ESSAY

THE GOLDEN ANNIVERSARY OF THE
CHOICE OF LAW REVOLUTION:
INDIANA FIRED THE FIRST SHOT

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Unheralded, unsung, and generally unrecognized, the 1945 decision of the Indiana Supreme Court in *W. H. Barber Co. v. Hughes*1 helped change the course of choice of law in this country. *Barber* was the first case nationwide to abandon expressly the rigid rules of the *First Restatement of Conflict of Laws*2 in favor of a more flexible multifactor approach that applies the law of that state “with which the facts are in most intimate contact.”3 Although *Barber’s* rejection of the lex locus approach4 of traditional conflict of laws scholars5 occurred in the context of a contract dispute, over forty years would pass before the Indiana Supreme Court rejected the traditional conflicts doctrine in tort cases,6 replacing it with a more refined analysis.7 This Essay will celebrate the fiftieth anniversary of the choice of law revolution by focusing on *Barber* and the evolution of choice of law in Indiana. While other states have flailed about, flitting from one approach or set

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1. 63 N.E.2d 417 (Ind. 1945).
2. RESTATEMENT OF CONFLICT OF LAWS (1934).
4. Generally, the *First Restatement* provides that the place of contracting (lex locus contractus) determines the validity of a contract, while the place of performance determines all issues involving the manner and sufficiency of performance or excuse for nonperformance. RESTATEMENT OF CONFLICT OF LAWS §§ 332, 358 (1934). See also Joseph Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 260 (1910).
5. See, e.g., 1 JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS (1916). Beale’s theories were accepted and virtually unchallenged in the courts until mid-century. However, several scholars of the legal realism stripe criticized Beale’s “vested rights” approach. See, e.g., WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS, chs. 1-3 (1942); ERNEST LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS, chs. 1-8 (1947); David F. Cavers, A Critique of the Choice-of-Law Problem, 47 HARV. L. REV. 173, 178, 192 (1933).
6. RESTATEMENT OF CONFLICT OF LAWS § 384 (1934) (providing that the existence of a tort cause of action was governed, invariably, by the law of the place of wrong (lex loci delicti)).
of rules to another, Indiana attempted to make steady and more consistent, albeit slow, progress toward a predictable, uniform, and perhaps, sufficiently flexible approach to clearing up the “dismal swamp” of conflict of laws. For this Indiana ought to be congratulated, though much work remains to be done if these goals are to be achieved.

I. **Barber: The Fifteen Minutes of Fame That Never Was**

*W. H. Barber Co. v. Hughes* presented a rather complicated fact pattern involving the validity of a promissory note and its cognovit\(^9\) clause. The plaintiff was a Delaware corporation licensed to do business in Illinois with its principal place of business in Chicago. The defendants were Indiana domiciliaries. The promissory note was prepared and negotiated in Illinois and mailed there by defendants in Indiana. Upon defendants’ falling behind in payments, the plaintiff obtained an Illinois judgment which it sought to enforce in Indiana.\(^11\) Indiana, unlike Illinois, forbade the use of cognovit clauses. Chief Justice Richman

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9. “The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.” William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953). Forty-three years later, Prosser’s comments are equally, if not more, salient. See infra notes 59-69, 77-84 and accompanying text.

10. This is a confession of judgment that permits a creditor to obtain a judgment in a sister state court without serving process on the debtor in the debtor’s domicile state. See *W.H. Barber Co. v. Hughes*, 63 N.E.2d 417, 417 (Ind. 1945).

concluded that the judgment was entitled to enforcement.

While initially paying lip service to traditional choice of law doctrine, citing \textit{Milliken v. Pratt}, the paradigmatic lex locus contractus case, and vested rights/lex locus literature by Goodrich and Beale, Chief Justice Richman tested his conclusion that Illinois law governed the validity of the note and cognovit clause by reliance on two contemporary casebooks that described judicial efforts to find "the most intimate contact" or "center of gravity" with respect to contractual transactions. Examining the "contact points," Richman noted that Illinois was the place where the parties' business was transacted almost exclusively, settlement conferences took place, and where the note was prepared and payable. Further, the note was on an Illinois form and Illinois law was intended to be applied. The only "contact points" with Indiana were the debtors' residence and where they signed the note and placed it in the mail. Thus, Richman concluded that the disputed transaction "centered" in Illinois and that its law applied. This result, achieved by a method, "[s]o far [unknown to have] been formulated by any court into a rule," began the choice of law revolution.

