



ACLU

AMERICAN CIVIL LIBERTIES UNION
of MASSACHUSETTS

FOUNDATION

RACIAL JUSTICE REPORT

June 2005

“I come here not to condemn but to encourage. I would be dishonest to say Boston is Birmingham or that Massachusetts is Mississippi. But it would be irresponsible for me to deny the crippling poverty and the injustice that exist in some sections of this community. The vision of the New Boston must extend into the heart of Roxbury. Boston must become a testing ground for the ideals of freedom”

*Dr. Martin Luther King, Jr.
Boston Common, April 1965*



The John Roberts Fund for Racial Justice

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**Disproportionate Minority Confinement in Massachusetts:
Failures in Assessing and Addressing the Overrepresentation
of Minorities in the Massachusetts Juvenile Justice System**

May 2003



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OVERVIEW

This report sets forth the litigation, advocacy, public education, and legislative work of the ACLU of Massachusetts in the area of race and racial justice over the last two years. With support from the John Roberts Fund for Racial Justice, ACLUM staff has re-doubled its efforts to meet the growing threats to equal protection and racial justice throughout the Commonwealth.

Several themes run through the report. First, in the aftermath of 9/11, there has been a fundamental change in the treatment of Muslims and people of Middle Eastern or South Asian descent or appearance. They are not only viewed more often with suspicion, but frequently are stopped by police and other law enforcement officials solely on the basis of race or appearance. Second, youth of color are the most vulnerable victims of racial inequities and thus, remain a focus of ACLUM's racial justice work. Third, racism pervades our criminal justice system and must be addressed as part of our larger criminal justice agenda, particularly in the areas of sentencing and efforts to reinstate the death penalty in Massachusetts. Finally, there is a clear nexus between racial justice and equal opportunity in American society, requiring us to work in both areas if we are to achieve the goal of equal justice for all.

This report is by no means comprehensive; we couldn't possibly list every speech, conference, case, or other activity of the ACLU of Massachusetts related to racial justice. Rather, we offer these highlights from the last two years as a way of letting you know that your support makes an enormous difference in promoting racial justice in the Commonwealth.

I. ACLUM TAKES STEPS TO STOP UNCONSTITUTIONAL RACIAL AND ETHNIC PROFILING

Racial profiling by law enforcement has been on the increase since 9/11, with heightened focus on Massachusetts' Arab, South Asian, and Muslim communities. As a result, ACLUM has added a new concentration on civil liberties concerns arising from ethnic and religious profiling while continuing its traditional work in the area of racial profiling of African-Americans and Latinos.

Mass Impact. ACLUM's acclaimed publication, *Mass Impact: the Domestic War Against Terrorism in Massachusetts – Are We on the Right Track*, considers the impact of post-9/11 ethnic and religious profiling in Massachusetts through the stories of individual women and men who have been its victims. The publication has been sent to policy makers and the media, and provided the basis of a half-hour segment on WCVB's "Chronicle" and other programs.

Racial Profiling Task Force. ACLUM sits on the Governor’s Task Force on Racial Profiling, a group mandated by state statute to help compile a report stemming from a requirement that law enforcement collect data on racial profiling in traffic citations. The data collected in the first year showed significant racial disparities in traffic citations and searches (when compared to both population and commuter-modified population baselines) in the overwhelming majority of police departments in the Commonwealth. In the summer of 2004, the Executive Office of Public Safety largely adopted recommendations from ACLUM and other advocacy and community groups by requiring 249 out of 350 police departments to collect additional data on racial profiling traffic stops and citations. In the months ahead, ACLUM will urge state officials and law enforcement agencies to adopt permanent data collection in law enforcement stops and citations, under the theory that “you cannot manage what you don’t measure.”

Civil Liberties Task Force. Combating unconstitutional ethnic, religious and racial profiling has been a primary goal of ACLUM’s public education activity. Our Civil Liberties Task Force (CLTF) has made it a priority to collaborate with communities to pass resolutions upholding civil liberties in the wake of 9/11. Strong statements against profiling appear in many of the 53 successful community resolutions. The CLTF is currently working with Boston neighborhood activists to pass a resolution that includes this statement: “Resolved, that the City of Boston will stand against racial, ethnic, or religious profiling and local governmental involvement in the enforcement of federal civil immigration laws.” The City Council President has so far refused to allow the resolution to be considered on the grounds that it is not “local business.”

