

· POLICY BRIEF · JULY 2020 ·

Racial Disparities in the Criminal Justice System in Wisconsin – What We Know Thus Far

By Mike Nichols,
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Executive Summary

The racial disparities in Wisconsin’s criminal justice system are among the worst in the country. Of the 23,700 inmates confined in Wisconsin Department of Corrections facilities in December 2019, 42% were black¹ — six times higher than black representation in the state’s population as a whole.

Many studies have been conducted in an effort to determine whether this disparity is the result of the criminal justice system and its various components — police, prosecutors, the courts or the Department of Corrections — or a reflection of gaping racial disparities that also exist in many areas outside the criminal justice system in our state.

This policy brief is a synopsis of some of the most

salient existing research in each of those areas combined with links to some of the Badger Institute’s previous work as well as some initial recommendations. This is not meant to be a comprehensive or definitive document. The extent to which racism and/or other factors contribute to existing disparities is one of the most complex and controversial areas of study in America, and we intend to be among those delving deeper into these all-important issues.

But this brief does provide a broad and impartial look at what we know thus far — and a roadmap of sorts that lays out why our ongoing focus will include corrections reform, collective bargaining and police discipline, and perhaps legal representation rather than the judiciary or prosecutors.

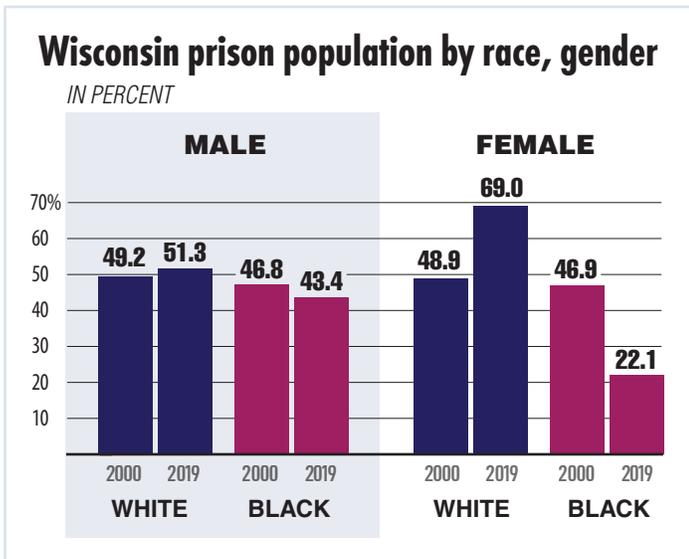
Corrections

On criminal justice issues, the Badger Institute at this point has spent the most time and effort researching corrections.

Corrections has three main components: The Division of Adult Institutions, the Division of Juvenile Corrections and the Division of Community Corrections. The Divisions of Adult Institutions and Juvenile Corrections have no control over who is incarcerated and, ever since parole was abolished almost 20

years ago, virtually no control over when inmates are released.

The Division of Community Corrections, on the other hand, is responsible for monitoring ex-inmates under supervision and helping to determine who is revoked and sent back to a cell. As the Badger Institute pointed out in its 2019 report *Ex-offenders under watch*, over 5,400 people were revoked and sent back to prison in 2016 alone. It’s clear that probation and parole agent decisions — and determinations made during hearings held



by administrative law judges working for the Department of Administration — have a significant impact on who is incarcerated.²

There are very large racial disparities in who is being revoked. In fact, the percentage of those being revoked who are black exactly matches the percentage of the prison population who are black: 42%.³ This would make sense if everyone being revoked was on extended supervision and previously served time in prison, but that is not the case.

Most revocations involve people on probation, and individuals on probation are overwhelmingly white. In fact, blacks make up only 25% of all individuals under some form of supervision, including both ex-inmates under extended supervision and people on probation who may or may not have been previously incarcerated.⁴ All else being equal, the number of blacks being revoked should be relatively close to 25%,⁵ rather than 17 percentage points higher.

All else is not equal, of course.

Just why blacks make up such a large percentage of people being revoked deserves further inquiry. One theory is that, especially in Milwaukee, revocations are often the result of interaction with police rather than merely interaction with a probation or parole agent. Police in Milwaukee have a great deal of contact with blacks — a fact that might make that racial group more susceptible not just to arrest for new crimes but revocation as well. We can't prove or disprove this hypothesis, however, without — at minimum — more and better data from the Department of Corrections.

