

ASSET FORFEITURE PROGRAMS

*IMPACT, ISSUES AND IMPLICATIONS*

Jefferson Institute for Justice Studies

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# **ASSET FORFEITURE PROGRAMS**

## **IMPACT, ISSUES, AND IMPLICATIONS**

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## ASSET FORFEITURE PROGRAMS: ISSUES, IMPACT AND IMPLICATIONS

### I. INTRODUCTION

"We are proud of our asset forfeiture program. It cripples drug syndicates and saves taxpayers hundreds of millions of dollars a year by supplementing law enforcement budgets out of the pockets of criminals." *Dick Thornburg, former U.S. Attorney General*

Asset forfeiture programs are powerful weapons in the fight against drugs. They are based on a simple and clear set of objectives, namely to disrupt drug trafficking, take the profits out of crime, and pour the money or assets from these illegal activities back into the war against drugs. But for all the simplicity of their goals, they are programs that are often difficult to organize, implement and maintain over time.

A large part of the difficulty stems from the legal basis for asset forfeiture which encompasses both civil and criminal laws and procedures. Their different standards of proof and procedures are not generally understood or accepted by criminal justice practitioners. Additionally, differences in federal and state statutes bring little uniformity to forfeiture procedures. Because asset forfeiture programs rely on a variety of activities not commonly associated with criminal justice, they gain a complexity that presents difficulties to many agencies. Yet, where these programs have been successfully installed, their results have met or exceeded the most optimistic goals. They represent one of the most effective law enforcement strategies in attacking the present drug problem and have even more powerful implications for use in other areas.

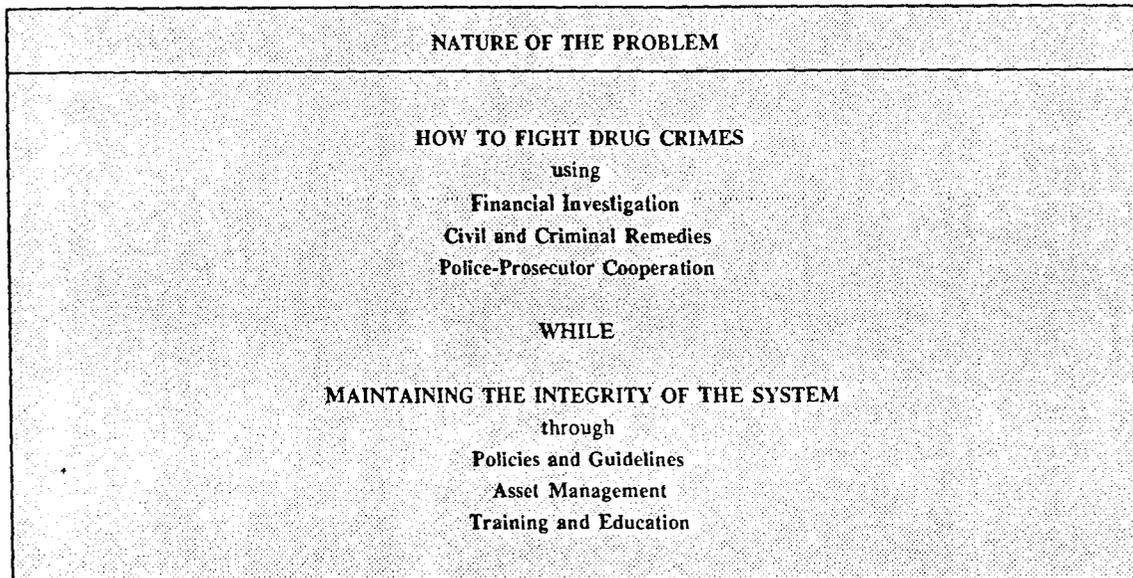
This report has been prepared to alert law enforcement and prosecution to the problems and issues related to asset forfeiture programs, and to assist them in building the capacity to successfully target assets related to drug and money laundering cases. It is based on the results of an evaluation, supported by the National Institute of Justice (NIJ), of asset forfeiture programs established in four demonstration sites, and supplemented by the findings from a nationwide survey of the state-of-the-art of asset forfeiture programs in 1990. Issues and problems related to the development of asset forfeiture programs are discussed; the essential ingredients to successful operations are identified; and, the impact of asset forfeiture on police and prosecutorial agencies is described.

#### THE NATURE OF THE PROBLEM

Even though the federal use of forfeitures has received priority emphasis, and despite the impressiveness of the results that are indicated by federal forfeitures of \$644 million in 1991, there has been sporadic use of asset forfeiture by state and local governments.

This is due to a variety of reasons. Foremost, are variations in forfeiture statutes among the states which impede the development of standardized programs or procedures; the complexity of legal issues especially the protection of third party rights; the quasi-criminal nature of the law and its imposition of a lesser burden of proof; the fact that procedures for civil remedies used for forfeitures are unfamiliar; and, opposition to civil forfeitures by the judiciary, public and media because of their perceived harshness and intrusion on 4th and 5th amendment rights. Asset forfeiture

programs also require the adoption of new sets of activities such as financial investigations, protection and management of assets, and the accounting for and distribution of proceeds which range from large sums of cash, to cars, boats, or airplanes, to real property or businesses.



#### **DEMONSTRATION PROGRAMS**

To assist state and local agencies in developing an asset forfeiture capacity and overcoming many of the legal and practical constraints, the Bureau of Justice Assistance (BJA) funded four demonstration projects in 1989 as part of a grant to the Police Executive Research Forum (PERF). The demonstration sites selected by PERF were Prince George's County, MD, Colorado Springs, CO, Tucson, AZ, and the Attorney General's Office in Arizona. These jurisdictions represent a cross-section of criminal justice environments and program organization. Seed money to develop asset forfeiture programs was provided to each program with the expectation that they would eventually become self-sufficient; and, indeed they did.

The demonstration project was part of PERF's Asset Forfeiture Training and Technical Assistance Project that started in 1986. About that same time, PERF, in cooperation with BJA, undertook a comprehensive program to increase state and local asset forfeiture capability. The role of the demonstration sites was to demonstrate how training, assistance, and additional resources could be used to improve a programs' productivity. In 1989, the Jefferson Institute for Justice Studies (JI) was awarded a grant by the National Institute of Justice to evaluate the asset forfeiture programs.

Each of the demonstration sites developed programs that shared common goals, but they were organized differently and their use of program funds emphasized different aspects of asset forfeiture.

<b>MANTIS, Tucson, AZ</b> (Metropolitan Area Narcotics Traffic Interdiction Squad)
<ul style="list-style-type: none"> <li>* \$124,986 seed money</li> <li>* Within umbrella of MANTIS</li> <li>* Two financial investigators</li> <li>* Property Manager</li> <li>* Prosecutor provides attorneys</li> <li>* Complex organization</li> <li>* Extensive ties to state/federal/local resources</li> </ul>

The *Tucson Police Department* which participates in a regional narcotics task force, *Metropolitan Area Narcotics Traffic Interdiction Squad (MANTIS)*, received \$124,986 to establish a Financial Analysis and Property Management Unit within MANTIS. The purpose of this unit was to identify and institute forfeiture proceedings against drug traffickers, and develop a capacity to store, maintain and dispose of assets. PERF provided BJA funds to hire two financial investigators, a property manager, and to purchase office equipment for them. The program sits within a task force configuration that has extensive ties to state, federal and local agencies. Although MANTIS concentrates on the local drug trafficking network, their proximity to the Mexican border often involves their investigators in international or multi-state activities.

<b>Colorado Springs Police Department</b>
<ul style="list-style-type: none"> <li>* \$105,281 seed money</li> <li>* County asset forfeiture team</li> <li>* Housed within Metro Vice/Narc/Intel Division</li> <li>* Directed by CSPD</li> <li>* Oversight and policy by Special Investigation Fund (SIF)</li> <li>* Financial investigator</li> <li>* Prosecutor on contract to SIF</li> <li>* Use public nuisance laws to forfeit</li> </ul>

The *Colorado Springs Police Department* established an asset forfeiture team that is housed within the Metro, Vice, Narcotics and Intelligence Division, (Metro VNI). This multi-jurisdictional task force includes two law enforcement agencies, two sheriff's offices and two prosecutor's offices. BJA funds supported salaries for one full-time Deputy District Attorney, a clerical support person, in addition to expenses for office space and equipment. An investigative accountant from the El Paso Sheriff's Department was detailed to the task force. The scope of the asset forfeiture team's interest was the local drug trafficking network, although its reach extended beyond the Colorado Springs area.

**State's Attorney's Office, Prince Georges County, MD**

- \* \$105,281 seed money
- \* Special unit
- \* Directed by S.A.'s office
- \* Two investigators, 1 paralegal
- \* Priority: Training 23 police departments
- \* Real property seizures started 1989

The *State's Attorney's Office in Prince Georges County, MD*, received \$105,281 to create a new Asset Forfeiture Unit. Directed by the prosecutor, this unit was placed within the Special Narcotics Prosecution Unit in the Narcotics/Homicide Division. The funds were used to hire two full-time investigators and one administrative aide. In addition, the State's Attorney assigned a paralegal, full-time, and an Assistant State's Attorney, part-time, to the unit. The unit gives priority to training the 23 municipal police departments in the county and the Prince George's County Police about asset forfeiture so as to expand its use. The scope of the initial program has been expanded to address complex operations and even some money laundering cases.

**Office of the Attorney General, Phoenix, AZ**

- \* \$124,763 seed money
- \* Forfeiture support project
- \* Money laundering through financial institutions
- \* One financial institution analyst
- \* One analytical assistant
- \* Work with a consultant and contract service provider

The *Arizona Attorney General's Office*, in Phoenix was also selected as a demonstration site. However, it differed from the others because it concentrated on high-level drug trafficking and money laundering activities and provided local prosecutors and investigative agencies with forfeiture-related support services. The \$124,763 received from PERF was used to hire a financial institution analyst, and an analytical assistant. The purpose of the program was to develop techniques for researching possible money laundering activity in Arizona financial institutions, and developing a racketeering money laundering strategy for the state. Major strategic emphasis was placed on financial institutions who were encouraged to comply with the voluntary reporting of suspicious transactions.

Because the grant for the Attorney General's Office in Phoenix focused on developing money laundering information strategies, it was substantially different from the other three operating programs, and the results were not integrated into those gained from the three operating programs.

The programs started operations between September 1988 and late summer 1989. JI's evaluation also started in September, 1989. The evaluation period is based on the first program year.

These four programs constituted only one part of the Jefferson Institute's comprehensive assessment. The total assessment included a nationwide survey of asset forfeiture programs to: (1) identify the state-of-the-art in asset forfeiture programs operating at the state and local level throughout the United States; and, (2) identify the needs and problems as perceived by the program directors.

Until this survey was undertaken, information about the characteristics of asset forfeiture programs and the level of sophistication in their operations at the state and local level was simply not available. JI's survey represented the first attempt to assess existing asset forfeiture capability and its potential in state and local agencies.

By coupling the level of implementation and use nationwide with a synthesis of the program information provided by the demonstration programs, a more comprehensive perspective was gained. It also allowed us to balance the reality of programs operating in 1990 against their potential value.

#### PURPOSE AND SCOPE OF THIS EVALUATION

EVALUATION OBJECTIVES
<ul style="list-style-type: none"> <li>* Evaluate the effectiveness of programs in relation to their goals;</li> <li>* Assess their value to other CJS jurisdictions.</li> <li>* Describe the impact these programs have on the agencies involved;</li> <li>* Assess the needs of asset forfeiture programs</li> </ul>

This report was written for two audiences: local jurisdictions that are interested in asset forfeiture as a strategy and the issues associated with establishing a program; and, the Federal government and state agencies who are the providers of training, assistance and resources to agencies seeking to develop or enhance their asset forfeiture capability.

The purposes of this report are to:

*1. Assess the effectiveness of asset forfeiture goals and its impact on the criminal justice system and crime*

The goals of asset forfeiture are simple and straight forward: to disrupt the drug trafficking network, by taking the profits out of this illegal activity, and use these funds to fight the war against drugs. The simplest measures of effectiveness are the amounts of forfeitures and the distribution of the forfeited funds by program area. The conviction and incarceration of the principals in the network are weaker indicators of the effectiveness of asset forfeiture programs because disruptions may only be temporary if replacements are easy to obtain. Thus, the focus of this evaluation is on the asset seizure and forfeiture process, not the prosecution of individual offenders.

Program effectiveness however does not equate with impact on crime. It is virtually impossible, at least not feasible, to try to measure the impact one new program has on the drug market. Indicators such as arrest rates, calls for services, drug overdose cases, surveys of the overall population, drug tests of arrestees, or the market price fluctuations of certain illegal drugs show trends of overall drug use and trends. However these changes generally occur due to several influences, such as changing police activities, international price developments in illegal drugs, changes of consumer behavior, etc. Increased law enforcement activities might reduce drug crime in one area, however this reduction might be due to displacement of criminal activities to other areas. Also one might question the real impact of law enforcement activities that can only reach a small percentage of those dealing in drugs.

Knowing this, the assessment of the pilot sites did not propose to provide sufficient scientific evidence that asset forfeiture programs can reduce drug crime. Nevertheless, it was attempted to gain at least some insight into possible effects the programs can have. As expected the available data could not provide any conclusive information as to the impact of increased forfeiture activities. The arrest data from Prince Georges County for example showed a decrease in all drug related activities in 1990, the year after the forfeiture unit was created. However, at the same, crime in general decreased.

What is left, is anecdotal evidence from the sites, reports that drug dealers increasingly started to lease cars and houses, instead of buying; that middle class buyers started to avoid driving to drug markets; in individual incidences it was reported that large and repeated forfeitures had finally depleted one organization of its financial basis and that no further activities by its known members were reported in the area.

Because of the reasons the main thrust of this assessment is on the effectiveness of asset forfeiture goals and their impact on the criminal justice system.

*2. Identify and discuss the factors that affect the establishment and operation of asset forfeiture programs.*

Asset forfeiture programs are complex. Much like career criminal and repeat offender programs, they may take a variety of forms and operate with different focuses and priorities. As a result, it is important for the planners and developers of these programs to be aware of the choices that are available to them and the implications of these choices on the success of their program. There are principles that are common to all programs, and issues that should be considered before starting an asset forfeiture program. The major factors are identified as a result of this assessment.

