

# MARQUETTE LAWYER

SUMMER 2021



## LOOKING AT JUDGING FROM A DIFFERENT ANGLE

Problem-Solving Courts and Other Newer Thinking

**ALSO INSIDE:** The Politics, Law, and History of Political Redistricting • Sociological Legitimacy and the U.S. Supreme Court  
Out-of-State Investors and Home Ownership in Milwaukee • Law Students Take Pro Bono Virtual

## What Does—and Should—a Judge Do Today?

A few years ago, after one of our distinguished lectures, which draw to Eckstein Hall so many engaged members of the profession, one attendee, not an alumnus, said to me, “Eckstein Hall is the center of the legal profession in this region.” This was a high compliment, but I largely demurred. For me, the nearest state courthouse will always be the heart of the legal profession anywhere. It is the place that symbolizes justice, and to which, as a society, we want our fellow citizens to resort, whether via the criminal law or through civil litigation.

And at the center of the courthouse, and of the profession, are judges. Their work is, accordingly, an important focus of legal education. Not simply in procedural courses, such as various of my own upper-level offerings, but also in first-year courses in Contracts, Criminal Law, and Torts, we study what



judges do. All familiar with law school require no elaboration on how this is true throughout the curriculum. The centrality of judges figures in other aspects of our work at Marquette Law School, helping explain, for example, our annual Hallows Lecture, which a faculty colleague (Professor Michael O’Hear) some years ago characterized to me “as one of the

many things the Law School does to validate public service in the eyes of our students, as well as to promote respect for the office of judge.”

It is thus natural that the *Marquette Lawyer* magazine often features and examines the work of judges. Sometimes we present it (or them) almost unmediated, as at the end of this issue, which boasts a conversation between one of my colleagues, Professor Nadelle Grossman, and the Hon. J. Travis Laster, an especially thoughtful jurist (and, more concretely, vice-chancellor in Delaware). Other times we offer an analysis: Examples include, several years ago, our featuring a symposium convened by my colleague, Professor Chad Oldfather, concerning the role of judicial law clerks, and, more recently, our engaging with the state’s bench and bar concerning the remarkable decline in the incidence of civil jury trials across the country, including Wisconsin.

This issue’s cover story inquires whether the role of the state trial judge (if the term is still apt) has been changing and, if so, what one might make of any trends. Our focus is not traditional civil litigation, where at least since Professor Judith Resnik’s famous 1982 article in the *Harvard Law Review*, “Managerial Judges,” there has been considerable discussion of the changing role of judges. Rather, in this instance we consider, in particular, “problem-solving courts” and the interest on the part of many Wisconsin trial judges in what they term “better outcomes.”

Better outcomes would not, historically, have been considered the focus of judges, whose great traditional office has been to deliver *judgments*. The mundane details of satisfaction of a judgment, or its execution, let alone its down-the-road effects, have not been thought to make up the essential work of the judge entering the decree. Indeed, in a broad sense, we have even suggested that judges should be indifferent to some such things: *Fiat justitia, ruat caelum*, you know.

So our cover story proceeds critically but uncritically. We seek to identify and help explain a phenomenon, even as we claim no great insight, certainly at this institutional level, into whether the phenomenon is, overall, a good thing or a bad one. And we invite your own observations, as alumni, other members of the Wisconsin bench and bar, judges and academics across the country, and others. On occasion, we have even run in the magazine a letter to the editor, reacting to a story. Without doubt, the changing role of the judge is, in important basic respects, an *empirical* question. So we will welcome your own experiences and observations (joseph.kearney@marquette.edu or alan.borsuk@marquette.edu).

In all events, we offer you herewith the latest *Marquette Lawyer*, with its glimpses of our students, the profession, and the larger society. Thank you for spending some time with it and us.

Joseph D. Kearney  
*Dean and Professor of Law*

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by Alan J. Borsuk

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## Honoring Alumni Known for Helping Others

Creating opportunities for themselves and others. Pursuing worthy goals and satisfying careers. Helping students and people in need. Building on the examples of their parents. Those characterizations help describe the four Marquette lawyers who are receiving alumni recognition honors from Marquette Law School this year in virtual ceremonies. They are:

### **James T. Murray, Jr., L'74** *Lifetime Achievement Award*



Jim Murray has always loved working as a litigator. The native of Racine, Wis., is a shareholder at von Briesen & Roper in Milwaukee and has tried more than 150 cases to verdict. His father was a Marquette lawyer, and his mother had an undergraduate degree from Marquette.

Murray has mentored law students who interned at his firm and hired many upon graduation, and he has been extensively active in Law School alumni efforts, including a term as president of the Law Alumni Association Board.

### **Deborah McKeithan-Gebhardt, L'87** *Alumna of the Year Award*



A lot about Deb McKeithan-Gebhardt's professional work can be learned from her description of the qualities that she says she aims to model for her six daughters: "Excellence, faith, leadership, service, along with one other important skill: courage." McKeithan-Gebhardt is president and CEO of Tamarack Petroleum Co.,

based in Milwaukee. She describes her father, the late Daniel "Jack" McKeithan, Jr., a well-known figure in business and public service, as the most influential person in her life.

### **Sarah Padove, L'12** *Charles W. Mentkowski Sports Law Alumna of the Year Award*



In high school, Sarah Padove knew that she wanted a career in baseball. And she has achieved that. She played softball as an undergraduate at Indiana University and chose Marquette Law School because of its sports law program. She is now senior coordinator of baseball and softball development for Major League Baseball,

based in New York City. Her work focuses on nationwide initiatives to get kids involved in playing ball—and involved in helping their communities.

### **Raphael F. Ramos, L'08** *Howard B. Eisenberg Service Award*



As director of Legal Action of Wisconsin's Eviction Defense Project, Raphael F. Ramos does all he can to see that people in "moments of utter desperation and turmoil" have good representation in legal proceedings. He also is involved with the Marquette Volunteer Legal Clinics. The ethic of

serving others was ingrained in him by his parents, who moved from the Philippines to the United States when Ramos was two years old. "The values I have are truly because of them," Ramos said.

Congratulations to each of these exemplars of Marquette University's mission.

## Edwards and Williams Honored with Portraits in Eckstein Hall

The contributions by Professors Carolyn M. Edwards and Phoebe Weaver Williams to Marquette Law School would deserve great honor without using the word *pioneers*. Each of them, now an emerita faculty member, has had a long career at the Law School, educating, mentoring, and inspiring students. But they also *have* been pioneers. Edwards, who joined the Law School in 1974, became the first woman to receive faculty tenure at the Law School. Williams, L'81, who joined the faculty in 1985, was the first full-time Black professor at the Law School.

Edwards and Williams were honored this year with the hanging of their portraits in Eckstein Hall. A ceremony to unveil the artwork formally was held in April. At the ceremony, Dean Joseph D. Kearney quoted another emeritus faculty member, Michael K. McChrystal, L'75, who suggested and underwrote the honor, noting some of the challenges that these two faculty members had faced and saying of them: "Their knowledge, perseverance, and incomparable dignity won over some, then many, then pretty much everyone. I saw this firsthand as a colleague, and secondhand through my own children, as Marquette law students and now as lawyers themselves, who single out these outstanding teachers from their law school days. . . . *They are Marquette* for thousands of alums and members of the community." ■



Professor Carolyn M. Edwards



Professor Phoebe Weaver Williams

## Leaders on Both Sides of Police Accountability Issues Agree on Need to Work Together

Milwaukee's interim police chief, Jeffrey Norman, L'02, summed up a conference on March 10, 2021, focused on the important and controversial issue of police accountability, in a few words: "We have a lot of work to do."

The good news is that leaders from different positions related to the subject expressed agreement on setting out to do that work. The subject has been a high priority since the death of George Floyd in police custody in Minneapolis in May 2020, which was followed by many protest events around the nation, including in Milwaukee and its next-door neighbor, Wauwatosa.

The program, "Policing and Accountability—A Community Conversation," was hosted jointly by Marquette Law School's Lubar Center for Public Policy Research and Civic Education and by the Marquette Forum, a university-wide program to focus attention across an academic year on a major matter.

"Ideologically, we want to live in a city where we all feel safe, where we feel heard, where we feel protected," said Amanda Avalos, a new member of Milwaukee's Fire and Police Commission. "And people's ideas of how we get there are different."

Norman said that police have to be accountable, in order to have legitimacy in the community. "Our acts and deeds have to line up," he said. "We can't just use it as a word of the day."

Milwaukee County Sheriff Earnell Lucas said that the results of law enforcement practices show disparity by race, gender,

and socioeconomic status. But he said that he was committed to changing that for the better. "It begins with each one of us, the chief [Norman] and myself, being active listeners to what it is that the people of this community are desiring," Lucas said.

Nate Hamilton, chair of the Community Collaborative Commission, said, "I'm completely committed" to sitting at the table and working with law enforcement leaders to create community-oriented policing policies. Hamilton's brother, Dontre Hamilton, was shot and killed by a Milwaukee police officer in 2014.

In a second session, Wisconsin Attorney General Josh Kaul, Milwaukee County District Attorney John Chisholm, and attorney Kimberley Motley, L'03, who has represented several families of men killed by police, discussed how such shootings were officially investigated in Wisconsin.

The conference was led by Mike Gousha, distinguished fellow in law and public policy, and Steve Biskupic, L'87, a former U.S. Attorney for the Eastern District of Wisconsin and an adjunct professor at the Law School, now in private practice. William Welburn, Marquette University's vice president for inclusive excellence, helped introduce the event. ■

The two-hour conference may be viewed at [law.marquette.edu/current-students/policing-and-accountability-community-conversation](http://law.marquette.edu/current-students/policing-and-accountability-community-conversation).

# OVERHEARD FROM ECKSTEIN HALL

## PROVOCATIVE THOUGHTS FROM THE (VIRTUAL) LUBAR CENTER

Marquette Law School's Lubar Center is many things, but it is two in particular: a grand room in Eckstein Hall and a shorthand for the Lubar Center for Public Policy Research and Civic Education. The room itself has not been available to host any community programs during this COVID-19 year, but the center's service as a crossroads for convening and for discussing important issues with significant people has not faltered. In the virtual Lubar Center, available at [law.marquette.edu](http://law.marquette.edu), the beat goes on. Here are glimpses from some recent "On the Issues with Mike Gousha" programs and other sessions.

### ***Justice in the Time of COVID***

January 22, 2021

During a discussion with legal system leaders on the pandemic's impact, Milwaukee County Circuit Court Chief Judge Mary Triggiano said that there was "a grand opportunity" coming out of the COVID period to look at how things are done. "We're committed to coming back in a different way that makes it better," she said. "We need to get up, but we also have to be careful in how we do it and do it right."

Milwaukee County District Attorney John Chisholm said that if the impact of the pandemic leads to greater efforts to deal with housing insecurity and improve public health services in Milwaukee, "we would actually see the need for criminal justice intervention recede greatly."

Milwaukee Municipal Court Judge Derek Mosley, L'95, was asked if the court system will be better for what everyone has learned in this period. "No doubt about it," he said.

### ***Amy Lindner, president and CEO of United Way of Greater Milwaukee and Waukesha County***

December 3, 2020

Between finishing college and starting law school, Amy Lindner spent a year working at an auto repair shop in Waukesha. One lesson she learned was that every job deserves dignity and respect. A second lesson: In dealing with customers, she saw that "the way we treat each other just makes such an impact." And a third: When she told customers

what was done for their cars, why it was needed, and why it cost what they were being charged, she found that "just being clear and kind to people is something we all can do in all of our jobs."

### ***What Is Being Learned in K-12 Education in This Difficult Year?***

March 2, 2021

Robin Lake, director of the Center on Reinventing Public Education at the University of Washington (Bothell), said that between higher-income and lower-income students nationwide, "achievement gaps or opportunity gaps are becoming chasms." She added, "What's killed me since the beginning of the pandemic is the lack of urgency and the lack of creative solutions that we're hearing about."

### ***Abim Kolawole, vice president for customer service integration at Northwestern Mutual***

February 17, 2021

Abim Kolawole talked about feeling comfortable as a Black person in the community. "The moment I step out of the four walls of my home or my company—and these are true experiences—you realize you are just as susceptible, just as vulnerable" as any other Black man, despite corporate titles and a good income. He recounted how he once was standing outside a downtown restaurant, waiting for a valet to bring his car, when a white customer walked up and handed him the keys to that customer's car, assuming Kolawole was a valet.

### ***Forward 48* | January 13, 2021**

Mike Hostad and Ian Abston created Forward 48, a leadership development program for young professionals, and also teamed together to lead the successful effort to light up the Daniel Hoan Memorial Bridge, spanning the Milwaukee harbor. Hostad said, "There's so much passion and good in the next generation of leaders coming into Milwaukee." Abston said the hope is that efforts such as theirs will make Milwaukee "more sticky" for young professionals who might consider moving elsewhere.

### ***Missy Hughes, secretary and CEO of the Wisconsin Economic Development Corporation* | March 18, 2021**

"Young people want to come to an inclusive environment. They want to come to a diverse environment. . . . Every moment we are not inclusive, we are turning somebody away."

### ***Reggie Moore, then-director of the Milwaukee Health Department's Office of Violence Prevention***

February 26, 2021

Asked if people had become numb to violence in the city and to seeking action to reduce it, Reggie Moore said, "That is not something that we can allow or even tolerate. We need to expect from our leaders and each other that we are doing everything possible to prioritize the preservation of life in our city. . . . It's a collective accountability." ■

# The Making of Chicago's World-Class Lakefront

More than 20 years of work by Kearney and Merrill produce a colorful, in-depth history.

Out of social conflict comes a great community asset. Out of legal tangles spanning decades come important precedents. And out of more than 20 years of research and writing comes a book that breaks ground in describing an important chapter in both American urban development and legal history.

The subject is the Chicago lakefront, the book is *Lakefront: Public Trust and Private Rights in Chicago*, and the authors are Dean Joseph D. Kearney of Marquette Law School and Thomas W. Merrill, Charles Evans Hughes Professor at Columbia Law School. The strong ties the book has to Marquette Law School extend beyond the many years of work by Kearney, much of it in summers, to include the work of numerous law students who assisted in the research.

"This book seeks to explain how Chicago came to have such a beautiful, well-tended, and publicly accessible lakefront—the city's most treasured asset," Kearney and Merrill say in the introduction.

It is not a simple story. "The history of the lakefront has been one of almost continual social conflict," they write. The cast of characters includes railroad magnates, business leaders, politicians, scalawags, haves, have-nots, Supreme Court justices, and many others, almost none of whom set out to create a great lakefront. But, in the end, they did.

The book documents how, through many disputes and lawsuits, the law was important in reaching such an outcome. The decades of contention over lakefront property included landmark decisions establishing the American public trust doctrine, which holds that some public resources are off-limits to private development.

Kearney and Merrill were both living in Chicago in the 1990s when the idea of writing this book was launched. Both moved to academic positions in other cities, as they note in the acknowledgments. "We found ourselves nevertheless—or, perhaps, all the more—unable to resist the challenge of untangling the history of the Chicago lakefront, which is at once a large puzzle and a kind of miracle," they relate.

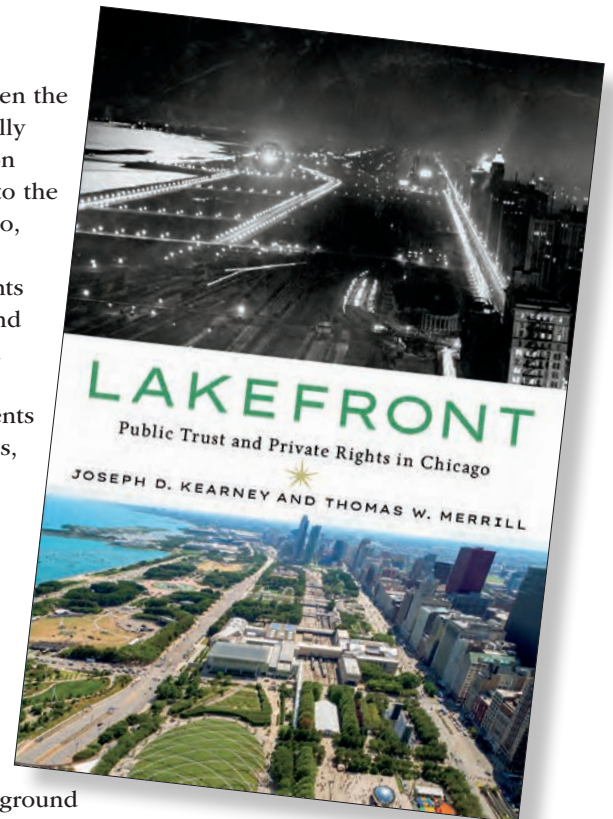
"Because the majority of the social conflicts over the lakefront have been waged by rival elites, the forums in which these disputes have unfolded have been legal ones," Kearney and Merrill write. "[T]he

lakefront has been the subject of virtually nonstop litigation from the 1850s to the present." The two, with the help of research assistants and librarians and others at several repositories of primary documents and legal records, piece together a history that has not been told previously in such detail or comprehensive fashion.

The many legal cases involving the lakefront broke ground in determining who owned the land under the water along the shore, as well as the balance between private and public rights to lakefront land. The legal history includes "the slow but inexorable development of new institutions to regulate the lakefront." One irony of the history: In some instances, private rights did more than public remedies to create the lakefront that exists today.

"[O]ur book can be seen as an examination of the importance of law and, in particular, legal property rights in the long-term development of an important resource like the lakefront," Kearney and Merrill write. "If the outcome in Chicago was largely fortuitous, part of our motivation in writing this book has been to suggest how a more deliberate mix of policies might produce similar results elsewhere."

The newly released book was published by Cornell University Press. It has drawn praise from experts in Chicago history and from law and history professors at universities including Harvard, Yale, Princeton, Notre Dame, and Northwestern. ■





# CAN JUDGES BECOME HELPERS?

**In search of better results, some judges are embracing new roles as captains of teams aiming to lead people to more stable lives.**

**By Alan J. Borsuk**

Judge Carl Ashley, L'83, of the Milwaukee County Circuit Court, said that when he became a judge 21 years ago, he was told that the judicial system is a funnel and judges are the tip. Or, it was said to him, "We call balls and strikes, and that's all."

"That's too myopic a view," Ashley recently said. The results of that approach were not good enough when it came to getting people off the paths that brought them to court repeatedly and that led to high recidivism rates. This was true also when it came to improving community safety. So Ashley changed the way he approaches his work as a judge to give greater attention to alleviating problems and helping people. "Outcomes," he said. "We need to incorporate outcomes with holding people responsible in an appropriate dynamic."

Mary Triggiano, the chief judge of the Milwaukee County Circuit Court, has been on the bench for 17 years. She also changed her approach to her work when her dissatisfaction grew with the results of conventional sentencing and related work. That was especially the case when she was serving in children's court. She recalls the case of a young man who came into court repeatedly but who seemed to be making progress. Then he committed a heinous murder. It was an "aha" moment for the judge, telling her that more needed to be done to understand the people who come before judges.

"You don't practice the same way as a judge once you understand that the person in front of you has a story and factors in their life," Triggiano said.

Ashley and Triggiano are part of a trend in Milwaukee County and, to a notable but lesser degree, across Wisconsin, which is expanding the roles of judges and courts. The traditional work of presiding over cases and issuing judgments continues. But often now, the goal of those who work in the justice system, including judges, is to keep people from needing to be brought to court in the future.



Judge Carl Ashley

That has particular impact in criminal courts, where there has been increasing use of diversion programs or deferred-prosecution plans to see if defendants can get on better paths, frequently with the help of trained professionals. Perhaps most notably, in some criminal cases and similar proceedings such as children's court matters involving children in need of protective services, the changing role of judges and courts has led to "problem-solving" courts. These courts connect people facing problems such as addiction, mental illness, or post-traumatic stress disorder with teams trained to work with them on plans to stabilize their lives—and to oversee their compliance with those plans. The work puts a big emphasis on encouragement and positive reinforcement and less emphasis on stern sanctions.

In short, the role played by many judges is changing. Black robes and formal proceedings are yielding in some courts to judges joining defendants and an array of others at a table (or in the pandemic world, in a Zoom session) to discuss how things are going. Sometimes the defendant ends up regarding a judge as an ally. It's an approach that aims to turn courts, as Milwaukee County Circuit Court Judge Jane Carroll put it, into "a tremendous resource" to people who generally are facing lower-bracket charges while leading lives shaped by toxic personal issues.

"We are creating a new wave of judges," Triggiano said. "We've made some profound changes in the way we judge." She said that a traditional judge presiding over civil litigation doesn't necessarily have a problem-solving hat on. But in the circuit court more generally? "We know people are coming into our courts with histories of being traumatized by things that are guiding their actions," she said. Having a positive impact on outcomes is much easier in a problem-solving court.

Milwaukee County Circuit Court Judge Laura Crivello, L'93, currently the presiding judge for children's court, leads a family drug treatment court, which focuses generally on cases where parents (almost all women) are trying to regain custody of their children by taking part in treatment.

What goes on in a treatment court is "completely different in the aesthetics and the incidentals, but also sometimes how we judge," Crivello said. "We are changing, based on an understanding of the human being in front of us, because we have a better understanding of human nature. It's not a matter of sitting on the bench in a black robe. It's 'how can we help you; how can we develop a relationship?'"

### Shifting from Adjudication to Seeking Good Outcomes

Tom Reed, regional attorney manager of the State Public Defender's Milwaukee Trial Office and an adjunct law professor at Marquette, said in an email, "There is a significant change in what we expect from our criminal justice system and how we imagine it operating. Although sweeping historical statements run the risk of error, it would be fair to say that, in the last several generations of American criminal justice, the focus has been on the adjudication of cases involving criminal charges and the meting out of punishment when guilt has been established. Commentators have noted a steady retreat from a commitment to rehabilitation and a greater focus on punishment of increasing severity as the proper way to hold accountable people who have been proven to have violated the criminal law. . . .

"The system created by these trends is under intense scrutiny because of its cost in human and economic terms, its inefficient and disorganized ability to protect public safety, its unfairness and arbitrary operation, and its perpetuation of racial disparity and overinclusion of those of lower socioeconomic status. . . .

"The important shift is away from a sole or exclusive focus on adjudicative measures to a commitment to improving system outcomes," Reed said. "People who enter the criminal justice system should, in most cases, be made better by the experience—at least ideally—whether they are victims or accused of crimes. To improve community well-being, the criminal justice system must work to prevent crime and remediate known offenders to reduce the likelihood of reoffending."

To be clear, the overall picture of the work of judges and the court system remains largely consistent with the past, and judges who advocate problem-solving approaches aren't trying to overturn the system. The law is the law, and there are big limitations on what judges can do. But a lot of room remains for discretion, particularly when it is exercised in conjunction with others in the system, from the district attorney's office to social services agencies.

As Maxine White, L'85, then chief judge of the Milwaukee County Circuit Court and now a state appeals court judge, said in a November 2015 "On the Issues with Mike Gousha" program at Marquette Law School, judges need to stay in their lanes.

Asked by an audience member what judges can do to reduce violent crime, White said, “A lot of people want to push the judges into other lanes. . . . As long as we are your judges making decisions about the outcomes of disputes, we have to be careful about crossing the lines and waving and marching with you about everything.” She emphasized things judges were not—including that “we are not the social service agencies.”

But, she said, there have been changes to what judges do—within limits. “We are marrying our lanes with other lanes, where it is appropriate,” White said. She referred to the involvement at that time by judges, including herself, in efforts for Milwaukee County to win a large grant from the John D. and Catherine T. MacArthur Foundation to improve ways of helping people with mental illnesses who were coming into the justice system often. Milwaukee won the grant, and there is general agreement that mental health issues in the county are being better handled currently. White also has been a long-time advocate of drug treatment courts and other problem-solving courts.

Triggiano said that the problem-solving approach can be seen not only in treatment courts and criminal proceedings but throughout the court system. “Problem solving right now is really an important skill for judges to have,” Triggiano said.

Criticism of treatment courts and, more generally, the changing role of judges was substantial when the courts were initiated 10 to 15 years ago around Wisconsin. A popular phrase among some judges was that they were judges, not social workers, and that the shifting priority amounted to taking a softer approach to crime. Some opinions from politicians and talk show hosts put such views in inflated terms.

### Limited Treatment Options amid Giant Crime Problems

The criticism has been less vocal in recent years, but it has not disappeared.

Judge David Borowski, L’91, of the Milwaukee County Circuit Court, is among those who are cautious about the changing approach to the duties of a judge. Treatment courts have roles for certain types of cases, he said, and the recidivism rates among those who have gone through such programs have been better than among those not given such help. Borowski praised current and past judges who have been involved and emphasized that he did not want to be labeled an opponent of treatment courts.

But, Borowski said, “I get concerned that at times we are moving too far in that direction . . . , and the courts are being asked to do things we weren’t designed to do originally. Courts are there to resolve disputes. I tend to agree with [U.S. Supreme Court] Chief Justice [John] Roberts’s philosophy: Judges are there to call balls and strikes. We aren’t there to solve every problem.”



Judge Jane Carroll



Judge Maxine White



Judge David Borowski

Borowski questioned how much difference treatment courts are making. “Due to the natural limitations of the court system and the limitations of resources, they affect the minority of cases, the cases on the margins,” he said.

That leads to a second level of questioning the impact of treatment courts: How much impact are they having on the overall picture of the places where they are operating? The fairest answer seems to be that they have successes, especially on an individual level, but problems remain huge.

In the big picture, Borowski said, the trends in Milwaukee are worrisome: violence is at historic levels, with the number of murders in 2020, the epidemic of deaths from overdoses of opioids and other drugs, and the large number of nonfatal shootings and other major crimes. Borowski serves currently in a court dealing with major crimes, and the number of cases he sees related to reckless driving, often with fatal consequences, is shocking.

The number of people in treatment courts or involved in efforts such as diversion programs doesn’t match the dimension of problems on the streets, Borowski said.

“I don’t really see the courts as ‘a resource’ in most cases,” Borowski said. “Resources need to be developed at the community level.” Social workers, people working for the state bureau of child welfare, people who work in treatment programs—they are resources, he said. “There is only so much that courts can do. By the time people end up in court, they often have moved a long way down the path of the criminal justice system.”

