

# **Problems with Wisconsin's Expungement Law**

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How the Law is Used  
and How to Make It More  
Equitable and Effective

## Executive Summary

Call it a second chance — all across the country, states are approving expungement laws that allow ex-offenders to clean up their records.

In Wisconsin, an existing law allows for the expungement — basically, the sealing of the record — of minor criminal offenses for anyone who was under age 25 at the time of the offense if a judge finds that the offender will benefit and society will not be harmed.<sup>1</sup>

There are numerous limitations: The maximum punishment for the crime cannot be more than six years, which eliminates the vast majority of felonies from consideration.<sup>2</sup> No defendant, regardless of the charge, is eligible if he or she has a prior felony conviction. And unless a judge declares a defendant eligible at the time of sentencing, the offender's record can never be expunged. Under current law, only if the judge makes the defendant eligible at that time — prior to serving the sentence — can the defendant be considered for expungement at a later date.

In order to help policy-makers understand how, when and where the expungement law is used in Wisconsin, WPRI partnered with researchers at Court Data Technologies in Madison to identify over 10,000 cases filed since Jan. 1, 2010, and later expunged, and then

linked each of those back to original Wisconsin court documents identifying the county in which the crime was committed, the nature of the crime, the defendant's race and his or her age at the time of the offense. Cases with multiple counts must be expunged fully or not at all. But in addition to looking at the number of cases expunged, the study looked at the number of counts — individual charges within a case — that were expunged.

The goal of the study was to determine how often cases are being expunged in Wisconsin, the types of cases most frequently expunged and whether expungement decisions vary by county, age or race.

Ultimately, we hope to help policy-makers determine whether Wisconsin's expungement law should be altered and made more logical, equitable and effective in helping both low-level offenders find work and companies find employees.

We found that of the approximately 10,000 expunged cases examined, most were criminal misdemeanors or involved charges for which the defendant had been found not guilty. We also found significant differences in the prevalence of expungement by age, location and race.

## Background on the Use of Expungements

The numbers across the nation are eye-opening: 70 million Americans — one out of every three working-age adults — have some kind of criminal conviction.<sup>3</sup> Those criminal records have lifelong consequences affecting everything from getting a job or a loan to joining the military to getting into college. The problem is particularly acute in Milwaukee, where 42 percent of the unemployed seeking jobs reportedly have a criminal history.<sup>4</sup>

The campaign to clean up minor criminal records of some of these offenders — mostly younger individuals who committed low-level crimes — is spreading across the country. Koch Industries, with 60,000 workers in the United States, removed questions about prior criminal convictions from its job applications in 2015, joining other big companies such as Walmart, Target, Home Depot and Starbucks.

“Do we want to be judged for the rest of our life for something that happened on our worst day?” a top Koch executive told *USA Today* in explaining the move.

A top official at the Federal Reserve Bank of Chicago says sealing minor criminal records puts people back to work.

“Expungement is one of many tools that will assist people that have a prior, nonviolent felony conviction,” says Steve Kuehl, the

bank's economic development and Wisconsin state director. “These are individuals who have paid their debt to society. We have to ask ourselves: (Do) people who have been in prison need to keep paying over and over again for that, or can we move forward?”

Last year, four states passed laws reforming expungement statutes, and this year, the Georgia Supreme Court ruled the state's expanded expungement law applied to old cases, not just offenses occurring since the law's expansion. The Pennsylvania Supreme Court ruled that any five-year period free of arrest made an offender eligible for expungement of a summary conviction, the most minor type of conviction in that state.

In Wisconsin, three bills making their way through the Legislature would change the time of consideration of eligibility by judges from when it currently occurs — at sentencing. Two of the bills change the eligibility determination to no sooner than one year after the offender completes his or her sentence. The third bill also moves expungement decisions — including eligibility — to the point after the sentence has been served. But it also clarifies the law so that, for employment purposes, an expunged record is not considered a conviction.

# Types of Cases and Charges Being Expunged in Wisconsin

An average of slightly over 2,000 cases — many with multiple counts — are expunged each year in Wisconsin. That number has been pretty steady since 2012.

