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

If there is a seed text for the school of thought that has come to be called legal pragmatism, it is Oliver Wendell Holmes, Jr.'s *The Common Law* (1881). If there is a signature statement for this school of thought, it is the fourth sentence of this text: “the life of the law has not been logic: it has been experience.” Yet *The Common Law* says a good bit more than that. A collection of lectures on the history of criminal law, tort, and contract, it narrates the law’s evolution from an ancient collection of practices rooted in kinship and blood sacrifice to a contemporary system of common law jurisprudence. A narrative explanation of what Holmes means by “the life” of the law, *The Common Law* is a natural history of sorts as well as an explanation of the process through which common law jurisprudence emerged as a set of social norms that might masquerade as logic. As Holmes explains, these norms ossify over time, becoming divorced from the experience—or “life”—that produced them in the first place. For Holmes, they nonetheless provide a broad and sustainable basis for legal continuity.

What is remarkable about this narrative is its presentation of the law’s functionality as the product of a material history that is both constitutive and dispensable. As Holmes explains, the experience that provides the law with its life is perpetually displaced within a legal narrative whose seamlessness elides the material history of the law itself. The historical explanation that *The Common Law* provides thus enables a judicial philosophy that is also a form of radical presentism: the law, by virtue of its history, allows the present to overturn the past. Holmes
would later write to his friend Harold Laski, “You respect the rights of man—I don’t, except those things a common crowd will fight for.” (*Holmes-Laski Letters*, 2: 948) *The Common Law* provides the theoretical basis for this statement. If it presents a legal system in which norms emerge from experience, it also frames the law’s power as witness to the materialization of these norms as they evolve over time. By contextualizing the law’s evolution, the history that Holmes provides renders the law perpetually amenable to new contexts. As I will argue, this presentist model is not a version of what Morton White famously called “anti-formalism.” Rather than a dismissal of the formal mechanisms of law, Holmes’s model is one in which the law functions as a re-embodied expression of the cultural logic that surrounds it. It is also one that corresponds eerily with the Supreme Court’s reconstruction of racial personhood in the late nineteenth century. *The Common Law* presents the law less as a collection of falsely elevated forms and principles than as a site for cultural excess awaiting its material—and newly legal—manifestation. Looking to the future as well as the past, the narrative that it provides is one of re-embodiment as well as displacement.

The specifics of this narrative shed important light on pragmatism’s appeal to contemporary theorists of race as well as the limits of pragmatism in the face of the white supremacy that characterizes the Jim Crow era and beyond. For contemporary thinkers, the appeal of philosophical pragmatism lies in its anti-foundationalism. Abandoning the epistemological dilemmas of traditional philosophy, pragmatism is a practical attempt to address the felt needs of live bodies. Critics and theorists in an increasingly broad array of disciplines frame the emancipatory possibilities inherent in these conceptual grounds.¹ Finding in pragmatism’s embrace of historical contingency, materiality, and sociality a radical potential as well as a mechanism for isolating continuities in American literary history resistant to the exclusionary
logic of earlier generations, many of these critics turn to the history of race to legitimate this potential and, in so doing, present pragmatism as either uniquely resistant to racial identification (Posnock, Hutchinson, Crane, Benn Michaels) or particularly suited to meet the needs of disenfranchised racial groups (West, Rogers, Shelby, Glaude, Levin). Supplementing these readings while resisting the instrumentality of their logic, this essay looks backward to the history of pragmatism and its relation to the racial politics of its era. Illuminating the formative links between the pragmatism of William James and Holmesian judicial logic, it finds in pragmatism an evolving racial nationalism that emerges most explicitly in the model of jurisprudence that Holmes articulates in *The Common Law*. In the latter portion of the essay, I track this racially inflected model as it guides Holmes’s conclusions about Constitutional law as well as common law. 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. At the heart of pragmatism is a
concern with the process of subject formation. In the legal arena, this concern emerges in debates not only about the meaning of citizenship, which was itself redefined in the latter half of the nineteenth century, but also about the conceptual logic that allows for coherence in the common law. How does the common law provide continuity between past and present? How does the concept of “the people” around which the common law coheres emerge and transform? At stake in these debates is the meaning of personhood and its reciprocal relation to the formal structures of law. Making this reciprocity its focal point, Holmes’s writing illuminates the law’s own transformation as the community it was designed to serve reconceived the logic of personhood. As the latter portion of this essay demonstrates, the circumscribed reading of the Fourteenth Amendment that Holmes espoused in the early twentieth century is distinctly pragmatic. Replicating the logic of *Plessy v. Ferguson*, it also exposes the subjectification inherent in the court’s disavowal of its own authority.

For those familiar with the philosophical tenets of pragmatism, this argument is counter-intuitive. Pragmatism emerged as a school of thought that might confront rather than avoid the lived crises of modernity. Forgoing the metaphysics that characterized older forms of philosophy, it focused instead on the content of experience and the mechanism through which experience shapes cognition and prompts action. As Brook Thomas suggests, pragmatism’s legal manifestation was an attempt to purge the law of dated forms and thereby minimize their discriminatory appeal. Given pragmatism’s dismissal of more traditional debates about ontology and epistemology for the sake of live bodies and felt human needs, as well as its emphasis on practice and results, its emergence at the “nadir” of race relations in the US begs more probing questions about its relationship to the meaning of citizenship and racial subjectivity. Historically,
pragmatism failed to represent the racialized subjects that in the post-Reconstruction era were re-inscribed within the national body and increasingly disenfranchised.⁶

Holmes’s record is especially provocative on this front. In 1905, he ruled in favor of United States vs. Toy, a decision that sweepingly forbade judicial review of a court's denials of claims to citizenship.⁷ In 1922 he supported a Supreme Court ruling that denied Puerto Ricans the constitutional right to trial-by-jury through the "unincorporated territory" doctrine.⁸ And in 1927 he ruled in favor of a statute that instituted compulsory sterilization of the mentally retarded for "the protection and health of the state."⁹ As a portrait of the license taken by a pre-Civil Rights Supreme Court, what this series of cases exposes primarily is the racial anxieties and affiliations of the early-twentieth-century judiciary. In relation to Holmes and his theory of law, it also represents a more philosophically grounded judicial stance: a committed deference to the rulings of state and local elected officials that adheres to his pragmatist jurisprudence. The practical result of what for Holmes was a policy of meticulous judicial restraint, this deference to the local interpretation of law overrode his ethics, allowing for the displacement of what Gregg Crane has called a principle of "higher law" jurisprudence with a popular sovereignty rooted in positive law. As I will argue, the above series of Supreme Court cases also marks a key moment of collusion between pragmatist jurisprudence and the white supremacy that was the defining feature of immigration and civil rights law in a post-Reconstruction US. The logic that made this collusion possible, I am suggesting, originates less from the language of these particular cases than from the legal mechanisms that The Common Law lays bare.

