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## SERVICE MEMBERS' REACTIONS TO AMENDS FOR LAWFUL CIVILIAN CASUALTIES

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*When states engage in armed conflict, militaries often kill or seriously injure civilians. Sometimes the actions that lead to these deaths and injuries violate the law, but often the laws of war that govern collateral damage permit them. International and domestic law, however, say little about redress for these lawful harms.*

*As a practical matter, when civilians are lawfully killed during armed conflict, states tend neither to directly acknowledge causal responsibility nor to make promises of non-repetition, though they may provide small monetary payments as an expression of sympathy to affected families—disbursements known as condolence or solatia payments. In contrast, making amends for lawful harm offers both the injured and the injurer a more fulsome mechanism for addressing that harm. Civilians and their families and communities may benefit from a recognition of their loss, an explanation of the circumstances that led to the harm, attention to the prevention of future harm, financial repair, and a showing of respect. From states' perspectives, offering amends has the potential to further important military objectives, address soldiers' moral injuries, and contribute to the professionalization of the military.*

*In the study we report here, we use experimental and survey methods to begin to explore service members' views of amends making generally and their reactions to different forms of responding in the aftermath of a lawful civilian casualty. We find that most service members did not see the*

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We appreciate the financial support of the Illinois Program on Law, Behavior, and Social Science. Thank you to Andrew Mettry for research assistance and to Capt. Rory J. Kelly and Christian Williams for assistance with the survey. We appreciate the helpful comments of Kenworthy Bilz, Bryce Hagedorn, Bob Lawless, Colleen Murphy, Arden Rowell, Tom Tyler, Steve Willborn, Verity Winship, and participants at the University of Illinois College of Law Faculty Retreat, the American Bar Foundation Research Seminar, the American Psychology-Law Society Annual Meeting, the Association for Psychological Science Annual Meeting, and faculty workshops at the University of Arizona, and Arizona State University.

*lawfulness of harm to civilians as a barrier to offering a response, nor did it preclude their feelings of remorse. In addition, we find substantial support for various aspects of amends – particularly for apologies and review of policies in the aftermath of lawful harm. In contrast, service members tended to see a typical—relatively low-dollar—solatia payment as an insufficient response to lawful harm. Our results also demonstrate the ways in which remorse, moral values, and emotion, along with a tendency to shift obligation to victims following an official response, play important roles in the reactions of service members. In addition, the questions that we raise speak more generally to other settings in which the law permits harm to others. This includes other international military harm settings, but also domestic, non-military, settings such as non-negligent police uses of force that result in death or serious harm.*

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## I. INTRODUCTION

When states engage in armed conflict, civilians are frequently killed or seriously injured by military actors.<sup>1</sup> A civilian is mistaken for a combatant at a military checkpoint and is shot.<sup>2</sup> A drone strike hits the wrong target.<sup>3</sup> Or the drone finds its target, but also kills civilians being held hostage.<sup>4</sup> A raid on a home believed to be an insurgent safe house escalates and a civilian family is killed.<sup>5</sup> Civilians are caught in the crossfire of an attack on a high-value target.<sup>6</sup> These sorts of scenarios, and many more, occur more often than anyone would like, particularly in modern unconventional conflicts without clear battle lines in which distinguishing combatants and civilians can be difficult.<sup>7</sup>

Sometimes the actions that lead to these deaths and injuries violate the law, but often the laws of war permit them. Rooted in principles of reciprocity and humanity, the laws of war place significant constraints on when and how harm may be imposed but allow combatants to legally impose harm on both combatants and civilians under some circumstances.

The principle of discrimination, enshrined in the Geneva Conventions, forbids combatants from targeting civilians not participating in hostilities, but contemplates and immunizes reasonable mistakes.<sup>8</sup> The principle of proportionality, also adopted in the Geneva Conventions, allows combatants to target military

1. See generally NETA C. CRAWFORD, ACCOUNTABILITY FOR KILLING 37–38 (2013) (detailing the “scope and scale” of civilian casualties in war); Azmat Khan & Anand Gopal, *The Uncounted*, N.Y. TIMES MAG. (Nov. 16, 2017), <https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-air-strikes.html> [<https://perma.cc/J63W-B86R>]. Empirical research on the war on terror suggests that a significant percentage of American soldiers have killed civilians. Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG. J. MED. 13, 18 tbl.2 (2004).

