CALLING ALL CRIMINALS, OUR STATE WILL PROTECT YOUR CRACK HOUSE: HOMESTEAD PROTECTION'S APPLICATION TO FORFEITURE RESULTING FROM CRIMINAL CONDUCT

by James Tawney

I. FRANK'S STORY[1]

Frank is a notorious drug dealer known for distributing large amounts of marijuana and methamphetamine in the state of Utopia. The majority of his illegal operation takes place at his residence, which he purchased with proceeds from his previous drug operations. After months of surveillance,

1. Frank's Story was adopted from *Torgelson v. 17138 880th Ave.*, 734 N.W.2d 279 (Minn. Ct. App. 2007), *aff'd*, 749 N.W.2d 24 (Minn. 2008).

the local drug task force finally catches Frank in the act of selling drugs on his property. The authorities detain Frank and charge him via a local statute for the sale of a controlled substance. Frank, knowing that he has been caught red-handed, pleads guilty to the controlled substance crime in violation of the local statute. After Frank pleads guilty, the local county attorney then commences an action to seize Frank's residence as authorized under the local statute for drug related crimes. Frank quickly answers the action by claiming that his property is exempt from forfeiture because the state of Utopia's constitution provides for homestead protection. Because this is an issue of first impression in Utopia, Frank's defense may be correct depending on which approach the court of Utopia decides to adopt.

II. INTRODUCTION

As America continues to criminalize conduct, state courts struggle to hold onto the value that homestead protection represents.[2] At the same time, homestead protection becomes limited because of new laws prohibiting criminal conduct and the illegal use of property.[3] This comment addresses whether homestead protection should exempt property from forfeiture that has resulted from criminal conduct or illegal use of the property. Upon addressing this issue, this comment justifies the need for states to adopt legislation that specifically allows forfeiture of the homestead.[4] To defend this assertion, Part III discusses the history and intentions behind both homestead protection and forfeiture of assets in America. Part IV examines cases highlighting the argument that states should not allow the seizure of a person's property protected under homestead exemption. Part V focuses on case law holding that forfeiture law trumps homestead protection. Part VI of the comment addresses how federal law applies to state homestead protection and why the federal courts allowed federal forfeiture statutes to preempt state homestead protection. In addition to the history of homestead protection and forfeiture, this comment uses case law to show that states must adopt legislation that prohibits the use of homestead protection as a defense against forfeiture resulting from criminal conduct.[5]

2. *See infra* Parts III-V.
3. *See infra* Parts V-VI.
4. *See infra* Parts IV-VII.
5. *See infra* Part IV.

III. THE HISTORY OF HOMESTEAD PROTECTION AND ASSET FORFEITURE IN THE UNITED STATES

A. Homestead Protection

In the United States, homestead protection, also known as homestead exemption, arose as a form of security aimed at calming the panic created by the development of capitalism.[6] Before the advent of free enterprise in American history, Americans based commercialism on the idea that the state was both the regulator and promoter of the economy.[7] Based on this concept and many powerful religious and communitarian traditions, Americans contested the idea of free enterprise.[8] Asset protection, such as homestead protection, eased the panic created by the development of capitalism because "it restricted the rights of creditors while encouraging enterprise by lessening the penalty for failure."[9]

Beginning in the 1820s, Mexico and Texas began using homestead protection as a tool to attract settlers.[10] Homestead protection in Mexico originated from feudal Europe when there was a history of protecting estates of lower nobility.[11] In an attempt to attract settlers, Mexico used this idea of protection of estates when they created a two-prong recruitment strategy.[12] The strategy consisted of offering free land to settlers, and in addition, declared that this free land would be secure from U.S. creditors.[13] At the time, colonial Texas was under Mexican rule; thus, Texas offered the same two-prong recruitment package via a statutory provision in 1829.[14] By 1836, the Texas homestead provision granted creditor protection to Texans who owned fifty acres or one town lot, which included the home site and a limited amount of improvements.[15] After the Panic of 1837, which increased unemployment, bankruptcy, and poverty, especially in the South, Americans viewed homestead exemption as a barrier to the destructive potential of the free market.[16] "Homestead exemption symbolized a faith that family security and free markets were compatible."[17]

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6. Paul Goodman, *The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880*, 80 J. AM. HISTORY 470, 470 (1993), *available at* http://www.jstor.org/stable/2079867.

7. *Id.* at 475.

8. *Id.*

9. *Id.* at 476.

10. Alison D. Morantz, *There's No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America*, 24 LAW & HIST. REV. 245, 252 (2006).

11. Goodman, *supra* note 6, at 476.

12. *See* Morantz, *supra* note 10, at 252.

13. *Id.*

14. *Id.*

15. Goodman, *supra* note 6, at 477.

16. Morantz, *supra* note 10, at 253.

17. Goodman, *supra* note 6, at 498.

As a result, homestead protection increased in popularity so much that it transcended partisan and class boundaries.[18] When Texas finally joined the Union in 1845, the new constitution granted the Texas legislature the power to enlarge the sweep of homestead protection by increasing the size and value of land covered by the exemption.[19] Due to the U.S. economic depression throughout the late 1830s and into the 1840s, the timing of the Texas legislature was excellent for purposes of attracting more settlers.[20] The depression hit the South especially hard causing farmers to be overwhelmed with debt enhanced by a collapsed banking system.[21] Because of its vast amounts of land and low population, excellent natural resources, and protection for debtors via homestead exemption, Texas became a haven for Southerners looking to start anew.[22]

The enactment of homestead protection laws quickly spread throughout the South during the 1850s and 1860s.[23] The population of Texas began to grow very rapidly in response to homestead protection.[24] As homestead protection attracted settlers from the southern states, the populations of Alabama, Georgia, Tennessee, and Mississippi began to decline.[25] In response to the mass exodus of people headed toward Texas, the southern states began to adopt their own homestead protection laws because of local residents who sought the protection but refused to move to Texas.[26] With an increasing number of states enacting homestead protection, Texas began to continually refine and liberalize its homestead laws, thus increasing exemption amounts so that Texas could attract more settlers and further develop as a state.[27] Leaders from this era such as Supreme Court Justice Hemphill praised homestead protection for its beneficial effects on free enterprise because it secured individuals "from any fear of their families being turned out without a home."[28] Northerners responded to the Texas expansion of homestead protection by claiming it was an attempt by Texas to attract settlers for purposes of paying taxes, fighting Mexicans, and making Texas a sanctuary for desperadoes.[29]