Law’s bodies
As Holmes makes clear throughout *The Common Law*, the formal structures of law emerge not from Reason, God, or Nature, but from a particular—and particularly violent—set of histories. Over time, the replication of a particular set of legal practices becomes a code through which to categorize legal actors and actions. *The Common Law* thus provides a description not only of the evolution of legal norms but also of the mechanism by which the law, as it evolves, evacuates itself of live content. For Holmes, such an evacuation does not devalue the law itself but rather makes way for new life. In this regard, Holmes is attentive to the future as well as the past. The source of the law’s life, he argues, is in front of it as well as behind it. His task is prescriptive as well as descriptive, an attempt to reinvigorate the law by making it more attentive to the populous that relies upon it. If *The Common Law* is, to use Holmes’s own words, “an instructive example of the mode in which the law has grown, without a break, from barbarism to civilization” (5), it is also a model for keeping the law alive.

What happens, one might ask, in the space between the live bodies that are the source of the law’s life and the interpretive process that allows for the evolution of legal norms and thereby keeps the law itself alive? Or rather, what does it mean to provide “a life” for the law? Is it, according to the logic of *The Common Law*, to endow the law with a material history? Or to recognize the law as an entity that responds to history even as its functionality depends upon the myth of its distinction from this history? For Holmes, the answer is decisively both. In *The Common Law*, his description of the law’s evolution is also an explanation of the law’s ghostly vitality—one that works by presenting the formal mechanisms of law as a product of material histories that will perpetually reinvigorate the law itself. Within this narrative, the interplay between the material and the abstract is less functional than immanent. Herein lies the alchemy that allies Holmesian judicial logic with the pragmatism of his era.
In a collection of essays called *Pragmatism, Nation, and Race* Robert Brandom tracks the Darwinian logic that distinguishes pragmatist empiricism from the seventeenth-century empiricism of John Locke. As he observes, the novelty inherent in the pragmatism that emerged in the late nineteenth century is its location of biology and the social sciences on a singular spectrum of knowledge. For the pragmatist, something as protean as culture is, like habit, an extension of instinct that works, like the long neck of a giraffe, to sustain the equilibrium between community and environment. Brandom’s account of pragmatism validates that of a growing number of scholars who recognize in pragmatism a materialist logic that is also the source of its radical potential (Richardson, Shook, Sullivan). What is most remarkable about the pragmatism of William James is its treatment of immaterial concepts and ideas as if they were material. Within this logic, concepts and ideas act like biomaterial tools. This rootedness in the material body is the source of pragmatism’s limits as well as its potential.

Yet pragmatism’s relation to modern science is complex. Though it arose from an intellectual community deeply concerned with the proper role and function of science, it is not an extension of the scientific method. Rather, it is a philosophical response to the limits of 19th-century science. James’s earliest formulations of it were in large part a response to the increasingly popular appeal of Darwin and the Spencerian theories of social evolution that arose from it. Looking for ways to acknowledge the authority of material science without abandoning the value and gravitas associated with conceptual entities like self, spirit, agency, and will, he sought challenges to a popular scientific materialism and the determinism that accompanied it in the US. For James, this quest was deeply personal. In his late 20s he spent a year, "hav[ing] given up all pretense to study or even to serious reading," seeking cures for a debilitating depression. Terrified by the possibility of a materialist universe in which free will was an illusion, he
emerged from these years with the mantra for his 1897 collection of lectures *The Will to Believe.* "My first act of free will," he writes, "shall be to believe in free will." (Perry, 121) In this intellectual environment, James's task was to articulate the value of abstract categories—and the authority we derive from them—as part and parcel of a material universe that might be observed empirically. That which was in most need of preservation for James were the abstract categories by which we secure and distinguish the self—hence his concern with the meaning of consciousness, will, and religious experience. These were the elements of experience that a materialist model of the universe seemed to threaten.

James’s solution was to locate evidence for the reality of these concepts in the embodied experience of the human subject, expanding the logic of material science into the realms of philosophy and metaphysics while elevating the category of experience above and beyond the forms that inhabit that experience. As Clive Bush writes in *Halfway to Revolution,* “Whereas for [John] Locke Religion and Science filled two separate realms, for James science rushes into the vacuum left by the death of God” (Bush, 227). A vestige of the idealism threatened by material science, this vacuum retains its shape. In *The Will To Believe* James presents belief as an object that is as real as it is useful to the community at hand. Through this logic, he imagines a world made entirely of subjects rather than objects. What gets lost in this description are the objects of desire and loss that mediate social engagement and thereby shape collective models of the self. What is unique about this epistemological starting point is its evocative leveling of material and abstract entities, requiring the latter to behave like the former. As conceptual categories like the self become mere tools for thought, James's schema erases the history of their abstraction.

