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MAKING THE ACCUSED PAY FOR HIS CRIME: A PROPOSAL TO ADD RESTITUTION
AS AN AUTHORIZED PUNISHMENT UNDER RULE FOR COURTS-MARTIAL 1003(B)Lieutenant Colonel David M. Jones, USMC^{a1}

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*Then it shall be, because he hath sinned, and is guilty, that he shall restore that which he took violently away, or the thing which he hath deceitfully gotten*¹

I. Introduction

Two weeks ago, Corporal (Cpl) Johnson's \$2,000 stereo system was stolen from his barracks room. A fellow Marine, who also lived in the barracks, overheard Lance Corporal (LCpl) Rob N. Pawn bragging about selling the stereo to a pawnshop out in town for \$1,000, which he reported to the Criminal Investigation Division (CID). CID apprehended LCpl Pawn for the theft. Charges are preferred and the case proceeds to trial. Despite a confession to CID and admissions made to fellow Marines, LCpl Pawn pleads not guilty to the larceny charge and elects a members trial. Predictably, the members find him guilty of larceny.

Both trial and defense counsel then put on their sentencing case. The government's case includes the testimony of Cpl Johnson who testifies that *2 CID has not found his stereo and he has not been reimbursed by the accused. After hearing the sentencing instructions, the panel deliberates on an appropriate sentence for LCpl Pawn's exploits. After an hour, the members send word to the judge that they have a few questions. All parties reconvene in court and the judge reads the members' questions: "We don't see any mention of restitution on the sentencing worksheet. May we order LCpl Pawn to pay restitution in the amount of \$2,000 to Cpl Johnson? May we add a provision sentencing LCpl Pawn to three extra months of confinement if he doesn't make restitution?"

Unfortunately, the above hypothetical is all too familiar in military courts-martial. The judge must inform the members that restitution is not an authorized punishment under the Rules for Courts-Martial (RCM),² and is, therefore, not a sentencing option. A fine is an authorized punishment if adjudged as part of the sentence.³ The adjudged fine, however, is paid to the U.S. Treasury and not to the victim. Under the military's present punishment system, there is no judicial mechanism for victim restitution.

Victim restitution has been a part of federal law in district courts for over 20 years⁴ and mandatory victim restitution has been the federal law in sentencing cases since 1996.⁵ It is time that victim restitution be an option in military sentencing.⁶ This is especially true now that the jurisdictional limits on confinement and financial penalties at special courts-martial have doubled.⁷

*3 This change not only gives the government greater negotiating strength, but it also allows the government more room to maneuver when deciding the appropriate forum for a case.⁸ In other words, the convening authority has more negotiating power at a special court-martial now than under the previous system. Most importantly, the increase in special court-martial jurisdictional limits doubles the amount of money available for restitution to crime victims.⁹ Under the proposed restitution

scheme explained in Part V.A.2, court ordered restitution would be unlimited for general courts-martial, but limited for special courts-martial.¹⁰

Is there a way, under the Uniform Code of Military Justice (UCMJ), to make victim restitution a viable sentencing option?¹¹ This article proposes that although there may be enforcement issues in collecting the restitution,¹² the military should adopt restitution as a sentencing option. First, the article reviews the inadequacy of the present military system in compensating victims of crimes. Next, it provides an historical overview of efforts, both in and out *4 of the military, to provide for victim restitution. After providing necessary background, the article examines the federal Mandatory Victim's Restitution Act of 1996 (MVRA),¹³ which mandates court ordered restitution for victims of crimes.¹⁴ With that baseline, the article then proposes amendments to the existing military justice system to incorporate restitution as an authorized punishment. Finally, the article offers possible solutions to the most difficult problem of judicially mandated restitution--enforcement.

II. Attempting To Get Restitution In The Present Military System

At present, restitution is not an authorized punishment under RCM 1003(b) in courts-martial. There is a chance the victim may get restitution if the case is a guilty plea, the trial counsel is creative in negotiating the pre-trial agreement,¹⁵ and the accused does not receive less punishment from the judge than what was in the pre-trial agreement.¹⁶ If the case is contested, however, the victim has no chance of getting court ordered restitution. Judges have attempted to fashion a judicial remedy for this gap in sentencing by recommending to the convening authority that he grant clemency if restitution is paid by a certain date.¹⁷

It is little wonder that crime victims try to get restitution from accused servicemembers by working outside of military judicial channels, given the lack of restitution in the present system. For example, if the victim is a family member, the victim may seek transitional compensation.¹⁸ A victim may also seek assistance from the chain of command by filing an Article 139, UCMJ (Article 139) complaint.¹⁹ Alternatively, or in addition to the Article 139 *5 complaint, a victim may seek redress, through the convening authority, after court proceedings have terminated, by asking the convening authority to give the accused a break on his confinement if restitution is paid.²⁰ Lastly, some victims go through the arduous process of seeking redress through local small-claims courts or civil courts because they feel they have no other recourse.²¹

A. Judicial Attempts at Restitution

1. Bargained-for Restitution Pursuant to Pre-Trial Agreements

The best way for a victim to get restitution under the present system is to make restitution a term of the pre-trial agreement between the convening authority and the accused. This requires, of course, that the accused plead guilty pursuant to a pre-trial agreement. Rule for Courts-Martial 705(c)(2)(C) succinctly states that “[a] promise to provide restitution” is an authorized provision of a pre-trial agreement and not contrary to public policy.²² Getting restitution up front, before the defendant goes to trial, is best because the victim is ensured of actually receiving the compensation.²³ The government can still hold the accused accountable however, by enforcing additional confinement if restitution is not paid in situations where the pre-trial agreement does not require complete restitution until after trial.²⁴ Military courts have consistently enforced restitution provisions in pre-trial agreements voluntarily *6 entered into by the accused, and holding the accused accountable.²⁵ Regardless of whether or not restitution is added as an authorized punishment, the wise trial counsel will always ensure that the interests of victims are protected through restitution provisions in the pre-trial agreement.²⁶

Problems remain, however, even with a properly drafted pre-trial agreement that includes a restitution provision. What can the government do if the accused decides not to pay restitution after his trial is over? The only legal option is to order a vacation

hearing²⁷ to decide if suspended confinement is appropriate. But unless the case is particularly noteworthy, a convening authority may decide that he has little interest in resurrecting an old case to conduct this time-consuming hearing. This may be especially true when the accused has complied for some time with restitution and then stopped, just short of the required restitution amount.²⁸

If the suspension period in the pre-trial agreement passes before all of the restitution has been made to the victim, this may result in another unforeseen situation.²⁹ There is no enforcement mechanism in place to enforce the payment of restitution, if this occurs, even though the process started with a pre-trial agreement.³⁰ Additionally, the accused may be out of confinement and on appellate leave, pending separation from military service, before the victim has been made whole.³¹ One would hope that the government has a better grasp of its cases than these situations describe, but experience may *7 prove otherwise.³² The bottom line is that after the court-martial, the commanding officer and trial counsel may lose interest in the accused's case, and subsequently, the victim's restitution.

2. A Judge's Recommendation to the Convening Authority

A judge may make a recommendation to the convening authority to disapprove or suspend some portion of the punishment awarded if the accused makes restitution to the victim within a certain period.³³ This situation will most likely arise when either the accused has plead not guilty and then been found guilty by the judge, or when the accused has plead guilty but the first portion of the pre-trial agreement is silent on the subject of victim restitution. In either situation, the judge is not empowered to award restitution as an authorized punishment. The judge must work the restitution clause of his punishment into a recommendation to the convening authority. For example, from the hypothetical above, the judge might state:

LCpl Rob N. Pawn, it is my duty to sentence you as follows: To be reduced to the grade of E-1, to forfeit \$961.40 per month for five months, and to be confined for a period of one hundred and fifty (150) days. However, I am recommending to the convening authority that he suspend sixty (60) days of that confinement if you make restitution in the amount of \$2,000 to Cpl Johnson within sixty (60) days of today's proceeding.

A sentencing authority's recommendation (whether from a judge or a panel) in support of restitution is nice, but it has no binding legal authority; a recommendation is simply that, a suggestion. It is not an enforceable part of the sentence.

*8 The weakness in the above approach is obvious--some victims will not receive restitution from the accused. A collateral consequence of this approach is that if the accused does pay the restitution, he is now in a position to bargain for less confinement time from the convening authority based on the judge's recommendation.³⁴ Of course, the convening authority may always approve the sentence "as adjudged." The military should expect a system that makes victims whole, regardless of other punishments meted out. The military should demand, and victims should expect, a restitution system that is not contingent on judges' recommendations and post-trial maneuverings by the accused.

Allowing restitution as an authorized punishment may even benefit the accused in certain situations. For example, if an accused had not made restitution before his court-martial, and one of the punishments the judge awards is restitution, that punishment might be given in lieu of forfeitures or extra confinement that the judge may otherwise have awarded.³⁵

B. Nonjudicial and Non-Military Attempts at Restitution

Victims also use other judicial and nonjudicial means to seek restitution outside the present system. These means include: informally seeking the commander's help, filing an [Article 139](#) complaint,³⁶ applying for transitional compensation³⁷ and resorting to the civilian legal system for relief.³⁸

***9 1. Informally Seeking the Commander's Help**

Victims are left seeking assistance from the commander, or convening authority, when there is not a properly drafted pre-trial agreement and no court ordered restitution.³⁹ The victim goes to the commanding officer in this situation, hoping the commander can somehow force or convince the accused to pay restitution. This puts the convening authority in the uncomfortable position of considering leniency for an accused that should have been required to make restitution anyway. If the commander decides not to offer the accused any clemency in exchange for restitution, the victim is left unprotected by the sovereign. There really is no way to force the accused to pay restitution, even if the commanding officer wants to help the victim get restitution. The only option the commander has is to appoint an investigating officer to conduct an investigation under [Article 139, UCMJ](#).⁴⁰

Some might argue that this process gives the accused too many opportunities to negotiate with the convening authority regarding restitution because he can do so pre-trial, and post-trial, when submitting clemency matters.⁴¹ This argument is without merit, however, as this is exactly what happens with other types of punishment in any court proceeding. Regardless, the government should not have to negotiate for what the federal district courts already mandate-- victim restitution. Neither the government nor the victim should have to worry about whether or not restitution will be ordered post-trial. The government's focus should be on enforcement of court ordered restitution, not its obtainment. Under the current system, criminals have more protection than they deserve and victims less.

2. Filing an [Article 139, UCMJ](#), Complaint

Filing an [Article 139, UCMJ](#), ([Article 139](#)) complaint appears, at first glance, to be another workable solution to the victim restitution problem. [Article 139](#) provides, in pertinent part:

(a) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that his property has been wrongfully taken by members of the armed forces, he may ... convene a board to investigate the complaint. The board shall *10 consist of from one to three commissioned officers The assessment of damages made by the board is subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The order of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for the payment by him to the injured parties of the damages as assessed and approved.⁴²

Both this section and section (b)⁴³ of [Article 139](#) appear to contemplate a claim by civilians against the military wrongdoer. The Act, however, is not limited to civilians; military personnel may also make a claim to the wrongdoer's commanding officer for the wrongful destruction or taking of property. The basis for an [Article 139](#) complaint may occur anywhere. One common situation is when a foreign national makes a claim against a servicemember for damages done while the service member is in the host country.⁴⁴

An [Article 139](#) complaint is an appropriate mechanism for victim restitution if it is properly used. It provides a claim process for victims of willful property damage or theft of property.⁴⁵ It also has a fairly efficient investigative process of appointing

a single investigating officer (IO) within four working days of receipt of the claim.⁴⁶ The finding of liability by the IO is based on a preponderance of the evidence⁴⁷ and there are procedural safeguards for the accused servicemember.⁴⁸ Most significantly, monies are generally available to pay the claimant because the servicemember is still being fully paid throughout the investigative process (unlike an accused who is *11 confined post-trial and may be receiving only 1/3 of his base pay).⁴⁹ The commanding officer orders the finance office to take the money out of the servicemember's paychecks and directly pay the claimant, if he determines that the claim is just.⁵⁰ Article 139 complaints may also be filed post-trial.

But there are pitfalls to using Article 139 complaints for victim restitution. First, Article 139 contemplates only willful property damage or theft of tangible property, nothing more. There are several categories of losses specifically excluded by the Article: negligent acts; personal injury, death and theft of services; claims involving contractual disputes; and claims for consequential damages.⁵¹ Second, Article 139 mandates that the claim be submitted within ninety days of the incident that gave rise to it.⁵² Many crime victims may miss this window of opportunity. Third, many servicemember victims may simply not file an Article 139 complaint because of their ignorance of its existence.⁵³

Fourth, pursuant to Article 58b, UCMJ,⁵⁴ fourteen days after the accused is sent to confinement, he receives no money if tried by a general court-martial. If tried by a special court-martial, the accused receives only one-third his base pay and allowances. This may make it difficult for the victim to get restitution, as Article 139 contemplates being in accord with these regulations.⁵⁵ Fifth, Article 139 has monetary limits that are less than what can be awarded under the restitution proposal. The approval limits are \$5,000 and \$10,000 for a special court-martial convening authority and general court-martial authority respectively.⁵⁶ Under the restitution provisions outlined later in the text, there would be no monetary limit for restitution at general courts-martial and a limit of two-thirds of the accused's base pay times twelve months.⁵⁷ Sixth, there is no remedy for the claimant if the wrongdoer is in a "no pay" status, because Article 139 claim money is taken from the paycheck *12 of the wrongdoer as it is earned. This "no-pay" status may arise if the wrongdoer is on excess leave, appellate leave, or in an unauthorized absence status.

Seventh, although Article 139 does not require a conviction for the convening authority to order the payment of money to the claimant, it does mandate that the convening authority appoint an investigating officer to investigate the claim.⁵⁸ This can be an administrative burden, especially in high operation tempo organizations. A command does not need this added burden, especially if it contemplates the responsibility of taking the accused to a court-martial. Eighth, a wise commander may not favor using Article 139 complaints for servicemember on servicemember type crimes. A commander may be reluctant to get between conflicts with servicemembers regarding money. Additionally, commanders may not want to open up Article 139 complaints for all restitution purposes because they may feel it makes them too involved in the judicial process. For example, if the convening authority becomes too intimately involved in the Article 139 complaint process, he may unwittingly become too personally involved with the case or the accused, resulting in a potential "accuser" problem.⁵⁹

Lastly, and perhaps most significant, restitution as an authorized punishment may contain the powerful enforcement mechanism of contingent confinement if the restitution is not paid.⁶⁰ This court ordered restitution, as a binding judgment, might follow the accused, even in his civilian life, until the amount is repaid.⁶¹ The Article 139 complaint process does not incorporate either of these two enforcement concepts.

3. Applying for Transitional Assistance

There is a select group of people who may receive money if they are victims of domestic abuse. This much-needed program is commonly called the "Transitional Compensation Act" (TCA).⁶² It is designed to offer financial assistance (particularly to civilian spouses) if their servicemember spouse is separated from the military, either punitively or administratively, due to *13

domestic abuse.⁶³ This program is very limited and applies to only a few select individuals in certain situations. For example, it does not apply to nonfamilial victims and it does not cover non-domestic abuse crimes, such as larceny or property damage.⁶⁴

Most importantly, the program is not a restitution⁶⁵ scheme at all; it is merely government interim financial support for victims of domestic abuse. The payment of these monies is not in any way a punishment for the accused since he does not have to pay any money out of his pocket. The program does not compensate victims for monies lost, nor is it tied to economic loss. Under this program, if the accused abuses his family, the government pays the abused victim, with no reimbursement ever from the accused. The addition of this program to the prosecutor's arsenal undoubtedly makes it easier for him to convince reluctant spouses to testify against their abusers. It does nothing, however, to alleviate the economic impact felt by the majority of victims harmed by military members' criminal behavior.

