

Making justice a reality for all of God's children

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Louisville Metro Human Relations Commission

Community Forum: Jury Pool Selection/What Does It Mean To Be a Citizen

Catholic Enrichment Center

6:00PM – 7:30PM

There is illegitimate racial disparity in our criminal justice system. It must be eliminated. We have a responsibility to eliminate it now.

I am here to encourage a look at the whole body of the criminal justice system. The selection of jurors in criminal cases occurs in a context that needs urgent attention. We must go upstream to understand and change the discriminatory practices that leave us here today discussing one important aspect of racial discrimination, jury selection.

As Kentucky's chief public defender, I and my fellow defenders have special responsibilities to:

- work for authentic awareness of what Dr. Martin Luther King, Jr. in 1963 termed as the "chains of discrimination"¹ that continue in 2016 to cause illegal racial disparity in our society and the Kentucky criminal justice system, and
- call for common sense reforms that bring us closer to the dream where justice surges like waters, and righteousness like an unfailing stream.²

Let's look at the facts, what people want, and what leaders see as realistic measures to reduce inappropriate discrimination.

Facts in Kentucky

Massive increased incarceration amidst declining crime

The "state's prison population has jumped more than 260 percent since 1985, from about 5,700 inmates to more than 20,700 in 2010...."³ In 2016 it is at 22,405.

The Kentucky crime rate is falling, down 17% between 1985 and 2014. The Kentucky violent crime rate has declined 31% since 1985. Kentucky's crime rate and violent crime rate are both below the national average. The reduced crime rates have resulted in a dramatic decrease in criminal cases in Kentucky. Since Calendar Year 2007, cases have declined by 42,040 from 254,285 to 212,245.

¹ Martin Luther King, Jr., *I Have a Dream*, delivered 28 August 1963, at the Lincoln Memorial, Washington D.C. "One hundred years later, the life of the Negro is still sadly crippled by the manacles of segregation and the chains of discrimination." Found at: <http://www.americanrhetoric.com/speeches/mlkhaveadream.htm>

² Amos 5:24.

³ Report of the Task Force on the Penal Code and Controlled Substances Act (January 2011) at 1; found at: <http://www.lrc.ky.gov/lrcpubs/rm506.pdf>

On the other hand, during the past 2 decades, the Commonwealth’s spending for the increased incarceration has grown dramatically. From \$140 million in FY 1990, to \$490.5 million in 2014 it was a \$350 million increase in 24 years. In 2016 total Corrections expenditures are at 536,571,200.⁴

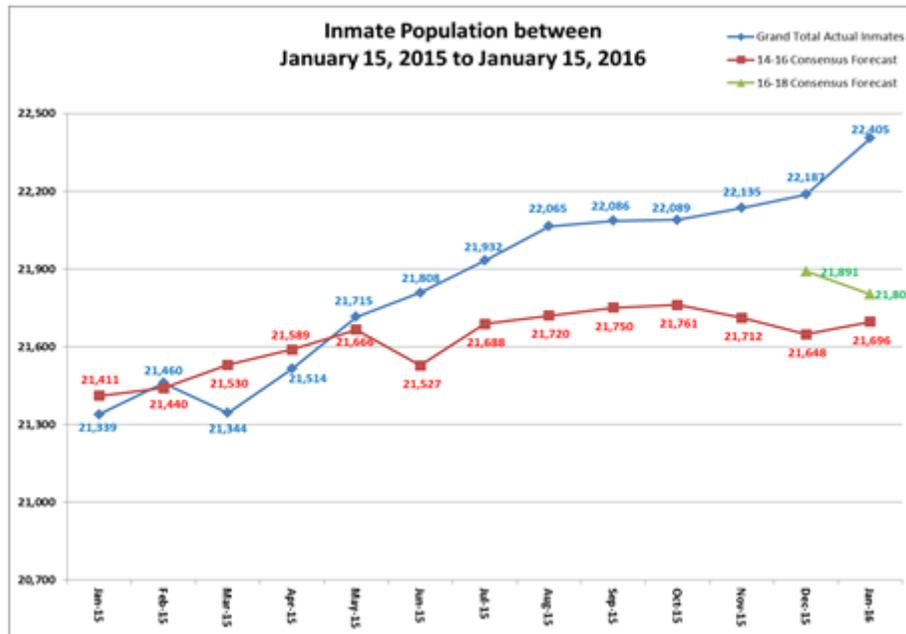
In Kentucky, African Americans are 8% of the population (2015), and are disproportionality represented in our criminal justice system:

- 15% of all arrests (2014);
- 17% of all arrests for serious crimes (2014);
- 22% of Kentucky’s prison population (December 2015);
- 30% of the confined juvenile population (2013).