*3. Identify the needs of state and local asset forfeiture programs.*

Because the use of asset forfeiture at the state and local level is still relatively new, there are obvious needs for education, training and assistance. The purpose of this assessment was to determine the extent of these needs and establish a priority for future federal support for these programs.

*4. Develop guidelines to assist jurisdictions in evaluating the effectiveness of asset forfeiture programs.*

There is often much resistance to the concept of civil forfeitures. Some of it is undefined and vague, such as the basic unfairness of the process, or the belief that the

value of the assets will set law enforcement priorities; some focus on particular problem areas such as the protection of innocent owners and third party rights; and some is misdirected such as applying the criminal standards of proof beyond a reasonable doubt to civil standards based on the preponderance of evidence. Major countermeasures can be found in education and public accountability. It is important that the public is educated about these unfamiliar proceedings and that the agencies monitor and record the results of asset forfeiture activities, especially the disposition of the assets and the distribution of the funds. The starting point for accountability is the establishment of an automated case management tracking system.

## **METHODOLOGY**

The methodology used in this assessment included: (1) qualitative and quantitative analysis of the effectiveness of the demonstration programs; (2) surveys of a representative sample of the universe using some form of asset forfeiture at the state and local level; and (3) a synthesis of the findings to identify important factors and issues.

### **Assessment of Demonstration Programs**

The effectiveness of asset forfeiture programs was assessed at each site using both qualitative and quantitative analytical techniques.

The purpose of the qualitative assessment was to identify problems and issues that affected the program's ability to seize and forfeit illegally obtained assets. The identification of these issues would form the basis for assessing transferability to other jurisdictions, and yield an overall determination of the effectiveness of these programs as a strategy for criminal justice activities.

The purposes of the quantitative assessment were to: (1) establish the level of success in meeting the program's goals; (2) provide a base for comparisons with other programs and establish a range of impact; and (3) to obtain insight into the impact of the program under different conditions or with different models.

The qualitative analysis was conducted through on-site visits by teams of experts. Program assessments were prepared for each site. A preliminary identification of issues stemming from differences in program organization and operations was made. Barriers or supports for each program were also identified.

The quantitative analysis was based on the statistical reporting procedures designed by the Criminal Justice Statistics Association under contract to PERF, and prepared quarterly by each demonstration site. The reports describe the number, type, and value of seizures and forfeitures, and significant changes to the program organization.

The information from both evaluation sources was reviewed and synthesized by the staff, consultants and federal officials overseeing asset forfeiture programs, to determine: 1. Did the program reach its goal, what type of goal was set and how sizable were the achievements? 2. Did different organizational structures affect goal achievement? 3. Were there differences in performance in various parts of the programs? 4. Were there unanticipated problems or costs?

### State-of-the-Art Survey

It is inappropriate to make generalizations from four, specially-supported operating programs and assume that they will be relevant to other jurisdictions. The experiences of the demonstration programs should be placed within a perspective which reflects typical programs. Therefore, a telephone survey was made of 100 programs operating throughout the United States. This was followed by an in depth mail survey of those jurisdictions with operating asset forfeiture programs to gather additional management and operational information. The results of this survey were reported in "Survey of Asset Forfeiture Programs in 1990" (Jacoby et al., 1991)

### Asset forfeiture workshops

Workshops were held to gain additional insight into the problems and issues related to asset forfeiture programs. These meetings brought the principal members of the pilot projects together with asset forfeiture experts from Federal, state and local agencies. With their different backgrounds and experiences, the wide ranging discussion on issues and problems provided significant input into the identification of critical areas for consideration by others.

### RESOURCES

Assessment expertise was provided by consultants and staff who have extensive experience in the program management and operations, and program evaluation. They included:

*Steven Bertucelli*  
Colonel, and Director  
Department of Organized Crime  
Broward County Sheriff's Office  
Ft. Lauderdale, FL.

*Kai Martensen*  
Principal Associate  
Jefferson Institute  
Washington, DC

*John Draa*  
Lieutenant  
Baltimore Police Department  
Baltimore, MD

*Edward Ratledge*  
Director  
Center for Applied Demography  
and Public Policy  
College of Urban Affairs  
University of Delaware  
Newark, DE

*Heike Gramckow*  
Research Analyst  
Jefferson Institute  
Washington, D.C.

*William Saugit*  
Assistant U.S. Attorney  
U.S. Attorney's Office  
Detroit, MI

*Joan Jacoby*  
Executive Director  
Jefferson Institute  
Washington, DC.

*Susan Somers*  
Regional Legal Advisor  
Florida Department of Law  
Enforcement  
North Miami Beach, FL

*Michael Leverenz*  
Assistant Chief  
Tucson Police Department  
Tucson, AZ.

The survey was conducted by *Heike Gramckow*; the analysis of the survey and its graphics, in addition to other research activities, was the responsibility of *Erica Price*.

## STRUCTURE AND ORGANIZATION OF REPORT

This report is organized to provide the reader with an understanding of the fundamental concepts of asset forfeiture programs, the significant issues involved in planning for and developing these programs, and their implications for program success. In lieu of expounding on the successes of this program, this approach has been adopted because, with few exceptions, the state of asset forfeiture programs in the U.S. is rudimentary. As a result, more crucial is the need for a basic document that assists program officials in understanding the complexity and power of these strategies and their ability to disrupt the drug trafficking network.

In the first section, an overview of asset forfeiture programs is presented. Here the goals and objectives of the program are presented, followed by a functional description of the program to illustrate its basic complexity.

In the second section, the status of asset forfeiture programs at the state and local level is described to give perspective to the level of utilization of this strategy, and the needs of state and local jurisdictions.

In the third section, a discussion is presented of the factors and issues that have a direct bearing on the effective utilization of this strategy.

In the final section, an agenda for future support and research is presented which is designed to increase the ability of these programs to reach their full potential.

## II. AN OVERVIEW OF ASSET FORFEITURE PROGRAMS

It is indeed poetic justice when money seized from illegal drug dealing can be used to arrest, convict, and jail other drug traffickers. *Dick Thornburg, Former U.S. Attorney General*

### GOALS AND OBJECTIVES

Federal asset forfeiture programs were created to provide law enforcement and prosecution with the tools to successfully target the assets of drug traffickers and money launderers. The U.S. Department of Justice established three major goals for these programs: (1) for law enforcement, the forfeiture of assets punishes and deters criminal activity by depriving criminals of property used or acquired through illegal activities; (2) for interagency coordination, asset forfeiture activities enhance cooperation among law enforcement at all levels, domestically and internationally; and (3) for financial support, they produce revenues for the war on crime. (Office of the Attorney General, 1990)

At the state and local level, the strategy underlying the use of asset seizure and forfeiture embodies what appear to be a few remarkably simple and clear goals consistent with law enforcement and criminal justice values.

#### GOALS AND OBJECTIVES FOR ASSET FORFEITURE PROGRAMS

- Disrupt the drug trafficking network
- Take the profits out of crime
- Use the revenues to fight the war against drugs

However, when these goals are made operational through seizures and forfeitures, the results produce mixed opinions. In some instances, programs are criticized or resisted by a variety of sources including the media, legislators, citizens and even the courts. In other cases, they are enthusiastically embraced by law enforcement agencies but criticized by the prosecutor or the courts. This wide variation in attitudes occurs because the goals generate a number of issues that are not routinely addressed in the traditional criminal justice system. Some include questions about the appropriateness of using civil procedures when criminal procedures already exist to handle illegal drug activity. Others focus on the potential conflict that the goals of these programs may have with internal law enforcement and prosecution agency priorities. Finally, the power of money flowing from forfeitures has the potential of becoming the driving force for setting law enforcement priorities rather than other legitimate factors.

Many law enforcement agencies have difficulty in accepting the use of civil remedies as a legitimate law enforcement strategy. They tend to hold to the premise that it is "not their duty to be involved in civil disputes". Nevertheless, civil remedies are a legitimate government tool to make social changes and they have been legitimized by legislation and Supreme Court rulings. (*Waterloo Distilling Corp. v. United States, et al.*, 515 S. Ct. 282, 282 U.S. 577, 75 L.Ed 558 (1931); *United States v. United States Coin and Currency*, 91 S. Ct. 1041, 401 U.S. 715 28 L.Ed. 2d 434 (1971); *Van Oster v. State of Kansas*, 47 S.Ct. 133, 272 U.S. 465, 71 L.Ed. 354 (1926); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 94 S. Ct. 2080, 416 U.S. 663, 40 L.Ed.2d 452 (1974))

The major step towards establishing asset forfeiture as a crime-fighting tool against illegal drug activities was taken with the enactment of the 1984 Comprehensive Crime Control Act. The Anti-Drug Abuse Act of 1986 further improved the Federal government's ability to effectively use forfeitures to fight not only drug related crimes but also money laundering crimes. This Act also authorized the criminal forfeiture of substitute assets in RICO and drug felony offenses, the sharing of forfeited property with cooperating foreign governments, and made the Asset Forfeiture fund permanent. The present legislative trend is to apply forfeiture to other felonies, to include a broader range of forfeitable assets and to generally enhance the forfeiture capability at the state and local level. The 1988 Anti-Drug Abuse Act and the 1989 forfeiture enactments within the Financial Institutions Reform, Recovery and Enforcement Act (FIRRA), more commonly known as the Savings and Loan bill, and the Department of Defense Authorization Act provide for these enhancements.

An asset forfeiture program can be extremely productive, or it can turn into a very frustrating and disappointing endeavor. The way to prevent its untimely demise is to determine what one hopes to accomplish through it, carefully define those goals, and meticulously plan all phases of the effort. *Janet E. Ferris, Chief Counsel, Florida Department of Law Enforcement.*

The goals and priorities for asset forfeiture programs may conflict with other more traditional agency goals. For example, one of the most successful techniques for disrupting or damaging the drug trafficking network is to use informants who are located within the organization. Yet, when informants are allowed to plea to lesser sentences or offenses in exchange for intelligence, the reason may not always be made known to the police or obvious to the public, especially when they see drug dealers back on the street. The conflict between the decisions to damage the network or punish an offender is never far away.

Similarly, the ability to take the profits out of crime varies from state to state according to legislation defining what can be seized (proceeds, derivative assets, substitute assets, etc.). It also varies by department policy. The simplest asset forfeiture program is not one! It merely requires seizing cash or conveyances incident to the crime. Yet, the ability of the program to reduce the profits in the illegal network may be significantly degraded if the total range of seizable assets is not sought through thorough investigations and coordinated intelligence gathering activities.

Finally, it has been claimed that the priorities for law enforcement will be subverted by money which will drive the system and set priorities for arrests and seizures. The message being portrayed to the public is one of greed not mission. The principle of using the revenues from crime to fight crime is masterful. How it is made operational, kept within its proper perspective and distributed fairly and equitably is a major issue arising from this goal. Even now there is an on-going debate about how the revenues should be used to fight crime. Law enforcement agencies seek to retain the bulk of the revenues to enable them to continue their operations; but in this troubled economy, they often must compete with other local interests that seek to reduce the incidence of drug abuse through education, treatment and rehabilitation.

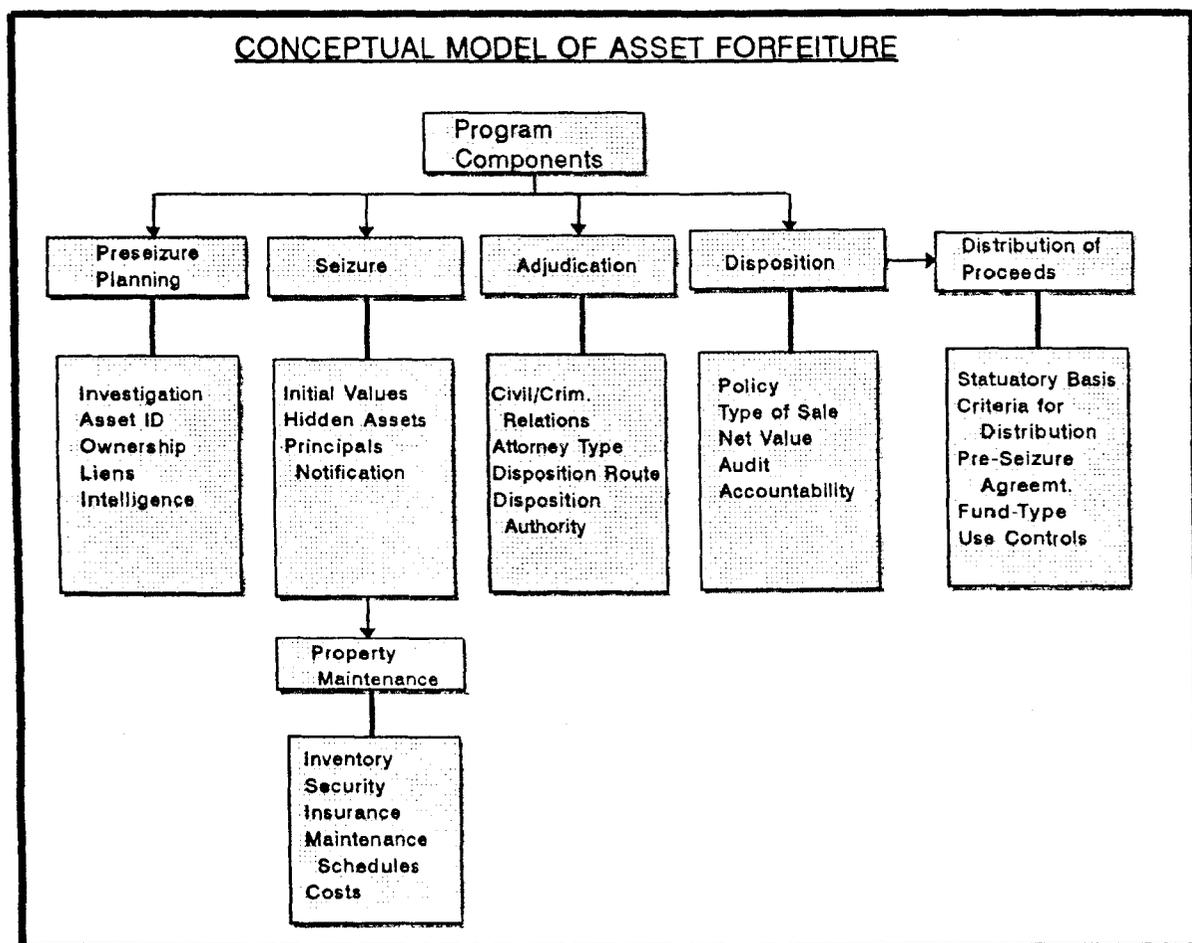
Even though the asset forfeiture strategy provides one of the most powerful responses by law enforcement against drug trafficking, its stated goals need to be considered carefully and explored in detail with respect to the state and local environment. The volatile issues these responses give rise to should be discussed and resolved before asset forfeiture programs are undertaken. State and local agencies about to develop

their own program should set their goals in accordance with the legislation available, oriented along the lines of their own resources and capabilities, and based on the drug problem they face in their jurisdiction. A discussion of the factors that should be considered in this exercise is presented in Section IV.