In a legal context, where the conceptual categories in question are formal entities like citizenship, personhood, blackness and whiteness, the stakes of such erasure are particularly
pronounced. When, for example, the 1896 Supreme Court in *Plessy v Ferguson* introduced the concept of “separate but equal” to nationalize racial segregation, it presented the racial markers of black and white as if they had no history at all, erasing a combination of symbolic and material histories that the Court had itself substantiated in its 1857 definitions of citizen (as white) and slave (as black). This generative combination of symbolic and material histories is what continues to make race real. It is also what pragmatism, through its evocative leveling of the material and the abstract, fails to see. Patricia Williams illuminates the legal and philosophical stakes of this kind of erasure in *The Alchemy of Race and Rights*. Here Williams suggests that we analyze *stare decisis*, the legal principle that limits the grounds for deciding cases to those of previous court decisions in factually analogous situations, as a "filter to certain types of systemic input" rather than "a silent, unquestioned 'given'" (Williams, 7). My reading of a lingering idealism internal to pragmatism suggests something similar. Both James's pragmatism and Williams' judicial skepticism share an interest in the process of subject formation, or rather the transformation that makes abstract terms—like *black*, *white*, *me*, and *not-me*—meaningful. Whereas Williams describes this transformation in legal terms—the process by which a living, feeling person becomes an object within the schema of law—James describes it as the very nature of cognition.

The roots of Holmes's pragmatism lie in a series of discussions in the late 1860's with a group of Cambridge friends that included James, Charles Peirce, Chauncey Wright, and Nicholas St. John Green. The disciplinary affiliations were different for each member of the group: physiology, psychology, and then philosophy for James; physics and mathematics for Peirce; law for Holmes. Yet each would go on to produce scholarly work in their respective fields that articulated some version of a definition of belief that, borrowed originally from Charles Peirce,
expressed a collective organicism that is fundamental to pragmatist epistemology. Belief, according to Peirce, is that upon which one is prepared to act. The source of social mobility and cohesion, it is a felt entity that emerges from individual experience yet functions collectivity as a trans-generational consensus that precedes legal and inherited forms. For the pragmatist, belief is what provides meaning for the structures of law and reason, not the other way around. It is also what secures the formal autonomy of the individual (for James), of the scientific community (for Peirce), and of the populace (for Holmes).

At first, the historical narrative that Holmes provides in The Common Law seems like it might resist the procedural act of forgetting characterized by the Plessy v. Ferguson decision. In the first and second lectures of The Common Law, Holmes narrates the material histories of law through a discussion of the customs that sustained the bonds of kin and clan and the gradual displacement of these customs with principles that were constructed and maintained by virtue of their ongoing use-value to particular communities. The effect of this narrative is the dismissal of any ahistorical notion of the law's authority. As Holmes asserts throughout The Common Law, the life of the law emerges from the population that provides it at each evolutionary turn. The material history of the law that he narrates is a demonstration of this life.

Yet Holmes’s emphasis on the law’s material history in The Common Law leads ironically to a personification of the law itself. The “life of the law” that emerges here is a strange amalgam of a dead history and a living populous. The formal mechanism of law provides a skeletal body—the remnant of a history no longer legible—that is perpetually brought to life by those who rely upon it. The “living” product is a body of law awaiting its lifeblood from future generations, a ghostly manifestation of a history whose negation is essential to its own reenactment. Vindicated by a future-oriented legal perspective, this body of law finds new life in
the hopes, fears, and experience of those who interpret it on a case-by-case basis. A description of the law’s perpetuity as well as its history and functionality, this model looks to the future while making use of its ossified past. As Susan Haack explains, the pragmatism inherent in this judicial philosophy is less a form of realism than an exercise in the subjunctive. It depends upon an ideal imagined future, if not an imagined past.

To describe the stakes of this future-oriented perspective, legal scholars tend to emphasize the continuity of the law itself. In so doing, they mask the sacrificial logic that fuels the law’s evolution and that Holmes himself was keen to flaunt. Take, for example, Holmes’s discussion of criminal liability in the second lecture of *The Common Law*, where he turns to the following example to demonstrate the evolving nature of criminal law:

> The law does not punish every act which is done with the intent to bring about a crime. If a man starts from Boston to Cambridge for the purpose of committing a murder when he gets there, but is stopped by the draw and goes home, he is no more punishable than if he had sat in his chair and resolved to shoot somebody, but on second thoughts had given up the notion. On the other hand, a slave who ran after a white woman, but desisted before he caught her, has been convicted of an attempt to commit rape… Eminent judges have been puzzled where to draw the line, or even to state the principle on which it should be drawn, between the two sets of cases. (68)

Just twenty years after the Emancipation Proclamation, in an era of African-American disenfranchisement, economic consolidation and racial violence, why would Holmes turn to this example to uncover the cultural logic of criminal liability? How does it invite us to relate past to present? "No doubt," adds Holmes candidly, "the fears peculiar to a slave-owning community had their share in the conviction which has just been mentioned" (69). Embedded in a broader
discussion about liability and intent, the above passage is for Holmes not about race or slavery per se; he offers it without critique. This lack of critique, moreover, is integral to his scholarly presentation of the law’s emergence as the product of particular material histories. The aggressive conviction of a black slave, suggests Holmes, provides a portrait of the mechanism of law that is also the source of its vitality.