Reggie Moore, who stepped down in April as director of the City of Milwaukee Health Department’s Office of Violence Prevention to take a position at the Medical College of Wisconsin, is an advocate of treatment courts and other efforts to shift from punishment-oriented approaches to problem-solving approaches. He said the “classic western system” of dealing with people convicted of crimes is “an industry of punishment” focused on incarceration and confinement. It is not a system of compassion, he said. “If we are not intentional around reimagining an entire system that looks at issues from the standpoint of restoration and repairing harm, then people will be returned to their communities more frayed, more likely to engage in harm.”

But, Moore said, the changing approach to judging may not be making much of a dent on the streets or on how people in general look at judges and courts. In the court of public opinion, he said, attitudes toward the legal system are not good in some communities—and you don’t hear often from people who say the court system helped them.

## Trauma Doesn’t Explain Everything, but It Often Explains a Lot

A central word in understanding the changes in the work of judges is *trauma*. It’s a term that advocates say is important but needs to be used carefully. Not everything bad that happens to people creates a lasting trauma, and the impact of trauma should not be used as an excuse for criminal behavior or other wrongdoing, advocates say.

But understanding what negative events or forces have shaped a person’s life can be a key to unlocking change. In short, the thinking is that a lot of the people who come into the court system have serious problems that often are not directly part of the reason they got into trouble. But if those problems were addressed successfully, the people would be much less likely to come back into court.

Tim Grove, senior leader of trauma-informed care initiatives for SaintA, a social services agency serving Milwaukee, has been closely involved in helping judges and other staff members in court systems across Wisconsin understand trauma and developing responses to it.

“It’s important to define trauma,” he said. “Not all acute events are trauma.” The vast majority of people who have traumatic events are not struggling with the impact six months later. “We’re worried more about prolonged exposure, intensive events, things that overwhelm the immune system,” Grove said. For people in such circumstances, a trauma-sensitive approach to judging them can be particularly beneficial.

Milwaukee County Circuit Court Judge Cynthia Davis, L’06, said that she would define trauma as “any experience that has had a significant mental, emotional, or physical impact on a person.”

One widely used gauge of trauma is a simple questionnaire that asks people about “adverse childhood experiences” (or ACES) they may have had. People with high “ACES scores” are more likely than others to have troubled lives as adults and to end up in front of judges such as Davis. Trauma, she said, doesn’t excuse behavior, but it can help explain it, and knowing about it can help the court respond in an appropriate way to address rehabilitative needs of a defendant. She tries to impress on people before her that they’re not responsible for the trauma that impacted them, but they are responsible for stopping the cycle of trauma.

Benjamin S. Wagner, an attorney with Habush Habush & Rottier in Milwaukee, is president of the community board of the Neuroscience Research Center at the Medical College of Wisconsin and a strong advocate of expanding trauma awareness in legal proceedings. Traumas such as homelessness, food insecurity, or being abused as a child are important to how a person acts in the long run—and, he said, the impact of the COVID-19 pandemic “has poured gasoline on all of these traumas.”

Wagner said that treating people with sensitivity can be helpful in bringing constructive outcomes for defendants—or, as he put it, “It’s easier to accept responsibility if you’ve been treated well.” ►►

## MOVING FROM CONVICTING TO CONNECTING

**Two tough prosecutors become two judges offering positive support to those trying to find ways out of trouble.**

Laura Crivello, L'93, was a prosecutor for 24 years, focusing her work mostly on members of drug organizations and gangs—"the worst of the worst," as she put it. Her goals were all about incarceration. There would be a trial and then a sentence, often a long one.

Cynthia Davis, L'06, was a prosecutor for almost six years. She handled cases that involved neglect and physical abuse of children and sexual assaults and trafficking of children and adults. It, too, was a heavy scene.

Now, the two of them are leaders in a different direction, not focused so much on what to do about bad actors but, rather, on how to bring out "the better angels" in people who have ended up in the legal system because of troubles in their lives. Crivello and Davis are now Milwaukee County circuit judges who preside regularly in treatment courts where you hear a lot of encouragement and support and not much prosecutorial sternness, where the goal is to help people get to better places in their lives and not to places behind bars, and where Crivello and Davis's roles are to lead treatment teams and not be the one making all the decisions.

Crivello, appointed as a judge by then-governor Scott Walker in 2018, is the presiding judge in children's court, a role that includes handling a calendar in what is called a family drug treatment court. Every day, she said, she goes to work thinking, "What can I do to help this kid and his life; what can I do to make [these kids] see the role they can play in the community?" She added, "It's all about 'How do we reach out and connect with kids to make a difference?'" Frequently, it's also about how to get the adults in a child's life to come through for the child in the healthy and stable ways that have previously eluded those adults.

Davis, appointed by Walker in 2016, is assigned to a drug treatment court and also presides in a treatment program for veterans. In both situations, the emphasis is on collaboration with professionals involved in treating people's addictions and other problems, working together with individuals often for more than a year. "It's definitely a different role for a judge because you try to reach consensus," Davis said. "You're trying to involve everyone sitting around the table. It's collaboration versus the traditional court system" with its adversarial structures.

Both Crivello and Davis are advocates for the treatment approach where it is appropriate.

Davis has been deeply involved for years in yoga as a source of relaxation and wellness. (A profile story of her in the Summer 2014 issue of *Marquette Lawyer* focused on her work as a yoga teacher and practitioner.) Her involvement in treatment

courts "really provides a unique intersection of the law and my interest in . . . wellness and healing," she said. "It's been a neat way for me to combine all of those interests."

The treatment approach, with its emphasis on helping people deal with traumatic factors in their lives, is particularly valuable in children's court, Crivello said. She said that the trauma a child sustains from birth to five years of age impacts the development of the brain; that, in turn, affects behavior later in life. Almost all of the juvenile offenders she sees have histories of being involved at early ages in "child in need of protection or services" (CHIPS) proceedings. She said that 80 to 85 percent of the youths in court for criminal matters have mental health problems.

Are the juvenile courts there to provide help? "Yes, without a doubt," Crivello said. "Children's court provides amazing resources. . . . Our goal is to wrap around [the kids] and to help meet their needs." But even when youths are in secure detention, Crivello said that she and others have been involved in relationship building through such things as book clubs and bake-offs.

Crivello said, "People want to feel the judge made eye contact with them, listened to them, made them feel like their voice was heard. They want to feel they had some modicum of control of the hearing. . . . We want them to know that they matter. The more that they feel that, the less they are going to want to do any harm."

Davis said if a central goal of the justice system is rehabilitation, treatment courts are a good way to accomplish that. Understanding trauma in people's lives, she said, doesn't mean you excuse bad behavior, but it helps explain that behavior, and it helps a judge—and the treatment team working with a judge—address a person's rehabilitative needs.

"I like to approach addressing trauma from a self-empowerment standpoint," she said. In short, the goal is to give people the tools to lead stable and productive lives.

It's not easy work. Davis said that determining people's honesty and sincerity in treatment is "definitely an art, not a science," although in this context it's generally assisted by frequent drug tests. And bringing people to productive consensus on how to proceed when dealing with someone involved in treatment can be challenging.

For Crivello, the circumstances are not as violent or severe as those she dealt with as a prosecutor. But she said that judges, including her, feel the weight of trying to reunite families or help troubled kids. "There are some days when I sit up there and I'm sweating through the robe" because the decisions are so hard and affect the rest of a kid's life, she said. ■



Judge Laura Crivello

Judge Cynthia Davis

Terri Strodthoff, founder and CEO of the Alma Center in Milwaukee, which works on trauma-oriented treatment largely with men who were involved in domestic abuse, also has been closely involved with programs for defendants in legal proceedings. “We try to move from punitive accountability to compassionate accountability,” she said. Counselors tell people, “You are 100 percent responsible—all of us are 100 percent responsible—for the choices you are making right now.”

But in moving forward from the past, Strodthoff said, “We don’t have to shame you, punish you, undermine your humanity, but we can try to restore you to your original self. It’s not like a free pass. There are consequences of behavior, but we believe passionately in the capacity to change.” By contrast, if society expects to lock people up, she said, that expectation will be fulfilled by finding reasons to lock people up. And small things can matter, Strodthoff observed: “Just the language judges use can have a lot of impact.”

### Treatment Court Glimpses: Positivity and Oversight

What goes on in a treatment court is definitely different from what many people envision when they think of court proceedings, with a judge always on a bench and two parties at tables before the judge. Treatment programs are team efforts, with the judge as leader.

The recipe for making the treatment court process work includes strong doses of encouragement and support, but also a firm flavoring of enforcement and standards for what is required of a defendant or respondent. (For simplicity, we’ll use just the word *defendant*.) And many cooks are in this kitchen—the judge, court staff, prosecutors, defense attorneys, case managers, social workers, therapists, psychologists, law enforcement officers, probation officers, and sometimes other people. The goal is for all of these people to work together in ways that move defendants toward long-term stability in their lives.

There are two steps to each session of Milwaukee County treatment courts. The first is a “staffing” meeting—an opportunity for team members to pool information on the status of each defendant and discuss what should happen next. Then comes a hearing with the defendant.

In normal times, both the staffing meeting and the subsequent court hearing are held in person, sometimes with everyone, including the judge, at the table. The talk is more informal and more participatory than in a regular court proceeding. Since the COVID-19 pandemic began, these proceedings have been virtual. So everyone appears on a computer screen. But the processes of a staffing session and then a court hearing, both with a team-oriented tone, remain the same.

As a side matter, what will happen when life, including within the legal system, returns to normal remains to be seen. Virtual proceedings have advantages, including ease of access, increased participation, and, for some participants, more openness to talk while in the comforts of home or at work or wherever the person might be. But they have disadvantages, too, such as missed signals from a person’s body language or other nonverbal communication and, in general, more trouble communicating at times, as well as occasional technical difficulties. It appears likely that what emerges will be a mix, with both in-person and distance options put to use.

A few vignettes from sessions of the Milwaukee County drug court, veterans court, and family drug court show how different the proceedings of such treatment courts are in tone and content from the traditional approach. We agreed to respect the confidentiality of participants, so names and some details are omitted.

### DRUG COURT, with Judge Cynthia Davis Presiding

**CASE 1:** At the staffing session, there was agreement that the man was doing well overall, with a few glitches. Davis said, “I’ll emphasize to him that he’s doing a great job, but he has to do his recovery hours on time.” He was far along in the program, nearing “graduation,” when he would be released from a variety of restrictions and required activities.

At the court session, the man reflected on his progress. “I’m a person who acts in the moment,” he said, describing his past. “It’s no way to live your life. I’m getting too old for that.” He said nine months in jail had given him time to think about who he wanted to be, and the treatment programs he was part of helped him. He’s sober now, and he has seen the benefits of that, especially the fact that his family is back in his life. He has also been working every day. He said he promised his grandmother on her deathbed that he would never be an addict again. Davis asked what his goal was now. “To maintain my sobriety—that’s my main goal in life,” the man answered. Several participants in the session commended him on how he was doing. And Davis announced that he earned five more points on the drug court’s scoring system. That made him “fishbowl eligible,” meaning he could draw an incentive prize out of a fishbowl. The prizes, worth up to \$50, are funded by program fees in this particular court.

**CASE 2:** This situation is more complicated. During the pre-hearing staffing session, people working with this woman said that her compliance had had its ups and downs. She hadn’t taken part in some classes and medical appointments. Her story about what was going on didn’t add up, one person said. “She’s not in a place to make smart choices.” Davis said that it appeared that the woman was not being completely honest with the team. One participant suggested that the woman had given up on treatment. She might have a serious



medical problem, a therapist said. And she might be having thoughts of suicide. After a half hour of discussion, there was a silence, and Davis said, "Well." She paused before adding, "She's not working the program like we want." But she hadn't dropped out either. "It's a difficult place to be in," Davis said. One of her counselors added, "I really want to advocate for her, but I'm more concerned for her own safety and life at the moment." Davis decided to go ahead with the woman's hearing to find out what she had to say and then to wait a week before deciding how to proceed, while more was being learned about her medical situation, and this was then agreed to in the court hearing.

**CASE 3:** This man was doing well in treatment until he had a lapse over the weekend before his hearing. He told a counselor that he had seen an old friend who had some cocaine, and they used it. He said it was an impulse, and he was sorry, and that he was planning to change treatment programs. The team agreed that maybe a change in programs would help him. At the court session, the man said he needed help from a psychiatrist. He said he thought he could get back on track. Davis told him that he needed to do better—and to come back in a week.

**CASE 4:** After several consecutive cases involving people who were not doing well in their programs, Davis was pleased to hear a good report on this man. "Knock on wood, guys, knock on wood," Davis said. "I need this one." In court, the man told Davis and the team that he was taking care of his daughter and staying sober. "I like my life now," he said. Davis said, "Just all praise for you." But he needed to take care of restitution that he still owed, she pointed out. See you in two weeks.

**CASE 5:** This man "continues to do stellar," a case worker told Davis. In court, Davis told him, "Keep up the great work. We're rooting for you." The man said, "Thank you, guys, for the opportunity. I really do appreciate it."

**CASE 6:** The report on this woman was that she was doing well in treatment. When the woman appeared on the computer screen, Davis welcomed her warmly and complimented her on how she looked—she had color in her cheeks and looked healthier. "I feel better, too," the woman said. Davis said, "We are very, very impressed, very proud of you." The woman told Davis she was trying to spend time only around "positive people." Davis told her she had earned another point on the scoring system.

### MILWAUKEE COUNTY FAMILY DRUG TREATMENT COURT, with Judge Laura Crivello Presiding

Crivello said that people who appear before her sometimes tell her the worst day in their life was the day their children were taken away. The second-worst day was going into court. Her goal is to turn around those perceptions and make the process in this court helpful. In general, the people coming into this court are women who have been given conditions that they need to meet to get their children back. Regular drug testing, participation in treatment programs, and commitment to stable living are keys.

**CASE 1:** Because of her drug use and behavior, the woman on the computer screen had had her children put in the care of another family member. The woman was working on stabilizing her life but had been having disagreements with the other family member. “Try to say four to seven positive things before you slip in a negative,” Crivello advised her. “People respond better to positive things.” Crivello and more than a half dozen people who were part of the conference were practicing what they preached—praise, encouragement, and positive reactions were abundant.

**CASE 2:** “I’m proud of you that you’re in residential treatment,” Crivello told the woman, who had previously resisted that step. Crivello said, “The fact that you’re making a commitment to yourself and finding your own value is making a huge difference—so, way to go.”

**CASE 3:** The woman told Crivello, “I’m trying really hard; I’m not losing focus.” Crivello asked what had made things better. “I can see the future now. I’m more positive.” The woman said she is intending to go back to school. Crivello said, “It’s nice that you see your future. What a difference.” She added, “I think everything is pretty much stacked in your favor if things keep going well for you.”

**CASE 4:** This woman was moving forward, except for when she was going backward. “I am improving,” she told Crivello, but admitted to missing some scheduled visits with her baby and some drug tests. “When I get so overwhelmed, I give up,” she said.

Crivello encouraged her, telling her that she sounded “much more grounded and sure of” herself when she wasn’t with her boyfriend and giving him the opportunity to yell at her. “Think about how important it is to the kids to see you move forward,” Crivello said.

The woman responded: “You guys are worried about me because I’m an addict, but I would never hurt my child.” She added, “Now I just have to be more responsible, and I’ll be fine. It’s harder than I thought it would be, but I have to keep pushing.”

The woman’s thoughts then took a startling jump. If they take her child away from her, she told them, she would just have another child. Crivello responded, “Let’s not talk about having another baby now.”

The woman answered, “I know I screwed up in my life, and I have to pay a price for that.” She added, “I’m really improving myself . . . I can do it.” She told Crivello she will not use drugs again. “That’s how I feel today, at least.”

**CASE 5:** The woman cried hard through much of the court session. She had violated some of the rules, and monitored visits with her baby had been halted. “How are you holding up?” Crivello asked. The woman answered, “How am I supposed to be holding up when your baby is taken away?”

One of her therapists responded that the woman had not followed the rules and then denied what she did. A second team member told her, “Honesty is not happening right now.”

Still sobbing, the woman responded, “I’m having more problems being sober than I was when I was high.” She said she just wanted her son back. “I’m just shattered, you guys. What do you want me to do?”

Crivello answered that they wanted her to comply with the plan that had been set up. But, even amid this, Crivello offered the woman encouragement. “Let’s look at the positives we have today,” the judge said. “You’re sober; you’re stronger than at some times in the past.”

The woman agreed she had been supported by the treatment team. “All of you guys have been here for me. . . . I’m just hurt right now,” she said. Members of the team offered her advice on how to get through each day. A follow-up was scheduled. Crivello ended by saying, “Keep working on this. You take care.”

### MILWAUKEE COUNTY VETERANS TREATMENT COURT, with Judge Cynthia Davis Presiding

This program deals with veterans facing a range of criminal issues, generally not the most serious ones. The mission statement for the court says it aims “to successfully habilitate Veterans in recognition of their service to our country and the challenges it may present to them and their families by diverting them from the traditional criminal justice system by using evidence based practices and providing them with the tools and resources they will need to lead a productive and law-abiding life.”

Davis said the percentage of people in veterans court who complete the program successfully and are released from supervision is around 80 percent. In drug court, it is around 50 percent, she said.

**CASE 1:** During the staffing discussion, a counselor said the man was adjusting to sobriety well and seemed excited about it. He wants to have a sober birthday party, the counselor said, but he doesn’t know what that would involve. When the man came before Davis later, he was positive and grateful. “I’m so ▶▶

## Across Wisconsin, an Openness to Trying a Different Approach to Addressing Some Crimes

James Morrison is a circuit judge in Marinette County, 55 miles north of Green Bay and bordered by Lake Michigan and the upper peninsula of Michigan. It's a pretty conservative area politically, "a pretty stern place," as Morrison put it. And this chief judge of the state's Eighth Judicial District is a pretty conservative, even stern, guy.

"I was appointed by Scott Walker," Morrison said. "I'm not a loose liberal here, by any means."

There's a "but" coming: "But if you're a conservative . . . , you want government to do what it can do effectively." In many cases, Morrison realized a few years ago, sending people to prison didn't score well by that standard. A huge percentage of people were committing more crimes after they were released. Morrison concluded that "we couldn't do much worse" when it came to the constructive impact of prison time.

So about eight years ago, Morrison became a leader in efforts to launch a drug treatment court in Marinette County. Those efforts met with substantial opposition. Morrison said he heard from others in the criminal justice system that "if we wanted to be social workers, we'd be social workers."

Yet the effort, overall, has been a success, Morrison said, so much so that he has gone around Wisconsin encouraging creation of treatment courts. He is a prominent figure among Wisconsin judges. He is a former "chief of the chiefs," as it is sometimes called, referring to the statewide organization of chief judges of the nine administrative districts of the state's trial courts.

Treatment courts, as well as diversion programs that give defendants routes to treatment and to avoid conviction, have grown significantly in Wisconsin since the state legislature first opened the door to funding for "treatment alternatives and diversion," also known as TAD programs, in 2005.

Katy Burke, who recently stepped down as statewide coordinator for such programs through the Office of the Director of State Courts, said that Wisconsin currently has 101 problem-solving courts, operating in more than two-thirds of the counties. The number of such courts has been steadily increasing. In 2016, she said, the total was 84. This number includes drug courts, drunken-driving courts, mental health courts, and veterans treatment courts. Each program has its distinctive elements, she said. Most of the courts deal with people after they have been convicted of a crime, but some involve people prior to conviction.

J. C. Moore, a Milwaukee County court commissioner, is finishing a five-year term as president of the Wisconsin Association of Treatment Court Professionals. He said that diversion programs and treatment court programs aim to get lower-risk and lower-urgency cases out of the court system. They are "focused on having the person who is involved in the criminal justice system go through treatment and have the matter reviewed by a judicial officer, with a view toward something good happening."

"Thirty years ago, people figured out that what we were doing, quite frankly, didn't make sense," he said. That led to the launch of court programs aimed at treating people and not just punishing them. The first courts were in Florida.

Moore said that, in broad terms, treatment courts have two main advantages: they're smart, and they're humane. He said that studies of Wisconsin programs generally show recidivism rates among those who go through such courts to be 10 to 20 percentage points lower than among those who go through conventional sentencing.

*continued on page 18*



Judge James Morrison

He pointed to a report from the Bureau of Justice Information and Analysis within the Wisconsin Department of Justice. The report found that, from 2014 to 2018, people who completed diversion programs had lower recidivism rates than people who completed treatment court programs, and both groups had lower rates than those who did not succeed in such programs.

For example, within three years of discharge, treatment court graduates had a 43.2 percent recidivism rate, compared to 61.4 percent for those who were terminated from treatment programs. For diversion programs, the recidivism figures within three years of discharge were 29.4 percent for those who completed a program and 62.4 percent for those who were terminated from a program.

The report said that, from 2014 to 2018, TAD programs statewide had 6,125 admissions. The report calculated that, for every dollar spent on treatment courts, the state realized a \$4.17 benefit in terms of reduced public spending on the criminal justice system. For diversion programs, the figure was \$8.68 of benefit for every dollar spent. Treatment court programs cost \$7,530 per discharge, the report said, while diversion programs cost \$2,347 per discharge.

Burke, the state coordinator, said that she expects continued growth in treatment courts statewide. She noted that there is a lot of interest in expanding family treatment courts because people around the state are seeing more families affected by addiction and mental health problems. When Burke took the job in 2016, the state had four family treatment courts; now that number has doubled.

Moore said that the Wisconsin organization he heads was founded in 2002 and focuses on setting operating standards for treatment and diversion programs and providing training for people involved in such efforts. The organization has a membership of 600 to 700, Moore said.

Attorney Robert "Rock" Pledl has practiced in courts across Wisconsin for about 40 years, often representing people with disabilities or mental issues or "children in need of protection or services" (CHIPS), as the law puts it.

Pledl said that the same kinds of cases show up in counties with small populations as in counties such as Milwaukee. But differences exist. Obviously, frequency is one of them—a court deals differently with a CHIPS case if it sees many of them every day rather than only several in a month. The breadth of social services that are available is also different.

When it comes to judicial responses to people who need help, "you have to divide the question into the places where an intentional decision has been made to have a judge do a little different job versus places where a human services system isn't robust enough and judges are being forced to do a job," Pledl said. Judges in more rural counties sometimes have to come up with "a ridiculous work-around" to find ways to help people.

There are also differences in how judges do their jobs. On the one hand, in large court systems, judges develop specialties and are well versed in the issues that come before them, including what social service agencies can or should provide. In rural counties, a judge may not have that same expertise. On the other hand, individual cases may get much more attention in a court in a small county than in an urban court.

"The assembly line moves faster if you have hundreds of the same cases," Pledl said. "Occasionally, you run into a specialist judge who, because of their specialty, doesn't slow down to get everybody's point of view the way a judge in a small county who rarely sees some kinds of cases would do."

Is there a trend in the way judges' roles are changing? "Yes, absolutely," Pledl said, and it goes beyond treatment courts to courts that deal with civil issues such as the well-being of children, eviction, family matters, and mental treatment. "It would be a shame if judges over time hadn't become more sensitive to the types of issues those litigants are facing, besides what they're doing there in that court."

How has the Marinette County treatment court turned out? "Quite well," Morrison said. People have learned a lot about how to run such a program, and they've taken on higher-risk, higher-need defendants than they were willing to deal with initially. When it comes to individuals, "we've had some tremendous successes, and we've had some very frustrating failures," Morrison said.

He mentioned a young woman, "an utter screwup," who went through treatment court and is now a successful businesswoman. Morrison said he knows babies who were born drug free in cases where that would not have happened without the treatment court. And he said there are statistics to support saying that Marinette County is safer now, including a comparison with data for its Michigan neighbor, Menominee County, which does not have a treatment court and has experienced crime increases.

Morrison said that he has struggled with how to balance the roles of being a stern judge for people who have committed crimes and being a supportive presider for people who need treatment. "Am I a judge, or am I social worker?" he has asked himself. "Do these people become my friends? Of course not." There's a tension in the roles he plays—"it's a tightrope, and it's tough work."

In the big picture, Morrison said, "I think judges are more and more coming to realize that part of justice is to be effective, to do what works. It is unjust to do what clearly does not work. And that's what we've done with addiction for a long time. So our role is changing. Judges are expected to be more conscious of the impact of what we are doing."

"The state of treatment courts is strong and evolving, as it ought to be," he said. "I hope we will continue figuring out processes that actually work. Warehousing people is not a very satisfactory thing to do." He added, "There's always going to be a place for prisons; there's no choice." But, for some defendants, there is also a place for options that are a lot more helpful. ■

glad to be sober,” he told Davis. “I’m kind of glad I got in trouble. . . . This is saving my life.”

Davis responded, “I love your enthusiasm and your positive attitude.” The man said, “This is the happiest I’ve been in years . . . because I’m not using alcohol and I’m not smoking any drugs, thank God.” He had reconnected with family members. Davis praised him further: “If I were grading you, you’d get an A-plus-plus.” The man said, “I’m just doing something that I should have been doing a long time ago, and that’s being responsible.”

**CASE 2:** The man is making good progress in treatment but will stay in the veterans court program until he makes more progress. Davis went over the different required treatments for him, including substance abuse therapies and post-traumatic stress disorder (PTSD) therapy. But he had a job, had contact with his family, and was in a positive frame of mind. Davis told him that he did not need to come back before her for two months. “You have a good couple months,” she said. He answered, “Roger that, ma’am.”

**CASE 3:** The tone of this session was not so positive. The man was making progress on some fronts. But his living situation and his personal relationships were undergoing changes, and he was unhappy about how he was being treated by therapists and counselors.

Davis laid it out to him, including that he needed to complete a therapy program called “Thinking for a Change.” The man responded, “I do not see it that way, but if that’s what you say, that’s what it is. I find no value in it.” He said the sessions “bore me to tears.”

Davis made clear what he would gain by taking part—and what he could lose. “You face the potential of revocation,” she said. “At this point, it is not a negotiation.”

