Jim Crow Pragmatism: Oliver Wendell Holmes, Jr. and the Legal Logic of Race

In *The Common Law* (1881) Holmes wrote famously “the life of the law has not been logic; it has been experience.” This essay turns to this seminal work of American legal pragmatism to reconsider the stakes of pragmatism for contemporary studies of race. After a framing discussion of Holmes’s debt to William James, it examines *The Common Law* as well as Holmes’s subsequent reading of the Fourteenth Amendment and the ways in which this reading replicates the Supreme Court’s reconstruction of racial citizenship from the end of Reconstruction to *Plessy v. Ferguson* (1896). I argue that the root of this shared logic is a pragmatist theory of personhood that, first elucidated in *The Common Law*, is itself a remnant of racial citizenship in the US. A close study of the relationship that Holmes presents between the law and its history exposes the extent to which the elements of Holmesian jurisprudence that have long vexed legal scholars, producing contradictory conclusions about his relationship to positivism, liberalism, and most recently pragmatism, are a product of the late-nineteenth-century racial logic that informs them.

This is not a very pragmatic approach to pragmatism. Declining pragmatism’s own emphasis on the reconstruction of meaning for concepts that have outlived their context, I am more concerned with uncovering the history of abstraction that pragmatism’s own emphasis on reconstruction belies. Central to this argument is the observation that pragmatism is as invested in the preservation of form as it is in the dismantling of it, or rather, in making better
use of forms by perpetually subjecting them to new verification procedures. I turn to Holmes’s model specifically because it exposes both the liberal humanism embedded in pragmatism and the limits of pragmatism with regard to the pursuit of racial justice. Pragmatism's failure to address practically the racial discord of its era, I argue, is inseparable from its conceptual failure to recognize the social histories of racialized bodies.