one other building in which two-way mirrors had been installed, as well as a hole cut in the wall of yet another.[44]

Judy Mas was home the day the mirrors were discovered, taking a nap after returning from a visit to the dentist. A knock on the door awoke her, and two policemen entered and told her that she "had better sit down, that [she] was being watched."[45] Judy immediately drove to LSU and came back to the apartment with Jean Paul. When they arrived, the police were still there.[46]

Jean Paul and Judy Mas appear to have responded to the incident very differently. Jean Paul was initially angry, and stayed angry. At trial, he testified, "I was shocked. I could not believe it could happen. And then I was very angry, very angry."[47] He

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33. BUTCH CASSIDY AND THE SUNDANCE KID (Twentieth Century Fox Film Corporation 1969).
34. *Id.* at 28:21–22 (testimony of Linda Bourgeois).
35. *Id.* at 40:14–15 (testimony of Collen Pilley Melancon).
36. *Id.* at 28:25–29:5 (testimony of Linda Bourgeois).
37. *Id.* at 29:13–15.
38. *Id.* at 29:16-24.
39. *Id.* at 29:20–24; *id*. at 50:4–13 (testimony of Officer Kenneth C. Hanson).
40. *Id.* at 43:14–23 (testimony of Colleen Pilley Melancon); *id.* at 50:6–25 (testimony of Officer Kenneth C. Hanson).
41. *Id.* at 54:14–16 (testimony of Officer Kenneth C. Hanson).
42. *Id.* at 73:5–21 (testimony of Officer John J. Landry).
43. *Id.* at 74:6–10.
44. *Id.* at 78:10–81:5.
45. *Id.* at 106:13–17 (testimony of Judy Mas).
46. *Id.* at 106:24–107:3.
47. *Id.* at 100:3–4 (testimony of Jean Paul Mas).

apparently continued to be angry for months after the incident, with a desire to seek revenge on Perry, so much so that Judy's psychiatrist, a Dr. Steele, felt that Jean Paul was hindering her recovery. Jean Paul, unlike his wife, did not seek psychiatric treatment.[48]

In contrast to Jean Paul's anger, Judy Mas's reaction was fear and shame. She was convinced that Perry had brought others to the vacant apartment to view her, including a man with a black mustache whom she had seen one day exiting the vacant apartment just after she had taken a bath. She testified that the man, accompanied by Perry, "just looked at me, all the way out to the truck, and I could not understand it. I remember thinking at the time that maybe my robe was opened. I looked down real quick to see and it was not."[49] She was afraid to stay in the apartment, could not undress near mirrors, and was convinced that male members of her French classes at LSU had watched her while she was in the bathroom or in her bedroom with her husband.[50] After some time, she sought psychiatric treatment on the advice of her lawyer.[51]

During litigation, Judy's psychiatrist, Dr. Steele, opined that "[s]he was raised in a strict, authoritarian, fundamentalist tradition and she is breaking from that tradition in a more open style of living. She has a good deal of guilt about doing so. Her guilt was thrown into the open by having been observed doing (forbidden) sexual practices."[52] Dr. Steele also testified that he "became aware of her husband functioning as an agitator restoring the issues again and again" and concluded that her husband played a large role in "pushing her anger."[53] Both testified that the trauma of the incident negatively affected their marriage.[54]

A few months after the incident, the Mases filed suit against Perry in the federal court for the Middle District of Louisiana, alleging that Perry had committed a tort under Louisiana law by violating their right to privacy and seeking damages of $100,000 each.[55] Judy and Jean Paul each testified to the trauma they suffered as a result of Perry's actions. In his closing argument, the Mases' lawyer emphasized the trauma experienced by Judy Mas and described Jean Paul's claim for relief as flowing from Judy's pain. The injury suffered by Judy, as characterized by her counsel, was of an intimate nature that only a woman would understand:

> I'm a man, I don't know what it would do to me. I could figure out pretty much what it would do to my wife. I would ask you ladies on this jury, you will know more than the gentlemen on this jury what this would do

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48. *Id.* at 100:17–18; *id.* at 132:7–13 (testimony of Dr. Curtis Steele); Steele Deposition, *supra* note 20, at 17:7–19:5.

49. Trial Transcript, *supra* note 18, at 110:8–13 (testimony of Judy Mas).

50. *Id.* at 108:6–17, 111:6–112:22.

51. *Id.* at 126:3–4 (testimony of Dr. Curtis Steele).

52. Letter from Dr. Curtis Steele to Dennis Whalen (May 10, 1971).

53. Steele Deposition, *supra* note 20, at 17:11–15.

54. Trial Transcript, *supra* note 18, at 100:1–101:5 (testimony of Jean Paul Mas); *id.* at 111:6–112:23 (testimony of Judy Mas).

55. Complaint for Damages at 1, Mas v. Perry, No. 71-114 (E.D. La. Apr. 12, 1971), *aff'd*, 489 F.2d 1396 (5th Cir. 1974); Trial Transcript, *supra* note 18, at 171 (jury instructions).

> to a woman. I have no way of knowing, I have no way of telling you what would go through a girl's mind at a time like this.[56]

In contrast, the injury suffered by Jean Paul was based entirely on how his wife's pain affected him. Counsel was not clear whether Jean Paul's injury was the decline in his own sexual satisfaction due to the trauma to his wife or rather an injury to his property; both possibilities were suggested:

> Jean Paul Mas, like I said, he is a man. A man would not be bothered as much by this and if he were just a man with some woman and found out there was a two-way mirror, he could forget it, but he is her husband. It hurt him, his wife. It hurt a marriage. It hurt the husband.[57]

The jury appears to have followed this lead, rendering a verdict of $15,000 in favor of Judy and only $5000 for Jean Paul.[58] Perry appealed, hiring a new lawyer—a woman—to represent him.[59] The Fifth Circuit affirmed the verdict, and the United States Supreme Court declined to hear the case.

B. The Problem of Intent

The close tie between Judy and Jean Paul's tort claims was echoed by the court's analysis of diversity jurisdiction. The Mases premised their suit on the presence of diversity jurisdiction, albeit without alleging any facts pertaining to that jurisdiction.[60] In order for a federal court to hear a case that does not involve federal claims, the parties must be "diverse"; in other words, no plaintiff can be a citizen of the same state as any defendant.[61] Courts determine citizenship for purposes of diversity jurisdiction using the concept of "domicile"—one's "true, fixed, and permanent home and principal establishment," to which one "has the intention of returning whenever he is absent therefrom."[62]

In the *Mas* litigation, the issue of diversity jurisdiction turned on the question of Judy Mas's domicile. Jean Paul was still a citizen of France, and Perry was uncontestably domiciled in Louisiana. That meant that Jean Paul could sue Perry in federal court, because the parties were diverse. But Judy Mas's domicile was less clear. In an earlier era, she would likely have been deemed a citizen of France by the simple fact of her marriage to Jean Paul.[63] By the 1970s, U.S. women were no longer

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56. Trial Transcript, *supra* note 18, at 146:20–25 (closing statement of Whalen, attorney for Jean Paul and Judy Mas).

57. *Id.* at 148:4–8.

58. *Id.* at 178:15–22 (reading of jury verdict).

59. Form for Appearance of Counsel, *Mas*, 489 F.2d 1396 (5th Cir. 1974) (No. 73-3008) (entering Sylvia Roberts as lead counsel for Appellant, Oliver Perry); Motion To Enroll Additional Counsel, *Mas*, No. 71-114 (M.D. La. Jul. 11, 1973) (enrolling Sylvia Roberts as additional counsel for Perry).

60. *See* Complaint for Damages, *supra* note 55, at 1.

61. 28 U.S.C. § 1332 (2012).

62. *Mas*, 489 F.2d 1396, 1399 (5th Cir. 1974) (quoting Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954)).

63. From 1907 to 1922, an American-born woman who married a foreign citizen lost her

expatriated upon marrying a foreign citizen,[64] but a domestic version of "derivative domicile" still prevailed. Under the "derivative domicile" rule, a woman gained her husband's domicile by operation of law.[65] This "patriarchal rule," which "epitomized married women's more general subordination," was still widely in effect at the time of Judy Mas's suit.[66] In some cases, the legal rule could mean that a woman would be domiciled in a place where she had never actually set foot, so long as her husband had retained his domicile there.[67] Although neither the district nor the circuit courts made a determination of Jean Paul's domicile (as under the statute, his citizenship in France—not his domicile—was determinative for diversity jurisdiction), they treated him as though France was his domicile in considering application of the derivative domicile rule. In Judy Mas's case, the consequences if she were found to be domiciled in France were particularly harsh: the statute did not provide a mechanism for a U.S. citizen, domiciled in a foreign country, to sue in federal court under diversity jurisdiction. Only *citizens* of foreign countries, or citizens of the United States, domiciled in a state, were entitled to do so. Legal unity with her husband would destroy Judy Mas's case; for purposes of federal diversity jurisdiction, she would have no citizenship.

Probably with this idea in mind, Perry contested the existence of diversity jurisdiction as the parties approached trial.[68] In a summary pretrial order, however, the court rejected Perry's claim and provided a rationale for diversity jurisdiction, stating that the couple had "contend[ed] that Jean Paul Mas [was] a citizen of France, and his wife, Judy Mas, was a citizen of the State of Mississippi at the time of their marriage."[69] This determination gave no consideration to the relevant factors surrounding Judy's domicile (such as whether she had an intent to remain in Louisiana, or whether the derivative domicile rule—which was alive and well in both Louisiana

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U.S. citizenship by operation of law. Expatriation Act, ch. 2534, §§ 3–4, 34 Stat. 1228, 1228–29 (1907); Act of Feb. 10, 1855, ch. 71, 10 Stat. 604 (reenacted as 1 Rev. Stat. 350, § 1994 (1878)); *see also* Abrams, *supra* note 12, at 414 (discussing history of derivative citizenship laws).

64. The Cable Act (or Married Women's Act) changed the policy of expatriation by marriage in 1922, but did so fairly narrowly, as its protections only applied to women who married aliens "eligible for citizenship." Women who married an alien not eligible for citizenship or who lived with their foreign husband on foreign soil for over two years still lost their citizenship. Cable Act, ch. 411, 42 Stat. 1021 (1922)*; see* MARTHA GARDNER, THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870–1965, at 124 (2005). Even following the passage of the Cable Act, courts continued to links wives to their husbands in ways that circumvented the literal text of immigration restrictions. *See* Kerry Abrams, *Peaceful Penetration: Proxy Marriage, Same-Sex Marriage, and Recognition*, 2011 MICH. ST. L. REV. 141, 157–66 (2011) (discussing judicial recognition of proxy marriage).

65. Appleton, *supra* note 7, at 1468–69. As Appleton discusses, this rule was "simply one facet of the broader system of coverture." *Id.* at 1469.

66. *Id.* at 1476. In fact, the Restatement (Second) of Conflict of Laws did not reject this rule until 1988. *Id.*

67. *See* Abrams, *supra* note 12, at 413 n.24.

68. Pre-Trial Order at 1, Mas v. Perry, No. 71-114 (M.D. La. May 10, 1973), *aff'd*, 489 F.2d 1396 (5th Cir. 1974).

69. *Id.*

and Mississippi[70]—applied to her). Moreover, even if the event of marriage had not changed her domicile, many factors beyond her marriage pointed towards a possible change in domicile.

Despite the court's pretrial order, Perry's attorney continued to dispute Judy Mas's domicile. When Judy took the stand at trial, Perry's attorney asked whether she was required to pay nonresident tuition at LSU.[71] This question highlights the link between domicile and residency determinations for tuition purposes and hints at the changes that were taking place in the realm of higher education at the time.[72] The judge responded that, if the question was aimed at contesting jurisdiction, there was "no question" that the court had jurisdiction, but he allowed the question.[73] Judy answered that she had paid no tuition at all due to her job as a teaching assistant.[74] Whether, without the graduate stipend she received, LSU would have classified her as an in-state or out-of-state student was never determined at trial.

After Judy Mas concluded her testimony, Perry moved for dismissal of her case, alleging that she had failed to establish diversity of citizenship with Perry.[75] Again, the judge rejected the argument out of hand. He reasoned that "as far as Mrs. Mas [was] concerned, the evidence [was] very clear that she [was] from out of state" and was simply in the state "temporarily" to study and teach.[76] The judge did not elaborate on the details of this "clear" evidence, instead stating only that "[t]here [was] no indication that there was any intention [by the Mases] to make Baton Rouge their permanent home" and moreover that the complaint's allegations that the Mases were citizens of France and Mississippi, respectively, were sufficient.[77] Nor did he cite any legal rule that students cannot obtain domicile in the place where they study, although, as we shall see, such a rule did develop in the decades following *Mas v. Perry*.[78]

In this way, the judge skirted the issue of derivative domicile, but raised other issues related to domiciliary intent. In effect, he substituted one domiciliary presumption, based on stereotypes about gendered relationships in marriage, for another,

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70. *See* Welch v. Lewis, 184 F. Supp. 806, 808 (N.D. Miss. 1960) ("It is well settled under Mississippi law that when a woman marries, her domicile, and thereafter her legal residence, becomes that of her husband."); Juneau v. Juneau, 80 So. 2d 864, 867 (La. 1955) ("The courts of this State have been of the opinion, on innumerable occasions, that a married woman has no other domicile and can acquire no other than her husband's."); Hobbs v. Fireman's Fund Am. Ins. Cos., 339 So. 2d 28, 35 (La. Ct. App. 1976) (stating that "[a]lthough a married woman's domicile is that of her husband, she may establish a separate domicile if she is abandoned or leaves the matrimonial domicile as a result of serious misconduct on the part of her husband" (citation omitted)).

71. Trial Transcript, *supra* note 18, at 118:6–7 (testimony of Judy Mas).

72. *See infra* Part IV.

73. Trial Transcript, *supra* note 18, at 118:10–14 (testimony of Judy Mas).

74. *Id.* at 118:15–19.

75. *Id.* at 120:1–5 (statement of Avant, attorney for Oliver Perry). He also moved for dismissal based on "the failure of the Plaintiff to establish the necessary jurisdictional amount as far as the Plaintiff Jean Paul Mas is concerned." *Id.* at 120:5–7.

76. *Id.* at 120:22–25 (statement of Hon. E. Gordon West).

77. *Id.* at 121:11–15.

