

## State Amends for Lawful Harm Doing

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### Abstract

This essay explores the justifications for offering amends to victims of *lawfully* caused harm and the nature of amends in such contexts. In particular, we examine instances in which a state actor commits a grave, but lawful, harm to another, exploring why and how the state ought to respond to victims of lawful harm. This aspect of harm doing is often overlooked, but directly addressing the lawful harm that states cause is a vital part of an appropriate state response to having caused grave, though lawful, harm. First, we explore some general reasons why making amends is a morally appropriate response to lawful harm doing. Second, having justified why states ought to respond to the lawful harm they create, we move to outline a set of appropriate responses. These responses are grounded in the empirical literature on amends and apology and satisfy a number of the moral reasons it may be appropriate for states to offer amends. We offer some specific suggestions for managing amends in the military and police settings, though the basic elements of our proposal might also help inform response to the wider spectrum of lawful harms imposed by the state.

### Key words

Lawful harm; apology; amends; responding to wrongdoing

### Resumen

Este ensayo analiza las justificaciones para ofrecer una compensación a víctimas de daños legales y la naturaleza de las compensaciones en estos contextos. En particular, se exploran las instancias en las que un actor estatal comete un perjuicio grave, pero legal, analizando por qué y cómo debería responder el Estado a las víctimas de perjuicio legal. A menudo se obvia este aspecto de los perjuicios causados, pero abordar directamente el perjuicio legal provocado por el Estado es fundamental para que los Estados den una respuesta adecuada a los daños graves, aunque legales, causados. En primer lugar, se analizan razones generales por las que compensar es una respuesta moralmente apropiada a los daños legales causados. En

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segundo lugar, tras justificar que el Estado debería responder del perjuicio legal que ha causado, se esbozan una serie de respuestas apropiadas. Estas respuestas se basan en la literatura empírica sobre compensaciones y disculpas, y satisfacen un número de razones morales que podrían ser apropiadas para que los Estados ofrezcan compensaciones. Se ofrecen algunas sugerencias específicas para gestionar las compensaciones en el ámbito militar y policial, aunque los elementos básicos de esta propuesta podrían ayudar a dar una respuesta a otros ámbitos más amplios de daños legales causados por el Estado.

**Palabras clave**

Perjuicio legal; disculpas; compensaciones; respuestas a una mala conducta

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## 1. Introduction

While scholars in both law and moral philosophy frequently grapple with questions surrounding the appropriate responses to wrongdoing, the category of *lawful* harm doing has received much less sustained attention. This essay explores the justifications for offering amends to victims of such lawfully caused harm and the nature of amends in such contexts. In particular, we explore instances in which a state actor—such as a military or the police—commits a grave, but lawful, harm to another. In both settings, there are circumstances in which state actors may lawfully use lethal force. Such lawfully imposed harms—including death and serious injuries—are of great numerical, symbolic, and pragmatic significance. And an extensive academic and policy literature grapples with questions surrounding these harms, including how to classify and count them, whether and how to reduce them, and whether discrete groups disproportionately suffer them. In this essay, we add to this conversation by engaging in a systematic discussion of why and how the state ought to respond directly to victims of lawful harm. This aspect of harm doing is often overlooked, but directly addressing the lawful harm that states cause is a vital part of an appropriate state response to having caused grave, though lawful, harm.

In Section 2, we explore some general reasons why making amends is a morally appropriate response to lawful harm doing. Our discussion first concentrates on the justifications for state responses to unlawful and immoral wrongdoing. We introduce the wide variety of victim, perpetrator, and reconciliation-oriented goals for state responses to wrongdoing. We then discuss how these justifications can be extended to at least some cases of lawful harm doing. In doing so, we note particular puzzles generated by responses to serious harm that is a product of lawful and morally permissible actions. Our response to these puzzles emphasizes the risks that lawful harm doing generates and which amends may reduce, as well as the considerations of fairness that support making amends.

In Section 3, having justified why states ought to respond to the lawful harm they create, we move to outline a set of appropriate responses that ought to be provided by states. These responses are grounded in the empirical literature on amends and apology and satisfy a number of the moral reasons it may be appropriate for states to offer amends. Specifically, in cases of lawful harm doing, an agent of the state should acknowledge the state's agency in harm doing; investigate its causes and communicate the outcome of that investigation to the relevant parties; and learn from the experience and make appropriate reforms. This amends process facilitates accountability, learning, and respect for those who are harmed. We offer some specific suggestions for managing amends in the military and police settings, though the basic elements of our proposal might also help generally inform response to the wider spectrum of lawful harms imposed by the state.

## 2. Responses to grave harm doing in violent contexts

Many discussions in moral, legal, and political philosophy take up the question of how to appropriately respond to harms that an individual may suffer as a result of the actions of others. Such discussions typically concentrate on responses to immoral and unlawful actions, and in this section, we first provide an overview of the moral purposes behind such responses. We then draw on this discussion and extend these purposes to responses to harms that are a result of *lawful* behavior on the part of state actors. In doing so, we identify and grapple with a series of puzzles about why responses to such harms are morally justified.