2. Dexter Filkins, *Atonement: A Troubled Iraq Veteran Seeks Out the Family He Harmed*, NEW YORKER (Oct. 22, 2012), <http://www.newyorker.com/magazine/2012/10/29/atonement> [<https://perma.cc/T9RY-L6P5>].

3. *Afghan Hospital Bombing: Pentagon to Pay Compensation to Families*, GUARDIAN (Oct. 10, 2015, 8:07 PM), <https://www.theguardian.com/us-news/2015/oct/11/kunduz-pentagon-to-pay-compensation-over-afghan-hospital-bombing> [<https://perma.cc/U46C-GHDJ>].

4. Peter Baker, *Obama Apologizes After Drone Kills American and Italian Held by Al Qaeda*, N.Y. TIMES (Apr. 23, 2015), <http://www.nytimes.com/2015/04/24/world/asia/2-qaeda-hostages-were-accidentally-killed-in-us-raid-white-house-says.html> [<https://perma.cc/HGJ4-X3GR>].

5. CRAWFORD, *supra* note 1, at 2–3.

6. NANCY SHERMAN, AFTERWAR: HEALING THE MORAL WOUNDS OF OUR SOLDIERS 78 (2015).

7. Brett T. Litz et al., *Moral Injury and Moral Repair in War Veterans: A Preliminary Model and Intervention Strategy*, 29 CLINICAL PSYCH. REV. 695, 696 (2009).

8. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 57(2)(a)(i), Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

objectives even if doing so would kill or injure civilians, so long as the decision to act satisfies a balancing test.<sup>9</sup>

While international and domestic law provide some means of redress, however imperfect, for *unlawful* harm imposed during armed conflicts, the law says little about redress for these *lawful* harms.<sup>10</sup> Under the laws of war embodied in International Humanitarian Law (“IHL”), states committing lawful killings need not provide reparations nor any other form of redress.<sup>11</sup> As a practical matter, when civilians are lawfully killed during armed conflict, states have tended neither to directly acknowledge their causal responsibility nor to make promises of non-repetition, though they have sometimes provided small monetary payments as an expression of sympathy to affected families—disbursements known as condolence or solatia payments.<sup>12</sup>

It is not clear, however, that the lawfulness of the conduct that leads to civilian harm should completely determine the official response. Former-U.S. President Barack Obama highlighted the limits of legality when he noted, “To say a military tactic is legal, or even effective, is not to say it is wise or moral in every instance.”<sup>13</sup> States may be concerned not just with the legality of the conduct that leads to civilian harm, but also the legitimacy of their policies about how to respond when such harm occurs.<sup>14</sup> For victims, there may not be a meaningful difference between lawful and unlawful harm. For soldiers, there is a “moral burden [that] comes with killing civilians, as part of the permissible but no less wrenching collateral damage of war.”<sup>15</sup> And both victims and soldiers

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9. *Id.* art. 51(5)(b).

10. See Lesley Wexler & Jennifer K. Robbennolt, *Designing Amends for Lawful Civilian Casualties*, 42 YALE J. INT’L L. 121, 124 (2017).

11. *Id.* at 130.

12. *Id.* at 123; see also Katharine M. E. Adams, *A Permanent Framework for Condolence Payments in Armed Conflict: A Vital Commander’s Tool*, MIL. L. REV. 314, 331 (2016); Khan & Gopal, *supra* note 1; Joanna Naples-Mitchell, *Condolence Payments for Civilian Casualties: Lessons for Applying the New NDAA*, JUST SEC. (Aug. 28, 2018), <https://www.justsecurity.org/60482/condolence-payments-civilian-casualties-lessons-applying-ndaa/> [https://perma.cc/68NJ-CYCE]. Condolence payments by the U.S. date back to at least the Korean War and have continued through the most recent conflicts but they have been “ad hoc and underutilized.” Missy Ryan, *U.S. Military Made \$2 Million in Civilian Casualties Payments in Afghanistan in Recent Years*, WASH. POST (Aug. 17, 2020), [https://www.washingtonpost.com/national-security/us-military-made-2-million-in-civilian-casualties-payments-over-5-years-in-afghanistan/2020/08/17/cd550af0-d025-11ea-af07-1d058ca137ae\\_story.html](https://www.washingtonpost.com/national-security/us-military-made-2-million-in-civilian-casualties-payments-over-5-years-in-afghanistan/2020/08/17/cd550af0-d025-11ea-af07-1d058ca137ae_story.html) [https://perma.cc/UF3Y-XHS2]; Annie Shiel, *DOD’s New Ex Gratia Policy: What’s Right, What’s Wrong, and What’s Next*, JUST SEC. (July 10, 2020), <https://www.justsecurity.org/71332/dods-new-ex-gratia-policy-whats-right-whats-wrong-and-whats-next/> [https://perma.cc/82BY-JTJ2]. Debate over the appropriate purposes of condolence payments continues. See, e.g., *id.*