Wisconsin's criminal justice data collection and reporting has significant gaps that make it difficult to conduct research, evaluate policy reform initiatives or even create a framework to monitor the success or failure of policy changes.

The Badger Institute has released specific, detailed [recommendations](#) regarding data that should be gathered and made

public. But one area where better data is essential is Community Corrections.

For instance, *Ex-offenders under watch* shed considerable light on deficiencies in community supervision in Wisconsin, made policy recommendations and illustrated the complexities and individual nature of the revocation process. But regularly reported, detailed information is needed to determine what is generally driving revocations. We need to know more about what events are causing probation and parole agents to begin the revocation process. We need to know whether law enforcement is involved in the process and, if so, what brought the offender to the attention of the police.

The data should also include demographics of the offenders being revoked so we can determine how race, education, employment and socioeconomic status are relevant to the revocation process.

We have identified [key reforms](#) that can and should be implemented right now and will benefit both society and all inmates sincere about reintegrating into their families and communities. But the lack of information makes it difficult to determine what reforms would be appropriate to address racial disparities in particular.

Police, Prosecutors and Judges

Milwaukee County is home to 69% of all blacks in Wisconsin, and most blacks who are imprisoned in Wisconsin come from that area.⁶ As a result, any examination of racial issues and disparities in Wisconsin's criminal justice system must begin there, specifically with an examination of the Milwaukee Police Department, the Milwaukee County district attorney's office and the Milwaukee courts system.

Judiciary:

At least two serious attempts have been made in the last dozen years to determine if race influences sentencing decisions in Wisconsin.

A study undertaken by the chief justice of the state Supreme Court with the help of the staff of Wisconsin's Consolidated Court Automation Programs (CCAP) and University of Wisconsin-Madison statistician Nicholas Keuler, *Race and Sentencing In Wisconsin Criminal Courts — A Preliminary Inquiry*, tried to compare defendants convicted of the same class of felony and with similar conviction histories in Milwaukee County to see whether racial differences resulted in different sentences.

They found that to be insurmountably difficult because convictions often result from pleas, which can make it hard to use court records to ascertain the severity of the initial offense. Readily determining and quantifying the severity of prior criminal conduct, they concluded, is also exceedingly difficult.

“Some of the data that CCAP currently stores are necessary to considering race and sentencing, but they are not sufficient

to answer the question I posed: whether similarly situated African American and Caucasian males are sentenced similarly,” wrote Chief Justice Patience Roggensack in a 2016 article in *Marquette Lawyer*.⁷

There has been talk of improving the data available within CCAP, the Department of Corrections and the state Department of Justice and — as noted above — the Badger Institute has compiled recommendations and is poised to advocate for legislative change.

Even then, however, a complicating factor exists that would make it very difficult to prove or disprove racial bias among judges: Wisconsin case law specifies that a defendant’s educational background and employment record are relevant to sentencing.⁸ Judges legally and appropriately often take both into consideration.

The Wisconsin Sentencing Commission, which authored the other serious attempt at discerning whether racial bias affects sentencing in the state, pointed to this reality when it, too, came up short in reaching definitive conclusions about the reasons for racial disparities in the state’s courtrooms.

“Due to the fact that race is generally correlated with many legal sentencing factors permissible for judges to consider — (including) employment history and educational opportunities — it becomes a challenging directive to sufficiently separate the effect of race over other interconnected factors,” the commission concluded in *Race & Sentencing in Wisconsin: Sentence and Offender Characteristics Across Five Criminal Offense Areas*.

