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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 approach[4] of traditional conflict of laws scholars[5] 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).

3. *Barber*, 63 N.E.2d at 423.

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)).

7. Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071 (Ind. 1987).

of rules to another,[8] 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"[9] 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[10] 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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8. New York is one example. New York is said to have "hopped frenetically from one theory to another like an overheated Mexican jumping bean." ROGER CRAMTON ET AL., CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS 243 (3d ed. 1981). *Compare* Cooney v. Osgood Mach., Inc., 612 N.E.2d 277 (N.Y. 1993) (analyzing a tort conflict of laws question about contribution by employing interest analysis and, secondarily, the so-called "Neumeier" Rules) *with* Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y. 1972) (three rules which essentially employ a territorialist view, focusing on the domicile, conduct, and, by default, the place of the accident) *and* Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963) (adopting a "grouping of contacts" test). *Babcock* engendered considerable confusion. *See, e.g.*, Tooker v. Lopez, 249 N.E.2d 394 (N.Y. 1969); Dym v. Gordon, 209 N.E.2d 792 (N.Y. 1965). For a comprehensive treatment of the New York Court of Appeals' conflicts opinions, see Harold L. Korn, *The Choice of Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983). Professor Kay engages in a similar analysis of choice of law decisions in California since 1970. *See* Herma H. Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 576 (1980). *See also* Herma H. Kay, *Chief Justice Traynor and Choice of Law Theory*, 35 HASTINGS L.J. 747 (1984) (deploring the "decline in the clarity and precision of [California's] choice of law opinions" since 1970). Professor Juenger calls California's conflict of laws "bouillabaisse." Friedrich K. Juenger, Babcock v. Jackson *Revisited: Judge Fuld's Contribution to American Conflicts Law*, 56 ALB. L. REV. 727, 744 (1993).

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).

11. Plaintiff relied on the Full Faith and Credit Clause. U.S. CONST. art. IV, § 1.

concluded that the judgment was entitled to enforcement.

While initially paying lip service to traditional choice of law doctrine, citing[12] *Milliken v. Pratt*,[13] the paradigmatic lex locus contractus case, and vested rights/lex locus literature by Goodrich[14] and Beale,[15] 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.[16] 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.[17] Thus, Richman concluded that the disputed transaction "centered" in Illinois and that its law applied.[18] This result, achieved by a method, "[s]o far [unknown to have] been formulated by any court into a rule,"[19] 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,"[20] why is it that so little celebration or recognition in the academy occurred then or in the ensuing years?[21] Only a few writers have even mentioned, and then mostly in passing, *Barber*'s special place in conflict of laws history.[22] In contrast,

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12. *Barber*, 63 N.E.2d at 421.

13. 125 Mass. 374 (1878).

14. HERBERT F. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS § 104, at 262 (2d ed. 1938).

15. JOSEPH BEALE, CONFLICT OF LAWS § 1048 (1916).

16. *Barber*, 63 N.E.2d at 423 (citing CHEATHAM ET AL., CASES AND MATERIALS ON CONFLICT OF LAWS (2d ed. 1941); HARPER & TAINTOR, CASES AND OTHER MATERIALS ON JUDICIAL TECHNIQUES IN CONFLICT OF LAWS (1937)).

17. *Id.* at 423.

18. *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. *Id.* The full faith and credit mandate, explicated in Fauntleroy v. Lum, 210 U.S. 230 (1908), foreclosed the policy argument. *Barber*, 63 N.E.2d at 423-24.

19. *Barber*, 63 N.E.2d at 423.

20. *Id.*

21. The publication deadline of this journal forecloses our ability to wait for a new Oliver Stone movie describing the *Barber* conspiracy. Hollywood insiders report that the movie reveals a Cuban connection to A.L.I. folks and that "Checkers" is implicated in *Barber*-gate. In a tour de force, Brad Pitt will enact the role of the cognovit clause.

22. *See, e.g.*, ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW: CASES AND MATERIALS 403 (2d ed. 1989) (reproducing the *Auten v. Auten* decision, 124 N.E.2d 99 (N.Y. 1954), which credited *Barber* as the "first" to employ the new method to rationalize choice of law results); EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 18.28, at 677 n.3 (relegating *Barber* to a footnote as an "early decision" reflecting RESTATEMENT (SECOND) 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 statute[28]—while *Barber* is a contract

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§ 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").

23. 191 N.E.2d 279 (N.Y. 1963).

24. David D. Siegel, *A Retrospective on* Babcock v. Jackson*: A Personal View*, 56 ALB. L. REV. 693, 694 (1993).

25. Symposium, *Comments on* Babcock v. Jackson*, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963).

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.

27. *See Symposium on Conflict of Laws: Celebrating the 30th Anniversary of* Babcock v. Jackson, 56 ALB. L. REV. 693-939 (1993).

