

CHAPTER 2

Mass Incarceration

What's at Stake and What to Do

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Mass incarceration in the United States has resulted in the largest national prison population of any country in the world and is one of the gravest social concerns of our time. Described by the *New York Times* as a destructive “40-year experiment” (New York Times Editorial Board, 2014), its profound human and economic costs extend far beyond the more than \$80 billion spent annually on federal, state, and local corrections in the United States; the additional \$58 billion spent on judicial and legal expenses; and the \$126 billion spent on policing services (Kyckelhahn, 2015). With more than 2.2 million adults incarcerated, more than 4.7 million adults on probation or parole (Kaeble, Glaze, Tsoutis, & Minton, 2015), and disproportionate impact on people who are African American, Hispanic/Latino, experiencing mental health and substance use problems, and affected by poverty and limited education (Alexander, 2010; Carson, 2014, 2015; Engstrom, 2008; Gottschalk, 2015; James & Glaze, 2006; Karberg & James, 2005; Mauer & King, 2007; Mumola & Karberg, 2006; National Research Council, 2014; Prins, 2014; Schirmer, Nellis, & Mauer, 2009; Teplin, 1990, 1994; Teplin, Abram, & McClelland, 1996;

Torrey et al., 2014), the social costs are staggering. They include perpetuation of profound inequality, loss of liberty, and suffering at individual, family, and community levels in ways that are at odds with notions of the United States as a just society.

These economic and social costs have not yielded proportionate reductions in crime. In fact, as noted by the National Research Council (2014), crime rates rose and fell twice in the last four decades, despite the steady climb in incarceration. Using state-level data, the Brennan Center for Justice (Roeder, Eisen, & Bowling, 2015) finds that since the 1990s, greater incarceration has had essentially no effect on violent crime declines, and since 2000, there has been virtually no effect (0–1%) on property crime declines, with recent declines being partially attributed to alcohol use reduction, income growth and other economic factors such as inflation and consumer confidence, and the implementation of a data-driven approach to policing called CompStat. It should be noted that CompStat is not without limitations and critiques, including pressures in some police departments to show reductions in crime that may not be accurate. The Brennan Center analyses attempted to address this issue by drawing on data from numerous years and cities.

Oft-cited reasons for the extraordinary climb in incarceration include multiple changes in sentencing policies and practices. Most notable are increased risk of incarceration with arrest, lengthy mandatory minimum sentences that limit judicial discretion in sentencing (including “three strikes and you’re out” legislation that yields sentences of 25 years or more), limits on early release from incarceration, increased prison admissions for parole violations, and the context of the war on drugs, which involves a combination of heightened policing and sentencing practices (Engstrom, 2008; National Research Council, 2014; New York Times Editorial Board, 2014). With tougher sentencing laws, prosecutors gained greater power in criminal charging decisions, which has led to greater use of plea bargaining. As described by Jed Rakoff (2014), a U.S. district judge, the proportion of federal cases going to trial dropped from 19% in 1980 to less than 6% in 2000 and to less than 3% in 2010. In plea bargaining, defendants are often pressured to enter a guilty plea or

face more serious charges by prosecutors at trial—charges that are accompanied by tough mandatory sentences (Devers, 2011). The daunting risks of going to trial, even if a person is innocent, often prompt taking a plea bargain.

Political scientist Marie Gottschalk (2015) notes additional contributing factors, including increased income inequality, criminalization of poverty and immigration policy, erosion of social services, and larger economic and political forces that perpetuate mass incarceration and impede its recession. An implication of these disturbing trends in the United States is powerfully represented in a frequently quoted statement by Patrick Leahy (2013), U.S. senator from Vermont: “it is better to be rich and guilty than poor and innocent.” An example of the skewed nature of the justice system toward people with financial means is the bail system. Many people with low risk, including people who are innocent, spend long periods in jail before their cases are heard because they don’t have the financial means to pay for bail. This is especially troubling considering that approximately 60% of the U.S. jail population has not been convicted of pending charges (Bureau of Justice Statistics, 2015; Minton & Golinelli, 2014; Neal, 2012) and that such detention can have serious, long-lasting effects, as illuminated by the recent suicide and experiences of Kalief Browder, age 22 (Gonnerman, 2014, 2015; Schwirtz & Winerip, 2015). Beginning at age 16, he was held without sentencing for three years after primarily being accused of theft of a backpack and its contents. The charges were ultimately dropped, but not before he endured physical abuse by staff and other people incarcerated at Rikers Island and two years of solitary confinement.

