

— UNDERGRADUATE —
RESEARCH
JOURNAL FOR THE
— HUMANITIES —



— *vol. 4 spring 2020* —

**The Undergraduate Research
Journal for the Humanities
at the University of Kansas**

Fourth Edition ♦ Spring 2020

© Spring 2020

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Cover Design: © Sully Dyvad 2020

Front and Back Cover Photos Information: © Kelsey Rolofson 2020

Photos of Potter Lake and the sculpture “Korean Cranes Rising (Korean War Memorial)”
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ISSN: 2473-2788

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Its purpose is to provide a venue for undergraduates at the University of Kansas to share their research in the Humanities.



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Letter from the Editor-in-Chief

Dear Readers,

When I embarked on the British Summer Institute in the Humanities last summer, I had no idea I would be returning as the head of a student organization, or soon-to-be at least. I had not been part of any previous *URJH* editorial staffs, I did not consider myself a research-oriented undergraduate, and I certainly did not know what exactly an Editor-in-Chief was supposed to do. Nevertheless, I was eager to find out and to make something that matters. After a difficult, turbulent, very educational, and very rewarding year, I am extremely excited to be passing this tradition on to the outstanding Kelsey Rolofson for the 2020-21 edition.

The University of Kansas has once again proven itself an exceptional place for undergraduate research. To be frank, I knew very little about undergraduate research at KU beyond my obligatory final papers – and something called an “Honors Thesis” – before I signed on to bring back the *Journal*, but the response from KU faculty, staff, and students has been overwhelmingly positive and supportive. This journal is for them.

This journal is the culmination of countless hours of work by some of the best KU has to offer. I must first thank the Editorial Committee, who believed in this cause and trusted me enough to take on more work outside of their reading-and-writing intensive Humanities classes and their on- and off-campus jobs. As my predecessor Matthew Dunn wrote, “It takes a special kind of undergraduate to not only complete a majority of their class readings but to volunteer to read and edit even more articles.” It has been a joy and a comfort to work alongside them through this process, which we were all learning together, and they deserve commendation for their patience with my rambling updates and endless questions. Thankfully, we had the exhaustive blueprint and consultation of our founding Editors, Savannah Pine and Matthew Dunn. Without Savannah’s documentation and patience with my many questions and Matt’s willingness to answer questions essentially “on-call”, this fourth edition of the *URJH* would not be possible.

For the KU faculty and staff that welcomed me into the fold of undergraduate research and guided me as I assembled a staff and re-assembled our network of partners, I am tremendously grateful, especially for those faculty members who so generously donated their time to the *Journal* while re-structuring their classes to an online format. You are superheroes. And, of course, to our talented authors published and yet unpublished, who provided us with captivating research and new perspectives, thank you for being part of the process; for believing in the *Journal*, for the courage to submit your work, and for your patience and understanding thereafter.

The *Journal* is especially indebted to the KU History Department, the KU English Department, and KU Libraries, all of which have given the *Journal* a home and the support of a family as we rebuild. I am thankful for Student Senate, who had so generously coached us through the funding request process and allocated funds to publish this issue before the campus shutdown. Similarly, Marianne Reed and Pam LeRow of KU Libraries were vital in not only helping us publish our articles online and constructing this edition but also in maintaining the *URJH*’s online presence through our new OJS website. Finally, we thank our Partners for their unending support through changing times; and our faculty advisor Dr. Jonathan Hagel, who was the first to ask me, “Are you sure you want to do this?”, who has been an invaluable support to our efforts, and whom I personally count among my amazing advisors at KU.

The *Undergraduate Research Journal for the Humanities* would not be possible without the exceptional individuals and departments mentioned above, and many, many more that I am afraid I simply do not have the space to thank. The *Journal* extends its sincerest, deepest thanks to you. We hope you enjoy this issue and learn something new.

Sincerely,

A handwritten signature in black ink, appearing to be 'MK', written in a cursive style.

Madelynn G. Kurtz, Editor-in-Chief

Articles

“The Rivalry is Hot:” Shakespeare, Harry Potter, and the Magic of Fanfiction

Jamie Hawley is a senior majoring in English, political science, and communication studies. She is from Salina, KS. This article was supervised by Dr. Jonathan Lamb.

From adaptation to translation, fan art to fanfiction, audiences have long sought to interact with the stories they are exposed to. Literary scholar Sheenagh Pugh describes this as wanting both “more of” and “more from” the narratives we care about. Fanfiction is defined by professor Bronwen Thomas as “stories produced by fans based on plot lines and characters from either a single source text or else a “canon” of works” (1). By this definition, fanfiction could be considered as old as works like *Paradise Lost* or Dante’s *Inferno*, but fanfiction in the modern sense has largely been attributed to fans of *Star Trek* and *Star Wars*, according to scholar Henry Jenkins. These fans distributed works in self-published compilations called zines; over time, these compilations moved online, spurring the formation of fan communities on sites like *LiveJournal*, *Fanfiction.net*, and most recently *Archive of Our Own*. No creator or author is exempt from this treatment, and the more prominent a story is in culture, the more likely it is to attract the attention of fans interested in participatory works. It should come as no surprise, then, that the works of William Shakespeare have amassed thousands of fanfictions, not only in the more abstract sense of film and modern adaptations, but in the concrete sense of written fanworks posted online to sites like *Archive of Our Own*. These fanfictions speak to the ability of Shakespeare fans to interact with his

works on an interpretive level, an interesting shift from Shakespeare’s previous place as the epitome of “high culture.”

Popular culture, typically the subject of most fanfiction, is often seen as the antithesis of “high” culture, thereby making some scholars, usually those who hold popular culture in some level of disdain, to categorize it as “less than.” Professor John Storey writes that often, popular culture is what’s left over after the collective “we” has decided what constitutes “high” culture, leaving popular culture as “inferior” (6). Using this definition, high culture is defined by its difficulty, which makes the work in question inherently exclusive to those who have intellectual or physical access to it. However, this definition, like all definitions of popular culture, is flawed, and Storey uses Shakespeare as an example of this flaw. He writes, “William Shakespeare is now seen as the epitome of high culture, yet as late as the nineteenth century his work was very much a part of popular theatre” (6). This movement across boundaries from high to popular culture is not unique to Shakespeare, but Shakespeare’s movement is certainly one of the easier paths to track. As Shakespeare’s plays became less popular in the theater and his language fell out of style, he became less accessible to the masses and more commonly the subject of academic study. To many, Shakespeare is “difficult,” and therefore considered a separate entity from the *Harry*

Potters and *Avengers* of popular media. Despite this, Shakespeare has nonetheless made an impact on the fanfiction community.

Much of the scholarship focusing on Shakespeare fanfiction has concluded that, by writing fanfiction about Shakespeare, authors transform him from highbrow academic literature into lowbrow popular culture, brought to the same level as *The Avengers* or *Star Trek*. As Kativa Mudan Finn writes in her article, “History play: critical and creative engagement with Shakespeare’s tetralogies in transformative fanworks,” “By considering fanfiction as another popular response to Shakespeare, we can nudge him yet further off his pedestal and interact with his plays as his original audience would have done—in conversation” (221); basically, fanfiction is a way of solidifying Shakespeare’s movement across the boundaries of high and popular culture. However, while some Shakespeare fanfiction fits this description, Shakespeare as an entity functions differently in the world of fanfiction, specifically in crossover fanfiction, where aspects from two different “canon” works are merged into one fanfiction. Typically, crossover fanfiction exists because an author wants to see characters from one work interacting with characters from another work, but in most Shakespeare crossover fanfiction, it is the characters of one work interacting with one of Shakespeare’s plays. By examining three Harry Potter crossover fanfictions where the characters participate in productions of *Romeo and Juliet*, it can be seen that by bringing Shakespeare to this “lower” level, both his language and his tropes are allowed to function as a lens through which authors examine other works

and characters, which gives evidence to the new and exciting role Shakespeare and his creations play in transformative and interpretive works.

The three fanfictions that function as clear and useful examples of crossover Shakespeare fanfiction are all hosted by *Archive of Our Own*, and they consist of “Likewise Variable” by user ssstrychnine, “Drama Club” by user SaintDionysus, and “The Lark and the Nightingale” by user Felpata Lupin. Each of these fanfictions is different, but they have a few key elements in common. First, each center around two characters who are brought together while portraying the titular characters in *Romeo and Juliet*. Second, each fanfiction features a couple that is considered non-canon, meaning that they are not confirmed to be in a relationship in the original Harry Potter text. These relationships are, respectively, Remus Lupin and Sirius Black, Draco Malfoy and Hermione Granger, and Remus Lupin and Chiara Nightingale, an original character created by the fanfiction’s author. These two similarities are crucial in understanding how Shakespeare, both his language and the tropes he popularized, are used as a spine within these fanfictions, and each fanfiction shows different ways these authors use Shakespeare to further examine characters within the Harry Potter universe.

The reasoning behind combining Harry Potter and *Romeo and Juliet*, while perhaps not immediately obvious, does follow logically when one considers how ubiquitous *Romeo and Juliet* is, especially in high school classrooms. According to Jonathan Burton and Whittier College’s 2013 survey of 400 high school English teachers, the play

appears in roughly 93% of all ninth-grade classes, which partially explains why it accounts for over one-fifth of all Shakespeare fanfictions currently posted to *Archive of Our Own*. This frequency of exposure is more fuel for the argument that Shakespeare is losing some of his elite status, with Michelle K. Yost arguing that “the play is no longer one of highbrow culture, but mass pedagogy” (196). However, when it comes to Shakespeare fanfiction, conceptualizing *Romeo and Juliet* as literature for the masses is helpful not because it indicates a realistic reading of Shakespeare’s status as a cultural figure, but because it shows the play’s accessibility and its utility in crossover fanfiction. Readers know *Romeo and Juliet*, and they are particularly familiar with the trope of the star-crossed lovers. By using tropes that are already familiar to their readers, fanfiction authors can cause their readers to view Harry Potter characters in new but familiar ways.

In her article, Yost divides Shakespeare fanfiction into categories; all three of the aforementioned fanfictions are what Yost would categorize as “Shakespeare as incident,” where “Shakespeare is an object in the plot hovering on the periphery, a tool for telling the kind of story the fan writer wants to tell” (206). The most common way for writers to attempt Shakespeare as incident is through the structure of a “play within a play,” where the characters from one work put on a Shakespeare play in their own universe. As Yost describes it, this “is the frame with which authors can structure a narrative for their own characters, often paralleling the themes of Shakespeare with their primary narrative” (207). She also notes that

often, *Romeo and Juliet* is used as “a tool for the exploration of love between other characters” (208). The familiarity of the text and its tropes, as well as the framework for exploration it establishes, all come together to help fanfiction writers add a new layer of investigation to beloved Harry Potter characters, especially when it comes to exploring a romance between two characters who were never romantic in Harry Potter canon. As eloquently stated by Draco Malfoy, “The whole muggleborn/pureblood, Gryffindor/Slytherin thing?...Admit it. The rivalry is hot” (“Drama Club,” Ch. 4).

At its core, each of these fanfictions functions in a similar way: Shakespeare is the catalyst through which two characters realize their feelings for each other. In two of these stories, this realization takes place during the audition for *Romeo and Juliet*, where two main characters are made to read lines from Act I Scene IV, the scene of the ball where Romeo and Juliet share their first kiss. In “Drama Club” and “The Lark and the Nightingale,” reciting these lines is what acts as the catalyst for the relationship. This revelation is summarized by Ginny Weasley in “Drama Club” when she says, “[Hermione] snogged Malfoy at the auditions and now is morally conflicted” (Ch. 4), and in “The Lark and the Nightingale” through the internal monologue of Chiara, the original character portraying Juliet, when she says “she kept getting distracted by all the details in Remus’ face she’d never noticed before... At the end of the scene she nearly kissed him for real” (Ch. 2). While the relationship in “Likewise Variable” develops more slowly, it is also directly the result of being part of the play. After kissing off-stage, Remus

and Sirius panic, with Sirius saying, “It’s only...Romeo and Juliet,” to which Remus responds, “Yes...It’s...this stupid play” (Ch. 7). By using *Romeo and Juliet* as the framework that paves the way to actual relationships, the authors of these fanfictions, intentionally or not, demonstrate the power inherent in Shakespeare’s texts, and in turn use that power to bring about change in the opposing fictional universe of Harry Potter.

One of the most integral aspects of crossover fanfiction is the melding of two fictional worlds. In the case of Shakespeare and Harry Potter, the author is challenged to intermix the magic of Harry Potter with Shakespeare’s more reality-based drama, especially in a play like *Romeo and Juliet*, where there are no witches or fairies to help make the transition from the so-called “real world” to fantasy. How this transition is handled is one of the key differences between these three fanfictions. In “Likewise Variable,” magic is removed from the world completely; the main characters attend a non-magical English school, and while they are all characters taken from the Harry Potter series, they have been stripped of their magical powers and removed from their magical environment. In “Drama Club,” this environment is kept in place, and, in a move employed by many fanfiction writers, the “muggle-born” characters—characters who were born into the non-magical world but still possess magic themselves—are used as a point of connection between Shakespeare, considered in this story to be a non-magical playwright, and the magical world of Hogwarts. Finally, in “The Lark and the Nightingale,” not only is Shakespeare brought into the magical world, but the magical world

is brought into Shakespeare. While the text of *Romeo and Juliet* remains the same, this story reveals that Romeo and Juliet were actually wizards, and that they were prevented from being together because Romeo was a werewolf. The uses of magic within these fanfictions varies, but each interaction between Shakespeare and magic also gives information regarding Shakespeare and power, which is what magic in Harry Potter functionally is.

Magic in original Harry Potter books is instrumental to its narrative structure. It’s used both as a fix-it for the problems of the regular world and a social status symbol; those with magic or who come from a long line of magic-users are privileged above those who don’t come from a magical lineage. As a result, magic carries with it a sense of both physical power in that it can conjure objects, heal wounds, and cause pain, but also social power, as it is a way of moving up in community hierarchy. This is why it’s important to examine Shakespeare’s role in fanfictions where magic is and is not a regular part of the Harry Potter universe; is he a substitution, an enhancement, or both? In these fanfictions, Shakespeare exhibits a physical power, both healing and hurting as he brings about the coupling of these characters. However, the fact that his play possesses both the reputation and the skeletal structure strong enough to make this insertion effective indicates that he also carries a certain amount of social power. Shakespeare functions as magic in the world of these fanfictions, certainly. But he also functions as a form of magic to each fanfiction’s reader; his words and plots have a binding effect, and they function as a near-universal language

that can enhance readers' understanding of an entirely separate work.

By framing each story around a Shakespeare play and making this play crucial to the story's plot and characterization, the authors show just how much influence Shakespeare can have over a story's development, and how much the mere mention of his name can cause both readers and characters to change the way they view the narrative. In these fanfictions, Shakespeare's cultural power is not only implied by the fanfiction's plot, but explicitly celebrated within the text. Two of the three fanfictions make direct references to the 1996 film adaptation of *Romeo and Juliet*, and in "Likewise Variable," Remus Lupin is characterized as reading Shakespeare "religiously," to the point where he murmured lines out loud in his everyday life (Ch. 2). In "Drama Club," Draco and Hermione are aware that they're living the plot of the play as they perform it, and they use this to their advantage by using their performance in the play to normalize their relationship to Draco's disapproving father. All of these aspects of these fanfictions utilize and build on Shakespeare's accrued cultural capital, the power inherent in being a recognized and understood story structure, as well as a legitimizing force to any plot. While some may argue that these fanfictions are unoriginal, very few will argue that Shakespeare's plots are ineffective.

While much of this power comes from the familiar tropes in *Romeo and Juliet*, a fair bit of it also comes from Shakespeare's language. All three fanfictions quote Shakespeare at length, and just like each one has a different method of reconciling Shakespeare's world with the Wizarding World,

each one also has a method of utilizing Shakespeare's actual words within their text. In each of these fanfictions, Shakespeare's words function as a form of magic, as his quotations are used to bring about changes in plot and character the same way a magic spell or potion would in the Harry Potter series. It is the embodiment of Romeo and Juliet during the audition scene that brings Draco and Hermione together in "Drama Club," and in "Likewise Variable," the absence of actual magic words only makes more prominent the "magical" quality inherent in Shakespeare's text, especially when it comes to Remus and Sirius's developing relationship. Shakespeare's words sound different from the otherwise modern dialogue, and when Sirius texts Remus, "Give me my Remus and when I shall die take him and cut him out in little stars and he will make the face of heaven so fine that all the world will be in love with night" (Ch. 2), it feels like something has shifted between the two of them, even if it's a text sent in jest.

While present in the other two works, the idea of Shakespeare's words as magic features most prominently, and most literally, in "The Lark and the Nightingale." In this fanfiction, the witch Juliet is punished for falling in love with the werewolf Romeo, and a curse is put on her bloodline that affects any descendent who kisses a werewolf. When Chiara Nightingale, a character created by the author who is a descendent of the Capulet bloodline, kisses Remus Lupin, a werewolf, she is cursed to become a nightingale by day and a fully corporeal human on the full moon, when Remus would be a wolf and they would be unable to be together. While the text of *Romeo and Juliet* in this

universe remains the same, Shakespeare is nonetheless crucial to breaking the curse, as it is his line “Give me thy sin again” (Act I, Scene IV) that helps the characters discover that the cure to the curse is another kiss. In this fanfiction, Shakespeare’s words literally act as magic, and in this reimagining of the tale, his writing paves the way for the couple’s salvation rather than their demise.

This magic in Shakespeare’s language is combined with the familiarity and cultural power of Shakespeare’s plots to create a fanfiction that is unable to be replicated through any other crossover. When writing about fanfiction that interacts with Shakespeare’s sonnets, Yost writes, “Shakespeare could be replaced by a romantic poet like Blake or Wordsworth, but just as characters putting on a play by another writer would not hold the same symbolic strength for fanfiction’s readers and writers, Shakespeare’s sonnets hold a unique cultural power derived from their author’s mystified status” (208). This certainly hits at an important note within Shakespeare fanfiction, which is that Shakespeare’s cultural power is what makes the utilization of his work so effective. This power is a two-way street; as professor Douglas Lanier writes of Shakespeare’s cultural capital, “Shakespeare’s association with a mass-cultural product, medium, or genre lends that item a moiety of highbrow depth, ‘universality,’ authority, continuity with established tradition, or seriousness of purpose, while at the same time the association with mass culture lends Shakespeare street credibility, broad intelligibility, and celebrity” (104). By using Shakespeare’s plays in their fanfiction, authors give their work all the aforementioned traits, but as

Shakespeare is continually integrated with these works, he becomes associated with popular culture in a way that keeps him continually relevant and a crucial character in the discussion of modern storytelling.