4. Resorting to the Civilian Legal System

If compensation is unavailable through military channels, judicial or otherwise, the victim's last resort is to turn outside the military for help. Filing a suit in the local small-claims court is a common method of doing this. Although this is a relatively inexpensive way to seek compensation from the accused, small claims suits have limited application and have their own enforcement problems.

*14 First, the victim must pay to sue, is inconvenienced, and must comply with the procedural requirements of the local court.⁶⁶ Second, the small-claims court monetary limit is usually quite small.⁶⁷ Third, the small-claims court, by definition, is not set up for litigation of complicated claims. It makes much more sense to have the issue of restitution adjudicated at the sentencing phase of an accused's court-martial, where the sentencing authority is already intimately familiar with the details of the case.⁶⁸ Finally, it may prove difficult, if not impossible, to enforce a small-claims court judgment against a servicemember who constantly moves from state to state (or overseas) and whose assets may be beyond the reach of the court.

III. Optional Restitution In Federal District Courts And The Military's Victim and Witness Assistance Program

A. The Victim and Witness Protection Act of 1982

The Victim and Witness Protection Act of 1982 (VWPA)⁶⁹ was the first comprehensive body of law that Congress passed regarding victim and witness protection.⁷⁰ The focus of the legislation, as its name implies, was protection of victims and witnesses throughout the criminal justice process. The VWPA was momentous in its breadth of applicability⁷¹ and in the protection it offered victims of crimes.⁷² The Congress's declared purpose in passing the VWPA was as follows:

- (1) [T]o enhance and protect the necessary role of crime victims and witnesses in the criminal justice process;
- (2) to *15 ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant; and
- (3) to provide a model for legislation for State and local governments.⁷³

Perhaps most importantly, the VWPA included the right of victim restitution.⁷⁴ The Act authorized, but did not require, district court judges to order a criminal to pay restitution to the victim of his crime. This was a momentous breakthrough; for the first time in American federal jurisprudence, a judge was allowed to order a defendant to economically compensate his victim for the pecuniary losses he caused. The victim, as well as society, could now get meaningful retribution and be compensated at the same time.

Since 1982, the main thrust of the VWPA has remained relatively unchanged, despite several minor amendments.⁷⁵ The two main provisions that remained unchanged were: section 3663, the order of restitution; and section 3664, the procedure for issuance and enforcement of the order of restitution.⁷⁶ These two sections of the VWPA were the backbone of meaningful restitution under the Act. They also proved essential for two significant pieces of legislation that led to making mandatory victim restitution into law: the Crime Victim's Bill of Rights⁷⁷ and the Mandatory Victim's Restitution Act of 1996.⁷⁸

B. The Crime Victims' Bill of Rights

In 1990, approximately eight years after the passage of the VWPA, Congress decided to further delineate victim's rights. This led to the passage of the Crime Victim's Bill of Rights.⁷⁹ In this Bill of Rights, Congress unambiguously stated that those persons engaged in criminal detection, investigation, or prosecution of crime in the federal workforce should “make *16 their best efforts” to accord victims of crimes certain rights.⁸⁰ The Act noted seven essential rights, restitution being number six.⁸¹

The VWPA had given federal judges the *option* of awarding restitution back in 1982. But with the Crime Victims' Bill of Rights, Congress now declared that victim restitution was a right to which each victim was entitled. The right to restitution now had greater meaning, even if federal workers only had to use their best efforts to accord [those] rights.⁸² Victims of crime could now argue that not only was restitution allowed in the federal system, it was a right with a corresponding entitlement (the actual act of complete restitution). It is little wonder that after this congressional statement, people began pushing even harder for constitutional amendments for crime victims' rights at both the federal and state level.⁸³

C. The Victim and Witness Assistance Program

In 1994, as a result of the passage of both the VWPA of 1982 and the Crime Victims' Bill of Rights of 1990, the Department of Defense instituted *17 the Victim and Witness Assistance Program (VWAP).⁸⁴ This program sought to implement, in the military judicial system, the rights afforded a victim under the Crime Victims' Bill of Rights. The VWAP lists the rights of victims almost verbatim from the Crime Victims' Bill of Rights, with one notable exception. The sixth right declared by Congress, the “right to restitution,”⁸⁵ was modified in both the Department of Defense Directive (DODD) and Instruction (DODI) as the right to “receive available restitution.”⁸⁶

But what is “available restitution” under the VWAP? Neither the DODD nor the DODI answer this important question. The only guidance given is that “[c]ourt-martial convening authorities and clemency and parole boards shall consider making restitution to the victim a condition of granting pretrial agreements, sentence reduction, clemency, and parole.”⁸⁷ This provision did nothing more than encourage what already existed--the use of pre-trial agreements and post-trial negotiation to achieve victim restitution. Unlike the federal system, which authorized restitution as part of a sentence in 1982,⁸⁸ the military, twenty-one years later, continues to hope that pre and post-trial negotiations will result in restitution to crime victims.

Despite its faults, the VWAP was a good place to start; it brought victim and witness rights out in the open and ensured trial participants considered them.⁸⁹ The VWAP requires that, throughout the trial process, each witness and victim be informed of his or her rights to respect, dignity and information.⁹⁰ This often includes being assigned a Victim/Witness Advocate from the Family Advocacy Department.⁹¹ Prosecutors are required to consider *18 victim impact in the cases that they try, and encouraged to make the victim feel vindicated instead of vilified or ignored.⁹² Information about the trial process and the accused's sentence and release date is now shared with victims and witnesses.⁹³

The VWAP was a great start, but the military should now do more. The system should give victims a chance to be made economically whole through judicially authorized restitution. The military justice system is unique and distinct for various reasons,⁹⁴ and we cannot hope to satisfy all of the critics who wish it to be identical to the civilian justice system.⁹⁵ However, having said that, certain civilian judicial processes are well suited for the military. Court ordered restitution is one process that, if adopted, will enhance the military justice system.

IV. Mandatory Restitution In Federal District Courts

The federal legal system had in effect both the VWPA and the Crime Victims' Bill of Rights from 1992 to 1996, which authorized, but did not mandate restitution to victims. All of that changed in 1996 with passage of the Mandatory Victims' Restitution Act (MVRA).⁹⁶

A. The MVRA

*19 The MVRA⁹⁷ is the landmark Congressional legislation that mandated *20 restitution for victims of certain crimes. What was originally authorized but not required, is now required.⁹⁸ Under the MVRA, ordering restitution is no longer merely an option under federal law. The MVRA is a sweeping piece of legislation that seeks to cover every possible scenario in which a victim of a crime may suffer economic loss. In contrast to military courts, which do not even provide restitution as an option, district courts are not only entitled to award restitution to victims of crimes, they must award it. The MVRA states, "the court shall order ... the defendant [to] make restitution to the victim of *21 the offense."⁹⁹ In addition, the Act allows for the punishment of restitution to be combined with "any other penalty authorized by law,"¹⁰⁰ which by necessary implication includes a fine.¹⁰¹ There are several other notable provisions that are essential to understanding the implication of restitution in the military.

First, the MVRA's definition of who is a "victim" is very broad--"a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered."¹⁰² Effective litigation of this provision could turn many people into victims. Additionally, the Act allows for restitution to persons who are not victims of the offense if the parties agree to this pursuant to a plea agreement.¹⁰³

Second, the Act does a very good job of laying out the requirements of what the restitution order should seek to remedy by outlining how restitution is to be accomplished. The Act divides offenses into three distinct categories and also provides a fourth catchall provision.¹⁰⁴ The three categories concern offenses which result in: damage to or loss of property; bodily injury; and death of the victim.¹⁰⁵ For the first category, restitution consists of either returning the property or compensating the victim for the loss of the property. The second category, bodily injury, has much broader restitution requirements. It entails the offender paying for: all medical and professional services and devices, physical and occupational therapy and rehabilitation, and reimbursement of the victim for all lost income due to the offense.¹⁰⁶ For an offense which falls into the third category, death of the victim, the Act limits restitution to funeral and related expenses.¹⁰⁷

The catchall provision (part (b)(4)) allows that in any case, victims may be reimbursed for "necessary childcare, transportation, and other expenses incurred during participation in the investigation or prosecution of the *22 offense or attendance at proceedings related to the offense."¹⁰⁸ While the rationale behind this provision is understandable (put the victim in the same financial situation he or she would have been in "but for" the offender's conduct), it might be too encompassing for the military's system. Military courts typically move directly from the adjudication phase of the court-martial to the sentencing phase, unlike the civilian sector, which has a substantial time delay between adjudication of guilt and sentencing proceedings. In the military,

provision (b)(4)¹⁰⁹ could lead to delays in the proceedings due to proof problems and lengthy hearings wherein the court tries to determine all lost income of the victim, no matter how insignificant that loss may be.

Third, the MVRA effectively lays out the parameters of when the Act will apply to district court proceedings. In essence, one must be the victim of a crime of violence or of an offense against one's property and suffer a physical injury or pecuniary loss.¹¹⁰ Perhaps just as significant, the MVRA declares itself inapplicable in two scenarios: if there are so many victims as to render restitution impracticable, or if, in seeking to calculate a victim's losses, it becomes too burdensome on the sentencing process.¹¹¹ The latter provision appears to be of particular benefit in weeding out what may seem to be frivolous expenses by the victim, which might otherwise seem viable under section (b)(4).

Fourth, subsection (f)(1)(A) of section 3664 of the MVRA (the enforcement mechanism of the Act) states that "the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant."¹¹² This immensely powerful section directly overruled the VWPA's previous direction that the district court,¹¹³ in deciding whether to order restitution, should consider "the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and other such factors."¹¹⁴

*23 Lastly, and perhaps most significantly, the MVRA provides for an enforcement mechanism to ensure compliance with the court's restitution order. Section (d) states, "[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664."¹¹⁵

B. Issuance and Enforcement of the Order of Restitution

A judicial order of restitution means little without an enforcement mechanism. Section 3664 of Title 18, sets up the procedures for the issuance of the restitution order and provides the enforcement devices to ensure that victims are compensated.¹¹⁶ Although it is not necessary to discuss all of the particulars of the process, it will be helpful to look at some of the basics of how the process works in district courts.

The probation officer provides the court with a thorough pre-sentence report before restitution is ordered.¹¹⁷ This report details all victim losses and the defendant's economic information. A copy of the report is provided to the defendant and the government. In addition to the pre-sentence report, the court may order any additional testimony or documentation it believes necessary to decide any issue and the amount of restitution to order. Disputes concerning amount are resolved by a preponderance of the evidence.¹¹⁸ The government bears the burden of proving victim losses and the defendant bears the burden of proving his financial situation and that of his dependents.¹¹⁹ Interestingly, this has no bearing on the mandated restitution provision or on the amount of restitution ordered. Instead, the court uses it only in determining an appropriate payment schedule. The payment may be in the form of a single lump sum or partial payments spanning years.¹²⁰ The payment of monies to victims is mandated regardless of the financial situation of the victim, whether the victim has insurance to cover the loss, or any other consideration. Therefore, there is little room for maneuvering in the statute. Once the court determines the amount of restitution a defendant must pay, the court fashions a payment plan of in-kind payments (returning or replacing the property), monetary restitution or, if the victim is amenable, even personal *24 services rendered. Then the court signs the restitution order. The restitution order may then be enforced by the government against the defendant, wherever he goes, to the same extent as a civil judgment. The Act goes so far as to allow the victim to request from the clerk of the court an abstract of judgment that has the force of law and can be used in the state as a judgment lien against the defendant's property. This judgment is enforceable in the state "in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that [s]tate."¹²¹ Finally, section 3664 provides that the restitution order, which accompanies the sentence, is a final judgment regardless of the fact that the sentence may be appealed, modified, corrected or adjusted.¹²²

Sections 3613 and 3614, of Title 18, help implement the MVRA by providing various remedies in the event of a defendant's nonpayment of restitution. These remedies include both civil penalties (such as putting a lien on the defendant's property)¹²³ and criminal penalties (such as re-sentencing the defendant to any sentence which might have originally been imposed).¹²⁴ The appellate courts have held that although indigency is a consideration, it is not a bar to restitution because the restitution can be structured over a significant number of years and the defendant's ability to pay is taken into consideration by the court.¹²⁵

It is plain to see that the enforcement provisions of the MVRA, section 3664 of Title 18, are powerful; they provide restitution to victims regardless of the defendant's or the victim's financial situation and do so with the force of a federal court judgment.¹²⁶ It might seem that Congress has given the federal criminal courts a power traditionally held by civil courts, the power to award a monetary remedy. This, however, is not the case. The federal criminal court has been given the power and mandate to place the victim in the situation the victim was in before the crime was committed. This power, however, is not without limits. The court cannot order consequential and punitive damages; damages routinely available in civil courts.

*25 C. Constitutionality of the MVRA

It is no surprise that the MVRA has been attacked on various constitutional fronts, given its expansive power. These attacks have included alleged violations of the Seventh and Eighth Amendments¹²⁷ as well as the Due Process Clause of the 5th Amendment.¹²⁸ None of these attacks, however, have been successful and the MVRA continues to be valid law.

