Seizing Some Tax Relief: Civil Forfeiture as a Casualty Loss Deduction

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Introduction

In 2015, Mr. Gerardo Serrano, an American citizen and a former Kentucky statehouse candidate, was driving his brand-new Ford F-250 truck on a trip to visit family in Mexico.[1] When Serrano reached the border, Customs and Border Protection agents stopped him, asked him why he had taken some pictures near the border, and demanded that he surrender his cell phone.[2] Serrano told the agents that he was just taking pictures of a bridge to show to his family, and said that the agents needed a warrant to search his phone.[3] Instead, the agents searched Serrano's truck.[4] In the truck, the agents found five bullets in a magazine clip that Serrano, a concealed carry permit holder in Kentucky, had obtained legally but had forgotten to take out of his truck before leaving the state.[5]

The agents then seized Serrano's truck, claiming that it was subject to forfeiture because it had been used "to transport munitions of war."[6] The agents detained Serrano, but they did not arrest him.[7] Serrano was never charged with, nor convicted of, any crime related to

* Antonin Scalia Law School, J.D. expected 2019. While I have enjoyed crafting an argument using the Internal Revenue Code to help innocent property owners who have lost significant amounts of property under civil forfeiture, I do sincerely hope that the arguments presented herein become unnecessary in the near future. As this Comment goes to press, the Supreme Court has on its docket a case that will present the Court—for the first time in more than 20 years—with an opportunity to render the practice of civil forfeiture unconstitutional under the Eighth Amendment. Let us hope that innocent property owners will no longer require relief from civil forfeiture, as it will finally have met its end.

1 Doug McKelway, *Has Asset Forfeiture Gone Too Far? Truck Seizure Sparks Outrage, a Call for Change*, Fox News: Law Blog (Sept. 20, 2017), http://www.foxnews.com/politics/2017/09/20/has-asset-forfeiture-gone-too-far-truck-seizure-case-sparks-outrage-call-for-change.html.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 McKelway, *supra* note 1.

the seizure of his truck.[8] Serrano continued to make the monthly payments on the truck after the agents seized it, and continued to pay for the truck's insurance and other fees.[9] Represented by attorneys from the Institute for Justice, a civil liberties law firm, Serrano decided to challenge the seizure in court.[10] In his suit, Serrano argued that the seizure was unlawful and that he was entitled to the immediate return of his truck.[11] He also requested compensatory damages and an injunction to prevent Customs and Border Protection from making similar property seizures in the future.[12] Two years after seizing his truck, Customs and Border Protection still had not granted Serrano a hearing.[13]

Then, on October 13, 2017, without explanation, Customs and Border Protection officials returned Serrano's truck to him, complete with a new set of tires, a fresh washing, and a new battery.[14] According to Serrano's attorneys, agencies sometimes return forfeited property this way when they do not want to have to defend their actions in court.[15] Serrano, however, will not abandon his suit so easily; he is still seeking compensatory damages for the payments he made while Customs and Border Protection controlled his truck.[16] Additionally, the Institute for Justice is seeking a class action certification to represent other individuals who had their property taken from them under similar circumstances.[17] Serrano hopes that his experience will help end the practice of civil forfeiture, the legal framework that allowed the Customs and Border Protection agents to seize Serrano's truck without charging him with a crime.[18]

Civil forfeiture laws in the United States allow federal, state, and local law enforcement officials to seize property without necessarily

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8 *Id.*

9 *Id.*

10 Christopher Ingraham, *Customs Took His Truck Without Charging Him with a Crime. Two Years Later, He's Finally Getting It Back*, THE WASHINGTON POST: WONKBLOG (October 20, 2017) https://www.washingtonpost.com/news/wonk/wp/2017/10/20/customs-took-his-truck-without-charging-him-with-a-crime-two-years-later-hes-finally-getting-it-back/?utm_term=.e171dfb33490.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 Ingraham, *supra* note 10.

17 *Id.*

18 McKelway, *supra* note 1.

charging the property owner with a crime.[19] In civil forfeiture proceedings, the property itself is considered to be guilty and is not afforded the same protections that are given to a person who is suspected of committing a crime.[20] A program called Equitable Sharing allows the federal government to give a percentage of the proceeds of sold seized property back to the state or local law enforcement officials who originally seized it, creating an incentive for state and local police officers to seize property for profit and enabling them to circumvent state-level restrictions on civil forfeitures.[21]

This profit incentive has produced many stories of abuse.[22] In an October 2014 episode of *Last Week Tonight*, comedian-journalist John Oliver incredulously described some of these abuses, to include instances of state police officers stopping motorists, asking if they had cash in their cars, and then seizing the cash because it was purportedly intended for purchasing drugs.[23] Oliver further reported that one police department used the proceeds from sold seized property to purchase a margarita machine for their offices, creating a "literal slush fund."[24]

A recent Washington Post investigation found that, since 2001, police officers have made cash seizures worth almost $2.5 billion from motorists, and others, without search warrants or indictments.[25] In its investigation, the Post found that state and local police officers often pull over drivers for minor traffic infractions, pressure them to agree to warrantless searches, and then seize large amounts of cash without any evidence that the money was connected to a crime.[26]

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19 *See e.g.* 18 U.S.C.A. § 981 (West 2016); VA. CODE. ANN. § 19.2-386.2 (2016).

20 *See* Nathaniel Beal, *Suing Your Stuff: An Introduction to Civil Asset Forfeiture in Texas*, 29 APP. ADVOC. 218, 220 (2017).

21 *See* Adam Crepelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems it Creates*, 7 WAKE FOREST J. L. & POL'Y 315, 325 (2017). *See also* Michael Van den Berg, *Proposing a Transactional Approach to Civil Forfeiture Reform*, 163 U. PA. L. REV. 867, 883 (2015).

22 John Oliver, LAST WEEK TONIGHT, *Civil Forfeiture* (2014), https://www.youtube.com/watch?v=3kEpZWGgJks. *See also* Robert O'Harrow Jr., Sari Horwitz & Steven Rich, *Holder limits seized-asset sharing process that split billions with local, state police*, THE WASHINGTON POST: INVESTIGATIONS (Jan. 16, 2015) https://www.washingtonpost.com/investigations/holder-ends-seized-asset-sharing-process-that-split-billions-with-local-state-police/2015/01/16/0e7ca058-99d4-11e4-bcfb-059ec7a93ddc_story.html?utm_term=.aa935b4775d0.

23 Oliver, *supra* note 22.

24 *Id.*

25 O'Harrow Jr. et al., *supra* note 22.

26 *Id.*

Unfortunately, stories like these and Mr. Serrano's are all too common. In most cases, property owners have no realistic recourse to get their property back after a seizure.[27] Most seized property is simply not valuable enough for a property owner to expend her time and money trying to recover it.[28] In cases where the value of the seized property is less than what it would cost to retrieve it—to include paying for an attorney and related court fees—any rational property owner would choose simply to cut her losses. Instead of getting their day in court, most property owners are trapped by a system that makes it irrational for them to even consider challenging the seizure of their property.

Part I of this Comment will provide a brief history of the practice of civil forfeiture in the United States, highlighting the broadened applications of civil forfeiture over time. Part I will also provide an overview of the current civil forfeiture framework, at the federal and state levels, and will summarize the various constitutional challenges that civil forfeiture has been able to withstand.[29] Given that civil forfeiture is currently considered a legitimate law enforcement tool, Part II will examine the potential for victims of civil forfeiture to seek financial relief by claiming a particular deduction on their federal income taxes. With no other relief from civil forfeiture available, the ability to claim a tax deduction would at least provide innocent property owners, who have lost a significant amount of property relative to their income, with some kind of relief.

This Comment will argue that property owners who are not convicted of a crime before their assets are seized should be permitted to claim a casualty loss deduction on their federal income taxes for the value of the property taken from them via civil forfeiture during that

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[27] *See* Crepelle, *supra* note 21, at 328-31 (describing why "seizing property is easy" but "reclaiming it is tough").

[28] *Id.* at 330-31 (stating that attorney's fees to recover forfeited property can easily exceed $1,000 and that the median value of forfeited property is $500).

[29] On June 18, 2018, the Supreme Court granted *certiorari* in a civil forfeiture case, *Timbs v. Indiana*, and will hear arguments during the October term. *See* Timbs v. Indiana, 2018 U.S. LEXIS 3725 (2018); State v. Timbs, 84 N.E.3d 1179 (Ind. 2017). *See also* Nick Sibilla, *Supreme Court Will Decide If Civil Forfeiture Is Unconstitutional, Violates the Eighth Amendment*, FORBES.COM (June 19, 2018, 9:30AM), https://www.forbes.com/sites/nicksibilla/2018/06/19/supreme-court-will-decide-if-civil-forfeiture-is-unconstitutional-violates-the-eighth-amendment/#533746577165. Although the Supreme Court could finally limit the practice of civil forfeiture in its ruling in *Timbs*, that ruling may not apply retroactively, and may not extend to cases in which the property owner was not convicted of a crime prior to having her property seized.

taxable year. If innocent property owners could take a tax deduction for their seized property, the offset in their tax liability would at least somewhat mitigate the financial burden imposed on them by the seizure. Being able to claim a casualty loss deduction, for example, would have cushioned the blow for property owners like Mr. Serrano.

