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# UTAH SHOULD ADOPT A LAW ALLOWING COURTS TO APPLY CASH BAIL TOWARD RESTITUTION

Amy J. Lavin\*

## *Abstract*

*Utah's restitution laws are not effective. Too many victims are not fully compensated for their losses following a crime. Many states allow courts to require defendants to pay cash bail and to apply cash bail toward restitution. Utah should adopt a similar law to improve the collection of court-ordered restitution.*

*This Note analyzes Utah's current restitution process and identifies its weaknesses. Then it proposes a cash bail plan to improve the collection of restitution. Finally, it examines potential problems to having a cash bail system and how Utah can avoid those problems to create a successful restitution collection system.*

## I. INTRODUCTION

According to Utah's Victims' Bill of Rights, crime victims are entitled to seek restitution.<sup>1</sup> In the criminal-justice system, restitution is the "payment by an offender to the victim for the harm caused by the offender's wrongful acts."<sup>2</sup> Whenever a defendant has been convicted of a crime that results in pecuniary damages, the court must order restitution at sentencing.<sup>3</sup> Some typical examples of pecuniary damages that a victim might request are medical expenses, counseling and therapy costs, prescription charges, lost wages, and insurance deductibles.<sup>4</sup> For example, a rape victim could recover the expenses from her medical exam, the wages she lost while testifying at trial, and her future therapy visits, but she could not recover money for any emotional trauma she suffered from the rape. Nor could she obtain punitive damages.

Requiring a defendant to pay restitution is society's way of righting a wrong. When victims become entangled in defendants' criminal acts, they lose something substantial, often something irreplaceable. The payment of monetary damages—past and future—is an attempt to compensate victims for at least some of their

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\* © Amy J. Lavin, J.D. Candidate, 2014, University of Utah S.J. Quinney College of Law. Special thanks to Donna Kelly, who introduced me to the problem of low restitution collection and its possible solutions.

<sup>1</sup> UTAH CODE § 77-37-3(1)(e) (LexisNexis 2013).

<sup>2</sup> *Restitution*, NAT'L CTR. FOR VICTIMS CRIME, <http://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/restitution> (last visited Jan. 18, 2014).

<sup>3</sup> UTAH CODE § 77-38a-302.

<sup>4</sup> *Restitution*, *supra* note 2.

losses. Unfortunately, in the decade from 2000 to 2009, the State of Utah only collected 7.7% of court-ordered restitution.<sup>5</sup>

By not collecting restitution, the State of Utah allows defendants to evade parts of their sentence requirements and avoid paying their full debt to society. Unfortunately, a defendant's unpaid debt shifts to the victim. As a result, defendants force victims to shoulder uncompensated financial losses and continue to violate victims' rights long after the initial crimes occurred.

The state should change the way it collects restitution to ensure that more defendants fully compensate victims. It is not acceptable for Utah to have such low restitution collection rates; the state needs to find a way to ensure that defendants literally pay for their crimes.

This Note proposes a solution to Utah's restitution collection problem. Part II discusses Utah's current restitution collection process. Part III recommends using a cash bail system to pay court-ordered restitution. It also shows the need for statutory authority for a cash bail system, as well as potential constitutional issues that opponents may raise. Finally, it addresses how third-party payments and other debts should be handled.

## II. COLLECTING RESTITUTION IN THE STATUS QUO

The payment of restitution is an essential part of the criminal-justice system. “[H]olding a convicted offender financially responsible for the harm caused by the crime is a proper criminal sanction.”<sup>6</sup> Additionally, the collection of restitution helps crime victims recover from difficult ordeals.<sup>7</sup> To better achieve these two policy goals in Utah, the restitution collection process needs to improve.<sup>8</sup>

The process for obtaining a restitution order in Utah is not difficult, but it is not very effective. Once a crime has been committed and a defendant has been charged, a victim can claim restitution under the Crime Victims Restitution Act.<sup>9</sup> A victim who wants compensation in the form of restitution should submit records of pecuniary losses and ask the court for a restitution order.<sup>10</sup> The victim can contact the prosecutor's victim-advocate program for advice and assistance in submitting a claim for restitution.<sup>11</sup> A victim advocate will have the victim complete a “Victim Impact Statement,” which needs to be “signed and returned

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<sup>5</sup> Andrew Adams, *Restitution Difficult to Come by for Victims, According to New Numbers*, KSL.COM (Sept. 10, 2009, 2:28 PM), <http://www.ksl.com/?nid=148&sid=7870934>.

