

**December 3-5, 2015 Preventing and Treating the Invisible Wounds of War:
Combat Trauma and Psychological Injury Conference**

**THE CODE OF CONDUCT – TRAINED IN PEACETIME AND LIVED IN COMBAT
TO ACHIEVE MENTAL AND PHYSICAL RESILIENCE AND AVOID MORAL INJURY
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Abstract

In August 1955, nearly two years after the signing of the Korean Conflict Armistice, Dwight D. Eisenhower signed Executive Order 10631 into effect that stated, "Every member of the Armed Forces of the United States are expected to measure up to the standards embodied in the Code of Conduct while in combat or in captivity."¹ To ensure this six-article creed of conduct was implemented, specific training and instruction was given to the use of the Code. Since the signing of the Code of Conduct (CoC), it has gone through only two modifications of four provisions, notwithstanding the change in nature of conflict that U.S. military forces have faced.² The code remains applicable as a firmly comprehensible, achievable set of beliefs and expectations even in today's changed battlespace, as "a moral guide designed to assist military personnel in combat or being held as prisoners of war to live up to the ideals contained in the [Department of Defense (DoD)] policy."³

Now, more than ever, as the Nation combats violent extremist movements and threaten our freedom with a state of persistent conflict, trained and ready forces must have the capacity to deal with protracted confrontation among state, non-state, and individual actors. The non-state and individual actors are increasingly willing to use violence to achieve their political and ideological ends. Our forces must have the capacity to sustain physical and mental stamina to deal with rapidly changing and high-risk threats.

The CoC serves as a guide to leaders and service members for avoiding *moral injury* defined as "perpetrating, failing to prevent, bearing witness to, or learning about acts that transgress deeply held *moral* beliefs and expectations."⁴ General George C. Marshall

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¹ Executive Order 10631--Code of Conduct for members of the Armed Forces of the United States, Aug. 17, 1955, 20 FR 6057, 3 CFR, 1954-1958 Comp., p. 266, <http://www.archives.gov/federal-register/codification/executive-order/10631.html>.

² Id. Article V amended by EO 12017 of Nov. 3, 1977, 42 FR 57941, 3 CFR, 1977 Comp., p. 152. which U.S. military forces have faced; the first change came about in 1977 when President Carter made it more "reasonable" by taking out the verbiage that would imply only one suitable course of action. See also *Id.* Articles II and VI amended by EO 12633 of Mar. 28, 1988, 53 FR 10355, 3 CFR, 1988 Comp., p. 561. The second change came in 1988 when President Reagan made it gender neutral.

³ Department of Defense, Guide for Military Personnel Isolated from U.S. Control, DoD Joint Staff Guide 5260, Antiterrorism Personal Protection Guide: A Self-Help Guide to Antiterrorism, February 2008, <http://www.dhra.mil/perserec/osg/t5terror/captured-military-personnel.htm>.

⁴ Brett Litz, et al. "Moral Injury and Moral Repair in War Veterans: A Preliminary Model and Intervention Strategy." *Clinical Psychology Review* 29, no. 8 (2009): 695-706.

commented early in World War II on the threat to the moral fiber of the combat soldier and warned leaders to take precautions:

“Once an army is involved in war, there is a beast in every fighting man, which begins tugging at its chains, and a good officer must learn early on how to keep the beast under control, both in his men and himself.”⁵

This paper will advance the notion that the CoC has become an integral part of developing and sustaining U.S. service member endurance, both emotional and physical, as the nature of conflicts has changed. Rather than through a coercive, proscriptive legalistic approach but rather through meaningful training, and individual and cultural adherence to the standards in advance of deployment, service members actions in accordance with the CoC enhance their ability to recover from physical and emotional adversity, to live within standards of moral and ethical excellence, and to conduct themselves with principled action.

This lived-by-example approach to the CoC will also be described in the context of physical and mental fitness, training readiness, commitment to national and service-specific values, and the well being of service members’ loved ones. The CoC anchors the environment of the military unit and character of the command climate. The Army has a long tradition of holding leaders responsible for setting the “command climate.” Command climate contains that environment and context that govern the conduct of the soldiers in the units and affect the effectiveness of operations. Commanders are responsible for “what they do and don’t do.”

The burden of combat over the past 14 years has adversely affected command climate across the Army and the ethical conduct of its leaders. The environment and command climate impose stress on young soldiers and officers and contribute to experiences of “moral injury.” Soldiers make decisions and act under pressure and in circumstances that contribute to doubt and anxiety on reflection and cooler conditions.

This paper will examine historical traditions and necessities that gave rise to the CoC comprised of readily identifiable, moral foundation principles by which individual U.S. service members as well as the DoD as a whole may hold individuals and others to account for moral values in a purposeful and coherent codification. In the process of inculcating the moral code, training and periodic reinforcement is key and has devolved with one notable exception to become a subset of Law of War (LOW) training; this paper will examine the rationale for military lawyers (judge advocates) as the primary instructors for such CoC training. While a moral code, the CoC also has parallel legal codifications making CoC violations subject to criminal investigations and, in some cases, conviction at courts-martial. In conclusion, it will show how the CoC fits into the ongoing training and evaluation of service members’ emotional and psychological strength, and the controversy over the measurability of so-called “resilience” capacity in encountering and readjusting after traumatic circumstances.