78. *See infra* Part IV.

based on stereotypes of students and their ties to home.[79] Earlier in the trial, Judy Mas confirmed that she "had no intention of returning to the home [in Mississippi] to reside with [her] parents any longer."[80] The judge, however, ignored both Judy's stated intent and the traditional idea that marriage severs a person from parental ties. Until the early 1970s, most young adults were deemed minors until the age of twenty-one.[81] Upon the event of marriage, however, they were viewed as legal adults, regardless of their age.[82] In fact, Judy was past the age of majority and had moved to Louisiana even before meeting and marrying Jean Paul, meaning that actions separate from and in addition to her marriage demonstrated her intent to form an independent legal identity and life. The judge, however, continued to identify her with her childhood home, despite her departure from her home and her subsequent marriage. The arguments of Judy's own lawyer may have contributed to this identification of Judy as linked to her childhood home rather than as an autonomous adult, as he consistently referred to her as a "little girl" whose upbringing had predisposed her to react with shock and horror to the discovery of Perry's violations.[83]

Moreover, the judge's reasoning implied that, as a student, Judy could not have any intent of making Louisiana her "permanent home."[84] Indeed, Judy and Jean Paul had moved to Illinois sometime after filing the suit.[85] They testified that they intended to return to Baton Rouge so that Jean Paul could get his PhD at LSU,[86] but Jean Paul also stated that, after receiving his PhD, he was unsure where he would receive a position. "I don't know where I can get a position in this country. Maybe in Chicago or New York City or whatsoever," he stated.[87]

The couple's mobility, fueled largely by Jean Paul's career aspirations, illuminates the changes occurring among the young adult population. Although the Mases were married and even had their first child sometime after filing suit against Perry, they were not settled in one place or planning to be for some time. This mobility perhaps made them incapable of considering a single state as their "permanent home," leading the judge to identify Judy's domicile as the one place she emphatically did *not* intend to make her home—Mississippi.

The trial judge could have ended his analysis with his determination that Judy retained her Mississippi domicile because she had not acquired another. But he did

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79. *See infra* Part III.

80. Trial Transcript, *supra* note 18, at 115:2–4 (testimony of Judy Mas).

81. David B. Palley, *Resolving the Nonresident Student Problem: Two Federal Proposals*, 47 J. HIGHER EDUC. 1, 7 (1976).

82. *See, e.g.*, Stanton v. Stanton, 421 U.S. 7, 14 (1975) (citing a Utah law that both men and women lost their minority upon the event of marriage, regardless of their age); *In re* Greer, 184 So. 2d 104, 106 (La. Ct. App. 1966) ("The law is well settled in Louisiana that a minor, whether male or female, is emancipated by marriage."); Rennie v. Rennie, 718 So. 2d 1091, 1093 (Miss. 1998) (citing a Mississippi statute stating that emancipation of minors occurs, *inter alia*, upon marriage).

83. Trial Transcript, *supra* note 18, at 143:2–5, 146:9–25 (statements of Whalen, attorney for Judy and Jean Paul Mas).

84. *See id.* at 120:22–25 (statement of Hon. E. Gordon West).

85. *Id.* at 101:6–7 (testimony of Jean Paul Mas).

86. *Id.* at 101:11–15, 103:5–14.

87. *Id.* at 103:12–14.

not; he seemed compelled to also address the issue of derivative domicile. Even if, he stated, Judy had established the intent to remain in Louisiana, it "is hard for me to think that she can be a resident of any place other than her husband [sic]."[88] Jean Paul was clearly not domiciled in Mississippi, so it is unclear how this statement fit with the judge's prior determination that Judy was domiciled there. The judge did not attempt to reconcile these statements; rather, he simply stated that if Judy could be deemed a resident of Louisiana, he would still assume the court had jurisdiction over her claims, "ancillary" to her husband's case.[89] The judge did not take this argument to its logical conclusion: if Judy Mas's domicile was in France, then she was not diverse with Perry because she was neither a citizen of a different state nor a noncitizen under the statute.[90]

Because the trial court failed to adequately justify its jurisdiction over Judy Mas, Perry had a convenient legal hook on which to hang his appeal. After the jury found in favor of Judy and Jean Paul, Perry promptly appealed to the Fifth Circuit,[91] and when he lost on appeal, he filed an unsuccessful petition for rehearing. Although his attorney could have argued for application of the rule of derivative domicile as a means of demonstrating incomplete diversity, Perry failed to make such a claim. Perhaps his lawyer feared that the rule might be constitutionally suspect in an era in which the Supreme Court was striking down legal classifications based on gender,[92] or perhaps there was an absence of precedent with which to make that argument. Instead, Perry's appeal focused on the trial judge's assertion that Judy's student status implied an absence of intent to make Louisiana her domicile.[93] Perry argued that students were in fact capable of forming a domicile in the state where they attended school.[94] In this way, his brief reflects the ongoing shifts in young adulthood and higher education that were occurring at the time of the case. Furthermore, his arguments depicted Judy as an autonomous individual, one whose domicile was not defined solely by the fact of her marriage or her parents' residence. In these ways, Perry's petition for appeal reflected new ideas of gender equality.

The Fifth Circuit opinion, however, largely ignored any questions of student status or burden of proof, and did not rely on the notion that women could have autonomy within marriage. Instead, the court focused on Judy's domicile in the context of her relationship with Jean Paul. The court reasoned that the derivative domicile rule was premised on "the theoretical identity of person and interest of the married

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88. *Id.* at 121:16–19 (statement of Hon. E. Gordon West).

89. *Id.* at 121:19–22.

90. 28 U.S.C. § 1332(a) (2012).

91. Notice of Appeal at 1, Mas v. Perry, No. 71-114 (M.D. La. Jul. 11, 1973), *aff'd*, 489 F.2d 1396 (5th Cir. 1974).

92. *See infra* Part II (discussing changes in gender equality and Supreme Court cases including Frontiero v. Richardson, 411 U.S. 677 (1973), and Reed v. Reed, 404 U.S. 71 (1971), as well as the Fifth Circuit's arguable awareness of these issues).

93. Petition for Rehearing and Petition for Rehearing En Banc at 3, Mas v. Perry, 489 F.2d 1396 (5th Cir. 1974) (No. 73-008).

94. *Id.* Perry also argued that Judy Mas should have borne the burden of proof of demonstrating diversity jurisdiction, and that she did not allege sufficient facts to demonstrate that her domicile had not changed upon her move to Louisiana. *Id.* at 2.

couple."[95] If Judy were domiciled in France due to her marriage to Jean Paul, then she would not be a domiciliary of any U.S. state, so she could not sue as a U.S. citizen diverse from Perry. Yet she was not an alien, so she could not sue under the portion of the statue that provided jurisdiction over suits brought by foreign nationals against U.S. citizens. Thus, a finding that her domicile followed her husband's would render her a "jurisdictional zero."[96] Such a finding would work "curious" and "absurd results on the facts" of the case.[97]

On the other hand, if the court found that Judy were domiciled in Louisiana, she would not be able to join this diversity suit with her husband because she would not be diverse to the defendant. In either case, the "identity of person and interest of the married couple" would be destroyed.[98] Accordingly, the Fifth Circuit refused to invoke the derivative domicile rule, but only as a means of furthering the gendered policy—unity of husband and wife—behind the rule. To deny diversity jurisdiction would be to deny the right of the married couple to bring suit together in federal court, frustrating the idea that husband and wife were "one."

The Fifth Circuit also appeared to endorse the trial court's concept of a kind of "ancillary jurisdiction" linking Judy and Jean Paul's claims. The court stated that its jurisdiction stood "on two separate legs of diversity jurisdiction: a claim by an alien against a State citizen; and an action between citizens of different States."[99] The court then circled back to "the propriety of having the federal district court entertain a spouse's action against a defendant, where the district court already has jurisdiction over a claim, arising from the same transaction, by the other spouse against the same defendant."[100] Like the lower court, the Fifth Circuit invoked an idea of ancillary jurisdiction, and then went one step further to explicitly root that jurisdiction in a unitary theory of marriage. The court failed to fully analyze the relevant facts in any detail. Instead, the court essentially decided that there was diversity as between Judy Mas and Perry because of the propriety of entertaining both spouses' actions in one case, without really examining any decisive facts on that issue. This linkage may have been especially salient given the facts of the *Mas v. Perry* case, where Jean Paul's claim was largely dependent on the emotional distress of his wife. Ironically, in order for Jean Paul to make his largely derivative tort claim, his wife had to invoke derivative domicile.

Rather than signaling the "death-knell" to the patriarchal rule of derivative domicile, then, the Fifth Circuit treated Judy as simultaneously wifely and childlike. The court tied her to both her husband and her parents: in order to preserve the unity of her marriage for purposes of the litigation, she retained the domicile of her parents and childhood home. Using this logic, the Fifth Circuit preserved the vision of female identity as defined by first a woman's parents and then by her husband.

Judy Mas's situation appears to have befuddled both the trial and appellate courts in her case because her actions flouted the social norms of the time. She was married but still pursuing higher education and a career, had moved to a new state but did not

95. *Mas*, 489 F.2d at 1400.
96. Thanks to Professor Michael Collins for suggesting this term.
97. *Mas*, 489 F.2d at 1399–1400.
98. *Id.* at 1400.
99. *Id.* at 1401.
100. *Id.*

appear to know where she would end up next, and expressed uncertainty of what her future would bring. The one thing she did seem sure of was the fact that she would never return to Mississippi. Because she seemed incapable of forming another fixed domiciliary intent, however, the court linked her to Mississippi and to the legal status of her childhood.

Social norms, regardless of what the *Mas v. Perry* judges thought, were changing. These changes, which were well on their way in the early 1970s but have continued to develop in subsequent decades, have rendered the concept of domicile even more confusing and inaccurate than it was in *Mas v. Perry*. When both young women and young men take longer to finish their education, move more frequently for school and employment, and reject traditional gender norms, the traditional concept of domicile and particularly of derivative domicile based on marriage or parentage becomes far more difficult to apply in any consistent and meaningful way. Furthermore, individuals such as Judy Mas may not be in a position to form domicile in the traditional sense, as they have no sense of where they will remain indefinitely, especially in their twenties. The fluidity of their lives clashes with the rigidity of domicile, rendering domicile incapable of accurately measuring and reflecting their intent and their lives.

II. THE RISE OF GENDER EQUALITY

Mas v. Perry was decided amidst a revolution in sexual behavior and gender norms, and the case reflects this time of transition and shifting social mores. As these changes developed, they contributed to the confused and contested use of domicile. In particular, the increase in the number of highly educated women, the shift toward a more equitable legal understanding of marriage, and the corresponding rise of two-career marriages made the notion of a single fixed domicile, shared by all members of a family, far less reflective of the realities of many people's lives.

A. The Gender Revolution of the Seventies

During the decades leading up to the 1960s and 1970s, women and men operated in separate spheres.[101] Men were expected to work outside the home to support their families, while women were understood to belong within the home, raising children and engaging in other domestic activities—even though they, too, often worked for wages outside it.[102] Under common law, women could marry earlier than men, reflecting the idea that men needed additional years of training and education to be able to support a family, whereas women simply needed to find a husband.[103] These rigid gender roles permeated American society. The nation's highest Court even sanctioned the idea that "[t]he paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother."[104]

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101. Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1093–94 (1994).

102. *Id.* at 1116.

103. *See* Miriam Aberg, Patricia Small & J. Allen Watson, *Males, Fathers and Husbands: Changing Roles and Reciprocal Legal Rights*, 26 FAM. COORDINATOR 327, 328 (1977).

104. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

The late 1960s and early 1970s, however, witnessed a "revived and burgeoning feminist movement" and drastic changes in the "life patterns of women."[105] The percentage of women in the workforce had risen steadily over the preceding decades, growing from 34% in 1950 to 45% by 1973.[106] As women began to leave the private sphere traditionally ascribed to them to enter the public labor market in competition with men, traditional gender roles came "under fire."[107] Women were no longer simply the homemakers responsible for childcare and housework; rather, by 1975, families in which only one parent worked outside the home were no longer the majority in the United States.[108] Consequently, this decade ushered in a new era of two-career families.

To enable their entry into the workforce, and particularly into higher paid and more prestigious career tracks, women also had to seek higher levels of education. Previously, many women had bypassed higher education to focus on finding a husband, or were constrained in their occupational choices if they did seek employment.[109] In this era, however, previously all-male colleges began to admit women and more women began to attend college seeking more than just their "M.R.S. degree." Their numbers continued to increase, and by the 1980s, female enrollment had surpassed that of male students.[110]

These changes led to "a revolution in attitudes towards" gender roles in the United States.[111] Increased levels of education in particular influenced both sexes, and especially women, to reject old norms, making women more likely to choose occupations similar to those of their male counterparts.[112] With members of both sexes seeking higher education and more demanding jobs, both women and men experienced delays in the ages of marriage and childbearing.[113] When they did eventually undertake these roles, moreover, they began to seek more equitable ways of structuring their marriages and families. In these ways, "women's increasing commitment to educational opportunities and employment activities and men's increasing awareness of and support for family decisions based on spousal equity"[114] transformed the structure of the American family and led to "an increasing number of marriages in which the partners" sought "a balance of fairness."[115]

One important effect of the move toward gender equality was the phenomenon of

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105. Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 2 (1975).

106. *Id.* at 2 n.10.

107. JEFFREY JENSEN ARNETT, EMERGING ADULTHOOD: THE WINDING ROAD FROM THE LATE TEENS THROUGH THE TWENTIES 75 (2004).

108. Ginsburg, *supra* note 105, at 2 n.10

109. ARNETT, *supra* note 107, at 6–7.

110. *Id.* at 7, 7 n.8.

111. Karen Oppenheim Mason & Yu-Hsia Lu, *Attitudes Toward Women's Familial Roles: Changes in the United States, 1977–1985*, 2 GENDER & SOC'Y 39, 39 (1988).

112. Marvin Bressler & Peter Wendell, *The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations*, 51 J. HIGHER EDUC. 650 (1980).

113. ARNETT, *supra* note 107, at 4–5 (pointing to the 1970s as the beginning of a "dramatic shift in the ages when Americans typically get married" and become parents).

114. Gerald A. Bird & Gloria W. Bird, *Determinants of Mobility in Two-Earner Families: Does the Wife's Income Count?*, 47 J. MARRIAGE & FAM. 753, 753 (1985).