Mr. Serrano falls into the worst possible category of civil forfeiture victims: people who have lost an amount that causes great financial damage, but that is not quite large enough to prompt them to fight the seizure in court, absent pro bono representation.[30] These property owners suffer the most financial damage, but find themselves trapped by the staggering costs of attempting to regain their property.[31] A casualty loss deduction would be most beneficial to property owners in this category, those who suffer the most damage but still have no realistic recourse via the courts.[32] Although this solution would be limited by the various requirements to qualify for a casualty loss deduction, it would still help property owners who have lost a substantial amount of property relative to their annual income.[33]

Effective January 1, 2018, the casualty loss deduction will only be available to taxpayers in situations where the President has declared the qualifying event a "disaster."[34] Property owners who lost property in a civil forfeiture during the 2017 taxable year (and before), however, would still be able to file amended returns to claim the deduction.[35]

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30 *See e.g.* McKelway, *supra* note 1.

31 *Id.*

32 Allowing a tax deduction for property seized through civil forfeiture would also diminish the profit incentive for police departments to pad their budgets with the proceeds from seized property. If property owners could claim a casualty loss deduction for seized property, seizures would result in a corresponding decrease in federal income tax revenue. In other words, seizures that could benefit state and local police department budgets would simultaneously harm the federal treasury.

33 *See* 26 U.S.C.A. § 165(h) (2017) (stating casualty loss deductions and requirements).

34 *Id.* (summarizing that casualty losses, under previous law, were eligible as itemized deductions to the extent that they exceeded $100 plus 10% of the taxpayer's adjusted gross income, but that the new law allows the deduction only for disasters in which "a presidential disaster area declaration was made").

35 The 1040X, the amended tax return form, can be filed within three years of the date that a taxpayer originally filed. *See Instructions for Form 1040X*, DEPARTMENT OF TREASURY INTERNAL REVENUE SERVICE, Mar. 14, 2018, at 3, https://www.irs.gov/pub/irs-pdf/i1040x.pdf. Furthermore, given the resilience of civil forfeiture over time, the casualty loss deduction may very well reappear, without the additional limitations, long before the practice of civil forfeiture meets its end.

I. BACKGROUND: THE PROBLEMS WITH CIVIL FORFEITURE

A. *A Brief History of Civil Forfeiture in the United States*

Civil forfeiture is a legal action filed directly against property, and relies upon the concept that property itself can be considered guilty of a crime.[36] Because civil forfeiture actions proceed against the guilty property, the property owner is not afforded the same constitutional protections that she would be given if she had been charged with the crime.[37] The concept that property can be guilty of a crime is rooted in Biblical texts.[38] The idea eventually evolved in Medieval English common law into a form of action called deodand.[39]

In deodand, the owner of an object that caused the death of one of the King's subjects had to surrender that object, or the value of the object, to the Crown.[40] Although deodand was eventually eliminated as an action in the English common law in the early nineteenth century, the practice helped form the basis for other actions, such as writs of assistance,[41] which British customs agents employed against the American colonies.[42] Colonial grievances with such practices helped

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36 Van den Berg, *supra* note 21, at 869.

37 *See id*. *See e.g.* Austin v. United States, 509 U.S. 602, 606 (1993) ("[W]hen the [g]overnment is proceeding against property *in rem*, the guilt or innocence of the property's owner is constitutionally irrelevant.") (internal quotations omitted) (citing United States v. One Parcel of Property Located at 508 Depot Street, 964 F.2d 814, 817 (8th Cir. 1992)).

38 *See* Van den Berg, *supra* note 21, at 869. *See also* Susan R. Klein, *Civil in Rem Forfeiture and Double Jeopardy*, 82 IOWA L. REV. 183, 184-85 (1996) (*Exodus* 21:28 (King James)) ("If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten"—to demonstrate that the basic idea of forfeiture has its origins in the Bible).

39 Van den Berg, *supra* note 21, at 873. *See also* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 21-27 (Project Gutenberg 2000) (1881) (tracing the development of the concept in the English common law).

40 *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S 663, 680-81 (1974) (stating that "[a]t common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand," and that "the value of the instrument was forfeited to the King, in the belief that the King would provide the money for Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses").

41 Writs of assistance, used during the American colonial period, were general search warrants that authorized British government officials to search any house for smuggled goods without first specifying any particular cause for or object of the search, in order to assist the British government in enforcing trade and navigation laws. *See Writ of Assistance*, ENCYCLOPAEDIA BRITANNICA ONLINE, https://www.britannica.com/topic/writ-of-assistance (last visited Aug. 15, 2018).

42 *See* Van den Berg, *supra* note 21, at 873-74.

galvanize the American Revolution, and resulted in America's Founders codifying express protections against such abuses in the United States Constitution.[43] For example, the Fourth Amendment ensures "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."[44] Article III of the Constitution also bans the forfeiture of estates as punishment for treason.[45]

Although "deodands did not become part of the common law tradition" of the United States,[46] statutory forfeitures became a legitimate part of the American legal landscape during the nation's first two hundred years.[47] Many of the early forfeiture statutes in the United States targeted smugglers, allowing customs officials to seize smuggled property and ships used in smuggling operations.[48] Supreme Court cases during this period, such as *The Palmyra*, upheld these statutory forfeitures.[49] During the Civil War, civil forfeiture was used as a tool to seize property from Confederate sympathizers who aided in the rebellion.[50] Then, during Prohibition, forfeiture statutes were again enforced to seize the illicit profits and property of liquor smug-

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43 *Id. See also* Crepelle, *supra* note 21, at 321.

44 U.S. CONST. amend. IV.

45 *See* U.S. CONST. art III, § 3, cl. 2; Austin v. United States, 509 U.S. 602, 613 (1993) (stating that "[t]he Constitution forbids forfeiture of estate as a punishment for treason except during the Life of the Person attainted," and that "the First Congress also abolished forfeiture of estate as a punishment for felons") (internal quotations omitted).

46 Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974).

47 Van den Berg, *supra* note 21, at 874.

48 *See id.* at 874-75.

49 In The Palmyra, the Supreme Court considered a case in which a ship was seized under suspicion of its involvement in piracy. *See* The Palmyra, 25 U.S. 1 (1827). The Court stated, "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing . . . The same principle applies to proceedings *in rem*, on seizures in the Admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam* . . . In the judgment of this Court, no personal conviction of the offender is necessary to enforce a forfeiture *in rem* in cases of this nature." *Id.* at 14-15. *See also* Bennis v. Michigan, 516 U.S. 442, 446-47 (1996) (stating that "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use") (citing The Palmyra, 25 U.S. 1 (1827) as the Court's "earliest opinion to this effect").

50 *See* Crepelle, *supra* note 21, at 323; Van den Berg, *supra* note 21, at 875; Daniel W. Hamilton, *The First and Second Confiscation Acts (1861, 1862)*, ENCYCLOPEDIA.COM (2004), http://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/first-and-second-confiscation-acts-1861-1862.

glers, including seizures of automobiles used to transport liquor.[51] The use of civil forfeiture by law enforcement expanded dramatically again in the 1980s, as a tool in the War on Drugs.[52] Civil forfeiture statutes have been used—and expanded—periodically throughout United States history.[53]

B. *Federal Civil Forfeiture Laws*

Currently, the primary federal civil forfeiture statute is the Civil Asset Forfeiture Reform Act (CAFRA), which Congress enacted in 2000.[54] Although CAFRA is the "dominant" federal framework for civil forfeiture, it also interacts with other substantive forfeiture statutes, such as customs laws.[55] CAFRA (and other federal statutes) allows law enforcement officers to keep a certain percentage of the proceeds from sold seized property.[56] Additionally, the federal Equitable Sharing program allows federal law enforcement agents to adopt property that state and local law enforcement officials seize.[57] This allows state and local law enforcement officials to circumvent more prohibitive state civil forfeiture laws—in favor of less stringent federal standards—whenever the action in question is also a violation of federal law.[58]

The amount of money and property that federal, state, and local law enforcement officers have seized via civil forfeiture has skyrocketed over time.[59] In 1986, the Department of Justice's (DOJ) Asset Forfeiture Fund collected $93.7 million from federal forfeitures.[60] By 2014, annual deposits into the Fund had reached $4.5 billion, representing an astounding 4,667% increase.[61] From 2001 to 2014, forfei-

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51 *See* Van den Berg, *supra* note 21, at 875; Brent Skorup, *Ensuring Eighth Amendment Protection from Excessive Fines in Civil Asset Forfeiture Cases*, 22 GEO. MASON U. C.R. L.J. 427, 443 (2012).

52 Skorup, *supra* note 51, at 433.

53 Van den Berg, *supra* note 21, at 869.

54 Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000).

55 Van den Berg, *supra* note 21, at 869.

56 *See id.*

57 *See* U.S. DEP'T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR ST. AND LOC. LAW ENF'T AGENCIES 3, 6 (2009).

58 *See* Van den Berg, *supra* note 21, at 869.

59 *See* DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 8 (2ed. 2015).