⁵ Marshall, George C. (1942)

Moral Codes From History As Foundations For The Present Code of Conduct

Sun Tzu's first of five Constant Factors exhorted military leaders of the fifth century BCE (and wise ones studying him ever since) to consider "The Moral Law, which causes the people to be in complete accord with their ruler so they will follow him regardless of their lives, undismayed by any danger."⁶ The Roman concept of *virtus* did not carry the same overtones as the Christian "virtue," but like the Greek *andreia*, *virtus* had a primary meaning of "acting like a man" (*vir*), specifically "acting like a brave man in military matters" in the context of 'outstanding deeds' (*egregia facinora*), and brave deeds bringing about *gloria* ("a reputation").⁷

From this notion of *virtus* evolved Chivalry, or the chivalric code of conduct associated with the medieval institution of knighthood between 1170 and 1220.⁸ The code of chivalry that developed in medieval Europe had its roots in earlier centuries, and abided through modern times as oral tradition, legend, and written exhortation. From the 12th Century onward, "the code of chivalry implied that a man ought to fulfill his military duties, prove his strength and fortitude in battle, serve his people and king (lord), treat people well, and show nobility and reasonableness in peace"⁹ Then, as now, the notion of an ethical framework rooted in an idea of chivalry proves "pernicious...because it associates valor and honor with physical hardship and heroism, especially in ground close combat."¹⁰

The American concept of military virtue, as with much else related to discipline and order, owes much to the British heritage steeped in these ancient principles. Many traditions from the British military heritage were adapted and altered by the Continental Army, through present-day requirements for military leaders to dedicate themselves to selfless service, and advancing the rule of law domestically and abroad, while scrupulously adhering to the law, moral codes, and standards of ethics.¹¹

When a martial ethos of virtuous service failed through acts of misconduct, the standard approach prior to the 20th Century was to seek criminal sanction rather than exhort prescriptive positive conduct. Such instances of misconduct included the first American prisoner of war (POW) "turncoat" during the Revolutionary War, resulting in conviction for treason.¹² By the time of the American Civil War, the Union Forces made it

⁶ Sun Tzu, *The Art of War*, trans. Samuel B. Griffith (1963), p. 63-64, <http://web.stanford.edu/class/polisci211z/1.1/Sun%20Tzu.pdf>.

⁷ See, e.g., John Paul Adams, *The Roman Concept of Fides*, California State University- Northridge, May 4, 2009, <http://www.csun.edu/~hcfl004/fides-text.html>, cited with authority in W.D. Wilkerson, *Walking With The Gods* (2014), 126.

⁸ *Historical Dictionary of Late Medieval England, 1172-1485*, ed. Ronald H. Fritze, William B. Robison (2002), 105.

⁹ *Id.*, p. 105.

¹⁰ *The Chivalry Trap*, Routledge Handbook of Military Ethics, ed. George Lucas (2015), pp. 304-5.

¹¹ Kevin Govern, *The Commissioned Army Officer, Committed By and To The Law*, West Point Perspectives on Officership, The Commissioned Army leader, 4th Edition (2006), 77.

¹² *Republica v. M'Carty*, 2 U.S. 86 (1781), <http://openjurist.org/2/us/86/republica-v-mcarty>.

obligatory for soldiers captured by Confederates to escape.¹³ Through World War II, U.S. forces continued to prosecute repatriated POWs for collaboration with the enemy,¹⁴ a problem estimated to grow to the point that “30% of U.S. personnel collaborated to some degree with the enemy during the Korean [Conflict].”¹⁵

In this context, in 1955, President Eisenhower issued Executive Order (E.O.) 10631, creating the modern day concept of the CoC.¹⁶ That E.O., amended five times substantively over the years to reflect changes to the command structure¹⁷ and once to make gender-neutral references better reflecting the composition of the Armed Forces,¹⁸ now reads as follows with the CoC included:

By virtue of the authority vested in me as President of the United States, and as Commander in Chief of the armed forces of the United States, I hereby prescribe the Code of Conduct for Members of the Armed Forces of the United States which is attached to this order and hereby made a part thereof.

All members of the Armed Forces of the United States are expected to measure up to the standards embodied in this Code of Conduct while in combat or in captivity. To ensure achievement of these standards, members of the armed forces liable to capture shall be provided with specific training and instruction designed to better equip them to counter and withstand all enemy efforts against them, and shall be fully instructed as to the behavior and obligations expected of them during combat or captivity.

¹³ Margaret E. Wagner, *The Library of Congress Civil War Desk Reference, Prisons and Prisoners of War* (2002), 597.

¹⁴ See, e.g., *U.S. v. Provoo*, 124 F. Supp. 185 (S.D.N.Y. 1954), rev'd, 215 F. Supp. 531 (2d Cir. 1954) <http://openjurist.org/215/f2d/531/united-states-v-provoo> (mistreatment of fellow POWs and making radio broadcasts for Japanese).

