Articles

THE *SALVE REGINA COLLEGE* CASE: PUTTING *ERIE* BACK ON TRACK

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In 1984 a sharply divided *en banc* panel of the United States Court of Appeals for the Ninth Circuit in *In Matter of McLinn*,[1] concluded contrary to overwhelming authority, that district court determinations of state law made pursuant to the *Erie*[2] doctrine are subject to the same *de novo* review as any other question of law. In a short essay in the *Arizona Law Review* published that year, I was deeply critical of the Ninth Circuit's position.[3] My essay had little impact on the real world and was largely ignored in academia as well. Indeed, in the ensuing years the Republic survived and prospered without my advice. In 1989, however, Professor Dan T. Coenen, former Supreme Court Law Clerk, and practicing lawyer, published a substantial article in the *Minnesota Law Review* on the same topic.[4] What I thought was a simple problem of procedural efficiency and *Erie* ideology is now apparently a matter of high philosophy and transcendent importance. Even the Supreme Court of the United States has become interested.[5]

Professor Coenen opens his article with the observation that "lawyers know if others do not that what may seem technical may embody a great tradition of justice."[6] Great traditions or no, when technical concerns overwhelm the mind, justice may also be denied,[7] and in this case simplicity has great virtue. The differences between Professor Coenen's views and my own would likely have been lost in the ever expanding and voluminous pages of law

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1. 739 F.2d 1395 (9th Cir. 1984).
2. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
3. Woods, *The* Erie *Enigma: Appellate Review of Conclusions of Law*, 26 ARIZ. L. REV. 755 (1984).
4. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899 (1989). Unlike my little article which consumed only eleven pages with fifty-one footnotes, Professor Coenen's article runs one-hundred and twenty-two pages and has an astonishing seven-hundred and seventy-eight footnotes.
5. *See infra* note 8.
6. Coenen, *supra* note 4, at 899 n.1 (quoting Kotteakos v. United States, 328 U.S. 750, 761 (1946)).
7. Woods, *Judge Hill's Rule*, 23 IND. L.J. 137 (1990).

review arcania were it not for the fact that on June 28, 1990, the Supreme Court of the United States granted certiorari in *Russell v. Salve Regina College*.[8] In that case the Court of Appeals for the First Circuit refused to reconsider a district judge's determination of an unclear question of state law on the ground that his opinion was entitled to "the customary appellate deference accorded to interpretations of state law made by federal judges of that state."[9] Indeed, the grant of certiorari was expressly limited to the precise question that Professor Coenen and I addressed, notwithstanding the presentation of three other perhaps more interesting questions.[10]

THE *SALVE REGINA COLLEGE* CASE

Sharon Russell, an obese person, attended Salve Regina College from 1982 to 1985 when she was expelled prior to her senior year. The reason for her expulsion was her failure to comply with a contract she had made with the College in which she promised to lose weight. She claimed she had substantially complied with the contract and sued for damages in the United States District Court for the District of Rhode Island after graduating from another school. Among the issues in the case was whether the Rhode Island courts would apply the contract doctrine of "substantial performance" under the circumstances of the case.[11] There were no Rhode Island cases on point. The trial judge was of the opinion that, if the issue were presented in the context of *Salve Regina College*, the Rhode Island Courts would apply the substantial performance doctrine. He explicitly based that opinion on his long experience:

> Now, I have an advantage the Court of Appeals doesn't have, and that is I was a state trial judge for 18 and 1/2 years, and I have a feel for what the Rhode Island Supreme Court will do or won't do. As a matter of fact, I charged at least two juries on the issue of substantial performance in other than construction contract situations, and I am satisfied in my own mind that if the Supreme Court of Rhode Island had this particular case to decide, the Supreme Court of Rhode Island would say [statement of district

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8. 890 F.2d 484 (1st Cir. 1990), *cert. granted*, 110 S. Ct. 3269 (1990) (No. 89-1629).

9. *Russell*, 890 F.2d at 489.

10. The petition raised the following questions:

> Questions presented: (1) Is party entitled to de novo review of federal district judge's determination of state law in case in which federal jurisdiction is founded upon diversity of citizenship? (2) Does federal court violate constitutionally mandated rule of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), when it disregards relevant holdings of state's highest court and other available sources of state law and creates novel rule of state law? (3) Should federal court certify question involving complex relationship between college and student to state's highest court, when state's highest court has not yet had opportunity to rule directly on issue, prior to independently creating novel rule of state law? (4) Can federal court refuse to instruct jury as to binding effect of facts stipulated by parties to be true, and may court thereafter permit jury to draw factual conclusions that are incompatible with facts as stipulated?

58 U.S.L.W. 3712 (May 8, 1990).

11. She did not seek specific performance. Thus the claim of substantial performance presented what must be seen a classical question for the jury.

> court's view of the appropriate rule regarding substantial performance]. . . .[12]

On appeal, the First Circuit reviewed the cases and concluded that the substantial performance doctrine, as a general rule, allowed the court "to step in where, as here, full performance by the student has been hindered by some form of impermissible action."[13] Since the district court concluded that the Rhode Island courts would follow such a rule, the First Circuit accorded "customary appellate deference" to the trial court's opinion. It is to that holding alone that the Supreme Court granted certiorari.

THE RULE OF DEFERENCE

If not for the Supreme Court's grant of certiorari in *Salve Regina College*, I suspect that I might never have been moved to reconsider the position I took in 1984, having devoted my efforts to seemingly more pressing academic and professional concerns. Indeed, it is likely that I would never have come across Professor Coenen's magnum opus on the question. But the Supreme Court granted certiorari, I read Professor Coenen's article and I am moved to make a responsive comment.