60 *Id.*

61 *Id.*

ture funds at the DOJ and the Treasury Department, combined, collected nearly $29 billion—for a combined annual revenue increase of 1,000%.[62] Similarly shocking trends occurred at the state level.[63] From 2002 to 2013, annual forfeiture revenues collected across fourteen states more than doubled.[64]

Another troubling trend is that the vast majority of forfeitures are being accomplished using civil forfeiture laws instead of criminal forfeiture laws, primarily because seizing property through civil forfeiture proceedings is much easier.[65] From 1997 to 2013, only 13% of the DOJ's forfeitures were criminal forfeitures.[66] A shocking 87% were civil forfeitures.[67] Also concerning is the number of civil forfeitures that were never challenged in court.[68] Eighty-eight percent of the DOJ's civil forfeitures during that time period were administrative, meaning that the property was automatically seized because the property owner failed to challenge the seizure in court for some reason.[69] A property owner's reasons for failing to challenge a seizure could include an inability to pay for an attorney or simply missing a deadline.[70] In an administrative forfeiture, the seized property is automatically presumed to be guilty, without a judge first determining whether it should have been permanently taken from its owner.[71]

From 2000 to 2013, the annual DOJ Equitable Sharing remissions to state and local law enforcement more than tripled, growing from $198 million to $643 million.[72] During that period, the DOJ paid state and local law enforcement agencies a total of $4.7 billion in forfeiture proceeds.[73] The lower burden of proof required in civil forfeiture proceedings, and the ability to keep the proceeds of sold seized property, creates a strong incentive for law enforcement officials, at all levels, to seize property using civil forfeiture to boost their budgets.[74]

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62 *Id*.
63 *See id.* at 11.
64 *See id.*
65 CARPENTER ET AL., *supra* note 59 at 5.
66 *Id.*
67 *Id.*
68 *See id.*
69 *Id*.
70 *Id.* at 12.
71 CARPENTER ET AL., *supra* note 59 at 6.
72 *Id.*
73 *Id.*
74 *See* Van den Berg, *supra* note 21, at 885-86.

The Trump Administration also announced rollbacks to Obama-era restrictions on the federal government's use of adoptive forfeitures.[75] In 2015, Attorney General Eric H. Holder, Jr., barred local and state police officers from using federal laws to seize cash, cars, and other property—with limited exceptions for public safety—without warrants or criminal charges.[76] Holder's guidance effectively prohibited federal agency adoption of state and local seizures, and virtually eliminated all cash and vehicle seizures made by local and state police officers under the Equitable Sharing program.[77] In contrast, speaking before a group of law enforcement officials on July 19, 2017, Attorney General Jeff Sessions announced new DOJ guidance on civil forfeitures—a tool that, he said, "helps law enforcement defund organized crime, take back ill-gotten gains, and prevent new crimes from being committed."[78]

In his defense of civil forfeiture, Sessions further stated that civil forfeiture "takes the material support of the criminals and instead makes it the material support of law enforcement, funding priorities like new vehicles, bulletproof vests, opioid overdose reversal kits, and better training."[79] Sessions conveniently neglected to mention the funding of margarita machines. Although Sessions stated that precautions should be taken to protect "law-abiding people whose property is used without their knowledge or without their consent," he also insisted that "in the vast majority of cases" innocent property owners are not an "issue" because law enforcement officers do "an incredible job."[80] As evidence of law enforcement's successes, Sessions stated that four out of every five administrative civil forfeitures, during the past decade, were never challenged in court.[81]

Although Sessions's guidance provides some protections for property owners, these protections are minimal and could easily be circumvented.[82] Under Sessions's guidance, the federal government would not adopt property unless the state or local agency involved provided information "demonstrating that the seizure was justified by

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75 *See* O'Harrow Jr. et al., *supra* note 22; Ingraham, *supra* note 10.

76 *See* O'Harrow Jr. et al., *supra* note 22.

77 *See id.*

78 Ingraham, *supra* note 10.

79 *Id*.

80 *Id.*

81 *See id.*

82 *See id.*

probable cause."[83] The DOJ plans to implement this requirement through a "new adoption form" that state and local law enforcement officials would have to complete before the federal government could adopt the property.[84] This new paperwork hurdle would include the "necessary information" to allow the DOJ to determine whether adoption is "proper."[85]

Additional protections include a requirement that law enforcement agencies participating in the Equitable Sharing program go through "enhanced training" on forfeiture laws.[86] Following the new guidance, the DOJ would only adopt seizures of cash between $5,000 and $10,000 if there was "some level of criminality" involved in the seizure, or with the consent of the U.S. Attorney's office.[87] Finally, the guidance offers "expedited review" of cases, which would require state and local law enforcement agencies to request federal adoption of property within fifteen calendar days after a seizure, and would require the adopting federal agency to notify the parties within forty-five days.[88]

Attorney General Sessions's reinstatement of adoptive forfeitures prompted a bipartisan reaction in the House of Representatives.[89] Thus far, four amendments have been submitted for consideration to the House Rules Committee, each proposing to defund Sessions's adoptive forfeiture directive.[90] Representatives Justin Amash (R-Michigan) and Warren Davidson (R-Ohio) submitted separate amendments that would prohibit the DOJ from using funds for adoptive seizures.[91] Two other bipartisan amendments submitted—the first by Representatives Jamie Raskin (D-Maryland) and Jim Sensenbrenner (R-Wisconsin), and the second by Representatives Tim Walberg (R-Michigan) and Steve Cohen (D-Tennessee)—would

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83 *Id.*

84 Ingraham, *supra* note 10.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *See* Jason Pye, *Congress is Finally Working to Defund Civil Asset Forfeiture*, THE HILL, Sept. 2, 2017 (7:00AM), http://thehill.com/blogs/pundits-blog/civil-rights/348890-congress-is-finally-working-to-defund-civil-asset-forfeiture.

90 *Id.*; *see also* H.R. REP. NO. 115-297 at 126, 129-30 (2018).

91 *See* Ingraham, *supra* note 10. *See also* H.R. REP. NO. 115-297 at 126 (2018).

also prevent any funding from being used to implement Sessions's directive.[92]

Additionally, several civil forfeiture reform bills have been submitted for consideration in the House and the Senate.[93] Representative Walberg and Senator Rand Paul (R-Kentucky) submitted the Fifth Amendment Integrity Restoration (FAIR) Act, and Representative Sensenbrenner submitted the Deterring Undue Enforcement by Protecting Rights of Citizens from Excessive Searches and Seizures (DUE PROCESS) Act.[94] These pieces of legislation would increase the burden of proof for civil forfeitures at the federal level to a clear and convincing evidence standard and would provide more protections for property owners who contest seizures in federal court.[95] Both bills have yet to make it out of committee, and there is always the possibility that these reform bills—like others in the past—will never make it to full consideration in the House or the Senate.[96]

Although there have been several proposed amendments, and some proposed bills, aimed at limiting civil forfeiture, reforms at the federal level seem unlikely for two reasons. First, the law enforcement community has a powerful lobby.[97] Second, police budgets, at all levels and all around the country, have now come to depend on the funds that civil forfeiture generates.[98] The Trump Administration has also made many statements in support of civil forfeiture, and in support of police departments more generally.[99] During a February 2017 meeting with law enforcement officials from across the country, Presi-

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92 *See* Ingraham, *supra* note 10. *See also* H.R. REP. NO. 115-297 at 129-30 (2018).

93 Pye, *supra* note 89.

94 *See* Fifth Amendment Integrity Restoration Act of 2017, S. 642, 115th Cong. (2017); Deterring Undue Enforcement by Protecting Rights of Citizens from Excessive Searches and Seizures Act of 2017, H.R. 1795, 115th Cong. (2017).

95 Pye, *supra* note 89.

96 *See id.*

97 *See* Van den Berg, *supra* note 21, at 912 (summarizing several failed attempts at civil forfeiture reform and concluding that many such reform efforts collapse, in part, because of law enforcement lobbying groups).

98 *See* Sarah Stillman, *Taken*, THE NEW YORKER (Aug. 12 & 19, 2013), https://www.newyorker.com/magazine/2013/08/12/taken (describing an increasing police budgetary dependence on civil forfeiture proceeds).

99 *See* Ashley Dejean, *The Trump Administration Just Made it Easier for Law Enforcement to Take Your Property*, MOTHER JONES (Jul. 19, 2017), https://www.motherjones.com/politics/2017/07/the-trump-administration-just-made-it-easier-for-law-enforcement-to-take-your-property/; Eric Reed, *Trump Just Resurrected the Ugly Practice Known as Civil Forfeiture for No Reason*, THESTREET (Jul. 24, 2017), https://www.thestreet.com/story/14237541/1/civil-forfeiture-trump-resurrects-an-ugly-practice-for-no-reason.html.

dent Trump even joked about destroying the career of a Texas state senator who supported requiring Texas law enforcement officers to obtain a criminal conviction before seizing property.[100]

C. *State Civil Forfeiture Reforms*

Federal civil forfeiture laws also interact with forfeiture laws at the state level. Since 2014, twenty-four states have enacted some kind of reform of their civil forfeiture statutes.[101] These state reforms have ranged from completely eliminating civil forfeiture within the state to removing the profit incentive of seizures, by requiring proceeds received through the Equitable Sharing program to go directly into the state's general budget, thus preventing police departments from automatically benefiting.[102] Additional state reforms include raising the burden of proof for the initial seizure of property and allowing "innocent owner" defenses for people whose property is used to commit crimes without their prior knowledge or consent.[103]

Currently, only three states—North Carolina, New Mexico, and Nebraska—have abolished civil forfeiture entirely.[104] Fourteen states require a criminal conviction for most or all forfeiture cases, and seven states and the District of Columbia have passed anti-circumvention laws to try to close the Equitable Sharing "loophole."[105] Although several states have enacted reforms, these reforms have not gone far enough to protect innocent property owners from arbitrary government seizures.[106] According to the Institute for Justice's 2015 rankings of state civil forfeiture laws, many states still warrant failing grades for their protection of property owners in civil forfeiture cases.[107]

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100 *See* Christopher Ingraham, *Trump Jokes with Sheriffs About Destroying a Texas Legislator's Career Over Asset Forfeiture,* THE WASHINGTON POST: WONKBLOG (Feb. 7, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/02/07/trump-jokes-with-sheriffs-about-destroying-a-texas-legislators-career-over-asset-forfeiture/?utm_term=.aa8b0aadca8a (quoting President Trump as saying, "Who is the state senator?" "Do you want to give his name?" "We'll destroy his career.").