¹⁵ See, e.g., Julius Segal, *Factors Related to the Collaboration and resistance behavior of the U.S. Army PWs' in Korea* 4 (Dec. 1956), and see Note: *Misconduct in the Prison Camp, A Survey of the Law and an Analysis of the Korean Cases*, 56 Col. L. Rev. 709 (1956) for a detailed factual and legal analysis of Korean POWs experiences, cited with authority in International and Operational Law Department, The Judge Advocate General's School, U.S. Army, *Law of War Deskbook*, June 2000, p. 89, https://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2011.pdf.

¹⁶ Executive Order 10631, Code of Conduct for members of the Armed Forces of the United States, August 17, 1955, 20 FR 6057, 3 CFR 1954-1958 Comp. p. 266, <http://www.archives.gov/federal-register/codification/executive-order/10631.html>. Note: The second paragraph was amended by EO 12633 of Mar. 28, 1988, 53 FR 10355, 3 CFR, 1988 Comp., p. 561; the third paragraph amended by EO 11382 of Nov. 28, 1967, 32 FR 16247, 3 CFR, 1966-1970 Comp., p. 691; Article I was amended by EO 12633 of Mar. 28, 1988, 53 FR 10355, 3 CFR, 1988 Comp., p. 561; Article II was amended by EO 12633 of Mar. 28, 1988, 53 FR 10355, 3 CFR, 1988 Comp., p. 561; Article V was amended by EO 12017 of Nov. 3, 1977, 42 FR 57941, 3 CFR, 1977 Comp., p. 152, and; Article VI amended by EO 12633 of Mar. 28, 1988, 53 FR 10355, 3 CFR, 1988 Comp., p. 561. *Id.*

¹⁷ The DoD issued guidance through Dep't of Def., Pamphlet 8-1, *U.S. Fighting Man's Code*, first issued in November 1955 and revised three times. DoD also issued in July 1965, DoD Dir. 1300.7, *Training and Education Measures Necessary to Support the Code of Conduct* (July 8, 1964). However, this guidance left it to the individual services to develop, interpret, and train its service members on the Code. This lead to interpretation problems by U.S. POWs in North Vietnam. See *Law of War Deskbook*, *supra* note 15, p. 89.

¹⁸ Executive Order 12633 – Amending the Code of Conduct for Members of the Armed Forces of the United States, March 28, 1988, <http://www.reagan.utexas.edu/archives/speeches/1988/032888c.htm>.

[Second paragraph amended by EO 12633 of Mar. 28, 1988, 53 FR 10355, 3 CFR, 1988 Comp., p. 561]

The Secretary of Defense (and the Secretary of Transportation with respect to the Coast Guard except when it is serving as part of the Navy) shall take such action as is deemed necessary to implement this order and to disseminate and make the said Code known to all members of the armed forces of the United States.

[Third paragraph amended by EO 11382 of Nov. 28, 1967, 32 FR 16247, 3 CFR, 1966-1970 Comp., p. 691]

Code of Conduct for Members of the United States Armed Forces

I

I am an American, fighting in the forces which guard my country and our way of life. I am prepared to give my life in their defense.

[Article I amended by EO 12633 of Mar. 28, 1988, 53 FR 10355, 3 CFR, 1988 Comp., p. 561]

II

I will never surrender of my own free will. If in command, I will never surrender the members of my command while they still have the means to resist.

[Article II amended by EO 12633 of Mar. 28, 1988, 53 FR 10355, 3 CFR, 1988 Comp., p. 561]

III

If I am captured I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.

IV

If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.

V

When questioned, should I become a prisoner of war, I am required to give name, rank, service number and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.

[Article V amended by EO 12017 of Nov. 3, 1977, 42 FR 57941, 3 CFR, 1977 Comp., p. 152]

VI

I will never forget that I am an American, fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.

[Article VI amended by EO 12633 of Mar. 28, 1988, 53 FR 10355, 3 CFR, 1988 Comp., p. 561]¹⁹

It is DoD policy that “all members of the Armed Forces at risk of capture shall receive the applicable level of CoC training”²⁰ since:

[These] six brief Articles that address those situations and decision areas that all personnel could encounter in captivity. It includes basic information useful to U.S. POWs in their efforts to survive honorably while resisting their captor’s efforts to exploit them to the advantage of the enemy’s cause.²¹

The COC is not to be confused with the so-called “Soldier’s Creed,” which exists in similar guises as an Airman’s Creed in the U.S. Air Force, a Sailor’s Creed for the U.S. Navy, My Rifle – The Creed of a United States Marine, and the Creed of the U.S. Coast Guard. In its present, post-2003 iteration, reciters of the Soldier’s Creed profess:

I am an American Soldier.
 I am a Warrior and a member of a team.
 I serve the people of the United States, and live the Army Values.
 I will always place the mission first.
 I will never accept defeat.
 I will never quit.
 I will never leave a fallen comrade.
 I am disciplined, physically and mentally tough, trained and proficient in my warrior tasks and drills.
 I always maintain my arms, my equipment and myself.
 I am an expert and I am a professional.
 I stand ready to deploy, engage, and destroy the enemies of the United States of America, in close combat.
 I am a guardian of freedom and the American way of life.
 I am an American Soldier.²²

¹⁹ *Id.*

²⁰ See, e.g., DoD Directive 1300.7, “Training and Education to Support the Code of Conduct, December 8, 2000, <http://www.dtic.mil/whs/directives/corres/pdf/130007p.pdf>

²¹ DoD Instruction 1300.21, “Code of Conduct (CoC) Training and Education, January 8, 2001, <http://www.dtic.mil/whs/directives/corres/pdf/130021p.pdf>.

