YOUR MONEY OR YOUR LIBERTY: CLARIFYING MILITARY CONTINGENT CONFINEMENT

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I. Introduction

Your money or your liberty? Barring certain limitations, monetary penalty or incarceration awaits service members who have fines and contingent confinement — i.e., sentence conditions allowing for the imposition of confinement if an individual fails to pay a punitive fine — adjudged against them under the military justice system.[1] This is the case despite recent significant changes to the Manual for Courts-Martial (MCM) and Rules for Courts-Martial (RCM)[2] and contrary interpretations of how to implement contingent confinement.[3]

The RCM outlines military fine enforcement through contingent confinement in Rule 1003(b)(3), which states that sentences including fines "may be accompanied by a provision" providing "that, in the event the fine is not paid," the convicted individual may be "confined until a fixed period considered an equivalent punishment to the fine has expired."[4] Although another rule addressing this punishment was removed from the RCM by Executive Order 13825 in 2018 — Rule 1113(e)(3), which described contingent confinement as replacing any associated fine and the manner in which this substitution must take place[5] — Rule 1003(b)(3) was left unchanged.[6] Both courts and scholars, however, have stumbled in interpreting this Rule, creating confusion as to its true legal effect and viability for achieving certain penological outcomes.

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[1] It must be noted that "courts-martial rarely adjudge punitive fines" due to the legal and administrative effort often required to collect them post-sentencing. Major Daniel J. Murphy, *Do Not Pay $200–Go Directly to Jail: Clarifying the Fine Enforcement Provision*, Army Law., Oct. 2012, at 4.

[2] Exec. Order No. 13825, 2018 Amendments to the Manual for Courts-Martial, United States, 2018, 83 Fed. Reg. 9889, 9889–10353 (Mar. 1, 2018) (amending the Manual for Courts-Martial and Rules for Courts-Martial); *see* Lisa M. Schenk, Modern Military Justice: Cases and Materials v (3d ed. 2019) (referring to Executive Order 13825 as one of "four executive orders making extensive amendments to the [MCM]").

[3] United States v. Rascoe, 31 M.J. 544 (N.M.C.M.R. 1990); Murphy, *supra* note 1.

[4] Manual for Courts-Martial, United States, [hereinafter MCM] (2019 ed.), Rule for Courts-Martial [hereinafter R.C.M.] 1003(b)(3).

[5] MCM (2016 ed.), R.C.M. 1113(e)(3). See Exec. Order. No. 13825, *supra* note 2, at 10048–50 (presenting the revised R.C.M. 1113, which does not include R.C.M. 1113(e)(3)).

[6] *Id*. at 10015.

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Clear illustrations of such missteps are presented in an article by Major Daniel Murphy[7] and the opinion of the United States Navy-Marine Corps Court of Military Review (NMCMR) — the precursor to the Navy-Marine Corps Court of Criminal Appeals — in *United States v. Rascoe*.[8] The article and opinion incorrectly put forth that, under Rule 1003(b)(3) and former Rule 1113(e)(3), those who fail to pay fines may be subject to contingent confinement *and* remain liable for their original financial punishment, rather than one or the other.[9] Though the NMCMR does so expressly in dicta,[10] courts have relied on the interpretation as precedent, propagating faulty law.[11] Murphy additionally proposes problematic recommendations for the modification of Rule 1003(b)(3) and Rule 1113(e)(3).[12]

In light of the aforementioned recent removal of Rule 1113(e)(3) from the RCM and inaccurate scholarly and judicial presentations, this article clarifies the law of military fine enforcement through contingent confinement and offers recommendations for its use. Part II presents an overview of the historical development of military contingent confinement prior to the promulgation of the 1984 MCM. Throughout this period, the sanction is shown to have operated to discharge attendant fines via the imposition of confinement.

Part III examines the language of Rule 1003(b)(3), which was first published in the 1984 edition of the MCM, remained unchanged by Executive Order 13825,[13] and continues to govern the imposition of military contingent confinement.[14] Rule 1003(b)(3) directs that if confinement is imposed for failure to pay a court-ordered fine pursuant to a fine enforcement provision, the fine is discharged and any confinement contingent on nonpayment of the fine replaces the monetary penalty as punishment for the crime.[15] Part III also provides an assessment of former Rule 1113(e)(3),[16] which similarly

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[7] Murphy, *supra* note 1, at 8–10.

[8] *Rascoe*, 31 M.J. at 550–52.

[9] *Id*. at 550–53; Murphy, *supra* note 1, at 9.

[10] *See Rascoe*, 31 M.J. at 552 n. 6 (referring to its interpretation of the relevant RCM provisions as "dictum").

[11] *See e.g.*, United States v. Phillips, 2006 WL 650022, at *34 (N-M Ct. Crim. App. Mar. 16, 2006); United States v. Smith, 44 M.J. 720, 724 n. 6 (A. Ct. Mil. Rev. 1996).

[12] Murphy, *supra* note 1, at app. A.

[13] Exec. Order No. 13825, *supra* note 2, at 10015.

[14] MCM (2019 ed.), R.C.M. 1003(b)(3).

[15] *Id*.

[16] MCM (2016 ed.), R.C.M. 1113(e)(3). R.C.M. 1113(e)(3) is R.C.M. 1113(d)(3) in

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first appeared in the 1984 MCM,[17] but was removed from the RCM by Executive Order 13825.[18] The analysis of Rule 1113(e)(3) reinforces the interpretation of Rule 1003(b)(3) advocated here. Part III further argues that Rule 1003(b)(3) requires that contingent confinement replace an associated fine when it is executed and that partial payments made prior to execution and any payments made following execution have no effect on the period of imprisonment an individual must suffer; pre-confinement, partial payments must be returned and post-confinement payments cannot be accepted. Rule 1003(b)(3) should be amended to make this process explicit and a draft Rule 1003(b)(3) is provided.

Part IV analyzes how the military appellate courts have addressed contingent confinement under Rule 1003(b)(3) and former Rule 1113(e)(3) to help determine whether and to what degree case law should be adjusted to match the interpretations of this article. Although the United States Court of Appeals for the Armed Forces (CAAF) and its predecessor, the United States Court of Military Appeals (CMA), have thus far failed to rule on the issue, the appellate courts of the service branches have weighed in. In *Rascoe*, the NMCMR — though expressly in dicta[19] — espoused the position that this article critiques, while the Army appellate precedent entails conclusions that substantially mirror those of this article. Air Force appellate precedent is less clear but appears congruent with that of the Army.

Finally, Part V critiques Murphy's recommendations for the modification of Rule 1003(b)(3) and former Rule 1113(e)(3). It articulates shortcomings in the understandings of Murphy and the NMCMR with regard to the nature of the fiscal sanction an adjudged fine subjects individuals to. Part V then provides recommendations for the effective use of fine enforcement provisions at sentencing. Their employment is argued to be ineffective when the goal is the recouping of financial losses because the imposition of contingent confinement extinguishes the financial obligation and forces the government to expend additional resources on incarceration. If a debt goes unpaid, the United States has many effective avenues by which it can still collect what is owed. But when the penological goals are, wholly or in part, retribution

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iterations of the MCM preceding the 2012 edition. *See, e.g.*, MCM (1984 ed.), R.C.M. 1113(d)(3).

[17] *Id*.

[18] Exec. Order No. 13825, *supra* note 2, at 10048–50.

[19] United States v. Rascoe, 31 M.J. 544, 552 n. 6 (N.M.C.M.R. 1990). *But see supra* note 11 and accompanying text.

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or deterrence, such provisions give authorities more options and the chance to put the government in a better financial position without sacrificing the alternative punishment of confinement.

II. The Development of Military Contingent Confinement

The law of military fine enforcement through contingent confinement has evolved over decades to assume its current form. From the beginning of its codified existence in the 1918 MCM to its presentation in the 1984 MCM, the history of this punishment reveals that its imposition discharged attendant financial obligations.

Prior to its codification, as presented by the Army Judge Advocate General (Army TJAG) in 1880, contingent confinement was implemented as a matter of custom: "Sentences of imprisonment till a fine, also imposed by the sentence, is paid, are sanctioned by the usage of the service."[20] The Army TJAG went on to note that "[i]t is proper … in such sentences to affix a limit beyond which the punishment shall not be continued in any event."[21] This explanation, while stating that *some* limit on possible confinement *should* be prescribed, indicates that such additions were discretionary and provides no guidance for determining the length of possible confinement as a result of failing to pay a punitive fine. In addition, the language, "till a fine … is paid," does not make clear whether service of contingent confinement for the adjudged period discharged the fine.