We also have been working on a state-wide Resolution Affirming the Civil Rights and Liberties of the People of Massachusetts [hearing before the Committee of Public Safety & Homeland Security, June 22, 2005]. It contains a passage requesting “state and local law enforcement authorities to refrain from actions that impinge and infringe upon and violate constitutional rights, such as racial and religious profiling.” Another section asks federal agencies to refrain from investigations “which single out individuals for legal scrutiny or enforcement activity based upon their race, religion, ethnicity or country of origin.” The CLTF has also been raising consciousness about the profiling promoted by community “anti-terrorism watch” groups and has worked closely with immigrant advocacy organizations to oppose the targeting of immigrants by law enforcement. As part of its immigrant rights activity, the CLTF helped plan the February 2005 Immigrant Summit for New England.

ACLUM continues to urge law enforcement agencies to collect data on racial profiling in traffic stops under the theory that you cannot manage what you don’t measure.

FBI Interviews of Foreign-born Citizens. When the federal government announced a plan in 2003 to interview Iraqi-born people living in the U.S. (including U.S. citizens), ACLUM, the American-Arab Anti-Discrimination Committee, and other groups wrote an informational “Know Your Rights” flyer and organized a group of attorneys willing to provide pro-bono representation to anyone targeted for an interview by the FBI. ACLUM has also provided legal assistance to Muslims and other people of Arab and Middle Eastern origin who have been

similarly targeted for “voluntary” FBI interviews, often without probable cause. In many instances, ACLUM intervention has led the FBI to withdraw its request for such an interview.

Behavioral Profiling. ACLUM has filed a lawsuit challenging the constitutionality of a “behavioral assessment” program adopted by the Massport and the Massachusetts State Police to stop and detain individuals for questioning at Logan Airport. Behavioral profiling has been used as the basis for stopping passengers since 2002, when Massport announced that State Police troopers at Logan Airport were being trained by an outside security consultant. The procedures were subsequently incorporated into the state police “Behavior Assessment Screening System” (B.A.S.S.) used at Logan and other locations. A modified version of the program was also considered by the Massachusetts Bay Transportation Authority (MBTA). It was recently reported that B.A.S.S. is being used as a model by the Transportation Security Administration, which will soon launch a similar program nationwide, entitled SPOT (“Screening of Passengers by Observation Techniques”). The “behavioral profiling” program instructs officers to detain anyone who they believe is exhibiting “unusual” or “anxious” behavior. What constitutes unusual or anxious behavior is left to individual officer discretion.

ACLUM is challenging the behavioral profiling program in a lawsuit filed on behalf of King Downing, the National Coordinator of the ACLU’s Campaign Against Racial Profiling, who was stopped by Massachusetts State Police troopers after arriving at Logan Airport on October 16, 2003 to attend a meeting on racial profiling in Boston. Upon arriving at the airport, Downing, an African-American who wears a short beard, left the gate area and was making a phone call in the public terminal when he was stopped by a state police trooper who demanded that he produce some identification. When Downing declined to do so without knowing the basis for the request, he was first told that he would have to leave the airport. However, when he attempted to leave the terminal building,

Downing was stopped again, surrounded by four troopers and told that he was being placed under arrest for failing to produce identification. When Downing finally agreed to produce his driver’s license, the troopers then demanded to see his airline ticket. Downing was told by the police that he could be barred from the airport if he did not cooperate. After the police inspected Downing’s identification and travel documents, he was allowed to leave. No charges were ever filed against him.

ACLUM has worked closely with immigrant advocacy organizations to oppose the targeting of immigrants by law enforcement.

Random Searches on the T. In June 2004, ACLUM joined with other legal and community groups to form the “Safe and Free T Alliance” in response to the announcement by the MBTA that it would soon be “randomly” searching passengers on subway and bus lines. The Safe-T Alliance distributed “Know Your Rights” information and staged demonstrations at various T stops, which received national and local media coverage. On July 30th, the MBTA suspended its search program but announced that it could reinstate it at any time. ACLUM continues to collect reports from people who are searched and will challenge the policy in court if it is reinstated. ACLUM’s concern is that policies such as these will be carried out in a discriminatory fashion, focusing on foreign-born and people of color.