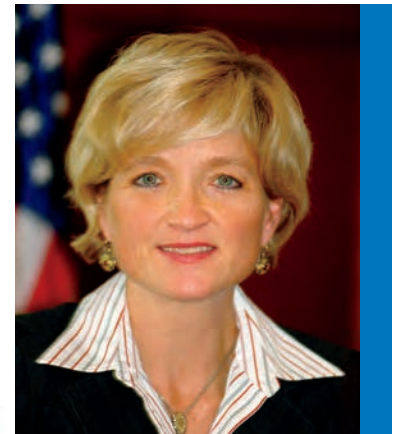
**CASE 4:** The treatment team, including Davis, had urged the man to end a major personal relationship that they concluded was hindering his progress. Davis told him, “I know I’m requiring a significant life change from you. . . . I commend you for working on it.” He answered, “Yes, ma’am.” Davis said he needed more structure in his life. She asked him if he could see the value of that. “Yes, ma’am,” he answered again.

The man said he realized his prior life “was burned out” and he needed to change. He added, “If I’d done things right 30 years ago, I’d be working for you and not appearing before you.”

### A Valuable Tool, Supported by Too Few Resources

Milwaukee County Circuit Court Judge Ellen R. Brostrom presided over the county’s drug treatment court and veterans court from 2013 to 2015. “These programs have added a valuable tool in the fight against drug addiction and its attendant antisocial consequences,” she wrote in a 2019 article for the *Wisconsin Lawyer* magazine, a publication of the State Bar of Wisconsin.

Brostrom said the course of a conventional criminal proceeding and of one that ends



Judge Ellen R. Brostrom



up in a treatment court is generally the same until the point where there is an adjudication of guilt. In a conventional case, that leads to a sentence of probation or incarceration. The alternative route means that the next step is “stay of entry of judgment of conviction and [instead] diversion into the treatment court program.”

Referrals to treatment courts are generally limited to nonviolent, addicted offenders at risk of continuing to offend, Brostrom wrote. The treatment court process can last as long as 18 months, and, if the person is successful, the original charges are dismissed. And if not, the process returns to conventional sentencing.

Treatment often begins with residential placements and, if things go well, proceeds step by step to less restrictive plans, including day programs, work or education placements, and oftentimes mental health treatment. Frequent drugs tests are a big part of the program, and missing or failing them can be a major setback. Participants generally appear before the judge and treatment team weekly at first and then less often if they are progressing.

“The greatest impediment to the overall success of the program is the limitation of resources: treatment, housing, and adequate mental health services exist at levels far below what is needed in Milwaukee County,” Brostrom wrote. “It is an incredible thing to see an individual go from dysfunctional and desperate to functional and recovering,” she said in the 2019 article. “It is a privilege to walk with participants on the journey.” When successful, treatment reduces incarceration and likely future criminal justice system involvement and leads to stable lives that help families and communities.

Daniel Blinka, a Marquette Law School professor with extensive experience involving criminal courts and proceedings, said that in the 1960s it was understood that juvenile courts needed to have a “therapeutic” aspect because a goal was to get troubled youths on paths to being productive adults. But in criminal courts, the focus was on adjudicating a case. If there was going to be any treatment, it wouldn’t be discussed until sentencing, and it would generally be left to the prison system, Blinka recalled. People pretended that prison could help prepare incarcerated people to do well when they returned to the community, Blinka said, even though everyone knew that wasn’t really happening.

People in the legal system and in the political world have often been of several minds about judges and courts offering the kind of programs associated with treatment courts. Helping people is popular, but so is being tough on crime. And many fear the impact of one “bad” case in which someone in a treatment or diversion program commits a major crime while not incarcerated. One result is that “worthy” people are picked for treatment programs while the bulk of people in the system get conventional sentences, Blinka said.

At times the approach in different places is chaotic, Blinka said, with the decisions on defendants depending on who the judge is, the circumstances of their cases, and other factors. External factors also shape what is offered to people. One general incentive for putting people into programs that avoid incarceration: the cost. A year in a Wisconsin prison involves large public expense. In 2019–2020, it was \$36,643 per inmate in a minimum-security facility and \$44,716 in maximum security, according to the Wisconsin Department of Corrections. ▶▶



## Building a Better Framework

### Chief Judge Mary Triggiano wants judges to make good use of “breathtaking tools” for helping troubled people.

Mary Triggiano became chief judge of the Milwaukee County Circuit Court in February 2020—which is to say that her time as administrative leader of 47 branches or courts has been dominated by the COVID-19 pandemic that started a month later. How to keep the court system operating, much of it in virtual mode and some of it cautiously in person, has dominated her work in the last year-plus.

Maybe that is why she compares discovering the importance of understanding how trauma affects the people who come before a judge to getting vaccinated against the coronavirus after months of quarantine. At last, something, in some sense, positive!

Trauma and responding constructively to those whose lives are shaped by it form Triggiano’s signature issue as a judge. Some might dismiss her advocacy by labeling her “chief social worker” as much as chief judge. But Triggiano is convinced that she is onto something that makes a difference in how effective the justice system can be, and she is doing all she can to promote it.

What led Triggiano, a longtime judge, to focus on trauma-related issues?

“The word *outcome* comes to mind,” she said. When she was a judge in children’s court, “we consistently had bad outcomes.” (She initially used an earthier adjective.) She began learning about trauma-informed ways of helping people deal with the problems in their lives beyond the specific incidents that brought them to court. The approach, using a team of professionals as allies, became a big part of her work. “Having those tools was so breathtaking,” she said.

Triggiano, a Racine native who was managing attorney for Legal Action of Wisconsin before being appointed a judge by then-governor James Doyle in 2004, speaks in a matter-of-fact fashion and is decidedly unflashy in her personality. But there is no mistaking her commitment to promoting change in how judges do their work in the pursuit of better results. “I’d like to bring some legitimacy back to our justice system,” she said.

“Trauma is not a natural fit for the justice system and how we deal with things,” Triggiano said. “Five or 10 years ago, we wouldn’t be having these conversations. . . . And we weren’t grappling then with how to respond to give people a better experience in court. In problem-solving courts, you can really roll up your sleeves. It’s easier than in conventional courts.”

What is the role of judges in helping people deal with the trauma behind many of their problems? Triggiano answered, “Judges have the ability to bring people together to have these conversations about trauma and trauma-informed care. . . . We need to be part of changing the trajectory and not just pronouncing judgments and following the statutes.”

Triggiano continued, “We’ve made some profound changes in the way we judge.” It shows up in “what we say, how we say it, and how we interact with people.”

No one has thrown the law out the door, she said. People are still being convicted, sentenced, and held accountable. “But we have another framework now as well.”

Trauma awareness has become a regular part of training for court personnel, including judges.

Laura Crivello, the presiding judge in Milwaukee County children’s court, said that all judges go through trauma training. She said that Triggiano starts every meeting talking about trauma sensitivity and emphasizing that the people who come before

*continued on page 22*

Chief Judge Mary Triggiano



the judges need to be treated with kindness and dignity. “That leadership has funneled down dramatically through the court system,” Crivello said.

How is the system doing in helping people? “We’re not there yet,” Triggiano answered. “We’re still learning.” She added, “I think we have been leading the charge as judges for years and years and years” with the goal of creating a court system “that looks at data and evidence and outcomes to try to do better in terms of families that come into our system.”

Triggiano and some other judges have taken things beyond the court system, becoming involved with increasing the capacity and effectiveness of social service systems and helping with initiatives to improve what is available to troubled people. “That’s a significant difference from 20 years ago,” Triggiano said.

That broadened field of vision means that she spends substantial portions of her time on matters that were once not viewed as part of a chief judge’s job, such as helping obtain grants from large foundations. Such grants have boosted some of Milwaukee County’s treatment court programs. But they require judicial buy-in and collaboration with community organizations.

Two recent sessions involving Triggiano illustrate that kind of collaboration. In one, Triggiano met virtually with members of the Milwaukee Community Justice Council, which was created a little more than a decade ago with a goal of making the legal system fairer and more effective, and with other engaged leaders. Among those participating in this meeting were Milwaukee County District Attorney John Chisholm; Carmen Pitre, who heads the Sojourner Family Peace Center, a large organization focused on helping victims of domestic violence and stemming such violence; and Tom Reed, who leads the state public defender’s office in Milwaukee. The goal of the meeting was to develop a proposal for a grant from a national foundation looking for “bold ideas” on improving racial equity. Triggiano’s other consultants on the proposal included Reggie Moore, then director of the City of Milwaukee Health Department’s Office of Violence Prevention and now in a position with the Medical College of Wisconsin also involving anti-violence efforts.

In the other session, convened by Triggiano, 15 people on a Zoom call discussed how the legal system could better handle eviction-related problems. The participants ranged from public defenders to landlords to leaders of mediation programs to representatives of philanthropists to other judges. Triggiano told the group that she wanted to find a way to build more of “a prevention model” to help people stay on in the places where they live, without penalizing landlords—and without bringing so many cases into court.

Participants described what they were doing in pursuit of those goals and what they would like to see happen. After an hour, Triggiano said, “All beautiful thoughts.” But how could they be turned into action? There was agreement to continue the conversation in further meetings.

Triggiano said that she believes the level of collaboration in Milwaukee on issues such as these may be unparalleled in the country. On the other hand, Triggiano acknowledged there is more demand for programs to help people than there are actual programs. She said, “There is a lack of resources, treatment resources, in our community to handle what our truths are about.”

Is the legal system’s attention to trauma a fad that will pass? “I don’t think it’s a fad because people realize it’s endemic to our community,” she said. Trauma often has impact on the lives even of judges, she said, which is one reason many have been receptive to approaches that respond to people’s needs.

Triggiano said that when she and Tim Grove, a senior treatment leader at SaintA, a social service program, were co-teaching a course at Marquette Law School a couple of years ago, they asked students what they would do if they were creating a justice system from scratch. The students responded that they all wanted the system to help people solve problems and show compassion, she said.

“I’d like to see their dreams come true,” Triggiano said. ■



That makes spending money on treatment programs more appealing, Blinka said. But, he said, “where are the resources” to handle the treatment needs of a large number of offenders?

Is the role of judges changing when it comes to keeping people out of prison and putting them in treatment? Blinka said, “Formally no, but more judges are receptive to the idea that their role doesn’t start or end with adjudicating a case.”

People involved in treatment courts and trauma-sensitive responses to defendants are generally supportive of the trend. Several were interviewed at the end of a drug court staffing session in which they participated.

### The Resiliency That Comes from Positive Relationships

Dawn Rablin, a supervising attorney in the state public defender’s office in Milwaukee, pointed to the success rate of diversion programs (about 80 percent of participants complete treatment) and treatment courts (about 60 percent complete treatment) as evidence that the efforts work. What are the keys to successful outcomes? “A large part of it is about resiliency,” Rablin said. “It’s about building positive relationships.” Many of these people have never had positive relationships with anyone, especially people in the justice system, she said. It can make a big impression on them when a judge says, “I want to have an honest relationship with you,” and that can create a foundation that the treatment court team can build on.

Brad Vorpahl, an assistant district attorney for Milwaukee County who was part of the drug court session, said that, anecdotally, the treatment court seems to be a program that is well worth it. “It’s nice providing the appropriate individual this opportunity to get the treatment, to get their lives in order, to avoid prison time.” Even for those who don’t succeed in the program, it often is beneficial, he said.

David Malone, also an assistant district attorney who took part in the drug court session, said he has been skeptical of a lot of people in the program—and he’s been proven wrong many times. They are different people at the end of the program from at the start. “It comes down to whether the person wants to do it,” he said.

In an interview, Grove, the SaintA’s counselor, said that when judges are kind to someone, even in a 10-minute interaction, “it has the potential to be a reparative moment.” People who come into court are often thinking, “My brain and body are geared to expect you to mistreat me,” Grove said. When there is a stressful moment and the judge doesn’t act harshly, “it’s awfully unfamiliar to people.” He said he hears story after story from kids and parents who talk about the kindness of judicial officers in a way that was transformative.

“Objectivity is a gift to people in the midst of a traumatic incident,” Grove said. “The ability of the system to objectively unpack what has happened and render a fair verdict is another reparative opportunity.” He added, “I keep reminding the people in the courts all the time how darn important they are.”

James P. Peterson, an attorney with Foley & Lardner in Milwaukee who has worked closely with SaintA, said trauma “is front and center in every case you see” in children’s courts and family courts. As a result, the proceedings are “all about problem-solving” and not really about issuing judgments. Judges turn to agencies such as SaintA to find tools that work because tools within the conventional system don’t work.

Peterson was asked if the emphasis on trauma and problem-solving in judicial work is a fad that will pass. “I would put it in the fad category if there was something else better to replace it,” he said. “I don’t think there’s a new thing that people have latched on to that helps you communicate with people and helps you solve issues as well as dealing with people’s trauma, and trauma-informed care does.” ■

## A Judge's Journey in Search of Positive Results

**As a young judge, Joe Donald thought that courts were going through the motions. So he sought ways to move people forward.**

Joe Donald, L'88, since 2019 a state appeals court judge for Milwaukee County, said that as long as 20 years ago, as a circuit judge, he was frustrated by the results of the justice system. He said that there were huge disparities in how different people were treated and there were high levels of recidivism. He had a sense that courts were "just sort of going through the motions" and not accomplishing much.

Donald said that one eye-opening moment, a number of years later, was when he observed a "healthy infant court" over which Judge Mary Triggiano was presiding. "I realized, wow, we can really make a difference."

Donald, who was appointed as a judge by then-Governor Tommy Thompson in 1996, had some experience with experiments. He was a leading advocate for launching a drug treatment court in Milwaukee and, beginning in 2009, served as the first judge in the court. "There was so much pushback," he recalled. A substantial number of judges said, "Look, I'm a judge, not a social worker." He said some people called it the "hug-a-thug court" or the "kumbaya court."

The drug court was started with little in the way of resources to help people, Donald said. "You can't have a treatment court if you don't have treatment." Over time, the resource picture improved, including major improvements in Milwaukee County's ways of dealing with people experiencing mental illness, although it is widely acknowledged that the needs overall still greatly exceed resources.

Donald subsequently was assigned to children's court and became involved in efforts there to increase treatment approaches to children and adults involved in proceedings. He said that he was impressed with how much could be accomplished when the right things were done to get people on solid paths in life.

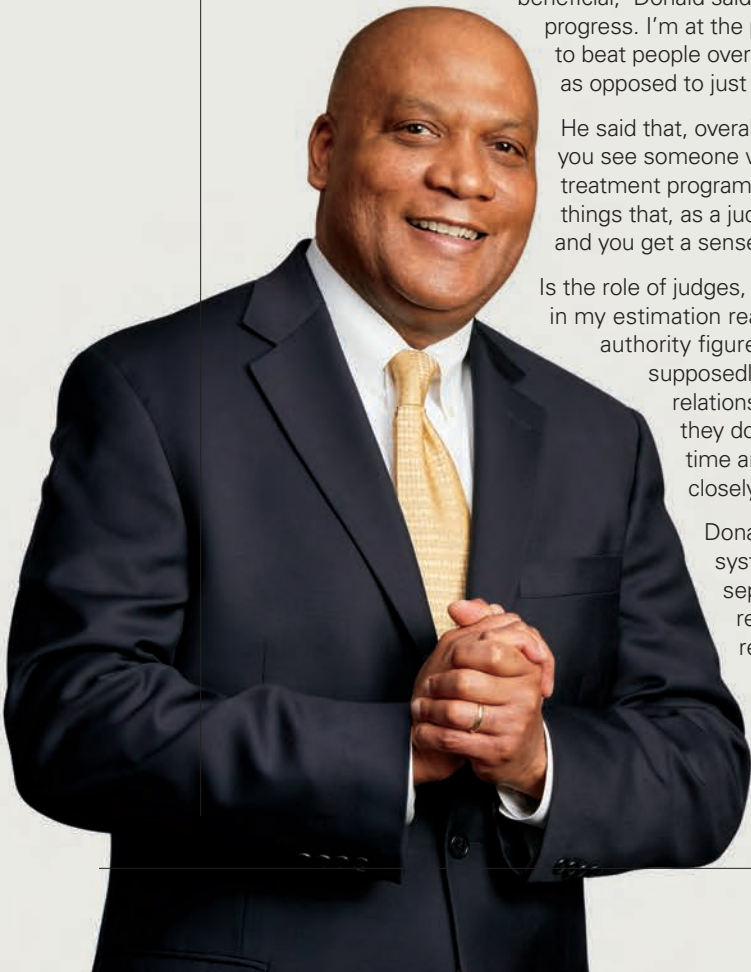
He originally was more inclined to use the threat of confinement on people who didn't comply with treatment programs. "What I've come to realize is that I don't think the sanction of confinement and locking them up is beneficial," Donald said. "In many respects, it has more of a negative impact on progress. I'm at the point now where I don't think you need that stick, that club to beat people over the head. There are other ways to address noncompliance as opposed to just locking people up."

He said that, overall, the treatment courts are succeeding. "It is amazing when you see someone who successfully completes the drug treatment or the family treatment programs or the healthy infant court," he said. "It is one of those things that, as a judge, you finally feel a sense of connection with the individual, and you get a sense that you've really made a difference."

Is the role of judges, overall, changing from 30 years ago? "The role of the judge in my estimation really hasn't changed. The judge represents this figure, the authority figure, who is presiding, who sits above everyone else and supposedly should see everything. What has changed is the offender's relationship with that judge, where the offender gets to the point that they don't want to disappoint the judge who has invested so much time and energy in making sure they're successful. . . . You're more closely connected with the participants."

Donald said, "If we really want more from our criminal justice system, we need to develop more of these types of courts to separate people who need help and treatment, as opposed to retribution and just locking them up, because that doesn't really work in terms of changing people's lives."

"The real test," Donald concluded, "whatever it is you are doing, is to ask, 'Is it changing their lives?'" ■



Judge Joe Donald





# Big Need, Big Change, BIG HELP

The Law School's pro bono efforts rise to the challenge of the pandemic, with some innovations likely to endure.

By Alan J. Borsuk

**"Come see us!"** Angela Schultz, the assistant dean for public service at Marquette University Law School, said that, for years, that was the standard response when people called to ask for legal help. It was the way Marquette Law School opened the door to programs located around Milwaukee that helped thousands of people who couldn't afford a private lawyer.

Then, abruptly in mid-March 2020, the standard response was no longer possible. "Come see us"—of course, that was all off the table," Schultz said.

But the determination to provide free legal help remained, and a scramble to find ways of doing this during the pandemic was launched. "We were optimistic that this was going to be a shift we could make," Schultz said. "We needed to just go."

In short order—by the end of April 2020—more than half a dozen pro bono programs involving law students were underway, all conducted remotely. Within a year later, that had grown to a dozen programs, with well more than 100 students involved. The number of students doing pro bono volunteering during the 2020–2021 academic year was almost identical to that in prior years, Schultz said.

One key to the success of the remote efforts was the creation of a civil legal "help line" that connected people with law students who could answer basic questions and advise them on where to turn for legal help.

Until the COVID-19 shutdown, people who called the Law School's public service office or the Milwaukee Justice Center, a collaborative program at the Milwaukee County Courthouse that supports pro bono efforts, heard phone messages directing them to visit clinic locations. To respond to the pandemic, a telephone help line was created instead, so that people could connect with the Law School's pro bono efforts. Thousands of people have been given help or directed to help as a result.

Look at a few selections from a summary that Schultz passed along (in anonymous form) of some calls:

- "Client needs help filling out legal separation paperwork."
- "Would like help with guardianship for his mother."
- "Domestic violence in household. I want a divorce and sole custody of our daughter."
- "Needs help with child support forms."
- "Trying to get all of her pension money from jobs; Spanish speaking."
- "I am in the middle of a divorce, and I don't understand why things are happening that are happening. I need help."

With 15 to 20 entries like these on each page of the summary, the list continued for 14 pages—and it covered only 11 days.



Student Fefe Jaber; Angela Schultz, assistant dean for public service; and student Ali Mahmood.

Illustrations by Stephanie Dalton Cowan

## Rewarding Experiences, Both for Those Seeking Help and for Students

Each call gets a response from a law student who hears people out, sets up appointments with attorneys volunteering to provide help (assisted by law students), or directs callers toward help in other ways. The preponderance of the calls involve family matters, particularly divorce and custody issues. Landlord-tenant disputes, immigration matters, problems with legal identification and related documents, and employer-employee disputes are also common.

And then there are the unusual cases.

Suzanne Caulfield, a math professor at Cardinal Stritch University, is a part-time law student and a pro bono volunteer. She described a call from a woman who was distressed about a letter she received and didn't understand. Caulfield realized the letter was actually telling the woman she had inherited several thousand



Suzanne Caulfield

dollars from a relative. They checked it out and found it was for real. "She thought she was going to jail because she couldn't afford this bill, and it wasn't a bill at all," Caulfield said.

The callers aren't the only ones who are continuing to benefit from the pro bono programs in the pandemic era. The law students who are involved have found their participation rewarding, especially in a time when so many people have so much need.

Laureen Lehnberg, who worked in financial industry positions and is now a second-year student at the Law School, said, "It was such a gift to me to connect people with resources they need and to provide some sort of comfort to them in a very difficult time in their lives."

Lehnberg said, "The most important thing I do with them is to listen, to hear them out, to figure out the best way to help them, and then to provide some assurance that they can get help, that



Laureen Lehnberg



Jenn Diaz

they can make one more phone call or do a Zoom call with an attorney who can actually help them.”

Some of the calls are “heartbreaking and really difficult to hear,” she said. “Just the fact that this level of need still exists in our communities is really unnerving to me, and it makes me that much more determined.” She said that she aims “to be kind before anything else—and patient.”

Lehnberg described one of the cases that moved her, involving a woman whose son was about to become an adult but who continues to need her care and guardianship. Lehnberg helped the woman get on the path to obtaining

guardianship. “It was hard to hear her story, but it was also that much more rewarding to connect her to the resources she needed,” Lehnberg said.

Jenn Diaz, a first-year law student from Chicago, is fluent in Spanish. Much of her pro bono work has involved helping people who speak Spanish and have a language barrier, as well as income barriers, to getting help. When people’s problems are large, the help that can be offered is limited, but it is still valuable. “Even if it’s small, we definitely make a difference,” Diaz said. “Sometimes they just need someone to hear them and point them to the right resource.”



Casey Campos

Casey Campos is finishing her last semester of law school. She started doing pro bono work when the work was still in person. “It was great to work one-on-one with someone,” she said. “Then COVID hit, and that kind of changed everything.” But she is happy that the switch to helping remotely was made. In the pandemic period, it seems that the issues people are facing are giving them more stress. The problems themselves haven’t been much different, but there is “more of an underlying urgency,” she said. “Pointing people in the right direction was extremely critical to them.”

Ali Mahmood, a second-year law student, said that at a new-student picnic held when he arrived at the Law School in 2019, he saw the Mobile Legal Clinic van used for pro bono programs. He was impressed with the idea of taking services to where people were. “I knew right then and there I wanted to pursue this,” he said, and by his second week in law school, he was involved in the work. He has logged pro bono hours almost every week since then, including during summers and between semesters.





Ali Mahmood

In this COVID time, he misses the collegiality with other students, lawyers, and clients that comes from being in person, Mahmood said, but helping people online has been effective and provides connections with people who would not have been reached otherwise. He regards his pro bono activities as having been valuable to him as a student, helping him experience, in real life, aspects of what was taught in class.

### **"I Quickly Realized a Lot of People Need Help"**

Fefe Jaber, a first-year law student who grew up in Milwaukee and attended college at DePaul University, said she

signed up for pro bono work because she wanted to get involved with the Milwaukee community. "I didn't even know what to expect, but within even the first day, I quickly realized a lot of people need help," she said.

Being able to offer that help remotely works, she said. Would she rather do the work in-person? Yes. "It's not the same as having a one-on-one sit down," Jaber said. "But under the circumstances, we do the best we can." And most important, people are getting questions answered. "They're still able to talk to someone about the help they need," Jaber said.

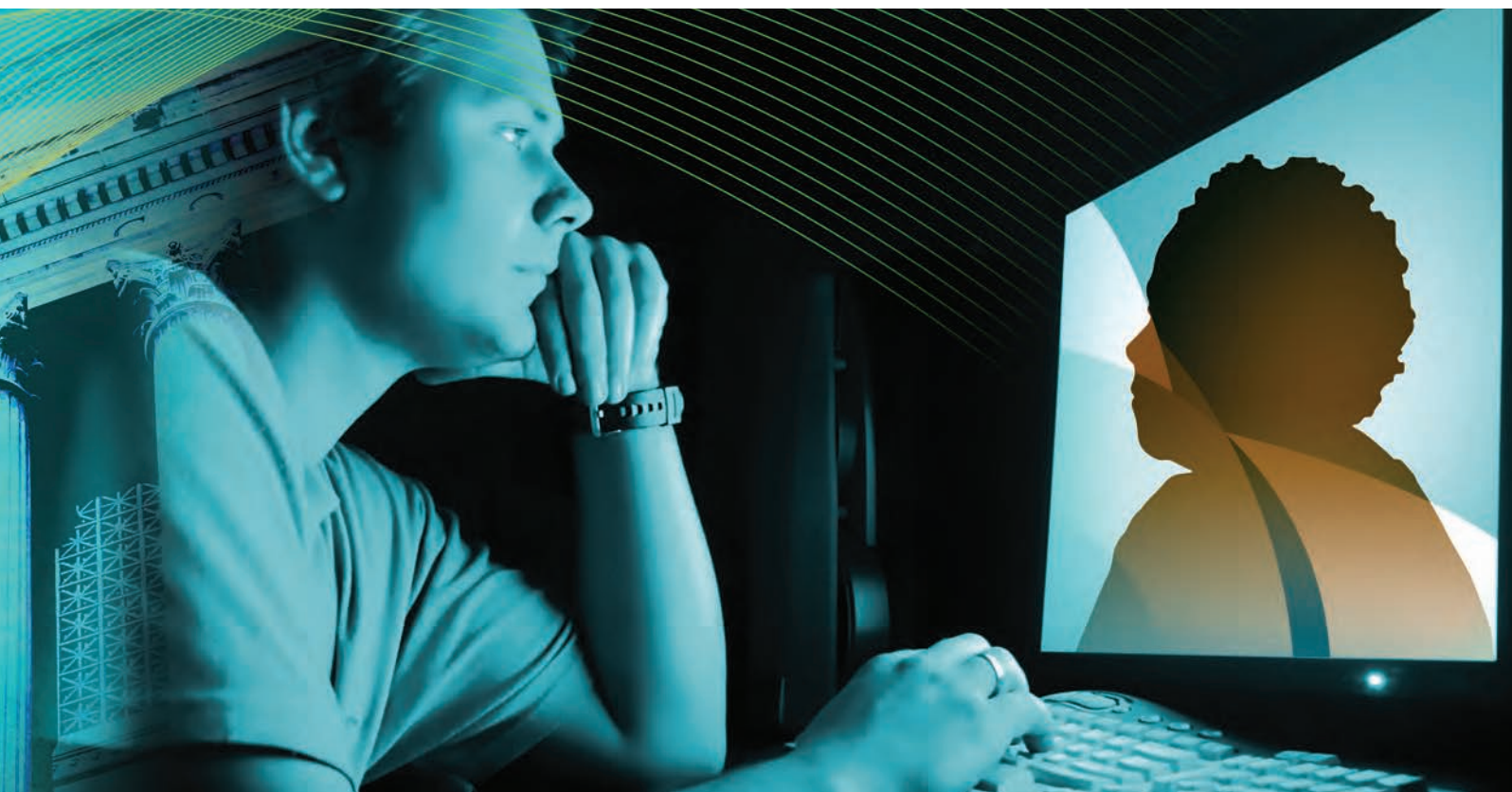


Fefe Jaber



Naomie Kweyu

Naomie Kweyu, who is in her last semester of law school, was born in the Democratic Republic of the Congo. She came to the United States when she was nine years old and has considered Fort Worth, Texas, as her home. She did not know much about the city of Milwaukee before she enrolled at Marquette Law School. She said she's since learned that the city is beautiful and has a lot of potential. But her pro bono involvement has taught her things about the city that weren't positive, including the level of racial and economic segregation. "I've gotten to realize a lot more people have problems in Milwaukee than I thought," Kweyu said.