115. Gertrude Zemon Gass, *Equitable Marriage*, 23 FAM. COORDINATOR 369, 369 (1974).

the dual-career household. Traditionally, although many women worked outside the home, husbands had much greater earning capacity, often due to sex segregation in the workplace and differential wages for men and women. Moreover, it was socially assumed—and legally required—that a husband would support his wife and children. The traditional law of marriage was not equal; men and women had very different obligations. A man had a duty to support his wife; she had a "reciprocal" duty to provide services to him.[116] A corollary to these rigid legal roles was the derivative domicile rule, whereby a wife's domicile followed her husband's.[117] This was not simply a rule that prescribed domicile for legal purposes—it was also literally a requirement that the wife follow her husband wherever he went.[118] If the husband was required to support his wife, then he needed to be able to relocate the family without his wife's desires impeding his mobility. And in order to provide services to her husband, a wife needed to be physically present.[119]

Gender equality increased the potential for frequent changes in domicile and even separate domiciles within marriages and families. Changes in sex roles and family structures now "facilate [sic] mobility" for both men and women,[120] and both sexes now seek educational and career opportunities around the country (and the world). Women, and not just men, now "initiat[e] family moves, with husband and children following."[121] A legal presumption that wife automatically follows husband no longer makes sense.[122]

Gender equality also led to couples that choose to live apart. As early as 1974, one scholar noted that some two-career families might have to endure "a separation in space" when career obligations or opportunities began to pull husbands and wives in different directions.[123] The example used was a Detroit advertising executive who kept an apartment in Detroit "but call[ed] home an early American farmhouse" outside of New York City where "[s]he spen[t] every weekend there with her husband and two sons."[124] These types of "transhousehold families" show how many modern marriages and families have outgrown the idea that a "single law," linked to a single domicile, should "govern" a family's interests.[125]

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116. NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 51–55, 90, 99, 111–12 (1982).

117. *See, e.g.*, Plains Twp. Sch. Dist.'s Appeal No. 2, 59 Pa. D. & C. 95, 97 (Pa. C.P. Luzerne Cty. 1947) (stating that "the whole theory of the marital relation involves the idea of a single home, established by the husband and cared for by the wife, where the two shall dwell together").

118. IRVING BROWNE, ELEMENTS OF THE LAW OF DOMESTIC RELATIONS AND OF EMPLOYER AND EMPLOYED 15 (2d rev. ed. 1909) ("The husband is entitled to select the mutual domicile, where the wife is bound to reside, and whither she is bound to follow him.").

119. *See* Abrams, *supra* note 12, at 415–19.

120. Harriet Holter, *Sex Roles and Social Change*, 14 ACTA SOCIOLOGICA 2, 6 (1971).

121. Bird & Bird, *supra* note 114, at 753.

122. *See* Appleton, *supra* note 7, at 1482–86 (arguing that gender equality has rendered domicile anachronistic).

123. Gass, *supra* note 115, at 371.

124. *Id.*

125. Appleton, *supra* note 7, at 1490–91.

B. The Legal Revolution

Although the Supreme Court declined to hear *Mas v. Perry*, and thus lost an opportunity to hear a derivative domicile case, its docket reflected the more general societal transition toward greater gender equality. The cases that the Court decided in the early 1970s challenged traditional ideas of men as breadwinners and women as homemakers.[126] In rejecting these stereotypes on Equal Protection grounds, the Court mirrored the ongoing societal shift toward greater gender equality.

In 1971, around the time the Mases discovered Oliver Perry was spying on them, the Court confronted the question of "the constitutionality of sex-based discrimination."[127] In *Reed v. Reed*,[128] the Court struck down an Idaho statute giving preference to men over women in the appointment of estate administrators.[129] The Court found that the statutory classification had no rational relation to sex and could not be justified on the basis of administrative convenience.[130]

Next, around the same time that Oliver Perry was contesting the trial court's jurisdiction over Judy Mas, the Supreme Court deemed unconstitutional a statute that allowed male service members to claim their wives as dependents but did not allow female service members to do the same for their husbands.[131] In *Frontiero v. Richardson*, Justice Brennan's majority opinion discussed in detail the country's "long and unfortunate history of sex discrimination."[132] He described the traditional "gross, stereotyped distinctions between the sexes" and the denial to women of many civil rights,[133] and pointed to ongoing congressional action and labor statistics as demonstrating the general effort to eliminate those disparities. In these ways, the Supreme Court recognized and furthered the societal changes that were occurring at this moment in time.[134]

The Fifth Circuit court that ruled on Judy Mas's domiciliary status during this same period was not unaware of these changes in the legal status of gender. In the mid-1970s, around the same time that it decided *Mas v. Perry*, the Fifth Circuit cited both *Reed* and *Frontiero* in several different cases.[135] But, for the most part, the Fifth

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126. Ginsburg, *supra* note 105, at 17.

127. Judith A. Baer, *Sexual Equality and the Burger Court*, 31 WESTERN POL. Q. 470, 476 (1978).

128. 404 U.S. 71 (1971).

129. *Id.* at 72.

130. *Id.* at 76.

131. Frontiero v. Richardson, 411 U.S. 677, 678 (1973).

132. *Id.* at 684.

133. *Id.* at 685–86.

134. *See also* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (striking down a section of the Social Security Act that granted insurance benefits to widows but not widowers).

135. *See, e.g.*, Tyler v. Vickery, 517 F.2d 1089, 1101 (5th Cir. 1975) (citing *Reed* and *Frontiero*); St. Ann v. Palisi, 495 F.2d 423, 426 n.17 (5th Cir. 1974) (holding that schoolchildren could not be suspended based on mother's striking of teacher) (citing *Frontiero*); NAACP v. Allen, 493 F.2d 614, 619 n.6 (5th Cir. 1974); Lane v. Att'y Gen., 492 F.2d 121, 123 n.2 (5th Cir. 1974). Indeed, Judge Ainsworth, the author of the *Mas v. Perry* opinion, did not wrestle with the meaning of *Frontiero* until 1981, when he used its historical description of sex discrimination to bolster his originalist interpretation of section 1981 of the

Circuit attempted to address sex discrimination during the 1970s only in employment discrimination cases where it had been specifically pled under Title VII; when plaintiffs brought cases involving discrimination based on their family role, the court was less sympathetic. Indeed, several of the sex discrimination cases the Supreme Court heard during this period arose from challenges to state laws from states within the Fifth Circuit, which were particularly slow to adapt to modern gender equality.[136] Thus, it may be no surprise that when confronted with the issues of *Mas v. Perry*, the court did not recognize the implications of these precedents for Judy Mas's situation or for the rule of derivative domicile more generally. Instead, the court clung to antiquated and gendered ideas about the legal unity of man and wife.[137]

Indeed, changes in the law's approach to gender equality did not result in any legal reform of the concept of domicile, nor did they make the use of that concept any easier. Instead, these changes made domicile an even more difficult principle to apply and one that often fails to accurately measure the lives and intentions of modern families. The rule of derivative domicile remained in effect in most of the United States until the late 1980s, despite the efforts of women's rights activists to overturn the rule.[138] In the early 1970s, the vast majority of jurisdictions still followed the common law presumption, whether conclusive or rebuttable, that the husband "had the authority to choose the marital abode" and his wife was "was obliged to follow."[139] Fifteen states allowed women to establish their domicile for voting purposes

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Civil Rights Act as *not* encompassing discrimination against women. *See* Bobo v. ITT, Cont'l Baking Co., 662 F.2d 340, 343 n.5 (5th Cir. 1981).

136. *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455, 456 (1981) (affirming the Fifth Circuit and striking down Louisiana statute giving husband, as "head and master" of property jointly owned with wife, unilateral right to dispose of property); Orr v. Orr, 440 U.S. 268, 271 (1979) (reversing Alabama state court and striking down Alabama statute that made women but not men eligible for alimony at divorce); *see also* Taylor v. Louisiana, 419 U.S. 522, 525 (1975) (reversing Louisiana state court and striking down Louisiana law that excluded women from juries unless they filed a written declaration seeking to serve).

137. The opinion's conservatism in gender matters does not seem to be the result of drawing a particularly conservative panel. Judge Ainsworth, who authored the opinion, was lauded in 2002 by no less than Justice Ruth Bader Ginsburg as "a wise and good judge whose moderate, consistent, and forward-looking views helped to keep the Fifth Circuit steady during the tumultuous 1960s." *District Judge Robert Andrew Ainsworth*, TRACKING LOUISIANA'S LEGAL HERITAGE, http://www.laed.uscourts.gov/200th/judges/ainsworth.php [https://perma.cc/CC9B-BQXL]. Another member of the *Mas* panel, Judge John Minor Wisdom, was famous for ordering the racial integration of the University of Mississippi and for issuing and joining judicial opinions eliminating racial discrimination in jury selection and voting. Dennis Persica, *John Minor Wisdom: The Times-Picayune Covers 175 Years of New Orleans History*, NOLA.COM (Jan. 29, 2012, 5:02 AM), http://www.nola.com/175years/index.ssf/2012/01/john_minor_wisdom_the_times-pi.html [https://perma.cc/KKQ8-7URK]. The third panelist, Judge Charles Clark, authored other opinions during the time period that took seriously claims of sex discrimination in employment. *See* Long v. Sapp, 502 F.2d 34, 38 (5th Cir. 1974) (remanding claims of sex discrimination to district court because testimony suggested that "plaintiff may have been a victim of discrimination").

138. Abrams, *supra* note 12, at 423; Appleton, *supra* note 7, at 1476.

139. BARBARA A. BROWN, ANN E. FREEDMAN, HARRIET N. KATZ & ALICE M. PRICE, WOMEN'S RIGHTS AND THE LAW: THE IMPACT OF THE ERA ON STATE LAWS 111–13 (1977).

on the same basis as other adults, but went no further,[140] and only a handful of states had laws "declaring that the domicile of a person [should] not be denied or abridged on the basis of sex."[141]

Neither the Supreme Court nor any other court ever "definitively struck down" the rule of derivative domicile, but it largely faded out of use as time went on.[142] Now, although derivative domicile is no longer explicitly invoked in the vast majority of jurisdictions, traces of it continue to reverberate in various areas of the law.[143] These traces reflect the way in which domicile more generally "continues to exemplify a regime of domestic relations law from a mostly bygone era" and has "failed to keep pace with [the] transformation" of gender roles and family structures.[144] In this way, the current use of domicile not only continues to carry "gendered baggage,"[145] but it also fails to account for the new mobility and ambition of many women, whether married or single.

The increased mobility and "transhousehold" nature of many two-career families makes domiciliary intent far more difficult, if not impossible, to measure accurately. Both men and women are highly mobile and often have to choose between uprooting their families and their spouses' careers and enduring a period of separation from their children and/or spouses. For many families or married couples, therefore, their family home is not confined to a single residence, or it may be subject to frequent change and relocation. Consequently, imposing a rule of single residence on these families is both highly complicated and often inaccurate. Another trend that emerged in the 1970s has served to further complicate these inquiries: the new period of identity formation and exploration for young adults known as "emerging adulthood."

III. THE EMERGENCE OF "EMERGING ADULTHOOD"

Although the gender revolution of the 1960s and 1970s made an immediate impact on American society, the results of another, "quiet[er] revolution for young people in American society" have only recently come to the fore of the American consciousness.[146] Prior to the sixties and seventies, young people were eager to grow up and "settle down."[147] Completing one's education (if one was a man), marriage, and having children were the events that marked the transition from adolescence to adulthood. Young adults had a "predictable" pathway towards adulthood, and that status of adulthood was clearly defined.[148]

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140. *Id.* at 113.

141. *Id.*

142. Abrams, *supra* note 12, at 425.

143. *Id.* at 412, 425 n.100 (citing to evidence that the rule still explicitly or silently influences courts).

144. Appleton, *supra* note 7, at 1456.

145. *Id*. at 1481.

146. ARNETT, *supra* note 107, at 3.

147. *Id*. at 6. Arnett hypothesizes that this eagerness to settle down may have been due in part to the instability of the Great Depression and World War II.

148. COMM. ON IMPROVING THE HEALTH, SAFETY, & WELL-BEING OF YOUNG ADULTS, INST. OF MEDICINE & NAT'L RESEARCH COUNCIL, INVESTING IN THE HEALTH AND WELL-BEING OF

Beginning in the seventies, however, these pathways began to elongate and morph, sometimes beyond recognition.[149] Even as young people gained greater legal and civic responsibilities, it became more difficult to ascertain just what constituted adulthood from a social or socioeconomic perspective. These changes resulted in the formation of a new stage of life for young adults. Social scientists have labeled this period of life "emerging adulthood."[150] The characteristics of emerging adulthood further undermine the accuracy and usefulness of domicile, as young people take longer to decide where to establish their permanent home and to choose with whom they will share it.

A. Extending the Pathway to Adulthood

Marriage and parenthood have long served as defining benchmarks of adulthood.[151] Beginning in the seventies, however, women were no longer confined to marriage and the home; rather, they began to pursue higher levels of education and careers. Young men also began to attend college and pursue even higher levels of education at higher rates, meaning that young people of both genders began spending more time pursuing education and careers.[152] Between 1963 and 1968, the number of students enrolled in colleges and universities increased by 2,400,943 students, the largest jump in student enrollment in U.S. history.[153]

Due in large part to this increase in higher education enrollment,[154] it began to take young adults longer to reach the traditional markers of adulthood. The timing of traditional role transitions—such as leaving one's childhood home and entering the workforce—changed. So did the timing of marriage and parenthood.[155] In 1950, the median age of marriage was twenty for women and twenty-two for men. By 1970, there was only a slight rise to twenty-one and twenty-three, but by 2000 the average ages stood at twenty-five and twenty-seven, respectively.[156] As the timing of these markers changed, so did their importance, as young adults began to value other, more amorphous markers of adulthood, including financial independence and personal responsibility, and also began to view marriage and parenthood as "perils to be

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YOUNG ADULTS 3 (Richard J. Bonnie, Clare Stroud & Heather Breiner eds., 2015) [hereinafter INVESTING IN YOUNG ADULTS].

149. *Id.* at 3.

150. Jeffrey Jensen Arnett, a psychologist, first coined this phrase, and it is now widely used by others involved in researching or reporting on the phenomenon. ARNETT, *supra* note 107, at 4.

151. *See, e.g.*, INVESTING IN YOUNG ADULTS, *supra* note 148, at 43–44.

152. *See* ARNETT, *supra* note 107, at 5–6.