101 *Civil Forfeiture Reforms on the State Level*, INSTITUTE FOR JUSTICE, http://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/ (last visited Jan. 3, 2017).

102 *See id.*

103 *See id*.

104 *Id.*

105 *Id.*

106 *Id.*

107 *See* CARPENTER ET AL., *supra* note 59, at 6.

D. *Resilience to Constitutional Challenges*

Civil forfeiture has also withstood several constitutional challenges. The seminal Supreme Court cases on civil forfeiture include *Austin v. United States*[108] (challenging a civil forfeiture under the Eighth Amendment's Excessive Fines Clause), *Bennis v. Michigan*[109] (challenging a civil forfeiture under the Fifth Amendment's Takings Clause and the Fourteenth Amendment's Due Process Clause), and *United States v. Ursery*[110] (challenging a civil forfeiture under the Fifth Amendment's Double Jeopardy Clause). As a result of these cases—in which the Supreme Court placed very few and ill-defined limitations on the practice of civil forfeiture—civil forfeiture is still used as a law enforcement tool today.[111]

1. *Austin v. United States*[112]

The first of the seminal Supreme Court cases on civil forfeiture was *Austin v. United States*.[113] In *Austin*, the Supreme Court considered whether the Eighth Amendment's Excessive Fines Clause applied to civil forfeitures of property following a criminal conviction.[114] On August 2, 1990, petitioner Richard Lyle Austin was indicted on four counts of violating drug laws in South Dakota.[115] After Austin pleaded guilty to one count of possessing cocaine with the intent to distribute, a South Dakota state court sentenced him to serve seven years in prison.[116] On September 7, 1990, the United States also filed an *in rem*, or civil forfeiture, action seeking forfeiture of Austin's mobile home and auto body shop, primarily because Austin had agreed to sell a small amount of cocaine while in his shop, and because he retrieved the cocaine from his mobile home before selling it.[117] Austin argued that the property forfeiture violated the Excessive Fines Clause because he had already been sentenced to prison, and

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108 *See* Austin v. United States, 509 U.S. 602 (1993).

109 *See* Bennis v. Michigan, 516 U.S. 442 (1996).

110 *See* United States v. Ursery, 518 U.S. 267 (1996).

111 *See* United States v. Ursery, 518 U.S. 267 (1996); Bennis v. Michigan, 516 U.S. 442 (1996); Austin v. United States, 509 U.S. 602 (1993).

112 *Austin*, 509 U.S. 602 (1993).

113 *See id.*

114 *Id.* at 604.

115 *Id.*

116 *Id.*

117 Austin v. United States, 509 U.S. 602, 604-05 (1993).

because the amount of the forfeiture was disproportionate to the crime he committed.[118] Both the United States District Court for the District of South Dakota and the United States Court of Appeals for the Eighth Circuit sided with the government.[119]

In deciding whether the Eighth Amendment applies to civil forfeitures, the Supreme Court noted that the Excessive Fines Clause was intended to limit "the government's power to extract payments, whether in case or in kind, as *punishment* for some offense."[120] The Court concluded that forfeiture "generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment."[121] The Court also noted that "when the [g]overnment is proceeding against property *in rem*, the guilt or innocence of the property's owner is constitutionally irrelevant."[122] The Court further noted that statutory forfeiture has been justified based on two theories: "that the property itself is 'guilty' of the offense, and that the owner may be accountable for the wrongs of others to whom he entrusts his property."[123]

The Court reasoned that, at the root of both theories, they rest "on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for the negligence."[124] The Court left some room for an innocent owner defense—allowing one to get off the hook by demonstrating that he did not know his property would be misused—noting that the Court had never applied the "guilty-property fiction" to justify a forfeiture when the owner "had done all that reasonably could be expected to prevent the unlawful use of his property."[125]

In *Austin*, the Supreme Court determined that civil forfeitures constituted a punishment, at least in part, and that the Eighth Amendment's Excessive Fines Clause applied to civil forfeitures because of their retributive nature.[126] Although the Court ruled that the Excessive Fines Clause applied to forfeiture actions, it declined to articulate

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118 *See id.* at 605.

119 *See id.*

120 *Id.* at 609-10 (internal quotations omitted).

121 *Id.* at 618.

122 *Id.* at 606 (internal quotations omitted).

123 Austin v. United States, 509 U.S. 602, 615 (1993).

124 *Id.*

125 *Id.* at 616.

126 *See id.* at 610.

the test that would apply, leaving that task to the lower courts.[127] The Court also reaffirmed that innocent owners would not necessarily be able to use their personal innocence as a defense to the forfeiture, but did leave open the possibility that a *completely* innocent owner might have a defense.[128] Again, the Court did not provide a test for when owners would meet the standard of doing all that reasonably could have been done to prevent their property from being used unlawfully.[129]

2. *Bennis v. Michigan*[130]

The next Supreme Court case that contributed to civil forfeiture jurisprudence was *Bennis v. Michigan*.[131] In *Bennis*, the Court effectively closed the narrow opening it had left for an innocent owner defense in *Austin*.[132] In *Bennis*, the Court considered whether the forfeiture of a woman's car violated her Due Process rights and constituted an unlawful taking under the Fifth Amendment.[133] The petitioner in the case, Tina Bennis, jointly owned a car with her husband.[134] Unbeknownst to Mrs. Bennis, Mr. Bennis used the car while engaging in acts with a prostitute.[135] The Wayne County Circuit Court ordered the car to be forfeited as a public nuisance without giving Mrs. Bennis an offset for her property interest in the car and without considering her ignorance of her husband's illicit use of it.[136] The Supreme Court sided with the government, holding that the circuit court "did not offend the Due Process Clause of the Fourteenth Amendment or the Takings Clause of the Fifth Amendment."[137]

In rejecting Mrs. Bennis's innocent owner defense, the Supreme Court stated that "a long and unbroken line of cases holds that an

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127 *See id.* at 622.

128 *See id.* at 616-17 (noting that "innocent" owners are generally still negligent because they allowed their property to be used for unlawful acts, but some owners cannot reasonably be found negligent.)

129 Austin v. United States, 509 U.S. 602, 616-17 (1993).

130 *See* Bennis v. Michigan, 516 U.S. 442 (1996).

131 *See id.*

132 *Compare* Bennis v. Michigan, 516 U.S. 442, 453 (1996) *with* Austin v. United States, 509 U.S. 602 (1993).

133 *See Bennis*, 516 U.S. 442 (1996).

134 *Id.* at 443.

135 *See id.* at 443-44.

136 *Id.* at 443.

137 *Id.*

owner's interest in property may be forfeited by reason of the use to which the property is put, even though the owner did not know that it was to be put to such use."[138] The Court further stated that prior language hinting at a defense for an innocent owner, when that owner did "all that reasonably could be expected" to prevent misuse of the property, was simply *obiter dictum*.[139] The result of *Bennis* was the disallowance of an innocent owner defense to forfeiture, unless the governing forfeiture statute expressly provided it.[140]

3. *United States v. Ursery*[141]

United States v. Ursery rounded out the Supreme Court's consideration of Fifth Amendment challenges to civil forfeiture, and examined whether a civil forfeiture could violate that Amendment's Double Jeopardy Clause.[142] In *Ursery,* the petitioner, who was convicted of growing marijuana on his property, argued that the government's subsequent seizure of his property violated the Double Jeopardy Clause because he had been punished twice for the same offense.[143] The Court ruled against him, holding that an *in rem* forfeiture did not violate the Double Jeopardy Clause because an *in rem* forfeiture would not constitute a punishment under the Fifth Amendment.[144] Thus, the Court has considered civil forfeiture to be a punishment under an Excessive Fines Clause analysis and under a Takings Clause analysis, but not under a Double Jeopardy Clause analysis.[145]

4. *Leonard v. Texas*[146]

In *Austin*, *Bennis*, and *Ursery*, at least one of the property owners had been convicted of a crime before the government pursued an *in*

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138 Bennis v. Michigan, 516 U.S. 442, 446 (1996).

139 *Bennis*, 516 U.S. at 449-50.

140 *See id.* at 453.

141 *See* United States v. Ursery, 518 U.S. 267 (1996).

142 *See generally id.*

143 *See id.* at 271.

144 *See id.* at 292 (holding that "in rem civil forfeitures are neither "punishment" nor criminal for purposes of the Double Jeopardy Clause").

145 *Compare* Ursery v. United States, 518 U.S. 267 (1996) *with* Austin v. United States, 509 U.S. 602 (1993) *and* Bennis v. Michigan, 516 U.S. 442 (1996).