If, indeed, Indiana led the nation by deploring "the unsatisfactory state of the decisions" and by "resort[ing] to a method used by modern teachers of Conflict of Laws," why is it that so little celebration or recognition in the academy occurred then or in the ensuing years? Only a few writers have even mentioned, and then mostly in passing, \textit{Barber}'s special place in conflict of laws history. In contrast,

\begin{itemize}
  \item \textit{Barber}, 63 N.E.2d at 421.
  \item 125 Mass. 374 (1878).
  \item \textit{HERBERT F. GOODRICH}, \textit{HANDBOOK OF THE CONFLICT OF LAWS} § 104, at 262 (2d ed. 1938).
  \item \textit{JOSEPH BEALE}, \textit{CONFLICT OF LAWS} § 1048 (1916).
  \item \textit{Barber}, 63 N.E.2d at 423 (citing \textit{CHEATHAM ET AL., CASES AND MATERIALS ON CONFLICT OF LAWS} (2d ed. 1941); \textit{HARPER & TAINTOR, CASES AND OTHER MATERIALS ON JUDICIAL TECHNIQUES IN CONFLICT OF LAWS} (1937)).
  \item \textit{Id.} at 423.
  \item \textit{Id.} at 423-24. The court further rejected defendants' attempt to apply extraterritorially Indiana's law forbidding cognovit clauses, as well as an argument based on public policy. \textit{Id.} The full faith and credit mandate, explicated in Fauntleroy v. Lum, 210 U.S. 230 (1908), foreclosed the policy argument. \textit{Barber}, 63 N.E.2d at 423-24.
  \item \textit{Barber}, 63 N.E.2d at 423.
  \item \textit{Id.}
  \item 21. The publication deadline of this journal forecloses our ability to wait for a new Oliver Stone movie describing the \textit{Barber} conspiracy. Hollywood insiders report that the movie reveals a Cuban connection to A.L.I. folks and that "Checkers" is implicated in \textit{Barber}-gate. In a tour de force, Brad Pitt will enact the role of the cognovit clause.
  \item \textit{See}, \textit{e.g.}, \textit{ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW: CASES AND MATERIALS} 403 (2d ed. 1989) (reproducing the \textit{Auten v. Auten} decision, 124 N.E.2d 99 (N.Y. 1954), which credited \textit{Barber} as the "first" to employ the new method to rationalize choice of law results); \textit{EUGENE F. SCOLES & PETER HAY}, \textit{CONFLICT OF LAWS} § 18.28, at 677 n.3 (relegating \textit{Barber} to a footnote as an "early decision" reflecting \textit{RESTATEMENT} (SECOND) \textit{CONFLICT OF LAWS}}
Babcock v. Jackson,23 decided eighteen years after Barber, is described thusly: "[I]ts report was like a cannon shot. Most of its precursors among other cases came off, in retrospect, like caps in a toy pistol. Babcock was the big bang..."24 A contemporary symposium, with contributions by conflicts' big guns such as David F. Cavers, Elliot E. Cheatham, Brainerd Currie, Albert A. Ehrenzweig, Robert A. Leflar, and Willis L.M. Reese, greeted Babcock's arrival on the scene.25 Most conflict of laws casebooks reproduce the case as an introduction to modern conflicts doctrine.26 And, in 1993, Babcock was treated to its second symposium with another line-up of conflicts gurus.27 Why so much fuss about Babcock and so little about Barber? Is New York provincialism, so well-satirized in Saul Steinberg's famous New Yorker magazine cartoon, responsible for Babcock's ascendancy and Barber's relative obscurity? Is the Second City Syndrome (writ large) at work here?

One possible explanation is that Babcock is a tort case involving that erstwhile darling of conflict of laws scholars—a guest statute28—while Barber is a contract

§ 195 (1971), while noting Auten as an early departure from the rigid First Restatement rules. Id. § 18.17, at 657; RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 7.3 D, at 377 n.43 (3d ed. 1986) (citing Barber as one of a number of courts which hold that questions of contract validity are to be controlled by the state with the most significant relationship); Herma Kay, Chief Justice Traynor and Choice of Law Theory, 35 HASTINGS L.J. 747, 755 n.60 (1984) (recognizing Barber as prior to Traynor's "pathbreaking" opinions); Herma Kay, Theory into Practice: Choice of Law in the Courts, 34 MERCER L. REV. 521, 526 (1983) (Barber as precursor to the New York approach in Auten); James Audley McLaughlin, Conflict of Laws: The New Approach to Choice of Law: Justice in Search of Certainty, Part Two, 94 W. VA. L. REV. 73, 75 & n.3 (1991) (recognizing that Barber may have been the first court to use "center of gravity"); Gregory E. Smith, Choice of Law in the United States, 38 HASTINGS L.J. 1041, 1073 (1987) (recognizing the "now classic" Barber as the first "to depart conclusively from traditional choice of law rules").