153. Thomas E. Steaher & Calvin F. Schmid, *College Student Migration in the United States*, 43 J. HIGHER ED. 441, 444 (1972).

154. Shelly Lundberg and Robert Pollak also attribute the delay in marital age to increased premarital cohabitation and other social changes that eroded "the social and legal significance of marriage." Shelley Lundberg & Robert A. Pollak, *The Evolving Role of Marriage: 1950–2010*, 25 FUTURE CHILD. 29, 31 (2015). For instance, they state that starting in the 1980s, "the age at which households were first formed remained roughly constant while first marriages were further delayed." *Id.* at 30.

155. INVESTING IN YOUNG ADULTS, *supra* note 148, at 1.

156. ARNETT, *supra* note 107, at 4.

avoided" until a later age.[157] Also, many people declined to marry altogether,[158] resulting in the need for new markers of adulthood.[159] Unlike prior generations, young adults in the seventies faced an extended and often circuitous path to adulthood. This new process of attaining adulthood began to significantly undermine the usefulness of domicile as a tool for measuring the lives of young adults. As the example of Judy Mas shows, many young adults had no "true, fixed, and permanent home."[160]

This long and winding "road to adulthood" has only become more pronounced among today's young adults.[161] Reaching adulthood is no longer as simple as turning eighteen or even twenty-one, finishing one's education, and moving away from home to get married and start one's own family.[162] Instead, young people now define adulthood by more gradual and incremental markers and face significant challenges in reaching those signifiers of adulthood. Jeffrey Jensen Arnett has labeled the period between the late teens and mid-to-late twenties, or even thirties, as a time of "emerging adulthood,"[163] a term that has gained widespread usage among those who study and report on this phenomenon. According to Arnett, this period of life is defined by "identity exploration[]," "instability," "self-focus[]," "in-between[-ness]," and "possibilities."[164]

The increase in the number of students who attend college has contributed to these delays and difficulties in many ways. The trend of increased higher education has only amplified since the seventies, and levels of education continue to rise.[165] This increase in young people seeking higher education can be attributed at least in part to "the massive economic restructuring of the last several decades," which has "reshaped the labor market into an hourglass with little middle ground between the security afforded by professional careers and the insecurity of low-wage unskilled work."[166] Consequently, "young people are incentivized to invest more in accruing advanced academic credentials" in order to "push through the bottleneck in this hourglass."[167] This phenomenon has created delays in young adults' entry into the workforce. Young adults now take longer to complete bachelor's degrees than they

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157. *Id*. at 6.

158. Lundberg & Pollack, *supra* note 154, at 30 ("More men and women than ever, though still a small minority, do not marry at all.").

159. ARNETT, *supra* note 107, at 4.

160. Mas v. Perry, 489 F. 2d 1396, 1399 (5th Cir. 1974) (quoting Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954)).

161. ARNETT, supra note 107, at 3.

162. Chelsea Smith, Robert Crosnoe & Shih-Yi Chao, *Family Background and Contemporary Changes in Young Adults' School-Work Transitions and Family Formation in the United States*, 46 RES. SOC. STRATIFICATION & MOBILITY 3, 5 (2016) (describing how "[a]ges once considered appropriate starting points are often deemed too young now, and the transition into adulthood is increasingly seen as a precursor to family formation rather than a setting for it").

163. ARNETT, *supra* note 107, at 4.

164. *Id*. at 8.

165. Jessica Hartogs, *Study: Record Number of Young Adults Living with Their Parents*, CBS NEWS (Aug. 1, 2013, 5:04 PM), http://www.cbsnews.com/news/study-record-number-of-young-adults-living-with-their-parents/ [https://perma.cc/FPA7-PNZG].

166. Smith et al., *supra* note 162, at 4.

167. *Id.*

used to, and about two-thirds of those who do earn a bachelor's degree plan to attend graduate school, meaning their education could last for most of their twenties, if not longer.[168] When they graduate, however, they often do so with large amounts of debt and few employment prospects.[169] Today's emerging adults face higher unemployment rates than any other age group.[170] Moreover, forty million Americans now have student loan debt that contributes to the financial difficulties faced by college graduates, especially as the average amount of student debt per person continues to increase rapidly.[171] The issue of student debt is even more severe for graduate students, who make up only 14% of students in all of higher education but carry 40% of the nation's student debt.[172] These educational and financial issues greatly contribute to delayed adulthood, as young adults graduate from college or graduate programs only to face limited job prospects and large loan payments.

As a result, many emerging adults return to their parents' homes after graduating or between career moves, hoping to pay off their loans and achieve financial stability.[173] Many also return home to achieve the freedom to explore new (and often risky or low-paying) career directions. As one reporter noted, many young adults "are rejecting the Dilbertian goal of a steady, if unsatisfying, job for years of experimentation, even repeated failure, that eventually leads to a richly satisfying career."[174] For young adults seeking a career more suited to their personal passions, living at home for a period of time is not "a sign of giving up; it's an economic plan"[175] that reflects their generation's emphasis on self-exploration and authentic identity formation. These young adults continue to tie their domiciles to those of their parents for practical reasons, not because they are still legally incapable of forming intent.

Economic pressures are only one of the factors contributing to a postponement, or abandonment, of traditional markers of adulthood. Before the advent of easily accessible contraception and abortion, pregnancy often resulted in marriage and parenthood, ending the period of experimentation and discovery experienced by

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168. ARNETT, *supra* note 107, at 131.

169. Adam Davidson, *It's Official: The Boomerang Kids Won't Leave*, N.Y. TIMES MAG. (June 20, 2014), http://www.nytimes.com/2014/06/22/magazine/its-official-the-boomerang-kids-wont-leave.html?_r=0 [https://perma.cc/U4JQ-3Y9D] ("In 1970 only one in 10 Americans had a bachelor's degree, and nearly all could expect a comfortable career. Today, about a third of young adults will earn a four-year-degree, and many of them—more than a third, by many estimates—are unlikely to find lifelong secure employment sufficient to pay down their debt and place them on track to earn more than their parents.").

170. ALYSSA DAVIS, WILL KIMBALL & ELISE GOULD, ECON. POLICY INST., THE CLASS OF 2015: DESPITE AN IMPROVING ECONOMY, YOUNG GRADS STILL FACE AN UPHILL CLIMB 3 (2015), http://www.epi.org/files/2015/the-class-of-2015-revised.pdf [https://perma.cc/7N94-FSUE].

171. Blake Ellis, *40 Million Americans Now Have Student Loan Debt*, CNN MONEY (Sept. 10, 2014, 3:01 PM), http://money.cnn.com/2014/09/10/pf/college/student-loans/ [https://perma.cc/E83P-CXKS]; Halah Touryalai, *Student Debt: The Next Financial Crisis?* FORBES (Feb. 8, 2012, 5:26 PM), http://www.forbes.com/sites/halahtouryalai/2012/02/08/student-debt-the-next-financial-crisis/#4ecd858740c2 [https://perma.cc/MV6W-C8BJ].

172. Jon Marcus, *The Real Student Debt Problem No One Is Talking About*, TIME (Nov. 9, 2014), http://time.com/3544912/graduate-school-loans-debt/ [https://perma.cc/BY26-6KKU].

173. *See, e.g.*, Hartogs, *supra* note 165.

174. Davidson, *supra* note 169.

175. *Id.*

young adults. As Professors Naomi Cahn and June Carbone have explained, for many couples, "the improvident pregnancy triggered the assumption of adult responsibilities the couple might have preferred to postpone."[176] Today's emerging adulthood is partly a result of economic distress, but also partly a result of expanded freedom.

The post-college experience of these "boomerang kids" who return to their homes of origin is increasingly common: one 2015 source reports that at least 36% of eighteen to thirty-one year olds now live with their parents.[177] Although some commentators characterize these young adults as entitled and lazy, others laud their choices as "practical, long-term financial move[s]."[178] And even those young adults who do not move back home often maintain financial ties to their parents. Most young adults continue to receive financial support from their parents well into their mid twenties, regardless of whether they live with them.[179]

This continued parental support can stem from a desire to allow young adults to "follow their dreams," which in turn reflects the open-ended nature of emerging adulthood, during which young people spend an extended period of time exploring their options for careers, homes, and romantic partners. During this time of exploration and identity formation, emerging adults are unlikely to form permanent attachments to anything, anyone, or any place. They are likely to maintain ties to their parents, however, due to the difficulty of achieving financial independence but also to the fact that they will likely not form family units of their own for some time.[180]

In addition to financial support and healthcare, moreover, emerging adults frequently rely on their parents' guidance in life decisions both big and small and often feel more emotionally connected with parents than did prior generations.[181] This dependency cuts across socioeconomic lines, although it affects different classes in different ways. For the college educated, it is correlated with later age of first marriage, as young adults with college degrees seek to become financially self-sufficient before marrying—and before having children.[182] For young adults from lower socioeconomic classes, who are more likely to have children outside of marriage and at an earlier age, it can mean the intensive involvement of their parents in the raising and financial support of their own children.[183] Many young adults see adulthood as the

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176. NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 51 (2010).

177. INVESTING IN YOUNG ADULTS, *supra* note 148, at 43.

178. Davidson, *supra* note 169.

179. Samantha Raphelson, *Some Millenials—And Their Parents—Are Slow To Cut the Cord*, NPR (Oct. 21, 2014, 6:40 AM), http://www.npr.org/2014/10/21/356951640/some-millennials-and-their-parents-are-slow-to-cut-the-cord [https://perma.cc/QSD7-BBRN] (describing how many parents are willing to support children who have left the family home because "they invented the idea of striving for a career you really want").

180. *See* ARNETT, *supra* note 107 at 56–57.

181. *See* Raphelson, *supra* note 179.

182. *See* June Carbone, *Unpacking Inequality and Class: Family, Gender and the Reconstruction of Class Barriers*, 45 NEW ENGL. L. REV. 527, 551 (2011) (noting that during the 1990s, the average age of childbearing continued to rise for college-educated women but remained flat for others).

183. *See* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 393 (2008) (discussing involvement of grandparents in assisting single parents with childcare); *see also* Jessica Dixon Weaver, *Grandma*

culmination of a gradual progression away from the traditional markers of dependence, but that process will take significantly longer than it might have in the past.[184]

Other characteristics of emerging adulthood further muddle this inquiry. In particular, the mobility of emerging adults demonstrates that very few twenty-year-olds have a permanent intention to reside anywhere. In earlier generations, young adults settled into permanent careers immediately or soon after graduating high school or college. Now, however, young adults are highly likely to face unemployment and uncertainty in their careers.[185] If they are lucky enough to be employed, that employment is often unstable and likely to change. Young adults now change jobs an average of seven times in their twenties,[186] and change their residences even more frequently.[187] At the age of eighteen, rates of mobility for young adults increase drastically, and they continue to increase until they peak in the midtwenties, meaning that young adults "rarely know where they will be living from one year to the next."[188] This instability reflects the fact that emerging adults tend to only have a vague "plan" for their lives, a plan that "is subject to numerous revisions" as young adults explore different career paths in different locations.[189]

As a result, even young adults who forego college or have graduated from college or graduate school may lack the ability to truly choose a domicile. Imagine a young woman from, say, Minnesota, who strikes out on her own in Los Angeles or New York City and relies on a monthly check from her Minnesotan parents to make rent. She telephones Minnesota most days for life advice from her mother and visits Minnesota several times a year, for major holidays. Perhaps her parents still claim her as a dependent for income tax purposes. They may even still claim her as a dependent for health insurance purposes. She likely has only a tentative idea of where the next few years of her life will take her, in terms of both jobs and locations. It's quite likely that she may move back to Minnesota to live with her parents again, if only for a brief period, and it's just as likely that she could move to several other states, or even countries, before forming a "permanent" residence. Many courts today would hold that she never abandoned her Minnesota domicile.[190] Linking her to her parents' home, however, despite her close financial and emotional ties to her parents, likely does not reflect the reality of her present or her future. Her future simply does not fit within the framework of domicile, in large part because young adults' lives no longer follow set and well-established paths.

Emerging adults may have some vague conception of what they want to do and where they want to be, but those ideas are amorphous and subject to frequent

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in the White House: Legal Support for Intergenerational Caregiving, 43 SETON HALL L. REV. 1, 29–31 (2013) (discussing varying cultural traditions of kin care).

184. INVESTING IN YOUNG ADULTS, *supra* note 148, at 45.

185. *Id.* at 47. The unemployment rate for the under-twenty-five population is twice that of the general population. *Id.*

186. Heidi Stevens, *Bright Side of Millennials Moving Home*, CHI. TRIB. (Mar. 11, 2014), http://articles.chicagotribune.com/2014-03-11/features/sc-fam-0311-millennials-20140311_1_millennials-jeffrey-jensen-arnett-pew-report [https://perma.cc/H5U5-FRTZ].

187. ARNETT, *supra* note 107, at 11.

188. *Id*.

189. *Id.* at 10.

190. *See infra* Part IV.

change—an instability exacerbated by a punishing job market and extensive student loan debt.[191] Consequently, marshalling the evidence to prove their domiciliary intent is difficult, and the rigid confines of domicile fail to capture the amorphous nature of their intentions.

B. Emerging Adulthood and the Law

The social and legal ages of adulthood diverged in the 1970s, as the legal age of majority decreased and the social age of adulthood began to increase. Prior to the early seventies, the legal age of majority was almost universally set at twenty-one,[192] a tradition inherited from English common law.[193] Some states set the age of majority slightly lower for women, reflecting the expectation that they were to marry young, while men needed more time to complete their education.[194] By the mid-1970s, however, only Utah and Arkansas still differentiated between men and women in this respect,[195] and the country was moving toward a lower age of majority for both sexes. Political pressures drove most of this change.

During World War II, Congress lowered the draft age to eighteen.[196] This legislation sparked a push for extending voting rights to eighteen-year-olds. Proponents of lowering the voting age argued that if young people were "old enough to fight, [they were] old enough to vote."[197] While this initial push had limited success, leading just a few states to lower their voting ages, it grew into a nationwide campaign in the late sixties and early seventies when young people rallied in opposition to the decidedly unpopular Vietnam War.[198]

Proponents of lowering the voting age argued that, due to "rising level[s] of education," young people were "better equipped to exercise the right" to vote than were previous generations.[199] Opponents of this change, however, argued that lowering the voting age would lead to "a flood of student votes in university communities," meaning that "temporary residents" with "nothing material at stake" would fail to "sober[ly] consider[]" their decisions and would "overwhelm[] the local electors."[200]

These arguments reflect the transitional moment in which they were made as well as traditional notions of electoral capacity. Beginning in the 1970s, "expanding

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191. *See* Davidson, *supra* note 169.

