

DEATH AND TAXES AND ZOMBIES

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The U.S. stands on the precipice of a financial disaster, and Congress has done nothing but bicker. Of course, I refer to the coming day when the undead walk the earth, feasting on the living. 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. The government's failure to anticipate or plan for this eventuality could cripple its ability to respond effectively, putting us all at risk.

This article fills a glaring gap in the academic literature by examining how the estate and income tax laws apply to the undead. Beginning with the critical question whether the undead should be considered dead for estate tax purposes, the article continues on to address income tax issues the undead are likely to face. In addition to zombies, the article also considers how estate and income tax laws should apply to vampires and ghosts. Given the difficulties identified herein of applying existing tax law to the undead, new legislation may be warranted. However, any new legislation is certain to raise its own set of problems. The point here is not to identify the appropriate approach. Rather, it is to goad Congress and the IRS into action before it is too late.

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INTRODUCTION

Last year, the Center for Disease Control issued guidance on how to survive a zombie apocalypse.¹ While it is reassuring that the government has finally awakened to this risk,² the guidance falls far short of what is needed. A zombie apocalypse will create an urgent need for significant government revenues to defend the living, while, at the same time, rendering a large portion of the taxpaying public dead or undead.³ In preparation for this looming financial crisis, it is critical that the government provide guidance, both to taxpayers seeking to comply with their tax obligations and to any government officials still alive and at their posts, who will be tasked with administering the tax laws. This essay begins that process by assessing how the tax laws should apply to the undead. Heretofore, the only things certain in life have been death and taxes. But what if death weren't quite so certain?

The legal issues that will arise when the undead walk the earth are legion, and addressing them all is well beyond what could reasonably be accomplished in this brief essay. Indeed, a complete treatment of the tax issues alone would require several volumes. Accordingly, I focus here on two broad questions that illustrate the numerous problems that are likely to arise: the application of the estate and income taxes to the undead. Not all undead are created equal, and therefore, after addressing zombies below in Part I, I turn to consider vampires and ghosts in Part II.

This study highlights the flawed assumption that lies at the heart of our tax code, namely that death may not be permanent, and reveals Congress's complete lack of foresight in designing the nation's tax laws. In light of the difficulties of applying existing tax law to the undead, it may well be that Congress needs to create new laws for the undead or even different laws for different types of undead. The point here is not to advocate for any particular solution. Instead it is to highlight the problem and to get Congress and the IRS to act now, before it is too late.

¹ Ali S. Khan, *Preparedness 101: Zombie Apocalypse*, CENTERS FOR DISEASE CONTROL & PREVENTION (May 16, 2011), http://www.bt.cdc.gov/socialmedia/zombies_blog.asp.

² As usual, the private sector is far ahead of the government. *See, e.g.*, MAX BROOKS, *THE ZOMBIE SURVIVAL GUIDE* (2003).

³ For a discussion of the speed at which a zombie outbreak might spread, see Philip Munz et al., *When Zombies Attack!: Mathematical Modelling of an Outbreak of Zombie Infection*, in *INFECTIOUS DISEASE MODELLING RESEARCH PROGRESS* 133 (Jean Michel Tchuente & Christinah Chiyaka eds., 2009), available at <http://mysite.science.uottawa.ca/rsmith43/Zombies.pdf>.

I. THE TAX CONSEQUENCES OF A ZOMBIE APOCALYPSE

Although there are many different varieties of undead, I begin with zombies, as they appear to pose the greatest threat. The tax consequences of a zombie apocalypse may depend on the type of zombie encountered, and therefore, I present a taxonomy of zombies before beginning the legal analysis. I follow this with a discussion of how the estate and income tax laws might apply to zombies, concluding with a discussion of the tax planning opportunities and traps for the unwary that might arise.

A. A Zombie Taxonomy

The word “zombie” appears to originate in Haitian voodoo to designate reanimated dead bodies and living people under the control of a powerful sorcerer.⁴ Over the years, the term has been applied to a variety of creatures, such that there is now no generally accepted definition of zombie.⁵ Indeed, significant debate exists as to who, or what, counts as a zombie.⁶ Insofar as Congress has not seen fit to include a definition in the tax code, and, indeed, has not deigned to use the term, developing a tight definition is not strictly necessary for the application of existing tax law. It is the fact of becoming *zombie-like* that will have legal significance, not a determination that one is, in fact, a zombie. Thus, for purposes of this article, I take a very broad view of what it means to be a zombie.

The literature on zombies is too vast to canvas in full, but there are now many different types of zombies and many different ways in which they are created. What follows are some of the key distinctions that may—or may not—have legal significance. For instance, some zombies are controlled by others, while others are self-motivating. Examples of the former include traditional Haitian zombies⁷ and the armies of Inferi raised by Lord Voldemort in both the First and Second

⁴ For a discussion of living zombies, see WADE DAVIS, *PASSAGE OF DARKNESS: THE ETHNOBIOLOGY OF THE HAITIAN ZOMBIE* (1988) and WADE DAVIS, *THE SERPENT AND THE RAINBOW* (Touchstone 1997) (1985).

⁵ See MATT MOGK, *EVERYTHING YOU EVER WANTED TO KNOW ABOUT ZOMBIES* 5–7 (2011) (explaining that both the Oxford English Dictionary and Encyclopedia Britannica have incomplete definitions). Mogk promotes a definition of a “modern” zombie as a human corpse, who is relentlessly aggressive and biological in origin. *Id.* Insofar as we cannot be certain as to the nature of the coming attack, limiting ourselves to Mogk’s definition seems ill-advised.

⁶ *Id.*

⁷ See *supra* note 4.

Wizard Wars.⁸ Those under the imperius curse, which allows a wizard or witch to control living beings, could also be termed zombies under some definitions.⁹ Examples of the latter include the zombies from George Romero's ground-breaking documentary, *Night of the Living Dead*;¹⁰ the hit reality television program, *The Walking Dead*;¹¹ and the classic work of putative fiction, *Pride and Prejudice and Zombies*,¹² to name but a few.¹³

Within the category of self-motivated zombies, distinctions may be made based on volition, abilities, and personality. Some zombies slowly stumble along in search of brains upon which to feed, exhibiting little personality or ability to think.¹⁴ Others move quickly, organize,

⁸ Inferi were also used to guard one of Voldemort's horcruxes. J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE 555-578 (2005). According to Albus Dumbledore, the headmaster of Hogwarts School of Witchcraft and Wizardry, Inferi "are corpses, dead bodies that have been bewitched to do a Dark wizard's bidding. Inferi have not been seen for a long time, however, not since Voldemort was last powerful... He killed enough people to make an army of them, of course." *Id.* at 62. According to Severus Snape, the Defense against Dark Arts teacher at Hogwarts (at long last), an Inferius is "a corpse that has been reanimated by a Dark wizard's spells. It is not alive, it is merely used like a puppet to do the wizard's bidding." *Id.* at 460.

⁹ J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX 209-227 (2002).

¹⁰ NIGHT OF THE LIVING DEAD (Image Ten 1968).

¹¹ THE WALKING DEAD (American Movie Classics 2010).

¹² JANE AUSTEN & SETH GRAHEME-SMITH, PRIDE AND PREJUDICE AND ZOMBIES (2009).

¹³ Self-motivating zombies seem to predominate. See, e.g., DAWN OF THE DEAD (Strike Entertainment 2004) (remake); DAWN OF THE DEAD (Laurel Group 1978); I AM LEGEND (Warner Bros. Pictures 2007); RESIDENT EVIL (Constantin Film Produktion 2002); SHAUN OF THE DEAD (Universal Pictures 2004), ZOMBIELAND (Columbia Pictures 2009); 28 DAYS LATER (DNA Films 2002). Examples from books include MAX BROOKS, WORLD WAR Z: AN ORAL HISTORY OF THE ZOMBIE WAR (2011) (WORLD WAR Z); HARRISON GEILLOR & SCOTT ALTMAN, THE ZOMBIES OF LAKE WOEBEGOTTEN (2010) (LAKE WOEBEGOTTEN); COLSON WHITEHEAD, ZONE ONE (2011).