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

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of citation." *See* Friedrich K. Juenger, Babcock v. Johnson *Revisited, Judge Fuld's Contribution to American Conflicts Law*, 56 ALB. L. REV. 727 (1993).

29. With apologies to my non-tort, contract-teaching colleagues.

30. 156 Eng. Rep. 145 (1854).

31. Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

32. The movie was made and distributed by former law students. In prior years, law schools could rent the movie for $65.20 from Martin Schneider of Brooklyn.

33. Auten v. Auten, 124 N.E.2d 99 (N.Y. 1954). At least the court notes the contribution of *Barber*. *See id.* at 101-02.

34. *See, e.g.*, CRAMTON ET AL., *supra* note 26, at 117, 130, 131, 165; WEINTRAUB, *supra* note 22, at 48, 379, 381.

35. *See* Solimine, *supra* note 26, at 782-89.

36. Babcock v. Jackson, 191 N.E.2d 279, 284 (N.Y. 1963).

37. Emery v. Emery, 289 P.2d 218 (Cal. 1955); Grant v. McAuliffe, 264 P.2d 944 (Cal. 1953).

38. Haumschild v. Continental Casualty Co., 95 N.W.2d 814 (Wis. 1959).

39. It has been said that tort reform wars are being fought on conflict of laws battlegrounds. Geri J. Yonover, *A Kinder, Gentler* Erie*: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 327 & n.120 (1994). *See also* JUENGER, CHOICE OF LAW, *supra* note 28, at 118 & n.724 & n.1187. *See* WEINTRAUB, *supra* note 22, § 6.9 at 294 n.44 (noting the causal relationship between conflicts

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,[40] 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.[41] 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,[42] for almost forty years.[43] 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*,[44] 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,[45] 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

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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).

41. W.H. Barber Co. v. Hughes, 63 N.E.2d 417, 421 (Ind. 1945).

42. Louisville & Nashville R.R. Co. v. Revlett, 65 N.E.2d 731, 734 (Ind. 1946).

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.

45. Burns v. Grand Rapids & Indiana R.R. Co., 15 N.E. 230 (Ind. 1888). The only exception, Witherspoon v. Salm, 237 N.E.2d 116, 124 (Ind. Ct. App. 1968), a guest statute case, used a state interest analysis approach, but was reversed on other grounds. Witherspoon v. Salm, 243 N.E.2d 876 (Ind. 1969).

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.

48. DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS (1965).

49. Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1585-88 (1966). Currently, five states use Leflar's method in torts and two use it in contracts. Symeonides, *supra* note 47, at 17, Table 3.

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.

58. Allstate Ins. Co. v. Hague, 449 U.S. 302, 316 nn.21 & 22 (1981).

59. *Hubbard*, 515 N.E.2d at 1073.

60. *In re* Estate of Bruck, 632 N.E.2d 745 (Ind. Ct. App. 1994).

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.[61] The court's reasoning is curious. The court noted that "the most relevant factor is the unique legal status of the wrongful death proceeds,"[62] but also stated that the case fell into a "legal lacuna."[63] 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.[64] Thus, it is not clear whether the court was really following *Hubbard*,[65] adopting a traditional exception that links remedy and right[66] to escape from otherwise applicable law, employing *sub rosa* a "Better Law"[67] approach by using the more liberal Ohio law, or, in essence, finding no real conflict as there was an "absence of applicable Indiana law."[68]

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.'"[69] 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

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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[70] and federal courts,[71] unlike *Bruck*, refuse to apply its law. For example, in *Gollnick v. Gollnick*[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.[73] Similarly, in *Autocephalous Greek Orthodox Church v. Goldberg*, although the tort occurred in Switzerland, the federal district court applied Indiana law.[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.[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.[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.[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,"[78] few courts have done so.[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

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70. *See, e.g.*, Hoffman v. Roberto, 578 N.E.2d 701 (Ind. Ct. App. 1991); Thomas v. Whiteford Nat'l Lease, 580 N.E.2d 717 (Ind. Ct. App. 1991); Gollnick v. Gollnick, 517 N.E.2d 1257 (Ind. Ct. App. 1988), *aff'd*, 539 N.E.2d 3 (Ind. 1989).

71. *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).

72. 517 N.E.2d 1257 (Ind. Ct. App. 1988), *aff'd*, 539 N.E.2d 3 (Ind. 1989).

73. *Id.* at 1258-59.

74. 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

75. *Id.*

76. *Id.* at 1394.

77. *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.

78. 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.

79. *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 . . . ."