Our analysis included every case filed from Jan. 1, 2010, through April 14, 2017 — ultimately covering over 10,000 expunged cases with almost 21,000 different counts or charges. Of the precisely

## Types of expungements

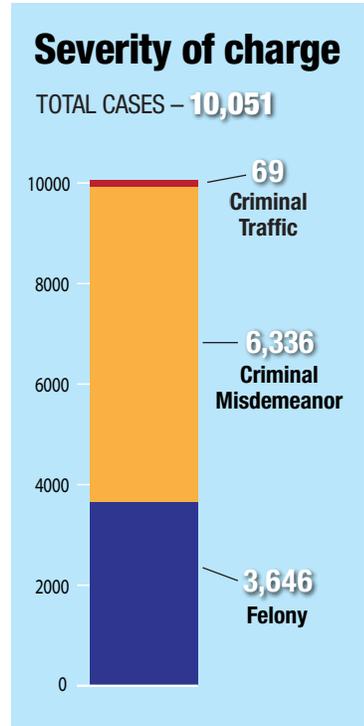
| Statute        | Sample description                                           | Counts* | Statute        | Sample description                                                      | Counts* |
|----------------|--------------------------------------------------------------|---------|----------------|-------------------------------------------------------------------------|---------|
| 961.41(3g)(e)  | Possession of THC (2nd+ Offense)                             | 2074    | 346.63(1)(a)   | OWI (1st)                                                               | 28      |
| 943.20(1)(a)   | Theft-Movable Property <=\$2500                              | 1324    | 943.38(2)      | Forgery-Uttering                                                        | 28      |
| 947.01(1)      | Disorderly Conduct                                           | 1194    | 943.01(2)(d)   | Criminal Damage to Property (Over \$2500)                               | 27      |
| 961.573(1)     | Possess Drug Paraphernalia                                   | 969     | 948.40(1)      | Intent. Contribute/Delinquency Child                                    | 26      |
| 947.01         | Disorderly Conduct                                           | 812     | 813.125(7)     | Violate/Harassment Restraining Order                                    | 25      |
| 946.41(1)      | Resisting or Obstructing an Officer                          | 756     | 941.01(1)      | Negligent Operation of Motor Vehicle                                    | 25      |
| 940.19(1)      | Battery                                                      | 741     | 961.41(1)(b)   | Manufacture/Deliver Non-Narcotics                                       | 25      |
| 943.01(1)      | Criminal Damage to Property                                  | 658     | 941.10(1)      | Negligent Handling of Burning Material                                  | 24      |
| 946.49(1)(a)   | Bail Jumping-Misdemeanor                                     | 354     | 948.02(2)      | 2nd-Degree Sexual Assault of Child                                      | 24      |
| 961.41(1)(h)1  | Manufacture/Deliver THC (<=200g)                             | 348     | 943.24(1)      | Issue of Worthless Checks(<=\$2500)                                     | 23      |
| 943.50(1m)(b)  | Retail Theft - Intentionally Take (<=\$500)                  | 336     | 940.30         | False Imprisonment                                                      | 22      |
| 940.225(3m)    | 4th-Degree Sexual Assault                                    | 222     | 943.50(1M)(A)  | Retail Theft-Alter Price (<=\$2500)                                     | 21      |
| 961.41(1m)(h)1 | Possess w/Intent-THC (<=200 grams)                           | 212     | 940.44(1)      | Intimidate Victim/Dissuade Reporting                                    | 20      |
| 961.41(3g)(am) | Possession of Narcotic Drugs                                 | 188     | 944.20(1)(b)   | Lewd, Lascivious Behavior-Exposure                                      | 20      |
| 450.11(7)(h)   | Possess/Illegally Obtained Prescription                      | 186     | 941.20(1)(b)   | Operate Firearm While Intoxicated                                       | 19      |
| 961.41(3g)(b)  | Possession of Controlled Substance                           | 176     | 948.10(1)      | Exposing Genitals to Child                                              | 19      |
| 943.14         | Criminal Trespass to Dwelling                                | 145     | 346.62(3)      | Reckless Driving-Cause Bodily Harm                                      | 18      |
| 948.09         | Sex with Child Age 16 or Older                               | 112     | 940.235(1)     | Strangulation and Suffocation                                           | 18      |
| 943.20(1)(b)   | Theft-Business Setting <=\$2500                              | 104     | 943.23(3)      | Drive or Operate Vehicle w/o Consent                                    | 17      |
