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The Thirteenth Amendment:

The Legal Framework Against Slavery throughout the History of the United States.

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Table of Contents

Introduction

The abolition of slavery from the Us legal system constituted an historically significant event. *De facto,* over two hundred years from the founding of the first English colonies in North America, there was no written law prohibiting the act of forcing people into a state of enslavement. The absence of such laws was one of the causes that allowed European settlers in North America and then Us Citizens to build a great economic power, thanks to the development of the primary sector, in which enslaved people constituted a significant percentage of the workforce.

Although the abolition of slavery defined a paramount moment for Us history and the affirmation of a principle of civilization, the promulgation of the *Thirteenth Amendment* in 1865 was not positively welcomed by a great portion of the population. As a matter of fact, this novelty encountered the reluctance of the Southern States, which, without the unpaid labor provided by enslaved people, were reduced to a subsistence economy.

For this particular reason, state level legislative and executive bodies resorted to multiple gimmicks in order to continue exploiting the African American citizens that had been freed from slavery in 1865. The enforcement of said laws, that were named *Black Codes*, caused the *en masse* arrest of black people. In order to serve this purpose, the *Exception Clause* of the *Thirteenth Amendment* was employed, as it allows the enslavement of those people who have been convicted of a felony:

> *(Neither slavery nor involuntary servitude) except as a punishment for crime whereof the party shall have been duly convicted (shall exist within the United States, or any place subject to their jurisdiction).*[1]

The abolition of slavery did not even manage to prevent the emergence of racial segregation at the turn of the Twentieth Century. Through the *Jim Crow* laws and the promotion of the "Separate but equal" doctrine on the behalf of Democratic President

[1] U. S. Const. amend. XIII.

Woodrow Wilson, the African American population, albeit being legally free, continued living in a position of subordination and social exclusion with respect to the white community.

Notwithstanding the fact that the foundations of racial segregation have been undermined thanks to the achievements of the *Civil Rights Movement*, American society is to this day plagued by racism.

In this day and age, racial segregation, that in the last century was allowed by the Jim Crow laws, lays in the enforcement of the laws that regulate the Us society. Several scholars affirm that the uncanniest proof of systemic racism in the Twentieth Century lay in the carceral system. As a matter of fact, statistic studies demonstrate that one in three male African American men is in prison right now.

The prison industrial complex is the sector in which the last vestiges of slavery can be found: specifically speaking, the Exception Clause of the Thirteenth Amendment authorizes who retains those who retain control of a prison to exploit prison labor for financial gain, without the obligation to retribute it.

The Research Question of this thesis is the following:

What are the vestiges of slavery that have survived the legislative measures that were aimed at abolishing it?

With the aim of answering to said research question, this dissertation thesis is divided into four chapters.

The main aim of the first chapter is to provide a legal definition of the practice of enslavement in the Us legal system and, in second instance, to trace the evolution of said practice from its introduction in the colonial economy to its abolition in 1865.

The purpose of the second chapter is to provide an analysis of the causes of the *Civil War* and of its effects on the US legal system, paying particular attention to the limitation of the *Thirteenth Amendment* within the *Exception Clause*, and the reason why its ratification did not manage neither to completely abolish slavery nor to allow full equality between white and black Us citizens.

The third chapter is focused on the historical analysis of racial segregation in the Us society of the Twentieth Century and how the action of the civil rights act has been able to dismantle this system, even though not completely.

The fourth and last chapter is aimed at demonstrating how the *Exception Clause* of the *Thirteenth Amendment* represents nowadays a vestige of slavery, by explaining its correlation with the nowadays phenomenon of mass incarceration, which particularly affect the African American population.

CHAPTER ONE – THE LEGAL FRAMEWORK OF SLAVERY BEFORE THE THIRTHEENTH AMENDMENT

1.1 Introduction

When it comes to listing the peculiarities that characterized the history of the United States of America, slavery is one of the first socio-economic institutions that occurs. This practice was not a merely regional institution, conversely, it helped establishing America's economic position and expanding capitalism. As a matter of fact, in the early 19th century, half of the export consisted in raw cotton, that was one of the main goods produced through slavery. (Beckert, 2016)[2] This is what made the national economy rise but also what divided the population on a political point of view.

The purpose of this chapter is to find out how the legal definition of slavery evolved throughout the centuries in which the practice was lawful, focusing on the legislations that determined the rights and limitations of all those people who held the status of slave.

1.2 The Birth and Purposes of Slavery in the new Continent

Addressing the concept of slavery before the ratification of the *13th Amendment* is not a straightforward task. This issue is due to the quasi-total absence of a proper definition of the practice in the jurisprudence previous to the abolition of slavery in 1861.

In order to accurately approach the condition of slavery, legal historian Paul Finkelman dates the phenomenon to the earliest days of the American history: its colonial past. (Finkelman, 2012)[3] In the 17th Century, when the eastern Coast of North-America was still divided in European-founded colonies, slaveholding was introduced by Spanish and Portuguese settlers, whose legal culture was based on Roman law. Not only does Roman law allows slavery

[2] S., Beckert, S., Rockman, *Slavery's Capitalism, A New History of American Economic Development*, Philadelphia, University of Pennsylvania Press, 2016.

[3] P., Finkelman, *Slavery in the United States Persons or Property?*, Oxford, Oxford University Press, 2012.

creation, but also the creation of a whole slavery system. In fact, as coded in the *Corpus Iuris Civilis*:

'the principal distinction in the law of persons is that all men are either free or slaves—there is no third, intermediate, category in Roman law'.(Scott, 1932)[4]

The demeanor of French settlers also had a notable impact in regard to the concept of slavery in the 17th Century and it must not be underestimated. Even though French people had a history of liberating slaves, they were also used to practice slavery at high levels in the many colonies they had in the Caribbean. On one hand, the concept of slavery was not new to the French legal system, on the other, the inclination to legal change due to the code-based system allowed French colonists to adopt the notorious *Code Noir*, which legally authorized slavery in their colonial Empire imposing the subdued people Roman Catholicism as the only religion. (Peabody, 1996)[5]

As far as British colonialism is concerned, the first settlers landed in Jamestown in 1607 devoid of either any constitutional law allowing slavery or any legal definition of such practice. Despite the fact that the monarchy and the Parliament never empowered any legal right to perform slavery, no effort was done to guarantee its interdiction, mainly due to economic reasons. Indeed, in a short matter of time, English settlers realized that slavery was economically profitable, especially in the production of sugar. Therefore, in order to let the first American colonies flourish, the English Parliament never passed a law prohibiting slavery, in spite of the fact that slavery was independently regulated by means of local laws that were enforced by settlers in the new continent. (Warren, 2016)[6]

As the French did, protestant missionaries in the English colonies coerced slaves to convert to Christianism and passed a legislation that legally allowed the enslavement of black Christians. In point of fact, in 1706, the effort of French missionary Elias Neau attained the

[4] S. Scott, P., *The Civil Law*, Volume II, New York, AMS Press, 1932.
[5] Peabody, S., *'There are No Slaves in France': The Political Culture of Race and Slavery in the Ancien Régime*, Oxford University Press, 1996.
[6] Warren, W., *New England Bound: Slavery and Colonization in Early America*, New York, Liveright, 2016.

approval of a New York law prohibiting freedom to any baptized slave of color. (Glasson, 2005)[7]

The economic benefits that brought English settlers to start holding slaves, is believed to be the leitmotiv of the whole history of slavery, even after its abolition in 1861. Throughout the decades, agricultural technologies in America were developed, and slavery became essential to the maximization in the agricultural product, especially when it came to cotton fields. Legal slavery was the factor that made America stand out globally in the economic sphere, being slaves a large finance asset and export commodity. Businessmen and plant owners made their main aim to use forced labor in order to maximize efficiency. For this reason, slavery was deeply rooted in the South, an agriculture-based region that, without such practice, would have struggled to compete with the later industrially developed north, therefore it was more prone to obstacle any effort to limit slave trade and slavery as a whole. (Lockhart, 2019)[8]

1.3 How did the Framers of the American Constitution projected Slavery de jure in the 18th Century?

As aforetasted, slavery was not directly mentioned in any legislative act until its abolition. Even so, a quest for the legal definition of the slave was actively undertaken from the end of the 18th century. The colonies were starting to divide in regard to the issue of slavery: some states in the North (Connecticut, Pennsylvania, and Rhode Island) abolished slavery denouncing it as immoral. On the opposite side, southern landowners and politicians defended slavery since it was considered a crucial economic resource. (Finkelman, 2012)[9]

This political polarization was, de facto, the point at issue in the most influential event in the shaping of the United States: The *Constitutional Convention* in 1787.

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[7] Glasson, T., *"Missionaries, Slavery, and Race: The Society for the Propagation of the Gospel in Foreign Parts in the Eighteenth-century British Atlantic World"*, New York, Columbia University Press, 2005.
[8] Lockhart, P. R., *How Slavery Became America's First Big Business*, Washington, Vox, August 16, 2019, 1-4.
[9] Finkelman, P., *Slavery in the United States Persons or Property?*, Oxford, Oxford University Press, 2012.

The convention was a turning point for the substantial definition of slavery (and slave *stricto sensu*). As a matter of fact, on this occasion, the debate whether slaves had still to be considered properties or human beings, officially started. This argument was supported by a series of law interpretations, that will be discussed in the following paragraph.

1.3.1 The *Three-Fifth Clause*

The first circumstance that determined the legal framework of the definition of slave was the issue of *Congress* representation. According to the standards of the time, the colonies of the North had more electors than the ones of the South, but only in theory. *De facto*, the colonies of the South were more populated, mainly because of the significant presence of slaves coming from the west African shores, who, at the time, were not considered to have legal personality.

Wanting to be represented proportionally to their population, many delegates from the South, in particular, those from North Carolina, demanded that the slaves were considered as belonging to the population, in order to be entitled to more congressional seats. (Finkelman, 2001)[10] On the other side, the representatives from the northern States, where there was a smaller percentage of slaves, thought otherwise. Another crucial point of contention laid in the fact that southern states would have included slaves in the taxable population, regardless of the fact that they were not entitled to the same rights as the other citizens. (Anderson, 2019)[11]

A compromise was attained with the approval of the *Three-Fifths Clause*, which was the third clause of Article 1, section 2 of the United States Constitution. As reported by the clause:

[10] Finkelman, P., *Slavery and the Founders: Race and Liberty in the Age of Jefferson*, Second Edition, Armonk, M. E. Sharpe, 2001.
[11] Anderson, M. J., Citro C. F., Salvo, J.J., *Three-Fifths Compromise*, Washington D.C., CQ Press, 2020

> *"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."*[12]

On the grounds of this political compromise, slaves were legally perceived as belonging to the population for the first time in the American history, albeit, for electoral purposes, they were only represented on a three-fifths basis.

1.3.2 The *Commerce Clause*

Albeit the *Three-Fifths Clause* recognized the status of people to slaves, the approval of two further provisions, the Commerce clause, and the *Slave Trade Clause* of the *Constitution*, clarified that such definition was only meant to be a formality. (Finkelman, 2012)[13]

As *the Commerce clause* (Article 1, Section 8, Clause 9) stipulates:

> *(The Congress shall have Power) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.*[14]

The meaning of the clause lays in the fact that, the Congress was invested with the authority to manage both international and interstate commerce. By controlling the commerce, the congress also had a significant decision-making power regarding slave trade. As a matter of fact, the *Commerce clause* made the Congress the only institution allowed to outlaw it. (Lightner, 2006)[15]

Nonetheless, the Congress decided to do otherwise and not to interdict this commercial activity for the following twenty years from the ratification of the Constitution. To make this

[12] M. J., Anderson, Citro C. F., Salvo, J.J., *Three-Fifths Compromise*, Washington D.C., CQ Press, 2020
[13] Finkelman, P., *Slavery in the United States Persons or Property?*, Oxford, Oxford University Press, 2012.
[14] U.S. Const, Art. 1, Sec. 8, Clause 3.
[15] D., Lightner, "*Slavery and the Commerce Power: How the Struggle Against the Interstate Slave Trade Led to the Civil War"*, New Heaven, Yale University Press, 2006.

decision more effective in point of law, the *Constitutional Convention* approved the so called *"Slave trade clause"* (Article 1, Section 9, Clause 1). The clause stipulated:

> *The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.*[16]

This clause, without the direct use of the term "slave", forbid the limitation of the importation of people.[17]

In the text of the Slave trade clause, the framers addressed slaves as "persons", in order to be coherent with the *Three-Fifths Clause*. *Nonetheless*, as founding father Governeur Morris witnessed, it was soon indubitable that the acknowledgement of the status of slaves as people was merely formal. As the representative of Pennsylvania stated, from the condition in which slave trade was managed, slaves were not granted any fundamental right that would have identified them as human. (Farrand, 1907)[18]

The latter provision was approved by the *Constitutional Convention*, due to the demand of southern delegates, whose states took economic advantage of slave exploitation, with regards to the agricultural sector. (Finkelman, 2001)[19]

1.3.3 The *Fifth Amendment*

Although the constitution was ratified in a relatively short time, its enactment did not happen without a heterogeneous opposition. If a percentage protested for compromises on slavery, a much larger one demanded a *Bill of Rights*. (Finkelman, 2001)[20]

[16] U.S. Const, Art 1, Sec, 9, Clause 1.
[17] Lloyd, G., *The Slave Trade Clause*, Philadelphia, National Constitution Center.
[18] Farrand, M.,*The Records of the Federal Convention of 1787*, Yale University Press, New Heaven, 1907.
[19] Finkelman, P., *Slavery and the Founders: Race and Liberty in the Age of Jefferson*, Second Edition, Armonk, M. E. Sharpe, 2001.
[20] *Ibid.*

In 1791, the *Bill of Rights* was ratified. Among all the amendments to the Constitution, one in particular seemed to stand out in favor of the slaves. Substantially, the *5th Amendment* to the *Constitution* enunciated:

> *"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."*[21]

In actuality, as much as the amendment could be interpreted as an acknowledgement of human rights, it could not guarantee the freedom of slaves in the late 18th Century. The founding father and at the time Member of the *House of Representatives* James Madison did not have any interest in prohibiting slavery, owning himself slaves, and not wanting to take this benefit away from the southern economy. (Carveth, 2011)[22]

Hence, the only way to interpret such amendment without eliminating the condition of slavery, was to continue considering slaves as mere properties, not recognizing them a legal personality. This was the most uncostly option, that did not imply forcing the government to give slave masters compensations for setting the slaves free.

1.4 The Action of the *Congress* on the Issue of Slavery

It is fairly relevant to consider slavery through the lens of the legislative. The *Congress*' constitutional power, which specifically grants the authority to make laws, marks a series of laws related to slavery that mirror the *dissension of the opinion in the legislative branch*, composed by the *House of Representatives* and the *Senate*. The purpose of this paragraph is

[21] U. S. Const. amend. V
[22] Carveth, B. G., Leichtle, K. E., *Crusade Against Slavery: Edward Coles, Pioneer of Freedom, Carbondale and Edwardsville*,Carbondale, Southern Illinois University Press, 2011.

to provide an extensive timeline comprising all the legislative action of the *Congress* that where influential to the evolution of the issue of slavery.

1.4.1 *Congress* acts limiting Slave Trade: a Timeline

The *Congress* made a lot of efforts to limit the practice of enslavement starting from 1794 with the *Act of March 22nd*. In the same year, the Congress, that held the power to regulate slave trade, enacted a law prohibiting the use of any American shipyards for any activity intended to benefit slavery.[23]

As the act enshrined:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no citizen or citizens of the United States, or foreigner, or any other person coming into, or residing within the same, shall, for himself or any other person whatsoever, either as master, factor or owner, build, fit, equip, load or otherwise prepare any ship or vessel, within any port or place of the said United States, nor shall cause any ship or vessel to sail from any port or place within the same, for the purpose of carrying on any trade or traffic in slaves, to any foreign country; or for the purpose of procuring, from any foreign kingdom, place or country, the inhabitants of such kingdom, place or country, to be transported to any foreign country, port, or place whatever, to be sold or disposed of, as slaves: And if any ship or vessel shall be so fitted out, as aforesaid, for the said purposes, or shall be caused to sail, so as aforesaid, every such ship or vessel, her tackle, furniture, apparel and other appurtenances, shall be forfeited to the United States; and shall be liable to be seized, prosecuted and condemned, in any of the circuit courts, or district court for the district where the said ship or vessel may be found and seized."* [24]

On a public law perspective, this was an unprecedented decision for the Federal Government of the United States. The particular reason for this circumstance is that, for the first time, the Government extended its influence on the population of each State, overriding the state power. This action can be considered historically atypical, especially in the age of the *First*

[23] Ibid.
[24] Act of March 22, 1794, Ch11

Republic (1774-1789), when there was a remarkable persistence of the State over the Federation, and the Congress was only entitled to enumerated powers. (Freeman, 2004)[25]

By signing the Act, President George Washington designated the Government to search for those ships and fine them, moreover, he did not forbid private citizens to capture those ships as prizes. By doing so, not only did he manage to legally condemn American people engaging in slave trade, but also found a way to incentive popular participation to the enforcement of the law. (Dubois, 1896)[26]

However, the wording of the act revealed a loophole, this demonstrates that slave trade was still feasible. As a matter of fact, as far as they were not transported from Africa by American ships, slaves could still be sold on the American sole.

On May 10th, another act of the *Congress* was issued to strengthen the fines and the sentences for American citizens participating to slave trade. The so-called *Slave Trade Act of 1800* established:

> *"And be it further enacted, That it shall be unlawful for any citizen of the United States or other person residing therein, to serve on board any vessel of the United States employed or made use of in the transportation or carrying of slaves from one foreign country or place to another: and any such citizen or other person, voluntarily serving as aforesaid, shall be liable to be indicted therefor, and on conviction thereof shall be liable to a fine not exceeding two thousand dollars, and be imprisoned not exceeding two years."*[27]

In order to reinforce the effect of the latter act, three years later, the *Congress* enacted further regulations creating new sanctions for people importing people of color as slaves from Africa. The act, approved on February 28, 1803, stated:

> *"And be it farther enacted, That no ship or vessel arriving in any of the said ports or places of the United States, and having on board any negro, mulatto, or other person of colour, not being*

[25] Freeman, J. B., *The American Congress: The Building of Democracy*, Princeton, Julian E. Zelizer Editor, 2004.

[26] DuBois, W. E. B., *The Suppression of the African Slave-Trade*, Boston, Harvard University Press, 1896.

[27] Act of May 10, 1800, Ch 51

a native, a citizen, or registered seaman of the United States, or seamen natives of countries beyond the Cape of Good Hope as aforesaid, shall be admitted to an entry."[28]

This specific manner to address black people was meant to prevent slaveholders from deporting slaves to the American shores claiming them as servants.

Howbeit, there was still a major impediment to the permanent interdiction of the Atlantic slave trade.

The limit to the abolition of slave trade was highlighted by the fact that all previous restrictions were specifically aimed to ships and other means of transport, revealing that slave trade as a commercial practice was indeed still allowed, as it was beneficial to the American economy. (Finkelman, 2001)[29]

1.4.2 The Watershed of 1807: Abolition of Slave Trade

In 1807, slave trade was still allowed by means of the constitutional loophole of Article 1 Section 9, however, every state, except South Carolina, had already abolished such practice. At the time, the slaves located on the American territory were around four million (Finkelman, 2012)[30], and President Thomas Jefferson was pressuring the *Congress* to approve a decisive act ending slave trade for good. As a matter of fact, at the end of 1806 already, he sent a message to the *Congress*, denouncing save trade as a violation of human rights in perpetuum.

As a result, on March 25th of the following year, the *Congress* passed the *Act of Abolition of Slave Trade*, prohibiting the importation of slaves in any port or place within the jurisdiction of the United States. (Lovejoy, 2011)[31]

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[28] *An Act to Prevent the Importation of Certain Persons into Certain States*, Where, by the Laws Thereof, Their Admission is Prohibited
[29] Finkelman, P., Slavery and the Founders: Race and Liberty in the Age of *Jefferson*, Second Edition, Armonk, M. E. Sharpe, 2001.
[30] Finkelman, P., *Slavery in the United States Persons or Property?*, Oxford, Oxford University Press, 2012.
[31] Lovejoy, P. E., *Transformations in Slavery: A History of Slavery in Africa*, Cambridge, Cambridge University Press, 2011.

Slave masters would have had a deadline of nine months to completely close the ocean trades. In order to discourage slave masters to continue importing slaves to America, the government established fines, imprisonment, and the intervention of the U.S. Navy for whoever infringed this rule.

1.4.3 The Reason why Slavery was not abolished in 1808

One of the biggest attainments that the United States derived from the abolition of slave trade was the weakening of piracy, an illegal activity that was affecting the shores of the United States. On the other hand, the abolition of slavery was not Jefferson's main purpose, as he himself did not support the emancipation of black people, also referring to them as "pets". (Finkelman, 2012)[32]

If a moderate republican with a classical education such as President Jefferson thought so low of slaves, this actively demonstrates that the majority of the American population continued to perceive people of color as a property goods and not as legal people. (Finkelman, 2012)[33] Considering slaves not as human beings but solely as a variable of a cost-benefit analysis, the cost of setting them free was too high and would have hurt an agriculture-based economy that the president, being a plantation owner himself, cherished and wanted to protect. (Reck, 2014)[34]

1.4.4 The legal Recognition of Slaves as People

After the paramount achievement of the abolition of slave trade, the following frontier was to amend the Constitution so that the legal personality of slaves would have been acknowledged. In 1822, a specific Act provided the demonstration of the humanity of slaves. The *Act to Protect the Commerce of the United States and Punish the Crime of Piracy* made

[32] Finkelman (n 47) Chs 6 and 7; *Letter from Thomas Jefferson to Edward Coles* (August 25, 1814)
[33] Finkelman, P., *Slavery in the United States Persons or Property?*, Oxford, Oxford University Press, 2012.
[34] Reck, D., Burleigh, M.M., *Where did Thomas Jefferson Stand on the Issue of Slavery?*, Columbia, Howard County Public Schools, 2014.

the latter, which also included slave trade, since it was proclaimed illegal in 1807, eligible for capital punishment. (Hugh, 1997)[35]

The 1820 Act was particularly influential to the condition of slaves, as they were suddenly humanized by the fact that death penalty is generally applied to capital offends, not to the impairment of a property or commodity. Another consideration that emphasized their human status was the fact that slave trade-related piracy had to be punished as a result of the infringement of the fundamental rights of slaves, that were being abducted from their homelands. (Finkelman, 2012)[36]

1.4.5 The *Missouri Compromise*: a federal Ban on Slavery

The year 1820 also marked the passing of another federal legislation, that had the purpose to prevent the propagation of slavery in the United States: the *Missouri Compromise*.

The drafting of this act was prompted by the congressional debate on whether to allow the soon-to-be-annexed state of Missouri[37], in order to legalize slavery in its constitution. The opinion of the Congress was deeply split: on one hand, the *House of Representatives* was in favor of the prohibition of slavery in Missouri, while, on the other hand, the *Senate* had reservations on this proposal. The argument was settled on February 1820, on this occasion, both Houses of the Congress passed a joint statehood bill stating that Missouri was admitted in the Union as a slave state. Howbeit, as stipulated by the eighth section of the compromise, slavery and involuntary servitude would have been prohibited in the geographic area located "north of the thirty-six degrees and thirty minutes north latitude. (Wiecek, 1977)[38]

The compromise represented a major milestone in the history of the United States. De facto, in spite of the fact that slavery was yet to be outlawed within the national territory, it inhibited the practice from being widespread in the newly annexed states.

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[35] Hugh, T., *The Slave Trade: The Story of the Atlantic Slave Trade: 1440-1870*. New York, Simon and Schuster, 1997.
[36] Finkelman, P., *Slavery in the United States Persons or Property?*, Oxford, Oxford University Press, 2012.
[37] The state of Missouri was admitted to the Union in 1821
[38] Wiecek, W. M., *The Sources of Anti-Slavery Constitutionalism in America, 1760-1848*, Ithaca, New York, Cornell University Press, 1977.

1.5 Definition of Slavery through the jurisprudence of the *Supreme Court*

After having discussed the role of the *Congress* in the definition of slaves, it is essential to have an all-around vision of what the Judiciary has done to shape the conception of slaves throughout the 19th century, before the abolition of slavery.

This paragraph will explore two particular cases in which the *Supreme Court*'s final ruling helped providing a complete definition to the term slave.

1.5.1 The *Antelope* Case Law

The Antelope case was the first case involving the *Supreme Court* to decide if slaves were to be considered humans or property.

This specific case revolves around the ownership of slaves confiscated in foreign waters.

The custom law in these events prescribed:

> *"the legality of the capture of a vessel engaged in the slave trade, depends on the law of the country to which the vessel belongs. If that law gives it sanction to the trade, restitution will be decreed; if that law prohibits it, the vessel and cargo will be condemned as good prize."(Finkelman, 2007)*[39]

In 1825, foreign companies were transporting slaves from Africa, when pirate ships surprised them and attacked them causing the death of some slaves. On this occasion, an American ship ambushed the pirates and took property of the confiscated slaves that were carried on the Spanish vessel *Antelope*.

The main issue of this case was if the foreign countries were entitled to reclaim the slaves and sell them as their original intention had been.

[39] Finkelman, P., *The African Slave Trade and American Courts: The Pamphlets Literature*, Clark, New Jersey, The Lawbook Excahnge LTD., 2007.

The countries to which the assailed ships belonged to, claimed their slaves back from America. Therefore, they sought an injunction through the *Supreme Court of Georgia*. As stipulated by the 1820's *Act to Protect the Commerce of the United States and Punish the Crime of Piracy*, the court deliberated that the foreign countries were not entitled to the restitution of any slave.

Being the point at issue the slave trade, the appellants decided to seek injunction to the *Supreme Court* of the United States, which is, up to date, the *Highest Court* in the federal judiciary. (Hendricks, 1978)[40]

The final decision of the *Supreme Court* was in favor of the plaintiff. Therefore, they were entitled to the confiscated slaves because:

> *"Although the slave trade was now prohibited by the laws of most civilized nations, the subjects of those nations who have not prohibited it by municipal acts or treaties may still lawfully carry it on."*[41]

According to the final sentence, the African people not belonging to Spanish claimants had to be returned to the coasts of Liberia in 1827, whereas the ones that were owned by Spain could be enslaved in Florida.

The rationale of the case consists in the fact that the subject of the nation who still had to outlaw slave trade were still allowed to carry it on. In this instance, the *Supreme Court* of the United States deliberated that if slave trade was still legal in other countries, the United States Government had no authority to nullify it.

As a main outcome of the *Antelope* case law, it is deductible that the *Supreme Court* still had a way of considering slaves as a commodity good. In point of fact, in the examination of the case, the will of the confiscated slaves was not taken into account. (Finkelman, 2012)[42]

1.5.2 The United States v. the *Amistad* case law

[40] Hendrix, J. P., *The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams by John T. Noonan*, Athens, Georgia, Southern Historical Association, 1978.
[41] U.S. Supreme Court, *The Antelope*, 23 U.S. 10 Wheat. 66 66 (1825)
[42] Finkelman, P., *Slavery in the United States Persons or Property?*, Oxford, Oxford University Press, 2012.

The 1841 case law *United States v. the Amistad*, marked a great shift in the legal status of slaves, which, as a matter of fact, were considered as people that had the right to engage lethal force in order to obtain freedom, as they were forcefully abducted and carried in a foreign place.

The Amistad was a Spanish schooner of which control was taken by the revolting African slaves that it was transporting to America. Whilst the mutiny happened in July 1836, after a month, the ship landed in Long Island, near New York. On that date, American forces seized the ship and took possession of the 53 slaves on it, claiming the rights to property to the ship and to its human cargo. (Lawrance, 2014)[43]

Such claim provoked an additional uprising on behalf of the slaves, who argued that they had the right to be shipped back to their homeland, as they address themselves as free people who had been forcefully kidnapped and enslaved. (Moses, 1987)[44]

Thanks to the fund-raising of a group of northern abolitionists, the 53 enslaved people managed to seek injunction to the *U.S. District Court*. In January 1940, the latter ruled that the plaintiffs had to be returned to their homeland, as forcefully abducted from it.