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18. Morantz, *supra* note 10, at 253.
19. Goodman, *supra* note 6, at 477.
20. *Id*.
21. *Id*.
22. Morantz, *supra* note 10, at 253.
23. *Id*.
24. Goodman, *supra* note 6, at 477.
25. *Id*.
26. *See id*. at 477-78. Another reason for the rapid growth of homestead protection in the South was that after the Emancipation Proclamation, southern states seized the law as a way of keeping land out of the hands of the newly freed slaves. Morantz, *supra* note 10, at 253.
27. *See* Goodman, *supra* note 6, at 477-78.
28. *Id*. at 478.
29. *Id*.

Despite the criticism from Northerners, other states began adopting their own forms of homestead protection.[30]

States across the country continued to adopt different forms of homestead protection, but not without criticism.[31] By 1852, the majority of the northeastern and mid-Atlantic states adopted some form of homestead protection.[32] Northeastern and midwestern states intertwined homestead protection with different social movements such as abolition, land reform, and labor reform.[33] California created a homestead protection provision as soon as it joined the Union in 1850.[34] By 1858, every midwestern state and territory had a homestead exemption codified in its laws.[35] Yet many individuals did not easily accept this rapid spread of homestead protection.[36] Critics claimed that homestead exemption laws encouraged families to defraud creditors and increased reliance on state governments, thus contradicting capitalism's fundamental principle of economic independence.[37] Due to this criticism, some states, such as Connecticut and South Carolina, repealed their homestead exemption laws only a few years after initially enacting them (although both of these states later reinstated homestead protection).[38] Today, all but two states have adopted some form of homestead protection.[39]

B. Asset Forfeiture

Forfeiture in America traces its roots back to the history of English common law.[40] Historians believe that the use of forfeiture in England has Saxon and ancient Scandinavian roots, and such use was practiced prior to the Norman feudal system.[41] Originally, if a landholder disturbed the King's peace, the King had the privilege to destroy an offender's land and property.[42] However, after Henry I, the punishment changed from destroying the land to taking the profits of the land for a set time, and at the

30. *See* Morantz, *supra* note 10, at 253-54.
31. *Id*. at 253-55.
32. *Id*. at 253.
33. *Id*. at 254.
34. *Id*.
35. *Id*.
36. *Id*.
37. *Id*. at 255.
38. *Id*.
39. *Id*. Neither Pennsylvania nor Rhode Island has statutory or constitutional homestead protection. *Id*. at 255 n.37.
40. Cecil Greek, *Drug Control and Asset Seizures: A Review of the History of Forfeiture in England and Colonial America*, *in* DRUGS, CRIME, AND SOCIAL POLICY: RESEARCH, ISSUES, AND CONCERNS 109, 120 (Thomas Mieczkowski ed., 1991), *available at* http://www.fsu.edu/~crimdo/forfeiture.html.
41. *Id*. at 111.
42. *Id*.

conclusion, the land would return to the offender.[43] However, the problem was that usually the King's court sentenced the offender to legal and physical death for violation of a crime.[44] Because of a feudal practice known as "corruption of blood," which disallowed the offender's wife and descendants from inheritance, the land escheated back to the original grantor lord or the Crown; thus, the offender forfeited his land.[45] Over time, lesser felonies, which did not have death as a required punishment, resulted in punishment that included forfeiture of goods and chattels.[46] Statutory forfeiture soon became a large source of the Crown's income.[47] Eventually, the English Crown began to abuse its ability to seize property through forfeiture.[48] As a result, the Magna Carta and the English Bill of Rights strictly forbid the use of forfeiture by the Crown.[49]

Under English common law, forfeiture consisted of either civil in rem forfeiture or criminal in personam forfeiture.[50] Civil in rem forfeiture is a seizure resulting from an action directly against property, as opposed to an action against an individual person or criminal.[51] In an in rem proceeding, the guilt or innocence of the defendant made no difference.[52] The court's jurisdiction in an in rem proceeding was solely over the property up for forfeiture because of its involvement in the accused criminal act.[53] In current times, this connection between the property and crime is of great relevance, even in the United States, because the court only has jurisdiction if the criminal used the property in furtherance of a crime.[54] However, the idea that the property itself commits a crime is a legal fiction because a court essentially finds an inanimate and unconscious object guilty of wrongdoing.[55] Under English common law, this method of forfeiture contrasts the second type of forfeiture, criminal in personam forfeiture.[56]

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43. *Id*.

44. *Id*.

45. *Id*.

46. *Id*. at 113.

47. *Id*.

48. *See* Erik S. Schimmelbusch, *Pretrial Restraint of Substitute Assets Under RICO and the Comprehensive Drug Abuse Prevention and Control Act of 1970*, 26 PAC. L.J. 165, 177 (1995).

49. *Id*.

50. *Id*. at 176.

51. *Id*.

52. *Id*.

53. *Id*.

54. *Id*.

55. Torgelson v. 17138 880th Ave., 734 N.W.2d 279, 284 (Minn. Ct. App. 2007), *aff'd*, 749 N.W.2d 24 (Minn. 2008).

56. *See* Schimmelbusch, *supra* note 48, at 177. Procedurally, the main difference between in rem and in personam forfeiture lies in the burden of proof each places on the owner of the property. *See* Alejandro Caffarelli, *Civil Forfeiture Hits Home: A Critical Analysis of United States v. Lot 5, Fox Grove*, 79 MINN. L. REV. 1447, 1452 (1995). The property owner has no burden in a criminal forfeiture proceeding. *Id.* The government is responsible for proving beyond a reasonable doubt that the property and its owner were involved in the criminal activity. *Id.* On the other hand, in a civil forfeiture proceeding, the government must prove only probable cause linking the use of the property to an illegal

Unlike civil in rem forfeiture, where the guilt or innocence of the defendant makes no difference, in personam forfeiture is directly contingent upon the guilty conviction of the defendant.[57] Under in personam forfeiture, the English common law required the defendant to forfeit all real and personal property.[58]

