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"Subjects and Citizens:
American Legal Pragmatism and the Logic of Jim Crow"

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"Pragmatism is a matter of human needs; and one of the first human needs is to be something more than a pragmatist."

C.K. Chesterton (from *Orthodoxy*, 1908)

Oliver Wendell Holmes' 1881 *The Common Law* marks the founding of American legal pragmatism. A series of lectures on the history of law and contract, it describes the law's evolution from an ancient model rooted in kinship and blood sacrifice to a contemporary model of common law jurisprudence. Within this gradual process, argues Holmes, the formal structures of law become progressively abstract so as to remain relevant to each generation. Judges re-interpret the law according to the particular concerns of each era, and thus the law itself becomes more universal. In one sense, then, Holmes's history of the law is a story of increasing idealization—epitomized by abstractions like "the rights of man"—that ironically makes way for a more immanent will of the people.

In another, more important sense, though, Holmes's history of the law favors the local mandates of particular populations. "You respect the rights of man," he wrote to his friend Harold Laski, "I don't, except those things a given crowd will fight for."[i] Replacing "the rights of man" with "what a given crowd will fight for," *The Common Law* makes way for the local agency of a community whose "rights" can only be defined by its members. Simplifying this doctrine, legal historians and contemporary literary critics have condemned Holmes as an amoral positivist, presenting him as the American representative of a Hobbesian tradition further refined by the utilitarianism of Jeremy Bentham and John Austin. Yet, as *The Common Law* makes

clear, Holmes's scholarly jurisprudence entails a careful preservation of the popular voice. For Holmes, this preservation of the local agency of particular populations is what makes the law progressively inclusive. As Thomas Grey and Frederic Kellogg have argued, it is also the defining feature of his pragmatism.[ii]

Why, then, did pragmatism arise at the height of Jim Crow legislation? A doctrine designed to accommodate the particular needs of local populations, it certainly failed to protect American blacks at the nadir of race relations in the US. In response to this inquiry, the most obvious explanation is the fierce and ardent racism of a Southern white populace, a racism practiced and disseminated through violent intimidation tactics and protected by a Northern white leadership that prioritized national consolation and economic growth over the instigation of racial justice. Still, pragmatism emerged, along with American literary Realism, with a democratizing mandate to remove a persistent residue of hierarchy and status from the formal structures of law. Given its emphasis on practice and results, its abandonment of epistemology for the sake of live bodies and felt human needs, how do we explain the complicity of its judicial logic with the authorized bullying of Jim Crow legislation? With this question in mind, this piece examines the legal pragmatism of Justice Oliver Wendell Holmes, Jr. in relation to the academic and judicial environment in which it emerged.

Holmes' own brand pragmatism has roots in a series of discussions in the late 1860's with a group of Harvard friends that included William James, Charles Peirce, Chauncey Wright, and Nicholas St. John Green. Called the Metaphysical Club by William 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."[iii] Perhaps Holmes should have been the one making this call. A scholar and devout abolitionist before the war, Holmes had left Harvard to fight in for the Union army and suffered severe injuries in battle. In the late 1860's he returned to the safety of Cambridge and this select circle of ambitious friends with an especially deserved claim upon James's haughty characterization. The rest of the group was ensconced within an academic community grappling with the social effects of Darwin's *On the Origin of Species*. Of particular concern was the relationship between empirical science and religious belief. Though the disciplinary affiliations were different for each member of the group (medicine for James, mathematics for Peirce, law for Holmes), each would go on to produce scholarly work in their respective fields that expressed some version of a definition of belief that Charles Peirce elucidated in 1870.[iv] For Pierce, belief 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 autonomy of the individual (for James), of the scientific community (for Peirice), and of the populace (for Holmes).

A philosophy called "pragmatism," though, did not receive its name until William James declared it in 1898. Popularized by James in the latter years of the nineteenth century and expanded by John Dewey in the early part of the twentieth century, it is continuous with a much broader anti-foundationalism that extends well into the twentieth century and beyond the borders of the US. Part of what David Kadlec calls "the early-twentieth-century assault on 'first principles,'"(4) it is also a more localized reaction to the decline of religious authority within

institutions of higher learning in the US. Consolidating it within an academic tradition of poststructuralist literary studies, critics have since read it as a feature of American modernism, of literary and legal realism, and of a new historicism.[v] It remains popular today among cosmopolitan race theorists and Protestant religious scholars. [vi] Against this importation of pragmatism into even broader theoretical discourses, I wish to situate it within the political landscape of the late-nineteenth century. As a philosophy designed for practical use, pragmatism has a unique resistance to critique. An anti-philosophy of sorts, it attaches itself to the social realm not only by insisting upon its own resistance to abstraction but also by erasing its own history. Especially since pragmatism is commonly revered among contemporary critics as either a uniquely American contribution to a history of philosophy or a defining feature of American literary history, I wish to interrogate its relation to the material and racial histories of the US.

In an era charachterized by increased academic specialization and new professionalism, pragmatists like James and Dewey presented themselves as a new generation of public intellectuals. They were also the first to deny the existence of a priori knowledge from a position of cultural authority. Attempting to make philosophy more applicable to a modern secular world, they emphasized contingency over epistemology and thereby developed an object of study they considered less illusory than the metaphysics of a previous era. Equally committed to modern science, they sought an ethical worldview that could be both useful and truthful.[vii] While disavowing epistemological order, then, the first pragmatists were as concerned with the determination of moral and intellectual value as they were with empirical data. Because the former foundations of such value—theology and/or systemic reason—seemed outdated, they provided a modern, scientific formula for making decisions: one should not refer back to some preordained system but rather assess the potential consequences of choosing one route over

another. As Louis Mennand notes, all forms of “truth,” then, are actually just useful ideas. Useful to *whom*, though? And for *what*?

In the late-nineteenth century the answer to each of these questions was different for each pragmatist. Within the judicial environment in which Holmes formulated his model of legal pragmatism, however, there were a few clear answers. 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. It would calibrate the nation's definition of citizenship, in other words, in relation to the citizenship claims of local state subjects. The result was a constricted reading of US citizenship aptly characterized by Justice Harlan's dissent in the 1883 Civil Rights Cases: "My brethren say 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." Presenting "the rank of mere citizen" as a leveling apparatus sufficient unto itself, the Court, notes Harlan, presented the national rhetoric of citizenship in a newly diminutive form. What was at stake in this decision is the relationship between private affiliation and legal representation. Acknowledging, moreover, the extent to which public and private were themselves redefined by the interpretation of this amendment,[viii] we might also describe what was at stake as the relationship between *personal agency* and *national recognition*, two modes of distinguishing selfhood that, within the structural apparatus of the nation-state, have a long history of discord. I refer to them in this piece as *subject* and *citizen*. Pragmatist decision-making, like the judicial logic of rights, depends upon a dialectic between these two modes of

selfhood. Yet it, like the Supreme Court of the late-nineteenth century prioritizes the subject. I will return to this parallel in a moment.