| 961.41(3g)(d)  | Possess Amphetamine/LSD/Psilocin                             | 104     | 943.41(5)(a)1a | Fin.Trans.Card-Fraudulent Use (<=\$2500)                                | 16      |
| 946.49(1)(b)   | Bail Jumping-Felony                                          | 102     | 943.41(5)(a)1b | Fin.Trans.Card-Fraudulent Use (<=\$2500)                                | 16      |
| 943.34(1)(a)   | Receiving Stolen Property (<=\$2500)                         | 85      | 941.24(1)      | Possession of Switchblade Knife                                         | 15      |
| 961.42(1)      | Maintain Drug Trafficking Place                              | 77      | 941.30(2)      | 2nd-Degree Recklessly Endangering Safety                                | 15      |
| 961.41(1m)(h)2 | Possess w/ Intent-THC(>200-1000g)                            | 76      | 943.23(4m)     | Operate Vehicle w/o Consent-Passenger                                   | 15      |
| 941.23(2)      | Carry Concealed Weapon                                       | 71      | 943.41(3)(a)   | Credit Card-Theft by Acquisition                                        | 15      |
| 961.41(3g)(c)  | Possession of Cocaine/Coca                                   | 71      | 56.0           | Unclassified Forfeiture                                                 | 14      |
| 346.67(1)      | Hit and Run                                                  | 70      | 944.30(1)      | Prostitution-Nonmarital Sex. Intercourse                                | 14      |
| 943.10(1m)(a)  | Burglary-Building or Dwelling                                | 69      | 961.41(1)(h)2  | Manufacture/Deliver THC (>200-1000g)                                    | 14      |
| 943.41(5)(a)   | Credit Card-Fraudulent Use (<=\$2500)                        | 68      | 940.20(2)      | Battery to Law Enforcement Officers, Firefighters or Commission Wardens | 12      |
| 346.04(2t)     | Resisting/Failing to Stop/Fleeing                            | 64      | 941.316(2)(b)  | Intentionally Abuse Hazardous Substance                                 | 12      |
| 940.19(2)      | Substantial Battery-Intend Bodily Harm                       | 63      | 943.50(1m)(d)  | Retail Theft-Intent.Conceal (<=\$2500)                                  | 12      |
| 943.20(1)(d)   | Theft-False Representation <=\$2500                          | 60      | 948.03(2)(b)   | Child Abuse-Intentionally Cause Harm                                    | 12      |
| 346.04(3)      | Vehicle Operator Flee/Elude Officer                          | 59      | 450.11(7)(a)   | Obtain Prescription Drug w/ Fraud                                       | 11      |
| 943.017(1)     | Graffiti                                                     | 54      | 948.10(1)(B)   | Exposing genitals - Child act as actor/ close age of actor and child    | 11      |
| 943.201(2)(a)  | Misappropriate ID Info - Obtain Money                        | 52      | 450.11(9)(b)   | Manufacture or Deliver Prescription Drug                                | 10      |
| 943.15(1)      | Entry into/onto Bldg/Constuct.Site/Room                      | 43      | 943.12         | Possession of Burglariious Tools                                        | 10      |
| 941.20(1)(a)   | Endanger Safety/Use/Dangerous Weapon                         | 38      | 943.203(2)(a)  | Identity Theft - Obtain Money or Credit                                 | 10      |
| 948.21(1)(a)   | Neglecting a Child                                           | 33      | 943.23(2)      | Take and Drive Vehicle w/o Consent                                      | 10      |
| 961.41(3g)(g)  | Possession of Methamphetamine                                | 32      |                |                                                                         |         |
| 941.23         | Carrying a Concealed Weapon                                  | 31      |                |                                                                         |         |
| 943.23(3m)     | Take/Drive Veh. w/o Consent-Abandon Veh. 31                  |         |                |                                                                         |         |
| 343.44(1)(b)   | Operating While Revoked (Rev due to alc/contr subst/refusal) | 29      |                |                                                                         |         |