In my essay, I viewed the question of whether or not an appellate court should give special deference to a federal district court judge's "best guess" regarding unclear questions of state law as a relatively straightforward issue under the *Erie* doctrine. In my view, a federal district judge, when asked to decide an unclear question of state law, is required only to predict what state courts would do in fact[14] if they were confronted by the same issue. It is true that we have always assumed that trial judges are probably better predictors because of their proximity to the state legal system and its "trench law."[15] But more than that, the *Erie* inquiry fits compatibly into the rubric regarding determinations of fact, and even the old fashioned notion that "foreign" law is a question of fact.[16] That characterization of the *Erie* process has a long and

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12. Petition for Certiorari app. at 91, Russell v. Salve Regina College, 890 F.2d 484 (1st Cir. 1990) (No. 89-1629).

13. *Russell*, 890 F.2d at 489.

14. I consciously borrowed from Justice Holmes famous phrase about bad men which Judge Kozinski recently noted in a Ninth Circuit dissent:

> 'The prophecies of what the courts will do in fact . . . are what I mean by the law,' wrote Justice Holmes almost a century ago. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). According to Holmes, the business of lawyers is the prediction of when and how the coercive power of the state will affect people's lives: 'People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts. . . . It is to make the prophecies easier to be remembered and to be understood that the teachings of the decisions of the past are put into general propositions and gathered into text-books, or that statutes are passed in a general form.' *Id.* at 457-58.

Kern v. Levolor Lorentzen, 899 F.2d 772, 781 (9th Cir. 1989) (Kozinski, Judge, dissenting).

15. Woods, *Burnham v. Superior Court: New Wine, Old Bottles*, 13 GEO. MASON L. REV. ___ (1991).

16. *Cf.* FED. R. CIV. P. 41.1. As Judge Arnold recently said in dissent in Arthur Young & Co. v. Reves, 856 F.2d 52, 56 (8th Cir. 1988):

illustrious history and by no means originated with me. I have always understood that question *not* to involve a determination that the district judge's prediction was right or wrong, or good or bad, in a moral or jurisprudential sense. The highest court of the state or its legislature always maintained ultimate power over those evaluative olympian judgments under the *Erie* doctrine.[17] The district judge's only job was to predict what that state court would do "in fact."

Professor Coenen apparently does not generally disagree with that characterization, at least in those cases where the law is clear.[18] But when the law is not clear, in what Professor Dworkin calls "hard cases,"[19] Professor Coenen and I part company. In his view, hard cases seem not subject to *Erie* at

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> The panel's almost casual rejection of the District Court's view of Arkansas law also disturbs me. We normally defer to district judges' interpretations of the law of their own states. My own attitude when hearing appeals on such questions is roughly akin to the posture of appellate judges when reviewing question of fact. That is, I am inclined to reverse on state-law questions only when the decision below is clearly erroneous. Such a use of a question-of-fact standard is not so strange as it may at first appear. Questions of foreign law are traditionally treated as questions of fact. And, while the law of a state is obviously not "foreign" to us in the same way as, say, the law of Afghanistan, a judge of a federal appellate court whose legal upbringing was in Arkansas cannot be expected to have the same instinctive feel for the law of North Dakota as a Judge of that State. One can look at all the law books in print and still not have the same degree of reliable judgment on legal questions as a lawyer who has lived and practiced for years in the jurisdiction.... So when we defer to the opinions of the district courts on the law of their own states, we are not shirking our responsibilities. We are simply using common sense.

17. Justice Brandeis held in *Erie*:

> [T]he law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

304 U.S. at 78. It therefore necessarily followed that the coextensive power of the federal judiciary was no greater than that of the Congress. Accordingly the federal courts are constitutionally impotent to exercise their broad ranging appellate powers in regard to matters of state law that have not been infected with some federal question justifying the exercise of federal judicial authority. That is the very core of the *Erie* doctrine. It is the core of the many doctrines of federalism and it is the principal that Professor Coenen ignores.

18. Coenen nonetheless seeks to destroy the policy and intellectual foundations of the deference rule. He identifies what he perceives to be the three justifications for the rule of deference. Let me use his words to describe the three rationales:

> Close reflection suggests, however, that appeals' court's which allude vaguely to district court expertise probably subscribed to at least one of three distinct rationales. This article will label these rationales as: (1) the 'superior decisionmaker' rationale, (2) the 'collaborative review' rationale, and (3) the 'cost benefit' rationale. Careful examination suggests that none of these justifications packs persuasive punch.

Coenen, *supra* note 4, at 920. He then mounts a detailed attack upon each of the rationales he ascribes to the deference rule. *Id.* at 920-36. A fourth factor, which he ignores, is the fact that these cases do not establish precedent and bind no one other than parties. He also ignores the fact that the typical certification process would allow an appellate court to certify unclear questions of state law in lieu of deciding it in a vacuum.

19. Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); Coenen, *supra* note 4, at 941 nn.215-17.

all and he would invoke the full processes of what he calls "multi-judge" review. I, on the other hand, view the "hard case" as the quintessential *Erie* case where the judge is simply asked to predict the outcome if the case were before the state's highest court.