They later appealed to the *Circuit Court*. Nonetheless, the latter confirmed the sentence of the lower one. Therefore, the defendant sought injunction to the *Supreme Court* at the beginning of year 1841. The process was characterized by a heated litigation between two distinguished lawyers: John Quincy Adams representing the plaintiff and Josiah Gibbs representing the defendant. (Finkelman, 2012)[45]

During the process, Adams raised an argument that would have later be decisive for the abolition of slavery:

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[43] Lawrance, B. N., *'A Full Knowledge of the Subject of Slavery': The Amistad, Expert Testimony, and the Origins of Atlantic Studies, Slavery & Abolition A Journal of Slave and Post-Slave Studies,* London, A Frank Cass Journal, August 16, 2014, 5-6.

[44] Moses, W.J., *Mutiny on the* Amistad; *The Saga of a Slave Revolt and Its Impact on American Abolition, Law, and Diplomacy, Oxford University Press, 1987.*

[45] Finkelman, P., *Slavery in the United States Persons or Property?*, Oxford, Oxford University Press, 2012.

> *"The moment you come to the Declaration of Independence, that every man has a right to life and liberty, an inalienable right, this case is decided. I ask nothing more in behalf of these unfortunate men, than this Declaration."*[46]

Such argument managed to convince the Supreme Court justice to acknowledge the right to freedom to the captives. Unfortunately, it did not demand the government to provide funds from the repatriation of the people, who succeeded in going back to Africa only thanks to volunteering Christian Missionaries. (Lawrance, 2014)[47]

The *Supreme Court* ruled in favor of the African people that were about to be enslaved and acknowledged their status of free individuals. Associate Justice of the Supreme Court Joseph Story stated:

> *"It was the ultimate right of all human beings in extreme cases to resist oppression and to apply force against ruinous injustice."*[48]

This declaration marked the recognition of the involved African people as free individuals, as they were born in freedom and not in slavery.

The Amistad case law was certainly unprecedented, because it addressed the fact that the right to freedom, enshrined in *the Declaration of Fundamental Rights*, did not apply only to white people, but to everyone, as long as he was born free. Nonetheless, it upheld that free people were entitled to liberty but, on the other hand, people born in slavery had to be considered as commodity goods. This explains why, as unprecedented as it was, the *Amistad* case is not to consider a progress towards the abolition of slavery, due to the fact that, on the assumption that the plaintiff had happened to be born in a situation of enslavement, the Court would have sent them back to their masters.

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[46] *Argument of John Quincy Adams Before the Supreme Court of the United States in the Case of the United States Appellant v. Cinque, and Others, Africans, Captured in the Schooner Amistad* (Excerpts) Source. Avalon Project, Yale Law School.

[47] Lawrance, B. N., *'A Full Knowledge of the Subject of Slavery': The Amistad, Expert Testimony, and the Origins of Atlantic Studies, Slavery & Abolition A Journal of Slave and Post-Slave Studies,* London, A Frank ass Journal, August 16, 2014, 9.

[48] Text of *United States v. The Amistad, 40 U.S. (15 Pet.) 518 (1841), Library of the Congress.*

The concept of slavery as property was reinforced in light of the fact that the *Supreme Court* decided not to threat the secular institution of slavery.

1.6 How the Case laws in Regard to fugitive Slaves helped seal the legal Definition of slave

The third clause of article IV section 2, also known as *Fugitive Slave Clause*, was a significant exception in terms of legal consideration of slaves, as it stipulates:

> *"No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labour may be due."*[49]

The clause emphasizes the duty to return fugitive slaves to their masters.. The peculiarity of the clause instead, lays in its phrasing, which identifies the slave as a person.

Indeed, the legal jargon adopted in the clause is the one of extradition, which is the process that empowers governments to bring fugitives, that are residing abroad, to justice. The difference between a runaway slave and a person who is extradited was that the former had to be returned to the slave holder with minimal procedural standards and requirements. (Finkelman, 2012)[50]

Processes related to fugitive cases became common in the middle of the Nineteenth Century. There are two of them distinguishing themselves for giving a more thorough explanation of the figure of the fugitive slave and his rights.

This paragraph will examine and compare the *Prigg v. Pennsylvania* and the *Dredd Scott v. United States* rulings, while identifying how both sentences shaped the condition of the fugitive slave.

1.6.1 *Prigg v. Pennsylvania*: the first legal Definition of Slavery

[49] U.S. Const., Art IV, Sec. II.
[50] Finkelman, P., *Slavery in the United States Persons or Property?*, Oxford, Oxford University Press, 2012.

In year 1842, slave owner Edward Prigg had been imprisoned for kidnapping a runaway slave. This conduct was against the *Pennsylvania's Personal Liberty law of 1826*, according to which:

> "*If any person or persons shall, from and after the passing of this act, by force and violence, take and carry away, or cause to be taken or carried away, and shall, by fraud or false pretence, seduce, or cause to be seduced, or shall attempt so to take, carry away or seduce, any negro or mulatto, from any part or parts of this commonwealth, to any other place or places whatsoever, out of this commonwealth, with a design and intention of selling and disposing of, or of causing to be sold, or of keeping and detaining, or of causing to be kept and detained, such negro or mulatto, as a slave or servant for life, or for any term whatsoever, every such person or persons, his or their aiders or abettors, shall on conviction thereof, in any court of this commonwealth having competent jurisdiction, be deemed guilty of a felony, and shall forfeit and pay, at the discretion of the court*"[51]

Prigg decided to seek injunction to the Supreme Court, invoking the *Fugitive Slave Act* of 1793. The issue at hand questioned the Pennsylvania law, on whether the regulation of personal liberty was legitimate.

In its decision, the Supreme Court declared Prigg innocent and *Personal Liberty Law* unconstitutional. As a result of this case law, slave masters had the full-fledged right to seize a fugitive slave. The judgement of the *Supreme Court* removed every trace of personhood in the legal definition of slave, condemning it to be fully considered as a property. (Nogee, 1954)[52]

The Prigg v. Pennsylvania case marked a stark polarization of the American citizens. As a matter of fact, it originated civil unrest, in light of the fact that the citizens from the North started protesting in order to ensure justice and recognition of the rights of black people. On

[51] *Prigg v. Pennsylvania*, 41 U.S. 16 Pet. 539 539 (1842)

[52] Nogee, P., *"The Prigg Case and Fugitive Slavery, 1842–1850"*, Chicago, Journal of Negro History, Vol. 39, No. 3, July 1954.

another front, southerners were fighting to obtain the abrogation of the *Personal Liberty Law* and strongly pushed for the approval of new effective slavery measures.[53]

This led to the creation of the *Fugitive Slave Act*, in 1850, approved in order to help masters regain control of their slaves. As the *Fugitive Slave Act* stipulates:

> *"Be it enacted by the Senate and House of Re presentatives of the United States of America in Congress assembled, That the persons who have been, or may hereafter be, appointed commissioners, in virtue of any act of Congress, by the Circuit Courts of the United States, and Who, in consequence of such appointment, are authorized to exercise the powers that any justice of the peace, or other magistrate of any of the United States, may exercise in respect to offenders for any crime or offense against the United States, by arresting, imprisoning, or bailing the same under and by the virtue of the thirty-third section of the act of the twenty-fourth of September seventeen hundred and eighty-nine, entitled "An Act to establish the judicial courts of the United States" shall be, and are hereby, authorized and required to exercise and discharge all the powers and duties conferred by this act."*[54]

According to the aforementioned law, fugitive slaves had no fundamental rights, along the lines of the right of appeal, no right to a writ or habeas corpus, and especially no right to test their liberty before a jury or an appellate judge. Thus, they did not have the right to express the thought using words, which is the ultimate identifier of a human being. (Finkelman, 2012)[55]

This case had a paramount constitutional impact, in primis on the statutes of Maryland and Pennsylvania, but also on the Constitution of the United States itself. Through *the Prigg v. Pennsylvania* case, the Pennsylvania Statute was declared unconstitutional and void. At the same time, Maryland established a law enforcing the right of slave owners to capture and repossess their slaves. This right was acknowledged by all slave holding states at the time of the ruling. If the delegation of power of the state legislature was absent, the *Congress* had the power to enforce the right.

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[53] Finkelman, P., *Prigg v. Pennsylvania and Northern State Courts: Antislavery Use of a Proslavery Decision'*, Volume 25, Number 1, Kent, Ohio, The Kent State University Press, 1979.
[54] *The Fugitive slave law.* [Hartford, Ct.? : s.n., 185-?]
[55] Finkelman, P., *Slavery in the United States Persons or Property?*, Oxford, Oxford University Press, 2012.

1.6.2 *Dred Scott v. Sanford*: the final ante-bellum Definition of Slavery

The 1857 *Dredd Scott v. Sanford case* is the most infamous of the whole jurisprudence of the *Supreme Court*, however, it is historically relevant since it allowed the attainment of the ultimate antebellum definition of slavery.

The main issue at hand is the achievement of freedom and emancipation from the slave owner of a slave. The rule on this topic was enshrined by means of the *Fifth Amendment*:

> *"(No person shall) be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."*[56]

Dredd Scott was the former slave to an *US Army* officer named John Emerson. When his slave holder died, Scott tried to purchase his freedom, but Emerson's widow denied it to him. Therefore, Scott decided to report the case to the *Supreme Court* in 1846. (Finkelman, 2008)[57]

The issue under consideration concerned whether the *Circuit Court* of the United States had jurisdiction to judge a case in which one was held as a slave by defendant.

The case took a long time to become *res judicata*. Initially, the *Missouri State Court* declared the appellant free. Nonetheless, in 1852, the widow handed over her inherited estate to his brother, who did not reside in Missouri, hence he did not have to comply with the State Jurisdiction. As a consequence, Scott sought injunction to the *Supreme Court* in 1957. As a final sentence, the *Supreme Court* declared that every black person, either born in slavery or in liberty, could have never been a citizen of the United States. (Urofsky, 2020)[58]

The fact that black people were at all times slaves, independently from the fact that the place in which they reside allows slavery or not, makes them a special property.

Since the sentence created a great deal of confusion in the interpretation of the law, Justice Roger Brooke Taney decided to give a fixed definition of the term slave.

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[56] U. S. Const. amend. V.
[57] Finkelman, P., *Was Dred Scott Correctly Decided? An "Expert Report" For the Defendant'*, Portland, Lewis and Clark Law Review, 2008.
[58] Urofsky, M.I., *Was Dred Scott Correctly Decided? An "Expert Report" For the Defendant'*, Britannica, 2020.

> *"Blacks are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time [1787] considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them".*[59]

As a rationale to the case, the *Supreme Court* repealed the legislation that settled *Dred Scott v. Sanford* by stating that the *Congress* had "exceeded its authority"[60] by outlawing slavery in the region west of the Missouri river, therefore illegalizing the aforementioned *Missouri Compromise*, that was ratified only thirty-seven years before.[61]

1.7 Conclusion

To provide an answer to the research question of this chapter, the definition of slave has been affected by judgement of the *Supreme Court*, on the basis of an interpretation of articles and clauses of the *US Constitution*. The former is the situation in which a person seized from Africa is being carried to the new world to assume the status of slave, the latter is the case of a fugitive slave trying to achieve freedom.

The final ruling of the *Amistad* case represented a significant achievement for the people of color living in the United States, as it recognized their right to personal freedom in case of captivity, which was before only acknowledged to white people.

On the other hand, the decisions regarding fugitive slaves helped to extend the limitations to the rights of enslaved people. *The Prigg v. Pennsylvania* decision emphasized the right of the owner to regain property of their fugitive saves. On a similar note, the judgement to the *Dredd Scott v. Sanford* case enshrined the definition of slave as an inferior being that was

[59] U.S. Supreme Court, *Scott v. Sandford*, 60 U.S. 19 How. 393 393 (1856).
[60] *Judgment in the U.S. Supreme Court Case Dred Scott v. John F.A. Sanford*, March 6, 1857.
[61] The Missouri Compromised was passed in 1820 and banned slavery from the Louisiana purchased lands north of the 30rd Parallel. Wallenfeldt, Jeff, *Missouri compromise*, Britannica, 2019.

conceived as property of its owner and was not entitled to basic rights, such as the one to independently claiming his own freedom.

The consideration of a slave as a person or as an object was a great question for almost two centuries, from the start of the first slave trading activities to the Secession War. The final definition of slave, given by justice Roger Brooke Taney at the end of the Dredd Scott case, was that every person of African heritage had no right to national citizenship, whether slave or free.[62] In the justice's opinion, slaves were not acknowledged legal personality. In the same ruling, Taney gave his own definition of slave: all black people had the legal status of slave, even those who had achieved freedom were still "inherently, genetically, and constitutionally inferior"[63] and were not entitled to be fully members of society. (Finkelman, 2012)[64]

The *Dredd Scott v. Sanford* case had a paramount impact on the pre-war historical period, as it provided, once and for all, a thorough definition of the civil status of slave.

The case achieved a role of turning point that ultimately led to the American *Civil War*. The final judgement of the case had such a crucial impact on the political scenario of the time due to the fact that it utterly outraged the abolitionists, which were those people supporting the movement to end slavery. They thought that the decision of the *Supreme Court* had been taken in order to eliminate the debate on slavery that was starting to take on in the United States. The longitudinal divide on slavery grew even bigger and culminated in the secession of the southern states that brought to the start of the *Civil War*. The latter topic will be addressed in the next chapter, whose aim will be the one of exploring how this conflict brought to the abolition of slavery through the amendment of the United States Constitution.

[62] Dred Scott v Sandford, 60 US 393 (1857), at 404–05.
[63] U.S. Supreme Court, *Scott v. Sandford*, 60 U.S. 19 How. 393 393 (1856).
[64] Finkelman, P., *Slavery in the United States Persons or Property?*, Oxford, Oxford University Press, 2012.

CHAPTER TWO – THE CIVIL WAR AND THE CRAFTING OF THE THIRTEENTH AMENDMENT

2.1 Introduction

The legal status of slaves in America was radically changed by one of the most relevant events for the US history: the American Civil War.

Not only was the question of the abolition of slavery one of the main reasons for the divide between the unionist northerners and the secessionist southerners, but it was also involved as a strategic measure to end the conflict.

The purpose of this chapter is to investigate in depth on the causes, the development and the effects of the *Civil Wa*r and, in second analysis, on the content and limitations of the amendments that were approved in the aftermath, in order to legally abolish slavery and avoid the possibility of its reappearance.

2.2 The Civil War: a racially Charged historical Milestone

The following paragraph has the ultimate purpose to provide an historical context to the drafting of the *Thirteenth Amendment to the United States Constitution*, which abolished the practice of enslavement. The main focus is to examine the topic of the American *Civil War*

(1861-1865) and the role of slavery in depth, in light of the fact that such practice had a significant relevance to the outbreak and conduct of the historical conflict.

2.2.1 How the issue of Slavery exacerbated the Tension that caused the Outbreak of the Civil War

Among the reasons that historical authorities attribute to the outbreak of the military conflict, they enlist: the request in reference to the abolition of slavery on the behalf of the Northern states; the quandary between maintaining the unity of the United States or allowing the secession of the southern states; the economic inequality between the industrialized North and the rural South.

However, among the three motivations hereabove listed, the abolition of slavery was the most dominant topic, that has affected the two other causes. *De facto*, the forced and unpaid labor that was employed in the agricultural sector, especially in cotton picking, was the economic source for the economic development of the southern states. Furthermore, the will of the South to secede also depended on the refusal of the rural society to pull back on the intensive agricultural production allowed by means of human exploitation, in view of the fact that it was the only way to compete with the industrially developed North without having to invest in a process of industrialization, which would have implied a costly and long transformation, at the expense of the primary sector. (Lothrop, 1861)[65]

2.2.2 The Discrepancy between North and South regarding the Approach to Slavery

As mentioned in the previous sub-paragraph, the American *Civil War* had its roots in the contrast between the North and the South on three specific levels: economic, political, and social. These terms of contraposition will be hereafter addressed in depth.

From an economic perspective, the industrially developed North counteracted the agriculture-sustained South. Conversely, the northern economy was more focused on restricting imports to support the national economy, while the southern one mainly benefitted

[65] Lothrop, J. M. *Causes of the Civil War in America*, London, M. Manwaring, 1861.

from free export. As a matter of fact, the northern states produced industrial items for the internal market, while the southern ones agriculturally supplied cotton, to export it to England. Therefore, the North needed custom tariffs in order to prevent European items from entering the US market, whilst the South could have thrived only if those tariffs were removed. (Pessen, 1976)[66]

From the political point of view, the United States were divided upon the dilemma between unity and secession. As a matter of fact, the population of the United States was divided in two antagonistic lines of reasoning: from the ratification of the *US Constitution*, it was still unclear whether the US was a weak confederation in which each state exercised a wide-ranged set of powers, including the right to secede, or if it was a federation with a strong central government. The population was divided upon the question whether the US had to be a confederation, in which secession was legally allowed, or a federation, where secession was unconstitutional. People from the South, primarily the siding with the *Democratic Party*, advocated for the secession of the South while the people in the North, in particular Republican supporters, believed in the unbreakable unity of the United states. (Rugemer, 2019)[67]

From a social point of view, the discrepancy between the northern and the southern consideration of slavery resulted from new humanitarian beliefs that arose in the northern states. As a matter of fact, in the decades that preceded the outbreak of the *Civil War*, several issues in reference to moral nature emerged, especially in the light of what was stated by the *Declaration of Independence* in 1776, which stipulated:

> *"We hold these truths to be self-evident, that 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"*[68]

[66] Pessen, E. *The Distribution of Wealth in the Era of the Civil War*, Baltimore, Reviews in American History,1976.
[67] Rugemer, E. *Explaining the Causes of the American Civil War*, Baltimore, John Hopkins University Press, 2009.
[68] 68 *Declaration of independence*, Washington DC, 1776.

At the beginning of the 19th Century, the rapid influx of immigrants from Europe filled the main urban centers of the North with new human resources and low-cost labor. This social phenomenon enabled the growth of the belief that not only was slavery morally unacceptable, yet again that such practice was unnecessary in that economic reality. In addition, in the land-based South, cheap labor was not as easy to retrieve, in the light of the fact that, without mentioning the exorbitant amount of people that detained the legal status of slaves and white indigent people living in urban areas, the southern society was mainly based on landed nobility who owned cotton and rice plantation and benefitted from the forced labor of slaves. (Williams, 2015)[69] Consequently, since slavery was a practice that provided a major contribution to the southern economic prosperity, it became more and more rooted in the southern society. (Rugemer, 2019)[70]

It is also necessary to mention the contrast between the northern and the southern social stratification. The southern ruling class considered itself as aristocratic. The northern counterpart believed to have a higher moral stature, being conditioned by the *Second Great Awakening*[71] that led a great number of northerners to consider the institution of slavery as incompatible with the Christian beliefs. Conversely, southerners, who emphasized states' rights and limited government on a political point of view, argued that opinions along the lines of opposition to slavery should not be admitted, since slavery was a major economic resource for a significant percentage of the country population. (Rugemer, 2019)[72]

2.2.3 The legislative Acts that marked the Beginning of the *Civil War*

As aforementioned, the political and ideological tension between the North and the South of the United States was already strong at the outset of the 19th century. However, what brought

[69] Williams, D., *A People's History of The Civil War: Struggles for the Meaning of Freedom.* New York: New Press, 2005.
[70] Rugemer, E., Explaining the Causes of the American Civil War, Baltimore, John Hopkins University Press, 2009.
[71] The Protestant religious revival that took place in the United Stated from 1795 to 1835. During this time, the number of believers exponentially increase, along with the importance of the Protestant values in society. From *Encyclopedia Britannica Second Great Awakening*, 8 May 2019.
[72] Rugemer, E. *Explaining the Causes of the American Civil War*, Baltimore, John Hopkins University Press, 2009.

the two opposing factions to a climax was the ratification of two particular law encompassing slavery: the *Fugitive Slave Act* and the *Kansas-Nebraska Act*.

In 1850, the Congress approved the *Fugitive Slave Act*, which was a political compromise providing that the abolitionist states in the North had the duty to capture fugitive slaves and bring them back to their owners. [73]

In order to implement this law, the first federal law enforcement bureaucracy was established, so that runaway slaves could be successfully returned to their slave masters. Such authority was composed by a federal commissioner who ruled on the cases, without giving right to of appeal, to a writ of habeas corpus or to test their liberty before a jury or an appellate judge. (Finkelman, 2012)[74]

Abolitionists used to refer to this law as the *"Bloodhound Bill"* (Nevins, 1947)[75], in light of the fact that, from the earliest days of the Union, fugitive slaves used to be tracked down by the owners with this ferocious breed of dog, that was usually engaged for the purpose of hunting. In addition, the law at issue also appalled the citizens of the northern states, who, from that moment, found themselves involved in a legal system that they found exceptionally immoral. They had no choice but to realize that slavery was becoming a legal reality in the states that had already abolished it in their legislations and aimed to do the same on a constitutional scale.

Abolitionists never failed to protest against whoever had recourse to the *Fugitive Slave Act*, and they even got to sue against the federal government. An example of public grievance against the implementation of the Act is the case of fugitive slave Anthony Burns. In 1854, the enslaved person was forcefully shipped from Boston, Massachusetts, back to the plantation whence he came in Virginia, while the local population angrily protested for his freedom. Although the riot was shortly thereafter suppressed, the event resulted in the enhancement of the abolitionist cause. As a matter of fact, *The Fugitive Slave Act* and the

[73] *An Act to Organize the Territories of Nebraska and Kansas*, 1854; Record Group 11; General Records of the United States Government; National Archives.
[74] Finkelman, P., *Slavery in the United States Persons or Property?*, Oxford, Oxford University Press, 2012.
[75] Nevins, A. *Ordeal of the Union: Fruits of Manifest Destiny, 1847–1852*, New York City, Collier Books, 1947.

trial of Anthony Burns furtherly fomented the abolitionist movement, whose aim was to free the whole country from slavery. (Matz, 2010)[76]

As far as the *Kansas-Nebraska Act* is concerned, the legislative act focuses on the legal framework of slavery nationwide. Throughout the 19th Century, as the United States extended their national borders westward, the political tension due to the spread of slavery intensified. The main point at issue was whether the newly admitted states would have legalized or outlawed slavery. The act had a similar legal significance to the *Dred Scott v. Sanford* ruling, as it repealed the aforementioned *Missouri Compromise*, so that slavery was not prohibited in the new states.[77]

The escalation of such hostility caused the founding of the Republican party, headed by at the time member of the House of Representatives Abraham Lincoln, who quietly adopted an anti-slavery line of thought and, after the passing of the *Kansas-Nebraska Act*, took on a strong opposition towards the practice. (Black, 2013)[78]

Lincoln was elected 16th President of the United States in 1861, and his electoral victory rose alarm in the southern states, since the Republican and anti-slavery politician would have not served the interests of the rural and slave-holding society. By the time mentioned, the only feasible option for the South, that would have guaranteed the persistence of legal slavery, was to secede from the Union. Therefore, in 1860, the states of South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, Texas, Virginia, Arkansas, Te nnessee, and North Carolina converged in the Confederate States of America, withdrew formally from membership of the United States with the purpose to emancipate from the abolitionist North. Those states were considered by the North "rebels", while they attributed themselves the title of Confederated States, they were led by the democratic politician

[76] Matz, E. M., *Fugitive Slave on Trial, the Antony Burns Case and the Abolitionist outrage*, Lawrence, Kansas, University Press of Kansas, 2010.
[77] *An Act to Organize the Territories of Nebraska and Kansas*, 1854; Record Group 11; General Records of the United States Government; National Archives.
[78] Black, E., *Facing facts about Lincoln and his Views on Slavery* in "Minnpost", May 31st, 2013.

Jefferson Davis. This historical event marked the beginning of the *Civil War*. (Williams, 2005)[79]

2.2.4 The Conclusion to the *Civil War* and opening of the Congressional Debates for the Abolition of Slavery

With the decisive *Battle of Gettysburg*, in 1863, the Yankees army started prevailing over the confederated one, that lost any chance to win the conflict. After a myriad of bloody battles and countless deaths, the *Civil War* drew to a close in 1865, when Confederate general Robert Edward Lee decided to withdraw his troops in the devastating *Battle of Appomattox*.

A year before the event, the congressional debates to amend the Constitution and abolish slavery begun. President Lincoln's main purpose was to ratify the amendment to the Constitution before the end of the Civil War, in order to face the southern states with an accomplished fact. (Samito, 2015)[80] The aim of the President imparted the debate a historical nature. The dilemma consisted in whether to keep the war going by leaving the issue of slavery open, or to reach a peace agreement by establishing one legislation on the whole country's jurisdiction. (McPherson, 2008)[81]

2.3 The drafting of the *Thirteenth* and the other *Reconstruction Amendments*

The victory of the Union over the Confederated States marked the military predominance of the North, that is the supporters of the abolition of slavery. From an Ideological point of view, the population of the whole country was deeply divided on this subject.

For this reason, the legal framework behind the amendments that granted freedom and emancipation to black people had already started long before the end of the *Civil War*, in order to ensure that the ratified legislation maintained its validity even under the state and

[79] Williams, D., *A People's History of The Civil War: Struggles for the Meaning of Freedom.* New York: New Press, 2005.
[80] Samito, C., *Lincoln's Struggle with The Thirteenth Amendment* in "Forbes", December 6th, 2015.
[81] McPherson, J., *Tried by War: Abraham Lincoln as Commander in Chief*, London, The Penguin Press, 2008.

local jurisdiction of the whole country and regardless of the political beliefs of the government in charge.

The purpose of this paragraph is to enlist and examine in its entirety the legislative process that brought to the ratification of the *Reconstruction Amendments*.

2.3.1 The *Emancipation Proclamation*

In the year 1963, *President Lincoln* gave rise to a series of legislative provisions that would have granted African Americans freedom.

On the first of January of that year, he issued the *Emancipation Proclamation*, which was composed by two executive orders. The first one decreed the liberation of all the slaves in the territories of the confederated states and the legal obligation of the authorities to make sure the disposition was respected. The second order enlisted the states of the Union in which the first one had to be applied. (Lincoln, 1998)[82]

Many scholars defined this decree as the first stance of the American presidency against slavery (Welling, 1880)[83] but at the same time a strategic maneuver implemented by the authorities supporting the reunification of the states. The Proclamation would have overwhelmed both the economy and the war effort of the rebel states, which would have increased the economic and military divide between the northern and the southern states. As a matter of fact, the slaves, whose legal status of submission was invalidated by the Proclamation, constituted the majority of the labor force in the South, and their legal emancipation would have been so detrimental for the agricultural-based states in the South that they would have survived on a subsistence economy.

The strategic character of the Proclamation also manifested itself in the fact that the executive order was proclaimed with regard to the states that were still revolting against the Union. On the other hand, Tennessee, parts of Louisiana and Virginia, along with other slaveholding

[82] Lincoln, A., *The Emancipation Proclamation*, Bedford, Mass.: Applewood Books, 1998.
[83] Welling, J. C., *The Emancipation Proclamation*, Cedar Falls, The North American Review", 1880.

states that did not separate from the Union or pledged allegiance to it had been exonerated from following the disposition.[84]

Lincoln issued said order under the name of the commander in chief of the country in a time of actual war and rebellion. The emancipation of the slaves, in this instance, was limited by what war powers allowed. Which is to say that the disposition only had to be applied to the states that were in armed rebellion against the United States or had seceded from it. President Lincoln did not enforce the proclamation in the United States, since it could have violated the *Takings Clause*[85] of the constitution, which enables the government to take hold of private property only it can provide a "just compensation" in exchange. (Cramer, 2007)[86] The assumption was validated by the final ruling of the Supreme Court in the *Dred Scott* case, stating that forbidding slave owners from taking their property into free states equals to a violation of the owners' *Fifth Amendment* rights not to have private property taken from them without just compensation.[87] The fact that this loophole in the *US Constitution* would have always benefitted the slaveowners rather than the slaves, was yet another confirmation that a constitutional amendment was the only way slavery could have been comprehensively eradicated.

