



GOING THROUGH THE MOTIONS

Kiel Brennan-Marquez

IT WAS SOME YEARS AGO, before the norms of legal scholarship had fully sunk in. I'd submitted a student note to the *Yale Law Journal* – my first paper – and was excited about the prospect of getting published.

It was disappointing, therefore, to receive an email a few weeks later from the Executive Editor, explaining that the Notes Committee was kindly taking a pass. The email went on, however, to assure me that most notes require 2-3 rounds of back-and-forth before getting accepted. So I shouldn't despair prematurely: I was welcome to resubmit the piece later on. To this end, the email also included an edit letter outlining the committee's feedback. (See pages 382-384 below.)

As I finished reading the letter, my brow furrowed in confusion. "Too much zombie and not enough law"? I knew, of course, what the committee had in mind; the note overflowed with "zombie." But that was the point. The conceit of the piece was that zombies, as a trope, can be taken to express our collective anxiety about jurisprudence becoming so mindless and formalistic that it loses touch with humanity; our suspicion that it's possible for law to go – zombically – through the motions of justice, all the while making no contact with deeper normative commitments. To bring this point home, the committee was right: a "difficult balance" *did* need striking. But apparently I'd struck it wrong.

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The Yale Law Journal

Dear Author #9025:

Thank you for submitting your Note, *Night of the Living-Dead Constitution: Of Zombies, Vampires, and Jurisprudence*, for consideration by the Notes Committee of **[REDACTED]** *The Yale Law Journal*. This letter summarizes the Committee's discussion and provides editorial comments for your consideration should you decide to resubmit.

Members of the Committee thought that your Note was a creative approach to a classic issue of constitutional law. Nevertheless, the Committee has a number of concerns regarding your Note that prevented it from being accepted for publication at this time. A summary of the Committee's primary concerns follows.

* * *

I. Original Contribution

The Committee felt that while your analogy to undead creatures was certainly creative, we were unsure what additional insights it provided into existing scholarly and jurisprudential debates. Aside from the intrinsic novelty and interest involved in comparing judges to zombies, and in the zombie/vampire dichotomy, how does this analogy improve our understanding of judicial decisionmaking and constitutional interpretation? We were concerned that you do not sufficiently leverage the comparison to say something about judges, *as judges*, that has not been said before. While some members of the Committee were intrigued by the ideas that you sketch in Part IV in light of the analogical framework that you set up through the rest of the piece, they also would have liked to see those ideas greatly expanded and more deeply considered, rather than sketched.

II. The Law/Undeath Analogy

In terms of the analogy itself, members of the Committee were not fully convinced by the dichotomy you create between different visions of the Constitution. For example, many who oppose the "living Constitution" do not favor one that is "dead," but rather question the validity of the biological metaphor itself. Your piece would be strengthened by a deeper engagement with this question, rather than taking the living/dead dichotomy as a given. In doing so, you might want to explore the distinction between the meaning of the Constitution changing because new language has been added to the text, and the meaning changing because the existing language has taken on new meaning – the question not simply of whether the meaning of the Constitution can ever be altered, but how, and by whom.

Some members of the Committee were also concerned that you do not sufficiently justify the exclusion of legal realism and minimalism from your analysis. In particular, if your thesis is

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that the key jurisprudential desire is for “legal undeath,” and that such undeath defines “the social status of law,” it is problematic to say that those judges and scholars who do disagree with this definition are irrelevant to your analysis, at least without a more extended discussion than that provided in note 13.

III. Application of the Analogy

Members of the Committee were also concerned by the structure of your piece, and the way that it applies your analogy. You begin by distinguishing between two polar versions of constitutional interpretation, and develop the zombie analogy as a way of illuminating anxieties about one such pole. It is thus somewhat odd that you do not go on to explore fears of the other interpretive ideal type via a discussion of vampires (as your Statement of Originality seems to suggest you will), but deal instead with the quite-different problem of the sovereign. As a result, the piece sometimes feels like two papers yoked a bit awkwardly together.

