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Prosecuting the Undead: Federal Criminal Law in a World of Zombies

Michael L. Smith



ABSTRACT

Adam Chodorow's recent essay, *Death and Taxes and Zombies*, has alerted the legal world to the dangers posed by the looming zombie apocalypse. Chodorow successfully demonstrates that existing tax laws are woefully inadequate in a world where the undead outnumber the taxpaying living. In this Essay, I argue that while tax law may be ill suited to address the zombie apocalypse, federal criminal law offers an alternative approach to solving the problems that Chodorow identifies. In fact, the only plausible explanation for the existence of seemingly pointless features of federal criminal law is that these features are precautions for this imminent disaster. The extensive scope of the federal criminal law, its frequent use of low or nonexistent *mens rea* requirements, and federal laws concerning mandatory victim restitution create a legal structure that can effectively transfer resources from the undead to the living. Until the zombies arrive, these features will remain largely ineffective.

AUTHOR

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TABLE OF CONTENTS

INTRODUCTION.....46
I. PROBLEMS CAUSED BY THE ZOMBIE APOCALYPSE48
II. WIDE SCOPE AND STRICT LIABILITY: FEDERAL CRIMINAL LAW AS THE
ULTIMATE WEAPON IN THE ZOMBIE APOCALYPSE50
III. MANDATORY RESTITUTION: GIVING VICTIMS THE POWER TO FIGHT BACK.....54
CONCLUSION56



INTRODUCTION

Oliver Wendell Holmes famously decried laws and legal rules based on ancient needs that are no longer present, observing that “ingenious minds” use policy arguments to justify a rule’s existence so that “[t]he old form receives a new content.”¹ While the practice of maintaining old laws with defunct purposes indicates ineptitude, one must admit that it requires an even greater level of genius to create laws that address presently nonexistent, future needs. I contend that the federal criminal law of the United States is an instance of such genius, at times even at the expense of effectively addressing current needs. The U.S. government has presciently enacted three features in particular to protect the nation against the financial disaster that would otherwise befall the United States in the event of a zombie apocalypse: (1) the rapid expansion of federal law’s crimes and scope, (2) the strict liability character of many of those crimes, and (3) the federal government’s broad laws requiring restitution to victims.²

Legal academia, long mired in the realm of the arcane and overtheorized, has finally turned its gaze to one of the “world’s most harrowing problems”: the “impending zombie apocalypse.”³ Adam Chodorow, in his canonical essay, *Death and Taxes and Zombies*, takes upon himself the burden of warning the legal community about the difficulties that United States tax laws will face when the dead walk the earth.⁴ While Chodorow’s attention to the important issue of the zombie apocalypse is admirable and important, his analysis overlooks the existing safeguards that are built into the United States Code.

Scores of legal commentators have bemoaned seemingly perverse outcomes under modern federal criminal law.⁵ These commentators overlook a single rational justification for such laws: They were enacted to ameliorate the impact of the coming zombie apocalypse. The contemporary federal criminal code includes

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1. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (1948).
 2. A notable and uniquely American accomplishment, for as Blackstone laments, “it hath happened, that the criminal law is in every country of Europe more rude and imperfect than the civil.” See 4 WILLIAM BLACKSTONE, *COMMENTARIES* *3. But see A.P. HERBERT, *Rex v. Haddock: Is It a Free Country?*, in *UNCOMMON LAW* 24, 28 (1988) (detailing the bright-line rule that “[p]rima facie all actions are illegal”).
 3. Christopher Matthews, *Tax Implications of the Zombie Apocalypse*, *TIME*, July 17, 2012, <http://business.time.com/2012/07/17/tax-implications-of-the-zombie-apocalypse>.
 4. See Adam Chodorow, *Death and Taxes and Zombies*, 98 *IOWA L. REV.* 1207, 1231 (2013).
 5. See e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 *AM. U. L. REV.* 703, 708–11 (2005) (detailing the increased breadth of federal criminal law and the rise in criminal punishments this development has caused).

thousands of crimes and covers an unprecedented scope of activity.⁶ These crimes frequently are strict liability offenses, meaning that a defendant need not intend to commit the crime or even act in a reckless or negligent manner to be found guilty.⁷ Additionally, the law concerning restitution for victims of federal crimes calls for mandatory restitution when victims of crimes of violence and offenses against property suffer identifiable monetary losses.⁸ Courts requiring restitution must order it without consideration of the defendant's economic circumstances.⁹ Each of these legal structures will take on new relevance when zombie apocalypse occurs.