After many years of limited attention and action, we are seeing broad recognition among liberal and conservative policy makers and advocates that mass incarceration must be addressed (Epperson & Pettus-Davis, 2015; New York Times Editorial Board, 2014; Stiglitz, 2015). Numerous municipalities across the country are enacting innovative policies and programs to reduce incarceration, and citizens are demanding criminal justice reform. As paths to change are considered, it will be important to ensure that clear attention is paid to what’s at stake and what can be done to address

mass incarceration, including recognition of the need for evidence-supported, multifaceted strategies.

Trends in Incarceration in the United States: What's at Stake

It is generally recognized that unprecedented growth in incarceration in the United States began about four decades ago, due to policies and practices initially instituted in response to high rates of crime. As summarized by the American Civil Liberties Union (n.d.), the number of people in prison in the United States has grown by 700% since 1970, and despite having just under 5% of the global population, the United States has more than 20% of the world's imprisoned population (Lee, 2015). The Bureau of Justice Statistics reports that at the end of the year in 2014, there were 1,561,500 adults incarcerated in state and federal institutions (Carson, 2015). An additional 744,600 adults were incarcerated in local jails (Kaeble et al., 2015). These combined numbers translate into a rate of incarceration of 900 people out of every 100,000 U.S. adults, consistently among the highest rates in the world. Further, 1 in 36 adults in the United States was incarcerated, on probation, or on parole in 2014 (Kaeble et al., 2015). As Bryan Stevenson (2014) of the Equal Justice Initiative notes, between 1990 and 2005, a new prison was built every 10 days in the United States.

While men comprise the majority of adults incarcerated in prisons or local jails (approximately 92.7%), the number of incarcerated women has grown more quickly than that of men in recent years (Glaze & Kaeble, 2014; Minton & Zeng, 2015). Of particular note, there was a 3.2% reduction in the number of men incarcerated in local jails at midyear between 2010 and 2014; however, the number of women incarcerated in local jails grew by 18.1% during this time (Minton & Zeng, 2015). Additionally, when considering all people involved in the adult correctional system, including people who are on probation and parole, we see a higher percentage of women (approximately 18%; Glaze & Kaeble, 2014).

There are deeply disturbing disparities in rates of incarceration by race and ethnicity. African American adults comprise approximately 13% of the U.S. population over age 18; however, approximately 37% of men in prison and 21% of women in prison are African American (Carson, 2015; U.S. Census Bureau, 2014). A 2007 report from the Sentencing Project (Mauer & King, 2007) finds that the rates of incarceration among people who are African American or Hispanic/Latino are 5.6 and 1.8 times the rate among people who are White, respectively, and that there is considerable variation in these ratios by state. Harsh penalties related to immigration have created one of the fastest-growing populations affected by mass incarceration. Immigration-related charges made up over half of federal prosecutions in 2013 (Gottschalk, 2015). Between 2000 and 2010, there was an increase of nearly 60% in the number of people in state and federal prison who were Hispanic/Latino (Guerino, Harrison, & Sabol, 2012; Kilgore, 2014).

Intersections between gender, age, education, race, and ethnicity have resulted in extraordinary risk of incarceration among young African American men, particularly African American men with limited education. As described by the National Research Council (2014), 20% of African American men who haven't attended college have been incarcerated in state or federal prison at some point. This number jumps to 68% among African American men who did not complete high school. Between 1972 and 2010, there was a negligible increase in the rates of incarceration among men ages 20–39 with some college experience; however, the increases among men with no college and less than high school education were dramatic, especially among the latter group.

At every turn, we see that mass incarceration builds upon and exacerbates profound social inequality. This picture becomes even starker when considering the effects of incarceration on families. According to a revised 2008 Bureau of Justice Statistics report (Glaze & Maruschak, 2010), more than half of the people in state (52%) and federal (63%) prisons in the middle of 2007 were parents of children under age 18. At that time, it was estimated that their children comprised 2.3% of children in the United States and that approximately

half of the children were quite young (9 years old or younger). African American and Hispanic/Latino children were 7.5 and 2.5 times, respectively, more likely than White children to be in this group, respectively. And this group didn't include the many children with a parent in local jails. A 2009 report from the Sentencing Project estimated that 1 in 15 African American children, 1 in 42 Hispanic/Latino children, and 1 in 111 White children have a parent who is incarcerated (Schirmer, Nellis, & Mauer, 2009).