American colonists did not embrace the idea of criminal in personam forfeiture with open arms, and they rarely used it as a form of punishment.[59] Several factors discouraged the use of criminal in personam forfeiture in colonial America.[60] To begin, American colonists knew that the King's incentive behind forfeiture was to reap the benefits of the accused's property.[61] Thus, the colonial government wanted to limit the King's ability to take colonial property.[62] Another significant factor was the way colonial America viewed ownership of land.[63] The American colonists viewed their land ownership as absolute and loathed the idea of forfeiture.[64] If the King ordered a colonist to forfeit land, the colonist could simply move to another colony or have the provincial colonial governor remit the forfeiture as they frequently did because of sympathy for the innocent family members of criminals.[65] Eventually, forfeiture became an obsolete form of punishment because most criminals were so poor they had very little, if any, significant property to forfeit.[66] Americans abandoned the idea of criminal forfeiture until 1970 when Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Comprehensive Drug Abuse Prevention and Control Act of 1970, which reinstated the use of in personam forfeiture.[67] After these enactments, Americans began to apply in personam forfeiture more broadly via a stronger punitive use.[68]

Meanwhile, the American colonists never did away with civil in rem forfeiture, which courts continually used to seize contraband, and it too became a punitive tool expanded under RICO and the Continuing Criminal Enterprises Act.[69] These acts provide for both criminal in personam and

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activity. *Id*. at 1452-53. The burden then falls on the property owner to show by a preponderance of evidence that the property is not subject to forfeiture. *Id*. at 1453. For purposes of this comment, the distinction between civil in rem and criminal in personam forfeiture is not material to issues of whether homestead exemption applies to forfeiture resulting from criminal conduct.

57. Schimmelbusch, *supra* note 48, at 177.

58. *Id*.

59. Greek, *supra* note 40, at 120.

60. Schimmelbusch, *supra* note 48, at 177.

61. Greek, *supra* note 40, at 120.

62. Schimmelbusch, *supra* note 48, at 177.

63. Greek, *supra* note 40, at 120.

64. *Id*.

65. *Id*.; Schimmelbusch, *supra* note 48, at 177.

66. Greek, *supra* note 40, at 120; Schimmelbusch, *supra* note 48, at 177.

67. Schimmelbusch, *supra* note 48, at 177.

68. *Id*. In personam forfeiture did have a short lifespan during the Civil War when the Confiscation Act of 1862 allowed the President to seize property of confederate supporters. *Id*.

69. Greek, *supra* note 40, at 124, 127-28.

civil in rem forfeiture against any person violating the provisions set forth.[70] For example, the Comprehensive Drug Abuse Prevention and Control Act provides for forfeiture if a person is convicted of any drug offense related to manufacturing, possessing, and distributing a controlled substance.[71]

With the War on Drugs escalating, asset seizure has also expanded and grown immensely.[72] Following the federal government's lead, many states enacted statutes granting asset forfeiture similar to that of RICO.[73] For example, Florida responded to drug dealing by passing the Contraband Forfeiture Act of 1980, and amended the Act in 1983 to include forfeiture for all felonies.[74] The government has brought RICO cases against other accused criminals besides drug dealers.[75] The possibility of asset forfeiture has arisen in cases including, but not limited to, pornography, anti-abortion activists, and organized crime.[76] With its expansion, asset forfeiture has brought about many legal questions.[77] One of these questions is how asset forfeiture applies to homestead protection.[78]

IV. HOMESTEAD PROTECTION *DOES* PROTECT PROPERTY FROM STATE ASSET FORFEITURE

A. Torgelson v. 17138 880th Ave.

In 2008, the Supreme Court of Minnesota had to decide whether homestead protection prohibits the forfeiture of property under a drug-asset forfeiture statute.[79] The *Torgelson v. 17138 880th Ave.* facts are very similar to that of Frank's story.[80] In *Torgelson*, the appellant, Kent Feigum, admitted to a charge of possession of twenty-three pounds of marijuana located on his homestead property.[81] In response, the county attorney proceeded with an in rem forfeiture action against Feigum's homestead property under Minnesota statute section 609.5311(2a), which allowed for forfeiture of property for drug-related offenses.[82] The appellant fought this

70. Schimmelbusch, *supra* note 48, at 175.

71. *Id.*; 21 U.S.C. §§ 841(a), 853(a) (2009).

72. *See* Greek, *supra* note 40, at 129.

73. *Id.*

74. *Id.*

75. *Id.* at 128-29.

76. *Id.*

77. *Id.*

78. *See* Torgelson v. 17138 880th Ave., 734 N.W.2d 279, 284 (Minn. Ct. App. 2007), *aff'd*, 749 N.W.2d 24 (Minn. 2008).

79. Torgelson v. 17138 880th Ave., 749 N.W.2d 24, 25 (Minn. 2008), *aff'g*, 734 N.W.2d 279 (Minn. Ct. App. 2007).

80. *See supra* text accompanying note 1; *see also Torgelson*, 749 N.W.2d at 24.

81. *Torgelson*, 734 N.W.2d at 280.

82. *Id.* Minnesota statute section 609.5311(2a) states:

> All property, real and personal, that has been used, or is intended for use, or has in any way facilitated, in whole or in part, the manufacturing, compounding, processing, delivering,

forfeiture action by relying on homestead protection pursuant to Minnesota constitution article I, section 12, which forbids seizure of a person's property for the satisfaction of any liability or debt.[83] The constitutional homestead protection enacted by Minnesota constitution article I, section 12, provides in pertinent part that "[a] reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability."[84]