192. Hamilton, *supra* note 22, at 1831.

193. Vivian Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK. L. REV. 1447, 1453 (2012).

194. See *supra* Part II.

195. Stanton v. Stanton, 421 U.S. 7, 15 (1975). The Equal Rights Amendment would have required that states have the same age of majority for both men and women. BROWN ET AL., *supra* note 139, at 101.

196. THOMAS H. NEALE, CONG. RESEARCH SERV., No. 83-103 Gov., THE EIGHTEEN YEAR OLD VOTE: THE TWENTY-SIXTH AMENDMENT AND SUBSEQUENT VOTING RATES OF NEWLY ENFRANCHISED AGE GROUPS 4 (1983), http://digital.library.unt.edu/ark:/67531/metacrs8805/m1/1/high_res_d/83-103GOV_1983May20.pdf [https://perma.cc/D347-YGL8]; *see also* WENDELL W. CULTICE, YOUTH'S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA (1992).

197. NEALE, *supra* note 196, at 4.

198. Hamilton, *supra* note 193, at 1453.

199. NEALE, *supra* note 196, at 8.

200. *Id.* at 9–10.

mobility and increased affluence" among the American populace contributed to a rise not only in the number of young adults seeking higher education, but also in those attending colleges in states other than their home state.[201] Both men and women began to seek more education and, in doing so, became more transient.

Like the judge in the *Mas* trial, however, opponents of lowering the voting age believed that students could not have any domiciliary intent regarding the place where they attended school. This belief mirrored arguments about voter capacity made as early as the seventeenth century, when legislators defended property-based voter qualifications on the basis that voters should have "a permanent fixed interest" in both the nation and their locality.[202] Property ownership, the argument went, ensured that a voter would have a "personal stake in and knowledge of the community," unlike "transients" that could be "here today, and gone tomorrow."[203] In these ways, property status and student status have each served as proxies for domiciliary intent and permanent connections (or lack thereof). The changes among the life patterns of young adults in the 1970s, however, began to undermine the usefulness of these proxies.

Despite these arguments against lowering the voting age, the government moved to extend voting rights to eighteen-year-olds in anticipation of the 1972 presidential election. The 1971 extension of the Voting Rights Act granted voting rights to eighteen-year-olds participating in federal elections,[204] and the 26th Amendment extended that provision to state and local elections.[205] The new voting age corresponded to a new conception of the legal age of majority and the corresponding "rights and responsibilities of young people."[206] Across the United States, young people were now widely considered legal adults at the age of eighteen.[207]

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201. Comment, *Vlandis v. Kline: Due Process and Status Determination Under State Tuition Regulations*, 59 IOWA L. REV. 712, 712 (1974) (footnote omitted).

202. Hamilton, *supra* note 193, at 1456.

203. *Id.* at 1457.

204. NEALE, *supra* note 196, at 11. Upon signing the bill into law, President Nixon remarked that he believed eighteen-year-olds should have the right to vote because they were smart enough to do so, not because they were old enough to fight. Hamilton, *supra* note 193, at 1463. The Voting Rights Act as passed purported to extend voting rights for state and local elections in addition to federal ones, but the Supreme Court struck down those provisions of the Act, ruling that it was beyond Congress's enumerated powers to regulate any elections other than federal ones. *Oregon v. Mitchell*, 400 U.S. 112, 117–18 (1970). A few states filled the gap and extended voting rights to eighteen-year-olds, but most others were hampered by the difficulties of amending their own state constitutional provisions and administrative systems, making the federal constitutional amendment both necessary and desirable. NEALE, *supra* note 196, at 12.

205. U.S. CONST. amend. XXVI, § 1; ROBERT F. CARBONE, STUDENTS AND STATE BORDERS: FISCAL/LEGAL ISSUES AFFECTING NONRESIDENT STUDENTS 49 (1973). The 26th Amendment was ratified with "unprecedented speed." NEALE, *supra* note 196, at 14. The amendment created a class of 11,000,000 potential new voters, but actual turnout rates in the 1972 election were much lower for that age group. Neale's report hypothesizes that this was due in part to "greater mobility combined with residency requirements for registration." *Id.* at 16. Some states now allow seventeen-year-olds to vote if they will turn eighteen in time for the general election. Hamilton, *supra* note 193, at 1473.

206. CARBONE, *supra* note 205, at 43.

207. INVESTING IN YOUNG ADULTS, *supra* note 148, at 25.

States were simultaneously lowering the marital age of consent for men. Traditionally, many states had different rules for marital consent for men and women, with a higher age for men, who presumably needed more time to develop a profession to support a dependent wife.[208] By the 1970s, half of the states had lowered their age of marital capacity from twenty-one to eighteen for both sexes.[209] Examined in isolation, the reduction of the age of consent would appear to encourage the onset of social adulthood, not delay it. For instance, when the age of consent was twenty-one, young people could generally marry at an earlier age, provided they had the consent of their parents. Moving the age of consent to eighteen, or younger, meant that younger adults could choose to marry on their own without approval by their parents.

But the downward shift in legal adulthood coincided with other legal changes that cut in the opposite direction. Women increasingly demanded equal rights and gained access to professions that would enable them to be self-sufficient.[210] The Supreme Court struck down laws banning the sale of contraceptive devices, first to married couples,[211] and then to single people.[212] The Court also declared unconstitutional many restrictions on abortion.[213] Restrictions on pre- or extramarital sex went unenforced,[214] and legal disabilities imposed on nonmarital children were invalidated.[215] Marriage might be available to young men at an earlier age, but that did not mean it was desirable or necessary. Once sex outside of marriage was socially and legally acceptable, reliable prevention of pregnancy was widely available, and women were capable of supporting themselves economically, the entire architecture of interdependency that had encouraged early marriage disappeared.[216]

As this architecture crumbled, other economic changes—namely, more years of more expensive education combined with a shaky job market—further contributed to delayed attainment of social adulthood. Recent measures taken by the federal government show that many government representatives recognize the economic challenges facing emerging adults transitioning to adulthood, at least in the area of healthcare. When members of Congress proposed an addition to the Affordable Care Act that would allow young adults to stay on their parents' healthcare plan until age twenty-six,[217] they focused on the "time of transition and uncertainty" many young

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208. JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND FAMILY IN 20TH CENTURY AMERICA 44 (2011).

209. Hamilton, *supra* note 22, at 1830–31.

210. *See supra* Part II.

211. Griswold v. Connecticut, 381 U.S. 479 (1965).

212. Eisenstadt v. Baird, 405 U.S. 438 (1972).

213. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973).

214. *See* Lawrence v. Texas, 539 U.S. 558, 569 (2003) (discussing lack of enforcement of sodomy laws) *But see* Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 23–26 (1998) (discussing enforcement of adultery and fornication bans in the military and showing how despite nonenforcement of criminal law, violation of these prohibitions could result in other legal impediments).

215. *See* Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015) (discussing illegitimacy cases).

216. For a discussion of the criminalization of nonmarital sex and its effects on marriage, see Kerry Abrams, *The End of Annulment*, 16 J. GENDER, RACE & JUST. 681, 688 (2013).

217. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 132, sec. 1001, § 2714(a) (codified at 42 U.S.C. § 300gg-14 (2012)) ("A group health plan and a

adults face during that time period.[218] The lawmakers noted the trend of emerging adulthood, focusing in particular on the fact that young adults frequently change jobs, work in part-time or temporary positions that do not provide healthcare, or lack the funds to pay for their own healthcare.[219] These issues meant that prior to passage of the Affordable Care Act, when young adults were cut off from their parents' healthcare at twenty-one, young people over the age of twenty-one had the highest uninsured rate among all U.S. age groups.[220] Lack of insurance also exacerbated financial issues among the young population by allowing for huge amounts of medical debt that affected the repayment of other types of debt, including student loan debt.[221]

Various proposals for health-care reform used different ages as the new cutoff point—twenty-six,[222] twenty-seven,[223] and even twenty-nine.[224] The range of proposed ages shows the difficulty of defining the age at which true social and legal adulthood coincide.[225] By allowing young adults to stay dependent on their parents' healthcare, the legislators argued, they were freeing young adults and allowing them "a long way down the path of some independence, some liberation to follow their [dreams]."[226]

In short, the law has struggled to adapt to the reality of emerging adulthood. Just as gender equality challenged traditional understandings of married women's lack of capacity to form their own domicile, emerging adulthood challenges the notion that young adults have capacity to do so. Both trends were prefigured by *Mas*, in which the appellate court reluctantly declined to apply the derivative domicile rule to its full effect and used well-established principles of domicile to craft a new rule that tied adult students to their parents and homes. That *Mas* concerned students was no

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health insurance issuer offering group or individual health insurance coverage that provides dependent coverage of children shall continue to make such coverage available for an adult child (who is not married) until the child turns 26 years of age.").

218. Press Release, Congressman Chris Van Hollen, Van Hollen, Dahlkemper, Schwartz, Baldwin Urge Inclusion of Provision To Improve Health Care for Young Adults (Oct. 8, 2009), http://vanhollen.house.gov/media-center/press-releases/van-hollen-dahlkemper-schwartz-baldwin-urge-inclusion-of-provision-to.

219. *Id.*

220. 155 CONG. REC. 15422 (2009) (statement of Rep. Dahlkemper).

221. SARA R. COLLINS & JENNIFER L. NICHOLSON, COMMONWEALTH FUND, RITE OF PASSAGE: YOUNG ADULTS AND THE AFFORDABLE CARE ACT OF 2010, at 2 (2010), http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2010/May/1404_Collins_rite_of_passage_2010_v3.pdf [https://perma.cc/HZ2H-WRBR].

222. 155 CONG. REC. 20903 (2009) (statement of Sen. Dodd).

223. News Release, *Pelosi Announces Key Provision in Health Insurance Reform for Young Adults*, PR NEWSWIRE (Oct. 13, 2008), http://www.prnewswire.com/news-releases/pelosi-announces-key-provision-in-health-insurance-reform-for-young-adults-64152797.html [https://perma.cc/RQQ5-UZT2].

224. 155 CONG. REC. 15422 (statement of Rep. Dahlkemper).

225. INVESTING IN YOUNG ADULTS, *supra* note 148, at 25 ("From biological and societal perspectives, no compelling evidence supports 26 versus 24, 25, 27, or 28 [as the appropriate age of adulthood]. . . . [But] 26 (up to the 27th birthday) denotes a point at which a large majority of young adults have completed some of the transitions associated with adulthood . . . .").

226. News Release, *supra* note 223.

accident; it was in the realm of student tuition that the tensions over gender equality, emerging adulthood, and the limits of domicile came to a head.

IV. THE BATTLE OVER TUITION

Before the late 1960s and early 1970s, the American system of higher education was "relatively well-ordered."[227] Because young adults were considered minors until the age of twenty-one, they retained their parents' domicile until that age, even when attending an out-of-state college or university.[228] Even after turning twenty-one, out-of-state students faced almost insurmountable challenges in overcoming their initial classification as nonresidents, largely because they would likely not have time to fulfill a durational residency requirement before graduating.[229] For female students, marriage often ended their education, as they became housewives or worked to put their husbands through school.[230]

The new age of legal adulthood and the new move toward gender equality, however, fundamentally altered this system. To many, the "enfranchisement of eighteen year olds" signified that eighteen-year-olds were also now capable of forming their own domicile.[231] As one judge reasoned, the extension of the right to vote to an eighteen-year-old ended that individual's "traditional dependence on his parents, including the view that their home is his residence."[232] Consequently, many viewed eighteen-year-olds as capable of forming a separate domicile, and many eighteen-year-olds were willing to do so by traveling to other states to attend college. At the same time, courts began to dismantle the architecture of coverture, the law by which married women were legally subservient to their husbands, in favor of a "partnership" model of marriage.[233]

These changes wreaked havoc on the settled system of tuition setting and university financing. In particular, they called into question the usefulness of domicile in determining state citizenship for educational purposes. Just as the judges in *Mas v.*

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227. CARBONE, *supra* note 205, at 49.

228. Deborah F. Masters, Comment, *Nonresident Tuition Charged by State Universities in Review*, 38 UMKC L. REV. 341, 350 (1970) ("It is . . . the rule . . . that the university student begins his career as a minor, living in university-provided housing away from his parents' home. . . . Ordinarily the child's domicile is as a matter of law that of his parents . . . .").

229. CARBONE, *supra* note 205, at 9; *see also* Palley, *supra* note 81, at 7 (stating that states had "a de facto four-year waiting period" for establishing residency due to the higher age of majority (italics omitted)).

230. BETTY FRIEDAN, THE FEMININE MYSTIQUE 16 (1963) ("By the mid-fifties, 60 per cent dropped out of college to marry, or because they were afraid too much education would be a marriage bar. Colleges built dormitories for 'married students,' but the students were almost always the husbands. A new degree was instituted for the wives—'Ph.T.' (Putting Husband Through).").

231. Barry D. Glazer, Note, *Education at a Discount: Qualifying for Resident Tuition at State Universities*, 5 U. MICH. J.L. REFORM 541, 549 (1972).

232. Gene I. Maeroff, *Residency: Challenge Over Tuition*, N.Y. TIMES, Jan. 16, 1972, at E11 (discussing the judge's reasoning).

233. *See infra* Part II (discussing legal challenges to sex-discriminatory family law); *see also* Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 739–40 (2012) (discussing rise of partnership model of marriage in the 1960s and 1970s).

Perry questioned the applicability of the derivative domicile rule to Jean Paul and Judy Mas's marriage and wondered whether a student could obtain a new domicile apart from her parents, so did colleges and universities across the country grapple with these same issues in a variety of cases. This Part first explores how emerging adulthood and gender equality worked together to undermine the educational financing system and then examines the resulting litigation and the effects it had on traditional uses of domicile.

