Case Briefing Exercise
Professor Beazley

To prepare for the case-briefing session, please brief Stifel v. Hopkins (attached) using the format described below. **Please complete the case brief before you come to orientation.** We'll go through the brief section by section as a group in a case-briefing session, and I'll be glad to take questions and try to identify common problems that students have with case-briefing.

A "case brief" is a method for taking organized notes on a "case," which is how lawyers often refer to a written court opinion. There are probably as many different possible case brief formats as there are lawyers. If a professor recommends a particular format to you, you should *certainly* use that format in that professor's course, because the professor probably finds the elements in that format particularly helpful when briefing the type of cases studied in that course. The format below is adapted from one found in Ray & Ramsfield, Legal Writing: Getting it Right and Getting it Written (West 2000). It has many more segments than some other formats do, so I use it for this exercise to show you the many different things going on in a court opinion. This format is meant only to be a sample to teach you how case briefs work, and how some typical sections within case briefs work. It is *not* meant to identify the "one perfect case brief format." The descriptions of each element in the format are meant to provide only a basic overview; you may have study guides that describe some of them in more depth, and that you may certainly consult for guidance as you work on this exercise.

One more piece of advice before you begin: Get a law dictionary and keep it with you always during your first semester. Look up any word that you don't understand as you read this handout and especially as you read cases for this exercise and for homework. Although in the past you may have discerned rough definitions of unfamiliar words from the context of what you were reading, you might not have enough context right now to figure things out. Looking up unfamiliar words will help you to learn the language of the law more quickly and to read and understand your casebooks more easily.

Sample Case-Brief Format
Professor Beazley[1]

Citation:

The citation is information about the case that the reader can use to find the case in a library, *and* to assess the relevance of the opinion to future cases. A case citation (or "cite") should tell the reader five things: (1) the name of the case (meaning the parties who are involved in the case); (2) where the reader can find the case; (3) the particular page being cited to, if any; (4) when the case was decided; and (5) which court decided it. Most professors won't care about the form of the citation, but you may be asked about certain citation information (like the court and the date). Note that the case citation illustrated is fictional.

Example: Rogers v. Beazley, 606 F. Supp. 2d 101, 105 (S.D. Ohio 2006).
Rogers v. Beazley: The name of the case
606 F. Supp. 2d 101: The reader can find the case at Volume 606 of the Federal Supplement reporter, Second Series, beginning on page 101. (Of course, it would also be available on the web.)
105: The part of the case the writer is referring to can be found on page 105.
(2006): The case was decided in 2006.
(S.D. Ohio): The court is the United States District Court for the Southern District of Ohio.

Parties:

In a civil case, who has sued and who is being sued? In a criminal case, who has the government charged with a crime, and which unit of government is doing the charging? Some cases have more than one party on one side or on both sides. In addition to names, try to identify the *procedural categories* that each party falls into (that is, appellant or appellee? Plaintiff or defendant below?) and the *legally significant factual categories* for each party, as well (employer or employee? Husband or wife? Driver or passenger?). The procedural categories will be pretty similar from case to case (almost every trial has a defendant, for example), while the factual categories will vary depending on the facts and issues that each case presents.

Generally, after you complete this list of labels, you will want to refer to the parties by their *legally significant categories*. Sometimes the procedural category can be legally significant (especially in courses where you are addressing procedural issues – like civil procedure). More often, though, what is significant is that the person was a homeowner or a driver or a landlord. Of course, if that category label isn't handy, you may decide to use another label.

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[1]Adapted from Ray & Ramsfield, Legal Writing: Getting it Right and Getting it Written 56-58 (West 2005).

Prior Proceedings:

How did this case advance through the court system to the point it is now? That is, who sued who, and on what basis? If this is a criminal case, what charges were filed against the defendant? In either kind of case, have any motions been made and ruled on? If this is an appellate decision, what is the precise decision that was made at the trial court? That is, in a civil case, did the court find in favor of the plaintiff or the defendant? In a criminal case, did the court find that the defendant was guilty or not guilty? (No one is found "innocent," despite what they say on the news.) Was there another appellate decision after the trial court and before this court?

Facts:

In this section, list the facts that happened "in the world" that got the case into court. In a civil case, this usually means asking why the plaintiff sued the defendant – what did the defendant [allegedly] do wrong? Is there anything relevant about the personal or professional relationship between the parties? In a criminal case, what did the defendant [allegedly] do wrong that got him or her arrested and charged with a crime? Did the police [allegedly] do something wrong in the way they arrested or interrogated the defendant that is the basis for a motion, or for the appeal?

If a main issue in the case is a procedural issue rather than an issue about "the merits," the relevant facts will be different. E.g., if Joe is accused of murder, a merits question is whether or not Joe committed the murder, and another merits question might be whether Joe had the requisite intent. Procedural issues might be whether Joe's arrest and confession were handled appropriately by the police.

The facts you include in your fact section will vary depending on the issues before the court in the case you are reading. Your facts will generally include the "legally significant facts" and the "relevant background facts."

Legally significant facts: Facts which, if they were different, might mean that the outcome of the case would be different.

Relevant background facts: Facts that help you understand, organize, or think about the legally significant facts.

We'll talk more in our session about what these terms mean.

Objectives:

What did each side want the court to do, procedurally? Affirm, reverse, reverse and remand, grant the motion, deny the motion, vacate a decision below? Use of precise language is important here.

Theories of the Parties:

What is the legal basis for each party's objective? What law or theory shows that the court should do what each side wants? [Note that the court may give a party what it wants based on a legal theory different than the one proposed.] This section is a more unusual section; many professors care more about what theory the court used than a theory that a party proposed.

Issue(s):

In this section, identify the legal question(s) that the court is answering. Generally, a formal issue statement will include 3 elements: (1) the legal context (usually the area of law is relevant, and maybe a particular statute or other enacted law), (2) the narrow legal question (a yes or no question), and (3) the factual context. A less formal issue statement will just identify the narrow legal question and perhaps some facts. Thus, a formal issue statement might be: "Under Ohio's dog owner liability statute, which allows an owner to escape liability for a dog's bite if the victim was 'committing a trespass or other criminal offense,' [legal context] can an owner avoid liability [narrow legal question] if the victim was committing a civil trespass when he was bitten? [facts]" A less formal issue statement might say, e.g., "Can a dog owner avoid liability for his dog's bite if the victim was committing a civil trespass when he was bitten?"

Generally, your narrow legal question should ask about whether a certain legal status exists. E.g., Is a person or company liable or not liable? Guilty or not guilty? Does this person count as an "employer" under the statute? Is the plaintiff a "resident"? The legal context and the factual context provide relevant background information for the question. For example, legal context is needed because the definition of "employer" might be different for an anti-discrimination statute than for a statute requiring employers to provide health insurance or a statute forbidding child labor. Knowing factual context, in contrast, helps the reader understand how the issue is relevant to this situation; e.g., what is it about this person that indicates that he or she would or would not be an employer?