<sup>6</sup> OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, *RESTITUTION: MAKING IT WORK* 4 (2002), available at [https://www.ncjrs.gov/ovc\\_archives/bulletins/legalseries/bulletin5/ncj189193.pdf](https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin5/ncj189193.pdf).

<sup>7</sup> *Id.*

<sup>8</sup> *See id.*

<sup>9</sup> UTAH CODE §§ 77-38a-101 to -601 (LexisNexis 2013).

<sup>10</sup> *Restitution*, *supra* note 2.

<sup>11</sup> *E.g.*, *Legal Department: FAQs*, LAYTON CITY, <http://www.laytoncity.org/public/Depts/Legal/faq.aspx> (last visited Jan. 16, 2014).

with copies of receipts and other documents that support the claim.”<sup>12</sup> If the victim lives in an area that does not have a victim advocate program—like many rural parts of Utah—the victim may send a letter to the court “that includes the court case number, the amount of restitution requested, and copies of receipts or other documents that support the claim.”<sup>13</sup>

After a defendant has been convicted or has pled guilty, the Department of Corrections includes “a specific statement of pecuniary damages” in their presentence investigation report to aid the court in determining how much restitution should be awarded to the victim.<sup>14</sup> During sentencing, the defendant and the prosecutor determine the restitution amount.<sup>15</sup> If the defendant and the prosecutor disagree about the amount of restitution, the court must schedule a restitution hearing.<sup>16</sup> In determining the amount of restitution, the court must consider a number of factors, including the costs to the victim and the defendant’s situation.<sup>17</sup> Specifically, the court will consider

the cost of the damage or lost property, the cost of the medical and related professional services and devices, the cost of funeral and related services, the financial resources of the defendant, the ability of the defendant to pay, the rehabilitative effect on the defendant of the payment of restitution, [and] other circumstances which the court deems relevant.<sup>18</sup>

Once the court “determin[es] that a defendant owes restitution, the clerk of the court shall enter an order of complete restitution . . . on the civil judgment docket.”<sup>19</sup> The judgment is automatic and is “considered a legal judgment, enforceable under the Utah Rules of Civil Procedure.”<sup>20</sup>

After the defendant pays restitution to the court, the court sends a check to the victim for the amount the defendant has paid.<sup>21</sup> The court has sixty days from receipt of restitution payments to disburse the money to the victim.<sup>22</sup> Unfortunately, because many defendants do not pay, many victims do not receive any restitution. In these circumstances, a victim can pursue a civil action based on

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> UTAH R. CRIM. P. 21A(c)(1).

<sup>15</sup> *Id.* 21A(c)(2).

<sup>16</sup> *Id.*

<sup>17</sup> UTAH CODE § 77-38a-302(c).

<sup>18</sup> *Legal Department: FAQs, supra* note 11 (bullet points omitted) (citing UTAH CODE § 77-38a-302(5)).

<sup>19</sup> UTAH CODE § 77-38a-401(1).

<sup>20</sup> *Id.* § 77-38a-401(2).

<sup>21</sup> *Legal Department: FAQs, supra* note 11.

<sup>22</sup> UTAH CODE § 77-38a-404(1).

the court-ordered restitution. Such an action entitles a victim to recover “collection and reasonable attorney fees.”<sup>23</sup>

If the defendant has been incarcerated or has been placed on probation or parole, the Department of Corrections “may require each offender . . . to place funds received or earned by him from any source into an account administered by the department.”<sup>24</sup> The Department may use funds from the defendant’s account to pay the victim’s restitution.<sup>25</sup>

If the defendant has finished parole or probation and still owes restitution to a victim, the Utah Office of Debt Collection takes over the case from the Department of Corrections.<sup>26</sup> The Office of Debt Collection does not try to collect the money itself; instead, it uses private collection agencies.<sup>27</sup> Collection agencies use any available option to collect restitution, including wage garnishment.<sup>28</sup> However, these means are generally not enough to collect all of the restitution ordered by the courts.<sup>29</sup>

Despite the process Utah has set up to collect restitution, there are too many victims who never receive court-ordered compensation from defendants. In reflecting on Utah’s restitution program, Kirk Torgensen, Chief Deputy Attorney General, highlights this point: “One of the sad commentaries on the system is, victims rarely get repaid the amount they are owed.”<sup>30</sup> The problem, said Weber County Attorney, Dee Smith, is that a lot of defendants “don’t have the ability to make money to pay back restitution.”<sup>31</sup> Many of them lose their jobs when they are incarcerated or as a result of the social stigma of having been convicted; others were indigent before they were even arrested. Without an income, a defendant will have a difficult time paying court-ordered restitution.