146 *See* Leonard v. Texas, 137 S. Ct. 847 (2017).

rem forfeiture against their property.[147] *Leonard v. Texas*, however, could have been the test case that finally presented the Supreme Court with a situation in which the property owner was *not* convicted of a crime before the property was seized—a case in which the abuses of civil forfeiture were set in clearer relief. However, the Court denied *certiorari* in *Leonard*, primarily because the petitioner tried to raise Due Process issues that had not been raised at the state court level.[148]

Leonard v. Texas began when the petitioner, Lisa Leonard, tried to overturn Texas's seizure of approximately $200,000 in cash from a safe in her son's car in 2013.[149] Liberty County police officers pulled over Leonard's son and his girlfriend on a "known drug corridor" and seized the cash, alleging it was profit from drug sales.[150] Leonard told the state trial court that the cash was hers and that it was from the recent sale of a house she had owned in Pennsylvania.[151] She further testified that she had given the money to her son so that he could buy a house in Texas.[152] Despite the fact that a bill of sale for the Pennsylvania house had been found with the cash in the safe, the Texas courts—ultimately including the Supreme Court of Texas—all sided with Texas law enforcement.[153]

Although Justice Thomas agreed with the Supreme Court's procedural rationale for denying *certiorari* in *Leonard*, he also issued a statement that indicated his desire to revisit the issue of civil forfeiture in the future.[154] Justice Thomas wrote, "Whether this Court's treatment of the broad modern forfeiture practice can be justified by the narrow historical one is certainly worthy of consideration in greater detail."[155] Justice Thomas also asserted that the civil forfeiture system "has led to egregious and well-chronicled abuses" and that "forfeiture

147 *See* United States v. Ursery, 518 U.S. 267 (1996); Bennis v. Michigan, 516 U.S. 442 (1996); Austin v. United States, 509 U.S. 602 (1993).

148 Statement of Thomas, J., Leonard v. Texas, 137 S. Ct. 847, 850 (2017).

149 *See id.* at 847. *See also* Matt Ford, *Justice Thomas's Doubts About Civil Forfeiture*, THE ATLANTIC (Apr. 3, 2017), https://www.theatlantic.com/politics/archive/2017/04/clarence-thomas-civil-forfeiture/521583/.

150 *See* Ford, *supra* note 149.

151 *Leonard*, 173 S. Ct. at 847.

152 *See id.*

153 *See* $201,100.00 United States Currency v. State, 2015 Tex. LEXIS 1116 (Tex. Oct. 23, 2015).

154 *See* Ford, *supra* note 149.

155 *See id.*

operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings."[156] Commenting on the bizarre legal history of civil forfeiture in the United States, Justice Thomas opined that someone "unaware of the history of forfeiture laws and 200 years of this Court's precedent regarding such laws might well assume that such a scheme is lawless"[157] Addressing the potential for further abuses, Justice Thomas also warned that "forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice."[158]

Unfortunately, until the Supreme Court strikes down civil forfeiture statutes as unconstitutional—or until Congress bows to rising pressure from both the political right and left to abolish the practice—innocent property owners will have to look to other avenues for relief. One place innocent property owners can look is in the Internal Revenue Code (IRC), as it stood during the 2017 taxable year and before.[159]

II. ANALYSIS: CIVIL FORFEITURE LOSSES SHOULD QUALIFY AS CASUALTY LOSSES

A. *Casualty Loss Deductions*

Property owners often have little to no recourse when law enforcement officials seize their property through civil forfeiture.[160] Attempting to reclaim seized property can cost property owners thousands of dollars in legal fees—and can also cost them months of their time—as they navigate labyrinthine legal processes to try to get their property back.[161] Property owners often bear the burden of

156 Leonard v. Texas, 137 S. Ct. 847, 850 (2017).

157 *Id.* at 849 (quoting Bennis v. Michigan, 516 U.S. 442, 454 (1996)).

158 *Bennis*, 516 U.S. at 456. *See also* Ford, *supra* note 149.

159 *See* Dan Caplinger, *These 9 Tax Deductions Are Going Away in 2018: Learn What the Tax Bill Just Took Away from Taxpayers*, THE MOTLEY FOOL (Dec. 24, 2017, 6:02PM), https://www.fool.com/taxes/2017/12/24/these-9-tax-deductions-are-going-away-in-2018.aspx.

160 *See generally* Crepelle, *supra* note 21.

161 *See* Stillman, *supra* note 98 ("Owners who wish to contest a civil forfeiture often find that the cost of hiring a lawyer far exceeds the value of their seized goods. Washington, D.C., charges up to twenty-five hundred dollars for the right to challenge a police seizure in court, which can take months or even years to resolve.").

proof in demonstrating that their property was not misused, requiring them to contradict the law enforcement officials who seized the property.[162] For these reasons, and more, the vast majority of civil forfeitures go unchallenged in court,[163] and many property owners have virtually no choice but to accept that they will never get their property back.

Although civil forfeiture statutes at the federal and state levels have let these property owners down—in terms of protecting them from unjustified seizures of property—the IRC might provide some relief for property owners, like Mr. Serrano, who had property taken from them without first being arrested or convicted of a crime.[164] The arguments in this Comment, as a result of the recently enacted Tax Cuts and Jobs Act, only apply to civil forfeiture losses that occurred in the 2017 taxable year or before.[165] The analysis in this section, therefore, relies upon the tax law pertaining to casualty losses as it existed during the 2017 taxable year.

The IRC provides a deduction to taxpayers who have suffered a sudden and unexpected property loss. Section 165(a) of the IRC provides, generally, that "There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise."[166] Property owners who have lost property through civil forfeiture should be able to claim this deduction to reduce their federal income tax liability for the year in which their property was seized. Although this deduction would not offset their loss dollar-for-dollar, it would at least provide some financial assistance where they would otherwise receive none.[167] Because losses from civil forfeiture are not covered by insurance, property owners

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162 *See* CARPENTER ET AL., *supra* note 59, at 20.

163 *See id.* at 12-13 (estimating that 88% of the DOJ's civil forfeitures were administrative, meaning that the seizures went uncontested by the property owners).

164 *See* 26 I.R.C. § 9.7.1 (2015); McKelway, *supra* note 1.

165 *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97 (2017).

166 *See* 26 U.S.C.A. § 165(a) (2017).

167 The taxpayer's loss would not be met dollar-for-dollar because, generally speaking, the value of a deduction depends on the percentage at which the taxpayer is taxed. For example, if Taxpayer A has $100,000 in income, which is taxed at a (fictitious) 10 percent rate, she would pay $10,000 in taxes. However, if Taxpayer A can claim $50,000 in deductions, her taxable income would be reduced to $50,000. If she is taxed at the (fictitious) rate of 10 percent on her income after the deductions, she would only be paying $5,000 in taxes. The deductions would be worth $5,000 to her in this case, because she pays $5,000 in taxes (after including the deductions) when she otherwise would have been paying $10,000. While $5,000 might not seem like much, it is certainly better than nothing.

who have had their property seized through civil forfeiture could meet this basic criterion.[168]

IRC Section 165(c) further provides that deductions are allowed for individuals who lost property that is not connected with a trade or business, or a transaction entered into for profit, so long as "such losses arise from fire, storm, shipwreck, *or other casualty*, or from theft."[169] Property lost through civil forfeiture could qualify as a loss under the "other casualty" category, giving property owners the ability to deduct the loss from their taxable income in the year that the loss occurred.[170] For example, Mr. Serrano would be able to deduct the amount lost from the seizure of his truck, reducing his overall tax liability for 2015, the year his truck was seized.

This deduction would be especially helpful in cases where the property owner lost property that was worth less than what it would cost to retrieve the property. For example, if a person lost $10,000, she likely would not bother to attempt to reclaim that money because it would likely cost her $10,000, or more, in legal fees and time.[171] The deduction would also be helpful in situations where the value of the lost property is significant compared to the property owner's income for that year. Again, if a person lost $10,000, not only would she be unlikely to try to retrieve that property, but that loss would likely represent a large amount of money relative to her income for that year.[172]

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168 If an insurance product for civil forfeiture existed, property owners who were compensated by that insurance would no longer be eligible for the casualty loss deduction for the amount covered by the insurance. *See* 26 U.S.C.A. § 165(a) (2017). An insurance product for civil forfeiture, however, does not currently exist. If insurance against civil forfeiture did exist, property owners would have to elect to have that coverage. The benefit of the casualty loss solution is that it requires no action up front from property owners. *But see* Michael J. Keblesh, *Using Insurance to Regulate Civil forfeiture*, 50 CREIGHTON L. REV. 455, 470-72 (2017) (outlining a proposal for an insurance solution for civil forfeiture property losses).

169 *See* 26 U.S.C.A. § 165(c) (2017) (emphasis added).

170 *See id.*

171 *See* Stillman, *supra* note 98 (describing how property owners often find that the cost of hiring a lawyer far exceeds the value of their seized goods).

172 *See* Matthew Frankel, *Here's the average American household income: How do you compare?* THE MOTLEY FOOL, Nov. 24, 2016 (1:15PM), https://www.usatoday.com/story/money/personalfinanc e/2016/11/24/average-american-household-income/93002252/ (stating the average household income was $73,298 in 2014, the latest year for which complete data is available).

B. *Limitations on Casualty Loss Deductions*

Like most provisions of the IRC, the general rule stated in §165(a) is subject to several limitations.[173] To qualify for the casualty loss deduction, a property owner must satisfy several additional requirements.[174] These range from meeting specific dollar amount requirements for the loss incurred to satisfying broad public policy considerations. Although some of the requirements might be easier for a property owner to satisfy than others, the underlying facts of many civil forfeiture cases should meet all of them.[175] Even with these additional limitations, property owners who have suffered a property loss through civil forfeiture should be able to claim the casualty loss deduction and receive much needed relief in the form of a reduced tax liability.