The Civil Rights case mentioned above overturned the Civil Rights Act of 1875 and thereby paved the way for the *Plessy v. Ferguson* "separate but equal" ruling. In it, Justice Joseph Bradley attested that the rights guaranteed by the 13th and 14th amendment "remain in full force." The statement was part of a majority decision that legalized the refusal of access to inns, public conveyances, and places of amusement on the basis of race. Ensuring the rise of a Jim Crow South, the Court ruled that the prohibitive clauses of the 14th 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. Thus Bradley's argument 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, he deemed these rights as impervious as they were necessary. The "civil rights [that were]… guaranteed under the Constitution against State aggression," in other words, were too personal to be defined by federal legislation yet too fundamental to be threatened by the actions of private individuals. According to this argument, the rights that were most significant existed beyond the pale of federal law. [ix]

To clarify the logic behind this overtly racist argument is to expose a structural ambiguity inherent in Constitutional democracy. Bradley's argument depends upon a nationalist homology of rights and personhood that is fundamental to our conception of the nation-state. The nation grants citizenship and its attendant rights; citizens demand rights of the nation that grants them.

This is a familiar circle, one ceaselessly troubled by debates about immigration and the meaning of citizenship. Though it haunts us today from a different side of the national fence, the source of this circular logic has a history that binds the complex racial politics of US citizens with those of immigrants in the US. Acknowledging this pattern, I frame Bradley's argument as more than a technical extension of late-nineteenth-century racism. It was certainly that. Yet it was also part of a broader history of civic identity. By focusing on the logic itself, this piece contributes to a growing body of work that interrogates the conceptual history of the nation-state through its relation to US racism. In so doing, it also informs our understanding of what made a ruling of "separate but equal" as acceptable to Northern liberals as it was to Southern democrats.

The intellectual history of pragmatism helps us do so. The circular logic of the Court and that of American legal pragmatism are not exactly parallel. Rather, pragmatists sought to address such logic with a practical formula that might more effectively address the human needs of US citizens. They did so by partitioning these human needs to a realm rendered newly subjective, one that, in theory, might function independently of the national mechanism of law that itself determines citizenship. What is most striking about this tendency, though, is the extent to which it was shared by the nation's most powerful lawmakers in the latter half of the nineteenth century. The pragmatists' turn to belief, in other words, reflects a consolidating trend among US policy-makers, as well as public intellectuals based in the academy, that stunted the progressive potential of pragmatist philosophy by informing the structural categories it took for granted. Whether they knew it or not, Peirce's principle provided philosophical backing for nationalist lawmaking.

In the latter half of the nineteenth century senators on both the left and the right presented the private freedom of social affiliation as a sacred right that preceded the law. While defenders of

Jim Crow legislation presented the mixing of races on busses and in schools as a threat to the "freedom of association" guaranteed private citizens in a democratic republic, liberal republicans assured white voters that resistance to such legislation "does not touch the subject of social equality." "The law which regulates that," wrote Senator Frederick Frelinghuysen, "is found only in the tastes and affinities of the mind; its law is the arbitrary, uncontrolled human will." Granting psychology a law-giving quality, Congressman described a realm of legal subjectivity governed less by legislation than by felt affiliation and private belief. Summarizing the formal logic underlying this debate, Senator Waitman Willey described "social relations" as that which "cannot be regulated by law, and "social equality [as]… a matter of taste, of feeling, and of everyman's unfettered sense of propriety."

In this context, "social equality" became a coded phrase for racial mixing that tapped deep-seated fears of miscegenation. In order to prevent this possibility without acknowledging it explicitly, US Congressmen turned to a republican language of right, a rubric for civil collectivity meant to sustain chosen forms of difference. It was within this rhetorical environment that the Civil Rights Act proposed by radical republicans in the late days of Reconstruction was presented as an intrusive attempt "to regulate the associations, companionship, tastes, and feelings of the people,"[x] a tyrannous conflation of the civil with the social. Constricting the value of legal citizenship, while acknowledging a model of legal subjectivity that preceded citizenship, policy-makers and public intellectuals placed the civil and the social in stultifying opposition. Amidst a visible threat of racial impurity, those who acknowledged this pre-civil, decision-making agent clung to it with increasing vigor. The result was an imaginative blend of John Locke and Jeremy Bentham—a law-making subject projected by the interpreters of law that crossed a Lockean model of mythic individualism with a collective

model of national purity. This is the judicial environment in which American legal pragmatism arose.

Meanwhile, within the social realm that senators so carefully partitioned from the civil, traditional markers of race were in radical flux. As conceptual dichotomies like savage and civilized, owner and owned, black and white, lost meaning and influence, government decisions like *Plessy v. Ferguson*, Jim Crow legislation, and imperialist expansion into the Philippines sought to regulate this flux by establishing clear delineations between categories like race and nation. At the same time, federal leaders like Theodore Roosevelt merged them anew through rhetorical distinctions between foreign and domestic, citizen and alien. Among a white scholarly elite that had spent the early part of the century developing elaborate schemes of racial classification, Spenserian theories of social evolution, eugenics, and other forms of scientific racism accompanied a well-documented crisis of religious and intellectual authority.[xi] At the most renowned universities, cultural models of race were beginning to displace the biological models that characterized racial science in the earlier part of the century[xii]. Pragmatism arose, then, alongside a new formulation of the relationship between racial and civic identity, acquiring meaning in reflexive relation to this new formulation. It did so within a social sphere that was not only newly diversified but also newly objectified by the developing social sciences.

To present pragmatism within this intellectual environment it to expose it as a conceptual entity rooted in the epistemological crisis that, for late-nineteenth-century intellectuals, accompanied the racial ambiguity of the US. Whereas Cornel West distinguishes pragmatism as a uniquely American tradition of "prophetic" evasion[xiii], I frame it here as part of a national framework that sought new definitions of selfhood in reaction to newly recognized racial formations that were imagined both within and without US borders. I situate it, in other words,

not only in relation to the violence of Jim Crow but also, and more immediately, in relation to a white academic left that sought to distinguish itself from that violence.