Racial Profiling Litigation and other Activities

Abou-Houssein v. American Airlines. Alex Abou-Houssein is a U.S. citizen who is a native of Egypt. An engineer, Mr. Abou-Houssein was scheduled to travel from Logan Airport to Washington's Reagan National Airport on Thanksgiving Day in 2001. Although he passed through the security screening without incident, he was subjected to special screening at the gate, during which he heard loud mention of his Egyptian national origin. He was told that the pilot would not allow him to fly on that plane. Officers told him to take a later plane or the train. After filing a complaint at the Massachusetts Commission Against Discrimination, ACLUM brought suit on his behalf in Superior Court protesting his removal from the flight.

Kantamanto v. Peter Pan Bus Lines. Abdur-Rachman Kantamantu, a Black Muslim, had planned to travel by bus from Worcester to Philadelphia with his wife and three children. When he went to the bus station in Worcester to buy tickets, he was not only asked to produce identification for himself and his wife, he was told by the ticket agent that he would not be able to purchase tickets for his children without presenting their birth certificates. They were forced to postpone their trip until they could obtain the documentation. They later learned that this was not required, and that other passengers had not been subject to this treatment. ACLUM represented Mr. Kantamanto on a complaint he filed against the bus company with the Massachusetts Commission Against Discrimination, charging discrimination in a place of public accommodation. The case was settled, with the complainant receiving a monetary payment; we received attorneys fees, and the company agreed to undertake training of its employees to avoid future discrimination.

In re Sundeep Sahni. In conjunction with the Sikh American Legal Defense Fund, ACLUM is representing Sundeep Sahni, a Sikh student at Boston College. Sundeep was detained and questioned for about seven hours by Secret Service agents who were staying on the college campus during the Democratic National Convention in Boston in July 2004. The detention appears to have been based only on Sundeep's appearance as a person of color and his wearing of a turban. On his behalf, we filed a complaint with the civil rights office of the Department of Homeland Security, which is pending.

Our concern is that policies such as these will be carried out in a discriminatory fashion, focusing on foreign-born and people of color.

I. ADDRESSING RACIAL DISPARITIES IN THE MASSACHUSETTS JUVENILE JUSTICE SYSTEM

Disproportionate Minority Confinement. Concerns raised in the June 2003 ACLU report, "Disproportionate Minority Confinement in Massachusetts," starkly illustrate how racism in the Massachusetts juvenile justice system targets the most vulnerable of children. Simply put: once arrested, African-American kids are imprisoned at far higher rates than white kids. Specifically, the report found that while black youth represent 23% of the Commonwealth's juvenile

population and about a quarter of all youth arrested, they constitute 63% of the 3,300 juveniles who are taken from their homes and locked up.

These numbers suggest that institutional racism infects the entire juvenile justice system. Consider the number of discretionary decisions that are made after an arrest: officials must decide the nature and seriousness of the charge, whether the youth will be put on probation or held in detention, and the length and nature of the sentence. It is wrong that a black juvenile is more likely than his white counterpart to be locked up for committing the same or similar crimes.

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Acknowledging the problem of disproportionate confinement is a crucial -- but only a first -- step toward solving it. The ACLU report documented the Commonwealth's ten-year failure to address the problem of over-representation of minority youth in the juvenile justice system. It also provided specific recommendations for the state to, at a minimum, comply with requirements of federal law.

Since the release of the first report, the ACLUM has worked with juvenile justice advocates from around the state to bring about an overhaul of the state's Juvenile Justice Advisory Committee -- a process that is still on-going. In conjunction with national ACLU and local groups, ACLUM also co-sponsored a comprehensive forum of national experts on disproportionate minority confinement issues in the Spring of 2004.

In the 2005-2006 state legislative session, ACLUM has worked with the juvenile justice community and with policy makers to develop legislation requiring racial data collection throughout the juvenile justice system. Such data will help us to better determine the points within the juvenile justice system where reform is needed.

Later this year, the ACLU will release a follow-up report on the juvenile justice system in Massachusetts, with funding from the John Roberts Fund for Racial Justice.