While resilience and functioning well in the face of adversity shouldn't be overlooked (Poehlmann & Eddy, 2013), having an incarcerated parent is associated with numerous challenges for children. The challenges can include behavioral and emotional problems, relational disruptions within the family, and often co-occurring risks associated with poverty, problematic substance use among parents, and numerous transitions in caregiving arrangements and schools (Engstrom, 2008). Relatedly, these challenges can affect the caregivers of children with incarcerated parents, who often provide critical material and emotional support not just for the children but also for the parents who are incarcerated (Engstrom, 2008).

The starkness of mass incarceration's intersections with social disadvantage and inequality is furthered by the disproportionate representation of people with mental illness, substance use problems, and histories of victimization who are involved in the U.S. criminal justice system (Harlow, 1999; James & Glaze, 2006; National Research Council, 2014; Teplin, 1990, 1994; Teplin, Abram, & McClelland, 1996; Winham, Engstrom, Golder, Renn, Higgins, & Logan, 2015). Nicholas Turner (2015) of the Vera Institute argues "that jails have become the provider of last resort for people with mental health issues" and that it is common for this group to be charged with nonviolent acts, to be unable to pay small bail amounts, and then to experience conditions that worsen their mental health, including abuse, inadequate health care, and excessive solitary confinement. A 2013 *Wall Street Journal* article (Fields & Phillips, 2013) noted that the three largest county jail systems in the United States (Cook County, Los Angeles County, and New York City) are also the country's largest mental health treatment facilities. Within these jails, 11,000 people received

mental health treatment each day (of an approximate total population of 41,500 people in 2013); however, there are large numbers of people with mental health and substance use problems who do not receive treatment while incarcerated (James & Glaze, 2006; Teplin, Abram, & McClelland, 1997) and many whose lack of adequate treatment in the community is related to heightened risk of criminal justice system involvement (Evans, Li, Pierce, & Hser, 2013; Garnick et al., 2014; Kissin, Tang, Campbell, Claus, & Orwin, 2014; Van Dorn, Desmarais, Pettila, Haynes, & Singh, 2013). Especially given the context of the war on drugs and the disproportionate representation of people with substance use problems who are incarcerated (68% of people in local jails and approximately half of people in state [53.4%] and federal [45.5%] prisons are estimated to meet diagnostic criteria for a substance use disorder); (Karberg & James, 2005; Mumola & Karberg, 2006), it is stunning that the majority of people with need do not receive treatment while incarcerated, upon community return, or while on probation or parole (Belenko & Peugh, 2005; Karberg & James, 2005; Mumola & Karberg, 2006; Taxman, Perdoni, & Harrison, 2007).

And yet, as disturbing as all this is, the enduring consequences of incarceration exacerbate it further. As described by Marie Gottschalk (2015), millions of people are sentenced to “civil death” related to their incarceration. These effects involve ineligibility for public housing, student loans, food stamps, and numerous professional licenses, as well as restrictions on voting eligibility. In addition to these formal exclusions, a criminal record limits employment prospects and opportunities to rebuild one’s life, support oneself and one’s family, and avoid rearrest and reincarceration.

Ending Mass Incarceration: What to Do

Mass incarceration results from the intersection of multiple phenomena, including policing practices, sentencing policies, responses to substance use and mental illness, inadequate educational and

vocational opportunities, and economic and political influences. Effective approaches will require multifaceted solutions informed by evidence and evaluated upon implementation to examine intended and unintended outcomes. We highlight several key strategies here.

Guiding Principles, Evaluation, and Changing Course When Indicated. The National Research Council (2014) asserts that while considering responsibility for one's actions and addressing crime, a well-informed approach should involve recognition of the harshness of imprisonment that extends to individuals, families, communities, and society and should take into account four principles: (1) *proportionality* between sentences and seriousness of the illegal activity; (2) *parsimony* so that sentences do not extend longer than needed; (3) *citizenship* so that effects of incarceration do not violate rights of citizens in lasting ways; and (4) *social justice* so that the use of incarceration supports the aims of a just, equitable society. We agree with these assertions and would add that policies and practices drawing upon these principles should be rigorously evaluated by nonpartisan parties to assess intended and unintended effects. The current context of mass incarceration makes it necessary to state an obvious, overlooked consideration: failed policies and practices should not continue to be funded, especially when they have dire consequences for individuals, families, communities, and society.