For Holmes, the legal mechanism that this example illustrates depends upon an earlier explanation of the material history of law that he provides in “Early Forms of Liability,” the first of ten lectures in The Common Law. Here, even as Holmes emphasizes the mutability of legal forms and principles, the historical narrative that he provides frames the ancient material roots of law as an implacable foundation for its functional longevity. Holmes’s central and provocative point in this first lecture is that the most sordid aspects of the law's history, specifically the local narratives of revenge and sacrifice that provide its origins, are also the "living" aspects of the law that make way for subsequent generations to view it as timeless. "[E]arly forms of legal procedure," he notes, "were grounded in vengeance." (2) Both Roman and German law began with "the blood feud," which was gradually "bought off." (3) Within the development of Anglo-Saxon law, the logic of retribution and "the passion of revenge" remained preeminent. (5) On the one hand, Holmes provides these examples to demonstrate the historical distance between these legal practices and our own. On the other hand, he presents these portraits of the brutality of ancient law to liken its practice to that of our own time. The historical narrative that he provides thus has a dual function of sorts, rendering the law both historically specific and immanently applicable, the product of material particulars as well as a functional mechanism that history has endowed with form.
What stands out about this narrative is its emphasis on the material origins as well as the material ends of the law’s evolution. For Holmes, the law exists by virtue of its material history; it will cease to exist if this material history does not continue to reproduce it. What is remarkable here is the leveling of the material and the abstract that occurs through the translation of a material history into a neutral mechanism—the law itself—that awaits re-embodiment. In Holmes’s text, this translation ensures that the legal determination of liability sustains the biopower of the state. For a more illuminated view of this mechanism, observe the progression from Holmes’s first lecture of *The Common Law* to his second. As the first lecture explains, the roots of common law liability lie in the embedded notion of "intent," a concept that lodges the crime committed in the body of the person—or even thing—that commits the crime. Indeed, Holmes devotes a large portion of this first lecture to the notion that liability adheres to the offending body, be it a man, an ox, or a ship: "A consideration of the earliest instances will show, as might have been expected, that vengeance, not compensation, and vengeance on the offending thing, was the original object" (34). He concludes at the end of this lecture, however, that "[the law] nevertheless, by the very necessity of its nature, is continually transmuting those moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated" (38). The "moral standards" to which Holmes refers here arise from the personal and material harm that is the product of a criminal act, the perception of guilt inherent in the person or thing that commits the act, and the reciprocal call for retribution. For Holmes, that which is "moral" qualifies as such only through its relation to this originary network of embodied relations. In his second lecture, however, he turns to the aforementioned example of the escaped slave to clarify the more evolved meaning of liability that he elucidates at the end of the first lecture. Here he places the example of the aggressive conviction of the
slave in service of the “external standard,” a standard for determining liability that remains a touchstone for modern jurisprudence.\textsuperscript{14} As Holmes describes it, the liability associated with this standard is not about “the condition of a man’s heart or conscious,” or "the degree of evil in the… person's motives or intentions,” but rather "the nature of the standards to which conformity is required" (50). As he clarifies in his discussion of trespass and negligence, "A man may have as bad a heart as he chooses, if his conduct is within the rules" (110). What is significant here is the transformation that occurs, not on a case-by-case basis but rather over the course of many hundreds of years, from an understanding of liability as both distinctly material and adherent to the criminal object to a more amorphous yet ever-present conception of liability whose embodied status nonetheless lingers in the fears and expectations of a given community. With the evolution of the external standard, the very meaning of liability performs an about-face—its source flips from the defendant to the community that is also the potential prosecutor. This about-face also explains the familiar adage that for Holmes the law and ethics have nothing to do with one another.

In Holmes's example of the aggressive conviction of the escaped slave, what we also witness is the extent to which the imagination becomes a viable factor in the determination of guilt and innocence. If Holmes’s theory of the common law reinvigorates the law by injecting it with the material particulars of its past, it also hollows out the formal apparatus of law by placing it in reciprocal relation to the hopes and fears of a populous for whom the law has – and will always be – a biomaterial extension of force. Like the nation, the law provides a mirror for something called “the people.” For Holmes, this mirror can and should be more precise than the formal structures of national government, reflecting the ““[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the
prejudices which judges share with their fellow-men.” (1) What Holmes makes way for here is a reconceptualization of the racial history of law – one that was especially prescient in the latter half of the nineteenth century as US courts worked to redefine racial citizenship.

Subjects, Citizens, and “External Standards”

Holmes’s use of the term "external standard" to discern modern liability semantically distinguishes the lawmaking apparatus of the federal government from the felt needs of local subjects. Yet the example that Holmes uses of the aggressive conviction of the slave exposes the particular racial histories from which the external standard emerges. His use of such an example to demonstrate the contemporary practice of deciphering criminal liability presents a genealogy of law that purges itself of particular racial histories precisely to the extent that it acknowledges—or remembers—those very histories. In this sense, Holmes hollows out a formal space within the law whose re-embodiment depends upon a particular act of forgetting. What this example exposes primarily is the extent to which the history of jurisprudence that Holmes provides in *The Common Law* is also a system of legal classification that works by erasing the material that is the source of the law's construction. What gets erased is the complex relationship between the material and the abstract that the law, through its very power as law, perpetually reconstructs. Rather than dismantle the formal structures of law, Holmes reattaches them to an imagined collective whose fears and inclinations provide the ghostly content for his external standard. Rather than remove an inherited model of national subjectivity from the law, Holmes’s model of judicial restraint makes national subjectivity—and specifically white national subjectivity—the source of law, thus consolidating racial identity alongside that of the federal government.
Several critics have isolated the popular sovereignty inherent in Holmes’s model of jurisprudence, presenting Holmes as an amoral positivist and the judicial theory that arises from his writings as a consolidation of a Hobbesian tradition further refined by the utilitarianism of Jeremy Bentham and John Austin. Yet, as *The Common Law* makes clear, Holmes's dual insistence on the "rules" and the "crowd," the law and its subjects, bespeaks an understanding of a legal process that is distinctly dialectical. Though his description of the law's evolution entails careful preservation of the popular voice, for Holmes the law is nonetheless a formal apparatus. It contains—in the negative sense as well as the positive—the will of local communities. Making this will systematic, it not only emerges from those communities but also provides a check upon them. This codification of the local agency of particular populations, argues Holmes, is essential for making the law itself progressively inclusive. As Susan Haack, Thomas Grey, and Frederic Kellogg have argued, it is also the defining feature of his pragmatism.

What I am suggesting is a formalism that adheres to Holmes's pragmatist jurisprudence by functioning on a more local, self-referential scale. Maintaining its reciprocal relation to the material world that, as we saw at the start of *The Common Law*, provides the ancient roots for common law liability, this more locally applicable formalism codifies the private desires of individual citizens as well as broader shifts in the collective affiliations of racial and national populations. A code for imagining new forms of kinship and community, the formal logic inherent in Holmesian jurisprudence functions, much like the racialized empiricism that characterized the developing social sciences, as a means of organizing the material through an objectifying schema that resists historicity. It is thus a formalism that sits less in opposition to the material than as a means of reimagining it. As Holmes makes clear in his discussion of criminal liability, the law exists for—and thus serves—those who want it to exist. A placeholder for the
will of particular populations, it is a necessary abstraction as well as an imagined entity that, like the inherited structure of literary romance, awaits definition through an unfinished process of transformation.