### 2.1. Responding to wrongdoing

#### 2.1.1. Immoral and illegal harms

The literature in legal and political philosophy that deals with responses to harm largely focuses on harm that is caused by immoral actions. Philosopher Jean

Hampton's definition of harm captures features widely agreed upon as constituting harm. Harm is defined as a "disruption or interference in a person's well-being, including damage to that person's body, psychological state, capacities to function, life plans, or resources over which we take this person to have an entitlement" (Hampton 1992, p. 1662). Such disruption or interference is objectively determined.

Philosophers generally presume that there is no necessary connection between the legal status and the moral status of an action (Hart 1961, Raz 1979, Coleman 2001, Shapiro 2013). That is, the morality of an action can be evaluated independently from its legality. There is extensive debate about whether there is a moral obligation to obey the law, though the prevailing view is that the legal status of an action does not automatically generate a moral duty of obedience (Raz 1979, Klosko 1992, Edmundson 1998, Lefkowitz 2006). We do not assume that morality and legality fully overlap; legal actions may still be immoral.<sup>1</sup> The moral status of the legal actions committed by state agents influences our explanation of why a response to such actions may be permissible, and what response is fitting or appropriate.<sup>2</sup>

Despite recognition of their conceptual difference, the legality and morality of an act frequently come together in discussions of criminal punishment. Indeed, theorists generally assume that the criminal law criminalizes actions that are also immoral (Morris 1968, Hampton 1984, Moore 1997, Duff 2001), though the descriptive adequacy and normative justifiability of that assumption is increasingly being challenged (see Husak 2009). In discussions of the justifications for responses to harm via tort law, the relationship between morality and legality is more complicated. Theories of corrective justice, for example, focus on wrongful losses and gains that result from individual actions and transactions (Fletcher 1972, Epstein 1973, Hurd 1991, Aristotle 1999, Weinrib 2012). Accordingly, wrongful losses are not necessarily linked with moral fault; that is, the losses need not have resulted from moral wrongdoing to be tortious. More minimally, losses are generally wrongful in the sense that they are a consequence of the failure of an individual to satisfy a particular standard of care, a failure for which the individual may be, but is not always, morally blamed.

A final assumption implicitly or explicitly underpinning most philosophical discussions of responding to harm is that the source of harm is a non-state actor. While there are discussions of state reparations for slavery, such discussions characteristically take place separately from the development of general justifications of reparations or amends (Bedau 1972, Kershner 1999, Boxill 2002, Bittker 2003). By contrast, the interdisciplinary literature on transitional justice concentrates on responses to harms inflicted by state actors or actors acting with the sanction of the state (see Teitel 2000). The harms on which that literature concentrates, however, are the result of immoral, and in many cases illegal, action on the part of state actors (Hampton 1992).<sup>3</sup> Thus, the cases we consider of state offers of amends for lawful harm doing

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<sup>1</sup> Many of the laws in Nazi Germany mandating state discrimination against minorities are paradigmatic examples. They were enacted by a duly elected government. Adolf Hitler was appointed chancellor after a democratic election and laws implementing curfews, expropriating property, and limiting employment opportunities for Jews were duly enacted (Dawidowicz 2010).

<sup>2</sup> Applying existing theories to the case of legal but immoral actions is not especially problematic given that the theories are, at their core, concerned with wrongdoing broadly speaking. One potential complication stems from the assumption of theories of criminal law that it is *prima facie* impermissible to punish an individual who has acted legally. However, the obstacle to responding to individuals who have acted legally, but immorally, stems from the severity of the response legal punishment entails. Because we are ultimately interested in cases in which the response does not involve the deprivation of liberty on the part of the respondent, the threshold for the permissibility of a response will be different.

<sup>3</sup> Theories of domestic criminal law generally assume that the individuals subject to prosecution and possible punishment are private citizens, rather than state actors. As a neutral third party, the state is thought to be in a position to be an impartial judge of how much punishment is appropriate given a particular crime (Hampton 1992). The state, however, is not a neutral party in the set of cases on which we focus—those in which the state has caused the harm. Tort law, involving claims among private plaintiffs, provides a better comparison in this regard.

are not identical to the cases considered in the philosophical or transitional justice literatures.

### 2.1.2. Responses to harm

Responses directed at *perpetrators* of wrongfully caused harm, such as criminal punishment, serve a number of objectives. First, responses aim to express moral censure or condemnation of the action the perpetrator committed (Hampton 1992, Duff 2001). Through such censure and condemnation, the norms that structure interactions within a community can be reaffirmed and strengthened. A second aim is to hold perpetrators accountable for their actions. For retributivists, punishment does this by giving perpetrators what they deserve, namely suffering (Morris 1968, Hampton 1992, Moore 1997). Deterrence or non-recurrence is a third moral objective. Punishment achieves non-recurrence by deterring the individual perpetrator and others within a community (see Bentham 2004). Finally, punishment and other responses to perpetrators can be justified as a way of achieving some combination of the above objectives (Tasioulas 2006).

