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POLICE PRACTICES IN NEW YORK: BETWEEN RACIAL PROFILING, DISCRIMINATION AND UNCONSTITUTIONALITY

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***Abstract*:** *In August 2013, in a historic class action lawsuit, Floyd, et al. v. City of New York, et al., brought against City of New York, Police Commissioner Raymond Kelly, Mayor Michael Bloomberg, and police officers, Judge Shira Scheidlin ruled that Stop and Frisk was unconstitutional, arguing that: "[i]n order for an officer to have reasonable suspicion' that an individual is engaged in criminal trespass, the officer must be able to articulate facts providing a minimal level of objective justification for making the stop' which means something more than an inchoate and unparticularised suspicion or hunch". This article looks at the history, results and consequences behind New York Police Departments' standard policies for combating and preventing crime: Stop-and-Frisk.*

Key words: *civil rights abuses, discriminatory policies, racial profiling, New York Police Department, Stop-and-Frisk.*

1. Introduction

The problems affecting the police departments across the United States are systemic and they cannot be reduced just to the "bad apples" metaphor as a stand in for the "ABC theory on police malpractice", where ABC stands for: Abuse, Brutality and Corruption. An Amnesty International report issued in June 2015, found that: "[t]he United States has failed to track how many people are killed by law enforcement officers; [while] all 50 states and Washington, D.C. fail to comply with international law and standards on the use of lethal force by law enforcement officers" [39]. In 2009, a report issued by the American Civil Liberties Union in partnership with The Rights Working Group, stated that one of the dominant and grievous forms of discrimination continues to be ethnic and racial profiling [43].

Fifty years earlier, in 1965, the Johnson administration passed the Law Enforcement Assistance Act, in order to assuage "white fears of black agitation" in the context of the 1960s civil rights movement [33]. The law had both a direct and indirect effect on what Thompson regards as the "complete overhaul of this country's criminal laws as well as its state and federal polices governing policies" [33]. The author further notes that in 1965 when the foundation for the carceral state

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is laid down: "the nation was not experiencing a crime wave. Indeed, the same states that were clamouring most loudly to bolster the criminal justice system in the mid-1960s were, according to data gathered by the federal as well as state governments, experiencing the lowest crime rate since 1910" [33].

This paper analyses aspects pertaining to the origins, methodology and assessment of the results versus impact of New York Police Department's (NYPD) practices such as Stop-and-Frisk.

2. The ideology of the "carceral state" and its social ramifications

In 1958, when the Cincinnati Police Department was among the first to initiate "field interrogation campaigns", the local branch of the American Civil Liberties Union questioned the "dragnet-like campaign of indiscriminate accosting and interrogation of citizens" by the police that "place an entire community under its control in this fashion" [6].

This complex problem that disproportionately affects people of colour, the poor or the homeless can be deconstructed in several ways. One is through the analysis of the centuries old tradition of discrimination and brutalisation of minority bodies through a white supremacist system of control and domination. Another ties in with the prison-industrial complex and its strive for profit extensions, which are not designed to perform any of three "re-s" of post-prison life: rehabilitation, reformation, reintegration of individuals into society.

1964 Republican presidential candidate, Barry Goldwater campaigned during the Freedom Summer when the Civil Rights Act was signed, on a platform inherently critical of the black freedom movement, stating that: "nothing prepares the way for tyranny more than the failure of public officials to keep the streets from bullies and marauders" [quoted in 23]. In other words, as Murakawa suggests "black civil rights [...] are linked to crime", while the rising crime rates, he argued, were related "to black civil disobedience, black demands for equality under the law, and black reliance on the welfare state" [23]. The subtext being: "that black freedom necessitates a strong 'law and order' response" [23]. Similarly, Weaver argues that "punitive policy intervention was not merely an exercise in crime fighting; it both responded to and moved the agenda on racial equality" [36].

