

Asset Forfeiture Reform Must Include Restrictions on Equitable Sharing

Testimony by Jon Guze
Georgia Advisory Committee to the U.S. Commission on Civil Rights
March 10, 2021

I hope by now you're all convinced that Georgia's asset forfeiture laws are in dire need of reform. In my presentation I want to suggest that any reform measures you undertake won't be complete unless they include restrictions on a federal program called "equitable sharing." Without such restrictions, your state and local law enforcement agencies will be able to use that program to circumvent whatever reforms you put in place under state law.

Before I begin, however, I want to note that, until the practice was revived by the federal government in the 1980s, civil asset forfeiture was regarded as an archaic relic—something comparable to putting animals on trial for murder. Here's an illustration of one of the last times that happened.



Source: Illustration from "Chambers Book of Days"

The trial took place in France in 1457. A sow that had attacked and killed a child was accused of murder along with her piglets. According to one account of the trial, the sow was convicted and hanged, but her piglets were acquitted, "partly because of their youth and innocence and the fact that their mother had set them a bad example, but chiefly because proof of their complicity was

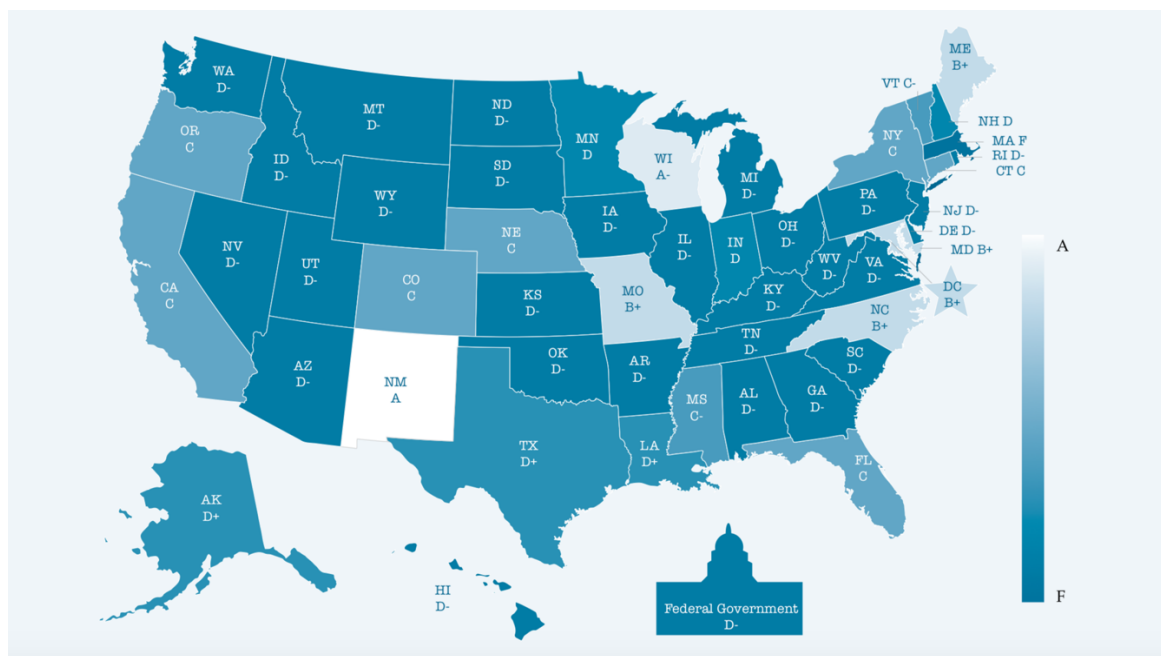
not forthcoming.” To us this seems ridiculous, but animals were routinely tried, convicted, and punished for crimes throughout the middle ages, and, as in this case, the practice continued into the early modern period. The point, however, is that we don’t do that anymore! In a modern, enlightened legal system we don’t charge animals with crimes, and we shouldn’t be filing lawsuits against inanimate objects like cars and houses either.

Getting back to my topic, I’ll begin by telling you a bit about our experience with equitable sharing in North Carolina. As I presume goes without saying, depriving criminals of their ill-gotten gains is clearly desirable. The challenge is to do it in a way that protects the rights of innocent property owners and discourages abuse by law enforcement agencies. North Carolina has successfully met that challenge in two ways.

First, with a couple of minor exceptions, under North Carolina law property may only be forfeited if the state can prove it was acquired as a result of committing a felony, and only after the owner has been convicted of that felony. Those provisions protect the rights of innocent property owners.

Second, under the North Carolina State Constitution, forfeiture proceeds must be used exclusively for maintaining public schools. This provision removes the incentive for asset forfeiture abuse and discourages the kind of predatory policing that has poisoned relations between the police and the public in many parts of the country.