\*This list does not include counts that were dismissed. It does include charges for which there were at least 10 different expungements from 2010-2016.

20,957 counts in cases filed during that period, we found that more than a third — 7,362 — had been dismissed or involved charges for which the defendant was found not guilty. We broke down the rest — 13,595 charges that involved convictions — by statute.

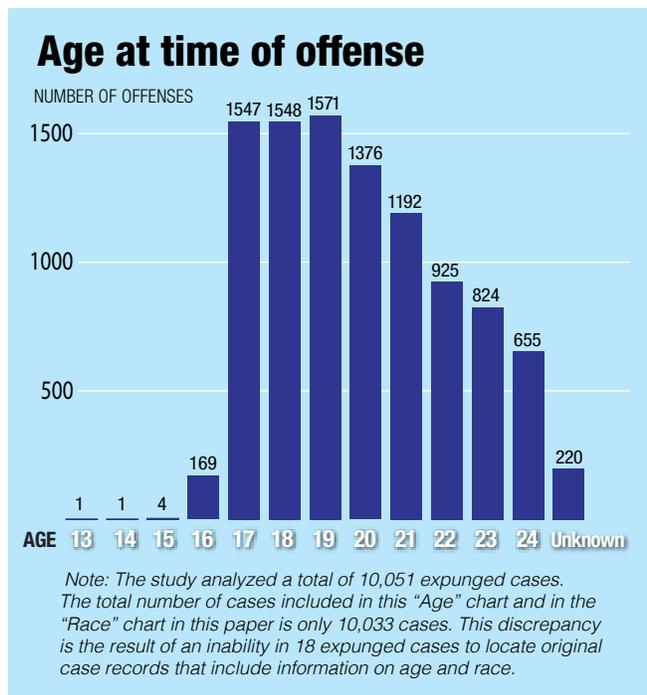
The chart on Page 5 illustrates the fact that most defendants currently benefiting from the expungement statute were charged with possession of small amounts of marijuana or drug paraphernalia, minor thefts such as shoplifting or disorderly conduct. When looking at cases (rather than counts within those cases), almost two-thirds of the expungements — 6,336 of 10,051 — were for cases wherein the most serious charge was a criminal misdemeanor. Slightly more than a third — 3,646 — included low-level felonies, and a sliver involved traffic cases that rose to the level of a criminal offense.

In sum, the original intent of Wisconsin’s expungement law — clearing minor criminal infractions from the records of young offenders so that a forgivable mistake does not affect job prospects — is being met. However, it is being met much less frequently for some classifications of defendants than for others.



## Age of Defendants

Expungements are available in Wisconsin only to individuals who committed crimes prior to the age of 25. The younger the defendant, our analysis reveals, the more apt judges are to agree to expunge a record. For instance, over twice as many individuals (1,547) who committed crimes as 17-year-olds had records expunged as individuals (655) who committed crimes as 24-year-olds.



## Prevalence of Expungement and Comparison of Counties

Slightly over 10,000 cases filed since Jan. 1, 2010, were expunged by judges in Wisconsin.