The general aims of responses directed to *victims*, such as reparations or compensation, are also varied. The first is to acknowledge the impermissibility of how the victim was treated (see Murphy 2017). Acknowledgement requires, first, recognition that individuals suffered a particular harm and that the harm was a product of the actions of specific actors. Denials of harm or responsibility for having caused harm are incompatible with such acknowledgement. Through acknowledgement, responses may also aim, secondly, to recognize and reaffirm the moral status of the victim as a rights bearer who can make claims against others to be treated with a certain minimum level of respect (see Goldberg and Zipursky 1998, Zipursky 2003). In certain contexts, recognition of the victim not only as a rights bearer but also as an equal member of a political community and citizen is crucial (Murphy 2017, see also Lind and Tyler 1988). For the families of those killed or injured, successful responses might help them assign some positive meaning to the loss, or at the very least, provide a feeling of being respected by the state as persons worthy of a response (see Cohen 2011).

The third aim of responses directed to victims is repair of the harm (Walker 2006). Such repair is often characterized as requiring that the victim be brought back to his or her status quo ante position (Weinrib 2012). In contexts where harm to victims is compounded by their marginalized status within a community, however, the status quo ante position may be insufficient and a more demanding standard of repair necessary (Murphy 2017, ICTJ 2011). For particularly grave harms, there is no possibility of making the victim whole—the dead cannot be restored to life. Yet even the dead can be treated with dignity and respect (Smolensky 2009). Finally, as with responses to perpetrators, a final overarching objective of responses to victims is non-recurrence.

In addition to victim-oriented and perpetrator-oriented goals, punishment and compensation are also justified by appeals to reconciliation-oriented goals (Braithwaite 2002, Radzik 2009, Murphy 2010, Philpott 2012). Reconciliation targets the repair of relationships that have been damaged in some way (Radzik 2009, Murphy 2010). Theories of restorative justice in the criminal context emphasize the importance of the relationship between victim and perpetrator, a relationship which crime impacts and disrupts (Walker 2006). Other objectives attributed to responses aimed at repairing damaged relationships include cultivating trust or overcoming distrust, affirming or reaffirming normative standards that should structure interaction but that have been violated through wrongdoing (Walker 2006, Radzik 2009, Murphy 2010), and overcoming negative emotions such as resentment and anger (Braithwaite 2002). The precise content of reconciliation-oriented objectives varies depending on the relationship in question. Which reactive attitudes it is appropriate to overcome or adopt is a function of what kind of relationship is in need of repair; love, for example, is appropriate as an attitude to cultivate in marriage but

not necessarily appropriate in the relationships among citizens or between citizens and officials (Radzik and Murphy 2015). And international relationships among members of different political communities are thinner in their content than relationships among members of the same political community.

## 2.2. Lawfully caused harm

The previous section considered the moral aims associated with responses to victims or perpetrators of the infliction of wrongful harm, where harm is wrongful in the sense that it is caused by legally impermissible action on the part of state actors. But our focus in this essay is not on these wrongful harms, but on harms that result from legally and morally *permissible* action on the part of state actors. For example, in international law, demands for responses to state harm doing focus on redress for unlawful killings. Harm that results from *lawful* conduct does not give rise to a claim for reparations. (Pfanner 2009, Wexler and Robbennolt 2017) We restrict our focus to harms suffered by identifiable individuals, though the analysis we offer could potentially be extended to (some) collective harms. Our intuition is that a state response, particularly in the case of grave harms, is appropriate and fitting. Explaining the reasons why, however, is not as obvious or straightforward as it is in the context of unlawful harm doing.

Consider some examples of the types of lawful harm with which we are concerned. Absent rules to the contrary, both the military and police may use lethal force in self-defense (*Tennessee v. Garner* 1985, Chairman of the Joint Chiefs of Staff 2005, Trumbull 2012, Amnesty International 2015). Police officers may use lethal force to protect third parties (Amnesty International 2015). During armed conflicts, members of the military may use lethal force against combatants at any time (ICRC 1977, Department of the Navy 1995 Sec.8.1.1.). And, the laws of war, while prohibiting the intentional targeting of civilians, countenance civilian deaths in a number of instances (Fleck 1995, Wexler and Robbennolt 2017).

In deploying lethal force, state actors may lawfully cause the death of innocent parties in a range of circumstances. Civilian killings may be legal in the military context, for example, despite errors in identifying targets or misinformation about the presence of civilians at a target site as long as reasonable precautions were taken (ICRC 1977, Art. 57(1)). By the same token, civilian killings attendant to stray bullets or occasioned when civilians are used by insurgents as shields may be lawful. And civilians may lawfully be killed when the loss of civilian life is reasonably believed not to be disproportionate to the specific military objectives at stake (ICRC 1977, Art. 51(5)(b)). In the policing context, domestic law permits harm to parties not posing an immediate threat to themselves or others if such harm arises as the result of a reasonable mistake (*Scott v. Harris* 2007) or in the course of attempting to apprehend or respond to the imposition of an imminent threat by someone else (see Edlund 1995).