The discretionary nature of affixing a limit beyond which contingent confinement would not continue is illustrated in the case of "an officer[] sentenced … to the payment of a fine and to imprisonment till the fine was paid and held for *some time in confinement* by reason of the non-payment of the fine …."[22] After "some time in confinement," the officer "applied

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[20] William Winthrop, A Digest of Opinions of the Judge Advocate General of the Army, With Notes 285 (1880). *See* George B. Davis, A Treatise on the Military Law of the United States: Together With the Practice and Procedure of Courts-Martial and Other Military Tribunals 168 (3rd ed. 1913) ("[A] sentence of imprisonment until a certain fine, specified in the sentence, has been paid is … authorized by custom of service.").

[21] *Id.*, Winthrop at 285 (internal quotation marks and citations omitted). *See id.,* Davis at 168 ("The term of imprisonment should be expressly stated in the sentence.").

[22] Charles McClure, A Digest of Opinions of the Judge Advocate General of the Army 376 (1901) (emphasis added). For a further demonstration of this discretionary nature, *compare* Colman v. United States, 38 Ct. Cl. 315, 335 (Ct. Cl. 1903) (stating, in

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to be released."[23] When the case reached the Army TJAG, he stated that official procedures for determining whether an individual is a "poor convict" be followed "before exercising any clemency in [the] case" so as "to protect the Government from fraud."[24] No set period of confinement was delineated and the officer had to apply for release after serving "some time." The Army TJAG then recommended that the officer continue to be imprisoned without a fixed end date unless he was found to be a "poor convict" warranting clemency.[25] This case also indicates that the imposition of contingent confinement did not extinguish the officer's financial obligation. That is, the conditional incarceration did not discharge the fine since the officer remained imprisoned indefinitely for not paying, and paying the fine was the key to securing his release.

Passages from the 1896 edition of Colonel William Winthrop's influential treatise on military law expound upon these early understandings and implementations of military contingent confinement.[26] With regard to the punishment generally, Winthrop writes,

> In the military, as in the civil, procedure, where a fine is imposed, it commonly is, and in general properly should be, added in the judgment that the party shall be imprisoned till the fine is paid. But, especially as there is no process known to the military law by which a convict, destitute of means,

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relevant part, that the service member was sentenced "to pay a fine of $700 to the United States, and be imprisoned for the period of seven months at such place as the general commanding should designate, and thereafter until said fine was paid and said sum of money turned over," and further noting that "upon a finding of payment of the fine before mentioned, [the service member] was discharged from further imprisonment"), *with* Runkle v. United States, 19 Ct. Cl. 396, 398–99 (Ct. Cl. 1884) (recounting, in relevant part, that the service member "was sentenced … to pay the United States a fine of $7,500, and to be confined … for the period of four years; and in the event of the non-payment of the fine at the expiration of four years, that he should be kept in confinement until the fine be paid; the total term of imprisonment, however, not to exceed eight years").

[23] *Id.* at 376.

[24] *Id*.

[25] *Id*.

[26] *See* William Winthrop, Military Law and Precedents 420 (2nd ed. 1920) (discussing contingent confinement in the military). The most widely available version of this treatise was printed in 1920, but this iteration is simply a reissue of the book's second edition that was originally published in 1896, though with a smaller type size and, therefore, different pagination. *See id*. at 3 (stating that the 1920 version is a "reprint[]" of the 1896 edition), 8 (describing alterations to type size and pagination).

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> can, because of his inability, be relieved from an imprisonment imposed for the enforcement of a fine, it is usual and proper in a military sentence to declare that such an imprisonment shall not exceed a certain term of months or years; otherwise — the pardoning power not intervening — the confinement might be indefinitely prolonged.[27]

As examples of how to adjudge such confinement, Winthrop presents court language abating the owed fine at a rate of "five (or other number of) dollars *per* day" and imposing imprisonment of "one day for every two dollars [owed], or any part thereof that remains unpaid."[28] Contrary to the Army TJAG, Winthrop appears to evince a preference for contingent confinement sentences in terms of direct dollars-to-days conversions. This would seem to have allowed for the progressive diminishment of a fine as conditional imprisonment was served, perhaps having permitted an individual to secure his liberty at a lower cost the longer he was incarcerated.

The first mention of contingent confinement in the primary text of the military legal system, the MCM, was in its 1918 iteration. The 1918 MCM provides that the imposition of a fine as criminal punishment

> is usually accompanied in the sentence by a provision, in order to enforce collection, that the person fined shall be imprisoned until the fine is paid or until a fixed portion of time considered as an equivalent punishment has expired.[29]

This passage appears to have left open the following two avenues for convicted individuals to secure their liberty following confinement for failure to pay a fine: (1) they paid the fine in full and were released, the fine apparently unabated by any contingent confinement already served; or (2) they served the full term of conditional imprisonment. With regard to the second option, "imprisonment … until a fixed portion of time considered as an equivalent punishment has expired," it is unclear from the language whether being subjected to such a period of confinement satisfied the fine owed; the mere execution of the contingent confinement provision does not appear to have discharged the fine given that payment mid-term of imprisonment seemed an acceptable path to immediate release. Since contingent confinement was

[27] *Id*. at 420.

[28] *Id*. at 420 n. 73 (emphasis in original).

[29] MCM (1918 ed.), pt. XII, ¶ 317.

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meant to be an "equivalent punishment" for the crime, as was the original fine, interpreting this language as leaving the financial penalty in place after service of "a fixed portion of time" would appear to have doubled an individual's punishment for his conduct.

The following sample "forms for sentences" supplied in Appendix 9 of the 1918 MCM provide insight into the shapes these punishments took:

> To pay to the United States a fine of ------- dollars and to be confined at hard labor, at such place as the reviewing authority may direct, until said fine is so paid, but not more than ------- months (*or* years) ….
>
> To pay to the United States a fine of ------- dollars, to be confined at hard labor, at such place as the reviewing authority may direct, for ------- months (*or* years), and to be further confined at hard labor until said fine is so paid, but for not more than ------- months (*or* years), in addition to the ------- months (*or* years) hereinbefore adjudged.[30]

Following sentences to confinement at hard labor with "until said fine is so paid" indicates that the contingent confinement satisfied the adjudged financial sanction and did so once the whole term of imprisonment was served.

The 1918 MCM's description of military fine enforcement through contingent confinement is in broad accordance with Winthrop's; that is, with the service of the contingent confinement discharging the fine. The 1918 MCM's sample sentences, however, differ from those offered by Winthrop by simply declaring a period of time beyond which contingent confinement would not continue and at the conclusion of which the entire fine was deemed satisfied.[31] There is no indication in the 1918 MCM examples that a fine was abated as contingent confinement was served or that the sum due following service of only a portion of the full contingent confinement term was less than the amount adjudged or owed at the time the imprisonment was executed.[32]

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[30] *Id*. at app. 9 (capitalization altered).

[31] *Id*.

[32] *Id*. Of additional interest in the 1918 MCM is the following passage in Appendix 2, which is titled, "System of courts-martial for National Guard not in the service of the United States":

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Military contingent confinement, as outlined in the MCM, next underwent change in the 1951 edition, assuming the following form:

> In order to enforce collection, a fine is usually accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired …. The total period of confinement adjudged in such a sentence shall not exceed the jurisdictional limitations of the court.[33]

One of the clearest changes is the elimination of the passage in the 1918 MCM allowing for contingent confinement "until the fine is paid."[34] This deletion is significant insofar as it appears to have removed the possibility of securing liberty via fine payment after contingent confinement was executed. Additionally, a sentence was added limiting "[t]he total period of confinement adjudged," including both contingent and non-contingent confinement, to "the jurisdictional limitations of the court."[35] Thus, contingent confinement terms were limited by the maximum confinement imposable for the crime(s) in question and the punitive mandates of different types of courts-martial; this indicates that, if executed, such confinement served as punishment for crimes in place of associated fines.[36] Finally, with regard to examples of

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> All courts-martial of the National Guard, not in the service of the United States, including summary courts, shall have power to sentence to confinement in lieu of fines authorized to be imposed: Provided, That such sentences of confinement shall not exceed one day for each dollar of fine authorized.

Id. at app. 2. This is the only mention in the 1918 MCM of a dollars-to-days conversion standard.