A. A New Standard for Student Residency

American college students in the 1970s were highly mobile[234] and continue to be so. Women in particular gained mobility during this period, as traditionally male schools opened their doors to students of both genders.[235] Although the rates of migration to public institutions decreased during the seventies, the number of students migrating to attend private institutions increased during the same period.[236] This disparity reflects the affluence of the students attending those private institutions.[237] But it also reflects the deterrent effect of barriers put in place by public institutions to prevent more budget-conscious students from attending college outside their home state, barriers that resulted from another ongoing economic change.[238]

Just as more students sought higher levels of education, state systems of higher education faced budgetary crises. Public schools responded to their deflating budgets, as well as the prospect of eighteen-year-olds with a new potential capacity to establish domicile, by restricting the admission of out-of-state students and raising

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234. CARBONE, *supra* note 205, at 13. Carbone points to the fact that, in 1972, more than 450,000 students matriculated at a public institution of higher education in a state different from the one where they attended high school, calling it "a function of affluence and of the willingness of public institutions to welcome nonresident students." *Id.*

235. Although many state universities, especially those in the western part of the country were coeducational from their inception, several held out until the 1960s and 1970s. For example, the University of North Carolina first admitted women in 1963, Texas A&M in 1964, UC Irvine in 1965, Georgia State in 1967, and University of Virginia in 1970. Many private schools, including most of the Ivy League, did not admit women until this period (e.g., Princeton—1969, Yale—1969, Brown—1971, Harvard College—1972, Dartmouth—1972, Columbia College—1983). Claudia Goldin & Lawrence F. Katz, *Putting the Co in Education: Timing, Reasons, and Consequences of College Coeducation from 1835 to the Present* 30–31 (Nat'l Bureau of Econ. Research, Working Paper No. 16281, 2010).

236. Steaher & Schmid, *supra* note 153, at 444.

237. As one scholar found, there was a "very strong positive relationship between income and interstate migration" for college students at this time. Robert H. Fenske, Craig S. Scott, & James F. Carmody, *Recent Trends in Studies of Student Migration*, 45 J. HIGHER EDUC. 61, 67 (1974). For students who attended schools close to home, low cost was a major motivating factor, while those who went to schools out of state valued the institution's national reputation more. *Id.* at 69–70.

238. *Id.* at 71 (pointing to "the erection of a variety of barriers . . . to stem the influx of out-of-state college students," including "prohibitively high levels of tuition, achievement and aptitude admission standards that are higher for nonresidents than for residents, and outright quota restrictions"); *see also* Palley, *supra* note 81, at 2 (crediting the decline in out of state student enrollment to "access barriers newly raised by the states").

nonresident tuition rates.[239] Before 1968, resident and nonresident tuition rates were roughly equivalent, but in the late sixties and early seventies, state institutions began to raise tuition rates.[240] By 1973, the tuition differential between nonresident and resident students had nearly doubled,[241] in an attempt to "extract more money from nonnative students or to discourage their attendance."[242]

As a result, the capacity of eighteen-year-olds to form a domicile separate from that of their parents became immensely important. If young adults could prove that they were domiciled in a new state upon matriculating at a college there, they would only have to pay resident tuition rates. Those young adults would reap substantial financial benefits, while the school they were attending would suffer significant financial losses. Professor Raymond Carbone predicted that, should these tuition differentials disappear, universities would experience potential losses of $250–300 million annually.[243] Universities paid attention to this legal landscape and to these predictions, with some steeply raising tuition for all students in anticipation.[244] These "doomsday" predictions did not come to fruition, but out-of-state students, as well as parents funding their children's education, "became aware of the relationship between newfound voter status and the higher tuition" they were charged.[245]

Higher education struggled to confront these issues, resulting in an intricate system of regulations for tuition classification. The complexity and variety of these classifications among the states made the world of residency requirements analogous to "a keg of fishhooks."[246] Schools heightened their efforts to verify which students should actually be classified as residents,[247] while students began to find inventive ways of establishing residency in the state where their schools were located[248] and to bring lawsuits when those efforts failed.[249]

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239. CARBONE, *supra* note 205, at 27; *see also* Palley, *supra* note 81, at 8.

240. CARBONE, *supra* note 205, at 3.

241. *Id.* at 19.

242. Palley, *supra* note 81, at 8.

243. Iver Peterson, *Youth Residency Perils College Funds*, N.Y. TIMES, Sept. 28, 1972, at 36.

244. Evan Jenkins, *State Colleges Spared from Expected Losses in Out-of-State Tuition Fees*, N.Y. TIMES, Dec. 2, 1973, at 30. For instance, the University of Michigan had raised its tuition rates by an average of 24% in anticipation of drastic revenue losses, but planned to return some of that money to students after it did not suffer the losses it had expected. *Id.*

245. CARBONE, *supra* note 205, at 50; *see also* Masters, *supra* note 228, at 341 ("With the increasing mobility of the American populace, and the increasing numbers of students entering the universities at younger ages than ever before and demanding more rights, the problems of determining residency are becoming more complex.").

246. CARBONE, *supra* note 205, at 7.

247. William P. Barrett, *Out-of-Staters Face Rutgers Crackdown*, N.Y. TIMES, May 4, 1975, at 90. Previously, students had filled out their own tuition bill which enabled students to just fill in the in-state tuition amount, so the University changed to a computerized system where the amount was already filled out, and instituted auditing procedures to verify student residency. *Id.*

248. *Id.* Barrett discusses some of these students' "imaginative ideas," which included buying cemetery plots in states that placed weight on property ownership.

249. Carbone describes the litigiousness of this period as one of "increasing student penchant to carry their grievances to the courts." CARBONE, *supra* note 205, at 9.

Most universities arrived at a solution that incorporated both domicile and residence into in-state tuition regulations.[250] A student would first have to demonstrate that he or she was domiciled in a particular state, using the traditional definition of domicile. The California Education Code, for example, defined residence as the singular "place where one remains when not called elsewhere for labor or other special or temporary purpose, . . . to which he returns in seasons of repose," and which "cannot be lost until another is gained."[251] This definition of "residence" matched California's definition of "domicile."[252] One court found that the purpose of the Education Code was to ensure that a person "was not temporarily residing within the state for the mere purpose of securing the advantages of the university" but rather intended to become a permanent resident of the state—thus highlighting the aspect of domicile that focuses on long-term intent and not simply residence.[253] But the California Education Code went one step further beyond merely requiring that those seeking in-state tuition demonstrate domicile. Students would also have to demonstrate that they had been domiciled in California for at least a year prior to their first day of classes at the school.[254] This rule prevented students from relocating to California solely to take advantage of in-state tuition. In order to establish domicile in California, they would need to demonstrate the intent to become a permanent resident, not merely to access in-state tuition. A student who paid out-of-state tuition for one year, then, would not become an in-state student during the second year, as no domicile (or, in the words of the California statute, "bona fide residen[ce]"[255]) had been established. The California Code further stated that "the residence of the husband is the residence of the wife," thereby explicitly incorporating the concept of derivative domicile, and, as we shall see, opening up ample room for extensive litigation.[256]

Many other states followed California's model in their attempts to balance the rights of state citizens with the financial needs of universities.[257] These were

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250. *See, e.g.*, Eastman v. Univ. of Mich., 30 F.3d 670, 672 (6th Cir. 1994) (describing residency rules adopted by Michigan in 1974).

251. Kirk v. Bd. of Regents, 78 Cal. Rptr. 260, 262 (Cal. Ct. App. 1969) (citing California regulations), *appeal dismissed*, 396 U.S. 554 (1970).

252. *Id.* at 262–63.

253. *Id.* at 263 (citing Bryan v. Regents of Univ. of Cal., 205 P. 1071 (Cal. 1922)).

254. *Id.* at 261–62.

255. *Id.*

256. *Id.* at 262.

257. *See, e.g.*, N.C. GEN. STAT. ANN. § 116-143.1 (West, Westlaw through 2016 Reg. Sess.) (first enacted in 1971); *see also* Hooban v. Boling, 503 F.2d 648, 650 (6th Cir. 1974) (describing the University of Tennessee's tuition regulations); Kelm v. Carlson, 473 F.2d 1267, 1268–69 (6th Cir. 1973) (challenging the University of Toledo's tuition regulations); Black v. Sullivan, 561 F. Supp. 1050, 1074 (D. Me. 1983) (attaching the University of Maine's administrative rules and regulations for tuition and residency as Appendix A); Hasse v. Bd. of Regents, 363 F. Supp. 677, 678 (D. Haw. 1973) (challenging Hawaii's durational residency requirement); Clarke v. Redeker, 259 F. Supp. 117, 121–22 (S.D. Iowa 1966) (quoting the regulation applied to students enrolling at the State University of Iowa); Hauslohner v. Regents of Univ. of Mich., 272 N.W.2d 154, 156–57 (Mich. Ct. App. 1978) (quoting the University of Michigan's tuition regulations); DeCecco v. Bd. of Regents, 442 N.W.2d 585, 588 (Wis. Ct. App. 1989) (citing Wisconsin's tuition regulation).

challenged by students who were denied access to in-state tuition, but the Supreme Court consistently proved to be unsympathetic towards the students.[258]

Residency requirements appeared more vulnerable following the Supreme Court's articulation in *Shapiro v. Thompson*, of a constitutional right to travel.[259] *Shapiro* concerned residency requirements that denied welfare assistance to residents of states who had not lived in those states for a minimum of one year.[260] The Supreme Court found the statutes unconstitutional, holding that the "constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union" and that the statutes abridged this right in violation of equal protection.[261]

Although *Shapiro* concerned welfare residency requirements, not tuition residency requirements, the parallels were clear. The states in *Shapiro* had argued that the purpose of the challenged statutes was to "preserve the fiscal integrity of state public assistance programs."[262] This concern, however important, was not sufficient to override potential migrants' constitutional right to travel.[263] *Shapiro* largely insulated universities, however, by inserting a potentially large loophole in a footnote. By characterizing the penalty imposed by the state in *Shapiro* as one that could impair someone's "ability . . . to obtain the very means to subsist—food, shelter, and other necessities of life,"[264] the Court implied that less severe penalties might not be significant enough to trigger constitutional scrutiny. Indeed, the Court pointedly took "no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth."[265]

This exception proved to be robust in tuition litigation that followed.[266] In 1973, in *Vlandis v. Kline*, the Court heard a case concerning a Connecticut statute that created an irrebuttable presumption of nonresidency for state university students whose legal addresses were outside Connecticut when they applied for admission.[267] The Court found the statute to violate due process because it included some bona fide

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258. *See* Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971); Sturgis v. Washington, 368 F. Supp. 38 (W.D. Wash.), *aff'd mem.*, 414 U.S. 1057, 1057–58 (1973).

259. 394 U.S. 618, 630–31 (1969).

260. *Id.* at 622–26 (discussing the statutes at issue, which imposed one-year residency requirements for welfare benefits in Connecticut, Washington, D.C., and Pennsylvania).

261. *Id.* at 630, 633 (omission in original) (quoting United States v. Guest, 383 U.S. 745, 757 (1966))

262. *Id.* at 627.

263. *Id.* at 629.

264. *Id.* at 627.

265. *Id.* at 638 n.21.

266. In addition to deciding cases about in-state tuition, courts have also ruled on durational residency requirements involving: divorce, Sosna v. Iowa, 419 U.S. 393 (1975) (sustaining one-year durational residency requirement); eligibility for elective office, Kanapaux v. Ellisor, 419 U.S. 891 (1974) (mem.) (sustaining requirement), and Sununu v. Stark, 420 U.S. 958 (1975) (mem.) (sustaining requirement); aliens applying for welfare assistance, Graham v. Richardson, 403 U.S. 365 (1971) (striking down requirement); and nonemergency health care, Mem'l Hosp. v. Maricopa County, 415 U.S. 250 (1974) (striking down requirement).

267. 412 U.S. 441, 442, 452 (1973).

state residents as nonresidents.[268] In its opinion, the Court endorsed Connecticut's rewritten law, which incorporated a domicile standard. Rather than looking only at a student's address, the University would also consider his or her "year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, marital status, vacation employment, etc."[269] This dictum opened the door for universities to impose a one-year residency rule so long as the "residency" was based on these traditional indicators of domicile. Although the Court never directly addressed the issue of durational residency requirements for in-state tuition, many lower courts did, uniformly upholding them.[270]

Despite an earlier age of majority, then, the new durational residency rules functioned to make it more, not less, difficult for college students to demonstrate independence from their parents. Students who moved solely for education could not obtain a domicile in their new place of residence—at least not for purposes of the most salient aspect of their new state citizenship, in-state tuition. Instead, they retained the domiciles of their parents. This is likely why Oliver Perry's lawyer questioned Judy Mas about whether she was paying in-state or out-of-state tuition. If her answer had been "in-state," the implication would have been that she had established a domicile separate from that of her parents.

As the *Mas* case suggests, the new residency rules had implications far beyond the undergraduate years. They applied to anyone, even students in their twenties or thirties who were seeking a graduate education. And they applied to married students as well. Because of the derivative domicile rule that presumed that a married woman took the domicile of her husband, the application of tuition residency requirements to married students created the most complex litigation of all.

B. The Return of Derivative Domicile

When the *Mas v. Perry* court analyzed Judy Mas's domicile, it ran up against two

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268. *Id.* at 452.

269. *Id.* at 454 (quoting Op. of the Att'y Gen. of the State of Conn. Regarding Non-Resident Tuition, 1972 WL 24937 (Conn. A.G., Sept. 6, 1972)).

270. *See, e.g.*, Ward v. Temple Univ., No. Civ.A 02-7414, 2003 WL 21281768 (E.D. Pa. Jan. 2, 2003); Teitel v. Univ. of Hous. Bd. of Regents, 285 F. Supp. 2d 865 (S.D. Tex. 2002); Markowitz v. Univ. of Cal., No. A096182, 2002 WL 31428619 (Cal. Ct. App. Oct. 30, 2002); Gurfinkel v. L.A. Comm. Coll. Dist., 175 Cal. Rptr. 201 (Cal. 1981); Kirk v. Bd. of Regents, 78 Cal. Rptr. 260, 266 (Cal. Ct. App. 1969), *appeal dismissed*, 396 U.S. 554 (1970). Nevertheless, durational residency requirements have periodically come under attack, usually from law students paying out-of-state tuition. *See, e.g.*, John W. Anderson, Comment, *Strangers in their Own Land: Durational Residency Requirements for Tuition Purposes, Though Illegal, Are Here to Stay*, 85 NEB. L. REV. 1058 (2007); Douglas R. Chartier, Note, *The Toll for Traveling Students: Durational-Residence Requirements for In-State Tuition After* Saenz v. Roe, 104 MICH. L. REV. 573 (2005); Lawrence J. Conlan, Note, *Durational Residency Requirements for In-State Tuition: Searching for Access to Affordable Higher Learning*, 53 HASTINGS L.J. 1389 (2002); Michael Llewellyn, Note, *Citizens Without Statehood: Denying Domicile To Fund Public Higher Education*, 108 W. VA. L. REV. 775 (2006); Kathleen Winchell, Note, *Disparate Treatment of Students in a Similar Class: The Constitutionality of Kentucky's Method of Determining Residency Status for Admission and Tuition Assessment Purposes*, 40 BRANDEIS L.J. 1037 (2002).

competing principles—the traditional principle that a married woman's domicile followed that of her husband, and the more recent principle established in part by tuition residency rules that a person could not establish a domicile merely by going to school in a particular state. This same conflict was at the heart of much of the litigation over tuition residency rules. These cases reveal just how difficult it is to apply the concept of domicile in a world of emerging adulthood, gender neutrality, and interstate mobility. In each of these cases, the courts struggled to maintain the traditional domicile rule while accommodating changed gender norms and changed concepts of adulthood, ultimately undermining the concept of domicile.