When it comes to Harry Potter fanfiction, Shakespeare couldn’t be replaced by any other writer and have the fanfiction work, because his cultural capital is necessary to his integration with the magical world. Shakespeare, through his status as “the greatest playwright of sixteenth century’s England. Possibly the greatest of all times” (“The Lark and the Nightingale,” Ch. 2), is the only nonmagical author who can be convincingly pulled into the magical world, or, in the case of the non-magical setting of “Likewise Variable,” the only one whose words hold enough understood power to function as magic in a world where magic doesn’t exist. This symbolic strength doesn’t just make these fanfictions more impactful; it makes them possible. As a result, Shakespeare becomes instrumental to each fanfiction’s existence, rather than just an instrument.

Shakespeare and the trope of the star-crossed lovers becomes even more applicable due to the nature of the non-canon couples in each fanfic. Each of these couples have obstacles to overcome within the text, be it homophobia, prejudice between Hogwarts houses (a parallel which is surprisingly underutilized in these fanfictions), disapproving parents, or a literal curse on a character’s bloodline. But beyond these more obvious barriers, there is one that is inherent in all of these couples: the Harry Potter canon does not allow them to be together. Each couple is star-crossed because

they are not together in the text, and each author, through the utilization of a well-known trope that details this very conundrum, seeks to bring these couples together in fanfiction. Once again, Shakespeare serves as a catalyst, not only in the narrative of this fanfictions, but outside the narrative, as he provides a framework for authors to bring their star-crossed non-canon couples together, defying fate and J.K. Rowling herself.

All three fanfictions show that when Shakespeare and other works enter into conversation through crossover fanfiction, it is his tropes, language, and cultural capital that make this fanfiction possible and successful. However, this does not mean that Shakespeare is immune to critical conversation and interpretation. One example of this is found in each fanfiction's interpretation of the play's production. While the specific details of each production are not made equal across these fanfictions, two of them do offer specifics about the production that indicate certain interpretative choices. In "Drama Club," magical effects are added to the play that make it flashier and more grandiose, causing one theater-goer to remark, "Flitwick's interpretation of Shakespeare is very...colorful," to which another replies, "I was going to say blatantly oversexualized, but we can go with your description" (Ch. 7). In this fanfiction, the love and lust in *Romeo and Juliet*, while mocked by certain characters, also heavily plays into the story's tone and content, particularly in the off-stage interactions between Draco and Hermione. (It's worth mentioning that this fanfiction is rated "M" for mature and is much more sexually explicit than the other two.) In a differ-

ent vein, "Likewise Variable" describes the costuming in its production by saying, "[The directors] want their Romeo and Juliet quiet and soft in their love while their families and their friends are in a tumult around them. Romeo and Juliet in simple black and white in the middle of loud, gaudy sets and loud, gaudy people in loud, gaudy costumes" (Ch. 9). These are acts of interpretation, clearly on the part of the characters within the story, but also on the part of the author of the fanfiction. It also shows an interaction with the text that extends beyond the trope, engaging with the play as a whole. This interaction goes deeper than merely quoting the text or using the narrative framework; when it comes to the actual in-story production of *Romeo and Juliet*, each author makes certain interpretative choices that not only affect the plot of the fanfiction, but also use Shakespeare as an object of interpretive study.

Of course, the major way that these fanfictions rewrite or recontextualize Shakespeare is that at the end of the story, tragedy is averted. No one dies at the end of these fanfictions because that doesn't contribute to the larger purpose. These fanfictions focus on non-canon couples; the authors have a vested interest in having them live happily ever after, because fanfiction is the only place where this ending is possible. When it comes to the star-crossed lovers as a trope, the barriers between the two characters matters much more than their "inevitable" fate. *Romeo and Juliet* is about much more than just two children in love; it's about the feud between two families and the larger consequences it has on the world. But when it comes to *Romeo and Juliet* fanfiction, "this variation on 'star-crossed' love seems to

speak to [authors] more directly than bitter family feuds” (Pugh 62). This indicates that not only are Shakespeare’s tropes becoming powerful interpretative lenses, but that these tropes are also undergoing a sort of transformation as they are applied to crossover fanfiction. What is appealing about the trope of the star-crossed lovers is the barriers the characters have to overcome, not the tragedy inherent in these characters’ fates.

This alternative focus on the trope and the pivot away from its tragic end is interesting when juxtaposed with another aspect of fanfiction scholarship, which professor Cornel Sandvoss articulates when he says, “As the object of fandom corresponds with a textual field of gravity, rather than a text in its classical sense, readers gain new tools to normalize texts and to reconcile their object of fandom with their expectations, beliefs, and sense of self” (71). He goes on to describe fandom as primarily focused on “familiarity and the fulfillment of expectations” (72), which speaks both to the shift in focus away from the tragedy in *Romeo and Juliet* and to the usage of non-canon couples in *Romeo and Juliet* fanfiction. Shakespeare’s tropes heavily contribute to the familiarity of the piece: they provide a narrative framework that audiences can easily identify and follow. But the expectations and beliefs that these fanfictions wrestle with do not refer to the expectations of the play itself, but rather the expectations of the other tropes in fanfiction, specifically the happy ending each couple receives. Because these couples exist only in the world of fanfiction, to have their happy ending robbed from them would be contradictory to each author’s beliefs; they don’t need to “normalize” the couple’s

tragic fate, because as far as canon goes, this tragic fate is already the norm. Through their work, each author participates in a reading of Shakespeare that reconciles his familiar framework with their rejection of a tragic ending as inevitable. Instead, they choose to fulfill the larger expectations of “shipping,” the romantic pairing of characters in fandom through fanworks, and give each non-canon couple the happy ending they were denied in Harry Potter canon.

This rejection of tragedy is not only implicit in each fanfiction’s ending, but also made explicit through critique of Shakespeare’s story. In “Drama Club,” when Hermione-Juliet wakes up to find Draco-Romeo dead beside her, it’s called “a painful reminder of how fucked up this play is;” later, a character remarks, “That’s not love. That’s psychotic” (Ch. 7). The critique found in “Likewise Variable,” while not as overt, is nonetheless impactful; after the dust has settled and Remus and Sirius have begun a real, off-stage relationship, Remus reflects, “He is glad to be rid of Shakespeare because he and Sirius are not Romeo and Juliet, despite James calling them that at every opportunity. They are not dead children, they are *alive*” (Ch. 17). In each refusal to acquiesce to Shakespeare’s tragic ending, there is a kernel of defiant hope which hints at a phenomenon described by scholar Jess McCall when she says, “Fandom has re-legitimized the validity of loving love as a particularly...subversive act” (34), meaning that in these fanfictions, the love between two characters and the triumph of this love functions as a more powerful ending than a replication of Romeo and Juliet’s tragic fate. Despite the fact that each author uses Shake-

speare's trope to frame their own narrative, they're still openly critical of what they see as the main takeaway from *Romeo and Juliet*: that lovers are doomed to die, that the walls that keep people apart are impossible to tear down, that in the end, our heroes lose. This is certainly not the only takeaway from the play, but it is a crucial one that puts *Romeo and Juliet* firmly on the list of Shakespeare's tragedies. By acting against and openly criticizing this ending, the authors of these fanfictions are not only using Shakespeare for their own narrative advantage, but they are also entering into a critical discussion of Shakespeare's work and its many interpretations.

Shakespeare, of course, is not unique in this treatment; all fanfiction is, at its core, interpretative. But all of these factors together: the familiar frame of star-crossed lovers, the power inherent in Shakespeare's language, and the cultural capital he lends to each fanfiction, all mean Shakespeare functions on a level in fanfiction that is unseen by any other

literary figure. As said by Finn and McCall, "There is no question that 'Shakespeare' has taken on mythic status in modern Western society, whether we mean the author 'Shakespeare'...or the textual 'Shakespeare'" (31). With this mythic status comes a host of power, and while writing fanfiction featuring Shakespeare's texts opens the doors to new and interesting interpretations, it does not diminish this power or Shakespeare's status as a cultural icon. These three fanfictions and their focus on the world of Harry Potter serve to highlight just how akin Shakespeare has become to magic, both in the power of his words and the way he is able to be integrated into the magical world. By bringing Shakespeare to the "lower" level of popular fanfiction, these authors reaffirm again and again just how much power he really has. If we accept fanfiction as an indication of how literature matters, then Shakespeare has cemented himself as a powerful cultural shortcut and interpretive lens, a role in fanfiction that no one else can play.

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Contradictions in the Treatment of Roma and Sinti During the Holocaust

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Abstract:

In this article, I argue that the Nazi treatment of Roma and Sinti Gypsies was distinct from the treatment of other victim groups by virtue of its inconsistency. There was never a clear articulation of the ideological position of the Nazis regarding the Roma, and the guidelines that were in place were applied haphazardly. A wide variety of exemptions theoretically protected Roma from arrest and deportation. As distinct from the Nazi beliefs about Jews, so-called “racially pure Gypsies” were sometimes considered more valuable and were protected. These rules, however, were never consistently followed. The extent to which the Roma were persecuted by the Nazis was often determined more by the attitudes and personal beliefs of regional administrators, combined with the perceived demands of the local situation, than by an intentional Nazi mandate.

In the decades of research and commemoration that followed the Holocaust, the Nazi persecution of Roma has often been overlooked. Frequently called “Gypsies,” the Roma and Sinti ethnic groups emigrated to Europe from India in the thirteenth or fourteenth century.¹ Although they experienced discrimination from the time of their arrival, the violence increased dramatically during the Nazi regime. Like the Jewish community, the Roma suffered exclusion, sterilization, deportation, and mass murder. To gain a more comprehensive understanding of the Holocaust, their experience bears investigating. In the absence of clearly articulated doctrines, the treatment of the Roma was determined by the negotiation between official Nazi policy and local sentiments, resulting in a spectrum of experiences.

The Roma and Sinti people have faced discrimination since their arrival in Europe.

¹ The term “Gypsy” is now considered to be pejorative. Since most members of this ethnic group refer to themselves as Rom (plural Roma), this term will be used exclusively hereafter, except when historical accuracy necessitates the use of the term “Gypsy.”

Local populations tended to be suspicious of traditional Romani practices, such as nomadism, and commonly believed that all Roma were thieves, kidnappers, and murderers. Additionally, the Roma were accused of refusing to assimilate to their host cultures. In reality, integration was frequently impossible, due to laws circumscribing Roma status and prohibiting their ownership of land, making itinerancy the only way of life possible. When the Nazis took power in the early twentieth century, many discriminatory laws were already in place. The policies they created for the Roma were not entirely unprecedented, but they were far more extreme.

A few recent works have examined the policies that guided Nazi treatment of Roma. Historians have attempted to determine if Nazi leadership was intentionally pursuing the eradication of the Roma ethnic group, as they were the Jews, or if the volatile climate created by the Nazis only incidentally led to violence against Roma. Each study comes to different conclusions.

In their book, *Gypsies Under the Swastika*, Donald Kenrick and Grattan Puxon make the argument that Nazi policy towards the Roma was intentionally genocidal from the beginning and just as murderous as policies targeting Jews. They admit that the policies governing the Roma were often haphazardly applied but argue that Jewish racial laws were also inconsistent. They mainly approach the Holocaust from an intentionalist, rather than functionalist, perspective, suggesting that the end result for both Jews and Roma—mass murder and destruction—was the goal from the beginning, rather than evolving over time.

By contrast, Guenter Lewy argues that Heinrich Himmler always intended to have Roma policies that were distinct from Jewish ones. While Roma who were not deported were still subject to many legal restrictions, including forced sterilization, he dismisses the idea that their fate is comparable to that of the Jews. In his opinion, the Roma's higher rate of survival can be directly attributed to Himmler's fascination with them.

Michael Zimmermann approaches the persecution of the Roma from a functionalist position, suggesting that mass murder and violence against Roma was not planned from the beginning, but developed organically. He argues that there was no consensus regarding the Roma among Nazi authorities, demonstrating that central and local governments often acted in contradiction to each other. According to Zimmermann, it was this tension between the central government and the local administrators, rather than the impact of decisions made by Himmler or other executives, that escalated the violence

against Roma and ultimately led to their murder.

Each of these studies approaches the violence against the Roma from a different perspective, whether arguing that Nazi policies were murderous from the beginning or that they were never intentionally murderous at all. I argue that there was always ambiguity in the official policies governing the treatment of Roma, but that the beliefs of Himmler and other top authorities did influence the actions of local administrators. If local authorities were sometimes guided by government or party directives, however, they just as often followed their own beliefs or the perceived needs of their particular context. The Roma experience of the Holocaust can only be understood as a spectrum, because no consistent rule was applied to them during the Third Reich.

The Nazis viewed the Roma as inferior, but there was a lack of consensus as to their exact position in the constructed racial hierarchy. They were generally believed to be “work-shy,” uneducable, unhygienic, inevitably criminal, mentally deficient, and generally “a-social.”² The treatment that they merited, based on those characteristics, was less clear. There was a spectrum of beliefs about the best solution to “the Gypsy question.”³ Hitler, who was closely involved in the formation of the policies towards Jews, was uninterested in the Roma and only mentioned them twice during his

² Donald Kenrick and Grattan Puxon, *Gypsies Under the Swastika* (Hatfield: University of Hertfordshire Press, 2009), 12.

³ “Circular on the Fight Against the Gypsy Nuisance Issued by Himmler,” Jewish Virtual Library, accessed November 24, 2019, <https://www.jewishvirtuallibrary.org/circular-on-the-fight-against-the-gypsy-nuisance-issued-by-himmler>.

time as chancellor, though SS officer Perry Broad insisted that it was “Hitler’s aim to wipe out all Gypsies.”⁴ By contrast, Heinrich Himmler, a leader of the *Schutzstaffel* (SS), was obsessed with the Roma. In comparison to some Nazi leaders, he held a more positive belief on the value of the Roma race. Based on the work of Dr. Robert Ritter, head of the Race Hygiene and Population Biology Research Center of the National Health Office, Himmler believed that there was a kind of kinship between the Aryan race and some of the Roma, because of the latter’s Indian origins. Though Ritter did not believe any of the Roma were equal to Aryans, he argued that it was the “part-Gypsies,” rather than “full-Gypsies,” who posed the greatest danger to the German population and that the Roma with more “pure” blood might be worth preserving.⁵ In his 1938 circular on “Combatting the Gypsy Nuisance,” Himmler emphasized the importance of distinguishing between “pure and part-Gypsies,” and stated that “experience shows” part-Gypsies were more likely to be involved in crime.⁶ “Pure Gypsies,” according to Himmler, were also less likely to intermarry with Germans and thus did not pose a danger to German blood.⁷ “Part-Gypsies” could possibly be accepted into German society if they were

fully assimilated and had been sterilized.⁸ Thus, as opposed to Jews, Himmler believed that full-blooded Roma could potentially have a future in the German Reich, though *mischlinge* Roma—at least those considered “asocial” because of alleged crimes, “non-German” customs, and itinerancy—could not. Ritter suggested designating a territory within which the “racially pure” Roma could wander, separate from the German people but allowed to maintain their own customs.⁹ Himmler seems to have supported this suggestion, writing vaguely that the goal of legislation regarding Roma was “the regulation of [their] way of life,” not their sterilization or extermination.¹⁰ Eva Justin, however, a racial researcher who worked with Ritter, disagreed with the assumption that the purer elements in the Roma population were superior. She declared that “Gypsies and part-Gypsies of predominantly Gypsy blood, whether socially assimilated or asocial and criminal, should as a general rule be sterilized,” though she allowed that “socially integrated” Roma with “less than half Gypsy blood” could be accepted into the German population.¹¹ According to Justin, any degree of Roma blood merited exclusion, and a greater degree meant a larger measure of negative Roma characteristics. Another researcher, Dr. Behrendt,

⁴ Guenter Lewy, “Himmler and the ‘Racially Pure Gypsies,’” *Journal of Contemporary History* 34, no. 2 (April 1999): 202; Kenrick and Puxon, *Gypsies Under the Swastika*, 131.

⁵ *Ibid.*, 203.

⁶ “Circular on the Fight Against the Gypsy Nuisance Issued by Himmler,” Jewish Virtual Library, accessed November 24, 2019, <https://www.jewishvirtuallibrary.org/circular-on-the-fight-against-the-gypsy-nuisance-issued-by-himmler>.

⁷ Kenrick and Puxon, *Gypsies Under the Swastika*, 36.

⁸ Michael Zimmermann, “The National Socialist Solution of the Gypsy Question: Central Decisions, Local Initiatives, and Their Interrelation,” *Holocaust and Genocide Studies* 15, no. 3 (Winter 2001): 420.

⁹ *Ibid.*, 16.

¹⁰ “Circular on the Fight Against the Gypsy Nuisance Issued by Himmler,” Jewish Virtual Library, accessed November 24, 2019, <https://www.jewishvirtuallibrary.org/circular-on-the-fight-against-the-gypsy-nuisance-issued-by-himmler>.

¹¹ Kenrick and Puxon, *Gypsies Under the Swastika*, 19.

agreed, declaring that “All Gypsies should be treated as hereditarily sick” and imprisoned and sterilized.¹² Himmler and Ritter, by contrast, argued it was mainly the mixed blood Roma who were “asocial and useless.”¹³ Though no researchers or authorities in the Third Reich believed Roma were equal to Germans, there was no consensus about their place in the racial world.