There is some debate whether the I AM LEGEND creatures are zombies or vampires. In the original short story by Richard Matheson, they are clearly vampires. See RICHARD MATHESON, I AM LEGEND (1954). However, in the movies they appear to be zombies. Indeed, George Romero described NIGHT OF THE LIVING DEAD as an homage to I AM LEGEND, which Matheson took to mean that George Romero was able to steal his idea without paying royalties. See Mogk, *supra* note 5 at ___.

¹⁴ See, e.g., LAKE WOEBEGOTTEN, *supra* note 13; NIGHT OF THE LIVING DEAD, *supra* note 10; DAWN OF THE DEAD, *supra* note 13; SHAUN OF THE DEAD, *supra* note 13; THE WALKING DEAD, *supra* note 11.

and learn.¹⁵ Still others appear to retain some of the memories or personalities of the original person.¹⁶ In some cases, zombies of the same ilk may fall into more than one of these categories. For instance, mummies appear to be an Egyptian form of zombie, though that designation may be disputable given their pharonic powers and disinclination to eat human flesh. Regardless, it is indisputable that some mummies are slow and lumbering, while others retain all their faculties.¹⁷

Another way to distinguish among zombies is the method by which people become zombies. Controlled zombies are typically created through some form of dark magic.¹⁸ Zombies can also be created by viruses (either naturally occurring¹⁹ or man-made²⁰), radiation,²¹ biochemical agents,²² and even a mysterious meteor.²³ In

¹⁵ See, e.g., DAWN OF THE DEAD, *supra* note 13 (remake); DAY OF THE DEAD (Laurel Entertainment Inc. 1985); I AM LEGEND, *supra* note 13; RETURN OF THE LIVING DEAD (Hemdale Film 1985); 28 DAYS LATER, *supra* note 13; 28 WEEKS LATER (Fox Atomic 2007); ZOMBIELAND, *supra* note 13; LEFT 4 DEAD and LEFT 4 DEAD 2 video games. See also Jonathan Coulton, *Re: Your Brains* (Thing a Week Two, 2005).

¹⁶ For instance, some of the zombies in Zone One are “stragglers,” who return to some place that was important to them. WHITEHEAD, Zone One, *supra* note 13, at 32-34, 54. Those described in Pet Sematary retain significantly more of the original, though in somewhat altered form. PET SEMATARY (Laurel Productions 1989). See also LAND OF THE DEAD (Universal Pictures 2005) (zombies return to place of work); COLIN (Nowhere Fast Productions 2008) (infected person retains some memories of life before he became infected); AMERICAN ZOMBIE (Lee Lee Films 2007) (in which a number of zombies live together in Los Angeles); SURVIVAL OF THE DEAD (Artfire Pictures 2009) (person who rode horses becomes a zombie and continues to do so as a zombie); S.G. BROWNE, BREATHERS: A ZOMBIES LAMENT (2009) (dead people return completely intact, but still dead. Rather than eat flesh, they drink formaldehyde and attend Undead Anonymous meetings); MY BOYFRIEND’S BACK (Touchstone Pictures 1993) (a dead boyfriend returns and learns that he must consume flesh to stay “alive.”); TERRY PRATCHETT, DISCWORLD SERIES (Mr. Slant, an attorney, continues his post as the head of the lawyer’s guild after his execution).

¹⁷ Compare THE MUMMY (Universal Pictures 1932) (slow and lumbering), with THE MUMMY (Universal Pictures 1999) (fast moving and fully sentient). Mummies do not appear to have the hunger for human flesh that is typical of most zombies.

¹⁸ See, e.g., Lord Voldemort’s Inferi.

¹⁹ See, e.g., ZOMBIELAND, *supra* note 13 (mutated mad cow disease). Mad cow in fact involves prions, as opposed to viruses, but I lump them together here because both are naturally occurring and reproducing agents.

²⁰ See, e.g., 28 DAYS LATER, *supra* note 13 (“rage” virus accidentally released); I AM LEGEND, *supra* note 13 (cancer cure gone bad).

²¹ See, e.g., NIGHT OF THE LIVING DEAD, *supra* note 13 (zombie plague caused by radiation from a destroyed NASA Venus probe).

some cases, one must be infected by a zombie to become a zombie;²⁴ in others, no prior zombie contact is necessary.²⁵ In some cases it is unclear how zombies are created. Take, for example, Michael Jackson's classic thriller, *Thriller*. We simply don't know what caused the first person to go zombie, and unless Michael comes back, we likely never will. To date, it does not appear that the drink named "The Zombie" causes zombies, though this author continues to test that hypothesis.²⁶

Finally, and as discussed in greater detail below, some people must die before becoming zombies, while others appear to make a seamless transition from living to undead.²⁷ There is often a connection between cause and the type of zombie created. For instance, zombies arising from viruses often retain some vestige of their former personalities. Controlled zombies are typically dead and retain none of the original person's personality or memories. Zombies of those who don't die first are typically fast, while those whose progenitors died are typically slow. However, it is possible to find zombies in each category that do not fit the typical pattern.²⁸ As a result, the Venn diagram is so confusing that I have opted to omit it in the interests of clarity.²⁹

B. Zombies and the Estate Tax

The most obvious tax issue raised by a zombie apocalypse is the potential application of the so-called "death tax," which imposes a tax

²² See, e.g., *PLANET TERROR* (Troublemaker Studios 2007).

²³ See, e.g., GELLOR & ALTMAN, *LAKE WOEBEGOTTEN*, *supra* note 13.

²⁴ See, e.g., BROOKS, *WORLD WAR Z*, *supra* note 13.

²⁵ See, e.g., GELLOR & ALTMAN, *LAKE WOEBEGOTTEN*, *supra* note 13 and *NIGHT OF THE LIVING DEAD*, *supra* note 14, in which all dead become zombies.

²⁶ For those willing to risk their lives in the interests of science, blend 1 oz pineapple juice, 1 oz orange juice, 1/2 oz apricot brandy, 1 tsp sugar, 2 oz light rum, 1 oz dark rum, and 1 oz lime juice with ice. Pour mixture into a collins glass and float 1/2 oz Bacardi® 151 proof rum on top. Garnish with a fruit slice, sprig of mint and a cherry. Bottoms up!

²⁷ Examples of the former include the zombies of *NIGHT OF THE LIVING DEAD* and the *ZOMBIES OF LAKE WOEBEGOTTEN*. Examples of the latter include the zombies of *28 DAYS LATER*.

²⁸ For instance, the zombies of *WORLD WAR Z* appear to be virally caused, but they do not retain any of the original's personality. Haitian zombies are controlled, but they are alive and retain some memories of their past. The zombies in the 2004 *DAWN OF THE DEAD* remake are fast, even though they must first die to become zombies.

²⁹ For a chart that gives some indication of the complexities associated with classifying zombies, see <http://movies.yahoo.com/photos/infographic-how-dangerous-is-a-zombie-slideshow-2902/>.

on the transfer of the estate of a “decedent.”³⁰ Zombies have been described variously as the “walking dead,” the “undead,” and the “living dead,” raising the question whether the estate tax should apply when a taxpayer becomes a zombie or, in the alternative, after a person’s zombie has been dispatched. The answer to this question hinges on how one defines decedent.³¹ On the one hand, it could be a question of law. On the other hand, this could be a question of fact, the answer to which depends on the nature of the zombie plague with which we are dealing. On yet a third hand, it could present a mixed question of law and fact. Fortune favors the bold, so into the fray.