Clarke v. Redeker,[271] an early case out of Iowa, reflects this tension well. In that case, a law student contested the University of Iowa's classification of him as a nonresident. George Clarke had moved to Iowa from Illinois at age seventeen to attend the State University of Iowa (SUI).[272] In 1964, three years after his matriculation at the school, he married Joan Weaver, a lifetime resident of Iowa, and he continued with his education by enrolling at SUI's law school.[273] By the time the litigation commenced, despite having lived continuously in Iowa for five years, Clarke was still classified as a nonresident student and paying the nonresident tuition fee, which was twice that of the resident fee.[274]

The Clarkes brought a civil rights action together in federal district court, claiming that the state should not be allowed to charge differential tuition rates for resident and nonresident students, and also arguing that the Iowa regulations "unreasonably discriminate[d] between a nonresident male whose wife is a resident of Iowa and a nonresident female whose husband is a resident of Iowa."[275] The Clarkes appeared to be arguing in part that Joan Clarke's rights as a citizen of Iowa were being harmed because her marriage to George had not reaped him the same benefits that it would have brought a female student who had married a male Iowa resident. Moreover, by suing jointly, the couple invoked the same concept of marital unity relied on in *Mas v. Perry*, seemingly arguing for a kind of reverse or equivalent derivative domicile rule in which a husband's domicile could follow that of his wife.[276]

Because this case occurred before the 1972 changes in the voting age and age of majority, the applicable Iowa regulations split students into two categories: minor students and those twenty-one and over.[277] Students under the age of twenty-one retained their parents' domicile, and could apply to change their initial classification as nonresidents if their parents moved to Iowa while they were students.[278] For those twenty-one or older, the state had a durational bona fide residence requirement, but bona fide residence meant "that the student is not in the state primarily to attend a college; that he is in the state for purposes other than to attempt to qualify for

271. 259 F. Supp. 117 (S.D. Iowa 1966).
272. *Id.* at 120.
273. *Id.*
274. *Id.*
275. *Id.* at 120–21.
276. For examples of cases in which courts applied a "reverse" derivative domicile rule in other contexts, see Abrams, *supra* note 12, at 420–22.
277. *Clarke*, 259 F. Supp. at 121.
278. *Id.* at 123 n.4.

residence status."[279] Because George had initially come to Iowa as a minor student and had remained a student once he turned twenty-one, he was unable to establish bona fide residence in the state unless he stopped being a student for at least a year and demonstrated that he was in Iowa for a reason other than obtaining in-state residency.

Had George been a woman married to a male Iowan, however, things would have been different. The Iowa regulation explicitly incorporated the derivative domicile rule, stating that, because "[t]he residence of a wife is that of her husband," nonresident female students could attain Iowan residency through marriage to an Iowan, while a resident female student could lose her residence if she married a nonresident.[280] The court showed no qualms in upholding this rule, reasoning that it simply "adhere[d] to the well established legal concept that the domicile of a wife is the same as that of her husband."[281]

The court did, however, qualify its endorsement of the derivative domicile rule. It emphasized that the regulation was just a "guideline for the possible reclassification of [a] female student," and that marriage to a female resident could still be a factor considered in reclassifying a male nonresident.[282] Moreover, the court ruled that Clarke had shown a "substantial basis" for reclassification as a resident, and that the school had applied its regulations too rigidly, although the court did not explain what constituted that "substantial basis."[283] In the absence of other discussion by the court, the Clarkes' marriage appears to be the primary reason that George could be deemed an Iowan.[284]

This case, then, might reflect a new willingness to rework some of the old precepts of domicile. Under a strict derivative domicile rule, Joan Clarke would have lost her own individual Iowa domicile upon her marriage to George. Moreover, if she had been a student at the time of her marriage, she could have lost her status for in-state tuition purposes as well. Although the *Clarke* court explicitly referenced the "well established legal concept" of derivative domicile, however, it still treated Joan as an Iowa domiciliary; moreover, her domicile appeared to be a primary factor in determining that of George. As a result, although the case in some ways reflects the traditional precepts of gender and domicile that were still in place at the time of *Mas v. Perry*, it also hints at some of the changes beginning to occur during that time period.

Clarke signifies the beginning of a wave of tuition-related litigation that peaked in the early seventies. After *Shapiro v. Thomas* was decided,[285] even more out-of-state students sought to overturn residency classifications, and many of these cases were complicated by the derivative domicile rule. Just a month after *Shapiro* was

279. *Id.* at 121.
280. *Id.*
281. *Id.* at 124.
282. *Id.*
283. *Id.* at 125.
284. *But cf.* Kirk v. Bd. of Regents, 78 Cal. Rptr. 260, 268 (Cal. Ct. App. 1969) (characterizing the *Clarke* court as finding that Clarke had "established a substantial basis, *independent of his marriage*, for being classified as a resident" (emphasis added)), *appeal dismissed*, 396 U.S. 554 (1970). It's not clear what the *Kirk* court believed provided a substantial basis beyond Clarke's marriage, since it makes this statement but then supplies no citation.
285. *See supra* text accompanying notes 259–65.

decided, a California Court of Appeals upheld the tuition differential and durational residency requirements imposed by the University of California Board of Regents.[286] *Kirk v. Board of Regents*, like *Clarke v. Redeker*, involved the nonresident spouse of a state resident seeking reclassification for tuition purposes. This time, however, their genders were reversed. In July 1967, Deborah Kirk, a resident of Ohio, married Charles Kirk, an attorney who had only become a California resident in 1966.[287] The couple moved to Berkeley and that fall, Deborah enrolled at the University of California, at which time she was classified as a nonresident student.[288]

California law required a person to have been domiciled in California for a year before becoming a resident for tuition purposes. Under the statute, Deborah Kirk had become domiciled in California by operation of law upon her marriage to Charles.[289] She argued that, because Charles had resided in the state for thirteen months prior to their marriage, she should be able to count that time towards fulfilling the one-year residency requirement. She further contended that she should be treated the same way as minor students, since her domiciliary status was also derivative.[290] Accordingly, Deborah sought to use the traditional concept of derivative domicile to her own benefit.

The court, however, rejected this effort, though without rejecting the authority of the derivative domicile rule. The court ruled that Deborah had become a resident of California on the date of her marriage.[291] It then refused, however, to allow her to "retroactive[ly] 'tack[]'" her husband's time of residence onto her own.[292] The court cited no precedent and gave little to no explanation, instead stating that Deborah had not shown that such tacking had previously been permitted.

This ruling, however, contradicted the stated purpose of the Education Code and of the derivative domicile rule that the court unquestioningly upheld. If the Education Code's residency requirements were meant to ensure that an individual was not in the state solely to obtain an education, Deborah satisfied that condition, as she moved to California primarily to reside with her husband. He had been employed in California and a member of the State Bar for a year, so she moved to the state in which he had chosen to reside for the indefinite future. In fact, when Deborah argued that the requirement exerted a "chilling effect" on her fundamental right to interstate travel,[293] the court rejected her argument, characterizing it as an absurd suggestion that "persons like herself who contemplate marriage and interstate changes of residence *to accompany their spouses*, take into account that . . . they will have to pay the higher nonresident tuition fee at publicly finance[d] institutions for a maximum period of one year.[294]

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286. *Kirk*, 78 Cal. Rptr. 260.
287. *Id.* at 262.
288. *Id.*
289. *Id.* at 263.
290. *Id.*
291. *Id.*
292. *Id.* at 264.
293. *Id.* at 266.
294. *Id.* (emphasis added). Recent trends indicate that the court underestimated the lengths to which students will go to obtain in-state tuition. Tess Townsend, *Get Married, Save Thousands on Tuition*, N.Y. TIMES (Feb. 5, 2011), http://www.nytimes.com/2011/02/06/us

In this way, the court acknowledged that Deborah was not moving to the state solely for the reason of obtaining education, but rather was following her husband. Ignoring these facts undermined the court's asserted adherence to the derivative domicile rule, a rule that was meant to reflect the legal unity of the married couple. Instead, the court placed the onus on Deborah to independently fulfill her durational residency requirement, while simultaneously establishing a presumption in her favor that she would be a full resident for tuition purposes a year after her marriage. In this way, like the court in *Clarke*, the *Kirk* court seemingly upheld the derivative domicile rule while undermining it.

Other courts similarly insisted on applying the derivative domicile rule, even where it led to absurd results. One court even held that two women who had moved to Colorado to join their student husbands were eligible for in-state tuition but their husbands were not.[295] The state regulation stated that "[u]nless the contrary appears to be true to the satisfaction of the [registrar] . . . it shall be presumed that . . . the domicile of a married woman is normally that of her husband."[296] This led the University of Colorado registrar to presume that the women had the same domicile as their husbands and to classify them as nonresidents as well.[297]

The Colorado court rejected that classification decision, but did not overturn the state's use of the derivative domicile rule. Instead, the court found that the school had applied the incorrect definition of domicile.[298] According to the court, the state regulation referred to the broader conception of domicile: "a person's true, fixed, and permanent home and place of habitation,"[299] as opposed to a more narrow version that would apply only with respect to tuition requirements. The court deemed it "uncontested" that both the female plaintiffs and their husbands met the broader, traditional definition; in fact, the court found that both husbands had established Colorado domiciles "for all purposes *except* for tuition purposes."[300]

In this way, the court, rather than taking the opportunity to find that the female plaintiffs were capable of establishing their own domicile, maintained the doctrine of derivative domicile. In doing so, however, the court reached an odd result. The women were eligible for in-state tuition, but their husbands were not, despite their supposed legal unity. Accordingly, another court undermined the purpose of the derivative domicile rule by applying it, and further failed to recognize the new reality of women's lives.

In this vein, most courts during this period refused to consider abolishing the derivative domicile rule, instead bending over backwards to retain it while undermining its rationale. A notable exception was the decision in *Samuel v. University of Pittsburgh*, which affirmatively discarded the rule's application in the tuition context as violating equal protection.[301]

/06bcmarriage.html?_r=1& [https://perma.cc/PU72-XU4V].

295. Kirk v. Douglas, 489 P.2d 201, 202–03 (Colo. 1971).

296. *Id.* at 203 (second omission in original).

297. *Id.*

298. *Id.* at 204.

299. *Id.* at 203.

300. *Id.* (emphasis added).

301. 375 F. Supp. 1119, 1134 (W.D. Pa. 1974), *rev'd on other grounds*, 538 F.2d 991 (3d Cir. 1976).

Confusion over domiciliary intent has only increased in the last three decades. In the more recent cases, courts have begun to call into question the legitimacy of one-year residency rules for domiciliaries, reinforcing the notion that intent to reside permanently is more important than the length of residence. Simultaneously, courts have recommitted to a modern form of the derivative domicile rule, in which marriage—for men *and* women—is often the deciding factor in determining a person's domicile. Both of these trends are likely to exacerbate, not solve, problems with eligibility for in-state tuition, as they ask universities and courts to search for intent that simply may not exist.

Consider, for example, the 1994 case of *Eastman v. University of Michigan*.[302] The plaintiffs in *Eastman* were an apt example of the changes wrought by gender equality and the rise of emerging adulthood. Susan Eastman, originally a resident of Pennsylvania, married a Nebraska resident.[303] She had attended the University of Michigan for two years before moving to California with her husband. After seven years in California, which included a brief interlude in New York, the couple decided to return to Michigan, because Mr. Eastman had received a job offer from a law firm there. Before leaving California, Susan applied to the University of Michigan and was "readmitted" as a nonresident student for the 1990 winter term.[304] She then applied for a reclassification as a Michigan resident for the fall 1990 term and was denied.[305]

Susan Eastman sued the University, arguing that the Michigan Regulation violated the Equal Protection Clause. The Michigan Regulation governing residence expressly presumed that students normally came to the University "for the primary or sole purpose of attending the University rather than to establish a domicile in Michigan,"[306] and therefore required a student to prove that she had been domiciled in Michigan and resided there continuously for the year before her enrollment or attempted reclassification.

When the case reached the Sixth Circuit, the court reaffirmed the importance of domicile to state citizenship. It explained that "[b]ecause domicile can be obtained without the passage of any particular period of time," imposing a durational requirement on a bona fide domiciliary would undermine the state's purported interest in providing subsidized tuition to its domiciliaries.[307] Therefore, the court held, time spent in the state could be relevant to show domicile, but it was not dispositive.[308] Because an individual could instantly form a new domicile in the state, the passage of time could only serve as one factor among many. Accordingly, the state could not simply impose a one-year residency requirement on anyone coming from out of state without also examining other factors that might indicate their domiciliary intent. If, taking all factors into consideration, the registrar found that the student was not domiciled in the state, he could make the student wait to reapply, but not an entire year. Instead, the registrar had to "be open to a new decision if information arose between

302. 30 F.3d 670 (6th Cir. 1994).
303. *Id.* at 671.
304. *Id.*
305. *Id.*
306. *Id.* at 672.
307. *Id.* at 673.
308. *Id.*

the initial application and the expiration of one year."[309] In this way, the court appeared to open the registrar's office to ongoing consideration of every nonresident student's domicile.