Because there was no consistent belief about the value and nature of the Roma, Nazi policies were left largely to the interpretation of local authorities. Though there were some official criteria regarding which Roma were supposed to be deported to concentration camps and which were not, it was applied or ignored on the basis of the opinion of local officials. According to Himmler’s stated policy, certain “pure” Roma—exclusively drawn from the Sinti and Lalleri tribes—were to be exempted from deportation. However, the measures by which Roma were deemed either “pure” or *mischlinge* were extremely arbitrary and sometimes contradictory. Settled Roma, for instance, were more likely to be exempted from deportation, although this indicates they were more integrated into German society, which completely contradicts the purpose of the exemption from Himmler’s perspective.¹⁴ In the small town of Breitscheid, the criminal police determined three families were “racially pure,” but under pressure from the mayor they were deported anyway.¹⁵ Additional exemptions were granted for Roma who were married to Ger-

mans, who were “socially adjusted,” or who had foreign citizenship.¹⁶ Roma who were in military service, veterans who had been wounded, and their families were also exempted.¹⁷ Except for “racially pure” Roma, all those exempted from deportation were expected to submit to sterilization.¹⁸

Exemption categories that existed on paper had little bearing on the actual deportation of the Roma. In an oral testimony, Karl Stojka, a Roma who was deported to Auschwitz, reported that his sister had a steady job and thus should have been exempted on the basis of being “socially adjusted.” After missing one day of work due to sickness, she was declared “work-shy” and arrested.¹⁹ The father and brother of Josef Reinhardt, another Roma survivor, had both served in World War I and were patriotic Germans; his brother had even been wounded. Both were sent with their families to Auschwitz.²⁰ In other communities, Roma were given *greater* freedom than was circumscribed within official decrees, sometimes being granted special travelling permits so they could continue to itinerate.²¹ Outside of Germany, in the countries under Nazi control, Roma deportations appear to have been even more arbitrary. No attempt was made to distinguish between pure and *mischlinge* Roma outside of Germany, indicating that distinctions which

¹² Ibid, 14.

¹³ Ibid, 16.

¹⁴ Ibid, 39.

¹⁵ Guenter Lewy, *Nazi Persecution of the Gypsies* (Cary: Oxford University Press, 1999): 266.

¹⁶ Ibid, 261.

¹⁷ Ibid.

¹⁸ Ibid, 262.

¹⁹ Karl Stojka, “Oral History,” interviewed by Linda G. Kuzmack, United States Holocaust Memorial Museum, April 29, 1992, <https://collections.ushmm.org/search/catalog/irn504716>.

²⁰ State Museum of Auschwitz-Birkenau, *Memorial Book: The Gypsies at Auschwitz-Birkenau* (New York, NY: Saur, 2002): 1523.

²¹ Zimmermann, “The National Socialist Solution of the Gypsy Question,” 417.

were vitally important to Himmler failed to be extended throughout the Nazi belief system.²² Karl Stojka describes the arrival of so-called “Gypsies” who were blond, spoke no Romani, and were deported on the basis of a great-great-grandfather who was a tinker, a traditional Roma occupation.²³ Without clear dictates from Berlin, community officials had great license to apply policies as they saw fit, based on “racist improvisation and random notions.”²⁴

Even within the walls of concentration camps, the actions of Nazi officials revealed the ambiguity surrounding Roma status. In Auschwitz, Roma families were not separated on the platform, as was the case for almost all other inmates.²⁵ Instead, they were taken to a group of barracks known as the Gypsy Family Camp. At first, most of the Roma were not detailed for forced labor, either.²⁶ The conditions of the barracks were still as inhumane and abominable as the rest of the camp, however. Karl Stojka describes the rampant disease and the rapid death of the inmates, especially children.²⁷ Of the estimated 360 babies who were born in the camp, all died, and only three lived more than nine months.²⁸ The vast majority of Roma in Auschwitz died due to the living conditions or from treatment meted out by camp officials, not through an extermination policy dictated by Berlin; of the more

than 19,000 Roma who died in Auschwitz, only about 5,000-6,000 were killed in the gas chambers.²⁹ Revealing the uncertainty surrounding the place of the Roma in Nazi beliefs, Rudolf Höss, one of the camp administrators, expressed concern over the conditions of the barracks, declaring that they were “utterly unsuitable” for a family camp. He even requested special rations for children and pregnant women.³⁰ In his testimony, Karl Stojka confirms this, stating that small children received jam with their bread.³¹ Although these rations were soon stopped, the fact that the request was submitted and granted, at least at first, demonstrates that Nazi policy regarding the Roma was flexible enough to be variously adapted by lower officials to be more brutal or more humane depending on their own beliefs. Roma survivor Hermine Horvath describes a member of the SS who was “so touched” by the malnourished Roma children in Auschwitz that he procured some extra bread for them.³² For an unknown reason, the man was gone the following day—perhaps due to the disapproval of his superiors.³³ In Horvath’s same paragraph, however, she writes that “the point” of the camps was “to break us Gypsies down to nothing.”³⁴ Her experience unites both the ambivalence of Nazi ideology towards Roma, which allowed a member of the SS to be moved by compassion towards Roma where perhaps he had hardened

²² Kenrick and Puxon, *Gypsies Under the Swastika*, 36.

²³ Stojka, interview.

²⁴ Zimmerman, “The National Socialist Solution of the Gypsy Question,” 420.

²⁵ Lewy, *Nazi Persecution of the Gypsies*, 279.

²⁶ Ibid, 282.

²⁷ Stojka, interview.

²⁸ State Museum of Auschwitz-Birkenau, *Memorial Book*, 1481-1489; Kenrick and Puxon, *Gypsies Under the Swastika*, 139.

²⁹ Zimmerman, “The National Socialist Solution of the Gypsy Question,” 420.

³⁰ State Museum of Auschwitz-Birkenau, *Memorial Book*, 1663.

³¹ Stojka, interview.

³² State Museum of Auschwitz-Birkenau, *Memorial Book*, 1510.

³³ Ibid.

³⁴ Ibid.

his heart towards Jews, and the brutality of the camp authorities towards all inmates, where the default was violence where policies were yet uncertain. In other camps, Roma received no special treatment, though in Ravensbrück children were sometimes allowed to remain with a parent.³⁵ Some Roma were also exterminated on arrival in Auschwitz and other killing centers.³⁶ Across camps, Roma received treatment consonant with the varying opinions of their racial status.

Additionally, local authorities often based their treatment of Roma on situational needs, not on ideological argument. On the night of August 2, 1944, the Gypsy Family Camp at Auschwitz was liquidated.³⁷ After maintaining the camp for sixteen months, the decision to suddenly transport 3,500 Roma to forced labor in other camps and to murder nearly 3,000 more seems incongruous.³⁸ The inconsistency may be explained by the transports of Hungarian Jews that arrived immediately after the murder of the Roma and were installed in formerly Roma-occupied barracks.³⁹ It seems that the liquidation of the Gypsy Family Camp was less a function of ideology than it was of necessity. Previous to this moment, it appears it was convenient to keep the Roma alive. Even this decision may have been based on the usefulness of the Roma in medical experimentation in Auschwitz, rather than some humanitarian instinct. Dr. Mengele used the Roma extensively in his research, espe-

³⁵ Kenrick and Puxon, *Gypsies Under the Swastika*, 127.

³⁶ Ibid, 143; Lewy, *Nazi Persecution of the Gypsies* 296.

³⁷ Ibid, 299.

³⁸ Ibid, 296-299.

³⁹ Ibid, 300.

cially twins.⁴⁰ There is some evidence that he ensured better treatment for some of his subjects, establishing a kind of kindergarten for Roma children and bringing them extra rations and even toys.⁴¹ The same Roma children, however, were later killed and dissected under his direction.⁴² Dr. Mengele was interested in keeping the Roma alive and even healthy, but only because they suited his needs. Whatever beliefs the Nazis had about the Roma were subsumed to the convenience of the moment.

Despite additional legislation attempting to clarify their position, Nazi beliefs and policy regarding Roma remained contradictory and inconsistent, leading to varying application by different officials. As late as 1944, when thousands of Roma had been arrested and killed, Himmler wrote that certain laws had erroneously led to identical treatment of Jews and Roma, but that this result “does not correspond with the differentiated political position to be granted to these groups.”⁴³ His insistence on the different status of Roma is evidence that other officials disagreed, or at least acted as if they did. Sometimes the Roma were kept separate from other inmates; Jewish survivor Gina Beckerman risked being shot for interacting with a Roma girl in Auschwitz.⁴⁴ But in other camps, Jews and Roma were imprisoned together and were treated no differently. Dutch political prisoner Anthony Van

⁴⁰ Kenrick and Puxon, *Gypsies Under the Swastika*, 146; Lewy, *Nazi Persecution of the Gypsies*, 290.

⁴¹ Lewy, *Nazi Persecution of the Gypsies*, 292.

⁴² Ibid, 294.

⁴³ Lewy, *Nazi Persecution of the Gypsies*, 357.

⁴⁴ Gina Schweitzer Beckerman, “Oral history,” interviewed by Randy M. Goldman, United States Holocaust Memorial Museum, July 13, 1994, <https://collections.ushmm.org/search/catalog/irn504753>.

Velsen lived in the Roma section of Auschwitz for a time and described the Roma as being treated “in the same manner as the Jews.”⁴⁵ In much of Germany and German-occupied lands, Himmler’s edicts had little effect on the daily experience of the Roma.

Analyzing the way Nazi beliefs imposed from above, often contradictory in and of themselves, intersected with the varying sentiments and needs of local administrators speaks more broadly about the crimes perpetrated by the Nazis. Ideology *could* be

⁴⁵ Anthony F. Van Velsen, “Oral history,” interviewed by Dr. Yaffa Eliach, United States Holocaust Memorial Museum, October 27, 1981, <https://collections.ushmm.org/search/catalog/irn513328>; Kenrick and Puxon, *Gypsies Under the Swastika*, 77.

the driving factor in the actions of military commanders and SS men, and perhaps for the Jews, the Aryan’s “anti-race,” it usually was.⁴⁶ Just as often, however, the local situation or their own feelings dictated their actions. For the Roma, this resulted in a kaleidoscope of experiences, because there was no one Nazi rule for their treatment. Thus, a full understanding of the Holocaust necessitates recognizing the spectrum of experiences, as simply citing the number of deaths “does not represent the full measure of suffering of the Romanies and Sinti.”⁴⁷

⁴⁶ Zimmermann, “The National Socialist Solution of the Gypsy Question,” 415.

⁴⁷ Kenrick and Puxon, *Gypsies Under the Swastika*, 153.

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All of Life an Experiment: A Synthetic Perspective on Oliver Wendell Holmes, Jr.'s Free Speech Opinions

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Abstract:

US Supreme Court Justice Oliver Wendell Holmes, Jr. reshaped American free speech law through his Supreme Court opinions during World War I and after. This paper explores the oft-debated questions of whether and how Holmes's free speech views changed between his legal education (during which he was taught that the common law's "bad tendency" test allowed governments to punish any speech after it was uttered) and World War I (during which he created and developed the more expansive "clear and present danger" test). This paper argues that Holmes developed the underlying principles of his later free speech ideas in his writings on American common law, but that he only expressed those ideas in Supreme Court opinions after several other legal thinkers prodded him to do so.

Introduction

A core principle of the American political system is the value of freedom of speech. As former Supreme Court Justice John Paul Stevens explained, "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole."¹ However, freedom of speech was not always clearly defined and broadly protected in the United States. In the early 20th century, the meaning of the First Amendment's Free Speech Clause was unsettled, and World War I threatened to submerge free speech under the waves of extreme patriotism. In two Supreme Court opinions in 1919, though, Justice Oliver Wendell Holmes, Jr. developed the "clear and present danger" test (which prohibited the Federal

Government from restricting anti-government speech unless that speech created a serious, imminent danger of civil disobedience) for free speech, and thus began a string of cases spanning several decades in which the Court interpreted the free speech clause to cover more and more types of speech. The evidence suggests that Holmes developed the basic principles of his free speech viewpoints in his writings on American common law, and also that his clear and present danger test and emphasis on the importance of free speech did not emerge until 1919, after several young legal thinkers had encouraged him to change his thinking.

Scholarly Literature

Scholars have suggested at least three significant viewpoints about how and when Holmes developed his revolutionary doctrine of free speech. Scholars such as Fred D. Ragan have argued that Holmes's primary change came in 1919 between his *Schenck* and *Abrams* opinions. According to Ragan,

¹ *Bose Corp. v. Consumers Union of US, Inc.*, 466 U.S. 485 (1984). Accessed from <https://caselaw.findlaw.com/us-supreme-court/466/485.html>.

Holmes originally used the clear and present danger test to prohibit seditious libel, a common law crime of criticizing the government in a way that supposedly decreased peace or respect for the government. By the time of *Abrams* in 1919, he had changed the test to be the libertarian test that most people think of it as.² A second view is that Holmes had changed his views before writing his *Schenck* opinion. One proponent of this perspective is David S. Bogen, who has argued that Holmes's dissenting opinion in *Abrams* was primarily a clarification of viewpoints he had already begun to express in *Schenck*.³ A third view is that Holmes never changed at all, but developed his free speech viewpoints through his writings on common law liability before he was ever appointed to the US Supreme Court. A proponent of this interpretation is Sheldon M. Novick.⁴ Each of these three perspectives contains part of the truth, but taken together they provide a more complete picture of how Holmes's free speech ideas changed. Holmes's judicial opinions show that he did change his opinion on free speech before *Schenck*, rejecting Blackstone's common law free speech doctrine in

² Fred D Ragan, "Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919," *The Journal of American History* 58, no. 1 (1971): 25, <https://doi.org/10.2307/1890079>. For a more recent example of this view, see Leslie Kendrick, "On Clear and Present Danger," *Notre Dame Law Review* 94, no. 4 (April 2019): 1653-1670, <https://heinonline.org/HOL/P?h=hein.journals/tndl94&i=1701>.

³ David Bogen, "The Free Speech Metamorphosis of Mr. Justice Holmes," *Hofstra Law Review* 11, no. 1 (January 1, 1982): 97-189, <https://scholarlycommons.law.hofstra.edu/hlr/vol11/iss1/3>.

⁴ Sheldon M. Novick, "The Unrevised Holmes and Freedom of Expression," *The Supreme Court Review* 1991 (1991): 303-390, <https://heinonline.org/HOL/P?h=hein.journals/suprev1991&i=307>

favor of the "clear and present danger" test. However, Holmes had developed the core elements of the clear and present danger test—imminent danger and subjective intent—in his common law writings decades before *Schenck*, so the core elements of his new speech ideas came from his thinking about the common law. Finally, Holmes became an outspoken supporter of broad free speech rights after *Abrams*. Thus, each of these three scholarly perspectives contains part of the truth about the development of Holmes's free speech thought.

Background: Oliver Wendell Holmes, Jr.

The most important advocate for free speech on the Supreme Court during the first few decades of the 20th century, Oliver Wendell Holmes, Jr. was a product of his experience in the Civil War. A lieutenant and captain in the Union Army, Holmes fought in the crucial Battle of Antietam and was wounded several times during the war, including a nearly fatal injury suffered at Ball's Bluff.⁵ The war exposed Holmes to Confederates who held different ideals from his, but seemed to fight for them with the same conviction. Looking back on the war in a Memorial Day speech in 1884, Holmes reflected:

We equally believed that those who stood against us held just as sacred convictions that were the opposite of ours... You could not stand up day after day in those indecisive contests... without getting at last something of the same brotherhood for the enemy that the north pole of a magnet has

⁵ Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas*, (First edition. New York: W. W. Norton & Company, 2019), 85-90.

for the south—each working in an opposite sense to the other, but each unable to get along without the other.⁶

From his wartime experiences, Holmes concluded that dogmatic commitment to any belief was harmful and ultimately led believers to attempt to force their views on others.⁷ At the same time, he felt that such conflict was inevitable and even appropriate. As one biographer explained, the war taught Holmes that, “Life is a struggle, and it is the struggle that gives it meaning. The only thing to do was to give one’s all, and leave the consequences to fate.”⁸ This tension in Holmes’s thinking between the uncertainty of truth and the right to fight over it would later shape his ideas on free speech. As a Supreme Court justice, Holmes wrote to fellow judge Learned Hand in response to Hand’s suggestion (in a previous letter) that uncertainty about many of our opinions should lead us to tolerate others’ views. Holmes wrote that he agreed, but added that “man’s destiny is to fight” over which ideas are correct, and continued, “If for any reason you did care enough you wouldn’t care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong.”⁹ The

⁶ Oliver Wendell Holmes Jr., “An address delivered for Memorial Day, May 30, 1884, at Keene, New Hampshire, before John Sedgwick, Post No. 4, Grand Army of the Republic,” quoted in Ronald K. L. Collins, *The Fundamental Holmes: A Free Speech Chronicle and Reader*, (New York: Cambridge University Press, 2010), 20.

⁷ Budiansky, *Oliver Wendell Holmes*, 130.

⁸ Budiansky, *Oliver Wendell Holmes*, 129.

⁹ Oliver Wendell Holmes Jr. to Learned Hand, June 24, 1918, quoted in Thomas Healy, *The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech in America*, (First Edition. New York: Metropolitan Books, Henry Holt and Company, 2013), 24-25.

Civil War convinced Holmes of the value of both skepticism about truth and conflict over whose beliefs were accurate, both of which ideas influenced his later thinking on freedom of speech.

A second important influence on Holmes’s legal ideas was his training and expertise in American common law. Like any common law system, American common law was a body of legal principles that was always slowly growing as judges added greater nuance to it through their rulings and opinions.¹⁰ The common law system that dominated US legal institutions in Holmes’s day came from English jurist William Blackstone, whose *Commentaries on the Laws of England* (a summary of English common law) had shaped American legal education in both universities and apprenticeship programs since the late 18th century.¹¹ As a student at Harvard Law School, Holmes had read Blackstone’s *Commentaries*, which argued for a prior-restraint-focused concept of free speech.¹² After law school, Holmes studied and applied the common law for about thirty-five years, first as an attorney, and later as a justice on the Massachusetts Supreme Court.¹³ In 1884, Holmes published a book entitled *The Common Law*, in which

¹⁰ J. Lyn Entrikin, “The Death of Common Law,” 42 *Harvard Journal of Law & Public Policy* 351, (Spring, 2019). <https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:5WC3-T400-00CW-H0M2-00000-00&context=1516831>.

¹¹ Dennis R. Nolan, “Sir William Blackstone and the New American Republic: A Study of Intellectual Impact,” *New York University Law Review* 51, no. 5 (November 1976): 761, 767.

¹² Bogen, “The Free Speech Metamorphosis of Mr. Justice Holmes,” 107-109.

¹³ Novick, “The Unrevised Holmes and Freedom of Expression,” 305.

he summarized his own thoughts on the common law. This book laid out an important test of civil liability: whether an ordinary person would have foreseen harm from a given action.¹⁴ In dealing with criminal attempts, in which a person attempts to commit a crime or comes close to committing it and then changes his mind, Holmes stated that the obvious tendency of an action (even if the action itself was not illegal) could make that conduct illegal if it was likely to cause a harmful result.¹⁵ In 1894, he expanded upon his ideas from *The Common Law* in an article for the *Harvard Law Review* called “Privileges, Malice, and Intent,” which explained two ways by which a person could escape liability for harming someone else: just cause and privilege. In both cases, Holmes argued that the actor’s intent was the primary standard for determining whether the actor was in fact exempt from liability.¹⁶ Holmes would later use his common law ideas about criminal attempts and the importance of intent to determine the constitutional limits of free speech for the Supreme Court.