But she said she has been helpful to many of the people whom she met, both in person and during the virtual period. She recalled someone whose mother had died; the client was stressed about what he was supposed to do as executor of her estate. When Kweyu spoke with the man, she related that her grandmother had died recently, and the conversation between her and the client extended to what needed to be done legally and to their overall situations. “I was able to calm him down,” she said. Kweyu said she has accepted a position with a large firm in Milwaukee and is eager for that opportunity, but she also is committed to continuing to do pro bono work.

Leaders of the pro bono efforts, as well as students who are involved, said that overcoming technological issues with people seeking help has been a challenge at times. Some people don’t have adequate internet access and good devices for conducting a Zoom call or for sending a lawyer or student volunteer material electronically. Some are simply not adept at using smartphones or similar devices. But overall, the virtual-communication hurdle has not been as big a factor as was feared, and solutions to overcoming impediments have been found in most cases.

Schultz said that initially legal aid leaders statewide had great concern about cyber-access issues. But the reality, she said, is that “we’re reaching plenty of people—every clinic is full.” She added, “If we built more, we’d serve more.” But everyone who seeks help gets an appointment.

### Finding Upsides to Offering Help Remotely

In fact, the remote world has benefited many of those who need help. If they have the capacity to be in touch electronically, they are spared having to make a visit in person and the hassles with accompanying factors such as parking, child care, and weather, Schultz said. In addition, without the need to



Marisa No

seek assistance in person, people have been calling the help line from places in Wisconsin beyond the Milwaukee area.

Marisa No, a first-year law student, said pro bono work had been more emotional than she expected. She described it as “90 percent listening, 10 percent doing something.” She said that sometimes she doesn’t need a lot of facts from someone to figure out how to get the person on track for help. But she has found that people need to talk to someone, perhaps even more so in a time when they are separated from so many other people.

No said that, most of the time, the interactions still feel “very personal” even when they are not face-to-face. “It’s listening, it’s deep breathing; a lot of the time it’s making time for comfortable silence and letting people get out what they need to get out” before turning to matters such as scheduling an appointment.

Many of the people who call are, in one way or another, dealing with what professionals refer to as trauma in their lives. Caulfield, the math professor, was asked what the word *trauma* means for her when it comes to pro bono work. She said that sometimes people have experienced physical violence or medical trauma. More often, they have experienced emotional and psychological trauma. For example, she said, an eviction is a traumatic event to many people. “A lot of the time, trauma is stress.” In what percentage

of calls does the word *trauma* apply? “Probably 95 percent,” she said.

One comment that was volunteered by several students about switching over to virtual work was that “Alexi was a huge help.” They were pointing to Alexi Richmond, intake supervisor for the Milwaukee Justice Center, the collaborative effort of the Milwaukee County Circuit Court, the Milwaukee Bar Association, and Marquette Law School, located in the county courthouse. Richmond supervises and schedules clinics. As the impact of COVID-19 and the need to operate in new ways became clear, new ways of training volunteers were needed, and she became a key to creating and carrying out the training, as well as to overseeing the law students’ work.



Alexi Richmond

Richmond said that in the first month of the pandemic help line, only about 20 requests for help came in. More recently, that number has risen to about 1,000 requests each month. In her revised role, Richmond said, she spends as much as six hours a day on Zoom, shadowing the efforts of the pro bono volunteers.

Lehnberg was among the students who sang Richmond’s praises. “Alexi was just amazing to work with—she was there with me for the first few times I was taking calls.” One result of virtual operations, though, is that Richmond and most of the students have never met in person.

## Building a Pro Bono Legacy

The Law School's pro bono effort has become a broad-based one. In addition to the students, the volunteer lawyers, and partnerships with outside agencies, Schultz leads a team of Katie Mertz, L'11, director of pro bono service at the Law School; Marisa Zane, L'11, leader of an estate-planning clinic at the school; and Mindy Schroeder, coordinator of the work of the Marquette Volunteer Legal Clinics, the school's largest pro bono project. Financial support comes from alumni and friends—most notably, in the form of a multiyear gift from the Gene and Ruth Posner Foundation, led by Josh Gimbel, a lawyer in Milwaukee.

"We created the Office of Public Service in 2006. A big part of our thinking was to establish a legacy honoring the late Dean Howard B. Eisenberg," said Dean Joseph D. Kearney. "Looking forward, the faculty were clear that the Law School

should help lead the effort to close the civil legal services gap in this region." Progress had been made over the years, but the pandemic was a whole new challenge, Kearney said. "We all very much admire what Angela Schultz and her team—including especially, of course, the students and the lawyer volunteers—have been able to do."

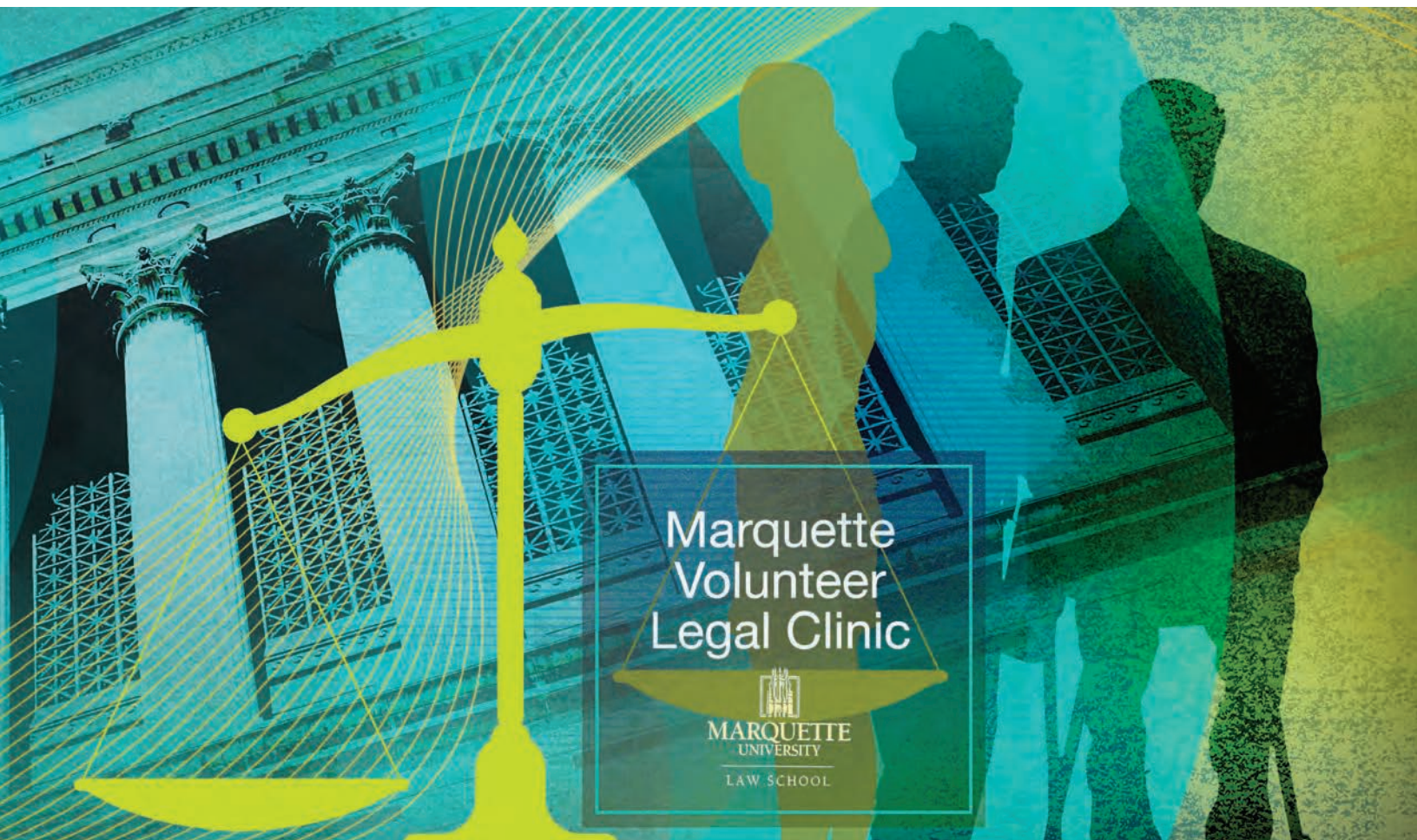
The pandemic will fade away. Will the impact it has had on pro bono work fade also? Only partly. Everyone involved wants to return to in-person work and understands what can be gained when working face-to-face. But the upsides of remote efforts also have been seen.

Schultz said, "Part of what we all know at this point is that we want some form of these remote services to outlast the pandemic. This will be part of our delivery service forever because it is convenient for so many of the people we are serving." And it's been convenient for students also.

"I hope there will be a narrowing in the justice gap between the urban centers and the rural parts of the state," she said. On the positive side of that hope is the way people can get help wherever they are. On the negative side is the fact that internet service issues are a bigger problem in rural areas than in urban areas.

"How do we further refine, refine, refine this system?" Schultz asked. Work on improving collaboration, cooperation, and overall service is necessary, she said.

Whether in person or virtually, the pro bono efforts will continue. Thousands of people will be shown ways to get help with issues in their lives, while volunteer law students gain their own benefits from their involvement. Lehnberg said pro bono work was "a life-changing experience" for her. "It showed me how I can help. It opened doors for me that I didn't even know were there." ■



# Still Winning in the Court of Public Opinion

VIEWS OF THE U.S. SUPREME COURT REMAIN GENERALLY FAVORABLE, AND THAT MAY HAVE AN IMPACT ON WHAT THE JUSTICES DO IN THE COMING TIMES.

by Alan J. Borsuk

"It's absolutely true," Tara Leigh Grove said in a recent interview, "that in order for any court to function, the court needs some level of support from the political branches and from the general public as a whole."

Grove is an expert on the United States Supreme Court. The "sociological legitimacy" of the Court has been a subject of interest to her for years. In October 2019, at a conference at Marquette Law School on public opinion about the Supreme Court, she said, "In our society, so far the losers [in cases before it] view the Supreme Court as a legitimate source of authority, and that's what allowed the Supreme Court to function."

Yet that legitimacy has become an issue of increased concern recently, even as signs emerge that overall deference to the Court and its decisions continues to prevail. Strong reasons for saying that confidence in the Court is steady lie in the results of two consecutive years of national surveys, by the Marquette Law School Poll, of adults on their opinions related to the Court, individual justices, and issues that have come before or may come before the Court. The poll results for both years showed much more respect for the Supreme Court than for the presidency or the Congress. The surveys also showed the majority of Americans believe that the Court makes its decision more on the basis of the law than on the basis of politics.

The first poll was "the deepest and broadest analysis of the Supreme Court that anyone has done," Professor Lawrence Baum, a prominent political scientist at The Ohio State University, said at the time. The second poll matched the depth of the first—and Marquette Law School intends to make the poll an annual event.

It was the first poll, conducted in September 2019, that brought Grove and other highly regarded observers of the Court to the conference in Eckstein Hall. It was the second poll, with results that were nearly identical, that led to the

**The first poll in 2019 was "the deepest and broadest analysis of the Supreme Court that anyone has done."**

Professor Lawrence Baum,  
political scientist,  
The Ohio State University

more recent interviews with Grove and other experts on the Court.

But a set of major events involving the Supreme Court unfolded in short order after the fall 2020 polling was completed. The field work on the poll concluded on September 15. Three days later, shortly before the poll results were released, Justice Ruth Bader Ginsburg died. Both years of the Marquette poll showed her to be unusually well known among the justices, and with the most favorable overall standing in the public nationwide.

Ginsburg's death led to then-President Donald Trump's appointing Amy Coney Barrett, a judge of the Chicago-based U.S. Court of Appeals for the Seventh Circuit, to the Court and swift confirmation of the nomination by the U.S. Senate, with only one Republican dissenting and no Democrats in support. That increased to six the number of justices on the nine-member Court who are regarded as conservatives.

Then came the election of Joe Biden as president and Trump's unrelenting effort to get courts—and particularly the Supreme Court—to intervene in the election results. Trump's effort, of course, did not succeed, and the justices did not accept any of several challenges filed with the Court. That left a Democrat as president and the balance of power in the Senate and House with Democrats, while the Supreme Court, including three Trump appointees, continues with six of nine justices appointed by Republican presidents.

The tumultuous recent events reemphasize questions about the Court's standing in public opinion, the effect that public opinion has on what the Court does, the strength of the assumption that those who lose major decisions will defer to the Court, and, most broadly, what lies ahead for the Court.

Asked whether the acceptance of Court decisions is changing, Grove said, "Unclear, but not yet." She said, "The norm seems to have held through the Trump administration." Although Trump announced at times that he would defy court decisions, in reality, he did not, Grove observed. ►►



## Views on past decisions

The Marquette Law School Poll gave brief summaries of past decisions by the Court and asked respondents for their opinions; the full summaries are available online.

PAST RULINGS	Strongly Favor	Somewhat Favor	Somewhat Oppose	Strongly Oppose	Don't Know
Permit college use of race in deciding admissions	5%	12%	19%	54%	10%
Allow private employers with religious objections to exclude contraception coverage from health plan	17	17	18	33	13
Public financial aid may include religious schools' students	21	30	16	16	15
Uphold Indian treaty rights limiting reach of Oklahoma's criminal laws	21	25	13	12	27
Strike down certain regulations on abortion providers	27	19	16	20	18
Reject Trump administration effort to end DACA immigration policy	31	19	15	20	14
Hold 1964 anti-discrimination statute to include LGBTQ in its protections	38	25	12	13	11

## Looking forward to possible decisions

The Marquette Law School Poll gave brief summaries of possible future decisions by the Court and asked respondents for their opinions; the full summaries are available online.

POTENTIAL RULINGS	Strongly Favor	Somewhat Favor	Somewhat Oppose	Strongly Oppose	Don't Know
Limit federal agency rulemaking	17%	36%	14%	5%	27%
Overturn <i>Roe v. Wade</i>	18	14	15	41	12
Rule religious schools to be substantially exempt from employment discrimination laws	18	23	19	24	14
Strike down limits on gun magazine capacities	20	17	17	33	11
Permit government to exclude from operating a foster-parent program a religious organization not willing to certify same-sex couples as foster parents	21	19	19	24	15
Strike down Affordable Care Act as unconstitutional	22	14	15	37	11
Rule against voting laws that have unequal party impact	30	19	14	15	21

## Poll Shows Broad Approval of How the Court Does Its Job

The fall 2020 Marquette Law School Poll found that 66 percent of people nationwide approved of the way the Court was handling its job, while 33 percent disapproved. Overall, 59 percent said that they trusted the Court the most among the three branches of the federal government, with 24 percent trusting the presidency the most and 16 percent trusting Congress the most. Approval of the Court was higher among Republicans and conservatives, but a majority of Democrats (57 percent) also approved of how the Court was doing its job.

And 62 percent of those polled said that the Court decides cases mainly based on the law and not politics. There was little partisan variation in answering that question: 60 percent of Republicans, 61 percent of Democrats, and 65 percent of independents answered, “Mainly the law.”

The poll found that favorable public opinion about past and potential-future judicial decisions included issues where a decision by the Court could be called liberal, such as 63 percent of the public in favor of the ruling in 2020 that extended federal anti-discrimination laws to people who are gay or lesbian and 56 percent opposed to a potential decision overturning *Roe v. Wade*, the 1973 case legalizing abortion. On other issues, public majorities could be called conservative, such as 73 percent opposing the Court’s past decisions allowing use of race as a factor in college admissions. And on still other issues, public opinion was split, without clear majorities for either side.

As the year before, the 2020 poll also found that justices were not widely known by the public overall. More than 50 percent of people offered opinions, favorable or unfavorable, on only three justices: Ginsburg, Brett Kavanaugh, and Clarence Thomas. Fewer than half of those polled offered opinions on the other six justices, including Chief Justice John Roberts. In both years, Justice Stephen Breyer was the least-known member of the Court.

Professor Charles Franklin, director of the Marquette Law School Poll, said that the similar results of the two Marquette polls indicate that “people have limited information about the Court, that they do their best to apply that information when they’re thinking about the Court, but that, outside of the rare blockbuster decision that rivets public opinion, for the most part, people are not moved by day-to-day decisions of the Court very much.”

Which of the three branches of government is trusted most?

The Supreme Court

59%

President

24%

Congress

16%

Fall 2020 national  
Marquette Law  
School Poll

But, Franklin said, that stable and favorable standing could shift. “Where there is potential for more change is that a lot of views of the Court are filtered through a partisan lens, and that partisan structuring is pretty strong.” He added, “It’s surprisingly less strong than the way partisanship shapes our views of Congress, state legislatures, governors, and so on.”

Franklin said that it can be argued that justices can have an impact on public opinion of their work by deciding cases in ways to some degree attuned to general public opinion—or, as he put it, by “avoiding counter-majoritarian decisions on a variety of issues.” There is much debate about this among Court experts, with wide agreement that Chief Justice John Roberts is the person on the Court who most keeps an eye on public opinion on hot issues such as the constitutionality of the Affordable Care Act (Obamacare). Roberts is regarded as the member of the Court who is most concerned about losing the “sociological legitimacy” that Grove described.

## Substantial Support for Changes in the Court’s Structure

Even with the relatively supportive public opinion of the Court, both years of the Marquette polling found levels of support for changes in the Court’s structure that surprised a number of experts. Among members of the public surveyed in the 2020 poll, 75 percent favored term limits for justices, 46 percent favored increasing the number of justices, and 41 percent favored limiting the ability of the Court to rule whether at least some laws are constitutional.

President Biden has appointed a commission to consider changes in the structure of the Supreme Court, but he has not given much support to substantive proposals along those lines. Term limits probably would require a constitutional amendment, and it is hard to picture that happening. Adding to the size of the Court could be done by Congress, but with an even split between Democrats and Republicans in the Senate, it is hard to see this occurring in the near future.

In an “On the Issues with Mike Gousha” program presented by Marquette Law School in October 2020, Russ Feingold, formerly a U.S. senator from Wisconsin and now president of the American Constitution Society, strongly criticized the appointment of Barrett to the Court. He said that Republicans had “stolen” two seats on the Court, the ones now held by Justice Neil Gorsuch and Barrett. “They are delegitimizing the United States Supreme Court, they are making it look like a kangaroo court in the eyes of the



American people because of this process,” Feingold said. “They’re setting off a situation where progressives and Democrats and others may have no choice but to consider the basic nature of judicial tenure or the number of members on the Supreme Court.”

In a phone interview in March 2021, Feingold stuck by these criticisms and said there needs to be “conversation” on how to change the Court’s structure to reestablish its standing in the eyes of the public as fair and nonpartisan.

But in a separate “On the Issues” program in October 2020, David French, a commentator, warned against trying to alter the Court’s structure. “Every escalation is accompanied by a greater and opposite additional escalation,” he said.

Knowledgeable observers interviewed for this story offered a range of opinions on what is likely to lie ahead for the Court. A few of their expectations:

**A quiet period.** Thomas W. Merrill, Charles Evans Hughes Professor at Columbia Law School and a former deputy solicitor general of the United States, said, “I have sort of perceived in the past that when the Court begins to be a matter of public controversy . . . , [the justices] tend to sort of draw under their shell like a turtle.” He added, “I should think that should very much be the case now, probably amplified.” If people are alarmed about the way Barrett was appointed and if there is substantial support for structural changes, “that is likely to cause them to be very cautious about provoking the Democrats and the Biden administration.”

**A not-so-quiet period.** David A. Strauss, Gerald Ratner Distinguished Service Professor of Law at the University of Chicago Law School and also a frequent advocate before the Court, said, “I’d group things into two categories: [first,] a set of high-profile issues that have been with us for a decade or more—abortion, affirmative action, gun rights.” He said, “There is no question what the majority’s inclination is on those issues. It’s really a question of how fast they’ll want to go and how sharply divided they will be.” He said he expected to see continued movement in conservative directions and that fast movement “is not impossible.”

The second category that Strauss described involves emerging issues, such as religious rights. Religion, he said, is “clearly something [the justices] are thinking about a lot and an area where they are willing to be fairly aggressive in recognizing rights of religious groups not to have to comply with laws that apply generally.”

**More attention to challenges of administrative powers.** Recent presidents, including Trump and Biden, have made extensive use of executive orders and administrative rule-making to accomplish their goals. Strauss said that challenges to such actions “set the stage for a different kind of confrontation between the branches.”

Marquette Law School Professor Chad M. Oldfather said he anticipates that, over time, this court “will try to pare back presidential power in a variety of ways.”

But Merrill suggested that, in the near term at least, the

Court might move cautiously in such cases because justices may not want to look as if they were asserting their power over administrative agencies or to appear to be opposed to Biden.

**Uncertainty about the upcoming role of Chief Justice John Roberts.** Strauss said, “It is no longer clear that the chief justice is at the center of the Court.”

Sarah Isgur, who works with David French on *The Dispatch* online news organization, said during a Marquette Law School “On the Issues” program that, with Barrett’s joining the Court and adding to the conservative majority, Roberts “just lost his swing vote privileges, if you will.” But, she noted, as the chief justice, Roberts still generally decides who is assigned to write opinions (where he is in the majority). This can be an important factor in shaping the impact of decisions. “I think you’ll see a lot more chief opinions,” Isgur said, because he will give himself more of a role.

Grove said, “It’s hard for justices not to care about the public view of the Supreme Court, and that often is particularly true of the chief justice.” A chief justice is the institutional caretaker, she said, and “when you’re the caretaker of an institution, you do care about that institution being able to go forward.” That could put Roberts in the role of trying to keep at least some of the Court’s decisions somewhat in line with public opinion.

Merrill suggested that Roberts is “hypersensitive” to perceptions of the Court. Some other justices also are concerned about the Court’s reputation if it overrules a lot of steps by the other branches of government, he said.

**Lobbying from liberals for Justice Breyer to retire.** When a vacancy occurs, appointing younger justices, with the hope that they will stay on the Court for many years, has become important to both Republicans and Democrats. Breyer is one of the Court’s liberals. At 82, he is currently the Court’s oldest member. He was appointed by then-President Bill Clinton in 1994. Breyer is believed to be in good health, but some liberals are suggesting he should step down, perhaps in June at the end of the Court’s current term, so that a younger liberal can be named while Democrats in the Senate have the votes to confirm. Feingold said, “I’d be a little surprised if he didn’t step down.”

**A shift of more issues to the states.** Marquette Law School’s Oldfather said, “I’m happy to be teaching state constitutional law now because I think state constitutions are going to matter more.” Oldfather suggested that, in coming terms, the Court will be “less inclined to make issues national” and will leave more to states. And, he said, if the Court takes steps to reduce abortion rights, the issue is likely to become important in some states.

In the end, Oldfather said, positive public regard for the Court is tied to people’s thinking that what the justices are doing is about the law and not about politics.

So far, the majority public opinion in the Marquette Law School Poll has been that the Court is more interested in the law. As long as that remains true, the legitimacy of the Court, in the eyes of the public, is likely to keep at bay both proposals for major structural change and calls for paring back the Court’s power. ■



# BETWEEN THE LINES

Much is at stake in redrawing the boundaries of Wisconsin's political districts.

By Larry Sandler

In one sense, redistricting is just one huge math problem—a whole lot of number-crunching to divide everybody in the state into substantially equal groups, with the result being lines on maps to mark the geographic areas where those equal populations live.

Put that way, it seems so mundane a task that it could be assigned to an agency of bureaucrats plugging data into computers. Indeed, that's exactly what neighboring Iowa actually does.

But Wisconsin doesn't, and neither does any other state, because that huge math problem is also a huge political issue. Redistricting has the potential to decide control of both houses of the state legislature for the next decade.

That's five biennial budgets, totaling close to half a trillion dollars of spending, taxes, fees and borrowing; countless major policy decisions on education, health, public safety, transportation, natural resources, and human services; dozens of laws shaping criminal justice, civil litigation, and elections; and confirmation of gubernatorial appointees during three terms. All of these things and more ride on where those lines are drawn.

The redistricting done every 10 years, after the U.S. census is completed, also sets boundaries for many other elected officials, from the U.S. House of Representatives to local city councils and school boards. On every level, district lines can, and often do, affect decision making.

The impact of the COVID-19 pandemic has slowed the release of 2020 census figures, and thus slowed the redistricting process. But the stakes are high, and maneuvering by people across the political spectrum has been underway for months. That can be seen in the legal and political firepower amassed on both sides of a case involving what might look initially like an arcane rules matter. Awaiting a decision by the Wisconsin Supreme Court as of deadline for this article, the outcome of the case involving Supreme Court Rules Petition 20-03 will affect the handling of legislative-redistricting decisions that might not be finalized until 2022. Who will make the call on the new political boundaries—politicians themselves, state judges, federal judges, or others—remained unsettled well into 2021.