As a corollary of the *Emancipation Proclamation*, Lincoln started to recruit black soldiers and sailors, who were mostly former slaves coming from the south. By doing this, the president managed to pit the people who were once unpaid and forced labor force against the slaveholding states.

Lincoln confirmed the constitutionality of the proclamation by stating that, according to the law of war, as the President of the United States, he had the right to resort to whatsoever

[84] *Emancipation Proclamation*, January 1, 1863; Presidential Proclamations, 1791-1991; Record Group 11; General Records of the United States Government; National Archives.
[85] U. S. Clause. *Amend V*
[86] Cramer, A., *Lincoln's Emancipation Proclamation and the Failure to Comply with the Fifth Amendment Taking Requirement*, Harrogate, Lincoln Memorial University Law Review, 2007.
[87] U.S. Reports: *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

measure in order to subdue the enemy or whatever constituted a menace to the wellbeing of the country.[88]

2.3.2. Why was the *Emancipation Proclamation* not sufficient to abolish Slavery?

As the civil war drew to an end, and the Union's army started to prevail over the rebel one, a question arose: what would have happened at the end of the war, an emergency situation, when the Proclamation would have lost its effectivity?

Since the Proclamation was a war measure intended to undermine the enemy, it was only a *pro tempore* law, that would have lost its effectiveness once the war would have come to a halt. (Lincoln, 1998)[89] Although many slaves would have obtained freedom, slavery would have survived if there was no actual law prohibiting it. As a consequence, President Lincoln and the Republican party engaged to draft and ratify a constitutional amendment that would have outlawed it once and for all.

The vulnerability of the Proclamation laid in the fact that this measure could have relatively easily been abolished. All it took to invalidate it was Lincoln's defeat at the 1864 presidential elections against the *Democratic Party*, in this instance, the newly elected president in office would have had the prerogative to revoke the Proclamation.

Another reason justifying the weakness of the *Emancipation Proclamation* was that, as the President issued it, the executive order was not valid on the whole territory of the United states once it had been unified post bellum, since Lincoln only imposed it on the rebel slaveholding states for strategic purposes. The Constitution had to be amended with a law drafted *ex novo*, in order to prevent incongruences and loopholes that could have inhibited the emancipation of former slaves.

The premise on which the drafting of the *Thirteenth Amendment* came to life was the fact that, if the emancipation of the slaves was necessary to the victory of the North in the Civil

[88] *The United States Department of Defense Law of War Manual*, § 5.17.2 (Enemy Property – Military Necessity Standard), Cambridge, Cambridge University Press, 2019.
[89] Lincoln, A. *The Emancipation Proclamation*, Bedford, Mass.: Applewood Books, 1998.

War, the complete deletion of slavery would have been essential to the prevention of its recurrence. (Finkelman, 2008)[90]

The only way to prevent the reintroduction of slavery by a future government was to amend the *Supreme Law of the Land* in order to interdict the possession and the exploitation of human beings in the American jurisdiction once and for all.

2.3.3 Focus on the Drafting of the *Thirteenth Amendment*

Starting from January 1864, the drafting process of the *Thirteenth Amendment* started in the legislative branch of the government: the *Congress*. On this occasion, the framers assessed the specific purposes of the amendment through a series of debates that lasted until its ratification in January 1865. (tenBroek, 1951)[91]

In February 1864, at the start of the drafting process, chairman of the *Committee on Slavery* Charles Sumner issued a proposal for the amendment, which was drafted by Republican Senator John Brooks Henderson:

> *All persons are equal before the law, so that no person can hold another as a slave; and the Congress shall have power to make all laws necessary and proper to carry this declaration into effect everywhere in the United States (Henderson, 1901)*[92]

Senator Sumner had the intention to send the draft to its own committee for approval, even though chairman of the *Senate Judiciary Committee* Lyman Trumbull objected, by stating, in order to commit to the legislative process, that the bill still had to be assigned to another committee for possible modifications before having it approved by the whole congress.

As stipulated by the text issued by the *Judiciary Committee*:

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[90] Finkelman, P. Lincoln, *Emancipation, and the Limits of Constitutional Change* in "Supreme Court Review", 349-387, 2008.
[91] tenBroek, J., *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment* in "California Law Review", June 1951.
[92] Henderson, J. B., *Preliminary text of the 13th Amendment*, Lansing, Michigan State Historical Society, 1901.

> *Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.*
>
> *Section 2. Congress shall have power to enforce this article by appropriate legislation.*[93]

The text was taken from the *Northwest Ordinance of 1787*.[94] Henderson's draft was also employed, although the *Judicial Committee* modified the phrasing, that could enable the constitutional amendment to be adopted by two thirds of both House and senate and ratified by three-fourths of the states, Henderson's aim was to get the amendment ratified, whether or not the congressional seats occupied by the states of the Confederacy were included in the voting or not. (Vorenberg, 2009)[95]

The main focus of the amendment did not reside in the legal institution of slavery but in what the status and the rights of African American people after its abolition would have been. Therefore, the main aim was to inhibit the reemergence of slavery.

If the interpretation of slavery in the amendment had not been broad, slavery could have resurfaced in new forms. (McAwards, 2012)[96]

Referring to the views of framer of the *Thirteenth Amendment* Lyman Trumbull, a constitutional reform was strictly necessary for the prevention of the possibility that former slaves could have come back to a status of subjugation due to the lack of work offer and social emancipation possibilities.

The necessity of an amendment was essential, as this would have been the only legislative measure that would have managed to ban slavery in the whole unified territory without reservation. Consequently, it would have allowed the United States to transition from a full-

[93] U. S. Const. *amend. XIII*.
[94] The Northwest Ordinance of 1787 was the legislative disposition that instituted a government for the newly admitted Northwest Territory, it guaranteed that newly created states would be equal to the original thirteen states and had to comply to the same laws, even the ones ratified before their admission.
[95] Vorenberg, M., *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment*, Cambridge, Cambridge University Press, 2009.

[96] McAwards, J. M., *Defining Badges and Incidents of Slavery in "Notre Dame Law Scholarship"*, 2012.

fledged slaveholding nation to one that had a broad set of fundamental rights with respect to every human being, without any shape of form of discrimination. (Magee Andrews, 2003)[97]

In order to guarantee the irreversibility of the amendment, Republican Senator and framer Henry Wilson emphasized the fact that the ratification of the amendment should have outlawed all the vestiges of the slave system, by completely rooting slavery out of the United States civil and statutory law. Since the evolution of the legal definition of slavery has undergone an abrupt evolution in the US, the only way to guarantee its permanent abolition and ensure that this practice would not become once again custom, was to eliminate all the shackles that allowed slavery. For the same reason, the amendment also eliminated the constitutional clause that considered slaves as three fifths of a person, the 1787 *Three-Fifths Clause*. (Lewis, 2017)[98]

Nonetheless, not all hurdles to the permanent outlawing of slavery could be found in the American jurisprudence, since there also where many badges and incidents of slavery, that could result from the interpretation of several laws. (Magee, Andrews, 2003)[99] The diffusion of such school of interpretation, with regard to the all the corpora enacted in the United States, was principally justified by the fact that the outlawing of forced and non-retributed labor would have deprived the southern agricultural sector of the benefits of intensive farming and harvesting, that only unpaid manpower could guarantee. (Davis, 2010)[100]

The aim of the following paragraph is to provide a thorough definition of the terms "badges" and "incidents", which started acquiring a legal meaning only in the period of time contiguous to the *Civil War*.

2.3.4 The Definition of Badges and Incidents of Slavery

[97] Magee Andrews, R. V., *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America* in "Alabama Law Review", 2003, 483, 491–92.
[98] Lewis, J. E., *What happened to the Three-Fifths Clause?* In "Journal of Early Republic", 2017, 5-6.
[99] Magee Andrews, R. V., *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America* in "Alabama Law Review", 2003, 483, 491–92.
[100] Davis, D. B., *Crucial Barriers to Abolition in the Antebellum Years*, New York, Columbia University Press, 2010.

The general definition of incident of slavery is a dependent variable to the practice of slavery. Thus, in relation with slavery, an incident is recognized as a feature of the law that is associated to the institution of forced unpaid labor. Incidents are the legal rights that, throughout the first segment of the American history, have been inherited by slaveowners qua slaveowners.

From the point of view of the latter, it represented the legal rights to which, throughout the two centuries during which slavery was legal, they were entitled to. From the perspective of the slaves, it embodied the civil disabilities that were imposed on the slaves by virtue of their status of property.

The *Supreme Court*, after the ratification of the *Thirteenth Amendment*, established the final and legal definition of the term incident: a closed set of public law applied in antebellum slaveholding states. Both *Congress* and *Supreme Court* started referring to the term "incident of slavery" as the effect of the Amendment, as its main task was to declare any legal right or restriction that necessarily accompanied the institution of slavery unconstitutional. (Carter, 2007)[101]

On the other hand, the meaning of badge evolved throughout the *Civil War* and, if it used to have a more rhetorical meaning, after a while, the term assumed a more legal meaning.

Before the war, the badges were indicators of physical features that distinguished African Americans, and, hence, a status of subordination. Nonetheless, forced labor could be a badge of slavery as well.

After the *Civil War*, the meaning changed to the manner with which the government of the Southern States and the white citizens endeavored, in order to reestablish on the former slaves, the incidents of slavery or, more generally speaking, in order to limit their rights so that they would have been labeled as a subordinated kind of citizen. (McAwards, 2012)[102]

[101] Carter Jr, W. M., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, in "UC Davis Law Review", April 2007.
[102] McAwards, J. M., *Defining Badges and Incidents of Slavery* in "Notre Dame Law Scholarship", 2012.

On this note, Senator and framer of the amendment Lyman Trumbull stated during the 39th *Congress* in year 1866:

Those laws that prevented the colored man from going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude made in the interest of slavery and as a part of slavery. They never would have been thought of or enacted anywhere but for slavery, and when slavery falls they fall also.[103]

By interpreting the line of reasoning of abolitionist republicans, Trumbull affirmed that the main purpose of the amendment was not only to obliterate laws and customs explicitly allowing slavery, but also to eradicate the racially nuanced interpretation that characterized the legal analysis of the constitution up to that time.(Hyman, 1982)[104]

2.3.5 Who had the Authority to enact the *Thirteenth Amendment*?

The second topic addressed during the Congressional Debates was which agency should have implemented the 13th Amendment. In point of fact, the framers initially discussed who, among the state or the central government, should have the authority to administer the legal disposition and make sure that slavery, along with all of its badges and incidents, would be completely eradicated. This issue was assessed by the fact that there were many badges and incidents of slavery that still had to be obliterated. As a consequence, the interests of the newly freed slaves still had to be safeguarded, bearing in mind the privileges and the rights that black people were entitled to as citizens of the United States. Therefore, the *Congress* had to meticulously plan how distribute the implementation procedures of the amendment, in order to make sure that every territory under the United States jurisdiction was equally covered. (Carter, 2012)[105]

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[103] Cong. Globe, 39th Cong., 1st Sess. 322 (1866). *Senator Trumbull's statement was made in the context of the Civil Rights Act of 1866*, the first major piece of legislation to be based upon the Thirteenth Amendment.
[104] Hyman H. M., and Wiecek, W. M., *Equal Justice Under Law: Constitutional Development 1835–1875*, New York, Harper and Row, 1982.
[105] Carter, W. M., *The Abolition of Slavery in the United States*, Pittsburgh, University of Pittsburgh Law School, 2012.

The intention of the framer was to make the amendment a prerogative of the central government. Hence, as the second comma of its text stipulated:

> *"The Congress should have the power to put into practice the article through an adequate legislation"*[106]

This section guarantees de jure and de facto, that the enforcement of the Amendment would be undertaken by central government throughout its legislative branch.

Consequently, the wording of the *Thirteenth Amendment* made the point that, when it came to the enforcement of the legislative disposition, the federal government would have had the priority over the state laws if they did not take measures against the reduction into slavery of citizens.

2.3.6 Conclusion of the Congressional Debates

The *Thirteenth Amendment* was approved by the Congress on the first of January 1865. Since the Congress was as divided as the American people on the question of slavery, its approval happened along with a great work of recruiting of the congressional supporters on the behalf of President Lincoln for its approval. Although, in 1864, a two-third majority of votes in favor was not achieved in the Congress, abolitionist house representative James Mitchell Ashley denounced the vote, affirming that the record was made up and the voting had to be scheduled de novo. (Zietlow, 2012)[107]

In the meanwhile, President Lincoln took advantage of the event in order to gain new supporters. He stated that the passage of the *Thirteenth Amendment* was to be added to the Republican Party platform for the upcoming Presidential elections.[108] Therefore, once he won the 1864 election, he announced:

> *"There is only a question of time as to when the proposed amendment will go to the States for their action. And as it is to so go, at all events, may we not agree that the sooner the better?"*

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[106] U. S. Const. *amend. XIII.*
[107] Zietlow, R. E., *James Ashley's Thirteenth Amendment* in "Columbia Law Review", 1697-1731, November 2012.
[108] President Abraham Lincoln, *State of the Union Address*, December 16th, 1864.

In addition, the newly elected president instructed his secretary of state Seward to provide votes in favor of the amendment by any mean possible and abolitionist politician James Mitchell Ashley to lobby Democrat Representatives into changing their vote.

His attempt was successful since the House passed the bill in January 1865 with a vote of 119–56. However, the representatives against the amendment were a lot. Hence, Lincoln determined a particular target in order to obtain a majority, which were the democratic congressmen in New Jersey and those who resided on the border.

2.3.7 The Process of Ratification of the *13th Amendment.*

For the *13th Amendment* to come into force, twenty-seven to thirty-six states had to ratify it. On April 14th, 1865, Abraham Lincoln was stabbed to death by the confederate sympathizer John Wikes Booth. Therefore, the president who fought for the outlawing of slavery did not live to see its official abolition. After Lincoln's murder, the power of the presidency was passed onto democratic Andrew Johnson, who started negotiating with the states' administrations in order to guarantee the ratification of the amendment. The will of the framers of the amendment to make the congress the guarantor of the fundamental rights of freedmen was contrasted by the request for power by the southern states, that President Johnson had to appease. (Vorenberg, 2009)[109] As a matter of fact, he also promised to their governors a proactive control of the allocation of rights to former slaves. For instance, South Carolina, Alabama, and Louisiana determined a *conditio sine qua non* to the ratification of the amendment:

> *"Any attempt by Congress toward legislating upon the political status of former slaves, or their civil relations, would be contrary to the Constitution of the United States." (McAward, 2012)*[110]

The amendment was officially ratified in 1865, when Georgia became the twenty-seventh state to pass it.

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[109] Vorenberg, M., *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment*, Cambridge, Cambridge University Press, 2009.
[110] McAward, J., *McCulloch and the Thirteenth Amendment*, New York, Columbia University Law Review, 2012.

2.3.8 The *Reconstruction Era*: The *Civil Rights Act* of 1866

Once the *Thirteenth Amendment* was ratified, its framers comprehended how the outlawing of slavery *per se* could not guarantee African Americans the same rights that white Americans were entitled to, thanks to their status of citizens. As a matter of fact, newly freed men did not dispose of money or lands and they were not legally protected from the discrimination and prejudice that was put upon them in many southern states, which were not required by law to provide them a job and shelter once they were no longer under their ownership. (Recchiuti, 2017)[111] Democratic president Andrew Johnson, who, for in order to gather as many electors as possible, had an alliance with the old leaders of the South, did little to nothing in order to protect the newly achieved freedom of former slaves. Historian Eric Foner supposes that President Johnson, being a democrat from the south himself, believed that an alliance with the southern elite would have ensured the domination of the white population in the south, to boost his 1868 election bid. (Foner, 1989)[112]

As a result of the president's behavior, the Congress embarked on its mission to guarantee civil rights to African Americans and adopted its own reconstruction program. By doing so, it passed a critical measure for American history: the *Civil Rights Act* of 1866, which marks the birth of the first law in the American legal system detailing the rights that all the American citizens are to enjoy, regardless of their race. (Foner, 2005)[113]

The act was introduced by senator Trumbull as a bill to the committee of jurisdiction. The committee made amendments to it and send it off to the Senate and the *House of Representatives* to be reviewed. The two began debating whether to pass the bill or not. The House and the Senate passed the bill but agreed to erase the key provision, which stipulated:

[111] Recchiuti, J. L., *Life after Slavery for African Americans*, Mountain View, CA, Khan Academy, 2017
[112] Foner, E., *Reconstruction: America's unfinished Revolution*, New York, Harper Perennial, 1989.
[113] Foner, E., *Forever Free: The Story of Emancipation and reconstruction*, New York, Knopf, 2005.

> *"There shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, colour, or previous condition of servitude."*[114]

Republican representative John Bingham influenced such deletion because he deemed that, basing on this clause, state Courts might have considered the term of civil rights in a broader sense. Therefore, he opposed the bill since it should have awaited a broader constitutional foundation than the *Fourteenth Amendment*. For this reason, he insisted that *ad hoc* amendment that would have eliminated discrimination based on race would have been necessary. (Frank, 1950)[115]

As far as the legislative process was concerned, the bill was sent back to the President for his approval. Notwithstanding, Jackson vetoed the act, on the grounds of the fact that the state's government has always been the agency in charge of conferring the status of citizen. He also raised the point that the bill would have constituted a relevant disadvantage for immigrants, because it would have given the rights of those of African descent, while people of foreign birth would have had to undergo a probation of 5 years. As a consequence, the president sent the bill back to the congress for reconsideration. However, the presidential veto was for the first time overridden by the Senate and, on April 5th, 1866, the *Civil Right Act* was ratified. (Nieman, 1978)[116]

The *Civil Rights Act* guaranteed paramount achievements such as: the legal introduction of the *Jus Soli*, likewise, known as *Birthright citizenship*, which is the automatic acquisition of American citizenship by whoever is born on the national territory, with the exception of native Americans; the interdiction to deny the right to citizenship to any individual, depending on the color of their skin. Nieman, D. G., *Andrew Johnson, the Freedmen's*

[114] CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).
[115] Frank J. P.,and Munro R. F.,, *The Understanding of "Equal Protection of the Laws"*, New York, Columbia Law Review, 1950.
[116] Nieman, D. G., *Andrew Johnson, the Freedmen's Bureau, and the Problem of Equal Rights, 1865-1866*, Houston, The Journal of Southern History, 1978.

Bureau, and the Problem of Equal Rights, 1865-1866, Houston, The Journal of Southern History, 1978. (DuBois, 1935)[117]

Nonetheless, the Act did fail to accomplish determined necessities of the African American community: the missing protection of political rights such as the right to vote and to hold public office. (Foner, 1988)[118]

2.3.9 The *Reconstruction Era*: the *Fourteenth* and *Fifteenth Amendments*

Once the *Thirteenth Amendment* was ratified, it became clear that a further adjustment to the *US Constitution* was necessary, in order to clarify that former slaves were entitled to American citizenship and should have not, in accordance with the constitution, undergone any form of discrimination. This decision was made compulsory by the fact that, after the final sentence of Justice Taney in the *Dredd Scott v Sanford* case[119], African Americans could not claim citizenship by law. (Finkelman, 2012)[120]

Since the Civil Rights Act could always be repealed, the congress passed the *Fourteenth Amendment* to insert the basic principles of the civil rights act into the constitution. The *Fourteenth Amendment* holds the record of introducing the concept of equality into the constitution. (Foner, 2005)[121]

The *Fourteenth Amendment* was approved by the Congress in 1868. It would have guaranteed the citizenship and right to process to African Americans, as it stipulated that:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor*

[117] Du Bois, W. E. B. *"Black Reconstruction in America: 1860–1880."* New York: Harcourt, Brace and Company, 1935.
[118] Foner, Eric. *"Reconstruction: America's Unfinished Revolution 1863–1877."* New York: Harper & Row, 1988.

[119] *Dred Scott v Sandford*, 60 US 393 (1857), at 404–05
[120] Finkelman, P., *Slavery in the United States Persons or Property?*, Oxford, Oxford University Press, 2012.
[121] Foner, E., *Forever Free: The Story of Emancipation and reconstruction*, New York, Knopf, 2005.

> *shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*[122]

Having stated that, the quest for the emancipation of black people was not over, as the constitution did not allow them to vote yet. Hence, a further amendment was proposed and adopted in year 1870. The *Fifteenth Amendment* stipulated that black people, as they benefitted from the status of citizens of the United States, were entitled to the right to vote:

> *Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.*
>
> *Section 2. The Congress shall have power to enforce this article by appropriate legislation.*[123]

Five years after the conclusion of the Civil War, black citizens were legally free. Notwithstanding, the state and federal law were often in conflict among each other, as the Reconstruction amendments (which are the *Thirteenth, Fourteenth* and *Fifteenth Amendments*) underwent several limitations on the behalf of both state and federal government.

2.4 The Hurdles to the *Reconstruction Amendments*

Historian Eric Foner defines the *Reconstruction Amendments* as a constitutional revolution that was not brought to completion. (Chotiner, 2019)[124] As a matter of fact, as the scholar concurs, the process of reconstruction that the framers of the amendments intended to accomplish started before the end of the Civil War but has not come to a halt yet. (Foner, 1999)[125]

The purpose of this paragraph is to analyze how the aftermath of the *Civil War* did not establish once and for all the premises for a society free from inequality and racism.

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[122] U. S. Const. *amend. XIV*.
[123] U. S. Const. *amend. XV*.
[124] Chotiner, I., *The Buried Promise of the Reconstruction Amendments* in "The New Yorker", September 2019.
[125] Foner, E., *The strange Career of the Reconstruction Amendments* in "Yale Law Journal", 1999, 2003-2009.

2.4.1 The limitations in reference to the *Thirteenth Amendment*

The *Thirteenth Amendment* made the reduction to slavery unconstitutional by granting the universal right to freedom. However, the legal disposition contains a loophole, which is constituted by the exception for those who have committed a crime, who can therefore undergo forced labor. As the first section of the *Thirteenth Amendment* stipulates:

> *"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."*

Hence, as enshrined by the *US Constitution*, whenever an American citizen is guilty of a felony, the *Thirteenth Amendment* does not give any protection to the citizen. (Foner, 2019)[126] This is "escape clause" was initially engaged in order to exploit non retributed labor to reestablish the southern economy on the expenses of black people who, by reason of the state and local laws, such as *Black Codes* and *Jim Crow*, that were approved by the government of the states of the South, could be incarcerated for minor crimes, contrariwise to white people who committed the same crime.

2.4.2 The Limitations in Reference to the *Fourteenth Amendment*

The *Fourteenth Amendment* may be the most revolutionary of the *American Constitution*. The ideals that were promoted by its framers were the equal protection by the law, the freedom of property and the right to life. It was effective on the whole territory of the United States and should have granted total equality to each citizen in the country. In spite of that, it was not phrased clearly enough to guarantee the right to vote, hence it was not enough to provide electoral equality without the passing of an additional amendment. /Foner, 2019)[127]

The *Fourteenth Amendment* was also targeted by the *Supreme Court*, which assumed a state of inactivity as far as the *Black Codes* were concerned, and it ignored the fact that such local

[126] Foner, E., *The Second Founding: How the Civil War and Reconstruction Remade the Constitution*, New York, W.W. Norton, 2019.
[127] *Ibid.*

legislative dispositions represented a hurdle towards the full compliance for the Reconstruction amendments.

The reluctance on the behalf of the *Supreme Court* with regard to the imposition of the *Fourteenth Amendment* de jure reflected the resistance of the majority of the American society vis-à-vis the changes operated on the American constitution.

2.4.3 The Limitations to the *Fifteenth Amendment*

The ultimate aim of the *Fifteenth Amendment* is to acknowledge the right to vote to the whole population on the United States without any form of racial discrimination. Nonetheless, the amendment was not efficient enough, because it was a halfway proposition, and it enabled the state administration to limit the electoral rights of African American citizens throughout laws and codes that did not explicitly address race. Examples of these rules can be: poll taxes, which were fixed sums on every liable individual without reference to incomes or resources; property qualifications, that is to say a clause or a rule by which those individuals without property were not enfranchised to vote or to stand in elections; literacy tests to prospective voters in order to disenfranchise African Americans and other minorities with diminished access to education.

These limitations to the right to vote are indeed the proof that the ratification of the amendment in 1870 was ephemeral. The fact that the state government had the authority to pass legislative dispositions that hindered the rights of African Americans corroborated the thesis that the Congress failed to bring the elimination of the badges and incidents of slavery to completion.

2.4.4 The Limits to the *Reconstruction Amendments* imposed by the *Supreme Court*

Several times, the Supreme Court itself did not fulfill the promises that the *Reconstruction Amendment* made to the American society. As a matter of fact, its decisions made the premises of the amendments narrower than planned to be in the first place.

The narrow interpretation of the Court was justified by the frequent use of the Dunning School view on the jurisprudence of the *Reconstruction Amendments*, which tended to consider them the reason for the decay of the South after the *Civil War*. Moreover, the US government did not place African Americans at the center of the Reconstruction, as a matter of fact, there were no black people in the Court fighting for their right to be respected, but only white men that could chose to take charge of this struggle or not.

A landmark decision of the Supreme Court with regards to the *Fourteenth Amendment* was made on the occasion of the *Civil Right Cases*: five cases[128] were conjoined by the Court because of their analogy into a single ruling, since they all had African American plaintiffs that sought injunction to a lower court for their exclusion from allegedly "White only" facilities, the existence of which violated the *Fourteenth Amendment.*

In 1883, the Supreme Court declared, in its final ruling, that neither the *Thirteenth Amendment* nor the *Fourteenth Amendment* were violated by the occurrence of uncodified racial discrimination, which therefore could not be constitutionally prohibited. In consonance with this line of reasoning, the *Civil Rights Act*, that was approved in 1866 was declared by the Court unconstitutional. The final ruling read:

> *"The XIVth Amendment is prohibitory upon the States only, and the legislation authorized to be adopted by Congress for enforcing it is not direct legislation on the matters respecting which the States are prohibited from making or enforcing certain laws, or doing certain acts, but it is corrective legislation, such as may be necessary or proper for counteracting and redressing the effect of such laws or acts." [129]*

Through this sentence, the *Supreme Court* made the *Civil Right Act* prohibiting segregation in public places was unconstitutional. Such ruling stipulated the *Fourteenth Amendment* was unlawful, in view of

the fact that it transcended the authority of the *Congress* by entrusting the control of the conduct of private individuals. This was indeed a prerogative of the state government, while

[128] *United States v. Stanley; United States v. Ryan; United States v. Nichols; United States v. Singleton; Robinson et ux. v. Memphis & Charleston R.R. Co*
[129] U.S. Reports: *Civil Rights Cases*, 109 U.S. 3 (1883).

the text of the amendment stipulated that only the Congress had the authority to implement the equality of "civil freedoms".[130] The governments of the southern states ratified the amendment but prevented black people to benefitting from the amendments throughout Black Codes. (Carter, 2012)[131]

The Supreme Court did not agree with the fact that the amendments had overturned its ruling in reference to the *Dredd Scott v Sanford* case, which ruled that black people were not citizens and were therefore not entitled to constitutional rights. It also made sure that the *Fourteenth Amendment* was not incorporated to the constitution, in order to allow the states not to sanction discriminatory acts. (Hemmingson, 2014)[132]

Chief Justice Morrison Waite decreed that it was not the prerogative of *Congress* to prohibit racial discrimination, but it was a task of the state government.

The amendments represented a threat to the *Supreme Court*, since giving the *Congress* such an essential competence would have certainly weakened its role. (Corwin, 1909)[133]

2.5 Conclusion

To sum up what has been stated so far, the emancipation of black people was one of the underlying causes to the secession of the states in the south. The abolition of slavery was obtained in 1865 with the approval and ratification of the *Thirteenth Amendment*, a bill that became valid in the whole country after the victory of the Union in the *Civil War* and the subsequent reunification of the United States. However, the ratified text of the amendment contains a loophole that enables the practice of slavery under conditions of incarceration. Furthermore, it was not extensive enough, hence it required further amendments to the

[130] "It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to." *United States v. Stanley; United States v. Ryan; United States v. Nichols; United States v. Singleton; Robinson et ux. v. Memphis & Charleston R.R. Co*

[131] Carter, W. M., *The Abolition of Slavery in the United States*, Pittsburgh, University of Pittsburgh Law School, 2012.