Those who present Holmes as a pragmatist tend to present pragmatism as a sort of middle way between the scientific empiricism that would ultimately inform analytic philosophy and the historicism of a Continental tradition. According to this argument, pragmatists turn to "experience" as a means of synthesizing historical and analytical schools of jurisprudence. These critics are also the most astute and penetrating readers of Holmes, finding in pragmatism a theoretical continuity that Holmesian judicial thought otherwise lacks. Pragmatism thus relieves Holmes of the charge of crude utilitarianism. As Haack explains, what makes Holmes a pragmatist is his experimentalism – his view of the law as a fluid entity that, though imperfect, is evolving toward a shared ideal by virtue of its continuous function as a reflection of the wills, wants, and desires of the particular people that deploy the law. To call Holmes a pragmatist, though, only intensifies the question of the relationship between his judicial logic, or legal pragmatism, and the racial politics of his era. Indeed, the pragmatist meliorism that Haack and Grey use to exonerate Holmes of amoral positivism squares neatly with his disheartening acceptance of the aggressive conviction of the black slave. Pragmatism is indeed a middle way, a means of trading upon our ideals. It is in the business of the evaluation of norms as well as their reconstruction, accommodating them to the material needs of the present. No wonder it was so appealing to Northern liberals in a post-bellum, post-Reconstruction era.

As Holmes was formulating his theory of jurisprudence, the 1868 passage of the Fourteenth Amendment had brought a redefinition of US citizenship through its inclusion of black Americans. In the following decades, the Supreme Court would interpret this amendment in
relation to the civil rights claims of those who challenged Jim Crow legislation in the South, calibrating the nation's definition of citizenship in relation to the citizenship claims of local state subjects. The result of these decisions was a constricted reading of US citizenship aptly characterized by Justice Harlan's dissent in the 1883 Civil Rights Cases. "My brethren say," writes Harlan, "that when a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the process of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws" (my emphasis). What Harlan acknowledges in his reference to "a mere citizen" is the Court's articulation of a newly diminutive form of citizenship. By minimizing the status of national citizenship, the Court provided a stop-guard against further requests of the federal government.

Clarification of the formal logic behind this overtly racist decision exposes a structural ambiguity that haunts Constitutional democracy in the US. The 1883 Civil Rights cases that overturned the Civil Rights Act of 1875 and thereby paved the way for Plessy v. Ferguson provide the most useful example. In a majority decision that legalized the refusal of access to inns, public conveyances, and places of amusement on the basis of race, Justice Joseph Bradley attested that the rights guaranteed by the Fourteenth Amendment "remain in full force."

Underwriting the expansion of a Jim Crow South, the Court ruled that the prohibitive clauses of the Fourteenth Amendment apply only to the states and thereby add nothing to a citizen's protection against private injuries. At the same time, it characterized the rights that were protected by the Fourteenth Amendment, specifically those pertaining to an individual's "person, his property, or his reputation," as entities that could not be abridged by private injury.

Immanent from one's status as a "person," these rights, argued Bradley, were as impervious as
they were necessary. The Court thus upheld the citizenship rights of the Reconstruction amendments within a ruling that minimized their value and function. Through an act of judicial restraint that worked to minimize the power of the federal government, Bradley deemed the "civil rights [that were]… guaranteed under the Constitution against State aggression" too personal to be defined by federal legislation yet too fundamental to be threatened by the actions of private individuals. To characterize these rights as an aspect of one's personhood was to deem them untouchable, transcendent, and thus unprotectable by the "mere" structures of law.

At stake in this decision is the conceptual relationship between personhood and citizenship. Or rather, between the personal agency of state subjects and the legal recognition of those subjects—two means of establishing civic identity that, within the structural apparatus of the nation-state, have a long history of discord. The result of this discord is a dual understanding of the imagined entity—both "person" and "citizen"—that is the constitutive unit of the nation-state. In the popular imagination, one part of this entity is active and embodied, a material agent that precedes the law; the other is abstract, a useful legal fiction. Bradley’s decision aligns citizenship with the latter and personhood with the former. On paper, though, both “person” and “citizen” are abstract, legal concepts that may or may not overlap. The Court has the uncanny power to combine or distinguish these entities at will. If Holmes’s description of the “external standard” in *The Common Law* evacuates the law of its material history, the 1883 Civil Rights cases enact a similar retreat by detaching US citizenship from the history of racial personhood that had formerly been integral to it. This hermeneutic maneuver is concerned less with addressing the law’s wrongs than with shoring up the alleged neutrality of the law’s categories. As in *The Common Law*, the material history of law is acknowledged so that it might be discarded. The law, then, becomes a placeholder for the future. Its status as a neutral agent remains in tact as the
grounds of its legitimacy shift from the past to the future. *The Common Law* provides a theoretical basis for this transfer.

For Holmes, the law is a formal entity as well as an embodiment of the will of particular populations. Or rather, it is a mechanism for codifying that will and thereby ensuring its futurity. Perhaps the most famous judicial example of this codification is his dissent in the 1905 case *Lochner v. New York*. Here the Court held that a New York law limiting the number of workers a baker could work in a given week was unconstitutional because it limited a "right to free contract" implicit in the due process clause of the Fourteenth Amendment. Supporting the reform legislation of New York, Holmes favored a more constricted reading of the rights guaranteed by the Fourteenth Amendment. The amendment, wrote Holmes, "does not enact Mr. Herbert Spencer's Social Statics." 19 Criticizing the Court's expansive definition of "liberty" for its basis in "an economic theory which a large part of the country does not entertain," he cited laws against Sunday trading and usury as "ancient examples" of legislation that prioritizes the communal wishes of a people over a theory of economic man that, as his opponent argued, was embedded in the Constitution. "Some of these laws," writes Holmes, "embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory." What is notable here is Holmes's reverence for a singular collective body that determines the content of law. He does not mythologize this body—it will have "prejudices"—yet nonetheless preserves it as the appropriate site of judicial authority within the law-making apparatus of a nation-state. This emphasis on the felt temperament of a people is precisely what becomes problematic within Holmes's model of jurisprudence. Are we to imagine the people as the majority? Is the majority the same as the citizenry? Of course not, and this would be Holmes's response as well. What he would also say is that the meaning of citizenship—
and thus the content of citizenship rights—is to be determined by the people whose objectives may or may not cohere with the ideals associated with citizenship. One's status as a person, in other words, which is itself protected by the language of the Fourteenth Amendment, is just distinct enough from one's status as a citizen to grant local communities the freedom to determine the content of their citizenship rights. Though critics of Holmes have emphasized the popular sovereignty inherent in this model, and thus its accommodation of Jim Crow legislation, they have overlooked the critical distinction between personhood and citizenship that is inherent in it. This distinction begs a more fundamental question about the meaning of personhood for Holmes and the extent to which a definition of it adheres to his jurisprudence. When viewed in the light of the Fourteenth Amendment, it also surfaces the fact that Holmes’s dissent in the 

