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Resumo O fim da Guerra Civil Americana trouxe a promessa de um novo tempo para todas as pessoas, assente num princípio de igualdade entre todos, com acesso às mesmas oportunidades e privilégios. Mas este marco histórico aguardava ainda o período que se seguiu da legislação que ficou conhecida como “Jim Crow”. Nas relações racionais ensaiava-se o momento histórico da segregação. Esta legislação com raiz em princípios da “supremacia branca” do Sul (dos EUA) depois da Reconstruction só terminaria com o mo...

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A CENTURY AFTER PLESSY v. FERGUSON. THE STRUGGLE FOR RACIAL EQUALITY IN THE ALGORITHM ERA

UM SÉCULO DEPOIS DE PLESSY v. FERGUSON. A LUTA PELA IGUALDADE RACIAL NA ERA DO ALGORITMO

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Abstract: The end of the American Civil War brought the promise of a new era where all people, assumed equal, could access to the same opportunities and privileges. Although, following this new historical moment the so-called Jim Crow legislation period was still to come and a new lane in racial relations, a segregationally one, awaited. This "*white supremacy*" legislation mainly of the Southern States of the US after the *Reconstruction,* only ended with the beginning of the civil rights movement in the 1950s and 1960s. After the approval of laws separating the *colored* from the white people the U. S. Supreme Court, in an infamous decision, legitimized racial segregation. A denial of equality. It was 18th May 1896 and the Supreme Court decision of the *Plessy v. Ferguson* legitimized the "*separate but equal*" doctrine. For the occasion of the anniversary of the American decision that marked the end of the nineteenth century with the acceptance racial oppression and a recognized hierarchy based on the color of the skin with discriminatory consequences, our goal is to analyze the decision and the inheritance that, nowadays, still disseminates in racial inequities and ostracism with severe consequences, including, allegedly, in AI and "racist" algorithms.

Keywords: Racial inequities; Equality; Human rights; Human dignity; AI; Plessy v. Ferguson.

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Resumo: O fim da Guerra Civil Americana trouxe a promessa de um novo tempo para todas as pessoas, assente num princípio de igualdade entre todos, com acesso às mesmas oportunidades e privilégios. Mas este marco histórico aguardava ainda o período que se seguiu da legislação que ficou conhecida como "Jim Crow". Nas relações racionais ensaiava-se o momento histórico da segregação. Esta legislação com raiz em princípios da "supremacia branca" do Sul (dos EUA) depois da *Reconstruction* só terminaria com o movimento dos direitos civis nas décadas de 50 e 60 do século XX. Depois de terem sido aprovadas leis que admitiam a separação entre brancos e negros (ou mestiços) a infame decisão que chegou pela mão do Supremo Tribunal dos Estados Unidos legitimaria em definitivo a segregação racial. Apesar do rendilhado argumentativo é, de facto, a negação absoluta da igualdade com base na raça. Foi a 18 de maio de 1896 que o Supremo Tribunal, na decisão que ficou conhecida como *Plessy vs. Fergunson*, legitimaria a doutrina, com repercussões além fronteiras, "*iguais mas separados*". Por ocasião do aniversário da decisão americana que marcou o fim do século XIX com a aceitação da opressão e segregação racial, e o reconhecimento de uma hierarquia entre as pessoas baseada na cor da pele com evidentes consequências discriminatórias, o nosso objectivo é analisar esta vil decisão e a pesada herança que, ainda hoje, se vai disseminando em discriminação racial e marginalização, com consequências nefastas, incluindo, alegadamente, na IA e em algoritmos "racistas".

Palavras chave: Discriminação Racial; Igualdade; Direitos Humanos; Dignidade Humana; IA; *Plessy vs. Ferguson*.

Introduction.

"All men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness", the extraordinary words are from the Declaration of Independence in US Congress, July 7, 1776 (The Declaration of Independence, 1776).

Although some men had to wait almost a century to be recognized as "equals" among others. Only in 1868 was recognized full citizenship to black community. This was the promise of the fourteenth Amendment of the US Constitution. But, in less than twenty years, the called Jim Crow legislation started to be adopted trough many States of the US, and black people's rights were, in fact, in danger as history ended up exposing.

How was that possible?

If the American Constitution committed to accomplish "(…) equality, solemnly attested by three amendments to the Constitution and by elaborate civil

rights acts (…)" (Woodward, 1964), the majority of legislators, judges, politicians and society in general ended up repudiating it in a demagogue set of arguments.