In my essay,[20] I likened the process to what Professor Terrell called "flat law" in a provocative essay in the *California Law Review*.[21] Professor Terrell identified what he considered to be a "fourth dimension" of legal reasoning involving the intersection of transcendental values, such as truth and justice, with traditional legal rules. I admit, indeed I proclaim, that I did not fully understand everything that Professor Terrell said in his article. I thought I understood enough, however, to connect his notion of "fourth dimensional" legal reasoning with the doctrine of federalism.[22] The doctrine of federalism, in turn, has the *Erie* doctrine as one of its major cornerstones. And, since the doctrine of federalism aptly fits Justice Hughes' famous observation that "behind the words of the constitutional provision are postulates that limit and control,"[23] it seemed appropriately metaphysical for Professor Terrell's theoretical construct. Indeed, in speaking of the doctrine of federalism a few years ago, Chief Justice Rehnquist, a judge notably ill at ease with metaphysics of the judicial kind,[24] observed:

> [W]hen the constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan — the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers. The tacit postulates yielded by that ordering are as much ingrained in the fabric of the document as its expressed provisions. . . .[25]

It all comes down to the view, shared by distinguished courts and commentators, that a district judge, when compelled to decide an unclear question of state law in a diversity case, must use her lawyer's intuition, instinct and analysis to arrive at a pure prediction regarding the state of state law.[26] That is

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20. Woods, *supra* note 3, at 756 & n.4.

21. Terrell, *Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles*, 72 CAL. L. REV. 288 (1984). That was probably a mistake since many readers took it that I was promoting a metaphysical view of the *Erie* doctrine. What I meant to say was not that the *Erie* doctrine requires participatory metaphysics on the part of the judge, but that the process of prediction is understandably iffy.

22. Professor Coenen's attempt to put Professor Terrell's words into my mouth is misleading. He cites to my discussion of the need to rely upon a trial judge's instinctive "feel" for the state of state law. His quotation of my words regarding the "fourth dimension" was clearly my characterization of Professor Terrell's observations, not my own. *See* Woods, *supra* note 3, at 756. My words, which appear at page 759 of my article are much more mundane. In any event, if we are to tolerate transcendental visions of what the law should be, *Erie* seems to me to demand that we adhere closely to the transcendental vision held by the state courts.

23. Principality of Monoco v. Mississippi, 292 U.S. 313, 322 (1934).

24. *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780 n.12 (1984). Justice Rehnquist derided the theory that "invisible radiations" from the first amendment should inform the doctrines of personal jurisdiction.

25. Nevada v. Hall, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting).

26. *See* Judge Arnold's observation quoted *supra* note 13. Judge Schroeder in her dissenting opinion in the *McLinn* case lists five pages of decisions supporting the rule of

not terribly hard to do most of the time. Every trial lawyer is required to do it frequently. Every trial judge is required to do it frequently. It is a familiar and common part of the lawyer's skill. I suggested that if prediction is impossible, the court should certify the question to the state courts, if such a procedure is available.[27] Normally, a Court of Appeals may also certify a question to the state courts.[28]

Given that relatively simple task, it seemed to me that, absent some showing of a substantial likelihood that the trial judge's prediction was clearly wrong, or that a refusal to certify was an abuse of discretion, her prediction should be the law of the case. It seemed to me that federal Courts of Appeal were in no better, and probably worse, position than the trial judges to make such a prediction. I drew solace from the fact that the vast majority of courts, including the Supreme Court of the United States, that had addressed the issue seemingly agreed.[29] Finally, Judge Schroeder on the Ninth Circuit, dissenting in *McLinn*, wrote a wonderfully articulated opinion that supported my view. Indeed, I thought it so clear that the majority of the *en banc* panel was so patently wrong, that I suspected the Supreme Court, in view of the split between the circuits created by *McLinn*, would take the case on review. But the *McLinn* case was not so easily decided. It returned to the Circuit Court three more times before it finally reached the Supreme Court *sub nom. Churchill v. F/V Fjord*.[30] By that time the question of deference to the trial judge's prediction of state law had disappeared from the case and was not presented to the Court on certiorari. It may be more than serendipity that the denial of

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deference. *See McLinn*, 739 F.2d app. at 1407. Professor Coenen lists even more in his Appendix. *See* Coenen, *supra* note 4, at 963-1017. Professor Coenen's Appendix II entitled "Exceptions to the Rule of Deference" runs a few pages less. *Id.* at 1017-21. Professor Coenen admits that "[f]ew Judges have criticized the rule. Scholarly commentary, although sparse, seems on balance to support the rule." *Id.* at 909.

27. The petitioners in *Salve Regina College* asked for this in their petition but the Supreme Court did not include it in the grant of certiorari. What I was not aware of in 1984 was the coming of the appellate deluge. The Circuits are now in a crisis state. The majority of opinions in many courts are no longer published and under common rules may not even be cited as precedent. In the state court a more ominous process called "depublication" is afoot. *See, e.g.*, Uelmen, *Mainstream Justice*, 9 CALIF. LAWYER 37 (July 1989).

In Arizona the Supreme Court has shown great willingness to aid District Courts through the certification process. *See, e.g.*, Catalina Mortgage Co., Inc. v. Monier, ___ Ariz. ___, ___ P.2d ___, 1990 WL 96481 (Ariz. 1990); Walker by Pizano v. Mart, 164 Ariz. 37, 790 P.2d 735 (1990); Torres v. Goodyear Tire & Rubber Co., Inc., 163 Ariz. 88, 786 P.2d 939 (1990); Smith v. Lewis, 157 Ariz. 510, 759 P.2d 1314 (1988); Joseph v. Pima County, 158 Ariz. 250, 762 P.2d 537 (1988); In re Bisbee, 157 Ariz. 31, 754 P.2d 1135 (1988); Bryant v. Continental Conveyor & Equipment Co., Inc., 156 Ariz. 193, 751 P.2d 509 (1988).

28. Rule 6 of the Rules of the Supreme Court of Rhode Island authorizes such a certification by the Court of Appeals, by the United States Supreme Court and, of course, by the United States District Court when there is no controlling precedent. I will argue later that, even if the Court of Appeals believes the trial court is probably in error, the interests of federalism are better served by certification than by Professor Coenen's "paradigm" of "multi-judge" review. Of course, when the trial court is *clearly* wrong, or its prediction has been rendered wrong by subsequent state court opinion, there is no need for certification.