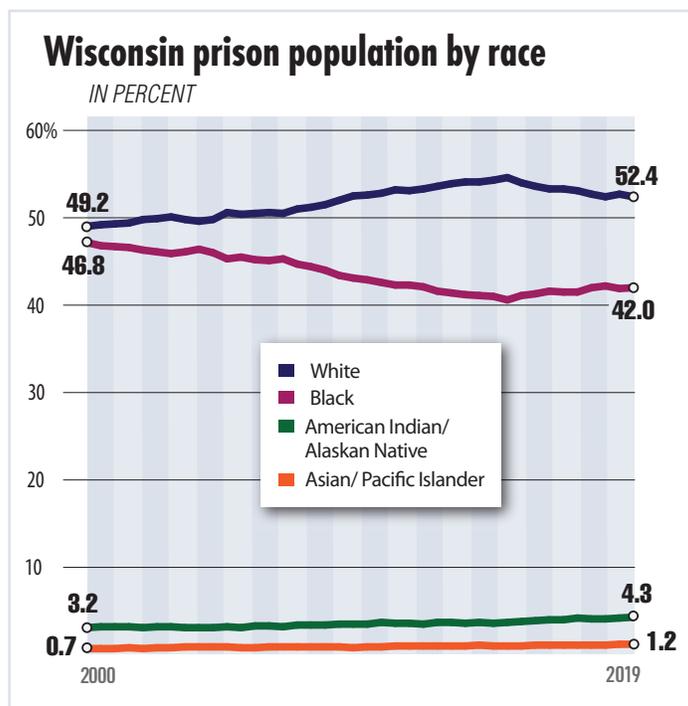
In other words, racial disparities in employment and education are reflected in the justice system, and although they may be to some unquantifiable extent the result of racism, it does not necessarily follow that judges themselves are racist.

In sum, trying to determine statistically whether judges are racially biased quickly becomes very murky.

Finally, there are some choices made by defendants themselves that can result in longer sentences. For instance, blacks in Wisconsin are somewhat more likely in some felony classes to take their case to a jury rather than accept a plea bargain, according to both Roggensack and Don Stemen, a professor at Loyola University in Chicago who previously was director of

research on sentencing and corrections at the Vera Institute of Justice.⁹

This can be self-defeating for the defendants because judges tend to sentence people who are convicted in jury trials to longer terms than those who plead guilty early in the process. Then again, at least some blacks are making a logical choice to go to trial instead of taking a plea deal because, according to data collected in Roggensack’s study, in at least some felony classes blacks are less likely to be found guilty by jurors than are whites.¹⁰



Prosecutors:

There is little evidence that race affects decisions being made by the Milwaukee County district attorney’s office, according to an independent analysis of 60,000 cases from 2017 and 2018.

The study, led by Stemen and funded by the John D. and Catherine T. MacArthur Foundation, found that while large racial disparities exist in the criminal justice system, there is little evidence of racial bias in decisions made by the Milwaukee County DA’s office.

Blacks make up 27% of the county’s population, yet black defendants represent 66% of the cases presented before

the DA for charging. Meanwhile, whites make up 64% of the county’s population and only 22% of defendants presented for charging.

However, the study notes that white defendants are charged in 52% of cases, black defendants in 49% of cases and Hispanic defendants in 55% of cases. These rates indicate that racial bias is not a factor in charging decisions by the district attorney’s office.

The study highlights the value of accurate, detailed criminal justice data. The researchers examined 59,120 cases referred by law enforcement, 22,999 cases disposed by the district attorney’s office and 15,525 cases sentenced in 2017 and 2018.

A few findings support the need for future research:

- White defendants, according to the report, are more likely to be charged for drug offenses, blacks are more likely to be charged for persons offenses (e.g., assault and robbery) and Hispanics are more likely to be charged for weapons and property offenses.
- Only 50.7% of all referrals result in charges filed. Further

research could examine what referred charges are not filed and why prosecutors make these decisions. The low charging rate may indicate that law enforcement agencies are referring charges that are not supported by evidence, that prosecutors are making decisions based on caseloads or that prosecutors' interpretations of what is just for the crime are not aligned with law enforcement's interpretation.

According to the study, there is little evidence of racial bias in the decision to file charges, the decision to increase or reduce charges from law enforcement, whether a case is dismissed and whether a case ends in a plea bargain or trial.

Police:

Countless studies and articles have focused on racial disparities in arrests and stops throughout the United States. In Milwaukee, the most comprehensive recent analysis was the Collaborative Reform Initiative conducted by the U.S. Department of Justice's Office of Community Oriented Policing Services in 2016 and 2017.

The report noted, among other things, that "traffic stop practices have a disparate impact on the black community" and noted that members of that community feel that "many innocent individuals are being stopped, harassed and detained unduly."

The Milwaukee Police Department, then run by Chief Edward Flynn, responded at length in a September 2017 document titled *Milwaukee Police Department Collaborative Reform Planning and Implementation Guide, November 2015-Present:*

Residents of neighborhoods characterized by intergenerational poverty, severe levels of unemployment and other social service needs rely more upon the police for safety and stability. Unemployment, poverty, low educational attainment, vacant homes, foreclosed homes, hazardous properties, crime, police calls for service, fire department calls for service and ambulance dispatches are geographically concentrated in Milwaukee. Therefore, traditional police interventions including traffic stops, field interviews, and probation and parole checks combined with community-oriented activities including bus checks, business checks, park and walks, tavern checks, vacant house checks and positive citizen contacts are concentrated in the same areas where criminals and victims are present.