The legal definition of death, and therefore of a decedent, has generally been left to the states, each of which has its own definition. That said, there has been a recent trend away from a definition that focuses on heart function to one that focuses on brain function.³² It is not at all clear under current state standards whether people who become zombies would be considered dead for state law purposes. A series of questions may help guide the analysis.

The first question that must be answered is whether the person who became a zombie died in the first place. The answer depends in large part on the type of zombie involved, as can be seen by considering a virus-caused zombie outbreak. In many cases zombie plagues clearly cause death under either the heart or brain function standard.³³ In others, the transition from living to zombie involves no

³⁰ I.R.C. § 2001 (2006).

³¹ A similar issue arises under I.R.C. § 1014, which resets basis in property as of the moment of death, or sometimes at a later valuation date. See also I.R.C. § 101(a), which excludes from income life insurance proceeds “paid by reason of the death of the insured;” I.R.C. § 2(a), which defines a “surviving spouse” for purposes of determining the appropriate tax-filing status; and § 691, which is devoted to “income in respect of decedents.” The list tax provisions implicated here goes on and on.

³² For a discussion of the evolution of the legal definition of death, see MICHAEL H. SHAPIRO ET AL., *CASES, MATERIALS, AND PROBLEMS ON BIOETHICS AND LAW* ch. 32 (2d ed. 2003). For a discussion of the science, see Laurence R. Tancredi, *Neuroscience Developments and the Law*, in *NEUROSCIENCE AND THE LAW* 71, 72–76 (Brent Garland ed., 2004). See also, ELIZABETH PRICE FOLEY, *THE LAW OF LIFE AND DEATH* (Harvard University Press 2011); DICK TERESI, *THE UNDEAD: ORGAN HARVESTING, THE ICE-WATER TEST, BEATING HEART CADAVERS--HOW MEDICINE IS BLURRING THE LINE BETWEEN LIFE AND DEATH* (Pantheon 2012).

³³ See, e.g., the zombies of Lake Woebegotten, *Night of the Living Dead*, *WORLD WAR Z* and *The Walking Dead*. Lord Voldemort’s Inferi are also dead, as are the folks buried in Stephen King’s pet cemetery.

discrete event of physical death.³⁴ Even within a given zombie plague, some may die as a result of their infection and then turn, while others transform while still alive. Thus, identifying the type of plague does not necessarily answer the question of whether the person who became a zombie has died.

It seems a stretch to conclude that those who transform seamlessly into zombies should be considered dead. They never lose heart or brain function, though they now function quite differently from before. While it might be tempting to declare them dead, significant line-drawing problems would arise as one tried to distinguish between zombies and those who have suffered some mental or physical breakdown. Put differently, were such zombies to be considered dead because they suffered a personality change, physical disability, or decreased brain function, the door would be open to declaring dead a wide range of people currently considered to be alive.

For instance, someone who suffers a stroke and loses the ability to speak, walks with a shuffle, and undergoes a significant personality change is clearly alive under any existing state standard. Similarly, someone with Alzheimer's or in a vegetative state, whose brain stem alone survives, is considered alive.³⁵ It would be inconsistent to classify those people as alive, while at the same time classifying those infected by a zombie virus as dead.

One difference may be that those afflicted by strokes would likely not develop an overpowering hunger for brains. However, developing a taste for brains cannot be the determinant of whether someone is dead or considered a zombie. The members of numerous aboriginal

³⁴ See, e.g., the zombies of *28 Days Later* and *I am Legend*. See also STEPHEN KING, *CELL* (2006) (people have their minds erased via a pulse from their cell phone); *PONTYPOOL* (2008) (a zombie virus spreads through spoken word); *DEAD AIR* (Team Cherokee Productions 2009) (a gas turns people into zombies).

While some might argue that these latter zombies should not be considered true zombies because they have not died, the example from Haiti of living zombies suggests that such a definition is too narrow. In any event, as described above, I have taken the broad view here and include them.

³⁵ See, e.g., the controversy over Terry Schiavo. In such cases, the possibility of recovery always looms large. See, e.g., Michelle Ye Hee Lee, *Doctor's Hunch Pays Off as Coma Patient Awakens*, ARIZ. REPUBLIC, Dec. 24, 2011, at A1 (describing a brain damaged coma patient who unexpectedly recovered). See also *Awakenings* (Columbia Pictures 1990) (patients suffering from encephalitis awaken after years of being in a catatonic state after they receive the new drug L-Dopa).

tribes³⁶ and Hannibal Lecter³⁷ practiced cannibalism and would not qualify as either dead or zombies.

Assuming someone has clearly died under state law, the second and more interesting question is whether he should be considered still dead after he has been reanimated as a zombie. For those whose dead bodies are simply under the control of a sorcerer, it would seem that the answer is yes. Just because Bernie Lomax gets posed in various positions to make him appear alive, does not negate the fact that he is, in fact, dead.³⁸ Similarly, a corpse that is being magically manipulated by another should be considered dead. Such zombies are puppets who have no heart or brain function and therefore clearly qualify as dead under state law.

In contrast, most self-motivated zombies likely would be considered alive under most state law definitions. Such zombies must have a biological mechanism by which they think and move. This will typically require brain function and some means of keeping the body nourished, which could imply heart function.³⁹ In *The Walking Dead*, tests reveal that the brain function ceases and then restarts sometime later, though at a far lower level than before.⁴⁰ The normal way to dispatch a zombie is by destroying the brain, strongly suggesting that they would pass most brain-function definitions of death.⁴¹ If someone in a vegetative state is alive,⁴² so are zombies. The case for zombies being deemed alive gets stronger as volition, ability, and personality increase.⁴³

³⁶ Cannibalism has existed at times in the South Pacific, the Fiji Islands, tropical Africa, and the Amazon Basin, among other places.

³⁷ See SILENCE OF THE LAMBS (Orion Pictures Corporation 1991). Nor is the fact that Dr. Lecter prefers his human flesh with fava beans and a nice Chianti legally relevant.

³⁸ See WEEKEND AT BERNIE'S (Gladden Entertainment 1989).

³⁹ For a discussion of the zombie brain and how it might move without heart function, see MOGK, *supra* note 5, at 46–58. See also, STEVEN C. SCHLOZMAN, M.D., THE ZOMBIE AUTOPSIES: SECRET NOTES FROM THE APOCALYPSE (2011).

⁴⁰ *The Walking Dead: TS-19* (AMC television broadcast Dec. 5, 2010). Data on this is scares as zombies seldom make willing test subjects.

⁴¹ See, e.g., BROOKS, *supra* note 13 (zombies dispatched most easily with “cherry bomb” bullets that explode once they enter the brain). It should be noted that exploding bullets are prohibited under the Hague Convention of 1899, Declaration III, raising the interesting question whether zombies can benefit from the protections of international law. Addressing this pressing question is beyond the scope of this article.

⁴² See *supra* note 35.

⁴³ Old school mummies may be the one exception. While they are self-motivated, their brains and heart remain pickled in jars. Accordingly, they would likely flunk any heart or brain-based test. More recent mummies may reanimate in

However, the question isn't whether the zombie can be considered alive, but rather whether, if someone's zombie is alive, the original person can be considered dead. This hints at the far larger questions of how the law should treat reanimation generally and whether different types of reanimation should be treated differently. A few examples should help illustrate the scope of the legal issues that arise when someone comes back to life, whether fully intact or in an altered state. Examples of those who return intact include Lazarus, whom Jesus raised from the dead,⁴⁴ and people who have died, seen the light, but then come back. One day, Walt Disney and Ted Williams may join this group, if science ever advances to the point where they can be de-thawed and reanimated.⁴⁵ Those who return from the dead unchanged are typically not considered zombies. Nonetheless, I start with such people because they raise a number of legal questions that also apply to zombies.