Additionally, the Department of Corrections has a hard time collecting restitution because “overworked Adult Probation and Parole agents don’t have time to track assets, seize property, garnish wages or post liens, as their priority is violent criminals.”<sup>32</sup> Similarly, the Office of Debt Collection has other priorities apart from collecting restitution. They are required to “go after money owed the

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<sup>23</sup> *Id.* § 77-38a-401(3).

<sup>24</sup> *Id.* § 64-13-23(1).

<sup>25</sup> *Id.* § 64-13-23(4)(b).

<sup>26</sup> STUDY OF CRIMINAL RESTITUTION IN COLORADO: REPORT TO THE COLORADO GENERAL ASSEMBLY 56 (1999) [hereinafter CRIMINAL RESTITUTION STUDY], available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251617684598&ssbinary=true>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See Adams, *supra* note 5.

<sup>30</sup> Tim Gurrister, *Criminals Don’t Pay / For Victims, Restitution Orders a Joke, Many Say*, STANDARD-EXAMINER (Aug. 2, 2009, 11:10PM), <http://www.standard.net/topics/news/2009/08/02/criminals-dont-pay-victims-restitution-orders-joke-many-say>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

state of Utah before assisting private individuals.”<sup>33</sup> Also, the private agencies that collect restitution on behalf of the Office of Debt Collection charge defendants a combined surcharge and interest rate,<sup>34</sup> increasing the defendant’s debt even higher.

### III. USING CASH BAIL TO PAY RESTITUTION

It is clear that Utah needs to find a more effective way to collect restitution. One possible solution might be to implement the National Center for Victims of Crime’s recommendations and focus on maximizing the amount a defendant pays “at the front end of the process.”<sup>35</sup> This approach incentivizes a defendant to pay early to avoid required financial disclosures or administrative fees.<sup>36</sup> Courts can “promote early payment” by allowing a defendant to apply bail funds to court-ordered restitution.<sup>37</sup> Many jurisdictions already allow or mandate that a defendant’s bail be used to pay restitution orders.<sup>38</sup> Utah should adopt a similar statute that allows a court to order cash bail toward the payment of court-ordered restitution.

In the criminal-justice system, the payment of bail permits the release of a defendant from custody while ensuring his appearance at all required court proceedings.<sup>39</sup> After an accused is arrested and booked into a detention facility, but before that person is arraigned on the charges, a bail hearing is held in which a

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<sup>33</sup> *Id.*

<sup>34</sup> CRIMINAL RESTITUTION STUDY, *supra* note 26, at vi. In 1999, the private collection agencies charged an 18% combined surcharge and interest rate. *Id.*

<sup>35</sup> *Making Restitution Real Toolkit*, NAT’L CTR. FOR VICTIMS CRIME, <http://www.victimsofcrime.org/library/publications/restitution-and-compensation/restitution-toolkit/promoting-early-payment> (last visited Jan. 18, 2014).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> For instance, the following states allow bail funds to be used toward restitution: Alaska (ALASKA STAT. § 12.30.075 (2012)); California (CAL. PENAL CODE § 1297 (West 2004)); Colorado (COLO. REV. STAT. § 16-4-109 (2012)); Florida (FLA. STAT. ANN. § 903.286 (West Supp. 2013)); Illinois (730 ILL. COMP. STAT. ANN. 5/5-5-6 (West Supp. 2013)); Indiana (IND. CODE ANN. § 35-33-8-3.2(a)(2)(B) (LexisNexis 2012)); Kansas (KAN. STAT. ANN. § 22-2802(4) (2007)); Maine (ME. REV. STAT. tit. 15, § 1074 (Supp. 2006)); Michigan (MICH. COMP. LAWS SERV. § 765.15 (LexisNexis 2003); *id.* § 780.67 (LexisNexis 2012)); Minnesota (MINN. STAT. ANN. § 629.53 (West 2009)); Mississippi (MS. R. UNIF. CIR. AND CTY. CT. 6.02(C)(7) (West 1999)); Montana (MONT. CODE ANN. § 46-9-512 (2011)); Rhode Island (R.I. GEN. LAWS § 12-13-10 (2002)); Wisconsin (WIS. STAT. ANN. § 969.02 (West 2007); *id.* § 969.03). The federal government also allows bail funds to be used toward restitution. 28 U.S.C. § 2044 (2006).