Sentencing. Sentencing reform efforts are developing to decrease sentence lengths and time served. For example, California recently passed Proposition 47, changing six nonviolent offenses from felonies to misdemeanors in the absence of prior violent convictions, which is projected to reduce the number of people incarcerated and the length of sentences. In 2012, California passed Proposition 36, providing opportunities for people with nonviolent, nonserious "third strike" convictions to be resentenced. A 2015 *New York Times* article (Eckholm, 2015) reported that over an 18-month period in California, there was a 4.7% reincarceration rate (typically for burglary or drug-related charges) among people released after prior life sentences, in comparison to a general rate of 45%. While such

efforts reflect important steps toward addressing mass incarceration, numerous people have raised the importance of sentencing reform for more serious convictions. As described by Marc Mauer and David Cole (2015), “We could cut sentences for violent crimes by half in most instances without significantly undermining deterrence or increasing the threat of repeat offending.” In addition to reviewing sentences according to the criteria above, it is critically important that the backlog within the courts be addressed immediately to ensure that the right to a speedy trial can be upheld.

Executive clemency. Currently, executive clemency (when a president or state governor grants leniency or a pardon) is parsimoniously given, a marked shift from the first half of this century (Gottschalk, 2015). President Barack Obama had a limited record of such action but may be making a shift as his presidency concludes (Sink, 2015; Shear, 2016)—he recently commuted drug-related sentences of 61 people, which, as of March 30, 2016, was reported to bring the total to 248 people who had their sentences commuted by him (Shear, 2016). While there is variation across states, governors rarely exercise this right.

Analysis of policy effects related to race, ethnicity, and gender. All policies related to incarceration should include what the Sentencing Project (Mauer & King, 2007) calls a “Racial Impact Statement” that would analyze potential race- and ethnicity-related effects prior to implementation. We would add that such pre-implementation analysis should include consideration of effects by gender and be followed by post-implementation analyses that consider effects by race, ethnicity, and gender.

Drug law reform. As federal and state governments have identified criminal justice policies and practices that don’t work, changes have been initiated. For example, in New York, the disbandment of the Rockefeller Drug Laws (named for Governor Nelson Rockefeller, who advocated for the 1973 laws that are often considered the nation’s most severe, with mandatory sentences of 15 years to life for the sale of two ounces or possession of four ounces of several drugs, including cocaine, heroin, and marijuana) has resulted in more people going to treatment rather than prison (Parsons, 2015). Multiple states

have introduced bills to reduce penalties for various drug charges and provide alternatives to incarceration. Particularly given the high rates of victimization, problematic substance use, and mental health concerns among people who are involved with the criminal justice system (Harlow, 1999; James & Glaze, 2006; National Research Council, 2014; Teplin, 1990, 1994; Teplin, Abram, & McClelland, 1996; Winham et al., 2015), it is imperative to consider alternatives to incarceration that provide pathways to treatment and services and reduce the use of incarceration to address these underlying issues.

Alternatives to incarceration. A range of alternatives to incarceration must be further developed, researched, and, when shown to have positive effects, widely employed. While not without critiques, adult drug courts, which involve coordination among substance use treatment, social services, and criminal justice procedures and oversight, have been associated with reduced substance use and reinvolvement with the criminal justice system when compared to other conditions (Mitchell, Wilson, Eggers, & MacKenzie, 2012). Similar to drug courts, mental health courts refer people experiencing mental illness to court-monitored treatment rather than incarceration. Multisite research finds that participants in mental health courts have fewer arrests per year and days of incarceration than people in the usual treatment group (Steadman, Redlich, Callahan, Robbins, & Vesselinov, 2011).

Incentivize reform. Approximately \$4 billion is provided by the federal government to cities and states to support criminal justice activities; however, current funding structures incentivize arrests and seizures. Instead, the federal government could financially reward states and cities for implementing approaches that decrease incarceration while supporting public safety (Chettiar, 2014; Fortier & Chettiar, 2014).