In this Essay, I will limit my discussion of the zombie apocalypse to a situation in which people become infected by a disease that causes them to become zombies.¹⁰ For the sake of convenience, I will refer to this disease as the "zombie germ," and I will assume for the sake of my analysis that this zombie germ will have certain properties. It will be spread by contact between the living and undead. Bites, scratches, and transfer of fluids will be sufficient to infect the living. The zombie germ will eventually kill the victim—unless, that is, the victim is killed before the disease's full progression. For example, the victim may be mauled to death by an attacking group of undead. Upon death, the victim will become a zombie and walk the earth searching for living victims to attack and devour.

Part I of this Essay will briefly discuss the implications of a zombie apocalypse and how tax and tort laws are unable to address this disaster. Part II notes that federal criminal law's broad scope and liberal use of strict liability allow legal action against unconscious zombies. The creation of new crimes prohibiting the spread of the zombie germ or attempts to spread this disease, coupled with severe fines for these crimes, will address the simultaneous problems of the government's loss of revenue from a decimated tax base and the government's

6. See, e.g., HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2011); Brian W. Walsh, *Doing Violence to the Law: The Over-federalization of Crime*, 20 FED. SENT'G REP. 295 (2008).

7. Walsh, *supra* note 6, at 295–96.

8. See Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A (2006).

9. 18 U.S.C. § 3664(f)(1)(A) (2006).

10. While Chodorow's focus on multiple classes of undead is admirable, addressing all of these scenarios is beyond the scope of this article. I choose to focus on diseased zombies due to the extent of the literature on the subject. See, e.g., MAX BROOKS, *THE ZOMBIE SURVIVAL GUIDE: COMPLETE PROTECTION FROM THE LIVING DEAD* 2–5 (2003); Philip Munz et al., *When Zombies Attack!: Mathematical Modelling of an Outbreak of Zombie Infection*, in *INFECTIOUS DISEASE MODELLING RESEARCH PROGRESS* 133, 134–35 (J.M. Tchuente & C. Chiyaka eds., 2009), available at <http://mysite.science.uottawa.ca/rsmith43/zombies.pdf>.

need for revenue to combat the zombies. Part III discusses how criminal restitution can supplement federal crimes and tax laws by transferring the resources of the undead to the living, providing those still alive with necessary funds to purchase weaponry and supplies. I conclude that while Chodorow raises a valid critique of tax laws, extant criminal law—for all its contemporary shortcomings—may effectively serve the functions of the tax code when the undead begin to attack the living.

I. PROBLEMS CAUSED BY THE ZOMBIE APOCALYPSE

Chodorow accurately notes that a zombie apocalypse “will create an urgent need for significant government revenues to protect the living, while at the same time rendering a large portion of the taxpaying public dead or undead.”¹¹ The Center for Disease Control (CDC) claims that it is ready to respond to a zombie threat and prevent widespread disaster, but the fact that the CDC’s point person on this issue admits that his favorite zombie movie is *Resident Evil* betrays the lack of expertise and attention the government has devoted to this concern.¹²

When the CDC’s containment efforts fail, the zombie apocalypse will create a dangerous world where the undead hunt, eat, and infect the living, who in turn join the ranks of the zombie horde.¹³ While the government may try to aid its citizenry, fighting zombies is expensive. Tax increases could provide the needed income, but contemporary politics suggest that partisan bickering will preclude both tax increases and deficit spending.¹⁴ If this political trend continues, the government will be woefully underfunded to address the zombie threat.