²² See, e.g., Soldier’s Creed and Army Values, Fort Jackson South Carolina Website, <http://jackson.armylive.dodlive.mil/about/soldiers-creed-army-values/>. For the Airman’s Creed, see, e.g., <http://www.airforce.com/learn-about/airmans-creed/>; for the Sailor’s Creed, see, e.g., http://www.navy.mil/navydata/nav_legacy.asp?id=257; for My Rifle – The Creed of a United States Marine, see, e.g., http://www.mcu.usmc.mil/historydivision/pages/frequently_requested/Rifle_Creed.aspx ;

The Soldier's Creed is set of standards by which all soldiers are encouraged to live:

[T]he American soldier swears faithfully to fulfill his mission, first and foremost, to serve the American people and the 'American way of life,' never surrendering, on the assumption that the individual soldier is both a strong warrior and a member of a team in which defeat is unacceptable.²³

Specific to the Army version of service creeds, the Soldier's Creed was promulgated "after Army leaders concluded that the increasingly high-tech force was becoming too specialized, with too many troops thinking of themselves in terms of their military specialties, not their mastery of marksmanship and other basic combat skills."²⁴

Training The Code of Conduct – A Legalistic Approach To Military Morality?

In 1952 the DoD designated the US Air Force as executive agent (EA) for escape and evasion activities, training primarily pilots and aircrew as most likely to be isolated;²⁵ by the early 1990s, DoD began to focus more on the importance of personnel recovery (PR) and in 1991 the Joint Services Survival, Evasion, Resistance, and Escape (SERE) Agency (JSSA) was designated the DoD EA for DoD Prisoner-of-War/Missing-in-Action matters. Presently, the Joint Services Survival Evasion Resistance and Escape (SERE) Agency (JSSA), as part of the Joint Personnel Recovery Agency (JPRA) implements the DoD Directive on Code of Conduct matters and joint doctrine for evasion and recovery.²⁶ As experienced during the Vietnam conflict, "[t]he most consistent unsolicited statement made by [U.S. POWs] concern[ed] the need for improved and uniform training so that future prisoners would all be working together from the same and the best ground rules."²⁷

Notwithstanding the JPRA's EA role, with its headquarters in Fort Belvoir, VA and schools located in Fredericksburg, VA and Spokane, WA,²⁸ it is incapable of performing repetitive, worldwide, entry level, refresher, or predeployment CoC training. Such training has devolved by and large to uniformed lawyers instead. By practice, and as

and for the Creed of the United States Coast Guardsman, see, e.g.,

<http://www.uscg.mil/history/faqs/creed.asp> .

²³ Lucas, *supra* note 10, at 202. Lucas' work is superb for a consideration of codes of conduct around the world, to include, but not limited to Canada (198), France (200-201), Germany (198-203), Great Britain (197-203), the Netherlands (200), Portugal (202), Russia (200), Spain (201-202), and more.

²⁴ Vernon Loeb, *Army Plans Steps to Heighten "Warrior Ethos,"* Washington Post, 8 September 2003, <https://www.washingtonpost.com/archive/politics/2003/09/08/army-plans-steps-to-heighten-warrior-ethos/aafb2625-a33d-48ca-8fcf-3ef2747f1243/> .

²⁵ Joint Personnel Recovery Agency, JPRA History <http://www.jptra.mil/links/About/History.html>

²⁶ *Id.* See also Law of War Deskbook, *supra* note 14, at 89. See also Joint Pub 3-50.3, Joint Doctrine for Evasion and Recovery, 6 September 1996, https://fas.org/man/dod-101/sys/ac/docs/jp3_50_3.pdf .

²⁷ The Code of Conduct: a Second Look (U.S. Air Force Productions), 1979, p. 198, *cited with authority* in Law of War Deskbook, *supra* note 13, at 103

²⁸ JPRA Organizational Chart, Joint Personnel Recovery Agency, <http://www.jptra.mil/links/About/OrgChart.html>

part of the DoD Law of War Program,²⁹ the General Counsel of the DoD exercised primary staff responsibility for the DoD Law of War Program, and supervises and assigns a chair of the DoD Law of War Working Group comprised of the General Counsel of each Military Department and the Judge Advocates General of each of the services that plan and create policies for training and education in the law of war.³⁰

As part of service-wide law of war training, Judge Advocates (JAs - uniformed military lawyers) have habitually conducted CoC training for their serviced units, notwithstanding the fact that most are not SERE graduates.³¹ From a U.S. Army perspective, JAs have become integral personal and special staff members to the units in which they serve, and “JAs are no less qualified [to conduct CoC training] than any other non-serie graduate;” JAs “can combine and distinguish between ... legal and moral obligations” while conducting CoC instruction which “meshes well with other POW classes [they] already teach.”³²