Holding(s):

Some people use the word "holding" to describe how the court disposed of the case, e.g., "the court held for the defendant." Others use it more formally to mean "the rule of the case" – in other words, the legal rule in the context of the facts of this case. Often, a more formal holding will have the same elements as a formal issue statement (stated as a pronouncement rather than as an issue or question, of course). Thus, a formal holding might say, "Under the dog owner liability statute, a dog owner can avoid liability for a dog bite when the victim was committing a civil trespass at the time of the attack because civil trespass is included in the meaning of the phrase 'trespass or other criminal offense.'" When drafting your case briefs, you may want to try to find the holding of the case *first*. The holding can provide a snapshot of the case and give you context as you read the opinion. You may also want to review the holding *last*, to make sure that you properly identified the holding and that it is consistent with the rest of the brief.

Reasoning:

How did the court get from the issue to the holding? Did it break the case down into sub-issues? What rules did it use? What methods of reasoning? How did it apply the rule(s) to the facts before it? Did it analogize the current case to or distinguish it from previous cases? Did it rely on relevant policy arguments to help it choose between two or more logically possible options? Did the court modify the original rule to get the result?

The reasoning section is usually the most important part of the case brief. In general, you want to work in two steps. First, identify the issues that the court analyzed. Courts may refer to lots of issues; you want to identify the issues or sub-issues that they analyzed: the issues that they reached a conclusion on by using the law and the facts. After you identify the issues they analyzed, look for three elements for *each* issue you have identified: (1) the rule (or governing legal principle), (2) the court's explanation of what that rule means, and (3) how the rule applies to the facts of the case. You don't necessarily have to write these three things out as separate elements, but having them in mind can help you as you mentally organize the court's analysis.

Rule: Although scholars could debate the precise meaning of the term "rule," in this context I mean the *governing* legal principle – in other words, the principle that the court is using to decide the issue. All statutes are rules, for example, but the rule governing a particular issue may not be the statute in the case, because the court may be using a different rule to decide the meaning of a particular word or phrase within the statute. In some cases that you read, you will probably see references to many different kinds of rules. Your job will be to distinguish the rules that are relevant but tangential from the rules that articulate the legal principles that govern the court's analysis of each issue and sub-issue.

When beginning to analyze the reasoning, first make sure you understand the legal context in which the case is set (you should have begun this task when you articulated the issue). Generally, if there is a statute, a constitutional provision, or other enacted law at issue, you should begin there. Is the court applying that enacted law to this situation? Is there a dispute about what certain words or phrases within the enacted law mean? For example, in a fourth amendment case, the more important rule might be a principle about what "unreasonable search and seizure" means: once that is decided, the fourth amendment can be applied to the facts quite easily. Nevertheless, you would begin your description of the reasoning with the fourth amendment and then move to the more narrow rule.

In addition to statutes and other enacted law, you should look for "common law" rules – that is, rules of law that come from court decisions rather than from legislatures. There is often interaction between statutory law and common law rules (e.g., some rules that originate in the common law are later made statutes, and some statutes are interpreted using common law rules), but some cases are solely about common law rules. For example, many states have a common law rule that says that employers must provide

their employees with a "safe workplace." An employee might bring a lawsuit trying to enforce that rule, and a court might apply that rule to the case, as well as other rules about what a "safe workplace" means, or about what types of legal remedies an employee might be entitled to if he or she proves that the workplace is unsafe. Even if the case were mostly about the types of remedies available to the employee, you will help your own understanding of the case if you start by identifying the rule that underlies the lawsuit – in this example, the rule about employers providing safe workplaces.

You should be aware of one other factor when looking for the rule. The cases that appear in law textbooks are often cases in which the court has staked out new ground. Many students read phrases like, "The rule in this area has always been thus-and-so," and presume that they have found the rule. Unfortunately for these students, they may miss the sentence a few paragraphs later in which the court says, "we now hold that the old rule is unconstitutional [or stupid, or irrelevant, or whatever]." Thus, Professor Linda Edwards of Mercer advises that students look to see if there is an "inherited rule," i.e., the "old" rule that has always been applied in cases like this. She then advises that students look to see if the court has changed the inherited rule into a new rule, which she calls the "processed rule."[2] Your professors will probably not use these same vocabulary terms, but the terms may be helpful for you to keep in mind as you try to identify the court's reasoning. You shouldn't necessarily skip over an "inherited rule," because identifying the inherited rule may help you understand the court's reasoning. Some professors may want to talk about both the inherited rule and the processed rule (not necessarily using that vocabulary), while others will want to discuss only the processed rule.

Explanation: In simple cases with uncontroversial rules, a court can apply a rule to the facts of the case without providing much (or any) explanation of the rule's meaning. Cases that appear in law textbooks, however, are rarely simple cases. Thus, to understand the court's reasoning, try to see how it explained what the rule means. If the court moved from an inherited rule to a processed rule, for example, what reasons did it give for doing so? Is the old rule out of date in light of rules from analogous cases or changes in society? If the court did not change the rule, it may have changed the interpretation of the rule, e.g., by broadening it to include a new category of people or situations that other courts may not have considered. What reason did it give for doing so? Even if the court did not change the rule, it may still spend some time explaining what the rule means, usually by talking about other cases in which it has been applied, about hypothetical cases in which it might be applied, or about the policies behind the rule.

Application: When a court applies law to facts, it shows how the rule connects or doesn't connect to the facts of the case. (Some people use the phrase "apply the facts to the law"

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[2]Linda Holdeman Edwards, *Legal Writing: Process, Analysis, & Organization* 40-43 (3d ed. Aspen L. & Bus. 2002).

to mean the same thing.) In some cases, the application is obvious once the knotty legal problem of what the words mean has been solved, and so the court may spend little time on application. In other cases, the "fit" of the case facts and the rule may be the heart of the issue, and so the court will spend more time on it. In these cases, the court may analogize or distinguish the facts of the case before it, comparing those facts to facts in previous cases or to facts in hypotheticals. Sometimes the court will use these analogies and distinctions as part of its explanation of the rule's meaning.

Policy:

This section won't necessarily be a formal part of every case brief, or of every decision or opinion. Professors will sometimes/always/never want to talk about it. Some of your professors may discuss "public policy" or ask you to identify policy reasons that could justify the court's holding, while others will rarely or never mention it. You should be aware of it, though, because it often makes the difference in a case outcome, whether the policy is spoken or unspoken.