The "(…) "compromise of 1877" between the Hayes Republicans and the southern conservatives had resulted in the withdrawal of federal troops from the South and the formal end of Reconstruction. What had started then as a retreat had within a decade turned into a rout. Northern radicals and liberals had abandoned the cause: the courts had rendered the Constitution helpless; the Republican party had forsaken the cause it had sponsored" (Woodward, 1964).

We can reasonably conclude that the grounds were being prepared to a tide of a renovated racist historical moment.

In fact, social acceptance of "white's" laws was unchallenged and, worst, socially accepted by the majority. Society in general unopposed to segregation, and black community was facing prejudice.

This lane made possible that, in June 7, 1892 when Homer Plessy "(…) walked into the Press Street Depot in New Orleans, (with) a first-class ticket to Covington, and boarded the East Louisiana Railroad's Number 8 train" (Urofsky) he was violating the law.

When he was asked if he was a "*colored man*" Plessy "(…) said he was, and the conductor told him to move to the colored car" (Urofsky). Plessy refused and a new path of racial segregation was open for the century to come.

The separation between whites and *colored* was a fact and people (with different races, white and *colored*) didn't mix. Segregation laws separated people in transports, schools, restaurants and other places.

The set of rules, despite the arguments, were discriminatory and established a hierarchy between races and a series of privileges and dominances in several areas, including politics.

Although, that day, Plessy refused to go to the *colored* car, he yelled that he was an American citizen and that he had paid for his first class ticket but, "(…) the conductor stopped the train, and Detective Christopher Cain boarded the car, arrested Plessy, and forcibly dragged him off the train with the help of a few other passengers" (Urofsky).

Plessy had violated the "Separate Car Act" and faced the next morning Judge Howard Ferguson.

This was the beginning of the abominable "*Separate but Equal*" doctrine and, throughout the South, black and white had to be separate and the fate of black people was defined.

Only two years later "(…) a Mississippi law designed to deny black men the vote" (Constitutional Rights Foundation) and "(…) Southern states began to limit the voting right to those who owned property or could read well, to those whose grandfathers had been able to vote, to those with "good characters," to those who paid poll taxes. In 1896, Louisiana had 130,334 registered black voters. Eight years later, only 1,342, 1 percent, could pass the state's new rules" (Constitutional Rights Foundation).

The doctrine set by the SU Supreme Court refers "(…) to a now-defunct principle that allowed African-American to be segregated" (USLegal). Although the 14th Amendment "(…) forbids the making or enforcing of any law which shall abridge the privileges or immunities of citizens of the United States or deny to them the equal protection of the laws" (Groves, 1951, p. 66) that not stopped the new "white supremacy" decision that ended up to admit classifications of people related to race and skin color.

Hierarchy between people based on race and skin color was legitimized by the America Superior Court in an unopposed country.

The doctrine only reversed in 1954 in *Brown v. Board of Education of Topeka* (1954) that declared that segregation in public schools was unconstitutional and, "in the years following, subsequent decisions struck down similar kinds of Jim Crow legislation" (Urofsky).

Jim Crow legislation.

Legislator Benjamin Arnett, in a resentful speech in 1886, said:

> "*I have traveled in this free country for twenty hours without anything to eat; not because I had no money to pay for it, but because I was colored. Other passengers of a lighter hue had breakfast, dinner and supper. In traveling we are thrown in "jim crow" cars, denied the privilege of buying a berth in the sleeping coach. This foe of my race stands at the school house door and separates the children, by reason of 'color' and denies to those who have a visible admixture of African blood in them the blessings of a graded school and equal privileges… We call upon all friends of 'Equal Rights' to assist in this struggle to secure the blessings of untrammeled liberty for ourselves and posterity".*
> (Bethune)

The speech published as *The Black Laws* describes the Jim Crow legislation[3]. The laws "(…) established different rules for blacks and whites. Jim Crow laws were based on the theory of white supremacy and were a reaction to Reconstruction. In the depression-racked 1890s, racism appealed to whites who feared losing their jobs to blacks. Politicians abused blacks to win the votes of poor white "crackers." Newspapers fed the bias of white readers by playing up (sometimes even making up) black crimes" (Constitutional Rights Foundation).

The first genuine Jim Crow law "requiring railroads to carry *Negroes* in separate cars or behind partitions was adopted by Florida in 1887. Mississippi followed this example in 1888; Texas in 1889; (…); Alabama, Arkansas, Georgia,

[3] A slang term for a black man.

and Tennessee in 1891; and Kentucky in 1892. The Carolinas and Virginia did not fall into line until the last three years of the century" (Woodward, 1964).