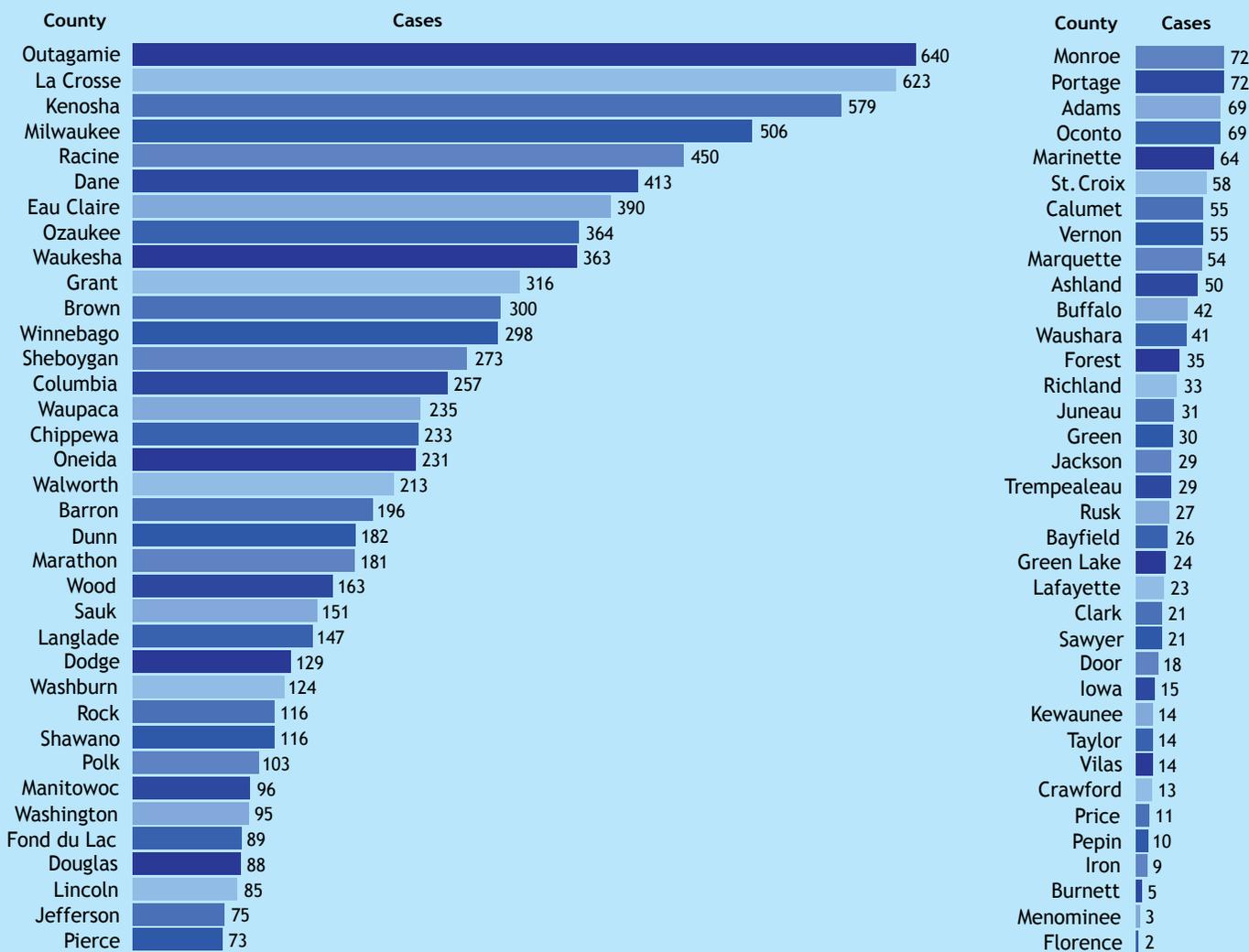
Determining the precise number of eligible cases is beyond the purview of this analysis because that would entail examining not merely every case filed since 2010 — because individuals with prior felonies are excluded from eligibility — but also linking each expunged case to every other case filed in the history of Wisconsin that involved the same defendant. Such an analysis would be too time-consuming and expensive.

However, we did identify all cases filed between the begin-

ning of 2010 and the end of 2016 for all defendants charged with a Class H felony or lower, including criminal misdemeanors and criminal traffic cases. Over that period, there were approximately 215,000 of those types of cases, and logic tells us that most would not involve a defendant with a prior felony. Ergo, we know that the number of expunged cases is a small percentage of all cases that are eligible, although we can't say for certain what that percentage is.