#### FUNCTIONAL COMPONENTS OF ASSET FORFEITURE PROGRAMS

The complexity of asset forfeiture programs is a result of the variety of functions that they require for successful operation. Many of these functions are new or unfamiliar to traditional law enforcement or prosecution activities. Often, because of this, activities are inadequately established or even ignored. In this section, we will describe each of the six functional areas of asset forfeiture and discuss their dimensions and activities. With this conceptual background it will be easier to discuss the important factors and their impact on asset forfeiture programs in the subsequent sections.

Figure 1



## Preseizure Planning

Preseizure Planning
<ol style="list-style-type: none"> <li>1. Has the target been identified?</li> <li>2. Are there assets associated with the defendant or target?</li> <li>3. Have they been identified?</li> <li>4. Are they worth seizing?</li> <li>5. Are search warrants (financial or others) needed?</li> <li>6. Have all preparations been made prior to the arrest and seizure for collecting assets?</li> </ol>

*Preseizure planning* relies on investigation and intelligence activities that occur before arrest and seizure. In the preseizure stage, intelligence gathering and investigations are the primary activities. Targets, who may be direct participants in the sale or possession of drugs, or who may be conspirators or recipients of the proceeds of the illegal money, are identified. Associated with the target are assets. Some may be hidden, others not. Even prior to arrests or seizures, asset forfeiture investigators may prepare for seizures by identifying owners and lien holders, and assessing the potential value of the asset. If financial search warrants or wiretaps are needed, they will be prepared for court approval.

The activities needing attention in this phase are conditioned on two prerequisites. The first is ample education and training. Law enforcement detectives, investigators and officers should be educated about the principles and objectives of asset forfeiture. They should be sensitized and trained to be aware of assets, to identify them, and to include them as part of their report writing process.

The second is extensive preplanning. Criminal investigators need to be informed about the information that financial investigators and prosecutors require and to assist in its acquisition. When financial investigators look for records and computers, the criminal investigators need to know why so they do not inadvertently destroy asset forfeiture evidence. With the exception of unplanned or random arrests, preplanning is the operative principle.

## Arrest and Seizure

Arrest and Seizure
<ol style="list-style-type: none"> <li>1. If a search warrant was needed, was it executed properly?</li> <li>2. What types of assets were seized?</li> <li>3. How are they to be processed?</li> <li>4. Who holds title, liens and ownership?</li> <li>5. Have the required notifications been made within the required deadlines?</li> </ol>

The *arrest and seizure* stage starts with the decision to arrest and is accompanied by the seizure of property. It is at this point that the first financial search warrants may be executed and the property seized. In the civil court's parlance, the asset is "arrested".

Following this criminal processing analogy, after the arrest, the asset has to be booked. This initiates a complex identification and notification process.

The ownership of the asset has to be determined and lienholders identified so that notification of the seizure can be made. The notification process is composed of a highly detailed set of procedures, most of which are dependent on deadlines. Owners and lienholders have to be notified, notices of seizures have to be published in the newspaper, and all documents are time dated to conform to the limits of local or state statutes.

The complexity of these programs is made clear in this functional area. The legitimacy of the search and seizure calls for prosecutorial review and assistance. The actual seizure initiates a detailed paperwork process that must be adhered to if the case is to be brought to successful conclusion. This creates a requirement for sufficient staff (paralegals and clerks) to support the search and notification process. What becomes obvious in this stage is that the paperwork and notification process cannot be left to chance nor in the hands of untrained staff.

### Property Maintenance

Property Maintenance
<ol style="list-style-type: none"> <li>1. Has an inventory been taken of the property?</li> <li>2. Are storage facilities available that can protect property?</li> <li>3. Is there adequate insurance to cover damages or loss of the asset?</li> <li>4. Should the asset be repaired or restored to increase its value, and by how much?</li> <li>5. Is maintenance performed according to recommended procedures and are logs kept to prove this?</li> <li>6. Have costs of maintenance been recorded?</li> </ol>

The arrest process also begins the *property maintenance* function. Once seized, assets must be protected and maintained. There is a vast difference between storing property seized as evidence in the commission of a crime and property arrested (seized), tried, found guilty (forfeited) and disposed. Until this property is returned to its owner or is forfeited, the directors of asset forfeiture programs assume responsibility for an entirely new set of activities. The importance of property management is underlined by the experiences of those who have learned the hard way.

For example, now the leader in providing for asset protection and maintenance, the Sheriff's Office in Broward County, FL, once lost the value of an airplane because daily logs for service and maintenance were not maintained; thereby, precluding FAA certification for sale. In Colorado Springs, CO, the value of the first house seized by the task force was lost because, seized in winter, the water was not turned off, the swimming pool was not emptied and the refrigerator was never emptied of food.

The need for property management is not just limited to high priced assets or properties. Any owner may sue for damages to his car and, without photos or inventories made at the time of seizure, the government can be liable for alleged damages and losses.

These activities are not common or traditional to law enforcement agencies where guns, drugs and cash are locked in the evidence room, and larger items like

automobiles are stored in open air impound lots. But these practices are not sufficient for the protection and management of assets that are yet to be found "guilty".

Finally, since the costs for property maintenance, e.g. advertising, storage, repair, and insurance, may be deducted from the proceeds by the seizing agency, they should be carefully recorded. One of the most important activities created by asset forfeiture programs is property management. In some programs this function is handled internally by property managers; in others it is performed by another local government agency such as administrative services; in still others it is contracted out to private companies specializing in these activities. If the responsibility is not internal to the program, an additional coordination requirement is added to the program.

### Adjudication

Adjudication
<ol style="list-style-type: none"> <li>1. How do civil cases proceed in relation to criminal? Are they tied to criminal convictions?</li> <li>2. Who is authorized to negotiate dispositions?</li> <li>3. Are there policies, guidelines and review mechanisms to ensure consistency in negotiated dispositions?</li> </ol>

The process of finding assets "guilty" introduces the next functional area, *adjudication*. There is a wide variation among the states with respect to these proceedings. Forfeitures may be adjudicated in civil courts, independent of criminal prosecution; or they may be processed only as part of a criminal case; or as result of a conviction for a criminal offense.

Although trials are available in civil courts, the proportion of contested litigations is very small. The Bill of Rights, state statute and court rule significantly affect this dispositional decision. Depending upon the relationship between criminal prosecutions and civil proceedings, the adjudication of the assets may proceed independent of the prosecution outcome, or they may proceed only after conviction.

Depending on the adjudication route that is followed, civil cases may be delayed pending the outcome of criminal prosecutions. Since so few seizures are contested, the impact on civil trial caseload is not substantial. With adequate case preparation and good paperwork procedures, the adjudication process itself is not particularly different from other civil proceedings. The important issue is the discretion used in negotiating dispositions. However, parallel criminal proceedings can impact the civil case especially the discovery process. The different regulations for burden of proof in civil and criminal cases, as well as different evidentiary standards, such as admissibility of hearsay provide challenging opportunities for both parties.

## Disposition of Assets

Disposition of Assets
<ol style="list-style-type: none"> <li>1. Is there a policy for the disposition of assets?</li> <li>2. For those sold, what type of sales are permitted?</li> <li>3. Has a policy been established regarding anticipated sale revenues?</li> <li>4. Are audit procedures established?</li> <li>5. Is there accountability for the disposition of the assets.</li> </ol>

The disposition of forfeited property can take many forms. Some property may be returned to the owner; some retained for agency use; some is destroyed; some may be given to other law enforcement or criminal justice agencies; and some may be sold. The decision about the disposition of these assets may be established by statute, by local government policy, by the court, or internally, by procedures established by the asset forfeiture program directors.

For those assets to be sold, the type of sale may often be dictated by state law. For example, in Maryland, property is sold by public auction on the steps of the courthouse. As a result, the proceeds from these sales are considerable lower than those obtained in Florida's Broward County where sales are conducted by professional auctioneers with a goal of high profits.

Clearly, this is a policy sensitive area. However, the audit and accountability requirements impose significant reporting demands on the program.

## Distribution of Proceeds

Distribution of Proceeds
<ol style="list-style-type: none"> <li>1. What distribution formulae are available and how do they affect the goals of asset forfeiture program?</li> <li>2. Who sets the policy for adoptive cases?</li> <li>3. How is the distribution of proceeds to contributing agencies decided?</li> <li>4. How are funds protected?</li> <li>5. Who sets, and what is, the policy for the use of these funds?</li> </ol>

Concluding the activities of asset forfeitures is the distribution of the proceeds. If there is one area that creates conflict, dissension and dissatisfaction, it can be found here. Proceeds are distributed essentially from two sources, the federal government and the state or local government depending upon the seizing and forfeiting authority. The federal government's distribution formula is the one most favored by law enforcement agencies because it mandates that 85 percent of the proceeds be returned to the agencies involved in the seizure. Admittedly, processing times are slow and subject to many complaints; but if the state statutes are restrictive, allocating funds to other agencies based on different criteria, then the Federal adoptive case route is the one preferred by law enforcement.

Once funds are received by the agency, it brings up the questions of how are the funds to be supervised, and what is the policy for their use. Often the first part of this question is predetermined by the state or local government which may mandate that the funds go into the general revenue or the to the fiscal authority. The recommended action is to hold some of the funds in escrow in an interest bearing account.

The use of funds can be subject to abuse, restrictive use policies that hinder operations, or liberal use with few restrictions and controls. Auditing and accounting controls are critical for these activities. Equally important is the need to establish a responsible policy for its use: one that enhances the goals and objectives of the program, not the agencies involved in the program.

If asset forfeiture programs are to be successful, they must have coordinated procedures and agreements among the agencies involved for the distribution of the proceeds. These policies cannot and should not be made in vacuum or by dictate. The interests of all parties should be considered and the agreements reached well before the programs are implemented. The easiest way to disband programs is to argue over who gets what and why.

There are many ways available to hold proceeds; most are dictated by state law. The recommended procedures is in an interest-bearing trust fund which usually has a cap of some set amount. Proceeds exceeding the cap are either returned to the state or local government or, if a task force is used, the excess may be distributed to each of the participating agencies.

Policy and procedures for the use of these funds are generally dictated by the statutes and specifically allocated by the person or board controlling the funds. Regardless of the type of mechanism established for holding and distributing funds, it is essential that proper auditing and accounting procedures be in place.

### Summary

The complexity of asset forfeiture programs is due to the variety of activities or functions that these programs require. Many of these functions are new or unfamiliar to the traditional law enforcement or prosecution procedures and some actually require these agencies to assume responsibility for functions they previously had not held. In the next section, we will explore how various operating programs at the state and local government level were handling these problems and issues in 1990.

### III. THE STATUS OF ASSET FORFEITURE PROGRAMS

#### INTRODUCTION

Given the multifaceted dimensions of asset forfeiture activities, it could be expected that they would produce a variety of program forms. In 1990, it was difficult to determine what the state-of-the-art was since the systematic collection of program information had never been undertaken. Additionally, it was highly unlikely that there existed many programs as sophisticated and well supported as the demonstration programs or such notable exceptions as Broward County, FL and Wayne County, MI. On the whole, little was known about other programs that might be in operation.

#### PURPOSE AND SCOPE OF THE SURVEY

As part of the assessment a telephone and mail survey was undertaken (Jacoby et al., 1991). The purpose of this survey was to identify and describe various asset forfeiture programs operating at the state and local level throughout the United States; to assess their needs; and to establish directions for planning for education, training and technical assistance programs.

The survey was based on responses from 100 active asset forfeiture programs in the United States operating in the period from July, 1990 to December 1990. Because of legislative variations, an attempt was made to include at least two agencies from each state; representing all organizational levels (including state, local and private organizations), and a variety of agencies (police, prosecution, or task force).

The survey was conducted in two parts. The first consisted of a telephone interview to obtain basic program elements, status information, and to collect the users' opinions about a variety of needs and issues. This was followed by a more detailed inquiry mailed to each of the participants.

The telephone survey was directed at assessing the needs of the programs. It requested information about the type and size of agency, the status of the program, and whether training, technical assistance, or publications about asset forfeiture were received. It also inquired about the major problems faced by the agencies and their needs.

The follow-up, mail survey was designed to capture program characteristics. It requested details about the organization and direction, staffing patterns, legal environment, caseload characteristics, asset handling and disposition. Program statistics consisting of the number, type, and dollar-value of the seizures and forfeitures during the first and the latest year of operation were also requested if available. (It should be noted that some jurisdictions, like Philadelphia, are not allowed to release these statistics).

Because of its detail, only 53 responses were returned. However, the distribution was representative of the sample of 100 agencies and, therefore, is considered to be reliable for suggesting future directions to achieve the program's goals of disrupting criminal activity and reducing illegal profits.

#### RESULTS

The results of the survey indicated that the status of asset forfeiture program efforts at the state and local level is rudimentary. In fact, identifying offices that were involved in forfeiture activities turned out to be a real obstacle. There were more

instances during the telephone survey when the respondent replied, "Asset forfeiture? How do you spell that?" than would be expected.

