Sykes in the Classroom

The hundreds of opinions written by the Hon. Diane S. Sykes in her career on the U.S. Court of Appeals for the Seventh Circuit and the Wisconsin Supreme Court make up a wealth of material about the law. On this and the following pages, seven members of the Marquette Law School faculty discuss how various of Sykes's writings have been a source for study and discussions with their students.

PROFESSOR ALEX LEMANN

Torts

My first-year torts class reaches something of a climax when we read *Palsgraf v. Long Island Railroad Co.*, the landmark 1928 New York Court of Appeals decision. *Palsgraf* is one of those old chestnuts that are simply irresistible to law professors. It combines engrossing facts, beautiful writing, and philosophical richness. I would probably assign it even if it didn't have canonical status and thus represent part of the esoteric *lingua franca* by which first-year law students are inducted into the cult of lawyers.

But *Palsgraf* can feel, after almost a century of life, somewhat remote. For students in Wisconsin in 2026, who often find the case to be the single most confusing thing they read all semester, a reasonable objection might be "what's the point?"

The good news for me as a teacher of tort law is that Wisconsin has its own *Palsgraf*, a 2003 state Supreme Court opinion called *Alvarado v. Sersch*, which I assign every year immediately after the perhaps somewhat hoary original. Like *Palsgraf*, *Alvarado* deals with the question of how far negligence liability ought to extend in situations where the connection between breach and injury feels attenuated.

In *Alvarado*, the plaintiff was cleaning a student apartment in Madison, at the end of an 11-hour shift during the hectic mid-August turnover period, when she found what she thought was a candle that had been overlooked by the property manager during his inspection of the apartment. The candle turned out to be a firework, and when Alvarado lit the fuse to preserve the pilot light of a stove she intended to clean, it exploded, blowing off most of her right hand.

Both the majority opinion, by Justice Ann Walsh Bradley, and Justice Diane Sykes's dissent in *Alvarado* engage with *Palsgraf* and the role it ought to play in 21st-century Wisconsin tort law. Part of the benefit of assigning the case is simply to show students that Wisconsin—most unusually—follows Judge William Andrews's dissent in *Palsgraf*, meaning that limitations on negligence liability in Wisconsin are based on an assessment of public policy rather than subtle philosophical elucidations of the concepts of duty and breach, as Judge Benjamin Cardozo set forth for the *Palsgraf* majority.

The good news for me as a teacher of tort law is that Wisconsin has its own *Palsgraf*, a 2003 state Supreme Court opinion called *Alvarado v. Sersch* . . . .

But another benefit of *Alvarado* as pedagogy is having students closely examine the point of departure between majority and dissent and push themselves to be precise in understanding the arguments that might have proved decisive. From this perspective, Justice Sykes's opinion is a gem, all that a dissent should be: it is shorter than the majority, it eschews scoring easy rhetorical points for the sake of rhetoric alone, and it raises valid concerns about the real-world impact of the majority's position. I feel confident that, like *Palsgraf*, Wisconsin law students will still be reading Justice Sykes's *Alvarado* dissent a century after it was written. ■

Illustrations on pages 23–29 by John Jay Cabuay

PROFESSOR LISA A. MAZZIE

Legal Writing

The crux of statutory interpretation in Wisconsin law, Justice Sykes explains in *Kalal*, is to stay within the statute itself.

Every fall semester, my first-year class in Legal Analysis, Writing & Research 1 is filled with eager students, excited to learn the law.

Law students and lawyers know that legal writing is a skills class. I don't teach doctrine for its own sake, as does, say, a torts professor who teaches about negligence, its elements, and its nuances. I work with students as they learn how to *work* with doctrine, doing so through an issue grounded in any area of law, whether tort, contract, criminal, constitutional, or property law. Or something else entirely. The overall framework for my instruction is legal reasoning: rule-based, analogical, and policy-based. And that is the order in which I introduce them.

We begin the semester with a rule-based reasoning problem. Typically, this involves a Wisconsin statute. Sometimes, we use a newly enacted statute, where there is no case law at all. More often, we use a statute (or set of statutes) in isolation, leaving aside for the moment any case law that exists. (I introduce the case law soon enough, when we discuss analogical reasoning.)