The government could instead try to transfer money from the undead to the living using the existing tax laws, but this is much easier said than done. Chodorow argues that the zombie apocalypse is a tax disaster largely due to the

11. Chodorow, *supra* note 4, at 1231.

12. See Ali S. Khan, *Preparedness 101: Zombie Apocalypse*, CENTERS FOR DISEASE CONTROL & PREVENTION (May 16, 2011, 11:48 AM), <http://blogs.cdc.gov/publichealthmatters/2011/05/preparedness-101-zombie-apocalypse>; see also Roger Ebert, *Resident Evil*, ROGER EBERT.COM (Mar. 15, 2002), <http://www.rogerebert.com/reviews/resident-evil-2002>.

13. The legal community is already familiar with this type of environment. See, e.g., *On-Campus Interview Programs*, UCLA SCH. OF L. CAREER SERVICES, <http://www.law.ucla.edu/career-services/employers/on-campus-interview-programs/Pages/default.aspx>. The federal government is not.

14. See Nicholas Riccardi, *US Economy Hamstrung by Washington’s Brinksmanship*, BIG STORY (Mar. 3, 2013, 4:38 PM), <http://bigstory.ap.org/article/us-economy-hamstrung-washingtons-brinksmanship>.

confusion over whether zombies are “dead” or “undead.” For example, the administration of estate taxes will be crippled because zombies will probably be deemed alive rather than dead for tax purposes.¹⁵ If zombies are deemed alive, then becoming a zombie will not subject one to the estate tax, which leads to decreased government revenue.¹⁶ In the unlikely event that the courts determine that the undead are dead for tax purposes, then there is little need for the criminal law, since the government can maintain its revenues through the estate tax.

Unfortunately, like taxes, many other areas of law will fail to transfer funds from zombies to those still living. Tort law is another example. Tort law’s incapacity to transfer funds is illustrated by a scenario of distributed denial of service attacks where numerous computers belonging to innocent users are infected by a malicious worm or virus and made to attack networks or websites by sending repeated data requests.¹⁷ In such a situation, the infected computers are analogous to zombies because they act as a horde and their actions are not under the direct control of their users.¹⁸ Even though these zombie computers attack and disable websites, their owners are not likely to be found liable because courts, applying negligence law, will probably find that computer owners do not foresee their failure to secure their computers as causing the destruction of other websites.¹⁹ Additionally, many courts would likely view the takeover by the malicious controller as a superseding cause that negates the zombie-computer owner’s liability.²⁰

A similar problem arises when suing the undead. Tort law’s negligence standard seems to require some mental capacity on the part of those sued.²¹

15. See Chodorow, *supra* note 4, at 1213–16. Chodorow also notes that the government will have trouble recovering income taxes from zombies due to poorly prepared tax returns and the difficulties of collecting taxes directly. *Id.* at 1219–21.

16. *Id.* Chodorow himself exacerbates these problems by advising those still living about the tax advantages of becoming a zombie, making it more likely that people will take advantage of this tax loophole. See John Schwartz, *Estate Planning for Savvy Zombies*, N.Y. TIMES, July 7, 2012, <http://www.nytimes.com/2012/07/08/business/mutfund/estate-planning-for-the-savvy-zombie-essay.html>.

17. See Lilian Edwards, *Dawn of the Death of Distributed Denial of Service: How to Kill Zombies*, 24 CARDOZO ARTS & ENT. L.J. 23, 23–24 (2006).

18. See Ronald L. Chichester, *Slaying Zombies in the Courtroom: Texas Enacts the First Law Designed Specifically to Combat Botnets*, 44 TEX. J. BUS. L. 1, 2–4 (2011).

19. Edwards, *supra* note 17, at 48–49.

20. See T. Luis de Guzman, Comment, *Unleashing a Cure for the Botnet Zombie Plague: Cybertorts, Counterstrikes, and Privileges*, 59 CATH. U. L. REV. 527, 528 (2010).