In addition to attaining a rough estimate of expungement-eligible cases statewide, we used the same methodology to get

### Expungements by county



similar approximations of eligibility in the counties of Kenosha, La Crosse, Milwaukee, Outagamie and Ozaukee. These counties vary greatly in size, economics, demographics and numbers of criminal cases and charges.

By any measure, one would expect Milwaukee County — the biggest county in the state with 951,000 people — to have more expungements than anywhere else. That is not the case.

- **Milwaukee has over three times the number of charges in the expungement-eligible crime categories that Outagamie, La Crosse or Kenosha counties do. Yet, in the 2010-'16 period examined, Milwaukee County had fewer total expungements (506) than Outagamie (640), La Crosse (623) or Kenosha (579).**

- **Milwaukee County has approximately 10 times the number of expungement-eligible crimes that Ozaukee County does but only 39 percent more expungements (506 in Milwaukee vs. 364 in Ozaukee).**

Determining the number of expungement-eligible crimes in any particular county is time-consuming and costly, and we had to limit our analysis to the handful of counties that raised very obvious questions when compared to Milwaukee County. But even a cursory look at the number of expungements in other counties where we did not analyze expungement-eligibility figures raises questions that policy-makers and judges might want to ponder further:

- **Why are expungements virtually unheard of in certain counties, albeit smaller ones? Burnett, Florence, Iron and Menominee counties all had fewer than 10 expungements over the seven years examined, meaning whole years go by without a single expungement granted in those counties.**

- **Ozaukee and Waukesha counties are similar demographically. Both are among the wealthiest in Wisconsin and overwhelmingly Caucasian. The difference: Waukesha has 398,000 residents, while Ozaukee has 88,000. Yet the number of expungements is virtually identical: 364 in Ozaukee and 363 in Waukesha. Meanwhile, Washington County, which borders the other two counties, had only 95.**

- **Eau Claire and Fond du Lac counties are about the same size, each with slightly more than 100,000 residents. Yet, Eau Claire had 390 expungements, while Fond du Lac had 89.**

- **Though on opposite sides of the state, Grant and Calumet counties each has around 50,000 residents. But Grant had 316 expungements, while Calumet had 55.**

- **Clark and Oneida counties each has about 35,000 residents. But Oneida had over 10 times as many expungements (231) as Clark (21).**

- **Washburn and Burnett are neighboring counties in northwestern Wisconsin, and each has about 15,000 residents. Their median household income and poverty levels are virtually identical. But Washburn had 124 expungements, while Burnett had five.**

We wondered if one partial explanation for the differences in expungement rates between Ozaukee and Milwaukee counties, for instance, might be that even within the relatively narrow universe of expungement-eligible cases we examined, the cases outside of Milwaukee County are on the whole for less-serious crimes — in other words, more likely to be misdemeanors than low-level felonies. Comparisons of misdemeanor charges in the two counties did not prove this hypothesis correct, however. The explanation lies elsewhere.

One obvious explanation for much higher expungement rates in Ozaukee, Kenosha, La Crosse and Outagamie counties than in Milwaukee County is economic. Median household income is \$43,800 in Milwaukee County and only \$36,000 in the city of Milwaukee, which comprises most of the county. Kenosha, La Crosse and Outagamie all have median household incomes of more than \$50,000. Ozaukee, one of the 25 wealthiest counties in the country, has a median household income of \$76,400. Poverty rates tell a similar story. The poverty rate in the city of Milwaukee is 29 percent, almost six times higher than the 5 percent rate in Ozaukee County.

Higher-income defendants are able to afford higher-quality defense attorneys. Low-income defendants frequently cannot afford representation at all and either have to use a court-appointed public defender or, in less serious cases, represent themselves. Defendants with hurried or less proficient attorneys, let alone no attorney at all, will be far less likely to know when or how to press for expungement.