This, of course, is not a very pragmatic approach to pragmatism. To look for its roots is to decline its own emphasis on the potential use-value of symbolic abstraction, to favor historical accuracy over fruitful translation. Yet to align these roots with those of a late-nineteenth century concept of race, as well as a history of Western liberalism—to consider and critique the ways in which a racialized sense of self is endemic to early pragmatism—is not to dismiss the work of more recent pragmatists who emphasize the potential use value of collective categories of selfhood[xiv]. Rather, it is to expose the intellectual alliances pragmatism makes and has made at the expense of others. Does it, for example, favor racial identification over the collective memory of stigmatization? Reinstating the category of the individual, does it masque its own indebtedness to a particular history of Western liberalism?[xv] Or does it create a space, as Paul C. Taylor argues, for addressing a history of racial violence through forms of identification that defy the epistemic violence of traditionally white typologies?

As cosmopolitan thinkers look to pragmatism to provide a space of freedom that might combat racial injustice without essentializing race, I consider whether using pragmatism to address questions of race presents a circular tautology rooted in nationalist ideology. This kind of inquiry requires an approach that is not only less invested in pragmatism per se but that also allows for more hopeful questions: Might pragmatism's past, closely historicized in relation to the racial and literary discourses[xvi] that continue to mobilize it, re-focus our attention on both the narrative formations that continue to mark bodies and the imaginative acts of dissent that accompany them? Might it inform the relationships we create between race, literature and politically effective forms of citizenship? I am suggesting that pragmatism has its own story to

tell about the way these categories inform and reform one another, one of marked bodies marking discursive histories.

This piece is a small part of that larger project. In what follows, I argue that pragmatism's overt failure to address practically the racial discord of its era is inseparable from its conceptual failure to recognize the social histories of racialized bodies. Charting one model of pragmatism through its own logical ends, I examine the legal pragmatism of Oliver Wendell Holmes, Jr. in relation to the contemporaneous construction of citizenship that occurred through Supreme Court readings of the 14th and 15th Amendments from the end of Reconstruction to the 1896 *Plessy v. Ferguson* decision. Through the language of these cases I isolate a late-century legal distinction between subject and citizen that not only mirrors the conceptual framework of the first pragmatist philosophers but also presents race as the formative grounds for this distinction. This separation of subject and citizen is the shared backbone of early pragmatism and Jim Crow legislation. Its own theorization of "separate but equal," pragmatism in this era works to either separate the individual from collective forms of citizenship or to encourage collective forms of identity that are themselves removed from the juridical history of citizenship. Either way, it insists upon a separation of cultural politics from government politics by constructing and removing models of the self—be it an atomized individualism of William James or cultural collectivism of Oliver Wendell Holmes, Jr.—from the institutional structures that produce and sustain them.

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In order to better understand Holmes's particular model of legal pragmatism it is necessary to clarify a defining feature of it and to distinguish this feature from that of contemporary jurists. The legal principle that became known as judicial restraint is fundamental to Holmesian jurisprudence yet seemingly at odds with the mandates of contemporary pragmatists. I linger here upon Holmes's specific model of judicial restraint not only because its logic became complicit with the federal authorization of Jim Crow legislation in the late-nineteenth century but also because it exposes an imagined collective, or citizenry, that is inherent to both US Constitutionalism and American legal pragmatism. One cannot consider the racial paradigms endemic to American legal pragmatism without simultaneously confronting the structural history of a nation-state that emerged—and is still taking shape—in relation to specific racial populations.

A theory of judicial restraint is one that encourages judges to limit their own power in making decisions about the Constitutionality of a law. The opposite of judicial activism, it entails deference to federal and local legislatures as the appropriate law-making apparatus of a nation and minimizes the power of the judiciary to enact policy. The Supreme Court Judges that practice judicial restraint thus tend to be conservative. Justices Anthony Scalia and Clarence Thomas, for example, practice it under the rubric of a related yet different doctrine called strict constructivism. Yet the difference between their model of judicial restraint and that of Oliver Wendell Holmes, Jr. is important. What distinguishes these models is the collective mechanism through which the judge attaches himself to the law and the nation. One could also refer to this "mechanism" in less legal terms: it is the unit of solidarity upon which the judicially restrained judge bases his decision-making power. A pragmatist would prefer this latter characterization.

A strict constructivist bases the authority of the law—and thus his decisions—upon the intentions of the founding fathers. That which is not contained within the law itself, he argues, ought not be enacted by a federal court. One could also call these judges legal positivists, then, in that they see the law as a system that is already complete. Yet whereas more traditional positivists like John Austin and Jeremy Bentham uphold a fundamental separation between law and morality, strict constructivists like Scalia and Thomas deemphasize this distinction through recourse to a mythic vision of the founding fathers. The source of their legal positivism, then, is a singular reverence for the nation-state as an entity that precedes them and their perspective as judge. This, they argue, is the conceptual center of the law's power and authority.

Holmes, on the other hand, bases his judicial restraint upon a view of the law as an evolving practice, not a closed system. In *The Common Law* he develops this thesis by replacing one model of continuity with another: an older appeal to tradition with a pragmatist appeal to inquiry. Holmes's common law, then, is one that develops gradually within real time and in accordance with a lived collective history. It continues to matter and exist by virtue of those who question it, and a jurist's accommodation of these particular challenges is what forces the law to evolve. The irony of this historical process, though, is that it forces the law to perpetually abstract itself in what seems a removal from the histories that give it meaning. Holmes describes this evolution as follows:

> [W]hile the terminology of morals is still retained, and while the law does still and always, in a certain sense, measure legal liability by moral standards, it 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. [xvii]

For Holmes, the law has no will or agency, only utility. Abstractions like "the rights of man" emerge to accommodate that which a group of men, at a particular moment in history, felt they

deserved. Yet such abstractions, argues Holmes, must never supersede the collective integrity of a governed people's will or belief. This principle is also what distinguishes Holmes's model from that of conservatives like Thomas and Scalia. The unit of solidarity upon which Holmes bases his judicial restraint is not the founding fathers—they are even less significant than the abstract logic pragmatists decried. Rather, Holmes bases his judicial restraint upon a vision of social community that is contemporary to each era and manifest in the laws of a people. Within such a model, the law will always lag a bit behind the people.