Such training has been enhanced by real-world feedback from those who evaded captivity, escaped it, or survived same. For instance, “Experiences of a P.O.W.” is a two-hour videotape widely used by all U.S. forces that captures the experiences of COL Nick Rowe who was captured by the North Vietnamese in 1964 and spent 5 ½ years as a POW until he successfully escaped. COL Rowe’s experiences and advice were instrumental in developing SERE training and CoC instruction generally regarding resistance and disclosure of information, regrouping and resistance, and avoiding being overwhelmed with guilt.³³

More recently, in the wake of the Jessica Lynch’s capture and detention during Operation Iraqi Freedom, U.S. military basic training has include defensive skills beyond a briefing on the CoC to “service members whose jobs put them at the highest risk of being captured” and to address the “‘asymmetric’ modern-day battlefield – one without clear-cut front lines or clear distinctions between friend and foe.”³⁴ Cited in validation for the need for such a “core captivity curriculum,” the Armed Forces Press Service quoted Army Chief Warrant Officer 2 Dave Williams, whose AH-64D Longbow Apache helicopter was shot down over Iraq in March 2003, in that “his 21 days of captivity reinforced the need for additional training for all service members, regardless of their job specialty.”³⁵ A graduate of SERE school, Williams believed the course “helped him endure the hardships of captivity and, as the senior U.S. prisoner, help his fellow

²⁹ DoD Directive 2311.01E, DoD Law of War Program, May 9, 2006, incorporating Change 1, November 15, 2010, <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>. Note: This Directive supersedes the longstanding but canceled DoD Directive 5100.77, DoD Law of War Program, December 9, 1998.

³⁰ *Id.*

³¹ *See, e.g.*, Law of War Deskbook, *supra* note 14, at 91.

³² *Id.*, p. 91.

³³ *Id.*, p. 92.

³⁴ Donna Miles, DoD Developing New Training to Help Potential Captives, Armed Forces Press Service, <http://archive.defense.gov/news/newsarticle.aspx?id=25696>. With respect to Jessica Lynch’s recovery from her captivity experience, *see, e.g.*, Meg Wagner, Ex-POW Jessica Lynch still has nightmares of Iraqi Captors 12 years after rescue, New York Daily News, Monday, July 20, 2015, <http://www.nydailynews.com/news/national/ex-pow-jessica-lynch-nightmares-12-years-article-1.2297905>

³⁵ *Id.*

soldiers” who included soldiers from the same maintenance company taken captive along with Jessica Lynch, and whose “only training – and the only training currently provided to the vast majority of service members – was limited to a briefing on the [CoC] during basic training.”³⁶

Criminalizing Nonadherence – Investigating and Prosecuting Code of Conduct Violations

The Executive Orders that established and amended the CoC provided for no punitive measures for nonadherence; it remains a moral rather than a legal code. Nevertheless, a violation of the CoC may concurrently meet the elements of a crime in the military’s code of criminal law, the Uniform Code of Military Justice (UCMJ).³⁷ Such offenses could include, but are not limited to:

Article 86, Absence without leave, and with the intent to remain away permanently, Article 85, Desertion (capital offense in time of war);

Article 89, Disrespect toward superior commissioned officer, Article 91, Insubordinate conduct towards warrant officer, noncommissioned officer or petty officer, or Article 92, Failure to obey order or regulation (in the instances of a subordinate captive’s disrespect or disobedience towards a fellow captive Senior Ranking Officer)(SRO);

Article 99, Misbehavior before the enemy (capital offense) or Article 104, Aiding the enemy (capital offense), or Article 105, Misconduct as a prisoner (by various acts), or Article 128, Assault (on a fellow captive)(or for that matter other articles relating to crimes against the person);

Article 94, Mutiny and Sedition (capital offense)’

Article 100, Subordinate compelling surrender (capital offense);

Article 106a Spies and 106a Espionage (both capital offenses); and

Article 108, Military property of the United States, Loss, damage, destruction , or wrongful disposition (by various acts of loss occasioned by wrongful relinquishment of military equipment, not in surrender or capitulation).³⁸

Since the CoC was instituted, various service members have been court-martialed in controversial cases involving their captivity. At least 24 American POWs informed on other POWs during escape attempts, and “[t]wenty-two percent of returning PW’s report being aware of outright mistreatment of prisoners by fellow prisoners -- including

³⁶ *Id.*

³⁷ Law of War Deskbook, *supra* note 14, p. 89. See, e.g., UCMJ arts. 77-134 (2015)(10 USC §§877-934), <https://www.law.cornell.edu/uscode/text/10/subtitle-A/part-II/chapter-47>

³⁸ UCMJ, *Id.*

beatings resulting in death....”³⁹ By contrast, “attempts were made after Vietnam to prosecute POWs but for “policy” reasons this did not occur,”⁴⁰ with the exception of the 1979 prosecution of Private First Class Robert Garwood, prosecuted after 14 years as a Prisoner of War, charged with of communicating with the enemy and the assault of an American prisoner of war interned in a POW camp, in violation of Articles 104 and 128, Uniform Code of Military Justice.⁴¹