[132] Hemmingson, G., *The Fourteenth Amendment and The African American Struggle for Civil Rights* in "T*he Virginia Tech Undergraduate Historical Review* ", 2014.

[133] Corwin, E. S., *The Supreme Court and the Fourteenth Amendment* in "*Michigan Law Review*", 643-672, June 1909.

Constitution in order to grant fundamental rights to the former slaves. Even so, both the *Supreme Court* and the state governments found operated in many ways to limit the authority of the Congress on these amendments and African American people of their fundamental rights, primarily because their wording presupposed a greater power of the federal *Courts* and the *Congress*, as opposed to the *Supreme Court*, to which the constitution recognize the authority to protect civil rights. (Foner, 2012)[134]

In final analysis, the *Civil Right Cases'* final ruling of the *Supreme Court* ultimately deprived black people of the protection of the amendments and ushered into an era of racial discrimination, perpetrated through laws such as *Black Codes* and *Jim Crow*, whose functioning will be analyzed in the following chapter.

CHAPTER 3 – THE AGE OF SEGREGATION: FROM THE LATE 19TH CENTURY TO THE END OF THE CIVIL RIGHTS MOVEMENT

3.1 Introduction

At the end of the Nineteenth Century, the ratification of the *Reconstruction Amendments* entitled black people to freedom, citizenship, as well as civil and electoral rights for the first time in history.

Nonetheless, the constitutional reform, operated by the federal legislative branch, was not endorsed by the State and local government in the South. As a matter of fact, as mentioned in the closing paragraphs of the previous chapter, many escamotages such as loopholes or

[134] Foner, E., *The Supreme Court and the History of Reconstruction*, New York, Columbia Law Review, 2012.

particular interpretations of the Amendments were employed in order to preserve the antebellum economic system, even though slavery was made unconstitutional.

The purpose of this chapter is to give a complete outlook on the treatment black people factually endured after the end of the *Civil War*, when their equality to white people was recognized *de jure*, but not *de facto*.

From a chronological point of view, the focus of the analysis will be the period of time starting in 1865, with the emergence of the aforementioned *Black Codes*. The subsequent age of *Jim Crow* (1877-1964) will also be addressed as a period of time that legally hurdled the African American community, provoking the rise of the *Civil Rights Movement*, whose achievements will be examined through the analysis of the landmark cases laws in the period between 1954, with the landmark case of *Brown v. Board of Education of Topeka*, and 1968, being the year in which the *Fair Housing Act* was ratified by the *Congress*.

3.2 The emergence of *Black Code*s in the postbellum era

The *Civil War* ended in 1865 with two epoch-making changes, the first one being the constitutional unity of the United States, despite the reluctance of the South, and the second one being the abolition of slavery, hence the integration of black people in the American citizenry.

The latter novelty was the cause for a major downturn in the Southern agricultural-based economy, since free and forced labor was no longer exploitable.

This paragraph is aimed at analyzing the so-called *Black Codes, i.e.,* laws that were ratified in the South with the purpose of limiting the newly acquired liberties of African Americans and continue exploiting them as free workforce.

3.2.1 The historical Background of the postbellum South

The aftermath of the *Civil War* mainly consisted in two factors that determined the new outlook of America.

First of all, it radically changed the legal status of citizen. As a matter of fact, before the Civil War ended, only white men had the right of citizenship. After the ratification of the *Reconstruction Amendments*, African Americans, and people of color could virtually compensate for all the injustices and deprivation of fundamental rights they endured under slavery. The most effective way to do so was to express their right to vote.

This novelty within the American legal system added up to an already convoluted situation. *De facto*, the main duty of the federal and task governments was to rebuild the South after a four-year long bloody war. Railroads and plantations had been razed to the ground by the northern army, destructing each mean of agricultural production and communication for the population of the former confederate states. Hence, the south was reduced into a condition of extreme misery. (Goldin, 1975)[135]

Since the main outcome of the civil war was the unification of the North and the South by constitution, the Federal Government was legally bound to help reconstructing the South once it witnessed the condition in which it was left by the war. Therefore, the Republican government in Washington set out a number of targets to achieve in order to bring the South at the same level of the postwar north.

Nonetheless, the operation of rebuilding the United States according to the same standards encountered different hurdles in the immediate aftermath of the *Civil War*. The northern politicians at government found the southern economy in tatters, mainly due to the loss of free labor that was provided by slavery. (Goldin, 1975)[136] The agricultural-based South could have never gotten to the level of the industrially based North by restarting its economic system ex novo, after the *Civil War* wiped it out. In order to restore the economic production, the white landowner community radicalized in terms of racism and supremacism, by continuing to apply the practice of slavery through *Black Codes*.

3.2.2 *Black Codes*

[135] Goldin, C., *The Economic Cost of the American Civil War: Estimates and Implications*, New Heaven, Harvard University Press, 1975.
[136] Ibid.

At the end of the *Civil War*, in 1865, the former slaveholding states started enacting a series of state laws with the purpose of discriminating black people, despite their newfound legal status of citizens. These laws were explicitly designed in order to maintain the social and economic structure of the antebellum era, in which slavery was legal and therefore subvert the *Thirteenth Amendment*. (Balkin, 2010)[137]

Such laws codified the supremacy of white people over blacks, by limiting the opportunities of freedmen to participate to public life. There were, for instance, many laws preventing black people from voting, holding weapons or leasing land. A relevant civil legislation that strengthened the legal effect of these laws was the *Vagrancy Act of 1866*. The act stipulated that if a vagrant, which is a citizen that appears to be unemployed and homeless, ran away or got captured off the streets, he would have been incarcerated on the spot.[138]

Such law came as an effect of the social outcome of the *Thirteenth Amendment*. Not only did the Amendment resulted in the liberation of millions of slaves, but it also provoked the vagrancy of hundreds of them, who wandered urban and rural centers in search of a job that did not require working long hours in a plantation. Such situation was utterly detrimental for the economy of the southern states, since it increased the rate of unemployment and decreased the rate of agricultural production, that was the main source of income for the poorly industrialized region.

Hence, the legislative branches of many southern states resorted to a solution that exploited the loophole of the *Thirteenth Amendment*: the clause allowing slavery as a punishment for any sort of crime. As a matter of fact, the main aim of the legislative act was to criminalize free people trying to build a new life and leading them back into a situation of forced labor.

The legislative act was also applied to the citizens opposing to working contracts that continued subjugating them to white landowners. If those people refused to continue working at the service of their old employers, they could be legally accused of "loitering"

[137] Balkin, J. M., "The Reconstruction Power", in "New York University Law Review", December 2010, 1801-1805.
[138] Virginia Vagrancy Law, January 15, 1866 Chap. 28.—*An ACT providing for the punishment of Vagrants.*

or “vagrancy”. As a consequence, they could have been convicted of a crime and as allowed by the *Thirteenth Amendment*, forced to do non-retributed labor during their jailtime.

In order to maximize the employment of free workforce through conviction, *Black Codes* restricted the capability of black citizens to resort to private parties and were denied the right to seek injunction to a court as plaintiff, juror, or witness, preventing them from appealing against their sentences of condemnation. (Tsesis, 2010)[139]

The emergence of the *Black Codes* and their strengthening throughout the *Vagrancy Act* created the situation of *“convict leasing”*, which corresponded to a system created with the aim of providing free labor despite the unconstitutionality of slavery. Under this particular system, the states that had enacted the vagrancy act “leased” prisoners to mines and plantations. This legislative provision determined the birth of a new social structure in the south, in which landowners continued profiting off of free and forced labor, while newly freed slaves had no right to step out of their antebellum situation and could be convicted and led beck into slavery just by wandering in search of a job and shelter.

3.2.3 The *Reconstruction Amendments*

From 1865 to 1870, under the presidency of the republican Lincoln and Johnson, the *Reconstruction Amendments* were passed, in order to give African American people the same rights as white citizens. Under reconstruction policies, the southern states had to pledge observance to the constitution, especially to the *Thirteenth, Fourteenth , and Fifteenth Amendments*, swear loyalty to the *Union* and pay off the war debit. In order to prevent the constitutional laws from being infringed, the former confederate territory was occupied and by the army of the North, which had been appointed to supervise the civil life in the territory.

[139] Tsesis, Alexander, *The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment*, New York, Columbia University Press, 2010.

On the other hand, in exchange for the observance to the reconstruction amendments the southern states obtained economic aid from the federal government in order to bring the postbellum recovery to completion. (Downs, 2016)[140]

3.2.4 The *1877 Electoral Compromise* and the Emergence of the *Jim Crow* Laws

By the late 1870's, support for the reconstruction egalitarian policies was increasingly waning in the occupied South. Many white supremacists decided to resort to violent ways of intimidating black people into abstaining from voting.

The situation was not looking up for the African American community in the South, since the Republican Party, which upheld their civil rights, was also losing popularity, as President Grant, Lincoln's successor, had been accused of corruption. Therefore, as the elections of 1976 approached, the Republican candidate Hayes appeared at disadvantage in the rush to office.

In order to gain popularity in the South, which was a neuralgic region he had to secure in terms of votes, Hayes based his presidential campaign on the restriction of federal enforcement of unpopular Reconstruction era policies.

Despite the incisive Republican presidential campaign, the democratic candidate Samuel B. Tilden obtained the most votes from the Electoral College. Nonetheless, the Republican Party refused to accept the electoral outcome. In the states of South Carolina, Florida and Louisiana, the party accused the democratic counterpart of bribing and intimidating the African American voters into choosing the democratic candidate or abstain from voting tout court. These accusations caused a situation of political vacuum and led the elections into a deadlock.

An *electoral commission*[141] was set up by the *Congress* at the start of 1877, in order to resolve the crisis. During the deliberation of the commission, the republican members had

[140] Downs, J. G., *After Appomattox: Military Occupation and the Ends of War,* in "Civil War Review", Fall 2016, 479-481

[141] The electoral commission consisted in five US members of the House of Representatives, five Senators and five Justices from the Supreme Court. Seven members were democrats, seven were republican and one

secret encounters with the democratic ones, in order to convince them not to filibuster the election of Hayes. On month after the start of the works, the members of the commission came to a compromise: the democrats would have accepted republican candidate Hayes as President and would have respected the rights of African Americans enshrined by the Constitution, on the condition that Republicans withdrew their troops from the South. (Chin, 2008)[142]

Apparently, the deadlock of the presidential election resulted in the victory of Hayes. In spite of that, the compromises made to have him elected lead to an increase of control of the *Democratic Party* on the South.

With the withdrawal of the *Republican Army* from the South, the Reconstruction era was brought to a halt. *De facto*, without the vigilant control of the northern States, the administration of the southern ones did not respect the commitment not to discriminate black people. The compromise also resulted in the end of the federal interference in the state administration, therefore it allowed the latter to disenfranchise black citizens' right to vote without the intervention of the former. (Peskin, 1973)[143]

These circumstances encouraged the Southern state legislative branch to pass a series of laws enshrining the separation of white people from those who were labeled as "people of color". Said laws took the name of *"Jim Crow laws"* and defined the period of time going from 1877 to 1968: the Age of Segregation.

3.3 The *Jim Crow* law and its landmark Cases

The Reconstruction era, which started in 1865 and ended in 1870, made any form of discrimination against black people punishable by law. Thus, the *Thirteenth, Fourteenth*

was independent. Nonetheless, when the independent one refused to serve, an eight Republican justice came in.

[142] Chin, G., *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, New Heaven, Harvard University Press, 2008.

[143] Peskin, A., *Was There a Compromise of 1877*, in "Journal of American History", June 1973, 63-74.

and *Fifteenth Amendments* forbad the observance of black codes, which were therefore discontinued.

The following paragraph is aimed at the analysis of how the system established by the *Black Codes* was replaced by the *Jim Crow* legal system, therefore circumventing the Us constitutional law. *Jim Crow* consisted in few written laws and many unwritten ones enacted in order to relegate black people to an inferior status and forcing them to settle for low paid jobs.

The point of beginning of the analysis will be set in 1890, the year of the landmark case of *Plessy v. Ferguson*, which legally established the segregation of public facilities, while the point of ending will be the case of *Brown v. Board of Education* in 1954, which first undermined the *Jim Crow* legal system.

3.3.1 *Plessy v. Ferguson*

In 1890, the state of Louisiana issued the *Separate Car Act*, a *Jim Crow* law that required all the state railroads to provide segregated train accommodations, for white and black people to travel separately. (Boyd, 1909)[144]

Two years later, the Louisiana citizen Homer Plessy, who was one eighth black[145], decided to take a stance and challenge the Act, as he was solicited by the *Comité des Citoyens*, a group in New Orleans whose aim was to repeal the act. The man, who was considered black under the Louisiana law, sat in a "*whites only"* car of a train in New Orleans, and when he was ordered to leave the seat vacant, he refused to do so and was consequently arrested.

During the trial, the lawyers of the defendant argued that the Act at issue was unconstitutional, as it violated the *Thirteenth* and the *Fourteenth Amendments*. Nonetheless,

[144] Boyd , R. H., *The Separate or Jim Crow Car Laws or Legislative Enactments of Fourteen Southern States: Together with the Report and Order of the Interstate Commerce: on Railroad Trains and in Railroad Stations*, Nashville , National Baptist Publishing Board, 1909.

[145] Each citizen with one-eight black and seven-eights European ancestry was denominated in the slave society as Octoroon. According to the law of many states, even after the Reconstruction Era, they were to be considered as black people.

Plessy was found guilty because the judge thought that the act could be enforced within the borders of Louisiana by the state authorities.

The *Supreme Court of Louisiana* held in its final ruling that the law at issue did not violate any article of the Constitution. Notably, justice Henry Billings Brown stated that the act did not breach the *Fourteenth Amendment*, since the separate but equal legal doctrine guaranteed the same quality in the railway cars reserved to black and white people.[146] The importance of this ruling lays in the fact that segregation was de jure considered as a constitutional practice, as it did not enshrine unlawful discrimination.

Plessy v Ferguson became a landmark case since it assessed the constitutionality of *Jim Crow* segregationist laws, enfranchising discriminatory behavior to become binding law in whichever country allowed it. (Hoffer, 2012)[147] As a matter of fact, the rationale of the case consisted in the fact that federal legislation had no power in eradicating the laws that enshrined distinction between black and white people. The ruling in *Plessy v. Ferguson* ushered into the "*Separate but Equal"* Doctrine, which justified racial segregation, as long as it was in compliance with the *Equal Protection Clause*. (Groves, 1951)[148]

The final ruling determined a legal line of reasoning that endured for 62 years, until the *Brown v. Board of Education* decision and the achievements of the *Civil Right Movement* in the 1960's.

3.3.2 *Jim Crow* Laws

Despite the fact that the southern States, which had maintained the most indulgences towards slavery, had to ratify the *Reconstruction Amendments*, outlawing *Black Codes*, the withdrawal of the Republican army in 1877 gave their administrations a large intervention domain within the field of civil law. Such situation enabled them to undo only some *Black Codes* and continue respecting them as unwritten laws. This was also possible thanks to the

[146] *Plessy v. Ferguson, 163 U.S. 537 (1896)*
[147] Hull Hoffer, W. J., *Plessy v. Ferguson: Race and Inequality in Jim Crow America*, Lawrence, University Press of Kansa, 2012.
[148] Groves, H.E., *Separate but Equal--The Doctrine of Plessy v. Ferguson*, in "Phylon", 1951, 66-72.

intimidatory role of the *Ku Klux Klan*, a secret association composed by white supremacists having the aim of preventing Black people to obtain full-fledged civil and political rights, first and foremost the right to vote. (Ruffins, 1991)[149]

Plessy v. Ferguson had had a decisive role for the history of America, since the Court's "separate but equal" decision at the end of the case allowed states to uphold discriminatory legislations that eventually became famous as *Jim Crow* laws. The doctrine enshrined by *Plessy v. Ferguson*'s final was a step forward for the states' administrations, since it enabled them to implement thousands of laws that deprived black people of the rights that they were given in the *Reconstruction era*.

From a legal point of view, the rationale of *Plessy v. Ferguson*, was the legalization of all the discriminatory and segregationist behaviors that had been maintained from the 1870s, in order to transform the customary laws, that were supported in the South to compensate for the abolition of *Black Codes*, into written laws. The presidential administration, in this instance, had no right to counter them, since they did not result unconstitutional, due to the fact that they respected the text of the *Fourteenth Amendment*.

The state that inaugurated *Jim Crow* was the one of Florida, which came back under Democratic rule immediately after the Civil War. In 1887, Florida approved the institution of separate train compartments for blacks and whites. After *Plessy v. Ferguson*, the eleven former Confederate States started following the lead of Florida, since the laws at issue could not be proven unconstitutional and brought before the Supreme Court. As a matter of fact, the text of such laws did not imply discriminating black people but offering them the same services that white people could benefit from, in a separated space. (Stephenson 1909)[150]

Jim Crow laws were also introduced in the electoral field, by limiting the exercise of the right to vote of the African American community.

[149] Ruffins, D., *Jim Crow: Racism and Reaction in the New South*, New York, Oxford University Press, 1991.
[150] Stephenson, G. T., *The Separation of The Races in Public Conveyances*, Washington, American Political Science Association, 1909.

28th Us President Woodrow Wilson gave even more momentum to the *Jim Crow* laws, by appointing many pro-segregation politicians as officers of his presidential administration. He also managed to institutionalize segregation within the *Federal Civil Service*. *De facto*, on April 13th, 1913, the newly elected president authorized segregation within the federal government. The justification of such measure was that it was considered morally unbearable for white women to work in the same space as black men, who were at the time considered as a threat to safety. Such belief was also widespread in popular culture, as blockbusters such as *"The Birth of a Nation"* started depicting black males as dreadful figures with a predatory behavior. (Hartsock, 2017)[151]

The democratic president was also responsible for the increase of segregation in the army. As a matter of fact, African Americans were always drafted in a much lower percentage than their white fellow soldiers. They were also assigned to segregated units that were commanded by white officers, who took credit for all their military exploits once the *US Army* came back from *World War I*. (Lehr, 2015)[152]

At the same time, aside from the laws that were enforced in public environments, segregation laws were also applied to private enterprises. This switch made the opportunity of black people to inhabit rich areas of the cities or to enter certain stores and restaurants infinitesimal.

Such discriminatory laws disenfranchised African American people of their rights, subjected them to humiliation on a daily basis and bolstered their marginalization, both in the economic and in the educational field. Such legal system, preventing them from social and economic advancement and relegating them to segregated areas of urban centers.

3.3.3 *Brown v. Board of Education*: achievements and limits of the landmark cases

Brown v. Board of Education of Topeka was a collective case, born from the consolidation of five cases that were brought before the Supreme Court in order to challenge the racial

[151] Harsock, P.I., *The unfortunate effects of 'The Birth of a Nation'*, in "The Washington Post", July 23rd, 2017.
[152] Lehr, D., *The racist legacy of Woodrow Wilson*, in "The Atlantic", November 27th, 2015.

segregation in the public school system of states such as Kansas, South Carolina, Virginia, Delaware, and Washington D.C. The common factor of all cases was that the plaintiff had been denied admittance to a white only public school. Because of the rationale of *Plessy v. Ferguson* and the striking down of the *Civil Rights Act* of 1875, Local authorities were entitled to segregate schools, but this reality created a relevant social unease within the African American Community, that had to send their children to far away schools in a situations of danger, due to the lack of protection against racially based hate crimes, perpetrated by white supremacists.

The lawyers of the plaintiffs argued that such behavior violated the *Equal Protection Clause* of the *Fourteenth Amendment*, which stipulated that:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[153]

All plaintiffs, when the cases were brought before the lower courts, were denied admittance to whites only public schools, based on the final ruling of *Plessy v. Ferguson*, which, in 1892, stipulated that racially segregated public facilities, including schools, were not violating the *Fourteenth Amendment*, as long as an equal quality in service was guaranteed.

In 1952, the lawsuit reached the *Supreme Court*, with the accusation that the segregation of public education infringed the *Equal Protection Clause* of the *Fourteenth Amendment*.

In the beginning, the justices were not in agreement on how to rule on the issue of school segregation. The final ruling was deadlocked until, in 1953, newly elected US President Dwight Eisenhower named Justice Earl Warren, in order to substitute the deceased Fredrick Vinson, and an agreement between the justices was finally reached. (Patterson, 2001)[154]

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[153] *U.S. Const. amend. XIV, § 2*

[154] Patterson, J. T., *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy*, New York, Oxford University Press, 2001.

Justice Warren deliberated the unanimous opinion of the Court in 1954, holding that the separate but equal doctrine did not guarantee identical quality in service and, therefore, it violated the *Fourteenth Amendment* to the *US Constitution*. Finally, the court stipulated that a segregated educational system instilled a sense of inferiority that resulted in psychological hurdles for the educational and personal growth of African American Children.

The rationale of the case law consisted in the reform of the educational system in the name of inclusivity, so that African American students would have had the right to choose what school to attend. *Brown v. Board of Education* immediately became a landmark case, mainly because its verdict made segregation unconstitutional in a vital sector of civil life: the one of public education. Furthermore, the case represented a catalyst for the *Civil Rights Movement* since the war for civil rights was not over yet, and the desegregation of other domains was still to be achieved. The activist movement was the voice of a struggle for social justice and end of racial discrimination that operated from 1954 to the late 1960's.

3.4 1954-1968: the *Civil Rights Movement* and its most paramount Achievements

The year 1954 is considered in the history of the United States as a major milestone since it delegitimized school segregation. Despite it constituting an attack to the *Jim Crow* legal system, this achievement did not completely abolish it, on the other hand, it opened the way for an era of civil demonstration aimed at allowing the African American community to *de facto* civil equality.

The time span from 1954, being the year of the *Brown v. Board of Education* final ruling and 1968, encompassing the ratification of the *Fair Housing Act*, marked the rise and fall of the *Civil Rights Movement*, which will be addressed in this paragraph throughout the analysis of the landmark cases and legal achievements that characterized it.

3.4.1 The Murder of Emmett Till

Emmett Till was a 14-years-old African American boy, whose brutal abduction and murder acted as a galvanizer, not only for the action of the *Civil Rights Movement*, but also for the awareness of the American population towards the deep-rooted racial injustice of the South.

In the summer of 1955, Till visited his grandparents in the town of Money, Mississippi. During his stay, he had a verbal altercation with shop owner Roy Bryant, after allegedly whistling at his wife Carolyn. Four days after, Emmet disappeared. It was later discovered that he had been kidnapped by Bryant himself and his half-brother Milam, who shot him dead and dumped his body in the Tallahatchie river, in the region of the Mississippi Delta. Three days after its murder, the body of Emmett Till was found in terrible conditions: the state of decomposition was very advanced since it happened underwater. (Rubin, 1995)[155]

Within a day after the disappearance of Till, Bryant and his half-brother had already confessed of kidnapping the boy and were arrested, although they did not admit to having killed him. Subsequently, after the body was found, a public trial was opened by request of Emmet's mother, who sought injunction to *Tallahatchie County Courthouse*. The trial was opened to the press, and reporters from all over the country came to witness and document it.

The two defendants did not get the aggravation for murder, since the local sheriff declared that the corpse was too disfigured to identify if it belonged to Emmet Till, as the attorney of the defendants had stated in their defense. Accordingly, the two kidnappers were released.[156]

After the case was closed, and no justice was done on the murder of the innocent boy, the protests of the *Civil Right Movements* became increasingly stronger. The demonstrations had a strong mediatic impact since the social climate was already heated after the achievement of *Brown v. Board of Education*. At the same time, many supporters of the movement began labeling the incident as full-fledged "lynching".[157]

The media impact reached the climax on the day of Till's funeral, which happened in Chicago. On that very day, his mother Mamie Till decided to hold an open casket ceremony, in which everyone could have witnessed how his son had been left by his

[155] Rubin, A., *Reflections on the Death of Emmett Till*, Chapel Hill, University of North Carolina Press, 1995.
[156] *J.W. Milam and Roy Bryant Trial Transcript Sumner, Mississippi September 19-23, 1955.*
[157] A common practice perpetrated by white supremacists against black people during the age of segregation, even though it was legally considered a hate crime.

murderers, and how such a horror had been left unpunished. The funeral was documented with photographs, which were later published on national newspaper, reaching an even wider audience. (Gorn, 2018)[158]

The tragedy of Emmett Till had a paramount impact on the development of the struggle for civil rights in the age of segregation, since it determined a great upsurge of activism, leading both black and white people that had been reluctant to take part in the movement decided to make a difference. Not only this trend resulted in the mass mobilization of the *Civil Right Movement* protest, but it also rose the awareness of the white American community of the lack of legal protection for the black community, especially in the South. (Rubin, 1995)[159]

3.4.2 Rosa Parks, the Montgomery Bus Boycott and *Gayle v. Browder*

The social impact of the Emmett Till case fomented another paramount event, that is known by popular culture as the *"Montgomery Bus Boycott"*. The boycott was started one hundred days after the death of Till, when a black woman named Rosa Parks refused to relinquish the *"whites only"* seat she had sat on to a white man in a segregated bus in Montgomery, Alabama.

In popular imagination, Rosa Parks took this decision because she was exhausted after a long day of work, but, as an interview to the woman revealed, her epoch-making action was motivated by a deeper reason. [160]Parks stated that, when asked to go to the back of the segregated bus, she thought to obey in order not to be arrested, but then she thought about all the social injustice the black population in the South had to endure. She particularly recalled how the innocent Emmett Till was denied any protection while he was alive and any justice after he had been murdered and envisage that a small action of protest could

[158] Gorn, E. J., *Emmett Till's Death Could Easily Have Been Forgotten. Here's How It Became a Civil Rights Turning Point Instead*, in "Time", November 1st, 2018.
[159] Rubin, A., *Reflections on the Death of Emmett Till*, Chapel Hill, University of North Carolina Press, 1995.
[160] *Interview with Rosa Parks*, Eyes on the Prize Interviews, Washington University Digital Gateway, November 14th, 1985.

have made a difference and make sure that such injustices would not persist for the following generations. (Morris, 2012)[161]

Such misdemeanor resulted in the arrest of the woman, nonetheless, it acted as a catalyst for a much more impactful event. The news of a boycott of the bus system started circulating thanks to the *Women's Political Council*. The initiative was immediately supported by the African Americans across the city of Montgomery and incremented its media coverage.

The boycott and protesting resisted the attempts of repression by the forces of order and the white population. Four black women with similar cases of racial discrimination on public means of transport managed to seek injunction to the *Federal Court of Montgomery*. The collective case was named *Browder v. Gayle*, and its main question was whether segregated public means of transport represented a violation to the *Fourteenth Amendment*, relying on the case of *Brown v. Board of Education* as legal authority. (Glennon, 1991)[162] On June 5th, 1956, the *Montgomery Federal Court* ruled that:

> *"(Segregated public means of transport) are unconstitutional and void in that they deny and deprive plaintiffs and other Negro citizens similarly situated of the equal protection of the laws and due process of law secured by the Fourteenth Amendment to the Constitution of the United States and rights and privileges secured by Title 42, United States Code, Sections 1981 and 1983."*[163]

Since the case challenged the compliance of the *Code of Alabama* with the *US Constitution*, it was also brought before the *Supreme Court* that, on November 13th, 1956, affirmed the decision of the *District Court*.

What made *Browder v. Gayle* become a landmark case was its rationale. *De facto*, sixty-four years after the final ruling of *Plessy v. Ferguson*, the *Supreme Court* reversed the

[161] Morris, A., *Rosa Parks, strategic Activist*, in "Contexts", Summer 2012, 25.
[162] Glennon, R. J., *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott*, 1955-1957, Cambridge University Press, Cambridge, 1991.
[163] *Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.), affirmed, 352 U.S. 903 (1956) (per curiam).*

sentence on the case. The rationale of the final verdict of the case resulted in the abolition of segregation in public means of transport. (Kennedy, 1989)[164]

After *Brown v. Board of Education* succeeded in desegregating the public educational system, the bus system was integrated by *Browder v. Gayle*, leaving more domain of intervention for the *Civil Rights Movement* to desegregate other aspects of public life. (Glennon, 1991)[165]

3.4.3 The *Southern Manifesto* of 1956: A Step Back from *Brown v. Board of Education*

The paramount achievement of *Brown v. Board of Education*, which consisted in the racial integration of the public school system, encountered a relevant hurdle before being implemented in the South.