Like law enforcement agencies throughout the country, the MPD upholds a commitment to police practices that are unbiased, constitutional and evidence-based. In agencies' efforts to effectively reduce victimization, agencies confront the unfortunate social reality that those neighborhoods most afflicted with high rates of poverty and violence are inhabited by people who for legitimate historical reasons are distrustful of the police ...

The (DOJ) report, unfortunately, does not effectively explain the difference between disparity and bias. While

researchers can easily measure disparity through data collection, it can (be) very difficult to identify the sources and causes of it — even for social scientists. For example, disparity could be due to bias or due to legitimate alternative factors such as differential criminal behavior. The COPS Office has identified Dr. Lorie Fridell as an expert in this field. Discussion on this topic should include a more expansive literature review, including research from Dr. Fridell. Dr. Fridell states, "Only after controlling for driving quantity, driving quality and driving location can a researcher who finds that minorities are disproportionately represented among drivers stopped by police conclude with reasonable confidence that the disparity reflects police bias and decision-making."¹¹

In sum, determining whether decisions in the criminal justice system are driven by current bias or are a reflection of historical racism, poor public policy or other factors is invariably an exceedingly complicated undertaking that traditionally has led to uncertain or refutable conclusions.

"The goal of definitively proving and quantifying a pure race effect in punishment will likely continue to be frustratingly elusive," Marquette University professor Michael O'Hear has written. "There are simply too many variables at play, many of which defy easy, reliable measurement and many others of which are themselves socially constructed in ways that may reflect bias (like going to trial). Perhaps we are focusing too much attention on the quixotic goal of pinning down the cause of racial disparity in our prison population. It should not distract us from the pressing imperative — in Wisconsin and nationally — of reducing our bloated and historically unprecedented incarceration rate."

Going forward:

There is much yet to be learned. Yet there is also much that can be done at this moment to lessen the possibility that blacks are being treated unfairly in the criminal justice system.

Data

One step toward better understanding the racial disparities and other trends in our criminal justice system is obtaining better data. The state Department of Corrections does not report data points such as community supervision success rates, agent caseloads, number of offenders who abscond, what crimes are committed by offenders, the number of sanctions imposed, the number of revocation hearings or the revocation rate. This lack of basic information makes it difficult to know whether community supervision is working well for offenders or whether revocations are justified. As noted above, we will be advocating for legislation that mandates more and better public data. We cannot fix the problem, after all, without knowing exactly what it is. The focus in the Badger Institute's 2017 *Black Robes & Blue Collars* report on racial disparities in expungements is an example of the value of pointing out the problem.

WISCONSIN			
	State overall	Blacks	Whites
Total population	5,813,568	370,632	4,957,243
Unemployment rate	3.2	7.6	2.8
Labor force participation	66.0%	60.2%	66.2%
Median household income	\$60,773	\$30,798	\$63,178
Poverty rate: all families	7.0%	28.3%	5.1%

Source: American Community Survey 2018 one-year estimates

“The disparities by race and county are troubling,” we wrote at the time. “Whatever the reason — economics and the related lack of legal representation, bias, differences in prior criminal records, differing attitudes among judges — it is clear that the defendants in the one place with the highest widespread levels of unemployment and poverty in the state, the city of Milwaukee, have much less likelihood of securing an expungement than most other Wisconsinites.”

With better data, we would, for example, revisit the revocation issue and try to determine the cause and remedy for racial disparities in that area.

Weeding Out Bad Officers

We will soon be releasing initial research findings on the use of force and current disciplinary procedures in many Wisconsin police departments. But we already have determined that two reforms would help immensely in disciplining or removing any bad or racist police officers.

- Act 10, the legislation that limited most public-sector collective bargaining to wages, should immediately be extended to police and fire contracts in order to give police chiefs more latitude in quickly and effectively rooting out misconduct in the ranks.