<sup>39</sup> *What Is Bail?*, REGIONAL BONDING COMPANY, <http://www.regionalbonding.com/whatIsBail/> (last visited Jan. 18, 2014).

judge determines whether the defendant is eligible to be released upon posting bail and, if so, sets the dollar amount of the bail.<sup>40</sup>

The best way to use bail for court-ordered restitution is for the judge to order the defendant to pay cash bail. The defendant's cash bail goes directly to the court or the jail.<sup>41</sup> If the defendant shows up for all of the court proceedings, the defendant "will get all (or nearly all) of [the] money back."<sup>42</sup> Usually, cash bail "will be returned at the end of the trial, if all the court requirements are fulfilled."<sup>43</sup>

However, many states have implemented statutes that affect whether defendants get all their money back, especially in circumstances where defendants owe restitution to one or more victims. For example, in Indiana, a defendant may deposit cash with the court "in an amount not less than ten percent (10%) of the bail."<sup>44</sup> In order for the defendant's bail to be applied toward restitution, the defendant must sign "an agreement that allows the court to retain all or a part of the cash . . . to pay . . . restitution."<sup>45</sup> In Alaska, if a defendant forfeits his bail by failing to appear, the cash "shall be held by the court in trust for the benefit of the victim . . . if the prosecuting authority gives notice that restitution may be requested as part of the sentence if the person is convicted."<sup>46</sup> Once restitution has been ordered, "the court shall apply the cash . . . to the satisfaction of the order."<sup>47</sup> In Kansas, "any person charged with a crime who is released on a cash bond shall be entitled to a refund of all moneys paid for the cash bond, after deduction of any outstanding restitution."<sup>48</sup> In Michigan, "[a] defendant who personally makes the cash deposit shall be notified that upon the defendant's conviction the defendant's cash deposit may be used to collect . . . restitution."<sup>49</sup> Once restitution has been ordered, "the court shall order the . . . restitution . . . collected out of the cash deposit."<sup>50</sup> In Minnesota, "money bail is the property of the accused."<sup>51</sup> However, "[i]n the case of conviction, the judge may order the money bail deposit to be applied to any . . . restitution imposed on the defendant by the court."<sup>52</sup> In Mississippi, the money from cash bail will be applied first to court costs and then to restitution.<sup>53</sup> In Rhode Island, the court is not allowed to "require the deposit of

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<sup>40</sup> Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L., Spring 2008, at 1.

<sup>41</sup> *What Is a Cash Bail Bond?*, CASH BAIL BONDS, <http://www.cashbailbonds.com/> (last visited Jan. 18, 2014).

<sup>42</sup> *Id.*

<sup>43</sup> *Bail vs Bond*, DIFFEN, [http://www.diffen.com/difference/Bail\\_vs\\_Bond](http://www.diffen.com/difference/Bail_vs_Bond) (last visited Jan. 18, 2014).

<sup>44</sup> IND. CODE ANN. § 35-33-8-3.2(a)(2)(A) (LexisNexis 2012).

<sup>45</sup> *Id.* § 35-33-8-3.2(a)(2)(B).

<sup>46</sup> ALASKA STAT. § 12.30.075(a) (2012).

<sup>47</sup> *Id.* § 12.30.075(c).

<sup>48</sup> KAN. STAT. ANN. § 22-2802(4) (2007).

<sup>49</sup> MICH. COMP. LAWS SERV. § 780.67(1)(a) (LexisNexis 2012).

<sup>50</sup> *Id.* § 780.67(7).

<sup>51</sup> MINN. STAT. ANN. § 629.53 (West 2009).

<sup>52</sup> *Id.*

<sup>53</sup> MS. R. UNIF. CIR. AND CTY. CT. 6.02(7) (West 1999).

cash as the sole monetary condition of the release on bail, except in those cases where the defendant owes court-imposed restitution.”<sup>54</sup> In Wisconsin, “the balance of the [cash] deposit . . . shall be applied first to the payment of any restitution.”<sup>55</sup> However, “[i]f the judge requires a deposit of cash in lieu of sureties, the person making cash deposit shall be given written notice of the requirement[.]”<sup>56</sup> All of these states—and others—have used cash bail to successfully compensate victims. Utah should adopt a similar law to allow or mandate that a defendant’s cash bail be applied toward court-ordered restitution.

First, this Part discusses the need for statutory authority before courts can require cash bail to be applied toward court-ordered restitution. Next, it explains how using cash bail toward restitution does not violate the Constitution. Finally, it provides help for the legislature in handling cash bail paid by third parties and applying cash bail toward defendants’ other debts.