Extending the justifications for state responses to wrongful harmdoing to cases of lawful harm caused by state actors raises a basic puzzle. The puzzle is this: if the harm caused to victims is both legally and morally permissible, why is there any moral need for the perpetrator to respond to the victim? We normally do not think it is necessary to respond to all of the consequences of our actions, especially when our actions are legally and morally permissible. In a competition for college admissions, for example, we do not think it required for admitted students to compensate or apologize to students who were not admitted. This is true even though the choice to send in an application caused the serious loss, in terms of future educational and employment opportunities, that the un-admitted applicant experienced. Absent the application of the selected student, the un-admitted student would have had those opportunities. Nevertheless, the admitted student need not make any response whatsoever to the other students who were not selected for the position she instead assumed. Indeed, any sort of response risks being seen as

condescending and as reflecting a failure on the part of the admitted student to recognize that she is not a perpetrator in the traditional sense, but is entitled to the position which she received. Nor do we expect colleges to compensate unadmitted students, identify why they were not admitted, or make promises that they will be admitted in the future.<sup>4</sup>

Another key challenge to extending the account of the moral purposes of responding to the morally and legally permissible losses state actors cause victims also exists: some of the moral aims and purposes in responding to victims and perpetrators seem *prima facie* not to be salient to the cases on which we focus.

Consider censure. Censure of the perpetrator and acknowledgement that what was done to victims was incompatible with the treatment they merit would not seem to be morally required, given that the action and resulting harm were, by stipulation, legally permissible. There is no failure to fulfil a set of normatively defensible legal expectations on the part of the actor who caused the harm. Communicating or expressing censure of the perpetrator or condemnation of the action would, in these cases, be morally inappropriate. No violation of defensible moral or legal standards occurred. Nor, for the same reasons, was there a failure on the part of the perpetrator to recognize that victims are rights bearers entitled to certain forms of treatment. Recognition of the status of victims as rights-bearers thus seems on the face of it unnecessary in these cases.

Similarly, deterrence or non-repetition is not a salient moral aim of responses to losses experienced by victims of lawful harm. If the action creating the losses was morally and legally permissible, then at first blush there is no compelling reason to ask the actor (or other actors) to refrain from similar action in the future.

Finally, there is no clear explanation of why reconciliation as an important moral objective would be required. If no violation of normative and normatively defensible legal standards occurred, then no rupture of a morally defensible relationship would seem to have transpired. Relationships are damaged from a moral point of view only when there is a moral failure; such failure calls into question the normative standards governing morally defensible relationships and terms of interaction. If there is no such failure, however, then it is not obvious that relationships have in fact been damaged in ways that would require efforts to seek their repair.

In responding to this puzzle and defending the appropriateness of amends in response to morally permissible and lawful serious harm, we think it important to recognize the risks the actions generating such harms generate. Even when permissible, the commission of actions that result in serious harm is *prima facie* concerning. Failing to respond to the harm caused risks eroding or undermining acknowledgement that the actions have, in fact, caused serious harm. This is so, especially when the actions at issue are part of an ongoing practice. Making amends emphasizes the value of each person that underpins human rights law. Even if the state may impose harm in exactly the same way in the future, it owes those it harms the respect of questioning whether it can achieve its military or policing gain without imposing such costs on individuals going forward. Making amends offers a way of reminding actors of this fact.

Responding appropriately to harm is also important for reconciliation-oriented reasons. Amends can act as a safeguard against actors crossing the line between permissible and impermissible action in the future. Through amends, actors can be reminded of the fact that there is a line they should not cross and of the importance of maintaining that line given the serious harm even permissible actions can cause. Such lines function in part to distinguish between morally justifiable and morally problematic relationships. Responding to harm can similarly remind state actors that

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<sup>4</sup> That said, an acknowledgement of the unadmitted student's qualifications and an expression of regret that the student was not admitted is certainly morally appropriate, though not morally demanded.



they are shifting a non-reciprocal risk onto civilians through their actions. The state's military objectives may or may not benefit those who are being asked to accept the costs. Thus, formal responses to harm provide a way of acknowledging that the state is not fully paying its own way. Finally, responding to the harm caused serves as a way for actors who are responsible for such harm to respond to the agent regret they experience for actions that, while permissible, result in serious harm to others.

On the community or societal level, appropriate responses to harm doing might enhance the legitimacy of the state bodies engaged in the use of lethal force and potentially reduce the support for other actors such as insurgents and gang members (see generally, Tyler 2006, Tyler and Fagan 2008, Tyler *et al.* 2015, Tyler and Jackson 2014). For militaries, winning the hearts and minds of the local population is particularly important if they are fighting an insurgency and wish to dampen support for the non-state threat to governance (see Condra and Shapiro 2012, Lyall *et al.* 2013). For police officers, winning and maintaining the support of the local population is particularly important for those engaged in "community oriented policing" which relies on the support of the community to collectively problem solve safety issues (Bureau of Justice Assistance 1994). Relatedly, appropriate responses to harm doing might enhance the professionalism of police and combat units by providing a systematic and reflective approach to addressing, and perhaps even ultimately reducing, the use of lethal force (see Wexler and Robbennolt 2017).