If students are going to learn how to interpret statutes for rule-based reasoning, our first stop is, of course, then-Justice Sykes's 2004 opinion in *State ex rel. Kalal v. Circuit Court for Dane County*, the most cited-case in the Wisconsin Supreme Court's history, with more than 1,500 citations to date, including in some 400 opinions of the Supreme Court itself. For our purposes, the facts are less important than the rules—the methodology—that we draw from the case to apply to the statute we are analyzing.

We begin, naturally, at the beginning: with the language of the statute itself. If "the meaning of the statute is plain," we stop there. The crux of statutory interpretation in Wisconsin law, Justice Sykes explains in *Kalal*, is to stay within the statute itself. That is, the interpretation of the statute proceeds according to the intrinsic evidence, which can include its "scope, context, and purpose" when those things can be ascertained from the text. "It is the enacted law, not the unenacted intent, that is binding on the public." Absent ambiguity in the statute, the inquiry does not consult extrinsic evidence, such as legislative history.

Justice Sykes's opinion presents *Kalal* as a "clarification" of Wisconsin's statutory interpretation methodology, although some might say the opinion transformed it. Previous case law had suggested that an extrinsic source such as legislative history was useful in interpreting a statute in the first instance. So, even in the absence of an ambiguous statute, courts sometimes went to extrinsic sources to effectuate the legislature's intent. Now, though, from *Kalal*, there are clear steps to unpacking the meaning of a statute (at least in the sense that anything's really "clear" in interpretation).

One difficulty in this methodology, for me, is trying to explain canons of construction in the first month of law school, when students are still wrapping their heads around so many other new ideas and words. Because under *Kalal* we use *intrinsic* evidence in the course of interpreting the meaning of the statutory text, canons of construction are important guideposts. Lawyers are quite familiar with these canons, and many are baked right into the case law. Yet students in the first month of their legal education often do innately and unintentionally apply such canons, even if they have a hard time grasping precisely what they are.

In any event, the *Kalal* methodology guides us as we examine, for example, whether a Zamboni (an ice resurfacer) is a "motor vehicle" for purposes of Wis. Stats. §§ 340.01(35) & 346.63(1) or whether it is better classified as "road machinery" under Wis. Stat. § 340.01(52). Or whether walking is a recreational activity under § 895.52(1)(g). Or what "reckless or wanton conduct" means under § 895.476, the statute that provides immunity from certain civil liability for harm caused by exposing someone to COVID-19.

Beginning with rule-based reasoning and statutory interpretation under *Kalal* is a most useful entry to legal analysis—concrete rules are always helpful—and it's an interesting way for students to compare their initial rule-based conclusions to their later conclusions, after case law is added. ■

PROFESSOR CHAD M. OLDFATHER

Criminal Law

The core question in *Kalal* concerns the meaning of the word *refuses*—in particular, whether a failure to act qualifies as a refusal.

A little more than a decade ago, I switched from teaching Criminal Law with a traditional casebook, featuring opinions from across the United States, to doing so using almost entirely Wisconsin materials. One of the benefits of the change is that it allows students to start to familiarize themselves with the criminal code many of them will spend their lives working with. They begin to learn how to work with the statutes, including how to interpret their occasionally unclear provisions. So the 2004 case of *State ex rel. Kalal v. Circuit Court for Dane County*—more often referred to simply as *Kalal*—would have appeared in the materials I prepared no matter what the statute it interpreted: For more than two decades, it has served as the authoritative source on statutory interpretive methodology in Wisconsin. And it would have appeared early in the semester, among the other foundational concepts.

But, as it happens, the substance of *Kalal* involves questions that are appropriate to a criminal law class also in a general sense—in fact, foundational, beginning-of-the-semester concepts. The case concerns an effort to invoke Wis. Stat. § 968.02, which creates a mechanism to bypass a district attorney's exercise of prosecutorial discretion in cases where "a district attorney refuses or is unavailable to issue a complaint." In the case, the Dane County district attorney had not pursued a former employee's claim that her employer stole money meant for her 401(k) retirement account. The district attorney's office had not expressly said that it was not going to proceed.

The core question in *Kalal* concerns the meaning of the word *refuses*—in particular, whether a failure to act qualifies as a refusal. But a substantial part of its value in the classroom stems from consideration of why the district attorney chose not to prosecute the case in the first place. What is prosecutorial discretion? Why does it exist? What sorts of considerations properly go into its exercise? What might have been behind the district attorney's decision not to prosecute in *Kalal*?

The operation of the bypass statute generates another set of questions. Why did the case end up before a judge from another county? Why does the law provide for the possibility of a special prosecutor? Functionally, what might be the result of allowing district attorneys to prevent bypass by simply delaying their decisions about whether to prosecute?