#### A. *Need for Statutory Authority*

Before Indiana enacted a statute to apply cash bail toward restitution orders,<sup>57</sup> the Court of Appeals of Indiana, in *Bennett v. State*,<sup>58</sup> recognized the need for such a statute.<sup>59</sup> In *Bennett*, the defendant was convicted of theft and ordered to pay \$500 in restitution.<sup>60</sup> He had signed an appearance bond, so the court ordered that restitution be taken out of his bond deposit.<sup>61</sup> However, the appellate court determined that the appearance bond, as drafted in the statute, did not allow for the deduction of restitution, but only for the deduction of court fees.<sup>62</sup> The court noted that the statute limited the court’s ability to enforce sentencing orders and referred to the restitution order as “a hollow attempt to impose justice.”<sup>63</sup> The court realized that “[a]ccess to bond deposit funds would facilitate meaningful imposition of . . . restitution.”<sup>64</sup> Thus, the court encouraged the legislature to “draft a statute which allows the realistic collection of . . . restitution.”<sup>65</sup>

Like Indiana, Utah courts cannot order a defendant’s cash bail to be applied toward restitution without a statute authorizing them to do so. Money forfeited by defendants who fail to appear in district court goes directly to the state treasurer.<sup>66</sup> Additionally, if a defendant appears for every hearing until the case is adjudicated

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<sup>54</sup> R.I. GEN. LAWS § 12-13-10 (2002).

<sup>55</sup> WIS. STAT. ANN. § 969.03(4) (West 2007).

<sup>56</sup> *Id.* § 03(1)(d).

<sup>57</sup> See IND. CODE ANN. § 35-33-8-3.2(a)(2)(B) (LexisNexis 2012).

<sup>58</sup> 668 N.E.2d 1256 (Ind. Ct. App. 1996).

<sup>59</sup> *Id.* at 1258.

<sup>60</sup> *Id.* at 1257.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1258.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> UTAH CODE § 77-20-9(1) (LexisNexis 2013); *id.* § 78A-5-110.



or dismissed, the court must return the cash bail.<sup>67</sup> Thus, even if a judge orders a defendant to pay cash bail, the money cannot be used for court-ordered restitution. Accordingly, for Utah to use a defendant's cash bail funds to pay off court-ordered restitution, the State must have a statute giving judges authorization.

### *B. Constitutional Issues*

One potential concern that the Utah legislature may have about applying bail toward restitution is the possibility that the practice is unconstitutional. There are three possible constitutional challenges: (1) an allegation of excessive bail, (2) a due process violation, and (3) an illegal taking. First, the United States Constitution protects a defendant from excessive bail.<sup>68</sup> In *United States v. Higgins*,<sup>69</sup> the defendant was convicted of tax fraud.<sup>70</sup> During his sentencing, the court ordered defendant to pay \$3,351.20 in restitution.<sup>71</sup> The court further ordered that the defendant's appearance bond of \$1,000 be applied toward restitution,<sup>72</sup> an order authorized by 28 U.S.C. § 2044.<sup>73</sup> The defendant argued that the use of his bond violated the Eighth Amendment's prohibition against excessive bail because his bail was being used for something other than the "purpose for which bail was intended."<sup>74</sup>

The Eighth Circuit disagreed. It held that section 2044 "is a simple procedural mechanism by which the government, after the purposes of bail have been served, may make a motion as a judgment creditor that the court order the bond fund be delivered to it."<sup>75</sup> Additionally, "courts have long had the discretion to order the disbursement of bond funds, after the defendant has appeared and the purpose of bail has been served, to those with superior claims on the funds."<sup>76</sup> Since section 2044 is "merely a procedural variant of that post-appearance discretion," it does not violate the Eighth Amendment's prohibition against excessive bail.<sup>77</sup> Thus, a Utah law allowing a defendant's bail to be paid toward a restitution order would not violate the constitutional proscription against excessive bail.

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<sup>67</sup> *Id.* § 77-20-7; *id.* § 77-20-4.

<sup>68</sup> U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

<sup>69</sup> 987 F.2d 543 (8th Cir. 1993).

<sup>70</sup> *Id.* at 544.

<sup>71</sup> *Id.* at 544-45.

<sup>72</sup> *Id.* at 545.

<sup>73</sup> 28 U.S.C. § 2044 (2006) ("[T]he court shall order any money belonging to and deposited by or on behalf of the defendant with the court for the purposes of a criminal appearance bail bond (trial or appeal) to be held and paid over to the United States attorney to be applied to the payment of any assessment, fine, restitution, or penalty imposed upon the defendant.").

<sup>74</sup> *Higgins*, 987 F.2d at 547.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 548.