Finally, responses that come from the harm doers might alleviate the guilt and related suffering associated with moral injury. A moral injury is one in which a person believes he has acted or observed others act in such a way as to violate fundamental personal beliefs (see, e.g., Drescher 2011, Maguen and Litz 2012, Vargas *et al.* 2013). Most people, for example, believe that killing civilians or other innocent persons is wrong. For many soldiers, training in the laws of war reinforces that belief. When soldiers violate or witness a violation of that belief, they can suffer extensive psychological harm leading to such problems as alcoholism and suicidal ideation (Drescher 2011, Maguen and Litz 2012, Vargas *et al.* 2013). Similarly, police training emphasizes the importance of keeping the public safe from harm. Even when lethal force is authorized, many police officers who kill or seriously injure someone in the line of duty experience PTSD like symptoms (Komarovskaya *et al.* 2011). Providing an appropriate response to having caused harm might provide harm doers and their compatriots a mechanism by which they can begin to restore moral balance by acting in a way that is consistent with their fundamental beliefs in relation to the lethal force incident.

Finally, we note that responding to lawfully caused harm is not without precedent. There are a number of instances in which domestic law imposes duties on actors who engage in lawful harm-doing to assist those persons they harm. In tort law, for instance, while no general duty to rescue exists, if a person's act or an instrumentality under his control places another person in danger, he owes a duty to act reasonably to rescue the imperiled person (Restatement (Second) of Torts, §322, 1965). This duty is owed even if the actor is otherwise wholly innocent under the law. It is only if the actor fails to respond to the danger he created that tort liability may be imposed (Restatement (Second) of Torts, §322 cmt. a, 1965, Dobbs 2000). Similarly, if an individual enters land without permission and causes damage for reasons of private necessity, such action is privileged and the trespass itself is not wrongful. Nonetheless, tort law dictates that she must pay compensation for any damage done. Take the famous case of *Vincent v. Lake Erie Transportation Co.* (1910), in which a ship captain kept a boat tied up at the plaintiff's dock during a violent storm to save persons and cargo. After the wind battered the ship against the dock causing extensive damage, the ship owners had to pay for the damage to the dock, but not for the simple intrusion of tying the boat onto the dock. The law does not label the ship owners as tortfeasors, but they still owe something to the dock owners because of their actions. And consider the case of vaccines. Claimants may receive compensation under a no-fault statute if they show that a factor related to the vaccine

caused their injury or disability (42 U.S.C. Sec. 300aa-119(c)(1)(C0(i))). The injured party need not show negligence on the part of the manufacturer nor is the individual vaccine manufacturer considered to have committed a strict liability tort.

In some situations, duties to compensate for lawful harm may attach to the state itself. A state, for example, may use its power of eminent domain to condemn privately held property for a public use. When doing so, the state must provide compensation. Jurisdictions disagree about whether the public use must also be necessary and whether “necessary” means essential or merely useful, (Thomas 1994 Sec. 80.03(a)), but all require the payment of compensation. Notably, such state duties can arise even when issues of public safety are implicated. In many states, innocent persons convicted of a crime and then exonerated may receive compensation and other amenities, as well as apologies from the state (Innocence Project 1988, Trivelli 2016). While a few jurisdictions limit their statutes to instances of wrongdoing by the state (Innocence Project 1988), many state statutes extend the possibility of compensation to all exonerees including those towards whom the state behaved lawfully (Mandery *et al.* 2013). Such statutes reflect an intuition about the basic unfairness of the exoneree’s situation. Even if the state did not wrong the individual by choosing to prosecute her, the state deployed its coercive power to harm her and such coercion injured an innocent person. To fail to take efforts to recognize and remedy this unfairness once it was known would itself be a wrong, even if the initial conviction was not unlawful.

One way of understanding such cases is through the lens of corrective justice. Corrective justice focuses on the transactions that occur among individuals, providing an account of the compensation those who suffer wrongful losses should receive. Importantly for our purposes, corrective justice theories do not define losses as wrongful only when such losses result from unlawful or immoral action. Rather, losses are wrongful when they should not be borne by the individual who experienced such losses. Because there is an intrinsic unfairness in letting such losses lie where they fall, compensation is needed to remove this unfairness. The unfairness of letting losses lie where they fall may be explained in different ways. Unjust enrichment accounts point to the intuitive unfairness that results when individuals whose actions result in personal gain are not required to compensate or repair the damages that those actions caused to others. Individuals “unjustly enrich” themselves when they are not forced to bear the costs as well as the benefits of their actions (*Vincent v. Lake Erie Transportation* 1910). Transferring losses to another in the pursuit of private gain constitutes a form of unjust enrichment when one is not required to compensate the injured party.

State responses to lawful harm might also be justified by the fact that the risks posed by the state’s conduct are not reciprocal. Some scholars justify tort law as operating from the baseline that harms need to be compensated when such risks are imposed on others who do not pose similar risks in return or when one side imposes a much greater risk than does the other (Fletcher 1972, Keating 2004, Smart and Majima 2012, Reisman 2013). By definition, civilian and other innocent bystanders present no direct risk to the state or the opposing military. Thus, killing them, even lawfully, subjects them to a non-reciprocal risk.

