

# Restitution in Texas

A Report to the Legislature



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# TABLE OF CONTENTS

Restitution in Texas: A Comprehensive Approach	3
Current Practice	4
Restitution Issues	5
Offenders' Ability to Pay	5
Payment of Restitution	5
Collecting and Dispersing Restitution Payments	6
Revocation	7
Restitution Laws in Texas	7
Restitution Laws in Other States	8
Enforcing Orders of Restitution	8
Monitoring Restitution	8
Access to State Payments	8
Payments from Prison Work Programs	8
Probation and Parole	8
Other Provisions	9
Investigating and Preserving Offenders' Assets	9
Investigating Offenders' Assets	9
Preserving the assets of Offenders	9
Recommendations	9
The Offender's Ability to Pay Restitution	9
Accessing Offenders' Assets and Payments	10
Preserving Offenders' Assets	11
Duplicating Payments	11
The Role of Probation/Parole Departments	11
Enforcing Restitution	12
Disbursing Restitution Payments	12
Conclusion	12
Endnotes	13

*...from the Director*

In 2005, Speaker of the House of Representatives, Tom Craddick, highlighted restitution payment as a key issue in his “Interim Study Charges” for the 79<sup>th</sup> Legislative Session of the Texas House: “Review the applicable laws governing the payment of restitution to victims of crime and the methods by which restitution is collected and disbursed to victims of crime and [through] the Compensation to Victims of Crime Fund.”<sup>1</sup> The purpose of this report is to provide background information about the issues germane to restitution for victims of crime in Texas.

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## **RESTITUTION IN TEXAS: A COMPREHENSIVE APPROACH**

The concept of *restorative justice* provides a context for understanding the issues surrounding restitution. “Restorative justice is aimed toward repairing the damage done to victims and the community while providing re-integrative responses by the criminal justice system, victims, and other ‘stakeholders’ in the community.”<sup>2</sup> Although punishment is not a goal of restorative justice, restitution certainly involves repairing the damage between offenders and victims, as well as rehabilitating offenders. It is under the framework of restorative justice, keeping in mind the need to strictly enforce laws when necessary, that specific issues and initiatives are reviewed in this report.

Restitution to crime victims has a long history. Mosaic Law, the Code of Hammurabi, and Roman law all contained provisions for restitution. Throughout history, crimes were primarily regarded as harms against individual victims. Beginning in Europe during the 12<sup>th</sup> century, however, crimes were gradually viewed as offenses against the king’s peace rather than against individual victims. Offenders were ordered to pay fines to the king’s coffers rather than pay restitution to a victim who was actually violated.<sup>3</sup>

During the development of the U.S. criminal justice system the issue of restitution was addressed. In the years following the American Revolution, however, crimes were increasingly viewed as acts against the state, rather than the individual victim. As a result, criminals were ordered to pay their debts to society through fines and imprisonment. Increasingly, restitution to a victim began to be handled by tort law. Victims who wanted restitution were referred to civil courts.<sup>4</sup>

The prevailing concept of crime as “harm against the state” virtually eliminated the victim from the justice process, often rendering them “invisible” in the American criminal justice arena. Beginning in the 1970s, however, these forgotten victims increasingly influenced America’s conscience. The victims’ movement called for a return to the old practice of victim restitution.<sup>5</sup> Since 1972, when the first modern restitution center in Minnesota was created, restitution has become a fixture in the justice process of the U.S. and currently all states and federal governments have some statutory or constitutional provisions pertaining to restitution.

## CURRENT PRACTICE

According to Akers & Sellers, restitution has three specific goals:

*First, it restores victims by providing financial and psychological benefits. The compensation aspect of restitution can address both the victim's financial loss and the victim's sense of injustice. Second, restitution can serve as a means of changing offenders' behavior. This rehabilitation aspect of restitution is aimed at changing offenders' behavior by forcing them to recognize both the losses that they have caused and their responsibility for repairing those losses. Third, restitution has punishment aspects, in that the requirement of making payments is more onerous than straight probation.*<sup>6</sup>

All three goals are important when considering policy changes to restitution procedures. These goals can also be seen as interrelated; when one is being properly addressed, the others are likely to be met as well.