<sup>77</sup> *Id.*

Second, the Constitution also protects a defendant from the deprivation of due process.<sup>78</sup> In *Ellis v. Hunter*,<sup>79</sup> the defendant pled guilty to driving under the influence of alcohol.<sup>80</sup> His father-in-law posted a cash bond so that the defendant could be released from jail.<sup>81</sup> The court deducted restitution from the cash bond,<sup>82</sup> based on section 903.286 of the Florida code.<sup>83</sup> The defendant's father-in-law claimed his due-process rights were violated because "he did not receive notice that the bond money would be used to pay all of [the defendant's] outstanding obligations, nor did he have an opportunity to be heard and challenge the withholding of the return of the cash bail."<sup>84</sup>

The court determined that the defendant's father-in-law "was expressly notified" of section 903.286 when he signed a form that specifically listed that bail money would be used toward any outstanding criminal penalties.<sup>85</sup> The county jail also posted a notice that "advise[d] arrested persons and their families about this statute."<sup>86</sup> Additionally, the court determined that a person has been provided with adequate notice once a statute has been enacted and published.<sup>87</sup> Finally, the court found that section 903.286 "does not prevent a person who posts a cash appearance bond from contesting the amount withheld or whether those amounts are properly owed by the defendant."<sup>88</sup> Since the defendant's father-in-law was provided with notice and an opportunity to contest the bail, he was not deprived of his due-process rights.

In order for Utah to prevent future due process claims stemming from a law that allows a defendant's cash bail to be applied toward restitution orders, the legislature should require the court and the jails to give adequate notice to a defendant regarding how the cash bail may be used for restitution orders. Also, the court will need to set up a process for a defendant to contest the bail, if necessary. By satisfying the notice and hearing requirements, the Utah law will not deprive any defendant of due-process rights.

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<sup>78</sup> U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."); *id.* at XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

<sup>79</sup> *Ellis v. Hunter*, 3 So. 3d 373 (Fla. Dist. Ct. App. 2009).

<sup>80</sup> *Id.* at 377.

<sup>81</sup> *Id.* at 376.

<sup>82</sup> *Id.* at 377.

<sup>83</sup> FLA. STAT. ANN. § 903.286 (West Supp. 2013) ("The clerk of the court shall withhold from the return of a cash bond posted on behalf of a criminal defendant . . . sufficient funds to pay any unpaid court fees, court costs, and criminal penalties.").

<sup>84</sup> *Ellis*, 3 So. 3d at 379.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (internal quotation marks omitted).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

Finally, the Constitution protects a defendant from a government taking without just compensation.<sup>89</sup> In *Ellis*, the defendant also claimed that the use of his bail bond to pay restitution constituted an illegal taking.<sup>90</sup> The appellate court upheld the trial court's holding that "[t]he posting of bond for oneself or another, as in this case, is totally voluntary. No one can be forced to post a bond. Those posting the bond are presumed to have knowledge of Sec. 903.286."<sup>91</sup> The defendant's father-in-law acted on his own free will to cover his son-in-law's bail. Therefore, the court did not illegally deprive him of his property through an unconstitutional taking. The same conclusion would apply in Utah if it adopted a law allowing a defendant's bail to be applied toward court-ordered restitution. Anyone who chose to pay a defendant's bail, including the defendant himself, would be making a voluntary decision to give money to the court in order to obtain release from jail.

In sum, a Utah statute allowing a defendant's cash bail to be used toward a restitution order would be constitutional. It does not constitute an excessive bail, a due process violation, or an illegal taking.

### *C. Third-Party Payments and the Defendant's Other Debts*

In states with statutes that allow courts to apply a defendant's cash bail toward the payment of restitution, courts have addressed two additional issues about the validity of the statutes. The first issue is whether the courts may use the cash bail for restitution if it is posted by a third party, and the second issue is whether the courts may use a single cash bail payment toward restitution in multiple cases where the defendant has been convicted and sentenced. In order for Utah to avoid having these problems, the legislature should explicitly address each issue in its statute.

#### *1. Payment of Bail by Third Parties*

When a defendant is unable to pay the bail amount set by the court, a third party—a family member, friend, coworker, or employer—may pay bail.<sup>92</sup> A third party expects the money to be returned once a defendant appears for court proceedings. Currently, there is a split in opinion on how courts should address this situation. In some jurisdictions, courts allow bail posted by a third party to be used

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<sup>89</sup> U.S. CONST. amend. V (“[P]rivate property [shall not] be taken for public use, without just compensation.”); *id.* at XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”).

<sup>90</sup> *Ellis*, 3 So. 3d at 380.