The state of free speech law in the United States in the early 20th century provided a golden opportunity for the Supreme Court to reconsider the free speech clause of the First Amendment. The growth of government and its power in the late nineteenth century had begun to unintentionally foster

the development of modern federal protections of free speech and other civil liberties.¹⁷ This development occurred because modern nation-states like the United States Federal Government began to increase their power by directly engaging the individual. Through a sort of social contract, the Federal Government offered citizenship and civil liberties protection in exchange for the individual’s support. This social contract made traditional political allegiances to non-governmental groups (such as churches and other civic-minded community groups) obsolete, as the individual was increasingly loyal to the Federal Government alone.¹⁸ Additionally, before World War I the Supreme Court had made few rulings on the meaning of the Bill of Rights. Other than slavery, the 1798 Alien and Sedition Act, and a few matters from the Civil War, the Court had rarely addressed civil liberties issues, including free speech.¹⁹ A key reason for this omission was that the Supreme Court had not yet conclusively declared the incorporation of the Bill of Rights against the states, meaning that states could pass speech laws at their own discretion without fear of federal intervention. Because no Supreme Court rulings clearly defined the constitutional limits of free speech, many courts relied upon the common law for guidance. The common law doctrine of free speech protection was based on prior re-

¹⁴ Novick, “The Unrevised Holmes and Freedom of Expression,” 306-307.

¹⁵ Oliver Wendell Holmes Jr., G. Edward White, and Oliver Wendell Holmes, Sr., *The Common Law*, (Cambridge, United States: Harvard University Press, 2009), <http://ebookcentral.proquest.com/lib/ku/detail.action?docID=3300809>, 61-63.

¹⁶ Oliver Wendell Holmes, “Privilege, Malice, and Intent,” *Harvard Law Review* 8, no. 1 (1894): 5-12, <https://doi.org/10.2307/1322381>.

¹⁷ Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Development*, (7th ed. New York: Norton, 1991), 509.

¹⁸ Christopher Joseph Nicodemus Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen*, (Oxford; New York: Oxford University Press, 2008), 7-8; Kelly et. all, *The American Constitution*, 510.

¹⁹ Kelly et. all, 510.

straint, the idea that the Federal Government must allow everyone to speak freely, but may punish speech after the fact.²⁰ William Blackstone, the English jurist who helped codify English common law, was a key proponent of this “bad tendency” test. In his *Commentaries on the Laws of England*, Blackstone stated that freedom of speech meant that governments must allow people to say whatever they desired. According to Blackstone, however, governments could also punish such speech at their discretion once a person uttered an offending statement.²¹ Because of changing ideas of citizenship, a lack of civil liberties precedents, and the restrictiveness of the bad tendency test, the US Supreme Court found the opportunity to hand down groundbreaking free speech opinions in the early 20th century.

World War I, the immediate context for Holmes’s landmark Supreme Court opinions, was a key reason for the emergence of the new rights-oriented idea of citizenship. Traditionally, Americans viewed citizenship primarily as an obligation to participate in various community- and nation-strengthening local organizations. This participation was not required but became a hallmark of true patriotism, leading to a form of peer pressure historian Christopher Capozzola has called “coercive voluntarism.”²² This culture of voluntary service for the national good pushed people to follow the Federal Government’s dictates or face ostracism and even criminal charges. However, the war also helped create a new definition of American citizenship to rival this traditional view. During the war,

the Federal Government attempted to control the personal lives of Americans at an unprecedented level, threatening the traditional function of local organizations.²³ Because the Federal Government emphasized obedience to national law during World War I, the war reshaped the American definition of obligation to country—from voluntarily contributing out of duty, to obeying the mandatory laws of an increasingly powerful federal government.²⁴

The Selective Service Act of 1917, which instituted a draft of men aged twenty-one to thirty, sharpened the tensions between the old and new views of citizenship and further strengthened the new view.²⁵ On one hand, the Federal Government could appeal to the obligation-based old view to support the draft. Draft cards allowed the Federal Government to both gain information about its citizens and change the terms of faithful citizenship to include registering for the draft.²⁶ Because Americans now defined their citizenship largely in terms of the draft, the “slackers” who evaded the draft were considered unpatriotic, and the majority of Americans strongly condemned them.²⁷ Further, the Federal Government’s newfound power and federal law’s increased authority motivated dissidents to use federal institutions (such as the federal court system and Congress) to get their viewpoints heard. For example, the American Civil Liberties Union was formed in 1920 as the renamed version of the Civil Liberties Bureau, a civil liberties interest group that advocated for the free

²⁰ Kelly et. al., 511.

²¹ Bogen, “The Free Speech Metamorphosis of Mr. Justice Holmes,” 101-102.

²² Capozzola, *Uncle Sam Wants You*, 6-9.

²³ Capozzola, *Uncle Sam Wants You*, 7-8.

²⁴ Capozzola, *Uncle Sam Wants You*, 15.

²⁵ Capozzola, *Uncle Sam Wants You*, 21.

²⁶ Capozzola, *Uncle Sam Wants You*, 23

²⁷ Capozzola, *Uncle Sam Wants You*, 30.

speech rights of minorities who opposed the war.²⁸ Finally, in mid-1917, Congress passed the Espionage Act, which prohibited anyone from lying to impede the success of American war efforts, and enforced the prohibition with fines or imprisonment for offenders. The act also allowed the Postmaster General to remove from mail circulation any publication that advocated breaking a federal law.²⁹ The Sedition Act of 1918, passed on May 16, 1918, amended the Espionage Act to further restrict free speech by making felonies of inciting mutiny among soldiers, discouraging military recruiting, or opposing the United States or its soldiers.³⁰ These laws, along with the political climate in the United States at the time, proved to be the ideal circumstance for landmark free speech cases before the Supreme Court.

Although the Supreme Court generally, and Justice Oliver Wendell Holmes Jr. in particular, had no history of broad free speech rulings, two Espionage Act cases marked the beginning of a new chapter in free speech jurisprudence. The first case, *Schenck v. United States*, dealt with whether the Espionage Act's banning of a circular published by a group of American Socialists (including Charles Schenck, the General Secretary of the American Socialist Party) was constitutional under the 1st Amendment right to freedom of speech. Writing for a unanimous Court upholding the conviction of the Socialists, Holmes introduced the "clear and present danger" test for determining whether the government could restrict speech. In his own words, "The question in every case is whether the words used are used in such circum-

stances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." In applying this test in *Schenck*, Holmes recognized the rights of the defendants to say the things they said under other circumstances. However, whether a particular type of speech was protected depended on the circumstances surrounding it. During a war, the government had a right to restrict speech more than during peace time to prevent anyone from hindering the war effort. Since the clear intent—the only foreseeable effect—of the publication was to encourage people to obstruct the draft, Schenck and his colleagues had no right to publish the pamphlet.³¹

The second wartime case was *Abrams v. United States*. Jacob Abrams and other American Communists were arrested for publishing two leaflets attacking the United States government and its efforts in World War I. The United States charged Abrams and his colleagues with attempting to convince Americans to oppose US military efforts.³² Using a variation of the bad tendency test, Justice John H. Clarke wrote for the majority that the purpose of the pamphlets was to incite sedition against the United States, and that prohibiting them was therefore constitutional.³³ This time, Holmes dissented from the majority opinion. To determine whether the Sedition Act was constitutional,

²⁸ Kelly et. all, *The American Constitution*, 515.

²⁹ Capozzola, *Uncle Sam Wants You*, 150-151.

³⁰ Kelly et. all, *The American Constitution*, 513.

³¹ *Schenck v. United States*, 249 U.S. 47 (1919). Accessed from https://www.law.cornell.edu/supremecourt/text/249/47#writing-USSC_CR_0249_0047_ZO

³² *Abrams v. United States*, 250 U.S. 616 (1919). Accessed from https://www.law.cornell.edu/supremecourt/text/250/616#writing-USSC_CR_0250_0616_ZD

³³ Kelly et. all, *The American Constitution*, 514.

Holmes repeated his clear and present danger test from *Schenck* as a two-pronged test. Unless the government could show either imminent danger to harm the government's efforts or subjective intent to do so, the First Amendment prevented the government from restricting seditious speech. Holmes also included the following famous philosophical justification of free speech:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.³⁴

Though Holmes was in the minority in this case, his free speech ideas would soon become the official doctrine of the Supreme Court.

Continuity: How Holmes Initially Developed His Free Speech Ideas

Oliver Wendell Holmes Jr. began to develop the core elements of the clear and present danger test – imminent danger and subjective intent—in his common law writings.

³⁴ *Abrams v. United States*, 250 U.S. 616 (1919). Accessed from https://www.law.cornell.edu/supremecourt/text/250/616#writing-USSC_CR_0250_0616_ZD

He began to develop “imminent danger” in his book *The Common Law*, published in 1884. In *The Common Law*, Holmes argued that intent to commit a crime (as shown by actions close to committing it) was adequate to convict someone of criminal conduct. When he discussed criminal attempts (how the law dealt with people who attempted to commit a crime and were not successful), Holmes explained that intent and attempt are two different things. An intent in the mind to commit a crime is not criminal by itself; on the other hand, “If an act is done of which the natural and probable effect under the circumstances is the accomplishment of a substantive crime,” the actor is criminally liable.³⁵ In general, therefore, Holmes believed that the perpetrators of a failed crime were still guilty under the law if their actions were likely to accomplish that crime. At the same time, Holmes recognized another category of criminal attempts: actions which are closely connected with criminal activity but are not criminal themselves. In these cases, Holmes explained that subjective intent to commit a crime was the key, since criminal intent determined the likelihood that the actor would follow the legal conduct with other actions that were illegal.³⁶ But what otherwise legal conduct shows criminal intent so dangerous that the conduct becomes illegal? Holmes answered as follows:

Public policy, that is to say, legislative considerations, are at the bottom of the matter; the considerations being, in this case, the nearness of the danger, the greatness of the harm,

³⁵ Holmes, Jr., *The Common Law*, 61.

³⁶ Holmes, Jr., *The Common Law*, 64.

and the degree of apprehension felt. When a man buys matches to fire a haystack, or starts on a journey meaning to murder at the end of it, there is still a considerable chance that he will change his mind before he comes to the point. But when he has struck the match, or cocked and aimed the pistol, there is very little chance that he will not persist to the end, and the danger becomes so great that the law steps in.³⁷

In summary, Holmes's book *The Common Law* explored when the law could punish criminal attempts and offered imminent danger as the answer. Holmes would later apply this standard to constitutional free speech in both his *Schenck* and *Abrams* opinions.

In several judicial opinions, Holmes further explained his ideas on criminal attempts. The first case was *Commonwealth v. Lincoln B. Peaslee*, a Massachusetts Supreme Court case in which a man set up explosives around a building with intent to burn down the building, destroy its goods, and injure its insurers.³⁸ After setting up the explosives, the man drove to within a quarter mile of the building to light them, but then changed his mind and left. Holmes explained that actions in furtherance of a planned crime were not generally crimes themselves if further actions were needed to complete the crime. However, "some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete

³⁷ Holmes, Jr., *The Common Law*, 64.

³⁸ *Commonwealth v. Lincoln B. Peaslee*, 177 Mass. 267, <https://law.justia.com/cases/massachusetts/supreme-court/volumes/177/177mass267.html>.

it renders the crime so probable that the act will be a misdemeanor." In this case, Holmes argued that the defendant was innocent because he did not come near enough to committing the arson. A punishable attempt required intent to complete the crime very soon, and at a time and place in which he could carry out his intentions. For Holmes, an example of a punishable attempt in this case would be if Lincoln Peaslee had been in the building lighting the match when he was caught by police.³⁹ In *Aikens v. Wisconsin*,⁴⁰ two newspaper publishers were convicted of willfully and maliciously attempting to harm someone's business by charging different interest rates to advertisers based on whether those advertisers bought advertisements in a third paper. Holmes applied his criminal attempts analysis from *The Common Law* by emphasizing the importance of the probable effect of an action when he said, "The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."⁴¹

In his Harvard Law Review article entitled "Privileges, Malice, and Intent,"⁴² Holmes began to explore what would become the second element of his clear and present danger test: subjective intent. Holmes first laid out his theory of torts with an external test: If a person acts in a way that

³⁹ *Commonwealth v. Lincoln B. Peaslee*, 177 Mass. 267, <https://law.justia.com/cases/massachusetts/supreme-court/volumes/177/177mass267.html>.

⁴⁰ *Aikens v. Wisconsin*, 195 U.S. 194 (1904), <https://caselaw.findlaw.com/us-supreme-court/195/194.html>.

⁴¹ *Aikens v. Wisconsin*, 195 U.S. 194 (1904), <https://caselaw.findlaw.com/us-supreme-court/195/194.html>.

⁴² Holmes, "Privilege, Malice, and Intent," 1-14.

harms another person under circumstances the actor knew were likely to produce that effect, he is liable for that harm.⁴³ However, Holmes explained that in some cases, knowingly inflicting harm on another person is acceptable if just cause is present.⁴⁴ To determine whether the actor had just cause to harm someone else, the key factor was the actor's motives. As an example, Holmes imagined a person who counsels another person to refrain from hiring a certain doctor. If that counsel harmed the doctor's business, the person who provided that counsel might be liable if he gave the counsel solely to harm the doctor's business, as opposed to believing that the doctor was unqualified to practice medicine. Holmes then stated his thesis: "If the privilege is qualified, the policy in favor of the defendant's freedom generally will be found to be qualified only to the extent of forbidding him to use for the sake of doing harm what is allowed him for the sake of good."⁴⁵ In other words, a person's motives determined whether a defendant could be liable for a privileged action that harmed someone else. Later in the article, Holmes addressed another type of tort: When a person's lawful actions lead to the wrongdoing of another person. Holmes explained that people have a right to expect that others will act lawfully, even if that expectation is not likely to be true. For instance, if a person spreads a message he heard from someone else, he is not responsible if that message turns out to be slanderous.⁴⁶ However, if the conduct he attempted to induce in another person required tortious action

⁴³ Holmes, "Privilege, Malice, and Intent," 1.

⁴⁴ Holmes, "Privilege, Malice, and Intent," 3.

⁴⁵ Holmes, "Privilege, Malice, and Intent," 6-7.

⁴⁶ Holmes, "Privilege, Malice, and Intent," 10.

(i.e. he intended to cause the tortious action), he is liable.⁴⁷ Holmes began to apply his ideas on intent from "Privileges, Malice, and Intent" in *Gandia v. Pettingill*, a US Supreme Court case in which Holmes decided that the authors of news articles claiming that the attorney general of Puerto Rico was operating a private law practice were not libelous, since they were not excessive or malicious, and they revealed issues of great interest to the public.⁴⁸ Holmes's emphasis on malice (similar to intent) reflected his analysis in "Privileges, Malice, and Intent" of liability for privileged conduct. Since intent is one of two elements Holmes emphasized in his clear and present danger test, and speech is both a privileged action and a potential cause of unlawful action, it appears that the principles in this article also influenced Holmes's thinking on free speech in *Schenck* and *Abrams*.

Holmes's academic writings and judicial opinions suggest that the two elements of his clear and present danger test originated long before his groundbreaking free speech opinions in 1919. Even more convincing, however, are two letters Holmes wrote to other legal thinkers in which he further described his thinking on these issues. Holmes wrote the first letter in response to a question from friend and Harvard law professor Zechariah Chafee, Jr. On June 9, 1922, Chaffe wrote to Holmes asking, "whether this definition of freedom of speech in the Schenck case was at all suggested to you by any writers on the subject or was the result entirely of

⁴⁷ Holmes, "Privilege, Malice, and Intent," 11.

⁴⁸ *Gandia v. Pettingill*, 222 U.S. 452 (1912). Accessed from https://scholar.google.com/scholar_case?case=10495946766850350745&hl=en&as_sdt=6&as_vis=1&oi=scholar

your reflections.”⁴⁹ Holmes responded that he developed the clear and present danger test after several cases taught him that his commitment to Blackstone’s prior restraint doctrine of free speech was incorrect. He then added, “But I did think hard on the matter of attempts in my Common Law and a Mass [Massachusetts] case [*Commonwealth v. Peaslee*], later in the Swift case (U.S.) [*Swift v. United States*].”⁵⁰ In other words, Holmes explicitly recognized that his criminal attempts writings found in *The Common Law*, *Commonwealth v. Peaselee*, and *Swift v. United States* led to his clear and present danger test in *Schenck v. United States*. Holmes sent the second letter to an English friend, the jurist Sir Fredrick Pollock. In this letter, while commenting on his own opinion in *Abrams v. United States*, he argued that to constitutionally restrict speech, “an actual intent to hinder the U.S. in its war with Germany must be proved.” He continued, “even if there were evidence of a conspiracy to obstruct, etc., the overt act laid must be an act done to effect the object of the conspiracy and it seems to my plain that the only object of the leaflets was to hinder our interference with Russia. I ought to have developed this in the opinion.”⁵¹ These statements

49 Letter from Zechariah Chafee, Jr. to Oliver Wendell Holmes, Jr. (June 9, 1922), quoted in Bogen, “The Free Speech Metamorphosis of Mr. Justice Holmes,” 101-102.

50 Letter from Oliver Wendell Holmes, Jr. to Zechariah Chafee, Jr. (June 12, 1922), quoted in Bogen, “The Free Speech Metamorphosis of Mr. Justice Holmes,” 101-102.

⁵¹ Letter from Oliver Wendell Holmes, Jr. to Fredrick Pollock (December 14, 1919), in Mark De Wolfe Howe, ed. *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874-1932*, (Cambridge, Massachusetts: Harvard University Press, 1942), 2:32-33. <https://heinonline.org/HOL/P?h=hein.beal/holpol0002&i=1>

unmistakably suggest that Holmes applied his thoughts from “Privileges, Malice, and Intent”—that liability for privileged actions depended upon subjective intent – to constitutional freedom of speech in *Abrams*.