The idea of restitution is important in that crime is not merely a symbolic assault against the state, but also one that inflicts harm on innocent victims. Criminals have long paid their debts to the state through fines and confinement. Fairness dictates that the same criminals pay debts to victims to repair the harm they have caused. Moreover, research has consistently shown that restitution rehabilitates and reduces recidivism of offenders.<sup>7 8 9 10</sup>

Restitution is certainly important, but it is only available when an offender is apprehended and convicted. Consequently, only a small percentage of victims receive any reparation payments. Unfortunately, many victims do not report their victimization to the police. Statistics show that as many as 50% of victimization incidents go unreported. In the case of robbery, for example, approximately half of all robberies are reported, and only one quarter of them are solved. According to a recent report, one out of every eight robbery victims is likely to receive restitution.<sup>11</sup> Worse yet, not all offenders are ordered to pay restitution, and of those who are, many do not fully comply with the order.

Judges typically order restitution when quantifying the harm to the victim is uncomplicated. Thus, property crime offenders are more likely to receive restitution orders than are violent criminals. A national study showed that the proportion of property crime offenders on probation who were ordered to pay restitution was about 40%, while that of violent perpetrators was a mere 15%.<sup>12</sup> When ruling on restitution, judges may not take into consideration salient factors other than the dollar value of the damages. Texas law requires judges to order defendants to pay restitution to victims. If judges do not order restitution or order only partial restitution, they must state their reasons for the record.<sup>13</sup>

An accurate assessment of the extent of victims' injuries and losses are essential to a fair order of restitution. When determining the optimal amount of restitution, judges often rely on information provided by community supervision officers in a pre-sentence investigation. However, pre-sentence investigations are ordered in only a small percentage of cases. Victims are asked to describe their physical, psychological, and emotional injury in a victim impact statement after an indictment is brought against an offender. However, victim impact statements may not fully capture the extent of damages that victims experience. For example,

unforeseen financial expenses may be incurred after the victim impact statement is submitted. Greater effort is required to more accurately document the extent of suffering crime victims' experience. Only in this way will judges be able to order restitution that addresses the harm experienced by victims.

## **RESTITUTION ISSUES**

Despite the popularity of restitution and the many statutory provisions related to this issue, restitution remains one of the most under-enforced rights of crime victims. To rectify this, many victims want restitution to be mandatory regardless of offenders' ability to pay. They also want higher amounts of restitution imposed, and harsher penalties for failure to comply. Increasingly, state policies and laws are addressing these concerns.

### **Offenders' Ability to Pay**

Many victim advocates argue that an offender's ability to pay should not be considered when ordering restitution. Instead, they maintain that the offender's financial ability should be taken into account only when setting the payment schedules. The ostensible rationale of such an argument is that judges do not have to be concerned about the defendant's financial ability at the time of the restitution order, because the offender's earning ability and financial situation can change over time.<sup>14</sup> Pursuant to this argument, the 79<sup>th</sup> Session of the Texas Legislature removed the requirement of having judges consider a defendant's ability to pay when determining the amount of restitution. Nothing prevents a judge from considering it, but it is no longer required.

Controversy continues on this issue, however. Offenders who do not have adequate resources to pay restitution may not even attempt payment.<sup>15</sup> Many probationers have financial, mental, and physical health problems, which adversely affect their ability to comply with restitution orders. A study by the American Bar Association concluded that the ability of the offender to pay should be considered in setting the amount of the restitution award and in responding to delinquent offenders.<sup>16</sup>

Restitution benefits not only victims, but offenders as well. The community as a whole also benefits as a result of reduced recidivism.<sup>17 18 19</sup> Several studies that examined the impact of restitution on recidivism suggest that restitution reduces future law violations. Ervin and Schneider suggest that with regard to juvenile offenders:

*...restitution involves a continuing, tangible, positive action by the youth that culminates in successful completion of [restitution].... Restitution's impact on recidivism operates largely through the opportunity it presents for positively rewarding the juvenile for actions taken.<sup>20</sup>*

This is in contrast with traditional sanctions where probationers passively avoid punishment by not violating the conditions of probation.

### **Payment of Restitution**

Many offenders often do not fully pay the restitution that is ordered. The national estimates of restitution dollars collected vary. A study conducted by the American Bar Association showed that only 45% of restitution dollars were actually collected.<sup>21</sup> Similarly,

the mean collection rate over a three-year period in Cook County, Illinois was a mere 34%.<sup>22</sup> In Pennsylvania, 41% of probationers with restitution orders paid nothing or less than half of the amount required.<sup>23</sup> In Texas, the Legislative Budget Board<sup>24</sup> estimated that approximately 50% of restitution ordered is actually collected, an estimate that is higher than the national figure. The average dollar amount collected for victims in Texas from 1999 to 2003 was approximating \$45 million a year.