Generally, a "public policy" is a strongly held societal belief or understanding that supports a rule. When these societal beliefs change, rules change. For example, when I was a child, people smoked almost anywhere, and there were few if any laws forbidding smoking. As society began to understand the dangers of secondhand smoke, rules of law changed to restrict the places in which people were allowed to smoke; this change was based on a public policy in favor of public health. Thus, when analyzing the court's reasoning, look to see if the court justified itself by referring to *a societal belief or understanding about human behavior, the role of law, the role of certain institutions in society*, etc.[3]

Very often there will be two logically plausible/possible results to a case. The court may well make its decision (consciously or unconsciously) based on which decision best promotes public policy. If there are competing policies – i.e., a decision in either party's favor would support some kind of public policy – the court must decide which policy is more important in this situation. For example, a court might decide that protecting the health of non-smokers is more important than protecting the freedom of choice of smokers.

You can often see the policy reflected in the way that the court articulates the issue or the rule. In a smoking case, for example, a court might ask whether employers should be allowed to let their employees participate in legal activities during working hours even though some employees may find these activities unhealthy or bothersome. The court

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[3]*See generally,* Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs,* 62 Mont. L. Rev. 60 (2001).

could also ask whether employers should be required to restrict an activity that harms the health of all workers.

Disposition:

In this section, record how the court *disposed* of the case (similar to the "objectives" section above). Did it affirm, reverse, reverse and remand, vacate? Did it grant the motion or deny the motion? If further action is contemplated (e.g., if a court "remands" a case, it is generally sending it back to a lower court to take action), you might note the action that is contemplated. Try to use the precise procedural terms here. For example, motions are "granted," or "denied." They are *not* "upheld" or "overturned." An appellate court "reverses" or "affirms" or "vacates" or "reverses and remands" a decision submitted to it for review. It does *not* "strike down" or "overrule" the decision submitted to it. These terms have precise legal meanings, and so you should strive to use them accurately.

Dicta:

"Dicta" means statements or analysis by the court that are not needed for the court to arrive at its holding. Generally, dicta means court comments on issues that are not currently before it. "This case is about dogs. If it were about cats, we would reverse, but because it is about dogs, we will affirm." In a future case about cats, a court would not be obligated to follow this court's hypothetical rule about a cat case. Of course, if the court finds the hypothetical rule persuasive, it may always decide to adopt it. Some professors may not ask you about dicta, but you should learn to recognize the difference between holdings and dicta.

Comments:

If you wish, you may write comments about your understanding of the case. Why do you think the textbook author chose it? How does it relate to the topic of the chapter that it's in? Is there some aspect of the case you don't understand? Is there anything that seems inconsistent with earlier cases? You can record your questions and concerns here; a brief is for your eyes only. After class, you may discover that you have answered some questions and realized that others were irrelevant.

Use for educational purposes only

ORVILLE E. STIFEL, II, Plaintiff-Appellant,
v.
WILLIAM F. HOPKINS, ESQ., HILDEGARDE A. STIFEL AND ORVILLE E. STIFEL,
Defendants-Appellees

No. 72-1424

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

477 F.2d 1116, *; 23 A.L.R. Fed. 595

May 1, 1973, Decided

ON APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

Orville E. Stifel II, pro se.

Lindhorst & Dreidame by James L. O'Connell, Cincinnati, Ohio, for defendant-appellee, William F. Hopkins.

Before PHILLIPS, Chief Judge, and EDWARDS and McCREE, Circuit Judges.

[*1118] McCREE, Circuit Judge.

This case presents the question whether a federal prisoner who is incarcerated in a state other than the state of his domicile prior to conviction can show that he is a citizen of the state of incarceration for purposes of federal diversity jurisdiction. The District Court held that as a matter of law the prisoner was precluded from making this showing, and dismissed the complaint for lack of jurisdiction. We reverse.

In 1969, appellant was convicted by a jury of violating 18 U.S.C. § 1716 (1970), by mailing an "infernal machine" that exploded and caused the death of the addressee upon opening the package. Appellant's conviction was subsequently affirmed by this court. United States v. Stifel, 433 F.2d 431 (6th Cir. 1970), cert. denied, 401 U.S. 994, 28 L. Ed. 2d 531, 91 S. Ct. 1232 (1971), and he is now serving a life sentence in the federal penitentiary in Lewisburg, Pennsylvania. Prior to his arrest and conviction, appellant lived with his parents in Cincinnati, Ohio, and concededly was a citizen of Ohio. As we recognized in our consideration of his prior appeal, he was known in his community "as something approaching a model young man." 433 F.2d at 431.

In 1971, following the denial of certiorari by the Supreme Court in appellant's criminal case, he instituted this action against his parents and against the attorney who represented him throughout the criminal proceedings. Reciting that [*1119] plaintiff was a citizen of Pennsylvania, that defendants were citizens of Ohio, and that the amount in controversy exceeded $10,000, the complaint, which was filed in United States District Court for the Southern District of Ohio, invoked the diversity jurisdiction of the court. The complaint asserted that the attorney had fraudulently induced plaintiff to retain him and had deliberately and negligently engaged in acts of professional misconduct to the detriment of plaintiff; that plaintiff's parents had agreed to pay the attorney a large sum of money for representation of their son and

then obtained a judgment in federal court against plaintiff in the amount of their debt to the attorney; and that plaintiff was entitled to compensatory and punitive damages from the attorney and to injunctive relief against the payment of any moneys by plaintiff's parents to the attorney.

Defendant attorney moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. In support of this motion, he submitted an affidavit stating that plaintiff resided with his parents in Ohio until he was incarcerated in federal prison in Pennsylvania and that Stifel was in prison at the time of suit. Plaintiff filed a counter-affidavit in which he stated that he was 25 years of age, unmarried, and childless; that from July 1969 he had resided in Pennsylvania and would continue to do so indefinitely; that all his personal belongings and assets were in Pennsylvania and that all his business transactions were conducted in Pennsylvania; that, because of the actions of his attorney as set out in the complaint, he had been subject to public scorn and ridicule in Ohio, had become a "notorious person" there, and was a "target of great public hostility" in his former community, and that he therefore did not intend ever to return to Ohio. He stated that he considered Pennsylvania his home and intended to remain there indefinitely. Plaintiff subsequently submitted a supplemental memorandum in which he asserted that federal prisoners have some choice of the particular prison facility in which they will be incarcerated and that transfers are often allowed, and he contended that he had decided to remain in Pennsylvania despite urgings by unnamed prison officials that he transfer to a facility in Indiana.

The District Court granted the motion to dismiss. The court accorded no weight to appellant's affidavit on the ground that appellant was not voluntarily in Pennsylvania and his intentions regarding his domicile if and when he should be released from prison were irrelevant. Appellant's domicile, the court held, remained in Ohio until appellant should have voluntarily changed it, and a prisoner cannot perform such a voluntary act because he is at all time subject to the physical and legal compulsion of federal authorities.[1]

On appeal, plaintiff contends that a rule of law that precludes a prisoner from showing that he has changed his domicile and thereby denies him access to federal court is a rule that is based solely on the litigant's status as a prisoner, and as such violates the due process clause of the Fifth Amendment. He contends that it works arbitrarily to discriminate against prisoners and to deprive them of an important federal right -- the right to sue in federal court. He claims that the rule constitutes an irrebuttable presumption in violation of the Fifth Amendment, that it restrains his First Amendment right to form and express his thoughts, and that it places unjustifiable obstacles in the path of prisoner -litigants that would not have to be overcome by unconfined citizens.