[33] MCM (1951 ed.), pt. XXV, ¶ 126(h)(3). The MCM editions between 1918 and 1951 contain the same language as the 1918 edition. *See, e.g.*, MCM (1949 ed.), pt. XXVI, ¶ 116(g) ("In order to enforce collection, a fine is usually accompanied in the sentence by a provision that the person fined shall be imprisoned until the fine is paid or until a fixed portion of time considered as an equivalent punishment has expired.").

[34] MCM (1918 ed.), pt. XII, ¶ 317.

[35] MCM (1951 ed.), pt. XXV, ¶ 126(h)(3). *See* William B. Aycock & Seymour W. Wurfel, Military Law Under the Uniform Code of Military Justice 79–84 (1955) (describing the then-contemporary limitations on punishments for individual offenses and at summary and special courts-martial).

[36] *See* United States v. Garcia, 17 C.M.R. 88, 92–93 (C.M.A. 1954) ("There is, of course, no doubt under the Manual language … that alternative confinement imposed for the purpose of compelling payment of a fine is nonetheless a part of the sentence."). This

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contingent confinement sentences, the Appendix to the 1951 MCM offers substantively identical form sentences to those that were in the 1918 MCM, each including the important "until said fine is so paid" language indicating that the conditional incarceration discharged the fine.[37]

Between the 1951 MCM and the next meaningful change to the military's contingent confinement provisions, the legal landscape surrounding such punishment shifted as the Supreme Court decided a trio of cases involving individuals subjected to contingent confinement as a result of their inability to pay rather than any nefarious refusal to do so.[38] The first case, *Williams v. Illinois*, decided in 1970, involved an appellant convicted of petty theft and sentenced to the maximum term of confinement permitted by statute (one year) and to pay $505 in fines and court costs.[39] Additionally, "if appellant was in default of the payment of the fine and court costs at the expiration of the one-year sentence," he was to "remain in jail … to 'work off' the monetary obligations at the rate of $5 per day."[40] Because the appellant was indigent, "the effect of the sentence … required [him] to be confined for 101 days beyond the maximum period of confinement fixed by the statute."[41]

In *Tate v. Short*, decided in 1971, the appellant accumulated $425 in fines through nine convictions for traffic offenses.[42] When he was unable to pay this amount as a result of indigence, the court committed him to a

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new language in the 1951 MCM was perhaps in response to determinations like that in *United States v. DeAngelis*. 12 C.M.R. 54 (C.M.A. 1953). In *DeAngelis*, the CMA held that, under the 1949 MCM (which contained a contingent confinement provision identical to that in the 1918 MCM), a sentence including confinement at hard labor for five years and a fine of $10,000 with two years of potential contingent confinement was permissible, despite the fact that the maximum allowable confinement for the offense in question was five years. *Id*. at 61–62; *see id*. at 62 ("The provision for further confinement was not made as punishment for the offense, but merely as a means of coercing the collection of the fine imposed …. The provision that the accused be further confined until the fine is paid, after imposition of the maximum period of confinement, was a proper exercise of the court-martial's punitive authority, and is legal.").

[37] MCM (1951 ed.), app. 13.

[38] Williams v. Illinois, 399 U.S. 235 (1970); Tate v. Short, 401 U.S. 395 (1971); Bearden v. Georgia, 461 U.S. 660 (1983).

[39] *Williams,* 399 U.S. at 236.

[40] *Id*.

[41] *Id*.

[42] *Tate,* 401 U.S. at 396.

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municipal prison farm to work off his debt at a rate of $5 per day.[43] This dollars-to-days conversion rate meant that the appellant would serve 85 days on the prison farm.[44] Furthermore, as opposed to the situation in *Williams*, this confinement came from infractions that, statutorily, did not carry imprisonment as a punishment and from a municipal court that otherwise had no jurisdiction to impose confinement.[45]

Finally, *Bearden v. Georgia*, decided in 1983, brought before the Supreme Court an appellant who pled guilty to burglary and theft and was sentenced to three years on parole and to pay amounts totaling $750.[46] The appellant borrowed $200 from his parents but was unable to come up with the remaining sum due to indigence.[47] Consequently, the court required him "to serve the remaining portion of the probationary period in prison."[48] Since the appellant was initially sentenced in October 1980 and sentenced for the second time in May 1981, this meant that he was to serve roughly 17 months in confinement rather than on probation by reason of his destitution.[49]

In each of these three cases, the Court found that the Equal Protection Clause of the Fourteenth Amendment[50] bars the imposition of confinement on an individual for failure to pay a fine if the failure is the result of indigence.[51] These practices were held to unconstitutionally visit deprivations of liberty upon those unable to pay fines while allowing those with sufficient financial means to avoid such severe sanctions, a significant difference in sufferable hardship impermissibly based on individual wealth.[52]

Citing *Williams*, *Tate*, and *Bearden* — along with other sources — the drafter's Analysis of the 1984 MCM notes that alterations to military contingent confinement provisions were made in this edition "to avoid con-

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[43] *Id*.

[44] *Id*.

[45] *Id*.

[46] *Bearden,* 461 U.S. at 662.

[47] *Id*.

[48] *Id*. at 663.

[49] *Id*.

[50] U.S. CONST. amend. XIV, § 1 ("No state shall … deny to any person within its jurisdiction the equal protection of the laws.").

[51] *Williams*, 399 U.S. at 241–44; *Tate*, 401 U.S. at 397–98; *Bearden*, 461 U.S. at 672–73.

[52] *Bearden,* 461 U.S. at 662.

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stitutional problems."[53] Rule 1113(d)(3) was added[54] and Rule 1003(b)(3) was modified to reference the newly created subsection in both the Discussion section following the Rule and the Analysis of the Rule in Appendix 21.[55] This article turns to them now.[56]

III. The Relevant Rules for Courts-Martial

"When deciding an issue governed by the text of a legal instrument, the careful lawyer or judge trusts neither memory nor paraphrase but examines the very words of the instrument,"[57] and the language of Rule 1003(b)(3) produces the most powerful argument for the position taken by this article.[58] That is, if, subject to a fine enforcement provision, a service member is placed in confinement for failing to pay a punitive fine, the financial obligation is discharged and the confinement becomes the punishment for the crime. This mandate is limited in accordance with the three Supreme Court decisions noted above,[59] but, barring indigence and adequate alternative punishments, it is the law put in place by the President. An analysis of the now-defunct Rule 1113(e)(3) further supports this position.

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[53] MCM (1984 ed.), app. 21, Analysis, R.C.M. 1113(d)(3). The military did, however, apply the protections for indigent individuals mandated by these cases by relying on federal law prior to their inclusion in the RCM. *See* Colonel (Ret.) Myron L. Birnbaum, *Confinement for Non-Payment of Fines*, 9 The Reporter 7, 9 (1980) ("We have long held that this procedure applies to persons confined as the result of courts-martial.").

[54] *See supra* note 16 and accompanying text.

[55] MCM (1984 ed.), R.C.M. 1003(b)(3) and 1113(d)(3).

[56] MCMs since the 1984 edition do not contain instructive sample form sentences. For its part, the 1984 MCM provides no sample sentence including contingent confinement. *Id*. at app. 11. The current MCM, published in 2019, also provides no such sample form sentence. MCM (2019), app. 11. In turn, the 2016 MCM offers the following: "To pay the United States a fine of $ ____.00 (and to serve (additional) confinement of (____ years) (and) (____ months) (and) (____ days) if the fine is not paid)." MCM (2016), app. 11.

[57] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 56 (2012).

[58] *Cf*. United States v. Sager, 76 M.J. 158, 161 (C.A.A.F. 2017) (quoting Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253–54 (1992)) ("The Supreme Court has 'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.'"); United States v. Desha, 23 M.J. 66, 68 (C.M.A. 1986) (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)) ("If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'").

[59] *See supra* notes 38–52 and accompanying text.

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The NMCMR noted in *Rascoe* that "[Rule] 1003(b)(3) appears on its face to provide for a fixed period of confinement set by the court to become substitute for the adjudged fine if the fine is not paid."[60] Murphy also states that "[a] logical reading" of the Rule "suggests" that "contingent confinement discharges the accused's liability to pay the adjudged fine."[61] Both the NMCMR and Murphy then work against this "suggestion." The discharge of liability for an adjudged fine through the imposition of contingent confinement is, however, no mere suggestion; it is the law, resting foremost on the foundation of the language of Rule 1003(b)(3).