These provisions of North Carolina’s law have elicited high praise from public policy experts and have made our asset forfeiture regime a model for other states. Currently, the Institute for Justice’s asset forfeiture scorecard has us in a four way tie for third place with Maine, Maryland, Missouri, and Washington, DC.



The federal government's approach to asset forfeiture is very different from North Carolina's. Under federal civil asset forfeiture law, there's no need to convict, or even charge, the owner of the property. Instead, as noted above, a lawsuit is filed against the property itself. In addition, under federal law, law enforcement agencies are not just *allowed* to keep and use forfeiture proceeds, they're *required* to do so.

It would be bad enough if federal civil asset forfeiture laws were limited to federal law enforcement agencies, but, unfortunately, they are not. Instead, the federal equitable sharing program makes it possible for state and local agencies to seize assets, refer them to federal agencies for processing under federal forfeiture law, and receive a substantial portion of the proceeds in return. Because the transaction takes place under federal law, state law does not apply, and that is the source of the problem. Simply put, federal equitable sharing makes it possible for state law enforcement agencies to circumvent any protective provisions that may be present under state law.

In North Carolina more than 100 agencies, including the State Bureau of Investigation and the Highway Patrol, regularly process seized assets through the equitable sharing program. Between 2000 and 2019, those agencies collected almost \$300 million worth equitable sharing proceeds.

Year	North Carolina Forfeiture Revenues	Dept. of Justice Equitable Sharing Proceeds	Treasury Equitable Sharing Proceeds	Total Equitable Sharing Proceeds	<div> <div>Treasury</div> <div>Dept. of Justice</div> <div>State</div> </div>	\$0	\$12,426,256	\$24,852,512
2000	None Reported	\$7,125,291	\$1,018,000	\$8,143,291				
2001	None Reported	\$6,808,539	\$754,000	\$7,562,539				
2002	None Reported	\$4,581,800	\$1,632,000	\$6,213,800				
2003	None Reported	\$9,480,431	\$899,000	\$10,379,431				
2004	None Reported	\$8,536,628	\$720,000	\$9,256,628				
2005	None Reported	\$10,121,517	\$3,802,000	\$13,923,517				
2006	None Reported	\$10,817,405	\$2,675,000	\$13,492,405				
2007	None Reported	\$20,920,094	\$2,734,000	\$23,654,094				
2008	None Reported	\$17,964,512	\$6,888,000	\$24,852,512				
2009	None Reported	\$15,445,754	\$7,081,000	\$22,526,754				
2010	None Reported	\$10,600,785	\$3,276,000	\$13,876,785				
2011	None Reported	\$10,603,162	\$2,761,000	\$13,364,162				
2012	None Reported	\$15,563,496	\$4,108,000	\$19,671,496				
2013	None Reported	\$12,763,130	\$5002,000	\$17,765,130				
2014	None Reported	\$10,805,901	\$5736,000	\$16,541,901				
2015	None Reported	\$11,883,462	\$3,651,000	\$15,534,462				
2016	None Reported	\$8,709,152	\$5480,000	\$14,189,152				
2017	None Reported	\$9,256,927	\$1,915,000	\$11,171,927				
2018	None Reported	\$17,116,834	\$2,237,000	\$19,353,834				
2019	None Reported	\$11,277,342	\$1,019,000	\$12,296,342				
Totals	\$0	\$230,382,162	\$63,388,000	\$293,770,162				

All revenue figures include both civil and criminal forfeitures. Revenues are not adjusted for inflation.

On a per-capita basis, we go in for equitable sharing more than most states, which is why we consistently rank near the bottom on the Institute for Justice’s equitable sharing report. As you can see, in the latest report North Carolina is down very near the bottom, even worse than Georgia!

State Equitable Sharing Rankings

State	Rank
South Dakota	1
North Dakota	2
Wyoming	3
New Mexico	4
Idaho	5
Maine	6
District of Columbia	7
Iowa	8
Montana	9
Utah	10
New Hampshire	11
Vermont	12
Delaware	13
Oklahoma	14
Alaska	15
West Virginia	16
South Carolina	17
Nebraska	18
Minnesota	19
Oregon	20
Louisiana	21
Arkansas	22
Arizona	23
Tennessee	24
Wisconsin	25
Hawaii	26
Mississippi	27
Connecticut	28
Kansas	29
Nevada	30
Virginia	31
Maryland	32
Indiana	33
Missouri	34
Kentucky	35
Alabama	36
New Jersey	37
Pennsylvania	38
Colorado	39
Michigan	40
Ohio	41
Washington	42
Georgia	43
Florida	44
North Carolina	45
Illinois	46
Texas	47
Massachusetts	48
California	49
New York	50
Rhode Island	51