Drawing district lines is at the heart of democratic representative government, a primary mechanism for enforcing the constitutional mandate that every citizen's vote counts equally.

But with so much depending on the outcome, redistricting is also the focus of rampant political gamesmanship, hard-fought litigation, and persistent calls for reform. It is a system rooted in more than two centuries of law and history, but very much steered by the politics of the moment.

During the 2020–2022 cycle, Marquette Law School's Lubar Center for Public Policy Research and Civic Education is placing particular emphasis on reporting and programs concerning redistricting. This set of articles for the *Marquette Lawyer* by Larry Sandler, including the "sidebars" on pp. 44–51, is part of that initiative. Sandler is a freelance journalist with more than 35 years of experience covering government and business in southeastern Wisconsin for the *Milwaukee Journal Sentinel* and other publications.



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AND CIVIC EDUCATION

**In the most famous example, from 1812, the Massachusetts legislature drew a bizarrely shaped state senate district, which benefited Governor Elbridge Gerry's Democratic-Republican Party. . . . Ever since, the practice of drawing districts for political advantage has been known as gerrymandering.**

## Mapping Out the Law

Redistricting is derived from the United States Constitution, although it is never directly mentioned there. Article I of the nation's founding document says that the number of U.S. House members from each state will be determined by population, based on a nationwide census every 10 years, but it leaves the details up to Congress and the states. It doesn't say anything about redistricting state legislatures.

Yet the concept of electing state legislators from districts had already taken hold by the time the Constitution was ratified. Wisconsin's territorial legislature was elected by districts, starting in 1836, says a 2016 report on redistricting by the state's Legislative Reference Bureau (LRB). After statehood, the 1848 constitution specified that those districts should be determined "according to the number of inhabitants."

Despite that language, lawmakers decided that ensuring that each district had an equal "number of inhabitants" was secondary to respecting political geography, and, for more than 100 years, Wisconsin legislative districts were based largely on county lines, the LRB report says. The state supreme court upheld this principle in 1892, ruling that populous counties could be split into multiple districts and sparsely populated counties could be joined to make a single district, but that districts could not be constructed from pieces of different counties.

At the same time, the Fourteenth Amendment to the U.S. Constitution guarantees everyone "the equal protection of the laws," and the 1960s brought new legal force to those words.

In its landmark 1962 *Baker v. Carr* decision, the U.S. Supreme Court established the "one person, one vote" standard and ruled that federal courts could hear constitutional challenges to state legislative districting (and redistricting). Congressional legislation has provided that, unlike most cases, such challenges are heard by three-judge panels, consisting of both district and appellate judges, and any appeals go directly to the nation's high court.

*Baker v. Carr* was followed in 1964 by *Reynolds v. Sims*, which required both houses of a state legislature to be redistricted according to population, and *Wesberry v. Sanders*, which held that districts must be equal in population. In 1973, the high court clarified that state legislative districts—unlike congressional districts—need only be "as nearly uniform as practicable," rather than exactly equal.

Meanwhile, Congress approved the Voting Rights Act of 1965, outlawing discrimination against racial and linguistic minorities in election procedures, including the way that districts are drawn. The 1986 *Thornburg v. Gingles* decision established that the act prohibits even unintentional discrimination in redistricting.

Legal challenges alleging only a Voting Rights Act violation, but not a constitutional violation, proceed through federal court in the ordinary way, rather than with an original three-judge panel.

## A New Era of Redistricting

With the legal landscape transformed, "[t]he 1960s ushered in a completely new world in redistricting nationally and in Wisconsin," the Wisconsin LRB report says.

In addition to new laws, new court decisions, and new ideas about equality and justice, advances in technology have allowed the Census Bureau to release detailed demographic information more quickly, the report explains. Those developments also heightened awareness of the political impact of redistricting.

That's not to say that politics weren't already deeply embedded in the process from the beginning.

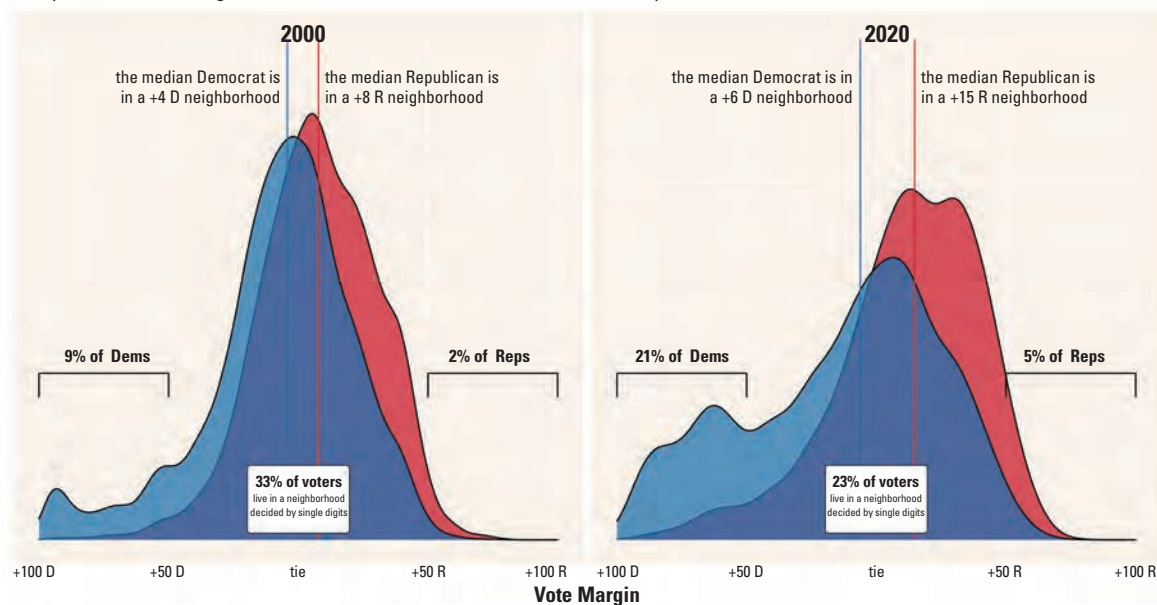
In the most famous example, from 1812, the Massachusetts legislature drew a bizarrely shaped state senate district, which benefited Governor Elbridge Gerry's Democratic-Republican Party. After Gerry, a signer of the Declaration of Independence and delegate to the 1787 Constitutional Convention, signed the map into law, a political cartoon compared the narrow, curving district to a monstrous salamander, and dubbed it a "Gerry-mander." Ever since, the practice of drawing districts for political advantage has been known as gerrymandering.

But in Wisconsin in recent times, political divisions thwarted gerrymandering attempts for four decades. In most of those decades, the same divisions also failed to produce compromises, and redistricting wound up in court, where judges drew the maps.

The history of drawing state legislative maps has been more tumultuous than for congressional maps. (See the sidebar article on page 49 about the state's congressional redistricting.) Those political and legal machinations are summarized in the LRB report and in the 2007 report of a task force appointed by the Wisconsin Supreme Court to study redistricting rules for the justices.

## In a narrowly divided state, shifting political geography

The partisan lean of neighborhoods where Wisconsin's Democratic and Republican voters live, 2000 and 2020



Wisconsin is becoming more politically polarized, a trend that has significant implications for redistricting. In the 2000 presidential election, a third of voters lived in neighborhoods where the percentage of support for the parties differed by single-digit margins. By the 2020 election, fewer than a quarter of voters lived in neighborhoods that were so closely divided. In addition, in 2020, 21 percent of Democratic voters and 5 percent of Republican voters lived in neighborhoods that overwhelmingly favored their party, more than twice the percentages of those living in lopsided neighborhoods in 2000 (then 9 percent of Democrats and 2 percent of Republicans).

**1960s:** After the 1960 census, Republicans controlled both Wisconsin's Assembly and Senate, but could not agree on a redistricting plan until after the U.S. Supreme Court handed down its ruling in *Baker v. Carr* in March 1962. The Democratic governor, Gaylord Nelson, vetoed the plan, and the legislature failed in override attempts or to bypass him by including its plan in a joint resolution instead of a law.

A federal court allowed the state to use its old maps for the 1962 elections, in which the GOP held on to its legislative majorities and Democrat John Reynolds succeeded Nelson as governor. After Reynolds vetoed a Republican-sponsored plan, the legislature sustained his veto but adopted a joint resolution to enact its map without his signature.

Reynolds then appealed to the state high court, which ruled the joint resolution approach unconstitutional in *Reynolds v. Zimmerman*. In that February 1964 decision, the Wisconsin Supreme Court also issued an ultimatum: If a redistricting plan wasn't law by May 1, the justices would draw the maps themselves. The court did just that, after Reynolds vetoed yet another GOP-backed plan and the legislature failed to override his veto.

**1970s:** Following the 1970 census, the Democratic-controlled Assembly and Republican-led state Senate were unable to agree on a redistricting plan, drawing another state supreme court

ultimatum. Governor Patrick Lucey, a Democrat, called the legislature into special session, opening with a joint session in which he personally beseeched lawmakers to adopt equitable maps.

They heeded Lucey's call, and he signed the resulting plan. For the first time, every district was within 1 percent of the statewide average population. Also as part of this act, the legislature created the system of wards, or voting units, that would become building blocks for future state, federal, and local redistricting plans. (See the sidebar article on page 46 about local redistricting in Wisconsin.)

**1980s:** With Democrats in control of both chambers after the 1980 census, the legislature agreed on a redistricting plan, only to face a veto from the Republican governor, Lee Dreyfus. The state's largest labor organization, the Wisconsin AFL-CIO, filed suit, leading a panel of three federal judges to draw the maps.

But the court's maps were only used once. Democrats scored a trifecta in the 1982 elections, keeping their hold on both houses while Governor Anthony Earl replaced Dreyfus. The legislature then adopted its own maps, which Earl signed into law.

**1990s:** As they had a decade before, Democrats controlled both chambers of the state legislature after the 1990 census. And in a repeat of the early-1980s pattern, they approved a redistricting plan that was vetoed by the GOP governor, Tommy

**In that February 1964 decision, the Wisconsin Supreme Court also issued an ultimatum: If a redistricting plan wasn't law by May 1, the justices would draw the maps themselves. The court did just that . . .**

**After five decades of shifting political tides, the “red wave” election of 2010 was perfectly timed for Republicans.**

Thompson. This time, the Republicans filed suit, led by Assembly GOP leader David Prosser, resulting in another map drawn by a three-judge federal panel.

**2000s:** Following the 2000 Census, Democrats held the Senate, while Republicans controlled the Assembly. They couldn't agree on a redistricting plan to send to Governor Scott McCallum, a Republican. That triggered 2002 litigation in both federal court and state court. As a three-judge federal panel was considering the case, the Republican speaker of the Assembly, Scott Jensen, asked the state supreme court to intervene. Unlike their predecessors of the 1960s and 1970s, the justices declined, deferring to the federal court, which drew the maps.

### Power Play

After five decades of shifting political tides, the “red wave” election of 2010 was perfectly timed for Republicans. In the first midterm balloting under President Barack Obama, a Democrat, the GOP swept to big gains both nationally and statewide, taking over Wisconsin's lower house, Senate, and governor's office—the first time in 72 years that all three changed hands simultaneously.

That handed Republicans complete control of redistricting for the first time since the 1950s. But Democrats soon mounted recalls against six GOP senators in an effort to capitalize on opposition to 2011 Act 10, which had stripped most public-employee unions of nearly all collective-bargaining rights. Republicans retaliated by launching recalls against three Democratic senators.

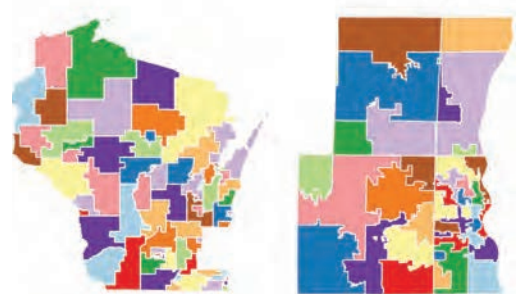
With the Senate divided 19–14, Democrats needed a net gain of three seats in the nine recall elections to retake the upper chamber. If redistricting proceeded on the usual timetable, Democrats would have a shot at influencing—or blocking—the legislature's maps.

Republicans swiftly upended the timetable. Instead of waiting for local governments to redraw wards based on tentative county supervisory districts, the GOP used census blocks to start drawing legislative districts as soon as detailed census data became available, then retroactively legalized that process (2011 Act 39).

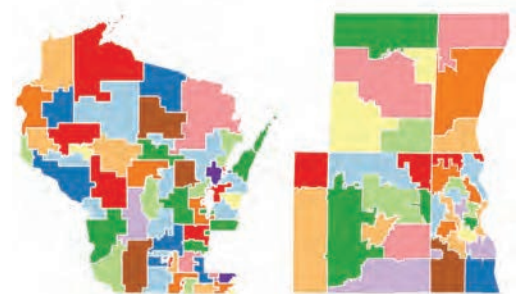
Aided by powerful new computer technology, Republicans created their maps in remarkable secrecy. They drafted the maps in the Madison law offices of Michael Best & Friedrich and required GOP lawmakers to sign nondisclosure agreements (NDAs) just to get a look at their own districts, without being allowed to see the entire draft maps.

## ASSEMBLY DISTRICTS BY DECADE

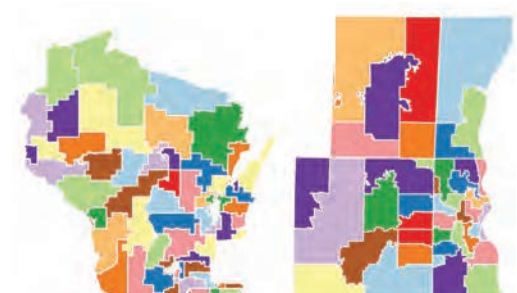
### 1990s



### 2000s



### 2010s



These maps show the boundaries of state Assembly districts during the past three decades (the insets on the right show the Milwaukee metro area, which is whited out to the left).

The court-drawn map of districts for the 2000s changed relatively little from the previous court-drawn map for the 1990s, but the map drawn by Republican legislative leaders for the 2010s differed significantly. In the 2010s, 35 percent of the state (by area) wound up in a different district, more than twice the 17 percent shift of a decade earlier. Similarly, the total perimeter of all Assembly districts, a measure of their boundaries' complexity, grew by 5.3 percent in the 2010s, more than three times the 1.7 percent increase the prior decade. The varying colors in the map are simply to make the district boundaries more visible.

Madison attorney Jim Troupis, who was involved in this process, maintains that the secrecy was nothing new. Like other legislation, district maps are commonly drafted behind closed doors rather than in open committee meetings, says Troupis, a former judge who also represented Republicans in the previous two rounds of redistricting.

But this time was different, because the GOP's unified control of state government meant that its maps would become law, argued Doug Poland, the Madison attorney who represented the Democratic side. By drawing maps in law offices and using NDAs, Republicans tried to cloak their work behind a veil of attorney-client privilege and legislative privilege that a three-judge federal panel partly rejected, but that Democrats could not fully remove until they later (and briefly) retook the Senate, says Poland, now litigation director for progressive legal organization Law Forward, in Madison.

The legislature approved the maps in July 2011, and Governor Scott Walker signed them into law the next month. This was the earliest that a state redistricting plan had been enacted since 1921, the LRB noted. Walker's signature came on the same day as most of the recall elections, where the Republicans maintained control of the Senate, but by a narrower (17–16) margin.

Democrats promptly filed suit to challenge the maps. In 2012, a three-judge federal court upheld most of the maps but ordered the boundary between Assembly Districts 8 and 9 to be redrawn to give Milwaukee's Hispanic community a supermajority in District 8. When the legislature didn't do so, the court approved a revised map for those districts, drawn by Kenneth Mayer, a University of Wisconsin-Madison political science professor who served as an expert witness for the Democratic side, Poland said.

In contrast to previous cycles, however, litigation did not end there.

Democrats saw the impact of the GOP maps in the 2012 election. Obama carried the state by seven percentage points on his way to reelection, and Democrat Tammy Baldwin defeated Tommy Thompson by six points to win a U.S. Senate seat. But Republicans boosted their majority in the Assembly from 58 to 60 seats (out of 99) and took back the state Senate from Democrats, who had briefly held the upper chamber after a 2012 recall election.

Republican Dale Schultz, a former Senate majority leader, calls the 2012 election “an epiphany” that led him to join forces with former

Senate Democratic leader Tim Cullen to work for changes in redistricting. “I realized we had invented a process that was thwarting the will of the voters,” Schultz said at an October 2020 “On the Issues with Mike Gousha” online program from Marquette University Law School.

“The 2011 round [of redistricting] was an intentional and extreme gerrymander, probably one of the most extreme in American history,” said Mayer, who also had been an expert witness for the Democrats in 2002.

However, as Republicans argued at the time, partisan gerrymandering wasn't illegal. Unlike gerrymandering based on racial discrimination, the courts had repeatedly refused to step in. The only glimmer of hope for gerrymandering opponents was that U.S. Supreme Court Justice Anthony Kennedy, a frequent swing vote, had suggested in 2004, in a case called *Vieth v. Jubelirer*, that the practice might be unconstitutional if someone could “define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights.”

With Kennedy's words in mind, then-University of Chicago law professor Nicholas Stephanopoulos and policy analyst Eric McGhee devised the “efficiency gap,” which measures “wasted votes”—votes in excess of the majority needed to win a seat—to demonstrate the impact of “packing” party loyalists into the fewest possible supermajority districts or “cracking” them between districts (the latter to prevent them from gaining a majority in any one district).

For example, if Democrats win one district with 70 percent of the votes, they have “wasted” 20 percent. If Republicans win two adjacent districts with 55 percent each, they have “wasted” only 10 percent of the combined vote. For all three districts together in this example, the efficiency gap favors the Republicans—and drawing the lines differently might have allowed the Democrats to win all three with approximately 53 percent each.

Based on the efficiency gap, Poland and Stephanopoulos convinced a three-judge panel in 2016 to strike down Wisconsin's Republican-drawn maps, the first time a federal court had ruled against a partisan gerrymander. In 2018, in *Gill v. Whitford*, the Supreme Court set aside the decision for failure of the plaintiffs to have shown adequate legal standing to proceed in federal court, but it sent the case back to the federal district court for further proceedings on the matter.

**Based on the efficiency gap, Poland and Stephanopoulos convinced a three-judge panel in 2016 to strike down Wisconsin's Republican-drawn maps, the first time a federal court had ruled against a partisan gerrymander.**

**If the high court wants a rule, it should be studied in detail, “not just based on the musings of Rick Esenberg and Scott Jensen,” Poland said.**

While *Gill* was returning to the lower court, Kennedy retired. In 2019, his successor, Justice Brett Kavanaugh, joined in a 5–4 decision, written by Chief Justice John Roberts: *Rucho v. Common Cause* ruled that “partisan gerrymandering claims present political questions beyond the reach of the federal courts.”

Within a week, the three-judge federal district court in Wisconsin dismissed the *Gill* case.

### Redrawing the Rules

Given the history, no one expects a bipartisan agreement to emerge from the current round of redistricting. Republicans still have a firm grip on both houses of the legislature, but a Democratic governor, Tony Evers, holds the veto pen.

“The probability of an actual compromise between the legislature and the governor is approximately nil,” Mayer said.

“Adopting a new map for redistricting after the 2020 census will likely be difficult and any dispute will end up in the courts (as it did the last time Wisconsin had divided government in 2001),” the conservative Wisconsin Institute for Law and Liberty (WILL) wrote in support of a petition for a new state supreme court rule on redistricting cases.

WILL filed the petition on behalf of Jensen, the former GOP speaker of the Assembly who tried to shift the 2000s redistricting litigation from federal to state court. When the justices demurred back then, they said they did not have procedures in place to handle such a case. WILL and Jensen, now a school-choice lobbyist, said it was time to create such procedures.

The court previously had attempted to do so. In 2003, the justices named a committee of legal and political science professors—including Mayer and Peter Rofes, a Marquette University law professor—to propose a rule. The committee came back with its recommendations in 2007, and, in response to justices’ concerns, followed up with a revised version in 2008.

The committee’s proposed rule called for a panel of five randomly selected state appellate judges to hear redistricting challenges—and if necessary, draw new maps. Their decision could be appealed to the Wisconsin Supreme Court. That structure recognized that such cases require substantial fact-finding, and that the supreme court and its counterparts “do their best work when others have taken their shots before” and “cleared away the underbrush,” Rofes said. But in 2009, the justices rejected that proposal, 4–3, with conservatives in the majority.

“I do not think the court, this court, which consists of elected officials, really ought to be jumping into this political thicket,” said Prosser, the former Republican speaker of the Assembly who by then was a justice. He also called the rule “almost like an invitation [to the legislature] to fail” at redistricting, since the court would be ready to step in if lawmakers were deadlocked.

Jensen’s proposed rule, by contrast, would provide for the supreme court to exercise original jurisdiction over redistricting cases, although the justices could appoint a circuit judge or special master if they determined facts to be in dispute. His petition is supported by Republican legislative leaders and the state’s five GOP congressmen.

WILL President Rick Esenberg called redistricting “a quintessential original action case,” because of its statewide importance and the “considerable urgency” to resolve all redistricting issues before June 1 of the election year, when candidates can start circulating nominating petitions for fall elections.

That urgency could be even greater in this cycle, because of a major delay in releasing census data. Ordinarily, the Census Bureau would have sent detailed data to all states by March 31 of this year. But coronavirus complications repeatedly pushed back that timeline, and in February, the bureau said its new deadline would be September 30, sharply compressing the time available for legislative and court action.

Law Forward, which has led the charge against the proposed rule, is backed by Evers and others who filed hundreds of comments in opposition, including lawyers, academics, and progressive groups. If the high court wants a rule, it should be studied in detail, “not just based on the musings of Rick Esenberg and Scott Jensen,” Poland said.

Esenberg said redistricting is a state question that belongs in state court. Poland said three-judge federal panels have demonstrated experience and expertise in redistricting issues. He and Esenberg agree, however, that state and federal courts have concurrent jurisdiction and plaintiffs can try to get relief in either venue.

Underlying the legal debate is the political question whether either side has an advantage in either court. WILL has a recent history of filing original-jurisdiction actions with the state supreme court, and Poland called its proposed rule “forum-shopping in the extreme.” Esenberg denied this, saying that the independent streak shown by Justice Brian Hagedorn shows the court isn’t that predictable.

In fact, Hagedorn lamented the trend toward original actions in rejecting an unrelated WILL-filed lawsuit in December, writing, “This court is designed to be the court of last resort, not the court of first resort.”

And at a January 2021 public hearing on the proposed rule, Chief Justice Patience Roggensack, as she had in 2009, expressed deep skepticism at the idea of the court’s drawing the maps. As of late April, the court had not announced a decision on the rule.

Another previously rejected idea that could resurface is redistricting by joint legislative resolution to bypass Evers. Although the state supreme court found that tactic unconstitutional in the 1964 *Reynolds* case, the progressive *Wisconsin Examiner* reported in 2019 that Republicans were considering it again. GOP leaders denied discussing that option but didn’t completely rule it out.

## Commissioning a Map

With that history in mind—and similar experiences in other states—it may not be a surprise that some people want to find a less contentious and less politicized way to handle redistricting. Many cite Iowa as a model. Since 1981, that state’s maps have been drawn by its nonpartisan Legislative Services Agency, under the guidance of a bipartisan commission, subject to approval by lawmakers. However, no other state has adopted a similar system. In Wisconsin, Cullen and Schultz cosponsored a bill in 2013 to assign redistricting to the LRB, but that bill died in committee without a hearing.

A more common method is the use of a bipartisan commission, often including independents or third-party representatives, to draw the lines. In 14 states, those commissions have primary responsibility for legislative (and often congressional) redistricting, without lawmakers’ approval. Politicians are prohibited from serving on the most independent of these commissions (in Alaska, Arizona, California, Colorado, Hawaii, Idaho, Michigan, Montana, and Washington), an approach upheld by the Supreme Court in a case from Arizona. By contrast, five other states (Arkansas, Missouri, New Jersey, Ohio, and Pennsylvania) not only have politicians on their commissions but also sometimes include their governor and other high-ranking officials on them.

Another five states (Connecticut, Illinois, Mississippi, Oklahoma, and Texas) have backup

commissions, typically consisting of top state officials, that swing into action if lawmakers cannot agree on maps by a set deadline. Five more states (Maine, New York, Rhode Island, Utah, and Vermont) have constitutionally or legislatively authorized advisory commissions whose work is subject to lawmakers’ approval.

In Wisconsin, creation of some sort of “nonpartisan procedure” for redistricting has been endorsed in advisory referendum questions approved by voters in 28 counties and 19 municipalities and in resolutions adopted by 54 of the state’s 72 county boards. That idea also was backed by 72 percent of respondents in a 2019 Marquette Law School Poll.

Wisconsin’s legislature, however, hasn’t agreed to give up any of its redistricting authority. And as Mayer noted, voters here don’t have the power to bypass lawmakers and initiate a referendum on a constitutional amendment by petition, the way Arizona, California, Colorado, and Michigan established their commissions in recent years. Instead, Evers followed Virginia’s lead in creating an advisory commission by executive order. His nine-member People’s Maps Commission has been holding hearings to take comments from experts and residents about how the lines should be drawn.

Evers empowered three retired judges to pick commission members and banned politicians and lobbyists from serving on the panel, but Republican legislative leaders slammed the commission as partisan and vowed to ignore its maps. Cullen, the Democrat speaking at the October 2020 Marquette forum, said that the panel erred by inviting Obama’s former attorney general, Eric Holder, a national leader of Democrats’ redistricting and fundraising efforts, to address its first meeting. Evers’s office did not respond to requests for an interview with the commission chairman, Milwaukee physician Christopher Ford.

Still, the commission’s maps could play a role in any litigation over the issue. Schultz said they should show “what a fair map looks like.”

Troupis, the longtime Republican lawyer, said it would be preferable for elected officials to negotiate a compromise on redistricting without judicial intervention, as the state constitution intends. “The courts are a poor substitute for the political process,” Troupis said. “We do the best we can as lawyers and judges.” ■

**With that history in mind—and similar experiences in other states—it may not be a surprise that some people want to find a less contentious and less politicized way to handle redistricting. Many cite Iowa as a model.**



# Red State, Blue State

Densely populated Democratic cities lead to GOP redistricting edge.