As a matter of first impression, the Supreme Court of Minnesota addressed whether the Minnesota constitution precludes drug asset forfeiture of homestead property.[85] The court relied on earlier Minnesota case law to determine that it should construe homestead exemptions liberally.[86] In addition, the court held that it should construe civil in rem forfeiture strictly, because it is at least in part a penalty.[87] In particular, the court looked at the phrase "debt and liability" in the constitutional provision and determined that no other state that has addressed the issue of homestead exemptions protecting homesteads from forfeiture used the word liability in its homestead protection clause.[88] With the breadth of the term liability, in addition to the idea that the court should construe homestead exemptions liberally, the court held that the constitutional language providing for homestead exemptions is in fact broad enough to encompass forfeitures.[89] The court believed that the framers of the Minnesota constitution intentionally left section 12 of article I vague so that the courts could apply it to future situations that the framers could not foresee.[90] With this in mind, as well as the idea that the court should strictly construe forfeiture because it is harsh and unfavorable, the Supreme Court of Minnesota ruled that Minnesota's homestead protection from debt and liability does exempt homestead property from forfeiture.[91]

By ruling that the homestead property is not subject to forfeiture, the Minnesota court makes forfeiture an obsolete form of punishment in Minnesota for all drug related offenses involving the homestead.[92] The court does not base its extinction of forfeiture on the criminal's lack of property to forfeit, as is the reason forfeiture became obsolete in colonial

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> importing, cultivating, exporting, transporting or exchanging contraband or a controlled substance that has not been lawfully manufactured, distributed, dispensed, and acquired is subject to forfeiture under this section . . . .

MINN. STAT. § 609.5311(2a) (2007); *see also Torgelson*, 734 N.W.2d at 282 (referring to the Minnesota statute).

83. *Torgelson*, 734 N.W.2d at 281.
84. MINN. CONST. art. I, § 12.
85. *Torgelson*, 749 N.W.2d at 27.
86. *Id*. at 26. The court relies on Denzer v. Pendergast, 126 N.W.2d 440, 444 (Minn. 1964). *Id*.
87. *Id*.
88. *Id*. at 27.
89. *Id*. at 28.
90. *Id*.
91. *See id*. at 29.
92. *See id*.

America.[93] Rather, the court overextends the principle that a homestead provision should be construed liberally to the point that it inhibits the ability of law enforcement to effectively combat crime.[94] Moreover, by allowing homestead protection to trump forfeiture while undermining the purpose of section 609.5311(2a), the Supreme Court of Minnesota essentially provides a haven for criminals who desire security for their illegal profits invested in a homestead.[95]

B. Tramel v. Stewart

The Supreme Court of Florida also tackled the issue of whether homestead protection prohibits civil forfeiture of homestead property when proceeds to purchase the property originated from illegal conduct.[96] In *Tramel v. Stewart*, police discovered, by way of an informant, that Stewart was selling marijuana at his home.[97] Upon searching Stewart's residence, not only did police confirm that Stewart was selling marijuana, they stumbled upon a sophisticated marijuana growing operation in a barn nearby his home.[98] As a result, the authorities began forfeiture proceedings against all real and personal property that Stewart used in connection with the drug operation or acquired from funds that stemmed from the violation of the Florida Contraband Forfeiture Act.[99] Stewart's defense claimed that the Florida constitution protects the real property, as homestead property, from forfeiture.[100]

After examining the Florida Contraband Forfeiture Act against the homestead exemption provided by Florida's constitution, the Supreme Court of Florida determined that they must liberally construe homestead protection.[101] The Florida constitution provides that a homestead

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93. *See* Schimmelbusch, *supra* note 48, at 177.
94. *See Torgelson*, 749 N.W.2d at 26-29.
95. *See id*.
96. Tramel v. Stewart, 697 So. 2d 821 (Fla. 1997).
97. *Id.* at 822.
98. *Id*.
99. *Id*. The Florida Contraband Forfeiture Act makes it unlawful to obtain any real property from funds acquired by violating the Florida Contraband Forfeiture Act, thus subjecting that property to forfeiture. FLA. STAT. § 932.701(2)(a)(6) (1995). The relevant provision provides that contraband subject to forfeiture is

> [a]ny real property, including any right, title, leasehold, or other interest in the whole of any lot or tract of land, which was used, is being used, or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.

Id.
100. *Tramel*, 697 So. 2d at 822.
101. *Id*. at 822-24.

> . . . shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field, or other labor performed on the realty . . . .[102]

The Supreme Court of Florida noted that this provision protected against forced sale in its plain language.[103] In addition, the Supreme Court of Florida pointed out that nowhere in the constitutional provision is there an exception for criminal activity; thus, the illegal activity did not necessarily allow forfeiture of the homestead property.[104]

The Supreme Court of Florida in *Tramel* focused on the idea that "[p]roperty rights are among the basic substantive rights expressly protected by the Florida Constitution," and that those rights are free from government intrusion; however, it still showed strong concern regarding the idea of homestead exemption protecting criminal conduct.[105] The court noted "homestead protection should not be used to shield fraud or reprehensible conduct."[106] Nevertheless, it deferred to the Florida Constitutional Revision Commission to remedy the problem and ultimately held that Stewart's property was not subject to forfeiture.[107] Although recognizing the issue, the Supreme Court of Florida essentially punted instead of addressing the problem with such a liberal interpretation of a constitutional homestead provision.[108]

C. In re Bly

The Supreme Court of Iowa came to a similar conclusion when they held that a legitimately acquired homestead was not subject to forfeiture even though the owners of the homestead were using it to facilitate the commission of a crime.[109] In *In re Bly*, police officers searched the Bly homestead and discovered cocaine, marijuana, methamphetamines, and drug paraphernalia related to the distribution of narcotics.[110] The state seized Bly's home pursuant to Iowa Code section 809.1(2)(b), which makes forfeitable any "[p]roperty which has been used or is intended to be used to facilitate the commission of a criminal offense or to avoid detection or

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102. FLA. CONST. art. X, § 4.
103. *Tramel*, 697 So. 2d at 823.
104. *Id*.
105. *See id*. at 824 (citing FLA. CONST. art. I, § 2).
106. *Id*.
107. *Id*.
108. *See infra* Part IV.C.
109. *See In re* Bly, 456 N.W.2d 195 (Iowa 1990).
110. *Id*. at 196.

apprehension of a person committing a criminal offense."[111] Bly argued that Iowa statutory homestead protection blocked any forfeiture under section 809.1(2)(b).[112] Iowa Code section 561.16 provides homestead protection and states, in relevant part, that "[t]he homestead of every person is exempt from judicial sale where there is no special declaration of statute to the contrary . . . ."[113]