It is important to understand the factors that affect payment of restitution if compliance rates are going to be improved. For example, closer supervision might be provided for high-risk offenders who are likely to default on their payments.

Outlaw & Ruback<sup>25</sup> found that female offenders were less likely to pay than males, presumably because they often have fewer financial resources. Likewise, offenders who are younger, unmarried, unemployed, and without community ties were less likely to comply with restitution requirements. Those with prior criminal records paid less. Although African Americans did not differ from Whites in whether they made any payment, they did not contribute as much as Whites. White-collar offenders, as opposed to violent criminals, were more likely to fully comply with restitution orders. In summary, those who have fewer resources, are minorities, have previous records, and commit violent crimes are less likely to pay restitution. In contrast, those who are most likely to carry out the order are White males who are employed, have little or no previous criminal record, and commit financial crimes such as theft or fraud.

In addition to the demographic factors discussed above, another feature that affects restitution payment is close supervision.<sup>26 27 28</sup> In Texas, the responsibility for supervising restitution payments falls to Community Supervision and Corrections Departments and the Pardons and Parole Division of the Texas Department of Criminal Justice. The following section discusses this issue.

### **Collecting and Dispersing Restitution Payments**

Although probation and parole officers in Texas are charged with supervising offenders and collecting restitution, the latter responsibility was not one for which these departments volunteered. They have traditionally focused on offenders rather than victims. Therefore, victim-related tasks in these departments may not be given a high priority.

Collecting restitution payments competes with the collection of other fees, including fines, court fees, and supervision fees. Some of these fees are used to supplement the budgets of the respective departments and officers' salaries. The average community supervision order contains 18 conditions, which strains the officers' ability to efficiently supervise restitution payment.<sup>29</sup>

A related issue is that a significant proportion of restitution dollars collected is not disbursed to victims, because they cannot be located. Each year about \$1 million of the money collected goes unclaimed. In some cases victims may not claim the funds, because they are unaware from the outset that restitution is their right and has been ordered.

Many victims of crime receive financial help from the Crime Victims' Compensation Fund (CVCF). However, when they also receive restitution payments, consideration should

be given to using those funds to reimburse the CVCF. Although this duplication may not often happen, it could be prevented by developing a system that more accurately tracks reparation to victims and payments by offenders.

## **Revocation**

Some might argue for an immediate revocation of probation or parole upon any renegeing on a scheduled restitution payment. However, there are obvious drawbacks in doing so: victim restitution is unlikely to be paid and the prison population increases, along with the associated costs to the state. Revocation of offenders' probation and parole accounts for a significant share of all TDCJ admissions. A Dallas Morning News article pointed out that two out of every three inmates who entered the prison system were there because of parole or probation violations in 1998; half of them were not charged with committing a new crime, but with committing technical violations.<sup>30</sup> Therefore, putting offenders back in prison for not fulfilling restitution orders may not be the best option, especially when nonpayment is unintentional. Alternative remedies are needed to more effectively handle offenders who are noncompliant with restitution orders.

## **RESTITUTION LAWS IN TEXAS**

The Texas Code of Criminal Procedure allows judges to impose restitution in a variety of situations.<sup>31</sup> However, the issue here is not targeting offenders for restitution. The problem lies in the fact that Texas, as well as most other states, has been unsuccessful in making sure restitution orders to crime victims have been fulfilled by defendants. It is estimated that the collection rate for restitution is only about 50% in Texas.<sup>32</sup>

Although the rate of restitution collection for victims of crime is low, Texas law does include some provisions designed to promote payment by the defendant. First, the court is required to set a specific time period for a defendant to complete payment. The time frame cannot exceed the time period of probation (if applicable), nor can the time period end more than five years after the end of a prison term.<sup>33</sup> This provides a deadline for the defendant to fulfill the restitution obligation. Also, if the court or parole panel places a defendant on probation or parole, restitution is a required condition of the terms of probation or parole. Thus, the court has the ability to revoke probation, and the parole panel has the ability to revoke parole when restitution is not paid. When determining whether or not to revoke probation or parole, the court must consider several factors including: defendant's employment, future earning capabilities, financial resources, and willingness to pay.<sup>34</sup> The law allows the courts to obtain information about the defendant from a community supervision and corrections department in order to make a decision.<sup>35</sup>