The most famous example of Holmes's judicial restraint is his dissent in the 1905 case *Lochner v. New York*. 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. This amendment, he writes, "does not enact Mr. Herbert's Spencer's Social Statics." 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 any theory of personhood embedded in the Constitution: "Some of these laws 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 preserves it as the appropriate site of judicial authority within the law-making apparatus of a nation-state. [xviii]

Yet it is this emphasis on "the people" that ultimately becomes problematic within Holmes's legal pragmatism. 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, though, is that the meaning of citizenship—and thus the content of citizenship rights—is to be determined by citizens themselves. One's personhood, in other words, cannot be contained or described by the formal structures of law. Another way of articulating this principle would be to say that one's status as a person, which is itself protected by the language of the Fourteenth Amendment, is just distinct enough from one's status as a US citizen to grant local communities the freedom to determine the content of their citizenship rights. Critics of Holmes have emphasized the popular sovereignty inherent in this model and thus its accommodation of Jim Crow legislation.[xix] What they have not emphasized is the critical distinction between legal subject and legal citizen that is inherent in it, a distinction that 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. For a doctrine that arose in a post-Reconstruction/pre-civil rights era, the question of particular concern is whether or not this model of legal personhood is finally a *racial* model—a vision of civil collectivity inextricable from the collectivity commonly understood as race. Let us turn, then, to the particular aspects of the *Plessy v Ferguson* ruling that are parallel to Holmes's dissent in *Lochner*.

What makes *Plessy v Ferguson* especially relevant to this inquiry is the way in which the Court sustained racial categories of personhood while at the same time surrendering the power to define those categories. Through a logic that is as damning as it is ironic, the Court not only admitted the epistemological instability of these categories but also used that very instability as a point in its argument. Plessy, who was not discernibly black, had made the scientific

indeterminacy of race a part of his defense. With reason more sound than that of the Court, he asked how the state could mandate the separation of races that scientifically could not be distinguished from one another. The Court responded to this point with the following:

> It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some holding that any visible admixture of black blood stamps the person as belonging to the colored race… and still others that the predominance of white blood must only be in the proportion of three fourths… But these are questions to be determined under the laws of each State and are not properly put in issue in this case. Under the allegations of his petition it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race. (51)

From here, the Court could 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 maintaining its "health and welfare." If, then, with the Fourteenth Amendment the Court had relinquished the whiteness formerly attached to US citizenship, its subsequent interpretation of this Amendment—and especially the phrase "separate but equal"—further erased the 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 made Homer Plessy's most prescient argument mute. 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. To do so is sustain a racial model of personhood that exists outside of law yet turns 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 a model of personhood that entails racial affiliation to a social realm that the Supreme Court rendered newly distinct from the formal apparatus of US citizenship.

This relocation of legal personhood began long before the *Plessy* case. *Plessy*, rather, was part of a series of post-Civil War victories for Southern legislatures that had formerly fought under the pre-Civil War banner of "states' rights." What is different about this consolidation of states rights from that for which the Southern states had formerly fought, though, is the fact that it was also part of a federal consolidation of the nation's own law-making powers. The rights formerly attached to personhood, in other words, were *given* to the states by the federal government. To emphasize this seemingly minute legalism over the broader well-documented correspondence between the rhetoric of "states' rights" and that of white nationalism in the US is to risk missing the point. I do so, though, because this legalism is not only the theoretical root of this broader correspondence but also the root of a Holmesian pragmatism that sought to purge the law of objectifying hierarchy.

Holmes's evacuation of the law, then, was also a re-embodiment. His pragmatism was an attempt to replace the status formerly attached to the law's positive content with the felt needs of those who would reinvigorate the law. In the first lecture of *The Common Law* Holmes summarizes this theory in what is also a history of the common law. "The life of the law," he writes "has not been logic: it has been experience." That which keeps the law alive, he later adds, is "[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."[xx] Yet as an acting judge, he also writes "A man may have as bad a heart as he chooses, if

his conduct is within the rules." Deeming the "bad heart" of the accused an irrelevant factor in determining guilt or innocence, he removes intent from the parameters by which a man might be judged. Thus he not only evacuates the law of positive content but also prescribes a new method for the judgment of men, one that deprives the judge of his own power to interpret both legal concepts and contemporary mores. In *The Common Law* he names the extra-legal mechanism by which judges make decisions an "external standard." Yet to employ this standard and thereby determine guilt or innocence, a judge must re-imagine the crime scene in relation to a "reasonable man" who may or may not commit the crime; he must ask himself, "How might a reasonable man be expected to act in the situation presented by a given case?" That which is considered "reasonable" will necessarily change over time, for it is dependent upon "the felt necessities of the time." Thus his "reasonable man" not only replaces the citizen, an entity once endowed with participatory "rights," but also becomes a vessel for the sovereign will of a particular community.[xxi]

The federal Courts of the late-nineteenth century left unique room for "the felt necessities of the time," particularly those of Southern racists. What I wish to emphasize, though, is not only the accommodation of legal racism inherent in Holmes's model but also its inscription within the legal apparatus that Holmes sought to evacuate of positive content. Consider the following passage from *The Common 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)

Distinguishing "the nature of the standards to which conformity is required" (50) from "the condition of a man's heart or conscious," or "the degree of evil in the… person's motives or intentions," Holmes presents a history of jurisprudence that highlights the limits of judicial ethics. For the pragmatist, criminal liability is determined more by the expectations of a self-governed community—the "external standard" that itself required an imagined subject—than by the actual behavior of the accused. His discussion of criminal liability, however, exposes the particular histories from which such standards emerge. "No doubt," he adds candidly, "the fears peculiar to a slave-owning community had their share in the conviction which has just been mentioned" (69). Since for Holmes the law is itself devoid of positive content, the historical facts of slavery and racial discrimination have nothing to do with the just determination of liability. Why, then, is this memory of the aggressive conviction of a black slave embedded within his prescriptive model of jurisprudence?