29. *See, e.g., McLinn*, 739 F.2d app. at 1407-12.

30. 892 F.2d 763 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S. Ct. 3273 (No. 89-1747, June 28, 1990)

certiorari in the reconstituted *McLinn* litigation came on exactly the same day as the grant of certiorari in *Salve Regina College v. Russell.*[31]

IN PRAISE OF TRIAL JUDGES

I am always amazed at the ability of trial judges to make pretty fair guesses about the "law." I find that much more often than not their instincts are right. That seems remarkable because most state trial court judges labor under heavy dockets and inadequate staffing, at least as compared to their federal counterparts. In my experience, federal district judges have a similar capacity. I have always supposed that the ability to instinctively decide questions of law derives from the constant need for non-reflective, instinctive, decisionmaking during the trial process. I have also found, sometimes to my dismay, that trial judges as a group try very hard to apply the legal rules that they believe to exist, and leave the development of new legal rules to the appellate courts. In general, I find trial judges to be a cautious group, careful and, if anything, overly sensitive to their susceptibility to appellate reversal on matters of law.

Professor Coenen disagrees with my faith in trial judges and their ability to predict the state of state law. Professor Coenen begins his critique by noting the obvious: "In the paradigm of appellate review, the court identifies de novo the command of the controlling statute or principal of common law. If the appeals' court's conclusion differs from that of the trial court then there is error."[32]

There is, however, another important paradigm of appellate judging and that is the *Erie* paradigm. *Erie* contemplates a reflective and diffident judge who is sensitive to her limited role, constrained as it is by a fundamental lack of adjudicatory authority. The *Erie* paradigm of judging is the antithesis of Professor Coenen's model of the activist progressive judge. However admirable or appropriate that model may be at the forefront of constitutional adjudication, it is inappropriate in the *Erie* context. The power to "adjudicate" must find its justification in the fundamental authority of the government that creates the court, and in the *Erie* context that authority is missing.[33]

There are many standards of review outside Professor Coenen's paradigm.[34] The hard question is which standard applies in the *Erie* context.

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31. 890 F.2d 484 (1st Cir. 1990), *cert. granted*, ___ U.S. ___, 110 S. Ct. 3269 (No. 89-1629, June 28, 1990).

32. Coenen, *supra* note 4, at 910-11.

33. The core of the *Erie* decision is the express limitation upon federal power found in the doctrine of federalism:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or part of the law of torts. And no clause in the constitution purports to confer such a power upon the federal courts.

Erie, 304 U.S. at 78.

34. *See* Stern, *Review of Findings of Adminstrators, Judges & Juries: A Comparative Analysis*, 58 HARV. L. REV. 70 (1944). Professor Coenen collects many authorities in his article. *See* Coenen, *supra* note 4, at 911 n.78.

Because *de novo* review is the most powerful exercise of appellate jurisdiction, the alternative standards of review (and there are many) accord some degree of deference to the lower court's decision. For example, Rule 52 of the Federal Rules of Civil Procedure provides that findings of fact made by a trial court in the federal system will not be overturned unless it is shown that they are clearly erroneous.[35] Other deferential standards include the substantial evidence test,[36] the clear and convincing evidence test,[37] the plain error test[38] and the test that allows an appellate court to set aside a lower court determination if it holds the "definite and firm conviction" that error was committed.[39] There are a multitude of other articulations of the deference rules.

De novo review is typically thought appropriate in the federal system because of the expertise that federal appellate courts develop in regard to federal law.[40] Because of this special expertise, *de novo* review allows the appellate court to substitute its judgment for that of the trial court, or other juridical entity, if it determines that the trial court is wrong for any reason. But the federal Courts of Appeals have no special expertise in matters of state law and under *Erie* are constitutionally impotent to even have an opinion about what that law "ought" to be. Their task is simply to replicate the state court procedure for the particular parties before them.[41]

It is certainly not so, as Professor Coenen implies, that the rule of deference is an exception to some ill-defined general rule of appellate practice supporting *de novo* review.[42] Contrary to Professor Coenen's suggestion, *de novo*

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35. Fed. R. Civ. P. 52(a).
36. Baker v. Heckler, 730 F.2d 1147, 1150 (8th Cir. 1984).
37. Reel-O-Matic Systems, Inc. v. United States, 16 Cl. Ct. 93, 99 (1989).
38. United States v. Hubbard, 889 F.2d 277, 279 (D.C. Cir. 1989).
39. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).
40. The Court of Appeals for the District of Columbia has noted that in the context of the specialized bodies of federal law, both common and statutory, "the special expertise and experience of appellate courts in assessing the relative force of competing interpretations and applications of legal norms makes the case for *de novo* review of judgments [of whether the Government's legal position was substantially justified] even stronger than the case for such review of paradigmatic conclusions of law." Spencer v. NLRB, 712 F.2d 539, 563 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984).
41. Under many modern court rules regarding non-publication of opinions, *Erie* prediction cases seem to be of the non-publication variety. Under the First Circuit's own rules it seems that an opinion on a state law issue alone would not meet the standards for publication:

> Loc. R. 36.1. Opinions. The volume of filings is such that the court cannot dispose of each case by opinion. Rather, it makes a choice, reasonably accommodated to the particular case, whether to use an order, memorandum and order, or opinion. An opinion is used when the decision calls for more than summary explanation. However, in the interests both of expedition in the particular case, and of saving time and effort in research on the part of future litigants, some opinions are rendered in unpublished form; that is, the opinions are directed to the parties but are not otherwise published, and may not be cited in unrelated cases. As indicated in Local Rule 36.2, the court's policy, when opinions are used, is to prefer that they be published, but in limited situations, described in Local Rule 36.2, where opinions are likely not to break new legal ground or contribute otherwise to legal development, they are issued in unpublished form.