Evidence-guided emphasis on community reentry. Incarceration disrupts life in just about every imaginable way, often making the return to the community a nearly insurmountable challenge, particularly when combined with the effects of a criminal record on access to housing, employment, and educational resources. The stigma attached to having a felony record lasts a lifetime, as do some of the

approximately “50,000 legally mandated collateral consequences” described by Lorelei Laird in a 2013 article in the *American Bar Association Journal*. With an estimated 93% of all people who are in prison returning home at some point (Petersilia, 2003), it is necessary to address community reentry from the outset of incarceration. Halden, a maximum security prison in Norway, exemplifies this approach, as described in a 2015 article in the *New York Times* (Benko, 2015). Its primary orientation is to prepare people to return to the community following incarceration. There are numerous practices and structures within the prison to support this aim; however, of particular note, preparation for community return involves steps to ensure housing, employment, and social support for each person *prior to leaving* the prison. Research conducted in the United States underscores the importance of housing, the ability to meet one’s basic needs, access to health care, and attention to substance use issues as important factors in the risk for rearrest (Freudenberg, Daniels, Crum, Perkins, & Richie, 2005; Mallik-Kane & Visher, 2008; Luther, Reichert, Holloway, Roth, & Aalsma, 2011); however, evaluations of comprehensive community-based reentry programs that address these needs have found mixed results, with some studies finding positive effects on reinvolverment with the criminal justice system and substance use and others finding negative or no effects (Grommon, Davidson, & Bynum, 2013). It is critically important that the United States prioritize (1) research regarding community reentry programs, (2) identification of effective approaches, and (3) uptake of evidence-supported programs.

Family-focused services. Incarcerating individuals has ripple effects through families, social networks, and, often, communities. A growing body of research suggests that addressing parenting and connecting incarcerated parents with their children is associated with positive gains, including reduced involvement with the criminal justice system; however, such services have limited availability, and when they do exist, they rarely incorporate children’s caregivers (for discussion, see Engstrom, 2008). Involving supportive significant others and children’s caregivers holds tremendous

untapped potential to yield multidimensional positive outcomes, including improved relational and emotional experiences for families and reduced risk of reincarceration for individuals. Research and program development in this area are critical to realizing this untapped potential. Further, it is critical to widely distribute resources that can assist families who are affected by incarceration. One such resource is the Sesame Street tool kit “Little Children, Big Challenges: Incarceration,” which provides child-friendly tools for understanding incarceration, coping with its effects, and maintaining family connections. However, this tool kit has also drawn critiques for receiving fiscal support from the philanthropic division of BAE Systems, a Department of Defense contractor that relies on labor by people incarcerated at for-profit institutions (Trotter, 2013).

Substance use treatment. There are significant shortfalls in access to evidence-supported substance use treatment in the United States. Ensuring access to a wide range of evidence-supported psychosocial and pharmacological treatments for problematic substance use, including those that also address mental health and trauma, in the context of society at large and in the context of incarceration and community reentry is a promising strategy to reduce incarceration. A key element in this strategy involves the need for the United States to consistently move its response to substance use from a moral, criminal perspective to a public health perspective that recognizes the complexity of factors associated with substance use and substance use-related problems and draws upon science to support the health and well-being of individuals, families, communities, and society (Miller, Forcehimes, & Zweben, 2011).

A growing body of research suggests that substance use treatment in correctional facilities, especially when followed by community-based treatment during reentry, can yield gains (Belenko, Hiller, & Hamilton, 2013; Chandler, Fletcher, & Volkow, 2009; Grommon et al., 2013; National Institute on Drug Abuse, 2007; Taxman, 2009); however, ongoing challenges involve ensuring access to treatment within correctional facilities, connecting

people to substance use treatment upon community return, and supporting ongoing engagement with substance use treatment in the community (Belenko & Peugh, 2005; Belenko, et al., 2013; Chandler et al., 2009; Grommon et al., 2013; Karberg & James, 2005; Mumola & Karberg, 2006; Taxman, 2009; Taxman et al., 2007). Emerging research is showing promise of medications, such as methadone, buprenorphine, and naltrexone, to reduce substance use upon community return (Belenko et al., 2013; Chandler et al., 2009; National Institute on Drug Abuse, 2007; Taxman, 2009). For example, for people who experience challenges with opioids (e.g., prescription pain medications and heroin), Vivitrol, which is extended-release naltrexone in a monthly injection, has been shown to reduce return to opioid use among men exiting jail (Lee et al., 2015). The Supervision Motivation Accountable Responsibility and Treatment program in Kentucky is an example of one probation service that provides Vivitrol through a partner clinic (Associated Press, 2015).