Other possible explanations for the low level of expungements in Milwaukee County compared to smaller, wealthier counties could include differing attitudes of judges, the possibility that much higher percentages of our sample in Milwaukee County have prior, disqualifying felonies than is the case in other counties, or racism.

## Race of Defendants

We are not, of course, able to prove or disprove the existence of racism or the impact it may or may not have on the justice system. We are, however, able to break down expungements by race and compare them to estimates of expungement-eligible cases by race.

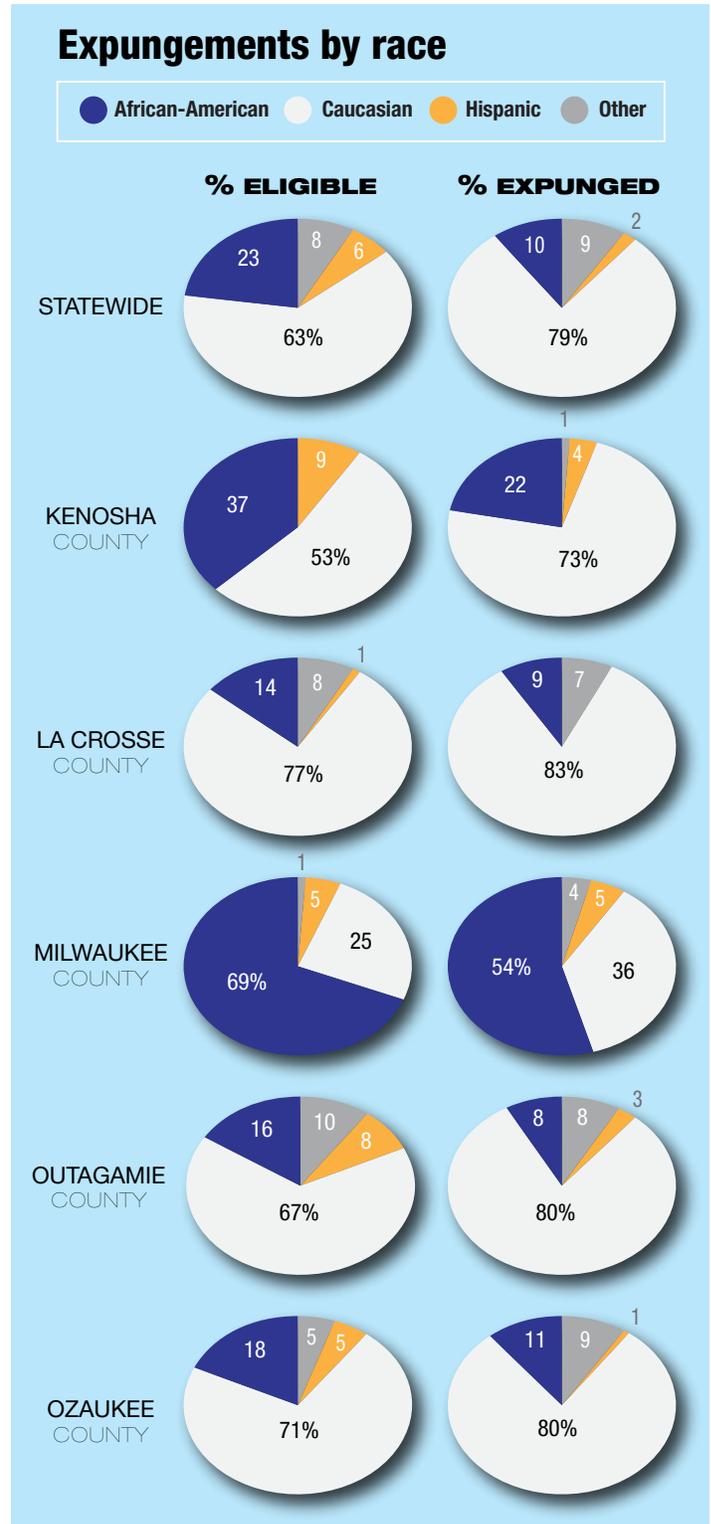
Our estimates of percentages of “eligible” individuals were determined by, again, looking at all cases filed from the beginning of 2010 involving defendants younger than 25 at the time of the offense. Again, we included all criminal cases except for those more serious than Class H felonies at the time of sentencing. We believe this method provides a fair, though not perfect, estimate of the percentages by race of eligible defendants. The resulting data shows a sharp disparity between white defendants, African-American defendants and, to a lesser degree, Hispanic defendants.