26. See Michael Solimine, The Impact of Babcock v. Jackson: An Empirical Note, 56 ALB. L. REV. 773 n.6 (1993). In their most recent edition, however, the editors of the casebook I have adopted for use in my Conflict of Laws class have reduced Babcock to editorial commentary. See ROGER C. CRAMTON ET AL., CONFLICT OF LAWS 165 (5th ed. 1993). I deny categorically that this is why I use this text.


28. Friedrich K. Juenger has often criticized conflicts scholars for their inordinate attention to guest statute cases. See, e.g., FRANK K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 235 (1993). On the other hand, Juenger himself, heaping encomia of praise onto Babcock, says that while "it does not rise to the level of Marbury v. Madison or Brown v. Board of Education, and lacks the topicality of Roe v. Wade, [Babcock] may well rank with such classics as Erie Railroad v. Tompkins and International Shoe Co. v. Washington in seminal importance, if not in frequency
case about promissory notes and cognovit provisions, hardly the stuff that might make our hearts beat faster. Also, everyone knows that torts are sexier than contracts. 29 No one yet has made a movie of Hadley v. Baxendale, 30 but Palsgraf, 31 the cult movie, 32 has excited generations of law students. (Passengers raising their noses to the sky to sniff for "negligence in the air" is one of the great American film moments!) That Babcock is a tort case, however, does not explain fully its fame compared to Barber. For almost a decade prior to Babcock the New York Court of Appeals adopted a "center of gravity" approach in a contract/matrimonial case. 33 Decided nine years after Barber, Auten was also widely recognized in casebooks and commentaries. 34

Michael Solimine posits several reasons for Babcock's influential status: the high prestige of the New York Court of Appeals, the court's adoption of proposals made by certain scholars who, in turn, warmly applauded the decision, the tendency of the court toward judicial innovation in several areas of the law, and the explicit use of new choice of law doctrine to trash outmoded or disfavored tort laws. 35 As to this last factor, Babcock refused to apply Ontario's harsh guest statute because Ontario (the place of injury) had no interest implicated in a case where the plaintiff, defendant, and insurance company were not Ontario residents. 36

The California Supreme Court, per Chief Justice Traynor, 37 and the Wisconsin Supreme Court 38 had also used innovative choice of law methods as a "way out" of anachronistic tort results or to avoid disfavored substantive tort law. In the future, it may very well be that we will see more creative choice of law decisions by way of innovation or manipulation of existing doctrine given the disparity between states' tort laws in the wake of the current round of tort reforms. 39 Of
course, if Congress is successful in enacting comprehensive federal “tort reform,” conflicts battles may be fewer.

When one thinks of innovative state supreme courts over the last few decades, it is common to name the New York Court of Appeals, and the California, Oregon, and New Jersey courts. With all due respect to the Indiana Supreme Court, its relative paucity of civil cases, let alone conflict of laws cases in the last fifty years, explained in part by its rules, contributed to the fact that Barber is not a conflict of laws household name. Moreover, the Barber opinion itself does not indicate the depth and intensity of its break with the past as do opinions like Babcock. In fact, Barber’s new path is paved initially with citations to vested rights theory so the court does not seem to criticize directly or to undermine significantly that theory. Further, after Barber, the Indiana Supreme Court did not again hear a conflict of laws case, save one in 1946 that used the old lex loci approach to torts, for almost forty years. In contrast, the New York Court of Appeals grappled with many conflicts cases during that time. Lastly, as Professor Solimine notes in regard to Babcock, we should not underestimate the interconnectedness between the academy and the New York Court of Appeals, a cross-fertilization connection which the Indiana Supreme Court lacked.

Nevertheless, Barber did fire the first shot in the judicial choice of law revolution. The next part of this Article will describe the evolution of Indiana choice of law theory since Barber.

II. Barber’s Progeny

Although Barber abandoned the traditional choice of law approach in resolving contract issues, the lex loci delicti method, employed in Indiana since 1888, flourished in non-contract cases for another forty-two years after Barber. Not until 1987 did the Indiana Supreme Court recognize that “[r]igid application

methodology and abolition of a guest statute). In very few states will we have guest statutes to kick around anymore. See Weintraub, supra note 22, at 294.

40. Until recently, the Indiana Supreme Court devoted its resources to hearing criminal appeals. For a thorough history, see Randall T. Shepard. Changing the Constitutional Jurisdiction of the Indiana Supreme Court, 63 Ind. L.J. 669 (1988).


43. Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071 (Ind. 1987) (adopting a “significant contacts” approach to be used with lex loci).