The attacks alleging a violation of the Ex Post Facto Clause¹²⁹ of the Constitution¹³⁰ are of particular note. Congress, however, opened the door for ex post facto claims when it made the mandatory restitution measures under the MVRA effective for any conviction after enactment of the Act (24 April 1996).¹³¹ This brought up the unfortunate situation of people becoming financially liable for restitution retroactively. This could have easily been avoided by making the Act's restitution provisions applicable for any case in which the misconduct occurred after passage of the Act. This is the suggested method for the proposed restitution measures under RCM 1003(b), as will be shown later.¹³²

V. Optional Restitution In Military Courts

Optional, judicially ordered restitution can work in the military system. Before concerning ourselves with the important question of how it would be enforced, let us first discuss what changes the new system would require. The task of amending any section of the Manual for Courts-Martial is daunting. Adding only one small provision to allow for restitution as an *26 authorized punishment under RCM 1003(b) necessitates making changes to many other places in the Manual that reference this section or correspond with it. The following portion of the article suggests amendments to RCM 1003(b), 1107(d)(5), 1113(d)(3), as well as proposed military judge's Benchbook instructions and a pre-trial agreement sentencing limitation provision. There are other sections of the Manual for Courts-Martial that would need minor amending that this article does not discuss.¹³³

A. Amending RCM 1003(b)

1. RCM 1003(b)(3)

The natural starting point to begin modifying the existing system to allow for restitution as an authorized punishment is the fine provision of RCM 1003(b)(3). It states:

(3) *Fine.* Any court-martial may adjudge a fine in lieu of or in addition to forfeitures. Special and summary courts-martial may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. In order 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.¹³⁴

There are two important aspects to the fine provision. First, the provision allows a fine to be adjudged in addition to forfeitures, even at special courts-martial. The only limit is that the fine by itself, or in combination with adjudged forfeitures, cannot exceed the jurisdictional maximum allowed by that type of court-martial.¹³⁵ For instance, at a special court-martial, the fine, combined with the forfeitures cannot exceed the total of two-thirds pay per *27 month for twelve months.¹³⁶ Using our hypothetical character, LCpl Pawn could receive a fine and forfeitures at his special court-martial, but if his base pay were \$1,547.70,¹³⁷ the maximum amount of money he could lose would be \$1,032.00 per month times twelve months,¹³⁸ or \$12,384.00. This total amount can be in the form of a fine, forfeitures alone, or a combination of the two.¹³⁹

Second, the provision provides an enforcement mechanism. It states that an appropriate amount of confinement may be added if the fine is not paid. The amount of confinement, however, cannot exceed the jurisdictional limit of the court. At a general court-martial, LCpl Pawn could receive up to five years confinement for his larceny because he stole non-military property of a value in excess of \$500.¹⁴⁰ However, if his case is being adjudicated at a special court-martial, his maximum confinement exposure, including any fine enforcement mechanism, cannot exceed one year.¹⁴¹ If LCpl Pawn had stolen from the government, and was at a special court-martial, a possible punishment, including the fine enforcement provision might read as follows: reduction to E-1, confinement for six months, forfeitures of two-thirds his base pay per month for six months¹⁴² and a fine of \$2,000, with an additional three months confinement to be added to the sentence if the fine is not paid within three months from the date of trial. Bear in mind that these limitations apply only at special courts-martial. General courts-martial are not limited in the amount of a fine which may be adjudged.¹⁴³

To make RCM 1003(b)(3) compatible with the proposed RCM 1003(b)(3)(a), the language of the present rule needs to be changed slightly. The following is the proposed amendment to the rule, with changes underscored:

(3) *Fine*. Any court-martial may adjudge a fine in lieu of or in addition to restitution and in addition to or in lieu of forfeitures. Special and summary courts-martial may not *28 adjudge any fine or combination of fine, forfeitures, and restitution, in excess of the total amount of forfeitures that may be adjudged in that case. In order 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.

In essence, the proposed provision permits an accused to receive all three financial punishments at a court-martial--a fine, restitution and forfeiture of pay.

2. RCM 1003(b)(3)(a)

The proposed RCM 1003(b)(3)(a) restitution provision should incorporate both of the important provisions of RCM 1003(b)(3), by allowing restitution to be adjudged in addition to or in lieu of forfeitures and a fine, and by carrying a potent enforcement mechanism. The proposed provision would read:

(3)(a) *Restitution*. Any court-martial may adjudge restitution in addition to forfeitures and a fine. Special and summary courts-martial may not adjudge any combination of a fine, forfeitures and restitution in excess of

the total amount of forfeitures that may be adjudged in that case. In order to enforce restitution, a restitution order may be accompanied by a provision in the sentence that, in the event the restitution is not paid, the person ordered to pay the restitution shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the amount of restitution has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial. Any restitution order must state the name(s) of the person(s) or entity(ies) to whom restitution is to be made.¹⁴⁴ The Government has the burden to prove, by preponderance of the evidence, the pecuniary loss of the victim, while the accused has the *29 burden to prove his financial situation and that of his dependents by the same standard.¹⁴⁵

There are several important provisions of the proposed rule. First, the rule allows for the possibility of a contingent confinement provision, in the event the restitution is not paid. Second, the rule sets up a preponderance of the evidence standard as the burden of proof applicable in proving damages and financial resources. This is the same standard used in the MVRA¹⁴⁶ and allows for efficient adjudication of both the defendant's financial resources and the victim's damages. Third, the rule requires that the restitution order specifically name the person or persons to whom payment is to be made.¹⁴⁷ Lastly, the rule allows an accused to receive a fine, forfeiture of pay and restitution at any court-martial.¹⁴⁸

3. *RCM 1003(b)(3) Discussion*

The non-binding discussion accompanying [RCM 1003\(b\)\(3\)](#) provides useful guidance in describing when a fine is due, what type of crime warrants a fine, what happens if an accused fails to pay a fine, and the limitation on the convening authority in approving that fine.¹⁴⁹ First, the most important *30 guidance in the discussion is that a “fine is in the nature of a judgment and, when ordered executed, makes the accused immediately liable to the United States” for the amount.¹⁵⁰ This provision makes the enforcement of the fine possible because once the fine is ordered executed, the individual becomes indebted to the government. This indebtedness is enforceable by the United States through the withholding of income tax returns.¹⁵¹

Second, the section states that a fine should not normally be awarded unless the defendant was unjustly enriched.¹⁵² By using the word “normally,” the drafters gave even more room for interpretation than normally seen in the non-binding discussions. Despite this guidance, courts have ruled that a fine may be adjudged against an accused even when there was no unjust enrichment, and regardless of the crime committed.¹⁵³ There can be no such ambiguity about the appropriateness of ordering restitution in the new provision.

Third, the discussion cross-references [RCM 1113\(d\)\(3\)](#),¹⁵⁴ which addresses the procedural prerequisite for imposition of additional confinement for nonpayment of a fine. If the accused is unable to pay the fine, despite making good faith efforts (e.g., he is indigent) the commander may only *31 impose additional confinement upon determining that there is no other punishment adequate to meet the government's interest in appropriate punishment.¹⁵⁵ There is always the possibility that the contingent confinement may be imposed, but the government must satisfy another procedural prerequisite to do so.

Fourth, the discussion reminds us of [RCM 1107\(d\)\(5\)](#).¹⁵⁶ This rule states that if the “cumulative impact of the fine and forfeitures ... would exceed the jurisdictional maximum dollar amount of forfeitures that may be adjudged” at a special court-martial, the convening authority may not approve it.¹⁵⁷ This is self-explanatory and makes sense. This rule would also need to be modified if we add restitution as an authorized punishment.

4. *RCM 1003(b)(3)(a) Discussion*

The discussion section of the proposed [RCM 1003\(b\)\(3\)\(a\)](#) restitution provision should follow the format set out for the discussion section of [RCM 1003\(b\)\(3\)](#)¹⁵⁸ with regards to the important points mentioned in the previous section. Having said that, it must do more; it also needs to explain what restitution is and what its parameters are.¹⁵⁹ The proposed discussion section therefore, by necessity, is quite extensive. The following is the proposed discussion section, which follows [RCM 1003\(b\)\(3\)](#)¹⁶⁰ and incorporates many of the provisions of the MVRA:

Restitution is a punishment that is appropriate when the victim of the accused's crime is a person, or an entity that is not the United States government. Any restitution order must state the name(s) of the person(s) or entity(ies) to whom restitution is to be made. The goal of restitution is to compensate the victim for the victim's loss; to put the victim back in the same financial position the victim would have been in but for the criminal conduct of the accused. Therefore, restitution does not cover consequential or punitive damages. An imposed punishment of restitution is in the nature of a judgment and, when ordered executed, *32 makes the accused immediately liable to the victim for the entire amount of money specified in the sentence. Restitution payments to the victim should begin immediately after imposition of punishment.¹⁶¹ It is not the purview of the sentencing authority to set up a payment schedule for restitution.

Orders of restitution should take into account the pecuniary loss to each victim that is the direct or proximate consequence of any offense for which the accused has been found guilty, as well as all information relating to the financial situation of the accused. Pecuniary loss to the victim is a broad term which encompasses not only direct loss from real and personal property offenses, based on the value of property at the time it was lost, damaged or destroyed, but also the cost of necessary medical care and related professional services and devices relating to physical and mental health care, including any necessary physical, speech, or occupational therapy for any offense that directly results in bodily harm to the victim. A victim's economic losses may also include, but are not limited to, lost income, to the extent that it can be readily determined, and un-reimbursed travel-related expenses incurred by the victim to attend and participate in proceedings related to the case.¹⁶² In the case of an offense that involves bodily injury resulting in death, the restitution order may include an amount equal to the cost of necessary funeral and related services.¹⁶³

In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim, the representative of the victim's estate, or another family member may assume the victim's rights of *33 restitution under this section, but in no event shall the accused be named as such representative or guardian.¹⁶⁴

Where more than one accused is responsible for the loss to a victim, the accused being sentenced may be ordered to pay either the entire amount of restitution due or an apportioned amount. It may not be appropriate to order restitution for an offense where the number of identifiable victims is so large as to make restitution impracticable, or if determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to such a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

See [RCM 1113\(d\)](#) concerning imposition of confinement when the accused fails to pay restitution. Where the sentence adjudged at a special court-martial includes restitution, see [RCM 1107\(d\)\(5\)](#) for limitations on convening authority action on sentence.

5. *RCM 1003(b)(3)(a) Analysis*

In referring to the Analysis section of the Manual for Courts-Martial, the manual states that the "... Analysis sets forth the nonbinding views of the drafters as to the basis for each rule or paragraph, as well as the intent of the drafters, particularly with

respect to the purpose of substantial changes in present law. The Analysis is intended to be a guide in interpretation.”¹⁶⁵ What follows is a proposed addition to Appendix 21, Analysis of Rules for Courts-Martial:

Subsection (3)(a) is based on [Title 18 U.S.C. Sections 3663A and 3664](#) (Mandatory Restitution to Victims of Certain Crimes (1996) and Procedure for Issuance and Enforcement of Order of Restitution (1982)); [42 U.S.C. Section 10606](#) (Victims' Rights (1990)); and DoD Dir. 1030.1 (Victim and Witness Assistance (1994)). This new punishment option authorizes courts-martial to award victim restitution as part of the sentence. It is designed to give courts-martial power similar to that of United States district courts to order an *34 accused to pay direct compensation to any person or entity that has suffered direct pecuniary harm as a result of the accused's crimes.¹⁶⁶

The proposed Analysis section provides the rationale for the proposed new punishment. It lists all of the major legislation and the Department of Defense Directive upon which restitution in the military system is based.

B. Amending [RCM 1107\(d\)\(5\)](#)

[Rule for Court-Martial 1107](#)¹⁶⁷ gives lengthy instructions for convening authority action on the sentence adjudicated at trial. If restitution is added as an authorized punishment, [RCM 1107\(d\)\(5\)](#)¹⁶⁸ must be amended because of the third sentence in the proposed restitution provision: “Special and summary courts-martial may not adjudge any combination of a fine and forfeitures or restitution and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case.” [Rule for Court-Martial 1107\(d\)\(5\)](#) is specifically mentioned in the Discussion section of both [RCM 1003\(b\)\(3\)](#)¹⁶⁹ and the proposed [RCM 1003\(b\)\(3\)\(a\)](#).

This section does not need to be rewritten, and no original language need be stricken. It just needs to be changed slightly to incorporate the punishment of restitution into the language. The proposed changes are underscored:

(5) *Limitations on sentence of a special court-martial where a fine or restitution has been adjudged.* A convening authority may not approve in its entirety a sentence adjudged at a special court-martial when, if approved, the cumulative impact of the fine, restitution, and forfeitures (whether the forfeitures are adjudged or by operation of [Article 58b](#)), would exceed the jurisdictional maximum dollar amount of forfeitures that may be adjudged at that court-martial.¹⁷⁰

This change comports with the proposed restitution clause. It keeps intact the rule that at a special court-martial, an accused can never pay (for a fine or *35 restitution) or lose (for forfeitures) more money than the combined total of two-thirds of his base pay times twelve months.¹⁷¹ Of course, no such rule is necessary for general courts-martial cases as there is no set jurisdictional limit on fines or restitution.¹⁷²

C. Amending [RCM 1113\(d\)\(3\)](#)

[Rule for Court-Martial 1113\(d\)\(3\)](#)¹⁷³ is also specifically mentioned in the discussion following [RCM 1003\(b\)\(3\)](#) and the proposed [RCM 1003\(b\)\(3\)\(a\)](#). This is commonly referred to as the indigency provision. Once again, drastic change is not needed to amend the rule to comport with adding restitution as a punishment option. The proposed changes to the original rule are underscored:

(3) *Confinement in lieu of fine or restitution.* Confinement may not be executed for failure to pay a fine or restitution 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.¹⁷⁴

Indigency hearings are uncommon. The fine is usually paid, but if it is not, the fine follows the accused, even if he leaves the military. The government, eventually, recoups the fine by withholding the amount of the fine through garnishment of the individual's tax returns.¹⁷⁵

D. Proposed Military Judge's Benchbook Instructions

The Military Judge's Benchbook (Benchbook)¹⁷⁶ also needs to be modified to incorporate the new restitution punishment. The Benchbook states that although it is not required, it is recommended that the military judge read the definitions of each kind of punishment the accused is facing.¹⁷⁷ There are *36 two sentencing instructions with regard to fines, one for a general court-martial and one for a special court-martial. We would need to modify both of these existing fine instructions if restitution were authorized. Additionally, it would be necessary to incorporate two new restitution instructions.

1. Amending the General and Special Court-Martial Fine Instructions

Both fine instructions need slight modifications to incorporate restitution language. Language must be added to allow members to sentence the accused to a fine, restitution and forfeitures at both types of courts-martial. The following is the original general court-martial fine instruction with the proposed changes underscored:

(FINE--GENERAL COURT-MARTIAL:) MJ: This court may adjudge a fine either in lieu of, or in addition to, forfeitures, and/or restitution. A fine is a punishment that is appropriate when the victim of the accused's crime is the United States government. A fine, when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence. (In your discretion, you may adjudge a period of confinement to be served in the event the fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other confinement you might adjudge and the fixed period being an equivalent punishment to the fine. The total of all confinement adjudged, however, may not exceed the maximum confinement for the offense(s) in this case.)¹⁷⁸

The "and/or" language is incorporated to leave open the possibility of a sentence including a fine, payment of restitution and forfeitures at a general court-martial.

The present special court-martial fine provision, once again, need be only slightly modified. The following is the original special court-martial fine instruction with the proposed changes underscored:

*37 (FINE--SPECIAL COURT-MARTIAL:) MJ: This court may adjudge a fine either in lieu of, or in addition to, restitution and/or forfeitures. A fine is a punishment that is appropriate when the victim of the accused's crime is the United States government. If you should adjudge a fine, the amount of the fine, along with any forfeitures and/or restitution that you adjudge, may not exceed the total mount of forfeitures which may be adjudged, that is, forfeiture of two-thirds pay per month for (twelve)(_____) month(s). A fine, when ordered executed, makes the accused immediately liable to the United States for the entire amount of the fine. (In your discretion, you may adjudge a period of confinement to be served in the event the fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other

confinement you might adjudge and the fixed period being an equivalent punishment to the fine. The total of all confinement adjudged, however, may not exceed ____ (month(s)) (year).¹⁷⁹

2. Proposed General and Special Court-Martial Restitution Instructions

The proposed restitution instructions will, necessarily, follow the basic structure of the fine provisions. The following is the proposed general court-martial restitution instruction:

(RESTITUTION--GENERAL COURT-MARTIAL:) MJ: This court may adjudge restitution either in lieu of, or in addition to, forfeitures and/or a fine. Restitution is a punishment that is appropriate when the victim of the accused's crime is a person, or an entity that is not the United States government. Any restitution order must state the name(s) of the person(s) or entity(ies) to whom restitution is to be made. The goal of restitution is to compensate the victim for the victim's loss; to put the victim back in the same financial position the victim would have been in but for the criminal conduct of the accused. Therefore, restitution does not cover consequential or punitive damages. Restitution, when ordered executed, makes the accused immediately liable to the victim for the entire amount of *38 money specified in the sentence. (In your discretion, you may adjudge a period of confinement to be served in the event the restitution is not paid. Such confinement to enforce payment of the restitution would be in addition to any other confinement you might adjudge and the fixed period being an equivalent punishment to the restitution. The total of all confinement adjudged, however, may not exceed the maximum confinement for the offense(s) in this case.)