The early seventies witnessed a low point in the American prison population, with "nearly 90 Americans [...] in prison for every 100.000 free residents" [31]. From the mid-seventies onwards, Simon notes that "US incarceration rate began an unbroken climb in more than 25 years", in so far that as Beck and Harrison highlight "[b]y the end of the 2000, nearly 500 residents of the United States were in prison for every 100.000 free persons" [31]. In an essay penned in 1971, Michel Foucault characterised prisons as "a war having other fronts in the black ghettos, the army and the courts" while incarceration reflected "an experience of [a] hostage, of a concentration camp, of class warfare, an experience of the colonized" [cited in 5]. Murakawa contends that "black-to-white ratio for incarceration rates jumped from three-to-one at Nixon's inauguration [1969] to eight-to-one by the turn of the millennium" [22]. Gottschalk observes that the carceral state "exercises vast new controls over millions of people, resulting in a remarkable change in the distribution of authority in favor of law enforcement and corrections at the local, state and federal level" [12]. Imprisonment becomes in the author's opinion, "a 'pervasive event' in the lives of the poor and of blacks, Hispanics, and other minorities"

[see also *Imprisoning America: The Social Effects of Mass Incarceration* edited by Western, Patillo and Weiman, cited in 13]. Moreover, Gottschalk adds that "[w]hile the proportion of blacks among those arrested for violent crimes dipped slightly from the mid-1970s to the early 1990s, the proportion of blacks in prison skyrocketed" [13; see also Tonry, *Symbol, Substance, and Severity in Western Penal Policies*, 2001]. The dimension of the carceral state which conveniently lags on the re-education and re-integration component – thus ensurring potential carceral perpetuity – constitues in David Garland's words: "an unprecedented event in the history of the USA, and, more generally, in the history of liberal democracy" [quoted in 30]. According to data provided by the Bureau of Justice Statistics analysed by Roberts, at the end of 2002, "[o]f the two million inmates in the U.S. jails and prisons, [...] black men (586.700) outnumbered white men (436.800) and Hispanic men (235.000) among inmates with sentences of more than one year. African American women were also imprisoned in record numbers, to higher degrees than white and Hispanic women" [30].

Perversely, the carceral state evolves and solidifies its parasitic standing under a societal umbrella comprised of a punishment and respectability dogma, unperturbed by any significant collective outcry. In turn, this widespread acceptance becomes a symbol and not a symptom of "commonsense racism". Ian Lopez considers the fact that: "[f]or most Americans ... even extreme racial disparities evoke not a sense of moral outrage but something closer to its opposite, a belief in the basic fairness of the world as currently organized. ... Shocking disparities in incarceration rates prove for most not the racial injustice of the current situation but the primal fact of minority depravity" [quoted in 35].

Unnever explains these attitudes through the racialisation thesis which states "that a racist ideology permeates whites' attitudes about crime control", that "[w]hites tend to associate being black with the involvement in crime, [or that] [w]hites also tend to believe that the criminal justice system is relatively "color blind" [34; see also Peffley and Hurwitz 2011].

This attitudinal trend can be attributed in part to the policies pursued by what Weaver calls "dominant issue entrepreneurs" – remnants and successors of the active and passive opponents to civil rights, coalesced into powerful elite countermovements and preoccupied with changing the discourse and the policy from the domain of the civil rights fight to that of the crime epidemic. In Weaver's view, "[t]he same actors who had fought vociferously against civil rights legislation, [once] defeated, shifted the 'locus of attack' by injecting crime onto the agenda. Fusing crime to anxiety about ghetto revolts, racial disorder [...] was redefined as a crime problem, which helped shift debate from social reform to punishment" [36].

In the book *The New Jim Crow*, Michelle Alexander drawing from U.S. Department of Justice, Bureau of Justice Statistics' report on the "Prevalence of Imprisonment in the U.S. Population, 1974-2001", observes that: "One in three young African American men will serve time in prison if current trends continue, and in some cities more than half of all young black men are currently under correctional control – in prison or jail, on probation or parole" [1]. These being said, Alexander continues: "[...] mass incarceration tends to be categorized as a criminal justice issue as opposed to a racial justice or civil rights issue (or crises)" [1].

In the following section, we analyse how police practices contribute to the issues of mass incarceration, black life criminalisation, as well as to the perpetuous reiteration and even reification of race wars based in police brutality, abuse of force, Manichean interpretations of law and order, and superficial degrees of accountability. Since 9/11, the constant militarisation of police departments across American soil – has reinforced what Rizer characterises as a "culture of police departments in America today [that] is far too often one that encourages aggressive responses to quell discontent [which also] [...] may be allowed or encouraged because of the militarization of police forces" [29].