We agree with appellant that the District Court should not have ruled as a [*1120] matter of law that appellant could not make the requisite showing of a change of domicile. We reach this result not on constitutional grounds but instead on the basis of our interpretation of the meaning of the word "citizen" in the statute defining the diversity jurisdiction of the federal courts.

Federal district courts have diversity jurisdiction of civil actions between "citizens of different states" if the amount in controversy exceeds $10,000. 28 U.S.C. § 1332(a)(1) (1970). The determination of a litigant's state citizenship for purposes of diversity jurisdiction is a matter of federal law, Ziady v.

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[1]The court observed that the judgment obtained by plaintiff's father against plaintiff in the United States District Court for the Southern District of Ohio could not avail plaintiff in this proceeding because that judgment was void for lack of jurisdiction.

Curley, 396 F.2d 873, 874 (4th Cir. 1968); Taylor v. Milam, 89 F. Supp. 880, 883 (W.D. Ark. 1950); *See* 1 J. Moore, Federal Practice (pt. 1) para. 0.74[1], at 707.1 (2d ed. 1972), although federal courts may look to state law for guidance in defining terms, formulating concepts, or delineating policies. *See* Napletana v. Hillsdale College, 385 F.2d 871, 872 (6th Cir. 1967). Thus, although it is settled that citizenship for purposes of 28 U.S.C. § 1332(a) means domicile rather than residence, Gilbert v. David, 235 U.S. 561, 569, 59 L. Ed. 360, 35 S. Ct. 164 (1915); Williamson v. Osenton, 232 U.S. 619, 624, 58 L. Ed. 758, 34 S. Ct. 442 (1914); *See* D. Currie, Federal Courts 250 (1968); 1 J. Moore, *supra*, para. 0.74[3], considerations on which federal courts rely in determining domicile often derive from state choice-of-law rules that have been developed in such diverse contexts as probate jurisdiction, taxation of incomes or intangibles, or divorce law. *See* 1 J. Moore, *supra*, para. 0.74[3. - 1], at 707.53; C. Wright, Law of Federal Courts § 26, at 86 n.4 (2d ed. 1970); Restatement (Second) of Conflict of Laws § 11, comment o (1971); *cf.* Note, Evidentiary Factors in the Determination of Domicile, 61 Harv. L. Rev. 1232, 1233-34 (1948). Although this importation of the law of conflicts into resolution of federal jurisdictional questions can have the unfortunate consequence of causing federal courts to lose sight of important federal interests that may be involved, conflicts law is useful in providing basic working definitions. *But See* Currie, The Federal Courts and the American Law Institute (pt. 1), 36 U. Chi. L. Rev. 1, 10-12 (1968).

To acquire a domicile within a particular state, a person must be physically present in the state and must have either the intention to make his home there indefinitely or the absence of an intention to make his home elsewhere. Gilbert v. David, *supra*, 235 U.S. at 569-70; Gallagher v. Philadelphia Transp. Co., 185 F.2d 543, 546-47 (3d Cir. 1950); *See* 1 J. Moore, *supra*, para. 0.74[3.-1]; C. Wright, *supra*, § 26. A threshold inquiry, then, is whether a person has the legal capacity to form the intention to abide where he resides. Although in a federal diversity case the capacity of a person to sue or be sued is to be determined by the law of the state of the litigant's domicile, Fed. R. Civ. P. 17(b), and although state law may define certain concepts or relations that bear on the question of a litigant's disability to perform particular acts, *See* Spurgeon v. Mission State Bank, 151 F.2d 702 (8th Cir. 1945), cert. denied, 327 U.S. 782, 90 L. Ed. 1009, 66 S. Ct. 682 (1946), the determination in a diversity case whether a litigant can acquire citizenship in a particular state is a federal question to be resolved in accordance with federal principles. *Cf.* O'Brien v. Avco Corp., 425 F.2d 1030, 1034 (2d Cir. 1969); Ziady v. Curley, *supra*; Napletana v. Hillsdale College, *supra*.

If appellant is not legally capable of establishing a domicile in Pennsylvania, it must be either because he is in Pennsylvania under compulsion and for that reason cannot, as a matter of law, form the intent to make the state his home, or because he is under a civil disability resulting from his status as an inmate of a federal prison. We will consider each of these possible reasons in turn.

[*1121] **I**

In his essay on the subject of domicile in 1830, Joseph Story stated the rule to be that "residence in a place by constraint, or involuntarily, will not give the party a domicile there; but his antecedent domicile remains." Hogan, Joseph Story's Essay on "Domicile," 35 B.U.L. Rev. 215, 221 (1955). It has since become black-letter law that a person cannot acquire a domicile of choice in a place if he is there by virtue of physical or legal compulsion. *See, e.g.*, Neuberger v. United States, 13 F.2d 541, 542 (2d Cir. 1926); Shaffer v. Tepper, 127 F. Supp. 892, 894 (E.D. Ky. 1955); Wendel v. Hoffman, 24 F. Supp. 63, 64-65 (D.N.J. 1938); 1 J. Beale, The Conflict of Laws § 21.1 (1935); 1 J. Moore, *supra*, para. 0.74 [3.-3], at 707.67; Restatement (Second) of Conflict of Laws, *supra*, § 17; Note, Domicile as Affected by Compulsion, 13 U. Pitt. L. Rev. 697, 699 (1952); Recent Decision, 26 Mich. L. Rev. 571, 572 (1928). The rule has been applied, in a variety of contexts, to political refugees, *See* White v. Burnley, 20 How.