Mental health treatment. Inadequate community-based resources and stigma regarding mental health issues and treatment often conspire to keep people with mental illness from receiving necessary supports. This conspiring has been especially problematic in the wake of deinstitutionalization, which began in 1955 and involves transferring people out of state psychiatric hospitals and dramatically reducing the capacity of these hospitals. A report from the Treatment Advocacy Center (Torrey et al., 2014) estimates that jails and prisons house 10 times the number of people with serious mental illness than state psychiatric hospitals. A wide range of interventions for people with mental illness is required to curtail incarceration and its related costs, which exceed those of community treatment (e.g., American Psychiatric Association, 2001). Needed interventions include access to evidence-supported mental health and integrated substance use treatment, housing, vocational resources, and social services to support positive functioning and quality of life for people experiencing mental illness, their families, and their communities (Corrigan, 2016; Lamberti, Weisman, & Faden, 2004). Early steps to reduce the risk of initial

and continued criminal justice system involvement, including improved police response to people with mental illness, are also needed. One such model involves crisis intervention teams that consist of police officers trained to respond to people experiencing mental health crises and collaborating medical centers that provide emergency mental health services (Corrigan, 2016; Watson & Fulambarker, 2012). Though there have been mixed findings, use of such teams carries the potential to decrease arrests and mental health symptoms and to increase linkages to mental health services among people they serve (Arey, Wilder, Normore, Iannazzo, & Javidi, 2016; Taheri, 2016; Watson & Fulambarker, 2012). Research also supports the potential of jail diversion programs among people experiencing co-occurring mental illness and substance use problems to reduce jail time and improve treatment participation (Steadman & Naples, 2005). If diversion isn't possible, adequate mental health care, on par with needed medical care, is necessary for people with mental illness who are incarcerated, as is reentry planning to ensure linkages to community-based treatment and services (Corrigan, 2016). The Affordable Care Act offers funding opportunities for states that opt in to Medicaid expansion to provide mental health and substance use services for people upon community return.

Education. Education, including completing high school and college, buffers against the risk of incarceration (National Research Council, 2014). Based on factors noted by the American Civil Liberties Union (n.d.) that contribute to what has been called the “school-to-prison pipeline,” it is critical that there be

- (1) adequate funding and resources for public schools so that all students can thrive and remain in school;
- (2) due process and proportionality in school discipline;
- (3) examination and implementation of the most effective ways to ensure student safety, support relationships between students, teachers, and staff, and avoid police presence in schools (some may be surprised to learn of schools where police officers patrol hallways and

- provide criminal consequences for nonviolent disruptive behavior);
- (4) appropriate oversight of disciplinary alternative schools to ensure that students receive needed education that strengthens their opportunities upon completion; and
 - (5) within the juvenile justice system, appropriate legal representation, educational opportunities, and strategies to support positive trajectories for youth.

Grassroots efforts. Ongoing grassroots efforts will be important to ensure that current attention to mass incarceration is sustained and backed by multifaceted strategies to address the complex factors that fuel it. Many individuals and groups are advocating for greater equality and justice, improved immigration policy, and reductions in severe sentences and lasting consequences of incarceration. Grassroots advocacy can make a difference. For example, as described by the Sentencing Project (2015), collaborative efforts between Out for Justice and the Job Opportunities Task Force played significant roles in the enactment of Maryland's Second Chance Act of 2015. To learn more and to get involved in action to address mass incarceration, see the numerous resources and organizations listed at <http://newjimcrow.com/take-action>.

There is growing recognition that the magnitude of mass incarceration in the United States and its effects on individuals, families, communities, and society demand action. To be effective, such action will require attention to multifaceted strategies that address intersecting social concerns. Let us capitalize on the current calls for change to ensure that evidence-supported, multifaceted action regarding mass incarceration remains a national priority and fulfills the promise of the United States as a just society.

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