Holmes' use of such an unsettling example to demonstrate "the nature" of criminal liability highlights a new relationship between past and present that is posed by late-nineteenth-century pragmatism. More specifically, it presents a genealogy of law that purges itself of particular racial histories precisely to the extent that it acknowledges those histories. Thus Holmes hollows out a formal space within the law whose re-embodiment depends upon a particular act of forgetting. The jurisprudence he describes in *The Common Law* is thus a system of legal classification that works by erasing itself. Rather than dismantle the formal structures of law, Holmes deprives them of the ability to make new meaning. Rather than remove an inherited model of national subjectivity *from* the law, his model of judicial restraint makes national subjectivity the source of law, consolidating racial identity alongside that of the federal government.

This dual consolidation also informs Holmes's preference for the term "duty" over "rights." [xxii] For Holmes, a judge that acts responsibly is one that acts dutifully, not ethically, by injecting the law not with his own convictions, nor with those of the law's founders, but with an interpretation of what is "reasonable" for a given populace. He calls the criteria by which a judge makes this interpretation an "external standard." But where, then, is the judge? To whom—or what—is he attached? Positioning himself both within and without of the populace, Holmes's model judge is a keen social reader, an analyst rather than an ideologue, and certainly not a sentimentalist. He is also profoundly isolated. In this context, it is unsurprising that legal scholars continue to find Holmes "useful" yet have trouble drawing contemporary conclusions about him. By virtue of his pragmatism, Holmes was inextricably of his time. Perhaps this is the problem.

For Holmes, the act of affiliation through which a judge credits himself a legal interpreter of the law is professional and, in its own way, social; yet not civic. Herein lies the tragedy inherent in Holmesian jurisprudence. In evacuating the law of positive content, Holmes also erases himself. Recognizing the logical complicity between human interests and legal rights, he reduces the judge's role to that of institutional maintenance. The tragedy here, alongside that of Jim Crow, is the constriction of Holmes's own civic identity that accompanied his scholarly disdain for rights, the objectification of his role as judge and the insipid professionalism that made this possible. Prevention of this tragedy would have required a legal model of the self that is more than a constitutive unit of the nation state yet that a Supreme Court judge might nonetheless project and interpret; a more imaginative, less constricted interpretation of federal law, rights, and their relation to national sovereignty. For a closer look at how these categories interacted with one another in the late-nineteenth century, let us return to the Civil Rights case with which I began.

The 1883 Court responded to Jim Crow legislation with a restrictive reading of the fourteenth amendment that limited the scope of civic life through which citizenship and personhood were traditionally aligned.[xxiii] It did so by manipulating an old site of rhetorical ambiguity particularly prevalent in US political thought: a blurry line between political right and natural right. Political rights are the product of sovereignty and as such protected by the US Constitution. They gain legitimacy from the state that deems them necessary and thus function within a logic that is fundamentally Hobbesian. Natural rights have discursive roots in a god-given mandate that supposedly precedes the state. Though our secular society has replaced them with "social rights," they remain what the Declaration of Independence calls "self-evident." Meant to precede national sovereignty, they are the rights that become defendable around the world. They are also more clearly attached to personhood and not necessarily protected by the law. The US government has a history of combining the two indiscriminately.

For a nineteenth-century Supreme Court, however, the passage of the Fourteenth Amendment brought the discursive distinction between political and social rights to the forefront. Introducing "civil rights" into the American lexicon, the amendment allowed for a new arrangement between the rights attached to citizenship and those attached to personhood. As Brook Thomas notes, civil rights occupy "a middle ground" between political and social rights. They are the social rights that a federal government deems significant enough to receive formal recognition and legal protection. We might also call them, as Thomas does, "the nonpolitical rights of citizens of a particular country." Civil rights, then, retain an attachment to the personal, a sacred realm historically attached to both nature and culture. Whether we refer to them as public or private, natural of social, they are the personal rights that a federal government guarantees its citizens by virtue of being human. Especially in light of the discursive distinction between citizenship and

personhood that informed legal subjectivity before the Civil War, this level of specification is necessary. What were they, though, in what we now recognize as a pre-civil rights era?

Here Bradley's 1883 argument is exemplary. By partitioning certain legislative powers to the states and others to the federal government, while simultaneously defining those powers as the maintenance of civil rights, the Supreme Court presented these rights as a theoretical placeholder for that which it deemed inalienable but could 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."[xxiv] 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, for Holmes—and the extent to which that collective unit coheres organically. Legal personhood thus remains in tact, and a national collective that makes "the people" a meaningful term remains preeminent.

Or is it "the logic" that remains preeminent? This particular maintenance of legal personhood also implies that one cannot look to the law for redress or recognition without the support of a cohesive community that anticipates the law for its own broader maintenance. Justice Henry Billings Brown reiterated this point in the majority ruling of *Plessy v Ferguson*: "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals… this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate." According to this argument, racial personhood is an organic affiliation that precedes legal mandate. As such, it was distinguished from the category of citizenship. As a result of this discursive distinction, the rights attached to

citizenship could function within an increasingly abstract realm that became impervious to the rights claims of black Americans. Thus the Court turned to a logic of rights that was newly vacuous to distinguish its power to protect citizens from the "natural affinities" that govern the social: "If the civil and political rights of both races be equal one cannot be inferior to the other civilly of politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane." This distinction between formal equality and social equality depends upon a collective model of personhood that is newly distinct from the citizenship guaranteed by the US Constitution.

By distinguishing personhood from citizenship, the Court preserved a model of subjectivity that it could not imagine independently of race. It was willing to expand the meaning of citizenship to include blacks, but only by shrinking the value and significance of that very citizenship. It did so through a partitioning of rights that distinguished the most fundamental parts of the self as those requiring police protection at the most local level. This partitioning sustained the integrity of belief for a population that understood itself as white even before it understood itself as a US citizenry, one that also expected its whiteness to remain protected by the laws of the US government.

Ironically, it was the language of the Fourteenth Amendment that made this distinction 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. This distinction between federal and state citizenships, as well as between "persons" and "citizens," was meant to overturn the racial logic of the 1857 Dred Scott decision, the factious case that racialized US citizenship by denying it to all African Americans. Yet in 1883 Bradley turned to this distinction 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. This irony was not lost on Justice Harlan in the *Plessy v Ferguson* case. In his dissent he wrote:

> In my opinion the judgment this day rendered will prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case… The present decision, it may well be apprehended, will not only stimulate aggressions more or less brutal and irritating upon the admitted rights of colored citizens, but will encourage the belief that it is possible by means of state enactments to defeat the beneficient purposes which the people of the United States had in view when they adopted the recent amendments of the constitution.