(61 U.S.) 235, 248-49, 15 L. Ed. 886 (1858); to persons living in forced exile, *See* Neuberger v. United States, *supra*; *cf.* Guessefeldt v. McGrath, 89 F. Supp. 344, 347 (D.D.C. 1950), aff'd, 88 U.S. App. D.C. 383, 191 F.2d 639 (Cir. 1951), rev'd on other grounds, 342 U.S. 308, 96 L. Ed. 342, 72 S. Ct. 338 (1952); to evacuees, *See* Hiramatsu v. Phillips, 50 F. Supp. 167 (S.D. Cal. 1943), noted in 42 Mich. L. Rev. 321 (1943); and to servicemen, *See* Kinsel v. Pickens, 25 F. Supp. 455 (W.D. Texas 1938); Radford v. Radford, 26 Ky. L. Rep. 652, 82 S.W. 391 (1904). It has also been consistently applied to inmates of penal institutions. *See* Cohen v. United States, 297 F.2d 760, 774 (9th Cir.), cert. denied, 369 U.S. 865, 8 L. Ed. 2d 84, 82 S. Ct. 1029 (1962) (mailing of notice of tax deficiency); United States v. Stabler, 169 F.2d 995, 998 (3d Cir. 1948) (venue for cancellation of citizenship); White v. Fawcett Publications, 324 F. Supp. 403, 404 (W.D. Mo. 1970) (diversity of citizenship); Urbano v. News Syndicate Company, 232 F. Supp. 237, 239 n.1 (S.D.N.Y. 1964), rev'd on other grounds, 358 F.2d 145 (2d Cir. 1965), cert. denied, 385 U.S. 831, 17 L. Ed. 2d 66, 87 S. Ct. 68 (1966) (capacity to sue); Shaffer v. Tepper, 127 F. Supp. 892, 894-95 (E.D. Ky. 1955) (diversity of citizenship); Ferguson's Adm'r v. Ferguson's Adm'r, 255 Ky. 230, 73 S.W.2d 31 (1934) (jurisdiction to appoint administrator of estate); People v. Cady, 143 N.Y. 100, 37 N.E. 673 (1894) (voting residence); Anno., 132 A.L.R. 509, 510 (1941) (venue); Restatement (Second) of Conflict of Laws, *supra*, § 17 comment c; 1 J. Beale, *supra*, § 21.3, at 158-59; *cf.* Ott v. Ciccone, 326 F. Supp. 609, 613 & n.3 (W.D. Mo. 1970); Wendel v. Hoffman, 24 F. Supp. 63 (D.N.J. 1938). As one commentator has observed, this rule

> was doubtless designed to help persons who presumably would prefer to retain their old domicile in spite of enforced presence elsewhere. It is also based on the proposition that, if a person is forced to do a certain act, he cannot at the same time be doing the thing of his own free will. Intent, which is of its very nature voluntary cannot co-exist with compulsion.

Note, Domicile as Affected by Compulsion, *supra*, 13 U. Pitt. L. Rev. at 699. *See also* 1 J. Beale, *supra*, § 21.1, at 154; Recent Decision, 26 Mich. L. Rev. 571, 572 (1928).

As an abstract proposition, the rule is unassailable. It makes eminent good sense to say as a matter of law that one who is in a place solely by virtue of superior force exerted by another should not be held to have abandoned his former domicile. The rule shields an unwilling sojourner from the loss of rights and privileges incident to his citizenship in a particular place, such as, for example, paying resident tuition at a local university, invoking the jurisdiction of the local divorce courts, or voting in local elections.

However, in practice this salutary principle has hardened into a per se rule that prevents any prisoner from ever effecting [*1122] a change of domicile, although at the same time it will yield with respect to persons in other situations when its application would produce illogical or socially undesirable results. *See generally* Comment, Domicile of Choice -- Fixed Rules, 36 Yale L.J. 408, 410-12 (1927). In fact, prisoners appear to be the only persons who may never be able to escape the rule even though there are many other classes of individuals that are subject to compulsion similar to that experienced by prisoners but have been permitted to attempt to show a change of domicile to the place of their enforced presence.

The most obvious example is the serviceman. It has long been the rule that presence at his military station, without more, cannot make the station his domicile because a serviceman is subject to the orders of his superior officer. *See, e.g.*, Deese v. Hundley, 232 F. Supp. 848, 850 (W.D.S.C. 1954); Kinsel v. Pickens, 25 F. Supp. 455 (W.D. Tex. 1938); Radford v. Radford, *supra*; 1 J. Moore, *supra*, para. 0.74 [6.-4], at 708.62; Anno., 21 A.L.R.2d 1163, 1168 (1952); Anno., 148 A.L.R. 1413, 1414 (1944). A

corollary of this rule is that a serviceman who lives on the military base, even if his family is living on-base with him, cannot establish a domicile at the base. *E.g.*, Deese v. Hundley, *supra*; Harris v. Harris, 205 Iowa 108, 215 N.W. 661 (1927); *See* Anno., *supra*, 21 A.L.R.2d at 1173-75; 1 J. Moore, *supra*, para. 0.74 [6.-4], at 708.63; Restatement (Second) of Conflict of Laws, *supra*, § 17 comment d. The reason usually assigned in support of this rule is that a serviceman has no free choice in the decision that he live on base: whether or not he wishes to live on-base, his commanding officer makes the decision that he will be allowed, or required, as the case may be, to reside in quarters on the base. *See* Harris v. Harris, *supra*; 1 J. Beale, *supra*, § 21.2.

However, the serviceman is not precluded as a matter of law from showing that he has established a domicile different from the one he had before he entered military service. Although the standard of proof is variously stated, a serviceman who lives off-base will be regarded as a domiciliary of the place of his residence if the circumstances surrounding his acquisition of an off-base residence unmistakably indicate an intention on his part to abandon his former domicile and adopt a new one. *E.g.*, Ellis v. Southeast Construction Co., 260 F.2d 280 (8th Cir. 1958); Ferrara v. Ibach, 285 F. Supp. 1017 (D.S.C. 1968); Deese v. Hundley, *supra*; *See* Anno., *supra*, 148 A.L.R. at 1415-17; Anno., *supra*, 21 A.L.R.2d at 1167-79; 1 J. Moore, *supra*, para. 0.74 [6.-4], at 708.63-.64; Restatement (Second) of Conflict of Laws, *supra*, § 17 comment d. Illustrative indicia of intent include affidavits of intention, transfer requests, registration for driver's licenses, opening bank accounts, addressing tax returns, motive for establishing domicile, and other physical facts evidencing that the desire to remain will not expire when the order requiring presence does. *See* authorities collected in Annos., *supra*, 148 A.L.R. 1413, 21 A.L.R.2d 1163; 1 J. Moore, *supra*, para. 0.74 [6.-4]; Restatement (Second) of Conflict of Laws, *supra*, § 17 comment d; Thames, Domicile of Servicemen, 34 Miss. L. J. 160 (1963); Note, Domicile of Members of Armed Forces, 26 Tenn. L. Rev. 415 (1959); *See generally* Note, Evidentiary Factors in the Determination of Domicile, 61 Harv. L. Rev. 1232, 1235-40 (1948).