1990 STATE-OF-THE ART SURVEY RESULTS
<ol style="list-style-type: none"> <li>1. A largely unknown program</li> <li>2. Rudimentary in:               <ul style="list-style-type: none"> <li>program approach</li> <li>organization</li> <li>staffing</li> </ul> </li> <li>3. No guidelines or program models</li> <li>4. Fragmented training courses</li> <li>5. Little understanding of program components</li> <li>6. Limited in activity, mostly cash/car seizures</li> </ol>

Where programs did exist they were generally underdeveloped in their activities, organization and staffing. Most operated without guidelines or program models. With the exception of those program directors who had established informal networks with other successful operations such as Broward County, and Wayne County, the training that had been provided was not comprehensive in its approach to the program.

Training programs emphasized the constraints imposed by the legislative environment as it applied to forfeitures; the characteristics of the distribution and use of proceeds; and, the investigation and financial analysis activities. Little attention was given to the organization, management and operation of all the functional areas in the program. Part of this fragmentation was due to the types of training the directors received. Most instructors tended to be specialists in one particular area. But part was also due to an absence of a conceptual frame that embraced all the functional components of the program and treated it as a unified program.

The unfortunate result is that in 1990 the large majority of seizures were mostly unplanned, netting cash and cars. Those requiring a more sophisticated knowledge of the program or more complex investigations were either transferred to the federal government or simply were not acted upon if the case did not meet federal guidelines.

The picture painted is one of a program in its infancy needing much more support than is available at the present time to have them realize their full potential. In the next sections, we will explore some of the detail that supports these conclusions.

### **Taking Profits Out Of Crime**

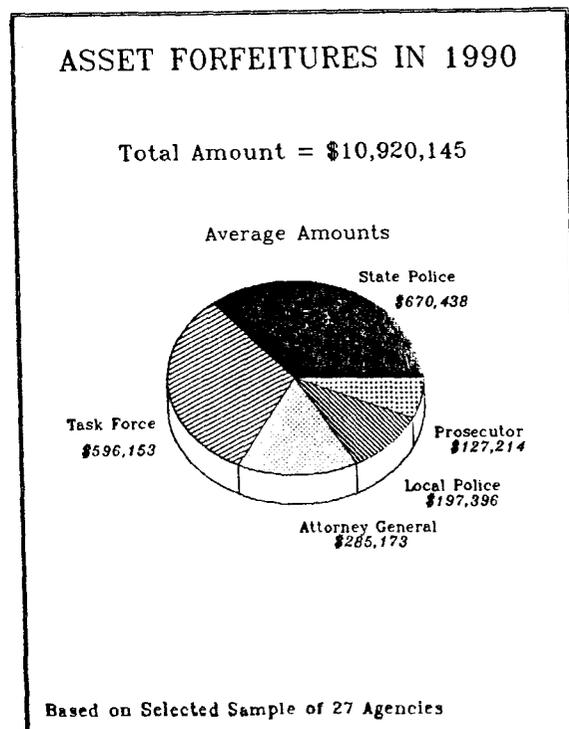
The potential for reducing the profits of drug trafficking are enormous with comprehensive asset forfeiture programs. In the three demonstration sites, the first year netted the initial investment funds and more.

Figure 2.

FIRST YEAR (1989) RESULTS OF ASSET FORFEITURE PROGRAMS			
<u>Jurisdiction</u>	<u>Amount Funded</u>	<u>Assets Seized</u>	<u>Net Forfeitures</u>
Prince Georges Co. State's Attorney	\$105,000	\$1,849,078	\$224,450
Tucson MANTIS	\$124,986	\$1,043,015	\$824,564
Colorado Springs Metro VNI	\$105,281	\$793,304	\$615,325

A more varied picture is painted by the survey where, based on 27 responses, the net forfeitures (after liens and expenses) for 1990 ranged from a low of \$680 to a high of \$2.3 million. The larger pool of resources commanded by the state police, multi-jurisdictional task forces and the Attorneys General produced significantly higher average dollar values than programs operating at the local jurisdiction level (either police or prosecutor).

Figure 3



It is important to note that when the 100 jurisdictions with asset forfeiture programs were surveyed by mail, they were asked to supply these statistics. Only 27 were able to do so. Many of the program directors did not know what the forfeitures amounted to because this portion of the program was outside their purview. They could often cite the value of assets seized but not necessarily the results of the forfeiture. In some cases, program directors were unable to even estimate the value of assets seized, other than cash, because they were not privy to the appraisal process.

In most states, the basic measures needed to evaluate the effectiveness of the program are not available or known. This limited sample suggests that much of the effort was focused on the seizure of cash and cars or conveyances. The programs reported that of all the forfeitures, two thirds were based on seizures of cash; 22 percent from cars and conveyances; 10 percent from real property; and, 2 percent from other assets. Program directors were asked if there had been major changes in these figures compared to their first year of operation. They reported none.

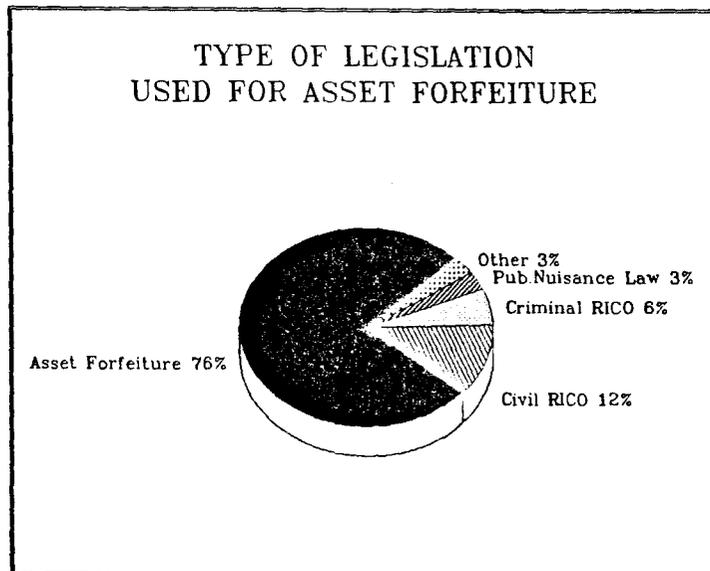
The bulk of the programs appear to have little sophistication in the types of assets seized beyond what could be seized incident to the offense. The reasons for this need to be determined. One can assume that they are, in part, due to legislative constraints that limit the type of seizures, or partly due to the low level of existing program development. The survey points to both factors but does not explain the extent of their influence.

#### Legislative Environment

It is clear that the legislative environment plays an important role in asset forfeiture programs. Because of the wide variation among the states, some programs, like those in Florida and Arizona, can operate under statutes that are favorable to asset forfeiture; in other states, so many restrictions are imposed on law enforcement activities that their ability to be active in asset forfeiture is diminished.

The statutes vary because of constitutional requirements, protections established for innocent owners or third parties, or the scope of their powers. Some statutes allow for the forfeiture of real property; but few provide for administrative forfeiture procedures which are prevalent for Federal forfeitures.

Figure 4

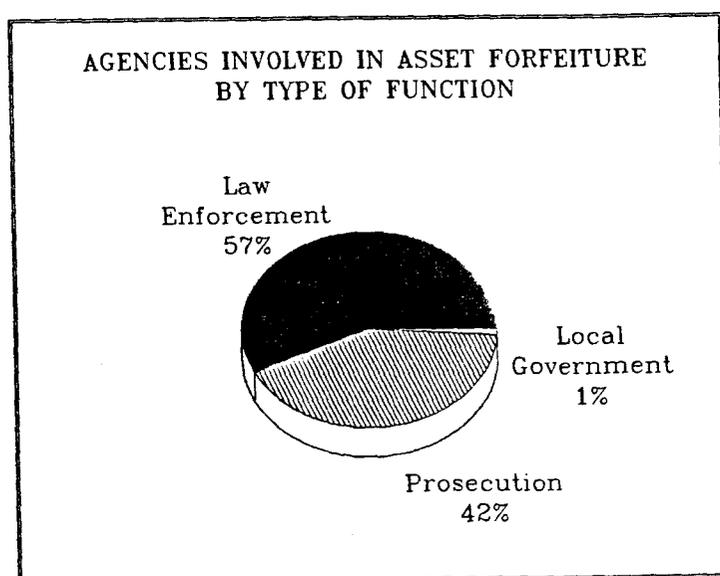


The survey indicates that most of the programs exist because of asset forfeiture legislation. However, other types of statutes are also used, such as public nuisance laws, and RICO if they are available and if needed. It is difficult to understand the limitations imposed by current asset forfeiture statutes without more extensive study. However, there is general dissatisfaction with them; 74 percent of the respondents indicated that they would like to change their state asset forfeiture statutes.

#### Program Characteristics

Asset forfeiture is primarily a law enforcement and prosecution program, to a lesser extent it may involve other local government agencies.

Figure 5



Programs are conducted at all levels of government within the state. The typical jurisdictional responsibility is either within city limits or at the state level. County-wide or multi-jurisdictional task forces are less prevalent.

Although the majority of asset forfeiture efforts are directed by either prosecutors or the police (36 and 38 percent, respectively), no single type of agency or function dominates the asset forfeiture program scene.

Asset forfeiture programs are comprehensive. They reach across the criminal and civil justice systems. As a result, they cannot successfully reach their full potential if they are designed to be self-contained programs in a single agency. They require coordination and collaboration with many agencies to be effective.

Figure 6

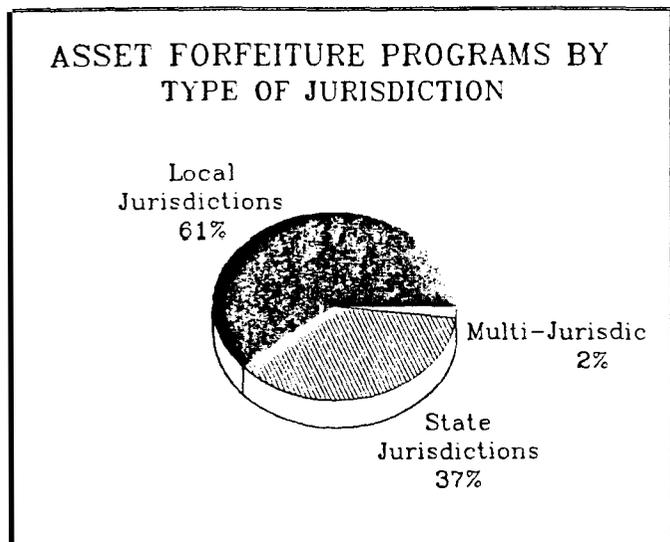
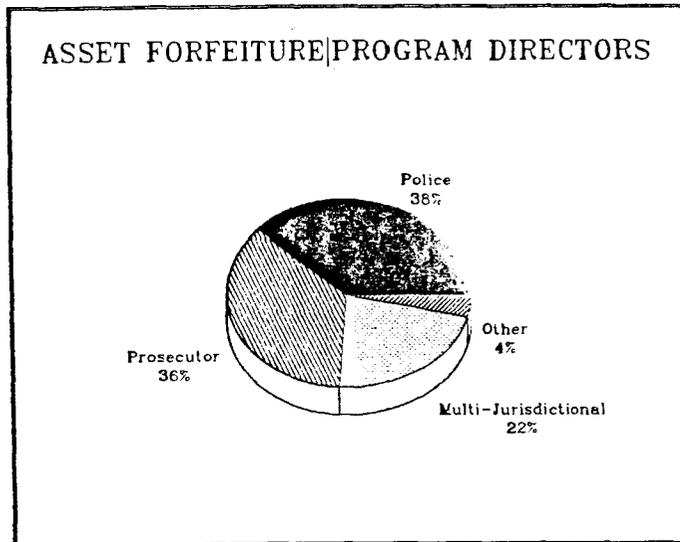


Figure 7



Police programs, for example, need legal counsel; prosecutor programs need investigative support; and task forces by their very nature require a coordination of activities. Therefore, although program leadership and direction can reside in any of these organizational entities, the asset forfeiture function requires the involvement of other agencies and sometimes, two court processing systems.

#### Structure and Organization of Asset Forfeiture Programs

Generally speaking, when a set of activities are combined to form a program, they take one of two organizational forms: either a separate entity is created to conduct and support the activities, or the activities are integrated into on-going operations. (This latter option yields a more dispersed, but less costly, program).

In 1990, there was no predominant organizational form largely because model programs and guidelines were not developed. Slightly less than half (48 percent) of the programs were created as separate entities. The other 52 percent were not and their structure is indicative of how the activity is viewed. For example, 4 percent of the "programs" merely created a position to handle the activity involved.

Most programs were integrated within the department (30 percent), some were attached to special units, usually a narcotics and vice unit (11 percent) and others were located within a drug task force operation (7 percent).

The choices for how these activities should be organized within agency seem to be based more on personal preference than any specific guidelines or recommendations.