In point of fact, Southern political leaders agreed on not abiding by the legislative decision of the *Supreme Court*, considering its decision on *Brown v. Board of Education* an abuse of judicial power, since the administration of public education was a prerogative of the State Government.[166]

Their resistance immediately started in 1954, when senators from Virginia and Mississippi refused to apply such decision in their fields of authority. In the month of August, Virginia Governor Thomas Bahnson Stanley established a commission with the deliberate aim to defy the verdict of *Brown v. Board of Education*: the *Gray Commission*. It held that school attendance should not be compulsory, and that parents would have been incentivized to oppose integration at school by money allocated as tuition grants. It also gave the school

[164] Kennedy, R., *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, in "Yale Law Journal", April 1989, 999-1067.
[165] Glennon, R. J., *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955-1957*, Cambridge University Press, Cambridge, 1991.
[166] Declaration of Constitutional Principles, *Congressional Record*, 84th Congress Second Session. Vol. 102, part 4 (March 12, 1956). Washington, D.C.: Governmental Printing Office, 1956. 4459-4460: "We regard the decision of the Supreme Court in the school cases as a clear abuse of judicial power. It climaxes a trend in the Federal judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights pf the States and the people."

boards, as institutions, the power to assign determined students to determined schools. (Aucoin, 1996)[167]

This resilient form of segregation acquired legal effect in 1956, when Virginia Senator Harry Byrd issued a collection of laws aimed at forestalling and preventing school integration. The so-called *Southern Manifesto*, registered under the formal name of *Declaration of Constitutional Principles*, managed to do so by eliminating state funds and even closing schools. The legal justification that allowed the political leaders to go against the verdict of Brown was the following:

> *"The original Constitution does not mention education. Neither does the 14th Amendment nor any other amendment. The debates preceding the submission of the 14th Amendment clearly show that there was no intent that it should affect the system of education maintained by the States."*[168]

Based on this reasoning, the Manifesto stipulated that:

> *"We pledge ourselves to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent the use of force in its implementation. In this trying period, as we all seek to right this wrong, we appeal to our people not to be provoked by the agitators and troublemakers invading our States and to scrupulously refrain from disorder and lawless acts."*[169]

The Manifesto allowed the shaping of an alarming social scenario in the south. For the duration of five years maximum, a lot of school remained closed, denying right to education to a great percentage of the population, therefore infringing the *Fourteenth Amendment* per se. Furthermore, the collection of laws left the door open to many violent forms of discrimination in the school environment.

The background remained unchanged until, in the late 1960's and early 1970's, the cases of *Green v. County School Board* (1968) and *Swann v. Charlotte-Mecklenburg* (1971) were

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[167] Aucoin, B. J., *The Southern Manifesto and Southern Opposition to Desegregation*, in "The Arkansas Historical Quarterly", 1996.
[168] Declaration of Constitutional Principles, *Congressional Record*, 84th Congress Second Session. Vol. 102, part 4 (March 12, 1956). Washington, D.C.: Governmental Printing Office, 1956. 4459-4460
[169] *Ibidem.*

brought before the *Supreme Court*, which, as a final verdict for both cases, issued mandates aimed at eradicating any form of Segregation from the school environment. (Day, 2014)[170]

3.4.4 1957: the *Little Rock Nine*

In the year 1957, six black students from Arkansas[171] were allowed to enroll in the *Little Rock Public High School* for the very first time. They were given this opportunity because of their good academic performances and were picked as the first subjects of the forced integration of the school system, after the final verdict of *Brown v. Board of Education*.

The group of students found more hurdles, once they started attending all-white school. First of all, the troops of the *Arkansas National Guard*, that worked for the State Governor[172], prevented them from entering the classes. The students also underwent verbal aggression from their white schoolmates, not happy about the desegregation of the school system.

Few days after, President Eisenhower sent federal troops to Little Rock, in order to make sure that the nine students were allowed into the school and could attend class without restrictions. Despite the presence of the army, the students continued to endure violence and discrimination by their peers, before the eyes of the teachers.

The following year, the governor sought to slow down the process of desegregation by closing the school for a year, and the white population of Little Rock blamed the closing on the nine black students, that had broken the status quo.

The story of the Little Rock nine became an important part in the struggle for equal opportunities in the American educational system. Despite the difficult situation they were faced with in the all-white school, the whole group later pursued successful careers,

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[170] Day, J. K., *The Southern Manifesto: Massive Resistance and the Fight to Preserve Segregation*, Jackson, University Press of Mississippi, 2014.
[171] Thelma Mothershed, Minnijean Brown, Elizabeth Eckford, Gloria Ray, Jefferson Thomas, Melba Beals, Terrence Roberts, Carlotta Walls, and Ernest Green.
[172] Thelma Mothershed, Minnijean Brown, Elizabeth Eckford, Gloria Ray, Jefferson Thomas, Melba Beals, Terrence Roberts, Carlotta Walls, and Ernest Green.

proving that the assumption that the integration of black students in segregated high school would did not lower the teaching standards of public schools.

3.4.5 The 1960 *Woolworth Lunch Counter*

On February 1st, 1960, four 14th old black men entered the *F.W. Woolworth Store* in Greensboro, North Carolina, shopped some items and sat on the segregated lunch counter in sign of protest. They were motivated by the daily dose of humiliation they had received from their childhood in the *Jim Crow* South. At the same time, similarly to Rosa Parks, they took a stance it in memory of their contemporary Emmet Till, who paid for a petty crime with his own life because he was a black boy in the segregationist state of Missouri.

The peculiarity of this protest consisted in the fact that it did not solicit any form of violent action, since the four students drew inspiration from the success that had been attained by Mahatma Gandhi one decade before through non-violent protest. What made the Greensboro sits in a landmark historical event is the fact that it was the first peaceful demonstration, that lead the way for the success of the *Civil Rights Movement*, which adopted this strategy as its *Modus Operandi*. (Wilson, 2020)[173]

The police attempted to break up the protest but could not intervene due to the lack of provocation. Ralph Johns, a local white businessman that had offered his help to the students in order to give life to the demonstration, alerted the media so that they could televise the event and mobilize the public opinion. This action allowed many students to learn about the event and to join the protest on the following day. By February 5th, the protesters in front of the shop became three hundred, the crowd was so big that it managed to boycott the activity of the shop. This also helped growing the media coverage of the manifestation, whose strategy of sit in was adopted by the activists of Southern states in the following weeks. (Cohens, 2015)[174] This particular type of protest attracted many liberal white students, who came forward to help and made them grew stronger,

[173] Wilson, Christopher, *The Moment Four Students sat down to take a Stand*, in "Smithsonian Magazine", January 31st, 2020.
[174] Cohen, S., *Why the Woolworth's Sit-In Worked*, in "Time Magazine", February 2nd, 2015.

The success of the sits in all around the South resulted in the integration of many public facilities, the *F. W. Woolworth Store* included.

3.4.6 1961: *Freedom Riders*

The *Freedom Riders'* civil rights program was organized by the *Congress of Racial Equality* in 1961. It was based on the 1947 *Journey of Reconciliation*[175], and it consisted in a bus tour around the South, where Bus terminals were segregated.

The *Freedom Riders*, a group of both black and white people, embarked on this journey in order to test the 1960 *Supreme Court* decision of the *Boynton v. Virginia* case. The case was brought before the Hustings Court in Richmond, Virginia by African American student Bruce Boynton, since he had been convicted for having entered a segregated restaurant in a bus stop. As final ruling, the court stipulated that:

> "1. Notwithstanding the fact that the petition for certiorari presented only the constitutional questions this Court will consider the statutory issue, which involves essentially the same problem—racial discrimination in interstate commerce. P. 364 U. S. 457."
>
> 2. Under § 216(d) of the Interstate Commerce Act, which forbids any interstate common carrier by motor vehicle to subject any person to unjust discrimination, petitioner had a federal right to remain in the white portion of the restaurant, he was there "under authority of law", and it was error to affirm his conviction. Pp. 364 U. S. 457–463.
>
> (a) When a bus carrier has volunteered to make terminal and restaurant facilities and services available to its interstate passengers as a regular part of their transportation, and the terminal and restaurant have acquiesced and cooperated in this undertaking, the terminal and restaurant must perform these services without discriminations prohibited by the Act. Pp. 364 U. S. 457–461.
>
> (b) Although the courts below made no findings of fact, the evidence in this case shows such a situation here. Pp. 364 U. S. 461–463."[176]

[175] Also defined as the first Freedom Ride. A non-violent form of protest that took place in April 1947 in the shape of a bus ride from Washington DC to North Carolina, in order to challenge state segregation laws on interstate buses.

[176] *Boynton v. Virginia*, 364 U.S. 454 (1960)

In the following year, the final ruling of the case law was never applied by the state administration, therefore, bus terminal remained segregated, and the *Freedom Riders* program was enacted in order to finally allow the rationale of the case to enter into force.

The journey started from Washington D. C. on May 4th 1961, and was supposed to end in New Orleans. The first inconvenience occurred on May 12th in Rock Hill, South Carolina, where some members were violently attacked by local supremacists. From that moment on, the journey was continuously interrupted by mobs of white people with the intention of stopping the initiative and the struggle for the desegregation of public facilities. In Annison, Alabama, a bomb was thrown into the bus, the passengers managed to escape, but they were afterwards brutally beaten by the mob.

The climax of the violent repression of the journey was reached in Birmingham, Alabama, where the ride should have been resumed. On this occasion, the participants were severely beaten by a very aggressive crowd of white supremacists. The mass beating was nationally televised, and it generated the horror of the population of the north, which, in some cases for the first time, witnessed what treatment black people were undergoing. The public opinion was driven to put pressure on the presidential administration. (Joseph, 2020)[177]

Newly elected President Robert Fitzgerald Kennedy started a negotiation with the governor of Alabama John Patterson, and he had to call in six hundred Federal Marshals in order to calm the mob. Many activists, *Civil Rights Movement*'s leader Martin Luther King included, called for a peaceful resolution of the conflict, but the violence went on.

On May 24th, a new group of *Freedom Riders* sat off from Montgomery, Alabama. The journey continued facing violent reaction of the locals and the intervention of the forces of order, which arrested the members for trespassing more than one time.

The ride kept on going until the *Interstate Commerce Commission* issued written regulations prohibiting segregation in interstate transit terminals, by establishing that:

[177] Joseph, N., *How the images of John Lewis being beaten during 'Bloody Sunday' went viral*, The Conversation (website), July 23rd, 2020.

"Seating aboard this vehicle is without regard to race, color, creed, or national origin, by order of the Interstate Commerce Commission."[178]

As tumultuous as it was, the initiative had a positive outcome, since it was considered as an escalation of non-violence, that paved the way for incisive protest marches like the ones of Washington and Selma. (Taylor, 2020)[179]

3.4.7 1963: The *March on Washington*

The violent events that occurred in Birmingham Alabama gave rise to the organization of a mass non-violent protest in the form of a march that ended on August 28th in Washington D.C.. The Movement in order to achieve fair treatment and equal opportunities for black Americans and obtain the passing of a comprehensive legislature for the civil rights of black people and other minorities.[180] The demonstration was organized by trade unionist Asa Philip Randolph, allied with the *Civil Rights Movement.*

The march was supported by President John Fitzgerald Kennedy, who voiced some concerns on the possible violent outcome of the event, but, aside from that, allowed it. To guarantee safety during the march, the President gave his brother, the attorney general Robert Fitzgerald Kennedy, the task to coordinate with the organizers and make sure that security precaution was taken. (Gentile, 1983)[181]

The Civil Rights Movement leader Martin Luther King decided to give a symbolic significance to the march by making it end at the *Lincoln's Memorial*. By doing so, he wanted to urge the *Congress* to continue his legacy by approving an act that would have once and for all guaranteed the freedom of black people. At the same time, he decided not to end the march in front of the *Capitol*, not to make the *Congress* feel under siege.

At the end of the protest, Martin Luther King engaged in an epoch-making speech, in which he employed a skillful use of rhetorical devices in order to communicate timeless concepts

[178] *Code of Federal Regulations: 1949-1984*, Columbus, Library of the Ohio State University.
[179] Taylor, D. B., *Who were the freedom riders?*, in "The New York Times", July 18th, 2020.
[180] What would have later become the Civil Rights Act.
[181] Gentile, T., *March on Washington: August 28, 1963*, Washington, DC, New Day Publications, 1983.

such as: struggle, pain, but also hope for the future. This became the most famous speech of the *Civil Rights Movement* Era. He called for a future when segregation was only a distant memory.[182]

3.4.8 1964: the *Civil Rights Act*

Despite the constitutional achievements of the *Reconstruction Era*, the State administrations of the South managed to find loopholes not to apply them in the following decades. The need for a legislative act approved by the *Congress* that could disenfranchise *Jim Crow* laws.

After decades of inactivity in terms of civil rights, with the *Civil Rights Act* of 1957, the *Congress* established a Civil Rights section in the *Justice Department*, including an attorney general for civil rights. Furthermore, the legislative body established a *Commission on Civil Rights*, aimed at investigating discriminatory conditions, which could be labeled as unconstitutional since they infringed the *14th Amendment*. Nonetheless, both the African American community and President Lyndon Johnson called for a new *Civil Rights Act*, since the one of 1957 was not effective. *De facto*, federal mechanisms for combating discrimination in voting were ineffective: the process of litigation that challenged biased voting was too expensive; local officers and jurors involved in the cases were often hostile and reluctant to cooperate with; the only way to counter said attempts of filibustering for the *Commission* was to fill another lawsuit, which proved inconclusive. (Oates, 1982)[183]

1960 was also an important year for Civil Rights, as the *Congress* passed a *Civil Rights Act* that would have helped black people register to vote, introducing the idea of federal voting referees to countermeasure racially based voter discrimination. In specific, the act introduced penalties for whoever would have tried to obstruct someone's attempt to register to vote; it included provisions for federal inspection of local voter registration rolls; it also

[182] King, M. L., "I Have a Dream.", Speech presented at the March on Washington for Jobs and Freedom, Washington, D.C., August 1968.
[183] Oates, S.B., Let the Trumpet Sound, The Life of Martin Luther King, New York, Harper Collins, 1982.

appointed referees designated by the *Supreme Cour*t, with the task to help African Americans to register to vote. Despite the civil relevance of the bill, it resulted as very watered down, due to the fact that too many compromises were reached during the congressional debate. As a matter of fact, southern senators imposed many amendments, during the hearings of the *Civil Rights Act*, which would have ultimately produced a law devoid of concrete mechanisms to enforce school desegregation. Another hurdle to a proper enforcement of the act was once again the slowness, cost, and ineffectiveness of the mechanisms. Therefore, the passing of a stronger legislation was necessary to overcome the resistance from the Southern States' administration. (Lawson, 1976)[184]

The election of Democratic President John Fitzgerald Kennedy, in 1961, did not make a significant difference since he initially delayed the enactment of anti-discrimination policies. Soon after, the violent repressions of the peaceful demonstration of the *Civil Rights Movement* by the white supremacists of the south acted as a catalyst for a deep change in its presidential administration. An important turning point in John Fitzgerald Kennedy's presidency is represented by the repression of the Birmingham campaign in 1963, that had such a negative impact on the public opinion, that it urged the President in office to take a position on the matter and start working on a legislative initiative in order to safeguard the civil rights of African Americans and minorities. (Lord, 1978)[185]

In the same year, he proposed the most comprehensive legislation to date. He announced the proposal of the act to the congress through a radio and television address on June 11th, 1963, he stated:

> *"One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet free from the bonds of injustice. And this nation, for all its hopes and all its boasts, will not be fully free until all of its citizens are free."*[186]

[184] Lawson, S., *Black Ballots: Voting Rights in the South, 1944-1969*, New York, Columbia University Press, 1976.
[185] Lord, D.C., *JFK and Civil Rights*, Washington, in "Presidential Studies Quarterly", Spring 1978, 151-163.
[186] *Radio and Television Report to the American People on Civil Rights*, available from the John F. Kennedy Presidential Library linked to the EDSITEment-reviewed American President

> *In this address to the nation, Kennedy referred to civil rights not only as a constitutional issue, but also as a moral hurdle that had to be overcome, in order to truly make America "The land of the free".*[187]

The process of ratification of the act was dramatically halted by the assassination of the President, with abruptly happened on November 22nd, 1963 in Dallas. His place was taken by his vice president Lyndon B. Johnson, who adopted the same line of reasoning as his predecessor. *De facto,* in his first *State of the Union Address,* he stated that his first task as president in office would have been the enactment of the *Civil Rights Act.*[188]

The approval of the Act did not have an easy life, as a matter of fact, it was opposed by the southern members of the *House of Representatives,* as they argued that it infringed individual liberties and State's rights. The state of Virginia almost managed to sabotage the act, but, in the end, it was passed by the *House of Representatives* by a voting of 290-130.

Once the act was passed to the Senate, it underwent the longest filibuster in history, staged by the Democratic Senators. Nonetheless, thanks to a close behind-the-scenes negotiation, the act managed to be approved.

On July 2nd, 1964, one year after the initial proposal, Johnson signed the *Civil Rights Act* into law, banning any form of segregation from public facilities, where black people and white people were entitled to the same treatment and service. *Title VII* of the act guaranteed safeguard form discrimination both in the work environment and in trade unions. With regard to the public school system, the act authorized the *Office of Education* to supervise and assist desegregation in the school environment.

The enforcing of the *Civil Rights Act* on the entirety of the US territory had a paramount impact on the daily life of its people, making a customary practice such as segregation unconstitutional and enfranchising black people to the fundamental rights they had been denied for a century, even though they had the legal status of citizens from 1865.

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[187] Kennedy, J. F., *Radio and Television Report to the American People on Civil Rights*, Washington D.C., June 11, 1963.
[188] Lyndon B. Johnson, *Annual Message to the Congress on the State of the Union*. Online by Gerhard Peters and John T. Woolley, The American Presidency Project.

Furthermore, this event also determined a political trend that would have lasted for decades to come. (Williams, 2004)[189]

In an interview with political commentator and journalist Bill Moyers, President Johnson made a forward-thinking point:

> *"It is an important gain, but I think we just delivered the South to the Republican Party for a long time to come"*[190]

In point of fact, the signing of the *Civil Rights Act* into law provoked a massive political switch-up. Black voters, converted almost entirely to their new advocates: the Democrats of Lyndon Johnson. On the other hand, the white voters in the South, started resenting the interference of the federal government in the matter of civil rights. Over the following three decades, the southern white population of the switched to the Republican Party, making the south an overwhelmingly Republican region. (Bates, 2014)[191]

3.4.9 1965: the *Voting Rights Act*

During the *Reconstruction Era*, the 15th Amendment to the *US Constitution* was ratified in order to enable black people to exercise the right to vote. Nonetheless, in the subsequent decades, many practices[192] were employed by State administration in order to prevent them from voting. (Foner, 1988)[193]

During the period of protest of the 1950's and the 1960's, a federal legislation prohibiting the marginalization of black people from the electoral field was one of the main aims of the *Civil Rights Movement*. Such mobilization provoked the violent reaction of southern supremacists against activist, but this did not stop the social rallying from growing stronger overtime. (Franklin, 2011)[194]

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[189] Williams, J., *The 1964 Civil Rights Act: Then and Now*, in "Human Rights Law Review", July 1st, 2004.
[190] Presidential Recordings Digital edition, *Lydon B. Johnson and Bill Moyers on 26 December 1966.*
[191] Bates, K. G., *Why Did Black Voters Flee The Republican Party In The 1960s?*, in "NPR", July 14th, 2014.
[192] Literacy text and poll taxes were still instituted in the South in order to limit the access of African American voters to the polls.
[193] E. Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, New York, Harper Collins, 1988.
[194] Franklin, J. H., *From Slavery to Freedom: A History of African Americans*, New York, McGraw Hill, 2011.

The apex of the non-violent demonstrations for the approval of the *Voting Rights Act* was reached in 1965, when six hundred people took a stance and started a monumental march from Selma to Montgomery, Alabama. Unfortunately, few days after the march had started, many participants underwent the violent reaction of the *Alabama State Troopers*, aimed at repressing the initiative and delay the enacting of a legislation that would have prevented the state administration from disenfranchising black people from exercising the right to vote.

However, the dramatic event acted as a turning point for the approval of the act. Since the violent repression of the March, which was later called *"Bloody Sunday"*, was captured on national television, the event generated a wave of indignation in the public opinion. (Fairclough, 1986)[195] In a time when the rate of appreciation of the government was already low (Jacobs, 1999)[196] because of the massive intervention in the Vietnam war, Johnson called for a comprehensive voting rights legislation.

On March 15th, 1965, President Johnson held a speech to a joint session of the Congress, where he affirmed:

> *"There is no Negro problem. There is no Southern problem. There is no Northern problem. There is only an American problem. And we are met here tonight as Americans--not as Democrats or Republicans-we are met here as Americans to solve that problem."*[197]

Thus speaking, Johnson intended to affirm that the problem of segregation was not under the jurisdiction of the Southern States, instead it was a social issue that infringed the *US Constitution*. As such, it had to be addressed on a federal level, especially in light of the violent events of the previous months. This became a landmark speech, as it jumpstarted

[195] Fairclough, A., *Martin Luther King, Jr. and the Quest for Nonviolent Social Change*, Atlanta, Clark Atanta University, 1986.
[196] Jacobs, L. R., *Lyndon Johnson, Vietnam, and Public Opinion: Rethinking Realist Theory of Leadership*, Hoboken, Wiley, 1999.
[197] Johnson, Lyndon B. (Lyndon Baines), 1908-1973. "President Lyndon B. Johnson's Message to Congress on Voting Rights." *President Lyndon B. Johnson's Message to Congress on Voting Rights, March 15, 1965; "S. 1564, 1 of 7" folder, Legislative Bill Files, Box 26; Committee on the Judiciary; 89th Congress; Records of the U.S. Senate, RG 46; National Archives.*

the congressional debate for the approval of the *Voting Rights Act* of 1965. (Rutenberg, 2015)[198]

The *Senate* passed the bill on May 26th, 1965, with a voting turnout of 77-19. On July 9th, the *House of Representatives* approved it by a voting of 333-85. A month after, President Johnson signed the Act into law, which also banned the practice of *Literacy Tests*, that had to be passed in order to vote.

The enacting of the *Voting Rights Act* resulted in an exponential rise of the voter turnout in the South, enabling the African American community to reach proportional representation. (McMillen, 1994)[199] Furthermore, it also provoked a drastic change in the political trend in the whole Nation. As a matter of fact, the legislation transformed the patterns of political power. Not only did millions of African Americans registered to vote and were elected to public offices in a time span of few years, but the *Democratic Party* also changed its segregationist rhetoric in order to appeal to the very electorally active black population. The signing of the *Voting Rights Act* into law under a Democratic President showed how progressive reformers in the party had gained the upper hand over conservative supremacists. This political phenomenon steered the *Democratic Party* away from its racist past towards equality. (Freeman, 1986)[200]

3.4.10 1968: the *Fair Housing Act*

In 1948, the final ruling of the Supreme Court to the *Shelley v. Kraemer* case, stipulated that the exclusion of African Americans or other minorities from determined areas of the city violated the *Fourteenth Amendment*.[201] Despite the signing into law of this legislation, ace-based housing patterns were still in force in the years following the ruling.

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[198] Rutenberg, J., *The Speech that defined voting Rights in Congress*, in "The New York Times", August 6th, 2015.
[199] McMillen, J. D., *The Effects of the Voting Rights Act: A Case Study*, in "Washington University Law Review", January 1994, 725-756.
[200] Freeman, J., *The Political Culture of the Democratic and Republican Parties*, New York, The Academy of Political Science, 1986.
[201] *U.S. Supreme Court Shelley v. Kraemer, 334 U.S. 1 (1948)*

Protests and activism against such type of discrimination were growing stronger and stronger. One of the main catalyzers for the civil rights protest was the fact that the Vietnam war had claimed the lives of many black and Hispanic citizens who had enrolled in the *US Army*. At home, the families of those people encountered difficulties in affording a place to live, also given the fact that they could not access to determinate areas of their city because of their origin. (Berman, 2015)[202]

In such social climate, organizations such as *NAACP* lobbied for a fair housing legislation to be passed. This legislation was meant to be an expansion of the *Civil Rights Act*, approved in 1964. It consisted in *Title VIII* of the aforementioned act, addressing the right to fair housing.

The legislation was proposed in 1968. In early April, it was passed by the *Senate* by a slim margin. The passing of the legislation occurred thanks to the engagement and support of Illinois Senator Everett Dirksen, who created a coalition of Republican and Democratic senators from the North, with the aim of stopping filibuster to the approval of the Act.

Subsequently, the act was passed to the *House of Representatives* for its approval. The passing of the legislation by this chamber was forecasted as quite difficult, since the *House of Representatives* had been growing increasingly conservative, due to the strengthening of the activism and militancy of the *Civil Right Movement* in the entire nation. However, the expectation on the congressional debate were outturned by what happened on April 4th, 1968.

On that day, Martin Luther King was shot death in Memphis, where he went in order to participate to a strike. The public indignation and wave of protests generated by this event were used by President Lyndon B. Johnson in order to exercise pressure on the *House of Representatives* to pass the new legislation.

The situation of ferment significantly shortened the Congressional debate. *De facto*, the act was approved only three days after Martin Luther King's death, and, on the same day, the

[202] Berman, A., *Give Us the Ballot: The Modern Struggle for Voting Rights in America*, New York: Farrar, Straus and Giroux, 2015.

President signed it into law. By doing so, Johnson attained his goal of having the legislation approved before King's funeral, as it considered it as the fitting testament of the activist and of his legacy, since King participated to many protests in favor of open housing since 1966. (Mathias, 1999)[203]

Despite the passing of the Act, fair housing was not enforced in the following years. The black population of urban centers skyrocketed. This led to an exponential growth of *ghettos*, which are emarginated urban areas in which minorities live, plagued by unemployment, crime, and social illnesses such as alcoholism and drug abuse, due to the lack of opportunities to advance socially.

3.5 Conclusion

1968 is historically seen as the end of the *Civil Right Movement* era, but not as the completion of the fight of the African American community for equality.

De facto, the end of the *Civil Right Movement* coincides with the abandonment of the non-violent protest as modus operandi employed to achieve civil rights. The relinquishment of such approach was provoked by three main reasons.

First of all, the main advocates for the fight for civil rights could not bring short terms achievement, as it took more than 80 years to defeat *Jim Crow* and upturn the final ruling of *Plessy v. Ferguson*. In second place, given the fact that the non-violent protest often encountered an aggressive response on the behalf of the southern white population, it was extremely detrimental for the safety of black activists to continue protesting unarmed. Furthermore, despite the ratification of the *Civil Right Act* (1964), the *Voting Rights Act* (1965) and the *Fair Housing Act* (1968), the African American community was still undergoing economic discrimination, especially in the field of employment and housing, in which racial profiling continued being widespread. (Halliwell, 2018)[204]

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[203] Mathias, C. M., *Fair Housing Legislation: Not an Easy Row To Hoe*, Department of Housing and Urban development, 1999.
[204] Halliwell, M., *Reframing 1968 American Politics, Protest and Identity*, Edinburgh, Edinburgh University Press, 2018.