In Wisconsin's often-heated redistricting debates, one fact is frequently overlooked. Even if Republicans had not gerrymandered legislative districts, they probably still would hold a majority of seats in both houses of the Wisconsin legislature—likely not as large or as safe a majority, but a majority still.

The reasons for this are rooted in the state's political geography, its ideological split personality, and its urban-rural divide. These are nuances that get lost in some of the shorthand characterizations of Wisconsin as a “battleground,” “purple,” or “swing” state, or as a place where Democrats win most of the votes while Republicans win most of the legislative seats.

“My preferred description is that Wisconsin, politically speaking, is not one moderate state; rather, it is one very conservative state overlapping another very liberal one,” said John D. Johnson, research fellow in the Lubar Center for Public Policy Research and Civic Education at Marquette Law School.

Historically, “Wisconsin gave the nation the rabid anti-communist Sen. Joseph McCarthy at the same time Milwaukee elected its third mayor from the Socialist Party,” Johnson noted at an “On the Issues with Mike Gousha” online program at Marquette Law School in February.

That divide reflects the increasing tendency of Democrats to concentrate in cities, while

**“My preferred description is that Wisconsin, politically speaking, is not one moderate state; rather, it is one very conservative state overlapping another very liberal one,” said John D. Johnson . . .**

Republicans are more spread out through rural and suburban areas, Johnson said. He called this “asymmetrical polarization,” pointing out that 21 percent of Democrat Joe Biden's 2020 Wisconsin votes came in wards that he carried by at least 50 percentage points. That compares with Democratic presidential candidate Al Gore, who in 2000 received only 9 percent of his vote in Wisconsin from wards with such lopsided results.

This is a national trend. In his 2008 book, *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart*, journalist Bill Bishop argued that, since the 1960s, Americans have been segregating themselves into areas where others agree with them politically.

But in his own 2019 book, *Why Cities Lose: The Deep Roots of the Urban-Rural Political Divide*, political scientist Jonathan Rodden contended that the split goes much further back, to the 19th century's urban concentration of unionized manufacturing workers, through the 20th century's migration of immigrants and people of color to cities, culminating with the 21st-century preference of highly educated “knowledge workers” for urban neighborhoods—all bolstering big-city Democratic coalitions.

However, that urban strength becomes a statewide weakness for Democrats when legislative districts are drawn, said Johnson and Rodden, a professor at Stanford University's Hoover Institution. Because various state and federal

laws and court decisions require districts to be compact and contiguous, to respect city and county lines wherever possible, and to maximize opportunities for racial and linguistic minorities to elect representatives, Democrats typically will be packed into a disproportionately small number of predominantly urban districts, they said.

Some on the GOP side cite this demographic logic as proof that they didn't do anything wrong in their 2011 Wisconsin legislative redistricting.

"A political result does not make it political gerrymandering," said Madison attorney Jim Troupis, who worked on the 2011 maps and represented Republicans in the previous two rounds of redistricting. "Because legislative districts are geographic to a significant degree, the results will naturally reflect the geography that the state has."

Even the maps drawn by a federal court after the 2000 census skewed unintentionally in favor of Republicans, conceded Law Forward litigation director Doug Poland, the Madison attorney who represented Democrats in two lawsuits over the 2011 maps.

## Running Up the Score

But the Republican-drawn 2011 maps went far beyond reflecting the GOP's built-in advantage, said Johnson and Kenneth Mayer, a University of Wisconsin-Madison professor of political science.

Although "cities tend to be much more Democratic . . . , that does not come close to explaining the size, the scope, the endurance of the gerrymander," said Mayer, who has served as an expert witness for Democrats in redistricting litigation.

"Over the past decade, mathematicians and quantitative social scientists have developed a set of sophisticated methods for measuring the partisan bias of maps," Johnson said. "No matter the technique used, every examination of Wisconsin's state Assembly map reveals a remarkable gerrymander."

Mayer and Johnson pointed to the work of Jowei Chen, a University of Michigan political scientist who studied the Wisconsin maps. "Wisconsin's natural political geography, combined with a nonpartisan process following traditional districting principles, could plausibly produce a plan with a modest amount of Republican-favoring electoral bias," Chen wrote in a 2017 article in the *Election Law Journal*. However, "these levels of natural electoral bias pale in comparison to the much more extreme electoral bias exhibited by the [GOP] plan."

Based on his own research, Johnson said, "The gerrymandered map drawn in 2011 probably hasn't cost the Democrats control of the Assembly in any election this decade, with the possible exception of 2012. Nonetheless, it has inflated the Republican majority in the close elections of 2012, 2018, and 2020." And, in each election, he said, it has meant that many Wisconsinites have not had real competition for their votes.

For example, a different map might energize Democrats to compete in more districts that they now leave uncontested, Johnson said, and it might enable them to raise more campaign cash, while increasing the chances that they could retake the majority if the statewide political tide turned in their favor.

But alternative approaches pose other challenges.

In his executive order in 2020 creating the People's Maps Commission, the Democratic governor, Tony Evers, directed the new advisory body to propose maps that "shall, whenever possible," be "free from partisan bias and partisan advantage."

To fulfill that mandate, former Democratic Assembly member Fred Kessler argued, the commission should ignore traditional rules and guidelines that limit crossing county and municipal lines. It should look at partisan voting data to intentionally draw a certain number of competitive districts, Kessler said in a column written for *The Fulcrum* and reprinted in the *Wisconsin State Journal*.

"I think that's a terrible idea," said Kessler's fellow Democrat, former Senate Majority Leader Tim Cullen. Trying to engineer districts that way "would be gerrymandering competitiveness," Cullen said at an October 2020 "On the Issues with Mike Gousha" program.

Wisconsin Institute for Law and Liberty President Rick Esenberg agreed that mandating competitive districts would be just "a different form of gerrymandering."

Iowa's Legislative Services Agency is prohibited from using election results in redistricting, and maps drawn by the nonpartisan civil servants still have increased competitiveness, former Senate Republican leader Dale Schultz said during the October program.

"No map is perfect," said Schultz, who has joined forces with Cullen to work for changes in redistricting. But once maps are drawn, he added, "It will be obvious what's a fair map and what's not a fair map." ■

**[T]hat urban strength becomes a statewide weakness for Democrats when legislative districts are drawn . . . .**



# Closer to Home

Local governments go first—usually—in Wisconsin redistricting.

Every 10 years, the redistricting spotlight is trained on the state legislatures and Congress. But in Wisconsin, the process typically starts at the local level, and every municipal and county government plays a role.

In the 2010 cycle, however, the Wisconsin legislature pushed the locals out of the way to dash ahead with unusually swift redistricting plans for itself and the state's U.S. House seats. And in the current cycle, the coronavirus pandemic has slowed census results so much that local governments might not be able to finish their work in time for the spring 2022 elections. Meanwhile, Wisconsin's two largest counties have established redistricting commissions—a model that their voters, through advisory referendums, have urged the state to adopt as well.

Like the legislature, local governments must keep districts substantially equal in population, draw districts so that they are compact and contiguous, and respect the voting rights of racial and linguistic minorities. In addition to the laws and court decisions that guide state and federal redistricting, a 1965 decision by the Wisconsin Supreme Court struck down most counties' systems of allocating supervisors by individual towns and, for villages and cities, by municipal wards; as summarized by the state's Legislative Reference Bureau (LRB) in a 2016 report, the result of those systems had been that "members of the county board represented constituencies that were sometimes vastly different in population."

Under a process established in the 1970s, Wisconsin gives its counties the first shot at using the census data. Within 60 days of receiving those data—but no later than July 1, current state law says—the counties must tentatively redraw the lines of their supervisory districts. Those supervisory district maps are shared with the cities, villages, and towns within each county. The municipal governments then have another 60 days to use the tentative county board maps to redraw lines for their voting wards, the equivalent of precincts in other states.

Because nobody is elected from the wards themselves, they aren't required to have substantially equal populations like aldermanic, supervisory, and legislative districts, the Wisconsin LRB explained in its guidebook, *Redistricting in Wisconsin 2020*. Instead, state law sets acceptable population ranges for wards according to the size of each municipality.

**Like the legislature, local governments must keep districts substantially equal in population, draw districts so they are compact and contiguous, and respect the rights of racial and linguistic minorities.**

While wards must be adjusted if they fall outside those population ranges, they otherwise aren't supposed to change much, to ensure consistency and convenience for voters, the guidebook said. But they must be compact and contiguous and should be set up to accommodate the creation of aldermanic, supervisory, legislative, and congressional districts that meet all legal requirements, including protecting the voting rights of people of color, according to the guidebook.

Adoption of the ward maps sets off another 60-day clock, this one for cities to redraw aldermanic districts and for counties to finalize their supervisory districts. That's not an issue for villages, towns, or nearly all school districts, which elect their board members at large from the entire community. Some smaller cities also elect all their aldermen at large, while Eau Claire elects five city council members from districts but elects the council president and five other members at large.

However, redistricting timelines do matter—in different ways—for the Milwaukee Public Schools (MPS) and the Racine Unified School District (RUSD) school boards. Since the early 1980s, state law has required MPS, Wisconsin's largest K–12 school system, to elect eight of its nine board members from districts, leaving just one seat elected at large. The state legislature shifted RUSD to electing all nine of its board members from districts as well, starting with the 2016 election.

At the time the first of these laws was adopted, the Milwaukee Common Council had 16 members, and the law specified that each of the eight school board districts would consist of two aldermanic districts. Within a few years, however, the law was changed to empower the Milwaukee school board to redistrict itself the same way that common councils do, and on the same schedule, within 60 days following the finalization of ward maps.

That was necessary because Milwaukee's council wasn't required to remain at 16 members or any other number divisible by eight. The redistricting process gives county boards and common councils the chance to change their sizes, and the Milwaukee Common Council took that opportunity to grow from 16 to 17 members, starting with the 1992 election, and then to shrink to 15 members, beginning with the 2004 election.

Similarly, the Milwaukee County Board of Supervisors dropped from 25 to 19 members, starting with the 2004 election, and then to 18 members, since the election in 2012.

For the upcoming redistricting cycle, Milwaukee Common Council President Cavalier Johnson and Milwaukee County Board of Supervisors Chair Marcelia Nicholson said earlier this year that they weren't aware of any efforts to change the sizes of their respective bodies. Madison voters opposed resizing their city council in an April 2021 advisory referendum. The issue has been discussed for such bodies as the West Allis Common Council and the Dane, Jefferson, and Marathon county boards.

## New Directions

The usual process changed in a big way for the last redistricting cycle, and more changes are ahead this time. A decade ago, Republicans were in control of state government and eager to cement that hold by approving new legislative and congressional district maps before a series of 2011 Senate recall elections that threatened their majority in the upper chamber, the LRB noted in its 2016 report.

Instead of waiting for local governments to redraw ward lines, GOP lawmakers used census blocks to start drawing their own maps. Those maps, approved in July 2011, were accompanied by a new law, 2011 Act 39, which retroactively authorized the new process and required local governments to adjust their ward lines to fit the legislative and congressional districts, instead of the other way around.

This time, the political calculus is different, with Republicans still running the legislature but Democrat Tony Evers in the governor's office and no recall elections on the horizon. GOP legislative leaders haven't said whether they plan to again invoke the Act 39 process, but the LRB guidebook warns local governments that it is possible.

Unlike common councils, county boards, and the MPS board, the Racine-area school board, RUSD, is required to follow the same process as Act 39, using census blocks to redistrict itself within 60 days after detailed census results are available, without waiting for ward maps.

A larger concern for the current redistricting cycle is the pandemic-driven delay in census results. That has repeatedly pushed back the U.S. Census Bureau's release of detailed redistricting data to the states. As of late April, those data were expected in late September, about six months later than usual.

That would force every county in Wisconsin to miss its statutory July 1 deadline to adopt a tentative supervisory district map. And if local governments then took the full 60 days each to draw up preliminary county board maps (and the RUSD map), then ward maps, and then aldermanic, MPS board, and final supervisory maps, they would not be done in time for the February 2022 primaries, let alone by December 1, 2021, the first day for candidates in the spring 2022 elections to circulate nominating petitions. As a result, the spring 2022 elections might have to use the existing maps, said Joseph Kreye, a senior coordinating attorney at the LRB.

In a January 2021 email, shortly after the Census Bureau announced a delay to late July, Mark O'Connell, executive director of the Wisconsin Counties Association, said, "We are aware of this issue and are working on a fix which likely will require legislative action."

Yet another new development is the rise of redistricting commissions to redraw the Dane and Milwaukee county board maps, a process approved by supervisors in each of those counties in 2016. Although the commission system is best known for its use in legislative and congressional redistricting in certain states, it is catching on in a growing number of cities and counties, primarily in California.

Milwaukee County's commission will consist of six retired judges, appointed by Nicholson and confirmed by the board, with technical assistance from the Southeastern Wisconsin Regional Planning Commission staff. Dane County's commission will consist of 11 citizens (none of whom is involved in formal politics or lobbying), appointed by the board chair and the county clerk and confirmed by the board, with technical assistance from county planners. In each county, the maps must be approved by the county board, and the commission will get at least one chance to redraw the map if the board rejects its first proposal.

Milwaukee County also has offered its system, free of charge, to help any municipality in the county redraw its ward and aldermanic district maps. Glendale was the first suburb to accept the county's offer. The city of Milwaukee is expected to use its normal process, with help from the city's Legislative Reference Bureau, its common council president said. The Milwaukee school board also plans to use the city bureau, as it did in the last cycle, assistant board clerk Jillian Kawala said. ■

**The usual process changed in a big way for the last redistricting cycle, and more changes are ahead this time.**





# House Rules

**Drama is rare in Wisconsin congressional redistricting.**

If Wisconsin's state legislative redistricting process seems as genteel as a mixed martial arts fight to the death, redrawing its U.S. House district lines has been more often like a friendly round of golf.

While legislative maps emerged from gridlock, veto battles, and lawsuits, congressional maps were long produced through bipartisan backroom meetings, approved by both houses of the legislature, and signed by the governor, with little if any significant litigation. That process didn't break down until 2012, when a court challenge failed, with far less attention than that given to the legislative maps being disputed in the same case.

One reason for the difference in intensity is the difference in stakes. Legislative redistricting can play a major role in determining control of both houses of the state legislature for a decade. By contrast, only in one specific and rare situation could majority control of an individual state's House delegation have an unquestionable impact.

When no presidential candidate commands a majority of the Electoral College, the U.S. Constitution calls for the House to choose a president from among the top three candidates, with members voting as state delegations rather than as individuals. But that has happened only twice in American history: after the 1800 election, when the House broke a tie between Thomas Jefferson and Aaron Burr in Jefferson's favor; and after the 1824 election, when none of the four main candidates won an Electoral College majority and the House picked runner-up John Quincy Adams over plurality winner Andrew Jackson. Otherwise, congressional redistricting is a small piece of a much larger nationwide puzzle, and Wisconsin is too closely divided to have much impact on control of the House.

"If you have a stable electorate," Wisconsin's eight-member delegation will have "a pretty even split" between the two major parties, either 4–4 or 5–3, and that's "not worth fighting about," said

**One reason for the difference in intensity is the difference in stakes.**

Milwaukee attorney Thomas L. Shriner, Jr., who represented House Republicans in the last four rounds of redistricting.


History bears out Shriner's point about the even split. The House delegation was divided 4–4 between Democrats and Republicans for the first four years after Wisconsin dropped to eight seats in 2002. Democrats enjoyed a 5–3 majority for the next four years, until Republicans gained a 5–3 advantage in the 2010 "red wave" election, maintaining that edge since then.

Similarly, over the prior 30 years, when the state had nine House seats, the delegation was split 5–4 in Democrats' favor for 20 years and 5–4 in Republicans' favor for four years. Only for six years did either party hold a 6–3 majority: the Democrats, for four years after scoring big gains nationwide in the 1974 backlash against GOP President Richard Nixon's Watergate scandal, and the Republicans, for two years after their party captured the House in 1994, the midterm election during Democratic President Bill Clinton's first term.

As a result, "congressional gerrymandering has a different motive than legislative gerrymandering," former Wisconsin Senate Democratic leader Tim Cullen said at an October 2020 "On the Issues with Mike Gousha" program presented by Marquette University Law School.

"Legislative gerrymandering is done for partisan purposes, to help the party in power. That's what we have in Wisconsin right now. But congressional gerrymandering . . . is what I call incumbent gerrymandering," Cullen said. At least since the 1970s, incumbent members of Congress essentially have been drawing their own maps, and "they try to make every seat safe," he said.

"The congressional representatives figured out a long time ago that they wanted to protect themselves as incumbents," said Shriner, who teaches as an adjunct professor of law at Marquette. "People scratch each other's backs."



## Drawing by Numbers

Of course, no such back-scratching is required by the Constitution or related federal laws and court decisions, which set the basic guidelines for reapportioning and redistricting the House.

First, results of the decennial national census are used to determine how many of the 435 House seats are assigned to each state. Under this process, known as reapportionment, Wisconsin dropped from 10 seats to nine after the 1970 census, and from nine to eight seats after the 2000 census, as its proportionate share of the nation's population declined.

In 2020, then-President Donald Trump threw a new wrinkle into the system by ordering the Census Bureau to exclude undocumented immigrants from the reapportionment figures, notwithstanding the bureau's constitutional mandate to count "the whole number of persons." This order was challenged in court, delayed by coronavirus complications, and ultimately reversed by President Joe Biden.

In late April, the Census Bureau released population totals establishing the size of the congressional delegation for each state. The result is that Wisconsin will continue to have eight members of the House for the next decade.

After this reapportionment, the Census Bureau sends each state the detailed data needed to draw up House districts in the 43 states that have more than one seat in that chamber. As of late April, those figures were expected to arrive by September 30, six months behind the normal timeline.

For the most part, the requirements for drawing congressional districts are the same as those for state legislative districts, in that they must be compact and contiguous and cannot impair the voting rights of racial or linguistic minorities. Both types of districts are governed by such landmark decisions as the U.S. Supreme Court's "one person, one vote" holding in *Baker v. Carr* (1962).

One significant difference, however, is that while legislative districts need be only substantially equal in population, congressional districts within each state must be almost exactly equal, according to *Redistricting in Wisconsin*, a 2016 report by the Wisconsin Legislative Reference Bureau (LRB).

Before *Baker v. Carr*, the state legislature didn't bother to change congressional district lines from 1931 to 1963, and by the 1960 census, the largest districts had more than twice the population of the smallest, the LRB report says. By contrast, the populations of state legislative districts drawn in 1963 varied by no more than 25,000 residents.

**... this level of agreement was achieved by incumbent congressional representatives submitting their own plans to the legislature over those four decades.**

The absolute-equality standard was established under decisions of the high court in 1964 and 1983 and has been reflected in Wisconsin redistricting plans from the 1990s on. For example, after the redistricting following the 2010 census, six of Wisconsin's House districts had 710,873 residents each, and the other two each had 710,874, the LRB report notes.

## History Behind the Lines

After the 1970, 1990, and 2000 censuses, congressional redistricting plans passed both houses of the state legislature and were signed by the governor without litigation, according to the LRB report. In the 1980 cycle, then-Governor Lee Dreyfus initially vetoed the plan, triggering a federal lawsuit, but he later signed a revised plan approved by the legislature.

As Shriner and Cullen observed, this level of agreement was achieved by incumbent congressional representatives submitting their own plans to the legislature over those four decades. In the 1980s, 1990s, and 2000s, veteran Democratic representative Dave Obey said, he and another Wisconsin member of Congress, Republican James Sensenbrenner, "would sit down as 'gentlemen' and redraw the lines to account for shifts in population without creating major disruptions," Dave Zweifel of the Madison *Capital Times* wrote in a 2011 essay.

That changed after Obey's retirement in 2011. Although Sensenbrenner was still the delegation's senior Republican, then-Representative Paul Ryan took the lead on redistricting for the GOP side, said Shriner and Madison attorney James Olson, the latter of whom represented House Democrats during the 2010 redistricting cycle.

With their party controlling both houses of the Wisconsin legislature and the governor's office, "the Republican members . . . expressed their desire to draw districts that would maximize the chances for Republicans to be elected," although they conferred at least briefly with their Democratic colleagues. So found a three-judge federal court in its 2012 decision in *Baldus v. Wisconsin Government Accountability Board*, the lawsuit Democrats filed that challenged both the legislative and congressional maps.

The change was most dramatic in Obey's former 7th District, where GOP Representative Sean Duffy had succeeded him. Traditionally Democratic areas were swapped with more-Republican areas in neighboring districts to strengthen Duffy's position, Olson said.

Obeys was appalled, according to Olson and Zweifel. But, as in previous years, the congressional plan was approved by the legislature and signed by the governor, then Scott Walker. And with no clear legal standard outlawing gerrymandering for partisan purposes, the map was upheld by the court in *Baldus*.

## What Happens Now?

In the current round of redistricting, Republicans again control both houses of the legislature, but the governor's office is in the hands of Democrat Tony Evers, who has named an advisory commission to propose congressional and legislative maps.

It is not clear whether incumbent House members will again draw their own map; neither Rep. Glenn Grothman, the senior Republican, nor Rep. Ron Kind, the senior Democrat, responded to requests for comment on the matter.

As with legislative redistricting, the congressional districts will be influenced to a significant degree by the state's political geography, *Milwaukee Journal Sentinel* Washington Bureau Chief Craig Gilbert wrote in a December 2020 analysis. "On the whole, Democrats begin the next redistricting process with a disadvantage: their voters are disproportionately clustered within two districts—one anchored by Milwaukee and one by Madison," wrote Gilbert, a former Lubar Fellow at Marquette Law School. "The result in the current map is two ultra-blue districts (the 2nd and 4th), five pretty Republican districts (the 1st, 5th, 6th, 7th and 8th), and then the purple but Republican-trending 3rd.

"The signature political trends of the past decade—the growing urban-rural gap and the emergence of the suburbs as the hottest partisan battleground—will color the fight over the next congressional map," Gilbert concluded.

Those trends have contributed to an increasing GOP strength in Kind's western 3rd District, Rep. Tom Tiffany's northern 7th District (formerly represented by Duffy), and Rep. Mike Gallagher's northeastern 8th District, while Rep. Scott Fitzgerald's suburban 5th District (formerly represented by Sensenbrenner) is still rather red but no longer as overwhelmingly Republican as it used to be, Gilbert wrote.

As a result, redistricting is unlikely to change the Democratic hold on Rep. Mark Pocan's Madison-based 2nd District and Rep. Gwen Moore's Milwaukee-based 4th District, or the Republican dominance in the 5th, 7th and 8th districts, Gilbert said. But how the lines are drawn could affect the competitiveness of Kind's district, GOP representative Bryan Steil's southeastern 1st District, and possibly even Grothman's east-central 6th District, Gilbert suggested. That's where parties are most likely to jockey for political advantage, something that Shriner sees as a normal part of redistricting.

"I don't know why anyone would be surprised that a political question would get decided along the lines of politics," he said. "It's an intensely political business." ■

**"The result in the current map is two ultra-blue districts (the 2nd and 4th), five pretty Republican districts (the 1st, 5th, 6th, 7th and 8th), and then the purple but Republican-trending 3rd."**

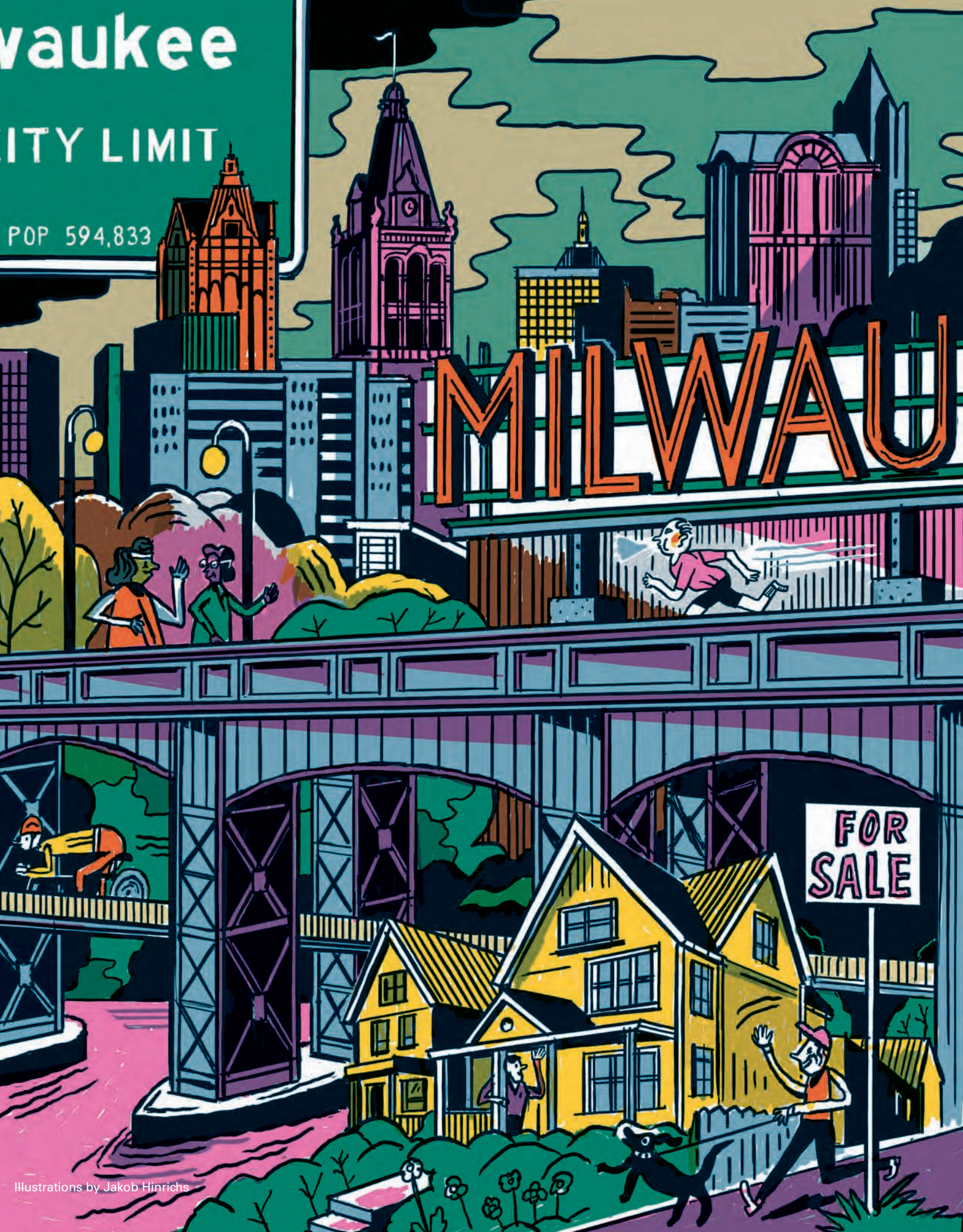
Craig Gilbert



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# WHO OWNS THE HOUSE NEXT DOOR?