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 is endemic to a nationalist discourse of rights. 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.

Like the absent definition of race in *Plessy v. Ferguson*, or the "external standard" that for Holmes replaces intent, a model of legal personhood that the late-nineteenth century Court refused to define was carefully preserved through the protection of discriminatory racial mandates whose enforcement it relegated to local communities. The Court deemed Jim Crow legislation Constitutional through recourse to the police power of the states, a power whose

formal charge was to protect the "health and welfare" of each state. In turn, state governments were to specify the rights pertaining to "life, liberty and property." "People," then, the constitutive unit of a nation's "health and welfare," were protected by the police power of the state; citizens by the fourteenth amendment. The two entities need not be confused. Through this 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.

It was in accordance with this logic that the same Court would uphold anti-miscegenation laws in both the North and the South. Whereas the 1857 Dred Scott case had 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 boundaries of US citizenship alongside a realm of national subjectivity that remained distinct from this citizenship—the "health and welfare" that only a local police power could protect—the site of legal personhood became local rather than national, social rather than civic. In the late-nineteenth century, it also became distinctly racial. This was the most sweeping result of this careful juggling of legal categories. Thus 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.

Holmesian jurisprudence requires a similar leveling of citizenship, a transformation of the abstract rights of citizenship into the needs of a singular cohesive body. Still, I do not mean to suggest direct causality between Holmsian jurisprudence and the Supreme Court's abandonment

of civil rights. Instead, by locating Holmes' legal writings within a broader school of pragmatist thought, I hope to expose the particular means by which rights marked the boundaries of national citizenship alongside a concurrent redefinition of the liberal subject that, with a pretense to being extra-legal, 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.

What remains at stake is the relationship between personhood and citizenship. The problem with Bradley's argument is not the formalization of rights, his articulation of them as abstract placeholders for the human necessities that he—and the federal government—mandated but could not define. The problem, rather, was his objectification of rights as a static entity that might exist independently of the people who claim them. As a tool for justice, rights can only work within a shared conceptual field whose members recognize them as *both* a formal administrative apparatus and a felt necessity. Maintenance of this dialectic, or gap, between these two conceptions of right is essential for making rights effective in law.

What happens to this gap within Holmes's legal pragmatism? This question returns us to Holmes' preference for "duty" over "rights." For Holmes, the work of the law is no less than the transformation of reason—of tired abstractions like "the rights of man"—into the integrity of lived belief. This integrity depends upon a collective will that develops gradually and is sustained and tested by the collective life of a people. The process will never be complete. Yet it is the judge's duty to respect it. By continuing along this path, the law maintains its attachment to the felt needs that emerge only from a distinctly social realm. The development of the law, then, is a slow, organic progression from old to new consensus. It is the judge's duty, according to Holmes, to respect this—potentially more democratic—process. The decisions of each judge

are an important part of it. Yet by virtue of his professional affiliation with the formal structures of law, the judge's foremost duty is to interpret that which lies "outside" the law. As a representative of the law itself, his job, then, is to disappear, or at least get out of the way. This mandate entails a tragic erasure of self, one that, for Holmes is nonetheless the product of belief. Through it, he disowned his own authority, dissolving into a judiciary environment that accommodated Jim Crow.

The judicial environment in which Holmes allowed himself to dissolve had even more tragic effects. *Plessy v Ferguson*, as well as the 1883 Civil Rights casesc became a precedent for further legislation concerning the Fourteenth Amendment and the rights of blacks. Consistently, the verdict in these cases relied upon an interpretation that eliminated intent from the structures of law, relying instead upon a speculative cause-and-effect logic akin to the Holmsian "external standard." In *Williams v Mississippi* (1898), for example, which upheld legislation that, through an 1891 grandfather clause, required jurors and electors to pass literacy tests, Justice McKenna summarized the Court's logic: "It has not been shown that their actual administration was evil, only that evil was possible under them." Through reference to a "reasonable" third party 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 nonexistent third party, the imagined inheritor of an "external standard," became the ghostly agent of discriminatory legislation for jurors who could claim to avoid self-interest.[xxv]

This logic was just as pervasive on the left. A 1904 article lamenting the extent to which the Supreme Court had failed to protect blacks in the South nonetheless described the reality of Jim Crow as follows: "Indeed the course of decisions of that court on this subject form an interesting and instructive illustration of the fundamental truth, that it is useless for the statesman of one

epoch, however patriotic, wise or far-seeing he may be, to attempt to regulate, or to circumscribe the political activities of future generations." The article prescribes a "social" solution instead: "the diffusion of intelligence, of higher moral ideals, and a spirit of industry and thrift among the colored people through channels which will reach them as individuals, rather than collectively as a distinct race." As Holmesian jurisprudence morphs into Jamesian individualism, a cultural logic emerges that further distinguishes subject from citizen:

> The world has come to realize that reality between negroes and caucasions cannot be created by legislation, and that the negroes position as one of inferiority, of equality, or of superiority will depend upon what he is or may make of himself, and not upon any artificial or civic conditions or status which a statute may impose or confer.

Demoting that which is civic or legal to the status of "artificial," the author not only reifies a lamented divide between the civil and the social but also imagines a collective organicism out of which a newly national subject will emerge. [xxvi]

For many, this newly national subject was the representative of a race newly purified. In a discussion of *Plessy v. Ferguson* Charles Lofgren describes Daniel G. Brinton's 1895 "The Aims of Education," a presidential address to the prestigious American Association for the Advancement of Science, that provides telling insight into the broader intellectual environment out which both *Plessy* and pragmatism, emerged. Brinton's address focused on what he considered the deficiencies of "the black, the brown, and red races." Insisting that no race could "escape the mental correlations [*sic*] of it physical structure," he spoke of "a racial mind, or temperament of a people" that, he claimed, was as accurate a marker of race as distinguishing physical traits. He concluded with a statement that the differences between mankind's "component social parts, its races, nations, tribes" supply "the only sure foundations for legislation; not *a priori* notions of the rights of man…"[xxvii] Echoing the pragmatists' call to abandon a priori logic, his racial science becomes a racist prescription.