44. See Solimine, supra note 26, at 787-88. For instance, Babcock cited a draft of the Second Restatement which was authored in part by Willis L.R. Reese—Restatement Reporter and Professor of Law at Columbia. Judge Fuld, Babcock’s author, graduated from Columbia at the time of Reese’s tenure there. Id. at 788 n.71.

of the traditional rule . . . [might] lead to an anomalous result." 46 In one sense this four-decade hiatus is astonishing. Given the intellectual ferment in choice of law engendered by scholars such as Brainerd Currie (interest analysis), 47 David F. Cavers (principles of preference) 48 and Robert A. Leflar (choice-influencing considerations/"better law"), 49 as well as adoption by several sister states of new choice of law theories, the persistence of lex loci in Indiana is not easily explainable. Perhaps the perceived advantages of the First Restatement approach (certainty, predictability, uniformity, and discouragement of forum shopping) gave lex loci its longevity in Indiana and elsewhere, 50 although Currie 51 and some First Restatement decisions 52 effectively undercut these asserted advantages.

Nevertheless, in Hubbard Manufacturing Co. v. Greeson, the Indiana Supreme Court finally abandoned a strict lex loci approach to choice of law for tort cases. 53 Noting that all states bordering Indiana would not apply Illinois law

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46. Hubbard, 515 N.E.2d at 1073. Recall that this was the first choice of law case the court addressed since 1945. See supra note 40 and accompanying text.

47. Brainerd Currie, Married Women's Contracts: A Study in Conflict-of-Laws Method, 25 U. Chi. L. Rev. 227 (1958), reprinted in BRAINERD CURRIE, SELECTED ESSAYS ON CONFLICT OF LAWS (1963). Currie's policy analysis of conflicting laws and his division of situations into true or false conflicts and disinterested forum cases has been adopted expressly by less than a handful of states. See Symeon C. Symeonides, Choice of Law in the American Courts in 1995: A Year in Review 17, Table 3 (Newsletter Version) (1995). Nevertheless, his influence on judicial choice of law has been enormous. Although the majority of states adhere to the most significant relationship test of the Second Restatement for torts or contracts, id. at 15, they do so in a way that is scarcely distinguishable from a pure Currie governmental interest method.


50. A recent count indicates twelve states using lex loci delicti for torts and ten states using lex loci contractus. Symeonides, supra note 47, at 13.

51. See Currie, supra note 47, at 230-51. But see Paul v. National Life, 352 S.E.2d 550-51 (W. Va. 1986), where the court rejects emphatically the conflicts of law "playpen" of the last twenty years and reaffirms its commitment to lex loci, with a public policy escape valve. Id. at 555. "Having mastered marble, we decline an apprenticeship in bronze." Id. at 556.

52. Courts purporting to use the First Restatement have resorted to a number of devices to "escape" from what otherwise would be the applicable law. See, e.g., Bournias v. Atlantic Maritime Co., 220 F.2d 152 (2d Cir. 1955) (exploring the substance/procedural dichotomy of foreign statute of limitations); In re Schneider’s Estate, 96 N.Y.S.2d 652, 659 (N.Y. Sup. Ct. 1950) (employing renvoi); Levy v. Daniel’s U-Drive Auto Renting Co., 143 A. 163 (Conn. 1928) (characterizing the issue as tort rather than contract). First Restatement courts have also employed the public policy exception to escape from disfavored law. See, e.g., Kilberg v. Northeast Airlines, 172 N.E.2d 526, 528 (N.Y. 1961) (refusing to apply a sister state’s damage cap). The public policy exception has been criticized as a "substitute for analysis." See Monrad G. Paulsen & Michael I. Sovern, “Public Policy” in the Conflict of Laws, 56 Colum. L. Rev. 969, 1016 (1956).

53. 515 N.E.2d 1071 (Ind. 1987).
(as the place of injury), the court found it “anomalous” and “inappropriate” that Indiana would do so.\(^{54}\) Instead, Chief Justice Shepard said that unless the place of the tort is significant, with the most contacts to the case, the court must examine several factors to see whether the law of the place of injury should apply. If the place of the tort is an insignificant contact, the court should consider the following factors and evaluate them “according to their relative importance to the particular issues being litigated[:]

1) the place where the conduct causing the injury occurred;

2) the residence or place of business of the parties; and

3) the place where the relationship is centered.”\(^{55}\)

Based on the Hubbard facts which indicated that the place of tort was “insignificant,” the court applied the factors above and concluded that Indiana—the residence of both parties, place of manufacture of the allegedly defective product, and center of the relationship between the defendant and the plaintiff’s decedent—had “the more significant relationship and contacts,”\(^{56}\) therefore compelling the application of Indiana law.\(^{57}\) Thus, the Indiana Supreme Court joined the ranks of many state courts that had abandoned earlier an approach to choice of law which the United States Supreme Court has called “hoary” and “wooden.”\(^{58}\)

Part III will examine the impact of Hubbard on Indiana choice of law and will conclude that the relative infancy of Indiana’s “new” conflict of laws approach, as well as its continued emphasis on the presumptive primacy of lex loci, indicates that more conflicts work needs to be done, and it needs to be done with more purposive analysis.