In one of the most controversial captured service member stories of our time, Bowe Bergdahl, a U.S. Army Private (promoted to Sergeant while in captivity), vanished June 30 2009, was captured by the Taliban in Afghanistan, and held for nearly five years by members of the militant Haqqani network until the U.S. government negotiated for his release. According to Terence Russell, a DoD expert and former Air Force survival instructor who debriefed Bergdahl, the captured soldier appeared in videos released by his captors, but “ never disclosed classified information and did his best to comply with the Army's code of conduct and resist.” According to Russell, “Sgt. Bergdahl did that — did the best he could do — and I respect him for it ... He had to fight the enemy alone. ... You can't underestimate how hard that is.”⁴² Sergeant Bergdahl, faced, at the time of this writing, charges of Article 85, desertion, and Article 99 misbehavior before the enemy⁴³ While misbehavior before the enemy cases were tried at least 494 times for soldiers in Europe between 1942 and 1945, and the U.S. Army has prosecuted about 1,900 cases of desertion between 2001 and the end of 2014, only a few misbehavior charges have been filed against service members since 2001.⁴⁴

³⁹ Julius Segal, Factors Related To The Collaboration And Resistance Behavior Of U.S. Army Pw's In Korea 33, 90 (Dec. 1956), cited with authority in Law of War Deskbook, p. 91. See also See, e.g., United States v. Floyd, 18 C.M.R. 362 (A.B.M.R. 1954); United States v. Dickenson, 17 C.M.R. 438 (A.B.M.R. 1954), aff'd 20 C.M.R. 154 (C.M.A. 1955); United States v. Batchelor, 19 C.M.R. 452 (A.B.M.R. 1954). See also Edith Gardner, Coerced Confessions of Prisoners of War, 24 GEO. WASH. L. REV. 528 (1956). Eleven of the fourteen were ultimately convicted. *Id.*

⁴⁰ See The Code of Conduct: A Second Look (U.S. Air Force Productions, 198_) [archive ref.# AFL 095-034-045, Pin #51190]. See also Charles L. Nichols, Article 105, Misconduct as a Prisoner, 11 U.S.A.F. JAG L. Rev. 393 (1969), <http://heinonline.org/HOL/LandingPage?handle=hein.journals/airfor11&div=49&id=&page=>. See also e.g., *Miller v. Lefman*, 801 F.2d 492 (D.C. Cir. 1986), cited with authority in Law of War Deskbook, supra note 14, p. 91. By way of background, LtCol Miller, USMC was a POW that the SRO preferred charges against after the war.

⁴¹ United States v. Robert R. Garwood, 16 M.J. 863 (N.C.M.R. 1983), aff'd, 20 M.J. 148 (C.M.A. 1985). The court-martial sentenced Garwood to reduction to private, forfeiture of all pay and allowances, and a dishonorable discharge. He was not sentenced to confinement. His conviction was upheld on appeal.

⁴² See, e.g., Molly Hennessy-Fiske, Jail would be ‘inappropriate’ for Sgt. Bowe Bergdahl, general says during desertion hearing, Los Angeles Times, September 18, 2015, <http://www.latimes.com/nation/la-na-bowe-bergdahl-desertion-hearing-20150918-story.html>

⁴³ For a redacted copy of the U.S. v. Bergdahl charge sheet, see, e.g., <https://timedotcom.files.wordpress.com/2015/03/charge-sheet-summary-sgt-bergdahl-25-march-2015.pdf>

⁴⁴ Jonathan Drew, Military selects rarely used charge of Bowe Bergdahl case, Military Times, September 7, 2015, <http://www.militarytimes.com/story/military/2015/09/07/military-selects-rarely-used-charge--bowe-bergdahl-case/71837020/>

The Code of Conduct's Role in Mental and Physical Strength, Injury, and Resilience

The burden of combat over the past 13 years has adversely affected command climate across the Army and the ethical conduct of its leaders. Wong & Gerras, at the U.S. Army War College, recently published a report of their survey of Army leaders & ethical conduct – *Lying to Ourselves: Dishonesty in the Army Profession*.⁴⁵ Their findings corroborate observations of changes in the command climate and ethical conduct over the past 10 years that are relevant to the ethical conduct of soldiers at all levels. The environment and command climate impose stress on young soldiers and officers and contribute to lapses in judgment and misconduct.

- a. The mission requirements exceeded available time, resources, & personnel.
- b. Leaders, colonel and below, acknowledge “hand waving, fudging, massaging, or checking the box.” Nonetheless, they feel indignant if challenged on the honor & professionalism of their conduct.
- c. Commanders induced enlisted soldiers to fudge or break the rules to meet requirements.
- d. Common practices in reporting readiness requirements involve fudging data. Nonetheless, senior leaders recognize that most of the reported data is imprecise.
- e. The pressure of “getting bodies to combat” forced overlooking important personnel data.
- f. “Mutually agreed deception exists in the Army because many decisions to lie, cheat, or steal are no longer viewed as ethical choices.”
- g. Many officers rationalize “lying to the system” as “prioritizing, taking prudent risks, or just good leadership.”
- h. The system imposes on each individual to determine what he/she will lie about.
- i. Careerism is a potent force that serves as a catalyst for dishonesty (especially at the higher ranks). The current downsizing intensifies the competition among the ranks.
- j. Wong & Gerras refer to St. Augustine – “When the regard for truth has been broken down or even slightly weakened, all things remain doubtful.”⁴⁶

The authors aptly point out that “[a] false sense of integrity prevents the profession of arms from addressing – or even acknowledging – the duplicity and deceit through the formation”⁴⁷ The absence of integrity, and more seriously, duplicity and deceit, fundamentally undermines the trust and confidence that the Nation places in its uniformed leaders, as well as the trust that subordinates must have in their leaders in peacetime and in war. Leaders, officially sanctioned or chosen by consensus of the

⁴⁵ Leonard Wong and Stephen J. Gerras, U.S. Army War College Strategic Studies Institute Monograph, *Lying to Ourselves: Dishonesty in the Army Profession*, February 17, 2015, <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=1250> .