The economic gap between the white and the African American community increased in the years after the end of the *Civil Right Movement* and helped creating a society where systemic racism was consolidated. In such circumstances, black people were still denied the possibility to leave the urban zones in which they were segregated, because they were still discriminated in the housing field. Therefore, the fact that the government did not properly address the failures of the *Civil Rights Movement*, after the ratification of the aforementioned legislative acts, left the black community with an unfinished quest for equality and no strategy to achieve it. (Hartford, 2020)[205]

CHAPTER 4 – THE ISSUE OF MASS INCARCERATION IN THE 21ST CENTURY

4.1 Introduction

As of 2021, the United States are ranked 56th in the list of countries with the highest crime index.[206] On that note, it is quite difficult to believe that the same country has the highest incarceration rate in the whole world, outperforming non-democratic countries.[207]

The prison crisis the United States are currently undergoing has its roots in the second half of the 20th Century. In the 1970's, the incarceration rate skyrocketed due to the declaration of the War on Drugs on the behalf of Us President Nixon. The campaign was enforced through though-on-crime policies and caused a sharp increase in arrests and convictions.

Law and Order enforcement against drugs was intensified by Reagan with the *Anti-Drug Abuse Act* (1986) and by Clinton with the *Violent Crime Control and Law Enforcement Act* (1994). Both laws brought the prison population to 1.8 million people. Although prison

[205] Hartford, *Nonviolence, Self-Defense & Provocateurs,* Civil Rights Movement Archive, October 2020.
[206] World Population Review, Crime Index for Country 2021.
[207] World Population Review, Incarceration Rates By Country 2021.

population has decreased of 25% during the COVID-19 pandemic, it still outnumbers the correctional population of every country in the world.[208]

A cursory analysis of the statistics regarding incarceration in the United States can confirm that the racial disparity of the prison population stands out: African Americans constitute 38.% of the total prison population. This means that one in three black men and one in eighteen black women can be expected to be imprisoned at some point in their life. This compares with one in seventeen men and one in 111 women.[209]

The aim of this chapter is to demonstrate the correlation between the exception clause of the thirteenth amendment and mass incarceration, also displaying how the latter particularly affects black over white people.

In order to achieve this purpose, I will realize a statistic analysis, whit the aim of investigating how the issue of mass incarceration affects the African American community. In second instance, an historic analysis will be carried out, examining the career of the exception clause and the nature of the federal policies that triggered mass incarceration. Furthermore, the fourth paragraph will be focused on the modus operandi of the department of Law and Order in the enforcement of the *War on Drugs* laws. To conclude, the focus of the fifth chapter will be the analysis of the role prison labor plays in the Us economy, in order to find a justification why, to this day, slavery I still constitutionally allowed in prison.

In order to prove my thesis, the aforementioned analyses will also aim attention at the racial biases in the framing and enforcement of laws that triggered mass incarceration.

4.2 Statistics regarding Us Prison Population

As reported by the statistical tables computed by the *Bureau of Justice Statistics* in 2021, despite a slight recovery from the previous levels of incarceration rate, the issue of mass incarceration continues affecting the United State.

[208] Bureau of Justice Statistics, *Impact of Covid-19in the Jail Population*, 2021.
[209] Federal Bureau of Prisons, *Inmate Race*, Last Updated: Saturday, 21 August 2021.

As a matter of fact, roughly 1.8 million of people are currently incarcerated in the United States, making the incarceration rate 537 people per 100,000. This implies that, nowadays, 0.53% of the United States population is residing in a federal or state prison.[210]

There are two specific reasons that prove the existence of a prison crisis in the United States. First of all, with a prison population of 1.8 million inmates, 6.3 million people in the correctional system and a 107.6% occupancy *level*, the United States have the highest prison rates in the whole world. This record is alarming for the international community, since these percentages are overcoming the ones of Russia and China, whose government's democratic nature is debatable, and seem far from the rates of developed countries.[211] In second place, on a chronological note, the incarceration rate in the US has dramatically increased within the timeframe of 50 years. From 1960, the rate of incarceration almost grew by a factor of five, going from a 0.16% incarceration rate to todays 0.53%, with a 500% growth rate.

The reason why thought-on-crime is often criticized as a source of racial segregation lays in the demographic analysis of the Us prison population. As reported by *Pew Research Center*, racial disparities in jail incarceration are very high. De facto, black inmates constitute 33% of the prison population, with and incarceration rate of 1719 black men per 100,000 people.[212] Likewise, black people with a criminal record constitute 30% of the population under correctional control, therefore, 4 out of 10 black people in the United States are under correctional supervision.[213]

Given the fact that the number[214] of white people in the United States population is higher than the one of black people, such high gap in the incarceration rate means that black people, males in particular, have a higher probability of spending time in jail than white people. This is a very significant fact, especially in the timeframe after the decay of the

[210] Vera Institute of Justice, *People in Jail and Prison in Spring 2021*, June 2021.
[211] World Prison Brief, *Highest to Lowest – Prison Population Rate*, May 9th, 2021.
[212] Vera Institute of Justice, *People in Jail and Prison in Spring 2021*, June 2021.
[213] Bureau of Justice Statistics, *Probation and Parole in the United States*, 2021.
[214] Us Census Bureau, *Visualizing the U.S. Population by Race*, 2020.

Civil Right Movement: when people are granted the same opportunities by a set of legislative acts and constitutional amendment, the fact that that 1 out of 3 black males resides in prison and is therefore excluded by the civil society.

The growth rate of the prison population since the 1970's has been included in the present analysis for a specific reason. This particular decade marks two important historical events: on one hand, the decay of the Civil Right Movement caused by the death of Martin Luther Kind and, on the other hand, the rise of *tough-on-crime* policies, that were first enforced by Republican President Richard Nixon and triggered a very fast increase of the number of people behind bars.

The purpose of the following paragraph is to analyze in depth the career of the Exception Amendment and the enforcement of *tough-on-crime* policies, with particular attention to the *War on Drugs* government campaign. Said analysis will also inquire into the reason why the enforcement of such policies resulted in the exponential growth of the incarceration rate of black people.

4.3 The historic Career of the *Exception Clause* and the *War on Drugs*

This paragraph is aimed at providing an historical overview on the development of mass incarceration in the United States. The main focuses of the analysis will be: the framing of the exception clause; the way it allowed the reemergence of slavery prior to the 20th Century; the impact of the though-on-crime policies on the US prison population during the *War on Drugs*. The latter focus will also include the analysis of the racial biases that crime-related policies, promoted from 1970 to 1994, could contain.

4.3.1 The *Exception Clause*

In 1864, abolitionist Senator Charles Sumner proposed a model of the *Thirteenth Amendment* that drew inspiration from France's *Declaration of the Rights of the Man and Citizen*.[215] The formulation of the Amendment, which asserted to the equality of all men,

[215] *Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l'utilité commune.* Translated: Men are born and remain free and equal in rights. Social

would have implied that those who might be sentenced to prison and even hard labor would have not been doomed to lifelong enslavement. (Howe, 2009)[216]

Nonetheless, the model drafted by Sumner was criticized for being too expansive[217], therefore, a different text was adopted by the *Senate Judiciary Committee*. Said draft of the amendment was written by Senator John Brooks Henderson, who was inspired by the *1787 Northwest Ordinance Slavery Regulation*, and included the clause:

> *"(Neither slavery or involuntary servitude) except as a punishment for crime whereof the party shall be duly convicted (shall exist within the United States)"*[218]

There is no clear evidence that the Senate included the *Exception Clause* for racial reasons. Since the drafting of the *Thirteenth Amendment* dates back to the end of the *Civil War*, a period of time in which state legislations were stronger than the federal one, the model of the Constitutional Amendment had to constitute a compromise between the most liberal and the most conservative state laws. Although the entirety of the states of the Union had abolished slavery by 1860, the majority of them had adopted the *Exception Clause* exemption. Some scholars state that the clause has been included for the sole purpose of preserving the prevalent practice of imposing penal labor in the whole territory of the United States. (Ghali, 2008)[219]

Although the Thirteenth amendment was ratified to end the enslavement of black people, the *Exception Clause* was exploited for racial purposes immediately after the end of the *Civil War*. As soon as the *Vagrancy Act* was passed by the *Congress* in 1866, whoever was arrested for loitering could be forced back into enslavement by means of forced labor. Since many former slaves, especially those residing in the supremacist South, struggled finding a steady job, they were often homeless and had no other choice but to loiter around

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distinctions may be founded only upon the general good. *Declaration of the Right of Man and the Citizen*, Art. 1 , 26 August 1789

[216] Howe, S.W., *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause of the Thirteenth Amendment*, in Arizona Law Review, 2009, 984-1000.

[217] The inclusivity of the legislative text would have inspired women to seek emancipation according to conservative senator Howard.

[218] U.S. Const. amend. XIII.

[219] Ghali, K., *No Slavery as a Punishment for Crime: the Punishment Clause and Sexual Slavery*, in "UCLA Law Review", February 23rd, 2008, 608-634.

their areas. By criminalizing the unintentional condition of homelessness, the *Vagrancy Act* forced a substantial percentage of former slaves back into involuntary servitude, normalizing the convict leasing system. (Alexander, 2010)[220]

The latter system consisted in the conviction of African American for petty crimes such as loitering or unemployment. The exception clause of the *Thirteenth Amendment* stipulated that people that has be convicted of whichever crime could be re-enslaved and exploited as labor force in farms, mines, lumber yards, brick yards, manufacturing facilities, factories, railroads, and road construction. Such practice was so lucrative that it determined a massive increase of prison population, especially in the South. (Mancini, 1978)[221]

Since convict leasing was employed by the southern states in order to compensate for the lack of agricultural workforce due to the ratification of the *Thirteenth Amendment*, its Exception Clause allowed such system to become an alternative to slavery. During the *Jim Crow* era, the deliberate prohibition for black people to be part of juries or testify against whites increased the probability of the members of the African American community to be convicted for minor crimes with inflated charges.

From the second half of the 20th Century, the issue of the *Exception Clause* has resurfaced due to the phenomenon of mass incarceration, which emerged in the early 70's with the start of the War on Drugs and is still present to this day. Since the 1970's, the *United States Justice System* has convicted far more people than any state in the world, thus, mass incarceration represents a social stigma for the whole American population in this day and age. However, as explained in the following paragraph, the African American community is affected by this issue in a specific way.

4.3.2 Richard Nixon and the *War on Drugs* in the 1970's

[220] Alexander, M., *The New Jim Crow: Mass Incarceration in the age of Colorblindness*, New York, The New Press, 2010.
[221] Mancini, M., *Race, Economics, and The Abandonment of Convict Leasing*, in "The Journal of Negro History, 1978, 339-352.

The roots of mass incarceration were set 50 years ago, during the decay of the *Civil Right Movement*. After Martin Luther King's murder, the sit ins and non-violent protests that granted the rise of the movement came to a halt. Said strategies lost momentum, since their modus operandi was considered ineffective in the short term and too dangerous, with respect to the violent responses that the activists encountered from southern supremacists.[222]

In the midst of the *Civil Right Movement*, both the state and the federal government started enacting *though-on-crime* policies. Considering that *Civil Rights Movement* activists were proving segregation laws unjust by violating them, lawmakers stressed the need for law and order, since the achievements of the African American community were perceived as a breakdown of the respect of law by the white population of the South. (Halliwell, 2018)[223]

The promotion of *tough-on-crime* policies and law and order preservation were soon adopted by the Republican Party as the main feature of its electoral strategy. This particular modus operandi became known as the *Southern Strategy*, i.e., the political plan that the Republican Party undertook to appeal to the white, preponderantly southern, electorate. The *Southern Strategy* specifically targeted this electorate in order to rebuild a solid electoral base. Since Johnson's signing into law of the Civil Right Act in 1964 and the *Voting Rights Act* in 1965 made many African American voters align with the Democratic Party, this particular strategy allowed Republican Candidate Richard Nixon to win the Presidential Election of 1969 by gaining the vote of most of the Southern and Midwestern States in the *Electoral College*. (Phillips, 1969)[224]

In the sake of this mindset, Richard Nixon became the one of the main promoters of the *War on Drugs*. In 1971, Nixon announced that the upmost priority of the federal government was going to be the criminalization of drug abuse, as well as its prevention and treatment. Initially, the enforcement of the *War on Drugs* consisted in the financing of anti-

[222] Halliwell, M., *Reframing 1968 American Politics, Protest and Identity*, Edinburgh, Edinburgh University Press, 2018.
[223] Alexander, M., *The New Jim Crow: Mass Incarceration in the age of Colorblindness*, New York, The New Press, 2010.
[224] Phillips, K., *The Emerging Republican Majority*, New Rochelle, New York, Arlington House, 1969.

drug public health initiatives like medication-assisted treatments such as methadone clinics, education campaigns aimed at the prevention of young people from consuming drugs, and research on drug abuse. (Lopez, 2016)[225]

Furthermore, Nixon, who won the elections by promoting law and order, based the War on Drugs on the proposal of stricter measures, consisting in the surge of penalties and incarceration for drug offenders. In 1973, Nixon created the *Drug Enforcement Administration (DEA)*, which was aimed at fighting the traffic of illegal substances and enforcing the laws on controlled substances.

In the same year, the President repealed the mandatory minimum sentencing for marijuana possession. Instead, Nixon decreed that Cannabis was a scheduled 1 drug: a class of drugs that were considered to have a high potential for abuse and addiction with no medical use, such as Heroin, LSD and Extasy. Moreover, the President incentivized the increase of arrests and drug raids in the United States. Said policy resulted in the increase of the arrests within black communities, since the areas inhabited by African Americans often held an higher consumption rate marijuana and heroin. As a matter of fact, Nixon profusely financed police patrolling in urban areas, whose mostly black population was more likely to be accused of drug possession and therefore depicted by the media as the "Public Enemy Number One". (Mayer, 2002)[226]

During Nixon's re-election campaign, the measures of the *War on Drugs* became even stricter, in order to once again appeal to the southern anti-black electorate. After the declaration of *War on Drugs*, the number of incarcerated people in the United States skyrocketed from 300,000 to 2.3 million. 50% of the prison population was convicted for drug offence and two-thirds of this percentage were African American people. Nixon won the presidential election because he managed to secure the white supremacist electorate, but also because almost 800,000 black adults were incarcerated and unable to cast their vote,

[225] Lopez, G., *Was Nixon's war on Drugs a racially motivated Crusade? It's a bit more complicated*, in "Vox", March 29th, 2016.
[226] Mayer, J., *Running on Race*, New York, Random House, 2002.

that would have been likely to go to Nixon's Democratic opponent George McGoven. (Edsal, 1992)[227]

4.3.3 Reagan and the 1986 *Anti-Drug Abuse Act*

In October 1982, Republican President Ronald Reagan announced the start of his administration's *War on Drugs*. In order to enforce anti-drug policies, Reagan raised the budget of federal law enforcement agencies, particularly the one of FBI, DEA and *Department of Defense's* antidrug allocations. Although Reagan chose to finance law enforcement agencies, he reduced the funding for agencies managing drug treatment, prevention and education, which received much of Nixon's attention during his war on drugs.[228]

In order to make sure that the policy received support from the new Republican majority, Reagan endorsed a heavy media offensive aimed at justifying the costs of the *War on Drugs*. Said offensive had the purpose of sensationalizing the emergence of crack cocaine in inner city neighborhoods.

Crack cocaine, either known as "smokable cocaine", was a drug that achieved popularity in the mid 1980's and was depicted by the media as a stigma of the black community, due to its significantly lower price in comparison to powder cocaine. For his reelection campaign in 1988, Ronald Reagan further exploited the racial biases of tough-on-crime policies, hoping to appeal to the Republican electorate.

Reagan's campaign rhetoric was knowingly racially coded. As a matter of fact, not only was it centered on crime and welfare, but he often stressed how this issue concentrated in inner-city areas inhabited by African American people. Thus saying, the President meant that the War on Drugs had to be focused in the ghettoes. The rhetoric was highly successful, since 22% of the democrats chose Reagan in the 1988 presidential election.

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[227] Edsall, T., *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics*, New York, Norton, 1992.
[228] U.S. Office of the National Drug Control Policy, National Drug Control Strategy (1992).

Once reelected, the President vowed to enhance the enforcement of law and order and the fight against street crime. (Alexander, 2010)[229]

The economic crisis of the mid 80's increased the rate of poverty and unemployment, which resulted in the increase of crack dealing and consumption,[230] The media depicted the crack crisis in racial undertones, focusing more on the drug related issues of the black community, so that this demographic could be directly associated with drug-related crimes.

The aforementioned media frenzy endured until 1986, when the *House of Representatives* passed a bill that allocated $2 billion in favor of the fight against drugs. The legislation also decreed the participation of the military in the efforts to control narcotics. Furthermore, it established death penalty to some drug-related crimes[231] and authorized the admission of illegally gained evidence during drug trials. Such novelty determined an infringement of the *Fourth Amendment*[232] of the *Constitution*, which protects people from unreasonable searched and seizures by the government. However, after the declaration of the war on drugs, the *Supreme Court*'s jurisprudence with regard to said amendment changed. In the timeframe from 1982 to 1988, the *Supreme Court* ruled on thirty narcotics-related cases appealing to the *Fourth Amendment*. The rationale of each of the aforementioned cases determined that the *Fourth Amendment* did not apply to citizens suspected of drug possession. The fact that in twenty-nine out of thirty cases the Government was the

[229] Alexander, M., *The New Jim Crow: Mass Incarceration in the age of Colorblindness*, New York, The New Press, 2010.
[230] By 1988, at least six million Americans had consumed crack cocaine throughout the yar, resulting in 2.4% of the us population at the time. Crack Cocaine was consumed on a weekly basis by 862,000 people and on a daily basis by 292,000 people. On average, three crack cocaine users died every day. United States General Accounting Office, The Crack Cocaine Epidemic: Health Consequences and Treatment, January 1991.
[231] Amends the Controlled Substances Act to establish procedures for the imposition of the death penalty for certain continuing criminal enterprise drug offenses, H.R.5484 - Anti-Drug Abuse Act of 198699th Congress (1985-1986)
[232] *The right of the 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 the persons or things to be seized. U.S. Const., amend. IV.*

petitioner shows how the Federal policy of the *War on Drugs* reached such a high consensus that it undermined constitutionally granted liberties. (Mauer, 2007)[233]

In the same month, the Republican-dominated Senate proposed the *Anti-Drug Abuse Act*, a stricter legislation that was signed into law as the *Anti-Drug Abuse Act* of 1986. The most effective measure of the act was the mandatory minimum sentence for the distribution of cocaine, associated with whites, and an even higher mandatory minimum sentence for crack, which was most likely to be consumed by black people. The possession of one pound of crack cocaine would have resulted in the same time in prison as the possession of a hundred pound of powder cocaine. (Provine, 2007)[234]

In 1988, the Congress revisited the *Anti-Drug Abuse Act*, only to make it more punitive. The resulting legislation allowed public housing authorities to evict any tenant who authorizes whichever form of drug-related criminal activity. Furthermore, the legislation prohibited federal benefits such as student loans and access to public housing for those convicted of a drug offense. The mandatory minimum sentence for cocaine possession was raised of five years. (Provine, 2007)[235]

Reagan's *War on Drugs* resulted in the exponential increase of the prison population of the United States. Due to the soaring of the Mandatory Minimum Sentence, more people were convicted for a long period of time, making prisons increasingly crowded.

According to a statistic study disclosed by the *Department of Justice* in 1990, more than 50% of the people who were incarcerated in the 80's was convicted of drug-related crimes, as demonstrated by the graph below. Within the period from 1985 to 1995, the prison population registered an 80% increase, resulting from drug related arrests.[236]

4.3.4 Clinton

[233] Mauer M., King R., *A 25-Year Quagmire: The "War on Drugs" and Its Impact on American Society*, Washington, DC, Sentencing Project, 2007.
[234] Provine, D., *Unequal Under Law: Race in the War on Drugs*, University of Chicago Press, 2007.
[235] *Ibidem.*
[236] Department of Justice. (1990) *National Correctional Facility reaches new High*.

Bill Clinton became the first chair of the democratic party when fellow party member Michael Dukakis lost the presidential race with George H. Bush. The 1988 presidential election was characterized by the racially biased and defamatory campaign of the Republican candidate, who criticized his opponent Dukakis for having enforced a prison weekend furlough program in Massachusetts, where he occupied the position of Governor. Dukakis was blamed for having allowed the gruesome murder of a woman by convict felon Willie Horton, who had been in fact released for the weekend. The Willie Horton case had a strong media coverage. Moreover, the fact that the criminal was African American was used to the advantage of the democratic party, who managed to mobilize the conservative electorate and eliminate Dukakis from the presidential election.[237]

Once elected president in 1992, Clinton took on a tough-on-crime campaign, with the purpose outflanking the Republican party. Republican presidents Nixon and Reagan gained the support of the white and southern electorate through the war on drugs and the enforcement of law and order at the federal level. After Dukakis'- media scandal, Clinton's priority was to release the Democratic Party from the reputation of being soft on crime.

In 1994, amid the worryingly high consumption rate of crack cocaine[238], Clinton supported the approval of the *Violent Crime Control and Law Enforcement Act*. In the first place, the legislation established $30.2 billion Crime Trust fund, that resulted in the placement of 100,000 new police on the streets of the country. On a second note, the act expanded the number of crimes eligible for death penalty. It also enforced the "*Three Strikes and You're Out*" law, which convicted people who had committed the third violent federal felony to life imprisonment. A further provision of the act allowed children as young as 13 years old to be legally prosecuted as an adult, given special circumstances. (Beckett, 1997)[239]

[237] Baker, P., *Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh,* in The New York Times", December 3rd, 2018.
[238] The estimated number of crack cocaine abusers in 1994 was 500,000, although the rate of consumption of crack was not as high as in the 80's, it still maintained an epidemic status.
[239] Beckett, K., *Making Crime Pay: Law and Order in Contemporary American Politics*, New York, Oxford University Press, 1997.

Clinton's punitive policies resulted in an even higher incarceration rate than his Republican predecessors, since they were implemented on a larger scale. During the president's two terms, the prison population grew from 1.3 million to 2 million people, 40% of which were convicted for drug offenses by federal courts,[240] while the same offense constituted 34.6% of felony convictions in State Courts.[241] In both instances, drug offences appeared in a much higher precent, compared to other categories such as violent offenses and property offenses.[242]

Clinton's war on drug is historically peculiar because it opened the *Democratic Party* to the incarceration agenda, which was before a prerogative of the *Republican Party*. The 1994 act resulted in the increasing of the incarceration rates in the following decades. Besides, on the state level, the 1994 Act provided funds for the building of new prisons and the adoption of truth-in-sentencing laws, that required prisoners to serve at least 85% of their sentence without any chance of early release. The act reinforced Reagan's *Anti-Drug Abuse Act* and led to the multiplying of drug-related arrests and conviction for crack cocaine, which was still in compliance with the 100:1 rate.[243]

The promotion of the war on drugs policies resulted in the media depicting black people as criminals, whose misdemeanor highlighted the urgence of tough on crime policies. Such media frenzy fomented systemic racism in the Us society. Due to the stereotyping of the black community, racial profiling was employed to single out black people and accuse them of drug related crimes, which resulted in a rising disproportion between the percentages of white and black inmates.

[240] United States Sentencing Commission, 2000 federal sentencing statistics.
[241] Bureau of Justice Statistics Bulletin, *Estimated number of felony convictions in State courts in 2000*, June 2003.
[242] United States Sentencing Commission, 2000 federal sentencing statistics.
[243] Ofer, U., *How the 1994 Crime Bill Fed the Mass Incarceration Crisis, in American Civil Liberties Union*, June 4th 2019.

4.5 The Functioning of the penal and social system in the Age of Mass Incarceration

Since the legislature of the war on drugs left extensive intervention domain to city officials and district attorneys on how to enact the policies at issue, this paragraph will be aimed at analyzing how police decisions and prosecutorial choices impacted incarceration trends.

4.5.1 The Reception of Police

In order to build consensus among local and state law enforcement agencies, President Reagan promised substantial cash grants to the law enforcement agencies that were willing to prioritize drug enforcement policies.

The surge of funds allocated by Presidents Reagan and Clinton in the law enforcement system in the United States lead to an exponential increase of drug-related arrests on an annual base. *De facto*, the flow of money from the government to law enforcement agencies led the latter to compete against each other for funding, recruitment, and training, which was awarded by the former depending on the number of drug related arrests on the behalf of each agency. (Beckett, 1997)[244]

Even so, there was no check on the exercise of police discretion, therefore, many police departments started conducting drug operations mainly in poor communities of color, relying on race as a factor in selecting whom to stop. (Pfaff, 2015)[245]

The media frenzy that Ronald Reagan activated in order to sensationalize the *War on Drugs*, based on the belief that African American communities living in inner-city areas had a higher drug consumption rate, lead police to concentrate their work in these areas, in order to round up as many people as possible to receive federal funds.

[244] Beckett, K., *Making Crime Pay: Law and Order in Contemporary American Politics*, New York, Oxford University Press, 1997.
[245] Pfaff, J., *The War on Drug and Prison Growth: Limited Legislative Option*, New York, Fordham University School of Law, 2015.

4.5.2 Criminal Conviction for Drug Offenses

The second stage of mass incarceration consists in conviction, the act resulting in arrested people being officially under control of the criminal justice system. Once arrested, defendants are generally pressured to plead guilty even if they are not.

According to the *Sixth Amendment* to the *Constitution*, criminal defendants not able to hire a lawyer[246], the defendant will be granted one by the *National Association for Public Defenders*. However, the *Public Defender System* is characterized by a disproportion between the number of attorneys and the number of defendants, therefore, each lawyer often has to defend a large number of clients at a time. (Alexander, 2010)[247]

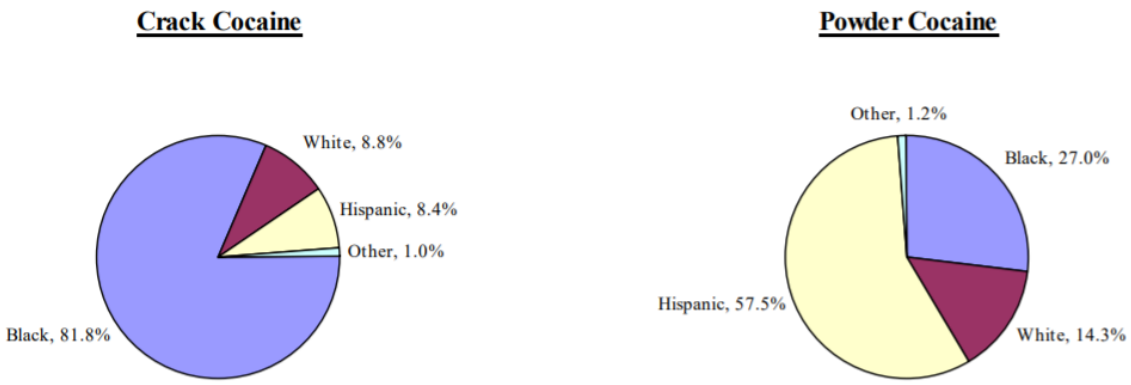
Often, public attorneys end up suggesting their clients to accept plea deals, in order not to face mandatory minimum sentences. For this reason, 98% of drug charges result in plea deals and not trials[248], which would also represent an additional cost for the local, state, and federal judiciary system. The practice of encouraging defendants to plead guilty of crimes they might have not committed has incentivized mass incarceration in the long-term. Many people, especially in the African American community, once they are arrested, feel compelled to plead guilty, fearing that the trial will be racially biased, and they will be obliged to undergo a mandatory minimum sentence. (Mauer, 2016)[249]

Mandatory minimums require judges to hand out specific sentences for those crimes that are deemed uniquely harmful to society. Therefore, under federal law, the possession of a certain drug automatically gets a determined number of years in prison. The federal minimum on the possession of drugs has been supplemented by the 1986 *Anti-Drug Abuse Act*. The Congress-passed anti-drug criminal bill featured a mandatory sentencing disparity

[246] "In all criminal prosecutions, the accused shall enjoy […] to have the Assistance of Counsel for his defense. *U.S. Const. amend. XVI.*
[247] Alexander, M., *The New Jim Crow: Mass Incarceration in the age of Colorblindness*, New York, The New Press, 2010.
[248] Vera Institute of Justice, *In the Shadows: A Review of the Research on Plea Bargaining*, September 2020.
[249] Mauer, M., *Race to Incarcerate: The Causes and Consequences of Mass Incarceration*, in "Roger Williams University Law Review, 2016.

punishing crack violations much more harshly than those for powder cocaine.[250] As proven by the *U.S. Sentencing Commission* in 2006, African Americans living in inner-city areas, especially males, were more likely to be accused and convicted for crack possession.[251]

Figure 3: Race/Ethnicity of Cocaine Defendants



Source: *U.S. Sentencing Commission 2006 Datafile*, USSCFY06.