Should those who have died and come back intact still be considered dead? Or, should their deaths be treated as a legal nullity? If annulment is a possibility, what standards should be used to determine when it should be allowed? For instance, should it matter whether one anticipated or hoped to be resurrected? Lazarus did not expect to come back, but Walt Disney did. If intent is deemed legally significant, should it matter whether that intent was reasonable? While Walt may have held good faith subjective belief in his eventual resuscitation, it has never been done before, and most in the scientific community doubted that it could be done at the time of his death.⁴⁶

full, regaining both heart and brain function. Compare, one more time, *THE MUMMY* (1932) to *THE MUMMY* (1999), *supra* note 17.

⁴⁴ *John* 11:1-46. This appears to be modeled on the prophet Isaiah, who is reported to have raised the dead. See *2 Kings* 13:21. I purposely do not address here Jesus' resurrection to avoid entering the contentious debate regarding his status as human, divine, human and divine, or divine and human. Wars have been fought over less. For a discussion of the fights over Christ's true nature, see Bart D. Ehrman, *THE ORTHODOX CORRUPTION OF SCRIPTURE: THE EFFECT OF EARLY CHRISTOLOGICAL CONTROVERSIES ON THE TEXT OF THE NEW TESTAMENT*, 2nd ed., Oxford University Press, 2011.

⁴⁵ I do not address the notion that there are different levels of death, as suggested by Max the Miracle Worker, when he indicated that he was able to revive Westley because he was only "mostly" dead, having slipped from "sort of" dead while Inigo and he haggled over the price for Westly's resurrection. See WILLIAM GOLDMAN, *THE PRINCESS BRIDE* 248-251 (1973).

⁴⁶ This raises the question of what will happen when we know that death can be reversed. Will probate occur? Will it depend on whether the decedent has the will and means to be resurrected? Might people be tempted to remain dead for a few centuries to allow the magic of compounding interest work while they wait for global warming to make their property in the Antarctic prime beachfront property?

Should it matter whether someone has been declared legally dead? Those who “see the light” but come back are generally not declared legally dead, so no annulment would be necessary. We don’t know whether Lazarus was officially declared dead. However, for Walt Disney or the poor souls who are declared dead only to awaken at the morgue⁴⁷ or, worse yet, six feet under,⁴⁸ there is no question. Perhaps there should be a time limit, such that annulments are unavailable to those who have been dead too long. Lazarus came back after 4 days,⁴⁹ and this could be the outer limit. But, this would exclude people like Walt Disney, who may be dead for years. If those who come back are still considered dead, would they have to create a new identity? Would they be able to use the same social security number? If they are deemed still alive, would probate need to be undone? What do we do with life insurance proceeds that have been paid out? Addressing these issues could be quite difficult, especially if significant time has passed.

Many of these issues have been addressed in the situation where someone has been declared legally dead and then reappears.⁵⁰ However, at present this happens quite rarely, and it seems likely that the procedures adopted in those cases will not be adequate to handle the volume one could expect when resurrection becomes more commonplace.⁵¹ Lawmakers may want to look to Tibetan law for inspiration, insofar as Tibetans openly acknowledge reincarnation and

⁴⁷ See, e.g., David W. Freedman, *Man wakes up in morgue after being deemed dead: What went wrong?*, CBSNEWS (Jul. 26, 2011), available at http://www.cbsnews.com/8301-504763_162-20083534-10391704.html.

⁴⁸ Safety coffins with bells and air tubes have been invented to account for just this possibility.

⁴⁹ *John* 11:1-46.

⁵⁰ See, e.g., *CAST AWAY* (ImageMovers 2000); *THE RETURN OF MARTIN GUERRE* (Dussault 1982). For a discussion of the legal issues that arise when people are presumed dead and complications that arise when they reappear, see Jeanne Louise Carriere, *The Rights of the Living Dead: Absent Persons in the Civil Law*, 50 LA. L. REV. 901, 906–19 (1989).

⁵¹ Even absent a zombie apocalypse, these issues will certainly arise during the end-times, when the dead are resurrected and all saved souls are reunited with their bodies. See, e.g., the thirteenth principle set forth by Maimonides: “I believe with complete (perfect) faith, that there will be *techiat hameitim* - revival of the dead, whenever it will be God’s, blessed be He, will (desire) to arise and do so. May (God’s) Name be blessed, and may His remembrance arise, forever and ever.” See also, the Nicene Creed (“We look for the resurrection of the dead, and the life of the world to come.”). It appears that time itself will cease to exist when this occurs, and it is difficult to speculate as to how the tax code would apply under such conditions. At the very least, the provisions covering interest would clearly need to be rewritten. See, e.g., I.R.C. §§ 163, 482, 7278 (2006).

claim to be able to identify currently living individuals as reincarnations of prior individuals. They may well have developed a legal system capable of accounting for resurrection.

So far, we have focused on those who return from the dead intact. What happens if the dead return in some altered state, that is, as zombies? Should it matter that they no longer have the personality or memories of the original person? If so, how much of the original person should be gone before we decide that the zombie is not the same person? Even though zombies are likely to be considered alive under most state law definitions, it seems a stretch to consider a flesh-eating automaton to be the same person as the Nobel laureate he used to be. In some real sense, the laureate has died, even if his body and some part of his brain live on. Thus, it seems possible that the law could deem the zombie alive, without necessarily affecting the status of the original as dead. The zombie could be considered a new being.

This solution, of course, begs the question of what happens if there is a cure. The human body has an amazing ability to cure itself,⁵² and science continues to make significant strides. The zombie could be considered a new person, but, if some cure is devised, and the original returns, would we then declare the zombie dead? Would we declare the original never to have died? And, what do we do about creations to whom the spark of life has been administered, such as Frankenstein's monster and Rocky of *The Rocky Horror Picture Show* fame?⁵³ It seems clear that both should be considered alive, as opposed to undead, but are they new individuals or a continuation of their parts?

To summarize, it seems clear that most self-motivated zombies would be considered alive under state law standards. However, the question of whether those who become zombies should be considered dead while their zombies remain active remains open. This sorry state of affairs results from the state law's surprising and utter failure to account for resurrection, whether intact or not. This failure is all the more surprising given that the large majority of our legislators claim to be devout Christians, whose religion is based on a resurrection and who purportedly believe in resurrection of the dead.⁵⁴

Of course, the question we are trying to answer is not whether a person who becomes a zombie should be considered dead under state law. Answering this question is only the first step of the analysis. Ultimately, our goal is to determine whether such a person should be considered a decedent for federal estate tax purposes. Unfortunately,

⁵² See Lee, *supra* note 35.

⁵³ ROCKY HORROR PICTURE SHOW (20th Century Fox Film Corporation 1975).

⁵⁴ See, *supra*, note 51.

this inquiry adds yet another level of complexity. Tax law typically piggybacks on top of state law. Normally, someone considered dead for state law purposes would be considered dead for federal tax purposes as well. However, federal tax law deviates from state law in a number of situations, including what constitutes a devise, bequest or inheritance.⁵⁵ Thus, it is not unreasonable to think that a person could be dead for state law purposes, triggering probate and a distribution of assets, but not a decedent for federal tax purposes. Conversely, someone alive under state law definitions could be deemed dead for federal tax purposes.⁵⁶

The key justification for allowing federal tax law to deviate from state law is uniformity. It would be unseemly if tax law deviated from state to state because of minor differences in state law. Administrability is also a chief concern. Imagine trying to determine whether people are dead under 50 different state laws, not to mention Puerto Rico and the American Virgin Islands, while in the middle of a zombie apocalypse. These concerns strongly suggest the need for a uniform federal standard, detached from the myriad state laws. However, they do not suggest what the standard should be. As with the state laws defining death, federal tax laws are surprisingly silent on the legal consequences of becoming a zombie, creating a dire need for clear guidance.