Texas law also gives crime victims a restitution lien in order to ensure restitution is paid by the offender. This means that victims have legal access to offenders' assets. Also regarding liens, the victim has priority over any lien the state has over an offender's property.<sup>36</sup>

Finally, the Texas Legislature recently passed Article 103.033 of the Texas Code of Criminal Procedure. The Collection Improvement Act was passed in order to increase the amount of money collected for court-ordered payments. All counties with a population greater than 50,000, and all municipalities with a population greater than 100,000 are now required to develop a program for collection improvement following the guidelines set forth in the law. The Office of Court Administration is responsible for developing specific guidelines for the

new programs as well as ensuring each jurisdiction is in compliance with the guidelines.<sup>37</sup> Although the specific program qualities have not yet been established, this program should increase the collection of fees, as well as restitution orders.

## RESTITUTION LAWS IN OTHER STATES

Although some aspects of Texas statutory law have mechanisms in place to promote and enforce restitution collection, additional methods may be necessary to fulfill the rights of victims of crime.

### Enforcing Orders of Restitution

**Monitoring restitution.** A number of measures have been taken in other states to more effectively enforce restitution orders. One way to enhance enforcement is improved monitoring of restitution orders. Texas has addressed this need with the Collection Improvement Program discussed above.<sup>38</sup> However, some states have implemented other provisions that could enhance current Texas policies. For example, Wisconsin law requires that a separate account be set up for offenders who are ordered to pay restitution.<sup>39</sup> Presumably, this allows for better tracking of compliance with restitution orders. In Michigan, the probation or parole officer must review each case in which restitution was ordered every two years. This is to ensure that all payments are being made.<sup>40</sup> In Utah, the Corrections Department is required to file a violation report when a defendant does not make required restitution payments.<sup>41</sup>

Some states specifically provide victims with information on offenders' restitution plans. In Massachusetts, a victim has the right to the restitution payment schedule and the contact information of the probation officer in charge of supervising these orders.<sup>42</sup> This enables the victim to monitor compliance as well.

**Access to state payments.** Some state statutes allow state payments, which are intended to go to the offender, to be taken for restitution payment purposes. In Colorado, any lottery winnings may be garnished if the offender owes restitution.<sup>43</sup> Similar laws can be found in Maryland and Wisconsin.<sup>44</sup> Colorado also allows for tax refunds to be transferred to restitution payments.<sup>45</sup> In Iowa, any witness fees paid to an offender must be used for restitution payment.<sup>46</sup> Iowa also requires restitution payments to be taken out of a prisoner's account, regardless of the source of the money.<sup>47</sup>

**Payments from prison work programs.** Several states have enacted laws that allow for a significant portion of prisoners' wages to go toward restitution payments. Under California law, the wages of prisoners can be taken for restitution payment. The law allows for up to fifty percent of a prisoner's wages to be garnished.<sup>48</sup> Iowa also has a similar law.<sup>49</sup> Although Texas does have a program for inmates to work for wages, some of which can go toward restitution, the program is limited to a small number of inmates.<sup>50</sup>

**Probation and parole.** Many states, including Texas allow for probation to be revoked or extended if an offender fails to pay restitution. In a somewhat different fashion, Washington allows the court to have continuing jurisdiction over a defendant for the purpose of ensuring that restitution is paid. This means that even though the defendant may not have his or her probation or parole extended, he or she remains under the jurisdiction of the state until restitution is paid.<sup>51</sup>



**Other provisions.** Some other practices pertaining to the enforcement of restitution orders should be noted. For example, Virginia allows for an offender's driver's license to be suspended for failure to pay restitution.<sup>52</sup> In Utah, the governor recently signed a bill into law that requires that, "Judgment for a conviction for a lower degree of offense may not be entered if there remains any unpaid balance on court ordered restitution for the offense for which the reduction is sought."<sup>53</sup> Also, anyone wishing to obtain expungement for a criminal record must not have any unpaid restitution.<sup>54</sup>

### **Investigating and Preserving Offenders' Assets**

Not only is it important to make sure offenders are paying restitution, it is also important to ensure any assets that can be used toward restitution are preserved.