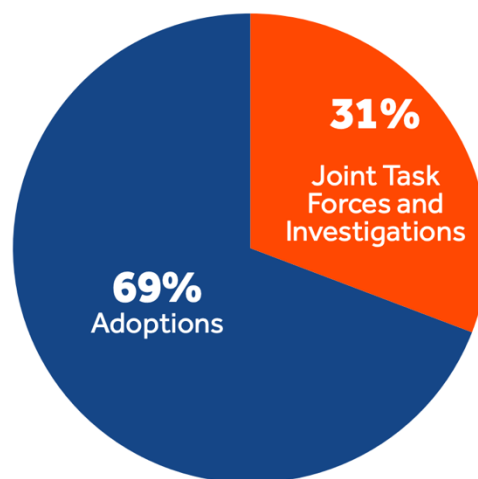
Source: Institute for Justice

There are actually two different ways in which state and local agencies can use equitable sharing to circumvent state asset forfeiture laws. The first is by referring seized assets to a federal agency for “adoption.” As the Department of Justice’s *Guide to Equitable Sharing for State and Local Law Enforcement Agencies* explains, “An adoption occurs when a state or local law enforcement agency seizes property and requests one of the federal seizing agencies to adopt the seizure and proceed with federal forfeiture.” After processing the assets through the federal system, the adopting agency returns the bulk of the proceeds to the state or local agency that made the seizure. It’s really just a money laundering scheme, and, of course, the launderer gets a cut—the adopting agency keeps 20% of the proceeds.

The second way in which state and local agencies can use equitable sharing to circumvent state asset forfeiture laws is to participate with a federal agency in a “joint investigation.” As explained in the DOJ Guide, “Joint investigations are those in which federal agencies work with state or local law enforcement agencies to enforce federal criminal laws.” With joint investigations, a local law enforcement agency’s share is determined by its level of participation, but the feds always keep at least 20%.

Adoptions and joint investigations both make it possible for state and local law enforcement agencies to circumvent state asset forfeiture laws, and they both make it possible for state and local agencies to keep forfeiture proceeds and use them for their own purposes. Nevertheless, there are important differences. Joint investigations can play a legitimate and valuable role in law enforcement. They facilitate the sharing of information, expertise, and resources, and they often lead to the arrest and conviction of dangerous criminals. Adoptions, on the other hand, serve only one purpose: to provide a way for state and local law enforcement agencies to circumvent state asset forfeiture laws. Which makes it particularly galling that adoptions account for more than two-thirds of equitable sharing in North Carolina.

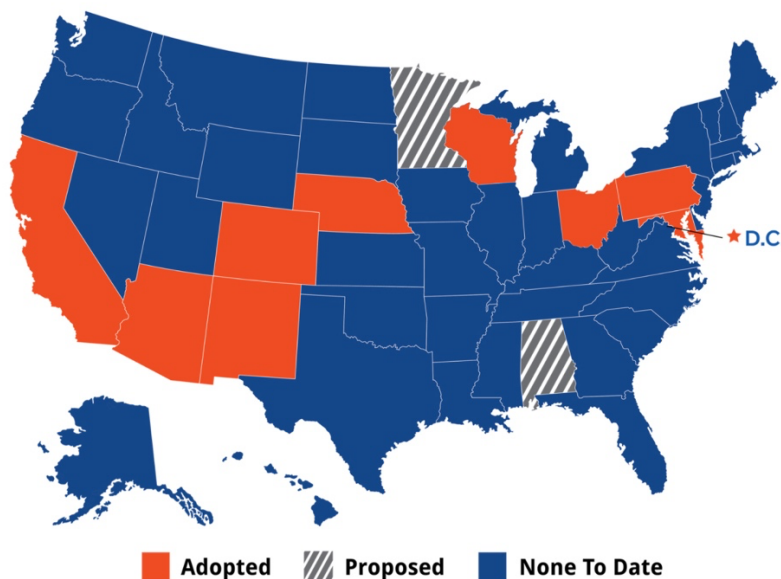
Adoptions Account For Most Sharing in N.C., 2000-2013



Source: Institute for Justice

Anti-circumvention legislation has been enacted in nine states and the District of Columbia

Status of Anti-Circumvention Laws Across the U.S.



Source: John Locke Foundation.

Significantly, despite equitable sharing's manifest faults, states have been reluctant to ban the practice completely, and, indeed, no state has done so. This, no doubt, is mostly because the prospect of taking money from drug traffickers and other criminals and using it to fund law enforcement is almost irresistibly attractive to legislators. However, it is also because no one wants to stop participating in joint investigations, which, as previously noted, can play a valuable role in law enforcement. Rather than banning equitable sharing entirely, therefore, reformers have experimented with various ways of mitigating its worst aspects without entirely cutting off the flow of shared revenue and without losing the benefits of joint investigations. From their experience, we can draw three broad lessons about what works and what doesn't.