In terms of the analysis of the sovereign itself, some members of the Committee were concerned that you did not adequately justify your choice to adopt the view of the sovereign put forward by Schmitt and Agamben. Why do you inherit your conception of sovereign authority from those theorists, and what makes their conception superior to other extant perspectives on the sovereign? Given how important this view of the sovereign is throughout your paper, it would strengthen your analysis to explain and it, rather than taking it as a given.

Additionally, you state on p.10 that you are seeking to describe our collective anxieties about the abuse of judicial power, yet these anxieties are not limited solely to zombic textual formalism. For that matter, doesn't the stereotype of the rigid, unthinking/unfeeling government bureaucrat suggest that anxieties about the power of the sovereign are not limited to vampirism-type problems? Is it possible that the zombie/vampire dichotomy can be seen as reflecting a broader anxiety about power, and how it may be wielded yet controlled as a general matter?

IV. Engagement with Existing Scholarship

Members of the Committee were concerned that your discussion of the significance of undead creatures does not sufficiently engage with the existing literature. What do film studies theorists beyond Steven Shaviro have to say about zombies and vampires, and how does that analysis affect your thinking? To what extent are your assessments of the various movies cited throughout the piece consistent with current scholarship? In those places where you differ, why do you do so and what difference does it make to your conclusions and to the broader thesis of your Note?

V. Style

Some members of the Committee found the style of the piece to be at times distracting. They felt that the use of imagery and rhetorical flourishes, while fun to read, sometimes interfered with or even replaced your substantive arguments, especially in Part I, and that it would have been easier to follow those arguments had the roadmap on pp. 8-9 appeared earlier. Also, while your piece uses a description/analysis of the behavior of zombies to engage with

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legal concerns, some members of the Committee felt that in places there was too much zombie and not enough law. This is obviously a difficult balance to strike properly, but it would be helpful to make sure that, as much as possible, your use of the undead creature metaphor is illuminating, rather than distracting from, your legal analysis.

* * *

The Committee enjoyed reviewing your Note, and we hope that these comments will be helpful to you in considering revision and resubmission. Please retain this letter, because you will need to include it if you resubmit. If you have any questions about the comments contained in this letter, we encourage you to contact our Managing Editor [REDACTED]

Each voting Committee member either votes to accept a Note as submitted, or states how s/he believes s/he would likely vote if the author were to make the changes suggested in this letter. A member voting not to accept indicates that s/he (a) is likely to vote yes later if the changes are made; (b) thinks that it is *possible* that s/he will vote yes later, but that the changes are too extensive to predict the outcome; (c) is *unlikely* to vote yes later because of the magnitude of the suggested changes; or (d) cannot ever foresee voting yes later (possible reasons include, but are not limited to, originality, scope, or magnitude of the required changes).

In the case of your Note, **one** member indicated that they thought it is possible that they would vote yes later, but that the changes required are too extensive to predict the outcome, **five** members indicated that they were unlikely to vote yes later because of the magnitude of the suggested changes, and **two** members indicated that they cannot ever foresee voting yes later.

Again, many thanks from all of us for your submission.

Sincerely,

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
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[REDACTED]

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Making matters worse, I'd also neglected to engage "sufficiently" with "the existing literature [on] the significance of undead creatures," not to mention with the relationship between "legal undeath" and judicial minimalism.¹ Taking little comfort in the committee's assurance that my note was "creative," much less in its boilerplate "enjoy[ment]" of the review process, the core diagnosis was simply withering. I'd failed to "leverage[] the comparison [between zombies and judges] to say something about judges, *as judges*." The italics reverberated disapproval. The only thing missing was the word "qua."



As I look back on the letter today, the striking thing isn't so much its content as its form. Was the *Yale Law Journal* ever going to consider – I mean, *really* consider – publishing a first-year student note entitled "Night of the Living-Dead Constitution: Of Zombies, Vampires, and Jurisprudence," dedicated to expounding on "zombic textual formalism"? No, of course not. At the end of the letter, per convention, the committee relayed its vote as to the likelihood of acceptance down the line. Although no committee member thought it "likely" that he or she would vote for a revised version, one member thought it "possible." Five members thought it "unlikely." And two confessed that they could "[n]ever foresee voting yes." Bless these last two! For they, alone, refused to indulge the charade.