Like the previous fine instruction, the proposed restitution instruction allows for the accused to be sentenced to all three monetary punishments at a general court-martial--a fine, restitution and forfeitures.¹⁸⁰

The following is the proposed special court-martial restitution instruction:

(RESTITUTION--SPECIAL COURT-MARTIAL:) MJ: This court may adjudge restitution either in lieu of, or in addition to, forfeitures and/or a fine. Restitution is a punishment that is appropriate when the victim of the accused's crime is a person, or an entity that is not the United States government. Any restitution order must state the name(s) of the person(s) or entity(ies) to whom restitution is to be made. The goal of restitution is to compensate the victim for the victim's loss; to put the victim back in the same financial position the victim would have been in but for the criminal conduct of the accused. Therefore, restitution does not cover consequential or punitive damages. If you should adjudge restitution, the amount of the restitution, along with any forfeitures and/or fine that you adjudge, may not exceed the total amount of forfeitures which may be adjudged, that is, forfeiture of two-thirds pay per month for (twelve)(____) month(s). Payment of restitution, when ordered executed, makes the accused immediately liable to the victim for the entire amount of money specified in the sentence. (In your discretion, you may adjudge a period of confinement to be served in the event the restitution is not paid. Such confinement to enforce payment of the restitution would be in addition to any other confinement you might *39 adjudge and the fixed period being an equivalent punishment to the restitution. The total of all confinement adjudged, however, may not exceed ____ (month(s))(year).)

Regardless of which court-martial sentences an accused to make restitution, the sentencing worksheet for the members must also be modified to allow the members to annotate their decision and specify to whom restitution payments should be made.¹⁸¹

E. Proposed Pre-Trial Agreement Sentencing Limitation Provision

In most sentencing limitation portions (Part II, or the Appendix) of pre-trial agreements, there is a subsection, after the punitive discharge, confinement and forfeitures subsections, entitled “Other Lawful Punishment.” What usually follows “Other Lawful Punishment” are the words “May be approved as adjudged.” Rather than having what amounts to a fairly useless sentencing subsection, one option is to put a contingent confinement clause for payment of restitution and fines.¹⁸² For example, the “Other Lawful Punishment” provision might read:

4. Other Lawful Punishment: Any other lawful punishment adjudged, including a fine or restitution, may be approved as adjudged. Contingent confinement imposed as a condition of, or in conjunction with, a fine or restitution, is not affected or limited by any period of confinement limited, suspended or disapproved in paragraph 2, above.

“Paragraph 2,” listed in the above proposed sentencing limitation provision, is usually the confinement limitation provision. Including this added language will ensure that there are no misunderstandings between the government and the accused concerning contingent confinement if restitution payments are not made.

*40 VI. Implementing And Enforcing Judicially Awarded Restitution In Military Courts

We have examined how the MVRA is set up and possible changes to the military's jurisprudence to incorporate restitution in courts-martial. The biggest problem, however, still remains--how do we implement and enforce the restitution that is awarded by either a judge or members? As stated previously, ordering restitution is easy, enforcing it is an entirely different matter. First, this section sets out several distinctions between how the federal and military systems might treat restitution. Next, four different possible restitution enforcement mechanisms are discussed. Finally, the section explains how to deal with potential ex post facto concerns associated with implementation of restitution in the military.

The principle weakness in the military system for implementation of restitution is that, unlike the federal system, the military does not have access to state probation officers to enforce the court's restitution order.¹⁸³ This is compounded by the fact that, in most cases, the military loses jurisdiction over a servicemember when they deliver a certificate of discharge to the accused. This usually occurs either at the end of the servicemember's active service at the unit, or at the end of confinement and appellate review.¹⁸⁴

Another problem area that arises in implementing restitution in the military is that sentencing proceedings follow almost immediately after the findings are announced.¹⁸⁵ This may seem odd to some,¹⁸⁶ since in the federal *41 civilian system, sentencing of a defendant can happen weeks or months after the adjudication of guilt. This is significant because it is during this time, in the civilian system, that the probation officer compiles an extensive pre-sentencing report,¹⁸⁷ which includes all possible victim restitution issues. This report is then given to the judge. After delivery of the pre-sentence report, both the government and defense present restitution evidence in court to prove their cases by a preponderance of the evidence to the judge; the government seeks to prove all victim restitution amounts and the defendant seeks to prove his and his dependents' financial situation.¹⁸⁸ Because the military usually has its sentencing hearings immediately following the findings, one could argue that there will not be effective litigation of restitution issues. This, however, is unlikely.

The government already presents to the members or judge, before sentencing, some of the particulars of the accused's financial situation. The members are informed how much time the accused has in the military, what his pay is, how many dependents he has and other data.¹⁸⁹ The only thing left to do is what is currently done in federal civilian courts--the government must prove victim restitution amounts and the accused must prove any financial considerations he has (which is commonly done

in military sentencing proceedings already). One other important point to keep in mind is that military members and judges, unlike their federal counterparts, are intimately familiar with the lifestyles, pay scale, housing arrangements, and other financial considerations of military personnel.

One last difference between the federal civilian system and military courts is that in the federal system the judge awards the punishment, whereas *42 in the military system a judge *or* members award punishment. Given the fact that the military has blue ribbon juries, picked for their experience and judgment, it seems shortsighted to claim that our “lay jury” would not be able to establish appropriate restitution awards. It is not difficult to figure out dollar figures for property damage, medical expenses, or other incidentals subject to restitution.¹⁹⁰ And, as in the federal civilian system, the members have the prosecutor to help point them in the right direction as to an appropriate amount of restitution to be awarded.

There are four main ways to enforce restitution payments: garnishing the accused's pay; having the government pay the restitution by proxy and then recovering the money from the accused; allowing military restitution orders be enforced by the states; and imposing contingent confinement or recalling the accused from appellate leave if restitution is not made.

A. Restitution by Garnishing the Accused's Pay

One way to get restitution money from the accused and to the victim is to garnish the accused's pay. Under this scenario, once the court-martial sentencing authority has ordered restitution, that amount could be immediately¹⁹¹ taken out of the accused's pay by the disbursing or finance office. This is the how [Article 139](#) complaints are processed.¹⁹² Under an [Article 139](#) claim, the convening authority may approve an amount to be taken out of the accused's pay after an investigating board determines that the servicemember was at fault.¹⁹³ [Article 139](#) states, “[t]he order of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for the payment by him to the injured parties of the damages as assessed and approved.”¹⁹⁴ This is powerful language.

If the convening authority can issue a binding order on the disbursing officer to garnish a servicemember's pay based on the investigating officer's recommendation, why can't he have that same power for the payment of restitution? In other words, after the court awards restitution as a punishment, *43 the commanding officer could immediately order the disbursing officer to pay that amount of money to the victim.¹⁹⁵

Of course, [Article 139](#) specifically gives that power to the commanding officer. Perhaps that same authority could be given to the commanding officer (or convening authority) by modifying the previously proposed restitution provision.¹⁹⁶ The original restitution provision would contain the additional, underscored language:

(3)(a) *Restitution*. Any court-martial may adjudge restitution in addition to forfeitures and a fine. Special and summary courts-martial may not adjudge any combination of a fine, forfeitures and restitution in excess of the total amount of forfeitures that may be adjudged in that case. The restitution ordered may be charged against the pay of the accused upon the approval of the convening authority, which approval is conclusive on any disbursing officer for the payment by him to the victim(s) of the restitution ordered. In order to enforce restitution, a restitution order may be accompanied by a provision in the sentence that, in the event the restitution is not paid, the person ordered to pay the restitution shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the amount of restitution has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial. Any restitution order must state the name(s) of the person(s) or entity(ies) to whom restitution is to be made. The Government has the burden to prove, by preponderance of the evidence, the pecuniary loss of the victim, while the accused has the burden to prove his financial situation and that of his dependents by the same standard.

A few important points need to be mentioned. First, the underlined restitution language contains the verb “may,” as opposed to “shall,” as is contained in the [Article 139](#) language. This is to grant leeway to the convening authority as to whether to garnish the accused's pay or set up some other payment plan for *44 restitution. Second, the convening authority's decision to garnish the accused's pay for restitution is final on the disbursing officer. Third, the contingent confinement language is left in to give the sentencing authority as much freedom as possible to construct an appropriate sentence. Finally, the term “convening authority” is used in the proposed punishment, instead of “commanding officer,” as is used in the [Article 139](#) complaint.¹⁹⁷ This is to ensure that the same authority that had the power to refer the case to the court-martial is the one who garnishes the accused's pay. Using the term “commanding officer,” could be taken to mean someone other than a convening authority, such as a company commander.

The weakness in the above system is that the accused may be in a no-pay status or the convening authority may deem him unable to afford the garnishment of pay. For example, if the accused is sentenced to confinement at a general court-martial, he receives no pay after fourteen days from when the sentence was adjudged.¹⁹⁸ The same is true for a sentence received at a special court-martial, except the accused receives one-third of his pay.¹⁹⁹ At either court-martial, a convening authority may decide not to garnish the accused's pay because of monetary commitments the accused has, such as child support payments.

B. Restitution by Proxy

The most important notion in any restitution scheme is to make the victim whole, by securing for the victim the ordered restitution as soon as practicable. It is possible for the military to have a better system than the probation officer and payment plan system that exists in federal district courts, where restitution is burdensome to secure and may take years to complete.²⁰⁰ The military can also have a system that does more than merely garnish the accused's pay. The government can ensure restitution is paid both quickly and easily by instituting a system of “restitution by proxy.” Under this system, the government would pay the victim the restitution ordered, and then the accused reimburses (or becomes indebted to) the government. Unlike district courts, all of the accused who are sentenced in military courts work for the United States government. The government controls their pay.

Restitution by proxy is the best way to ensure timely restitution takes place because this system compensates victims by allowing them to recoup *45 adjudicated pecuniary losses directly from the government. The government pays the victim the amount of restitution the court has awarded and then the accused must reimburse the government the full amount. Restitution by proxy has an obvious advantage for the victim that the civilian system does not--the victim is not forced to wait around for years to collect the restitution money.²⁰¹ It also has a very practical advantage. Under restitution by proxy, the victim is not required to have any interaction with the accused in seeking to collect restitution. Victims will not be required to keep track of where the accused is or what his ability to pay is.

Restitution by proxy also avoids the predicament of the victim not receiving complete restitution because the accused is discharged from the military and the military loses jurisdiction over him. As mentioned previously, the military does not have the luxury of state probation officers to track defendants and ensure restitution is paid, like the civilian system does.

The government is reimbursed by the accused just as it is under a fine in the restitution by proxy system; the accused pays the full amount of restitution to the U.S. Department of Treasury. If the accused does not pay, the Defense Finance and Accounting Service (DFAS) is notified that the accused is indebted to the government. Just like with nonpayment of a fine, the federal government is then free to notify the Internal Revenue Service (IRS), who, in turn, can garnish tax returns from the accused until he has fully reimbursed the government. It is irrelevant, at this point, whether the accused is still serving in the military.

It may take the government time to recoup its money under the restitution by proxy system. But, despite the administrative burden, the government would eventually get its money back. Unlike other well-meaning entitlement programs that pay out huge amounts of money with no reimbursement,²⁰² restitution by proxy results in only a temporary loss of *46 funds. More importantly, the victim is immediately made whole and any inconvenience is borne by the accused, not the victims of crimes committed by servicemembers.

1. Creating New Law for Restitution by Proxy

The conspicuous drawback to restitution by proxy is that there must be a law or regulation allowing the government to pay the restitution and then be reimbursed by the accused. The President, by Presidential Executive Order, may make all of the changes and amendments needed in areas relating to punishment.²⁰³ But Congress must authorize the expenditure of funds; the expenditure of public funds is proper only when specifically authorized by Congress.²⁰⁴ It is doubtful that any commanding officer will want to use precious Operation and Maintenance (O&M) funds to pay for restitution by proxy. Besides, paying restitution may not qualify as an O&M need.²⁰⁵

One solution to this dilemma, therefore, is for Congress to pass a statute authorizing the Secretary of Defense to pay restitution to crime victims upfront and seek reimbursement from the accused afterward. There is a practical model of what this might look like, that already exists--the Transitional Compensation Act (TCA).²⁰⁶ Although this Act is an entitlement program, rather than a reimbursement program, the Act still gives us a working model for what a "restitution by proxy" statute might look like.

It is not necessary to propose a draft for the entire statute here. However, using the TCA as a guide,²⁰⁷ the following is how the proposed law (we will call it 10 U.S.C. Section 10XX) might begin:

*47 § 10XX. Court ordered restitution to victims: payment to victims, reimbursement from accused.

a. Authority to pay restitution. The Secretary of Defense, with respect to the armed forces (other than the Coast Guard when it is not operating as a service in the Navy), and the Secretary of Homeland Security, with respect to the Coast Guard when it is not operating as a service in the Navy, may each establish a program to pay court-martial ordered restitution to victims, in accordance with this section. Upon establishment of such a program, the program shall apply in the case of each such victim described in section (b) for which the court-martial case was under the jurisdiction of the Secretary establishing the program.

b. Victim for which restitution is authorized. This section applies to any person, persons, or entity named in a court-martial sentencing proceeding, as being entitled to restitution from the accused in a court-martial.

c. Payment and reimbursement of restitution. In the case of any individual described in section (b), the Secretary shall pay the full amount of the court ordered restitution. Thereafter, the accused becomes immediately liable to the United States Government for the entire restitution amount. Any sentence that imposes an order of restitution shall be final, notwithstanding any appeal. This statute allows the Secretary of Defense (or Secretary of Homeland Security with respect to the Coast Guard) to set up a program for restitution, just as previously done for the TCA. Section (b) stresses the importance of the sentencing authority specifically naming the recipient of restitution. Section (c) contains two important provisions: the word "shall," which requires the Secretary to pay restitution; and language making the accused immediately liable to the United States for the entire restitution amount.

2. Amending Article 58b, UCMJ

There is a second way to set up restitution by proxy if the possibility of a new statute is unfeasible. If the government cannot pay the victim directly and then get reimbursed by the accused, why not modify [Article 58b, UCMJ *48 \(Article 58b\)](#),²⁰⁸ to allow the government to take money it would have paid to the accused and pay restitution to the victim instead? Of course, if the accused is not sentenced to confinement, garnishing the accused's pay²⁰⁹ might be the easiest course of action. However, if the accused is sentenced to more than six months confinement, or less than six months confinement and a punitive discharge, he forfeits pay and/or allowances to the jurisdictional limit of the court.²¹⁰ These financial penalties are effective fourteen days after announcement of the sentence.²¹¹ This makes it extremely difficult, if not impossible, to garnish the accused's pay to make restitution payments.