<sup>91</sup> *Id.*

<sup>92</sup> *See, e.g.,* *People v. Baugh*, 544 N.E.2d 1165, 1167 (Ill. App. Ct. 1989); *State v. Davis*, 843 P.2d 460, 461 (Or. Ct. App. 1992).

toward the payment of a defendant's restitution order.<sup>93</sup> Accordingly, in these jurisdictions, a third party may not have his or her funds returned.

In *State v. Davis*, the defendant was convicted of racketeering and failure to appear.<sup>94</sup> The court suspended his sentence and ordered the defendant to pay \$59,449.50 in restitution.<sup>95</sup> Five years later, the court found that the defendant had violated his probation and ordered him to pay the remaining restitution of \$37,902.50.<sup>96</sup> At that point, the court applied the defendant's \$5,000 security deposit to the balance of restitution still owed.<sup>97</sup> The defendant argued that the court erred in applying his deposit toward restitution because someone else paid his deposit.<sup>98</sup> The court explained that this did not matter because there was no "requirement that money deposited as security by a third party be treated any differently than if it were deposited by the defendant."<sup>99</sup> The court also determined that "[a] court has broad discretion to retain some or all of a security deposit."<sup>100</sup> Specifically, a court "may lawfully withhold a defendant's security deposit to satisfy 'obligations under the judgment.'"<sup>101</sup> Since "restitution was one of defendant's obligations," the court could withhold his security deposit, even if a third party deposited it.<sup>102</sup>

In *People v. Baugh*, the defendant was convicted of violating his bail bond and theft exceeding \$300 in value.<sup>103</sup> The defendant's father paid the bail amount of \$2,200.<sup>104</sup> The court ordered that restitution of \$2,200 be deducted from the remainder of the defendant's bail after paying court costs.<sup>105</sup> The defendant argued that the court erred in deducting restitution from his bail since it was his father's, not his own, money.<sup>106</sup> The court determined that the "[d]efendant's father has no more right to the funds than did [the] defendant."<sup>107</sup> Specifically, third parties who

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<sup>93</sup> See, e.g., Colorado (COLO. REV. STAT. § 16-4-109 (2012)); Indiana (IND. CODE ANN. § 35-33-8-3.2(a) (LexisNexis 2012)); Minnesota (MINN. STAT. ANN. § 629.53 (West 2009)); Rhode Island (R.I. GEN. LAWS § 12-13-10 (2002)); see also, e.g., *People v. Rayburn*, 630 N.E.2d 533, 537 (Ill. App. Ct. 1994) ("[T]he bond may be used for restitution purposes regardless of who posted the money."); *State v. Grant*, 606 P.2d 1166, 1167 (Or. Ct. App. 1980) ("[I]t was lawful for the court to regard the deposit as defendant's and available to satisfy defendant's obligations under the judgment."); see generally *Ellis v. Hunter*, 3 So. 3d 373 (Fla. Dist. Ct. App. 2009).

<sup>94</sup> 843 P.2d at 461.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* (quoting *State v. Grant*, 606 P.2d 1166, 1167 (Or. Ct. App. 1980)).

<sup>102</sup> *Id.* at 461-62.

<sup>103</sup> 544 N.E.2d 1165, 1166 (Ill. App. Ct. 1989).

<sup>104</sup> *Id.* at 1167.

<sup>105</sup> *Id.* at 1166.

<sup>106</sup> *Id.* at 1168.

<sup>107</sup> *Id.* at 1169.

pay bail are “subject to the power of the court to invade the funds for the purpose of paying restitution to the victims of defendant’s criminal activity.”<sup>108</sup>

However, there are some jurisdictions with statutes that explicitly provide that third parties who post bail for a defendant will always receive their money back, regardless of any restitution orders. In Maine, if bail is posted by someone other than the defendant, “it must be returned to that person unless otherwise forfeited.”<sup>109</sup> Similarly, in California, if someone other than the defendant deposited the money, “the deposit after judgment shall be returned to that person within 10 days.”<sup>110</sup> These jurisdictions have chosen to protect the rights of third parties over the rights of the victims.

Since there is a split in opinion, the Utah legislature will need to decide what to do when third parties post bail for a defendant. If Utah allows bail posted by third parties to be used toward restitution orders, the restitution collection rates will increase. However, it may upset third parties who want their money back. On the other hand, if Utah chooses to return the money to third-party payers, victims will be left without compensation. This Note recommends that the Utah legislature authorize third-party bail payments to go toward restitution orders. To prevent any problems, the statute should require courts and jails to include the information about the statute’s requirements directly on the bail forms and require a signature from third parties verifying that they read and understood the information.