21. Certain strict liability torts may apply, such as torts pertaining to unusually dangerous animals. See RESTATEMENT (SECOND) OF TORTS § 509 (1977). As I will argue in this Essay, however, federal criminal law ensures a unique transfer of revenue to the government

Courts will probably find that zombies lack the sufficient mental capacity to hold or process duties of care because their mental functions appear to be limited to basic motor control and a strong desire for human flesh.²² Courts will also probably find zombies not liable for becoming zombies when they were still alive. Similar to the case of computers controlled by a malicious hacker, courts will likely view the initial zombie attack as a superseding cause of the immediate offender's zombification. This is especially likely because the undead tend to be relentless and vicious when attacking their victims. Even if a diligent survivor defends against an attack, it is still very easy to be infected by airborne droplets of infected fluids. Again, while this legal regime could be modified to address these difficulties in application to zombies, tort reform is not a politically feasible solution.²³

An examination of these legal failures is informative because it illustrates the desired legal outcomes in a world overrun by the undead. If our society is to survive, our government must be able to fund its zombie countermeasures. To do that without tax revenue, our laws must be able to extract money from zombies—without requiring that zombies act with any level of intent before carrying out harmful actions. Any politically viable strategy must be able to take advantage of existing laws or extract government revenue from the undead in a manner that cannot be portrayed as increasing taxes, or in a way that is so politically appealing that a tax effect is hidden by an alternate narrative. I argue in the remainder of this Essay that the federal criminal law accomplishes this goal.

II. WIDE SCOPE AND STRICT LIABILITY: FEDERAL CRIMINAL LAWS AS THE ULTIMATE WEAPON IN THE ZOMBIE APOCALYPSE

The federal government has wisely enacted criminal laws that have an extensive reach and that lack a *mens rea*, or “guilty mind” requirement.²⁴ Federal crimes are now so numerous that they cover many activities that might not

and restitution for victims, making even this aspect of tort law a redundant and incomplete solution.

22. See BROOKS, *supra* note 10, at 14–17 (describing zombies' lack of mental functions).

23. Politicians have long decried laws that increase the rate of litigation. See THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 188 (2002) (describing the partisan divide over the issue of civil litigation in the 104th Congress). Zombie torts would certainly generate more lawsuits during a zombie apocalypse.

24. See WAYNE R. LAFAVE, CRIMINAL LAW § 5.5 (4th ed. 2003); see also Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, WALL ST. J., Sept. 27, 2011, <http://online.wsj.com/article/SB10001424053111904060604576570801651620000.html>.

intrinsically require criminalization. The Marine Mammal Protection Act offers three examples: the sale of otters by native Alaskans to nonnatives is criminalized,²⁵ whistling at whales may be punished as harassment of marine mammals,²⁶ and the manipulation of blubber that is already being eaten by whales may constitute illegal feeding of the whales.²⁷ Thousands of other obscure federal crimes exist. Many of these crimes have weak or nonexistent *mens rea* requirements.²⁸ This means that those who commit these peculiar crimes may be found guilty without a showing that they acted intentionally, recklessly, or negligently.

This complex and farreaching criminal code that punishes without criminal intent has critics.²⁹ Commentators have criticized these laws, arguing that they create an unprecedented expansion of federal power and lead to the punishment of numerous activities that most people think are lawful.³⁰ Laurie Levenson has criticized strict liability crimes that do not require the establishment of recklessness or negligence by the defendant, questioning whether they are crimes at all and enlisting the scholarly support of Henry Hart, Jr. to denounce strict liability crimes as “having no moral or rational justification.”³¹

I, however, find a different Hart’s argument persuasive. H.L.A. Hart notes that strict liability inspires a great deal of criticism, but admits that strict liability can be useful, or even critical.³² Commentators’ attacks on the federal law’s scope and strict liability are shortsighted because this criticism fails to account for the true purpose of federal criminal law: Federal criminal law’s scope and low *mens rea* requirements exist as powerful safeguards against the harms of a zombie apocalypse. Courts should ignore the incomplete critiques of strict liability and

25. Fields & Emshwiller, *supra* note 24.

26. See George F. Will, *Blowing the Whistle on the Federal Leviathan*, WASH. POST, July 27, 2012, http://articles.washingtonpost.com/2012-07-27/opinions/35486624_1_killer-whales-gray-whale-humpback.