Figure 8

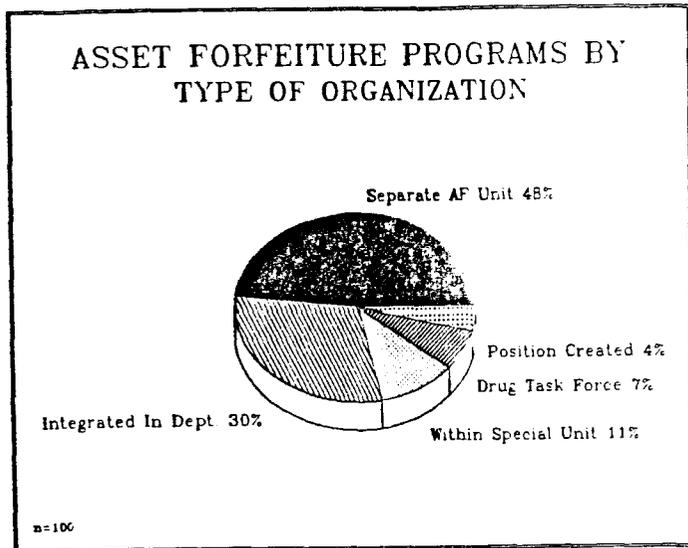
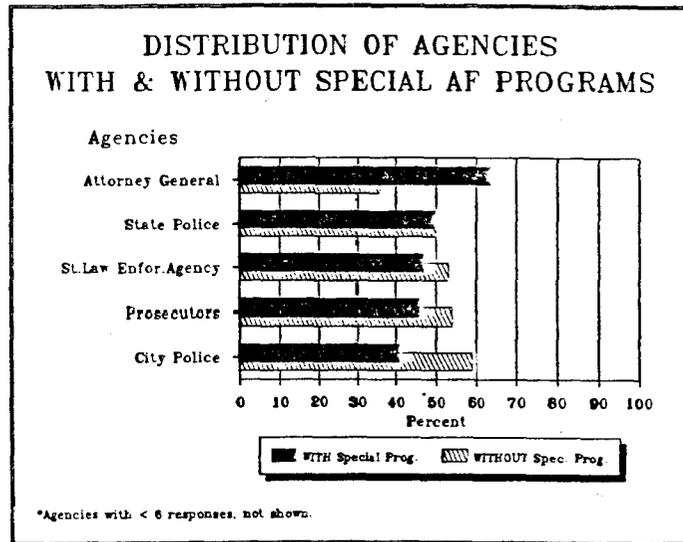


Figure 9



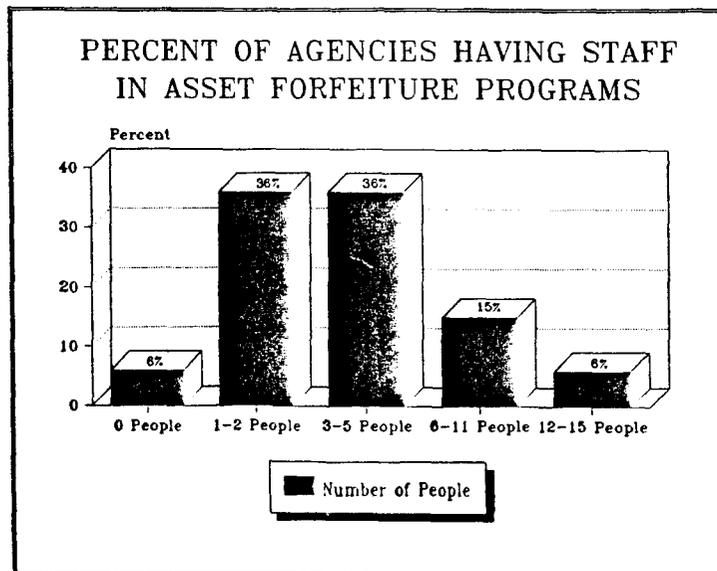
Only the police and the Attorney General show distinct, but opposite, preferences. The Attorney General prefers to set up separate units while the city police prefer to integrate the activity into existing operations.

**Staffing and Resources**

As noted earlier, the complexity of asset forfeiture programs sets requirements for financial investigators, intelligence analysts, property managers, and accounting and auditing professionals. Since these positions are not common to law enforcement agencies or prosecutors, we would expect to see staff dedicated to these activities.

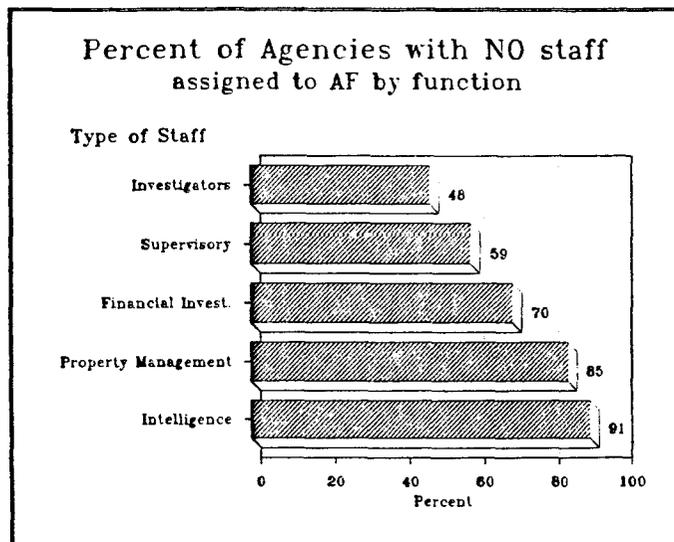
Reflecting the limited scope of activity in these programs, it was not surprising that the majority of agencies (72 percent) have 1 to 5 persons assigned to asset forfeiture programs, with the median being 3.

Figure 10



Although this number may seem sufficient to operate these programs, when staffing is classified by key functions, the numbers indicate a different conclusion.

Figure 11

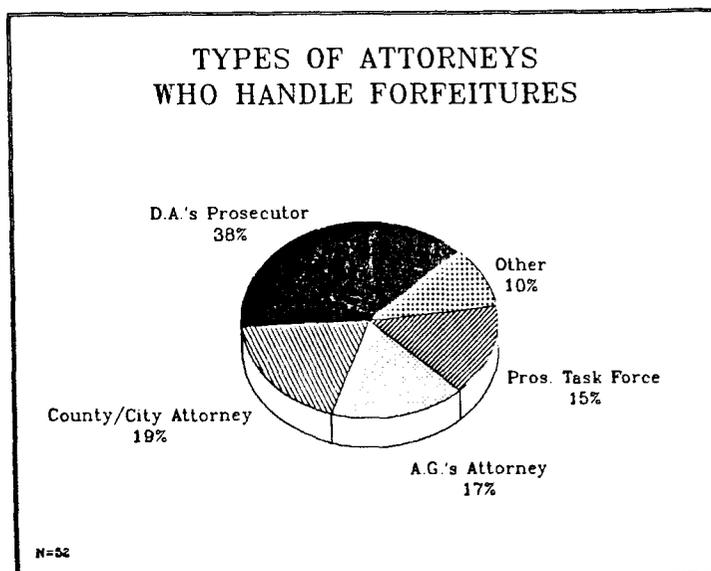


Organizationally, it appears that there is either (1) a substantial delegation of asset forfeiture activities to programs or agencies outside the program; or, (2) some activities not being conducted; or, (3) the seizure of cash and cars are the primary focus of the program. The likelihood that the cash/car type of program is predominant is supported by the type of property management used by the programs. Eighty three percent use either in-house facilities (such as impound lots) or other public resources such as garages maintained by the administrative services departments.

#### Adjudication and Disposition

One of the more interesting characteristics of asset forfeiture programs is the variety of legal talent that is employed for adjudication and dispositions.

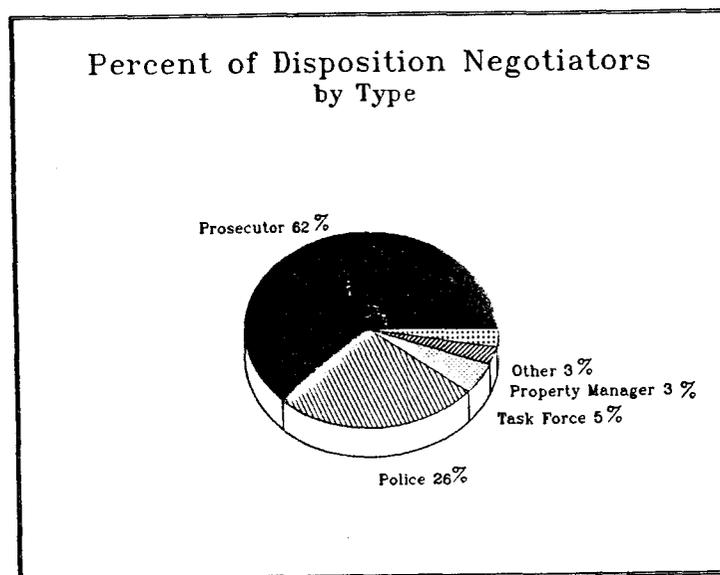
Figure 12



Since forfeiture proceedings are essentially civil, this explains the involvement of a county or city attorney with civil jurisdiction in the program. It also explains the "Other" category which is primarily composed of police legal counsel, and privately contracted attorneys.

There is another aspect of this part of the process which is so dependent on attorneys and that is the disposition phase. Since most dispositions are negotiated, the identity of the negotiator is of interest. Unlike traditional criminal proceedings where the prosecutor assumes this responsibility, in asset forfeiture programs, almost anyone can negotiate the disposition of the assets.

Figure 13



There appears to be little sensitivity to this highly discretionary area. Not only are few guidelines present for the negotiator, but in 49 percent of the programs, the negotiator's decisions are not reviewed.

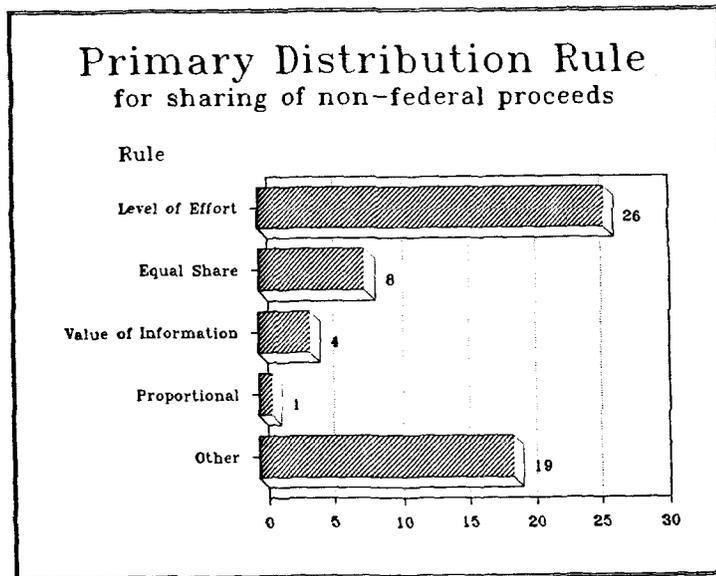
#### **Distribution and Use of Forfeited Proceeds**

One of the most controversial aspect asset forfeiture programs have to deal with is the distribution of the forfeited proceeds and their use. Because state law and program policy vary, few situations exist where all participants in the program are satisfied with the distribution plan.

Law enforcement agencies are generally the primary recipients of forfeited assets; however, they often compete with other recipients designated by state and/or local agencies; or they may receive a smaller share depending on the criteria used for the state's distribution formulae.

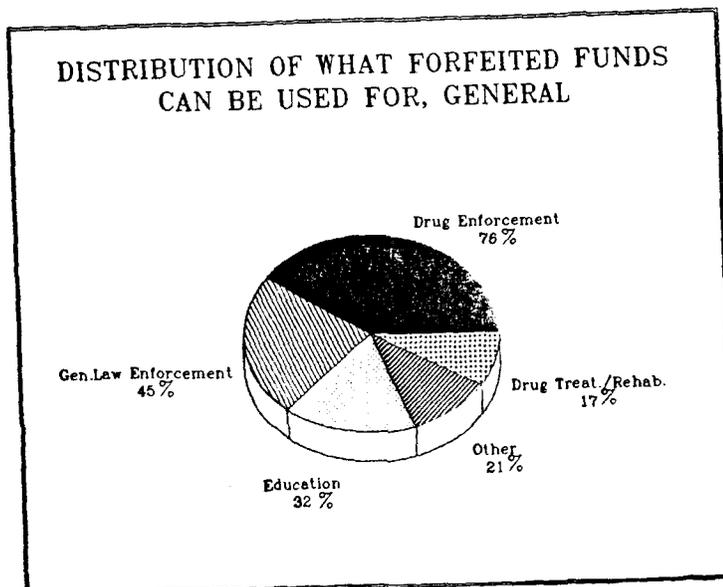
Another source of conflict arises when there are multiple law enforcement agencies involved in the seizure and the principles used for distribution are either not understood or are negotiated *after* the property has been seized.

Figure 14



The most prevalent principle used is based on level of effort expended by each participating and eligible agency. But as the Figure 14 indicates, there is a wide range in the types of principles employed in 1990. Attempts to reduce conflicts through the adoption of pre-seizure agreements have a certain amount of acceptance (46 percent of the programs use them). But a full 50 percent do not come to agreement until after either the seizure or forfeiture.

Figure 15



The use of the funds after distribution varies just as widely as the basis for its allocation. The primary use is for drug enforcement but the full range includes general law enforcement, drug treatment, education and other purposes.

## CONCLUSION

### *Comment from the Colorado Springs, Metro VNI Deputy Prosecutor*

*I think you can tell that asset forfeiture works on the state and local level by several factors. The first is the impact that it has on the criminal community. We are noticing more instances of "straw ownership" in real property, motor vehicles being leased and rented as opposed to outright ownership, and an older grade of vehicles being used for distribution.*

*The second area where you can tell asset forfeiture is working is that people are talking about it. It is of concern to defendants. Attorneys are talking about it. Our office is approached regularly by attorneys after their clients have been arrested to find out whether or not we have initiated forfeiture proceedings. I think part of this is based on the fact that they realize that we are now institutionalized. We will go out and seize anything and everything if it meets the criteria the statutes allow.*

*The third area is money. The amount of money that our forfeiture fund has had to pass through in the past two and one half years is well over \$1,000,000. In fact the Fund has now had to write checks to keep it from popping the \$1 million mark which would then start a distribution in equal amounts to the separate agencies involved. We have also taken a core amount of money in our Special Investigation Fund and invested it with a broker that handles primarily government accounts.*

Like many other approaches, asset forfeiture is a strategy that is most effective when every criminal justice resource is mobilized. Cooperation and communication, a well planned strategy to develop a coordinated effort are needed. The more complex the targeted illegal activity is, the more increases the need for mutual agreements and understanding.

Only if every car, every asset used for illegal drug activities can be subject to seizure by every level of government the impact on disrupting the network and reducing the profits from the crime is maximized. However, this also means that some part of the proceeds should be used to support and expand these activities. And that guidelines be established that assist law enforcement agencies in focusing their activities depending on the drug problem they face and the resources available.

The conclusion one can draw from the state of the art in 1990 is that these programs have nowhere near reached their potential. In the next section we will explore the issues and factors that are crucial to the establishment of effective asset forfeiture programs.