Lesson One: Ban or severely restrict federal adoptions.

The District of Columbia was the first jurisdiction in the country to enact anti-circumvention legislation. In addition to reforming the District's own asset forfeiture regime, the Civil Asset Forfeiture Amendment Act of 2014 included two anti-circumvention provisions, one of which was an outright ban on federal adoptions. In 2016, California passed an asset forfeiture bill that included a provision that effectively banned adoptions within the state. In 2017, Pennsylvania followed suit with a similar measure. That same year, the Institute for Justice incorporated a modified adoption ban into its Anti-Circumvention Model Act. Finally just last year, Wisconsin enacted its own adoption ban based on IJ's model act.

In short, banning or severely restricting federal adoptions has become a generally recognized “best practice” when it comes to asset forfeiture reform.

*Lesson Two: **Do not divert equitable sharing proceeds away from law enforcement.***

The ban of federal adoptions was not the only anti-circumvention provision included in the District of Columbia’s 2014 Civil Asset Forfeiture Amendment Act. While the Act did not restrict the District’s law enforcement agencies’ ability to participate in joint investigations with federal agencies, it did restrict the use of shared proceeds derived from such investigations by requiring that all such proceeds be deposited in the General Fund.

In theory, diverting forfeiture proceeds from law enforcement to the General Fund would appear to be a very sensible requirement to impose. Like the provision in North Carolina’s constitution requiring that forfeiture proceeds must be used for public education, diverting proceeds to the General Fund removes the profit motive from the forfeiture process and ensures that it is used—not to generate revenue—but for its proper purpose, which is to punish criminals and discourage crime.

In practice, however, there is a problem with the diversionary approach. The problem was not immediately apparent because the District of Columbia’s reform act did not become effective at the time of passage, but it was recognized the following year when New Mexico enacted asset forfeiture legislation that also diverted forfeiture assets to the General Fund.

New Mexico’s law took immediate effect, and, when it did, the federal government’s reaction was swift and brutal. Citing its own rule requiring that equitable sharing funds must be used “by law enforcement agencies for law enforcement purposes only,” the Department of Justice (DOJ) announced that it would no longer participate in any joint investigations with New Mexico law enforcement agencies. This was an extreme response. The agency could have continued to participate in joint operations and simply stopped sharing the proceeds of assets seized in the course of those operations, but it evidently wanted to send a message, and that message was received. None of the anti-circumvention laws that have passed since 2015 have included a provision that diverts forfeiture proceeds away from law enforcement, nor is there any such provision in IJ’s Model Act.

*Lesson Three: **Only permit equitable sharing when the value of seized assets exceeds a minimum monetary threshold.***

With the diversionary approach effectively off the table, reformers were forced to look for an alternative way of taking the profit motive out of the forfeiture process. In the end, they settled for an approach that takes the profit motive out of *most* forfeiture cases by limiting equitable sharing to cases in which the value of seized assets exceeds a minimum monetary threshold.

As “second best” solutions go, this one is not too bad. Because most forfeiture cases involve small seizure amounts, the imposition of a threshold ensures that most forfeiture decisions will be made on public safety grounds alone. At the same time, because most forfeiture revenue

comes from cases involving large seizure amounts, the imposition of a threshold accomplishes this goal with a minimal loss of shared revenue.

There are actually two versions of the threshold approach. Under the first, a minimum monetary threshold must be met before a state agency can *transfer* seized assets *to* a federal agency. Under the second, a minimum monetary threshold must be met before a state agency can *receive* a share of seizure proceeds *from* a federal agency. Each version has its pros and its cons, and if any of you are interested I'll be happy to discuss them during the question-and-answer period. Since I'm running out of time, however, I'll wrap things up by reiterating the three lessons learned about best practices when it comes to anti-circumvention legislation:

1. Ban or severely restrict federal adoptions.
2. Do not divert equitable sharing proceeds away from law enforcement.
3. Only allow equitable sharing when the value of seized assets exceeds a minimum monetary threshold.

I'll leave you with one final thought. I've already mentioned the Institute for Justice's Model Anti-Circumvention Act. They've also developed a model asset forfeiture reform act as well. Here in Georgia you would do well to be guided by both models when you go about crafting your own asset forfeiture reform legislation, and you would do well to consult Dan Alba and other IJ experts as you work out the details. You will find them both extremely knowledgeable and extremely generous with their time. IJ is a national treasure!