**Investigating offenders' assets.** Texas law does allow for the state to investigate possible sources of restitution payment.<sup>55</sup> However, this information is limited to the courts and community supervision officers. Some states allow victims to investigate assets as well. "In California, a victim is entitled to see a defendant's disclosures identifying all assets, income, and liabilities or certain other documents concerning financial information."<sup>56</sup> Kansas has similar provisions that are in place until all restitution is paid.<sup>57</sup>

**Preserving the assets of offenders.** Although investigating offenders' assets is fairly common, some states also include laws designed to preserve assets for restitution. California makes it a criminal offense to attempt to avoid paying restitution by disposing of property.<sup>58</sup> Georgia has a similar law.<sup>59</sup> In Pennsylvania, the prosecutor may be granted a restraining order in order to preserve the assets of a defendant if the court finds that the Commonwealth is likely to prevail in judgment.<sup>60</sup>

## **RECOMMENDATIONS**

### **The Offender's Ability to Pay Restitution**

Even though a number of initiatives have been enacted by other states to improve victim restitution, little is known about the effectiveness of these methods. For example, one concern involves requiring judges to consider an offender's ability to pay when determining the amount of restitution to order. Some may argue that requiring judges to determine an offender's ability to pay will lead to less compensation for the victim than they deserve. However, there is evidence to suggest that offenders are more likely to comply with restitution orders if they think the amount is in line with their resources.<sup>61</sup> Thus, there is a conflict between the need for victims to be given what is deserved, and the ability of an offender to pay.

Texas law does not require judges to consider an offender's ability to pay when determining the amount of restitution to order. Nevertheless, there may still be considerable disparity among judges' restitution orders for similar types of crime. At one extreme, a judge may impose a large amount of restitution payment for an offender with no assets or job potential. At the other extreme, a judge may not order any restitution regardless of the type of crime based on his or her evaluation of an offender's ability to pay.

- *Legislation should be enacted that establishes guidelines for the amounts of restitution ordered for particular types of crime or for categories of victim losses.* The offender's ability to pay should influence the schedule of payments, not the amount of restitution

ordered.

- *Restitution payments should be a priority over other payments due from the offender, including fines and fees.*

Since a number of justice entities share responsibility for restitution (e.g., courts, community supervision departments, and the Crime Victims' Compensation Program), automation can be an effective means by which these agencies communicate electronically with each other. Many states have already established automated systems.<sup>62</sup>

- *Texas should create an automated system of monitoring, managing, collecting, and disbursing restitution money.* Automation would facilitate communication with offenders, and victims could be automatically informed of the restitution process and the status of payments. This would also limit the number of victims who are paid both by offenders and from the CVCF.

### **Accessing Offenders' Assets and Payments**

Texas is currently limited in the types of assets available for restitution. An increase in ways to collect money may improve collection.

- *Texas should allow an offender's tax refunds, lottery winnings, and assets acquired while incarcerated to be subject to forfeiture when necessary to fulfill restitution obligations.*

Some judicial districts in Texas have established Community Corrections Facilities (CCF). These residential facilities could be operated by a Community Supervision and Corrections Department (CSCD) or by a public or private vendor under contract with the department. A CCF provides services and programs to offenders placed on community supervision, with the aim of modifying criminal behavior and restoring victims of crime.<sup>63</sup>

Of particular interest among CCFs is the restitution center. Restitution centers target offenders who have problems maintaining employment and meeting court ordered monetary obligations. Most offenders who reside in restitution centers are employed and return substantial value to their community by paying taxes, supporting their families, and, most importantly, by making restitution payments to their victims.

The average annual cost of a CCF placement is considerably less than the cost of revoking probation.<sup>64</sup> The recidivism rate for those who participate in CCF programs tends to be much lower than for those who do not.<sup>65</sup> However, funding for CCFs has been decreasing in recent years.<sup>66</sup>

Building more CCFs, especially restitution centers, and giving offenders an opportunity to pay their debts to both victims and society seems like a better idea for all parties involved than revoking technical violators and putting them back in prison.