13. President Barack Obama, Remarks at the National Defense University (May 23, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-barack-obama> [https://perma.cc/EAT4-GDCS].

14. See Cora Currier, *Hearts, Minds, and Dollars: Condolence Payments in the Drone Strike Age*, PROPUBLICA (Apr. 5, 2013, 10:15 AM), <https://www.propublica.org/article/hearts-minds-and-dollars-condolence-payments-in-the-drone-strike-age> [https://perma.cc/WW5F-VL8G]. See generally Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 376 (2006).

15. NANCY SHERMAN, *THE UNTOLD WAR: INSIDE THE HEARTS, MINDS, AND SOULS OF OUR SOLDIERS* 1 (2010).

may suffer additional harm when the state responds ineffectively to civilian harms.<sup>16</sup>

In prior work, we have proposed that states offer more robust amends in the aftermath of civilian casualties—even lawful civilian casualties—and have explored why amends are both a morally appropriate response to lawful harmdoing<sup>17</sup> and practically justified from the perspectives of the civilian populations, the relevant military or state, and individual soldiers.<sup>18</sup> Amends making for lawful harm offers injured civilians, the families of civilians who are killed, and injurers a mechanism for addressing the harm. Civilians and their families and communities may benefit from a recognition of their loss, an explanation of the circumstances that led to the harm, attention to the prevention of future harm, financial repair, and a showing of respect.<sup>19</sup> From states' perspectives, offering amends has the potential to further important military objectives, address soldiers' moral injuries, and contribute to the professionalization of the military.<sup>20</sup>

While the U.S. Department of Defense has not been particularly forthcoming on civilian casualties, it does now comply with statutory requirements to release some details documenting its recent civilian condolence payments in Afghanistan and Iraq.<sup>21</sup> The Department of Defense reported the number and amounts of payments made in 2019, characterizing them as “goodwill expressions of condolence and [noting that they] should not be issued as compensation for injuries or damage resulting from conflict or to try to restore civilians to the situation that existed before the armed conflict.”<sup>22</sup>

This disclosure provided some information about when and why and how the Department of Defense issues condolence payments. Reports by others have also explored how victims and advocates feel about such payments (particularly

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16. SHERMAN, *supra* note 6, at 78–79; A. Nazarov et al., *Role of Morality in the Experience of Guilt and Shame Within the Armed Forces*, 132 ACTA PSYCHIATRICA SCANDINAVICA 4, 7 (2015).

17. Colleen Murphy, Jennifer K. Robbennolt & Lesley Wexler, *State Amends for Lawful Harm Doing*, 7 OÑATI SOCIO-LEGAL SERIES 547, 547 (2017).

18. Wexler & Robbennolt, *supra* note 10, at 167 tbl.4; *see also* Shiel, *supra* note 12 (arguing for a “comprehensive range of responses” to civilian harm); THE U.S. MILITARY AND POST-HARM AMENDS POLICY AND PROGRAMS: KEY CONSIDERATIONS AND NGO RECOMMENDATIONS (2019) (recommending a comprehensive “amends framework”).

19. Wexler & Robbennolt, *supra* note 10, at 150, 157, 159, 157, 159; *see also* Gilat J. Bachar, *Collateral Damages: Domestic Monetary Compensation for Civilians in Asymmetric Conflict*, 19 CHI. J. INT'L L. 375, 416–17 (2019) (detailing the variety of motives that claimants might have).