3. *A Tale of Two People*: How Abuse Becomes the Norm in a Discriminatory Culture

Unlike the typical cases of community violence revolving around instances of black on black or white on white crime, when we refer to police abuses, we perceive them as state violence. Papachristos and Wildeman combined five years of homicide and police records in order to assess "the association of an individual's exposure to homicide in a social network and the risk of individual homicide victimization across a high-crime African American community". The study concluded that "[f]orty-one percent of all gun homicides occurred within a network component containing less than 4% of the neighborhood's population" [24]. In other words, "homicides cluster and overwhelmingly involve a tiny group of people who not only share social connections but are also already involved in the criminal justice system" [2]. Prior involvement with the criminal justice system supports the argument that federal and state based carceral policies fail to reintegrate former offenders and instead exploit a prison culture that virtually enables and ensures future criminal relapses. Add to this, the difficulties faced by people with criminal records, and the picture that takes shape has less to do with an almost "eugenic" notion of black criminality and more to do with the generations long, entrenched White supremacist culture that permeates every aspect of the race issues in the U.S.

Time and time again, this culture has proven to have fatal consequences for racially profiled black citizens. Moreover, it speaks to the in-built systemic double-standards when dealing with whites and minorities. This facilitates instances such as the shooting of 12 years old Tamir Rice playing with an toy gun (airsoft replica) in Cudell Recreation Center, a city park in Cleveland, Ohio – a traditionally open-carry state – which allows for one to openly carry a firearm in public – and has even legalised concealed carry [see 4]. Meanwhile, "activists bringing rifles into Texas chain stores – [also an open-carry state] – [...] say they have resorted to toting long arms such as rifles into chains like Target and Chipotle to make a point – because it is all they are legally permitted to do" [15]. In another instance caught on video, three Caucasian, "belligerent, heavily-armed [men] with rifles strapped to their backs" [...], wandered onto private property and the home owner called the police". One of three, Open Carry Founder CJ Grisham not only admonishes the police, he also "demands that the police drop their weapons: '*Hey, can you tell your man to stop getting at the ready and threatening me? Tell your man to stand down. He's over there with an AR-15 in his hands. He's telling me to drop my guns right now*'". He goes on to declare that: "*I am NOT talking to you guys*", until the police officer drops his weapon. When the police man tells him that "long guns just aren't safe", Grisham retorts that: "*How is*

it a safety thing? I'm a law-abiding citizen". When the policeman asks him "to stop yelling at them [...] Grisham declares, '*I can yell all I want, I've got a First Amendment right*" [25].

Two routine traffic stops three weeks apart, could not have had more different outcomes. In the first case, a black man, Samuel DuBose is fatally shot in the head by Ray Tensing, a University of Cincinnati police officer, after being stopped over a missing front license plate. The incident is recorded by the officer's body-camera.

Based on the recording, that contradicts Tensing's version of the events, Hamilton County prosecutor, Joseph Deters states that the officer "purposely killed DuBose" and that he "should never have been a police officer" [19].

In the second instance, Joseph Parker, a Caucasian man from Massachusetts, is arrested after he "became combative", then according to Parker's companions, "punched the officer 'for no apparent reason' and the officer fell backwards and struck his head on the pavement, knocking him unconscious". After the police tasered him, Parker continued to struggle, mimicked the police as he is read his Miranda rights and again, became violent in jail, where "he stood in a boxing stance and challenged officers to a fight before rushing toward one of them and punching him in the face". According to the police, "he attacked seven officers during the incident" [10].

Meanwhile, unarmed black men have been deadly shot for driving without license plates (Samuel DuBose), for playing in the park with toys (Tamir Rice), for stealing some cigarillos (Michael Brown), for a non-functioning brake light (Walter Scott), put in banned chokeholds that led to death, for selling "loosies" (single cigarettes) from packs without tax stamps (Eric Garner), mawed to death by a police dog after the officers instruct it to "get 'em" for being disorderly (Philip White).

These are examples of instances caught on camera which disprove the official versions. Moreover, even if some of these men had prior criminal records or had acted in an unruly manner, like the case of Caucasian Joseph Parker shows, the punishment for these alleged crimes or behaviours in a society based on the rule of law, does not equate death by execution. Moreover, the police officer should not act as prosecutor, judge, jury and executioner.