Amending [Article 58b](#) is only restitution by proxy in the loosest sense, because what the government is really doing when they do this, is paying the accused while he is confined so that he can pay restitution to the victim. In fact, one could argue that this is not restitution from the accused at all because the government is actually paying the victim with money the accused would never have received while confined. For this reason, amending [Article 58b](#) is not nearly as good an alternative as making a law that allows the government to pay the victim restitution and then recoup all of that money from the accused.²¹²

The biggest obstacle to implementing this proposal is that it appears to be in direct contravention to why [Article 58b](#) was passed in the first place-- Congress did not want the government to pay confined criminals. However, [Article 58b\(b\)](#) provides that the convening authority "may waive any or all of the forfeitures of pay and allowances ... for a period not to exceed six months" if that money is given to the dependents of the accused.²¹³ Thus, Congress already contemplated providing money for the dependents of the accused when it originally passed [Article 58b](#).²¹⁴ It is not a stretch to argue that a waiver for restitution should also be allowed, given that the intent of Congress was to avoid paying the confined criminal, but still provide for dependents. Under either scenario, the accused is not getting paid while confined.²¹⁵ Another drawback to this proposal, however, is that, like restitution by proxy, [*49 amending Article 58b](#) requires congressional action vice merely an executive order.

[Article 58b\(b\)](#) can be amended to allow the convening authority to waive forfeitures of pay and allowances for the payment of restitution awarded by the court. If an accused did not have dependents, there would be no competing interests between victims and dependents. If the accused did have dependents, [Article 58b\(b\)](#) could be modified so that the convening authority could waive forfeitures of pay and allowances for six months for both payment of restitution and for the benefit of the accused's dependents.

In the alternative, modifying [Article 58b\(b\)](#) would allow the convening authority to waive six months of forfeitures for the accused's dependents and six months of forfeitures for the payment of restitution. This provision seems to accord with congressional intent,²¹⁶ considering [Article 58b](#) was passed before the jurisdiction of special courts-martial was extended to a year for both confinement and forfeitures.²¹⁷ [Article 58b\(b\)](#) reads as follows:

(b) In a case involving an accused who has dependents, the convening authority or other person acting under section 860 of this title (article 60) may waive any or all of the forfeitures of pay and allowances required by subsection (a) for a period not to exceed six months. Any amount of pay or allowances that, except for a waiver under this subsection, would be forfeited shall be paid, as the convening authority or other person taking action directs, to the dependents of the accused.

A proposed amendment to [Article 58b\(b\)](#) is [Article 58b\(b\)\(1\)](#). This amendment copies much of the language of [Article 58b\(b\)](#), but allows for the waiver of forfeitures for the benefit of victims:

(b)(1) In a case involving an accused that has been ordered to pay restitution pursuant to a court-martial, the convening authority or other person acting under section 860 of this title (article 60) may waive any or all of the forfeitures of pay and allowances required by subsection (a) for a period not to exceed six

months. Any amount of pay or allowances that, *50 except for a waiver under this subsection, would be forfeited shall be paid, as the convening authority or other person taking action directs, to the victim(s) of the accused for restitution.

These two provisions could actually work together if the accused was sentenced for more than six months at either a special or a general court-martial; the convening authority could waive six months of forfeitures for the family and waive six months of forfeitures for the victim. In addition, to ensure that the government is paid back any monies paid out for victim restitution, the following language should be added at the end of proposed [Article 58b\(b\)\(1\)](#): “The accused is financially liable to the government for any monies paid under this section for victim restitution.” The drawback to these provisions is that they remove any incentive the accused might have to pay restitution, and instead, put the financial onus on the government.

C. Restitution by State Enforcement

Another possible enforcement mechanism for restitution is to mandate that, by law, the restitution order resulting from a court-martial is binding in all states. This would allow either the government or the victim to enforce the restitution order in state court. The particulars of this were addressed in the MVRA section,²¹⁸ however, they will be briefly discussed again. In essence, the restitution order needs to be binding in state court, like a civil judgment, so that both the victim and the government have recourse against the accused.

The MVRA goes as far as to allow the victim to request from the clerk of the court an abstract of judgment that has the force of law and can be used in the state as a judgment lien against the defendant's property.²¹⁹ This judgment is enforceable in the state “in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that [s]tate.”²²⁰ Finally, [section 3664](#) provides that the restitution order, which accompanies the sentence, is a final judgment regardless of the fact that the sentence may be appealed, modified, corrected or adjusted.²²¹

*51 Ensuring that states recognize what the military does is not a novel concept.²²² A conviction from a military court-martial already carries with it the force and effect of a conviction in the state systems.²²³ The same should hold true for restitution orders. The president is allowed to prescribe the maximum punishments for offenses under the UCMJ,²²⁴ but that does not mean that an order of restitution will be recognized in state court. Perhaps relying on the Supremacy Clause of the U.S. Constitution²²⁵ is not enough. To ensure enforcement of military court-martial ordered restitution, title 10 should be amended to incorporate the language similar to the enforcement language of [sections 3664\(m\)](#) and [\(o\)](#), of [title 18](#). Proposed language for an amendment to title 10 would read:

Court-martial order of restitution; enforcement and finality. A victim may enforce an order of restitution from a military court-martial in any state. At the request of a victim named in the restitution order, a military judge may issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments in any state court, the abstract of *52 judgment shall be a lien on the property of the defendant located in such state in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that state. Any state may consider the abstract of judgment a final judgment.

This language allows victims to enforce the restitution order at the state level without having to go through procedural prerequisites, like getting the order recognized in the state. It provides a powerful enforcement mechanism by allowing the victim to put a lien on the accused's property if restitution is not paid.

D. Restitution by Threat of Contingent Confinement or Recall From Appellate Leave

There are two other related ways to enforce restitution, neither of which is as powerful as those already discussed. The first way to enforce it is by allowing contingent confinement for nonpayment of restitution, which was briefly addressed above.²²⁶ This sounds like a great way to get the victim paid. It has problems, however. For example, if the accused claims indigency, a hearing must be held to decide if confinement is the only way the government can meet its interest in appropriate punishment.²²⁷ Regardless of the result of the indigency hearing, however, the victim still gets no restitution.

The threat of additional confinement might be enough to convince the accused to either start, or to keep, making restitution payments.²²⁸ However, if the accused would rather serve confinement than pay restitution, nothing can be done, and the victim still does not receive restitution. In addition, an accused who is not confined could arrive at the end of his enlistment contract, at which time the military would lose jurisdiction. At this point, the government loses the ability to collect restitution from the accused absent reporting the issue to DFAS and then to the IRS.

One consistent theme of military justice for commanders is that they do not want the evildoer, who has received a punitive discharge, in their unit any longer than is absolutely necessary. They see him as a threat to good *53 order and discipline. He takes a “boat space” available for a productive servicemember. The commanders want these people gone and on appellate leave (home awaiting their discharge) at the earliest possible opportunity. So, what happens if the accused has not made restitution and the convening authority wants to place him on appellate leave? The convening authority can send the accused home with threats that restitution has to be made or he will be called back off of appellate leave, but this may be a hollow threat that neither party wants to be carried out. In particular, the commander may not want the accused at the unit, either before or after his confinement, because this may hurt the morale and discipline of the unit. In this type of case, contingent confinement may hold little threat for the accused on appellate leave.

Although bringing an accused off appellate leave and back to active duty is an option, practically speaking, it probably will not be utilized. After the accused is gone, the commanding officer has little incentive to bring him back on active duty to make certain he pays restitution. This is due to the cost and time commitment involved in tracking down the accused and getting him to come back. The accused may also disappear, which may result in the government forgetting the issue all together. Restitution delayed may become restitution denied.

E. Eliminating Ex Post Facto Issues

One of the prime concerns in implementing any new legislation is to avoid violating the ex post facto clause of article I, section 9 of the U.S. Constitution. Any proposed amendment to RCM 1003(b) should be forward-looking in its application, thus avoiding any ex post facto concerns.²²⁹ One of the seminal military cases in this area is *United States v. Gorski*,²³⁰ a 1997 Court of Appeals for the Armed Forces case. This case dealt with whether Article 58b, UCMJ, the 1996 amendment regarding automatic forfeiture of pay and allowances for persons confined, violated the ex post facto clause of the U.S. Constitution. Gorski argued that the newly enacted Article 58b, UCMJ, should not apply to him because he committed his offense before enactment of the new law.²³¹ The government disagreed, arguing that because the minimum punishment had never been increased for Gorski, article I, section 9 had not been violated.²³²

*54 The Court ruled that Gorski was correct; the provisions concerning automatic forfeitures, under Article 58b, UCMJ, could not be applied to him if the law was enacted subsequent to his offense.²³³ Most importantly for the present analysis on restitution, the Court of Appeals laid out the law on the prohibition of ex post facto laws for the military. The Court went all the way back to 1798, to cite Justice Chase, U.S. Supreme Court, who gave the following test for determining whether a law violates the ex post facto clause of the U.S. Constitution:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.²³⁴

In implementing restitution, the focus should be on not violating the third prong of Justice Chase's analysis--inflicting a greater punishment than the law affixed to the crime when committed. This is not hard to do. Ex post facto concerns can be avoided by carefully drafting the Executive Order to add restitution as an authorized punishment under [RCM 1003\(b\)](#) for only those offenses committed after the signing of the Executive Order. The Order must not use preferral of charges, arraignment, or adjudication of the sentence as benchmarks of when restitution is applicable.

In our hypothetical case of LCpl Pawn, assume LCpl Pawn committed his larceny on 15 June 2002 and the president signed the Executive Order allowing restitution as an authorized punishment on 16 June 2002. Further assume that charges were preferred against LCpl Pawn on 15 August 2002 and he went to trial from 15 to 17 September 2002. LCpl Pawn would not be subject to the new restitution provision because his criminal conduct took place one day before the Executive Order went into effect. This seems a simple ***55** concept to grasp, yet is not always applied in practice.²³⁵ The new law should not only list the date of enactment, but should state clearly that it applies only to offenses committed after the date of enactment. To do otherwise runs the risk of violating the ex post facto clause of the U.S. Constitution.

VII. Comparing the MVRA and Optional Restitution under [RCM 1003\(b\)](#)

This paper has discussed how restitution is set up in the federal civilian system and how it might work in the military system. Table 1 shows how the two systems compare to one another.

Table 1.

| | The Mandatory Victims' Restitution Act of 1996 | Optional Restitution Under R.C.M. 1003(b)(3) |
|---|---|---|
| Predecessor to Current Law | VWPA, Crime Victims' Bill of Rights. | VWAP, Crime Victims' Bill of Rights. |
| Restitution Mandated by Law? | Yes. For everything listed below. | No. |
| Who Imposes Restitution and When? | Judge, weeks or months after adjudication of guilt. | Judge or Members, immediately or shortly after adjudication of guilt. |
| Restitution to Whom? | Victim, others. | Victim. |
| Restitution for Property Damage, Loss or Destruction? | Yes. For real and personal property. Includes return of taken property. | Yes. For real and personal property. |
| Restitution for Bodily Injury? | Yes. For necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, | Yes. May include cost of necessary medical care and related professional services and devices relating to physical and mental |

| | | |
|--------------------------------------|---|---|
| | including nonmedical care and treatment rendered in accordance with a method of healing recognized by law. Also for necessary physical and occupational therapy and rehabilitation. Also, reimburse victim for income lost as a result of offense. | health care, including any necessary physical, speech, or occupational therapy for any offense that directly results in bodily harm to the victim. |
| Restitution for Death? | Yes. For necessary funeral and related services. | Yes. For necessary funeral and related services. |
| Restitution for Other Costs? | Yes. For lost income and necessary childcare, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense. | Yes. Included, but not limited to, lost income to the extent that it can be readily determined, and un-reimbursed travel-related expenses incurred by the victim to attend and participate in proceedings related to the case. |
| Joint and Several Liability? | Yes. | Yes. |
| Burden of Proof | Preponderance of the Evidence. | Preponderance of the Evidence. |
| When is Restitution Due? | Whenever schedule that judge sets up states. | Due immediately upon sentence. Possibility of garnishment if no restitution by proxy. |
| Possibility of Restitution by Proxy? | No. | Yes. |
| Possible Enforcement Mechanisms? | <p>1. Enforced like civil judgment, follows defendant.</p> <p>2. Victim can get judgment lien against defendant's property in state court.</p> <p>3. Judge can revoke probation, hold defendant in contempt, order sale of defendant's property or re-sentence defendant to more punishment</p> | <p>1. Enforced like civil judgment, follows accused.</p> <p>2. Victim can get judgment lien against defendant's property in state court.</p> <p>3. Pay by proxy, take immediately from accused's salary to pay victim.</p> <p>4. Contingent confinement.</p> <p>5. Nonpayment reported to DFAS,</p> |

| | | |
|--|---|---|
| | than he could have originally received. | IRS. 6. Convening authority waives automatic forfeitures to pay to victim. 7. Recall from appellate leave to active duty. |
| Is Indigency of Defendant or Accused Relevant? | No. Since payments can be stretched out over years. | Yes, but only as it pertains to contingent confinement. |

***58 VIII. Conclusion**

Under the present military system, crime victims have a difficult time getting restitution from those who do them harm. Military judges and panels should have the option of ordering an accused to pay restitution. Several changes can be made to incorporate restitution as an authorized punishment under [RCM 1003\(b\)](#) and there are also several ways to enforce restitution. The best way to do this is by creating a law allowing the government to pay restitution by proxy and then seeking reimbursement from the accused later. Setting up a viable restitution enforcement system will not be easy, but it will be worth it.

***59** Let us revisit LCpl Pawn at his court-martial, to illustrate how court ordered restitution, with a potent enforcement mechanism, works. After the members' questions about ordering restitution, the military judge instructs the members that restitution is an authorized punishment under [RCM 1003\(b\)](#) and that they can order restitution. The members then return and order LCpl Pawn to pay restitution. After the court-martial, the military pays Cpl Johnson \$2,000 to reimburse him for the crime committed by his fellow Marine. Now, LCpl Pawn is indebted to the U.S. government for that amount, which he must pay.

It may not be easy to incorporate restitution in the military system, but it should be done. It is time for the military to make the accused fully pay for his crime by including restitution as an authorized punishment under [RCM 1003\(b\)\(3\)](#).

Footnotes

^{a1} The positions and opinions stated in this article are those of the author and do not represent the views of the United States Government, the Department of Defense, or the United States Marine Corps. Lieutenant Colonel Jones is an active duty Marine Corps judge advocate. Lieutenant Colonel Jones is presently assigned as General and Special Courts-Martial Judge, Sierra Judicial Circuit, Navy-Marine Corps Trial Judiciary. L.L.M., *Honor Graduate*, 2003, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; J.D. 1992, Brigham Young University; B.A., *Cum Laude*, 1988, Brigham Young University. Previous assignments include Legal Services Support Section, Camp Pendleton, California, 1999-2002 (Officer in Charge, Legal Services Support Team Delta, 2001-2002; Senior Trial Counsel, 2000-2001; Trial Counsel, 1999-2000); Officer in Charge and Senior Defense Counsel. Naval Legal Service Office Detachment, Roosevelt Roads, Puerto Rico, 1996-1999; Legal Services Support Section, Camp Pendleton, California, 1993-1996 (Defense Counsel, 1994-1996; Legal Assistance Attorney, 1993-1994). Member of the bar of the State of Utah; admitted to practice before the Court of Appeals for the Armed Forces and the Supreme Court of the United States.