There are, therefore, a variety of reasons why it may be morally appropriate for the state to offer amends in the aftermath of lawful, but grave, harm done imposed by the police or the military. Maintaining a commitment to certain inviolable lines of conduct and a sense of legitimacy on the part of citizens, enhancing support by and cooperative interaction with citizens and civilians, and responding to the basic demands of corrective justice are all reasons that support the offering of amends by state actors for lawful grave harm done.

### 3. Our amends-making approach

Whether harm has been caused lawfully or unlawfully, the way that a state treats injured people or their families following a death or injury says something to victims and other audiences about the degree to which the state respects the victims and sees them as deserving of dignity (see Lind and Tyler 1988, Miller 2001). Section 2 delineated the category of lawful harm doing and explained why making amends is an appropriate response in such instances. In this section, we describe what amends making might look like in the context of *lawful* harm doing. While the components of amends are necessarily somewhat different in cases of lawful harm doing than in cases in which harm was caused in a legally or morally wrongful way, they also share a great deal of similarity.

In short, amends might include a variety of reparative measures, including financial payments, other material assistance, service, expressions of remorse or sympathy, apologies, accounts or other information about what happened, and promises of forbearance (Walker 2006, Radzik 2009, Holewinski 2012, Goodstein *et al.* 2016). In the case of illegally caused harm, amends ought to include an acknowledgement of the wrongdoing that resulted in harm, an expression of remorse, compensation, and other appropriate remedial measures (Goffman 1971, Walker 2006, Radzik 2009, Smith 2014, Tavuchis 1991). When a state causes *lawful* harm, we argue that an agent of the state should offer amends by acknowledging the state's agentic role in causing the harm, recognizing the injury in culturally appropriate ways, investigating the causes of the harm and communicating those findings, and using that information to improve policies and practices (Wexler and Robbennolt 2017). Such a process might mirror, in part, the emerging developments under international law allowing individual reparations for unlawful harm. (Wexler and Robbennolt 2017). The rest of this section explains why these responses are appropriate and what they might look like in the policing and military settings.

#### 3.1. Acknowledge agency

People who have been harmed often value having their harm acknowledged. This is so for those harmed across contexts, from armed conflict situations to torts (see Vincent *et al.* 1994, Hirsch 2006, Gaston and Wright 2009, Rogers 2010). In cases of harm that has been caused unlawfully, part of what people want is accountability. Some victims of drone strikes, for example, have sued to obtain formal acknowledgement, apologies, and declarations that the strikes were illegal (Shane 2015, see also Ackerman 2016). Claimants in medical negligence cases often sue, in part, because they want someone to be held accountable (Hickson *et al.* 1992, Vincent *et al.* 1994). Similarly, the desire to hold someone accountable motivated at least some of the few families who filed lawsuits rather than claims to the September 11<sup>th</sup> Victims' Compensation Fund (Hadfield 2008). Sometimes this accountability comes in the form of a judicial decision. In other instances, it may come as part of a settlement agreement—explicitly or implicitly. Or it may not come at all (see, e.g., *U.S. Securities and Exchange Commission v. Citigroup Global Markets Inc.* 2011, Des Rosiers *et al.* 1998, Fogg 2003). Sometimes acknowledgment may come in the form of an apology. Indeed, accepting fault for having caused harm is what tends to distinguish apologies from other types of accounts—such as denial, excuse, or justification (see Goffman 1971, Tavuchis 1991, Schlenker and Weigold 1992). And explicitly acknowledging responsibility for having transgressed tends to improve victims' assessments of and reactions to an apology and to the transgression itself (see, e.g., Scher and Darley 1997, Robbennolt 2003, 2008, Schmitt *et al.* 2004).

While legal accountability is appropriate in the case of unlawful harm, when it comes to lawfully caused harm, acknowledgement of the state's *agency* role in causing the harm is more relevant. This means that rather than a judgment or statement that acknowledges wrongful conduct, the state might simply offer a statement that it engaged in actions that resulted in harm. Similarly, the state might express sympathy

for the victim and regret for the fact that the state's actions caused harm. Such expressions of sympathy have been shown to have positive effects on and to be valued by injured persons in some circumstances. While these effects tend to be smaller than the effects of responsibility-taking apologies, they do tend to be positive, particularly when the harmdoer's legal responsibility is less clear (Robbennolt 2003, 2008).

Moreover, failing to acknowledge that harm was done may itself be wrongful:

Once the injurer, aware now of what he's done, ignores it, acting as though nothing untoward had happened. In particular, if he inflicts the harm and makes no effort to redress or apologize for it, *that* behavior or set of behaviors, unlike the mere harmful action alone, *does* arguably constitute an objective form of insult or slight or disrespect . . . . Harming someone and then not attempting to redress it treats the victim as though one is free to harm her in that way. And this treatment, or mistreatment, is objectively insulting and disrespectful, even if the initial harmful behavior was not (Helmreich 2012).