Statewide, only 10 percent of those granted expungements since 2010 are African-American and only 2 percent are Hispanic — much lower numbers than appear to have been eligible (23 percent and 6 percent, respectively). Conversely, statewide, 79 percent of those granted expungements were white, while only 63 percent of those generally eligible were white.

Analysis at the county level showed similar patterns:

- **In Milwaukee County, 69 percent of the cases eligible for expungement involved African-American defendants. But of the cases actually expunged, only 54 percent involved African-Americans. White defendants represented 25 percent of the cases eligible for expungement in the county but made up 36 percent of the cases expunged, the data shows.**

- **Similar patterns exist in the other counties examined. For example, in Kenosha County, African-Americans represented 37 percent of the cases eligible for expungement but only 22 percent of the cases expunged. Meanwhile, 53 percent of the cases eligible involved Caucasians, but 73 percent of the cases expunged involved white defendants.**



## Conclusion & Recommendations

Judges are most apt to expunge charges that were dismissed or cases that involved misdemeanors committed by individuals in their late teens or early 20s. The older the defendant, the less likely he or she is to have a record expunged — either because he or she is more likely to have prior offenses or because judges are more apt to grant second chances to individuals they think may have made a foolish, regrettable mistake of youth than someone who is older and should be wiser.

The disparities by race and county are troubling. 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.

Unemployed Milwaukeeans with records of nonviolent, low-level crimes are not the only ones who could benefit from better, more equitable use of expungement law, however. Burnett County, for example, has very low median household income (\$41,000), a higher-than-average poverty rate and one of the highest unemployment rates in Wisconsin (6.8 percent on March 2017). Nearly 25 times as many defendants are granted expungements in neighboring Washburn County, where the unemployment rate is also relatively high at 5.3 percent.

Reasons for the disparities range from obvious to speculative, but there are three ways that the process can be improved:

- **Common sense says that the decision on whether to make a defendant eligible for expungement should be moved from the time of sentencing to a point after an offender has served that sentence. Under current law, a judge at the time of sentencing weighing whether to give a defendant a shot at a second chance has little information on which to make that decision. Moving the**

**decision on eligibility to a later point will give the judge an opportunity to consider a defendant's post-sentencing behavior. It also will give defendants an opportunity to focus on and ask for expungement when they are less immersed in other legal questions and at greater distance from the prosecution of their case.**

- **Increase the focus on making sure defendants have knowledge of how to seek expungements and ask for legal assistance. It is worth noting that in Milwaukee, there is some help available for people seeking expungements. Nonprofit groups such as Clean Slate Milwaukee help former inmates get jobs by helping clean up their records; and another advocacy group for the poor, Legal Action of Wisconsin, helps youths who have minor criminal records expunge those cases through the Juvenile Re-entry Assistance Program (JRAP), which provides free legal assistance to people ages 18 to 24 who live in public housing. These efforts, however, likely pale in comparison to the legal help available to higher-income individuals outside Milwaukee.**
- **Share expungement data with judges throughout Wisconsin.**

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## Endnotes

<sup>1</sup> For anyone sentenced before July 1, 2009, expungement is available only to those under age 21 at the time of the crime and if the crime was a misdemeanor.

<sup>2</sup> In Wisconsin, Class A through G felonies allow for sentences over six years. None of those felonies, as a result, are eligible to be expunged. Only Class H and I felonies are potentially eligible, and individuals charged with those types of felonies are also disqualified if they have a prior felony or their crime fits a definition of violent.

<sup>3</sup> Brennan Center for Justice.

<sup>4</sup> Public Policy Forum, 2015 study.