A. Rule 1003(b)(3)

In pertinent part, Rule 1003(b)(3) states the following:

> To enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial.[62]

The words "considered an equivalent punishment to the fine" appear to tie the period of possible confinement for failing to pay an adjudged fine to the degree of severity of the fine itself. Because the fine is adjudged as a just punishment for the crime(s) without the application of contingent confinement, the possible confinement arrived at through the application of Rule 1003(b)(3) is as well: it is a just punishment for the crime(s) without the application of the fine. Therefore, both the fine and confinement have the severity, whether or not initially mixed with other punishments in a sentence, necessary to sufficiently punish an individual without the other. Applying them in tandem results in sentences whereby individuals find themselves doubly punished for the crime(s) committed.

This, however, is exactly what Murphy and the NMCMR advocate. Citing the language, "[t]o enforce collection," Murphy argues that since

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[60] United States v. Rascoe, 31 M.J. 544, 550 (N.M.C.M.R. 1990).

[61] Murphy, *supra* note 1, at 8–10.

[62] MCM (2019 ed.), R.C.M. 1003(b)(3).

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Rule 1003(b)(3) and contingent confinement are meant to enforce payment of adjudged fines,

> it is critical to remember that a fine enforcement provision itself is not punishment for the crime. As such, it would follow that an accused's confinement served under a fine enforcement provision would not discharge his liability to pay an adjudged fine, but only serve to enforce payment of the punitive fine.[63]

The NMCMR uses similar reasoning, asserting that "a fine enforcement provision is not punishment."[64]

Such arguments show a misunderstanding of the fair application of law and how Rule 1003(b)(3) actually works to enforce the collection of fines. Murphy and the NMCMR believe that the administration of contingent confinement through the Rule serves as a punishment solely for failing to pay an adjudged fine and that this is how individuals are induced to pay. But, as noted above, the severity of such confinement is fashioned to be of equivalent severity to the original fine.[65] The confinement is therefore tailored to be a just punishment for the crime(s) and meant to be employed *in place of* the financial penalty. Murphy and the NMCMR seek to subject those who commit the relatively minor infraction of failing to pay a punitive fine to punishments meant for those who commit criminal offenses. An individual subject to this interpretation will suffer both a fine *and* confinement, each having been tabulated to individually serve the punitive interests of the military justice system for the crime(s) committed. Punishing failures to pay fines with confinement fitted to crimes under the Uniform Code of Military Justice (UCMJ), and thereby doubling the punishment or a portion of it for such offenses, is an incorrect interpretation of the law, unjust, and could erode the standing and credibility of the military justice system in the eyes of service members and the public.[66]

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[63] Murphy, *supra* note 1, at 9.

[64] *Rascoe*, 31 M.J. at 550.

[65] *See supra* note 62 and accompanying text.

[66] *Cf.* Janice Nadler, *Flouting the Law*, 83 Texas L. Rev. 1399 (2005) (presenting experimental and real-world examples of perceived injustice in legal systems resulting in reduced respect for and compliance with the law); Paul H. Robinson, Geoffrey P. Goodwin, & Michael D. Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. Rev. 1940, 1997 (2010) ("[C]riminal law's moral credibility is essential to effective crime control and is enhanced if the distribution of criminal liability is perceived as 'doing justice' — that is, if it assigns liability and punishment in ways that the community perceives as consistent

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Further supporting the interpretation that contingent confinement replaces financial penalties adjudged under Rule 1003(b)(3) is the following language: "The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial."[67] Such limitations are the maximum confinement under the UCMJ that can be doled out for the offense(s) for which a defendant is convicted at a given type of court-martial.[68] Accordingly, contingent confinement durations are restricted by the maximum punishments allowable under the MCM for the crime(s) committed and the maximum punishments different types of courts-martial have jurisdiction to impose. Contingent confinement must therefore be implemented as punishment for any crime(s), replacing the adjudged fines to avoid double punishment.

The aforementioned considerations show that Rule 1003(b)(3) does not mean "to enforce [the] collection"[69] of fines by over-punishing individuals, but rather by taking liberty in place of money should they fail to pay. Some individuals may not settle financial penalties adjudged against them without harsh enough inducement. This is where Rule 1003(b)(3) comes in: it provides the means by which, upon failure to pay an adjudged fine, individuals will be subject to a deprivation of liberty equal to and in place of the monetary penalty.[70]

The "equal" portion of the preceding sentence, however, is not entirely accurate and should be read as more of a guideline for the translation of fines into confinement rather than a hard rule. This is because the Supreme

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with its shared intuitions of justice. Conversely, the system's moral credibility, and therefore its crime-control effectiveness, is undermined by a distribution of liability that deviates from community perceptions of just desert.").

[67] MCM (2019 ed.), R.C.M. 1003(b)(3).

[68] *See* Lawrence J. Morris, Military Justice: A Guide to the Issues 103 (2010) ("The additional time cannot exceed the maximum punishment authorized for that offense ...."); *see also* United States v. Tualla, 52 M.J. 228, 229 (C.A.A.F. 2000) (explaining that "[t]he President is authorized to establish the maximum punishment for offenses under the UCMJ, subject to limitations in the Code applicable to specific offenses and types of courts-martial," and referring to such maximums as "jurisdictional limitations" under Rule 1003(b)).

[69] MCM (2019 ed.), R.C.M. 1003(b)(3).

[70] *See* David M. Jones, *Making the Accused Pay for His Crime: A Proposal to Add Restitution as an Authorized Punishment Under Rule for Courts-Martial 1003(b)*, 52 Naval L. Rev. 1, 52 (2005) ("The threat of additional confinement might be enough to convince the accused to either start, or to keep, making … payments.").

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Court has concluded that deprivations of liberty are inherently more severe than financial punishments.[71] The NMCMR itself, in *Rascoe*, reached the same understanding.[72] In addition to inherent severity, the UCMJ, in certain situations, makes confinement more severe than fiscal punishments on their own by automatically applying financial penalties when incarceration is imposed. Service members convicted at court-martial and sentenced to "confinement more than six months" or "confinement for six months or less and a dishonorable or bad-conduct discharge or dismissal" automatically forfeit all pay and allowances for that period, or two-thirds of all pay in the case of special courts-martial.[73] Enlisted members face stiffer punishment: if their court-martial sentence includes a punitive discharge, *any* confinement, or hard labor without confinement and they are above pay grade E-1, they are automatically reduced to E-1.[74]

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[71] *See* Blanton v. N. Las Vegas, 489 U.S. 538, 542 (1989) ("Penalties such as probation or a fine *may engender a significant infringement of personal freedom,* ... but they cannot approximate in severity the loss of liberty that a prison term entails. Indeed, because incarceration is an intrinsically different form of punishment, ... it is the most powerful indication of whether an offense is 'serious.'") (internal quotation marks and citations omitted); *see also Criminal Sentencing of Indigents*, 97 HARV. L. REV. 86, 88 n. 13 (1983) (interpreting Supreme Court precedent "holding that the state may use imprisonment only as a last resort" as "manifest[ing] the assumption that incarceration, for any period, is a more severe punishment than a fine").

[72] United States v. Rascoe, 31 M.J. 544, 568 (N.M.C.M.R. 1990) ("[W]hen the punishment of a fine is transformed into confinement, a more severe punishment is imposed."), 569 ("[C]onfinement is more severe than fines or forfeitures."), 569 n. 28 ("Common sense would also indicate that confinement is more serious than monetary punishments since confinement is used as the tool to enforce payment. If confinement were not more severe, it would not be an effective tool of enforcement.").

[73] UCMJ arts. 58b(a)(1), (a)(2)(A), and (a)(2)(B) (codified at 10 U.S.C. § 858(a)(1), (a)(2)(A), and (a)(2)(B)); *See* MORRIS, *supra* note 68, at 103 (describing this "administrative consequence of confinement").