Moreover, by remanding to determine whether Susan Eastman should have been deemed a domiciliary of Michigan at the time of her initial application, the court acknowledged that, despite her mobility, Susan could have formed a domicile in Michigan simply upon moving there. That implication directly contradicts the findings of many earlier courts confronted with the question of student domicile and was ultimately contradicted by the events that occurred after Susan's graduation from the University, at which point she and her husband left Michigan once again.[310] This aspect of their case parallels the situation of the Mases, who were living in Illinois by the time their case went to trial, returning to Louisiana, and unsure where they were going next. The court's willingness to accommodate Susan's mobility undermines domicile's emphasis on permanency while also exposing the inapplicability of "permanent intent" to today's "emerging adults."[311]

Although the *Eastman* case involved a married couple, the opinion was unclear what weight the marriage carried; however, it is likely that without her husband's employment, Susan Eastman would have had a much harder time demonstrating that she was domiciled in Michigan. A more recent case makes this distinction more baldly. *Bergmann v. Board of Regents* involved multiple plaintiffs who sued the University of Maryland over a regulation that limited in-state tuition to students who could demonstrate that they were not in Maryland for the primary purpose of attending school.[312] If a student resided in another state at the time of his application and could not prove that he received less than one-half of his financial support from another person while "self-generating" the other half of his income, he was presumed to be in the state primarily for an education.[313]

Two of the *Bergmann* plaintiffs were treated very differently by the University. Karyn Bergmann, a thirty-six-year-old law student who resided in Virginia at the time she applied to law school, was financially independent but relied on loans and grants to pay more than half of her tuition, and was therefore found to be an out-of-state student. Similarly, Lance Pietropola, a dental student from Pennsylvania, was

309. *Id.* at 674.

310. *Id.* at 672 n.1.

311. The litigation over in-state tuition has continued to the present, unresolved. Another wave of tuition residency cases and law review commentaries occurred several years after *Eastman*, after another Supreme Court decision in *Saenz v. Roe* expanded upon its "right to travel" jurisprudence, again in the context of welfare benefits. Saenz v. Roe, 526 U.S. 489 (1999). In *Saenz*, the Court struck down a California statute that limited welfare benefits during the first year that a new resident resided in California to the amount that the new resident would have received in the state he or she had just left. *Id.* at 492. In ruling that this provision violated the fundamental right to travel, the Court articulated three components of that right, one of which was the right for those who chose to become residents of a state to be treated like other citizens of that state. *Id.* at 500. The language of this holding fueled renewed attempts to strike down tuition-related residency classifications on constitutional grounds.

312. 892 A.2d 604, 607 (Md. Ct. Spec. App. 2006).

313. *Id.* at 610–11. This "self-generated" income could not include any loans, grants, stipends, or scholarships.

initially denied in-state status when he first enrolled in dental school, and was denied again after his second year of school because his financial support came almost entirely from state and federal loans.[314] By his third year, however, he had married a Maryland resident. The school reclassified him as a resident for tuition purposes.[315]

The court upheld the school's policy on the grounds that the income-based presumption was rebuttable.[316] The presumption, however, was only rebuttable for the student who was able to marry a Maryland resident. The court acknowledged that the other plaintiffs denied in-state residency satisfied the traditional domicile factors, but stated that there were "special circumstances . . . justify[ing] adjustment of th[o]se traditional factors"[317]—namely, the plaintiffs' student status, which demonstrated that they "may well intend to leave the State after graduation" and had a "financial incentive" to meet domicile requirements, which justified more intensive scrutiny of their applications.

Moreover, the court argued that as students, the plaintiffs would remain linked to their prior domiciles for the time that they remained students—unless, of course, they could find an employed Maryland resident to marry. The court stated that the state's "presumption impose[d] no more burden on a student than traditional domicile law," which provides that "once domicile is established, there is a presumption that it continues until superseded by new domicile."[318] The court had earlier stated that the students satisfied the traditional domicile requirements, however, meaning that it was either contradicting itself or, more likely, believed that the plaintiffs' student status strengthened the presumption that they had retained their previous domicile. Accordingly, despite the doctrinal tensions caused by the ongoing changes in gender roles and social adulthood, the derivative domicile rule lives on.

The litigation over in-state tuition is unlikely to dissipate, as tuition differentials and student debt continue to rise,[319] making tuition residency distinctions a source of both stress and litigation. Students are still highly migratory, even more so than in the seventies.[320] As the "very concept of distance has changed," the "traditional borders on the enrollment map continue to erode," and students are willing to attend schools across the country.[321] Meanwhile, public universities are continually

314. *Id.* at 613–14.

315. *Id.* at 614.

316. *Id.* at 625.

317. *Id.* at 627–28.

318. *Id.* at 628.

319. *See, e.g.*, Jeffrey Selingo, *Tuition Surges at Public Colleges After Years of Modest Increases*, CHRON. OF HIGHER EDUC. (Sept. 22, 2000), http://chronicle.com/article/Tuition-Surges-at-Public/11032/ [https://perma.cc/4X9K-M5W6].

320. *See, e.g.*, Christopher C. Morphew, *State Borders Are Not Barriers to the Migration of College Students*, CHRON. HIGHER EDUC. (July 7, 2006), http://chronicle.com/article/State-Borders-Are-Not-Barriers/35856/ [https://perma.cc/DK3S-PAR9] (stating that 87,000 freshmen migrants enrolled in out-of-state schools in 1996, while 118,000 students enrolled out of state in 2004); Stevens, *supra* note 186 (discussing Jeffrey Arnett's statement that young adults will change careers an average of seven times in their twenties).

321. *See, e.g.*, Eric Hoover & Josh Keller, *More Students Migrate Away from Home: Public Universities Expand Recruitment Efforts in Quest for Out-of-State Money*, CHRON. HIGHER EDUC. (Oct. 30, 2011), http://chronicle.com/article/The-Cross-Country-Recruitment/129577/ [https://perma.cc/MJ5W-F8CP].

strapped for cash and see out-of-state students, and the higher tuition they pay, as a means of funding their activities.[322]

Students still work to demonstrate that they have formed a domicile in the state where they choose to pursue higher education, and some have discovered the "marriage loophole" that the revised derivative domicile rule provides. Although Lance Pietrepola, the *Bergmann* plaintiff, appears to have married for love, others take a more pragmatic approach to marriage, using it to demonstrate their financial independence from their parents and thereby obtain in-state residency. For instance, current students seeking resident classification in the University of California school system must be able to show physical presence, intent to stay, and financial independence.[323] Undergraduate students over the age of twenty-four are automatically deemed financially independent, perhaps reflecting that the state views adulthood as a status that is largely achieved by twenty-four.[324] Younger students, however, have much more difficulty proving financial independence—unless they get married. The state views marriage as an automatic means of showing financial independence. For this reason, some students in the University of California system have chosen to marry complete strangers simply to demonstrate their financial independence, planning to then divorce them after graduation.[325]

The litigation over in-state tuition highlights the ways in which trends of gender equality and emerging adulthood, beginning in the 1970s and stretching into the present day, have rendered domicile a clumsy and often useless tool. In spite of these changes, courts have maintained an antiquated view of the relevance of both marriage and student status. Most young adults, whether they are students or not, are largely incapable of forming permanent or indefinite intentions of residency, but they also do not intend to permanently reside in their home state. The doctrine of domicile, however, cannot grapple with this new reality. Instead, it is used by schools and by courts inconsistently, inequitably, and inaccurately to measure, and thus define, the lives of young adults—lives that they themselves have not defined and will not define for years to come.

CONCLUSION

When Judy and Jean Paul Mas sued Oliver Perry, they probably had no idea that their case was emblematic of a change in the social fabric that had far-reaching legal consequences. If there was anything about their case that seemed revolutionary, it was likely the application of tort law to a case involving the widespread availability of a "new technology"—the two-way mirror. But the lawyer's arguments in the case, as well as the trial court's and appeals court's convoluted reasoning, reveal just how difficult it was to apply traditional notions of domicile to a young, married, student couple in an age of gender equality and emerging adulthood. As this Article has shown through its analysis of in-state tuition litigation, the rule of domicile and the

322. *Id.* ("It's out-of-state students who are subsidizing the in-state ones, but many people think it's the other way around.").

323. Townsend, *supra* note 294.

324. *Criteria To Establish Residence for Tuition Purposes*, UC SAN DIEGO (2016), https://students.ucsd.edu/finances/fees/residence/criteria.html.

325. Townsend, *supra* note 294.

lived reality of the people who must demonstrate it have only become more disconnected over time.

Moreover, the difficulties inherent in measuring domiciliary intent in an age of delayed adulthood and increased gender equity may prevent courts from reaching consistent results in jurisdictional disputes. This is particularly so when antiquated notions of female and student capacity to form domiciliary intent continue to influence these determinations. The Judy Mases of the world are repeatedly linked to the interests and domiciles of their husbands, regardless of their actual intent—or their present inability to form one.

In particular, today's young adults exist in a kind of no-man's-land with respect to domicile. As they explore the options in front of them during college or after graduation, they lack the desire to permanently return to their parental home (even if they must do so temporarily), but they may also be incapable of forming the intent to reside indefinitely elsewhere. They may form a series of intentions to reside temporarily in a series of locations, but each with the hope that they relocate at some date in the future.[326] In the intervening period, however, their domicile is left to the definition of the courts. They will either be linked to a home they no longer consider theirs, or denied the ability to establish a new home due to the amorphous nature of their lives.

Clearly, the life experiences of emerging adults are not a sufficient excuse, standing alone, to rewrite age-old jurisdictional doctrine. Emerging adults, however, are but one example of the difficulties with using a concept that assumes that most people's lives have a sense of permanence they no longer have. As one leading civil procedure treatise puts it, "most of us do not jump up one day and cry out, 'I have formed the intent to make this state my permanent home!'"[327] This Article has contributed to the mounting evidence that domicile is no longer a concept that effectively functions as a proxy for state citizenship.

For example, Susan Appleton has argued the increasing number of transhousehold families, including "LATs" (couples "Living Apart Together") challenges the notion that a person must have only one domicile at a time.[328] Similarly, children of divorced, cocustodial parents may very well live in two households in two different jurisdictions,[329] neither of which fully represents their "permanent home." Homeless people lack a domicile, as do those fleeing natural disaster.[330] And strict adherence to domicile in jurisdiction over divorce actions resulted in an untenable situation for many same-sex couples; unable to obtain domicile in a state that recognizes their marriage, they were what Mary Pat Byrn and Morgan L. Holcomb dubbed "wedlocked."[331] The federal government's response to *United States v. Windsor*, in which the Supreme Court struck down the Defense of Marriage Act, provides another example. Agencies had to determine whether to use domicile to decide which state's law to apply or instead the state where a couple's marriage was celebrated—and they

326. *See* RICHARD D. FREER, CIVIL PROCEDURE § 4.5 (2d ed. 2009).

327. *Id.*

328. Appleton, *supra* note 7, at 1490–92.

329. *See id.* at 1492–93.

330. *Id.* at 1494–95.

331. Mary Patricia Byrn & Morgan L. Holcomb, *Wedlocked*, 67 U. MIAMI L. REV. 1, 3 (2012); *see also* Joslin, *supra* note 14, at 1711.

largely chose the latter, perhaps for convenience but also in recognition of modern mobility and the incongruity of having one's civil rights "flicker" on and off as one crosses state lines.[332] Professor Susan Appleton thus concludes: "domicile has stalled . . . [it] remains a fusty, ossified concept that has been so taken for granted that we frequently forget about it."[333]

Indeed, in legal areas outside jurisdictional rules, states have abandoned domicile as the operative test. For example, to determine where someone has voting rights or should pay state income tax, state law has increasingly look to actual residence rather than the intent to reside.[334] It makes sense that as law has become increasingly administrative and less court-focused, that states would need tests that can be applied simply with paper documentation, rather than with testimony about mental states.

Courts, however, still use domicile as the test for determining jurisdiction. To a large extent, these tests are a sham: Nevada's six-week residency rule for jurisdiction over divorce cases,[335] for example, is a poor proxy for domicile, and in any case is routinely flouted by litigants who pay for affidavits attesting that they have been "seen" in the state for six weeks prior to filing the action. But in federal court, domicile still provides the means for obtaining diversity jurisdiction. We believe it is time to rethink this. The commonly cited purpose for requiring diversity in federal cases that do not involve federal questions of law is the protection of outsiders. A state court—in which the judge might be elected and beholden to local interest—might discriminate against an out-of-state litigant.[336] But just as domicile was a poor proxy in *Mas v. Perry* for the various litigants' connection to Louisiana, it could be a poor proxy in many other types of cases as well.[337] Surely whether Judy Mas had the intent to remain indefinitely in Louisiana would not affect whether a local judge or jury would be biased against her. Her status as a recent arrival, or as the wife of a foreigner, would be more likely to cause discrimination.[338]

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332. *See* Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND 1, 26 (2010) (referring to marriage as "flicker[ing]" (emphasis omitted)).

333. Appleton, *supra* note 7, at 1489.

334. Reese & Green, *supra* note 8, at 561 (discussing how state statutes tend to use the word "residence" to determine citizenship rather than "domicil").

335. NEV. REV. STAT. § 125.020 (West, Westlaw through 2015 Sess.).

336. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 74 (1938) ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State."); *see also* Guaranty Trust Co. v. York, 326 U.S. 99, 111–12 (1945) ("Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias. The Framers of the Constitution . . . entertained 'apprehensions' lest distant suitors be subjected to local bias in State courts, or, at least, viewed with 'indulgence the possible fears and apprehensions' of such suitors.' And so Congress afforded out-of-State litigants another tribunal, not another body of law." (citation omitted)).

337. *See* HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 147–48 (1973).

338. The concept of "habitual residence," largely used in other countries, is a likely alternative. *See* Gadi Zohar, Note, *Habitual Residence: An Alternative to the Common Law Concept of Domicile?*, 9 WHITTIER J. CHILD & FAM. ADVOC. 169 (2009). Or, as some have suggested, perhaps diversity jurisdiction has outlived its usefulness altogether. *See, e.g.*, Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 82–83 (observing that diversity jurisdiction has been constricted over the years and would

Mas v. Perry, often explained as a case that ended the era of derivative domicile, is better read as heralding the dawn of a new era. The simultaneous rise of gender equality and emerging adulthood has transformed the way in which millions of Americans conduct their lives. Legal doctrines must adapt to keep pace with social reality.

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unlikely be adopted now if the system were to be designed from scratch); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1400 (2006) (arguing that, for the framers, diversity jurisdiction "served not so much to protect the unfortunate individual litigant who found himself in unwelcoming environs, but to provide a jurisdictional refuge for the commercial class").