The cumulative effect is to facilitate an initial survey of the procedural and atmospheric dimensions of criminal law, and at just the right time in the semester.

And, finally, there's that for which *Kalal* is famous: its interpretive method, involving modified textualism. We read the case a couple weeks into the semester, just as the excitement of the early days of law school is turning into a sense of being overwhelmed by the new ideas, the new vocabulary—the sense that it's all a little hard to pin down, that every answer is some version of "it depends." Here, at last, is a recipe, an actual formula to follow! Or so it seems. I find that I have to dampen the enthusiasm a bit, to emphasize that even within *Kalal*'s framework there are judgments to be made, and to make clear that not every effort to figure out what a statute means requires resorting to the full machinery of that framework.

Even so, as I said to my first-year students in Criminal Law in the fall of 2024, "*Kalal* is everywhere." I had statutory interpretation in mind when I said that—the idea that the framework is operating in the background, so to speak, every time one reads a Wisconsin statute. I wasn't thinking about the fact that it's the most-cited case in the history of the Wisconsin Supreme Court or that prosecutorial discretion also factors into every criminal case. *Kalal* is everywhere in those senses, too. The case more than merits the "*Kalal* is everywhere" buttons that a student was inspired to distribute among the class the following week. ■

PROFESSOR KAREN SANDRIK

Contracts

In Contracts, a required first-year course each fall, we use one opinion by Judge Diane Sykes. And this past year, a second of the judge's opinions shaped my final exam.

The case we study together is *Karma International, LLC v. Indianapolis Motor Speedway, LLC*, a 2019 Seventh Circuit decision. The opening line draws us in: "The Indianapolis 500 race has been a fixture of American life since 1911, interrupted only by world war." Judge Sykes wrote the opinion addressing mutual breach claims between an event-planning company (a licensee of *Maxim*, the men's magazine) and the Indianapolis Motor Speedway over a disappointing party at the race's historic 100th running.

We use the case to learn the requirement that contract damages cannot rest on speculation. The court of appeals affirmed summary judgment against Karma on its claim because its damages theory was "entirely speculative," emphasizing that "a factfinder may not award damages on the mere basis of conjecture or speculation." The facts make the principle memorable: although 1,787 guests attended Karma's event, the company had sold only 92 full-price tickets. Most importantly, it could not provide concrete evidence how greater promotional efforts by the speedway would have caused more tickets to be sold or yielded more revenue. Students can grasp quickly why the law demands more than hopeful arithmetic.

The case also illustrates something I value in Judge Sykes's work: her ability to show that older doctrines still have modern bite. Students read *Chicago Coliseum Club v. Dempsey*, an Illinois appellate decision from 1932, and can reasonably question whether the court was right to conclude that the promoter's evidence on lost profits from a prizefight between Jack Dempsey and Harry Wills (which never happened) was too speculative. The doctrine can seem like a relic. *Karma International* demonstrates otherwise. The reasonable-certainty requirement remains very much alive, and Judge Sykes applies it with rigor to a modern set of facts.

My exam this past year drew from *Quality Oil, Inc. v. Kelley Partners, Inc.*, a 2011 contract-interpretation case from the Seventh Circuit. Judge Sykes's opinion rejected a literal reading of a handwritten provision in a loan-and-supply contract. The provision stated that the agreement would terminate after 225,000 gallons of motor oil and 225,000 filters were purchased, or 60 months, whichever came first. The buyer argued that this relieved it of all liability after 60 months, regardless of how much product it had actually purchased.

Judge Sykes acknowledged that the handwritten language was not facially ambiguous but explained that the plain-meaning presumption is rebuttable. The opinion draws on Judge Richard Posner's earlier opinion for the Seventh Circuit, in *Beanstalk Group, Inc. v. AM General Corp.* (2002), which we also study in the course.

Judge Sykes's opinion rejected a literal reading of a handwritten provision in a loan-and-supply contract.

Two principles do the work. The first is the whole-contract rule—the precept that phrases in a contract cannot be read exclusive of other contractual provisions and that determining the parties' intentions must involve reading the contract in its entirety. The second is the anti-absurdity principle, traced to Judge Benjamin Cardozo: "If literalness is sheer absurdity, we are to seek some other meaning whereby reason will be instilled and absurdity avoided." Applying both principles, Judge Sykes concluded that the buyer's interpretation was "commercially absurd" because it would allow the buyer to retain a $150,000 loan, let 60 months elapse without purchasing anything, and walk away free.