The *rate* of imprisonment in Kentucky, as of June 30, 2010, shows a stark racial disparity:

- 425 white inmates for every 100,000 whites in the population;
- 1,412 African Americans for every 100,000 African Americans in the population.

While the crime rate falls, the number of people we incarcerate in Kentucky is increasing, 1,066 more prisoners in the last year.



The 2014-16 biennial budget consensus blended population projections are used for July 2014 – forward. FY16-18 consensus blended population projections are included for December 2015 forward.

⁴ 2016-2018 Executive Budget Recommendation, p. 219; found at: [http://osbd.ky.gov/Publications/Documents/Budget%20Documents/2016-2018%20Executive%20Budget%20Recommendation/Operating%20Budget%20-%20Volume%20I%20\(Part%20B\).pdf](http://osbd.ky.gov/Publications/Documents/Budget%20Documents/2016-2018%20Executive%20Budget%20Recommendation/Operating%20Budget%20-%20Volume%20I%20(Part%20B).pdf)

Michelle Alexander characterizes this increase as racially motivated and calls for broad remedies, “Mass incarceration is, metaphorically, the New Jim Crow and... all those who care about social justice should fully commit themselves to dismantling this new racial caste system.”⁵

Disenfranchisement has stark racial dimensions

Kentucky voting facts likewise show great racial disparity:

- Kentucky has the third highest rate of disenfranchisement in the country.
- One out of every 14 Kentucky residents is disenfranchised, a rate almost three times the national rate.
- Kentucky has the second highest African American disenfranchisement rate in the country with more than one of every five African Americans ineligible to vote, nearly triple the national rate.
- 75% of people ineligible to vote because of felony convictions have completed their sentences.⁶
- Kentucky is one of four states that permanently disenfranchise all persons with felony convictions even after they have completed their full sentence.

Racial aspects of juvenile cases

Kentucky juvenile data raises disturbing questions of racial disparity.

In juvenile prosecutions in which public defenders provided representation for 1st Degree Robbery, 58% of the clients were African-American compared to only 24% who were White. For 2nd Degree Robbery, the percentage of African-American clients climbs to 67%. For comparison, in prosecutions for Theft by Unlawful Taking, 71% of the clients were White as opposed to only 21% who were African-American.

QUESTION RAISED: Are African-American juveniles who steal more likely than White juveniles to be charged with Robbery instead of Theft?

The data for juvenile burglary cases is similar. 52% of the juvenile clients in 1st Degree Burglary cases are African-American, compared with 39% who are White. For 2nd Degree Burglary, the Black/White ratio drops to 27%/59%, and for 3rd Degree Burglary, the ratio is only 10% African-American and 80% White. In Criminal Trespass cases, 82% of the clients are White.

QUESTION RAISED: Are African-American juveniles who enter a property unlawfully more likely to be charged with 1st Degree Burglary instead of a lesser degree of burglary or criminal trespass?

⁵ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010), p. 11. Many believe that the drop in the crime rate is chiefly caused by the massive increase in incarceration and the decrease in release. “The reality is far more complex.... [A]bout 25% of the decline in violent crime can be attributed to increased incarceration. While one-quarter of the crime drop is not insubstantial, we then know that most of the decline in crime — three quarters — was due to factors other than incarceration.” Ryan S. King, Marc Mauer, *Incarceration and Crime: A Complex Relationship* (2005) at 3, 4.

⁶ The League of Women Voters of Kentucky in its Report, *Felony Disenfranchisement in the Commonwealth of Kentucky: A Report of the LWV of Kentucky* (January, 2013).