¹ *Leviticus* 6:4 (King James).

² [Rule for Court-Martial 1003\(b\)](#) of the *Manual for Courts-Martial* allows the following authorized punishments: a reprimand, forfeiture of pay and allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, a punitive separation, and death. MANUAL FOR COURTS-MARTIAL, UNITED STATES, [R.C.M. 1003\(b\)](#) (2005) [hereinafter MCM].

³ *Id.*

- 4 18 U.S.C. § 3663 (2000). This statute is entitled “Order of Restitution.” It became effective upon its enactment in 1982. *Id.* This statute, along with section 1512, Title 18, are commonly referred to as the “Victim and Witness Protection Act of 1982” [hereinafter VWPA]. Section 3663, Title 18, was the first victim restitution provision passed by Congress. Restitution was optional under the Act, however, not mandatory. *Id.*
- 5 18 U.S.C. § 3663A (2000). This Act, passed by Congress in 1996, is commonly referred to as the “Mandatory Victim’s Restitution Act of 1996.” This Act mirrors substantially the language of section 3663, Title 18, but makes restitution mandatory upon appropriate findings of economic loss. *Id.*
- 6 The purpose of this article is not to argue for *mandatory* victim restitution in the military system, but rather that the sentencing authority should have the *discretion* to order an accused to pay restitution. Under a discretionary system, consideration may be given to both the victim’s and the accused’s financial situation.
- 7 Section 577 of the National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512 (1999), increased the jurisdictional limits of special courts-martial for both confinement and financial penalties (forfeitures and/or fines). The passage of this Act amended Article 19, UCMJ. UCMJ art. 19 (2005).
- 8 The doubling of possible confinement for the accused (assuming the offenses warrant the maximum of twelve months, and most cases do) is a great change for the system. It expedites more cases in which it is uncertain as to whether the accused’s conduct warrants trial by special or general court-martial (borderline cases) by allowing the government to refer the case to a special court-martial vice being stuck in the procedural trappings of a general court-martial. This change is also a benefit to the accused. If his case proceeds to a special court-martial, he is protected against extensive confinement and a general court-martial conviction.
- 9 For example, assume that LCpl Pawn has just over two years of service. Using the 2005 pay scale, he makes \$1,547.70 base pay per month. Under the old law, the maximum financial penalty (forfeitures and/or a fine) that could be awarded to LCpl Pawn was \$6,192.00 (\$1,032.00 per month x six months). Under the new law, that figure is doubled to \$12,384.00. The greater amount of money that can be taken under the new law should cover most any case involving payment of restitution to a victim. It is doubtful that a special court-martial case would have a situation where the victim would need more restitution money than that; those cases will typically be referred to a general court-martial.
- 10 There is no limit for fines at a general court-martial. Judges however, need to be careful not to award too large a fine as this makes it easier for the accused to claim he cannot pay it, which opens the door to an indigency hearing. *See* MCM, *supra* note 2, R.C.M. 1113(d)(3).
- 11 One major difference between federal civilian cases and military cases is that in federal cases the judge is the sentencing authority whereas in the military a judge, or a panel of members, may sentence the accused. This appears to be a distinction without a difference, however, with regard to the appropriateness of adding victim restitution to the list of authorized punishments under RCM 1003(b). MCM, *supra* note 2, R.C.M. 1003(b). This is true for various reasons. One reason is that member panels in the military are like a “blue ribbon jury;” they are either officers who are college-educated or senior enlisted leaders, all chosen for their wisdom and experience. Given the particularities of the military system and its need for order and discipline, these members are very capable of awarding appropriate punishment. One other reason is that the military members on the panel may actually have more discretion to adjudicate a “fair” sentence than federal judges, who are hamstrung by both the mandatory federal sentencing guidelines and mandatory victim restitution. *See supra* note 5 and accompanying text.
- 12 *See infra* pt. VI.
- 13 18 U.S.C. § 3663A (2000).
- 14 The MVRA is a federal law, applicable only for cases that are tried in federal district courts. There is no provision for it to be used in military courts. *Id.*
- 15 *See, e.g., United States v. Pineda*, 54 M.J. 298 (2001); *United States v. Smith*, 53 M.J. 168 (2000).
- 16 The incentive for an accused to make restitution, pursuant to a pre-trial agreement, is lost if the judge awards a punishment which is less than the agreement negotiated between the accused and the government. For example, suppose that the pre-trial agreement caps confinement at 150 days, if the accused makes restitution to the victim within thirty days of the date of trial. If the judge awards

only 145 days confinement, there is no incentive for the accused to pay restitution because the pre-trial agreement does not help him in anyway.

17 See MCM, *supra* note 2, R.C.M. 1107. The convening authority may approve, disapprove, suspend, or commute punishment. Military judges have recommended disapproval or suspension of some or all punishment provided the accused makes restitution to the victim. Most judges require restitution to be made by a certain date. See *United States v. Resendiz*, No. 200200748, 2002 CCA LEXIS 313 (N-M. Ct. Crim. App. Dec. 30, 2002) (unpublished) (recommending suspension of \$1,000 fine if Marine agreed to pay restitution).

18 10 U.S.C. § 1059 (2000); see *infra* pt. II.B.3.

19 UCMJ art. 139 (2005); see *infra* pt. II.B.2.

20 See *infra* pt. II.B.1.

21 See *infra* pt. II.B.4.

22 MCM, *supra* note 2, R.C.M. 705(c)(2)(C). The Analysis of this short section tells us that the rule has its base in two service appellate court decisions, *United States v. Callahan*, 8 M.J. 804 (N.M.C.M.R. 1980), and *United States v. Brown*, 4 M.J. 654 (A.C.M.R. 1977). The Analysis also forewarns, however, that “[e]nforcement of a restitution clause may raise problems if the accused, despite good faith efforts, is unable to comply.” (citing *United States v. Brown*, 4 M.J. 654 (A.C.M.R. 1977)).

23 This is accomplished by a provision in the first part of the pre-trial agreement that indicates full restitution must be paid to the victim (with the amount specifically laid out) before the date of trial. That way, if the accused does not provide full restitution before the trial date, the government may back out of the agreement without the accused claiming he has already detrimentally relied on the agreement. Of course, the reverse is also true. If the accused has provided restitution, he may argue that he has already performed under the agreement and should be entitled to its full protection.

24 For example, the restitution provision could be tied to the confinement protection offered in the sentence limitation provision. The provision might read:

2. Confinement. May be approved as adjudged. However, if the accused makes full restitution to Cpl Johnson, in the amount of \$2000, within sixty (60) days of being sentenced by the military judge, then all confinement in excess of ninety (90) days will be suspended for a period of twelve (12) months, at which time, unless sooner vacated, it will be remitted without further action.

25 See, e.g., *United States v. Mitchell*, 51 M.J. 490 (1999); *United States v. Olson*, 25 M.J. 293 (C.M.A. 1987); *United States v. Foust*, 25 M.J. 647 (A.C.M.R. 1987); *United States v. Brown*, 4 M.J. 654 (A.C.M.R. 1977).

26 Complete restitution does not always occur. For example, the accused may decide he would rather do extra confinement time than pay money to the victim. Or, after the case is over, the government may lose its interest in ensuring that the victim actually gets the restitution. Unlike defense attorneys, who must continue to work with their clients on clemency matters after trial, some trial counsel give no thought to victims post-trial. Additionally, if the accused “beats” the pre-trial agreement, the power of clemency may be the only leverage available to force restitution.

27 MCM, *supra* note 2, R.C.M. 1109.

28 Note that impossibility to pay or indigency of the accused are not per se bars to additional confinement. See *infra* pt. V.A.3; *Mitchell*, 51 M.J. at 492; *United States v. Tuggle*, 34 M.J. 89, 92 (C.M.A. 1992).

29 For example, suppose LCpl Pawn agrees to pay restitution of \$200 per month until the \$2000 debt is paid off. If the pre-trial agreement suspends a portion of the confinement for six months, at which time it is remitted, without further action (a standard provision in a pre-trial agreement), LCpl Pawn would only have paid \$1200 of the restitution at the time the suspension period ran. Careful drafting of the pre-trial agreement to extend the normal six-month suspension period would be necessary to avoid this.

30 See, e.g., *United States v. Miley*, 59 M.J. 300 (2004).

31 This problem is solved if the proposed restitution by proxy provisions are implemented. See *infra* pt. VI.B.1.

32 This is especially true at large installations that process hundreds of cases every year.

- 33 See, e.g., [United States v. Latimer](#), 35 M.J. 736 (A.C.M.R. 1992). Most of the cases in this area appear to be unreported opinions from the Navy-Marine Corps Court of Criminal Appeals. See, e.g., [United States v. Resendiz](#), No. 200200748, 2002 CCA LEXIS 313 (N-M. Ct. Crim. App. Dec. 30, 2002) (unpublished); [United States v. Vallejo](#), No. 9602465, 1998 CCA LEXIS 47 (N-M. Ct. Crim. App. Jan. 22, 1998); [United States v. Davis](#), No. 9501581, 1996 CCA LEXIS 459 (N-M. Ct. Crim. App. June 20, 1996); [United States v. Norman](#), No. 9400836, 1995 CCA LEXIS 376 (N-M Ct. Crim. App. Feb. 24, 1995); [United States v. Womack](#), No. 901998, 1990 CMR LEXIS 1041 (N.M.C.M.R. Oct. 16, 1990); [United States v. Jensen](#), No. 900305, 1990 CMR LEXIS 767 (N.M.C.M.R. Aug. 8, 1990); [United States v. Pyne](#), No. 842559, 1984 CMR LEXIS 3754 (N.M.C.M.R. Aug. 27, 1984).
- 34 Of course, the opposite is also true. The accused may pay all of the restitution to the victim, relying on the convening authority to follow the judge's recommendation, but the convening authority may show no mercy. If this happens, the accused has no remedy against that convening authority.
- 35 Allowing restitution may also have the opposite effect. For instance, in the present system, a judge may award a fine to an accused and add a provision that if the fine is not paid by a certain date that the accused is sentenced to extra confinement. MCM, [supra note 2](#), [R.C.M. 1003\(b\)\(3\)](#). This may become the case with the punishment or restitution also, wherein the judge decrees extra confinement if the restitution is not paid by a certain date. The only remedy the accused has at this point is to demonstrate an inability to pay based on indigency. *Id.* [R.C.M. 1113\(d\)\(3\)](#).
- 36 [UCMJ art. 139](#) (2005).
- 37 [10 U.S.C. § 1059](#) (2000).
- 38 A victim may seek recourse in a state civil court. But more than likely, a victim will seek restitution through going to small-claims court where a lawyer is not required. For example, in California, an aggrieved party may sue for up to \$5000 in small-claims court. [CAL. CIV. PROC. CODE § 116.220](#) (Deering 2005). Not all states have such a high limit. In Virginia, for example, the monetary limit for small-claims suits is only \$2000. [VA. CODE ANN. § 16.1-122.3](#) (2002).
- 39 Although most all victims petition the convening authority for something, victims seeking restitution are particularly apt to do so given the inadequacies of the present punishment system.
- 40 [UCMJ art. 139](#) (2005); *see infra* pt. II.B.2.
- 41 MCM, [supra note 2](#), [R.C.M. 1105](#).
- 42 [UCMJ art. 139](#) (2005).
- 43 [Article 139\(b\)](#) is the only other provision under the article. It provides that if the offenders cannot be ascertained, but the organization is known, the amount of damages may be divided up among the members of that unit who were at the scene. *Id.*
- 44 For example, a servicemember goes out on liberty on a port visit, gets drunk, and does damage to a bar in town. The owner of the bar files an [Article 139](#) Complaint (or claim) against the servicemember and delivers it to the commanding officer of that servicemember. The commanding officer appoints an investigating officer to investigate the claim. If the commanding officer determines that the servicemember is at fault, he may, after a legal review, order the accounting or disbursing office to withhold the amount of money equal to the damages and pay it to the claimant. See U.S. DEPT OF ARMY, REG. 27-20, CLAIMS (1 Jul. 2003) [hereinafter AR 27-20]; and U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES (1 Apr. 1998) [hereinafter DA PAM. 27-162].
- 45 AR 27-20, [supra note 44](#), pt. 9-4.
- 46 *Id.* pt. 9-7(d)(1).
- 47 *Id.* pt. 9-7(g)(1)(b).
- 48 *Id.* pt. 9-7, 9-8. These procedural safeguards include notification to the servicemember, legal review of the claim and the right to petition the approval authority for reconsideration.
- 49 [UCMJ art. 58b](#) (2005).

- 50 AR 27-20, *supra* note 44, pt. 9-7(i).
- 51 *Id.* pt. 9-5.
- 52 *Id.* pt. 9-7(a). The special court-martial convening authority may, however, grant an extension to file if he determines that there is good cause for the delay. *Id.* There is no mention in the regulation of how long an extension is appropriate.
- 53 Trial counsel and victims' advocates have the responsibility to ensure victims know of this right. The problem is that these individuals may not find out about the victim's loss until after the time to file has passed.
- 54 UCMJ art. 58b (2005).
- 55 For example, Army Regulation 27-20 states that any assessment against the servicemember must be “[s]ubject to any limitations set forth in appropriate [such as pay or MCM] regulations.” AR 27-20, *supra* note 44, pt. 9-7(i).
- 56 *Id.* pt. 9-6.
- 57 This mirrors the current limitations regarding fines. *See infra* pt. V.A.
- 58 AR 27-20, *supra* note 44, pt. 9-7(d)(1).
- 59 UCMJ art. 1(9) (2005). If the commander's involvement in the Article 139 complaint process leads to him becoming personally vested in the accused's case, he may be disqualified from referring the case to a court-martial or acting as the convening authority in the case for post-trial action. MCM, *supra* note 2, R.C.M. 504(c)(1), 601(c).
- 60 *See infra* pt. V.A.
- 61 *See infra* pt. VI.B.
- 62 10 U.S.C. § 1059 (2000).
- 63 The Transitional Compensation Act is a congressionally authorized program that provides twelve to thirty-six months (depending on the amount of time left on the servicemember's enlistment contract) of support payments to family members of servicemembers who are separated from active duty (punitively or administratively) because of domestic violence. These support payments are designed to assist family members in establishing a life apart from the abusive service member. Support payments are paid via direct deposit and are supposed to be used for such things as relocation, food, education, counseling and medical treatment. Monthly payments are based on current dependency and indemnity compensation rates. The rates increase slightly each December. The monthly amounts for 2005 are \$993.00 for the spouse, \$247.00 for each dependent child and \$421.00 for a dependent child only. Commissary and exchange privileges and health care benefits are also available during the “transitional” time. There are other qualifications and disqualifications in the program. *Id.*
- 64 *Id.*
- 65 Restitution is defined as: “Reparation made by giving an equivalent or compensation for loss, damage, or injury caused; indemnification.” RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1641 (2d ed. 1998).
- 66 Most states charge around \$25 to file a suit and then anywhere from \$12 to \$25 for service of process. Virginia, for example, charges \$22 to file a small claim suit and a mandatory \$12 service of process fee. VIRGINIA SMALL-CLAIMS COURT PROCEDURES INFORMATIONNNNNN (2001). The sheriff in Virginia must do service of process. There is also the issue of obtaining jurisdiction in the local court, which may be difficult if the wrongdoer is from out of state or on deployment. *Id.*
- 67 For example, in Virginia the limit is only \$2000. VA. CODE ANN. § 16.1-122.3 (2002). Other states have higher limits. For example, California's limit is \$5000. CAL. CIV. PROC. CODE § 116.220 (Deering 2005).
- 68 This is how it is currently done in the federal district court system. *See infra* pt. IV.B. Please bear in mind, however, that even in district courts, the restitution is for provable compensatory loss. The victim must still go to civil court if the victim desires punitive or consequential damages.