Indeed, the distinction between on-post and off-post residence, for purposes of applying a per se rule, has been criticized as an "artificial" distinction that substitutes a difference of physical fact for one of intention. Note, Domicile as Affected by Compulsion, 13 U. Pitt. L. Rev. 697, 700 (1952). It might also be observed that a serviceman who lives off -base does so only by permission of his superior officers, and thus, although the fact of his living off-base may lend substance to a claimed intention, it can hardly be distinguished in terms of the [*1123] exercise of volition from the situation of the serviceman who is allowed to live on-base at the pleasure of his commander. Compare 1 J. Beale, *supra*, § 21.2. And, military personnel have a much greater voice in the location of their duty stations today than was true in the past. *See* Thames, *supra*, 34 Miss. L.J. at 165-72; Note, *supra*, 13 U.Pitt. L. Rev. at 700, 710; Recent Case, 13 Iowa L. Rev. 347, 348 (1928). This proposition has found some support in the cases. *See*, *e.g.*, Volmer v. Volmer, 231 Ore. 57, 371 P.2d 70 (1962); Thomas v. Thomas, 58 Wash. 2d 377, 363 P.2d 107 (1961); Percy v. Percy, 188 Cal. 765, 207 P. 369 (1922).

The civilian counterpart of the serviceman -- the officer or employee of the federal government who must change his residence upon assuming his duties -- may establish a domicile at his new residence. *See* District of Columbia v. Murphy, 314 U.S. 441, 86 L. Ed. 329, 62 S. Ct. 303 (1941); Anno., 129 A.L.R. 1382, 1396-1401 (1940). This is the rule generally with respect to holders of public office or public employees. *See* Restatement (Second) of Conflict of Laws, *supra*, § 17 comment h; Anno., *supra*, 129 A.L.R. at 1392-1404.

Inmates of institutions other than prisons can show that they have become domiciled within institutional confines even if they have been compelled by circumstances beyond their control to become

institutionalized. *See, e.g.*, Sealey v. United States, 7 F. Supp. 434, 437 (E.D. Va. 1934) (old-soldier's home); Sturgeon v. Korte, 34 Ohio St. 525 (1879) (charitable hospital); Restatement (Second) of Conflict of Laws, *supra*, § 17 comment e (paupers); *cf.* Coppedge v. Clinton, 72 F.2d 531 (10th Cir. 1934) (mental incompetents).

Refugees or fugitives, who leave their homes because of unhappiness with existing political conditions, fear of physical harm, or apprehension of prosecution, can establish domiciles within the jurisdictions in which they seek asylum. *See* Ennis v. Smith, 14 How. (55 U.S.) 399, 423-24 (1853); Restatement (Second) of Conflict of Laws, *supra*, § 17 comment g. Persons who are forced to leave their homes and travel to other jurisdictions for reasons of health can become domiciled at their new abodes. *See* Note, *supra*, 13 U. Pitt. L. Rev. at 704.

Students or teachers who are required to live in a particular jurisdiction because of the location of the institution in which they are enrolled or employed can establish domiciles within that jurisdiction.[2] *See* Johnston v. Cordell National Bank, 421 F.2d 1310 (10th Cir. 1970); Milliken v. Tri-County Electric Cooperative, Inc., 254 F. Supp. 302 (D.S.C. 1966); Wehrle v. Brooks, 269 F. Supp. 785 (W.D. N.C. 1966), aff'd, 379 F.2d 288 (4th Cir. 1967). In Krasnov v. Dinan, 333 F. Supp. 751 (E.D. Pa. 1971), on rehearing, 339 F. Supp. 1357 (E.D. Pa. 1972), the court held that defendant was a citizen of Pennsylvania for purposes of diversity of citizenship even though he was in Pennsylvania because he was a member of a semi-monastic order that assigned him to teach in that state. In so holding, the court rejected arguments that defendant had moved to the state "only because directed to do so by his superiors" and that "he did not intend to live in Pennsylvania permanently, but only until he was reassigned elsewhere." 333 F. Supp. at 753.

Many political subdivisions have ordinances requiring police officers and other municipal employees to reside within the city limits. *See* Detroit Police Officers Association v. City of Detroit, 385 Mich. 519, 190 N.W.2d 97 (1971), appeal dismissed, 405 U.S. 950, [*1124] 92 S. Ct. 1173, 31 L. Ed. 2d 227 (1972). Can it be doubted that municipal police officers may establish domiciles within the cities where they must live?[3]

The foregoing examples warrant two observations. First, the bare fact that a person has been "compelled" to relocate within a particular jurisdiction does not ordinarily prevent him from becoming domiciled therein, although courts are justifiably concerned with substantiating declared intentions. Second, persons are "compelled" to relocate by a variety of circumstances, ranging from pursuit of employment to therapeutic dictates for illness; from the desire to attend educational or vocational institutions to the demands of the sovereign. Although these forces may differ in kind, they often equate in degree, and yet the law in this area has developed along the lines of per se rules tailored to the type of compulsion being exerted rather than in the direction of varying standards of proof directly with the strength of the constraints upon individual freedom of action.

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[2]As with servicemen, *See* Carrington v. Rash, 380 U.S. 89, 13 L. Ed. 2d 675, 85 S. Ct. 775 (1965), the determination of a student's domicile can be affected by the fundamental nature of the right being asserted, such as the right to vote. *See* Wilkins v. Ann Arbor City Clerk, 385 Mich. 670, 189 N.W.2d 423 (1971); *See generally*, Anno., 37 A.L.R. 138 (1925).

[3]In fact, the Detroit ordinance requires that the employees be actually domiciled within the city, as contrasted with mere nominal residence. *See* Detroit Police Officers Ass'n v. City of Detroit, 385 Mich. 519, 525-26, 190 N.W.2d 97 (1971), appeal dismissed, 405 U.S. 950, 31 L. Ed. 2d 227, 92 S. Ct. 1173 (1972).

We believe that the prisoner, like the serviceman or the Cabinet official, should not be precluded from showing that he has developed the intention to be domiciled at the place to which he has been forced to remove. No good reason appears for applying a contrary per se rule to him by making the presumption that he has retained his former domicile an irrebuttable one.

In addition, whatever may be the rule ordinarily applied in resolving problems of conflicts of law, we decline to adopt a per se principle in defining "citizenship" for purposes of federal jurisidiction.[4] We

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[4]Development of the law of "citizenship" for federal diversity purposes has proceeded largely on the assumption that domicile is a unitary concept, meaning the same thing in all contexts. Perhaps the classic statement is that of Justice Holmes: "The very meaning of domicile is the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined. . . . In its nature it is one, and if in any case two are recognized for different purposes it is a doubtful anomaly." Williamson v. Osenton, 232 U.S. 619, 625, 58 L. Ed. 758, 34 S. Ct. 442 (1914). Eleven years later, Professor Walter Wheeler Cook took issue with that proposition during the debates of the American Law Institute on the adoption of the first Restatement on the conflict of laws. He argued: "There is no doubt that what you might call the core of the concept is the same in all these situations; but as you get out towards what I like to call the twilight zone of the subject, I don't believe the scope remains exactly the same for all purposes." 3 Proceedings of the American Law Institute 227 (1925). This position was rejected by the first Restatement (*See* Restatement (First) of the Conflict of Laws § 11 (1934)), and it evoked the indignant response of Professor Joseph Beale that to adopt it would ignore 150 years of legal history in which courts had been applying domicile as a single concept by citing cases from different contexts interchangeably in formulating general rules. *See* 1 J. Beale, The Conflict of Laws § 9.4, at 92-94 (1935).