1ST CIR. R. 36.1.

42. Coenen, *supra* note 4, at 910. It may be that if anybody ever puts together a running tally of all cases ever decided that the *de novo* standard of review cases would be the most numerous. But to extract those cases from the context in which they were decided makes

review is simply one endpoint on a continuum of standards applied by appellate courts under a variety of rubrics appropriate to the nature of the case before the court. To the extent that one speaks generally about standards of review, their major characteristic is their variety.[43]

It has also been suggested that courts do not provide the same quality of review in cases that bind only the parties, and that these opinions, therefore, are not persuasive as precedent.[44] To the extent that is so, *de novo* review of questions under the *Erie* doctrine seems particularly inappropriate. In any event, the alternative standards of review do not render the Courts of Appeals powerless. Whatever the standard for error may be, they retain their power to correct true error.

LEGAL REALISM, RULES AND THE OLYMPIAN COURT OF APPEALS

I do not deprecate Professor Coenen's scholarship. I doubt that there is a single case dealing with this narrow issue that he has not discussed. In terms of providing documentation and a survey of the doctrines of deference, his work is impeccable. Nonetheless, somewhere in that detail the core issue became obscured, if not lost entirely.

As I understand it, Professor Coenen's thesis is that:

1. The *Erie* doctrine entitles the litigants to a great deal more than a federal district judge's fourth dimensional prediction about the state of state law;

2. Federal appellate court judges are better, smarter and more circumspect than trial court judges, and the multi-judge process is a superior avenue to truth in law; and,

3. Every litigant in a federal case presenting an unclear question of state law is entitled to the level of judicial process which can only be provided by the Courts of Appeals with their massive intellectual resources.[45]

Since the rule of deference articulated by the Supreme Court and the majority of appellate courts other than the Ninth Circuit prevents that full scale *de novo* review of state law questions, Professor Coenen finds deference pernicious when judged by his postulates. But, the biggest vice he finds in the

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no sense, and it requires more than a leap of faith to conclude on the basis of mere numerosity that they form some general rule.

43. Indeed, many modern court rules require the drafters of briefs before the court to state the appropriate standard of review at the outset of each section of the brief. *See, e.g.*, 9TH CIR. R. 28-2.5.

44. In the matter of the Amendment of Section (Rule) 809.23(3), Stats., 456 N.W.2d 783 (Wisc. 1990).

45. Included in those resources are the law clerks who work on these cases. I have known and taught many of them. They are bright and able young lawyers, but I am not sure they are better predictors of state law than a trial judge with, as in the *Salve Regina College* case, eighteen and one-half years of experience on the state trial bench. It is also true, however, that federal district judges have able law clerks who have written for the law review and performed well in their studies.

rule of deference is its unabashed philosophical roots in legal realism.[46] In my view and the view of others,[47] the *Erie* decision is an example of legal realism at its finest. To the extent that the *Erie* doctrine is constitutionally based, one could argue that the realist point of view is an irreducible element of the *Erie* process, but that matter need not be addressed here. Professor Coenen reveals the depth of his distaste for the realist position and his unmitigated faith in "multi-judge decisionmaking" that "legitimatizes idiosyncracy and individual policy preference through such institutional mechanisms as consultation and majority vote." He concludes: "A multi-judge appellate process, although subjective, is at least carefully subjective. Multi-judge decisionmaking thus provides a valuable double check against the unwise exercise of judicial discretion that positivists and realists deem inevitable."[48]

He thus throws his lot with Ronald Dworkin, perhaps the preeminent modern opponent of legal realism.[49] In sum, Coenen believes the more process the better in regard to these matters. The search for state law in hard cases appears to him as primarily a search for truth and justice which may elude the unbridled discretion of the trial judge. It apparently does not concern him that the philosophical roots of his conclusion fit quite comfortably with Mr. Justice Story's position in *Swift v. Tyson*,[50] so soundly rejected by Justice Brandeis' opinion in *Erie Railroad Co. v. Tompkins*.[51]

It is doubtful, however, that the Supreme Court of the United States will decide this case by choosing sides between Justices Holmes and Story or by adapting Professor Dworkin's theories of law and justice to the *Erie* context. The likelihood that the court will engage in wide ranging philosophical speculation and battle on this tiny issue seems minimal. At bottom, the question is whether or not the Constitution commands the federal courts to adopt a rule requiring the Courts of Appeals to expend their increasingly scarce judicial resources on developing carefully articulated opinions on matters of law that bind only the parties before the court.[52] The simple fact is that the Court of

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46. Professor Coenen describes what he calls the "lawmaking" theory, which I take as code for "unprincipled and unbridled exercise of judicial power." While Legal Realism certainly recognizes such abuses exist, it is hardly fair to say that such a theory is "advocated" by legal "realists" and "positivists." Coenen, *supra* note 4, at 942. Indeed, it is the rejection of that "unprincipled abuse of power" that distinguishes those of us who deem ourselves to be realists from the modern theorists who follow the critical legal studies viewpoint. *See, e.g.*, D'Sousza, *The New Liberal Censorship*, 1986 POL'Y REV. 38:8.

47. *See, e.g.*, Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 209 n.3 (1956) (Frankfurter, J., concurring).

48. Coenen, *supra* note 4, at 945. It is hyperbole at best to conclude, as Professor Coenen apparently does, that such a view is the product of the "central message of modern legal scholarship." *Id.* at 946.

49. *See, e.g.*, R. DWORKIN, LAW'S EMPIRE (1986).

50. 41 U.S. (16 Pet.) 1 (1842).