Zero Tolerance and School Expulsion Policies. With continued publicity around school violence, the climate for "zero tolerance" has grown. In Massachusetts, this has taken many different forms, most of which have a disproportionate impact on minorities. One concern has been the growth in student expulsions to about 1,400 a year. Three hundred of those students will receive no alternative education. Legislation supported by ACLUM includes increased due process for students, including regular reviews to establish when a student may return to school. We were successful in gaining passage of some parts of this bill last year, mostly concerning alternative education. ACLUM lobbying efforts have also focused on countering crude attempts at stopping "bullying," and constructive legislation dealing with that behavior has been filed this year with significant attention to civil liberties concerns and without the kinds of penalties that lead to expulsion.

Roundtables. ACLUM continues to battle against “roundtables”, created and led by district attorneys, that use school personnel and records, social service and other confidential and personal records, but exclude parental notice or input, to do intervention for “troubled” kids.

III. PUTTING THE JUSTICE BACK INTO THE CRIMINAL JUSTICE SYSTEM

Compensation for the Wrongly Convicted. Most of the individuals in Massachusetts who have been exonerated of the crimes for which they served years in prison are African-American men. Late in 2004, the Acting Governor signed into law a bill creating a system for individual claims against Commonwealth funds (up to \$500,000) to compensate for erroneous convictions. The new law also provides for court orders that grant claimants access to state job training, health and mental health services, education, and other services. ACLUM, along with the Committee for Public Counsel Services, the Innocence Project and other groups that helped spearhead passage of this legislation, are celebrating this victory for racial justice, which was many years in the making. ACLUM is presently representing individuals on specific claims for compensation and services to which they are entitled.

ACLUM’s message has been clear and forceful: there is no such thing as a foolproof death penalty.

Opposing the Death Penalty. The racist nature of the death penalty haunts our past and present. ACLUM’s lobbying efforts on this issue are deeply rooted in the painful knowledge that there are clear patterns of injustice toward people of color. Governor Romney’s efforts to bring capital punishment back to Massachusetts have been most recently manifested in his proposal of a “perfect” death penalty (May, 2005). ACLUM’s message has been clear and forceful: there is no such thing as a foolproof death penalty. Indeed, as long as human beings are involved, there will be human error and bias. ACLUM continues to remind the public and policy makers that the death penalty has no deterrent effect. To the contrary, states without death penalties all have lower murder rates than states with death penalties. Massachusetts has not had an execution since 1947 and has one of lowest homicide rates in the country.

Sentencing Reform. Mindful of the racial disparities in the federal and other sentencing systems, ACLUM stands firm on protecting citizens of the Commonwealth from pro-incarceration sentencing “guidelines.” We continue to campaign for alternatives to incarceration, including drug treatment and sensible parole and release programs, and the elimination of mandatory minimum sentences.

Anti-gang Ordinances - I. In 2004, the Massachusetts Legislature approved Somerville’s home rule petition concerning an ordinance prohibiting “gang loitering.” The ordinance was modeled on the anti-gang ordinance that was found unconstitutional by the United States Supreme Court in *City of Chicago v. Morales*, but includes language aimed at curing the vagueness problems identified by Justice O’Connor’s opinion. The ordinance purports to allow the police to seek an injunction, enforceable by contempt, against persons who engage in supposed “gang” behaviors – such as “hanging out” in public areas. The ordinance is clearly directed at the predominantly Latino neighborhoods of East Somerville. ACLUM testified

against the ordinance at the hearing before the Board of Alderman and at several State House committee hearings, and we continue to work with Somerville community groups in Somerville on police community relations issues. The Somerville Police Chief has not yet deployed the “anti-gang” mechanisms in the new law, but we maintain our watch. Similar ordinances have been proposed in Chelsea and Lynn, but were stopped as the result of community opposition.

Anti-gang Ordinances – II. A member of the Boston City Council proposed an ordinance based on the Somerville ordinance. ACLUM testified in opposition at the hearing before the City Council, and the measure was also opposed by community groups, a state legislator and the Boston Police Department. Following the hearing, the proposing Councillor withdrew his proposal.