Accountability is important since there can be no justice without it. Yet, accountability based in the "random-bad-apples" phenomenon and not in reforming a deeply flawed white supremacist system, is a case of not seeing the "racist forest" for the "racist trees" and is therefore, not amenable for restorative justice.

The same argument can be applied when the issue is presented as a matter of "who gets hired" [29] since tougher rules, regulations and screening processes before hiring a person, are also not designed to deal with the overall ingrained problem of systemic racism and discrimination.

4. NYPD: When a Broken System Meets Broken Windows

Registering some of the lowest crime rates in decades – only 328 murder cases recorded in 2014 and 335 cases in 2013 compared to the 2245 instances in 1990, and marking the lowest figure since 1963 [11] – New York law enforcement as *the Floyd, et al. v. City of New York, et al* ruling has shown, is still tributary to deeply rooted racial and ethnic profiling practices. Presently, NYPD is focused on targeting "the pockets of violence that remain" [27] through but not limited to automated crime analysis. Crime mapping is supposed "to determine where and when crime occurs so that personnel can be assigned to catch

perpetrators in the act of committing the crime or to prevent them from committing it" [in 3].

This section analyses the Stop-and-Frisk policy as well as the revived Broken Windows practice of crime prevention. In this part too, we argue that while no one is contesting such traditional concepts as: "crime is bad" and "law and order should be upheld", in a majority of cases, we are dealing with a criminalisation of poverty, where administrative infractions (summary offences), misdemeanours and regulatory offenses, are treated like felonies, punished as such and hence ensure that all conditions are met for criminal records to become the very stigma that trigger repeat offenses. Accordingly, this closes the social Darwinist circle of blacks committing crimes and white systems – be it in law enforcement or judicial – restoring justice, law and order. Punitive measures for the sake of punishment and education deprivation are not *per se* conduits of criminal behaviour but both create the fertile ground where community and state violence are assured to clash in the ghettos, in the "projects" (New York City Housing Authority facilities or "developments") and in the streets, often with more negative (un)intended results for the parties targeted.

Adding pre-criminalisation to an already racially biased criminal justice system is a way to insure that the cycle of crime and criminalisation continues to be perpetuated. It has been noted that since the shift from behavioural to criminal approach has been openly adopted, arrest rates have increased, periods of incarceration have been prolonged, opportunities for rehabilitation have been reduced and as the Bureau of Justice Assessment points out, "most significantly, increases in the number of juveniles transferred to the adult criminal justice system" have become the norm [44].

Statistical figures paint the following picture: "African Americans make up 13% of the general US population, yet they constitute 28% of all arrests, 40% of all inmates held in prisons and jails, and 42% of the population on death row" [16]. Data provided by the ACLU shows how since 1970, [the] prison population rose to 700% [41]. With 4.4% of the approximately 7.1 billion world population, the United States has 2.24 million prisoners as of December 31, 2011 which accounts for about 22% of the global prison population [38]. Moreover, according to data provided by Pew Center on the States cited by the ACLU, "one in 99 adults are living behind bars in the U.S. while one in 31 adults are under some form of correctional control, counting prison, jail, parole and probation populations" [41].

During the 2013 mayoral campaign, then candidate Bill de Blasio vowed to reform the Stop-and-Frisk policy. On the surface, the numbers speak for themselves: from 685.724 people stopped in 2011 to 46.235 in 2014. On the racial disparities front, over a 12 years period, black people stopped-and-frisked, averaged around 50%: 54% in 2003, 2005, 2007, and 2010; 55% in 2004, 2009, 2012, and 2013; 53% in 2006, 2008, and 2011; 56% in 2014. White people averaged in the lower ten percent while Latinos averaged in the lower 30 percent. People age 14 to 24 average in the 50 percent [42]. A RAND Technical Report analysing the racial disparities of this policy, cited as listed reasons for the stops: "suspicion of minor offenses, such as scalping tickets, riding a bicycle on the sidewalk, and sales of untaxed cigarettes, to more serious suspected crimes, such as surveillance of terrorism, murder and assault" [28].