20. *See* Wexler & Robbennolt, *supra* note 10, at 159.

21. DEP'T OF DEF., REPORT ON EX GRATIA PAYMENTS IN THE EVENT OF PROPERTY DAMAGE, PERSONAL INJURY, OR DEATH THAT WAS INCIDENT TO U.S. MILITARY OPERATIONS IN FOREIGN COUNTRIES DURING 2019 (2020), <https://media.defense.gov/2020/May/12/2002298396/-1/-1/1/REPORT-ON-EX-GRATIA-PAYMENTS-IN-THE-EVENT-OF-PROPERTY-DAMAGE-PERSONAL-INJURY-DEATH-THAT-WAS-INCIDENT-TO-U.S.-MILITARY-OPERATIONS-IN-FOREIGN-COUNTRIES-DURING-2019.PDF> [<https://perma.cc/8DRD-BE7V>].

22. Matt Gluck, *An Examination of U.S. Military Payments to Civilians Harmed During Conflict in Afghanistan and Iraq*, LAWFARE (Oct. 8, 2020), <https://www.lawfareblog.com/examination-us-military-payments-civilians-harmed-during-conflict-afghanistan-and-iraq> [<https://perma.cc/NQK5-9G7W>].

when they are not accompanied by amends).<sup>23</sup> We do not yet, however, know how members of the military feel about condolence payments or other forms of amends making. State approaches to responding to lawful harm ought to consider the views of those who might cause the relevant harm, who might have to implement the response, or who are members of the organization on whose behalf any response is offered. And yet, there has been little legal discussion or empirical analysis of how military personnel might react to amends making for lawful civilian casualties. While the laws of war govern the behavior of combatants and aim to have a civilizing effect on their behavior, legal scholarship has largely ignored the consequences of lawful but awful harm for military actors. Even in those instances in which consequences for soldiers are recognized,<sup>24</sup> there is no discussion of how state responses to the harm might impact those consequences. This may be, at least in part, due to how little we know empirically about how amends might affect the military personnel who may cause lawful harm or be tasked with making condolence or solatia payments under current systems, or about the reactions of service members more broadly to the ways in which the state might respond to lawful harm to civilians.<sup>25</sup> In the study we report here, we begin to explore U.S. service members' views of amends making in the aftermath of lawful civilian casualties.

Soldiers who are involved in or witness civilian casualties may experience significant distress, guilt, and what has been recently labeled “moral injury.”<sup>26</sup> Civilian casualties may also produce collective or vicarious guilt<sup>27</sup> in others who are members of and identify closely with the group who has caused the harm—in this case, other members of the armed forces. Amends making has the potential to assist those soldiers who experience remorse or suffer from moral injury

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23. Andrea Presow, *Civilian Casualties: A Case for US Condolence Payments in Syria*, JUST SECURITY (Jan. 6, 2020), <https://www.hrw.org/news/2020/01/06/civilian-casualties-case-us-condolence-payments-syria#> [<https://perma.cc/BLB3-6S8M>].

24. Scholars and commentators occasionally discuss the negative effects on drone operators or interrogators. See, e.g., Michael J. Boyle, *The Legal and Ethical Implications of Drone Warfare*, 19 INT'L J. HUM. RTS. 105, 106 (2015) (noting that drone operators “report relatively high rates of post-traumatic stress disorder (PTSD) in part because they are so acquainted with their target”); Melinda Dee, *Effect of Torture on the Torturer*, GLOB. JUST. BLOG (Nov. 27, 2017), <https://law.utah.edu/effect-of-torture-on-the-torturer/> [<https://perma.cc/4NYB-XEU8>] (discussing PTSD and interrogators).

25. See Everett L. Worthington, Jr. & Diane Langberg, *Religious Considerations and Self-Forgiveness in Treating Complex Trauma and Moral Injury in Present and Former Soldiers*, 40 J. PSYCH. & THEOLOGY 274, 275 (2012) (lamenting the lack of empirical studies on self-forgiveness in combat veterans and active military personnel). Additional research that explores civilian reactions to amends is also needed. See Bachar, *supra* note 19, at 421 (calling for more empirical research on civilians' needs and motivations, how they understand their losses, and how they perceive the process); Jason Lyall, Graeme Blair & Kosuke Imai, *Explaining Support for Combatants During Wartime: A Survey Experiment in Afghanistan*, 107 AM. POL. SCI. REV. 679, 693 (2013); see also Jason Lyall, *Civilian Casualties, Humanitarian Aid, and Insurgent Violence in Civil Wars*, 73 INT'L ORG. 901, 901 (2019) (examining humanitarian assistance more broadly).