C. Zombies and the Income Tax

The second tax issue to consider is whether the income tax should apply to zombies. Income can come in two forms: earned and unearned. One does not typically think of zombies as earning income, but it can happen. By some reports, zombies have been known to return to places where they used to work.⁵⁷ Similarly, the living have put zombies to work on occasion.⁵⁸ It is not clear whether they are paid for their efforts, but if they are, questions would arise as to whether they owe tax on those earnings. Zombies may also have

⁵⁵ *Lyeth v. Hoey*, 305 U.S. 188, 193 (1938) (holding that devise, bequest and inheritance in the federal tax code do not track state law definitions).

⁵⁶ For instance, it appears that lepers were deemed legally dead when sent to Molokai, even though they were certainly alive under most state law definitions. See JOHN TAYMAN, *THE COLONY: THE HARROWING TRUE STORY OF THE EXILES OF MOLOKAI* 321, n. 8 (2006).

⁵⁷ See WHITEHEAD, *ZONE ONE*, *supra* note 13, at 32-34, 52. I will refrain here from noting that significant questions exist as to whether most big-firm lawyers could currently qualify as such.

⁵⁸ See, e.g., *FIDO* (Lions Gate Films 2006) (zombies act as servants); *SHAUN OF THE DEAD*, *supra* note 13 (zombies kept around as cheap labor).

unearned income. For instance, people who become zombies and are not considered dead for state law purposes will not go through probate and therefore will retain title to their property. Such zombies may have unearned income to the extent that their property produces income. Higher functioning zombies might also acquire income-producing assets, though that seems a stretch.

The internal revenue code imposes a tax on all incomes,⁵⁹ and the issue will be who is liable to pay the tax on zombie-earned income. The code defines “taxpayer” as any “person” subject to any internal revenue tax,⁶⁰ and it defines “person” to include an individual, trust, estate, partnership, or corporation.⁶¹ Are zombies taxpayers under this definition? As with the question of whether zombies are decedents, the answer to this important question may depend on the type of zombie involved.

Let us first consider zombies controlled by others, such as the Haitian zombies or *Inferi*. If they are dead, they will probably not qualify as a “person”⁶² and will not owe taxes. Instead, they are likely to be seen as agents for the person controlling them. Under basic agency principles, any income they earn would likely be attributed to their principals, who would be responsible for paying any taxes.⁶³ Living zombies controlled by others likely qualify as persons, but this does not necessarily mean that they will owe taxes on their income. As with dead, controlled zombies, they are likely to be seen as agents and therefore not responsible for paying tax on their incomes. Of course, if the entity controlling the zombie is a demon or other supernatural being, collecting the tax from the principal may be difficult.⁶⁴

Self-motivating, i.e., living, zombies are likely to qualify as “individuals” and therefore as “persons” and “taxpayers.” Moreover, even if they are not so construed, they would nonetheless likely be held responsible for any income they generate because there is no

⁵⁹ See I.R.C. § 1 (2006).

⁶⁰ See I.R.C. § 7701(a)(14) (2006).

⁶¹ See I.R.C. § 7701(a)(1) (2006).

⁶² If Mitt Romney is correct that “corporations are people,” see [C-SPAN, Romney: Corporations are People, My Friend](#), YOUTUBE (Aug. 11, 2011), http://www.youtube.com/watch?v=KIPQkd_AA6c, why not dead people? They were at least people at some point. That said, corporations are specifically identified as people under the tax law, while zombies surprisingly are not.

⁶³ The cashier who takes in money on behalf of his employer is not deemed to have income by virtue of doing so. He is only taxed on the money paid to him for doing so. A zombie who labors on behalf of another and receives no pay should have no income.

⁶⁴ The Internal Revenue Manual, which instructs IRS employees how to execute the tax laws, is surprisingly silent on how best to approach otherworldly creatures.

other person to whom the income could reasonably be attributed. The interesting question is whether such income would qualify as income with respect to a decedent.⁶⁵ Again, the Treasury regulations are silent.

Admittedly, subjecting zombies to the income tax presents certain administrative difficulties. For instance, most zombies would likely find it difficult to grasp the notion that they owe taxes, let alone have the capacity to fill out their returns. Tax forms are purportedly geared for readers at the 8th grade level,⁶⁶ though a quick glance at the forms suggests that it may be much higher.⁶⁷ The notion that zombies would be able to understand and fill out the tax forms properly seems fanciful. A zombie-prepared tax return is almost certain to suffer certain defects, and collection might require various skills not typically seen in the garden-variety government agent. Congress will need to consider whether the projected revenue from taxing zombies is worth the administrative hassle of including such income in the tax base.⁶⁸

D. Tax Planning Opportunities and Traps For the Unwary

Depending upon how the laws are construed, a number of planning opportunities or traps for the unwary arise for those who become zombies. For instance, under current law, when a person dies, his estate is hit with the estate tax, which is based on the fair market value of the property he owned as of the date of death. At the same time, for income tax purposes, the basis in a decedent's property resets to its fair market value as of the date of death, with the result that any appreciation in the property he owned at death will escape the income tax, though it will be subject to the estate tax, if the estate is large enough.⁶⁹

⁶⁵ See I.R.C. § 691.

⁶⁶ See Bradley Graham, *Tax Forms Called 8th Grade Stuff*, TOLEDO BLADE (Jan 13, 1979), available at <http://news.google.com/newspapers?nid=1350&dat=19790113&id=JUAXAAAAIBAJ&sjid=hwIEAAAAIBAJ&pg=1870.6093265>.

⁶⁷ See, e.g., Form 2555 (explaining how to determine whether a taxpayer may exclude foreign-earned income). I would like to see an 8th grader figure that one out.

⁶⁸ Of course, in a zombie apocalypse, the number of zombies could be great, so the potential revenues might justify the effort. Moreover, if zombies are exempt from income tax, a new form of income shifting may arise.

⁶⁹ See I.R.C. § 1014 (2006). Under some circumstances, taxpayers may elect a valuation date 90 days after the decedent dies. § 1014(a)(2). Any built-in loss on the property is lost when the basis resets. For this reason, it makes little sense to die holding property worth less than its basis.

If people who become zombies are considered dead for federal estate and income tax purposes, little will have changed. Becoming a zombie will be no different than dying from pneumonia, aside from the part where you eat your friends and loved ones. However, other outcomes are possible. For instance, if someone who becomes a zombie is considered not dead (as opposed to undead) for estate and income tax purposes, neither the estate tax nor the basis reset would be triggered upon becoming a zombie. We would be in a situation similar to the one Congress negotiated as part of the Bush tax cuts, which relaxed the basis reset rules in conjunction with eliminating the estate tax.⁷⁰ Alternately, both the estate tax and basis reset could kick in only when a person's zombie was dispatched. Were this the rule, people might have incentives to become zombies to delay the application of the estate tax.

One could also imagine the government taking the position that the estate tax and the basis reset were triggered both when one became a zombie *and* when a person's zombie is dispatched, giving the government two bites at the proverbial apple. This could be a significant revenue raiser as the wealthy would get hit twice by the estate tax. But it could also cost money because those with insufficient assets to trigger the estate tax would get their basis reset twice, thus reducing income tax revenues. The actual fiscal effect would depend on the distribution of assets, the identity of those hit by the zombie outbreak, and the time necessary to eradicate their zombies and therefore cannot be predicted with much accuracy. Regardless, given the current anti-tax atmosphere in Washington, it seems unlikely that anyone who wished to be re-elected would advance this position.