Being convicted for crack cocaine possession would cause the defendant to face longer mandatory minimum sentence than their white counterparts, which were more likely to be accused of possession of cocaine. (Davis, 2007)[252]

In 2010, with the signing into law of the Fair Sentencing Act by President Obama, the cocaine sentencing quantity disparity was reduced from 100 to 1 to 18 to 1 by raising the quantity of crack cocaine necessary to bring about the five- and ten-year mandatory minimum sentences. [253] Nonetheless, the existing sentencing disparity still triggers a disproportioned impact on poor people and people of color, who are more likely to consume crack instead of powder cocaine.

4.5.3 The further Punishment of former Felons according to the Us Legislation

[250] The sentencing disparity was 100 to 1, which means that while just 5 grams of crack would carry a 5-year mandatory minimum, it would take 500 grams of cocaine to trigger the same 5-year sentence.
[251] *Federal Crack Cocaine Sentencing*, The Sentencing Project, 2010.
[252] Davis, A., *Arbitrary Justice: The Power of the American Prosecutor*, New York, Oxford University Press, 2007.
[253] Federal Crack Cocaine Sentencing, The Sentencing Project, 2010.

Once convicted, due to the mandatory minimum sentences established by though-on-crime policies, drug offenders in the United States spend on average 6 years in prison.[254]

Furthermore, once they have served their time in prison and have been released, former felons are forced to undergo a set of criminal sanctions established by the provisions of law or the sentencing of a judge.

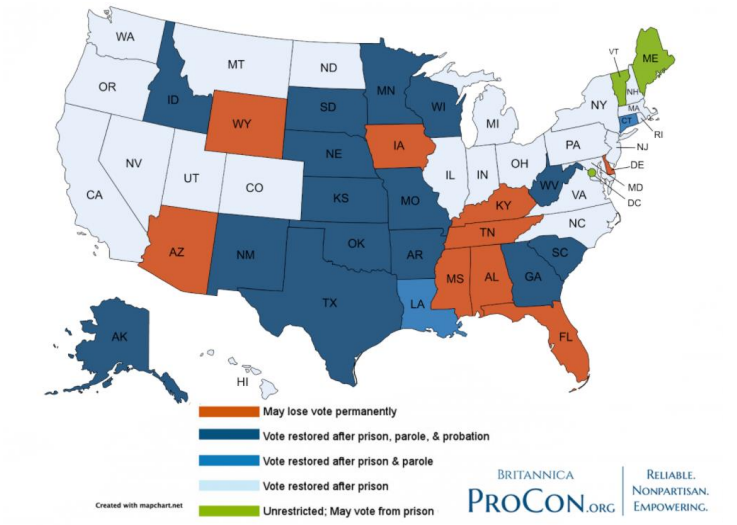
The application of such laws results in a considerable difficulty for former felons to integrate in the civil society once they are out of jail. Their electoral rights are limited. They have been denied employment in many fields, due to the fact that many job applications require to declare if their record of criminal offences. Such deprivation is very likely to trigger unemployment and create a vicious circle, in which people could resort to illicit employments such as drug dealing in order to make ends meet, and would therefore be re-arrested for having committed drug-related crimes. Furthermore, unemployed felon that are prevented from reentering the civil society are forced to occupy a pariah status and, even so often, tend to spiral down into drug abuse and addiction in order to cope with the feeling of being a social outcast.

The aforementioned laws deprive people with a criminal conviction of public benefits. As an example, food stamps can be off limit for those who have been convicted of a drug offence. The 1996 *Personal Responsibility and Work Opportunity Reconciliation Act* banned people with felony drug convictions from applying for *Supplemental Nutrition Assistance Program* (SNAP).[255] This is also a circumstance in which a people living in a state of poverty might have no other chance but to resort to illicit employments in order to feed their own families.

The law of some states also disenfranchises former felons from the right to vote for a time duration that can go from three years to life sentence. According to the law of nine states, people with a criminal record are disenfranchised from exercising their right to vote. The laws of 15 states decree that a former felon is eligible to vote after prison, parole and

[254] Administrative office of the U.S. Courts, Judicial Business of U.S. Courts Series, 1980-2011.
[255] The Network for Public Health Law, *Effects of Denial of SNAP Benefits on Persons with Felony Drug Convictions*, April 25th , 2020.

probation. Two states enfranchise former convicts to the right of vote after prison and probation. Therefore, former felons can exercise their right to vote immediately after prison only in 18 states and can vote directly from prison in only two.[256]



Source: ProCon.org, *State Voting Laws & Policies for People with Felony Convictions*

According to the estimates of the *Sentencing Project*, nowadays, more than five million people are disenfranchised from the right to vote, making up 2.27% of the voting age population. It is necessary to remark that back felons disenfranchised from their right to vote constitute 34% of the people that can vote due to criminal record, making up 6.2% of the black voting age population.[257]

As established by the 1994 *Violent Crime Control and Law Enforcement Act*, drug offenders and people with criminal convictions were denied public housing. This particular law is the cause for a substantial increase in homelessness. This trend is due to the fact that the majority of prisoners exits from jail lacking money or material possessions and not being able to afford any private mean of shelter. Due to the 1994 *Violent Crime Control and Law Enforcement Act*, nowadays, the rate of people who can neither request public

[256] Brennan Center for Justice, *Criminal Disenfranchisement Laws Across the United States*, brennancenter.org, April 7, 2021.
[257] Christopher Uggen, Ryan Larson, Sarah Shannon, and Arleth Pulido-Nava, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, sentencingproject.org, October 2020

housing nor be hosted in public housing amounts to 203 people *per* 10,000 formerly incarcerated people, as it would result in the eviction of the tenant due to the presence of a criminal record. (Couloute, 2018)[258]

Criminal convictions also prevent citizens from accessing to public education. De facto, the 1986 *Anti-Drug Abuse Act* prevented people with drug or criminal convictions from benefiting from student loans. Furthermore, in 1998, the *U.S. Congress* decreed a new question on the *Free Application for Federal Student Aid (FAFSA)* to prevent applicants with prior drug-related convictions receiving federal financial aid. Hence, if a person has been convicted of a crime and has served time in a Federal or State institution, he automatically becomes ineligible to receive *Federal Pell Grants of Federal Student Loans*. These particular pieces of legislation have a direct effect on the future of convicted people, as it foments former felons to drop out of education, diminishing their possibilities of finding a rewarding employment. As reported by the *Department of Education*, the number of people that have been denied a student loan due to a previous conviction amounts to approximately 200,000.[259]

4.6 The Relation between Prisons and Corporate America

The aim of this paragraph is to analyze how the Exception Clause of the *Thirteenth Amendment* is exploited by the carceral system.

The first focus will be the examination of the concept of prison work in the United States correctional system and the treatment of the inmates, who, due to the exception clause, can be put to forced labor.

[258] Couloute, L., *Nowhere to Go: Homelessness among formerly incarcerated people, Prison Policy Initiative*, August 2018.
[259] American Civil Liberties Union, *Injustice 101: Higher Education Act Denies Financial Aid to Students with Drug Convictions*, 2019.

The second stage of the analysis consists of the examination of the economic rationale of prison labor in the United States, with a particular focus on the trend of prison privatization from the 1980's up to the present day.

The last part of the research will enquire on the phenomenon of prison privatization, with particular attention to the reason why American corporations have a financial interest in keeping federal and state prison overpopulated. The very last part of the analysis will examine the case of the *American Legislative Exchange Council*, a nonprofit organization that reunites lawmakers and representatives of multinational corporation. The aim of said study will be to inquire if the joint legislation under the umbrella of ALEC has a particular impact on the rise of mass incarceration.

4.6.1 The Framework of Prison Labor in the United States

The United States are home to 2000 state and federal prisons, and each of them harbor highly profitable jobs. De facto, almost 60% of the nowadays prison population is engaged in forced labor.

Normally, inmates can engage in three particular types of jobs: they can work prison support jobs that consist in cooking, performing janitorial tasks, running laundries and doing clerical work in the canteen; they can be employed in agricultural jobs such as fieldwork, rising livestock and maintaining farm equipment; lastly, private prisons own manufacturing facilities where inmates engage in the crafting of products that are then sold by the companies to which the government has out contracted said prison.

A study carried by the thinktank *Prison Policy Initiative* demonstrated that, on average, inmates are paid $ 0.86 to $ 3.45 per day, which is well below the average federal minimum wage, that amounts to $7.25 per hour. On the other hand, in the states of Texas, Georgia, Arkansas and Alabama, prisoners do not receive any type of remuneration.

Although being highly dehumanizing, the underpayment of prison labor is condoned by the Constitution of the United States. Since the *Exception Clause* of the *Thirteenth Amendment* authorizes the enslavement of people convicted of a felony, there is no obligation for the

employer neither to remunerate inmates not to make sure that they are working on a voluntary basis.

Furthermore, prison labor is highly detrimental for convicts, both in terms of job perspectives outside the prison and financially wise.

The working experience that inmates acquire in prison can have little to no impact on their careers once they are released. As a matter of fact, licensing boards can deny licenses to ex-offenders. Such prohibition leads to a high unemployment rate among formerly convicted people, incrementing the rate of recidivism, which currently amounts to 44%.[260]

Prison labor is also financially unfavorable for prisoners. Underpaid inmates often have no possibility to save money in sight of their release because of the large costs of prison services and fees. The average cost of a medical co-pay in prison amounts to $ 2-5, which is a prohibitive cost to inmates earning $ 0.86 to $ 3.45 per day. One further service that can dry up the wages of inmates are telephone calls. Said service, which is provided by private telecom companies such as *AT&T* and *Securus Technologies* can cost more than a dollar per minute. A further fee that has a direct financial impact on the inmates' families is the one related to money transfer. De facto, the companies that manage this service can charge the donor fees as high as 45% of the transaction. (Alexander, 2010)[261]

The current system of low wages and high cost is detrimental for both prisoners and their families, which are likely to go in deep debt for carceral expenses, as a matter of fact, the *Ella Baker Center for Human Rights* has demonstrated that 34% of families reported going into debt to pay for phone calls or visitations.[262]

This system appears to be beneficial only for companies who manage to profit from prison labor. The following subparagraph is aimed at explaining what the economic rationale

[260] National Institute of Justice, An Overview of Offender Reentry, 2018.
[261] Alexander, M., *The New Jim Crow: Mass Incarceration in the age of Colorblindness*, New York, The New Press, 2010.
[262] Ella Baker Center for Human Rights, *Who Pays? The True Cost of Incarceration on Families*, September 13th, 2015.

behind prison labor and why this represents such a great source of investment for American corporations.

4.6.2 The economic Rationale of Prison Labor

In the capitalist economy of the United States, imprisonment has a determinate collocation and plays a paramount role. As theorized by sociologist Erik Wright, underclasses such as prisoners cease to have economic power, since they are no longer able to be employed in the labor market and can't virtually produce wealth. (Wright, 1997)[263]

As already said, since 1970, when Richard Nixon declared the war on drugs, the number of prison inmates has exponentially risen in a matter of few years. As a consequence, the prison population has become a wide pool of highly exploitable people that could not enter the labor market for a given period of time.

The exploitation of those people is legally allowed by the exception clause of the *Thirteenth Amendment*, which authorizes the enslavement of people that have been criminally convicted. Hence, the prison complex, or whoever is in charge of the prisoners, has no constitutional limit in benefitting from forced and unwilling prison labor. (Smith, 2008)[264]

De facto, sociologist Loic Waquant supposes that the current system of incarceration extracts labor from people that would otherwise constitute a surplus, as they would be unexploitable in terms of economic production. (Waquant, 2001)[265]

The same line of reasoning can be applied to unemployed people, who constitute a burden for society. The people living in inner-city areas, which are mostly of African American and Latino heritage, constitute a preponderant percentage of the unemployed US population. The same demographic was targeted by the media campaign of the war on drugs policies as the most likely to deal and consume drugs. Thanks to those policies, a

[263] Wright, E., *Class counts: Comparative studies in Class analysis*, New York, Cambridge University Press, 1997.
[264] Smith, E., *Incarceration: A Tool for Racial Segregation and Labor Exploitation*, in "Race, Gender and Class", 2008, 79-97.
[265] Wacquant, L., *Deadly symbiosis: Rethinking race and imprisonment in twenty-first-century America*, in "Punishment & Society" , 2001, 95-134

high number of unemployed people were charged for loitering and drug dealing and, once they were convicted, forced to work for little to no retribution. (Mauer, 2003)[266]

The enforcement of *tough-on-crime* policies under the presidential administration of Nixon, Reagan and Clinton resulted in a high increase of prison population created a highly exploitable labor pool of people who were legally forced to work for free. These circumstances incentivized multinational corporations to capitalize on mass incarceration. From the 1980's, corporations started entering into contract with the government in order to capitalize out of a federal or state prison. In the contract, the government states the basis for payment to the corporation, that is often directly proportional to the number of inmates of the prison house. The privatization of a prison is an economical relief for the Government since many burdens are taken off the government and but onto the private company at issue. At the same time, the acquisition of a federal prison allows the corporation to exploit prison labor in order to maximize their revenues by cutting production costs, since the Thirteenth Amendment allows it not to pay the inmates. (Gotsch, 2018)[267]

It is therefore assumable that companies that have invested in prison privatization are interested in keeping *though-on-crime* laws in order to keep prisons as crowded as possible. As a matter of fact, companies manage to keep the status quo by having though on crime laws approved thanks to the cooperation with lawmakers in lobbying groups.

The aim of the following chapter is to investigate how the cooperation of lawmakers and corporate America resulted in a profusion of state and federal laws aimed at keeping the prisons full.

4.6.3 The Cooperation between Lawmakers and private Companies on the Drafting of penal Laws: the *American Legislative Exchange Council*

The *American Legislative Exchange Council*, also known as ALEC, advertises itself as

[266] Mauer, M., *Comparative international rates of incarceration: An examination of causes and trends*, in "The sentencing Project, 2003.
[267] Gotsch, K., *Capitalizing on Mass Incarceration, U.S. Growth in Private Prions*, in "The Sentencing Project", August 2nd, 2018.

"A nonpartisan membership association for conservative state lawmakers sharing a common belief in limited government, free markets, federalism and individual liberties."[268]

As discovered by an intensive work of inquire on the behalf of newspaper "The Nation" and the non-profit organization *Center for Media and Democracy*, ALEC's main activities consist in forums for lawmakers and representatives of private companies jointly working to create model legislation that can be introduced to state legislatures.

ALEC came into the public eye in 2010, when over 800 resolutions and model bills were leaked, revealing the interest of companies pushing those model legislations to lawmakers through ALEC's task forces.[269]

Among the companies inside the American Legislative Exchange Council, there are or have been many that make a large percentage of their revenue by profiting from prison labor, such as *DELL* or *McDonalds*, as well as companies providing basic services to inmates such as *AT&T* and *ExxonMobil*. (Elk, 2011)[270]

One of the most engaged sponsors of the Council was the private prison company CoreCivic, formerly known as Correction Corporation of America. CoreCivic is by far the corporation that benefited most out of its ALEC membership. Through ALEC, CoreCivic managed shaping crime policy across the country, allowing prison privatization as well as the rapid increase in criminalization. As a matter of fact, the Council pushed forward several politicizes to increase the number of people in prison and to lengthen the sentences of people who are in prison. CoreCivic directly benefited and directly profited from its investment in ALEC, the American Legislative Exchange Council. Furthermore, the American people in many ways, were harmed by these policies. And the American people in many ways were harmed by these policies due to the mass incarceration of people, particularly people of color.

[268] ALEC website alec.org, accessed August 27th, 2021.
[269] The forums in which lawmakers and companies converge under the umbrella of ALEC are formally named "task forces.
[270] Elk, M., Sloan, B., *The Hidden History of ALEC and Prison Labor*, in "The Nation", August 11th, 2011.

CoreCivic almost paid $20,000 per year as an association member. The company devolved the funds to draft model legislations impacting sentencing, three strike laws and truth in sentencing policies, hand in hand with prison privatization policies. (Gotsh, 2018)[271]

Among the model bills that have been disclosed by an anonymous whistleblower to "The Nation" and the Center for Media and Democracy, there were two particular ones aimed at lengthening the duration of prison sentences: the Three Strikes Law gives repeat offenders twenty-five years to life in prison once they are convicted for the third time, even though they are charged for minor offenses. On the other hand, *Truth in Sentencing* requires prisoners to serve most of their time in prison without a chance of parole.

Versions of *Truth in Sentencing* and three strikes law had been passed by forty out of fifty states during the 1990's. The enforcement of the three strikes law resulted in a significant increase of the incarceration rate. For instance, in California, the first state that passed the law at issue, the prison population has highly expanded since 1993, since above 80,000 second strikers and 7,500 third-strikers are currently in prison. (Joshi, 2021)[272]

The enforcement of truth-in-sentencing laws resulted in considerable changes in prison population. Given the fact that the 80% rule was enacted in the early to mid-nineties, only few people that have been convicted of class A or first-degree felonies are now free. (Travis, 2014)[273]

There are four types of ALEC members that can highly benefit from the extension of the average duration of prison sentences. The first group is comprised of corporations that are directly involved in the provision of private prison facilities and services. The second type of ALEC member sells products/services to prisoners and their families. A third set of ALEC members benefit from cheap prison labor. A fourth type of ALEC member benefits

[271] Gotsch, K., *Capitalizing on Mass Incarceration, U.S. Growth in Private Prions*, in "The Sentencing Project", August 2nd, 2018.
[272] Joshi, A., *Explainer: Three Strikes Laws and their Effects*, in "Interrogating Justice", July 23th, 2021.
[273] Travis, T., Western, B., Redburn, S., *The Growth of Incarceration in the United States: Exploring causes and consequences*, Washington D.C., The National Academies Press, 2014.

from expansion of the PIC because they own substantial stock in private prison firms. (Heldman, 2016)[274]

4.7 Achievements and Struggles

The aim of this paragraph is to investigate on the achievement of modern-day activism against systemic racism vis-à-vis the federal and state correctional system. Such analysis will focus on the recent Congress Joint Resolution proposing an amendment to the *Constitution* of the United States to prohibit the use of slavery and involuntary servitude as a punishment for a crime, by abrogating the exception clause of the *Thirteenth Amendment*.

4.7.1 2021: Abolition of the *Exception Clause*

In the last three years, three out of fifty States have managed to repeal exceptions to slavery and involuntary servitude from their State constitutions. In 2018, Colorado was the first state to repeal the exception clause. (Chappel, 2018)[275] In 2020, Utah and Nebraska saw the victory of the referenda to repeal similar clauses in their constitution. (Deese, 2020)[276]

On June 13th 2021[277], American lawmakers revived the call for the repeal of the exception clause from the *Thirteenth Amendment*. The legislation to revise the *Thirteenth Amendment* was introduced by Oregon Senator Jeff Merkley in the Senate[278] and Georgia Representative Nikema Williams in the *House of Representatives*[279]. The aim of the so-

[274] Heldman, C., *Hidden corporate profits in the U.S. prison system: the unorthodox policy-making of the American Legislative Exchange Council*, in "Contemporary Justice Review", June 18th, 2016, 380-400.
[275] Chappel, B, *Colorado Votes To Abolish Slavery, 2 Years After Similar Amendment Failed*, in "npr News", november 7th 2018.
[276] Deese, K., Utah, *Nebraska voters approve measures stripping slavery language from state constitutions*, in "The Hill", April 11th, 2020.
[277] "Juneteenth" is the crasis between the words June and Nineteenth. On this day, emancipation of enslaved people in the United States is commemorated, as, on June 19th, Major General Gordon Granger came to Galveston, Texas, to announce the end of the Civil War and slavery.
[278] S.J.Res.21 - *A joint resolution proposing an amendment to the Constitution of the United States to prohibit the use of slavery and involuntary servitude as a punishment for a crime*.117th Congress (2021-2022)
[279] H.J.Res.53 - *Proposing an amendment to the Constitution of the United States to prohibit the use of slavery and involuntary servitude as a punishment for a crime*.117th Congress (2021-2022)

called "*Abolition Amendment*" would be to abolish the clause allowing slavery as a form of criminal punishment.

The two democratic members of the *Congress* justified the proposal by stating that this particular clause brought generations of African Americans to resent from mass incarceration, being incarcerated for minor crimes, exploited by the corporations that profit from prison labor and condemning them to an outcast state in the American society for the rest of their lives. For this reason, Juneteenth was chosen by the lawmakers as a symbolic day to address the clause of the *Constitution* of the United States that allows systemic racism to play a significant role in the American society.

The *Abolition Amendment* was introduced as a joint resolution earlier on December 2nd, 2020. The resolution was supported by the Democratic members of both the House and the Senate. Although the issue of mass incarceration and systemic racism had gained more relevance thanks to the protests of 2020, the joint resolution failed to be passed before the end of the session. Seven months after, the amendment was reintroduced with the hope to act as a catalyst for a national movement against the *Exception Clause*. On this occasion, the issue of the abolition of the clause has gained more relevance since the cause has been endorsed by more than 70 national organizations all over the country. (Tang, 2021)[280]

As a change to the constitution, the abolition amendment would need the approval of two-thirds of the members of each *Chamber of the Congress* and three-quarters of the states.[281]

It is fairly likely that the proposal will encounter the resistance of the head of the corporations that profit from prison labor. The eventual approval of the amendment would decree a fundamental leap forward in the history of the United States since it would recognize the universality of basic human rights for the first time in the history of the Us Constitution. (Foner, 2020)[282]

[280] Tang, T., *Lawmakers mark Juneteenth by reviving the "Abolition Amendment*", in "AP News", June 18th 2021.
[281] U. S. Const. amend. VI.
[282] Foner, E., *We Are Not Done With Abolition*, in "The New York Times", December 15th, 2020.

4.6.3 Probability of the Passing of the joint Resolution

In order to be proposed, the *Abolition Amendment* must receive either two-thirds approval in both houses of the *Congress* and the ratification of three quarters of the States, or a request from two-thirds of state legislatures to call to a national convention.

The amendment must then be ratified by three quarters of all states. In order to do so, each state can either have its legislature vote on the amendment or it can hold a separate ratification convention with delegates elected by voters.

The House version, which has attracted twenty-two cosponsors[283], and the Senate version, with nine cosponsors[284] Sen. Van Hollen, Chris (Maryland, Democratic); Sen. Markey, Edward J. (Massachusetts, Democratic); Sen. Wyden, Ron (Oregon, Democratic); Sen. Padilla, Alex (California, Democratic); Sen. Hirono, Mazie K. (Hawaii, Democratic); Sen. Sanders, Bernard (Vermont, Independent); Sen. Booker, Cory A. (New Jersey, Democratic); Sen. Durbin, Richard J. (Illinois, Democratic); Sen. Menendez, Robert (New Jersey, Democratic). Up to date, both await the potential vote of their respective Judiciary committees. The fact that today's America has reached the highest rate of polarization since the *Civil War* will eventually influence the possibility of passing of the amendment, which is mainly supported by democratic senators and representatives.

[283] Rep. Bush, Cori (Missouri, Democratic); Rep. Bass, Karen (California, Democratic); Del. Norton, Eleanor Holmes (District of Columbia, Democratic); Rep. Johnson, Henry C. "Hank," Jr. (Georgia, Democratic); Rep. Davis, Danny K. (Illinois, Democratic); Rep. Huffman, Jared (California, Democratic); Rep. Adams, Alma S. (North Carolina, Democratic); Rep. Carson, Andre (Indiana, Democratic); Rep. Clark, Katherine M. (Massachusetts, Democratic); Rep. Cleaver, Emanuel (Missouri, Democratic); Rep. Foster, Bill (Illinois, Democratic); Rep. Pressley, Ayanna (Massachusetts, Democratic); Rep. Watson Coleman, Bonnie (New Jersey, Democratic); Rep. Green, Al (Texas, Democratic); Rep. Lee, Barbara (California, Democratic); Rep. Hayes, Jahana (Connecticut, Democratic); Rep. Torres, Ritchie (New York, Democratic); Rep. Jones, Mondaire (New York, Democratic); Rep. Jones, Mondaire (New York, Democratic); Rep. Spanberger, Abigail Davis (Virginia, Democratic); Rep. Pocan, Mark (Winsconsin, Democratic); Rep. Nadler, Jerrold (New York, Democratic); Rep. Bowman, Jamaal (New York, Democratic).

[284] Sen. Van Hollen, Chris (Maryland, Democratic); Sen. Markey, Edward J. (Massachusetts, Democratic); Sen. Wyden, Ron (Oregon, Democratic); Sen. Padilla, Alex (California, Democratic); Sen. Hirono, Mazie K. (Hawaii, Democratic); Sen. Sanders, Bernard (Vermont, Independent); Sen. Booker, Cory A. (New Jersey, Democratic); Sen. Durbin, Richard J. (Illinois, Democratic); Sen. Menendez, Robert (New Jersey, Democratic).

Nonetheless, sponsor Merkley is rather confident that his Republican colleagues will overcome partisanship in the name of the abolition of slavery in all shapes of forms and thus support the legislation. (Tang, 2021)[285]

4.7.3 What would the Consequences of the *Abolition Amendment* be

The abolition of the *Exception Clause* won't be able to ban prison labor for good, since there is a plethora of statutes and regulations that allow prison work.

Nonetheless, the constitutional abolition of involuntary servitude in the carceral system will lead to the regulation of prison labor, such as the establishment of a minimum wage and a maximum number of working hours per day. The raise of wages would reduce the inside prison outside prison differential and allow inmates to build up savings for when they are released, preventing them from resorting to criminal activity to get by, and therefore perpetuating.

According to Senator Merkley, the signing of the *Abolition Amendment* into law would allow a higher intervention domain of programs aimed at allowing inmates to pursue employment or education or vocational work, so that they will have a foundation to rebuild their life as active part of society. However, such achievement would also imply the abolition of those laws preventing people with a criminal record from getting licenses.[286]

The regulation of prison work should result in the amendment of FLSA[287] so that the act would also cover prison work, therefore guaranteeing firm standards, the first standard being the voluntary base of work, and the second being the status of contractual employment with the company to which the prison facility has been out contracted. By resorting to the final ruling of *Henthom v. Dept. of Navy*[288], an inmate participating in a non-obligatory work release program, where he is retributed by an outside employer,

[285] Tang, T., Lawmakers mark Juneteenth by reviving the "Abolition Amendment", in "AP News", June 18th 2021.
[286] The Briefing, *Ending Legalized Slavery: Interview with senator Jeff Merkley*, October 7th 2020.
[287] Fair Labor Standards Act
[288] Henthom v. Dept. of Navy, 29 F.2d 682, 686 (D.C. Cir. 1994).

should be able to state a claim under the FLSA for compensation at the minimum wage. (Lang, 2002)[289]

Those who do not support the Joint Proposal affirm that there is no need to award prisoners a minimum wage, after the whole American jurisprudence on minimum wage never applies to prisoners. To defend their argument, they used the final sentence of Vanskike v. Peters, which stipulated:

> *"Requiring the payment of minimum wage for a prisoner's work in prison would not further the policy of ensuring a "minimum standard of living," because a prisoner's minimum standard of living is established by state policy; it is not substantially affected by wages received by the prisoner."*[290]

4.7 Conclusion

Writer and activist Michelle Alexander points out five characteristics of the *Jim Crow* system that perpetuate themselves in mass incarceration.

In the same way *Jim Crow* prevented people from accessing the same facilities of white people, *though-on-crime* policies have brought to the incarceration of black and Latino people living in urban areas and, upon their release, they forbid those people from accessing to licenses, public housing and student loans.