To resolve the issue concerning forfeiture, the Supreme Court of Iowa first had to determine if an order of forfeiture was in fact a "judicial sale" under section 561.16; and if so, whether section 809.1(2)(b) is a "special declaration of the statute to the contrary."[114] The court in *In re Bly* began its interpretation of judicial sale by first recognizing that the court must broadly and liberally construe homestead statutes in favor of exemption, as the courts held in *Torgelson* and *Tramel*.[115] The court also noted that homestead exemption is for the benefit of the family, not for any individual alone.[116] However, in addition to being for the benefit of the family, the court recognized that homestead exemption is for the benefit of society and public welfare.[117] With that in mind, the Supreme Court of Iowa ruled that judicial sale meant "any judicially compelled disposition of the homestead," regardless of whether the court deemed the disposition a sale or not.[118] The court noted that forfeiture is more of a commandeering by the state than a sale, but the court reasoned that giving the term judicial sale a narrow definition consisting only of a true sale goes against the purposes of the homestead statute.[119] Thus, the court remained consistent with the ideology that courts should liberally construe homestead protection statutes.[120] The Supreme Court of Iowa also determined that forfeiture under section 809.1(2)(b) is not a special declaration of the statute to the contrary.[121] The court made its determination on the basis that neither section 809.1(2)(b) nor section 561.16 references each other concerning forfeiture and the homestead.[122] Thus, the court liberally construed the homestead provision to surpass any state law unless specifically provided otherwise.[123] When making this decision, the court emphasized that "forfeitures are severe

111. *Id*. (construing IOWA CODE § 809.1(2)(b) (1987)).
112. *Bly*, 456 N.W.2d at 197.
113. *Id*. at 198 (construing IOWA CODE § 561.16 (1987)).
114. *Id*.; § 561.16; § 809.1(2)(b).
115. *Bly*, 456 N.W.2d at 199; *see supra* Part IV.A-B.
116. *Bly*, 456 N.W.2d at 199.
117. *See id*.
118. *Id*.
119. *Id*.
120. *See id*.; *see supra* Part IV.A-B.
121. *Bly*, 456 N.W.2d at199; IOWA CODE § 809.1(2)(b) (1987).
122. *Bly*, 456 N.W.2d at 199.
123. *See id*.

sanctions not favored by our law."[124] The Supreme Court of Iowa held that the Bly homestead was therefore not subject to forfeiture.[125]

The Supreme Court of Iowa failed to recognize the social benefit and public welfare resulting from the deterrent effect of forfeiture when it drew the conclusion that "[t]he policy of our law is to jealously safeguard homestead rights."[126] Nevertheless, the court provided some guidance in remedying the problem.[127] With a special declaration of the statute to the contrary, the court has no choice but to find in favor of forfeiture.[128] Thus, legislation, which clearly declares that homestead protection does not apply to forfeiture resulting from criminal conduct, would remedy the problems by not allowing such forfeitures.[129]

D. Summary

States holding that homestead protection trumps state forfeiture laws have consistently agreed that courts should construe homestead provisions liberally in favor of exemption.[130] The liberal construction adopted by these states has led to purposely adopted forfeiture laws becoming obsolete.[131] While homestead provisions are often vague in addition to being liberally construed, proponents of homestead protection preemption can hardly argue that it should be used to protect illegal conduct.[132] Furthermore, if homestead protection is for the benefit of society and public welfare, how do laws protecting the illegal use of property and the fruits gained from criminal conduct meet that purpose?[133] Frank would be quite fortunate if Utopia adopted such an unrestrained liberal construction.[134] For these reasons and many more, other states have been reluctant to allow their homestead exemptions to trump their state forfeiture laws.[135]

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124. *Id*. at 200 (citing State v. Kaufman, 201 N.W.2d 722, 723 (Iowa 1972)).

125. *Id*.

126. *See id*. at 199 (citing Merchs. Mut. Bonding Co. v. Underberg, 291 N.W.2d 19, 21 (Iowa 1980)).

127. *See id*. at 199-200.

128. *See id*. at 199.

129. *See infra* Parts V-VI.

130. *See supra* Part IV.A-C.

131. *See supra* Part IV.A-C.

132. *See* Torgelson v. 17138 880th Ave., 749 N.W.2d 24, 28 (Minn. 2008), *aff'g*, 734 N.W.2d 279 (Minn. Ct. App. 2007); Tramel v. Stewart, 697 So. 2d 821, 824 (Fla. 1997).

133. *See Bly*, 456 N.W.2d at 199.

134. *See supra* note 1.

135. *See infra* Part V.

V. HOMESTEAD PROTECTION *DOES NOT* PROTECT FROM STATE ASSET FORFEITURE

A. Lot 39, Section C v. State

While some states have held that homesteads are not subject to forfeiture, other states, such as Texas, have held that homestead protection does not protect property from seizure or forfeiture under criminal statutory provisions.[136] In *Lot 39, Section C v. State*, this very issue of whether criminal forfeiture laws supersede state homestead protection came up as a matter of first impression in Texas.[137] In this case, the criminal defendant, similar to Frank, was using his homestead property to manufacture methamphetamines.[138] On two separate occasions, the police executed search warrants that resulted in the confiscation of firearms, bulletproof vests, large amounts of cash, and various drug paraphernalia associated with the manufacturing of methamphetamines.[139] Pursuant to the Texas Controlled Substance Act, real property is subject to forfeiture if the perpetrator used it for or intended to use it for purposes that violate a provision of the Act.[140] The evidence from the search clearly showed a violation of the Act resulting in a forfeiture proceeding against the criminal defendant.[141] As a defense, the defendant relied on article XVI, section 50 of the Texas constitution, which declares the protection for homesteads against "forced sale, for the payment of all debts."[142] The Texas appellate court did not buy this argument.[143]

The court in *Lot 39* recognized that in many states, the homestead is not subject to forfeiture, yet the Texas court found the logic of those other jurisdictions to be flawed.[144] The court stated that they do not believe a criminal perpetrator who uses his criminal property to conduct criminal activity may use homestead protection as a defense to forfeiture.[145] The court came to this conclusion despite its awareness that homestead exemption provisions should be liberally construed while forfeiture provisions should be strictly construed in favor of the person whose property is at stake.[146] The reasoning behind this decision lies in the observation that the forfeiture of property due to criminal activity is far