⁴⁶ *Id.*

⁴⁷ Executive Summary, *Id.*

group, are key to the moral conduct of a unit. Rather than an “in case of fire break the glass” secreting away of the CoC in time of captivity, this abiding moral code of personal and collective leadership, is trained before going to war to act consistent with *jus ad bellum*, then employed in the conduct of war in *jus in bello*, and maintained when keeping the peace in *jus post bellum*, can steady those around them assaulted by the horrors of war, and the ravages of difficult to attain or maintain peace.⁴⁸

The converse of moral strength through integrity is moral injury; what the noted psychologist Jonathan Shay defines as “a betrayal of what’s right...by someone who holds legitimate authority (e.g., in the military—a leader)...in a high stakes situation.”⁴⁹ Chaplain Sean Wead reflected that “[i]n World War I, considered by many to be the first modern war, the soldier and his morality were weighed as one component of endurance in battle.”⁵⁰ The “officer corps of the British forces... instilled virtues such as temperance, loyalty, and candor in their soldiers. Most British officers believed this model of Christian virtues to be resilient in the stress of combat, providing a better chance of survival.”⁵¹ Wead reflects that “[a] strong ethical framework guided individual soldiers in World War II as well,”⁵² with exemplars in subsequent conflicts certain to be found.

An intact capacity for moral reasoning serves the soldier and the veteran in times of war and peace; their “ability to fully appreciate the nature or wrongfulness of the violent act or, in certain cases, to conform his or her conduct to the requirements of the law, may ...[become] impaired;” for those who have “been through modern military training and who are suffering from combat-related PTSD may be less culpable than other individuals committing similar crimes.”⁵³ Acting morally, and accordance with the laws of war, before any impairment takes place, removes one stressor for which there is no turning back the hands of time or satisfactory post-facto remedy for causing moral injury to others or oneself.

In response to the surge of veterans returning from Iraq and Afghanistan with various problems, Congress required DOD to study their physical and mental health and other readjustment needs. The IOM conducted such an assessment of the physical, psychological, social, and economic challenges facing returning service members and

⁴⁸ Chaplain (MAJ) Sean Wead, Ethics, Combat and a Soldier’s Decision to Kill, March-April 2015 MILITARY REVIEW, pp. 70-71,

http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview_20150430_art013.pdf

⁴⁹ Jonathan Shay, Moral Injury, Psychoanalytic Psychology, Vol. 31, No. 2, 182 (2014), <https://www.law.upenn.edu/live/files/4602-moralinjuryshayexcerptpdf>.

⁵⁰ Wead, *supra* note 47, p. 77, citing with authority Gerald Parsons, James Moore and John Wolffe, Religion in Victorian Britain (Manchester UK Manchester University Press 1988), pp. 2223-224.

⁵¹ *Id.*

⁵² *Id.*, citing with authority John Keegan, The Face of Battle (1983), pp. 279-280.

⁵³ See Barry L. Levin, Defense of the Vietnam Veteran with Post-Traumatic Stress Disorder, 46 AM. JUR. TRIALS 441, § 5 (1993); Lizette Alvarez & Dan Frosch, A Focus on Violence by G. 's Back from War, N.Y. TIMES, Jan. 2, 2009, at A1 (“For the past several years ...the number of servicemen implicated in violent crimes has raised alarm.”); Michael J. Davidson, Note, Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War, 29 WM. & MARY L.Rev. 415,424-29 (1988), at 424-29.

veterans, culminating in the 2013 report *Returning Home from Iraq and Afghanistan: Assessment of Readjustment Needs of Veterans, Service Members, and Their Families*.⁵⁴

A key component of the military's efforts to create psychologically and physically fit forces has been "resilience;" for instance, "since 2009, the Penn Resilience Program has been widely used by the United States Army as part of their Master Resilience Training program for Soldiers, family members of Soldiers, and Department of the Army civilians"⁵⁵ to "train more than 30,000 U.S. Army Soldiers how to teach the resilience skills to tens of thousands of other Soldiers." This program is run by the Army's Comprehensive Soldier and Family Fitness program.⁵⁶ In 2008 the Chief of Staff of the Army ordered the organization to measure resilience and teach positive psychology to create a force as fit psychologically as it is physically. This \$145 million initiative was established under the direction of Brigadier General Rhonda Cornum, herself a former POW who endured physical abuse by her captors and reputedly "maintained her spirits by singing to herself and living by the Code of Conduct."⁵⁷ The ongoing program, called Comprehensive Soldier and Family Fitness (CSF2), and consists of three components: a test for psychological fitness, self-improvement courses available following the test, and "master resilience training" (MRT) for drill sergeants.⁵⁸ According to Cornum, "comprehensive fitness focuses on five components: physical, emotional, social, family and spiritual. She said each is important to prepare soldiers, or anyone else, to respond better to stressful situations, no matter how traumatic."⁵⁹ Instead of a long list of "don'ts" for dealing with stress, Cornum said, when talking about resiliency and psychological health, should be taught effective problem-solving, how to be flexible and that challenges are temporary, not permanent."⁶⁰ These are based on PERMA: positive emotion, engagement, relationships, meaning, and accomplishment—the building blocks of resilience and growth.⁶¹