In the same way that a hit-and-run driver may act wrongfully in fleeing the scene—even if her driving prior to the accident was not wrongful, states that do not acknowledge their role in having caused harm may be thought to have wrongfully caused a secondary injury (Braithwaite and Roche 2001, Cohen 2005).

Acknowledging agency may also be beneficial for the state actors who have caused the harm. Causing harm to another can result in feeling of guilt—even if it was lawful to have caused the harm. Feelings of “agent regret,” like “survivor's guilt,” can manifest even if we would not hold the agent legally responsible or blame the agent for acting in the way that she acted (Baumeister *et al.* 1994, Margolis and Molinsky 2008). Such feelings of guilt may be addressed, in part, by acknowledging the harm done and reaffirming important community values, such as respect for humanity and the protection of innocents (Litz *et al.* 2009, Wenzel *et al.* 2012).

Thus, amends for lawfully caused harm ought to address victims' and states' need for acknowledgement—not by accepting *legal* responsibility for having caused the harm, but by acknowledging *causal* or *agentic* responsibility. For both the police and military, this means acknowledging their role in the causal chain by communicating with victims or their families in a way that identifies the specific actions taken on behalf of the state that resulted in death or grievous injuries.

### 3.2. Recognize loss (via culturally meaningful ritual)

Just as acknowledging the state's agency role in causing harm is important, so too is recognizing the loss that the injured person has sustained. Recognizing the injury respects the dignity of the injured and acknowledges their suffering (Muhammedally 2015). In contrast, failure to recognize injury can be like “pour[ing] salt in the wound.” (Gaston 2009, Ackerman 2016).

The observation of rituals with cultural meaning to the injured person or his or her family plays a role in appropriately recognizing the loss that has been experienced. While amends-making in general can be useful across cultures, (see Ohbuchi *et al.* 1989, Itoi *et al.* 1996, Takaku *et al.* 2001, Merolla *et al.* 2013). the specific practices engaged in to recognize harm will differ across cultural groups. The ritual of sitting Shiva, for example, may be important to some victims. Other victims might find meaning in their tradition of kneeling or bowing to acknowledge loss (Conner and Jordan 2009). The Islamic reconciliation rituals of *suhl* and *mahalaha* may be “symbolically powerful” for some victims (Irani and Funk 1998). Others may expect the payment of “blood money” or other compensation—even for accidental injuries (Irani and Funk 1998, Hallaq 2009, Grubeck 2011). It is important to pay attention to cultural differences in interdependence, the attention paid to saving “face,” communication patterns, emotional display rules, religious practices, the definitions and roles of family and community, and the construction and meaning of apologies

(see Matsumoto 1990, Brewer and Yuki 2007, Ren and Gray 2009, Maddux *et al.* 2012, Aslani *et al.* 2013). Importantly, for present purposes, it is also important to recognize that people from different cultures may differ in the extent to which an apology is seen as an acknowledgement of an injury or an injurious event as compared to an admission of guilt with a focus on culpability (Fehr and Gelfand 2010, Maddux 2011). Understanding these differences can create opportunities to acknowledge loss (though not fault) in ways that are meaningful to those who have experienced the losses.

Of course, state actors need to be sensitive to instances in which their outsider status would make it difficult or counterproductive to engage in culturally specific acknowledgements and rituals. But as we describe elsewhere (Wexler and Robbennolt 2017), the military is already in the initial stages of learning how to engage in such processes in the context of its existing condolence and solatia programs.

### *3.3. Investigate and communicate causal information (and its relation to law)*

In addition to acknowledgement of the state's causal role in the harm and recognition of their loss, victims may desire information about what happened, how the decisions leading to the harm were made, and what steps were taken to prevent harm (see Hickson *et al.* 1992, Vincent *et al.* 1994, Hirsch 2006, Hadfield 2008, Abrams and Ivory 2014). Particularly when a death or injury is sudden or violent, injured people or their family members may find themselves "left guessing" and with unanswered questions (Dubin and Sarnoff 1986, Kaltman and Bonanno 2003, Merlevede 2004, Ackerman 2016). As they try to make sense of what has happened, they may seek out or wish for more information (see Gallagher *et al.* 2003, Hirsch 2006). Indeed, in the tort context, when people are not provided with information and explanations they are more likely to file legal claims (see Sloan and Hsieh 1995, Lind *et al.* 2000).

As we will see, the gathering and provision of information is of central importance for efforts to learn from incidents in which harm is inflicted. But the provision of information to victims or family members also signals respect for those persons and concern for their dignity (Miller 2001). The provision of information also, explicitly or implicitly, communicates the parameters of the legal rules and a sense of how those rules are perceived by others within the community.

Importantly, information can be provided whether or not the actions that caused the harm were wrongful. Consider, for example, the ways in which medical "communication-and-resolution programs" attempt to provide information to patients who experience injury during their medical care. Whenever a patient injury is identified, the institution is to conduct a timely internal investigation of the incident. If the investigation reveals an error, the details are disclosed to the patient or family and settlement discussions are begun. On the other hand, if the investigation finds that no error was made, the patient or family is still provided with information about the investigation and the reasons for its conclusions—but the institution also defends any resulting claims "vigorously" (Boothman *et al.* 2009, Kachalia *et al.* 2010, Mello *et al.* 2014). Attention is paid to the expectations for and timing of such communications "as too much unexplained delay creates a sense that critical information is being concealed" (Boothman *et al.* 2012, p. 21).