- Absent extension of Act 10, the Legislature should immediately pass a law reversing action spearheaded by then-Gov. James Doyle in 2007 that gave police unions the ability to ask for arbitrators to preside over disciplinary cases. At least some police contracts in larger Wisconsin cities include clauses that can now be used to overturn disciplinary actions against bad officers. That should be changed.

Legal Representation

One of the Badger Institute’s recommendations in *Black Robes & Blue Collars* was to “increase the focus on making sure defendants have knowledge of how to seek expungements and ask for legal assistance.” We are now convinced that we can and should do more.

Our initial research in this area reveals numerous fundamentally troubling facts:

An individual defendant has to make under \$12,524 annu-

ally to qualify for publicly funded legal representation under Wisconsin guidelines. That number has been frozen since 2011 — one potential reason that fewer and fewer defendants are getting a public defender in Wisconsin each year.

The static threshold is so low that it is less than the slowly rising federal poverty line that now sits at just \$12,760 for an individual. That means there are defendants in Wisconsin living in poverty, who are quite literally under the federal poverty level (FPL), who do not qualify for a public defender under state guidelines.

For example, the FPL for a family of three is \$21,720 per year. The eligibility threshold for the appointment of a public defender under state guidelines is \$21,310.

This problem, exceedingly low indigency thresholds, is only getting worse due to inflation.¹²

On the positive side, many people who make more than the indigency threshold in Wisconsin still end up getting a public defender simply by asking judges, who can use county — rather than state — funds to pay for a defense attorney. Judges have considerable latitude in deciding who gets public representation, which is a good thing given the low indigency threshold but is also a potential problem.

Different judges have different personal notions of fairness or need and differing attitudes regarding the spending of tax dollars. They work in different counties, which means some might be subject to pressure from county budget officials while others might not. Differences also exist in costs of living and incomes in various parts of the state that might be relevant to some judges. All these factors might come into play and create inequities in who gets public representation.

Further research could shed light on whether inequities in representation have caused inequities in criminal justice system outcomes by economic status, geographic area and — given the strong correlation between poverty and blacks¹³ — race.

Related research could also go beyond the question of who qualifies for representation to the scope of that representation, caseloads for public defenders, limitations on publicly funded investigations by private investigators working for defense attorneys and availability of private attorneys compensated with tax dollars.

Other Badger Institute recommendations can be found on our website on the initiatives tab under “[Corrections reform](#)” or in a [booklet](#) by a likeminded coalition that we spearheaded.

Summary

Racial disparities in the criminal justice system are the focus of a considerable amount of research both across the country and in Wisconsin. Determining the cause is important but complex, often subjective and/or lacking in meaningful data. In Wisconsin, disparities are not quite as pronounced as they were 20 years ago, when blacks made up almost half of the prison population in Wisconsin.¹⁴

In the last couple of years, however, the trend has reverted — with the proportion of inmates who are black increasing once again.

Since 2000, white inmates have made up the largest proportion of the Wisconsin prison population at every point in time, according to the Department of Corrections. Between December 2000 and 2015, the proportion of white inmates increased by 10%, while the proportion of black inmates decreased by 12%. Since then, the trends for the two groups have reversed course; the proportion of white inmates has decreased by almost 3%, while the proportion of black inmates has increased by over 2%.

The bottom line is that in recent years, incarceration levels of blacks are getting worse. It would seem quite pessimistic to presume racism or bias is worse in just the last couple of years than it was in the preceding 15. Conversely, it's likely overly Pollyannaish to presume the opposite: that gradual elimination of racist impulses and actions was solely the cause of decreasing black incarceration between 2000 and 2015. There are likely other factors at work here, including crime trends in various parts of the state.

In the end, perhaps the most important thing from the Badger Institute's perspective is that behind all the numbers are individuals with varying backgrounds, culpability, opportunity, moral character and levels of aspiration. We must, of course, also always keep foremost in mind the extent to which each individual has victimized another human being. We must continue to examine the trends and societal factors. We must try

our hardest to make sure that each individual is treated fairly within the criminal justice system and in a way that disregards skin color and economic status.

We have an obligation and responsibility to conduct ongoing research on racial disparities and — whether they are the result of racial bias or not — help determine how they might be lessened.

This should be the goal of all concerned Wisconsinites in the weeks and months ahead.

About the authors

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Nichols



Hughes



Grace

Endnotes

¹*Prison Point-in-Time Populations, 2000-2019*, Wisconsin Department of Corrections.