Among juvenile cases that were transferred to Circuit Court, 59% involved African-American clients versus 29% with White clients.

QUESTIONS RAISED: What is the relationship between the higher rates of charging African-Americans with Class B felonies and the higher prevalence of African-American clients being transferred to Circuit Court? Does the ultimate transfer validate the seriousness of the Class B charges? Does the opportunity to transfer Class B felonies provide incentive to overcharge behavior that may be charged as a lesser offense?

Adult heroin data shows skewed racial makeup

In Heroin prosecutions of adults in Kentucky, those charged with Possession are overwhelmingly White (92%) while those charged with Trafficking are 28% to 50% Black, depending on the charge.

QUESTIONS RAISED: Are white addicts being charged with Possession, meaning they are eligible for Drug Court, Deferred Prosecution, Pretrial Release and possible Expungement, while black addicts are more likely to be charged with Trafficking? Put bluntly, is there compassion felt for white addicts that is not felt for black addicts?

Exclusion of blacks from jury service

The systematic exclusion of African Americans for serving on juries has a tragic history in our Commonwealth. One example close to home. In 1935 John Montjoy, a 24 year old African American, was convicted and sentenced to be hanged for the March 22, 1935 rape of a white woman. On appeal the Court of Appeals of Kentucky unanimously rejected the claim of the constitutional right to equal protection because of the exclusion of African Americans from the Grand Jury and jury, and the fact that no African American had ever served on a grand Jury or jury in Kenton County.⁷ The case gained national attention and was “clearly a miscarriage of justice” and was “termed a legal lynching” that should have been corrected by Kentucky’s Governor or the United States Supreme Court. Mr. Montjoy was hanged in the Kenton County courtyard December 17, 1937.⁸

When some prosecutors exercise their peremptory, discretionary challenges of potential jurors they strike blacks in the belief that blacks are more sympathetic to the accused. Defense lawyers challenge this practice as illegal racial discrimination.

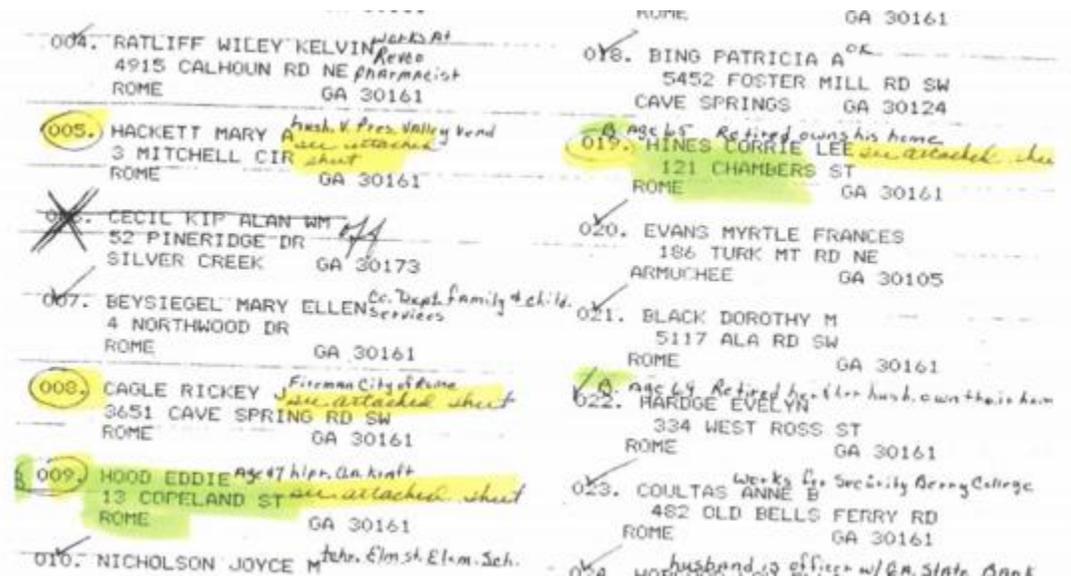
Thirty years ago, in *Batson v. Kentucky*, 476 U.S. 79 (April 30, 1986) (7-2 decision), the United States Supreme Court finally held that “State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause... the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.” As a result, prosecutors have to provide a race neutral

⁷ *Montjoy v. Commonwealth*, 90 S.W.2d 362 (1935).