Both the military and police often already compile some information for internal after-action reports. A comprehensive approach that enables the responsible parties to construct an accurate narrative of what happened and why such actions were lawful ought to be conveyed to the victims or their families. Though state actors ought to take appropriate care in sharing matters that might raise security concerns, the relevant factual information and legal conclusions ought to be disclosable in many instances.

### 3.4. Reflect, learn, and reform

Finally, amends ought to address victims' and agents' needs for appropriate reform to prevent future harm. Injured persons often seek and value promises or other signs that steps will be taken to prevent similar harm from occurring in the future (see e.g., Goffman 1971, Vincent *et al.* 1994, Gallagher *et al.* 2003, Mazor *et al.* 2004, 2013, Relis 2007). Believing that behavioral change will occur can help injured persons to re-claim a sense of security or help them find some sense of meaning in their loss (see Lazare 2004, Cohen 2011). Similarly, seeing the potential for and engaging in acts aimed at redress and improvement can help state actors address the negative experiences associated with agentic responsibility for having caused harm (Litz *et al.* 2009).

As with the acknowledgement of responsibility, including reform as a component of amends is appropriate even in the context of lawful harm. Self-assessment and improvement with an eye toward minimizing future harm are fitting responses to having caused harm, even if that harm was not wrongfully caused (see Helmreich 2012). Assessing one's role in having caused harm with a "growth" mindset focused on continual improvement can minimize (though not always eliminate) future harm and communicate respect for others (see generally Dweck 2006, Schumann and Dweck 2014).

Existing practices—such as the military's "after-action reports" or internal police investigations—can provide the basis for such reflection (Condra and Shapiro 2012). Examining why harm occurred, providing explanations to those who have been harmed, and implementing measures to prevent future harm should be routinely included in such processes. Because individual action reports will not always be sufficient to identify potential reforms, states should engage in systematic tracking and broad methods of data collection. (Wexler and Robbennolt 2017). This systematic information must then be used to design policies and engage in reform as appropriate.

## 4. Conclusion

Analysis of harm doing and responses to harm has typically not focused on the imposition of *lawful* harm. But lawful harm occurs in a variety of contexts—including the instances of harm doing on which we focus, instances in which state actors, such as the military or the police, act in ways that result in serious, though legal, harm to individuals. The justifications that are traditionally offered for responding to illegal or immoral harm doing provide a starting point for exploring justifications for offering amends to victims of such lawfully caused harm, as do notions of corrective justice, unjust enrichment, and the nonreciprocal imposition of risk. Making amends for serious harm caused by a state actor's legal actions can serve to reaffirm the state's commitment to the norms underlying principles of human rights and corrective justice, contribute to citizens' perceptions of the state as legitimate, enhance support and cooperation going forward, and address state actors' moral injuries.

In order to help states construct and implement appropriate amends in the wake of lawful harm doing, we consider the nature of amends and how such responses necessarily differ from amends offered following unlawful harm. Specifically, we argue that states should acknowledge the state's agency in having caused harm; recognize the loss that has resulted in culturally appropriate ways; investigate the causes of the harm and provide information about what happened to the affected parties; and draw available lessons from the incident and make reforms as appropriate.

Considering the justifications for and nature of appropriate responses to lawfully caused harm, offers a new lens through which to reflect on institutional design. In prior work, for example, we have discussed the need for states to more effectively engage in reflection and learning using military casualty response tracking cells and after-action reports (Wexler and Robbennolt 2017). In this vein, we echo reformers

like the Police Executive Research Forum (2016), who offer many similar suggestions in the policing context. Some states, including the U.S., have voluntary policies that discourage force even when permissible under international law (see Wexler and Robbennolt 2017). Similarly, police forces might systematically gather and use information about lawful harm doing with an eye toward improving their approaches to proportionality or training for de-escalation. Both militaries and police agencies could further limit the use of force and provide better guidance as to when the law allows for lethal force (Corn 2016). And, both militaries and police agencies might explore ways to improve the training of those who are charged with offering amends—with appropriate attention paid to communication skills and cultural sensitivity (Wexler and Robbennolt 2017).

Our initial examination of the reasons for and nature of amends making for lawfully caused harm raises a host of questions for future research. In particular, additional research and analysis is needed to explore the factors that are likely to influence the need for and influence of amends in the context of lawful harm. Relevant considerations might be whether the state deployed lawful but lethal force by mistake or calculated risk; how the state responded to the victim or community during or in the aftermath of the lethal force incident; whether the state action was an isolated event or part of an ongoing course of action; whether there are differences among victims that influence judgements about their appropriateness as recipients of amends; and whether the state's determination of the legality of its actions is perceived as legitimate. A deeper understanding of these and other questions about the role of amends for lawful harm is necessary to enable states to effectively design responses to those who they have harmed.

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