However, these are not the only options. Until now, the estate tax and income tax have been construed consistently with regard to who is a decedent. This need not be the case.⁷¹ In other words, it is possible that the transition from alive to undead could trigger the estate tax but not the basis reset. Were this to happen, taxpayers who become zombies would be hit twice, and years of tax planning could go out the

⁷⁰ See I.R.C. § 1022 (2006) (providing for limited basis reset in conjunction with the elimination of the estate tax). A number of scholars have identified significant issues with continuing basis beyond a taxpayer's death, and we could expect to see them arise here as well. See Nancy M. Annick, *Plugging The "Gaping Loophole" of the Step-Up in Basis at Death: A Proposal to Apply Carryover Basis to Excess Property*, 8 PITT. TAX REV. 75, 94–98 (2011).

⁷¹ For instance, in some cases property may be valued differently for estate and income tax purposes, despite the fact that both provisions require that value be set at fair market value. See I.R.C. §§ 1014(a)(1), 2031(a) (2006); Treas. Reg. § 20.2031-1(b).

window.⁷² Alternately, becoming a zombie could be deemed not to trigger the estate tax but to allow basis reset. Under this scenario, the government would forego two opportunities to raise revenue. While this would be great from a taxpayer perspective, it could significantly hinder the government's ability to respond to the outbreak, especially if it were severe.

Should it become possible to come back voluntarily and intact, as Walt Disney hopes, depending on how the tax law develops, it may become advantageous to be dead for some period.⁷³ Serious thought must be given to whether those who die and are resurrected solely for tax reasons should be deemed to have died or whether the sham transaction or some other legal doctrine should be invoked to disregard the death.⁷⁴ As with many intent-based rules, it is not clear how such a doctrine would be implemented, especially as "accidental" deaths could be easily arranged, and it would be relatively easy to establish a non-tax reason for coming back.

Another interesting question that may have far-reaching tax consequences is whether someone remains married once he becomes a zombie. Like death, the question of marriage is typically left to the states.⁷⁵ Typically, marriage ends when one spouse or the other dies.

⁷² People whose estates were too small to be affected by the estate tax would not suffer by virtue of the estate tax being triggered, but they would lose the benefit of a basis reset.

⁷³ See, e.g., Douglas Adams, *THE RESTAURANT AT THE END OF THE UNIVERSE*, in which Hotblack Desiato, the keyboardist for *Disaster Area* and a restaurant patron, is spending the year dead for tax purposes.

⁷⁴ One famous (at least to tax professors) example of this arose in the case of *Boyer v. Comm'r*, 668 F.2d 1382 (4th Cir. 1981), in which the Boyters perennially traveled to the Caribbean to get divorced and remarried, over the New Year, paying for their trips with their tax savings. One can easily imagine taxpayers attempting the same ploy by dying and then being resurrected when the tax climate improves. For an in depth discussion of this issue as it related to marriages, see Kerry Abrams, *Marriage Fraud*, 100 CAL. L. REV. 1 (2012).

⁷⁵ In some cases, federal tax law adds a gloss. For instance, for purposes of one's filing status, marriage is determined as of the last day of the year. See I.R.C. § 7703. However, whether someone is married on that date is typically a question of state law. In other cases, to prevent abuse, federal law deviates from state law. For instance, *Publication 501*, which addresses filing status, contains the following instruction: "Divorce and remarriage. If you obtain a divorce in one year for the sole purpose of filing tax returns as unmarried individuals, and at the time of divorce you intended to and did remarry each other in the next tax year, you and your spouse must file as married individuals." See *Publication 501* (2011) INTERNAL REVENUE SERVICE, available at <http://www.irs.gov/publications/p501/index.html>. Another example can be found in the Defense of Marriage Act (DOMA), under which the federal government will not recognize a state-sanctioned marriage between same-sex couples.

Whether someone remains married after becoming undead presents a host of family law questions, such as whether alimony or child support obligations cease, whether it would be polygamy to remarry before getting a formal divorce, etc. It may also raise certain religious questions. For instance, Catholics whose spouses have died are typically free to remarry. Regardless of what the state law answer may be, the Vatican will have to decide whether Canon law permits someone with a zombie spouse to remarry.

The marriage-related tax questions that arise are equally complicated. First and foremost, whether one remains married after a spouse has become undead (or becomes undead him or herself) affects one's filing status.⁷⁶ Depending on a taxpayer's earning profile, the answer could generate either a marriage bonus or penalty. Second, whether one is considered married implicates a host of anti-abuse and attribution rules that are designed to prevent married couples from engaging in transactions that affect their tax liability without changing their economic status. For instance, two separate provisions prevent taxpayers from deducting losses incurred on property sold to a spouse or other related party.⁷⁷ Absent such rules, taxpayers could trigger tax losses via such sales, while still retaining the property within the family unit. If people married to zombies are deemed no longer married, these rules would not apply, opening the door to significant tax planning opportunities.⁷⁸

Assuming the IRS and Congress respond to this call for action, they should keep in mind that people respond to tax incentives. Tax authorities must remain vigilant against shaping the tax law in ways that create tax advantages to becoming a zombie, thereby encouraging entrepreneurial scientists and tax lawyers to develop rogue viruses or radiation treatments that could create a zombie plague.

While it seems unlikely that anyone would willingly become a zombie for tax purposes, it is not unreasonable to suppose that someone might voluntarily become a vampire or some form of dead or undead to take advantage of loopholes in the tax laws. I turn, therefore, to consider the tax consequences for vampires and ghosts in Part II.

⁷⁶ See, e.g., I.R.C. § 1.

⁷⁷ I.R.C. §§ 1041 and 267. Related-party provisions prevent abuse in a host of other circumstances. See, e.g., I.R.C. § 453(e) (undoing the effect of installment sales where property is sold to a related party within two years). For a more robust discussion of the ability of people deemed strangers under the law to manipulate the tax system, see Theodore P. Seto, *The Unintended Tax Advantages Of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008). No comparison between zombies and same sex couples beyond their presumed tax status is intended.

⁷⁸ See *infra* note 99 for an example of how this might work.

II. VAMPIRES AND GHOSTS

Under the broadest definition of zombie, vampires could be defined as a type of zombie and included in the analysis above.⁷⁹ However, given their separate histories, I treat them separately here.⁸⁰ As with zombies, there is some question regarding how one becomes a vampire. In some traditions, if an animal, such as a cat or dog, jumps over a corpse, the dead body will become a vampire.⁸¹ In others, evil spirits control a corpse, making it a vampire. Such vampires have certainly died before becoming undead, raising many of the same issues discussed above.⁸² More recent literature suggests a biological cause. In many cases, to become a vampire one must be bitten by a vampire and then ingest some vampire blood.⁸³ As with some zombies, whether a person in this manner must die first to become a vampire is not clear.

For instance, the *True Blood* vampires must spend some time underground for the transition to take place, but we don't know whether they must be dead and buried or just buried. That they can also suffer "True Death" suggests they undergo a lesser death in the transformation, but we do not know whether such a death would qualify as death under applicable state laws. The *Twilight* vampires' hearts stop as part of the transition, but brain function clearly continues.⁸⁴ Thus, the answer may depend on which test is used.

⁷⁹ Zombies and vampires share the same early history in that both were considered to be corpses possessed by evil demons. It is said that George Romero modeled his zombies in *NIGHT OF THE LIVING DEAD* on the vampires from the Richard Matheson short story, *I am Legend*, thus supporting the linkage. See MOGK, *supra* note 5 at 15–17. Indeed, Mogk includes an entire chapter on vampires in his book on zombies. See *id.* at 28–32. For a lengthy discussion of vampires old and new, see PAUL BARBER, *VAMPIRES, BURIAL AND DEATH* (2010); KATHERINE M. RAMSLAND, *THE SCIENCE OF VAMPIRES* (2002).

⁸⁰ I apologize to any Egyptologists who believe that mummies, too, deserve their own treatment.

⁸¹ See BARBER, *supra* note 79 at 33.

⁸² See also Barnabas Collins of Dark Shadows fame.