Holmes was uninterested in the racial biology of scientists like Daniel Brinton. Yet his legal formulations bespeak an eerie correspndence with them. To test this correspondence, I have examined the symbolic field through which the logic of Jim Crow legislation and Holmsian jursprudence animated one another. To do so is to explain the particular "life" of the law imagined by both Holmes and those who asserted the maintenance of rights through exclusionary Jim Crow legislation. Perhaps, though, Holmes' articulates this logic better himself in a discussion of the "wholesale social regeneration" imagined by reformers in the late nineteenth century:

> I believe that the wholesale social 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.[xxviii]

Here Holmes exposes the extent to which pragmatism is a system of classification that works by erasing itself. Whether or not Holmes intended it, what on the surface seemed a philosophical position fundamentally resistant to both a priori logic and biological determinism became a coding mechanism for redefining race. If legal pragmatists 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 defining it as the legal entity that the police power of the states was charged to regulate and protect. To do so, suggests Holmes, is to build a race from the bottom up.

In *The Anatomy of National Fantasy* Lauren Berlandt describes an antebellum legal environment in which "the modern state's assurance of national identity as more fundamental to the person than any of his other historical affiliations provides the citizen his fundamental sense

of power, protecting the citizen as he negotiates everyday life, as he lives his own privileges." National identity, in other words, provided the most powerful form of personal identity, maximizing the privileges of citizenship for white males in a pre-Civil War era. Holmesian jurisprudence sought to overturn this logic, making one's personal affiliations the precedent that would inform the meaning of citizenship. This would have been very nice in the ante-bellum era. After the Fourteenth Amendment granted citizenship rights to blacks, however, a post-bellum Supreme Court evacuated US citizenship of the privileges of personhood that it previously entailed. Rather than dismantle the racialized model of legal citizenship authorized by the Dred Scott decision and upheld by popular racism, it distinguished the rights of personhood from those of US citizenship, thereby preserving a national model of subjectivity that, under the auspices of the states, kept racial affiliation in tact.

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[i] Oliver Wendell Holmes to Harold J. Laski. June 1, 1927. *Holmes-Laski Letters*, 2: 948.

[ii] Oliver Wendell Holmes, Jr., *The Common Law* (New York: Dover, 1991); Thomas C. Grey, "Holmes and Legal Pragmatism," *Stanford Law Review* 41. 4 (Apr., 1989): 787-870; Frederic R. Kellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint* (New York: Cambridge UP, 2007). See also David Luban, "Justice Holmes and the Metaphysics of Judicial Restraint," *Duke Law Journal*, 44.3 (Dec., 1994): 449-523.

[iii] Quoted in Max Fisch. Justice Holmes, *The Prediction Theory of Law, and Pragmatism*, *supra* note 14 at 4.

[iv] The seminal essays for Peirce's theory of belief are "The Fixation of Belief" (1877) and "How to Make Our Ideas Clear" (1878). William James would riff upon this theory nine years later in an essay called "The Will To Believe." In 1890 he would biologize it in his description of "habit" in *Principles of Psychology*. In 1907 he would name "Peirce's principle" the basis for his essay "What Pragmatism Means."

[v] On pragmatism and American modernism see Frank Lentricchia *Ariel and the Police: Michel Foucault, William James, Wallace Stevens* (Madison: U of Wisconsin P, 1988).
David Kadlec provides a more historically grounded reading, isolating the pragmatist and anarchist roots of both European and American modernism in *Mosaic Modernism: Anarchism, Pragmatism, Cutlure* (Baltimore and London: Johns Hopkins UP, 2000). On pragmatism and

literary and legal realism see Brook Thomas, *American Literary Realism and the Failed Promise of Contract* (Berkeley and Los Angeles, University of California UP, 1997). Thomas discusses Oliver Wendell Holmes, Jr. as a key figure in what Morton White called "the revolt against formalism": "Generated by what today is called antifoundationalist thought, this revolt would come to include pragmatists, new historians, and literary and legal realists" (45). On pragmatism and new historicism see Steven Knapp and Walter Benn Michaels "Against Theory" and the essays that respond to it in *Against Theory: Literary Studies and the New Pragmatism*, Ed. W.J.T. Mitchell (Chicago: University of Chicago UP, 1982). See also Richard A. Posner, "Pragmatic Adjudication," Michel Rosenfeld "Pragmatism, Pluralism, and Legal Interpretation: Posner's and Rorty's Justice without Metaphysics Meets Hate Speech," Richard Poirier, "Why Do Pragmatists Want to Be Like Poets?" and Louis Menand "Pragmatists and Poets: A Response to Richard Poirier," all in *The Revival of Pragmatism: New Esssays on Social Thought, Law, and Culture*. Ed. Morris Dickstein (Durham, Duke UP, 1998).

[vi] See Ross Posnock, *Color and Culture: Black Writers and the Making of the Modern Intellectual* (Cambridge, Harvard UP,1998). Paul C. Taylor, "What's the Use of Calling Du Bois a Pragmatist?" in *The Range of Pragmatism and the Limits of Philosophy*. Ed. Richard Shusterman (Malden, MA: Blackwell Publishing, 2004) and Paul C. Taylor's *Race: A Philsophical Introduction* (Cambridge: Polity UP, 2004; Kwame Anthony Appiah *Cosmopolitanism: Ethics in a World of Strangers*. (New York: Norton, 2006); Tommie Shelby *We Who Are Dark: The Philosophical Foundations of Black Solidarity* (Cambridge: Harvard UP, 2005).

[vii] In an intellectual community whose authority was threatened by theories like social Darwinism and "the death of God," the grounds of ethics had become unclear. Confronting a modern worldview that pitted science against religion, empiricist scholars like James sought ethical alternatives, like pragmatism, that allowed science and religion to co-exist.

[viii] In a sweeping redefinition of legal personhood, the equal protection clause of the Fourteenth Amendment was also used to protect corporate entities against the claims of labor.

[ix] Congress passed the Civil Rights Act during a lame-duck session in the fall of 1875. Sumner had died the previous year but had been fighting for it since 1870. Its passage was a last attempt on the part of radical republicans to shore up civil rights legislation before the disputed election of Rutherford B. Hayes ushered in the end of Reconstruction. Though it is debatable whether or not the Act would have prevented segregation of the "separate but equal" kind, it did contain the following language:

> all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by the law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude

The 1883 Civil Rights Cases explicitly overturned this language. See *Civil Rights Cases* 109 U.S. 3 (1883), 13.