#### IV. ISSUES AND FACTORS AFFECTING ASSET FORFEITURE PROGRAMS

*"Asset forfeiture is the law enforcement tool of the twenty-first century." Cary Copeland, Director, Executive Office for Asset Forfeiture, U.S. Department of Justice*

##### INTRODUCTION

Jurisdictions planning to establish asset forfeiture programs need to be aware of the issues and factors that will affect the success of their attempts. These can be divided into two classes: (1) those over which the program director has little or no control such as the type of legislation available, the availability of law enforcement investigative resources, court policy and rules, and public opinion; and, (2) those over which the program director has control such as the type of organization, criteria for seizures and dispositions, and the distribution of proceeds.

In this section, the issues and factors in these two categories will be discussed in relation to their impact on the establishment and operation of asset forfeiture programs.

##### EXTERNAL ENVIRONMENTAL FACTORS

The external environment which defines, in large measure, the scope and type of asset forfeiture programs includes the legislative environment, the nature of the criminal justice system including the courts, and public opinion. In each of these areas, there may exist certain situations or conditions that will determine some of the characteristics of the asset forfeiture program. It may be possible to make changes, or to modify some of the conditions if the program director is sensitive to them and is willing to use some long-term, strategic planning techniques.

##### Legislative environment

Forfeiture legislation varies significantly among the states. Some, like Florida and Arizona, are blessed with statutes that are favorable to asset forfeiture. Others impose so many restrictions on what can be seized and under what circumstances, that they reduce the potential effectiveness of these programs.

Some state forfeiture legislation may be more restrictive than others in a number of areas including the protection of innocent owners and third party rights, the definition of what can be seized and under what conditions; the nature of the forfeiture proceedings, and mandated formulae for the distribution and use of proceeds.

To many, asset forfeiture conjures up horrific visions of small children, and frail, sick or elderly persons being evicted because of the behavior of others that they cannot control. State legislation generally tries to ward against these situations; but even where safeguards are legislated, they may still threaten the public's acceptance of asset forfeiture. The Colorado Springs VNI unit had to face this decision when they could have evicted a family with small children right before Christmas. It was decided to leave the family in their home because an eviction would have caused a lot of negative press and community resentment, and opposition to the activities of the

forfeiture unit. Although the goals of the program are to seize the profits from drug trafficking, like every other law enforcement action, discretion is required.

*Comment from the Colorado Springs, Metro VNI Deputy Prosecutor*

*The decision to seize and forfeit a house that might be forfeitable under state legislation can also mean that those who inhabit it would be forced to leave. The Federal government usually does not have to consider these community reactions because they do not directly affect their work, but state and local agencies have to be sensitive to the needs and feeling of the citizens they are serving.*

*If we get greedy and go for completely strict adherence and total forfeiture of individual's assets, it can have the wrong results. Don't get me wrong, in certain situations it is necessary to cut off the head and the community will welcome that option. But in some situations such as the one mentioned above, it would not have served us to have evicted the individuals around Christmas time when they had small children in their home. I think the negative impact realized by the press and the community would have weighed against us. It seems the situation in Colorado is that the liberals and the conservatives, on each the far right and far left, are looking for these types of situations to be able to present to the legislature.*

In addition to the protection of innocent owners and third party rights, state legislation also defines what can be seized and incident to what event. For example, in some states property cannot be seized unless it was directly involved in the illegal activity. Derivative assets are not seizable in many states. In other states, seizures are not possible unless associated with a drug offense.

*Comment from the Colorado Springs, Metro VNI Deputy Prosecutor*

*You can ignore restrictive case law up to a certain point. Just because there is case law against a certain procedure does not mean that your attorney, as its advocate, cannot go ahead and seize the item, and in good faith, still argue that point. If it gets to court and the court rules against you, obviously you are at a more difficult situation. In Colorado, of course, you can appeal and you do not have to provide a bond. The item still remains in custody or in an interest-bearing account. In most situations, unless you are dealing with a considerable sum of money, the proper way to work this out is by settlement. We all have to realize that we can give ourselves a black eye by overreaching in this situation.*

Experiences in other states have shown that it is possible to change legislation by educating those who oppose the concept, and by lobbying for more favorable legislation. The development of the model Uniform Controlled Substances Act has increased the pace of legislative change and strengthened many state forfeiture laws. Unfortunately, not all states have model asset forfeiture legislation. Program directors must be able to develop strategies for using other legislative weapons which will achieve the same goals.

*Comment from the Colorado Springs, Metro VNI Deputy Prosecutor*

*We had hoped to adopt the Uniform Forfeiture Act this past legislative session. It was being done through a piecemeal effort because we felt there were provisions that would not bode well for Colorado. The legislature became highly incensed at the proposed asset for forfeiture legislation, The Senate approved it wholeheartedly and the House rejected it wholeheartedly. I think we took (such) a stinging defeat in this area that we won't go back to the legislature with changes for at least a couple of years.*

Colorado's forfeiture law does not allow for the forfeiture of real property, but its public nuisance law, extant since the 1800's, provides the legal basis for the forfeiture. Regulatory procedures, public nuisance abatements, ordinance and code violations, public health violations, and summary proceedings to evict may also be effective tools in shutting down properties that are engaged in illegal activities.

The statutes also define the forfeiture procedures. First, they state the type of forfeiture allowed, criminal, civil or both. Then they define the conditions that attach, i.e. whether the forfeiture is independent of the criminal case; dependent on an arrest being made; or available only after conviction. Obviously, this latter condition is the most restrictive for the forfeiture process, and especially troublesome if the defendant has fled the jurisdiction or died.

The rules for the distribution of the proceeds from forfeitures may severely restrict the level of asset forfeiture activity within a state. If none, or only a small portion of the proceeds are returned to the seizing or forfeiting agency, then there are few incentives to engage in this often costly practice. One could argue that money should not be the basis for a law enforcement incentive to fight drug crime. But in reality it is, and not necessarily because of greed. There is a constant need by agencies for "buy money" which may require \$50,000 to \$100,000 dollars depending on the type of investigation. This, added to personnel, equipment, asset maintenance and disposition costs impose significant expenses on the agency. By utilizing forfeitures, the costs are not passed on to the taxpayer; rather they are paid by the drug traffickers themselves. This is only the tip of the problem since other agencies and operations experience related costs including prosecutors, the courts and jails. But it makes the point that if the costs cannot be offset by the proceeds, then the very clear result is a diminution of law enforcement activity in asset forfeiture.

The Federal government's statutes offer an alternative to restrictive state statutes. They provide that 85 percent of the forfeited proceeds be returned to the seizing agency(s) and that the distributions be based upon the level of effort expended by each law enforcement agency. Of course, there are limitations to the number and types of adoptions accepted since the cases may not meet the guidelines and criteria established by the U.S. Attorneys Office (USAO), and many may be rejected. Thus, it is important that there be freedom to proceed either through the state courts or through the Federal courts so that no case will fall through the cracks.

*Comment from the Colorado Springs, Metro VNI Deputy Prosecutor*

*I believe our relationship with other federal agencies and other authorities are going to be controlled by the operating policies that they may have. For example, the federal government now has certain conditions under which they will accept a forfeiture action, i.e., the \$10,000 cut-off in terms of houses and the \$2,000 to \$3,000 cut-off for cars. These will also be controlling factors in whether or not we are involved with those agencies.*

### **Criminal justice system resources**

Regardless of the level or scope of the program, whether it simply seizes cash and cars incident to an arrest, or is based on wiretaps and informant information, law enforcement agencies play a major if not primary role in asset forfeiture. Thus, it is not surprising to find that their education and training become critical activities. Investigators and officers should understand the concepts basic to civil proceedings, the need for protecting the assets seized as distinct from their use as evidence, and the different types of evidence needed by the prosecutors or attorneys. Even when the asset forfeiture program is operated by the law enforcement agency, there is still a need to sensitize officers to look for assets as they observe or surveil, to identify them in their reports, and to think about the goal of taking the profits out of crime by seizing assets.

Unlike many investigations connected to other street crimes, those associated with drug trafficking may involve multiple law enforcement agencies at the Federal, state or local level. Coordination is an essential activity. Not only is coordination required among law enforcement agencies but with the prosecutor. This need imposes a different view of case management on law enforcement agencies because it focuses on assets in addition to offenders. Each requires different case handling procedures and more complex case management techniques.

The effectiveness of asset forfeiture programs is directly related to the ability of the law enforcement agencies to provide training to its personnel, support different investigative approaches and have qualified personnel available to coordinate with the prosecutors and other law enforcement agencies or task forces.

### **Courts**

Much resistance to asset forfeiture has been attributed to the courts. Only thirty eight percent of those surveyed stated that the courts held a positive attitude towards asset forfeiture. Whether this is representative of the universe cannot be verified except by anecdotal evidence. The consensus of the practitioners is that the resistance is due to two factors. One is that criminal court judges are not familiar with civil proceedings, the assumptions used and the different levels of proof. As a result, many "war stories" cite instances where criminal judges ordered the forfeited proceeds to be used for payment of criminal fines; and other judges who would not order forfeitures based on the "preponderance of evidence"; insisting on "beyond reasonable doubt" standards.

The extent to which the civil proceedings are independent of criminal does a lot to establish relationships between civil and criminal attorneys. Unfortunately, in many courts, the distinction between standards used to determine guilt in civil proceedings

(i.e. preponderance of evidence) and in criminal proceedings (i.e. beyond reasonable doubt) is not always made by the court. Also not always followed are the procedures and policies prohibiting the use of forfeited assets for criminal fines and fees. There appears to be an urgent need for the education of the judiciary as well as the legislators with respect to these differences.

Most cases, however, are disposed or adjudicated by negotiation and therein lies a major issue for asset forfeiture programs. The question of who is responsible for negotiation and within what guidelines is of critical importance. Negotiations have been conducted between the privately retained counsel (or the offender) and police legal counsel, prosecutors, or even property managers. If there is a hidden area of discretion in this adjudication process, it is here.

Courts are often resistant to civil forfeiture because of their concern for protecting innocent owners. Also, many judges believe that civil forfeitures have been used to circumvent the 4th and 5th amendments that protect the accused in criminal cases. This is despite the fact that civil forfeiture laws were enforced in the common law courts of the Colonies, and later in the States under the Articles of Confederation. (Executive Office for Asset Forfeiture, 1990). It is often overlooked that despite the lesser burden of proof the government still has to show probable cause for the initiating seizure, as well as the illegal use of the property. Many of the highly publicized negative examples of forfeitures resulted not from cases where no illegal activities could be shown but where the government overreacted. Especially on the State and local level seizing and forfeiting agencies have developed strict guidelines that help prevent unproportional forfeiture proceedings.

It was initially thought that these cases would impose more workload on the civil courts that are already backlogged and over capacity. However, there was no indication that this was a factor. Since the largest proportion of cases (95 percent or more) are not contested, but settled by negotiation, the effect on the existing inventory in the court is minimal.

### Public opinion

*"We in law enforcement have to ensure that a balance is always kept. You can't violate people's rights." Robert Fican, Wayne County Sheriff, Detroit, Michigan*

One cannot discount the effect of public opinion and the media on asset forfeiture programs. By their very nature, these programs spotlight a number of issues that are of legitimate public interest including the victimization of innocent owners; the personal use by law enforcement or criminal justice officials of seized assets especially expensive automobiles; the questionable use of funds; and the seeming lack of accountability over the proceeds.

There is no denying the need for the public and media's education about these programs. Few are familiar with the concept of asset forfeiture, and when they first hear of the concept, their initial reaction is to oppose it. Seldom asset forfeiture is thought of as an alternative reaction in which those who have dealt with drugs are sanctioned outside the criminal justice system with no prior record inflicted on them.

It is only after discussion and education, that the public begins to balance the benefits of these programs against their weaknesses, and is able to make rational decisions about their support or opposition.

The amount of money that these programs capture is another driving factor in whether they are criticized or accepted by the public. First, there are the legitimate concerns about auditing these funds and providing adequate, publicly accountable, controls over their use.

*Note from Pima County, AZ*

*The Pima County Anti-Racketeering Fund Grant Program was established in 1991 by directing 25 percent of all seized and forfeited funds in Pima County to a special account, in addition to all interest earnings for the entire forfeited funds account. The fund anticipates dispensing about \$1,000,000 in grants to support grass roots, innovative and "hands-on" community-based projects directed at children and youth. Funds are available ONLY for programs which address gang prevention, substance abuse prevention or substance abuse education. The first competitive awards will be announced early in 1992.*

*The Pima County District Attorney was instrumental in changing the legislation to allow asset forfeiture funds to be used for these specific program areas.*

It appears that public opposition will be reduced only if there are open discussions about the criteria and guidelines used for seizures; the creation of citizen watchdog committees; and a careful and complete auditing of the proceeds and their use.

### Summary

It is difficult to rank the importance of these factors for asset forfeiture programs. Clearly the legislative environment plays a large role in setting the scope and limits for seizures and how they are handled. However, many negative effects can be offset by using other statutes or regulations, or by having the cases adopted by the Federal agencies.

The quality of the law enforcement investigative personnel and the resources available to them, including buy money, are essential ingredients to successful operations. But in lieu of deficiencies in this area, asset forfeiture can still continue, albeit on a smaller scale. In Prince Georges County, for example, where the program was operated out of the State's Attorney's office, and the primary need was to build up capacity in law enforcement agencies through training and assistance. It was interesting to note that by the year's end, the office was moving into money laundering and the seizure of real property. These activities relied less on patrol and more on investigators and financial investigations which could be handled within the prosecutor's office.

Finally, resistance by the public, media and the legislators must be faced head on so that the issues and concerns are, first, articulated and then, resolved. The involvement of the community in this program through such activities as those proposed by Pima County may speed up understanding of the program and reduce a lot of the unfounded criticism that it receives. There is no doubt that abuses can and will occur. It is the responsibility of all to take the steps needed to reduce this problem. Some of

these can be taken by those outside the program, others can be made internally by the program directors.

#### INTERNAL POLICY ISSUES

"Unfortunately, asset forfeiture is still an evolving law enforcement tool that demands special attention. Apart from the unique legal issues that will arise, innumerable operational questions must be examined and addressed." *Janet Ferris, Florida Department of Law Enforcement.*

The theory behind asset forfeiture is to seize the spoils from drug trafficking so that current and aspiring traffickers will be deterred and the network disrupted. But the effectiveness of asset forfeiture depends largely on how thoroughly the programs identify and address key management questions associated with forfeiture programs.