27. *Id.*

28. See, e.g., Walsh, *supra* note 6, at 295–96.

29. Nor is their criticism a solely modern phenomenon. See, e.g., THOMAS MORE, *THE UTOPIA OF SIR THOMAS MORE* 134–35 (Ralph Robinson trans., Walter J. Black, Inc. 1947) (1516) (noting that the ideal society has few laws).

30. See SILVERGLATE, *supra* note 6, at 24–27.

31. Laurie L. Levenson, *Strict Liability Offenses: Are They Real Crimes?*, 25 CRIM. JUST. 13, 13 (2010) (citing Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958)).

32. See H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 20–21 (1968); see also JOHN KLEINIG, PUNISHMENT AND DESERT 107–08 (1973) (illustrating that despite its apparent deviation from practices of moral responsibility, strict liability appears in various areas of the law).

avoid the temptation to read intention requirements into federal criminal laws for fear of gutting this important legal protection.³³

Courts should also avoid any inquiry into the *actus reus*, or voluntary act, aspect of criminal actions. Courts can maneuver around the voluntariness requirement by focusing on philosophical justifications of *actus reus* that argue that the element is required to prevent the punishment of mere thoughts.³⁴ A singular focus on this justification may cloud out any realization of the troublesome voluntariness aspect of the requirement.³⁵ Failing this, courts should endeavor to make voluntariness an affirmative defense rather than an element of a crime.³⁶ Zombies, whose vocalizations tend to be limited to moans and wheezes, will be unlikely to raise and successfully argue this issue in their defense.³⁷ Ultimately, the law must treat the zombie's conduct as "autonomous and willed, not because it is, but because it is desirable to proceed as if it were."³⁸

Zombies will probably violate many federal laws and, thanks to our forward-thinking legal system, zombies can be fined and punished under these laws despite their lack of intent. The extensive scope of the federal criminal law guarantees that zombies can be found guilty at some point for something. Fines that result from these crimes can increase government revenue. This potential revenue stream is already on the books and, unlike new taxes, can be portrayed as "tough on crime" rather than "tough on taxpayers."³⁹

While the existing federal law effectively accounts for zombies' lack of intent, the law can be perfected to deal specifically with the zombie menace. In

33. For an example of this dangerous approach, see *Morissette v. United States*, 342 U.S. 246, 250–51, 263 (1952). To ensure the survival of humanity, courts should also refrain from a critical approach to whether zombies act voluntarily. For examples of this analysis, see *People v. Newton*, 87 Cal. Rptr. 394, 404–06 (Ct. App. 1970) and H.L.A. HART, *Acts of Will and Responsibility*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW, *supra* note 32, at 90, 94.

34. See FREEDOM AND RESPONSIBILITY: READINGS IN PHILOSOPHY AND LAW 106 (Herbert Morris ed., 1961). See generally Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257 (1987).

35. But see Ian Farrell & Justin Marceau, *Taking Voluntariness Seriously*, 55 B.C. L. REV. (forthcoming 2013) (manuscript at 6–8), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2255141 (arguing that avoidance of punishment for thought crimes only justifies requiring an act rather than a voluntary act).

36. See, e.g., *United States v. Webb*, 747 F.2d 278 (5th Cir. 1984).

37. A likely outcome even in non *pro se* cases, since attorneys seeking to defend zombies will probably become zombies themselves due to their clients' infectious nature.

38. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 74–75 (1968) (making this point in the context of non-zombie individuals).