⁸³ See, e.g., ANNE RICE, *INTERVIEW WITH A VAMPIRE* (1976); Charlaine Harris's Sookie Stackhouse series of books and *True Blood*, the Home Box Office (HBO) TV show based on that series; *The Vampire Diaries* TV series; and *THE LOST BOYS* (1987); *Buffy the Vampire Slayer* TV series; SETH GRAHAME-SMITH, *ABRAHAM LINCOLN, VAMPIRE HUNTER* (2010).

⁸⁴ See, e.g., the *Twilight* series of books and movies by Stephanie Meyer.

Most vampires seem to qualify as alive under a brain function standard.⁸⁵ Assuming, *arguendo*, that a person dies under state law before becoming a vampire, vampires are more like Lazarus and Walt Disney than traditional zombies. Unlike traditional zombies, vampires retain all their faculties and in many ways become better versions of their original selves: faster, stronger, un-aging,⁸⁶ and potentially able to transform into a bat, wolf or cloud of mist.⁸⁷ Because they are likely to be seen as a continuation of the person who died, the original person is likely to be treated as alive, even though he is undead.

The heart function test is more difficult. It appears that most vampires have no heart function, suggesting that the original person died and remains dead. However, vampires can be killed by putting a stake through their hearts, indicating that this common understanding may be wrong. More important, it seems likely that, despite a heart function test, most states would classify someone with a fully functioning brain as alive. The difficulty of classifying vampires under this test may explain why so many states have shifted from a heart function definition to one that focuses on the brain.⁸⁸

Finally, it must be noted that some vampires actually reproduce.⁸⁹ The ability to reproduce is a strong signal that life exists, and it may well be that the heart and brain definitions should be abandoned and replaced by some other, more comprehensive test that focuses on reproduction. However, problems exist with this test, as well. Prions reproduce and yet are not considered alive.⁹⁰ In contrast, mules cannot reproduce, but no one would consider them dead, though

⁸⁵ See *supra* note 32. It is not at all clear how many *Twilight* fans would qualify under this same standard.

⁸⁶ See, e.g., Anne Rice, *supra* note 83.

⁸⁷ See, BRAHAM STOKER, DRACULA (1898).

⁸⁸ The difficulty of determining whether vampires should be considered dead under the various tests described above suggests that we may be asking the wrong question. Perhaps, the question should focus on the line between human and non-human, an issue that will certainly arise as our ability to alter body and genes and integrate machines and biological life may soon require revisiting the current definition of what it means to be human. For a discussion of these issues in the context of the human-machine interface, see Fabrice Jotterand, *Beyond Therapy and Enhancement: The Alteration of Human Nature*, NanoEthics (2008) 2:15–23. Addressing the questions of when someone has transcended humanity and whether such transcendence should be considered a death event for tax purposes would break this camel's back and must be saved for another day.

⁸⁹ See RAMSLAND, *supra* note 79 at 224; BREAKING DAWN, PART I (Tall Girls Productions 2011) (Renesmee Cullen is the offspring of Edward Cullen (vampire) and Bella Swan (human, at least through most of her pregnancy)).

⁹⁰ For a discussion of prions, see Center for Disease Control and Prevention, available at <http://www.cdc.gov/ncidod/dvrd/prions/>.

advances in scientific knowledge and technology, such as the artificial heart, may also have something to do with the switch.⁹¹

While the tax issues that arise with regard to vampires are similar to those that arise with zombies, real and important differences exist. For instance, a conclusion that the estate tax does not apply to those who become vampires could have a far greater impact on government revenues than one about zombies because vampires are typically rich. For instance, Count Dracula owned a large castle and vast hoards of gold.⁹² Escaping the estate tax could provide a significant financial benefit for him and others like him. And in contrast to zombies, vampires could actually enjoy their untaxed wealth. Consider the estate taxes Steve Jobs could have saved had he become a vampire instead of dying. He could also have retained control over Apple, so long as he scheduled meetings only at night.⁹³

Every rose has its thorn, and, if the estate and income tax laws were construed consistently, vampires would fail to receive the benefit of basis reset for appreciated property. However, given their longevity, vampires, unlike zombies, would likely be able to take advantage of

⁹¹ For a discussion of mules, see *What is a Mule?*, available at http://www.lovelongears.com/about_mules.html.

⁹² See Stoker, *supra* note 83. Count Chocula has clearly made a killing on his cereal, and rumor has it that even Count von Count is loaded. While harnessed to the greater good of teaching children to count, it turns out that the Count's OCD-like fascination with numbers turns out to be typical of vampires. See BARBER, *supra* note 79, at 49 (describing a tradition where people placed bags of grain near a suspected vampire's grave on the theory that the vampire would be compelled to count all the grains, thus occupying the vampire through the night and precluding other, less socially beneficial activities). Batman is also well off, owning a mansion, the bat cave, and all the great toys at his disposal. However, all evidence suggests that he is not a vampire, just some guy who likes to dress up in tights and pretend to be bat-like.

⁹³ Given their longevity, vampires would also have significant advantages with compounding interest and the tax deferral provided by IRAs and other tax advantaged savings plans, such as whole life insurance. Vampires would presumably be subject to mandatory withdrawals at age 70 and 1/2, *see* I.R.C. §§ 408(b)(3), §401(a)(9), but it is not clear how the amount of withdrawals would be calculated because the traditional actuarial mortality charts would not apply.

Another interesting question would be whether a vampire qualifies as a "life in being" for purposes of the rule against perpetuities. If so the rule would functionally cease to operate in those states that have not already abandoned the rule. While vampires would not need to create trusts to exercise the undead hand, they might want to create self-settled asset protection trusts or trusts to provide for underage or spendthrift offspring in the event they are exposed to sunlight or a well placed wooden stake. If they could find a jurisdiction that does not tax trust income, such as Alaska, all the better. This may explain why the vampires who threatened Bella in the first *Twilight* book spent time in Alaska.

certain tax planning techniques to get around this problem.⁹⁴ Thus, they could potentially get the benefits of both no estate tax and basis reset, which would be a disaster from a government revenue perspective.

Application of the income tax to vampires also has far more significance than it does for zombies. Because they retain all their faculties, vampires can continue to earn income and acquire or dispose of property after they become vampires. Indeed, they are likely to work the night shift, which usually pays more than day jobs, so their income could be significant.

Above, when discussing zombies, I suggested that administrative concerns might warrant excusing zombies from income taxation. The foregoing discussion suggests that a rule excluding *all* undead from the income tax might be overbroad and could have significant consequences for the public fisc. Thus, were Congress to exempt zombies from the income tax for administrative reasons, it is critically important that it take care not to exempt vampires inadvertently. Indeed, this raises the question whether Congress should consider enacting new laws to cover the undead, or perhaps even different laws for different kinds of undead. However, this would require rigorous definitions of zombies, vampires, etc., and could create significant line drawing problems, with individuals arguing they are one or the other to obtain some tax benefit.⁹⁵

Issues related to marriage also arise with vampires. If people who become vampires don't die as part of the conversion process, presumably they will continue to be married, and the anti-abuse rules found in the tax code will apply to them in full. If they are considered to have died, and therefore not be married under state law, a strong argument could be made that the anti-abuse rules should nonetheless apply. Otherwise, the tax planning opportunities might prove too

⁹⁴ For instance, they could give appreciated property to their servants or others, who would agree to leave it to them in their wills. All the servant need do is live the obligatory 1 year to avoid the prohibition on basis reset found in I.R.C. § 1014(e). As vampires don't age, they have the luxury of taking the long view and simply waiting to let nature take its course. Or, if their servants inconveniently live longer than expected, they could no doubt fix that problem as well, so long as they are not caught and barred from inheriting under state law. Gift tax issues may arise, but they are beyond the scope of this article.