51. 304 U.S. 64, 79 (1938). After quoting Justice Holmes' famous statement, *see supra* note 14, Justice Brandeis concluded with a second quotation. The doctrine of Swift v. Tyson is, he said, "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *Id.* (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

52. The Court has recently begun to pull back from the activist position espoused by Professor Dworkin and embraced by Professor Coenen's article. *See, e.g.*, Cruzan v. Director,

Appeals' opinion regarding the state law applicable in a diversity case is not binding upon the state in any way in the absence of some intertwinement with questions of federal constitutional or statutory law. As Justice Brandeis said in *Erie* "there is no federal general common law"[53] such as Professor Coenen seemingly espouses for "hard cases."

Common sense and efficiency also support retention of some deference to trial court opinions regarding the state of state law, notwithstanding the beguiling whisper of the ghost of *Swift v. Tyson*.[54] Professor Coenen admits that the vast majority of courts confronting the question have adhered to the deference standard in the *Erie* context. He recognizes that the Ninth Circuit's position in *McLinn* is the odd man out.[55] He calls, however, for a new activism, a rejection of the philosophy of *Erie*.

Application of the process Professor Coenen prescribes to the case now pending before the Supreme Court demonstrates the problems and inefficiency of his proposal. Although the First Circuit's review of the law of substantial performance appears to be something less than Professor's Coenen's ideal paradigm of "multi-judge review," we do not know what went on behind the scenes, in conference or in private discussions between the judges or their law clerks. Opinions of appellate courts almost never tell us that, and it would be outrageous to assume that the court did not really consider what it says it considered. It is clear that the court decided that the trial judge's view of the doctrine of substantial performance was not perverse and indeed was sound as a matter of general contract law. It appears, in fact, that they reached that conclusion *de novo*. Since the trial court concluded that the Rhode Island courts would apply that not unsound rule, the doctrine of deference led to affirmation of his prediction.

So far as we can tell, there is no basis for saying the trial judge was wrong, particularly in regard to such a fact specific doctrine as "substantial performance."[56] There is no suggestion that the trial judge lacked the appropriate "feel" for predicting the Rhode Island law when he decided that Rhode Island courts would let this issue go to the jury. Eighteen years of trying cases at least gives a judge that. Indeed, one could read the Court of Appeals opinion to say the judge was right, as a matter of general contract law. The petitioners argue, however, that they were entitled to a fuller process which they describe in the Petition for Certiorari as follows:

> The accuracy of the prediction of state court decisions by a federal judge depends upon the judge's ability to emulate the judicial decision-making process of the state court. This, in turn, requires an examination of all sources of state law and methodologies of

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Missouri Department of Health, ___ U.S. ___, 110 S. Ct. 2841, 58 U.S.L.W. 4916 (1990); Webster v. Reproductive Services, 492 U.S. ___, 109 S. Ct. 3040 (1989).

53. 304 U.S. at 78.

54. "[T]he ghost of Swift v. Tyson . . . still walks abroad, somewhat shrunken in size, yet capable of much mischief." Sampson v. Channell, 110 F.2d 754, 761 (1st Cir. 1940) (opinion by Magruder, J.).

55. The Third Circuit has since joined in the *McLinn* analysis. *See* Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145, 148 (3rd Cir. 1988).

56. Indeed, one would expect that his failure to submit the issue to jury would have led to an appeal on that ground.

> decision making, in order to isolate those factors peculiar to the particular state's judicial process which materially affect the outcome of litigation within a state. Moreover, the examination must include all available persuasive data including compelling inferences or logical implications from other related adjudications. Anything else would be inconsistent with *Erie* and the principles of federalism upon which *Erie* is based.[57]

Were the Supreme Court to mandate such a detailed and time consuming process in every case, the burden on the federal judiciary would be overwhelming. Not every issue that comes up in the trial context requires such detailed analysis and justification. We do not need to treat the common cold with a heart/lung machine and we do not need to make every leaf on the litigation tree into a federal case. Indeed, issues that, as a practical matter, require such analysis are a minor part of the trial process.

Even assuming that such extensive review by the district court is appropriate but forgone, it should not be required on appeal unless the party who claims to be injured makes a pretty fair case that the trial court has committed substantial and important error. In *Salve Regina College v. Russell*, no such showing was apparently made and under a common sense rule the finding by the trial judge should be affirmed on that ground alone.

Professor Coenen's *de novo* review theory, however, does not require the losing party to make any showing of injury whatsoever. Under his approach, the Court of Appeals redoes the matter anew without regard to the trial judge's opinion. He would thus require the Court of Appeals to fully brief, hear and then redo what the trial judge did on every issue in every *Erie* case. It seems evident in this case that the marginal cost of perfection is too great to tolerate as a general rule.

Under the traditional deference standard, no matter how the predicate is stated, be it plain error or some other criterion, there is nothing amiss in *Salve Regina College*. The record is clear that the trial judge gave the legal question some real thought, and so did the Court of Appeals. There is no evidence that their respective opinions are the product of unthinking or irresponsible judging. Indeed, both the statements of the trial judge in the courtroom and the opinion of the Court of Appeals demonstrate that the case was given careful and professional attention. That should be the end of it.

There is, however, a better way to deal with hard cases, a way not dealt with in Professor Coenen's article. Though not available in all states, certification of questions is available in Rhode Island and a majority of other states.[58] Unfortunately, the Supreme Court in *Salve Regina College* expressly refused to grant certiorari in regard to the standards for certification, and is not likely to decide the case on that ground.[59] It is nonetheless an important part of the equation at issue here and bears brief discussion.

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57. Petition for Certiorari at 21, Russell v. Salve Regina College, 890 F.2d 484 (1st Cir. 1990) (No. 89-1629).

58. *See infra* note 64.

59. *See supra* note 8.