*Lochner* case echoes the Court’s logic in *Plessy v. Ferguson*.

**“Separate but Equal”**

What makes the *Plessy v. Ferguson* case especially relevant to this investigation is the way in which, through it, the Court sustained racial categories of personhood while at the same time surrendering its power to define those very categories. This, I am suggesting, is the Jim Crow principle that mirrors the logic of legal pragmatism. In *Plessy*, the Court redefined racial personhood as an entity distinct from national citizenship. Through a series of legal maneuvers that would transform the formal relationship between citizenship and racial personhood, the Court not only admitted the epistemological instability of race but also used that very instability as a point in its argument. Homer Plessy, who was not discernibly black, had made the scientific indeterminacy of race a part of his defense. With sound reason, he asked how the state could mandate the separation of races that scientifically could not be distinguished from one another.
The Court responded with a catalogue of the various ways that different states determine race only to conclude that, since there is no consensus on how to make this distinction, it should be left up to each state to determine black from white. From here, the Court could easily duplicate the logic of the 1883 Civil Rights Cases: If determining the meaning of blackness was a state and not a federal matter, then the question of whether a law requiring separate but equal accommodations was a reasonable use of the state's police powers rested upon a community's recognition of the regulation of race as a viable factor in the maintenance of its "health and welfare." If, with the Fourteenth Amendment, the US government had relinquished the whiteness formerly attached to US citizenship, its subsequent interpretation of the Fourteenth Amendment further erased the particular histories of blackness and whiteness from the law, presenting them instead as social categories that arise organically and independently of one another. It is this erasure that nullified Homer Plessy's most salient claim.

At the same time, by removing the definition of race as a necessary factor in determining Plessy's guilt or innocence, the Court hollowed out a space for race to take on new meaning. By refusing to define it, yet maintaining its significance as a factor for determining the health and welfare of each state, the Court made race both newly abstract—an entity inscribed within the law—and locally subjective. In so doing, it sustained a racial model of personhood that presumably existed outside of law yet could nonetheless turn to law for its own reflection. Though the *Plessy* case is most commonly remembered for nationalizing a distinction between blackness and whiteness, it would be more accurate to describe it as having partitioned its former model of national citizenship by relegating racial personhood to a social and material realm that the Supreme Court rendered newly distinct from the legal apparatus that defines US citizenship. Illuminating what is perhaps the most darkly ironic turn at this juncture in legal history is the fact
that it was the language of the Fourteenth Amendment that made this partition possible. The Amendment reads:

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.

The partitioning of federal and state citizenship runs parallel to a discursive distinction between "citizen" and "person." The former refers to one's status in relation to both "the United States and the State wherein one resides"; the later refers to one's status as an entity whose "life, liberty, or property" shall not be deprived by the State. With language that emphasizes the administrative distinction between federal and state citizenships, as well as the rhetorical distinction between "persons" and "citizens," the amendment was designed to overturn the racial logic of Dred Scott, which had racialized US citizenship by denying it to free blacks. In 1883, though, Justice Bradley turned to these very distinctions to support his ruling that the citizenship rights of the Fourteenth Amendment could remain in tact while the determination of their most essential content was relegated to the police power of the states. By detaching US citizenship from racial personhood, while projecting the latter into the realm of state governance, the Court transferred a nationalist model of racial collectivity from the federal government to the jurisdiction of the states. This two-fold logic worked to uphold a nationalist discourse of rights that is distinctly racial. Sustaining a legal apparatus that at any moment can decouple rights from personhood, the
national entity that deems certain rights "inalienable" is also what limits the sphere of their protection.

The Supreme Court's failure to define race in the *Plessy v. Ferguson* case—or rather, the absent definition of race that, through the logic of judicial restraint, nonetheless kept the formal category intact—performs the same function as the "external standard" that for Holmes replaces "intent." Both provide a model of legal personhood that the late-nineteenth century Court refused to define yet carefully preserved through the protection of discriminatory racial mandates whose enforcement it relegated to local communities. In both cases, moreover, the racial content of this personhood was preserved through subtle references to the bodily aspect of racial subjectivity and a collective fear of violence. Replicating the logic of the aggressive conviction of the black slave, the *Plessy* Court deemed Jim Crow legislation Constitutional through recourse to the police power of the states, a power whose formal charge to protect the "health and welfare" of each state evoked the embodied language of racial identification. In turn, state governments were to specify the rights pertaining to "life, liberty and property." Following the dual subjectivity specified by the language of the Fourteenth Amendment, "people," rather than US citizens, were the constitutive units of a state's "health and welfare." As such, they were protected by the Equal Protection Clause of the Fourteenth Amendment through the police power of each state. "Citizens," on the other hand, were protected by the federal government, but only from the formal apparatus of the state. The two entities—"people" and "citizens"—were not to be confused. Through this rhetorical maneuver, the Court maintained a theoretical space in which the demarcations of race that were sanctioned by local state powers could function independently of the citizenship rights guaranteed by the US Constitution. One's race, it ruled, was an aspect of one's personhood, not one's citizenship.
The Common Law reads like a prescription for this dismantling of racial citizenship, narrating the transformation of the abstract rights of citizens into the needs of a singular cohesive body whose path is more important than its past. In 1883, by partitioning certain legislative powers to the states and others to the federal government, and by presenting this very partition as a necessary means of preserving civil rights, the Supreme Court presented these rights as a theoretical placeholder for that which the federal government deemed inalienable but could not—or would not—specify. The federal government, wrote Bradley, could not "properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication." Civil rights, then, became erudite symbols of that which the federal government mandated but could not define. According to this logic, the extent and nature of one's citizenship rights were to be determined by the collective unit of which one is a part—the local community—and the extent to which that collective unit coheres organically. Holmes would have agreed—and did agree—yet would have felt no need to couch this argument in the formal language of "rights." For him, the "external standard" did the trick. What matters most, for Holmes and for the Supreme Court, is that legal personhood remains intact and that the collective consciousness that makes "the people" a meaningful term remains preeminent.