## 2. *Payment Toward Restitution in Other Cases*

Sometimes a defendant has multiple outstanding restitution orders when paying bail for a current criminal charge. In *Ellis*, the defendant was convicted of driving while under the influence of alcohol and was ordered to pay “a total of \$1,063.88 in fines, court costs, and fees.”<sup>111</sup> Additionally, he had “outstanding unpaid fines, costs, and criminal penalties in three other criminal cases totaling \$3,936.12.”<sup>112</sup> Of that outstanding total, he owed \$3,530.05 in restitution.<sup>113</sup> When his father-in-law posted \$5,000 for bail,<sup>114</sup> the court deducted the \$1,063.88 that the defendant owed in the DUI charge and used the rest of the bail toward the amount owed from the other three charges, leaving nothing left over to be returned to the defendant’s father-in-law.<sup>115</sup> The defendant claimed his cash bail should have only been applied to “the particular case for which bond was posted,” not to the outstanding cases.<sup>116</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> ME. REV. STAT. tit. 15, § 1074 (Supp. 2006).

<sup>110</sup> CAL. PENAL CODE § 1297 (West 2004).

<sup>111</sup> *Ellis v. Hunter*, 3 So. 3d 373, 377 (Fla. Dist. Ct. App. 2009).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 377, n.2.

<sup>114</sup> *Id.* at 376.

<sup>115</sup> *Id.* at 377.

<sup>116</sup> *Id.* at 376.

However, the court disagreed. It determined that “[w]hen a statute is clear and unambiguous, courts will not look behind the statute’s plain language for legislative intent or resort to rules of statutory construction to ascertain intent.”<sup>117</sup> In this case, “the plain language of the statute declares that ‘sufficient funds to pay *any* unpaid court fees, court costs, and criminal penalties,’ shall be withheld from the return of a cash bond.”<sup>118</sup> Also, the statute states that “if the bond funds are insufficient ‘to pay *all* unpaid court fees, court costs, and criminal penalties, the clerk of the court shall immediately obtain payment from the defendant or enroll the defendant in a payment plan.”<sup>119</sup> Thus, the court held that the “statutory language clearly establishes the Legislature’s intent that the statute be applied to all of a defendant’s cases in which fines, costs, or criminal penalties remain unpaid.”<sup>120</sup>

If the Utah legislature adopts a statute that allows a defendant’s cash bail to be applied toward restitution orders, it should determine whether it wants to give the court the authority to apply bail to multiple outstanding restitution orders. It is in victims’ best interests to allow a defendant’s cash bail to apply to as many restitution orders as possible so that a higher amount of restitution is collected. If a defendant has proven he has the monetary means to pay cash bail, then it is appropriate for the money to go toward his outstanding restitution obligations.

#### IV. CONCLUSION

Crime costs victims and society billions of dollars every year.<sup>121</sup> The lack of victim compensation for these losses is a large problem that Utah is not adequately addressing. Too many defendants are not paying restitution, and Utah currently does not have an effective way to collect payments for victims who deserve compensation.

Convicted defendants should be held accountable for the monetary damage they cause their victims. It does not matter whether a victim’s costs include medical expenses, future therapy, lost wages, or property damage.

Although the Utah Office for Victims of Crime helps victims recover for some of their expenses,<sup>122</sup> the office is limited by inadequate funding and cannot help everyone. Moreover, other departments, like the Department of Corrections and the Utah Office of Debt Collection, have been unable to successfully collect

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<sup>117</sup> *Id.* 383–84 (quoting *Daniels v. Fla. Dep’t of Health*, 898 So. 2d 61, 64 (Fla. 2005)).

<sup>118</sup> *Id.* at 384 (quoting FLA. STAT. ANN. § 903.286 (West Supp. 2013) (emphasis added)).

<sup>119</sup> *Id.* (quoting FLA. STAT. ANN. § 903.286 (West Supp. 2013) (emphasis added)).

<sup>120</sup> *Id.*

<sup>121</sup> See *Economic and Financial Crime*, NAT’L CTR. FOR VICTIMS CRIME, <http://www.victimsofcrime.org/library/crime-information-and-statistics/economic-and-financial-crime> (last visited Jan. 18, 2014).

<sup>122</sup> See UTAH CODE § 63M-7-511 (LexisNexis 2013).

restitution. It is time to try something new, something that will better protect victims' rights.

The most effective way to recover more restitution for victims is to enact a law that allows a court to order a defendant to pay cash bail and to use it toward the payment of a restitution order. Many states have already successfully enacted similar laws, and there is no reason why Utah should not follow their example. The Utah legislature need not worry since such statutes have been found to be constitutional. This law will protect victims' rights, which is one of the most important goals of the criminal-justice system.