The first step in implementing asset forfeiture programs is to identify the primary agency and the type of organization that sets policy and administration for the program and to specify the resources that should be added. After the organizational structure has been selected, then program implementation is considered. The major areas for program attention include:

1. establishing criteria for seizures and dispositions;
2. asset maintenance and protection;
3. guidelines for negotiated adjudications
4. disposition of the assets
5. distribution of the proceeds.

#### Program direction and organizational models

The variety of organizational structures depends largely on state legislation, the jurisdictional scope of the program, and the level of complexity. There is a continuum along which program types can be placed with respect to their level of complexity, scope and resource utilization. On the left side, at the basic level, is the cash/car program where seizures occur simultaneously with drug transactions within local jurisdictions. At the other end are complex investigations, crossing many jurisdictional boundaries and utilizing an extensive intelligence apparatus and complex financial investigations.

Program direction may vest with law enforcement or prosecution agencies. Since the major portion of the program is concerned with investigations and the proceeds generally are returned to the law enforcement agency, direction by them is often the case with counsel provided by the prosecutor, private attorneys or police legal counsel. If prosecutors direct the program, it can be expected that they receive a share of the proceeds to offset their expenses. At the state level, direction may be provided by the Attorney General or the state police. Regardless of the direction of the program, the need for coordination with the other agency is critical.

Organizationally, the programs seem to fit into one of four models:

1. *No structure* - the forfeiture function is assigned to specific individuals either within the law enforcement agencies or the prosecutor's office, or both.
2. *Law enforcement program* - the investigative function drives this program to the point of seizure. Adjudication activities and resources are an adjunct conducted by

either in house, e.g. police legal counsel, or retained as needed either from the public (prosecutor or county/city attorney) or private sector.

3. *Prosecution program* - the investigative function is generally decentralized among more than one police agency, (unless the prosecutor has a large investigative staff), while the seizure and forfeiture activities are the focus of the attorneys.

4. *Task forces* - all functional areas are carried out under the umbrella of a task force which may be an independent body or may function as a separate program within an agency.

According to the survey, the most effective organizations, as judged by net forfeitures, are those with the access to a variety of resources and the widest jurisdictional responsibility, i.e. state agencies, law enforcement and Attorney's General offices, and multi-jurisdictional task forces. A single, local agency will have difficulty establishing an operation that targets larger drug trafficking operations that extend over county, state or even national borders. Nevertheless, the impact made by local agencies is not to be discounted as the statistics on forfeitures show.

**Wayne County (Detroit) MI Prosecuting Attorney's Office**

The Wayne County Prosecuting Attorney's Office has developed and operated a successful asset forfeiture program that was the result of a gradual build-up. Initially, the prosecutor read narcotics cases to see if there were forfeitable assets mentioned in the police reports. If there were, the attorney would go to the police for seizure. As a result, the police created a forfeiture unit to work with the attorney. Now supported by forfeitures is an office manager, 2 secretaries, 6 attorneys, 3-4 investigators who review police reports, look for targets and serve as an intelligence clearinghouse.

The prosecutor cautions, however, that with this type of operation, you have to be careful not to turn the prosecutor's office into a law enforcement agency.

The appeal of the task force is that policy, direction and coordination are centralized which supports a better managed and more efficient operation. The least effective organizations are those involving single local law enforcement agencies or prosecutor's offices where the coordination requirements are beyond the resources of the office and its program. It is important to identify the types of resources that are already available to provide similar services.

*Comment from Colorado Springs, Metro VNI Deputy Prosecutor*

*Our current organization is most effective in that we are all housed with the very officers that do our forfeitures. I think we could become more effective if we had greater contact with the patrol or traffic officers who are out on the streets. However, our current organization is a large reason why we have seen the significant increases in forfeitures.*

*I think the least effective type of organization is one where the individuals are all housed in separate organizations, and you communicate through messages and weekly meetings. If something does not get done the way you want it, you have to wait sometimes days or even weeks to be able to discuss it with the individual, or you may even forget, and it does not get completed at all.*

### Special Personnel and Functions

Asset forfeiture alters the thinking and activities of law enforcement in ways that were previously not considered. It brings a new perspective to police investigations and arrests, asking officers or detectives to be sensitive to assets and evidence of assets. It imposes a new set of activities on the departments including financial investigations, processing cases through the civil courts, and protecting, managing and disposing of assets. It also introduces new personnel to the department in the form of financial investigators and property managers. Asset forfeiture programs may also affect prosecutors (especially if they have civil jurisdiction) and their relationships with other prosecutorial agencies at all levels, federal, state and local.

#### *Financial Investigators*

*Just as the search warrant is widely used to produce physical evidence in narcotics and other types of investigations, why not use the same tool to obtain financial information about the narcotics ring? Richard Stolker, former prosecutor, U.S. Department of Justice.*

The position of the financial investigator (FI) is a crucial one and has been the focus of many discussions. Hiring a financial investigator has been termed a "quantum leap" for asset forfeiture efforts. Having a financial investigative resource provides a valuable level of assistance in searches for assets. The financial analysis of records can link drug trafficking with assets used to facilitate it.

FIs provide affidavit support based on net worth analysis, asset identification, owner and lien holder information, and other background information that not only supports and extends searches, but enhances criminal prosecutions.

FIs provide investigative support based on asset searches, preparation of net worth analysis, providing support documentation for financial search warrants, debriefing of subjects or witnesses for financial and asset information, and identifying nominees or straw ownership for case development.

Individuals working in this new position often are faced with problems of integration and acceptance. This is especially true if the FI does not have the status of a sworn officer. Also, there is still disagreement about the background needed for FIs. Some argue for a strong accounting background; others, for extensive law enforcement investigative background. No matter what their experience, FIs are viewed as "paper

chasers". As a result, there is still reluctance from officers with traditional "bust 'em" attitudes to include them early in investigations, and to capitalize on their expertise.

#### *Forfeiture Attorney*

"I think depending on your statute, the minimal resource requirement would be a Deputy District Attorney or State Prosecutor assigned to your narcotics unit as long as there is someone to do the typing." *Douglas Price, Deputy District Attorney, Colorado Springs.*

Because asset forfeiture usually follows civil proceedings an attorney dedicated and knowledgeable in the different requirements of civil litigation is another requirement. Programs have experimented with a number of different arrangements. Forfeiture cases can be handled by the prosecutors' office, by police legal counsel, or even by a private attorney under contract.

If prosecutors are assigned forfeiture cases, they can work within the prosecutor's office, or be detailed to the asset forfeiture unit. Colorado Springs, for example, started its program with the assistance of one part-time prosecutor who worked out of the District Attorney's office. But as the program became operational, the prosecutor soon realized that this arrangement was not satisfactory. Not only was the commitment insufficient in terms of attorney time, but the office did not give these cases the priority they needed. In Baltimore, MD the city attorney was cross-designated as a State's Attorney to work in the asset forfeiture unit.

The use of police legal counsel as forfeiture attorneys has been questioned by prosecutors on the grounds that there are no checks and balances between law enforcement's seizures and the adjudication process (especially since most of the dispositions are negotiated). The issue that is critical to this discretionary power is to identify the client who the attorney serves. Police legal counsel may lack the independence that a prosecutor under contract to a Board of Directors has.

#### *Property manager*

The third critical position is the asset or property manager. They appraise or oversee the appraisal of seized assets; maintain logs and other protective procedures for the property; arrange for storage; oversee contracts and dispositions; and, report all transactions to the program director. Some of these activities can be contracted out, but it still remains the responsibility of the program director to establish plans for protecting assets before seizure, and monitor and protect the property after seizure.

The property manager should also make sure that the policy of the program towards repairs, investment and profits is enforced. Some programs merely sell property for the highest bid; other programs seek to increase the return on their dollars invested.

*Comment from Colorado Springs, Metro VNI Deputy Prosecutor*

*The property manager is one of the more critical employees. He can save you from problems. It is imperative that this employee be housed and is employed by the same organization as the other members of the asset forfeiture unit because day-to-day meetings and discussions solve problems before they occur. If property managers do not have enough to do, they can double as civil investigators, and you may want to cross train for financial investigations.*

Clear and comprehensive guidelines must be established for evaluating vehicles and property before they are seized, and describe the procedures for the property manager to use in preparing items for sale. Guidelines are especially critical if the attorney or supervisor does not have a daily, working relationship with the property manager, or if the function is conducted by another agency.

### **Program Activities**

Because of their complexity, asset forfeiture programs require the development and strengthening of systemwide strategies. Some of these may already be in place as part of other programs such as intelligence networks which target repeat offenders, or special drug courts for expedited drug case processing. Some may be missing such as access to legal counsel, the availability of FI's, or even protected property storage facilities.

All the functional areas need to be integrated into a comprehensive and coordinated program. In doing this, attention has to be given to establishing the criteria for seizures and dispositions; asset maintenance and protection; guidelines for negotiated adjudications; disposition of the assets; and, distribution of the proceeds.

#### *Establishing criteria for seizures and dispositions*

The decision to use asset forfeiture as a tool creates a number of issues and questions that should be resolved early in the intelligence gathering and investigation phase before seizures are made. They start with identifying the target and the assets to be pursued. The amount of investigative work needed to do this will depend on the nature of the asset, the extent to which there are hidden assets, the priority of the case; and, whether there is time and/or capacity to proceed.

Depending on the circumstances, the choices available range from not seizing the asset, conducting more extensive investigations, handing the case over to another jurisdiction, or waiting, pending the results of other investigations.

With the exception of unplanned seizures, there is a critical need for guidelines to assist in deciding which assets to seize. If the asset is essentially worthless or requires exorbitantly high maintenance costs, it may not be seized. Even unplanned seizures, those that occur incidental to arrests, such as the seizure of cars, beepers, car phones, and other equipment should be reviewed to determine whether the property should be retained or disposed according to guidelines. Formulation of these criteria and guidelines will go a long way in overcoming many of the criticisms claiming that law enforcement priorities are driven by the value of the assets.

### *Asset maintenance and protection*

Seized assets are subject to return to their owners if such a determination is made. It is, therefore, critical that prior to the seizure, plans be developed for the protection of valuable property. Expensive cars should be stored in covered and secured space which could be rented or provided by the government; conveyances such as boats and airplanes need special storage and maintenance arrangements; and, title to real property should not be taken without first providing for adequate protective measures such as installing burglar alarms, obtaining insurance and making property maintenance arrangements. In all cases, photographs and inventories need to be compiled.

One important policy question is whether funds should be invested to increase the value of the asset (such as restoring damaged automobiles) or whether they should be sold "as is". Whatever is decided, the policy should be placed in writing and a reporting system established to monitor its application.

### *Guidelines for negotiated adjudications*

If there is one area of hidden discretion in the asset forfeiture program it can be found in negotiated adjudications. Because upwards of 95 percent of all adjudications are negotiated, this is not a rare occurrence. Yet, it is essential that it be subjected to control and guidelines. The problem that this entails is that the negotiating process in civil cases is very loose and difficult to control. Negotiators may be police legal counsel, an assistant prosecutor or city attorney, privately retained counsel or even the property manager. The other party may be the claimant himself or an attorney. The issue is who will keep what?

Audits and accountability are essential to policy and procedures. One of the most sensitive areas in this program is the temptation that money and valued assets creates. The program directors should be overly sensitive to the auditing requirements the program imposes and be prepared to issue public accountability reports on a regular basis. Accountability is best obtained when separate interest-bearing funds are established and the use of the funds are controlled by a board representing all the interests in the program, police and prosecution.

### *Disposition of the assets*

**You can contract out safety and security, not discretion. Jack Harris, MANTIS, Tucson, AZ.**

How forfeited assets are disposed is largely determined by what the legislation allows. They can be returned to the seizing or forfeiting agency, they can be transferred to other governmental entities; they can be sold to the public (at public auction or by bid) or they can be junked.

It is essential that guidelines address these negotiated dispositions for a number of reasons. First, to ensure the uniform application of asset forfeiture policy and consistency with the program's goals; and, secondly to reduce criticism about differential treatment and abuse.

Selling policy is important in this area. It should be clearly established so that it is consistent with the statutes of the state or local government yet does not incur losses to the government. Whether the policy seeks maximum dollar return on the sale or simply the sale of the asset itself, is clearly a policy decision to be made by the program directors and monitored on a regular basis.

Colorado's legislation, for example, requires forfeited property to be auctioned "on the steps of the court house". As a result, the proceeds do not reflect high profits. In contrast, the Sheriff's Office in Broward County, FL fully expects to reap at least \$2 for every \$1 invested from its public auctions which are conducted by professional auctioneers.

Jurisdictions involved in or considering a forfeiture program should seriously consider the use of professional auctioneers, and seeking a fair market return on the assets.

*Distribution and use of the proceeds.*

There is probably no single more contentious part of asset forfeiture than this function. The spectacle of law enforcement agencies squabbling over their share of the proceeds is alarming and totally preventable.

The prosecutor, courts, treatment facilities and others do not fare as well as law enforcement. The distribution of proceeds from local forfeitures must conform to state distribution formulae. The conflict over the use of proceeds is never so clear as when the state declares a portion of the funds be used for the literacy fund (as was the case in Virginia), for education (as is the case in Missouri), or for general revenue (as is the case in Tennessee).

As a result of these wide variations in state distribution formulae, the Federal Government is placed in the unfavorable position of being asked to adopt cases so state or local law enforcement can circumvent distribution procedures that are unfavorable to them. Concomitantly, the incentive to utilize or expand local asset forfeiture programs is diminished. In this sense, complaints about money driving the program assume more validity.

Another important problems occurs if legislation restricts the distribution to law enforcement alone. It is obvious that other parts of the criminal justice system can incur substantial costs which should be offsets be the proceeds. For example, in Prince George's County, the State's Attorney's office cannot use forfeited funds to support its own asset forfeiture program. Respondents in almost every cited the need for legislative reform in this area. Even Federal legislation should be changed to support and enhance state and local activities not restricted to law enforcement.