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 worshiping 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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80. Chesny v. Marek, 720 F.2d 474 (7th Cir. 1983), *rev'd*, Marek v. Chesny, 473 U.S. 1 (1985), is a good example of interest analysis. Both the Seventh Circuit opinion and the Supreme Court opinion delve into the purposes behind Fed. R. Civ. P. 68 and 42 U.S.C. § 1988 (1982) to determine whether, in fact, a conflict existed and, if so, how to resolve it.

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).

85. *See, e.g.*, Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989).

86. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146-55, 189-97 (1971).

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.[89]

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

	A. Indiana State Cases	Issue	Applicable Law	Place of Injury	Place of Conduct Causing Injury	Plaintiff's Residence	Defendant's Residence	Center of Relationship
1.	*In re* Estate of Bruck[1]	Distribution of wrongful death proceeds	Ohio	Ohio	Ohio	Indiana	Irrelevant	Irrelevant
2.	Bencor v. Harris[2]	Personal Injury/ Defendant immunity	Indiana	Indiana	Indiana	Tennessee	▲ 1—Tennessee ▲ 2—Indiana	Indiana
3.	Tompkins v. Isbell[3]	Plaintiff's negligence	Illinois	Illinois	Illinois	Indiana	Indiana	Illinois
	B. Federal Cases	**Issue**	**Applicable Law**	**Place of Injury**	**Place of Conduct Causing Injury**	**Plaintiff's Residence**	**Defendant's Residence**	**Center of Relationship**
1.	Hardee's of Maumelle, Ark., Inc. v. Hardee's Food Systems, Inc.[4]							
	a. Indiana Plaintiff	Fraud	Indiana	Indiana	Unclear	Indiana	North Carolina	Unclear
	b. Arkansas Plaintiff	Fraud	Arkansas	Arkansas	Unclear	Arkansas	North Carolina	Unclear

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

[1] 632 N.E.2d 745 (Ind. Ct. App. 1994).

[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 I (continued)
Sample Cases — Lex Loci Applicable

B. Federal Cases, cont'd

		Issue	Applicable Law	Place of Injury	Place of Conduct Causing Injury	Plaintiff's Residence	Defendant's Residence	Center of Relationship
2.	Jean v. Dugan[5]	Defamation	Indiana	Indiana; Illinois; Iowa	Indiana	Indiana	Illinois	Illinois
3.	Bateman v. Central Foundry Div., GMC[6]	Negligence	Indiana	Indiana	Indiana	Indiana	Delaware	Indiana
4.	Big Rivers Elec. Corp. v. G.E. Co.[7]	Strict liability/ negligence	Kentucky	Kentucky	Kentucky	Kentucky	New York	Kentucky
5.	Stillwell v. Brock Bros.[8]	Indemnification; negligence	Kentucky	Kentucky	Kentucky	Indiana	unclear	Kentucky
6.	Consolidated Rail Corp v. Allied[9] Corp.	Contribution	Indiana	Indiana	Illinois or Indiana	unclear	unclear	unclear
7.	Castelli v. Steele[10]	Medical malpractice	Indiana	Indiana/Illinois	Indiana	Illinois	Indiana	Indiana

[5] 20 F.3d 255 (7th Cir. 1994).

[6] 822 F. Supp. 556 (S.D. Ind. 1992).

[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.

[8] 736 F. Supp. 201 (S.D. Ind. 1990).

[9] 882 F.2d 254 (7th Cir. 1989).

[10] 700 F. Supp. 449 (S.D. Ind. 1988).

TABLE II

Sample Cases — Lex Loci Not Applicable

	A. Indiana State Cases	Issue	Applicable Law	Place of Injury	Place of Conduct Causing Injury	Plaintiff's Residence	Defendant's Residence	Center of Relationship
1.	Hoffman v. Roberto[1]	Defamation	Michigan	Washington, D.C.; nationwide	Washington, D.C.	Indiana	Ohio	Michigan
2.	Thomas v. Whiteford[2]	Personal Injury	Indiana	Michigan	Michigan	Indiana	Indiana	Indiana
3.	Gollnick v. Gollnick[3]	Intrafamily Immunity	California	Indiana	Indiana	California	California	California
	B. Federal Cases	**Issue**	**Applicable Law**	**Place of Injury**	**Place of Conduct Causing Injury**	**Plaintiff's Residence**	**Defendant's Residence**	**Center of Relationship**
1.	Autocephalous Greek Orthodox Church v. Goldberg[4]	Art Ownership	Indiana	Switzerland	Switzerland	Cyprus	Indiana	None
2.	Ackerman v. Schwartz[5]	Misrepre-sentation	Indiana	court unable to decide	Michigan Indiana	Indiana/ nationwide	Michigan	Indiana

[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.

[2] 580 N.E.2d 717 (Ind. Ct. App. 1991).

[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).

[5] 733 F. Supp. 1231 (N.D. Ind. 1989) (place of tort is unclear, but Indiana is center of parties' relationship). *Id.* at 1240.