CERTIFICATION AS AN ALTERNATIVE

The certification process has special significance here because it provides a mechanism that avoids the unseemly exercise of common law making power in an *Erie* case. When the Court of Appeals concludes that the district court's conclusion of state of law should be reviewed, it should certify that question to the state court if such a procedure is available.[60] Since the Court of Appeals cannot make law beyond the parties before it, certification seems the prudent course to follow if the court reasonably doubts that the trial judge predicted the state of state law correctly. It is a monumental waste of scarce resources for the Courts of Appeals to decide such abstract common law issues because they will always be subject to immediate reversal in state trial courts. The prospect of federal courts issuing a non-binding, wholly advisory opinion on an unclear question of state law should give pause. Although the dispute in most cases will constitute a sufficient case or controversy under Article III, the prudential concerns that are so much a part of modern standing doctrine[61] should militate against a general doctrine of *de novo* review, except in those rare cases where the inefficiency of certification requires it.[62]

If the Court is inclined to require lower federal courts to do more than the trial court did in this case, it should reconsider its limitation of the issues on certiorari. The petitioners' seasonably presented the question of certification which has always been left to the discretion of the lower courts.[63] There seems no reason to require the circuit courts to give *de novo* review to unclear

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60. Is seems self evident that the question of whether the trial judge should have certified the question to the state courts is always subject to *de novo* review. Certification statutes typically allow any federal court to certify. *See, e.g.*, ARIZ. REV. STAT. § 12-1861 (Supp. 1989); 17 C.WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 4248 (2d ed. 1988).

61. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472-75 (1982).

62. The discretionary factors appropriate to the exercise of pendent jurisdiction seem an apt analogy. For example, the Court in Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988), noted that there is

> a distinction between the power of a federal court to hear state-law claims and the discretionary exercise of that power. The *Gibbs* Court recognized that a federal court's determination of state-law claims could conflict with the principle of comity to the States and with the promotion of justice between the litigating parties. For this reason, *Gibbs* emphasized that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." Under *Gibbs*, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction. . . . [T]he doctrine of pendent jurisdiction thus is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values.

Id. at 349-50 (citations & footnotes omitted). In the context of certification the same values are apparent. Thus where the state law issue is dispositive of the case, certification seems clearly superior. Where the state law issue is simply one small element of the case on appeal, certification may not be efficient and fair.

63. *See* Woods, *supra* note 3, at 765-66.

questions of state law in cases such as *Salve Regina College*, when state certification procedures allow the appellate court to certify the question for a final and binding resolution in the state court.[64]

CONCLUSION

The Court must be conscious that the circuit court opinion on an unclear state law question in the *Erie* context binds no one other than the parties to that suit. Indeed, a state court judge of any stripe may reject its reasoning on the following day. The deference rule avoids such uneasy confrontations and for that reason alone should be retained. Should the Court be so inclined, it could require certification as an alternative to *de novo* review or spell out in more detail the standards that should be applied to inform the exercise of discretion.[65] To adopt Professor Coenen's Dworkian proposal would be the worst of all possible solutions given the tremendous burden the Courts of Appeals must now shoulder.[66] It also runs counter to the recent trend in the Court to deconstitutionalize procedural issues.[67] Most importantly, however, it is inconsistent with the *Erie* mandate that federal courts simply have no business making state common law. *De novo* review implies and demands the full creative forces of appellate review, forces that are constitutionally removed from the federal court by *Erie*. Demanding that level of scrutiny, no matter how inconsequential the issue, seems inefficient in the extreme. A legal realist would say we should strive for good results but not expect perfection. Justice Holmes would have asked no more.

There is a broader issue here that I will address at some later time and place. It is my impression, an impression shared by many other appellate lawyers, that in recent years the federal Courts of Appeals have greatly broadened the scope of the review function. It is also my impression, again shared by many practitioners, that the federal Courts of Appeals are quick to jump in where once they feared to tread. It may well be that the much discussed overload of the Courts of Appeals is a product of the same kind of thinking that permeates Professor Coenen's article. His unbridled faith in the functionality of appellate review and his distrust of trial judges, if in fact shared

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64. Indeed, in a case in which the Supreme Court recently granted review, the Ninth Circuit when confronted by a unclear question of state law withdrew its opinion and certified the question to the Washington Supreme Court. *McLinn* was not mentioned. Shute v. Carnival Cruise Lines, 897 F.2d 377 (9th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3209 (Oct. 2, 1990) (No. 89-1647).

65. Certification is certainly a time consuming and expensive process that ought not be invoked in every situation. The issues surrounding the use of such statutes are surveyed in LeBel, *Legal Positivism and Federalism: The Certification Experience*, 19 GA. L. REV. 999 (1985). *See also* Note, *Erie R.R. and State Power to Control State Law: Switching Tracks to New Certification of Questions of Law Procedures*, 18 HOFSTRA L. REV. 421 (1989). Professor Lea Brilmayer's observations suggest it may all be an exercise in futility. *See* Brilmayer, *Wobble, or the Death of Error*, 59 S. CAL. L. REV. 363 (1986).

66. The problem of workload is a constant issue in the Federal Courts. *See Judges Address Civil Reform and Judgeship Needs*, 22 THE THIRD BRANCH 1 (July 1990), which discusses the efforts now pending before Congress to increase the number of judges to deal with the expanding caseload.

67. *See, e.g.*, Sun Oil Co. v. Wortman, 486 U.S. 717 (1988). And, compare Justice Scalia's dissent in Bendix Autolite Corp. v. Midwestco Enterprises, Inc., 486 U.S. 888 (1988) (Scalia, J., dissenting) eschewing balancing tests.

by a large number of appellate judges, may lead the courts to the gross overuse of *de novo* review. Indeed, Professor Coenen comes close to embracing a radical proposition that the Supreme Court has never adopted and should not even consider: the notion that there is a constitutionally based due process right to appellate review in a civil case. That doctrine has not even been adopted in criminal cases where there is a real "liberty" interest at stake. It should be rejected out of hand in the civil context.