[74] UCMJ art. 58a(a) (2018). Previously, Article 58a contained the following language preceding its directive to automatically reduce pay grade: "Unless otherwise provided by regulations to be prescribed by the Secretary concerned." *Id* at art. 58a(a) (2018). Accordingly, each military branch abrogated the application of this Article — to varying degrees — in the following service-specific manners: the Army allowed the automatic reduction only when a punitive discharge or confinement in excess of 180 days or six months was sentenced, U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5–29(e) (11 May 2016); the Navy allowed it only when a punitive discharge or confinement in excess of 90 days or three months was sentenced, U.S. DEP'T OF NAVY, JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) sec. 0152(c) (26 June 2012); and the Air Force and Coast Guard did not give effect to Article 58a's automatic reduction, U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE para. 9.26.3 (6 June 2013); U.S. COAST GUARD, COMMANDANT INSTR. M5810.1E,

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Confronting individuals with a harsher alternative punishment if they fail to pay a punitive fine is a potentially effective means of inducing compliance.[75] Rule 1003(b)(3) operates in this way by providing for the replacement of financial penalties with the inherently more severe punishment of confinement, which can also entail corresponding additional financial penalties.

B. Former Rule 1113(e)(3)

It is worth addressing the language of Rule 1113(e)(3), which was present in editions of the MCM from 1984 until its removal by Executive Order 13825, effective January 1, 2019.[76] It is an important part of the history of military contingent confinement and meaningfully elaborated on Rule 1003(b)(3). Rule 1113(e)(3) supports this article's argument by further showing the imposition of contingent confinement serving to discharge attendant fines under the military justice system throughout the punishment's codified existence.

Rule 1113(e)(3) is important for understanding Rule 1003(b)(3) because the latter deferred to the former for the implementation of contingent confinement.[77] Specifically, Rule 1003(b)(3)'s Discussion section required that one "[*s*]*ee* [Rule] 1113(e)(3) concerning imposition of confinement when the accused fails to pay a fine."[78] In addition to specifying certain procedures meant to ensure the constitutional execution of contingent confinement,[79] Rule 1113(e)(3) described what becomes of an attendant fine upon the imposition of contingent confinement.

MILITARY JUSTICE MANUAL para. 4.E.1 (Mar. 2018). These unique treatments under Article 58a are no longer allowed as a result of the removal of the language quoted above — as of January 1, 2019—which made the automatic pay grade reduction as put forth in the Article mandatory. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5303(1)(A) (2016) ("striking" the language in question); *see also* Exec. Order No. 13825, *supra* note 2, at 9889 (providing January 1, 2019 as the effective date for this change).

[75] *See supra* note 70 and accompanying text.

[76] Exec. Order No. 13825, *supra* note 2, at 10048–50.

[77] MCM (2016 ed.), R.C.M. 1003(b)(3) (Discussion).

[78] *Id*.

[79] *See supra* notes 38–55 and accompanying text.

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Rule 1113(e)(3) provides the following:

> *Confinement in lieu of fine.* Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigency, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government's interest in appropriate punishment.[80]

The most significant language is in the heading, "*Confinement in lieu of fine*."[81] The word "lieu" means "place" or "stead," and the phrase "in lieu of" means "in place of" or "instead of."[82] The imposition of confinement through fine enforcement provisions and Rule 1003(b)(3) was understood to replace the initial fine as punishment for the crime. If individuals could not pay their fines as a result of indigence, this conversion could only take place after consideration and rejection of other possible punishments.[83]

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[80] *Id*. at R.C.M. 1113(e)(3).

[81] The following consideration must be kept in mind when using provision headings, or "catchlines," in statutory interpretation: "Section headings or catchlines are subject to different treatment in the various compilations. As a general principle those which were supplied by the compiler have but little interpretative value. On the other hand, a section heading or catchline which was part of the statute as enacted generally does have considerable value." Arie Poldervaart, 50 L. Libr. J. 504, 511–12 (1957); *accord* 1A Sutherland Statutory Construction § 21:4 (7th ed. 2016); 2A Sutherland Statutory Construction § 47:14 (7th ed. 2016); Earl T. Crawford, Statutory Construction: Interpretation of Laws 359–61 (1940); Francis J. McCaffrey, Statutory Construction: A Statement and Exposition of the General Rules of Statutory Construction 60 (1953); Scalia & Garner, *supra* note 57, at 221–24. Since the R.C.M. is drafted by the Executive Branch in its entirety and promulgated through executive orders by which the President signs off on all of the language contained therein, it is appropriate to accord substantial interpretative value to Rules' headings. *See, e.g.*, Exec. Order No. 12473, MCM (1984 ed.), 49 Fed. Reg. 17,216 (Apr. 23, 1984) (dictating the headings and body text of relevant rules in the 1984 MCM); *see also* Captain Gregory E. Maggs, *Judicial Review of the* Manual for Courts-Martial, 160 Mil. L. Rev. 96, 100–01 (1999) (outlining "The President's Power to Promulgate the [MCM]," including the R.C.M.).

[82] *Lieu*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/lieu (last visited Aug. 20, 2020); *In lieu of*, Black's Law Dictionary (10th ed. 2014).

[83] MCM (2016 ed.), R.C.M. 1113(e)(3). *See* Bearden v. Georgia, 461 U.S. 660, 672 (1983) ("If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in

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Additional noteworthy language is the passage referring to the "Government's interest in appropriate *punishment*."[84] This shows that the confinement imposed through Rule 1003(b)(3) was interpreted to not simply be for enforcement purposes, but was also viewed as carrying out the punishment originally adjudged in the form of a fine. Contingent confinement was understood to ensure that even if individuals refused or were unable to pay a fine levied against them, the government could still satisfy its interest in punishing them for the crimes they were convicted of, albeit in a different form.

Despite the language of Rule 1113(e)(3), the NMCMR suggests that this provision, in conjunction with Rule 1003(b)(3), should be interpreted such that "the fine of an accused confined for contumacious conduct is not discharged regardless of how much confinement he serves; nor is an indigent accused's fine discharged if the fine enforcement provision is *not* transformed into punishment."[85] Put more plainly, the NMCMR asserts that impositions of contingent confinement can only discharge adjudged fines if convicted individuals are determined to be indigent, and even then only if their sentences specifically state that the imposition of contingent confinement will function in such a manner. Per the NMCMR, the title of Rule 1113(e)(3) and the deference to it with regard to all contingent confinement situations in Rule 1003(b)(3)'s Discussion section were to be ignored. This is a misinterpretation of Rule 1113(e)(3).[86]

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punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay."); Tate v. Short, 401 U.S. 395, 399 (1971) (holding that criminal punishments cannot be "limit[ed] … to payment of [a] fine if one is able to pay it, yet convert [a] fine into a prison term for an indigent defendant without the means to pay."); Williams v. Illinois, 399 U.S. 235, 241-42 (1970) ("[O]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency."). It has been noted that sentences containing contingent confinement are relatively uncommon "[b]ecause of the administrative complexities involved with adjudging that confinement (a hearing at which the government must prove that the accused is able to pay)." Morris, *supra* note 68, at 103.

[84] MCM (2016 ed.), R.C.M. 1113(e)(3) (emphasis added).

[85] United States v. Rascoe, 31 M.J. 544, 552 n. 6 (N.M.C.M.R. 1990) (emphasis in original). It is unclear whether Murphy agrees with this proposition, which he cites in putting forth that there is "ambiguity" as to the functioning of Rule 1003(b)(3) and Rule 1113(e)(3). Murphy, *supra* note 1, at 9.

[86] To its credit, the NMCMR recognized the potential invalidity of its view of Rule 1003(b)(3) and Rule 1113(e)(3), noting the following: "We leave for future decision, however, the validity of this dictum for we recognize that the phrase in [Rule] 1003(b)(3)

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Furthermore, diving deeper than Rule 1113(e)(3)'s language, the drafter's Analysis of the Rule cites the "Fines" section of the 1979 edition of the American Bar Association's Sentencing Alternatives and Procedures.[87] This section, in relevant part, states the following:

> The court should not be authorized to impose alternative sentences, for example, "thirty dollars or thirty days." The effect of nonpayment of a fine should be determined after the fine has not been paid and after examination of the reasons for nonpayment. The court's response to nonpayment should be governed by standard 18-7.4.[88]

In turn, the germane portion of Standard 18-7.4 of the same publication provides:

> [i]ncarceration should not automatically follow the nonpayment of a fine. Incarceration should be employed only after the court has examined the reasons for nonpayment. It is unsound for the length of a jail sentence imposed for nonpayment to be inflexibly tied, by practice or by statutory formula, to a specified dollar equation. The court should be authorized to impose a jail term or a sentence involving immediate sanctions [] for nonpayment, however, within a range fixed by the legislature for the amount involved, but in no event to exceed one year. *Service of such a term should discharge the obligation to pay the fine*.[89]

'in addition to any period *considered an equivalent punishment to the fine has expired*' could also mean either that the accused's fine is entirely discharged, if he does, in fact, serve the maximum of the additional fixed period of confinement prescribed by the court-martial that adjudged his sentence, as approved and ordered executed by the convening authority, or that he is entitled, at least, to some credit for time spent in confinement as a result of the execution of the fine enforcement provision." *Rascoe*, 31 M.J. at 552 n. 6 (emphasis in original).