1. Closed and Completed Transactions

First, to qualify for a casualty loss deduction, the event that caused the loss must be a "closed and completed transaction" that was "fixed by identifiable events."[176] For example, taxpayers were not entitled to a deduction when they did not sell or abandon property that had significantly diminished in value.[177] A mere diminution in value or rights to property did not produce a deduction because there was no "closed and completed transaction" that was "fixed by identifiable events."[178] Similarly, if a person who lost property through a civil forfeiture decided to try to reclaim her property in court, this might be considered an open transaction and might not qualify for a potential casualty loss deduction.[179] To qualify for the loss, the property owner would likely have to leave the seizure uncontested.[180]

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173 *See* 26 U.S.C.A. § 165(a) (2017).

174 *See id.*

175 Cases like Mr. Serrano's and *Leonard* would easily meet the basic requirements.

176 *See* Treas. Reg. § 1.165-1(b) (1977).

177 *See* Rev. Rul. 84-145, 1984-2 C.B. 47.

178 *See id.*

179 *See id.* If a property owner were currently pursuing her property via the courts, the property loss likely would not be a "closed and completed" transaction, but rather would be an on-going, unsettled transaction (at least until the court rendered a decision).

180 *See id.* If a property owner did not contest the seizure, her deprivation of property would be a "closed and completed" transaction because she would have effectively given up all ownership rights, permanently.

This limitation, however, would not pose a problem in most civil forfeiture cases. Because the majority of civil forfeitures go uncontested—as previously noted—the seizure of the property should be considered a closed and completed transaction.[181] Arguably, the property owner would not have suffered a mere diminution of rights or value, but rather would have suffered a complete abandonment of property rights and value.[182] The seizure itself would also likely satisfy the fixed and identifiable events criterion.[183] The initial seizure of the property could be considered the initial event, and the failure to contest the seizure could be considered the final event leading to the loss.

2. Dollar Amount and Income Percentage Thresholds

Additionally, to qualify for a casualty loss deduction, the property loss has to be large enough to overcome certain thresholds.[184] Generally speaking, these limitations are intended to eliminate cases where the loss suffered was minimal and could easily be borne by the property owner.[185] First, the value of each loss must exceed $100.[186] A person who had $100 seized from her, therefore, would not be eligible for a casualty loss deduction per this threshold.[187] Second, the value of the property lost must be at least 10% of the taxpayer's adjusted gross income (AGI) for that year.[188] A taxpayer's AGI is calculated by taking her total income for the year and then subtracting all of the exemptions for which she is eligible.[189] The amount that exceeds 10% of the taxpayer's AGI is the amount that would be deductible as a casualty loss.[190] These additional dollar amount limitations would rule

181 *See* CARPENTER ET AL., *supra* note 59.

182 *See* Rev. Rul. 84-145, 1984-2 C.B. 47. Unlike the taxpayers who did not sell or abandon their property (and therefore only suffered a mere diminution in value and rights to their property), a taxpayer who leaves a seizure uncontested has lost all value and rights in her property.

183 *See id.*

184 *See* 26 U.S.C.A. § 165(h) (2017).

185 *See e.g.* Dyer v. Commissioner, 20 T.C.M. (CCH) 705 (1961) (Petitioners' pet cat knocked over a vase during a "fit," causing a loss of roughly $100).

186 This effectively means that any loss that satisfies the threshold requirements will be reduced by $100 when calculating the loss amount. *See* 26 U.S.C. § 165(h)(1) (2017).

187 *See* 26 U.S.C. § 165(h)(1) (2017).

188 *See* 26 U.S.C. § 165(h)(2) (2017); Treas. Reg. § 1.165-1(b) (1977).

189 26 U.S.C.A. § 62 (2018).

190 For example, if a taxpayer suffered a casualty loss of $11,000, and the taxpayer's adjusted gross income for that year was $25,000, the amount that he would be able to deduct as a casualty loss would be $8,400. The $100 floor would reduce the initial loss amount of $11,000 to $10,900 ($11,000 - $100 = $10,900). The total deductible amount is the amount by which $10,900

out civil forfeiture cases in which the value of the seized property was relatively small compared to the property owner's adjusted gross income for that year.[191]

The dollar amount limitations produce a sliding scale: the larger the property owner's adjusted gross income for the year, the larger the property loss must be to qualify for a casualty loss deduction. This makes sense from the policy perspective of trying to alleviate the burden of a real and significant loss, while leaving property owners to their own devices to bear the burden of relatively small losses. Generally, the less money the taxpayer has in income, the less able she is to absorb even small losses.[192] The casualty loss deduction, then, would help the most in cases in which the property lost via civil forfeiture was a relatively large loss compared to the property owner's adjusted gross income for the year. These would be cases in which the property owner would have a more difficult time bearing the burden of her loss on her own.

3. Qualifying Casualty Events

To be eligible for a casualty loss deduction, the loss must result from a qualifying casualty event.[193] Considering the types of causes the statute includes, a "casualty" loss for the purposes of §165 has been defined as a loss that occurs as the result of an event that has some "sudden, unexpected, or unusual cause."[194] Although most of the enumerated causes are events over which humans generally have

exceeds 10% of the taxpayer's income of $25,000. The calculation would be: [$10,900 - (10% × $25,000)] = $8,400. The actual dollar value of the deduction would be $8,400 multiplied by the taxpayer's marginal tax rate.

191 The taxpayer would have to suffer a loss that exceeded the $100 threshold, and also be larger than 10 percent of the taxpayer's adjusted gross income. If the taxpayer had a large adjusted gross income, the loss would also have to be relatively large to meet the 10 percent requirement. For example, if Taxpayer B had an AGI of $100,000, her loss would have to exceed 10 percent of $100,000, which would be $10,000. If she had an AGI of $500,000, her loss would have to exceed 10 percent of $500,000, which would be $50,000. If her loss were smaller, say $5,000, her loss would not qualify under either scenario because her AGI would be too large.

192 For example, a $10,000 loss to a taxpayer who made $25,000 in a taxable year would seem much more onerous than it would to a taxpayer who made $100,000. The $10,000 loss to the taxpayer making $25,000 would make her income "feel" more like $15,000. The $10,000 loss to the taxpayer making $100,000 would make her income "feel" more like $90,000. While the dollar amount of the loss is the same in both scenarios, the drop in income to the taxpayer making $25,000 is more severe because the loss makes up a larger percentage of her income.

193 *See* 26 U.S.C. § 165(c) (2017).

194 Matheson v. Comm'r, 54 F.2d 537, 539 (2d. Cir. 1931).

no control (fire, storm, shipwreck), courts have allowed events caused by human agents to qualify as "other" casualty losses.[195] A fire caused by a human, instead of by a lightning strike, would potentially qualify. A shipwreck caused by human error, rather than a terrible storm, would also potentially qualify. Although most casualty loss cases likely involve damage caused by nonhuman events (houses lost to hurricanes, wild fires, etc.), the cause of the loss does not necessarily have to be weather-related.[196] A human cause of the loss is not an automatic disqualification for the deduction, so long as the human cause was sudden, unexpected, or unusual.[197]

Some courts also require that the damage to the property be permanent and physical to qualify for the casualty loss deduction.[198] In these cases, simply losing property would not be enough to qualify for the casualty loss deduction, because courts are concerned that people will abuse the deduction by claiming that property was lost without being able to prove it. In the so-called Ring Cases, various courts fleshed out the general requirement that damage to property must be physical and permanent, and that the property owner must be able to demonstrate that damage.[199] In these cases, which all involved damage to wedding or engagement rings, courts required the taxpayers to demonstrate that there was permanent physical damage.[200] In cases where the taxpayer simply lost a ring through some unfortunate series of events, the courts tended not to allow the casualty loss deduction.[201]

The result in *Chamales v. Commissioner* further demonstrates the permanent and physical requirement.[202] The Chamales family had purchased a home across the street from O.J. Simpson before the 1994 murders of Nicole Brown Simpson and Ronald Goldman.[203] The Chamales family claimed that the constant media presence outside

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195 *See* Durden v. Commissioner, 3 T.C. 1, 4 (1944).

196 *See id.*

197 *See id.*

198 *See* Keenan v. Bowers, 91 F. Supp. 771 (E.D. S.C. 1950) (Taxpayer was denied the deduction when he accidentally flushed his wife's wedding ring down the toilet); White v. Commissioner, 48 T.C. 430 (1967) (Taxpayer was allowed the deduction when her ring was damaged after she accidentally slammed her hand in the car door); Carpenter v. Comm'r, 25 T.C.M. (CCH) 1186 (1966) (Taxpayer was allowed to take the deduction when he accidentally ground up his wife's wedding ring in the garbage disposal).

199 *See Keenan*, 91 F. Supp. 771; *White*, 48 T.C. at 430; *Carpenter*, 25 T.C.M. (CCH) at 1186.

200 *See Keenan*, 91 F. Supp. 771; *White*, 48 T.C. at 430; *Carpenter*, 25 T.C.M. (CCH) at 1186.

201 *See e.g. Keenan*, 91 F. Supp. at 774.

202 *See* Chamales v. Comm'r, 79 T.C.M. (CCH) 1428 (2000).