Religious Freedom in Prison. ACLUM has brought several suits challenging Department of Correction policies restricting the right of Muslim and Rastafarian prisoners to follow the dictates of their respective religions. In Ahmad v. Maloney, ACLUM challenged the refusal to provide a Muslim prisoner housed in the maximum security Departmental Disciplinary Unit (DDU) with Halal meals during Ramadan, to permit him to retain a watch so that he may pray at the appropriate times, to retain certain religious items and to have access to religious counsel from an Imam. Although some of these policies were changed, the Department of Correction still refuses to provide Halal meals and the case is awaiting trial on the prisoner’s claim for damages.

In Gordon v. Pepe, ACLUM represents a Rastafarian prisoner whose beliefs compel him to eat a vegetarian diet. The prisoner was originally provided with vegetarian meals, but the DOC subsequently adopted a so-called “religious diet” for all faiths containing soy-based dishes that were intended to have the appearance of meat. The plaintiff asserts that he cannot eat the generic “religious diet” without violating his beliefs. The case was dismissed as moot after the prisoner was released. Other Rastafarian prisoners have raised similar complaints about the policy, but have not yet filed suit.

ACLUM Litigation in the Criminal Justice Field

Lavallee v. Justices in the Hampden Superior Court. In the spring of 2004, the system for providing lawyers to indigent persons entitled to counsel collapsed in two courts in Hampden County where the majority of the accused were persons of color. On a regular basis, men and women accused of crimes were brought from the county jail to the courthouse only to be returned without having been heard because assigned counsel was not available. The cause of this crisis was undisputed: compensation rates for attorneys in private practice who represent nearly ninety percent of indigent criminal defendants in Massachusetts are shockingly and unsustainably low. ACLUM, together with the Committee for Public Counsel Services, challenged the lack of legal representation in the Massachusetts Supreme Judicial Court. Rather than order the payment of higher rates, however, the court took the unprecedented step of ordering that any person who is held without counsel for seven days must be released on personal recognizance and that any charges which have been pending for forty-five days without counsel being appointed must be dismissed without prejudice.

Commonwealth v. Teixeira. Bishop Filipe Teixeira is a Cape Verdean community activist from Brockton who has taken a leadership role in protesting racial profiling and police misconduct. Late one night, he was awakened by a disturbance outside his home. When he went to the door to investigate, he saw his brother and another man being pulled from their car by the Brockton police. As he came out of the house to see what was going on, he was stopped by a police officer. He returned to his porch, but when he saw that the officers striking his brother he came forward to protest. As he did, he was sprayed with pepper spray. He was arrested and charged with interfering with a police officer, disorderly conduct, disturbing the peace and resisting arrest. The case is awaiting trial in the Brockton District Court.

IV. EQUAL OPPORTUNITY AND CIVIL LIBERTIES: FOCUS ON THE NEXUS

Massachusetts Alliance to Save Affirmative Action. In August of 2003, Massachusetts Governor Mitt Romney attempted to wipe out 30 years of affirmative action in state government with a stroke of a pen. ACLUM, in coordination with the Lawyers Committee for Civil Rights and other groups, helped to form the Massachusetts Alliance to Save Affirmative Action. We participated in a press conference, a community “speak out” hearing, and a letter writing campaign that effectively pressured the Governor to restore many of the cuts he had made to the affirmative action program. With the Alliance, ACLUM will continue to educate the Governor on the important role that affirmative action plays in ensuring racial justice in state government.

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Alliance for Jobs and Justice for Our Youth. ACLUM participated in the Alliance for Jobs and Justice for Our Youth (AJJOY), a grassroots and advocacy alliance aimed at empowering youth of color in the Boston area. In August 2003, ACLUM provided a briefing to AJJOY members on Disproportionate Minority Contact in the criminal justice system. In 2004, ACLUM offered testimony to the Boston City Council on the misuse of CORI checks to deny summer jobs to Boston youth.

Election Protection. ACLUM was an active participant in the 2004 Election Protection project in Boston neighborhoods to ensure full access to the polls. In addition, ACLUM has sponsored two key conferences on electronic voting technology that included a focus on structural barriers to equal voting rights.