- *Funding should be made available for CCF restitution centers in large metropolitan areas of the state.*

Another way to increase restitution payments is to have prisoners engage in wage-earning activities in and outside of prison walls. Of particular interest with regard to prison employment is the Prison Industry Enhancement (PIE) program. Congress created the PIE program to

encourage state and local governments to establish employment opportunities for prison inmates through partnership with private companies. PIE enables prisoners to earn prevailing industry wages and acquire marketable skills. In Texas, at least 10 percent of gross wages earned from Prison Industry Enhancement Program (PIE) is directed to restitution. However, utilization of the PIE program is limited. About 446 offenders a month are employed in the PIE Program.<sup>67</sup>

- *Texas should provide more opportunities for offenders to earn money while incarcerated.*
- *The first priority for the money earned while in prison should be victim restitution, followed by all other needs.*

### **Preserving Offenders' Assets**

It is important that resources which can reasonably be used for restitution payments be preserved. In some cases, an offender may dispose of assets simply to avoid paying restitution.

- *Statutory provisions should be in place to prevent offenders from disposing of property/assets that can go toward unpaid restitution.*
- *Legislation should be enacted making it a crime to dispose of property/assets that can go toward unpaid restitution.*

### **Duplicating Payments**

Victims sometimes receive restitution after receiving payment from the Crime Victims Compensation Fund. This can be attributed to several issues:

1. There is very little communication between the Office of the Attorney General (OAG) and the CSCD. Often the OAG does not have information that the defendant has been placed on community supervision, and the CSCD does not know that the victim has applied for or received any assistance from the CVCF. As a result, they both provide services to the victim. This is probably the exception rather than the rule. The victim may not know what the restitution was ordered for and may mistakenly believe that payments from the CVCF are separate and in addition to restitution payments.
2. The prosecutor's office and the court often do not adequately inform the victim or the CSCD what restitution has been ordered and its purpose. The restitution is ordered in a lump sum with no differentiation between property and expenses that may be covered by the compensation fund.
  - *When victims receive restitution payments after they have been compensated from the Crime Victims' Compensation Fund, the restitution money collected in these instances should be reimbursed back to the Fund.* Here again, automation of the restitution process could help correct this problem.

### **The Role of Probation/Parole Departments**

Generally, it is the task of CSCD and parole departments to collect restitution payments.

This role is often not embraced by these departments. To address this problem, Texas has established the Collection Improvement Program, which is intended to improve the process of collecting fees. Yet, more specific measures may be helpful as well.

- *Probation and parole departments could designate specialized officers or a departmental unit for the collection of restitution.*
- *Probation and parole officers should be required to submit reports to the courts on offenders who have not fulfilled restitution requirements.*
- *Victims should be provided with updated information about the restitution schedule of the offender, as well as the contact information for the officer in charge of collecting the restitution.*

### **Enforcing Restitution**

In addition to the recommendations already mentioned that can serve as enforcement measures, the following proposals are suggested:

- *Alternative means for collecting restitution should be established (e.g., civil remedies, garnishment of wages, statutory ability to expend supervision for nonpayment, denial of professional license, or acceptance of credit card payments).*
- *Offenders should be prevented from obtaining drivers' licenses, professional licenses, and other special privileges provided by the state when restitution obligations are not fulfilled.*
- *Offenders should be required to pay full restitution before a judge can lessen the degree of the offense.*

### **Dispersing Restitution Payments**

A significant proportion of restitution dollars collected is not disbursed to victims. Increased public awareness of restitution, effective communication between probation officers and victims, and genuine efforts to locate victims will significantly reduce the amount of restitution that goes unclaimed by victims.

- *A good faith effort to locate victims for restitution payments should be given greater priority by impressing on them the importance of notifying the department whenever their mailing address changes.*

### **CONCLUSION**

The problems associated with restitution are not easy to solve. It is often difficult to determine the amount a victim should receive and an offender's ability to pay. It is also difficult to forecast the overall impact of many measures due to the lack of empirical research. Despite the problems associated with restitution, there are plausible solutions, and many are being utilized by other states. Texas has also created provisions designed to improve restitution practices, yet more can be done. It is hoped that the recommendations provided serve as a useful guide for restitution reform in Texas.

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41. Utah Code Jud. Admin. R. 6-303.
42. Mass. Ann. Laws ch. 258B, § 3.
43. Colo. Rev. Stat. § 16-18.5-106.5.
44. Md. Ann. Code art. 27, § 810; Wis. Stat. § 973.05.
45. Colo. Rev. Stat. § 16-18.5-106.8.
46. Iowa Code § 622.69.
47. Iowa Code § 904.702.
48. Cal. Penal Code § 2085.5.
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