203 *See id.* at 4.

their home during and after the infamous murder trial reduced the value of their home by roughly 30 to 40%.[204] The United States Tax Court agreed with the Internal Revenue Service (IRS), and disallowed the deduction based, in part, on the fact that the damage to the Chamales's home was not physical, but was only to the value of their home, and was not permanent, because eventually the media attention would dissipate.[205]

4. Public Policy Limitations

Finally, casualty loss deductions are limited by a broad public policy doctrine, in which courts can deny the deduction when it would frustrate a national or state public policy.[206] Courts import this limitation into the §165 casualty loss deduction from another section of the IRC.[207] This other section, §162(f), states, "No deduction shall be allowed . . . for any fine or similar penalty paid to a government for the violation of any law."[208] The Tax Court has held that, "[c]onviction of a crime is not essential to a showing that the allowance of a deduction would frustrate public policy."[209] The Tax Court has also found, however, that "the negligence of the taxpayer is not a bar to the allowance of the casualty loss deduction."[210]

In other words, if a taxpayer's property is damaged because of her negligent behavior, she may still be eligible for the casualty loss deduction.[211] A taxpayer's *gross* negligence, however, "will bar a casualty loss deduction."[212] Additionally, a taxpayer cannot take a casualty loss deduction when she "knowingly or willfully" allows her property to be damaged, or when she "knowingly or willfully" dam-

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204 *Id.* at 9.

205 *See id.* at 23.

206 *See* George G. Tyler, *Disallowance of Deductions on Public Policy Grounds*, 20 TAX L. REV. 665, 665 (1965) (discussing when a deduction, otherwise allowable under the terms of a statute, may be disallowed because it would be against "public policy"—and arguing that the IRC does not contain a general provision that disallows deductions on "public policy grounds," that there is no Treasury Regulation to that effect, and that the "public policy" disallowance is a "gloss" that courts created when interpreting cases).

207 *See* 26 U.S.C. § 165 (2017). *See also* 26 U.S.C.A. § 162(f) (2017).

208 *See* 26 U.S.C.A. § 162(f) (2017).

209 Blackman v. Comm'r, 88 T.C. 677, 680 (1967).

210 *Id.* at 681.

211 *See id.*

212 *Id.*

ages her property herself.[213] A taxpayer, then, can still take a deduction when damage results from her negligence, but not when she has been grossly negligent, or when she has knowingly or willingly damaged her property.[214]

The case of *Blackman v. Commissioner* illustrates this public policy limitation.[215] In *Blackman*, a taxpayer, Mr. Blackman, tried to claim a casualty loss deduction after he set fire to some of his wife's clothes, on the stove in their home, to retaliate against her for her involvement with another man.[216] Although Mr. Blackman claimed that he believed he had extinguished the fire completely before he left the house, the fire spread and burned the house to the ground.[217] As a result, Mr. Blackman was charged with arson and malicious destruction under Maryland criminal statutes.[218]

When Mr. Blackman's insurance company refused to cover the loss of his home, he tried to claim the loss under the plain text of the casualty loss provision, which states that losses can be taken for damage caused by "fire."[219] After the IRS denied his deduction, the Tax Court, finding in the IRS's favor, held that Mr. Blackman's deduction was barred because of his gross negligence and because allowing the deduction would run counter to public policy.[220] The court found that Mr. Blackman's failure to ensure that the fire was completely extinguished constituted gross negligence, and that allowing Mr. Blackman to take the deduction would "severely and immediately" frustrate public policy against arson.[221]

As stated in *Blackman*, courts can disallow a casualty loss deduction when it frustrates public policy.[222] To determine if a taxpayer's actions meet this threshold, courts consider the severity and immediacy of the frustration.[223] In *Murillo v. Commissioner*, the Tax Court disallowed a loss deduction for property forfeited after the owner was indicted and pleaded guilty to ten offenses of illegally structuring his

213 *Id.*
214 *See id.*
215 *See* Blackman v. Comm'r, 88 T.C. 677 (1987).
216 *See id.* at 678-79.
217 *See id.* at 679.
218 *See id*.
219 *See id.* at 680.
220 *See id.* at 682.
221 Blackman v. Comm'r, 88 T.C. 677, 682 (1987).
222 *Id.* at 680.
223 *Id.*

bank deposits to avoid IRS detection.[224] Citing several prior cases, the court stated that courts "consistently have disallowed loss deductions where the deduction would frustrate a sharply defined federal or [s]tate policy."[225] The court further explained that the test for nondeductibility is "the severity and immediacy of the frustration resulting from allowance of the deduction."[226] The court reasoned that Congress' enactment of anti-structuring statutory provisions established a "declared public policy" such that allowing the petitioner to take a loss deduction would "frustrate a clearly defined national policy."[227]

The results in *Blackman* and *Murillo* suggest that, when a taxpayer's actions do not constitute a frustration to public policy that is severe and immediate, she will still be eligible for a casualty loss deduction.[228] In other words, if a taxpayer's actions are not grossly negligent or worse, and do not severely and immediately frustrate public policy, the taxpayer may still be able to claim a casualty loss deduction for property damage that results from her actions.[229] A deduction will be barred if it would severely and immediately frustrate articulated public policies, suggesting that a mild and indirect frustration of an articulated policy would be permissible.[230]

Most recently, the United States Court of Appeals for the Federal Circuit considered the deductibility of forfeitures in *Nacchio v. United States*, in 2016.[231] In *Nacchio*, the petitioner, Joseph P. Nacchio, a former telecommunications CEO, was convicted of insider trading, and sought a deduction for money that he ultimately had to forfeit to the government after he had already paid taxes on it.[232] The court held that Mr. Nacchio's forfeiture, following his criminal conviction, could not be deducted because it met the definition of a "fine or similar penalty," made nondeductible by §162(f) of the IRC.[233] The court noted that Treasury Regulation § 1.162-21(b)(1) defines a "fine or similar penalty" as "an amount . . . [p]aid pursuant to conviction or a plea of guilty or *nolo contendere* for a crime (felony or misde-

224 *See* Murillo v. Comm'r, 75 T.C.M (CCH) 1564, 1565 (1998).
225 *Id.*
226 *Id.*
227 *Id.*
228 *See id.*; Blackman v. Comm'r, 88 T.C. 677, 683 (1987).
229 *See Murillo*, 75 T.C.M. (CCH) at 1565; *Blackman*, 88 T.C. at 682-83.
230 *See* Murillo v. Comm'r, 75 T.C.M. (CCH) at 1564, 1565; *Blackman*, 88 T.C. at 682-83.
231 *See* Nacchio v. United States, 824 F.3d 1370 (2016).
232 *See id.* at 1372-73.
233 *Id.* at 1377.

meanor) in a criminal proceeding."[234] The court concluded that Mr. Nacchio's payments pursuant to his criminal conviction were nondeductible under both §165 and §162.[235]

C. *The Deductibility of a Civil Forfeiture Loss as a Casualty Loss*

When law enforcement agents seize property from a person under civil forfeiture statutes, and that person was not arrested for or convicted of a crime, the property owner should be allowed to take a casualty loss deduction for her lost property. Assuming that the seized property has a value of greater than $100, to satisfy the first dollar amount requirement for the deduction, and that the value of the seized property is at least 10% of the property owner's adjusted gross income for that year, to satisfy the second dollar amount threshold, an innocent property owner should be able to satisfy all the remaining requirements to take a casualty loss deduction.

When a property owner loses property through an uncontested civil forfeiture, the seizure should qualify as a "closed and completed" transaction "fixed by identifiable events," and the complete loss of the property should qualify as permanent physical damage.[236] Additionally, the property seizure should be an event that qualifies as a casualty event because having law enforcement agents seize property without first charging the property owner with a crime is both "sudden" and "unexpected."[237] Finally, the public policy limitation should not bar an innocent property owner from claiming a casualty loss deduction because civil forfeiture is not considered to be a punishment in all cases, because a property owner's negligence alone is insufficient, and because allowing the deduction would not "severely and immediately" frustrate a clearly articulated public policy.[238]

1. A Closed and Completed Transaction

All administrative forfeitures, or seizures that go uncontested, should satisfy the requirement that a loss be evidenced by a "closed and completed" transaction "fixed by identifiable events."[239] All

234 *Id.* at 1378 (citing 26 C.F.R. § 1.162-21 (1975)).
235 *See id.* at 1370.
236 Treas. Reg. § 1.165-1(b) (1977).
237 Matheson v. Comm'r, 54 F.2d 537, 539 (2d. Cir. 1931).
238 *See* Blackman v. Comm'r, 88 T.C. 677, 681 (1987).
239 *See* Treas. Reg. § 1.165-1(b) (1977).

administrative forfeitures should also satisfy the requirement that damage be permanent and physical.[240] When a property owner does not contest the seizure of her property, the transfer of the property from the property owner to law enforcement officials is a closed and completed transaction.[241] The initial seizure is the first identifiable event in this sequence. The property owner's decision not to contest the forfeiture is the final event in the sequence.

Once the property owner declines to contest the forfeiture, law enforcement officials take complete control over the property.[242] Because law enforcement officials retain control, the transfer of the property is closed and completed.[243] Additionally, because law enforcement retains control over the property, the property owner has suffered a permanent and physical loss of the property.[244] The loss is permanent because the property owner has effectively—and forcibly—relinquished all rights to her property.[245] The loss is also physical because the property owner will never be able to have physical possession of her property again.[246] To the property owner, the physical damage to her property is the complete and irrevocable removal of the property from her possession and enjoyment.