However, the argument that domicile is not a unitary concept, that its elements vary according to the nature of the rights being adjudicated, that it is applied in a flexible manner so that courts can reach equitable results (*e.g.*, by varying the quantum of evidence required or by drawing different inferences from identical facts) has gained scholarly support over the years since Cook's statement. *See* Currie, The Federal Courts and the American Law Institute (pt. 1), 36 U. Chi. L. Rev. 1, 12 n.61 (1968); Reese, Does Domicil Bear a Single Meaning?, 55 Colum. L. Rev. 589 (1955); Weintraub, An Inquiry into the Utility of "Domicile" as a Concept in Conflicts Analysis, 63 Mich. L. Rev. 961, 983-86 (1965); Note, Evidentiary Factors in the Determination of Domicile, 61 Harv. L. Rev. 1232, 1233-34 (1948); Comment, Necessity for a Continued Residence in Acquisition of a Domicile, 37 Yale L.J. 649 (1928). *But cf.* McClean, The Meaning of Residence, 11 Int. & Comp. L.Q. 1153 (1962). It should be observed that this argument attempts to describe what courts do, not what courts say, because courts ordinarily will pay lip-service to standard rules even while they strain and distort the rules to reach sound results. *See* Comment, Domicile of Choice-Fixed Rules, 36 Yale L.J. 408, 412 (1927). Nevertheless, occasional judicial expressions of doubt about the utility of the unitary-concept theory can be found. *See* Williams v. North Carolina, 325 U.S. 226, 244, 89 L. Ed. 1577, 65 S. Ct. 1092 (1945) (Rutledge, J., dissenting); Ziady v. Curley, 396 F.2d 873, 876 (4th Cir. 1968); Woolridge v. McKenna, 8 F. 650, 683 (C.C. W.D. Tenn. 1881); In re Estate of Jones, 192 Iowa 78, 82, 182 N.W. 227 (1921).

Professor Currie is unhappy with the equation of domicile with state citizenship for purposes of diversity jurisdiction because it is difficult to determine and because "it too frequently bears no relation to the probability of bias." Currie, *supra*, 36 U. Chi. L. Rev. at 10. He advocates that federal courts focus more on physical facts rather than on a probably unknown domiciliary intention, and he contends that the traditional tests of domicile, because they were not formulated with diversity jurisdiction in mind, should not be taken as determinative. Id. at 11-12 & n.61. To an extent, this argument ignores the fact that, except when precluded by the operation of some per se rule of law, *See*, *e.g.*, Seegers v. Strzempek, 149 F. Supp. 35 (E.D. Mich. 1957), courts usually will examine the physical facts in an effort to ascertain domiciliary intent, and will often assign a domicile on the basis of what appears to be the choice of a home rather than accept at face value declarations of intention. *See* Levitt, Recent Domicil Cases, 20 Ill. L. Rev. 134, 138-40 (1925). To the extent that he is arguing that federal courts are not bound by the traditional

ought to be hesitant to define a cognizable class of citizens out of access to the federal courts, which [*1125] are, after all, the courts of the sovereign to which that class of citizens belongs. *Cf.* Moore & Weckstein, Diversity Jurisdiction: Past, Present, and Future, 43 Texas L. Rev. 1, 19 (1964). We ought further to hesitate to raise the spectre of unconstitutionality by approving the application of an *irrebuttable* presumption of fact to a particular class of citizens. *Cf.* Carrington v. Rash, 380 U.S. 89, 13 L. Ed. 2d 675, 85 S. Ct. 775 (1965); Kelm v. Carlson, 473 F.2d 1267, 67 Ohio Op. 2d 275 (6 Cir. 1973).

Finally, it is interesting to observe that the facts of this case provide a rather unique twist to the reason most often given for the inclusion of diversity jurisdiction in the Constitution: the fear of local prejudice against out-of-state residents. *See, e.g.*, Moore & Weckstein, *supra*, 43 Texas L. Rev. at 15-16; Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 83 (1923); C. Wright, *supra*, § 23 at 73.[5] Assuming [*1126] the accuracy of this explanation,[6] determination of the citizenship of a party for purposes of federal diversity jurisdiction should emphasize the physical facts of the party's situation that could tend to result in local prejudice. *See* Currie, The Federal Courts and the American Law Institute (pt. 1), 36 U. Chi. L. Rev. 1, 11-12 (1968). Appellant, as we have pointed out, was known as a model young man in his community prior to his well-publicized conviction for the commission of a heinous crime. He has asserted that he will never return to his former community because of the scorn and obloquy to which he would be subject, and there is every reason to agree with his prediction in this respect. Should appellant not have the assurance that his suit for damages against his parents and his attorney would not be infected by the same feeling of outrage that he anticipates will prevent him from ever assuming residence at his erstwhile home? Federal courts should be alert to vindicate this type of interest in recognition of one of the traditional justifications for their existence.

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fixed rules of conflicts of law in the context of resolving federal jurisdictional questions, and that it is unfortunate to attach a blanket equivalence to areas of the law that may intersect in only one particular -- the notion of attachment to a single locale – his objections can be met by rejecting the unitary-concept rule and weighing in each case the policies underlying the question at issue and adapting the rule or evaluating the evidence in accordance with those policies. *See* Ziady v. Curley, *supra*; Woolridge v. McKenna, *supra*; Williams v. Williams, 328 F. Supp. 1380, 1382-84 (D. Virgin Islands 1971); Pannill v. Roanoke Times Co., 252 F. 910, 914-15 (W.D. Va. 1918); Reese, *supra*.

[5]As Chief Justice Marshall put it:

> However true the fact may be, that the tribunals of the States will administer justice as impartially as those of the nation, to parties of every description, it is not less true, that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different States.

Bank of the United States v. Deveaux, 9 U.S. 61, 5 Cranch (9 U.S.) 61, 87, 3 L. Ed. 38 (1809). *See also* Lankford v. Platte Iron Works Company, 235 U.S. 461, 478, 59 L. Ed. 316, 35 S. Ct. 173 (1915) (Pitney, J., dissenting); Scott v. Sandford, 19 How. (60 U.S.) 393, 580 (1857) (Curtis, J., dissenting); Dodge v. Woolsey, 18 How. (59 U.S.) 331, 354, 15 L. Ed. 401 (1856).

[6]*But See* Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483, 492-99 (1928).