Within this background the Louisiana Separate Car Act passed in July 1890. And the pretext was "to "promote the comfort of passengers" railroads had to provide "equal but separate accommodations for the white and colored races" on lines running in the state" (Urofsky)[4].

In the case is "(…) found "a legal distinction between the white and colored races" wholly reasonable, as reflecting the reality of "a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color" (Davis, 2004, p. 39).

The community of New Orleans "(…) with its strong infusion of French and other nationalities, was in a strategic position to furnish leadership for the resistance against segregation" (Woodward, 1964) and, when the bill passed the community was willing to fight it "(…) on May 24, 1890, that body received "A Protest of the American Citizens' Equal Rights Association of Louisiana Against Class Legislation" (Woodward, 1964).

The association defended the unmistakable. The bill was unconstitutional. Although the bill passed and "an Act to promote the comfort of passengers" (Woodward, 1964) was there to regulate the relations between races[5].

The first case to declare the legality of segregated schools was decided earlier in Massachusetts "in *Roberts v. City of Boston*, in 1849, Judge Lemuel Shaw, one of the most distinguished jurists of his century, explained that although equality is splendid in principle, in actual fact people are differently placed and their rights are modified by their circumstances. We treat children differently from adults, he said, and no one objects" (Brown Foundation).

"Boston's schools would remain segregated. The community was stunned" (African American Registry).

The terrain to a "white supremacy" era was ready and only ended the next century.

PLESSY's case.

When, in 1892, Homer Plessy bought a train ticket and decided to take a seat at the white's car he was violating the law. He was arrested and, even claiming for the 14th Amendment and the Equal Protection Clause, he was convicted by Judge John Ferguson enshrining a constitutional justification for racial segregation.

The decision argued that the "(…) petitioner was a citizen of the United States and a resident of the State of Louisiana, of mixed descent, in the propor-

[4] New Orleans had a third class, the called *creoles*.

[5] Segregation was practice with a new strength in South Africa, with the *apartheid* system until 1990's.

tion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege and immunity secured to the citizens of the United States of the white race by its Constitution and laws" (Plessy v. Ferguson, 1896).

The main argument was that "(…) if the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals" (Plessy v. Ferguson, 1896).

The decision *escaped* the constitutional equality principle concluding that it was true that a black person is not permitted to use whites' facilities but, it was also true that whites could not use the ones assigned to a black person.

The decision also considered the question related to the "(…) proportion of colored blood necessary to constitute a colored person (…)" (Plessy v. Ferguson, 1896), and ended up concluding that it was to be determined under the laws of each State.

The conclusion, as we astonish, was that State's had the right to establish rights based on the criteria of skin color or race.

The infamous decision legitimized the "*separate but equal*" with the argument that "(…) facilities for African Americans did not violate the Fourteenth Amendment, ignoring evidence that the facilities for blacks were inferior to those intended for whites" (Urofsky).

Racial identity?

Being a slave and being treated as an object was not a parameter to be eligible for citizenship. We can say, until the end of WWII, personhood was truly measured. And this was, in our view the key question in Plessy's case.

Plessy "(…) stood as a citizen "of mixed Caucasian and African blood, in the proportion of one eighth African and seven-eighths Caucasian, the African admixture not being perceptible. What was the identity of persons such as Plessy?" (Davis, 2004, p. 38).

Recognizing race as a category mainly to set a discriminatory set of rules was (and is) un-admissible, however, in Plessy's case "(…) both Justice Brown for the majority and Justice Harlan in dissent appeared to accept race as a clear category, as a set of "distinctions based upon physical differences" (…)" (Davis, 2004, p. 41).

The "(…) individual identity in the social construction of race formed the core of Plessy's case. The source of personal identity was the crucial issue at which Plessy's original and ultimate challenge aimed" (Davis, 2004, p. 2) and created in this segregation rule a true "*quality control*" through race neglecting that the conditions that black people faced were worse than white people's facilities.