⁸ Tenkotte, Claypool, *Encyclopedia of Northern Kentucky* (2008), p. 8.

reason when they strike a black. Most frequently, courts have allowed most every proffered reason to justify the strike. *Batson* therefore has not proved to remedy the problem.

The United States Supreme Court is again considering this issue in a case of a man sentenced to death in Georgia. In the 1987 trial of Timothy Foster, an 18-year-old poor, black, developmentally delayed man accused of murdering an 80-year-old white woman, the prosecution struck 100% of black jurors offering reasons such as, the juror didn't keep eye contact, looked bored, and was a social worker.⁹ A 2006 open records request¹⁰ for prosecutor notes revealed that prosecutors marked all African Americans on their list of potential jurors with a "B."¹¹



What people want

People want us to get on with it...

The opinions of Americans are clear. “Current sentencing policies and practices are widely viewed as unfair to minorities, non-English speakers, and low income offenders, and prone to give higher income offenders preferential treatment. “ “High levels of public support are found

⁹ [dailykos.com](http://trendwave.com/supreme-court/scotus-hears-case-on-racial-discrimination-in-jury-selection) SCOTUS hears case on racial discrimination in jury selection, <http://trendwave.com/supreme-court/scotus-hears-case-on-racial-discrimination-in-jury-selection>

¹⁰ Supreme Court to examine racial divide in jury selection, The Washington Post, https://www.washingtonpost.com/politics/courts_law/supreme-court-to-examine-racial-divide-in-jury-selection/2015/10/25/005ecc56-774d-11e5-a958-d889faf561dc_story.html

¹¹ US supreme court weighs 'strong' new evidence of racial bias in jury selection, The Guardian, <http://www.theguardian.com/law/2015/nov/02/us-supreme-court-timothy-foster-racial-discrimination-jury-selection> ; Supreme Court Takes On Racial Discrimination In Jury Selection, NPR, <http://www.npr.org/2015/11/02/452898470/supreme-court-takes-on-racial-discrimination-in-jury-selection>

for alternatives to a prison sentence like probation, restitution, and mandatory participation in job training, counseling, or treatment programs, at least for non-violent offenders.”¹²

People want a smart approach to crime. “Incarcerating more offenders and keeping them locked up longer means spending more money on prisons, [is] something most Americans view as a bad investment. By a substantial margin (76% vs. 19%) the public would rather see their tax dollars support programs that try to prevent crime by helping offenders find jobs and get treatment than be used to build more prisons.”¹³

People see substantial unfairness in the criminal justice system. “The NCSC survey finds a majority (60%) feeling that low-income offenders are treated worse than others convicted of similar crimes in the sentences they receive. Just under half the public (46%) feels African-American offenders experience discrimination in sentencing. Four in 10 people feel the same about the way non-English speaking (43%) and Hispanic offenders (40%) are treated. While minorities and disadvantaged groups are often assumed to get worse treatment, wealthy offenders are overwhelmingly assumed (81%) to get better treatment than others convicted of similar crimes.”¹⁴

How do African Americans see the system? “The perception of bias in sentencing on the basis of race, ethnicity, and socioeconomic status is particularly widespread among African Americans. Fully 77% of African-Americans think offenders of their racial background get worse treatment in terms of the sentences they receive and 70% feel the same way about low-income people. While not quite as united in their views as African-Americans, a majority of Hispanics (55%) also believe offenders of their ethnic background face bias in sentencing.”¹⁵

¹² The NCSC Sentencing Attitudes Survey: A Report on the Findings (July 2006) “This report presents the results of a new National Center for State Courts (NCSC) study about public perceptions of sentencing in the state courts. A representative national telephone survey of 1,502 adults age 18 and older was conducted from March 6 to April 9, 2006 by Princeton Survey Research Associates International (PSRAI),” page 2, found at: <http://www.ncsc.org/~media/Microsites/Files/CSI/The%20NCSC%20Sentencing%20Attitudes%20Survey.ashx>

The major findings were:

- Americans consistently favor a much tougher approach in sentencing those convicted of violent crimes than they do in sentencing non-violent offenders.
- Americans think rehabilitation is a more important priority than punishment and overwhelmingly believe that many offenders can, in fact, be successfully rehabilitated. But most see America’s prisons as unsuccessful at rehabilitation.
- Current sentencing policies and practices are widely viewed as unfair to minorities, non-English speakers, and low income offenders, and prone to give higher income offenders preferential treatment.
- High levels of public support are found for alternatives to a prison sentence like probation, restitution, and mandatory participation in job training, counseling, or treatment programs, at least for non-violent offenders. The public is particularly receptive to using such alternatives in sentencing younger offenders and the mentally ill.

¹³ Id. at 4.

¹⁴ Id.

¹⁵ Id. at 4-5.

Alternatives to incarceration have broad support. “The general idea of directing non-violent offenders into treatment and counseling programs is endorsed by about half the public (51%) as something that should be used “often” as an alternative to prison.”¹⁶

What leaders see as realistic measures to reduce inappropriate discrimination

Illegitimate racial disparity is real

“Illegitimate....racial disparity in the criminal justice system results from dissimilar treatment of similarly situated people based on race.”¹⁷ The gross disparities in Kentucky discussed above can only be explained one of two ways. African Americans commit crime at a much higher rate than others, or the policies and practices of our criminal justice system are causing disparities that are illegal. Empirical evidence does not support the claim that minority overrepresentation is solely because minorities commit more crime.¹⁸

The data and its analysis speak volumes. It matches experience. Michelle Alexander said, “We have not ended the racial cast system in America; we have merely redesigned it.”¹⁹ Tragically, our criminal justice system has illegitimate racial disparity that must be eradicated if people are to have full confidence in the system’s ability to provide results that are fair. Let’s get on with addressing it.

Reform is in our reach

Kentucky public defenders have been working on common sense reform to better address the illegal disparities safely. These safe ways include reducing low level misdemeanors to violations, releasing low and moderate risk persons prior to trial and when eligible for parole, adjusting our career criminal laws to more precisely match those who are incorrigible not those we are angry at for their behavior. DPA is getting on with its part of this reform through its alternative sentencing worker program by proposing scientifically informed community based alternative sentences for those with substance abuse or mental illness. We are ready to do more.

¹⁶ Id. at 5. The public supports specific applications of alternative sentencing for non-violent offenders at even higher levels:

- Requiring offenders to compensate their victims for their loss (66% say this should “often” replace a prison term)
- Placing mentally ill offenders in treatment and counseling programs (65% “often”)
- Requiring mandatory education and job training (63% “often”)
- Placing young adult offenders under 25 years of age in treatment and counseling programs (61% “often”)
- Placing drug offenders in treatment and counseling programs (56% “often”)

¹⁷ The Sentencing Project, “Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers (2008),” http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf

¹⁸ The Sentencing Project, “Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers” (2008), p. 6, http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf

¹⁹ “Today it is perfectly legal to discriminate against criminal in nearly all ways that it was once legal to discriminate against African Americans. Once you’re labeled a felon, the old forms of discrimination – employment discrimination, housing discrimination, denial of the right to vote, denial of educational opportunity, denial of food stamps and other public benefits, and exclusion from jury service – are suddenly legal.” Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010), p. 2.

The opportunities for broad²⁰ reforms in Kentucky remain. Here are 3 that are upon us in the 2016 Kentucky General Assembly:

- Automatically restoring voting rights for ex-felons who have completed their sentence, HB 70,²¹
- Expunging convictions for Class D felons, HB 40,²²

Reducing mass incarceration by making low level misdemeanors a violation and by making low level felonies a misdemeanor. HB 412²³ was filed by Representative Yonts on February 16, 2016 that would safely begin this process and bring other reforms while saving millions of dollars that could be invested in treatment and reentry services to help people succeed.