- 69 Do not confuse VWPA with VWAP (the military's Victim and Witness Assistance Program).
- 70 18 U.S.C. §§ 1512. 3579, 3663 (2000).
- 71 The VWPA even applies extraterritorially for certain offenses. 18 U.S.C. § 1512(h) (2000).
- 72 Section 1512, of title 18, is entitled “Tampering with a Witness, Victim, or an Informant.” 18 U.S.C. § 1512 (2000). It is an extensive section, detailing many crimes against victims and witnesses that can be categorized into general law crimes such as obstruction of justice, witness tampering, or impeding an investigation. *Id.*
- 73 97 P.L. 291; 96 Stat. 1248-49 (1982).
- 74 18 U.S.C. § 3663 (2000).
- 75 The Act was amended in 1984, 1986, 1987, 1988, 1990, 1994, 1996, 2000 and 2002. 18 U.S.C. §§ 1512, 3663 (2000).
- 76 All of the particulars of the VWPA are not spelled out here. The important provisions dealing with restitution are almost identical to those contained in the new law, the MVRA that is discussed in *infra* pt. IV.
- 77 42 U.S.C. § 10606 (2000), *repealed* by Justice for All Act of 2004, Pub. L. No. 108-45, 118 Stat. 2260, 2264.
- 78 18 U.S.C. § 3663A (2000).
- 79 42 U.S.C. § 10606 (2000).
- 80 *Id.* § 10606
- 81 Congress stated that a crime victim has the following rights:
- (1) The right to be treated with fairness and with respect for the victim's dignity and privacy.
 - (2) The right to be reasonably protected from the accused offender.
 - (3) The right to be notified of court proceedings.
 - (4) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.
 - (5) The right to confer with attorney for the Government in the case.
 - (6) The right to restitution.
 - (7) The right to information about the conviction, sentencing, imprisonment, and release of the offender.
- Id.* § 10606(b)
- 82 *Id.* § 10606(a).
- 83 *See, generally*, Rachel King, *Why a Victims' Rights Constitutional Amendment is a Bad Idea: Practical Experiences From Crime Victims*, 68 U. CIN. L. REV. 357 (2000); Jennifer J. Stearman, *An Amendment to the Constitution of the United States to Protect the Rights of Crime Victims: Exploring the Effectiveness of State Efforts*, 30 U. BALT. L.F. 43 (1999); William T. Pizzi, *Victims' Rights: Rethinking Our “Adversary System,”* 1999 UTAH L. REV. 349 (1999); Robert P. Mosteller, *Victim's Rights and the Constitution: Moving From Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY'S L.J. 1053 (1998); Walker A. Matthews, III, Note, *Proposed Victims' Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL ETHICS 735 (1998); Jennie L. Caissie, Note, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 647 (1998).
- 84 U.S. DEPT OF DEFENSE, DIR 1030.1, VICTIM AND WITNESS ASSISTANCE (23 Nov. 1994) (*cancelled and reissued* 23 Apr. 2004) [hereinafter DOD DIR. 1030.1]. *See also* U.S. DEPT OF DEFENSE INSTR. 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES (23 Dec. 1994)(*cancelled and reissued* 4 Jun 2004) [hereinafter DOD INSTR. 1030.2]. Curiously, the Directive actually references the later-in-time implementing instruction. DOD DIR. 1030.1, *supra*. Both documents, however, reference the VWPA and the Crime Victims' Bill of Rights. DOD DIR. 1030.1, *supra*; DOD INSTR. 1030.2 *supra*.
- 85 42 U.S.C. § 10606(b)(6) (2000).
- 86 DOD DIR. 1030.1, *supra* note 84, pt. 4.4.6; DOD INSTR. 1030.2, *supra* note 84, pt. 4.4.6.

87 DOD DIR. 1030.1, *supra* note 84, pt. 4.5.

88 *See supra* note 4 and accompanying text.

89 Shortly after the VWAP was passed, it generated a huge amount of work for the government because it had to search old files and find victims and witnesses to ensure their rights had been, and were being, met.

90 *See* DOD DIR. 1030.1, *supra* note 84; DOD INST. 1030.2, *supra* note 84.

91 This is how the United States Marine Corps handles it. Each service may implement the VWAP differently, however, the forms given to victims and witnesses are the same. Department of Defense Forms 2701-06 contain information for victims and witnesses about their rights in the military criminal justice system. U.S. Dep't of Defense, DD Form 2701, Initial Information for Victims and Witnesses of Crime (May 2004); U.S. Dep't of Defense, DD Form 2702, Court-Martial Information for Victims and Witnesses of Crime (May 2004); U.S. Dep't of Defense, DD Form 2703, Post-Trial Information for Victims and Witnesses of Crime (May 2004); U.S. Dep't of Defense, DD Form 2704, Victim/Witness Certification and Election Concerning Inmate Status (Mar. 1999); U.S. Dep't of Defense, DD Form 2705, Victim/Witness Notification of Inmate Status (Dec. 1994); U.S. Dep't of Defense, DD Form 2706, Annual Report on Victim and Witness Assistance (Dec. 1994) [hereinafter DD Forms 2701-06].

92 *See* DOD DIR. 1030.1, *supra* note 84; DOD INST. 1030.2, *supra* note 84.

93 *Id.* This is done verbally and in writing through DD Forms 2701-06. DD Forms 2701-06, *supra* note 91.

94 “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.” MCM, *supra* note 2, pt. I, ¶ 3. It has also been said that the mission of the military is to win the nation's wars. This involves much more than merely protecting society from evildoers.

95 For an example of a poorly researched and biased article, *see* Edward T. Pound et al., *Unequal Justice*, U.S. NEWS & WORLD REPORT, Dec. 16, 2002, at 19.

96 18 U.S.C. §§ 3663A, 3664 (2000). Note that the MVRA refers to both [section 3663A](#), “Order of Restitution” and [section 3664](#), “Procedure for Issuance and Enforcement of Order of Restitution.” *Id.*

97 The text of [section 3663A](#), title 18, of the MVRA is as follows:

§ 3663A. Mandatory restitution to victims of certain crimes

(a) (1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For purposes of this section, the term “victim” means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant--

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to--

(i) the greater of--

(I) the value of the property on the date of the damage, loss or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim--

- (A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;
- (B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and
- (C) reimburse the victim for income lost by such victim as a result of such offense;
- (3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and
- (4) in any case, reimburse the victim for lost income and necessary childcare, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.
- (c) (1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense--
 - (A) that is--
 - (i) a crime of violence, as defined in section 16;
 - (ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or
 - (iii) an offense described in section 1365 (relating to tampering with consumer products); and
 - (B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.
- (2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.
- (3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that--
 - (A) the number of identifiable victims is so large as to make restitution impracticable; or
 - (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.
- (d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.
[18 U.S.C. § 3663A \(2000\).](#)

98 This is the restitution piece of the VWPA. which is now required under the MVRA. *Id.* Section 3664, title 18, is the actual order of restitution that carries out what the MVRA mandates. [18 U.S.C. § 3664 \(2000\).](#)

99 [18 U.S.C. § 3663A\(a\)\(1\) \(2000\).](#)

100 *Id.*

101 Any proposed amendment to [RCM 1003\(b\)](#) would need to modify this provision for special-courts martial, where combined monetary punishments cannot exceed the jurisdictional limit of the court (no more than two-thirds base pay per month for six months). MCM, *supra* note 2, R.C.M. 1003(b).

102 [18 U.S.C. § 3663A\(a\)\(1\) \(2000\).](#)

103 *Id.*

104 *Id.* § 3663A(b)(1)-(3).

105 *Id.*

106 *Id.* § 3663A(b)(2).

107 To do otherwise would necessitate value judgments and proceedings far beyond the reach of district courts. Perhaps restitution for a taken life is better left to civil courts and a civil action for wrongful death.

108 [18 U.S.C. § 3663A\(b\)\(4\) \(2000\).](#)

109 *Id.*

110 *Id.* § 3663A(c).

111 *Id.* § 3663A(c)(3).

- 112 18 U.S.C. § 3664(f)(1)(a) (2000).
- 113 Although the text of most of the MVRA states simply that the “court” shall do this or that, the Act is referring only to the federal district courts. Neither state courts nor military courts-martial fall under these regulations. The MVRA specifically states that the mandatory restitution only applies for offenses falling under titles 18 and 21 of the U.S. Code, whereas military courts-martial fall under title 10 of the U.S. Code. 18 U.S.C. § 3663A(c) (2000).
- 114 18 U.S.C. § 3663(a)(1)(B).
- 115 18 U.S.C. § 3663A(d) (2000).
- 116 18 U.S.C. § 3664 (2000). The title of the statute is “Procedure for Issuance and Enforcement of Order of Restitution.” *Id.*
- 117 *Id.* § 3664(a). The probation officer, as part of his report, must provide notice to all victims and allow them to submit an affidavit detailing any economic loss, which resulted from the defendant's crimes. The probation officer also informs victims of the particulars of the sentencing hearing and even the availability of a lien against the defendant's assets. *Id.*
- 118 *Id.* § 3664(d), (e).
- 119 *Id.* § 3664(e).
- 120 *Id.* § 3664(f)(3).
- 121 *Id.* § 3664(m)(1)(B).
- 122 *Id.* § 3664(o). The section also applies even if the defendant is re-sentenced. *Id.*
- 123 18 U.S.C. § 3613 (2000).
- 124 18 U.S.C. § 3614 (2000).
- 125 *See, e.g., United States v. Purther*, 823 F.2d 965 (6th Cir. 1987); *United States v. Mounts*, 793 F.2d 125 (6th Cir. 1986); *United States v. Keith*, 754 F.2d 1388 (9th Cir. 1985) (explaining that it is proper for a court to take into consideration the defendant's future earning capacity).
- 126 18 U.S.C. § 3664(a), (f)(1)(A).
- 127 The Eighth Circuit, in *United States v. Williams*, 128 F.3d 1239, 1242 (8th Cir. 1997) ruled that the MVRA does not violate the Eighth Amendment because district courts can still consider indigency of the defendant while looking at a payment schedule that considers potential and projected earnings. The Ninth Circuit, in *United States v. Dubose*, 146 F.3d 1141, 1146-48 (9th Cir. 1998) stated that not only does the MVRA not violate the Eighth Amendment's provisions against cruel and unusual punishment or due process concerns, but also the provisions that enforce criminal restitution orders into civil judgments do not violate the Seventh Amendment's guarantee of a trial by jury. The Seventh Circuit went even further in protecting the legality of restitution. In *United States v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000), the Court ruled that restitution does not even constitute a penalty for a crime. In another case, *United States v. Szarwark*, 168 F.3d 993, 998 (7th Cir. 1999), the Court stated that restitution does not constitute criminal punishment at all.
- 128 *Dubose*, 146 F.3d at 1147.
- 129 U.S. CONST. art. I, § 9, cl. 3.
- 130 *See, e.g., United States v. Schulte*, 264 F.3d 656 (6th Cir. 2001); *United States v. Kubick*, 205 F.3d 1117 (9th Cir. 1999); *United States v. Siegel*, 153 F.3d 1256 (11th Cir. 1998); *United States v. Newman*, 144 F.3d 531 (7th Cir. 1998).
- 131 18 U.S.C. § 3663A (2000).
- 132 *See infra* pt. VI.C.

- 133 For example, minor changes would need to be made to [Articles 19 and 20, UCMJ](#), concerning the sentence limitations on special and summary courts-martial. [UCMJ arts. 19, 20 \(2005\)](#). Likewise, minor changes would need to be made to [RCM 201\(f\)\(2\)\(B\)\(i\)](#) to incorporate the possibility of restitution. MCM, [supra note 2, R.C.M. 201\(f\)\(2\)\(B\)\(i\)](#).
- 134 MCM, [supra note 2, R.C.M. 1003\(b\)\(3\)](#).
- 135 [United States v. Tualla, 52 M.J. 228, 230 \(2000\)](#) (citing [United States v. Harris, 19 M.J. 331, 332 \(CMA 1985\)](#)).
- 136 MCM, [supra note 2, R.C.M. 1003\(b\)\(3\)](#).
- 137 This is the base pay figure for calendar year 2005, for a LCpl with over 2 years service. Forfeitures are rounded off to the nearest whole dollar amount.
- 138 Twelve months is the maximum number of months LCpl Pawn could be sentenced at a special court-martial. *See supra* note 7 and accompanying text.
- 139 [Tualla, 52 M.J. at 230](#).
- 140 [UCMJ art. 121 \(2005\)](#).
- 141 MCM, [supra note 2, R.C.M. 201\(f\)\(2\)\(B\)\(i\), 1003\(b\)\(3\)](#).
- 142 Note that forfeitures are calculated at the reduced rank of the servicemember, regardless of whether the reduction in rank is suspended. *Id.* [R.C.M. 1003\(b\)\(2\)](#).
- 143 *Id.* [R.C.M. 1107\(d\)\(5\)](#).
- 144 The sentencing authority will be at liberty to set up a payment schedule for restitution, whether that authority is a judge or a panel. *See infra* pt. V.D.2.
- 145 As this paper was originally being drafted, in 2003, unbeknownst to the author, the Working Group of the Joint Services Committee was also drafting proposed amendments to [RCM 1003\(b\)](#) to incorporate restitution as an authorized punishment. Major Chris Carlson, U.S. Marine Corps, a member of the Working Group, shared the Navy-Marine Corps' proposed changes, including a proposed Discussion to [RCM 1003\(b\)\(3\)\(a\)](#), Analysis of the Rule and a proposed amendment to [RCM 1113\(d\)](#). The author wishes to credit and thank Major Carlson and the Working Group for allowing the use of their proposed amendments and compare them with his own. Despite any efforts of the Working Group, there has still been no change to the Manual for Courts-Martial.
- 146 [18 U.S.C. § 3664\(e\) \(2000\)](#).
- 147 Unlike district courts, there is no payment schedule set up in the military by the sentencing authority, whether that sentencing authority is a judge or a panel. The general court-martial convening authority, however, may set a deadline for the payment of a fine. [Townsend v. United States, No. 98-03, 1999 CCA LEXIS 26 \(A.F. Ct. Crim. App. Feb. 5, 1999\)](#). The convening authority could also set a deadline for payment of restitution.
- 148 For some cases, imposing a fine, forfeiture of pay and restitution will be appropriate. For example, a case in which an accused has stolen from both the government and another servicemember. The wise prosecutor will look ahead and ensure that cases such as these, which involve substantial monetary amounts, are referred to a general court-martial vice a special court-martial that has a monetary limit.
- 149 The complete Discussion section of [RCM 1003\(b\)\(3\)](#) is as follows:
A fine is in the nature of a judgment and, when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence. A fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted. Ordinarily, a fine, rather than a forfeiture, is the proper monetary penalty to be adjudged against a civilian subject to military law.
See [R.C.M. 1113\(d\)\(3\)](#) concerning imposition of confinement when the accused fails to pay a fine.
Where the sentence adjudged at a special court-martial includes a fine, see [R.C.M. 1107\(d\)\(5\)](#) for limitations on convening authority action on sentence.