2. Crossing the Dollar Amount Thresholds

Many cases would easily satisfy the requirements that the lost property be worth more than $100 and that the value of the property be at least 10% of the property owner's adjusted gross income for the year.[247] For example, if law enforcement officials seized $10,000 from a taxpayer, that amount would clearly satisfy the $100 requirement.

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240 *See Matheson*, 54 F.2d at 539.

241 *See*, *e.g.*, *How Do I Contest Forfeiture of my Property?*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (Apr. 2, 2018), https://www.atf.gov/asset-forfeiture/qa/how-do-i-contest-forfeiture-my-property ("[F]ailure to file a claim may result in the seized property being forfeited to the United States").

242 *See id.*

243 *See id.*

244 *Asset Forfeiture Abuse*, AMERICAN CIVIL LIBERTIES UNION (last visited Aug. 2, 2018), https://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/asset-forfeiture-abuse ("Civil forfeiture allows police to seize—and then keep or sell—any property they allege is involved in a crime. Owners need not ever be arrested or convicted of a crime for their cash, cars, or even real estate to be taken away permanently by the government.").

245 *See id.*

246 *See id.*

247 *See* 26 U.S.C.A. § 165(h) (2017).

Unless the taxpayer made more than $100,000 in adjusted gross income that year—putting her at least in the top 8% of earners in 2014[248]—the $10,000 seizure would also meet the 10% requirement.

Similarly, Lisa Leonard's case, in which Texas law enforcement officials seized $200,000 in cash from her son's car without arresting him,[249] would also easily cross these thresholds. Additionally, assuming that Mr. Serrano had paid a fair amount into his $60,000 truck, his case would also likely qualify.[250] In short, any case in which the amount of the loss suffered is high relative to normal income levels, the property owner should easily satisfy the basic dollar amount threshold requirements for the casualty loss deduction.[251]

3. A "Sudden" and "Unexpected" Event

The events surrounding the seizure of property via civil forfeiture should also qualify as the type of cause covered by the casualty loss deduction. As explained, the cause of the loss does not necessarily have to be an event over which humans have no control.[252] Courts have found that humans can be the cause of a qualifying loss.[253] The actions of law enforcement officials, then, could potentially be considered the cause of a qualifying loss. As stated, the cause of the loss also must be an event that is "sudden" and "unexpected."[254] The manner in which law enforcement officials typically seize property under civil forfeiture statutes would certainly constitute a "sudden" and "unexpected" cause from the perspective of the property owners whose property has been taken.[255]

In Mr. Serrano's case, for example, law enforcement officials seized his truck while he was on a trip to visit family.[256] Mr. Serrano had done nothing that he should have expected was illegal, or that could have warranted the Customs and Border Protection agents tak-

248 *See* Andrew Van Dam, *What Percent Are You?*, THE WALL STREET JOURNAL (Mar. 2, 2016, 7:00AM), http://graphics.wsj.com/what-percent/.

249 *See* Ford, *supra* note 149.

250 *See* U.S.C.A. § 165(h) (2017).

251 *See id.*

252 *See* Blackman v. Comm'r, 88 T.C. 677, 680 (1987).

253 *See id.*

254 *See* Matheson v. Comm'r, 54 F.2d 537, 539 (2d. Cir. 1931).

255 *See e.g.* McKelway, *supra* note 1; Ford, *supra* note 149.

256 *See* McKelway, *supra* note 1.

ing his truck from him.[257] In Mr. Serrano's case, he lost his truck during a single stop by Customs and Border Protection agents.[258] In *Leonard*, Ms. Leonard's son lost $200,000 in the course of a single traffic stop.[259] These property owners would certainly consider these brief interactions, which resulted in large property losses, to be both sudden and unexpected events.

4. Passing the "Public Policy" Test

Finally, the deductibility of property lost via civil forfeiture hinges on whether the allowance of the deduction would violate public policy. The test is whether allowing the deduction, in the particular circumstances of the case, would severely and immediately frustrate an articulated public policy.[260] Generally, courts disallow the deduction when a forfeiture is considered a "fine" or "penalty" imposed as a punishment for a property owner's behavior.[261] However, in deciding whether taxpayers can take the deduction for property seized under civil forfeiture statutes, the courts have only considered cases in which a property owner was first convicted of a crime and then had property forfeited after conviction.[262]

The case for disallowing deductions when the defendant has been convicted of a crime is an easy one to make. Obviously, it would be counterproductive for society to allow convicted criminals to benefit from the proceeds of their crimes, and seizing those proceeds to pay victims, or the federal government, is clearly intended to be a punishment for the convicted wrongdoer.[263] The case for disallowing a deduction when a property owner has *not* been convicted of a crime, however, is much more dubious. In most civil forfeiture cases, the property owner has not been convicted of a crime, or even arrested for a crime, in connection with the seizure of her property.[264] When a property owner has not been convicted of a crime, the punishment

257 *See id.*

258 *See id.*

259 *See* Ford, *supra* note 149.

260 *See* Blackman v. Comm'r, 88 T.C. 677, 682-83 (1987); Murillo v. Comm'r, 75 T.C.M (CCH) 1564, 1565 (1998).

261 *See* 26 U.S.C.A. § 162 (2017).

262 *See* Nacchio v. United States, 824 F.3d 1370 (2016).

263 *See* Austin v. United States, 509 U.S. 602, 621-22 (1993).

264 *See* Ford, *supra* note 149.

proceeds against the property itself.[265] Insofar as the punishment is targeted at the property owner, it is presumably to punish her for the negligence she exhibited in allowing her property to be misused.[266] A property owner's negligence, however, will not bar her eligibility for a casualty loss deduction, as stated.[267]

Allowing an innocent property owner to take a casualty loss deduction would also not severely and immediately frustrate a national or state policy.[268] Consider Mr. Serrano's case. Mr. Serrano did not violate a clear public policy. He accidentally forgot to remove five bullets, which he obtained legally, from his car before leaving his home state.[269] It seems difficult to believe that Congress was trying to catch people like Mr. Serrano when they made transporting munitions of war an offense for which property could be seized. Also consider Ms. Leonard's case. Her culpable act was allowing her son to transport money from the sale of her home along a "known drug corridor."[270] These cases should qualify for the casualty loss deduction because the acts that triggered the forfeiture were not clear violations of public policy.

D. *The Charitable Donation Deduction*

Although this Comment primarily focuses on crafting an argument that would enable innocent property owners to claim a casualty loss deduction for assets seized via civil forfeiture, there are also other deductions that could plausibly be used to accomplish the same goal.[271] For civil forfeiture cases that do not meet the qualifications for a casualty loss deduction, a property owner could potentially seek relief for seized property in the IRC's provisions for charitable deductions.[272] Specifically, in cases where the size of the loss is not large enough to trigger a casualty loss deduction—that is, 10% of the property owner's adjusted gross income for that year—a property owner

265 *See Austin*, 509 U.S. at 615-17.

266 *See id.* at 617-19.

267 *See* White v. Commissioner, 48 T.C. 430, 435 (1967).

268 *See e.g.*, McKelway, *supra* note 1.

269 *See id.*

270 *See* Ford, *supra* note 149.

271 *See e.g.* 26 U.S.C.A. § 170(c) (2018).

272 *See id.*

could potentially claim the amount of the seized property as a "charitable donation" to her state or local police departments.[273]

Whereas the casualty loss deduction was effectively eliminated from the IRC in the Tax Cuts and Jobs Act, the charitable donation deduction survived.[274] As a result, the casualty loss deduction would only be available for civil forfeiture losses incurred during the 2017 taxable year and before. The charitable donation deduction, however, would still be available for civil forfeiture losses into the future—and might be the only potential tax relief vehicle for innocent property owners in the 2018 taxable year and beyond.[275] Although an analysis of the charitable donation deduction is outside the scope of this Comment, it is worth exploring as an alternative to the casualty loss deduction.

CONCLUSION

In the United States, the practice of civil forfeiture has expanded immensely, but protections for innocent property owners have not kept pace.[276] Currently, when an innocent property owner loses her property under civil forfeiture statutes, she has little chance of being able to get her property back.[277] Property losses are especially painful when the value of the lost property constitutes a significant portion of the property owner's income for that year, but is still not large enough to make challenging the forfeiture in court worth the costs.[278] When property owners fall into this worst possible category—sustaining large losses relative to their income, but still having no real recourse—they must look elsewhere for potential relief.

These innocent property owners should be allowed to claim a casualty loss deduction on their federal income taxes for civil forfeiture losses sustained during that taxable year. Because civil forfeiture is not always considered to be a punishment under constitutional analyses, it should not be disallowed as a casualty loss deduction for violating public policy.[279] Furthermore, because civil forfeiture statutes—as

273 *See* 26 U.S.C.A. § 170(c)(1) (2018).

274 *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97 (2017).

275 *See* Caplinger, *supra* note 159.

276 *See* Ford, *supra* note 149.

277 *See* CARPENTER ET AL., *supra* note 59, at 11-12.

278 *See* Frankel, *supra* note 172.

279 *See* United States v. Ursery, 518 U.S. 267, 292 (1996).

applied in many cases—serve no clear public policy objective, allowing an innocent property owner to claim a casualty loss deduction would align with the policy goals the deduction is intended to accomplish, rather than contradict them.