⁹⁵ To avoid this problem, the IRS could create a check-the-box regime such as currently exists for partnerships and LLCs, *see Form 8832*, INTERNAL REVENUE SERVICE, *available at* <http://www.irs.gov/pub/irs-pdf/f8832.pdf>, and allow individuals to select whether they would like to be taxed as individuals, zombies, or vampires.

tempting, and people might seek to become vampires to take advantage of them.

One further wrinkle must be considered. The Defense of Marriage Act (DOMA) governs the definition of marriage for federal purposes. It defines marriage as the legal union between “one man and one woman.”⁹⁶ Were someone’s wife to become a vampire, and were state law to deem the couple still married, it is not clear whether the vampire wife would be considered a woman for purposes of DOMA.⁹⁷ If not, even though the couple would be considered married for state law purposes, they would be considered unmarried for federal tax purposes, and the anti-abuse rules would no longer apply.

And, as with real wrinkles, where there is one, there are often more. Even if a vampire wife were considered a woman under DOMA, tax planning opportunities still exist. Some vampires can turn into bats, wolves, or grey mist.⁹⁸ If DOMA is to be taken seriously, a vampire cannot be considered a woman, and therefore married, while in non-human form. Accordingly, someone married to a vampire could simply ask his spouse to transform into a bat before engaging in transactions that would normally be covered by the anti-abuse rules. The vampire would likely need to execute a durable power of attorney to avoid any issues regarding her capacity to act while in non-human form.⁹⁹

DOMA presents risks as well. For instance, if a vampire were killed while in a non-human form, the surviving spouse would likely not be able to take advantage of the estate and gift tax marital deduction.¹⁰⁰ The IRS has yet to issue guidance on the application of

⁹⁶ 1 U.S.C.A. § 7.

⁹⁷ This same concern arises for zombies. I have deferred its consideration until now so that I could address it in conjunction with the issues that arise with shape shifters.

⁹⁸

⁹⁹ This strategy would also be available to werewolves, who change from man or woman to wolf once a month. A brief example might help illustrate how this would work. Assume that Professor Lupin and Tonks survived their encounter with Lord Voldemort and emigrated to the U.S. Further assume that Lupin and Tonks had a 50,000 galleon gain on the sale of a piece of property, on which they normally would have to pay tax. Further assume that Lupin owned another piece of property with a built-in 50,000 galleon loss. If Lupin were to sell the property to a third party, he could claim the loss and offset his gain, zeroing out his income and avoiding any tax. However, if he were to sell the property to Tonks, he would be precluded from taking the loss under § 1041. However, if Lupin were to wait until a full moon to sell the property to Tonks, they would not be considered married for tax purposes, and he would be allowed to deduct the loss, thereby shielding the 50,000 galleon gain from taxation.

¹⁰⁰ I.R.C. § 2010(c).

DOMA to vampires, so tax lawyers are well advised to be cautious when giving advice to their married, undead clients.

Finally, I turn to the question of ghosts and other non-corporeal entities.¹⁰¹ Unlike zombies or vampires, ghosts are considered dead, not undead. The person who became a ghost clearly died for state law purposes. And, although ghosts often remain attached to their property, and indeed haunt it in some cases,¹⁰² they do not retain title to their property. Someone who dies and whose ghost remains behind goes through probate and has no rights to the property he or she owned while alive. There seems to be no reason why federal tax law would deviate from state law and treat ghosts as still alive, thus allowing them to escape the estate tax. Indeed, it is not clear when the estate tax would apply, if not at the person's death.¹⁰³

Nonetheless, ghosts still could theoretically be subject to the income tax. Insofar as they lose title to all their property and do not seem capable of acquiring additional property, they are unlikely to have any unearned income. Most ghosts do not work, so the question of earned income is typically moot. Nonetheless, examples of working ghosts can be found. For instance, Professor Binns at Hogwarts teaches the history of magic.¹⁰⁴ J.K. Rowling does not reveal whether he is paid for his services, but, if he is, he may owe income tax on his earnings. Of course, it seems unlikely that ghosts would be paid in earthly goods or currency, as they have little use for them.¹⁰⁵ More likely, they would receive "phantom" income. Thus, the question would be whether such income would be subject to tax. While some phantom income is included in the tax base,¹⁰⁶ it is not clear whether this type of phantom income would be.¹⁰⁷

¹⁰¹ The following analysis would also apply to spirits, including souls.

¹⁰² See, e.g., BEETLEJUICE (The Geffen Company 1988); *Ghost Hunters* (Alan David Management 2004) (on the SciFi Channel).

¹⁰³ With zombies and vampires, the estate tax could apply when the zombie is dispatched or decays into nothingness or the vampire suffers "true" death.

¹⁰⁴ See J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE (1991).

¹⁰⁵ But see Moira on *American Horror Show*, who continues to work for various families who live in the house in which she died. She is apparently paid so much that at least one family considered firing her. *American Horror Show* (2011) (episode 3, Murder House) (on the FX Channel).

¹⁰⁶ See I.R.C. § 61(12), which includes cancelled debt in income. In some cases such income is excluded. See I.R.C. § 108.

¹⁰⁷ Ghostly gold coins are like the virtual gold one earns in *World of Warcraft*. Despite repeated urging, the IRS has yet to provide guidance on whether this type of income should be included in the tax base. See 1 Nina Olson, National Taxpayer Advocate: 2008 Annual Report to Congress 214 (2008), available at http://www.irs.gov/pub/irs-utl/08_tas_arc_intro_toc_msp.pdf (discussing the lack of guidance by the IRS in this area).

CONCLUSION

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. If Congress is to take seriously its obligation to promote the general welfare and ensure the national defense, it should immediately begin the task of determining how existing laws apply to the undead so that it can provide guidance and thereby be assured of having the resources necessary to combat the crisis. At the very least, Congress should take this opportunity to remedy its utter failure to consider that the dead may rise and to clarify the relationship between state and federal law on this topic.

In light of the difficulties described above, it may make more sense to rethink these laws in their entirety, perhaps creating special tax laws for the undead. Given the wide variety of undead, this approach will raise its own problems, as it seems unlikely that one size will, indeed, fit all. Congress might consider creating different sets of tax laws to apply to zombies and vampires, much as there are different tax laws that apply to corporations and partnerships. However, such new laws would require us to develop rigorous definitions of a zombie or vampire, an admittedly difficult task.

Over the past several years, Congress has found itself locked in a form of partisan rigor mortis. There is no reason to believe things will improve when half of them have been turned into zombies and rigor mortis sets in in earnest. Congress should act now to address this looming crisis, before it is too late.

For a discussion of the taxability of virtual income, see Adam S. Chodorow, *Ability to Pay and the Taxation of Virtual Income*, 75 TENN. L. REV. 695 (2008) (arguing that virtual income is property considered income and should be included in the tax base in most cases); Adam Chodorow, *Tracing Basis Through Virtual Spaces*, 95 CORNELL L. REV. 283 (2010) (attempting to design a basis regime that accounts for the peculiarities of virtual worlds). See also Bryan T. Camp, *The Play's the Thing: A Theory of Taxing Virtual Worlds*, 59 HASTINGS L.J. 1, 2, 45 (2007) (arguing that virtual income should not be taxed because it is a form of imputed income); Leandra Lederman, "Stranger than Fiction": *Taxing Virtual Worlds*, 82 N.Y.U. L. REV. 1620, 1625 (2007) (arguing that virtual income earned in game worlds should not be taxed, but that sales-but not barter-in worlds such as Second Life should be); Theodore P. Seto, *When Is a Game Only a Game?: The Taxation of Virtual Worlds*, 77 U. CIN. L. REV. 1027 (2009) (arguing that taxation of virtual income should depend upon whether virtual goods are either convertible or redeemable). Also see also Adam Chodorow, *Tax in the Final Frontier: A Theory of Interstellar Tax*, 124 TAX NOTES 1033 (2009) (exploring the taxability of income earned in interstellar flight travelling at relativistic speeds).