III. HUBBARD’S PROGENY

A review of several tort choice of law cases (Appendix, Tables I and II) decided by Indiana state appellate courts and by federal courts employing Indiana choice of law suggests that it is not easy to predict when a court will conclude that the place of the tort is “significant and . . . with the most contacts,”\(^{59}\) such that its law will apply. The Bruck case\(^{60}\) is an interesting example.

In Bruck, the tort occurred in Ohio and the issue concerned the distribution of wrongful death proceeds. In Indiana, no mechanism existed for the distribution

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54. Id. at 1073.
55. Id. at 1073-74 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971)).
56. Id. at 1074.
57. It should be noted that application of Indiana law made it more difficult for the plaintiff to recover. Id. at 1073.
59. Hubbard, 515 N.E.2d at 1073.
of the wrongful death proceeds to certain plaintiffs; Ohio law permitted recovery for survivors other than dependents and spouses, to be distributed equitably. Despite concluding that Ohio, as lex loci, was an insignificant contact and that all but one of the distributees resided in Indiana, the court nevertheless upheld the presumption in favor of lex loci. The court’s reasoning is curious. The court noted that “the most relevant factor is the unique legal status of the wrongful death proceeds,” but also stated that the case fell into a “legal lacuna.” Moreover, the court went on to analogize to treatise authority which suggested that where a remedy is so closely intertwined with a right that it is inseparable, then the law that created both the right and the remedy ought to be applied. Thus, it is not clear whether the court was really following Hubbard, adopting a traditional exception that links remedy and right to escape from otherwise applicable law, employing sub rosa a “Better Law” approach by using the more liberal Ohio law, or, in essence, finding no real conflict as there was an “absence of applicable Indiana law.”

As students do in Algebra, conflicts courts should “show their work.” The court in Bruck did not. However, one aspect of Bruck is relatively straightforward: the court rejected the decedent’s father’s attempt to persuade the court to adopt a Second Restatement approach and apply Indiana law as “the state of domicile of the decedent and the beneficiaries.” Interestingly, under Hubbard, a very good argument could be made to support the application of Indiana, rather than Ohio law, because Ohio’s connection to the disputed issue was negligible.

In contrast, when the place of the tort lacks a significant relationship to the

61. Id. at 748.
62. Id.
63. Id.
64. Id. at 749 (citing 15A C.J.S. Conflict of Laws § 9 (1967)).
65. Id. at 747 (citing Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071, 1073 (Ind. 1987)).
66. See, e.g., The Harrisburg, 119 U.S. 199, 214 (1886).
67. See supra note 49.
68. Bruck, 632 N.E.2d at 746. Arguably, the court’s application of Ohio law as the place of injury, when Ohio admittedly had no significant contacts with the case, is unconstitutional under Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981), and Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). Ohio seems to lack “a significant contact or significant aggregation of contacts, creating [Ohio] interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” Allstate, 449 U.S. at 313. Ohio’s only connection to the distribution of the wrongful death proceeds is that it is the place of injury, while Indiana is the residence of all but one of the distributees. Under Hague and Shutts, therefore, application of Ohio law may violate the Due Process Clause, U.S. Const. amend. XIV, and the Full Faith and Credit Clause, U.S. Const. art. IV, § 1.
69. Bruck, 632 N.E.2d at 747 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 177 cmt. B (1971)).
case, several Indiana\textsuperscript{70} and federal courts,\textsuperscript{71} unlike Bruck, refuse to apply its law. For example, in Gollnick v. Gollnick\textsuperscript{72} an Indiana car accident led to a suit by a child against her father—both California domiciliaries. Because California had an interest in the integrity of familial relationships and Indiana, the place of injury, was not a significant contact, the court refused to apply Indiana law.\textsuperscript{73} Similarly, in Autocephalous Greek Orthodox Church v. Goldberg, although the tort occurred in Switzerland, the federal district court applied Indiana law.\textsuperscript{74} In Goldberg, a foreign plaintiff sued a fine arts corporation and the buyer of the mosaics that were allegedly stolen from the plaintiff. Although the court found that the buyer took possession of the mosaics in Switzerland and that, therefore, the tort occurred in Switzerland, the court held the Swiss contacts insignificant.\textsuperscript{75} Indiana was the buyer’s domicile, the principal place of business of the corporation that purchased the mosaics, the situs of the art dealer’s efforts to assist in the purchase, the state from which financing was obtained, and the location of the mosaics at the time of suit. Moreover, several Indiana residents held an interest in any profits arising from resale of the mosaics.\textsuperscript{76}