In theory, the Fourth Amendment of the United States Constitution is designed to "protect individuals against unreasonable searches and seizures by police officers".

The Constitution affirms: "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, *shall not be violated*, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized" [40].

Stop-Question-and-Frisk is predicated on the arbitrary idea that "police will detain and question pedestrians, and potentially search them, if they have a 'reasonable suspicion' that the pedestrian in question 'committed, is committing, or is about to commit a felony or a Penal Law misdemeanor'" [20]. Since according to official data, more than over 80 percent of those stopped-and-frisked were found to be totally innocent, it begs the question of how scientific and rigurous is the officers' 'reasonable suspicion' when so many stops proved to be unwarranted. More importantly, while not negating the deeply nefarious repercussion of crime in poor and destitute boroughs, institutions ought to refrain from participating in what are essentially, institutional-run campaigns of collective punishment.

Stop-and-Frisk rates may be down as of 2014, but the mentality that enabled such overreach in the first place is nowhere close to being sanctioned or comprehensively reformed. In the words of the new Police Commissioner and "one of the main architects of "broken windows" policing, Bill Bratton stated, in response to a question about crime rates staying down during a recent slowdown in arrests: "*I'm sorry, broken windows is here to stay. Stop, question and frisk is here to stay* [...] [and] *will be done at an appropriate amount*'" [8]. In the 1990s, Peters notes how NYPD Commissioner Bill Bratton "presided over a surge of petty-crime law enforcement on the theory that vigourously enforcing the small laws in some way dissuades or prevents people from breaking the big ones" [26]. So, like in a game of musical chairs, now mayor Bill de Blasio amended a faulty policy with an equal faulty one. Spitzer recounts that "[a]lthough 'community policing' was initially implemented under NYPD Commissioners Brown, and, later, Raymond Kelly, and although crime had begun to decline appreciable, by the time William Bratton became Commissioner of the NYPD in 1994, people were still fearful: the community's perception of crime lagged behind the actual crime statistics. As the new Commissioner under newly elected Mayor Rudolph W. Giuliani, Bratton made order maintenance policing the NYPD's primary strategy for reducing fear and fighting serious crime" [32]. That as shown, crime rates were already on a downwards spiral as early as 1994 but that the same vocabulary and under asiege mentality is still in play, 21 years laters, speaks less of the "Great Crime Epidemy of the XXth and XXIst centuries" and more of mainting and consolidating a toxic *status quo* fueled by the mantra that: "Restoring order reduces crime ... at least in part because restoring order puts police in contact with persons who carry weapons and who commit serious crime" (Bratton quoted in [32]). In theory, Harcourt concedes that "the 'Broken Windows' script privileges order over disorder. Whereas disorder attracts crime, order, by contrast, decreases criminal activity" [14].

The "Broken Windows" theory originates with a 1982, *Atlantic Monthly* nine-page article written by James Q. Wilson and George L. Kelling. The authors assert "the existence of an important connection between incivility and crime". Herbert explains that when "symbols of 'disorder' are left unaddressed in a neighbourhood, then more crime problems will intensify there. A corollary of the theory holds that the police should focus

on misdemeanour offences to reduce disorder, because this will work to prevent more serious crime" [17]. Tolerating and not aggressively pursuing "minor disorders" – littering, loitering, public drinking, panhandling, prostitution, jaywalking, subway turnstile jumpers and fare evaders – would under the "broken windows" framework, lead to a criminogenic environment [14].

Policy-makers do not properly institutionally address or consider how this argument and its policy outcomes are predicated on a logical fallacy: "correlation does not imply causation". Otherwise, it would not have made a resurgence twenty years later with Mayor de Blasio re-appointing Bratton as Police Commisioner: "I believe Commissioner Bratton knows a lot about driving down crime, and I think his first impulse here is to be careful not to lose some of what's been effective," the mayor said [7]. The fallacy appears both at the level of how crime is understood, of how it is conceived in a monolithic fashion and how it is dealt with. One fallacy is that petty crime is always the first step towards more serious crimes.