At a recent Marquette Law School event honoring Judge Sykes, her fellow Marquette lawyer and former clerk, Anne-Louise Mittal, L'15, observed that what stood out to her most was Judge Sykes's ability "to cut through even the most complicated case to identify the governing legal principle or principles at the heart of the case." That is precisely what these two opinions do. *Karma International* homes in on the principle that speculation is not proof. *Quality Oil* quickly arrives at the principle that text serves commercial purpose, not the other way around. Judge Sykes no doubt is a textualist, but *Quality Oil* shows she is not a blinkered one.

As we celebrate Judge Sykes upon her taking senior status on the Seventh Circuit and after serving as the court's chief judge, my contribution to marking the occasion is simply to make this point: her opinions continue to teach. ■

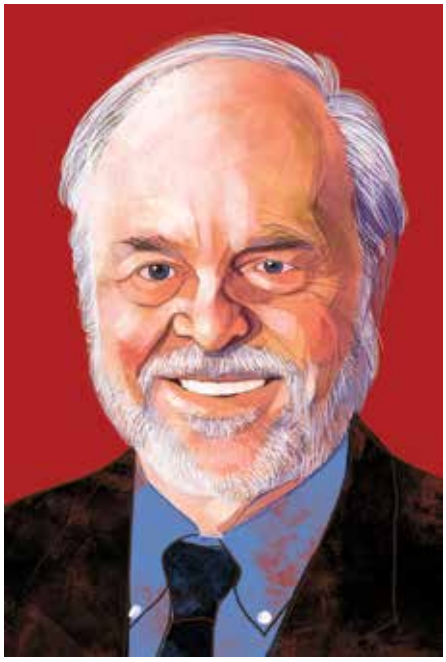
PROFESSOR DAVID R. PAPKE

Property

I switch over late in the semester in first-year Property from traditional common-law doctrine to modern zoning law. The students for the most part welcome the switch, but some find the abundant map amendments, conditional permits, special uses, and assorted variances as problematic additions to existing zoning ordinances. Fortunately for instructor and students alike, Justice Diane Sykes's thoughtful opinion for the Wisconsin Supreme Court in *State ex rel. Ziervogel v. Board of Adjustment* (2004) not only sorts out the state standards for variances but also provides a valuable metaphor for understanding how variances might best be conceived.

The case itself involved a request for a variance from Richard Ziervogel and Maureen McGinnity, of Washington County. Ziervogel and McGinnity owned a property that fronted Big Cedar Lake and included a 1,600-square-foot summer home, located 26 feet from the high-water line for the lake. In hopes of converting the summer home to a year-round house, Ziervogel and McGinnity sought to add 10 feet to the top of their summer home, a vertical addition that would ultimately include an office and two bedrooms. In order to do so, they requested a variance because the local zoning ordinance prohibited the expansion of any structure within 50 feet of the lake. The local zoning board had denied the request, and the case, as it came through the courts, concerned the standard properly to be applied in considering a variance.

Justice Sykes's opinion begins by reiterating the distinction between "use" and "area" variances, noting that while an area variance might change the shape and size of a structure, this type of variance was unlikely to be much of a threat to the character of a neighborhood. To Justice Sykes's consternation, the reigning case law failed to appreciate this or to distinguish between the two types of variances when setting standards for petitioners' requests for variances. For both a use variance and an area variance, a petitioner was required to show "no reasonable use" of the property was possible without a variance. This standard would obviously have prevented the petitioners in *State ex rel. Ziervogel* from obtaining a variance. After all, they already owned and presumably enjoyed their summer home on Big Cedar Lake.



After making her way through the confusing and frequently changed Wisconsin case law, Justice Sykes articulated a more appropriate standard. Henceforth, she stated, petitioners for an area variance need only show that compliance with a zoning ordinance would be "unnecessarily burdensome." A court might determine if petitioners met this standard by considering the purpose of the zoning ordinance at hand and also the public interests that were at stake. Justice Sykes's opinion then remanded the case for further proceedings involving the correct standard.

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Ziervogel and McGinnity were no doubt pleased by Justice Sykes's reasoning and her restatement of the variance standard, and, in addition, Wisconsinites benefited from greater clarity and thoughtfulness regarding how to perceive area variances in general. Interestingly enough, Justice Sykes achieved this larger purpose not through anything as pedestrian as a denotative rule but rather through a connotative metaphor.