An examination of Indiana choice of law cases since Hubbard leaves the reader with a feeling of unease. Most cases do not explain fully why the place of tort does or does not bear a significant connection to the case.\textsuperscript{77} Instead, the courts seem to be contact-counting, without furnishing an adequate method to determine the weight or priority of certain contacts compared to other contacts. Although Hubbard teaches that certain Second Restatement factors “should be evaluated according to their relative importance to the particular issues being litigated,”\textsuperscript{78} few courts have done so.\textsuperscript{79} This may be due, in part, to the relative youth of Indiana’s “modern” choice of law approach to torts (1987 to present), or it may follow from the nature of the presumptive rules of the Second Restatement itself which, unlike

\begin{itemize}
  \item See, e.g., Autocephalous Greek Orthodox Church v. Goldberg, 717 F. Supp. 1374 (S.D. Ind. 1989), aff’d, 917 F.2d 278 (7th Cir. 1990).
  \item 517 N.E.2d 1257 (Ind. Ct. App. 1988), aff’d, 539 N.E.2d 3 (Ind. 1989).
  \item Id. at 1258-59.
  \item 717 F. Supp. 1374 (S.D. Ind. 1989), aff’d, 917 F.2d 278 (7th Cir. 1990).
  \item Id.
  \item Id. at 1394.
  \item Gollnick is an exception. It notes that California, the place of the family’s domicile, has an interest in an intrafamily tort suit which Indiana lacks. Gollnick, 517 N.E.2d at 1259.
  \item Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071, 1074 (Ind. 1987). This language tracks the Restatement (Second) of Conflict of Laws § 145(2) (1971), although Hubbard does not quote it.
  \item See supra note 77. See also Jean v. Dugan, 20 F.3d 255, 261-62 (7th Cir. 1994), finding that in a defamation action plaintiff’s domicile and place of employment, Indiana, was “the relevant community in which the alleged injury to his reputation occurred . . . .”
\end{itemize}
Currie's interest analysis,\(^80\) does not inquire into the purpose or policy behind the conflicting laws to rationalize their application.\(^81\) Further, neither *Hubbard* nor any Indiana choice of law case since 1987 mentions section 6(2) of the *Second Restatement*, which provides a multi-factor list to serve as a final policy check on otherwise applicable law.\(^82\) Several of these factors urge the courts to focus on policy and state interests.\(^83\) Such analysis might cause a presumptive rule to be dismissed in favor of a law with a tighter and more relevant connection to the disputed issue. Of course, because section 6 lists seven factors with no guidance as to their relative weight, a court may rely on one to tip the balance while another court might emphasize one or more different factors and reach a different conclusion.\(^84\) This decreases predictability by enhancing the opportunity for flexibility and/or manipulation to achieve the desired result.

Whether this is a good development depends upon how one constructs the hierarchy of choice of law goals; should predictability, uniformity, and certainty count more or less than (or equal to) fairness\(^85\) and justice between the parties and/or recognition of significant state interests in the outcome of the litigation. It will be interesting to see how Indiana choice of law juggles these sometimes conflicting principles. The *Second Restatement* itself gives a schizophrenic solution to the “goals” problem. It first directs a court to a host of presumptive rules,\(^86\) thereby worshipping at the altar of predictability, uniformity, and certainty. Second, courts are to test these presumptive rules by reference to general tort or contract principles.\(^87\) Finally, courts must check this answer by way of a “policy” analysis based on a seven factor list.\(^88\) The second and third steps undercut, of

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81. Most scholars have been extremely critical both of the “center of gravity” approach, which preceded the *Second Restatement*, and the *Second Restatement*. See CRAMTON ET AL., supra note 26, at 132-33. Nevertheless, judicial acceptance of the *Second Restatement* is widespread; approximately 23 states adhere to its approach. See Symeonides, supra note 47.

82. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971).
83. Id. §§ (6)(2)(b), (c) & (e).
84. See, e.g., Wood Bros. Homes, Inc. v. Walker Adjustment Bureau, 601 P.2d 1369 (Colo. 1979) (emphasizing § 6(2)(c), the policies and interests of the concerned states, and applied New Mexico law); see also Walker Adjustment Bureau v. Wood Bros. Homes, Inc., 582 P.2d 1059 (Colo. Ct. App. 1978) (reversing the lower court and emphasizing §§ 6(2)(d), (f) & (g), protecting justified expectations, predictability, and ease of application, and applying Colorado law).
87. Sections 145 and 188 of the Restatement (Second) of Conflict of Laws are to be used when the case involves a tort or contract issue.
88. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971). For a case illustrating how cumbersome this process can become, especially in an air crash case, see Bryant v. Silverman
course, the putative certainty provided by the first step while attempting to ensure that the law of the state with the most significant relationship will apply. Although the result is an inconsistent blending of jurisdiction-selecting rules (a holdover from the *First Restatement*) and policy analysis, courts have been reluctant to abandon it.\(^8^9\)

**CONCLUSION**

Although the Indiana Supreme Court was the first in the nation to abandon the rigid *lex locus contractus* rule in favor of a “contacts” approach, it took more than forty years for the court to change over to this approach for tort conflict of laws cases. We are still in the first decade after this second revolution in choice of law, and courts (Indiana and federal, applying Indiana choice of law) seem to be unsure of themselves in using the “new” approach which uses *lex loci* only if the place of the tort bears a significant relationship to the issues disputed in the case.

Hopefully, the revolution begun in 1945 and continued in 1987 will flourish. In the future, Indiana choice of law should focus more closely on the purpose and policy of the conflicting laws and should analyze more explicitly the reasons for choosing the law of one state over that of another.

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\(^{703}\) P.2d 1190 (Ariz. 1985) (applying Arizona law and reversing the trial court’s conclusion that Colorado had the most significant relationship).

\(^{89}\) As of November, 1995, the *Restatement Second* (or “significant contacts”) approach to torts and contracts conflicts has been adopted by 23 and 29 jurisdictions, respectively, and is the prevalent mode of analysis in this country. *See* Symeonides, *supra* note 47, at 15. Commentators do not react with such warmth. *See* Cramton et al., *supra* note 26, at 132-33 (quoting, in part, Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 Am. J. Comp. L. 465, 486-87 (1991) (“one needs to read a lot of opinions in a single sitting fully to appreciate just how badly the Second Restatement works in practice . . . [it is] time to abandon this dead-end project in order to channel judges in more productive directions”)).
APPENDIX

TABLE I
Sample Cases - Lex Loci Applicable

<table>
<thead>
<tr>
<th>A.</th>
<th>Indiana State Cases</th>
<th>Issue</th>
<th>Applicable Law</th>
<th>Place of Injury</th>
<th>Place of Conduct Causing Injury</th>
<th>Plaintiff's Residence</th>
<th>Defendant's Residence</th>
<th>Center of Relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>In re Estate of Bruck</td>
<td>Distribution of wrongful death proceeds</td>
<td>Ohio</td>
<td>Ohio</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td>Bencor v. Harris</td>
<td>Personal Injury/ Indiana Defendant immunity</td>
<td>Indiana</td>
<td>Indiana</td>
<td>Tennessee</td>
<td></td>
<td>1—Tennessee</td>
<td>Indiana</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>B.</th>
<th>Federal Cases</th>
<th>Issue</th>
<th>Applicable Law</th>
<th>Place of Injury</th>
<th>Place of Conduct Causing Injury</th>
<th>Plaintiff's Residence</th>
<th>Defendant's Residence</th>
<th>Center of Relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Hardee's of Maumelle, Ark., Inc. v. Hardee's Food Systems, Inc.</td>
<td>Fraud</td>
<td>Indiana</td>
<td>Indiana</td>
<td>Unclear</td>
<td>Indiana</td>
<td>North Carolina</td>
<td>Unclear</td>
</tr>
<tr>
<td>a.</td>
<td>Plaintiff</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>b.</td>
<td>Arkansas</td>
<td>Fraud</td>
<td>Unclear</td>
<td>Arkansas</td>
<td>North Carolina</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* I thank Jennifer DeYoung for her research assistance in preparation for this Appendix.


2 534 N.E.2d 271 (Ind. Ct. App. 1989) (lex loci "retains some validity" especially where there are significant contacts.) Id. at 273.

3 543 N.E.2d 680 (Ind. Ct. App. 1989) (Illinois' then applicable pure comparative negligence governs, rather than Indiana's then applicable contributory negligence). Id. at 682 & n.1.