Equal Employment Opportunity. ACLUM is concerned about the increasing use of discriminatory “English Only” work rules. In Gorlier v. Whittier Street Health Center, ACLUM pursued a complaint to the Equal Employment Opportunity Commission (EEOC) on behalf of two employees who were fired from a private agency after complaining about the adoption of an “English-only” policy at their workplace. The EEOC found probable cause to believe the health center administration engaged in illegal discrimination by adopting its language policy and

illegally retaliated against the employees who protested against the policy. The case was settled, with the health center paying attorneys fees and compensation to our two clients. In addition, the health center revised its language policy and agreed to extensive training of all supervisors and employees on civil rights in the workplace.

In Stonehill College v. MCAD, ACLUM filed an amicus brief, joined by a large number of civil rights organizations, successfully urging the Supreme Judicial Court to overrule its earlier decision in Lavelle v. MCAD which gave employers the right to seek a jury trial in court after losing at a full-scale hearing at the Massachusetts Commission Against Discrimination, a practice which had created chaos in the state's procedures to combat discrimination and threatened to undermine state efforts to end unlawful discrimination

ACLUM also assisted an African-American teacher at the Boston Latin School who is was threatened with discipline for creating and distributing a mock "Wanted" poster, using the words, "No blacks need apply" to comment on the treatment of teachers of color when assignments are made to teach advanced placement courses. As a result of our joint action with the Boston Teachers Union, no discipline was imposed.

Educational Equity. In recent years, ACLUM has become a lead advocate for equal educational opportunity with a focus on poor school districts that are under-funded. Teaching the state standards to students who live in clusters of poverty, have special needs, or are English language learners requires programming and supports not necessary in other school systems. Yet these school systems have been historically deprived of what they need to meet the needs of the children who come to learn. While the focus has not been on race per se, it is clear that race plays an important role in the decisions that lead to under-funding, in standardized testing that is culturally insensitive, and in the demographic descriptions of the poor school districts.

ACLUM will monitor and continue to push for equal educational opportunities for all our children.

In two key cases, described below, the Massachusetts Supreme Judicial Court has declined to address the racially disparate impact of current educational policies. That noted, ACLUM will monitor and continue to push for equal educational opportunities for all our children.

Hancock v. Commissioner of Education. ACLUM joined the Lawyers Committee for Civil Rights in two amicus briefs in this historic case, which challenged inadequate state funding provided to poorer school districts. The first brief, submitted to the Superior Court judge post-trial, focused on the disparate racial impact of the state's method of funding public education. The Superior Court judge made extensive findings of fact and reported the case to the Supreme Judicial Court, concluding that the current education provided to plaintiff students was indeed inadequate and unconstitutional. Judge Botsford recommended that the state determine the cost of providing the education required by all seven curriculum frameworks, the cost of improving the educational leadership in the districts, and determine the funding and implementation to accomplish these goals in a limited but defined time frame. The second amicus brief went to the Supreme Judicial Court incorporating some of the report into the disparate impact arguments we

made. Unfortunately, while the Massachusetts Supreme Judicial Court subsequently adopted the Judge Botsford's findings, it declined to require the state to provide a remedy, thus acknowledging "the painfully slow progress" the state is making – and effectively accepting – the differential educational opportunities offered to poor communities in the Commonwealth.

Student No. 6 v. Massachusetts Board of Education. ACLUM filed an amicus brief in the Supreme Judicial Court of Massachusetts for a case challenging the use of the MCAS test to determine who may receive a high school diploma. The appeal challenged the state Department of Education's interpretation of the Education Reform Act to justify using MCAS for this purpose, although the statute calls for a "variety" of measures to be used to determine student competence. Our brief informed the court of the disparate racial impact of using MCAS to determine who graduates. The SJC upheld the denial of the preliminary injunction and did not address the issue of disparate racial impact.

CONCLUSION

Racial justice remains an integral part of the civil liberties and civil rights agenda of the ACLU of Massachusetts. We have accomplished a great deal with the support of the John Roberts Fund for Racial Justice. But even as our work expands, so, too, do the challenges to equal protection under the law. The ACLU of Massachusetts is uniquely poised to play a key role in meeting this challenge through its expertise in litigating, lobbying, and educating the public about the role of civil rights and liberties in America. In the months and years to come, the ACLU of Massachusetts will continue to strive to meet the challenge set forth by Dr. Martin Luther King, Jr. in his speech on Boston Common some forty years ago, when he said: "Boston must become a testing ground for the ideals of freedom."