- MCM, *supra* note 2, R.C.M. 1003(b)(3) discussion.
- 150 *Id.*
- 151 *See, e.g., United States v. Martinsmith*, 41 M.J. 343 (1995).
- 152 MCM, *supra* note 2, R.C.M. 1003(b)(3).
- 153 *See, e.g., United States v. Price*, No. S30012, 2002 CCA LEXIS 265 (A.F. Ct. Crim. App. Oct. 4. 2002); *United States v. Robertson*, 27 M.J. 741 (A.C.M.R. 1988).
- 154 Rule for Court-Martial 1113(d)(3) states:
 (3) *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.
 MCM, *supra* note 2, R.C.M. 1113(d)(3).
- 155 *Id. See also, United States v. Tuggle*, 34 M.J. 89, 92 (C.M.A. 1992).
- 156 MCM, *supra* note 2, R.C.M. 1107(d)(5).
- 157 *Id.*
- 158 *Id.* R.C.M. 1003(b)(3).
- 159 The *Manual for Courts-Martial* states that the drafters of the legislation intended that the “Discussion” sections be considered as treatises, helpful, but without the force of law. *Id.* app. 21, introduction.
- 160 *Id.* R.C.M. 1003(b)(3).
- 161 This language of requiring payments to “begin immediately” is taken from an article entitled “*The Perplexing Problem with Criminal Penalties in Federal Courts*,” (19 REV. LITIG. 167 (2000)) written by the Honorable W. Royal Furgeson, Jr., Catharine M. Goodwin and Stephanie Lynn Zucker. In the article, Judge Furgeson argues that rather than use the words “due immediately,” judges should order restitution payments to “begin immediately.” *Id.* at 188. This, he argues, makes it easier to avoid the fiction that the accused can make immediate and full restitution. *Id.*
- 162 Credit for a few of these concepts belongs to the Joint Services Committee Working Group. *See supra* note 145.
- 163 This part was taken substantially from the MVRA. *See supra* note 5.
- 164 *Id.*
- 165 MCM, *supra* note 2, *Id.* app. 21, introduction.
- 166 *See supra* note 145.
- 167 MCM, *supra* note 2, R.C.M. 1107.
- 168 *Id.* R.C.M. 1107(d)(5).
- 169 *Id.* R.C.M. 1003(b)(3).
- 170 Note that the parentheses and the language “the forfeitures are” within the parentheses are added to clarify that the follow-on language applies to forfeitures only.
- 171 MCM, *supra* note 2, R.C.M. 201(f)(2)(B)(i), 1003(b)(3).
- 172 *Id.* R.C.M. 201(f)(1)(A)(ii).

- 173 *Id.* R.C.M. 1113(d)(3).
- 174 *See supra* note 145.
- 175 *See, e.g., United States v. Martinsmith.* 41 M.J. 343 (1995).
- 176 U.S. DEP'T OF ARMY. PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (16 Sep. 2002) [hereinafter BENCHBOOK].
- 177 *Id.* ¶ 2-5-22. The Benchbook states that the only sentencing instructions concerning punishments that are required under paragraph 2-5-22 are those of [Article 58a](#) and [58b](#), the nature of a punitive discharge, and pretrial confinement credit if applicable. *Id.* Note that this section applies for contested cases. Identical fine provisions are included in paragraph 2-6-10 of the same chapter when members are used for sentencing only. *Id.* ¶ 2-6-10. Interestingly, types of punishments listed for capital cases do not include a fine as an authorized punishment. *Id.* ¶ 8-3-22.
- 178 *Id.* ¶ 2-5-22.
- 179 *Id.*
- 180 Note also that any general court-martial is entitled to award total forfeiture of all pay and allowances whereas at a special court-martial an accused risks only two-thirds forfeitures of his pay per month. MCM, [supra](#) note 2, R.C.M. 201(f)(1), (2)(B)(i).
- 181 Appendix C, of the Benchbook, contains the sample worksheets for all four possible special and general court-martial scenarios in sections C-1 through C-4. BENCHBOOK, [supra](#) note 176, app. C. Appendix 11, of the *Manual for Courts-Martial*, contains language to be used in announcing the sentence of a court-martial. MCM, [supra](#) note 2, app. 11. Section (b)(3) of this appendix would also need to be modified to include payment of restitution as an option under the category "Forfeitures. Etc." *Id.* app. 11, (b)(3).
- 182 The genesis for this idea came from Major Jan A. Aldykiewicz, Judge Advocate, United States Army, who was an instructor at the school when this paper was originally drafted in 2003.
- 183 Whether the military could forge alliances with state probation offices, like the federal civilian system, is a subject beyond the reach of this paper.
- 184 In some cases, the military will continue to exercise jurisdiction over the accused even when the discharge certificate is delivered. This is true for cases of extended confinement where the appellate process has run its course, the accused receives his discharge certificate, and still has confinement time to serve. UCMJ art. (2)(a)(7) (2005).
- 185 [Rule for Court-Martial 1001](#) states that "[a]fter findings of guilty have been announced, the prosecution and defense may present matter pursuant to this rule to aid the court-martial in determining an appropriate sentence." MCM, [supra](#) note 2, R.C.M. 1001(a)(1). Although the Rules for Court-Martial do not set a timetable on when the sentencing hearing will take place, it is generally done immediately after the findings are announced. This is probably because, unlike the federal system, where the judge decides the sentence, the same members who decided guilt or innocence decide the punishment to be awarded the accused. It appears to be, therefore, a matter of convenience. Experience has shown that significant general court-martial cases sometimes have a short intervening period between when the findings are announced and the sentencing proceedings. This is usually no more than a few days.
- 186 It may seem odd to the accused and his supporters that the military defense counsel must prepare for a sentencing case at the same time he prepares for the contested case on the merits. This is so because the sentencing case almost always immediately follows the case on the merits. The accused may think, "I thought we were going to win, why do we have to get stuff together for sentencing?"
- 187 18 U.S.C. § 3664(d) (2000).
- 188 *Id.* § 3664(e).
- 189 Although it is common practice to tell the members of the accused's marriage status and dependents, [RCM 1001\(b\)\(1\)](#) states the following with regard to what must come to the members' attention:
 (1) *Service data from the charge sheet.* Trial counsel shall inform the court-martial of the data on the charge sheet relating to the pay and service of the accused and the duration and nature of any pre-trial restraint. In the discretion of the military judge, this may be done by reading the material from the charge sheet or by giving the court-martial a written statement of such matter. If the defense

objects to the data as being materially inaccurate or incomplete, or containing specified objectionable matter, the military judge shall determine the issue.

MCM, *supra* note 2, R.C.M. 1001(b)(1).

190 The accused is free to present complicated evidence on possible retirement benefits that may be forfeited and the judge is required to instruct on the effect of a punitive discharge on these benefits. *See, e.g., United States v. Boyd*, 55 M.J. 217 (2001); *United States v. Luster*, 55 M.J. 67 (2001). If members (and judge advocates, for that matter) are expected to understand complicated actuary tables, with mathematical formulas, surely they can understand simple calculations involving pecuniary loss to victims.

191 Immediately begun, but taken out over increments if the amount is substantial.

192 *See supra* pt. II.B.2.

193 UCMJ art. 139 (2005).

194 *Id.* art. 139(a).

195 The purpose of this article is not to delve into all of the nuances of the military's pay regulations, but it appears that it does not appear a stretch to assume that the pay regulations could accommodate court-martial judgments of restitution to the same extent they accommodate Article 139 complaints.

196 *See supra* pt. V.A.2.

197 UCMJ art. 139 (2005).

198 UCMJ arts. 57, 58b (2005).

199 *Id.*

200 *See* 18 U.S.C. §§ 3613, 3664 (2000) (monitoring restitution in the federal system).

201 Under the federal civilian system, the judge orders a payment schedule for the defendant and then relies on the probation officer to ensure monies are collected. 18 U.S.C. § 3664(f)(2) (2000). The restitution could take years to pay off under the payment system if the victim is poor or out of work. *See also* Furgeson, *supra* note 161.

202 The Transitional Compensation Program provides a good example. The monies paid out for fiscal years 2004 through fiscal year 2000 are as follows: FY 04, \$677,000.00; FY 03 \$694,000.00; FY 02, \$659,000.00; FY 01, \$497,000.00; and FY 00, \$448,000.00. E-mail from Tracy C. Perl, Program Analyst, Transitional Compensation Program Manager, Manpower and Reserve Affairs, Headquarters, U.S. Marine Corps, to Lieutenant Colonel Dave M. Jones (Nov. 22, 2005, 7:59 a.m. EST) (on file with author). To illustrate how much money a single family is entitled to, consider the case of a military member who gets court-martialed for domestic abuse. Assume that he has three years left on his enlistment and has a wife and three children. That family would be entitled to approximately \$65,000. None of this money is ever reimbursed. The typical restitution case, on the other hand, would probably run from a few hundred to a few thousand dollars, and would be reimbursed.

203 MCM, *supra* note 2, pt. I, ¶ 4; *see also* UCMJ art. 56 (2005); 10 U.S.C. §§ 801-946 (2000).

204 *United States v. MacCollom*, 426 U.S. 317 (1976).

205 Operation and maintenance (O&M) money is an appropriated fund type that is set by the Appropriation Act. The Appropriation Act is the statutory authorization to incur obligations and make payments out of the U.S. Treasury for specified purposes. Operation and maintenance money is used for such items as day-to-day expenses of training exercises, deployments, and operating and maintaining installations. The Purpose Statute states that appropriations must be applied only to the objects for which the appropriations were made. 31 U.S.C. § 1301 (2000). To use O&M money for purposes for which it is not intended may result in an Antideficiency Act (ADA) violation. 31 U.S.C. § 1341 (2000). The ADA mandates administrative and criminal sanctions for unlawful use of appropriated funds. *Id.* Therefore, any money for this kind of program would have to be earmarked in the Appropriation Act for that year.

206 10 U.S.C. § 1059 (2000).

- 207 *Id.*
- 208 UCMJ art. 58b (2005).
- 209 *See supra* pt. VI.A.
- 210 UCMJ art. 58b (2005).
- 211 *Id.*
- 212 This actually looks more like the entitlement philosophy of the Transitional Compensation Act.
- 213 UCMJ art. 58b(b) (2005).
- 214 Article 58b, UCMJ, was passed on 10 February 1996. 10 U.S.C. § 858b (2000).
- 215 In fact, paying the dependents of the accused while he is confined may actually result in the accused eventually receiving that money. Paying restitution would not render the same result, assuming the victim is not a family member.
- 216 Although the jurisdictional limit for special courts-martial was extended for confinement time and forfeitures (as well as fines), the waiver provision of six months was never changed. *See supra* note 7 and accompanying text.
- 217 *Id.*
- 218 *See supra* pt. IV.B.
- 219 18 U.S.C. § 3664(m)(1)(A) (2000).
- 220 *Id.* § 3664(m)(1)(B).
- 221 *Id.* § 3664(o). The section also applies even if the defendant is re-sentenced. *Id.*
- 222 For example, consider how the military reacted when states stopped accepting military powers of attorney. The military began to put the following provision as the preamble of every power of attorney it drafted:
This is a military power of attorney prepared pursuant to [Title 10, United States Code, Section 1044b](#) and executed by a person authorized to receive legal assistance from the military services. Federal law exempts this power of attorney from any requirement of form, substance, formality or recording that is prescribed for powers of attorney under the laws of a state, the District of Columbia, or a territory, commonwealth, or possession of the United States. *Federal law specifies that this power of attorney shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the jurisdiction where it is presented.* J.A. 272, LEGAL ASSISTANCE DEPLOYMENT GUIDE (1994) (emphasis added).
- 223 Each state treats convictions a little differently, however. For example, what is considered a “felony” conviction from a military court varies from state to state. Some states, like Alabama, consider the accused to have a felony conviction if the crime he committed falls under a list of certain “felony” crimes ([ALA. CODE § 13A-5-3 \(2002\)](#)); other states, like California, consider the accused to have a felony conviction if he spent time in the equivalent of a state prison vice a city or county jail ([CAL. PENAL CODE § 17 \(Deering 2002\)](#)); and some states, like Montana, consider the accused to have a felony conviction based on the maximum confinement time he was facing from the charges ([MONT. CODE ANN. § 45-1-201 \(2002\)](#)).
- 224 MCM, *supra* note 2, pt. I, ¶ 4. *See also* UCMJ art. 56 (2005); 10 U.S.C. §§ 801-946 (2000).
- 225 The Supremacy Clause states that the Constitution and federal law is the supreme law of the land, notwithstanding state laws. U.S. CONST. art. VI, cl. 2.
- 226 *See supra* pt. V.A.2.
- 227 MCM, *supra* note 2, R.C.M. 1113(d)(3).
- 228 One issue that has not been addressed is how an accused would pay a victim absent restitution by proxy. One option might be for the accused to give it to his defense attorney, who would then give it to the victim. Another option might be for the Service Secretaries to

designate someone to act as an intermediary for the money; for example, the VWAP Coordinator, someone from Family Advocacy, or someone from disbursing.

229 Even the drafting of the MVRA gave rise to ex post facto concerns. *See, e.g.*, Irene J. Chase, *Making the Criminal Pay in Cash: The Ex Post Facto Implications of the Mandatory Victims Restitution Act of 1996*, 68 U. CHI. L. REV. 463.

230 *United States v. Gorski*, 47 M.J. 370 (1997).

231 *Id.* at 372.

232 *Id.* at 374.

233 *Id.*

234 *Id.* at 373 (quoting *Calder v. Bull*, 3 U.S. 386, 390 (1798)). *See also*, *Taylor v. Garaffa*, 54 M.J. 645 (2002).

235 *See Gorski*, 47 M.J. at 374. Another, more recent, example of the confusion that can arise from not knowing when to apply new law occurred when the President amended section 819, [Article 10 \(Article 19, UCMJ\)](#), in the National Defense Authorization Act for FY 2000, [Pub. L. No. 106-65, 113 Stat. 512 \(1999\)](#). *See supra* note 7. This amendment increased the jurisdictional maximum punishment of special courts-martial for confinement and forfeitures from six months to one year. This change became effective in military courts on 15 May 2002 but was silent on when commission of the offenses had to be to qualify under the new law. This led to a controversy on how to apply the new law. Some argued that if the accused committed his crime before 15 May 2002 he should face a one-year special court-martial. Others argued it should be based on preferral of charges, arraignment, or at adjudication of the sentence. To avoid the prospect of being overruled by the appellate courts, and having to re-try cases, some took the position that the new law would apply only for those cases in which the criminal conduct occurred after 15 May 2002. Subsequently, on 24 May 2002, the Navy finally came out with its position, endorsing the conservative approach--any offense that was committed before 15 May 2002 would be adjudicated under the old system. E-mail from Deputy Assistant Judge Advocate General of the Navy (Criminal Law), to all Navy and Marine Corps Judge Advocates (24 May 2002) (on file with author).

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