136. Lot 39, Section C v. State, 85 S.W.3d 429, 432 (Tex. App.—Eastland 2002, pet. denied).
137. *Lot 39*, 85 S.W.3d at 431.
138. *Id.* at 430.
139. *Id.*
140. *Id.*; Texas Controlled Substances Act, TEX. CODE CRIM. PROC. ANN. art. 59.02 (Vernon 2009).
141. *Lot 39*, 85 S.W.3d at 430.
142. *Id.* (quoting TEX. CONST. art. XVI, § 50).
143. *See Lot 39*, 85 S.W.3d 429.
144. *Id.* at 431.
145. *Id.* at 432.
146. *Id.*

different from the forfeiture for payment of the debts or claims of creditors for which the Texas constitutional drafters created the homestead exemption.[147] The court provided the following instruction in its *Lot 39* opinion:

> Neither in this history, nor in any reliable Texas case book authority, do we find even a suggestion that our forebearers conceived of a homestead exemption for the purpose of erecting a barrier behind which criminals might ply their trades while thumbing their noses at the law enforcement officers diligently and sincerely seeking to enforce prohibitions residents of the area had expressed a desire for at the ballot box.[148]

Lot 39 exemplifies that to allow homestead protection to trump state forfeiture laws defeats not only the purpose of homestead protection, but also the desires of society implemented in forfeiture laws, thus negating any form of social benefit or public welfare derived from those laws.[149] Other jurisdictions that do not allow forfeiture mistakenly view homestead protection as an expansive social benefit, instead of limiting its use for its intended purpose.[150] If instead those jurisdictions were to limit the overreaching of their homestead provisions, society could rightfully benefit from both forfeiture and homestead protection.[151]

B. Tellevik v. 6717 100th St. S.W.

A Washington appellate court limited this overreaching by reducing their homestead protection provision to its plain language, which does not provide for the protection of criminal conduct.[152] In *Tellevik v. 6717 100th St. S.W.*, the defendant was using his homestead to produce marijuana.[153] The Court of Appeals of Washington held that the defendant could not save his home from forfeiture via homestead protection.[154] *Tellevik* differentiated itself from *Lot 39* because the State of Washington had legislative history that clearly stated that a person who subjected their property to criminal forfeiture due to illegal activity could not claim homestead protection.[155] However, the issue remained whether the

147. *Id*. at 430-32; *see supra* Part III.A.

148. *Lot 39*, 85 S.W.3d at 432 (quoting 1018-3rd St. v. State, 331 S.W.2d 450 (Tex. Civ. App.—Amarillo 1959, no writ)).

149. *See id*.

150. *See supra* Parts III-IV.

151. *See* discussion *supra*.

152. *See* Tellevik v. 6717 100th St. S.W., 921 P.2d 1088, 1091 (Wash. Ct. App. 1996).

153. *Id*. at 1091.

154. *Id*.

155. *See id*. at 1094. Revised Code of Washington section 69.50.505(4) states that "[t]he community property interest in real property of a person whose spouse or domestic partner committed a

Washington constitutional homestead provision mandated that forfeiture be subject to homestead protection regardless of legislative intent.[156] The court held that homestead protection does not apply to forfeiture thereby limiting an overbroad interpretation of the state homestead provision.[157] The court based its decision on the key difference between forfeiture and a "forced sale" as used in the plain language of the Washington constitutional homestead provision.[158] Specifically, the court points out that to forfeit property is to take the property from its owner, at which point the property may or may not be sold by the state.[159] Thus, there is no forced sale because many times the forfeiting agency may retain or destroy the property as opposed to selling the property.[160] The premise that forfeiture and forced sale are equivalent concepts is flawed; therefore, the court relied solely on the plain language of the provision.[161]

Tellevik correctly limits the liberal interpretation of Washington's homestead provision by not allowing forced sales and forfeitures to be one and the same.[162] In addition, *Tellevik* suggests and verifies legislation as a remedy to the abuse of homestead protection by criminals.[163] In other words, legislation on the issue of forfeiture and homestead limits the liberal interpretation of homestead provisions.[164] Thus, to keep a criminal from enjoying illegal gains cleverly invested in a homestead, states must adopt legislation disallowing the use of homestead protection as a defense to forfeiture.[165]

C. People v. $8,450 U.S. Currency

Illinois case law informs any criminal attempting to use the homestead defense that the legislature of Illinois did not design homestead protection to exclude property from forfeiture.[166] In *People v. $8,450 U.S. Currency*, the Appellate Court of Illinois held that property used in furtherance of a

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violation giving rise to seizure of the real property may not be forfeited if the person did not participate in the violation." WASH. REV. CODE § 69.50.505(4) (2007). Upon examination of the history of this provision, the Washington court determined that "the Legislature rejected the idea that forfeiture based on a drug offense should be subject to homestead rights when such rights are claimed by the person who committed the offense." *Tellevik*, 921 P.2d at 1094.

156. *See Tellevik*, 921 P.2d at 1094.

157. *See id*. at 1095.

158. *See id*. The Washington Constitution states that "[t]he legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families." WASH. CONST. art. XIX, § 1.

159. *Tellevik*, 921 P.2d at 1095.

160. *See id*.

161. *See id*.

162. *See id*.

163. *See id*.

164. *See id*.

165. *See supra* Part IV.C.