Another one is that aggressive policing is a crime deterrent and the panaceum for lower crime rates. In both instances, logical fallacies of the questionable cause variety, are at play. The problem with the quality of life initiative, broken windows, stop-and-frisk and other related policies that have spawned from these frameworks, is that they automatically generate binary oppositions that mostly target people of colour as we have shown in previous sections, in which large swaths of people are made redundant in a callous quasi-"eugenic" manner, put in cages, and put away, out of sight and out of mind, in the hope that by dealing with the symptoms and not the causes of systemic state-sanctioned discrimination, oppression and abuses, the streets will be safer from these perilous, loitering, thuggish figures caught broking windows.

5. Conclusion

Feminist theorist, Marilyn Frye employs the metaphor of the birdcage in order to exemplify how oppression functions and how it cannot be reduced to a matter of individual cases / aberrations in the functioning of the state apparatus and institutions. In Frye's words: "Consider a birdcage. If you look very closely at just one wire in the cage, you cannot see the other wires. If your conception of what is before you is determined by this myopic focus, you could look at that one wire, up and down the length of it, and be unable to see why a bird would not just fly around the wire any time it wanted to go somewhere" [9].

Oppression disguised as a fight for civility in the name of upholding respectability discourses, is coupled with political vulnerability. At present, far removed from even the cynical Kiplingesque "white man burden" or the Cordocetian *mission civilisatrice*, policies pursued at various state levels from local police departments to the overall criminal justice system, are far more oriented towards justifying budgets, obtaining more funds, meeting arrest / fines quotas and providing a steady fodder for the public – private prison industrial complex. Similar profit-based motivations are what spurred the broken window criminalisation of poverty: during the '90s, under Mayor Giuliani, "[c]leaning up Times Square in midtown Manhattan was first priority, and was a wild success. City Hall then began looking to transfer the policy to the city's poorer, underdeveloped neighborhoods as a means to increase property values" [21]. That in turn, paved the way for gentrification which further marginalized and dispossessed the poor and undesirable.

With these stakes, only inconveniencing innocent stop-and-frisked passers-by after racially profiling them, might seem to some as benignly inconsequential.

The fact that Judge Shira Scheindlin, who presided the class action suit over the constitutionality of Stop-and-Frisk, as well as other related programs, was removed by a federal appeals court panel, sends "a chilling message to other judges: tread carefully when handling cases that challenge the government action" [37]. Though Mayor de Blasio and Commissioner Bratton dropped the city of New York's appeal of the "2013 federal court ruling stating that most uses of stop-and-frisk were unconstitutional racial profiling" [18], by vowing to continue with "slight amendments" the broken window policy through Operation Impact or others similar, they in fact assured that the core problem not only does not go way but mutates to even more virulent forms. In the case of "Operation Impact", Ladd describes how "[s]tarting in 2003, the department put 60 to 100 new police officers on foot posts in each so-called "impact zone" – the most violent sectors of crime-ridden precincts. The officers were expected to figure out how to interact with gang members and residents long leery of the police, and turn in high arrest numbers while receiving little guidance" [18].

Aggressive policing does more harm than good in pursuing directly / indirectly a policy of mass-targeting members of "risk" communities: "An arrest on an individual's record for not cooperating with an officer who stops him without pretext could potentially lead to years of unemployment. A young person's family could be evicted from public housing because of it. A university could deny a student a scholarship or need-based financial aid because of a petty crime on his record" [21]. For the people and communities that find themselves in crime-ridden areas and are directly affected by gang clashes or other similar phenomena, NYPD policies can seem like a God send. Instead, what they are is a band-aid on an open bleeding wound that can be doused and cleaned of impurities but that continues to be prurient so long as one does not come to term and acknowledges not a distant unsavoury past, but the very present moment, that will continue to breed mass incarcerations and collective sanctioning of poverty so long as it enables the propagation of the *status quo*. Paying lip service to the constituents and operating cosmetic changes have the perverse effect of replacing officers in uniform with "more unmarked police cars, plain clothes officers" that still target young black males [21]. The problem appears to be less about loitering being the first step towards armed assault and smoking marijuana, the first step towards more dangerous illegal drug trafficking, when framed as a somewhat "eugenic" crusade for a crime free / poverty free utopia designed (un)intentionally to benefit those same dominant structures and majorities to the detriment of the other racial minorities – especially blacks in so far as housing, schools, jobs and public funding are concerned.

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