The Court also turned to this logic to uphold anti-miscegenation laws in both the North and the South. Whereas the 1857 Dred Scott case had explicitly marked US citizens as white, the Supreme Court of the late-nineteenth century relinquished this whiteness, along with its protection of "persons," to the local jurisdiction of the states. As the meaning of national identity became less clear yet more pervasive, racial solidarity displaced national citizenship as the organizing principle for determining right. By marking the theoretical boundaries of US citizenship alongside a more embodied realm of national subjectivity that remained distinct from
this citizenship—the "health and welfare" that only a local police power could protect—the factors that would determine legal personhood became local rather than national, social rather than civic. In the late-nineteenth century, they also became increasingly racial. This was the most sweeping result of this careful juggling of legal categories. Re-substantiating race as a category for self-recognition and national belonging, post-Reconstruction readings of the Fourteenth Amendment transformed US citizenship into a negative category, increasingly disembodied, while upholding the existence of another form of personhood that sustained racial identity.

For late-nineteenth-century jurists, the abstraction associated with “rights” had become a liability, mandating an alternate category, “the person,” that might be more directly linked to the social body that the police power was charged to protect. In this light, the fact that Holmes’s dissent in *Lochner* rhymes with the logic of *Plessy v. Ferguson* is less significant than the objection that Holmes raises within this dissent to the economic model of legal subjectivity – the Court’s expansive reading of the freedom-of-contract clause – through which the private was distinguished from the public. Since for Holmes this distinction was itself highly suspect, he favored a model of the law that maximized its susceptibility less to “the rights of man” than to “those things a common crowd will fight for.” The trouble with this model is its presentation of the law as perpetually belated in its relation to the social order it is supposed to reflect. This belatedness allows for the law’s ongoing reconstruction of legal personhood, the product of which is the projection of the law’s past onto the future. Through this mechanism, Holmes streamlined the functionality of law. Veiling the power of the law to render its own categories materially real in the social world that it confronts, he rendered the law itself a conduit between past and future.
In the late nineteenth century, *Plessy v Ferguson* became a precedent for further legislation concerning the Fourteenth Amendment and the rights of blacks. The verdicts in these cases relied increasingly upon an interpretation that eliminated intent from the structures of law, relying instead upon a speculative cause-and-effect logic akin to the Holmesian external standard. In *Williams v Mississippi* (1898), which upheld legislation that through an 1891 grandfather clause required jurors and electors to pass literacy tests, Justice McKenna summarized this logic: "It has not been shown that their actual administration was evil, only that evil was possible under them." Through reference to a "reasonable" imagined citizen that was also an objective bystander, the proof of whether or not a law discriminated depended on neither the intent of the lawmaker nor the effect of the law itself. This objective bystander, a third self that was also the imagined inheritor of an external standard, became the ghostly agent of discriminatory legislation for jurors who could claim to avoid self-interest.

Holmes’s legal formulations in *The Common Law* legitimated this perspective. By locating Holmes's legal writings within a broader school of pragmatist thought as well as the legal discourse that shaped the Supreme Court’s interpretation of the Fourteenth Amendment, this discussion exposes the pragmatism inherent in late-nineteenth-century judicial logic. In the post-Reconstruction era, rights increasingly marked the boundaries of national citizenship alongside a concurrent redefinition of the liberal subject that, with a pretense to being extra-legal as well as embodied, was distinctly pragmatic. This rendering of personhood not only worked to distinguish cultural politics from government politics, subject from citizen, but also exposes the symbolic field shared by early pragmatists and the most liberal advocates of Jim Crow. Holmes's particular maintenance of legal personhood implies that one cannot look to the law for redress or
recognition without the support of a cohesive community that already anticipates the law for its own broader maintenance. For black Americans this experience did not exist.

The "life of the law" that, as Holmes makes clear, was grounded less in logic than in experience was prescriptively racial in the late nineteenth century. As the objectifying logic of pragmatism divorced the very concept of experience from the formal and material histories that would continue to make race real, the effects of this reality intensified. Perhaps Holmes articulates this irony best himself. In a discussion of the "wholesale social regeneration" imagined by reformers in the late nineteenth century, he writes:

I believe that the… regeneration which so many now seem to expect, if it can be helped by conscious, coordinated human effort, cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to build a race.

("Ideals and Doubts" in Collected Works, 306)

Here Holmes's call to action exposes the extent to which his pragmatism is a system of classification that works by concealing this very classification. What Holmes means by "race" is unclear. An amalgam of social and biological theories characteristic of a late-nineteenth-century humanism newly attentive to the mandates of material science and the logic of statistics, his usage suggests “the human race” as well as a classificatory mechanism that, through a jurisprudence that is its own form of legal eugenics, is meant to become a "national people." This model of personhood purportedly precedes the law yet must nonetheless look to the law for recognition and protection. Whether or not Holmes intended it, what on the surface seems a philosophical position fundamentally resistant to both a priori logic and biological determinism becomes a mechanism for redefining race through recourse to an extralegal category called “the human race”. If Holmes’s legal pragmatism resisted the urge to naturalize US citizenship—to
define and thereby safeguard the "inalienable" parts of oneself that the Constitution is charged to protect—it nonetheless maintained a model of this natural self, or the social inheritor of it, by redefining it as the legal subject that the police power of the states was charged to regulate and protect.