Elaborating on a suggestion from a venerable practice guide by E.C. Yokley, Justice Sykes advised that a variance could be conceived of as an "escape valve." The latter is a safety mechanism that releases excessive pressure from a container or a piece of machinery. Customarily spring-loaded, an actual escape valve opens automatically when internal pressure exceeds external pressure. An escape valve guards against equipment damage and, horrors, might even prevent the container or piece of machinery from exploding.

When the metaphor is invoked in zoning law, the variance as an "escape valve" provides the system with a way to avoid unduly rigid controls on property owners. The variance releases the pressure they might feel from well-intentioned but seemingly inflexible zoning ordinances. First-year Property students troubled by the way variances confuse and complicate zoning ordinances may take to heart Justice Sykes's reminder that variances are actually valuable devices for making zoning work more prudently. ■

PROFESSOR BRUCE E. BOYDEN

Copyrights and Civil Procedure

We have used opinions by Judge Diane Sykes in two of my classes. In both instances, I looked for an opinion that presented a complicated doctrinal issue in clear terms that students could understand and debate.

In Copyrights, for many years, I supplemented the casebook with *Kelley v. Chicago Park District*, a Seventh Circuit decision from 2011. *Kelley* deals with a basic yet challenging question: what, exactly, is a copyrightable work? Protected works must meet at least two requirements: they have to be authored, and they have to be written or recorded somehow—in the words of the statute, "fixed in a tangible medium of expression."

Not many cases deal with either issue, and what cases there are tend to arise in the context of new technologies, such as computers or remote-controlled cameras. Students struggle, for example, to determine if a temporary copy made in a computer's volatile memory counts as "fixed."

Kelley involves a flower garden. In 1984, Chapman Kelley created a "living art" installation of flowers and native plants in Grant Park, called "Wildflower Works." Later, when Chicago constructed Millennium Park, Wildflower Works was mostly destroyed. Kelley sued under the Visual Artists Rights Act (VARA), a federal statute, which provides protection against destruction for certain pieces of art, including sculptures.

The Chicago Park District failed to challenge the conclusion that Wildflower Works was a "sculpture" under VARA, an action (or inaction) that Judge Sykes called "astonishing." (A useful teaching moment for students: don't overlook the statutory text!) This left the court with a conundrum: Is a wildflower garden "fixed" within the meaning of the copyright statute? And if so, by whom?

Judge Sykes concluded that Wildflower Works failed in both respects. A garden is "naturally in a state of perpetual change." And the nature of that change also undermined the human authorship requirement for copyright. "[G]ardens are planted and cultivated, not authored," Judge Sykes wrote. "Most of what we see and experience in a garden . . . originates in nature, not in the mind of the gardener." *Kelley* has been an important precedent as courts grapple with the copyrightability of AI generations, which are similarly determined largely by nonhuman forces.

In Civil Procedure, I supplement the casebook with *McCauley v. City of Chicago* (2011). *McCauley* deals with another vague doctrine: what constitutes a "plausible" claim that will survive a motion to dismiss? The U.S. Supreme Court announced the plausibility requirement in *Bell Atlantic v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009), but neither of those involved a typical claim, and in both cases the plaintiff lost. This leaves students wondering: what makes a claim "plausible"? The Supreme Court's unhelpful answer is that it depends on "judicial experience and common sense."

By the time Judge Sykes wrote the majority opinion in *McCauley*, the Seventh Circuit had already decided two prior plausibility appeals, *Swanson v. Citibank, N.A.* (2010) and *Brooks v. Ross* (2009). The district court's dismissal in *Swanson* was reversed, but not in *Brooks*. Judge Sykes used these two prior data points to map out a spectrum of fact patterns, from less complex to more complicated. Where a case falls on that spectrum determines how hard a plaintiff has to work to plead their claim.

Judge Sykes then explained how Gloria Swanson, who alleged that her house was given a low-ball appraisal by Citibank due to her race, had a straightforward claim, whereas that of Victor Brooks, who alleged a wide-ranging conspiracy among unrelated parties to retaliate against him for a parole board vote, was "complex." The civil rights complaint in *McCauley*, which alleged that various city and state officials intentionally underenforced domestic violence orders on the basis of sex, was also "complex."