²This does not include people who are revoked and required to serve a jail term rather than a prison term.

³*The Wisconsin Community Corrections Story*, Columbia Justice Lab, P. 18.

⁴Ibid.

⁵Two-thirds of people who were revoked in a recent month were on probation and approximately one-third were on either extended supervision or parole, meaning they had been in prison where there are larger percentages of blacks, according to the DOC. Given these facts, and all else being equal, we could expect that just slightly more than 25% of all revocations would involve blacks.

⁶A University of Wisconsin-Milwaukee paper, *Wisconsin's Mass Incarceration of Black Males: Workforce Challenges for 2013*, stated that there were 5,631 blacks from Milwaukee County in Wisconsin prisons in early 2012. It is not possible to readily determine the total number of blacks in prison in 2012, but in 2014 the number was 8,024, according to an article by Wisconsin Supreme Court Chief Justice Patience Roggensack in *Marquette Lawyer*.

⁷This might be an area worth researching further, although right now we don't know for sure whether African Americans are getting longer sentences.

⁸ In *State v. Harris*, 75 Wis. 2d at 519-20, the Supreme Court delineated additional and related factors that courts could consider in sentencing, which are as follows:

"1) Past record of criminal offenses; 2) history of undesirable behavior pattern; 3) the defendant's personality, character and social traits; 4) result of presentence investigation; 5) vicious or aggravated nature of the crime; 6) degree of the defendant's culpability; 7) defendant's demeanor at trial; 8) defendant's age, educational background and employment record; 9) defendant's remorse, repentance and cooperativeness; 10) defendant's need for close rehabilitative control; 11) the rights of the public; and 12) the length of pretrial detention."

⁹"Specifically, cases are more likely to result in a plea or trial when defendants are black or Hispanic," Stemen concluded. "However, the absolute difference in plea/trial rates for white defendants and black defendants is small (~2%-4%) and the difference is largely explained by differences in deferrals, not in dismissals. In other words, cases involving black and Hispanic defendants are less likely to be deferred."

¹⁰*Race and Sentencing*, pp. 27-28.

¹¹Fridell, L.A. 2004. *By the Numbers: A Guide for Analyzing Race Data from Vehicle Stops*. Police Executive Research Forum, Washington, D.C., pp. 1-24. The most important conclusion in this draft chapter resulted from a "veil of darkness" study conducted by the CRI-TA researchers, which was the primary methodology to evaluate whether the "disparity" identified in the draft report is indicative of "bias." The draft report reads, "The study presented in this chapter utilizes Grogger and Ridgeway's (2006) 'Veil of Darkness' technique," and explains that this approach has been utilized in jurisdictions throughout the country. The draft assessment goes on to explain the Veil of Darkness: "The VOD technique compares the racial composition of traffic stops conducted during daylight hours with stops conducted during nighttime hours. This approach is based on the premise that police officers have a hard time seeing the race and ethnicity of drivers at night; therefore, it is difficult for them to use driver race and ethnicity in their decision to conduct traffic stops. If racial and ethnic minority drivers are stopped more frequently during the daytime than during the evening, this could be an indication that some officers may be using driver race and ethnicity in their decision to conduct traffic stops."

Perhaps the most relevant conclusion, derived from the researchers' primary methodology in their evaluation, resulted in the following conclusion: "First, we learned that most traffic stops involved African American drivers, regardless of district and time of day. A very large portion of traffic stops take place during the nighttime for all racial and ethnic groups included in this study. Further analysis using the 'Veil of Darkness' technique revealed there was no statistical evidence that MPD officers are using racial profiling when they conduct traffic stops." Given the importance of this finding, it is troubling that it seems to have been provided as an "afterthought" in the report, not cited in the executive summary or noted in press accounts.

¹²Back in 2011, when indigency standards were last established in Wisconsin, \$12,524 was 115% of the federal poverty level (FPL). Now, it is actually lower than the FPL for individuals and families. In comparison, all of the federal means-tested support programs kick in for individuals and households with incomes far above the federal poverty level. The FPL, after all, is incredibly low by almost anyone's standards and is itself an antiquated artifact of the past.

¹³The black poverty rate is more than 2.5 times the overall Wisconsin poverty rate and three to four times the white poverty rate, according to the *Wisconsin Poverty Report*.

¹⁴*Prison Point-in-Time Populations, 2000-2018*, Wisconsin Department of Corrections.