References


*Civil Rights Case* 109 US 3 (1883).


*Dred Scott v. Sandford* 60 US 393 (1857).


http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2358&context=fss_papers


Holmes, Oliver Wendell, Jr. to Harold J. Laski, June 1, 1927. *Holmes-Laski Letters*, 2


Williams v. Mississippi, 170 U.S. 213 (1898).

In literary studies, many take their cues from Ross Posnock and Joan Richardson. For a summary of this turn, see Nicholas Gaskill’s “What Difference Can Pragmatism Make for Literary Study?” See also Giles Gunn, Kwame Anthony Appiah, Gregg Crane, Eddie Glaude, Tommie Shelby, James Livingston, Nancy Fraser, Melvin Rogers, Colin Koopman, and Charlene Haddock Seigfried. Each of these thinkers considers the social and political potential of pragmatism, extending its analytical reach beyond that of Richard Poirier’s classic *Poetry and Pragmatism*.

Whereas Posnock turns to pragmatism to describe "the effort [of black intellectuals] to construct the aesthetic as an unraced category" (*Color and Culture*, 299), West and an increasing number of theorists in literature, philosophy, and political science find in pragmatism a model of historical consciousness that illuminates the history of racialized experience and the forms that emerge from it.

As I have argued elsewhere, the effort to define and mobilize a viable unit of solidarity that might displace older models of group solidarity is central to the most progressive forms of pragmatism. See Chad Kautzer and Eduardo Mendieta’s discussion of “community” as a keyword for pragmatism in their introduction to *Pragmatism, Nation, and Race*. Giles Gunn’s description of pragmatism as a mechanism for mourning in *Beyond Solidarity* is also illuminative here, exposing pragmatism’s commitment to “determining how to assess the benefits and liabilities of those devices, disciplines, and discourses that human beings have designed to compensate for the loss of some spiritual or moral safe haven.” (Gunn 2001, xvi) Whereas Gunn presents pragmatism as a mechanism for transnational identification, others expose the subject-citizen that pragmatism imagines through discussions of its relation to the development of the nation state and the history of national identity in the US. See Menand, Cotkin, Malachuk,
Livingston, Wilson, and Wells. Among legal scholars, this concern with subject formation and the collectivities through which it is imagined emerges in descriptions of pragmatism’s debt to a tradition of civic republicanism and its unique ability to balance rights claims with those of the collective. For this perspective, see Radin, Grey, Farber, and Sullivan.

4 See Margaret Jane Radin’s “Property and Personhood” as well as Stephen Schnably’s penetrating critique of the ways in which Radin’s progressive application of pragmatism takes personhood itself for granted.

5 For a masterful description of the counterintuitive legal logic that sustained the Court’s “separate but equal” ruling, see Saidiya Hartman’s Scenes of Subjection.

6 Louis Menand's remarkably readable study of the development of pragmatism as its founders reacted to both the Civil War and the development of scientific racism is useful here. Menand presents the philosophical conclusions of the first generation of pragmatists as a response, in part, to a previous generation of sentimental abolitionists, yet fails to consider the ghostly afterlife of that response.


10 See Dred Scott v Sandford 60 US 393 (1857).

11 Called the Metaphysical Club by James, this small circle discussed topics ranging from biology and mathematics to law and Continental philosophy. The first reference to the club appears in 1868 in a letter James wrote to Holmes: "When I get home let's establish a philosophical society to have regular meetings to discuss none but the very tallest and broadest questions—to be composed of none but the very topmost cream of Boston manhood" (Fisch, 4).
The seminal essays for Peirce's theory of belief are "The Fixation of Belief" (1877) and "How to Make Our Ideas Clear" (1878).

Refuting Richard Posner’s attenuated characterization of pragmatism as a means that is fundamentally indifferent to ends, Michael Sullivan writes, “[T]he pragmatist would understand that any view of the best future would be informed by a view of who we are as a people—and this depends upon an interpretation of our history… If a particular view of justice or democracy is to be favored, it should be favored because of its past consequences and future consequences.” (Sullivan 2007, 60-63) For more robust discussions of the historicism that informs Holmesian jurisprudence, see Grey, Rosenberg, and Kellogg.

With the external standard, Holmes wedded the subjectification inherent in the “reasonable person” standard with the state power and cohesion that strict liability is designed to protect. As Rosenberg explains, the external standard is the scientific principle through which Holmes unified strict liability, which turns to the effect of an act to determine liability, with older models of liability that focus on negligence and intentionality and thereby make personal culpability their focal point. As G. Edward White explains, the purpose of the external standard for Holmes was to convert terms such as “malice” or “intent” from subjective to objective concepts as well as to emphasize “the criminal law’s deterrent rather than… retributivist functions.” (White 1993, 260-261) For exemplary applications of the external standard, see Commonwealth v. Pierce and Rylands v. Fletcher.

See Schuler, Kelly, Gordon, Howe, and Rogat.

See especially Frederic Kellogg’s recent “Hobbes, Holmes, and Dewey: Pragmatism and the Problem of Order.”

See Grey, Haack, and Kellogg
This discord is also what animates the debate among legal scholars between a negligence model of liability and strict liability. As Rosenberg illuminates in *The Hidden Holmes*, Holmes’s writings sit at the center of this debate.

Though this quote is frequently cited as evidence of Holmes’s progressivism, it is important to note that Holmes was objecting less to social Darwinism than to the Court’s enforcement of laissez-faire economics. Among progressive legal scholars, the Lochner case is typically interpreted as a classic example of judicial overreach. The “Lochner era” refers to a period of subsidized industrialization made possible by the Court’s expansive reading of the freedom of contract as well as a lax “negligence standard” for liability. See Rosenberg for an incisive disputation of this “industrial-subsidy thesis” as well the “negligence-dogma” interpretation of Holmes that has obscured his more penetrating commitment to strict liability.

See also the “The Path of the Law” where Holmes famously describes law as the prophecy of what Courts will do in the future.

See Duncan Kennedy’s discussion of Holmes and the critique of rights in critical legal studies, 178-228.