4 31 F.3d 573 (7th Cir. 1994).
<table>
<thead>
<tr>
<th>B.</th>
<th>Federal Cases, cont’d</th>
<th>Issue</th>
<th>Applicable Law</th>
<th>Place of Injury</th>
<th>Place of Conduct Causing Injury</th>
<th>Plaintiff’s Residence</th>
<th>Defendant’s Residence</th>
<th>Center of Relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.</td>
<td>Jean v. Dugan⁵</td>
<td>Defamation</td>
<td>Indiana</td>
<td>Indiana; Illinois; Iowa</td>
<td>Indiana</td>
<td>Indiana</td>
<td>Indiana</td>
<td>Illinois</td>
</tr>
<tr>
<td>3.</td>
<td>Bateman v. Central Foundry Div., GMC⁶</td>
<td>Negligence</td>
<td>Indiana</td>
<td>Indiana</td>
<td>Indiana</td>
<td>Indiana</td>
<td>Delaware</td>
<td>Indiana</td>
</tr>
<tr>
<td>5.</td>
<td>Stillwell v. Brock Bros.⁸</td>
<td>Indemnification; negligence</td>
<td>Kentucky</td>
<td>Kentucky</td>
<td>Kentucky</td>
<td>Indiana</td>
<td>unclear</td>
<td>Kentucky</td>
</tr>
<tr>
<td>6.</td>
<td>Consolidated Rail Corp v. Allied⁹ Corp.</td>
<td>Contribution</td>
<td>Indiana</td>
<td>Indiana</td>
<td>Illinois or Indiana</td>
<td>unclear</td>
<td>unclear</td>
<td>unclear</td>
</tr>
<tr>
<td>7.</td>
<td>Castelli v. Steele¹⁰</td>
<td>Medical malpractice</td>
<td>Indiana/Illinois</td>
<td>Indiana</td>
<td>Illinois</td>
<td>Indiana</td>
<td>Indiana</td>
<td></td>
</tr>
</tbody>
</table>

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⁵ 20 F.3d 255 (7th Cir. 1994).
⁷ 820 F. Supp. 1123 (S.D. Ind. 1992) (both the presumptive lex loci rule and the balancing test lead to application of Kentucky law). Id. at 1125.
⁹ 882 F.2d 254 (7th Cir. 1989).
**TABLE II**

**Sample Cases — Lex Loci Not Applicable**

<table>
<thead>
<tr>
<th>A. Indiana State Cases</th>
<th>Issue</th>
<th>Applicable Law</th>
<th>Place of Injury</th>
<th>Place of Conduct Causing Injury</th>
<th>Plaintiff’s Residence</th>
<th>Defendant’s Residence</th>
<th>Center of Relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Thomas v. Whiteford¹</td>
<td>Personal Injury</td>
<td>Indiana</td>
<td>Michigan</td>
<td>Michigan</td>
<td>Indiana</td>
<td>Indiana</td>
<td>Indiana</td>
</tr>
<tr>
<td>3. Gollnick v. Gollnick¹</td>
<td>Intrafamily Immunity</td>
<td>California</td>
<td>Indiana</td>
<td>Indiana</td>
<td>California</td>
<td>California</td>
<td>California</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>B. Federal Cases</th>
<th>Issue</th>
<th>Applicable Law</th>
<th>Place of Injury</th>
<th>Place of Conduct Causing Injury</th>
<th>Plaintiff’s Residence</th>
<th>Defendant’s Residence</th>
<th>Center of Relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Autocephalous Greek Orthodox Church v. Goldberg⁴</td>
<td>Art Ownership</td>
<td>Indiana</td>
<td>Switzerland</td>
<td>Switzerland</td>
<td>Cyprus</td>
<td>Indiana</td>
<td>None</td>
</tr>
<tr>
<td>2. Ackerman v. Schwartz³</td>
<td>Misrepresentation</td>
<td>Indiana</td>
<td>court unable to decide</td>
<td>Michigan</td>
<td>Indiana</td>
<td>Indiana/nationwide</td>
<td>Michigan</td>
</tr>
</tbody>
</table>

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¹ 578 N.E.2d 701 (Ind. Ct. App. 1991) (where place of publication occurs simultaneously in more than one state, the place of the tort is insignificant). *Id.* at 705.


³ 517 N.E.2d 1257 (Ind. Ct. App. 1988) (place of tort irrelevant in capacity to sue and be sued case). *Id.* at 1258.

⁴ 717 F. Supp. 1374 (S.D. Ind. 1989) (Indiana’s contacts most significant; alternatively, Swiss choice of law would lead to same result as Indiana law would apply).

³ 733 F. Supp. 1231 (N.D. Ind. 1989) (place of tort is unclear, but Indiana is center of parties’ relationship). *Id.* at 1240.