“They’re Coming to Get You, Barbara.”

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Julie Cohen, *The Zombie First Amendment*, 56 **Wm. & Mary L. Rev.** __ (forthcoming 2015), available at SSRN.

Julie Cohen’s *The Zombie First Amendment* does not present itself as a piece of cyberlaw scholarship. It’s a treatment of information governance in the post-industrial, information age through the lens of constitutional law, with a broad range of potential applications—from information privacy to campaign finance reform to intellectual property law to network neutrality. In a sense, it’s a meta-cyberlaw paper. It’s not about information technology, but about information *as* technology.

Any piece by Julie Cohen both demands and rewards a more careful reading than a brief review such as this one can offer. Brevity is today’s currency, however. Begin, then, with the following overview of her argument: Contemporary First Amendment jurisprudence, she argues, is a species of the walking dead, legal doctrine whose form gives the appearance of being a plausibly sentient and responsive entity but whose spirit, soul, and intelligence has been displaced by powers that answer to a different, seemingly unstoppable and almost technological logic. Contemporary information practices have eaten the First Amendment’s brain.

The elements of the argument are these. The first part of the paper reviews and extracts a series of governing modern First Amendment principles from recent Supreme Court opinions. From *Citizens United v. Federal Elec. Comm’n,* 558 U.S. 310 (2010) (striking down certain campaign finance regulation), and *Sorrell v. IMS Health, Inc.,* 131 S. Ct. 2653 (2011) (striking down state regulation of marketing use of information about physician prescribing behavior), come the proposition that “information flows that advance the purposes of private property accumulation and consumer surplus extraction may move freely with little fear of encountering regulatory obstacles” (P. 13.) From *Holder v. Humanitarian Law Project,* 561 U.S. 1 (2010) (upholding a federal law forbidding material support to terrorist organizations), *Eldred v. Ashcroft,* 537 U.S. 186 (2003) (upholding Congressional extension of the term of copyright), and *Golan v. Holder,* 132 U.S. 873 (2012) (upholding copyright amendments that effectively restored copyright protection to certain works that had entered the public domain) come evidence that “some types of content and speaker distinctions will be supported by the full force of law—will be treated, in other words, as principled and nonarbitrary.” (P. 13). Cohen combines these two points, as follows: “[T]hese opinions establish both a generally deregulatory stance toward proprietary, profit-motivated uses of information and the predicate for installing circuit breakers within the network to intercept other kinds of uses that threaten proprietary interests.” (P. 13.)

The cyberlaw argument comes next, and it arrives in blunt, forceful terms. That deregulatory stance, framed in terms of speech as a good “thing” to be protected or a bad “thing” to be guarded against, evinces an uncritical, almost technological determinism. This is the zombie First Amendment, which, Cohen argues, treats speech presumptively as property for constitutional purposes. In so doing it treats attempts to regulate the property-like “thing-ness” of speech as presumptively invalid—unless the regulation is itself directed to defining or advancing a property or property-like claim.

This claim extends a common cyberlaw theme, namely, the rhetorical equivalence of information and property, once recorded as “code is law,” now elevated beyond rhetoric to constitutional status. In a

metaphorically technological sense, law is code, bereft of frameworks defined by humanism and justice. Understandings and definitions of what counts as "speech" for constitutional purposes have been overrun by a legal cousin of the market-oriented neoliberalism that characterizes much of the modern information economy. Speech doctrine under the First Amendment is turning from a bulwark against harmful incursions of legal power and privilege in a just society, into their avatar. More than 15 years ago, Cohen cautioned us about the implications of the technologies of the information society for distributive justice, in Lochner *in Cyberspace*.[1] Her baleful predictions regarding the enduring roles of power and privilege have, in *The Zombie First Amendment*, come to fruition. What was emergent then in digital information technologies is being realized in decisions of the Supreme Court.

The second part of this paper turns from that conceptual framing to doctrinal and practical payoffs, which are presented partly in terms of developments in intellectual property law, particularly the regulation of expressive corporate speech via trademark and copyright doctrine, and partly in terms of information law, particularly the regulation of secret information (particularly state secrets) and the regulation of commercial data processors (both longstanding credit reporting companies and also search companies such as Google, social network platforms such as Facebook, and data brokers such as Axciom).

The technological practices and business models of all of these firms depend on extensive access to fine-grained forms of personal information. Legally protecting both the processes that do the work and the products they produce requires, as Cohen points out, a conceptual framework that identifies these "biopolitical" resources as freely "available to be commodified" (P. 20.) Those resources and practices together form an emerging norm of information access and production that consolidates and is consolidated by the "zombification" of the First Amendment that Cohen describes in the first half of the paper, with corresponding implications for power and privilege. The zombie First Amendment has lost the capability that speech doctrine once had to identify speech-related harms and to recognize true speech-related beneficiaries. Law is code, in the popular (and problematic) sense that consumers and citizens *en masse* are subject to and helpless before an unthinking technology.

Is Cohen right? The questions she is asking are surely questions that need to be asked; the patterns that she has identified are surely patterns to document and critique. The paper does not make a real effort to frame a path forward (and does not claim to have tried), aside from pointing to underlying resource access and allocation problems. That's an important start. The zombie metaphor points further. Describing eventual solutions in terms of access and allocation means killing zombies by depriving them of food—that is, more brains. But everyone knows that the only truly effective way to kill a zombie is to destroy its brain. Cutting off the food supply is a half-step.

The brain of the zombie First Amendment appears to be the uncritical "thingification" of speech itself, an emerging pattern, exemplified by the work of Henry Smith,[2] that has an uncredited cameo role here. Cohen's paper calls to mind the work of another Cohen, Felix, who identified almost precisely the same problem, in almost precisely the same terms, 80 years ago.[3] Felix Cohen, it turns out, was ahead of his time, or a George Romero of the legal system, if you will: the creative and intellectual source of a widespread and hugely important 21st century phenomenon. (Romero, of course, made the first true zombie movie, *Night of the Living Dead*, in 1968. This review's title is a classic quotation from that film.) The physicality of the forms and practices of industrial production during the 20th century masked the true nature and implications of his claim. The rise of cyberspace, and the assumption that "information" and "code" are almost purely intangible and virtual, have pressed Felix Cohen's dormant "thingification" idea into urgent and important service in law and in commercial and cultural practice. Can that idea be destroyed? I don't know. But Julie Cohen's paper is an important part of a much-

needed revival of critical examination of the “thingification” pattern, and of how to go about resisting it.

1. Julie E. Cohen, Lochner *in Cyberspace: The New Economic Orthodoxy of “Rights Management*,” 97 Mich. L. Rev 462 (1998).
2. E.g., Henry E. Smith, *Property as the Law of Things*, 125 Harv. L. Rev. 1691 (2012).
3. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935).

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