"What does Judge Sykes mean by 'complex'?" I ask students. After all, Swanson's claim involved math, anathema to many lawyers, whereas Brooks's claim did not. In our discussion, using the spectrum mapped out by Judge Sykes, the students come to see that a "complex," plausibility-challenged claim is one that has a lot of improbable leaps, as in Brooks's complaint. On the other hand, Swanson's racial discrimination claim, sadly, is the sort of thing that happens every day. An opinion such as Judge Sykes's in *McCauley*, particularizing "judicial experience and common sense," helps students understand when a motion to dismiss may succeed. ■

DEAN JOSEPH D. KEARNEY

Advanced Civil Procedure

Some cases break ground or set precedent, while others are less well-known but useful for their representativeness of a doctrine or concept.

In Advanced Civil Procedure, an upper-level elective offered each spring, we have occasion to read all or parts of five opinions by the Hon. Diane Sykes. One we consider for its role in establishing the law, whereas the others we take up more for their exemplifying it. The distinction is familiar in the law: Some cases break ground or set precedent, while others are less well-known but useful for their representativeness of a doctrine or concept. Both sorts can be valuable in teaching and learning. In the Advanced Civil Procedure instances, perhaps it is not surprising that it is one of *Justice* Sykes's decisions (i.e., from her time on the Wisconsin Supreme Court) that falls into the precedent-setting category.

Let's start there. *Yahnke v. Carson* (2000) came toward the end of Justice Sykes's first year of her half-decade tenure on the state Supreme Court. In a matter of summary judgment process (and substance) and with Justice Sykes writing for a majority, the court adopted what it termed "the so-called 'sham affidavit' rule." The legal precept announced by the court may be less provocative than that phrasing, but it is still significant: "we hold that for purposes of evaluating motions for summary judgment pursuant to Wis. Stat. § 802.08, an affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of material fact for trial, unless the contradiction is adequately explained." Just about every federal court of appeals had previously come out the same way interpreting the materially identical federal law (Fed. R. Civ. P. 56) on which Wisconsin modeled § 802.08. Yet the interpretation barely made it into Wisconsin law, as *Yahnke* was decided by a four-to-three vote, with Justice William Bablitch dissenting for himself, Chief Justice Shirley Abrahamson, and Justice Ann Walsh Bradley. In class, we find the *Yahnke* case valuable both for its specific rule and as an example of Wisconsin's embrace of a number of summary judgment concepts found in the federal system.

The Seventh Circuit cases in Advanced Civil Procedure relevant here are less prominent but interesting all the same. Two of them are personal-jurisdiction cases. *Northern Grain Marketing, LLC v. Greving* (2014) involved a successful objection by a Wisconsin farmer to being sued in federal court in Illinois on a contract dispute with the plaintiff, Northern Grain. Greving lived very close to Illinois (just over the border, in Walworth County, Wis.) and had some connections with the state—but not the "minimum contacts with Illinois that would permit the district court, consistent with the due process clause of the Fourteenth Amendment, to exercise personal jurisdiction over him." As Judge Sykes explained, "although it may seem convenient as a practical matter for Greving to defend this suit in Rockford, the Constitution doesn't permit the Illinois courts—and, thus, [under Fed. R. Civ. P. 4(k)(1)(A)] federal district courts in Illinois—to exercise jurisdiction over him." Judge Sykes's opinion for the Seventh Circuit in *Felland v. Clifton* (2012) contributes to the law of personal jurisdiction in a different way: It has occasion to discuss how a court's federal "minimum contacts" due process analysis can contribute to its consideration whether the requirements of a Wisconsin long-arm statute (there, § 801.05(3)) are satisfied.

Finally (though early in the course), to demonstrate to the students an important way that the federal court system can connect with state supreme courts, we include brief excerpts from three Seventh Circuit opinions where a close question of state law was presented. In two of these cases, the federal court of appeals *certified* a question of state law to a state supreme court. Judge Sykes wrote these two opinions, seeking answers from the Illinois Supreme Court and the Minnesota Supreme Court. In the third instance, a diversity case where the Seventh Circuit had to sort out state law in a classic "*Erie* guess" or prediction situation (in fact, Wisconsin law), it didn't even discuss the possibility of certifying to the Wisconsin Supreme Court. For the contrast of interest here, Judge Sykes was not part of the panel in this third case. Had she been, I imagine, the court might well have proceeded differently, certifying the question. Judge Sykes might have been more apt to recall Justice Sykes, we may say. ■