None of this is to say that the *Journal* erred on the merits. On the contrary, I think the committee was right to reject my submission. The risk of fatuousness was too high. The editors simply had no way of telling that I was engaged in a genuine scholarly pursuit, not perpetrating an act of intellectual vandalism.² Perhaps if the equivalent

¹ Though isn't it obvious?

² To be clear, I *was* engaged in a genuine scholarly pursuit. A large portion of my undergraduate senior thesis – completed 9 months before I began writing "Night of the Living Dead Constitution" – was dedicated to a cultural analysis of zombie films. And before I repurposed the piece as a student note, it was a course paper, which my professor quite liked. On its strength, he hired me as a research assistant and became my intellectual mentor. And zombies even found their way into some of his work. See PAUL W. KAHN, *FINDING OURSELVES AT THE MOVIES* 172-76 (2013). Of course, the Notes Committee, in a tragic bout of information asymmetry, had no way of knowing these things.

piece were submitted by a full professor with unassailable credentials and a reputation for serious work at the intersection of law and popular culture; perhaps then, and only then – and only if the editorial board of the *Yale Law Journal* was feeling particularly affable – might something like “Night of the Living-Dead Constitution” see the light of day. In the form the committee encountered it, however, I fear the piece was doomed from the start.

But then the question is: why bother with the letter? Why pretend that “revision and resubmission” was something the editors sought to encourage, much less an enterprise that could conceivably bear fruit? The more honest course, surely, would have been to reject the note out of hand, to send me a gentle but forthright email, explaining that analogizing judges to zombies, while a creative spin on constitutional theory, isn’t the sort of thing that law journals realistically look to publish. In fact, as a first-year student – testing the waters of legal scholarship, and plainly mistaken about its currents – that might have been a helpful thing to know.

Yet I suspect that the chances of my receiving a candid, not-a-snowball’s-chance-in-hell letter from the committee were basically the same as that of the note getting accepted in the first place. There are two reasons this might be. The first possibility is that the committee saw itself as a kind of confederate – a partner in (what it took to be) good-humored frivolity, trucking a sense of humor drier than old-world Chardonnay. If this was the committee’s impression, it would have been difficult, indeed, to draft an earnest letter explaining how wildly I’d misconstrued the enterprise. That would have spoilt the fun.

The second possibility – the more likely one I suspect, but who’s really to say – is that the committee members, like so many generations of lawyers and law students before them, succumbed to the allure of rules. They were anxious about drawing exceptions; so they did not. In accordance with *Journal* policy,³ they composed an

³ See Memorandum from Yale Law Journal Volume 124 Notes Committee to All J.D. Candidates at Yale Law Sch. 3 (February 14th, 2014) (“Students whose work is not accepted will receive an email message indicating the decision. This will be followed by a Revise & Resubmit letter (R&R) providing feedback and evaluation.”),

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edit letter predicated on the wishful fiction that if I'd only shorn up the literature review, and traced the contours of "legal undeath" a little more exactly – and whatever else have you – my note might have leapt, suddenly, into publishable form.

How to describe the results? The letter certainly goes through the relevant motions. It takes care to employ customary section headings ("Original Contribution"; "Engagement with Existing Scholarship"; etc.), and to rehearse familiar jargon. But the motions, having lost touch with their underlying purpose, strike an oddly lifeless chord. The letter's cadence is not unlike that of a zombie's footsteps: fastidious and unceasing, but also somehow ruined – the empty form of motion that signifies little more than a bare impetus to keep going.

For many of us, this motion is what we've come to expect of law, in all of its sublime formality. For others of us, it's the stuff, precisely, of nightmares.



available at www.yalelawjournal.org/images/documents/124_notes_submissions_guidelines-1.pdf. A friend of mine – donning his zombic-formalist cap – pointed out that I'm citing to a 2014 memorandum as evidence of a policy that was in effect in 2009. Is this an issue? I'm not sure. I *am* sure that the policy was in effect in 2009. But the equivalent memorandum from that year has vanished from the digital ether.