[87] MCM (2016 ed.), app. 21, Analysis, R.C.M. 1113(e)(3).

[88] American Bar Association, Sentencing Alternatives and Procedures, Standard 18-2.7(e) (approved on Aug. 14, 1979).

[89] *Id*. at 18-7.4(b) (emphasis added).

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This further supports the interpretation that the imposition of contingent confinement under military law for failure to pay a fine has served to discharge the financial obligation throughout the punishment's codified existence and continues to do so today.

C. When Contingent Confinement Replaces an Attendant Fine

Thus far, contingent confinement — throughout its codified existence and currently under Rule 1003(b)(3) — has been argued to replace the fine with which it is adjudged, but when this replacement occurs has yet to be addressed. Such substitution transpires as a matter of law when the conditional imprisonment is *executed*. Moreover, this event extinguishes the fine and an individual therefore cannot secure release from contingent confinement via payment once it is executed because there is no longer a fine to satisfy, just a liberty debt. Finally, partial payment of a fine prior to the execution of contingent confinement has no effect on the length of imprisonment an individual must suffer for failing to discharge the fine in its entirety. If such a partial payment is made, it must be returned upon the execution of contingent confinement and the full term of the conditional incarceration adjudged must be served. Support for these interpretations can be found in the history of military contingent confinement and the language of Rule 1003(b)(3).

As noted above, removal of the language, "until the fine is paid," from the relevant provision of the 1951 MCM and all editions thereafter appears to have eliminated the option for an individual to pay the adjudged fine following the execution of contingent confinement in order to secure release prior to completion of the full term of imprisonment.[90] The only course remaining under Rule 1003(b)(3) is to be confined for the full, adjudged contingent confinement period.

In addition, the following language of Rule 1003(b)(3) is material: "in the event the fine is not paid, the person fined *shall* … be further confined until a *fixed period* considered equivalent to the fine *has expired*."[91] It is "the general rule that the word 'shall' is mandatory and inconsistent with the idea of discretion."[92] In turn, the CAAF has repeatedly found inclusion of

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[90] *See supra* notes 33–34 and accompanying text.

[91] MCM (2019 ed.), R.C.M. 1003(b)(3) (emphases added).

[92] State *ex rel*. Shepherd v. Nebraska Equal Opportunity Com'n, 557 N.W.2d 684, 694 (Neb. 1997). *See* Kingdomware Technologies, Inc. v. United States, 136 S.Ct. 1969, 1977 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually

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the word "shall" in the RCM to indicate a mandate from the President.[93] Accordingly, following failure to pay a fine, and barring indigence, the convicted *must* serve the "fixed period" of contingent confinement until it "has expired." This means that payment prior to the execution of contingent confinement does not reduce an individual's imprisonment liability — partial payment is still a failure to pay the full fine — and payment after execution has no effect because the conditional imprisonment replaces the monetary debt as a matter of law; there is no longer a fine to satisfy since it has been extinguished and the entire period of incarceration must be served, precluding payment and release mid-term. Any partial payments made prior to the execution of contingent confinement must, therefore, be returned because the full financial obligation is expunged by the imposition of imprisonment and payments made during confinement cannot be accepted because there is no longer a fine to apply them to.

In line with the analysis thus far, the following modifications to Rule 1003(b)(3) are recommended:

> To enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial. [Execution of contingent confinement requires imposition of the full term of contingent confinement adjudged and extinguishes the fine in full; the person subject to the execution of contingent confinement cannot remit such punishment through payment. Any partial payments made prior to the execution of contingent confinement must be returned.][94]

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connotes a requirement.").

[93] *See, e.g.*, United States v. Wilson, 65 M.J. 140, 143 (C.A.A.F. 2007) (interpreting the word "shall" in a Rule for Courts-Martial to communicate a "mandate" that "the convening authority was obligated to follow"); United States v. Miller, 58 M.J. 266, 272 (C.A.A.F. 2003) (stating that employment of the word "shall" in the Rule at issue indicates an "express[] mandate[]"); *see also* United States v. Rodriguez, 67 M.J. 110, 117 (C.A.A.F. 2009) (determining that inclusion of the word "shall" in the Article of the UCMJ in question "embodies a congressional mandate").

[94] MCM (2019 ed.), R.C.M. 1003(b)(3).

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IV. Judicial Treatment

Military appellate courts vary in the extent and manner with which they have engaged the relationship between fines and contingent confinement and whether imposition of the latter extinguishes the former. This body of case law — since the issuance of the 1984 MCM — is analyzed here to determine whether relevant precedent is in line with the interpretations of this article and, if not, which courts should endeavor to adjust their legal approaches to this issue and to what degree they should do so. The CMA and CAAF are addressed first, followed by the service appellate courts.

A. The CMA and CAAF

Following the changes to military contingent confinement in the 1984 edition of the MCM noted above,[95] the CMA decided *United States v. Tuggle* in 1992, where the appellant's sentence included a fine of $10,000 and a fine enforcement provision providing for one year of contingent confinement if the financial penalty went unpaid.[96] Tuggle failed to pay and faced a fine enforcement hearing.[97] He was found not to be indigent and not to have "made a good-faith effort to meet his court ordered obligation"[98] by failing to accept his mother's offer to incur an additional mortgage and continuing to make "voluntary" child support payments, despite making "reasonable efforts" to obtain a personal loan.[99] The CMA, however, disagreed with these findings and "took a more reasoned and compassionate approach."[100] It held that, in line with Tuggle's request at the fine enforcement hearing, he "should have been given the opportunity to pay the adjudged fine in good faith" through monthly forfeitures or an installment payment scheme.[101] Of additional importance for the purposes of this article, the court determined that "the confinement was a *substitute punishment* for the unpaid fine."[102] Moreover, it concluded that because the assertion that the "appellant has already served the confinement" was not challenged, "the fine has been

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[95] *See supra* notes 53–55 and accompanying text.

[96] 34 M.J. 89, 90 (C.M.A. 1992).

[97] *Id*.

[98] *Id*. (internal quotation marks omitted).

[99] *Id*. at 92. *See* United States v. Tuggle, 31 M.J. 778, 779 (Army Ct. Crim. App. 1990).

[100] Captain Tall, *How Far Must a Soldier Go in Attempting to Pay a Fine?*, The Army Law. 26, June 1992, at 26.

[101] *Tuggle*, 34 M.J. at 93.

[102] *Id*. at 90 n. 3 (emphasis added).

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satisfied by operation of law and no longer has legal effect."[103] The CMA therefore interpreted the relevant rules to provide that a fine accompanied by a fine enforcement provision is automatically discharged upon the imposition of attendant contingent confinement.

It took twelve years, but the CAAF — formerly the CMA — finally addressed contingent confinement again in *United States v. Palmer* in 2004.[104] Palmer's sentence included a $30,000 fine and twelve months of contingent confinement if he failed to pay.[105] Within the required timeframe — which included a 30-day extension — Palmer made payments of $5,000 and $17,175, leaving $7,825 unpaid — approximately 26 percent of the adjudged fine.[106] As a result, a fine enforcement hearing was held, at the conclusion of which Palmer was found not to be indigent and to have attempted to hide assets to avoid paying what he owed.[107] Accordingly, he was given two additional weeks to pay, and it was recommended that "if the balance was not paid by that time[,] then he should serve an additional 95 days of confinement" — approximately 26 percent of the contingent confinement adjudged.[108] Palmer then failed to pay within the new timeframe and "the convening authority remitted the unpaid $7,825 balance of the fine and executed an additional 95 days of confinement in lieu of the fine."[109] Palmer, however, made a partial payment of $3,000 one day later.[110] The convening authority rejected the money, returning $2,342.34, which was the payment minus "other debts … owed the United States."[111]

Before the CAAF, Palmer challenged the convening authority's rejection of his payment, the finding that he was not indigent, the length of executed contingent confinement, and the fact that he was not afforded alternate payment options prior to imprisonment.[112] The court ruled against

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[103] *Id*. at 93.