Change: How and Why Holmes Became a Champion of Free Speech

Though Holmes based his clear and present danger test on ideas from his common law writings, he did change his free speech viewpoints in important ways before his *Schenck* and *Abrams* opinions. One important change was his rejection of Blackstone’s prior restraint idea of free speech. As discussed above, Blackstone’s common law free speech doctrine allowed civil governments to punish speech after the fact. The key criterion was whether the speech showed proximate cause—a close connection between the speech and an illegal action—to show that the speaker had seditious intent. “In practice, however, more often than not the rule that obtained was the bad tendency test. Publication and speech were held to be punishable if they evinced a reasonable tendency, at some future point, to undermine the government.”⁵² This “bad tendency test” gave courts significant power to limit any kind of speech that potentially encouraged opposition to the government. In *Patterson v. United States*⁵³, in which a Colorado newspaper Holmes interpreted the constitution’s freedom of speech and of the press provisions in the Blackstone tradition: “the main purpose of such constitutional provisions is ‘to prevent all such previous restraints upon

⁵² Kelly et. all, *The American Constitution*, 511.

⁵³ *Patterson v. Colorado*, 205 U.S. 454 (1907). Accessed from <http://cdn.loc.gov/service/ll/usrep/usrep205/usrep205454/usrep205454.pdf>.

publications as had been practiced by other governments,’ and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.”⁵⁴ In an unpublished dissent for *Baltzer v. United States*, the first case the Supreme Court heard on the Espionage Cases, Holmes still left the bad tendency test intact, stating, “I agree that freedom of speech is not abridged unconstitutionally in those cases of subsequent punishment with which this court has from time to time.”⁵⁵ As late as December 1918, Holmes still held to prior restraint (and the accompanying bad tendency test) to define constitutional freedom of speech.

Eventually, Holmes questioned and ultimately rejected the prior restraint doctrine, beginning in *Schenck v. United States*. In discussing *Schenck*’s constitutional free speech claims, Holmes stated, “It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*, 205 U.S. 454, 462.”⁵⁶ Unlike in *Patterson*, Holmes mentioned the prior restraint doctrine of free speech, but seemed unsure about its legitimacy and willing to abandon it if needed. The clear and present danger test, which Holmes created in *Schenck*, was effectively a method for

narrowing the scope of the bad tendency test to only those kinds of speech that threatened serious, immediate attacks on the Federal Government or its laws. In *Abrams v. United States* several months later, Holmes went even further, saying, “I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force.”⁵⁷ In other words, Holmes explicitly rejected the US government’s argument that the free speech clause codified common law free speech doctrines. In 1922, Holmes openly rejected his previous adherence to the bad tendency test in a letter to Zechariah Chafee: “The later cases (and probably you-I do not remember exactly) had taught me that in the earlier *Paterson* [*sic*] case, if that was the name of it, I had taken Blackstone and Parker of Mass as well founded, wrongly. I surely was ignorant.”⁵⁸ Holmes changed his views on free speech by rejecting Blackstone’s bad tendency test and creating the clear and present danger test.

A second way in which Holmes’s views of constitutional free speech changed was in his increased emphasis on freedom of speech in his court opinions and his willingness to lead vocal minorities in favor of free speech. This pattern did not emerge in *Schenck*, likely because Holmes was assigned the majority opinion and wanted to encourage as many of his colleagues as possible to join it. In a letter to Fredrick Pollock, Holmes reflected upon *Schenck* and concluded, “I

⁵⁴ *Patterson v. Colorado*, 205 U.S. 454 (1907). Accessed from <http://cdn.loc.gov/service/ll/usrep/usrep205/usrep205454/usrep205454.pdf>.

⁵⁵ *Baltzer v. United States* (Holmes dissenting), memorandum distributed to the Justices on December 3, 1918, quoted in Novick, “The Unrevised Holmes and Freedom of Expression,” 388–390. <https://heinonline.org/HOL/P?h=hein.journals/suprev1991&i=307>.

⁵⁶ *Schenck v. United States*, 249 U.S. 47 (1919). Accessed from https://www.law.cornell.edu/supremecourt/text/249/47#writing-USSC_CR_0249_0047_ZO

⁵⁷ *Abrams v. United States*, 250 U.S. 616 (1919). Accessed from https://www.law.cornell.edu/supremecourt/text/250/616#writing-USSC_CR_0250_0616_ZD

⁵⁸ Letter from Oliver Wendell Holmes, Jr. to Zechariah Chafee, Jr. (June 12, 1922), quoted in Bogen, “The Free Speech Metamorphosis of Mr. Justice Holmes,” 101-102.

should go farther probably than the majority in favor of [free speech], and I daresay it was partly on that account that the C. J. assigned the case to me.”⁵⁹ In other words, Holmes recognized that the Chief Justice allowed him to write the majority opinion in *Schenck* to force Holmes to restrain his “extreme” speech viewpoints. After this obstacle was removed, Holmes began to support free speech (often through dissenting opinions) with greater emphasis than he had before. One tally of Holmes’s votes on key Supreme Court free speech cases found that he voted to protect free speech in just 2 of 11 cases before *Schenck* and *Abrams*. By contrast, he voted for free speech protection in 12 of 14 cases after *Schenck* and *Abrams*.⁶⁰ Beginning in *Abrams*, Holmes also began to use his opinions to make sweeping defenses of his philosophical reasons for believing in freedom of speech. In *Abrams*, he declared:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution.

⁵⁹ Oliver Wendell Holmes, Jr., to Fredrick Pollock (April 5, 1919), in Howe, ed. *Holmes-Pollock Letters*, 1:7.

⁶⁰ Ronald K. L. Collins, *The Fundamental Holmes: A Free Speech Chronicle and Reader*, (New York: Cambridge University Press, 2010), 399.

It is an experiment, as all life is an experiment.⁶¹

In *Gitlow v. New York* in 1925, Holmes once again used a dissenting opinion as an opportunity to stand up for freedom of speech, saying, “It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. . . . If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”⁶² Beginning with *Abrams*, Holmes showed a new willingness to vote for freedom of speech and a new eagerness to explain its philosophical backing in his Supreme Court opinions.

Two legal thinkers influenced Holmes to change his free speech views: Learned Hand and Zechariah Chafee, Jr. Hand was a US District Court Judge with whom Holmes corresponded. In 1917, Hand handed down an influential free speech decision in *Masses Publishing Company v. Patten*.⁶³ In this case, Hand decided that the New York Postmaster General could not refuse to carry a magazine because it criticized US involvement in World War I. Hand reasoned that the Espionage Act only prohibited people from encouraging others to obstruct the draft, and therefore the magazine in question was

⁶¹ *Abrams v. United States*, 250 U.S. 616 (1919). Accessed from https://www.law.cornell.edu/supremecourt/text/250/616#writing-USSC_CR_0250_0616_ZD

⁶² *Gitlow v. New York*, 268 U.S. 652 (1925). Accessed from https://www.law.cornell.edu/supremecourt/text/268/652#writing-USSC_CR_0268_0652_ZD

⁶³ *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y.), reversed, 246 F. 24 (2d Cir. 1917).

legal.⁶⁴ Unlike the bad tendency test popular at the time, Hand introduced a new test based on “direct incitement,” which suggesting that governments should fully protect nearly all speech, leaving only a few types unprotected.⁶⁵ Shortly after writing his *Masses* opinion, Hand discussed freedom of speech with Holmes during a train ride they happened to take together from [city] to [city] in [date]. In particular, Hand stated that our uncertainty about many of our opinions and the possibility that new insights may occur to us should lead us to tolerate others’ views. Apparently, Hand was dissatisfied with his response on the train to Holmes’s argument that humans have a “sacred right to kill the other fellow when he disagrees.” Hand now argued, “Not at all, kill him for the love of Christ and in the name of God, but always realize that he may be the saint and you the devil.”⁶⁶ Possibly Hand’s arguments about uncertainty as the ground of tolerance convinced Holmes to argue that “time has upset many fighting faiths” in support of his dissent in *Abrams*.⁶⁷ After Holmes published his opinions for *Schenck* and two other Espionage Cases, Hand objected in a letter that his opinions focused too much on intent and the likelihood of harm.⁶⁸ Holmes’s reply made clear that he

⁶⁴ Bogen, “The Free Speech Metamorphosis of Mr. Justice Holmes,” 133-134.

⁶⁵ Douglas Laycock, “The Clear and Present Danger Test,” *Journal of Supreme Court History* 25, no. 2 (2000), 163, 181. Accessed from http://supremecourthistory.org/assets/pub_journal_2000_vol_2.pdf

⁶⁶ Letter from Learned Hand to Oliver Wendell Holmes, Jr. (June 22, 1918), quoted in Healy, *The Great Dissent*, 22-23.

⁶⁷ *Abrams v. United States*, 250 U.S. 616 (1919). Accessed from https://www.law.cornell.edu/supremecourt/text/250/616#writing-USSC_CR_0250_0616_ZD

⁶⁸ Learned Hand to Oliver Wendell Holmes, Jr. (late March, 1919), quoted in Gerald Gunther, “Learned

saw Hand’s “direct incitement” idea as identical to his clear and present danger test.⁶⁹ In summary, the evidence suggests that Judge Learned Hand may have influenced the free speech views of Oliver Wendell Holmes.

A second influence on Holmes’s free speech developments was Zechariah Chafee, Jr., a law professor at Harvard University. Back in 1914, Holmes had subscribed to a new weekly magazine called *The New Republic*.⁷⁰ After Hand’s *Masses* opinion in 1917, Chafee used the summer of 1918 to study the appropriate boundary between free speech and speech the federal government could restrict.⁷¹ After Holmes’s first Espionage Act opinions (including *Schenck*) were published, Chafee wrote an article for the *New Republic* in November 1919. In this article, Chafee attacked Holmes’s decisions in the Espionage Cases for violating the First Amendment. Chafee argued that the First Amendment protected wartime opposition to the government as long as the opposition did not directly cause dangerous opposition to the war.⁷² In a 1919 Harvard Law Review article entitled “Free Speech During War-

Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History,” *Stanford Law Review* 27, no. 3 (February 1975): 758-759. Accessed from <https://heinonline.org/HOL/P?h=hein.journals/stflr27&i=737>

⁶⁹ Oliver Wendell Holmes, Jr. to Learned Hand (April, 1919), quoted in Gunther, “Learned Hand and the Origins of Modern First Amendment Doctrine,” 759-760.

⁷⁰ Oliver Wendell Holmes, Jr., to Fredrick Pollock (November 7, 1914), in Howe, ed. *Holmes-Pollock Letters*, 1:223-224.

⁷¹ Ragan, “Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech,” 37.

⁷² Ragan, “Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech,” 38.

time,” Chafee argued that the purpose of the First Amendment was to allow all people to express their viewpoints, thereby furthering the search for truth. He argued that the government could only ban types of speech that came close enough to inciting illegal actions, and severely criticized Holmes by name.⁷³ In a 1922 letter, Holmes answered Chafee’s question about how he developed the clear and present danger test by saying, “The expression that you refer to was not helped by any book that I know-I think it came without doubt after the later cases (and probably you-I do not remember exactly) had taught me...”⁷⁴ In other words, Holmes explicitly recognized that Chafee likely influenced him to reject the common law, prior restraint-based idea of free speech in favor of his clear and present danger test. Given Chafee’s criticisms of Holmes and Holmes’s own statements, it is likely that Chafee helped change Holmes’s free speech ideas.

Clear and Present Danger After Holmes

In the 1930s and 1940s, a more civil liberties-conscious Supreme Court accepted Holmes’s clear and present danger test and expanded its applicability beyond internal security issues. In *Whitney v. California*, Holmes’s longtime Supreme Court colleague Louis Brandeis further developed the clear and present danger test that Holmes had created.⁷⁵ In his opinion, Brandeis explained that speech must threaten clear, imminent,

and serious danger before the government could restrict it under the clear and present danger test.⁷⁶ The Court that would apply this version of the test was more committed to freedom of speech than previous Supreme Courts had been. President Franklin Roosevelt appointed several justices who supported expanded civil liberties (often including freedom of speech), including Benjamin Cardozo (1932), Hugo Black (1937), William O. Douglas (1939), Felix Frankfurter (1939), Frank Murphy (1940), and Wiley Rutledge (1943).⁷⁷ Combined with Brandeis and Harlan Fiske Stone, this gave civil liberties a majority on the Court by 1940.⁷⁸ This newly-composed Court began to apply the clear and present danger test to a wider scope of issues than the internal security issues Holmes had originally used the test for. For instance, *Bridges v. California* (decided in 1941) reversed the conviction of labor agitator Harry Bridges and the editors of the *Los Angeles Times* for contempt of court by publishing about pending state court cases. The Supreme Court found that the dangers the speech threatened were not serious, and therefore the state could not restrict that speech under the clear and present danger test.⁷⁹ *West Virginia State Board of Education v. Barnette* (decided in 1943) struck down a law that prohibited school children from refusing to salute the American flag. In his majority opinion, Justice Robert H. Jackson declared that refusing to salute the flag did

⁷³ Ragan, “Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech,” 41-42.

⁷⁴ Letter from Oliver Wendell Holmes, Jr. to Zechariah Chafee, Jr. (June 12, 1922), quoted in Bogen, “The Free Speech Metamorphosis of Mr. Justice Holmes,” 101-102.

⁷⁵ Collins, *The Fundamental Holmes*, 355.

⁷⁶ *Whitney v. California*, 274 U.S. 357 (1927). Accessed from https://www.law.cornell.edu/supremecourt/text/274/357#writing-USSC_CR_0274_0357_ZC

⁷⁷ Kelly et. all, *The American Constitution*, front matter.

⁷⁸ Kelly et. all, *The American Constitution*, 520.

⁷⁹ Kelly et. all, *The American Constitution*, 531.

not constitute a clear and present danger to the United States.⁸⁰ Through cases like these, the newly-configured Supreme Court of the 1930s and 1940s expanded the reach of the clear and present danger test.

In the 1950s, the Cold War encouraged a return to suppressing speech that criticized the government and brought about a landmark case that led to the death of the clear and present danger test. After the discovery of several Communist spies working to sabotage the United States, the free speech of American Communists became a hotly debated topic. Free speech libertarians used the spirit of Holmes's opinions—particularly his “marketplace of ideas” concept from *Abrams*—to argue for the Communists' right to speak. Conversely, free speech conservatives who opposed complete freedom of speech for Communists argued that the clear and present danger test could show when restricting Communist speech rights was appropriate.⁸¹ The debate culminated in *Dennis v. United States*, a 1951 Supreme Court case addressing the convictions of twelve American Communist party leaders. To decide this case, the Court had to consider whether the Communist party itself taught ideas sufficiently dangerous to the United States to warrant restricting its leaders' free speech. While he invoked Holmes's clear and present danger test, Chief Justice Fred Vinson reinterpreted it to fit his argument to convict the Communist leaders. Specifically, Vinson argued that the Court must weigh the seriousness of the threat against the likelihood of the threat occurring. If the threat was serious enough, governments could constitution-

ally restrict it, even if the illegal conduct the speech advocated was very unlikely to happen.⁸² *Dennis* destroyed the usefulness of the clear and present danger test by turning several justices against the test and turning it into a “sliding scale” instead of imminent danger and subjective intent. At the same time, the Court could not overrule *Dennis* in an effort to reclaim the test because of popular support for *Dennis*'s anti-Communist ruling. As a result, the Court had to abandon the clear and present danger test and find a new method of finding the limits of constitutional free speech.⁸³

In the 1960s, the Supreme Court developed the “Imminent Lawlessness” test to replace the clear and present danger test. The liberal Supreme Court under Earl Warren in the 1960s finally brought about the triumph of libertarian views of free speech on internal security issues. This triumph happened largely because of the decline in anti-Communist fear in Americans in the late 1950s, and because new Supreme Court justices Arthur Goldberg and Abe Fortas (appointed in the early 1960s) gave the libertarians on the Court a majority.⁸⁴ In *Brandenburg v. Ohio* (1969), the Court struck down an Ohio statute under which the state convicted a member of the Ku Klux Klan [of what]. In this case, the Court overruled *Whitney v. California*, formally nullifying the clear and present danger test. The new imminent lawlessness test took the “present danger” element of the CPD test and combined it with “incitement” from Learned Hand's *Masses* opinion during World War I. The result was a test that al-

⁸⁰ Kelly et. all, *The American Constitution*, 530.

⁸¹ Kelly et. all, *The American Constitution*, 560.

⁸² Kelly et. all, *The American Constitution*, 571.

⁸³ Laycock, “The Clear and Present Danger Test,” 179-181.

⁸⁴ Kelly et. all, *The American Constitution*, 574.

lowed the state to prohibit and punish a few types of speech while completely protecting most types of speech. This signified a clear break with the clear and present danger test, which attempted to balance individual rights and state interests.⁸⁵ Though *Brandenburg* rejected Holmes's test, it arguably vindicated his philosophy of free speech. As legal scholar Robert Bork has noted:

The law of free speech we know today grows out of the Supreme Court decisions following World War I – *Schenck v. United States*, *Abrams v. United States*, *Gitlow v. New York*, *Whitney v. California* – not out of the majority positions but rather from the opinions, mostly dissents or concurrences that were really dissents, of Justices Holmes and Brandeis....The great Smith Act cases of the 1950's, *Dennis v. United States*, as modified by *Yates v. United States*, and, more recently, in 1969, *Brandenburg v. Ohio* (voiding the Ohio criminal syndicalism statute), mark the triumph of Holmes and Brandeis.⁸⁶

Though the 1960s Supreme Court rejected the test in *Brandenburg*, it built upon Holmes's first steps toward a broader view of free speech.

In summary, Oliver Wendell Holmes, Jr. changed the face of constitutional free speech in the United States while showing

both change and continuity in his free speech views. Holmes's legal training caused him to accept the traditional bad tendency interpretation of the Constitution's free speech clause, but his Civil War experience encouraged a skeptical mindset that was willing to consider alternative approaches. On one hand, his common law writings on criminal attempts and liability for privileged conduct shaped his interpretation of the Free Speech Clause. On the other hand, only the Espionage Cases convinced Holmes to abandon the common law bad tendency test in favor of his own clear and present danger test. Not until even later, in *Abrams v. United States*, did Holmes begin to openly champion free speech and write dissents in favor of unpopular speakers. Holmes's clear and present danger test expanded beyond internal security to other areas of free speech before facing its downfall during the Cold War in *Dennis v. United States*. Though *Brandenburg v. Ohio* nullified the test in 1969, the new imminent lawlessness test retained Holmes's basic principle of protecting speech that was unpopular but not seriously dangerous. Though Holmes is known as one of the greatest legal thinkers in American history for his many contributions to American law, his contributions to free speech may be his most important accomplishment. His clear and present danger test changed the direction of American free speech jurisprudence and introduced the expansive free speech rights found in modern constitutional law.