²⁰See also, 10 Commonsense ways to reduce waste in Kentucky's criminal justice system: Lasting and Unrealized Benefits of HB 463, the Advocate (March 2014), <http://dpa.ky.gov/NR/rdonlyres/24D2AFDA-4F6F-427F-A641-4E2A9F0F55A8/0/AdvocateMarch2014Part2FINALFULLPAGEREDUCED.pdf>

²¹<http://www.lrc.ky.gov/record/16RS/HB70.htm>

²²<http://www.lrc.ky.gov/record/16RS/HB40.htm>

²³The bill is found at: <http://www.lrc.ky.gov/record/16RS/HB412.htm> It has the following reforms:

1. Establishing a **Gross Misdemeanor** level of offense for serious non-violent offenses that should not be punished as a felony. Its characteristics include: presumptive probation; potential sentence up to 24 months; treated as state prisoners so counties do not bear the cost. Offenses included in this new classification are Criminal Possession of a Forged Instrument, 2nd Degree (under \$500), Forgery, 2nd Degree (under \$500), and Flagrant Nonsupport.
2. Establishing **Earned Parole** for non-violent offenders serving sentences for Class D felonies who do not commit violent disciplinary violations while incarcerated.
3. Providing for **Misdemeanant Jail Credits** so those serving time for less serious offenses are given the same opportunities for release available to convicted felons. Jailers would be permitted to provide credits off of a sentence for good behavior, educational attainment and work programs. This will bring considerable savings to county jails that have an average cost of housing an inmate of \$36.25 per day and up.
4. Creating a standard that will lead to **Consistent Pretrial Release Practices** by requiring courts to have clear and convincing evidence that a person accused of a crime should be detained at county expense. This would allow for low and moderate risk people who do not have the cash for their bail and who are presumed innocent to be released prior to their trial.
5. Allowing **Discretionary Sentence Enhancements** to empower members of the community who serve as jurors to determine the appropriate sentence for a repeat offender based on the facts of the individual situation rather than require lengthened sentences in every eligible case regardless of the facts.
6. Ensuring implementation of **Graduated Sanctions** for probated individuals who commit technical non-violent violations of probation by requiring specific findings prior to ordering the individual to go to prison.



Many organizations support Rep. Yonts HB 412. From Left to Right, Jason Hall, Catholic Conference of KY, J.C. Young, KY Magistrates and Commissioners Association, Rebecca DiLoreto, KACDL, Kate Miller, ACLU, Rev. Anthony Everett, KY Council of Churches, Kenny Colston, KY Center for Economic Policy, Tommy Turner, KY County Judge/Executive Association, Rev. Peggy Hinds, KY Council of Churches, Vince Lang, KY County Judge/Executive Association, Ashley Watts, Chamber of Commerce, Rep Yonts.

“Families and entire communities are being ripped apart by laws that unjustly destroy the lives of low-level and nonviolent offenders....Today, if you’re poor and get caught possessing and selling pot, you could end up in jail. Your conviction will hold you back from many opportunities in life. However, if you are well-connected and have ample financial resources, the rules change dramatically. Where is the justice in that? Arbitrary restrictions limit the ability of ex-offenders to get housing, student or business loans, credit cards, a meaningful job or even to vote. Public policy must change if people are to have the chance to succeed after making amends for their transgressions. At Koch Industries we’re practicing our principles by ‘banning the box.’ We have voluntarily removed the question about prior criminal convictions from our job application.”²⁴

The fierce urgency of Now

Today, just as Martin Luther King, Jr. did in 1963 in the shadow of Lincoln, we must remind ourselves and all Kentuckians “of the fierce urgency of Now. This is no time to engage in the

²⁴ Charles Koch: This is the one issue where Bernie Sanders is right, Op-Ed The Washington Post (February 18, 2016), found at: https://www.washingtonpost.com/opinions/charles-koch-this-is-the-one-issue-where-bernie-sanders-is-right/2016/02/18/cdd2c228-d5c1-11e5-be55-2cc3c1e4b76b_story.html?hpid=hp_no-name_opinion-card-e:homepage/story

luxury of cooling off or to take the tranquilizing drug of gradualism. Now is the time to make real the promises of democracy. Now is the time to rise from the dark and desolate valley of segregation to the sunlit path of racial justice. Now is the time to lift our nation from the quicksands of racial injustice to the solid rock of brotherhood. Now is the time to make justice a reality for all of God's children."²⁵

²⁵ Martin Luther King, Jr., *I Have a Dream*.