[104] United States v. Palmer, 59 M.J. 362 (C.A.A.F. 2004).

[105] *Id*. at 363.

[106] *Id*.

[107] *Id*.

[108] *Id*. at 364.

[109] *Id*.

[110] *Id*.

[111] *Id*.

[112] *Id*. at 365.

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him on each contention. Pertinently, affixed to a quotation of the language of Rule 1003(b)(3) is a footnote stating the following:

> The unpaid portion of Palmer's fine was remitted pursuant to Department of the Air Force Instruction 51-201, Administration of Justice, §§ 9.9.2, 9.9.5.11 (Nov. 26, 2003) [(AFI 51-201)], both of which indicate that the additional confinement is a 'substitute' for the fine. This opinion does not address whether the convening authority may execute contingent confinement without remitting any unpaid portion of an approved fine or providing for remission of the unpaid portion of a fine upon service of a contingent period of confinement.[113]

The court noted the tension between the convening authority's actions and the language of Rule 1003(b)(3) and AFI 51-201, which posit that contingent confinement is a sanction for failing to pay the full amount of a fine and is to be enacted as a whole, displacing a fine as a whole. That is, as noted above, the language of the Rule, and the Instruction, does not seem to allow for the abatement of conditional imprisonment due to partial payment and any financial obligation is only extinguished through service of the entire contingent confinement period adjudged.[114] In this case, such an interpretation would require the conclusion that Palmer's partial payment did not reduce his contingent confinement liability and that service of only a portion of the conditional incarceration originally sentenced did not discharge his fine. However, the CAAF expressly avoided this issue.

Finally, the most recent CAAF case involving contingent confinement was *United States v. Phillips*, decided in 2007.[115] In relevant part, Phillips was sentenced to a fine of $400,000 and "if the fine was not paid, [he] would be required to serve an additional five years of confinement."[116] Yet the convening authority disapproved $100,000 "and suspended for a period of twenty-four months execution of that portion of the sentence adjudging a fine in excess of $200,000."[117] Thus, $100,000 of the adjudged fine remained due. When Phillips only managed to pay $790, a fine enforcement hearing

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[113] *Id*. at 364 n. 4 (alteration in original).

[114] *See supra* notes 62–75, 90–94 and accompanying text.

[115] United States v. Philips, 64 M.J. 410 (C.A.A.F. 2007).

[116] *Id*. at 411.

[117] *Id*.

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was initiated by his commanding officer.[118] Phillips was found not to be indigent and to have "failed to make bona fide efforts to pay the fine, and [to have] engaged in asset-shifting to avoid payment."[119] In addition, a payment plan proposed by Phillips was deemed inadequate "to meet the Government's interest in carrying out the adjudged sentence."[120] Based on these findings, the commanding officer ordered the execution of the five years of contingent confinement.[121]

Among other contentions, Phillips challenged the lack of consideration given to his alternative payment plan.[122] The court, however, concluded that the commanding officer would only have been compelled to consider it if Phillips was found to be indigent.[123] Since he was not, alternative punishments did not have to be contemplated.

The cases above illustrate a skeletal body of precedent when it comes to contingent confinement and the military's highest court. Of most relevance to the argument advanced in this article is the court's interpretation of the relevant rules of the RCM to require that an adjudged fine is discharged upon the imposition of attendant contingent confinement. Also of note is the court's express avoidance of the issues of whether partial payments made prior to the execution of contingent confinement reduce the period of imprisonment and whether service of a term of contingent confinement less than that adjudged discharges an associated fine.

B. The Service Branch Appellate Courts[124]

The Navy-Marine Corps and Army service appellate courts have offered clearer interpretations of military fine enforcement through contingent confinement than the CAAF. As noted above, the NMCMR, in what seems the only pertinent Navy-Marine Corps appellate opinion, determined, though

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[118] *Id*. at 413.

[119] *Id*.

[120] *Id*.

[121] *Id*.

[122] *Id*. at 411.

[123] *Id*. at 415.

[124] The United States Coast Guard Court of Criminal Appeals has yet to meaningfully interpret R.C.M. 1003(b)(3) or R.C.M. 1113(e)(3) with respect to the topics covered by this article.

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expressly in dicta,[125] that "the fine of an accused confined for contumacious conduct is not discharged regardless of how much confinement he serves; nor is an indigent accused's fine discharged if the fine enforcement provision is not transformed into punishment."[126] That is, the imposition of contingent confinement upon a failure to pay an adjudged fine only automatically discharges the fine if the individual in question is found to be indigent, and even then only if the sentence expressly puts forth that the imposition of confinement functions in such a manner.

For its part, the Army Court of Military Review (ACMR) — the precursor to the Army Court of Criminal Appeals (ACCA) — reached a different conclusion. In what appears to be the only Army appellate court opinion addressing the fate of adjudged fines following the imposition of attendant contingent confinement, the ACMR held that, under the relevant provisions of the RCM, "[c]onfinement imposed in lieu of a fine is not punishment but is a tool to enforce collection of the fine."[127] Nevertheless, the court determined that the fine "is transformed into punishment when the fine is not paid."[128]

The Air Force appellate court has approached the issue less directly, but appears to fall on the same side as the Army. In *United States v. Arnold*, the Air Force Court of Military Review (AFCMR) — the precursor to the Air Force Court of Criminal Appeals (AFCCA) — addressed a sentence that included "a fine of $1,000.00[] [and] one year and one day confinement if the fine is not paid."[129] The opinion did not mention whether this ambiguous phrasing entailed the automatic replacing of the fine with confinement in the event of non-payment. However, roughly three years later, the AFCMR cited *Arnold* in noting the following: "We previously interpreted [Rule] 1003(b)(3) to permit confinement *in lieu of paying a fine* only when such confinement would be additional to other confinement originally adjudged."[130] Then, in

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[125] *See supra* note 10 and accompanying text. *But see supra* note 11 and accompanying text.

[126] United States v. Rascoe, 31 M.J. 544, 552 n. 6 (N.M.C.M.R. 1990).

[127] United States v. Blizzard, 34 M.J. 763, 764 (A. Ct. Mil. Rev. 1992).

[128] *Id*. at 764–65. Curiously, the ACMR cites *Rascoe* in making this assertion.

[129] United States v. Arnold, 27 M.J. 857, 857 (A.F. Ct. Mil. Rev. 1989).

[130] United States v. Haley, 1992 WL 40719, at *1 (A.F. Ct. Mil. Rev. Feb. 19, 1992) (emphasis added). The Air Force appellate court would go on to reverse itself with regard to requiring contingent confinement to accompany other adjudged confinement by holding that R.C.M. 1003(b)(3) does indeed "permit[] a court-martial sentence to include confinement designed to enforce collection of a fine without also requiring punitive confinement." United States v. Ferris, 72 M.J. 817, 822 (A.F. Ct. Crim. App. 2013).

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2005, the court — now as the AFCCA — again interpreted the imposition of military contingent confinement as discharging the fine to which it is attached: "service members may satisfy a fine through the use of savings, selling an asset, obtaining a loan, *or serving contingent confinement*."[131] Finally, in 2017, the AFCCA interpreted Rule 1003(b)(3) and Rule 1113(e)(3) as allowing for the *conversion* of a fine into confinement by a convening authority through the execution of a contingent confinement sentence provision, provided constitutional safeguards against the wanton imprisonment of indigents are observed.[132] These passages do not furnish clear interpretations of the RCM and emanate from unpublished opinions, but they seem to show the Air Force appellate court considering punitive fines discharged upon the imposition of contingent confinement.

V. Realizing Just and Effective Military Contingent Confinement

Building on suspect interpretations of Rule 1003(b)(3) and Rule 1113(e)(3), Murphy offers problematic recommendations for the rules' modification and the use of contingent confinement at sentencing. Moreover, these recommendations are products of a misunderstanding of the nature of the financial obligation that an adjudged fine creates, one shared with the NMCMR. Here, these shortcomings are outlined and recommendations for the proper use of military contingent confinement at sentencing are provided.

A. False Starts and Misunderstandings

After presenting his interpretations of the RCM's contingent confinement provisions, Murphy offers recommendations for their modification. In line with his and the NMCMR's understandings, Murphy desires to make it explicit within Rule 1003(b)(3) that

> [c]onfinement under this provision is not a punishment for the crime committed, but an enforcement provision authorized upon the convening authority's finding that the accused's failure to pay was willful and not due solely to the accused's indigence. In no way shall this confinement discharge the

[131] United States v. Ladwig, 2005 WL 486353, at *2 (A.F. Ct. Crim. App. Feb. 8, 2005) (emphasis added).