OUT-OF-STATE LANDLORDS FIND MILWAUKEE A LUCRATIVE PLACE TO DO BUSINESS, EVEN DURING A PANDEMIC.

BY MIKE GOUSHA AND JOHN D. JOHNSON

Six years ago, Phoebe Alexander returned from an out-of-town family reunion to find a letter waiting at her apartment on Milwaukee's northwest side. It was from the city. The owner of the duplex where she lived had failed to pay taxes. The city was taking ownership of the property near 90th and Silver Spring.

The news was jarring. Alexander, her husband, and their son had rented the lower level of the duplex for 11 years. But city housing officials didn't want the Alexanders to leave. Instead, they asked them if they wanted to buy the duplex.

After thinking it over, the couple said "Yes." Today, that decision to own instead of rent is paying off. "I'm saving a couple hundred dollars every month," Alexander told us. "It's cheaper in the end. There are just so many great benefits to being a homeowner."

This is a story of what's possible in Milwaukee: the prospect of owning your own home while saving money at the same time. But it is also a story about a new kind of homebuyer in Milwaukee—one that has little in common with Milwaukeeans such as the Alexanders and is increasingly in competition with local residents.

The full consequences of the pandemic on Milwaukee's housing market have yet to be felt. A predicted surge in evictions is almost certain to be one of them. But another trend worth watching is what some have characterized as a

legal "land grab": the acquisition of thousands of affordable city homes and duplexes by real estate investors who do not live in Wisconsin.

Previous research by Marquette Law School's Lubar Center for Public Policy Research and Civic Education documented the plummeting number of owner-occupied residential properties in Milwaukee since the Great Recession. From 2005 to 2020, the owner-occupied percentage fell from 80 percent to 69 percent. Parts of the north and west sides saw declines double that.

But equally noteworthy is who is buying those residential properties. A new breed of distant, investment landlord has emerged. Since 2005, the number of residential properties owned by out-of-state landlords has quadrupled, from 1,300 to 6,000. Most of the properties are single-family homes or duplexes.



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Out-of-state landlords are continuing to acquire properties, even as the holdings of other landlords are shrinking. Each line shows the number of properties owned by different kinds of landlords, compared to 2015, and thus the change in property ownership over just a five-year period.

### The increasing number of out-of-state landlords in Milwaukee reflects a nationwide trend.

Initially, these out-of-state buyers mainly purchased properties that were recently owner-occupied. But when the number of foreclosures finally declined, the out-of-state landlords pivoted and began buying more properties from local landlords, often in bulk deals. Some are conventionally bank financed. Others are paid for strictly with cash. Most of the properties are valued at less than \$100,000, often considerably so.

These are not the “flips” made famous by HGTV, where investing tens of thousands of dollars in improvements leads to profitable re-sales. A check of work-permit and property records for the last four years shows that out-of-state landlords applied for considerably fewer work permits than owner occupiers and even local landlords.

Instead, these properties are used to produce a steady stream of income for distant investors, with landlords often charging rents hundreds of dollars higher than what it would cost for someone—with just a small down payment—to own the home. The result is that for some who can least afford it, Milwaukee is a more expensive place to live.

### What the Record Shows on Investors

As part of the Milwaukee Area Project at Marquette Law School’s Lubar Center, we compiled and analyzed public records and data with the hope of answering several key questions:

- Why are these out-of-state investors doing business in Milwaukee?
- Have they continued to purchase homes during the pandemic?
- And how do the costs of renting versus owning compare?

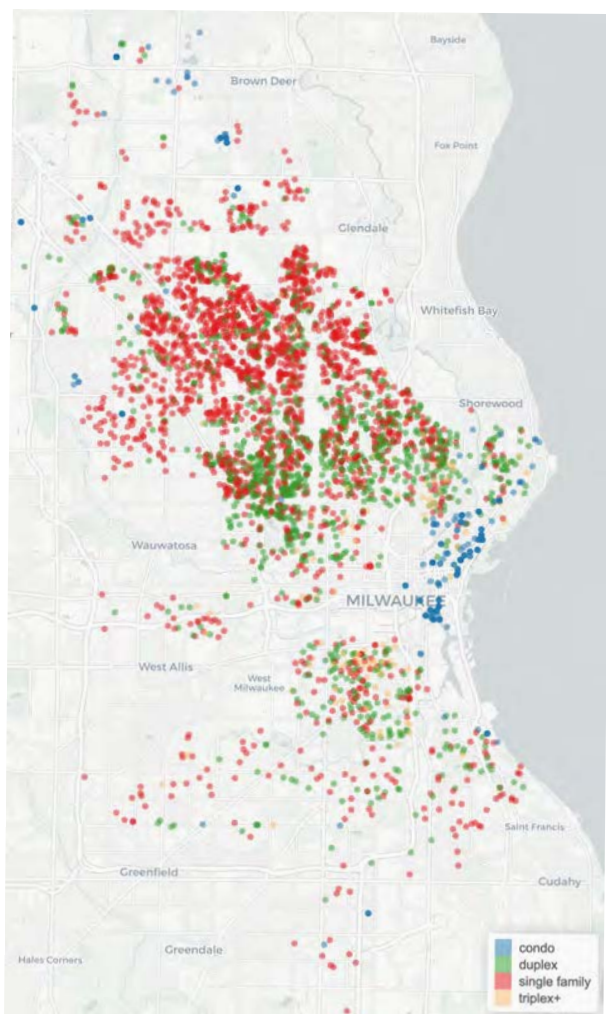
First, the backdrop. The Great Recession produced a nationwide housing reset. In the years following the housing crisis, Wall Street-backed investment groups purchased large numbers of foreclosed properties in cities such as Los Angeles, Phoenix, and Las Vegas. During a program at the Law School’s Lubar Center last fall, we talked with the author of *Homewreckers*, journalist Aaron Glantz, who detailed the business model for these new housing investment LLCs. Glantz said that they typically purchased newer homes in suburban areas with warm climates and significant job growth. And then they rented them, sharply raising monthly rents.

Milwaukee offers a different spin on the housing-as-investment model. Investors buy older, inexpensive properties, hold them, and earn steady income from renting them.

“You not only need to be worried about a land grab with homeowners losing their homes,” Glantz told us, “but you also need to be worried about mom-and-pop landlords, people who live in the community and have a stake in the community, losing their rental property and having it sucked up by people who live far away.”

The increasing number of out-of-state landlords in Milwaukee reflects a nationwide trend. Single-family home rentals are a rapidly growing business model. In Milwaukee, their number has more than doubled since 2005. Currently, 18,800 single-family homes are being rented inside the city limits. About half are valued at \$75,000 or less. About 5,000 homes are valued at \$50,000 or less.

For now, ownership of Milwaukee’s rented single-family homes and duplexes remains diffuse, spread among many different owners. But there are signs of consolidation. We estimate that a decade ago, the top 10 landlords in Milwaukee owned a total of fewer than 900 houses. Now they own some 1,800. Part of that consolidation is being



This map shows the Milwaukee homes acquired by all out-of-state owners since 2015.

fueled by the growing presence of out-of-state landlords. Ten years ago, none of the 20 largest landlords in the city was from outside Wisconsin. Today, six are from out of state.

Our analysis shows that one of every seven landlord-owned homes in Milwaukee is now owned by people living out of state, and that trend could accelerate further. Some smaller, local landlords have lost significant rental income during the pandemic and are now looking to sell their properties. Out-of-state investment funds often pay with cash.

In collaboration with *Milwaukee Journal Sentinel* investigative reporter Cary Spivak, we identified the nine largest out-of-state landlords of Milwaukee houses and duplexes. Again, these are businesses headquartered outside of Wisconsin.

They include entities from California, Texas, Ohio, and Illinois. Details about their operations can sometimes be difficult to discern, with investors often using multiple LLCs with different names for their acquisitions. But there are exceptions. Three of the most prolific buyers of residential properties in Milwaukee in recent years have quite polished websites, touting their business models and success.

At the end of 2020, the nine out-of-state landlords we identified owned 989 properties in Milwaukee, holding more than 1,500 units. They owned 670 single-family homes, 268 duplexes, 34 apartment buildings, and 17 other residential buildings, valued in total at \$79 million. We estimate that, in a normal year, city residents will pay these out-of-state landlords more than \$16 million in rent. All of the landlords entered the Milwaukee market following the worst of the housing crisis that began about 15 years ago.

### Buyers from Houston, Florida, Chicago, and Beyond

For this story, we took a closer look at five of the landlords.

Bulldog Ridge is led by a Chicago-area real estate investor and has a suburban Chicago mailing address. Along with a handful of associated LLCs, it owned 178 Milwaukee properties at the end of 2020, including 108 single-family homes, 54 duplexes, and 11 apartment buildings. Most of these properties are on the near south side, north side, and Sherman Park areas. The median value of the homes and duplexes owned by Bulldog Ridge is \$57,400. The valuations begin with \$21,600 at the low end, with the highest valuation being \$187,800.

Milwaukee Capital, along with sister company SCV Ventures, is led by a real estate investor based in Houston and Florida. Milwaukee Capital's properties are found in some of the city's most impoverished neighborhoods, primarily on the near north and near west sides. It ended 2020 with 115 properties in Milwaukee, including 66 single-family homes and 45 duplexes. The median value of the properties it owns is \$42,050. That includes a home assessed at \$2,800. Many of the properties had been owned by a real estate investment business once associated with former professional basketball player and Milwaukee native Devin Harris.

SFR3, started by two technology company executives in the San Francisco area, began buying homes in Milwaukee in 2017. Along with

**From mid-March to December 2020, VB One purchased 147 homes in Milwaukee with cash. It bought 29 in just the month of December.**

**“You not only need to be worried about a land grab with homeowners losing their homes, but you also need to be worried about mom-and-pop landlords, people who live in the community and have a stake in the community, losing their rental property and having it sucked up by people who live far away.”**

— Aaron Glantz

an associated LLC, SFR3 owned 95 properties in the city entering 2021. Eighty-seven of those are single-family homes; eight are duplexes. SFR3 operates largely on the far north and northwest sides. Its median-price house is valued at \$89,700, but it owns homes ranging in value from \$20,100 to \$167,800. Its website touts “affordable homes for America’s workers,” and says its mission is “to renovate old houses in disrepair” and make them “like new.”

VineBrook Homes is based in Dayton, Ohio, and was started by a successful venture capitalist. The company operates in other Midwestern cities, including Cincinnati, St. Louis, and Memphis. Using an LLC named “VB One,” it began purchasing homes in Milwaukee in 2019, mostly on the west and northwest sides, but it already has accumulated the largest number. It entered 2021 owning 250 properties: 235 single-family homes and 15 duplexes. The median value of its homes is \$84,400, with its least-valued property assessed at \$33,400 and its most expensive valued at \$201,800.

As the *Journal Sentinel*’s Spivak has reported, the economic fallout from the virus has caused both tenants and landlords to struggle. Property records indicate that most of the out-of-state investors we identified have paused their purchases of Milwaukee properties during the pandemic and subsequent eviction moratoriums. But several have continued to buy aggressively.

From mid-March to December 2020, VB One purchased 147 homes in Milwaukee with cash. It bought 29 in just the month of December. Virtually all of these properties were on the north and northwest sides of the city. In one two-day period

in early May 2020, VB One purchased seven single-family homes.

From mid-August to December, SFR3 purchased 39 properties in Milwaukee. Most were single-family homes. Most were paid for in cash. On a website, a representative of SFR3 identifies himself as a “Cash Buyer for Milwaukee,” and writes, “I’ve been tasked with buying 20 house [sic] per month. Please reach out if you have any properties that might work.”

A fifth landlord, based in southern California, was also busy buying Milwaukee duplexes last year, most on the near north side. The investment firm, which purchased 95 homes last year, has acquired properties here using names including “Copper Kettle” and, more recently, “Residential Properties Resources Fund II LLC.”

The LLCs are connected to a real estate investment fund called Highgrove Holdings Management, LLC, of Torrance, California, which even maintains a website with an entire page describing investment opportunities in Milwaukee. The website states that the price of a property purchased for investment purposes, including rehabilitation costs, averages \$35,000. Our data analysis shows the firm’s average property is worth \$32,600.

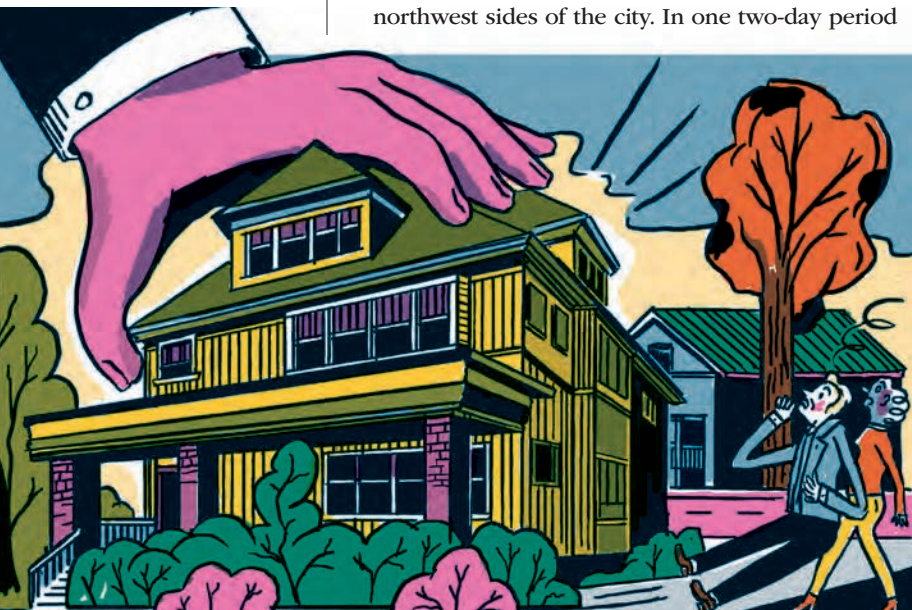
In addition to advertising “12%–18% returns annually,” Highgrove’s website says the firm “focuses on cleaning up communities where purchases are made. Focus will always remain on safety, clean environment and good service for our tenants.”

The website also describes Highgrove’s aspirations, saying, “Highgrove has been working closely with real estate professionals in Milwaukee to seek out and acquire properties in the area at discounted prices up to and in some cases exceeding 50% off of fair market value. The goal of HHM is to amass 1,100 properties in Milwaukee.”

## Making Money on Inexpensive Homes

So, what makes investing in Milwaukee, an older Midwestern city with stagnant population growth, lucrative? First, thousands of homes in the city are valued at less than \$100,000, in some cases much less. They are easily affordable to investors looking to buy. Second, in a normal year, they generally offer an excellent return on their investment.

How do we know that? While we have not seen the out-of-state landlords’ actual balance sheets, we created a model using publicly available records and data that help explain why Milwaukee has become a lucrative investment market:



- We estimated rents by collecting market-rate estimates of each property's value. Our analysis found that these estimates typically vary from actual rental listings by 10 percent or less.
- We estimated average management expenses by comparing the rates of eight local management companies to project a typical total management fee of 10.9 percent of rent. This includes tenant placement fees.
- Based on a formula used by the real estate data firm CoreLogic, we estimate maintenance fees as 17.5 percent of rent and insurance as 0.35 percent of the assessed property value.
- We also examined city records, to include taxes and assessments, but did not account for extra expenses such as legal fees and loan payments, which vary from landlord to landlord.
- Using this model, we calculated potential financial returns for all nine of the largest out-of-state investors. For illustrative purposes here, we will focus on two of them.

Milwaukee Capital, the Houston-based LLC, owns properties in some of the poorest sections of Milwaukee. From 2018 to 2020, it spent \$4.3 million acquiring 115 properties in the city. Those properties are now assessed at \$4.8 million. Most were acquired in bulk, bank-financed purchases. The company's history of accumulating code violations from the Department of Neighborhood Services at a pace five times the citywide average for landlords suggests that it has invested little in rehabbing its properties. If Milwaukee Capital charges market value rates for its units and matches the citywide occupancy average, that would bring in \$1.7 million each year. Subtract estimated management expenses of \$182,000, property taxes of \$124,000, maintenance costs of \$291,000, and insurance premiums of \$17,000, and you would have net annual revenue of approximately \$1.1 million. That is, in just one year, you would have 25 percent of the amount spent to purchase these properties. Again, this represents a more typical, non-pandemic year.

The leading out-of-state buyer of Milwaukee residential properties in recent years has been VineBrook Homes' LLC, VB One, which has a Dayton, Ohio, address. In 2020, it purchased 173 houses. No one else bought more than 95.

In less than two years, VB One has spent \$21 million acquiring 250 properties currently



assessed at a total of \$21 million. Charging market-rate rents at the city's occupancy rate would bring in annual gross revenues of \$3.4 million. We estimate property management expenses of \$369,000, property taxes of \$554,000, maintenance costs of \$590,000, and insurance premiums of \$74,000, leaving net revenue of \$1.8 million, or 8.7 percent of the entire amount spent to purchase these properties. All were paid for with cash. As of June 2020, VineBrook reported an average rehab cost of \$16,000 per property across its entire portfolio. Assuming that it invested the same amount in Milwaukee would lower its profit rate here to 7.2% of its total investment.

This analysis may understate the company's return. In reality, VineBrook Homes is a vertically integrated real estate firm that provides construction and property management services in-house, likely for a lower cost than that of local contractors.

To some extent, national data about VineBrook Homes are even more up-to-date and reflect the company's aggressive growth: In early February 2021, VineBrook Homes announced the acquisition of 1,866 more single-family homes across "seven new markets in Alabama, Georgia, North Carolina, and South Carolina, in addition to VineBrook's existing twelve markets in the Midwest and Heartland." As of February 1, the company owned 11,166 single-family homes. A sense of VineBrook's ambitions may be seen in its SEC filings in December 2020, disclosing that VineBrook Homes Trust, Inc., had sold \$266,674,920 in an exempt-securities offering with a total offering amount of \$1,085,000,000.

## The Advantages of Owning versus Renting

What also makes Milwaukee lucrative is that rental rates for cheaper properties remain relatively high. We compared annual rent to total property value for residential properties owned by out-of-state landlords. For properties under \$100,000, we found only a small relationship between home values and rents. Typical rent for a \$40,000 single-family home is only about 10 percent cheaper than rent for an \$80,000 house.

**"The math is very compelling. A lot of people are just unaware of the fact that they might be able to save \$300 or \$400 a month through home ownership."**

— Mike Gosman, Acts Housing



**“I’m saving a couple hundred dollars every month. It’s cheaper in the end. There are just so many great benefits to being a homeowner.”**

—Phoebe Alexander

According to Mike Gosman, the president and CEO of the nonprofit Acts Housing in Milwaukee, owning instead of renting is a better deal for many low-to-moderate-income working families.

“The math is very compelling. A lot of people are just unaware of the fact that they might be able to save \$300 or \$400 a month through home ownership,” Gosman said.

In the last year, Acts has helped more than 160 low-to-moderate-income families purchase homes. The nonprofit provides services needed to transition from renter to homeowner, including home-buyer counseling, its own realtors, and guidance for repair projects. In addition, Acts is often the lender, with an active portfolio of 100 loans made to families fixing up and purchasing distressed homes.

“Typically, families who purchase one of the distressed homes have total costs of \$650 per month,” Gosman said. “It is very common for us to have families spending \$900, \$1,000, \$1,100 a month to rent. And frankly, they’re renting places that are not decent.”

Gosman’s estimate of savings is supported by data analysis done for this story. We estimated ownership costs by assuming a 5 percent down payment, a mortgage at 4 percent APR, and a 30-year loan term. We included other ownership costs of \$1,000 a year homeowner’s insurance, 1 percent private mortgage insurance, property

taxes at 2.6 percent, city utilities at \$200 per quarter, and monthly maintenance expenses calculated as 17.5 percent of the housing unit’s total rent.

Our analysis found a dramatic difference between ownership and rental costs. We estimate that the average renter of a \$75,000 single-family home pays about \$227 more a month than it would cost to own the property. And the average renter of a \$50,000 home pays \$360 more per month than it would cost an owner with normal expenses.

Gosman said there is huge demand from working families to fix up and purchase homes, but he acknowledged there are challenges that must be overcome.

### **“I Always Wanted to Buy a House”**

Phoebe Alexander, whom we met earlier, knows those challenges firsthand. “I always wanted to buy a house,” she said. “But we knew there were some things in our past that we needed to clean up financially. We kept asking ourselves, how are we going to do this?”

The Alexanders had gotten into financial trouble when Alexander had not one but two jobs eliminated through corporate downsizing. While she said the purchase price for their northwest side duplex was “very reasonable,” the property required more than \$30,000 in repairs. She and her husband also needed a down payment.

It took nearly five years of working with Acts Housing for the Alexanders to repair their credit history, save money, and become eligible for financing. Finally, in July 2019, the Alexanders’ perseverance paid off. They closed on their property. Now in their 50s, with steady jobs, the family is living their version of the American Dream.

Gosman told us that the Alexanders’ story illustrates the obstacles that often stand in the way of ownership. Families may have debt and credit issues or not enough money for a down payment. That can discourage institutions from lending. Other families are simply living on the margins. Previous Lubar Center reporting found median income for Black households in Milwaukee is just \$30,000 a year.

Still, Gosman said many issues can be resolved through financial counseling. Of his organization’s 100 outstanding loans, only 1 percent are delinquent, even during the pandemic.

But the growing presence of out-of-state investors has created another challenge.

"This is the most competitive market for low and moderately priced homes that our organization has ever seen," he said. "It means that every single additional entrant in the market is competition for our families, who are not in a position to make cash offers."

Our analysis did not look at the impact of these purchases on Milwaukee neighborhood values or at how properties are maintained. On their websites, the investment groups say they are meeting a need for single-family rental housing.

But at last fall's housing program at the Lubar Center, the Milwaukee Common Council president expressed concern that out-of-state ownership can make it harder to address issues with a troubled property. "That ultimately affects the stability and cohesiveness of neighborhoods, and that's trouble," Cavalier Johnson said.

City Development Commissioner Lafayette Crump told us that Milwaukee is not alone in seeing a growing number of out-of-state landlords. With interest rates at historically low levels, he said individuals are seeking alternatives for investment.

Crump said that out-of-state landlords and investment funds still own only about 5 percent of the city's single-family homes and duplexes. He said that the increased out-of-state investment is "worth keeping an eye on but not necessarily a cause for alarm at the moment."

"We do believe local ownership is important and that people who live in and have a vested interest in the city are more likely to do a good job of being responsible owners," Crump said. "We do not want to cede portions of the city to external investors or control."

The city is taking steps to increase and maintain owner-occupancy, Crump noted. That includes

working with local partners, including emerging developers and nonprofits, to provide city-owned properties, financial resources, and support for the development of one- and two-family properties. Some will eventually be turned over to home ownership.

Crump said that when the city sells properties, preference is given to owner-occupiers. It is about to launch a pilot program that does the same for existing city homeowners interested in buying properties near their home.

Crump said Mayor Tom Barrett's 2021 budget also includes a new down-payment assistance program. The city's goals include not just preserving owner occupancy but increasing it, Crump added.

Gosman's organization hopes to help 220 more families purchase homes this year and plans to lend an additional \$2 million, almost doubling its portfolio. Still, creating awareness of what is possible remains a challenge. "The biggest obstacle is that people just don't believe that home ownership can be for people like them," Gosman explained.

Phoebe Alexander agreed. "I think there are more people out there that would love to own homes, but they need help in getting started," she told us.

As she described her home's most recent improvements, Alexander's excitement spoke to one of the key differences between local and long-distance home ownership. For her, it's more than just a financial investment. It's personal.

"I told my husband I don't want anything for Christmas because I've got my stainless-steel sink," she said. "You can make a house your own. That's what I love about it. When I turn the key, I'm turning the key to *my* home." ■

**"We do believe local ownership is important and that people who live in and have a vested interest in the city are more likely to do a good job of being responsible owners. We do not want to cede portions of the city to external investors or control."**

—Lafayette Crump, Milwaukee development commissioner



# Of LLCs, ESGs, Diversity, and Virtual Annual Meetings

Delaware Vice Chancellor J. Travis Laster talks with Marquette Law Professor Nadelle Grossman about the state of corporate law.



Hon. J. Travis Laster

In March 2020, the Hon. J. Travis Laster visited Marquette University Law School as its annual Hallows Judicial Fellow. Laster is a vice chancellor of the Delaware Court of Chancery, having served on the court since 2009. He is a recognized authority on corporate law, and in early 2021, he sat for a conversation (by Zoom) with Nadelle Grossman, professor of law and associate dean for academic affairs, whose teaching and research focus on corporate law. These are lightly edited excerpts of their conversation.

**Professor Nadelle E. Grossman:** Let me kick us off with asking you this: In the pandemic, a lot of companies are holding virtual shareholder meetings. I think a lot of shareholder activists are supporting this, thinking it can lead to increased engagement. But I have seen institutional investors also claim that having virtual meetings has been leading to less transparency because shareholder voices can be hidden from the other shareholders. I'm curious what you think the shareholder meeting will look like going forward.

**Vice Chancellor J. Travis Laster:** I will tell you that I haven't had a lot of direct involvement in this. But when the pandemic hit, the governor of Delaware, with advice from the Council of the Corporation Law Section of the Delaware State Bar Association, put out an emergency order that allowed companies to shift their meetings from in person to

virtual simply by providing a notice to shareholders in an SEC filing. This was followed up with legislation. So the transition to virtual meetings really happened without any court involvement, and there weren't any disputes. But for that order, one might imagine that some plaintiff's counsel might have tried to argue that because a company noticed the meeting in person, it had to occur in person. But people were also being fairly realistic about COVID at the time.