In addition to the distribution formulae established by the federal government or state statute, there are other issues that need to be addressed. Many of the seizures are the result of joint investigations and arrests. This is especially true when task force operations are involved. As a result, the proceeds also need to be distributed to the contributing agencies and this too leads to conflicts. The need for written pre-seizure agreements, signed while the case is still in its investigative stages, offers a rational and reasonable solution to later conflicts over who shares how much of the proceeds.

There are a number of acceptable criteria for the distribution of proceeds. They can be based on proportional share of the effort (which requires keeping logs), manpower allocations, equal shares, size of force, or even the population of the jurisdiction. It is

irrelevant as to which basis is used as long as the participating agencies and jurisdictions are informed before the seizures, and written memos of agreement are obtained from each.

Another contentious area can be found in the use of the proceeds. Proceeds should be deposited in special, interest-bearing accounts and the disbursement of the funds should be subject to the oversight and approval of a board composed of the principals in the program, i.e. the law enforcement agencies, sheriff, and prosecutor.

The survey indicates that there are many depositories for these proceeds ranging from the general fund to local law enforcement budgets. Serious consideration needs to be given to the goals and objectives of asset forfeiture and how they can be best met through the planned use of the proceeds. A coalition formed by the creation of a Board to oversee the distribution and use of the funds is often more powerful than single agencies and reduces criticisms about abusing the use of the funds. In Colorado Springs, the Special Investigations Fund, and in Tucson, the MANTIS Control Board act in this capacity.

Although its use is still experimental, the concept of making some of the proceeds available to community groups as is underway in Pima County, AZ should be carefully monitored as a means for extending the ability of asset forfeiture to impact on the drug problem in other, non-criminal justice ways.

#### CONCLUSION

"There is little doubt that developing asset forfeiture programs can be a challenging experience but one, which with foresight and planning, will substantially impair the drug trafficking network." *Michael Leverenz, Tucson Police Department.*

If the programs were developed and operating within their potential, then the losses incurred by the drug trafficking network would be enormous. In this report, little emphasis has been given to the effect of this program on the demand side of the drug problem. While no scientific evidence can be provided it needs to be recognized that asset forfeiture may have a deterrent effect on the casual, recreational user who loses his automobile, or the facilitating business owner who loses his livelihood. It is doubtful that these programs can in any form impact on the behavior of drug addicts. However, this was not the main target group asset forfeiture was meant for. The main target are those who reap financial gain from drug trafficking. When these programs are successful as the demonstration programs indicated, they have the ability to disrupt the trafficking network.

Although these benefits are possible, the challenge is to achieve them in a relatively hostile environment with strategies that demand communication, coordination and collaboration between law enforcement and prosecution agencies. It is, therefore, important that others approaching this project be aware of the issues and their implications. To summarize the major factors as revealed by this assessment, we can state them as a series of recommendations, many of which are not unfamiliar to those working in planning and development fields.

### *1. Identification of the Drug Problem*

The complexity of these programs require a clear and careful statement of the drug problems encountered by the jurisdiction; an appraisal of the ability of asset forfeiture to be used effectively as a strategy to reduce or eliminate the problem; the willingness of law enforcement agencies and prosecutors to assign it a mutually acceptable priority in light of other problems; and the development of a written set of goals and how they will be achieved that all agencies can buy into.

### *2. Identification of Program Issues and Constraints*

If the current drug problem is identified, the willingness to target it, and if priorities can be agreed upon, then the environment should be examined for constraints on the program. In other words, the program director should know "what he is getting into".

This involves examining the state legislation for the limits of forfeiture; and, if it is restrictive, examining other statutes for their ability to support the strategy of abatements, seizures and forfeitures.

It also requires testing the attitude of the court. If meetings with the judiciary fail to provide a basic level of support for the program, there may be little option but to just use the adoptive case route, realizing that the impact of the program will be diminished.

Finally, public opinion, the attitudes of the media and even the legislators should be determined. Even though asset forfeiture can operate with resistance from these groups, the task may be made easier with education and communication.

### *3. Program Organization and Coordination*

With steps 1 and 2 completed, the internal components of the program can be developed. First, the type of organization for the program should be decided. This choice should be guided by the principle that the wider the jurisdiction and the more resources involved, the more effective is the program. This suggests task force configurations if possible.

If a multi-jurisdictional program is not possible, and the program is to be lodged within a single agency such as law enforcement, then the prosecution resources should be available to the agency and the program on a full-time basis. If the prosecutor directs the program, the need for investigative and intelligence gathering resources will be a problem that will have to be resolved before the program can be fully effective.

Decisions should be made about each of the role and responsibilities of each individuals to be involved, their level of commitment to the program (e.g. some are detailed to the project for 1-3 year rotations), and who exercises supervisory control. Job descriptions should be developed for all internal positions including the financial investigator and the property manager. If services are contracted for, the contracts should serve in lieu of job descriptions, carefully spelling out program policy and job responsibilities.

#### *4. Functional and Operational Descriptions*

Each functional area of the program, from pre-seizure planning to the distribution and use of proceeds should be carefully examined, and decisions made about the scope of the activity. Policy governing each practice and procedure should be placed in writing, e.g. seizure criteria, repair and maintenance policy, distribution of proceeds. Most importantly accountability should be assigned for each operation, and the overall management of the program.

All policy guidelines should be placed in writing and reviewed semi-annually unless major changes in the environment have occurred.

#### *5. Education and Training*

The program directors and major participants should engage in an pro-active program of education and training. Training for staff and criminal justice personnel affected by the program should be offered on a continuous basis. Educational programs should be developed for the legislators, courts, media and the public. The participation of citizens groups to serve on the governing boards for the funds should be sought, and expanding the use of the forfeited proceeds to other drug-impacted areas should be a goal.

#### *6. Accountability*

All seizures, forfeitures, proceeds and the use of the proceeds should be subject to constant accounting and auditing procedures. These should be made available to the public in the form of quarterly financial reports.

#### *7. Monitor and Measure Performance and Impact*

Expand the measures of success of asset forfeiture programs to include changes in the crime in small neighborhoods, law enforcement satisfaction, and the public's perception of improvement. There is more public acclaim stemming from the seizure of a crack house than of a kilo of drugs. Street level enforcement is more observable and has a more rapid payoff. It may often happen that the program will solve a problem in a neighborhood even though it does not dismantle an organization. These types of impact should be incorporated into the evaluation process.

The establishment of asset forfeiture programs may depend in large part on luck and politics, but their sustained operations and effectiveness depends almost wholly on the quality of the decisions made about the above issues.

## V. NEW DIRECTIONS

In FY 1990 \$460 million of assets were seized and forfeited by the Federal government. From this amount, California received \$85.6 million; New York, \$66.1 million; Florida, \$59.4 million and Texas, \$43.9 million. Forfeitures exceeded one half billion in FY 1991, reaching \$644.3 million.

The significance of this amount lies in the fact that it is evidence of the enormous size of the drug trafficking network operating throughout the world. What has been seized and forfeited by the U.S. Government probably represents only a small proportion of the assets tied to this illegal industry.

### Concluding Note

Asset forfeiture is an important strategy in our fight to reduce or stop drug trafficking by making it unprofitable. However, its effectiveness is a function of the amount of profit taken out of the network. If the amount is too little, then the loss can be absorbed as a cost of operating a business. Therefore, to be truly effective all parts of the criminal justice systems, Federal, state and local, should be actively involved in asset forfeiture. Yet the state-of-the-art survey indicates that, at the present time, the ability of state and local agencies to be an effective partner is very limited.

Because of this, a two step plan is recommended. The first step is short-term and is aimed at developing state and local capacity; the second step is long term and focuses on extending forfeiture strategy to other areas to act as an agent for social reform and increasing social accountability.

### INCREASING STATE AND LOCAL CAPACITY

Given the present status of asset forfeiture programs, the needs of state and local programs are fairly basic.

#### Needs Assessment Results

1. Education
2. Development of training curriculum
3. Development of model programs
4. Establishment of clearinghouse and publications
5. Use of seed money to promulgate programs
6. Reduce gap between Federal interest and local program needs.

The priority need is for education. The fact that asset forfeiture is largely unknown or at least misunderstood, and instinctively opposed indicates the lack of knowledge that most people have about civil proceedings in general and asset forfeiture in particular. As a result, it is difficult to find support for the development and implementation of these programs. There is a critical need for the Federal government to take a leadership role in developing educational tools that explain the concepts, assumptions and protections that are in these programs and discuss the issues of most concern to the public and the media.

Using the resources available to it, the Department of Justice should support the development of educational videos, conduct or sponsor seminars, conferences, and workshops, that are not just direct at informing police and prosecutors about how to conduct a certain procedure. If available experiences and the results of forfeiture programs should be disseminated, to show their possible impact to make the public more knowledgeable and less fearful about asset forfeiture, its goals and objectives.

For those attempting to operate state and local programs, the basic needs are for support mechanisms such as training, model programs and a clearinghouse. Given the rudimentary nature of most of the programs surveyed, these needs are not surprising. What is surprising is that 22 percent of those surveyed and active in asset forfeiture indicated that they had received no training. In many instances, training had been provided to former employees and supervisors, but when they left or were transferred, the training was not repeated, and the knowledge lost.

There is a need for a balanced, comprehensive training curriculum. A review of the variety of subjects and courses being offered by a multitude of public and private groups is a reflection of the fragmentation that presently exists. Priority should be given by the Bureau of Justice Assistance to the development of a core curriculum that includes, at a minimum, training for: (1) planning and development phases; (2) implementation and operations; (3) management and administration; (4) modification and expansion, and; (5) specialized subjects. The curriculum should be designed so as to move program directors through a succession of increasingly complex program activities. The Federal government should support the development of a core curriculum which, then, can be tailored by the states to meet their specific statutes, and updated by the state as the legislation changes. The conceptual model used for this evaluation (Figure 1) should form the base for this development effort. Without such a curriculum, there is little hope that asset forfeiture will ever fully reach its potential.

Because of the wide variety that is possible in the structure and operations of asset forfeiture programs, the development of a single prescriptive model is not advisable. More relevant to the task of assisting jurisdictions in their planning and implementation processes are computer-assisted systems akin to the one developed by the Jefferson Institute for the Bureau of Justice Assistance for career criminal/repeat offender programs. This type of system designs a plan to the specifications established by each site. It considers the type of program sought (proactive or reactive); selection criteria for inclusion in the program (offender-based, offense-based, a combination of offense and offender characteristics); its direction (police, prosecutor or jointly); its organization (centralized, decentralized, integrated, separate unit) and other significant factors that color administration and operations. Based on policy and program preferences, the system develops a program plan and an abbreviated checklist of decisions to be made and actions to be taken. The development of an analogous system for asset forfeiture could significantly reduce start-up costs and provide guidance to larger numbers of jurisdictions.

In addition to the Federal Government's publications and resources (see the Directory of Resources compiled by the Jefferson Institute as part of this assessment), PERF has produced an outstanding series of publications directed at various aspects of asset forfeiture. This series is handy and easy to read and should be continued. However, additional support should be given to expand this activity into a broader clearinghouse function which can better meet the changing information needs of asset forfeiture program directors.

The asset forfeiture programs supported by BJA's demonstration grant funds clearly proved that the investment of \$105,000 to \$125,000 was worth the effort. In the first year alone, the programs could have returned the investment and still have received a substantial return for their efforts. However, each of the demonstration sites concurred that without the "seed" money, they could not have started a program. If we agree that the ability to take the profits out of drugs should be universally available and be operational in as many locales as possible, then some provision should be made for using forfeitures to help start these programs. It seems reasonable, therefore, to use some of the proceeds from drug trafficking to provide seed money for additional programs.

States should consider establishing a revolving fund for part of the proceeds so that new programs can be supported. When the fund's initial investment money is paid back, it would be used to seed additional programs. This would require legislative changes, agreements and procedures. There are a number of ways it could be achieved; therefore, a study should be undertaken to examine this proposal and make recommendations for change.

Finally, some of the Federal Government's asset forfeiture priorities should be realigned to meet local program needs. There is generally a large gap between the complexity of the cases investigated and prosecuted by the Federal government and those investigated and prosecuted by state and local governments. With the possible exception of the border states and large urban areas such as Los Angeles and New York and Miami, local programs tend to concentrate more on less complex cases and seizures. Currently, BJA's funding interest is on complex drug cases involving money laundering, hidden assets and conspiracies. These interests are not very helpful to many state and local jurisdictions whose needs are more basic, i.e. education, training and program planning and development. The gap between these two levels should be narrowed. Federal funds dispersed by BJA and NIJ should be addressing the question of how to improve the capacity of asset forfeiture at the state and local government, and balancing these interests with those contained within more complex cases, but less relevant to the local jurisdiction.

#### **LONG-TERM IMPLICATIONS FOR ASSET FORFEITURE**

For law enforcement, money and resources can create a conflict of interest driving cases in ways that are not to law enforcement's advantage. For example, in a local jurisdiction, cases are generally processed at the lowest possible level, then the money is extracted. When case investigations go no further, then there is no long-term, broad based, organizational strategy. This works against Federal law enforcement investigations, which after building a major case, find only a killing field of lesser cases. For example, in Arizona, \$200,000 was found with drugs in the trunk of a car. Rather than seizing the case and closing the case with an arrest, further investigation was conducted in New York and California. On the other hand, if the cash/car attitude is discouraged at the lower level, then law enforcement agencies will not think in asset forfeiture terms and the effect of the strategy will be lost.

Even more long-term is the potential of adding civil remedies to government's tools for social control which will forever change law enforcement and criminal justice. It will broaden and deepen the resources available to them and society. It will provide two sets of remedies: civil, to be used for social change; criminal, to be used for punishment. This two lane road is presently being designed to allow for community

policing. The use of civil remedies in other areas will provide law enforcement with other responses than just the hammer of punishment.

The use of civil penalties also gives recognition to the public's responsibility if they aid and facilitate illegal or socially irresponsible activities. The banker no longer can claim ignorance about suspicious money transactions, nor can the auto or real estate salesman disclaim knowledge.

Civil remedies should not be viewed as a means for punishment. They are, instead, a means for corrections to socially irresponsible behavior (such as the Exxon disaster in Alaska, or other environmental polluters). As the distinction between the purpose of civil and criminal remedies becomes clearer and more acceptable, the role of the criminal justice system should become more circumscribed, dealing with illegal actions.

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