Jim Crow laws prevented black people from exercising their right to vote though poll taxes and literacy tests. In a similar way, black voters are eliminated through the enforcement of though on crime policies that, due to the media frenzy criminalizing black people as drug consumers, were arrested en masse. Through mass incarceration, one in seven black men has not the right to vote, since he is in jail or has a criminal record, hence, the potential of the black electorate is decimated. (Fellner, 1998)[291]

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[289] Lang, M., *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should Be Extended to Prisoner Workers*, in "University of Pennsylvania Journal of Business Law, 2002, 191-209.
[290] Vanskike v. Peters, 974 F.2d 806 (7th Cir. 1992).
[291] Fellner, J., Mauer, M., *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, in "The Sentencing Project", October 1st, 1998.

Another phenomenon that approximates *Jim Crow* with mass incarceration is the exclusion of former felons from juries. Combined with the statistically proven fact that black people make up 38.2% of the prison population, such hinderance results in the diffusion of all-white, and possibly racially biased juries, that decrease the possibilities of a black defendant not to be convicted. (Kalt, 2003)[292]

Just like for the whole African American community under the *Jim Crow* Laws, segregation is nowadays applied to the people being released from prison. In point of fact, former felons are forced to get out of prison with little to no money and go back to the ghetto with a very high probability of unemployment. This trend leads to a decrease of unemployment rate in inner-city areas, an increase of criminal rate due to the common need of finding an alternative way to gain money. Not only do these circumstances bring to the recidivism of former felons, but also in the alienation of a high percentage of the US population from the civil society. (Wacquant, 2000)[293] This vicious cycle is also exploited by the multinational that, thanks to prison privatization, have started profiting of off prison labor, gaining a high percentage of their revenue from this particular activity.

The last parallelism between *Jim Crow* and mass incarceration is the symbolic production of race. The number of arrests and the high unemployment rate in those areas that are most commonly inhabited by people of color from the 1970's helped conservative politicians (with the exception of Democrat Bill Clinton) criminalizing black people and restoring systemic racism within the enforcement of law and order. (Pager, 2007)[294]

Nonetheless, there are also four major dissimilarities between *Jim Crow* and mass incarceration as social phenomena, which make it difficult to solve this problem through popular mobilization against racist institutions, as the *Civil Rights Movement* did.

The first difference lays in the fact that, in the age of colorblindness, the hatred for black people is dismissed, while slavery is still applicable criminals. Therefore, if racially neutral

[292] Kalt, B., *The Exclusion of Felons from Jury Service*, in "American University Law Review", 2003, 65.
[293] Wacquant L., *The New 'Peculiar Institution': On the Prison as Surrogate Ghetto*, in "Theoretical Criminology", 2000, 377–89.
[294] Pager, D., *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*, University of Chicago Press, 2007.

policies like the *Anti-Drug Abuse Act* allow the criminalization of a whole demographic, the Thirteenth Amendment still authorizes its enslavement.

One of the collateral effects of systemic racism in mass incarceration is the fact that, in the aftermath of the *War on Drugs* campaigns, black people are not the only subject that are likely to end up in prison and in a situation of forced labor. While people residing in suburban areas are less likely to be arrested for drug trafficking and possession, white people living in poor inner-city areas have a higher probability, although not as high as African Americans, to be stopped, searched, arrested and convicted. This creates in poor white people a sentiment of hatred towards black people living in the same conditions and leads to the increase of supremacist line of reasoning in the white poor us population.

Nowadays, the racial stigma that depicts black people as criminals no longer unites the African American community but turns it against itself. *De facto,* a significant percentage of the African American community living in inner-city areas is convinced that the elevated crime rate in the neighborhoods is the main reason why black people constantly undergo racial biases as a whole ethnic group. Such division in the community is what hinder activist organizations to flourish and converge in a fight for the actual eradication of systemic racism in the American society.

The aforementioned resemblances between *Jim Crow* and mass incarceration justify the thesis according to which the policies that caused the latter are racially biased. On the other hand, the dissimilarities between the two represent the characteristics that hurdle activists and politicians to denounce such laws and policies as racist. The main differences between today's mass incarceration and *Jim Crow* lay in systemic racism: the systems and structures that have procedures or processes that disadvantages African Americans without directly adopting a racist language. Though on crime laws can fit under this category.

As stated by Oregon Senator Jeff Merkley, cosponsor of the *Abolition Amendment,* the striking out of the exception clause from the *Thirteenth Amendment* would made a significant difference in the struggle against systemic racism in the United States. Not only would the prohibition to enslave criminally convicted people universalize fundamental

rights in the US *Constitution*, but it would also allow the regulation of prison labor. Said change in the Constitution would guarantee inmates acceptable working standards, a minimum wage, the promotion of meaningful re-entry programs allowing inmates to receive training and education, in order to find a vocational job, they can transform into a career once they are released. Such precautions would prevent the perpetuation of minor crimes in inner-city areas and the recidivism of former felons, which is an issue that mostly affects black people living in such neighborhoods, by allowing them to have savings to build upon and a job that would make them active part of the civil society.

Conclusion

At the beginning of this dissertation, I posed the following research question:

"What are the vestiges of slavery that have survived the legislative measures that were aimed at abolishing it?"

The text is divided into four chapters, that are organized in order to give an exhaustive answer to the above question.

The first chapter is focused on the legislative framework of the practice of slavery in the United States. The conclusion that has been drawn from said analysis proves that the original definition of *slave* was provided only in 1857, through the final ruling of the *Dred Scott v. Sandford* of the *Supreme Court*. According to Justice Roger Brooke Taney, there was no distinctive method that could be employed in order to determine the legal status of slave, and that descending from a black mother was enough for an individual to be identified as such.

Such condition was undermined a decade later, in the wake of the *Civil War*. As mentioned in the second chapter, even before that the conflict between the Union and Confederate States drew to a close, the abolitionist president Abraham Lincoln started promoting the passing and ratification of the *Thirteenth Amendment* in the Congress, in order to achieve the abolition of slavery. In doing so, Lincoln prevented the slaveholding states of the South from voicing any possible reservation. Nonetheless, the practice of enslavement was never completely removed from the *US Constitution*, since its biggest vestige remained intact through the *Exception Clause* of the *Thirteenth Amendment*, which, to this day, authorizes the enslavement of people convicted of any crime.

In accordance with the historical record of the Lincoln Presidential Administration, the *Exception Clause* was kept within the text of the *Thirteenth Amendment* in order not to

enshrine the universality of the constitutional rights and still make sure that convict felons would have been harshly punished.

Thanks to this constitutional loophole, the end of the Nineteenth Century witnessed the ratification of the *Black Codes*, which are the laws that condemn minor crimes such as loitering, namely, a felony which was commonly associated to newly freed slaves, who were consequently convicted and re enslaved. Such laws, as mentioned in the third chapter of the dissertation, have been abolished thanks to the ratification of the *Reconstructions Amendments* (the 14th and the 15th) which respectively enshrined the universal right to equality and the extension of the right to vote to every male citizen. Nonetheless, the limit of these legislative measures consisted both in the fact that the *Exception Clause* of the *Thirteenth Amendment* was not repealed, and that no measure against racial discrimination in the everyday life was passed.

In this way, laws foreseeing racial segregation in public facilities were took over the state legal system. Moreover, as demonstrated in the third chapter of this thesis, racial segregation in the Us society was highly promoted on the federal level by President Woodrow Wilson, who enforced the *"Separate but Equal"* doctrine both in federal offices and in the *US Army*.

Many of the laws allowing racial segregation were dismantled throughout the 1950's and the 1960's, starting from three ruling *Brown v. Board of Education* of 1954, which allowed the African American community to attend the same public schools of white people.

Those achievements were attained thanks to the *Civil Rights Movement*. Through its non-violent *modus operandi*, the movement managed to mobilize the American population and government (especially the Johnson Administration) and brought to the ratification of the *Civil Rights Ac*t in 1964, the *Voting Rights Act* in 1965 and the *Fair Housing Rights Act* in 1968.

However, the decay of the *Civil Right Movement* – caused by the escalation of violence on the behalf of the supremacist population of the South with regard to the non-violent protests – prevented the total attainment of its objectives, causing the sedimentation of racial segregation in the nowadays society through systemic racism. Systemic racism consists in the phenomenon that occurs when policies, laws and administrative practices perpetuate, strengthen, or produce social inequality and malaise to the disadvantage of minorities.

In this day and age, the biggest vestige of slavery lies in the exception clause, which, along with systemic racism, finds its most significant expression in the Us prison industrial complex. In this regard, the fourth and last chapter is focused on the analysis of how the exception clause is correlated with mass incarceration and how the carceral system is

characterized by racial prejudices, which are inherent to its history and its current functioning.

Nowadays, one out of two African American adult males are detained in a federal or state prison. This particular trend started affirming itself in the 1960's, simultaneously to the decay of the *Civil Right Movement*. At the end of the decade, President Richard Nixon inaugurated the *War on Drugs* era, which was later brought forward by Reagan and Clinton. The *War on Drug* consisted in a plethora of tough-on-crime policies which increased the level of patrolling and the intensity of the punishments with regard to the traffic and consumption of drugs. These policies were characterized by the great impact they had on inner city areas, predominantly inhabited by African American communities, which were more likely to consume crack cocaine. Such urban areas were subjected to intense patrolling and drug searching and resulted in the rise of the arrest rate in those areas, which became much higher than the one of the suburbs, mostly inhabited by white people who were likely to consume powder cocaine at the same rate.

The relation between cocaine and crack (also called smokable cocaine) was a leitmotiv in the unfolding of the *War on Drugs*. De facto, as established by the *Anti-Drug Abuse Act* of 1986, the possession of one gram of crack would have resulted in the same prison sentence of 100 grams of powder cocaine. This legislative measure caused the prolonged detention of a large number of African American citizens, who were incarcerated for the consumption or traffic of the cheap drug, whereas their white counterpart, which was mostly arrested for cocaine consumption, got to spend a relatively shorter sentence.

In the carceral system of the United States, forced labor is allowed by the *Thirteenth Amendment*, which authorizes the execution of working tasks that are neither regulated nor instrumental to the future of the convict. As a matter of fact, many licensing boards prohibit former convicts from getting licenses. This legal institution is the reason of the high recidivism rate in the poorest communities, where the low probability of finding a steady job forces these people to engage in drug related activities in order to make ends meet.

The final answer to the research question I posed at the beginning of my dissertation is the following: the solution to the vicious cycle throughout which the Us prison population is still enslaved, lays in the abolition of the Exeption clause of the *Thirteenth Amendment*. There is no way the United States society can be described as egalitarian, when the practice that allowed the subjugation of a whole ethnic group is still allowed by the constitution. Said measure has been proposed by means of a joint resolution of the Senate and the *House of Representatives*, which has been presented in June 2021.

The explicit intention of the resolution's sponsors, senator Jeff Merkley and representative Nikema Williams, is the one to eradicate systemic racism from the Us society by outlawing

slavery one and for all. However, the resolution still has to be passed both by the *Senate* and the *House of Representatives* and be signed by the President in order to become effective.

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Summary

The practice of slavery has been abolished 156 years ago, in spite of that, systemic racism is still a stigma in the nowadays US society. The term "systemic racism" has been coined in 1967 by activists Stockely Carmichael and Charles Harmilton and it summarizes every situation in which policies, laws and administrative practices reinforce or produce the social malaise of a disadvantaged minority.

As we have ushered in the 21st Century, racism has been labeled as unethical and inadmissible in every social context, amid the fight of the *Civil Right Movement* in order to end racial segregation in the past century. In spite of that, the black community is still segregated from the Us society. As a matter of fact, it is deprived of opportunities to exit from urban areas, where most of the community resides. Furthermore, African American people living in marginalized inner-city areas are very likely to engage in illicit traffics, due to, as proved by statistic studies, the lack of institutions providing means of social integration.

In view of the above, this dissertation shall take account of the subject of investigating what the vestiges of slavery in the nowadays society are, in order to find an explanation of why the black community is still denied the same opportunities of the white one and still struggles to fully integrate in the Us society, despite the fact that slavery and racial segregation have been declared against the law in the past two centuries.

The *modus operandi* of this study will be based on the analysis of the legal framework related to slavery and racial segregation in four specific periods of time: from the founding of the north American colonies to the outbreak of the *Civil War*; from the *Civil War* to the full ratification of the Thirteenth Amendment; from the late 19th Century to the ratification of the

Fair Housing Act, which also marks the end of the activity of the *Civil Rights Movement;* from the Nixon Administration to the present time.

The first chapter is mainly focused on the purpose of finding how the legal definition of slave evolved from the 17th to the 19th Century, in a time when such practice was still allowed by the law. This study will concentrate on the analysis of the rights and limitations of all those subjects who held the status of slaves from the establishment of the first colonies to the outbreak of the Civil War.

In the 17th Century, a legal definition of either slave or slavery was absent from the jurisprudence of the states that colonized North America, namely England, Spain, France and the Netherlands. In spite of that, the legal culture of those particular states was based on Roman Law, which allowed enslavement and the creation of a slave system *per se*, as written in the *Codex Iuris Civilis*.

Throughout the 18th Century, the quest for a legal definition of *slave* in the newly founded United States was intensified by the fact that many colonies in the northern region of the country started to outlaw it, whereas southern colonies continued profiting off the practice. In the *Constitutional Convention* of 1787, when the constitution of the United States was drafted by the founding fathers, the discussion on how to define the status of slave was still open.

In order to give the Southern states more representation in the *Congress*, the constitutional framers compromised on valuing every single Slave as three fifth of a person in article 1 section 2 of the *Constitution*. Despite the electoral purpose of the clause, it determined the consideration of slaves as human beings by the Constitution. Ratified during the 1787 *Constitutional Convention*, the *Slave Trade Clause* addressed slaves as people, in order to be coherent with the *Three Fifth Clause*.

Notwithstanding, the legal status of people that slaves had been given by the two clauses was not confirmed in further legislations. *De facto*, they resulted excluded from the *Fifth Amendment* in 1791, which articulates procedural safeguards designed to protect the rights of the criminally accused and to secure life, liberty, and property. Considering that awarding

them the right to liberty would have made slavery unconstitutional. In order to have slave excluded from the Amendment, the framers changed their legal status from people to commodity goods.

Throughout the 19th Century, the definition of slave was addressed by the *Supreme Court* through four cases law: the *Antelope case*; the *Amistad case*; *Prigg v. Pennsylvania*; *Dred Scott v. Sanford*.

On the occasion of the final judgement of the Antelope case in 1825, the *Supreme Court* stipulated that African people on an international vessel belonging to a state allowing slavery were still authorized to sell the slaves. Consequently, the rationale of the case consisted in the fact that slaves were still considered as commodity goods that could be exchanged from one state to another.

In 1841, the final ruling of the *Amistad case law* stipulated that African American people born in freedom had to be legally identified as free individuals. However, the ruling did not apply to people born in slavery, who were still considered commodity goods.

The following year, the final ruling of the *Prigg v. Pennsylvania* case stipulated that slave masters had the full-fledged rights to seize fugitive slaves, as they were not identified as human beings.

The last definition of the status of slave provided before the watershed of the *Civil War* (1861-1865) and the outlawing of slavery in 1965 was given by the *Supreme Court* in 1857, as a final ruling of the case *Dred Scott v. Sanford*. In this instance, black people in general were not considered citizens of the Us and therefore could not even benefit from the rights of the constitution. In point of fact, race was directly associated with legal status, since the descendance from a black mother was the only criteria that determined the status of slave.

The aim of the second chapter is to investigate in which way the abolition of slavery influenced the career of the *Civil War* and, in second analysis, the limitations of the Thirteenth Amendment, which abolished slavery but not in toto.

The *Civil War* broke out for a number of reasons among which slavery, that was one of the most paramount. In point of fact, forced unpaid labor was employed in the agricultural sector, and was the main mean of subsistence for the southern economy.

Hence, the will of the States of the North to abolish slavery triggered the attempt of the southern ones to secede, forming the so-called Confederate states and causing the outbreak of the *Civil War* in 1861. After the battle of Gettysburg, which constituted a military turning point in favor of the Union (i.e., the abolitionists states of the North), abolitionist President Abraham Lincoln took advantage of the situation and decided to abolish slavery before the soon to be happening reunification. By passing the *Emancipation Proclamation* in 1863, the Republican President prevented southern states from showing reserves and stall the abolition.

Nonetheless, the *Emancipation Proclamation* was not sufficient to abolish slavery, since it was only a *pro tempore* law and would have lost its effectiveness once the war was over. Therefore, President Lincoln decided to jump-start the drafting process of the *Constitutional Amendment* that would have abolished slavery. After a very heated discussion, the *Thirteenth Amendment* passed, nonetheless, it had a very significant limitation. In point of fact, the *Thirteenth Amendment* did not prohibited slavery *in toto*, but still allowed the enslavement of people who had been convicted of a crime. This particular clause, that to this day is referred to as the *Exception Clause*, was allowed in the constitution in order to counter the congressional trend that wanted to enshrine the equality of all human beings. Therefore, the clause was still enabling to enslave a significant percentage of the population.

At the beginning of the third chapter of the dissertation, an analysis on how the clause had been used in order to perpetrate slavery despite it being illegal is carried out.

The loophole that the *Exception Clause* constitutes was initially exploited by means of legislations outlawing behaviors that were typical of newly liberated slaves. In Virginia, a *Vagrancy Act* was passed 1866. Said legislative document outlawed the act of loitering, a very common activity for former slaves that still were not well-adjusted into society and had no shelter.

Similar laws were introduced by the lawmakers of the southern states and took the name of *Black Codes*. Both the Act and the state laws took advantage of the *Exception Clause* and exploited petty crimes in order to imprison a big amount of black people and lead them back into slavery. *Black Codes* were abolished by the passing of the *Fourteenth* and the *Fifteenth Amendments*, respectively outlawing racial discrimination *per se* and the denial of electoral rights on the account of race. Those two amendments would have given more agency to the black community if state legal systems, especially in the South, did not started passing laws enshrining the segregation of white and black people in public places in the first half of the 19th Century.

The first case law justifying such system was *Plessy v. Ferguson* in 1896, in which the *Supreme Court* deliberated that segregation laws related to public facilities did not violate the constitution's 14th Amendment, since it provided equal treatment to white and black people, even though in separated spaces. This led to a profusion of state laws prohibiting black people to attend the same public facilities as white people.

Said laws were named *Jim Crow*, so was the legal system that allowed racial segregation for the first half of the 19th Century. Not only were *Jim Crow* laws adopted by the state legal system, but also the federal one, under the presidential administration of Woodrow Wilson, the democratic President who promoted the "separate but equal" doctrine, enforcing racial segregation both in federal offices and the army.

The *Jim Crow* system was first undermined in 1954 with the *Brown v. Board of Education* case law. In this instance, the *Supreme Court* stipulated that the segregation of schools was unconstitutional since the services provided did not have the same quality. The *Brown v. Board of Education* final ruling was the event that jumpstarted the wave of protest of the *Civil Rights Movement*, an activist non-violent trend that took a stand for the dismantling of the institution of racial segregation.

The biggest achievements of the *Civil Rights Movement* were obtained under the Presidential administration of Democrat Lyndon B. Johnson. In 1964, the *Civil Rights Act* was signed into law, declaring racial segregation in public facilities illegal. In 1965, the Voting Rights

Act prohibited racial discrimination in voting by outlawing literacy tests and poll taxes. The following year, the *Fair Housing Act* outlawed discrimination in housing of people on the account of race. Such Act was signed into law with the aim of end aim of ending the segregation of black people in ghettos, allowing future generations to have the same opportunities of their white counterpart, a goal that, unfortunately, has still to be achieved.

After a decade of protests and dramatic events, due to the violent response of the supremacist population of the South, the *Civil Rights Movement*, far from having achieved all its goals of egalitarianism, started losing momentum. The two main reasons that justify the decay of the Movement are, in the first place, the killing of the charismatic leader Martin Luther King in 1968 and, on the other hand, the escalation of violence on the behalf of the white supremacist South, such as Bloody Sunday during the 1965 *March from Selma and Montgomery*, that was starting to become extremely harmful for the well-being of the non-violent activists.

With the signing into law of the *Civil Rights Act of 1964*, racial segregation was officially made unconstitutional. Nonetheless, the white conservative society is still able to exploit the Exception clause, in order to enslave a significant portion of the Us population, in which African American people constitute a significant percentage. As a matter of fact, 38% of the Us population is constituted by black people, and as reported by the *Federal Bureau of Prisons*, one in three black males in the United States has once been convicted of a crime and imprisoned.

The social phenomenon of mass incarceration has started developing fifty years ago at the federal level, through the promotion of the *War on Drugs* campaign, which was jumpstarted by Republican and conservative president Richard Nixon. Lyndon B. Johnson was the first democratic president that, following the lead of his predecessor John Fitzgerald Kennedy, endorsed laws that would have enfranchised the African American population in the society of the United States. Johnson's two presidential terms constituted a turning point for the Us political scene. As a matter of fact, the great deal of rights that the Johnson administration gave to the African American community brought this demographic to vote for the Democratic party instead of the Republican party. Such trend brought the Republican party to pursue the interest of a more conservative demographic in order to re-gain votes, and

started catering to the southern anti-black electorate. For this reason, Republican president Richard Nixon became a great supporter of the *Southern Strategy*. As the *Civil Rights Movement* activists were proving segregation laws unjust by violating them, southern lawmakers stressed the need for law and order, since the achievements of the African American community were perceived as a breakdown of the respect of law by the white population of the South.

Nixon's contribution to the war on drugs was the promotion of very strict measures to punish drug related crimes and the creation of the *Drug Enforcement Administration* (DEA), in order to guarantee an effective patrol when it came to drug-related crimes.

In spite of the fact that President Nixon allowed the rise of tough-on-crime policies in relation to drug-related crime, Ronald Reagan was the first Us president who caused the skyrocketing of the prison population through the strenuous promotion of *tough-on-crime* policies.

In 1986, the President signed the *Anti-Drug Abuse Act*, which enforced assiduous anti-drug police patrolling in those areas that were mostly inhabited by black people. Though-on-crime policies promoted by Reagan promised cash grants to any law enforcement agency that would have prioritized War on Drugs. Those measures led to a substantial increase in arrests for drug-trafficking or drug-possession in inner city areas where, in the 1980's, a crack-cocaine epidemy was affecting the black community. In relation to this historic fact, Reagan rose the minimum sentence for the possession and traffic of crack cocaine, a cheap drug that costed much longer sentence than the possession of cocaine, mostly consumed by white well-off people living in the suburbs.

Bill Clinton, who started his presidential mandate in 1993, was the first Democratic President to cause a further deterioration of the issue of mass incarceration. In point of fact, in 1994, Clinton issued the *Violent Crime Control and Law Enforcement Act*, which exacerbated the time sentences and punishments for drug-related crimes. The most relevant law that he ratified was the "Three-Strikes law" against recidivism, which condemned people that had been convicted of a felony three times to serve a mandatory life sentence in prison.

Furthermore, due to the fact that drug patrolling was especially widespread in the inner-city areas, mostly inhabited by the African American community, it triggered the rise in arrests and incarceration of black people. The particular reason for this circumstance is the bulimia of people trialed for crimes, that led many lawyers of the *Public Defender's System* to suggest those people to plead guilty and accept a plea deal instead of waiting to be proved not guilty.

The *Exception Clause* can be considered as a vestige of slavery, since private corporations have to this day been exploiting prison labor for the production of their own goods. The privatization trend has been going on for forty years now, when the government started out contracting the management of federal and state prisons to private companies. Within said contract, corporations are also given the task of managing prison labor, which is often exploited for the purpose of producing the good sold by said corporations.

Among the corporations that profit from prison labor there are also providers of basic services such as AT&T, which provide telephone service to inmates, charging them a very high price for every call, as well as financial service providers, along the lines of JPay, that charges a considerable high fee for every money transfer from the inmate's families. The aforementioned exploitation and high prices within the daily prison life result in the release of very poor inmates that struggle to fit in the outside society, especially when they originally come from a poor background.

The economic reasoning behind prison work consists in the fact that prisoners are normally not exploitable in terms of labor. In spite of that, when exploited in the name of the Exception Clause, non-retributed prison labor allows companies to maximize their income.

Based on this economic theory, the more unpaid labor private corporations are able to extract from inmates, the more they will be able to maximize their income. This is also the basic principle of organizations along the lines of the *American Legislative Exchange Council* (ALEC), which is a nonprofit organization of conservative states, legislators and private sector representatives who draft and share model legislation for distribution among state governments in the United States.

The probability that, through ALEC, big corporations guarantee the development of mass incarceration, is quite high. As a matter of fact, companies such as McDonald's and Corecivic – a company that owns and manages private prisons – have repeatedly issued laws lengthening prison sentences to lawmakers. This illicit lobbying activity has been discovered following an enquire on the behalf of the *Center for Media and Democracy* and the Newspaper "The Nation". However, ALEC has born in the 1980's and, since then, the phenomenon of mass incarceration has been exploited to the interests of Us corporations, due to the fact that the *United States Constitution* enshrines that people in prison can be enslaved.

As a conclusion to this dissertation, the most effective way in which slavery is reiterated in the American society is the Exeption Clause of the Thirteenth Amendment. De facto, after the abolition of the Black Codes and the achievements of the Civil Rights Movement, the prison industrial complex is the biggest perpetrator of racial segregation that exists up to date.

Accordingly, as long as slavery is still included in the Constitution, any attempt to eradicate its vestiges from the Us society will be limited and will repeatedly encounter the resistance of conservative entities that will exploit the *Exception Amendment* to their interest. Since slavery, in the form of unpaid prison labor, is an economically profitable practice, it will always attract the capitalistic interest of corporations and, as long as the law allows it, they will try to profit off of it.

Once a person has been convicted of a felony or has plead guilty, not only will he have to spend a determined period of time in prison, but he will also face a lot of hurdles once he is able to exit. *De facto*, people who have been convicted of a crime are not able to apply for certain jobs, ask for student loans and reside in public housing as tenants 'people' or even as guests for the rest of their lives.

The impossibility to earn a living, secure job opportunities with an education or even have right to public housing, often leads former convicts that were in a situation of indigence in the first place to resort to illicit activities, such as drug dealing.

Said restrictions are also likely to be the underlying cause of social marginalization of former convicts who, once they have spent their time in prison in a situation of total submission, are

considered outcasts that cannot be part of a society, since they cannot either contribute by doing a job or studying to pursue a career. In this situation of marginalization from society, many people resort to drug consumption as a coping mechanism and develop a drug addiction, which is more likely to trigger a further conviction than be treated in a treatment center.

This trend resulted in the rising of the criminality rate in poor areas, which led to the increase in police patrolling in those part of the city, where the predominantly African American population is at constant risk of being accused of drug related crimes and end up in jail. The outcome of this vicious circle consists in the recidivism of people living in disadvantaged areas and, therefore, in the increase of the US prison population, which, as allowed by the *Thirteenth Amendment*, can be legally enslaved.

One in three African American males is or has been in prison, therefore, he is prohibited from getting a license to practice a job, receiving education or having access to public housing, while those people who are currently serving a sentence are still in an inhumane state of subjugation.

Given this complex situation, Oregon Senator Jeff Merkley and Georgia Representative Nikema Williams, on June 17th, 2021, issued a Joint Resolution "proposing an amendment to the Constitution of the United States to prohibit the use of slavery and involuntary servitude as a punishment for a crime". The resolution consists in the proposal of the repeal of the *Exception Clause* of the *Thirteenth Amendment from* the *United States Constitution*. Senator Merkley has publicly stated that he himself, a white man, recently discovered the exploitative system behind prison privatization and has come to the conclusion that this significant issue cannot be dismantled until the United States Constitution outlaws the practice of slavery. Said resolution, that is highly sponsored by the Democratic Wing of the Congress, has yet to be passed.

Scholars and activist have predicted what the possible results of the ratification of the Abolition Amendment will be and, as things currently stand, the majority of them foresees two possible results. Not only will the abolition of the Exception Clause be an epoch-making

event – since this loophole has allowed human exploitation for more than one hundred and fifty years – but it will also regulate prison labor. This will allow prisoners to earn a dignifying wage and be able to employ the skills that they have acquired in prison once they are free, by allowing them to get working licenses or finish their education, so that they can become integral part of society once again.