⁸⁵ Laycock, "The Clear and Present Danger Test," 179-181.

⁸⁶ Robert Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47, no. 1 (Fall 1971): 23, <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2720&context=ilj>.

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Perspectives on the Transformation of Breslau into Wrocław, 1945-1948

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Introduction

The early stages during the transformation of Breslau into Wrocław were some of the most trying times that the European city has seen in its nearly thousand-year history. The Second World War left Europe devastated, and the Eastern and Western portions of the continent chose different paths towards recovery from the destructive war. The question of Poland's borders and leadership stood at the forefront of many post-war conversations between the Allies. The end of the Second World War brought up the question of whether or not to maintain Poland's territorial integrity: Where exactly should the borders be drawn? And what ethnic composition should a post-war Poland have? At the war's end, the Soviet government already had troops on the ground in Poland, because of this, Western allies such as Britain and the United States had little room to maneuver during negotiations.¹ When the Soviets decided that they wanted to shift the entire country of Poland westward, the Western allies had little choice but to agree.

After negotiations, The USSR annexed most of what was Eastern Poland, and, in replacement, they gave Poland most of what had previously been Eastern Germany.² The abrupt and hasty nature of the region's transfer from Germany to Poland sets the

stage for the transformation of Breslau into Wrocław.

The early period in the new Western Poland was commonly referred to as the "Wild West" because of the massive upheavals that happened as the region changed hands. This turmoil enveloped most of the province of Silesia, which is where the city Breslau, now Wrocław, is located. The city will henceforth be referred to as "Wrocław" in this article. Silesia was and still is a center of industry, and its historical capital has always been Wrocław. Wrocław had not been Polish territory since roughly the 14th century, so the reintroduction greatly surprised the Western Allies.

One great example of the change which occurred in this city is the Iglica, the spire that was placed in front of the Centennial Hall in Wrocław in 1948 by the Polish Communist Government in anticipation of the Exhibition of Recovered Territories.³ The Iglica is shaped like a tripod and was designed by Stanisław Hempel. It was originally 106 meters tall, and the designer indicated that the spire was meant to represent national unity built on the alliance of workers, peasants, and working intelligentsia.⁴ The Centennial Hall, the main structure standing behind the Iglica, was designed by German

¹ Admiral William D. Leahy, "Notes on the Yalta Conference", *The Wisconsin Magazine of History* 38, no. 2 (1954): 72, 112.

² See Image 1 in Appendix. Retrieved from United States Holocaust Memorial Museum.

³ Thank you to Professor Nathan Wood, University of Kansas, for bringing this landmark and his original ideas about its symbolism to my attention.

⁴ "Iglica." Visit Wrocław, Oficjalny serwis turystyczny, <https://visitWroclaw.eu/miejsce/iglica>, (October 15, 2019).

POLAND TERRITORIAL LOSSES AND GAINS 1945



Poland Territorial Losses and Gains, 1945. Retrieved from the U.S. Holocaust Memorial Museum.

architect Max Berg and began construction in 1911 when Wrocław was still German territory. It was a massive architectural feat; at the time of its construction it stood as the largest reinforced concrete dome in the world, and it represented a state-of-the-art use of metal in structural consolidation.⁵

The Centennial Hall was meant to be used as an exhibition hall, place of assembly, and even as a sports venue. The German government put a lot of time, money, and effort into creating this display of German wealth, power, and architectural prowess. When Poland gained control of Wrocław, the presence of this landmark tapped into an un-

dercurrent of resentment towards Germans that resulted from the war. The Poles were in unfamiliar land and constantly surrounded by the remnants of its previous inhabitants, and, as such, they found ways to adapt the area to their needs, even if it meant putting up a monument of their own that did not match the architectural style or achieve any of the accomplishments of the German monument standing behind it. After the Iglica was put up, the magazine *Przekrój* claimed that the spire was “a symbol of industry in the West” and that it was “hard to find a better of symbol of change.”⁶ The visuals in an advertisement for a Ballet in 1948 fo-

⁵ “Centennial Hall in Wrocław”, UNESCO World Heritage Centre, <https://whc.unesco.org/en/list/1165/>, (October 15, 2019).

⁶ L. Wolanowski, “Iglica I Dobrzy Restauratorzy,” *Przekrój Issue 171*, <https://Przekroj.pl/en/archiwe/artykuly/7303?f=number>, (October 22, 2019), Par 1.

cused on the newly built spire in front of the Centennial Hall without including the main structure behind it.⁷ The praise and attention that the spire received did not result from architectural or aesthetic accomplishments, rather, they were concerned with the spire as a symbol of making Wrocław Polish. The resentment behind the construction of the spire is the same motivation that guided both individual Poles and the Polish Government when incorporating Wrocław into Poland, and it is a large part of what caused the transfer to be bloody and chaotic.



Balet, Chór, Orkiestra Domu Wojska Polskiego z Warszawy. Observe the emphasis on the spire in the top right and left corners of the advertisement. Retrieved from Biblioteka Uniwersytecka we Wrocławiu.

The transformation of Breslau into Wrocław from 1945-1948 was one of the biggest turning points for the city in its history. The city was forced under Polish sovereignty despite having been German for hundreds of years prior, and this set the stage for it to be turned upside down. The

⁷ *Balet, Chór, Orkiestra Domu Wojska Polskiego z Warszawy*. Photograph. Wrocław, 1948. See Image 2 in Appendix. Retrieved from Biblioteka Uniwersytecka we Wrocławiu.

ethnic composition of the city was transformed thereby contributing to widespread social unrest and the civil and state administrations were ineffective and focused on the wrong problems. These two factors tended to combine and compound, and this led to a detrimental experience for most involved.

Civilian Perspectives

The civilian experience is complicated during the transformation of Breslau into Wrocław. This occurs for a multitude of reasons including post-war prejudices, desires for revenge, confusion caused by mass migration in and out of Wrocław, and the imposition of a communist society onto the “new” Polish city. The confluence of these factors eventually led to widespread social unrest.

One of the most important civilian aspects of this transformation is the mass migration of people both into and out of Wrocław that resulted after the Second World War. The ethnic composition of Wrocław changed drastically from 1945-1948. The goal of the Polish Communist government was to create an ethnically homogenous nation state,⁸ and, because of that, ethnic minorities in Polish territory, namely Germans, were removed. At the end of December 1945, “only 33,297 Poles were registered in Wrocław, compared to five times that number of Germans,” and, “nine months later, the positions had been almost exactly reversed: 152,898 Poles against 28,274 Germans.”⁹ As Germans were ex-

⁸ Joanna Talewicz-Kwiatkowska, “Persecution and Prejudice Against Roma People in Poland after World War II”, *The Polish Review* 64, no. 2 (2019): 40.

⁹ Norman Davies and Roger Moorhouse, *Microcosm Portrait of a Central European City*, (London: Pimlico, 2003), 419.

pelled from the city, Poles arrived from all over Eastern Europe. They were relocated by force and often arrived from areas that “had been violently torn apart by military action, social engineering, successive genocides, ethnic cleansing, political purges, and plain banditry.” The Soviet government used Catholicism and the ability to speak Polish as the twin criteria to decide who was Polish; this caused many mistakes when expelling people from the USSR and sending them to Poland.¹⁰ The Polish Government’s plan to move Germans out and to settle Poles coming in was executed with extreme speed. A newspaper article from the Chicago Daily Tribune highlighted the fact that 3,000 Germans had left Poland in one day in 1946, and that the plan was to be rid of 1.5 million Germans in a span of five months.¹¹ At the same time that this was happening, Poles and Soviet defined Poles were pouring into Poland. In 1946 alone, 130,000 people arrived in Wrocław.¹²

The new arrivals in Wrocław were not separated in any meaningful way, which only furthered social tensions in the recovering city. According to historian Gregor Thum, the chaos resulting from mass migration led to “professors living under the same roof as illiterates”¹³ as people were quickly and sloppily assigned abandoned homes to live in. Historian Padraic Kenney referred to Wrocław as “a camp filled with migrants

from all over Poland and Europe.”¹⁴ The hastiness of the movement of people into and out of the city fostered widespread confusion which fomented social unrest during this period. Poles from all over Eastern Europe were moved to a city with which they were unfamiliar and lived with people coming from vastly different countries, ethnic backgrounds, economic backgrounds, and war experiences. The goal of this process was to create an ethnically homogenous Poland, but it soon became very clear that what had been created was a “conglomerate of different communities not conducive to the formation of broader allegiances of class or even of nation,”¹⁵ and that “there had never been an ethnically homogenous Poland.”¹⁶ This was one of the first signs that this experiment may have led to what may be perceived as negative repercussions.

The Second World War left the nation in rubble, and the difficulties endured by Poles during the Holocaust and during combat took a lasting toll on the civilians of the country. As soon as the Poles had control of the city, German civilians that chose to stay were “subjected to the extremes of both deprivation and humiliation. Starving, sick, and stupefied, they bore the full brunt of the pent-up collective anger and contempt that Soviets and Poles alike had harboured.”¹⁷ According to Bishop Johannes Kaps, a German Bishop from the Archdiocese of Wrocław, Germans who remained in the city were “dreadfully maltreated by the Polish

¹⁰ Ibid, 425-426.

¹¹ “3,000 Germans Leave Poland for Allie Zones,” *Chicago Daily Tribune* (1923-1963), Feb 26, 1946.

¹² Alicja Maciaczyk, *Statystyka Wrocławia w Latach 1945-199*, (Wrocław: Urząd Statystyczny, 2000), 17.

¹³ Gregor Thum, *Uprooted: How Breslau Became Wrocław during the Century of Expulsions*, (Princeton: Princeton University Press, 2011), 178.

¹⁴ Ibid.

¹⁵ Padraic Kenney, *Rebuilding Poland Workers and Communists, 1945-195*, (Ithaca, NY: Cornell Univ. Press, 2012), 138.

¹⁶ Thum, *Uprooted*, 180.

¹⁷ Davies & Moorhouse, *Microcosm*, 408.

militia.”¹⁸ He claimed that Germans were often forced to work long hours for free, received less food than others, and that “no German’s life was safe if he appeared on the street.”¹⁹

The bloodthirsty treatment of German civilians remaining in Wrocław can be explained by exploring the Polish attitudes towards the war. The Polish people were subjected to a level of brutality and deprivation that took both a physical and mental toll on them during and after war. Poland was invaded by both the USSR and Nazi Germany at the beginning of the war and it had death camps set up and operated on its soil which exterminated millions of Jews and Poles. Warsaw, the capital, was razed to the ground by the Germans following a failed uprising, and Poland was then forced by the Soviets to adopt communism after the war.²⁰ During the war, Poles were required to house German soldiers and were often times required to do forced, unpaid labor for the Germans.²¹ They too were slaughtered in the streets, discriminated against, oppressed, abused, and looted from. This does not justify Polish actions against Germans following the war, but the prevailing attitude towards remaining Germans was one of apathy at best and antipathy at worst.

Many Germans, including Bishop Kaps, the German bishop from the Archdiocese of Wrocław, still believed that the territory was

rightfully German.²² Poles viewed this as further taunting after the atrocities committed against them during the war. The leading Polish opinion on the matter was that the Germans simply being allowed to leave was a preferable alternative to the treatment they received. Many Poles never had the option to leave and were killed or sent to concentration camps.²³ Because of this, Poles had a strong desire for “a Polish historical landscape in the western territories purged of all German traces.”²⁴

Another factor that contributed to the particularly brutal treatment of German civilians was what historians Davies and Moorhouse describe as a “palpable climate of impermanence” in Wrocław and the Western Territories as a whole.²⁵ Poles were acutely aware of the fact that many Germans held attitudes similar to Bishop Kaps’, and it led them to “never really settle into their new surroundings.”²⁶ Many of them longed for their familial homes in the East. This feeling only accelerated Polish mistreatment and persecution of remaining Germans. The longing for home and feeling of misplacement added to the already negative predisposition towards Germans due to the war. After having their homes torn apart by war, Poles were forced to move into the homes of the people they believed to have caused them this suffering. The Poles that now resided in Wrocław felt a need to assert themselves, and they likely expected that the Germans would soon return to reclaim the

¹⁸ Ibid.

¹⁹ Johannes Kaps, *The Tragedy of Silesia 1945-46 ; a Documentary Account with a Special Survey of the Archdiocese of Breslau*, (Munich: Christ Unterwegs, 1952), 137.

²⁰ Mitchell Orenstein, “Poland: From Tragedy to Triumph”, *Foreign Affairs* 93, no. 1 (2014): 23.

²¹ Henryk Kapturczak, *Wspomnienia z Okresu Okupacji*, (Poznań, 1947), Family Document.

²² Kaps, *Tragedy*, 32-33.

²³ Anna Cienciala, “Poles and Jews Under German and Soviet Occupation, September 1, 1939 - June 22 1941”, *The Polish Review* 46, no. 4 (2001): 393.

²⁴ Thum, *Uprooted*, 250.

²⁵ Davis & Moorhouse, *Microcosm*, 417.

²⁶ Thum, *Uprooted*, 186.

territory and retaliate. Poles likely wanted to assert themselves as the new and rightful owners of the now Polish territory, and they likely believed they could discourage future retribution from the Germans through fear.²⁷ Reconciliation with and apologies to Germans were not the goals of Poles moving into Wrocław at this time. Their methods were violent, but the motivations behind them stem from scars that resulted from the war.

The final factor that contributed to civilian chaos during the transformation of Breslau into Wrocław was the imposition of a communist society onto the newly Polish city. The Polish Communist government intended for Wrocław to be a part of “the Poland of the future, where social relations were reconstructed in a communist context.”²⁸ Many of the people who moved to Wrocław were “rural, young, poorly educated, and inexperienced,” causing party membership to center around creating a worker’s culture and community.²⁹ Communism was unpopular with Poles, and “doubly so after Soviet misconduct in 1939-41,”³⁰ but Wrocław presented a unique opportunity to create a communist society because Communism was seen as helping to bring order to the general chaos. It gave people who felt no sense of community or fellowship a common goal.

Civilians were encouraged to connect communism with Polish nationalism. A propaganda poster from the time shows a mile marker decorated with both traditional

Polish symbols and various communist symbols.³¹ It was intended to connect the idea of the land being rightfully Polish to the idea of Poland as a communist regime. Besides the Soviet requirements of speaking Polish and being Catholic, many of the new residents of the city did not have a lot in common and likely were not in favor of communism to begin with. The imposition of communism and the creation of a communist society where one had not previously existed likely only added to the social unrest of the city at the time. Most now had to adapt to a society being restructured around a Soviet economic scheme which was likely different from ones they had lived in previously. This only furthered the social tensions of the city at the time.

The civilian perspective on the transformation of Breslau into Wrocław can best be described as complicated and chaotic. Mass migration following the war completely redefined the ethnic composition of the city. It forcibly uprooted people from the East and dumped them into one central location while forcing them to coexist. Amidst these changes, Polish people were to adapt to a new communist society, to deal with leftover wartime history, and to hastily develop community in their new, assigned homes. These factors led to widespread social unrest, violence, the shared and intangible feeling of anxiety, a feeling of unbelonging, and a difficulty recovering from the experiences of war.

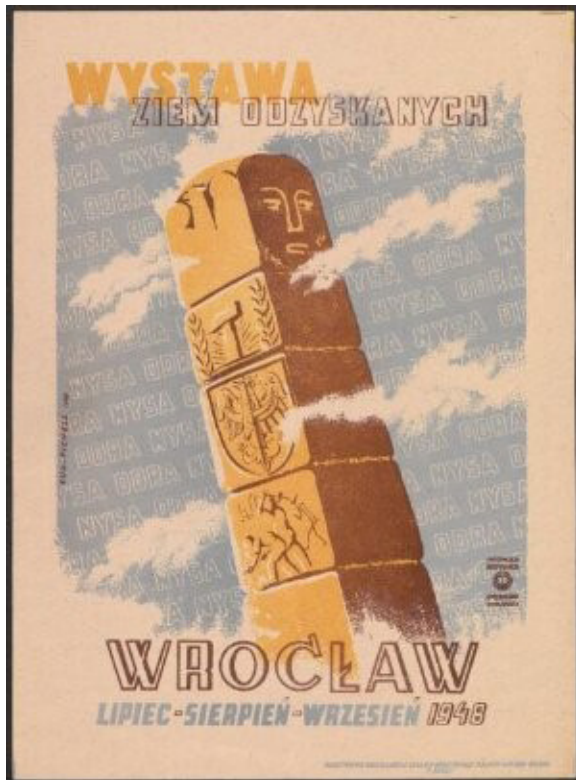
²⁷ Arthur Westermayr, “The Psychology of Fear,” *The Open Court* Vol. 1915, no. 4 (1915): 250.

²⁸ Kenney, *Rebuilding*, 136.

²⁹ *Ibid*, 173.

³⁰ Davies & Moorhouse, *Microcosm*, 411.

³¹ *Ulotka Propagandowa: Wystawa Ziem Odzyskanych*. Photograph. Wrocław, 1948. See Image 3 in Appendix. Retrieved from Biblioteka Uniwersytecka we Wrocławiu.



Wystawa Ziem Odzyskanych. This advertisement for the Exhibition of Recovered Territories combines both traditional Polish imagery with communist imagery including the hammer and wheat. Retrieved from Biblioteka Uniwersytecka we Wrocławiu.

Administrative Perspectives

The Soviets presented Poland with a unique and oftentimes difficult challenge when it came to the incorporation of Wrocław into the Polish state. The city was war torn, but not completely destroyed. It had been German for hundreds of years, and nearly everything in the city including the architecture, infrastructure, and culture reflected German culture. There was a stark difference between the picture of Wrocław that was painted by state propaganda and the city's reality; efforts to incorporate the city were not smooth or well calculated.

Immediately after the war, the Polish government came to realize that they had inherited a very German city that was still

stuck in wartime turmoil. The Ministry of the Recovered Territories, headed by PPR³² secretary Władysław Gomułka, “oversaw reparation, settlement, local administration, and the incorporation of the territories into Poland.”³³ The city was restructured quickly despite the large effort that was required to do so. In 1945, “nowhere was there a feature that one could, without hesitation, recognize as Polish,”³⁴ and “more than 30,000 place names, tens of thousands of natural features... as well as hundreds of thousands of streets and squares were to be given Polish names.”³⁵ During the time of Soviet occupation, the Red Army had put up signs in Cyrillic script which meant that many streets, landmarks, and buildings already had two names by the time Poland had to rebrand the area, one in German and one in Russian. They now were renamed for the third time in a span of nearly ten years. This caused difficulties in doing repairs, for example, since the administration could not find the correct addresses due to confusion caused by the constant renaming of the same locations. The city's German past permeated it deeply and even made it difficult for the administration to conduct basic operations.