I am familiar with some scholarly research on this topic. Megan Shaner, a professor at University of Oklahoma, has written on this subject with Yaron Nili, a professor at the University of Wisconsin–Madison. What they found is that the shifting to virtual meetings did not decrease voting participation levels and that it may have actually increased retail investor participation, particularly at places like Walmart, Berkshire Hathaway, and Google, where you almost

have a rock concert of an annual meeting. But there wasn't a lot of change among institutional investors.

I would think that virtual annual meetings are here to stay and that, to the extent that people have complaints about lack of participation or things like that, those things will be tweaked by changing or updating the annual meeting format rather than going back to in person, because in person in this day and age isn't a good method. It doesn't drive a lot of participation, and it doesn't drive a lot of attendance. You might get a few gadflies who are there to make a point, but the idea of the annual meeting as a deliberative gathering, I think, really is anachronistic. And so I hold out hope for the virtual annual meeting, and I think that it's probably something else that is a change that was coming, but which the pandemic has dramatically accelerated.

**Grossman:** I'd like to pose a few questions on board diversity. Of course, as you know, there's significant momentum toward diversifying boards. Mandates come from state legislatures like California, as well as the proposed NASDAQ rule, in addition to there being policy statements by large institutional investors in favor of board diversity. Are these movements impacting the development of corporate law in Delaware? Do you think they will or should?

**Laster:** So the short answer is they haven't come to us yet. My personal opinion is that this is a fundamental good; that this effort to promote diversity is a social good, and it's likely to promote better decision-making, from what I know about decision-making. Under decision-making theory, groups make better decisions when they have different sources of experience to draw on. Having different backgrounds and life paths and views and perspectives in the boardroom should go a long way to enhancing decision-making. So from a policy standpoint, I think it's an unmitigated good.

But the question I think becomes more complicated at the level of implementation for Delaware because of the internal affairs doctrine. And so to the extent that diversity is legislated by, for example, California for all corporations within its borders, even corporations that are formed elsewhere, this creates a tension under the internal affairs doctrine, which is, frankly, a dispute that I personally would rather us not have. So if you think about it purely from an internal affairs standpoint, there's tension between California's imposing this rule on Delaware corporations and how we normally look at questions of board composition and internal governance, where Delaware law—without this mandate—would control.

Now Delaware is a private-ordering jurisdiction. So if a corporation adopted a pro-diversity provision in its charter or bylaws establishing director qualifications, or even if a corporation set up different types of directorships (which have to be in the charter under section 141(d)), that is something that a Delaware court would enforce. But because we're a private-ordering jurisdiction and because we tend to protect that value, the imposition of these requirements by a coequal state could create an unfortunate collision. I don't know anyone who is anti-diversity, so I think it would be very disappointing if this collision happened, and I hope it never does.

There isn't the same problem with stock exchange listing requirements because those listing requirements essentially operate as an overlay on top of the Delaware state law regime, and so there isn't the same internal affairs collision, even though substantively you have the same effect. For example, the New York Stock Exchange requires a stockholder vote for the issuance of shares equal to 20 percent of the issuer's capitalization. Delaware doesn't. Delaware has no problem with the New York Stock Exchange provision or NASDAQ's similar requirement. Yet if another state had the same provision requiring a stockholder vote [and applied it to Delaware corporations], that would be a problem. We examined this issue in the *Vantagepoint* case. In that case, our supreme court found California's law conflicted with the internal affairs doctrine and rejected its provision.

So that's an example of how this could come up. I hope that this does not come up because I think it's one of those areas where it would risk a negative development and a potential for an understandable backlash if a Delaware court declared the internal affairs doctrine applicable and hence held a pro-diversity statute was inapplicable to Delaware corporations. I just don't like the optics of that, though from a strict corporate law standpoint, I think that is probably the correct result as an internal affairs matter.

**Grossman:** I have one more question relating to diversity. I'm curious about your view of whether a nominating committee might face potential liability for repeatedly failing to consider women, people of color, or other individuals with diverse backgrounds for board membership when it's considering whom to nominate to the board.



Professor Nadelle E. Grossman

**“There isn’t a very well-established casebook on LLCs—maybe that’s part of the problem. The other problem with LLCs is that they are the moldable clay of entity law. You can make them into whatever you want.”**

—Delaware Vice Chancellor J. Travis Laster

**Laster:** The reality is that the business judgment rule allows people to be stupid, and the business judgment rule allows people to be shortsighted. And so if you had essentially a reactionary, patriarchal sort of white-male focused board that wanted to return to some prior era, I don’t think that they would face liability as a fiduciary matter.

Now the calculus could change if there were, for example, a charter or bylaw provision that required diversity or imposed a board qualification, because there’s some tension in Delaware law about the extent to which a board can rely on its fiduciary duties to avoid compliance with a bylaw, as, generally speaking, bylaws are binding on the board. So if stockholders implemented a bylaw that required consideration of diversity and then the board resolutely refused to do it, that is a different question.

I tend to suspect that Delaware would default to the power of the stockholders to vote out these recalcitrant, backward-looking directors as opposed to using a judicial remedy through liability. But I think that, absent some type of charter or bylaw, the business judgment rule would allow them to be reactionary and antiquated.

**Grossman:** I have a few questions relating to fiduciary duties generally. At the Hallows Lecture that you gave at Marquette Law School last year, you pointed to *Marchand v. Barnhill*, a 2019 decision involving a listeria outbreak at Blue Bell Creameries, as an example of the Delaware Supreme Court’s recent invigoration of the duty of oversight, potentially holding directors liable for the failures to oversee “mission critical” aspects of the business. In your view, what’s the significance of this case in Delaware fiduciary duty law?

**Laster:** So *Marchand* is potentially significant because it was the first time in a major decision that the Delaware Supreme Court upheld a *Caremark* claim. I think it’s as much an attitudinal shift as anything else. Before *Marchand*, the standard statement was that *Caremark* claims were the most difficult theory to bring under corporate law. And there was essentially an expectation that “difficult to bring” almost equated with “impossible to survive a motion to dismiss.” And what

*Marchand* did was show that a complaint could survive a motion to dismiss.

Now there is still a high hurdle to survive a motion to dismiss: You still need facts that would support an inference of bad faith. In *Marchand*, those facts were specific allegations that there was no board-level reporting system that would keep the board apprised of food-safety risks. At an ice cream company, this was a mission critical issue. It changes people’s approach to oversight cases when the Delaware Supreme Court does not dismiss a *Caremark* claim.

The other aspect of *Marchand* that I think is important is that, historically, the Delaware courts regarded compliance with federal regulatory regimes as sufficient for Delaware law purposes. To elaborate on that a little bit: If you’re a company that makes food, then to comply with FDA regulations, you are going to have to have certain protections and reporting obligations and procedures that you follow, certifications, etc. And what historically would happen in *Caremark* cases—and this is also true for banks that have to comply with bank secrecy and anti-money-laundering laws, car companies that have to comply with transportation regulations, and mine companies that have to comply with mine-safety law—is that companies would point to the federal system and argue that compliance with the system was sufficient for purposes of board oversight.

And what the Delaware Supreme Court said in *Marchand* was that that is not necessarily true. Now it didn’t rule out the possibility that, in many cases, that *will* be true. But in *Marchand*, the fact that the company had all of the operational checks in place to comply with FDA regulations was not enough for the Delaware Supreme Court to find an adequate reporting system in place. The Delaware Supreme Court wanted a board-level system that built on those federal requirements and went a step beyond. I think that that’s likely to be significant because, again, it changes the historical approach of satisfying *Caremark* by pointing to regulatory compliance structures. Going forward, that may not be true. I still think it’s going to take egregious facts to support any type of *Caremark* claim, but we’ve

learned that they're not impossible to plead, which is a significant attitudinal shift.

**Grossman:** As you know, in 2019, the Business Roundtable issued an updated statement on the purpose of the corporation, which was signed onto by 181 CEOs, including the CEOs of many Delaware corporations. According to the statement, "While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders. We commit to: . . . [i]nvesting in our employees. This starts with compensating them fairly and providing important benefits . . . [,] supporting the communities in which we work . . . [,] and [g]enerating long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate." Does this statement of corporate purpose comport with Delaware corporate law? Relatedly, do you think this statement might lead to a shift in normative expectations for officers and directors of Delaware corporations?

**Laster:** It's certainly a statement that got a lot of press, and it's certainly a statement that was pitched as suggesting some major change toward stakeholder theory and away from stockholder theory, in the sense of the ultimate beneficiaries of fiduciary duties. When I read the statement at the time and when I hear you read it again now, the language strikes me as quite soft. And I think what the Business Roundtable is reacting to is really a caricature of fiduciary duties as stockholder-focused. That caricature is not consistent with what I think the Delaware law regime is. I think that that caricature has been very effectively used by, for example, hedge fund managers and other institutional investors as a rhetorical trope for why directors should do things that they think would boost the stock price.

It's important to stress that Delaware does not equate stockholder welfare with stock price. When Delaware speaks to fiduciary duties, we say fiduciary duties are owed to the corporation for the ultimate benefit of its stockholders. Duties are ultimately owed to stockholders because they are the people who provide capital to the corporation with no right to ever get it back. So they are contributing their capital permanently to a firm which, under Delaware law, has presumptively permanent life. Importantly, *stockholders* refer to the stockholders as a whole.

Now, we know in a public corporation, shareholders can sell their shares. But in that situation, the firm is

not giving capital back. The capital itself is locked in. So when Delaware speaks of obligations that ultimately run to stockholders, it's to the longest of long-term holders. And when you're talking about the longest of long-term holders, that group is synonymous with the interests of the corporation as a whole, which necessarily take into account things like benefits to employees, good relations with customers, good relations with suppliers, and even larger externalities. If anyone has reason to be concerned about how our society functions or whether climate change is a real problem, it's the people who have to think about being here permanently. So in my view, the stockholder metric that Delaware applies is a long-term metric that, I think, should do the best job of taking into account these various considerations.

Now what I do think is happening is a valuable and understandable pushback against this rhetorical approach to stockholder value, which seems to put short-term stockholder gains and the profits of fund managers and their investors above everything else. But I think it's fundamentally based on a misconception of Delaware law. And so what we have right now, to some degree, is one misconception talking to another misconception—in other words, a misconception by the people who believe that the law is short-term stock price focused, and then people responding to that saying, "No, we need to move to some type of stakeholder theory."

I do think ultimately this will play out at the societal level rather than necessarily at the doctrinal level. I also think that there is dramatic, understandable, and justified concern about income inequality in our society and whether we are on the right track in terms of income inequality. I think few people begrudge their fellow people who, you know, do well and generate wealth, etc. But at some point, it hurts everybody to have a society where the middle class disappears, and I think that concern is part of what we're seeing in the Business Roundtable letter.

It's understandable, and I'm sympathetic. I tend to think that the real solutions are harder. I think the real solutions aren't going to be found in a Business Roundtable press release. I think the real solutions are going to be found in things like better education, better infrastructure, health care—things that require broad-based societal planning. But those are harder solutions than just saying we want to take other stakeholders more seriously.

**Grossman:** A lot of companies issue ESG [environmental, social, and governance] statements and have a lot of disclosure about that which is not required. Is there anything within Delaware law (ignoring fraud for misstatements and omissions in those statements) that might promote a focus on ESG, apart from the long-term nature of fiduciary duties?

**Laster:** I think that the benefit corporation is a nice solution because it's a standalone statute with a ready-made form, and it comes basically branded and everybody understands what you're doing. So you don't have to do private ordering to achieve ESG, and there's value in that.

ESG goals can also be achieved under the corporate code. The core provision in the Delaware code, section 141(a), empowers it. It says that the corporation shall be managed by or under the direction of a board of directors, except to the extent the certificate of incorporation provides otherwise, and (to the extent it does) shall be managed in accordance with the certificate of incorporation. So I have always read that as saying that if you built into your charter these types of provisions, then the board was obligated to manage in accordance with those provisions. I don't think there's a specific case that says this; I flagged it in the *Trados*<sup>1</sup> case as something that was a possible way to solve what was perceived to be tension between preferred stockholders and common stockholders, but I think you could use that private-ordering power to drive some type of ESG motivation or even a benefit corporation motivation.

Absent that, I think you're right: The ESG issues really come into business judgment and the long-term value of the corporation. And we expect that directors would be considering these things when you're talking about a potentially perpetual entity. It's like the old theory of planning seven generations out. When you're dealing with a perpetual entity, you should be thinking absolutely about the longest of the long term, but I don't think you could point to anything prescriptively that would require it.

**Grossman:** I have one final question for you—it's definitely a gear shift. As you know, the number of newly formed LLCs in Delaware now surpasses the number of newly formed corporations, on the order of over three to one. But most notable business law

decisions continue to relate to Delaware corporations. Of course, there are some notable LLC cases, but I'm wondering why most still involve corporations.

**Laster:** I have a special interest in LLCs. Two years ago, I taught a three-credit course on LLCs at Rutgers Law School. There isn't a very well-established casebook on LLCs—maybe that's part of the problem. The other problem with LLCs is that they are the moldable clay of entity law. You can make them into whatever you want. There are very few mandatory provisions, and because of the contractual freedom, you can create an LLC that looks like a corporation. You can create an LLC that looks like a limited partnership. You can create an LLC that looks like a flat partnership—and, indeed, by default, the LLC structure is a flat partnership structure.

So you have this shape-shifting entity where individual cases tend to deal with individual LLC agreements. I decide a lot of LLC cases. Our court does a lot of LLC cases. I think there may just be some lag here. I also think that, at least in terms of law schools, the corporation remains the default entity and so in the Business Organizations course, you spend a lot of time with corporations. The course that I was teaching on LLCs, it was an advanced class, and it assumed you'd already dealt with the main cases of corporations.

I think you're right that there haven't been one or two or three big iconic LLC cases that we all know, the same way we all know *Unocal* and *Revlon* and *Weinberger* and *MFV* and cases like that.

I don't think it's that they resolve privately a lot, and it's not that the cases aren't happening. I do think that it may be that you are dealing with this shape-shifting entity. I can tell you that, in Delaware at least, a decision that I wrote in a case called *Feely* and a decision that the Delaware Supreme Court issued in *Auriga* are pretty important because they address the extent to which there are default fiduciary duties in an LLC.<sup>2</sup> But what we don't have a lot of in the LLC world is big public takeovers—big sorts of high-profile events—and maybe that's part of it, too. But it's a good observation, that we don't yet have the iconic LLC cases.

**Grossman:** Thank you so much, Vice Chancellor Laster, for taking time for this interview, and for your candid answers to my questions. I am confident that our readers will find them insightful. ■

<sup>1</sup> *In re Trados Inc. Shareholder Litigation*, 73 A.3d 17 (Del. Ch. 2013). – Ed.

<sup>2</sup> The question reserved in the Delaware Supreme Court's opinion in *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206 (Del. 2012), whether default fiduciary duties existed in LLC law, was resolved by legislation the next year. See Del. Code § 18-1104. – Ed.

# CLASS NOTES



David C. Sarnacki



William T. Purdue



Leslie Van Buskirk



Stephen D. Zubiago



Patrick E. Kelly



Chris E. Woleske

**62** Robert E. Meldman published a new book, *Saving Taxpayers from the Clutches of the IRS*.

**71** David L. Jorling is a member of the board of the foundation that operates the Oregon Rail Heritage Center in Portland.

**83** Jerome A. Konkel and his firm, Samster Konkel & Safran, joined the Groth Law Firm in Milwaukee.

**84** Thomas E. Reddin joined the law firm of Norton Rose Fulbright US as a partner in Dallas, Texas. He specializes in representing employers in employment litigation and labor matters.

**85** David C. Sarnacki published a book, *A Visual Refresher Course on Courtroom Persuasion*.

**86** William T. Purdue recently returned to Morrison Mahoney, a Boston-based law firm, as a partner.

**89** Micabil Diaz-Martinez was named an assistant district attorney in the district attorney's office in Trempealeau County, Wis.

Leslie Van Buskirk was elected to the board of the North American Securities Administrators Association. She is the administrator of the Division of Securities for the Wisconsin Department of Financial Institutions.

**90** James M. Carlin, a Republican state senator in Iowa, announced his candidacy for the state's 2022 U.S. Senate race.

**91** Luke A. Palese joined the North American legal team at Molson Coors Beverage Co. as senior counsel, procurement.

Stephen D. Zubiago was named CEO and managing partner of Nixon Peabody, based in Boston. Zubiago joined the global firm in 1999 and has led its corporate, global finance, and health care practice groups for the past 10 years.

**93** Patrick E. Kelly was elected by the Knights of Columbus Board of Directors as the new Supreme Knight. He served as Deputy Supreme Knight for four years.

Todd M. Podell, of Fort Worth, Texas, was promoted to senior vice president and chief procurement officer at Discover Financial Services.

**94** Chris E. Woleske was named a Marquette University trustee. She is president and chief executive officer of Bellin Health Systems, based in Green Bay, Wis.

## R. L. McNeely (1946–2020) Took an Unlikely Path to a Life of Scholarship and Community Leadership

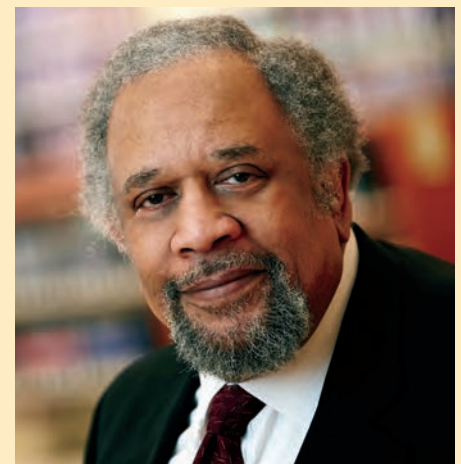
The expectation for an athletic Black teenage male in Flint, Mich., in the 1960s was to go to work in the area's auto factories. The late R. L. McNeely, L'94, took a different path and became known for his academic work and community service in Milwaukee.

McNeely did play one season of football at Eastern Michigan University, but his real interests were education itself and helping others. His bachelor's degree from Eastern Michigan led to a master's degree in social work from the University of Michigan and a Ph.D. from Brandeis University. In 1975, he joined the faculty of the University of Wisconsin-Milwaukee (UWM), teaching social work.

In 1990, he decided to tackle another educational challenge and enrolled as a part-time student at Marquette Law School. After completing law school, McNeely added legal work, concentrating on guardian ad litem cases, to his many involvements. His community work after his retirement from UWM included leading roles in the Milwaukee chapter of the NAACP and advocacy for the Felmers O. Chaney Correctional Center, a pre-release facility on Milwaukee's north side.

One of the commitments that meant a great deal to McNeely: He set up an estate plan to endow a \$500,000 scholarship fund at Marquette Law School. He particularly hoped to set an example encouraging young Black men to pursue careers in the law.

McNeely died at age 74 in December 2020. Survivors include his long-time partner, Georgette Williams. ■



# CLASS NOTES



Paul W. Connell



Tricia L. Walker



Eric G. Pearson



Katherine A. Charipar



Adam R. Finkel



LaKeisha D. Haase

**95 Sherry M. Terrell-Webb** was named general counsel for the Madison Metropolitan School District, Madison, Wis.

**98 Paul W. Connell** joined Cozen O'Connor as a member of its state attorneys general group, working out of the firm's offices in Chicago and Washington, D.C. Connell served as deputy attorney general and senior counsel to Wisconsin Attorney General Brad D. Schimel from 2015 to 2019.

**Kimberly R. Walker** was named special deputy city attorney for the City of Milwaukee.

**02 Elaine M. De Franco Olson** was named the first-ever chief privacy officer of Cargill in the Minneapolis-St. Paul area.

**Jeffrey B. Norman** was named acting City of Milwaukee police chief. Norman was an assistant chief before the retirement of the previous acting chief, Michael Brunson.

**03 Sherry D. Coley** has been selected as the office managing partner for Davis|Kuelthau's offices in Appleton and Green Bay, Wis. She is a commercial and intellectual property litigation attorney.

**05 Shannon M. Bragg** was named senior director, assistant general counsel strategic sourcing, at DaVita, Inc., in Denver, Colo.

**Greg R. Rabidoux** and his wife, Mara Lencina, along with Enrique Vila Torres, authored a book, *The Stolen Babies of Spain*, which also has become an award-winning documentary.

**06 Lori N. Goodwin** won election to a judicial seat in Jefferson County, Kentucky. She serves in family court.

**Michael J. Redding** started a new position as senior corporate counsel at AMN Healthcare, in San Diego, Calif.

**Tricia L. Walker** was appointed by Wisconsin Governor Tony Evers to serve as a judge of the Fond du Lac County Circuit Court.

**07 Eric G. Pearson** was promoted to partner at Foley & Lardner in Milwaukee. His practice concentrates in commercial and securities litigation, focusing on accounting, professional-responsibility, and tax-related matters. Pearson is also a certified public accountant.

**Megan A. Ryther** was promoted to partner at Ice Miller, in Indianapolis, Ind., where she practices in the firm's business group and collegiate sports and NCAA compliance group.

**08 Katherine A. Charipar** was elected a shareholder of Fredrikson & Byron in Minneapolis. She is a member of the trusts and estates group.

**10 Jessica A. Ballenger** has been appointed as an administrative law judge with the State of Wisconsin Division of Hearings and Appeals.

**Rachel M. Blise** was named a judge of the U.S. Bankruptcy Court for the Eastern District of Wisconsin. Blise was previously senior counsel at Foley & Lardner.

**Adam R. Finkel** has joined Husch Blackwell as a senior associate in the Milwaukee office.

**Stephen J. Howitz** opened Nostalgia Music and More in downtown Waukesha, Wis., buying and selling video games, records, and more. He also continues his legal practice.

**11 Laura A. Bautista** and **Alejandro Bautista** coauthored an article, "Lawyer Couple Juggles Relationship, Family and Advancing Careers," published in *The Legal Intelligencer* on Law.com.

**LaKeisha D. Haase** was appointed by Wisconsin Governor Tony Evers to be a judge of the Winnebago County Circuit Court. She is the first Black person to serve as a judge in the county.

**Sumeeta A. Krishnaney** joined von Briesen & Roper as a member of the trusts and estates section in the firm's Milwaukee office.

**Oladotun O. Obadina** was promoted to partner in the Minneapolis office of the global law firm Jones Day.

**Megan (Hummel) Thongkham** was named a partner at Lipson Neilson, a law firm with offices in Nevada, Arizona, Colorado, and Michigan. She works in the Las Vegas office.

**12 Noelle A. Granitz** was elected a partner of Quarles & Brady. She is a member of the firm's real estate and land use practice group in Milwaukee.

**Alyssa A. Johnson** was elected partner with Hinshaw & Culbertson. She works in the firm's Milwaukee office.

**Cassandra L. Jones** was elected as partner at Walker Wilcox Matousek, in Chicago. The firm focuses on insurance coverage and defense.

**Garrett A. Soberalski** was promoted to shareholder at Meissner Tierney Fisher & Nichols, in Milwaukee.



Oladotun O. Obadina



Ryan M. Spanheimer



Max T. Stephenson



Sergio M. Quiñones



Elizabeth Elving



Chinonso I. Osuji

**13 Wyatt D. Dittburner** joined Doering Fleet Management, based in Brookfield, Wis.

**Ryan M. Spanheimer** was elected a shareholder at Fredrikson & Byron in the firm's Minneapolis office. He is a member of its patents group.

**Max T. Stephenson** has been promoted to partner at Gimbel, Reilly, Guerin & Brown in Milwaukee.

**Ariane C. Strombom** was named general counsel and compliance officer at String and Key, in Milwaukee.

**15 Ashley D. Sinclair** joined Kirkland & Ellis as a corporate associate in the firm's Chicago office.

**David J. Tamburrino** was named to coach the U.S. national speed skating team at the 2021 World Single Distance Speed Skating Championships in Heerenveen, Netherlands.

**Cameron G. Weitzner** joined the criminal defense team at Gimbel, Reilly, Guerin & Brown in Milwaukee.

**16 Tyler M. Helsel** joined Schober Schober & Mitchell, in the Milwaukee area.

**Carl W. Knepel** was named assistant state public defender in the trial division in Manitowoc County, Wis.

**Kate A. Trudell** joined Johnson Financial Group as vice president, wealth fiduciary advisor, in Racine, Wis.

**17 Hannah E. Dockendorff** has become an attorney in the Milwaukee office of Hupy & Abraham.

**18 Alex T. Kay** joined Kay & Kay Law Firm, Brookfield, Wis., as a third-generation attorney in the Kay family.

**David A. Richie** joined von Briesen & Roper as an Eau Claire-based lawyer working out of the firm's Madison office. He is a member of the government law group.

**19 Alexandra J. Gregorski** joined Quarles & Brady in its Milwaukee office. She is a business law attorney.

**Sergio M. Quiñones** has joined the legal staff of Fiserv Inc. in Brookfield, Wis.

**William Ruffing** was named a COVID-19 eviction defense attorney with the Lawyers' Committee for Better Housing, in Chicago.

**20 Elizabeth Elving** joined Reinhart Boerner Van Deuren in the Milwaukee office as an associate in the firm's litigation practice.

**Shelby E. Hahn** joined Instagram in Washington, D.C., as a politics, government, and civic engagement associate manager.

**Kelly L. Krause** joined von Briesen & Roper, Milwaukee, as an associate in the firm's business practice group.

**Marnae N. Mawdsley** has become associate director, Office of Committees on Infractions, at the National Collegiate Athletic Association, in Indianapolis, Ind.

**Chinonso I. Osuji** joined Reinhart Boerner Van Deuren in Milwaukee as an associate practicing real estate law.

Employment data for recent classes are available at [law.marquette.edu/career-planning/welcome](http://law.marquette.edu/career-planning/welcome).



# THE MARQUETTE INTERCHANGES **READY FOR ACTION**

Photo by Mike De Sisti, *Milwaukee Journal Sentinel*.

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It is quiet just before dawn and the 300,000 daily journeys through the Marquette freeway interchange, in the center of Milwaukee. At its central curve is the graceful sweep of Eckstein Hall, the home of Marquette University Law School—the other Marquette interchange. An interchange among professors and students. An interchange among thought leaders and the public. An interchange hosting a wealth of research and programs, the Lubar Center for Public Policy Research and Civic Education, and the National Sports Law Institute.

**Whether it is the freeway or the Law School, the Marquette interchange helps people get where they want to go.**