[132] United States v. Hacker, 2017 CCA LEXIS 285, at *8–10 (A.F. Ct. Crim. App. Apr. 26, 2017).

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> accused of his liability to the United States under the fine imposed.[133]

Murphy goes on to reiterate this approach in proposed language for a revised Rule 1113(e)(3).[134] However, he spares those unable to pay their fines as a result of indigence. For these individuals, contingent confinement "shall become a substitute punishment for the adjudged fine …. Upon serving [such] confinement …, the fine will be discharged."[135] Yet for those whose nonpayment is determined to be "willful or recalcitrant"—i.e., those who are determined to have the assets to pay but do not — "confinement serves only as a tool to enforce payment of the fine and the accused shall be confined until such time as the fine is paid, not to exceed the length of time announced as part of the fine."[136] Thus, under Murphy's proposed regime, rather than indigent individuals facing harsher penalties for being poor, which the Supreme Court explicitly found unconstitutional,[137] wealthier persons, based on their affluence and failure to pay, are subjected to two sanctions, each severe enough in its own right to sufficiently punish them for the crime(s) committed.

Murphy's modified rules are based on a misunderstanding of how military contingent confinement works to enforce fine collection. As noted above, it does not do so by over-punishing those who fail to pay, but rather by threatening to replace financial penalties with deprivations of liberty, which are more severe and often entail additional, attendant fiscal sanctions.[138]

Murphy's proposals are also based on a misunderstanding of the legal obligation that an adjudged, punitive fine places on a convicted individual, one also evinced by the NMCMR in *Rascoe*. Both Murphy and the NMCMR put

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[133] Murphy, *supra* note 1, at app. A.

[134] *Id*. at app. B. It must be noted, however, that Murphy's recommendations for the modification of former Rule 1113(e)(3) are predominantly sensible. This is because the RCM does not contain procedures for transforming unpaid fines into confinement. *See* Larry Cuculic, *Contingent Confinement and the Accused's Counter-Offer*, The Army Law., May 1992, at 29 ("Although [Rule 1113(e)(3)] attempts to ensure constitutional protections to an accused, it fails to establish specific procedures that the government should use to convert an unpaid fine into confinement."). Murphy's proposition presents clear guidelines for how a fine enforcement hearing should proceed and hearing officers and convening authorities should execute their authority. Murphy, *supra* note 1, at app. B.

[135] Murphy, *supra* note 1, at app. B.

[136] *Id*.

[137] *See supra* notes 38–52 and accompanying text.

[138] *See supra* notes 62–75 and accompanying text.

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forth that absent the ability to impose contingent confinement, the government lacks any means of effectively enforcing the obligation to pay a fine.[139] For his part, Murphy states that,

> [a]s powerful a punishment as it may be, a fine is only as effective as the government's ability to enforce it. While forfeitures are enforceable through the government's withholding of pay, satisfaction of a punitive fine requires the accused to affirmatively pay money to the government. Absent some enforcement measures, the accused's obligation to pay a fine is subject only to the accused's own "moral persuasion."[140]

The NMCMR, in turn, offers the following: "Unless the court-martial includes such a fine enforcement provision in its sentence, no tool is provided the Government to enforce its collection, and in effect, the fine is enforceable only by moral suasion."[141] The NMCMR's mistake is particularly acute because elsewhere in *Rascoe* it acknowledges that "adjudged fines are debts owed the United States always … subject to collection,"[142] a situation that allows the government considerable latitude in recovery.

"[A] fine is a debt to the United States and does not terminate when accused is discharged."[143] Moreover,

> [a] fine creates a debt owed to the government for the entire amount of money specified in the sentence. The accused is immediately liable to the United States after the fine is ordered executed. A fine is not contingent on the accused's receipt of pay, and a fine may be collected from sources other than the accused's pay.[144]

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[139] United States v. Rascoe, 31 M.J. 544, 552 (N.M.C.M.R. 1990); Murphy, *supra* note 1, at 7.

[140] Murphy, *supra* note 1, at 7 (quoting *Rascoe*, 31 M.J. at 552). Murphy actually misquotes the NMCMR, which writes, "moral *suasion*." *Rascoe*, 31 M.J. at 552 (emphasis added).

[141] *Id*. at 552.

[142] *Id*. at 558 (citing Department of Defense rules and federal law).

[143] 57 C.J.S. *Military Justice* § 575 (2017).

[144] Major Michael K. Millard, *A Defense Counsel's Guide to Fines*, Army Law., June 1987, at 34.

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The fact that an adjudged fine is a debt to the United States means that, inconsistent with the statements of Murphy and the NMCMR,

> [i]f voluntary payment is not forthcoming, there are several ways to collect the fine involuntarily. Fines can be collected from any pay that may accrue to an enlisted accused (similar to collection of forfeitures), and from final settlement of pay at the time of an enlisted accused's discharge.[145]

Fines may also be collected from officer pay, service member retirement pay, and other federal payments — e.g., income tax refunds and pay due federal civilian employees.[146] In addition, those who fail to pay "may expect to encounter the full range of debt collection actions" authorized by federal law, including: referral of debt to a private debt collector, negative credit score impacts, wage garnishment, and property seizure.[147] It is therefore apparent that, in the absence of contingent confinement, "moral suasion" is far from the only impetus for a convicted individual to pay what he owes and the government has a litany of means to secure remuneration if so inclined.

B. Recommendations for the Use of Contingent Confinement

The true nature of punitive fines helps illuminate the proper use of contingent confinement provisions at sentencing. When the government's primary interest is the recoupment of that which was unlawfully taken, contingent confinement is not an effective means of inducing payment. This is because, as asserted above, its execution extinguishes an individual's punitive financial obligation.[148] Accordingly, not only does the government miss out on any payment, it spends additional money confining the individual when an adjudged fine amount could have been collected through a number of different means. In these situations, fines should be imposed sans contingent confinement provisions and, should an individual fail to pay, recovered through the expansive powers of the government.

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[145] *Id*. at 37.

[146] *Id*.

[147] *Id*. *See* 31 U.S.C. § 3711 (2018) (detailing the extensive debt collection methods permitted the Government).

[148] *See supra* notes 90–94 and accompanying text.

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Alternatively, if the government is only marginally interested in obtaining financial satisfaction from an individual and its primary desire is to exact quick, visible punishment for the purposes of retribution or deterrence, a contingent confinement provision can make sense and provide the government flexibility. Such a provision mandates payment by a convicted individual and coerces such action with the inducement of imprisonment. The individual can be placed behind bars if the government determines that its interests would be better served by an immediate punishment rather than the more prolonged process of collecting funds through the application of federal authority. The government may, however, ultimately conclude that a monetary result is more desirable and choose not to execute contingent confinement.

VI. Conclusion

This article has argued that contingent confinement provisions in sentences serve to replace monetary penalties with incarceration should an individual fail to pay an adjudged fine and contingent confinement be executed. In conducting this argument, this article has recounted the codified history of military contingent confinement, throughout which such imprisonment has been articulated as replacing associated fines when imposed[149]; analyzed Rule 1003(b)(3), the proper interpretation of which entails the replacement of a financial sanction with attendant contingent confinement when the latter is executed[150]; and explained the nature of punitive fines as debts to the United States and how contingent confinement should be used to further the government's penological interests.[151] Military appellate court precedent on this issue has also been detailed so the concordance of this case law with the interpretations of this article can be discerned and, hopefully, any discordance can be addressed.[152]

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[149] *See supra* notes 20–56, 76–89 and accompanying text.

[150] *See supra* notes 62–75, 90–94 and accompanying text.

[151] *See supra* notes 133–47 and accompanying text.

[152] *See supra* notes 95–132 and accompanying text.

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Throughout the aforementioned presentations, the problematic understandings of military contingent confinement evinced by Murphy and the NMCMR have been confronted. Their interpretation that the execution and service of such confinement does not discharge an associated financial obligation is inaccurate, would result in the double-punishing of service members for crimes, and risks eroding faith in the military justice system. Accordingly, it is important that Rule 1003(b)(3) is correctly understood: contingent confinement *replaces* the punitive fine to which it is attached *when executed*. Rule 1003(b)(3) should be amended in the manner recommended above to make this transformation explicit and ensure the correct and fair implementation of military justice.

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