166. *See* People v. $8,450 U.S. Currency, 659 N.E.2d 103, 106 (Ill. App. Ct. 1995).

drug trade is forfeitable as "derivative contraband," and unless a homestead provision clearly indicates it does not apply against forfeiture, no homestead exemption applies.[167] Furthermore, the Illinois court recognized that the legislature designed homestead exemptions to provide security for property and necessary shelter for the debtor against the debtor's financial misfortune.[168] On the other hand, the legislature designed forfeitures to be punitive, therefore classifying them differently from financial misfortunes.[169] Thus, as the court in *People v. $8,450 U.S. Currency* correctly states, "the forfeiture of ill-gotten gains does not implicate the interests of the exemption statutes."[170]

People v. $8,450 U.S. Currency suggests that even if there is no legislation allowing forfeiture of the homestead, there still must be legislation that the homestead is exempt for forfeiture not to occur.[171] The court's reasoning is consistent with the idea that the interpretation of homestead provisions cannot be overly liberal.[172] When courts allow such an interpretation, they defeat the intentions behind state legislatures enacting such forfeiture laws.[173] In an attempt to defeat those purposes, criminals continue to use homestead protection as a barrier to forfeiture.[174]

D. In re 1632 N. Santa Rita

The Court of Appeals of Arizona addressed the public policy argument that the state cannot forfeit homestead property in *In re 1632 N. Santa Rita*.[175] The defendant in this case pleaded guilty to growing 341 marijuana plants on his homestead property.[176] The defendant contended that forfeiture of his homestead would be against the public policy behind homestead protection.[177] The Court of Appeals of Arizona believed otherwise, holding that it would be against public policy to allow homestead provisions to supersede forfeiture provisions.[178] Just as in *Tellevik*, the court looked at the legislation on the matter; unlike *Tellevik*, the court noted the absence of any exclusion for homestead property under

167. *See id*. at 106. The Illinois statute at issue in this case provides only for an exemption against an attachment, a judgment, a levy, or a distress for rent. 735 ILL. COMP. STAT. ANN. 5/12-1001 (West 1994).
168. *$8,450 U.S. Currency*, 659 N.E.2d at 106.
169. *See id*.
170. *Id*.
171. *See id*.
172. *See id*.
173. *See supra* Part III.B; *infra* Part VI.
174. *See supra* Part IV.
175. *In re* 1632 N. Santa Rita, 801 P.2d 432, 437 (Ariz. Ct. App. 1990).
176. *Id*. at 434.
177. *Id*. at 437.
178. *Id*. at 436.

the relevant forfeiture law.[179] The Arizona court held that the reasoning behind homestead provisions is not for protection against debts incurred by illegal use of the property, but rather for a family's protection from forced sale of homestead to satisfy debts of the deceased owner.[180] The Arizona court stated, "The homestead statutes were not designed to immunize real property for use in a criminal enterprise."[181] After *In re 1632 N. Santa Rita*, the argument that a criminal cannot forfeit the homestead because of public policy has been severely limited; rather, public policy requires that the criminal forfeit the homestead under Arizona case law.[182]

E. Summary

Courts holding that forfeiture laws are superior to homestead protection have had a sound basis for such holdings.[183] As discussed in Part III, the adopters of homestead protection enacted such exemptions as a barrier to protect from creditors seizing the family homestead.[184] As *Lot 39* highlights, the forbearers of homestead protection never fathomed the idea that criminals could hide behind the curtain of homestead protection.[185] If courts allow a criminal to do so, the courts have essentially negated a goal of forfeiture, which is to punish the criminal.[186] In addition, the public policy argument against seizure of the homestead is essentially arguing for immunization of "real property for use in a criminal enterprise."[187] States must prohibit the use of homestead protection as a defense to forfeiture resulting from criminal conduct to limit the overreaching homestead protection.[188] Because many courts construe homestead provisions liberally, states must adopt legislation that clearly overrides these liberal interpretations of homestead protection.[189] The need to do so is evident in the logic behind the preemption of homestead protection provisions by federal forfeiture laws.[190]

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179. *Id.* at 437; *see* ARIZ. REV. STAT. ANN. § 13-4304 (2008); *supra* Part V.B.
180. *1632 N. Santa Rita*, 801 P.2d at 437.
181. *Id.*
182. *Id.*
183. *See supra* Part V.A-D.
184. *See supra* Part III.A.
185. *See* Lot 39, Section C v. State, 85 S.W.3d 429, 432 (Tex. App.—Eastland 2002, pet. denied).
186. *See* Schimmelbusch, *supra* note 48, at 180.
187. *See 1632 N. Santa Rita*, 801 P.2d at 437.
188. *See supra* Part IV; *infra* Part VI.
189. *See supra* Part IV.
190. *See infra* Part VI (discussing the Supremacy Clause of Article IV of the Constitution).

VI. FEDERAL PREEMPTION OF STATE HOMESTEAD PROTECTION

A. United States v. Curtis

Although jurisdictions disagree over whether state forfeiture laws apply to homestead protection, federal courts have held that federal forfeiture laws supersede all state homestead exemptions to effectively combat crime.[191] A leading case illustrating this federal dominance is *United States v. Curtis*.[192] In this case, an Iowa resident charged with manufacturing marijuana in her basement claimed that her homestead was not subject to forfeiture under federal law because Iowa homestead exemption protected her property.[193] The United States Court of Appeals disagreed; it held that federal law preempts state law under the Supremacy Clause of Article VI of the Constitution when federal and state laws conflict.[194] More importantly, however, the court realized the necessity of applying criminal forfeiture laws uniformly and that holding otherwise would interfere with the intent of Congress to regulate traffic and possession of controlled substances.[195] In other words, forfeiture laws would become ineffective if all states did not apply them consistently because some states would provide greater protection for criminals.[196]

B. United States v. Lot 5

United States v. Lot 5 expanded upon the necessity for uniformity.[197] In 1992, the federal government accused the defendant, Savannah Wims, of using her home to facilitate drug transactions, and as a result, the federal government moved to seize the house under a federal civil drug-related statute.[198] The defendant Wims responded by claiming that her home was protected under the Florida constitution, which exempted her homestead from forfeiture.[199] The court ultimately dismissed the argument made by Wims; the court reasoned that Congress intentionally eliminated state homestead protection as an exception.[200] The court emphasized that the bill, which provides for civil forfeiture, applies to *all* real property; therefore, if Congress intended to have a caveat for state homestead exemptions, then

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191. *See supra* Part IV-V; *see* United States v. Curtis, 965 F.2d 610, 616-17 (8th Cir. 1992).
192. *Curtis*, 965 F.2d at 610.
193. *Id.* at 612, 616.
194. *Id.* at 616-17.
195. *See id*.
196. *See id*.
197. United States v. Lot 5, 23 F.3d 359 (11th Cir. 1994).
198. *Id.* at 363; Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 881(a)(7) provides for forfeiture of all real property. *Id*.
199. *Id.* at 361-63; *see* FLA. CONST. art. X, § 4.
200. *Lot 5*, 23 F.3d at 363.