39. This is especially likely since zombies will probably not be paying taxes. See generally Chodorow, *supra* note 4.

the event of the outbreak of a zombie germ, Congress should pass legislation that criminalizes the spread or attempted spread of the zombie germ. This legislation has precedent: For example, federal law criminalizes the transfer of the smallpox virus.⁴⁰ Congress must take care in criminalizing the spread or attempted spread of the zombie germ: This crime should *not* be punishable by imprisonment.⁴¹

A substantial fine would be the ideal punishment for zombie offenders. Zombie fines, deducted from the accounts or repossessed assets of their former living selves, would transmit money directly from the offending zombies to the government. Congress would have extensive leeway in drafting laws that levy high fines against zombies because these fines will not violate the Eighth Amendment unless they are “grossly disproportional” to the criminal conduct that they punish.⁴² This standard requires a comparison of the zombie’s conduct to the amount of the fine the zombie incurs for its conduct. Courts will probably allow large fines against zombies because zombie attacks that cause even a small bite or scratch on a victim will result in the victim’s eventual death and reanimation as one of the undead. This substantial harm justifies significant fines for zombies’ criminal conduct.

Finally, the government should change its current approach to federal crimes in light of these laws’ true purpose. While this does not mean that the government should not stop prosecuting and punishing nonzombies for violations of strict liability federal crimes, the government should at least divert the revenue obtained from any resulting fines to a fund reserved for purchasing weaponry and pursuing future criminal cases against the undead. This diversion of funds realizes the true purpose of many federal criminal laws. This diversion may also reduce the criticism that these laws currently face since people will be aware that prosecutions before the zombie apocalypse will all contribute to a fund that will mitigate the eventual disaster.

One might object to the solution of criminally prosecuting zombies by arguing that zombies are dead and that the dead cannot be criminally prosecuted.

40. 18 U.S.C. § 175c (2006).

41. Imprisonment would lead to the likely spread of the zombie germ to inmate populations, and the large number of zombies that would be arrested would exacerbate prison overcrowding, all of which would lead to violations of the Eighth Amendment and extensive litigation. *See* *Brown v. Plata*, 131 S. Ct. 1910, 1928, 1933–34, 1937 (2011) (noting conditions of overcrowding in California prison lead to the spread of disease and violence and that this environment constitutes an Eighth Amendment violation). Not only would the imprisonment of zombies result in the (un)death of thousands of prisoners, the costs the government would incur in litigating the ensuing Eighth Amendment lawsuits would further divert government resources from combating the armies of undead.

42. *See* *United States v. Bajakajian*, 524 U.S. 321, 336–37 (1998).

This objection is mistaken because it relies on the common confusion between “dead” and “undead.” In the unlikely event that the courts determine that the undead are dead for tax purposes, criminal law may become less important, because the government will see an influx of revenue through the estate taxes of its slaughtered citizens. Additionally, it should be noted that laws enacted and prosecutions undertaken in the midst of the zombie apocalypse would occur under extraordinary circumstances. In this grim scenario, courts may be willing to prosecute those who are dead given the government’s pressing financial need. Fortunately, the prosecution of the dead is not without precedent; at the time of this writing, Russia is in the preliminary stages of prosecuting a man who is unquestionably dead.⁴³ In the event of a zombie apocalypse, courts may be willing to follow Russia’s example in order to do their part in confronting the zombie menace.

III. MANDATORY RESTITUTION: GIVING VICTIMS THE POWER TO FIGHT BACK

Criminal law contains a mechanism to fund private zombie defense actions as well. Another weapon in federal criminal law’s zombie-revenue arsenal is the Mandatory Victims Restitution Act (MVRA) of 1996.⁴⁴ This law mandates restitution in “almost all cases where the victim suffered an identifiable monetary loss from an enumerated crime.”⁴⁵ Enumerated crimes include crimes of violence and crimes against property.⁴⁶ The purpose of criminal restitution is to make the victims of crime whole and compensate them for any losses they experience as a result of defendants’ criminal actions.⁴⁷

Criminal restitution, especially as defined and applied under the MVRA, is an effective tool for transferring wealth from the undead to the living. Victims of attempted zombie attacks⁴⁸ will probably be able to successfully argue that they

43. See *Sergei Magnitsky: Dead Russian Lawyer Trial to Proceed*, BBC NEWS (Mar. 4, 2013, 1:22 PM), <http://www.bbc.co.uk/news/world-europe-21663062>.