After the rebranding, from 1945-46 the city of Wrocław only had 11 primary schools serving 1250 total students,³⁶ one high school serving 908 students,³⁷ and one institution of higher learning serving about 2900 students.³⁸ Considering 130,000 people

³² Short for Polska Partia Robotnicza (Polish Worker's Party).

³³ Kenney, *Rebuilding*, 137.

³⁴ *Ibid.*

³⁵ Thum, *Uprooted*, 244.

³⁶ Maciaczyk, *Statystyka Wrocławia*, 57.

³⁷ *Ibid.*, 61.

³⁸ *Ibid.*, 65.

arrived in Wrocław in 1946 alone,³⁹ it's clear that the education system was insufficient and it is very likely that many children were not going to school. In addition to this, the city's public transportation was in shambles. In 1947, the city only had 151 trams and 5 busses to serve 73.7 million yearly passengers.⁴⁰ The civil administration also had to deal with "buildings and wall fragments continually collapsing, [leftover] mines, unexploded bombshells, munitions depots blowing up," widespread rubble sickness,⁴¹ and "weapons and ammunition literally [laying] in the streets."⁴² This combined with the "relative lack of trained police" made entire portions of the city uninhabitable.⁴³ Neighborhoods in the Western and Southern portions of the city served as "hideouts for entire gangs,"⁴⁴ looters, and anyone who wanted to remain off the radar. Among other difficulties, the administration was struggling to police the city, educate its residents, and provide them with public transportation.

When presented with this delicate situation, the civil and state administrations floundered. The civil administration was plagued with internal power struggles and inefficiency. The city laid in wait as "no ration cards were issued until November 1945" and "most factories did not begin operation until early 1946."⁴⁵ This standstill left the new inhabitants hungry and out of work in unfamiliar territory. The new communist, government-owned factories promised to house, feed, clothe, and enter-

tain their workers⁴⁶ since the betterment of workers was supposed to be the focus of a communist government. These promises were delivered late. The PPR "succumbed to the same bureaucratic temptations as did the other councils and unions," and "activists saw themselves as representatives of party leadership, neither responsive to nor responsible for the local situation."⁴⁷ The administration took no responsibility for what was occurring in the city at the time. Instead, it retreated into bureaucratic entanglements that were only further exacerbated by the situation on the ground.

When later taking action, the administration's choices had a tendency to backfire. As a result of the rapid expulsion of Germans from Wrocław, the city's supply of skilled labor was rapidly depleted. The situation became so dire that the State Ministry of Industry was forced to begin a program of industrial sponsorship where factories in other cities were assigned one in Wrocław and told to populate its labor and administrative core with its own employees.⁴⁸ Factories in other cities responded by sending expendable employees. This led to factories in Wrocław being populated with workers from other cities while locals struggled, and it ensured that the administrative cores of these factories were composed of expendable workers. Those workers were expendable because of their lower quality of work, otherwise they would not have been sent to Wrocław by the factories previously employing them. Placing these workers into positions of authority in factories in Wrocław worsened working conditions.

³⁹ Ibid, 17.

⁴⁰ Ibid, 110.

⁴¹ Thum, *Uprooted*, 177.

⁴² Ibid, 183.

⁴³ Kenney, *Rebuilding*, 141.

⁴⁴ Thum, *Uprooted*, 183.

⁴⁵ Kenney, *Rebuilding*, 144.

⁴⁶ Kenney, *Rebuilding*, 163.

⁴⁷ Ibid, 147.

⁴⁸ Ibid, 143.

The one area in which the civil administration excelled was in the production of propaganda. Newspapers loudly proclaimed that bridges were being built on a large scale,⁴⁹ jobs and opportunities were plentiful, and that conditions were ideal. They also “trumpeted Wrocław ‘firsts’ – first tram line, first newspaper, first cinema,”⁵⁰ among other accomplishments. The city of Wrocław had already had all of these things in place when it was still a German city; they were just damaged or destroyed by the war. The communist party wanted to take credit for more than just reconstruction. The administration even spent hundreds of millions of dollars to host an Exhibition of the Recovered Territories in 1948 while the city itself suffered. The administration was intent on painting Wrocław as something it objectively was not. Opinions on Wrocław were “not much higher in Warsaw or Cracow than [they were] in Berlin or Hamburg.”⁵¹ One of the only places Wrocław was recognized as a robust city rife with opportunity was in the propaganda offices of the civil and state administrations.

The administrative perspectives on the transformation of Breslau into Wrocław tell a story of inefficiency and apathy. The administration failed to provide a basic standard of living for the residents of the city at this time. The city was unsafe due to a lack of policing, its residents were hungry and out of work at times, and there was no initiative to continue the education of the city’s populace. In addition, public transportation was in shambles, buildings

were unsafe to live in, money was spent on propaganda instead of reconstruction efforts, and factories were populated with laborers from other cities. Both the civil and state administrations chose to take a step back and not involve themselves in any meaningful way, and, when they did involve themselves, their actions often led to unintended, negative consequences. The civil and state administrations were indisputably presented with a complex problem to untangle when incorporating Wrocław into the Polish state. The city had been ravaged by war, and it had been a German city for hundreds of years. Furthermore, transitioning a city to fit into a communist blueprint is another challenge that the administrations had to face. The choices made by both the civil and state administrations to deal with the issues presented to them ranged from creating propaganda to inaction.

Connections Between Civilian & Administrative Perspectives

The civilian and administrative perspectives on the transformation of Breslau into Wrocław tell two different, yet interconnected stories about how the city transitioned from German to Polish territory. The civilian perspectives tell a tale of hardship and chaos. The administrative perspectives showcase the inefficiency in communist bureaucracy. The two combined and compounded where issues in one segment would further issues forming in the other.

The first connection observable between these two is the civil administration’s hands-off approach to policing and maintaining order within the city. This helps to explain the actions of the Poles towards the Ger-

⁴⁹ “Budujemy Mosty,” *Trybuna Robotnicza*. July 29, 1946, 205 edition.

⁵⁰ Kenney, *Rebuilding*, 141.

⁵¹ Davies & Moorhouse, *Microcosm*, 431.

mans that chose to remain in the city. The merciless killing and mistreatment of Germans by Poles that occurred in this period would not have been a possibility if the civil administration could have upheld the rule of law. The Poles harbored intense feelings of hatred following the war, and they were uncomfortable with their new surroundings. It was an already volatile situation that eventually led to Poles acting out. Failing to properly police the city could have been the result of negligence, a lack of resources, or both. It is highly plausible that in doing nothing, the civil administration encouraged the killings by allowing those that partook in them to walk away unscathed.

The second connection that can be observed is that between crime and the absence of jobs in the city. Wrocław became home to many thieves in this period, and the parts of town that they inhabited were unsafe. The war ended in May of 1945, and the migrants from Eastern Europe began pouring into Wrocław shortly after. Some viewed the city as a source of opportunity and came for that reason, but most were expelled from their homes in the East and relocated to Wrocław by force. Ration cards were not distributed until November of that same year, and factories did not begin production until 1946. There certainly is a possibility that some people came to Wrocław specifically to loot, but, given these circumstances, some people likely turned to crime because there were no other options. People still need to eat, and they need ways to be able to pay for food. Without factories and ration systems in place, these conditions could have contributed to the prevalence of crime in the city. The communist government was expected to care

for its citizens and provide them opportunities, and, when it failed to do so in a timely manner, those same citizens likely did what they had to in order to survive, even if it was illegal.

Another connection that can be made when comparing the two perspectives is how the lack of a common identity among the newcomers prompted targeted propaganda from the administration. People arriving in Wrocław came from all kinds of ethnic, regional, and economic backgrounds, and the administration was aware of this fact. The only commonalities many of them shared was the ability to speak Polish and the Catholic religion. In smaller communities and neighborhoods, “the most important institution was the church,”⁵² but beyond that, the administration likely saw an opportunity to try to foster a new sense of shared national identity through communism. This can explain why propaganda posters depicted traditional Polish symbols together with hammers and sickles and why newspapers constantly boasted about the achievements of the communist government. The goal was to present communism as both a positive influence on the country and as a unifying force for the new inhabitants of Wrocław. The administration likely hoped that civilians would read the headlines, see the posters, and then come to believe that the communist brand they saw could be the new unifying force to alleviate social unrest.

Exploring the connections between the civilian and administrative perspectives of this transformation show that the two were interrelated, and that they tended to follow logical cause and effect patterns. Influenc-

⁵² Kenney, *Rebuilding*, 163.

es ran both ways; the chaos and hardship experienced by civilians prompted an opportunistic administration to push propaganda, and the inaction of the administration only furthered the suffering of the inhabitants of the city.

The Lasting Impact, Moving Forward, and Conclusions

The lasting impact of the transformation of Breslau into Wrocław affected generations of Poles to come. The remnants of Wrocław's previous German inhabitants constantly surrounded the new inhabitants, and, as decades came to pass, they came to accept them along with the city's history. Olga Tokarczuk captures this experience in her novel *House of Day, House of Night*. She herself is a Polish woman who ended up moving to and living near Wrocław decades after the war. The novel is a collection of short stories and experiences, and the casual way in which German remnants of the city appear to the characters in the novel reflect the experiences of Poles growing up in or near Wrocław after the war. A young Polish child is casually described as being pushed along a path by his sister in "an old German pram,"⁵³ discovering a German automobile while exploring in the forest,⁵⁴ and playing in "houses that were abandoned by the Germans."⁵⁵ Additionally, the main character at one point comes to the realization that it was a German family that originally built the house in which she had been living.⁵⁶ People

growing up in Wrocław after the transition faced similar, repeated occurrences. German lab equipment was still used in schools, abandoned German bunkers became slides for children during the winter, and German greenery was still present throughout the city.⁵⁷ Many of the generations of Poles growing up surrounded by these remnants of German history knew that these buildings and objects were German but never paid them too much mind.⁵⁸

This marks a distinct shift in attitude and a departure from the anti-German bitterness that plagued the initial transformation of Breslau into Wrocław. The postwar generations of Poles who inhabited Wrocław likely felt less of a need for revenge and less of a need to assert themselves than the previous generation because they did not experience the war or any of the atrocities associated with it. It was likely easier for postwar generations to cope due to a lack of firsthand experience. They were able to be indifferent to the material remnants of the city's German past unlike those who experienced the war firsthand. It could be argued, however, that future generations were so indifferent precisely because only material remains were left.

Their indifference could also be explained by the shift of attitudes regarding Wrocław's status as Polish. In the decades following this transition, Poles growing up in or around the city had no reason to believe that the city was not Polish. It was ethnically almost 100% a Polish city with streets, churches, and parks all rebuilt by Poles. History was erased as the city was in-

⁵³ Olga Tokarczuk, *House of Day, House of Night*, (Evanston, IL: Northwestern University Press, 2003), 12.

⁵⁴ *Ibid*, 26.

⁵⁵ *Ibid*, 18.

⁵⁶ *Ibid*, 92.

⁵⁷ Conversation with Professor Justyna Beinek. September 25, 2019. Bailey Hall, University of Kansas.

⁵⁸ *Ibid*.

corporated into Poland, and, because of this, people growing up in this environment had no reason to doubt that the city was Polish and that it would remain that way. During the initial transformation of the city, however, the exact opposite attitude was prevalent. Many in 1945-1948 believed that the city would not remain in Polish hands for long, and, as a result of this, the existence of remnants of the previous German inhabitants caused bitterness and anxiety. Future generations of Poles growing up in Wrocław did not have these same anxieties. They were able to take on an attitude of indifference because the Wrocław they knew was definitively Polish, and the material remnants of German inhabitants were viewed as nothing more than fossils.

The transformation of Breslau into Wrocław from 1945-1948 taught the Polish nation a hard lesson about itself, and it can also be used as an example of the complexities in a transfer of sovereignty. Coming out of the war, the common Western and Polish attitudes towards Poland's wartime was one of pity and sorrow. The invasion of Poland had begun the war, the Holocaust took place on Polish soil, uprisings were crushed, and war crimes were committed against the Poles by both Germany and the Soviet Union. After being put through all of this, Poles decided to flip whatever abuse they could back onto the Germans remaining in their new territory. This certainly challenges the idea that Poles were nothing more than victims of the war. It is clear that they were

guilty of participating in the same behavior that the Germans were when given the chance, and it is also clear that their acute desire for revenge was a primary consideration during this period of the transformation.

In the short span of three years, the ethnic composition of the city was completely transformed. This alone would have been enough to place any major city into a state of confusion, but when this transition was combined with the traumas associated with the aftermath of the Second World War, the imposition of communism in the city, and an inept civil administration, it unraveled and challenged the city. Poles mistreated, looted from, and killed many Germans that chose to remain in the city. They felt few ties to fellow residents, little connection to their new homes, and little to no sense of belonging in the newly Polish city. They also struggled to feel loyalty to the ineffective communist government that presided over them. Both the civil and state administrations failed to provide a basic standard of living for their people for months at a time which was largely a result of bureaucratic entanglements and mismanagement of time, effort, and money. The problems in administration only served to further the suffering of the civilians, and the chaos of the civilian experience caused the already clumsy administration to focus any constructive efforts on mainly the wrong problems. This resulted in a generally miserable experience for those involved.

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Capitalist and Communal Foundations in *The Bingo Palace*

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Abstract:

Published in 1994, Louise Erdrich's novel *The Bingo Palace* traces the journey of Lipsha Morrissey, who is called by his grandmother to return to his childhood home, a fictional Ojibwe reservation, after years of living off-reservation with his father. Upon his return, Lipsha becomes enamored with a young woman, Shawnee Ray Toose, and entangled in conflict with Lyman Lamartine, Lipsha's uncle, half-brother, and the father of Shawnee Ray's child, who plans to build a glamorous "Bingo Palace" on reservation land to bring wealth to the Ojibwe people. As Lipsha struggles to reconcile his multi-layered conflict with Lyman, he faces questions of identity, family, and an ethical dilemma: would the economic benefits of a "Bingo Palace" outweigh the cultural costs? This paper examines the seemingly contradictory issues that arise in the novel regarding the titular Bingo Palace, Native gaming and gambling traditions, and the American capitalist superstructure through an analysis of the complex relationship between Lipsha and Lyman.

Literature Review:

Scholarly and literary criticism of Erdrich's *The Bingo Palace* largely focuses on Lipsha's struggle with Western ideology and how Indigenous definitions of home, family, and identity are complicated and influenced by the forces of colonialism and capitalism in modern America. The novel's account of the rise of Native American gaming following the Indian Gaming Regulatory Act of 1988 has garnered critical acclaim, while literary critics make note of Erdrich's stylistic technique, which combines Ojibwe cultural elements with historical and fictionalized events, and the novel's thematic commentary on Ojibwe identity and familial relationships. This paper specifically examines the relationship between Lipsha and Lyman as representative of the central conflict of the novel, necessarily nested within Erdrich's examination of Native gaming practices, casino gambling, family, and identity.

Louise Erdrich's novel *The Bingo Palace* centers on the tension between two inverse ideologies: American capitalism and traditional Native communalism. This conflict is illustrated by the differing ideals of main characters Lyman Lamartine and Lipsha Morrissey and the proposed development of a reservation gambling institution, the titular "Bingo Palace," on Ojibwe land. Lipsha, who has lived off-reservation for

some time, returns to the reservation to connect with his family and the Ojibwe community. Although Lipsha has been directly influenced by the lifestyle of American capitalism, he decides to honor his spiritual connection to his family by returning home. This internal tension, in which Lipsha feels like an outsider both as a Native person in Western society and an alien to his home, leads Lipsha to a vision quest, where he is

confronted not only by symbols of Western materialism, but also by his ancestor, the history of ancestral lands, and a skunk's mantra-like sentiment: "*This ain't real estate*" (Bingo 200). Meanwhile, Lyman's pursuit of a reservation casino, which begins as a communal project that could bring economic stability and prosperity to the Ojibwe community, becomes corrupted by his individual interests: his penchant for gambling and his drive for financial success and power. As Lyman becomes more invested in his capitalist venture, he devalues his investment in his people and even his own familial connections.

Although Lyman and Lipsha seem to be ideological opposites, they are connected through their family tree, the larger Ojibwe community, their love for Shawnee Ray, and the Bingo Palace. Lipsha comes to realize that the casino cannot merely be a place for economic return, nor just a symbol of money or the culture of Western capitalism but should be an important site for cultural affirmation and the honoring of Ojibwe people and traditions. Although the novel ends before the casino is built, through Lipsha and Lyman's conflict, which is represented both in their differing ideological perspectives and their competing romantic interests in Shawnee Ray, and the influence of both Native traditions and Western capitalism on each of them, Erdrich illustrates the possibility of a Bingo Palace that is founded in an appreciation of culture and community, not simply the aggregation of individual wealth. Thus, the rags-to-riches narrative in *The Bingo Palace* operates on several levels: while the casino could secure economic capital for individuals and the tribe as a whole, that

capital must be shielded from the corrupting forces of Euro-American capitalism by the enrichment of a generational, familial, spiritual connection to the community and ancestry, a constant commitment to that communal foundation, and a cultural appreciation of Ojibwe traditions that does not sink into stereotypical, monolithic portrayals of Native communities.

In *The Bingo Palace*, gambling represents both a modernized Native tradition and the necessary yet corrupting forces of capitalism. Erdrich, herself a member of the Turtle Mountain Band of Ojibwe (Kurup 223), envisions the development of a reservation casino on Ojibwe land along with "the accompanying concerns over the preservation of tribal culture" (224). While the novel recognizes the economic benefit the Bingo Palace could bring, *The Bingo Palace* is most concerned with the cultural costs of choosing "economic security at the expense of cultural distinctiveness" (Kurup 224). The novel's concern with the concept of the reservation casino demands an acknowledgment of the particularities of American racism and classism and the colonial legacies that play into the perception, legal treatment, and social environment surrounding reservation casinos. *The Bingo Palace* explores the cultural effects of contemporary capitalism on Native American communities but refuses to conform to the "typical Western binary" that economic stability is not achievable for Native Americans without damaging cultural identity (Kurup 225). Along the way, *The Bingo Palace* highlights controversy among contemporary Native communities about traditional Indigenous gaming versus corporatized gaming practices.