Almost a century later the founding fathers of the UDHR assumed the formulation of *universal standards*, "(…) associated with equality and therefore

intrinsic and inalienable to man, for the *simple* fact of being a man and, the fact that the concept of human dignity "anchors different worldviews"(…)" (Caulfield & Chapman, 2005). And, as the French Philosopher, Maritain commenting the drafting of the UDHR, stated that "(…) at one of the meetings of a UNESCO National Commission where Human Rights were being discussed, someone expressed astonishment that certain champions of violently opposed ideologies had agreed on a list of those rights. "Yes", they said, "we agree about the rights but on the condition that no one asks us why". The "why" is where the argument begins" (1948, p. I). Human dignity gained the formal strength of being the catalyst for the discussion and assumed as the guiding principle.

However, it was only on May 17, 1954, that the Supreme Court Justices announced the decision known as *Brown v. Board of Education*. Racial segregation violated the 14th Amendment. But it was just the beginning and race, in America or elsewhere in the world, is still, nowadays, a source of discrimination.

The Court decision concluded the obvious "segregation of white and *negro* children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to *Negro* children the equal protection of the laws guaranteed by the Fourteenth Amendment – even though the physical facilities and other "tangible" factors of white and *Negro* schools may be equal" (Brown v. Board of Education of Topeka, 1954).

The lament of Justice Harlan was finally heard and justice was made.

With the decision, almost a century later since, the 1896 words of Justice Harlan echoed: "(…) to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the bases of race" (Plessy v. Ferguson, 1896).

However, the "I have a dream"[6] is, yet, to be accomplished.

To set a mere example of the legacy of the historical bad memory "white supremacy" doctrine in a *modern* perspective we can relate it to AI.

The ProPublica analysed a commercial AI tool made by Northpointe, Inc. and tested whether the recidivism algorithm, the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), was predisposed against certain groups.

The analysis, reported on May 23, 2016 - "How we analysed the COMPAS Recidivism Algorithm" -, found that black defendants were more likely, than white ones, to be incorrectly judge to be at higher risk of re-offense (Larson, Mattu, Kirchner, & Angwin, 2016).

Can we conclude that the algorithm is racist?

The report analysed that:

[6] Martin Luther King, Jr, famous speech in 1963, Washington, on the march for Jobs and Freedom.

> "In forecasting who would re-offend, the algorithm made mistakes with black and white defendants at roughly the same rate but in very different ways.
> The formula was particularly likely to falsely flag back defendants as future criminals, wrongly labelling them this way at almost twice the rate as white defendants.
> White defendants were mislabelled as low risk more often than black defendants."
> (Angwin, Larson, Mattu, & Kirchner, 2016)

Whatever our conclusion is, truth is that skin colour is, still, an issue and a source of discrimination.

And, in a surprising historical moment, that just made world news[7], the Trump administration decision to add a citizenship question to the 2020 census is being taken to Supreme Court. For the first time since 1950 a citizenship question is added to census and is expected a decision from the Supreme Court in late June (Liptak, 2019).

The US Judge George J. Hazel held that the "(…) citizenship question would unreasonably compromise the distributive accuracy of the Census and the addition violates the Enumeration Clause" (Zimmermann, 2019).

Questions related to citizenship stopped exactly because it would reduce the responses among noncitizens and undermine the accuracy of the Census. But the main argument set by ACLU argues that "(…) since 1950 the government had realized that a "differential undercount" of racial and ethnic minorities would threaten census accuracy.

"The government stopped asking this question, along with dozens of others on the census, when it realized that these questions were harming the accuracy of the population count and were specifically causing an undercount of communities of color," Ho said" (Vogue, 2019).

Once again the American Supreme Court is called to make history in the epoch of Trump administration.

Conclusions.

The racial identity discourse in *Plessy v. Ferguson* "(…) left tragically to later generations of Americans the problem of sorting out the source of identity in law" (Davis, 2004, p. 41).

[7] As an example, CNN in February 15, 2019 with the news "Supreme Court agrees to take up 2020 census case", retrieved from https://edition.cnn.com/2019/02/15/politics/supreme-court-2020-census/index.html, in 30 April, 2019.

But one thing is for sure, "(…) there is no superior, dominant, ruling class of citizens", considering Justice Harlan words. And, as he said law (he referred specifically to the US Constitution but we use his words in a broader context) is "(…) color-blind, and neither knows or tolerates classes among citizens" (Plessy v. Ferguson, 1896).

Even though the echo of these magnificent words, racial inequities are, still, a social and legal problem around the world and, like Duwell "(…) in line with Ricoeur or Lévinas, one could say: the phenomenology of moral experiences confronts us with the worth of the other, the other has the same authority over us that is the origin of the respect we owe to him" (Duwell, 2014, p. 43).

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