[x] For a discussion of these debates that includes the above quotations see Frank J. Scaturro, *The Supreme Court's Retreat from Reconstruction* (Westport, Connecticut: Greenwood P, 2000), 136-140. See also Otto H. Olsen, Ed., *The Thin Disquise: Plessy v. Ferguson* (New York: Humanities Press, 1967). Brook Thomas, *Plessy v. Ferguson: A Brief History with Documents* (Boston and New York: Bedford, 1997).

[xi] On this crisis of intellectual authority see James T. Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870-1920* (New York and Oxford: Oxford UP, 1986). For its distinctly religious elements and the nativism that accompanied it see Jackson Lears, *No Place of Grace: Antimodernismm and the Transformation of American* Culture, 1880-1920 (New York: Pantheon Books, 1981). See also Kloppenberg's "Democracy and Disenchantment: From Weber and Dewey to Habermas and Rorty" and Dorothy Ross, "Modernist Social Science in the Land of the New/Old" both in *Modernist Impulses in the Human Sciences*, 1870-1930. Ed. Dorothy Ross (Baltimore and London: Johns Hopkins UP, 1994). For an especially thorough discussion of this crisis in relation to pragmatism and subjectivity see James Livingston, *Pragmatism and the Political Economy of Cultural Revolution, 1850-1940* (Chapel Hill: University of North Carolina P, 1997). For more on eugenics and the white racial science that accompanied this crisis see Thomas R. Gossett, *Race: The History of an Idea in America*. New Edition (New York: Oxford UP, 1997): 54-83, 144-175. Susan Mizruchi *The Science of Sacrifice: American Literature and Modern Social Theory* (Princeton: Princeton UP, 1998). Allen Chase, *The Legacy of Malthus* (New York: Knopf, 1977). Daniel J. Kevles, *In the Name of Eugenics: Genetics and the Uses of Human Heredity* (New York: Knopf, 1985).

[xii] See Dorothy Ross on the invention of the social sciences. *The Origins of American Social Science* (Cambridge: Cambridge UP, 1991). All of the sciences in this era became increasingly specialized and systematized. Pragmatists like Peirce, James, and Holmes were ardent participants in this project. A poignant example of this trend is the Preface to William James' 1890 *Principles of Psychology*. Its central point is the distinction between the new study of psychology and that of metaphysics, a careful cordoning of "finite individual minds" from that which James considers external and collective: "Psychology, the science of finite individual minds, assumes as its data (1) *thoughts and feelings*, and (2) a *physical world* in time and space with which they coexist and which (3) *they know*. Of course these data themselves are discussable; but the discussion of them (as of other elements) is called metaphysics and falls outside the province of this book… Metaphysics fragmentary, irresponsible, and half-awake, and unconscious that she is metaphysical, spoils two good things when she injects herself into a natural science" (vi). A decade later Peirce would begin work on a massive text entitled *The Classification of the Sciences*, which I will discuss further in this chapter. This practice of cordoning off knowledge as part of a broader classificatory scheme is endemic of early pragmatism and a distinguishing mark of its era.

[xiii] West's *The American Evasion of Philosophy* describes pragmatism as a form of "historical consciousness" (111) epitomized by both its abandonment of European metaphysics and its commitment to cultural criticism and political engagement.

[xiv] See Paul C. Taylor, Jose Medina, and Tommie Shelby. See also Sor-Hoon Tan, "China's Pragmatist Experiment in Democracy: Hu Shih's Pragmatism and Dewey's Influence in China," and Richard Shusterman, "Pragmatism and East-Asian Thought" both in *The Range of Pragmatism and the Limits of Philosophy*. Ed. Shusterman.

[xv] Both Clive Bush and Shamoon Zamir make this point about the pragmatism of William James. Clive Bush, *Halfway to Revolution: Investigation and Crisis in the Work of Henry Adams, William James, and Gertrude Stein* (New Haven: Yale UP, 1991). Shamoon Zamir, *Dark Voices: W.E.B. Du Bois and American Thought, 1888-1903* (Chicago: University of Chicago P, 1995).

[xvi] See Richard Poirier, "Why Do Pragmatists Want to Be Like Poets?" and Louis Menand "Pragmatists and Poets: A Response to Richard Poirier," both in *The Revival of Pragmatism: New Esssays on Social Thought, Law, and Culture.* Ed. Richard Shusterman.
[xvii] The Common Law, 38.
[xviii] *Lochner v. People of State of New York,* 198 U.S. 45 (1905)
[xix] Both Gregg Crane and Brook Thomas note the ways in which the logic of Holmes's dissent in *Lochner* "rhymes" with that of *Plessy v Ferguson*. Crane. *Race, Citizenship, and Law in American Literature* (New York: Cambridge UP, 2002).
[xx] Oliver Wendell Holmes, "The Path of the Law" (1897), in *Collected Legal Papers,* 161, 173.
[xxi] *The Common Law*. New York: Dover, 1991. 1.
[xxii] For a Holmes theory of legal duty in relation to contract see "The Path of the Law" (1897) 10 *Harvard Law Review* 457, reprinted in *The Essential Holmes,* ed. Richard Posner, Chicago and London: U of Chicago P, 1992, 163-164. For a discussion of Holmes preference for "duty" over "rights" see G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self,* New York: Oxford UP, 1993, 121-124.
[xxiii] For a summary of the historical relationship between personhood and US citizenship, see Lauren Berlant, *The Anatomy of Nantional Fantasy: Hawthorne, Utopia, and Everyday Life* (Chicago: U of Chicago P, 1991), 1-18. See also Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* (Durham, NC: Duke University Press, 1997); Catherine Holland, *The Body Politic: Foundings, Citizenship, and Difference in the American Political Imagination* (New York: Routledge, 2001); Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997).
[xxiv] *Civil Rights,* 13.
[xxv] *Williams v. Mississippi*, 170 U.S. 213 (1898)
[xxvi] B. Frank Drake, "The Negro Before the Supreme Court," *The Albany Law Journal: A Weekly Record of the Law and the Lawyers* (1870-1908); Aug 1904; 66, 8: APS Online 238.
[xxvii] Quoted in Lofgren, 104-105
[xxviii] Oliver Wendell Holmes, Jr. "Ideals and Doubts," *Collected Works*, Vol. 3, supra note 22, at 442-23.57. *Carino v. Insular Government* 212 U.S. 449, 459 (1909). See also "The Path of the Law" in *Collected Works*, Vol. 3, supra note 22, at 391, 405 (describing the urge to resist dispossession of that which one has long enjoyed as "one of the deepest instincts of man").