Some scholars argue that Erdrich's novels reveal that gambling can be compatible with some tribes' values as a "natural by-product of the tribal system" (Kurup 227), whereas other scholars view traditional tribal wagers as substantially different than corporate or capitalist gambling. Kurup quotes literary scholar Paul Pasquaretta's analysis of the discrete qualities of Native American versus Western gaming practices, in which Pasquaretta argues that, "Unlike Euro-American games of chance, which function as secular rituals and foster acquisitiveness, individual competition, and greed, traditional Native American games of chance are sacred rituals that foster personal sacrifice, group competition and generosity" (227). Because Indigenous gaming traditions were developed within a classless society, individuals participated in hopes of securing winnings for the common benefit and to restore balance to a tribe or between conflicting tribes. Gambling losses and gains were not tools for individual wealth aggregation, but were instead comprised of communal resources, so games of luck and chance contributed to the fair distribution of those resources among members of the community (227). Thus, gambling emerges from Erdrich's body of literature as "a strategy for tribes to recapture what has been lost to European traders, settlers, and the United States government. Gambling presents a means by which, in the absence of an equitable legal apparatus, tribes can counter the devastating losses of colonialism" (Kurup 230-231). Indeed, reservation casinos were legally implemented not just to support Indigenous tribes' quest for economic stability, but as a recognition of tribal

sovereignty (Cramer 314). *The Bingo Palace* was published shortly after the introduction of the Indian Gaming Regulatory Act (IGRA) and other regulatory measures into federal law in 1988. These changes federally legalized the reservation casino and determined protocols for tribal sovereignty that could allow tribes to enter into agreements with the government (Cramer 314). Therefore, *The Bingo Palace* acts as a historical response to the rise of the reservation casino and imagines the complications of an institution that represents tribal sovereignty in internal and economic affairs, which in some ways resists capitalism. Yet the reservation casino must play into capitalist ideology and cater to non-natives to be successful, which entrenches the casino in capitalist venture, despite its supposed sovereignty. However, if the casino is run by and for the Ojibwe, is it a net benefit despite the cultural cost?

While the reservation casino in *The Bingo Palace* offers both advantages and risks for the tribe, Erdrich seems particularly concerned with the cultural repercussions of the bingo as "a typically Western capitalist method of wealth accumulation designed to benefit individuals rather than communities" (Kurup 230). Lipsha recognizes that the casino could ensure the tribe stays alive (*Bingo* 221), and if the reservation casino could ensure the tribe's survival, it would therefore preserve their cultural identity. However, the *Bingo Palace* could ultimately destroy the culture it was intended to protect by "enacting this paradigm of capitalism on the reservation," which may result in a general assimilation (Kurup 231). The Lipsha and Lyman rivalry portrays this paradox, representing the "internal struggle to bal-

ance the communal spirit of the tribe with its capitalist aspirations” (231). While the entrepreneurial Lyman pioneers the Bingo Palace project, and Lipsha seems more uneasy about the use of Ojibwe land for such a venture, both characters ruminate on the consequences of cultural sacrifices that may be traded for the promise of economic stability. An analysis of reservation casino culture can illuminate precisely how these institutions can succumb to the pitfalls of capitalism, define and honor their cultural identity, or fall somewhere in between.

As reservation casinos have become more ubiquitous since the passage of IGRA, their potential for fiscal success and cultural demolition is evident. To explore the portrayal of Native public identity, defined as a tribe’s “articulations of collective world views, experiences, and practices” (Lawlor 31), scholar Mary Lawlor traveled to significant cultural sites of four Indigenous communities that interface with largely non-Native audiences. Lawlor reports on two commercial casinos, Foxwoods Resort Casino and Sky City Casino, which are both financially successful tribal enterprises yet offer different portrayals of the tribes that sponsor them. Foxwoods, the largest casino in the United States, is owned and operated by the Mashantucket Pequot tribe and has brought significant economic prosperity to their community (31). In conjunction with the adjacent Mashantucket Pequot Museum and Research Center, Foxwoods functions as a vehicle of “intentional as well as inadvertent public rhetoric” through which the Pequot tribe, like many others, communicates Pequot cultural identity for the non-Native audience visiting the casino (31). But Law-

lor argues that, as a result of the capitalist culture of the reservation casino, Pequot public identity has been “renegotiated” to emphasize the tribe’s connection to a more national, even global, economic and social environment (31). Lawlor cites the decorative elements of Foxwoods that “project a certain ‘Indian’ ambience,” not for authentic representation of the culture, but to evoke a recreational gambling environment (133). However, Lawlor posits that, in conjunction with the Museum and Research Center, Foxwoods does attempt to frame the casino experience within a tradition of authentic Native gaming. Sky City Casino, on the other hand, boasts a forty-foot tall blinking neon sign and a casino environment that “promises no lessons or information about the tribe at all” (133), but instead functions solely to make money for the Acoma Pueblo tribal nation.

The grandeur of Sky City Casino is reminiscent of the allure of the Sands Regency casino in Las Vegas, in which Lyman becomes ensnared when he visits for the Indian Gaming Conference. The Sands Regency is explicitly a material, capitalist venture. By virtue of its sheer size, dizzying opulence, and incorporation of name brands at every corner, from Orange Julius to Obsession (*Bingo* 90), everything is corporate-coded for the purpose of money-making. At first, Lyman is awestruck by this environment and has a series of lucky wins; the chips accumulate and he eventually cashes in, eating and drinking himself to sleep in a gluttonous binge. He wakes in the middle of the night, hungry for more luck, and although he has a winning streak at first, he begins to win less and less often. As his luck starts

to dwindle, a dark feeling washes over him, “a low wave, a green slide of nausea,” after which he “told himself to leave” (93). But he cannot pull himself away, as his rational mind and hunger for more “split” him into two people. After his luck turns, he loses his way, becomes desperate. Lyman continues to play “for the nostalgia of feeling the luck, wanting it to return, as much for the money,” until he loses everything he had won and more (93). In this scene, Erdrich ties the pursuit of economic capital and the dizzying casino environment intimately with the pursuit of luck, demonstrating the appeal and drawbacks of casino culture, the unpredictability of the game, the highs of the wins and the lows of the losses. Lyman’s experience displays this never-ending cycle that breeds destructive behaviors, obsession, and addiction, which in turn perpetuate the influx of capital into the casino. When Lyman is immersed in this environment, he is amazed not only by the draw of gambling but also the sights and sounds of the casino and the corporate gleam. As a result of this environment plus the incessant pull of the game, Lyman cashes in the money entrusted to him for the benefit of the tribe, and sells a ceremonial pipe, with which he previously had a meaningful spiritual, communal, and ancestral connection (87). He betrays his dream, his community, and his own history because he is “completely immersed in the pleasure of playing” (Quennet 205), which seems to suggest that the traditions and cultural symbols of a Native American lifestyle cannot survive in mainstream American culture. The representation of the classic, corporate casino in *The Bingo Palace* emphasizes the possible cost of the

tribal pursuit of economic success, perhaps at the expense of communal values and the “commodification of tribal traditions, symbols, and cultural artifacts” (Kurup 225). Therefore, in the chapter “Lyman’s Luck,” Lyman embodies the hazards of the casino environment, particularly when that enterprise is based in capitalist interests.

Despite Erdrich’s illustration of the cultural risks of a reservation casino, *The Bingo Palace* does not submit to the imposed binary of Western capitalist versus Native communal values. The intertwining journeys of Lipsha and Lyman demonstrate the complex relationship between these two economic ideologies within Ojibwe culture. Lipsha’s approach to the Bingo Palace problem and the notion of the reservation casino is influenced not only by his connection to Western culture but also his spiritual connection to the Ojibwe land and people. At the beginning of the novel, Lipsha is an outcast from the community, as a result of his father’s delinquent behavior and his own departure from the reservation to do manual labor harvesting sugar beets. The community claims that Lipsha is “destined” to become “one of those sad reservation statistics” (*Bingo* 7), but perhaps because of his separation from the community, Lipsha is “destined to become another statistic of Western ideology” (Wilson 47). Upon returning to the reservation, Lipsha has lost some of his innate power; although “his touch was strong” as a descendent of healer and matriarch Fleur Pillager, “he shorted it out” and was “weakened and confused” by going back and forth to the city (*Bingo* 8). The tribe believes that Lipsha doesn’t “fit” any longer (*Bingo* 9), and as a result,

he is caught between his Ojibwe self-identity, with which he is spiritually connected yet socially alienated, and “what Western encroachment influences him to become” (Wilson 47). Lipsha’s relationship to the reservation is further influenced by his personal trauma, particularly his mother’s attempt to drown him as an infant. His dreams of love are “tied up with his trauma” (Harper 26) and his character, marked by his obsessive and impulsive behaviors, reflects a desire for both a “transformed self and community” (23-24). Lipsha’s quest to come to terms with his identity as an individual, a member of his family, and his Ojibwe community are tied to his trauma and, ultimately, his spiritual quest.

Lipsha also has a spiritual, ancestral connection to the game of bingo, which emerges when his mother’s spirit appears to him, telling him to play bingo and providing him with lucky numbers. Bingo and other Native games of chance serve to blur the boundary between “one reality and another,” meaning the spiritual and human realms (Quennet 212), and Lipsha sees the intersection of these during his vision quest. As his journey progresses, Lipsha begins to see visions that he thinks are wrong or inconsistent with the traditional notion of a vision. He sees “clouds raining money into the open mouths of the tribal bank accounts” (*Bingo* 219) and a casino dome as the shape of a great stone turtle (220); this leads him to realize the connection between gambling and Ojibwe traditions (Quennet 205). Ultimately, Lipsha is visited by a skunk, who repeats, “*This ain’t real estate.*” The phrase seems to point to the plans to build a Bingo Palace on tribal land, but, somewhat strangely, “the plans for

land development originate *within* his tribe, in fact within his own family” (Kurup 223). While enterprising tribal leaders like Lyman have adopted the values of capitalism, entrepreneurship, and individualism, they “rarely consider the effect of gaming on tribal sovereignty or the cultural cost involved in this financial venture” (223). On the other hand, after Lipsha experiences these visions, he ruminates on the cycle of gambling and concerns about the Bingo Palace, wondering “if we’re going in the wrong direction, arms flung wide, too eager,” and claiming that “Money gets money, but little else, nothing sensible to look at or touch or feel in yourself down to your bones” (*Bingo* 221). Lipsha’s concerns about the Bingo Palace are rooted in a deep connection to his spiritual concerns, and he ultimately agrees with the skunk that “our reservation is not real estate, luck fades when sold” (221). In this moment, Lipsha depicts the bingo as a site of soulless attraction, yet he recognizes that it is intimately tied to Ojibwe tribal concerns, people, and culture.

Lipsha and Lyman’s contrasting ideological perspectives heighten the tension between capitalist ventures and communal well-being in the novel. Lyman is less attuned to the cultural concerns that Lipsha mulls over, but instead of pursuing the bingo entirely for his own interests, he believes that a casino on ancestral land might be, in fact, a net communal good. In a dream, Lyman’s grandmother, Fleur, tells Lyman that “*Land is the only thing that lasts life to life. Money burns like tinder, flows off like water, and as for the government’s promises, the wind is steadier*” (*Bingo* 148), which seems aligned with Lipsha’s concerns. However,

she further explains that Lyman's pursuit of the casino could secure a communal good and an ancestral legacy: "*Put your winnings and earnings in a land-acquiring account. Take the quick new money. Use it to purchase the fast old ground*" (*Bingo* 149). After this vision from Fleur, Lyman envisions his Bingo Palace venture unfolding into a prosperous life for his family and the land.

Furthermore, Lyman's faith in his own luck reflects Native traditions of trust in luck and chance, which can lead to "power[,] survival" (Quennet 208), and spiritual experience. The tradition of gambling, for many Indigenous cultures, is "rooted in religious rites and festivals," a sacred experience (Quennet 208). Indeed, even the Sky City Casino is an important ceremonial site to which many members of the Acoma Pueblo regularly return (Lawlor 135). Casinos like Sky City and the titular Bingo Palace can generate the economic resources that could help buy back land, as in the case of the Acoma Pueblo (Lawlor 134) and provide tribes with the power to reaffirm their tribal sovereignty (Cramer 321). Thus, for many Indigenous communities, the tradition of Native gambling is rooted in cultural significance, and the capitalist forces that drive the casino enterprise can be used to benefit the community. In *The Bingo Palace*, Lyman's interest in the casino is bound to his concerns for the wellbeing of his family and community and, although he differs from Lipsha in his approach to the Bingo Palace, they actually share a common goal: the preservation of the Ojibwe people, land, and culture.

These two characters' differing yet co-existing ideological perspectives complicate

the distinction between them because both Lyman and Lipsha are deeply influenced by the "social, economic, and cultural forces of Native communalism and American capitalism, neither of which can fully encompass the characters' existences alone" (Wilson 42). Erdrich does not perpetrate the "monolithic dichotomies" often drawn between Native and Euro-American worldviews, but instead "celebrates the interdependence of this dual cultural contact" (Quennet 217). Lipsha and Lyman's rivalry and conflicting concerns are resolved through Lipsha's realization that he can essentially "balance out Lyman's desires by ensuring that the land is not irretrievably corrupted" (Kurup 239) by making certain that cultural preservation is at the heart of the Bingo Palace rather than economic gain. Lipsha understands that money has "no substance" and "is not based on solid ground" (*Bingo* 221), but the Ojibwe history, land, and people are. Considering this, Lipsha concludes that "it's not completely one way or another, traditional against the bingo. You have to stay alive to keep your tradition alive and working" (221). As long as the casino fulfills this aim of cultural preservation, which Lipsha sees as its core purpose, he will not stand in its way. Erdrich's presentation of Lipsha as spiritual and Lyman as material ultimately serves the purpose of blending these perspectives because both are touched by Western capitalism and Ojibwe tradition, proving that each ethos is "necessary for the success of the reservation casino and the future of the tribe" (Kurup 233). Ultimately, both Lipsha and Lyman understand that tribal values can be preserved through the pursuit of reservation gambling, so long as

the casino remains aligned with Ojibwe traditions, culture, history, and the well-being of the community.

The Bingo Palace endeavors to reconcile Native American culture and customs that exist within a capitalist, colonial world. Through the symbiotic relationship between Lipsha and Lyman, the novel proposes a resolution in which the Ojibwe “meld tribal values with practical economic solutions” (Kurup 231). In order to secure their land and their future, Native American communities must pursue reservation gambling in the spirit of tribal values rather than solely for the purpose of economic prosperity. If the casino is founded and maintained on the basis of cultural preservation, rather than

purely for the sake of capital, which can produce negative portrayals of Native gambling traditions, then the economic benefit would not cost cultural identity but would ensure its endurance. Ultimately, the capitalist versus communitarian conflict is a paradox in itself: the community cannot survive without playing into the capitalist system, yet it cannot *truly* survive by betraying its values to conform to the expectations of that system. While the novel ends before the effects of this conflict play out, the struggle to solidify the intention for the reservation casino and the quality of the culture that it affects ultimately results in an affirmation of Ojibwe cultural identity.

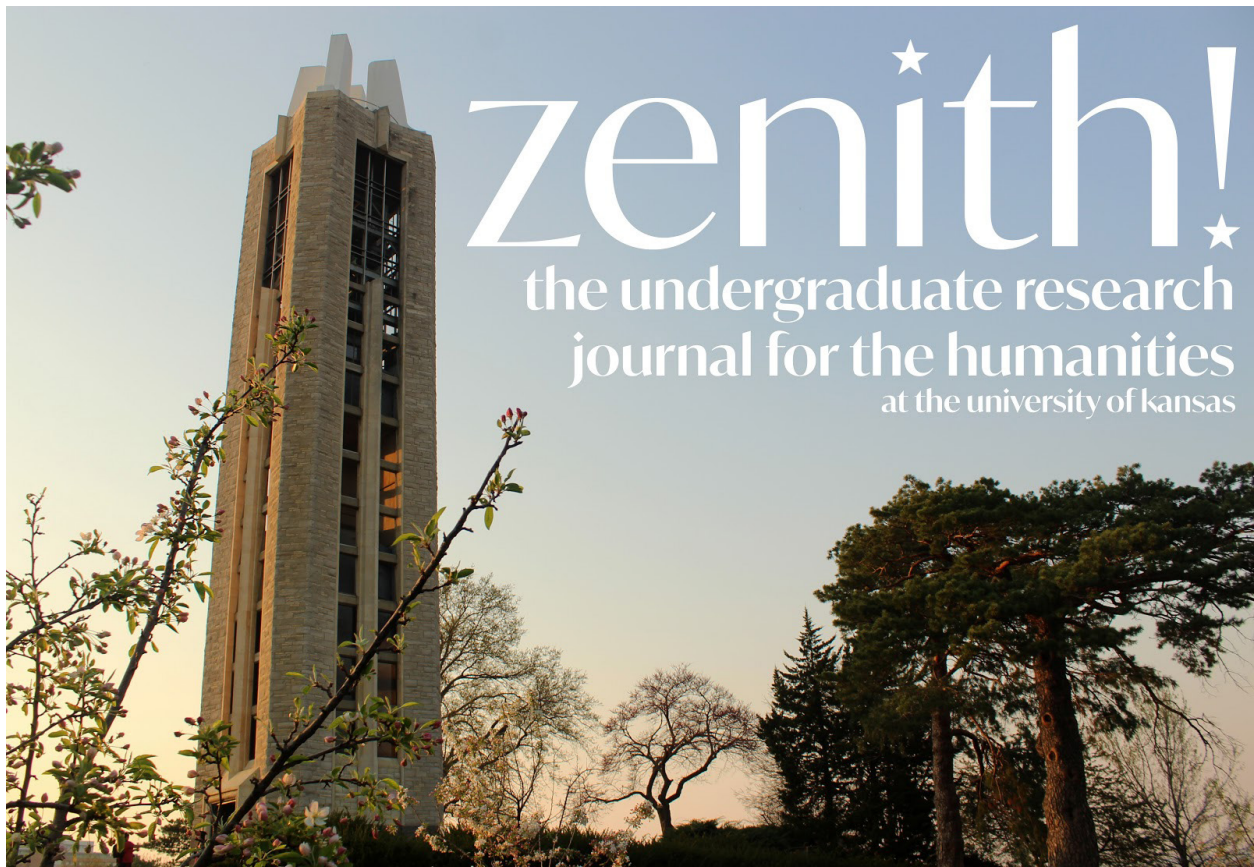
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