Constitutionalist thinking may, in fact, underlie much of the modern fascination with *de novo* review. It may be an unarticulated and perhaps unknown factor in the willingness of appellate courts to devote huge resources to issues that really matter very little. It may be that in the press of business the courts have intuitively accepted the constitutionalist argument. It may, therefore, be that the prescription for reducing the workload that threatens to destroy the appellate system as we have known it is a sharp reining in of *de novo* review and the reintroduction of a notion of respect for the trial process.

A CAVEAT

Good results may come from all of this if the Court clearly delineates the predicate for rejecting deference to a trial judge's opinion regarding state law issues. There is much confusion about the terminology appropriate to the description of the judicial function in cases where the trial judge's opinion is unsound.[68] As Professor Coenen notes there is great deal of discord, at least at a linguistic level, among and within the circuit courts.[69]

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68. Judge Seymour in the Tenth Circuit put it best in his concurring opinion in Carter v. City of Salina, 773 F.2d 251, 256-57 (10th Cir. 1985):

> I believe that application of the clearly erroneous standard of Rule 52(a) is inappropriate and reflects the confusion over this issue within our own circuit. Judge Schroeder acknowledged this confusion in her well-reasoned dissent in *McLinn* and offered some cogent criticisms of the clearly erroneous standard:
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> > "The phrase this Circuit, and to some extent the Tenth Circuit, has used most frequently is that the appellate court will follow the district court's interpretation of state law unless it is 'clearly wrong.' The wording of this formulation is similar to the Rule 52(a) 'clearly erroneous' standard of review of factual findings. This similarity is unfortunate, for it connotes that a district court's decision on a legal issue binds the appellate court just as a district court finding of fact binds the appellate court. In some opinions we have even used the phrase 'clearly wrong' and 'clearly erroneous' interchangeably. *See, e.g., Donaldson v. United States*, 653 F.2d 414, 416 (9th Cir.1981); *Gaines v. Haughton*, 645 F.2d 761, 770 (9th Cir.1981), *cert. denied*, 454 U.S. 1145, 102 S. Ct. 1006, 71 L. Ed. 2d 297 (1982). The result has been a tendency in a few of our decisions to look only to whether plausible support exists for the district court's legal conclusion, thereby according it presumptive validity. *See, e.g., Monte Carlo Shirt, Inc. v. Daewoo International (America) Corp.*, 707 F.2d 1054, 1056-57 (9th Cir.1983); *Smith v. Sturm, Ruger & Co.*, 524 F.2d 776, 778 (9th Cir.1975).
> >
> > Such excessive reliance on the district court has led to criticism of our formulation. . . ." *McLinn*, 739 F.2d at 1405-06 (Schroeder, J., dissenting).
>
> In addition to the "clearly erroneous" standard, *see, e.g., King v. Horizon Corp.*, 701 F.2d 1313, 1315 (10th Cir.1983), and the "clearly wrong" standard,

No matter how the standard of review is described, however, it seems clear that the Court of Appeals should not engage in *de novo* review of the trial judge's opinion unless the party who claims to be injured demonstrates prima facie that the trial judge got it wrong on the question of state law. In traditional terms of appellate review, the rule of deference should be applicable unless and until the disadvantaged party has demonstrated by clear and convincing evidence that the trial court's opinion is unsound under the law of the appropriate state. In the *Salve Regina College* case no such effort was even attempted.

It seems unfair, if not unconstitutional, to demand that the Court of Appeals undertake *de novo* review without imposing some burden upon the appellant. There should be a showing of at least probable cause to believe that error occurred. A probable cause standard would express a middle ground between the "clearly erroneous" test adopted by some courts and the *de novo* standard of the Ninth Circuit. Such a standard is sufficient and fair in the *Erie* context and the United States Supreme Court should continue to adhere to the overwhelming weight of judicial authority in that respect. This is not the time to add to the burden of the Courts of Appeals in regard to matters upon which they cannot by definition, have an authoritative view. *Some* federal cases need not be made.

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see, e.g., Mendoza v. K-Mart, Inc., 587 F.2d 1052, 1057 (10th Cir.1978), this circuit has also accorded district court state law determinations "extraordinary force on appeal," *e.g., Campbell v. Joint District 28-J*, 704 F.2d 501, 504 (10th Cir.1983), "extraordinary weight," *Adolph Coors Co. v. A & S Wholesalers, Inc.*, 561 F.2d 807, 816 (10th Cir.1977), "great weight," *e.g., Land v. Roper Corp.*, 531 F.2d 445, 448 (10th Cir.1976), "substantial weight," *e.g., Glenn Justice Mortgage Co. v. First National Bank*, 592 F.2d 567, 571 (10th Cir.1979), "great deference," *e.g., Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 561 F.2d 202, 204 (10th Cir.1977), "deference," *e.g., Taxpayers for the Animas-La Plata Referendum v. Animas-La Plata Water Conservancy District*, 739 F.2d 1472, 1477 (10th Cir.1984), "some deference," *e.g., Colonial Park Country Club v. Joan of Arc*, 746 F.2d 1425, 1429 (10th Cir.1984), "a degree of deference," *e.g., Obieli v. Campbell Soup Co.*, 623 F.2d 668, 670 (10th Cir.1980), and "at least a modicum of deference," *Cedar v. Daniel International Corp.*, No. 82-2574, slip op. at 5 (10th Cir. April 26, 1983). At best we are inconsistent; at worst, we are confused, and, in my view, this time we are just plain wrong [to utilize the same standard as Rule 52(a)].

69. Coenen, *supra* note 4, at 907-20.