One such tool is the Army's Global Assessment Tool, known as the GAT. The GAT is a confidential, self-assessment tool that can help you improve you and your family's overall health and wellbeing. By knowing yourself, you can stay emotionally and psychologically strong.⁶² It is a 20-minute questionnaire that focuses on strengths rather

⁵⁴ Institute of Medicine of the National Academies, *Returning Home from Iraq and Afghanistan: Assessment of Readjustment Needs of Veterans, Service Members, and Their Families*, 2013, <http://iom.nationalacademies.org/Reports/2013/Returning-Home-from-Iraq-and-Afghanistan.aspx>

⁵⁵ Penn Positive Psychology Center, *Resilience Training For The Army*, 2015, <http://www.positivepsychology.org/services/resilience-training-army>.

⁵⁶ *Id.*

⁵⁷ Robert Goetz, Today's Wingman Day observance focuses on mental resilience, Joint Base San Antonio News, December 8, 2009, <http://www.jbsa.mil/News/News/tabid/11890/Article/463267/todays-wingman-day-observance-focuses-on-mental-resilience.aspx>.

⁵⁸ See, e.g., Comprehensive Soldier and Family Fitness (CSF2), October 29, 2015, <http://csf2.army.mil/>.

⁵⁹ Drew Brooks, Retired Brig. Gen. Rhonda Cornum tells of resiliency following POW experience, Fayetteville Observer, October 21, 2013, http://www.fayobserver.com/military/retired-brig-gen-rhonda-cornum-tells-of-resiliency-following-pow/article_39730a23-6ef5-5605-85f2-01a1bbfa0417.html.

⁶⁰ *Id.*

⁶¹ Martin E.P. Seligman, Building Resilience, Harvard Business Review, April 2011, <https://hbr.org/2011/04/building-resilience/ar/1>

⁶² CSF2, *supra* note 57.

than weaknesses and is designed to measure four things: emotional, family, social, and spiritual fitness. All four have been credited with reducing depression and anxiety. According to research, they are the keys to PERMA. The understanding and commitment to the CoC, as a trained moral code, can and should be a logical reinforcer to GAT assessment and moral shortcoming reinforcement.

As promising as resilience training and assessment, and PERMA reinforcement may appear to be, there are unfortunately no meaningful metrics by which any of this can be measured. In its follow on to the previously noted 2013 report, the IOM recently conducted a systematic review of the DoD's reintegration programs and prevention strategies to identify various performance measures of effectiveness and cost-effectiveness. As a bottom line,

The IOM committee concluded that there is no generally accepted comprehensive set of measures to assess the structure, process, and outcomes in resilience, prevention, and reintegration programming. Their review of existing measures in national quality measure sets found few measures relevant to psychological health. Those they found to be relevant to psychological health were primarily clinically focused screening measures that do not address domains relevant to resilience, prevention, or reintegration.⁶³

It appears that resilience training and assessment, while doing no harm, may not (yet) have a quantifiable benefit.

Conclusion

Various historical traditions and necessities gave rise to the CoC, with minor revisions over the years to reflect changing circumstances but in its essence remaining an abiding moral code of prescriptive values. In relatively infrequent circumstances, CoC violations have been prosecuted as crimes under the UCMJ, but the CoC's value in training and evaluation of service members' emotional and psychological strength is a realm yet to be fully explored, and may well prove to be a positive component of building and sustaining "resilience" capacity when encountering traumatic circumstances and readjusting afterwards.

As St. Augustine noted – "When the regard for truth has been broken down or even slightly weakened, all things remain doubtful."⁶⁴ It is our most fervent hope that the Nation's sixty-year-old set of moral beliefs and expectations for its service members to

⁶³ Department of Defense, Report to Congressional Armed Services Committees, Implementation of Recommendations of Institute of Medicine on Improvements on Certain Resilience and Prevention Programs of the Department of Defense, July 2015, p. 8, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0ahUKEwi_vzc3rfJAhVM6SYKHb05CcEQFgg8MAQ&url=http%3A%2F%2Fwww.health.mil%2FReference-Center%2FReports%2F2015%2F07%2F16%2FReport-on-the-Implementation-of-Recommendations-of-IOM&usg=AFQjCNHF-88EcnScQHhiC8uKAgT67p1ZBA&sig2=IjufRCEvMBR4rKI0V8TerQ&cad=rja

⁶⁴ Augustine of Hippo, *Treatises on Various Subjects* (The Fathers of the Church, Volume 16), CUA Press, Apr 1, 2010, 78.

act with integrity will continue to be trained and embraced for years to come, especially since combat and resultant captivity regrettably will remain a part of human existence.