44. 18 U.S.C. § 3663A (2006).

45. Woody R. Clermont, *It’s Never Too Late to Make Amends: Two Wrongs Don’t Protect a Victim’s Right to Restitution*, 35 NOVA L. REV. 363, 379 (2011).

46. 18 U.S.C. § 3663A.

47. See Matthew Spohn, Note, *A Statutory Chameleon: The Mandatory Victim Restitution Act’s Challenge to the Civil/Criminal Divide*, 86 IOWA L. REV. 1013, 1032–33 (2001).

48. This strategy will probably succeed only in circumstances where the zombie attempts but fails to infect the victim with the zombie germ. In the event of a successful infection, the victim will become one of the undead and any resulting award would go to a zombie, thereby being of no use to those still hoping to survive.

have suffered emotional damages arising from fear and distress, especially because this harm must be proven based only on a preponderance of evidence, rather than beyond a reasonable doubt.⁴⁹ The victims may also claim they have suffered property damage if zombies break anything while attempting to devour the victims.

The MVRA is an effective mechanism for seeking restitution from zombies because the MVRA mandates recovery of the full amount of the victim's harm, no matter what the defendant's ability to pay may be.⁵⁰ Critics have attacked this aspect of criminal restitution law, arguing that it creates perpetual impoverishment of defendants, leading to more crime.⁵¹ This argument, like other criticism of the federal criminal law, is shortsighted due to its failure to account for the true purpose the government held when it enacted this law. Zombies, whether rich or poor, are going to continue to attack the living; they are motivated not by economic forces, but rather by a persistent desire for human flesh and, in some instances, brains. Because of this, mandatory restitution's impoverishment of zombie defendants will have little to no effect on their criminality. Without that downside, criminal restitution remains a viable mechanism to transfer wealth to the living.

A final benefit of criminal restitution under the MVRA is that this payment is remedial and not punitive and will therefore be shielded from Eighth Amendment lawsuits.⁵² While zombies may not be expected to perform well in court, an added layer of protection to the government's strategy is that the remedial nature of the MVRA is grounded on solid arguments from both theoretical and legislative history perspectives.⁵³ Restitution's failure to implicate Eighth Amendment concerns will allow courts to grant restitution awards without concern for the proportionality balancing that courts must apply to the severity of fines that zombies face. For this reason, restitution is a powerful and low-risk means by which the government may reallocate funds from zombies to individual citizens.

49. See, e.g., Clermont, *supra* note 45, at 368.

50. See 18 U.S.C. § 3664(f)(1)(A) (2006).

51. See Clermont, *supra* note 45, at 389–90.

52. See *United States v. Lessner*, 498 F.3d 185, 205–06 (3d Cir. 2007); *United States v. Newsome*, 322 F.3d 328, 342 (4th Cir. 2003); *United States v. Dubose*, 146 F.3d 1141, 1144–47 (9th Cir. 1998).

53. See Spohn, *supra* note 47, at 1038.

CONCLUSION

Chodorow is right to warn the legal world of the dangers of the zombie apocalypse. Chodorow correctly argues that tax laws are woefully ill-prepared for this eventuality. As this Essay has demonstrated, however, the living are not without hope in their fight against the undead. Congress and the courts are proactively prepared for this threat, in some ways so thoroughly that our system will work better than it does now. While tax law may fail the government in a world of zombies, it is in this world that the true genius of the federal criminal law is realized. Through properly enforced federal criminal laws and the supplementation of existing crimes with those tailored to fit the dangers that zombies pose, the government can build on existing safeguards and ensure a steady stream of public and private postapocalyptic revenue. Public income through fines, combined with consistent restitution for victims, will keep money and resources in the hands of the living and help them battle the undead.