The other possible rationale for denying a federal prisoner the opportunity to establish his citizenship in the state of his incarceration for purposes of diversity jurisdiction, which the District Court did not reach, can be quickly disposed of. We cannot find any federal statute or common-law rule to the effect that conviction and imprisonment destroys a citizen's right to invoke the diversity jurisdiction of the federal courts. In fact, whatever may be the viability of the "civil death" concept as it relates to the loss of fundamental rights by persons imprisoned for crime, *See, e.g.*, Goosby v. Osser, 409 U.S. 512, 93 S. Ct. 854, 35 L. Ed. 2d 36 (1973); Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971); *cf.* Carrington v. Rash, *supra*; the loss of the right to invoke the diversity jurisdiction of federal courts is not a collateral punishment of incarceration. *See* Ames v. Kuehnle, 425 F.2d 224 (5th Cir. 1970); White v. Fawcett Publications, 324 F. Supp. 403 (W.D. Mo. 1970); 1 J. Moore, *supra*, para. 0.74 [6.-5], at 708.65. We have no occasion to decide at this time whether appellant would have the capacity, under Pennsylvania law, to sue, *See* Fed. R. Civ. P. 17(b); Urbano v. News Syndicate Co., 358 F.2d 145 (2d Cir. 1966), cert. denied, 385 U.S. 831, 17 L. Ed. 2d 66, 87 S. Ct. 68 (1966); 1 J. Moore, *supra*, para. 0.74 [6.-5], at 708.65 & n.7; 3A id. para. 17.16; 3B id. para. 25.06 [3], at n.1, or whether, under Ohio law, he would have an enforceable remedy. *See* Angel v. Bullington, 330 U.S. 183, 91 L. Ed. 832, 67 S. Ct. 657 (1947); 3A J. Moore, *supra*, para. 17.16, at 653-54; 3B id. para. 25.06 [3], at n.1.

We hold that a litigant will not be precluded from establishing a domicile within a state for purposes of federal diversity jurisdiction solely because his presence there initially resulted from circumstance beyond his control. We recognize the importance of considering physical or legal compulsion in determining whether domicile is gained or lost, but we limit the application of involuntary presence to its operation as a presumption ordinarily requiring more than unsubstantiated declarations to rebut.

Accordingly, we reverse the judgment of the District Court and we remand for further proceedings. Appellant has the burden of proving Pennsylvania citizenship, and the District Court may decide the question upon affidavits or, if required, in a full evidentiary hearing, with or without a jury, in his discretion. *See* 1 J. Moore, *supra*, para. 0.74 [1], at 707.3-.5. In making this essentially factual determination, the court should accord weight to appellant's declarations of intentions, but in the circumstances of this case the physical facts pertaining to appellant's incarceration and to the conduct of his personal affairs assume [*1127] perhaps a greater than usual significance because appellant's statements of intention cannot bear on the fact of his initial relocation to Pennsylvania. The court should consider factors such as the possibility of parole for appellant,[7] the manner in which appellant has ordered his personal and business transactions, and any other factors that are relevant to corroboration of appellant's statements.[8] These factors must be weighed along with the policies and purposes underlying

[7]The fact that he is serving a life sentence, of course, lends a great deal of credibility to his assertion that he will never return to Ohio.

[8]Considerations ordinarily relevant to determination of domiciliary intent are discussed in 1 J. Beale, The Conflict of Laws §§ 41A-41D (1935); Beale, Proof of Domicile, 74 U. Pa. L. Rev. 552 (1926); Currie, The Federal Courts and the American Law Institute (pt. 1), 36 U. Chi. L. Rev. 1, 11-12 (1968); Heilman, Domicile and Specific Intent 35 W. Va. L.Q. 262 (1929); Levitt, Recent Domicile Cases, 20 Ill. L. Rev. 134 (1925); 1 J. Moore, Federal Practice para. 0.74 [3.-3] (2d ed. 1948); Note, Evidentiary Factors in the Determination of Domicile, 61 Harv. L. Rev. 1232 (1948); Note, Self-Serving Declarations and Acts in Determination of Domicile, 34 Geo. L. J. 220 (1946); Comment, Necessity for a Continued Residence in Acquisition of a Domicile, 37 Yale L.J. 649 (1928); Comment, Domicile of Choice -- Fixed Rules, 36 Yale L.J. 408 (1927).

federal diversity jurisdiction to determine whether appellant has overcome the presumption that he has maintained his former domicile.

Reversed and remanded.

EDWARDS, Circuit Judge, concurring.

The legal problems of this case are complex, but the practical problems may prove to be even more formidable. This case could trigger a quantity of frivolous litigation in the federal courts motivated by the natural desire of prisoners for a trip home to testify, even if the trip has to be under guard.

As the opinion of the court points out, for many years courts have followed the rule that persons (including federal prisoners) removed from their state of domicile by legal orders do not thereby lose their previous domicile. Cohen v. United States, 297 F.2d 760 (9th Cir. 1962); American Surety Co. of New York v. Cosgrove, 40 Misc. 262, 81 N.Y.S. 945 (1903); Metropolitan Life Ins. Co. v. Jones, 192 Ark. 1145, 97 S.W.2d 64, 66 (1936); United States v. Gronich, 211 F. 548 (W.D. Wash. 1914; Neuberger v. United States, 13 F.2d 541, 542-43 (2d Cir. 1926). In general, this rule serves to protect the legal rights of prisoners.

The corollary to the rule that imprisonment in another state did not occasion a change of domicile was, however, that during a prisoner's incarceration outside of his home state, as a matter of law he could not, even if he desired to, effect a change of domicile because his presence in the state of imprisonment was deemed coerced rather than voluntary. United States v. Stabler, 169 F.2d 995 (3d Cir. 1948); Shaffer v. Tepper, 127 F. Supp. 892 (C.D. Ky. 1955); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 17 (1971).

The opinion of the court in this case rejects the application of the rule just stated above as an absolute and irrebuttable presumption, and I concur. But I also feel that the rule should properly be characterized as a strong presumption capable of being overturned only by allegation and proof of change (or changes) of material circumstances bearing on domicile. I read the court's opinion as agreeing.

The two fundamental considerations in establishing domicile for purposes of state citizenship are residence in the state and intention to remain there permanently. Napletana v. Hillsdale College, 385 F.2d 871 (6th Cir. 1967). Both of these factors are usually subject to proof by objective facts. In the case of a federal prisoner in an out-of-state prison, however, his compelled presence [*1128] is certainly not identical with "residence" in its normal usage. And a declaration of intent to remain in the state concerned is greatly weakened (particularly for a person serving a life term) by the obvious lack of choice. The only proofs which come quickly to mind which a federal prisoner might substitute for the usually available objective proofs of domicile would be the establishment of an apparently permanent residence in the state of imprisonment by the prisoner's immediate family. *See* Metropolitan Life Insurance Co. v. Jones, *supra*.

Accepting (as I do) the proposition in the court's opinion that domicile is generally a question of fact for the trial judge, the great majority of domicile questions posed by federal prisoner diversity cases should be amenable to resolution by affidavits filed on motion for summary judgment without the expense and risk of cross-country prisoner travel under guard.