Congress would have included terminology stating so.[201] More importantly, the court in *Lot 5* recognized that Congress created the bill enacting federal civil forfeiture "to eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by federal law enforcement agencies."[202] To rule that federal forfeiture laws do not preempt the Florida homestead exemption, the court would frustrate the intentions of Congress to combat drug trafficking.[203]

C. Summary

States holding that forfeiture laws do not apply to protected homesteads frustrate the purpose behind these laws; therefore, homesteads must be subject to forfeiture for the same reasons outlined in *Curtis* and *Lot 5*.[204] *Curtis* suggests that without the option of uninhibited forfeiture in every state, criminals will be successful in disrupting the regulation of trafficking and possession of controlled substances.[205] In addition, *Lot 5* warns that the disallowance of forfeiture directly prohibits the active pursuit of combating crime by providing sanctuary for criminal facilities and assets.[206] Similar to Texas originally using homestead protection to create a haven for Southerners wishing to start anew, the states failing to allow forfeiture are using homestead protection to create a haven for criminals desiring asset protection and uninhibited criminal enterprises.[207]

VII. CONCLUSION

The true purpose behind homestead protection is lost due to an overly liberal interpretation of state homestead provisions.[208] Americans originally used homestead protection as a recruitment tool and as a means of protecting debtors from creditors in a society frightened by the advent of capitalism in America.[209] Since then, homestead protection has grown and evolved. Today, state courts view homestead protection as a basic substantive property right provided to citizens as a protection against creditors.[210] However, this basic substantive property right has been misapplied in cases of forfeiture resulting from criminal conduct.[211]

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201. *Id.*
202. *Id.*
203. *See id*.
204. *See supra* Part VI.
205. *See* United States v. Curtis, 965 F.2d 610, 618 (8th Cir. 1992).
206. *See Lot 5*, 23 F.3d at 363.
207. *See supra* Part III.A.
208. *See supra* Parts III.A, V.
209. *See supra* Part III.A.
210. *See* Tramel v. Stewart, 697 So. 2d 821, 824 (Fla. 1997).
211. *See supra* Part IV.

As outlined in *Tellevick*, the purpose behind homestead protection is for the protection to apply against creditors, not forfeiture resulting from criminal conduct.[212] By using overly expansive and liberal interpretations of homestead protection provisions, some state courts have ignored the true purpose behind homestead provisions, resulting in the immunization of property for use in criminal enterprise.[213] Accordingly, these states have provided criminals a haven to invest their illegal gains into their homestead without fear of forfeiture, thus securing their illegal gains. However, case law provides a solution: States can return homestead protection to its proper use by adopting legislation forbidding homestead protection as a defense to forfeiture.[214]

Legislation prohibiting homestead protection as a defense to forfeiture remedies the problem created by overly liberal interpretations of homestead exemption provisions.[215] As expressed by the court in *Lot 39*, states' allowing exemption from forfeiture is equivalent to allowing criminals to smirk at law enforcement as they unsuccessfully try to enforce laws.[216] Remember, governments use forfeiture as a punitive method for combating crime.[217] Therefore, without the uniform availability of forfeiture in *every* state, law enforcement will have more difficulty regulating criminal conduct, such as trafficking and possession of controlled substance, because criminals will find sanctuary in certain states.[218] States must restrain liberal interpretations of homestead provisions, such as the one in *Torgelson*, in the form of legislation.[219] Legislation prohibiting the use of homestead protection as a defense to forfeiture restrains the judicial overreaching allowed in *Torgelson*.[220] *Tellevik* and *People v. $8,450 U.S. Currency* prove that state legislatures have the power to restrain overbroad interpretations of homestead provisions.[221] Other states must adopt similar legislation to end the misinterpretation of homestead provisions and to allow law enforcement to effectively combat ever-growing crime.

The use of forfeiture to combat crime is continually growing in America; as a result, the need to restrain homestead protection is also growing.[222] Forfeiture arises in cases involving numerous other crimes in addition to drug related crimes.[223] If Frank's story were an issue of

212. *See* Tellevik v. 6717 100th St. S.W., 921 P.2d 1088, 1095 (Wash. Ct. App. 1996).
213. *See supra* Part V.
214. *See supra* Part V.
215. *See generally Tellevik*, 921 P.2d at 1095 (holding that the legislature may limit homestead rights in situations that do not fall below a constitutional minimum).
216. *See* Lot 39, Section C v. State, 85 S.W.3d 429, 432 (Tex. App.—Eastland 2002, pet. denied).
217. *See supra* Part III.B.
218. *See* United States v. Lot 5, 23 F.3d 359, 363 (11th Cir. 1994).
219. *See supra* Part IV.A.
220. *See supra* Parts IV.A, V.
221. *See supra* Part V.B-C.
222. *See supra* Part III.B.
223. *See supra* Part III.B.

forfeiture stemming from terrorism, child pornography, or organized crime, the issue caused by homestead protection would be just as relevant as it is with drug related seizures. By allowing homestead protection to trump forfeiture laws, states will essentially promote illegal profits from any type of crime by providing a "safety deposit box" called the homestead. This protection clearly contradicts society's policy of hindering crime, which is evident by the continuously adapting laws combating drug related offenses, terrorism, child pornography, organized crime, etc. As America continues to criminalize conduct and the use of forfeiture expands, the need to restrict the breadth of homestead protection grows immensely.

If the State of Utopia allows Frank to use homestead protection as a defense to forfeiture, Utopia is providing a jurisdiction in which criminals can prosper.[224] In order to prevent such an occurrence, states must adopt legislation that prohibits the use of homestead protection as a defense to forfeiture resulting from criminal conduct. When states adopt such legislation, criminals, such as Frank, will no longer find sanctuary in liberal interpretations of homestead provisions. Instead, criminals like Frank will suffer from the punitive effect of forfeiture as society intended when it enacted forfeiture laws.

224. *See supra* Part V.