26. See Worthington, Jr. & Langberg, *supra* note 25, at 275.

27. See Brian Lickel, Toni Schmader, Mathew Curtis, Marchelle Scarnier & Daniel R. Ames, *Vicarious Shame and Guilt*, 8 GRP. PROCESSES & INTERGROUP RELS. 145, 145 (2005); Michael J. A. Wohl, Nyla R. Branscombe & Yechiel Klar, *Collective Guilt: Emotional Reactions When One's Group Has Done Wrong or Been Wronged*, 17 EUR. REV. SOC. PSYCH. 1, 1 (2006).

in the aftermath of civilian casualties. Exploring service members' support or desire for amends making provides an initial window into this potential.

Exploring what service members think about amends making for lawful harm also provides more general insight into the attitudes and preferences of those who might cause such harm, who are tasked with implementing amends making, or who are members of the broader military community on whose behalf condolence payments are made. Is service members' sense of appropriate response driven by whether there has been a violation of the law?<sup>28</sup> Do the requirements of the law exhaust what they see as their responsibilities?<sup>29</sup> Are they opposed to offering amends for lawful harm? Are they averse to a more robust vision of amends making in ways that might elicit backlash against such approaches?<sup>30</sup> Do they see existing domestic practices or proposed international requirements for amends making for lawful harm as legitimate approaches? While decisions about whether and how to offer amends for lawful civilian casualties will be influenced by a variety of philosophical and practical considerations, policymakers ought not be indifferent to the needs and preferences of military personnel in making these determinations.<sup>31</sup>

More broadly, this project contributes to the emerging literature on amends making and *harmdoers*,<sup>32</sup> and to the literature on reparative measures offered by *groups* that cause harm.<sup>33</sup> Relative to the recipients of amends, harmdoers and groups that cause harm have been much less frequently studied. We study here the views of members of a group—a military organization—that causes serious, but lawful, harm as it carries out its work. We consider how service members think about responding in the aftermath of that harm. In addition, we explore how service members expect victims to respond to the making of amends—specifically, whether they see amends making as shifting an obligation or burden onto

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28. See generally Elinor Amit et al., *Outsourcing Moral Judgment* (unpublished manuscript) (on file with authors); Avital Mentovich & Maor Zeev-Wolf, *Law and Moral Order: The Influence of Legal Outcomes on Moral Judgments*, 24 PSYCH., PUB. POL'Y & L. 489, 499 (2018).

29. For some recent discussion of the relationships between law and morality in war, see Christopher J. Finlay, *Justification and Legitimacy at War: On the Sources of Moral Guidance for Soldiers*, 129 ETHICS 576, 576 (2019) and ADIL AHMAD HAQUE, *LAW AND MORALITY AT WAR* (Timothy Endicott et al. eds., Oxford University Press, 2017).

30. See Currier, *supra* note 14 (quoting retired General Arnold Gordon-Bray who noted that condolence payments weren't "always popular with the soldiers, who would say, "We're at war."").

31. The views of service members could also be compared to the views of laypeople or other constituencies in future research.

32. See, e.g., Joost M. Leunissen, David De Cremer, Marius van Dijke & Christopher P. Reinders Folmer, *Forecasting Errors in the Averseness of Apologizing*, 27 SOC. JUST. RES. 322, 324 (2014); Karina Schumann & Carol S. Dweck, *Who Accepts Responsibility for Their Transgressions?*, 40 PERSONALITY & SOC. PSYCH. BULL. 1598, 1598 (2014); see also Craig W. Blatz & Catherine Philpot, *On the Outcomes of Intergroup Apologies: A Review*, 4 SOC. & PERSONALITY PSYCH. COMPASS 995, 1003 (2010) ("[O]mitting the perpetrator group from past studies is a significant oversight that future research should correct").

33. See, e.g., Sabina Čehajić-Clancy, Daniel A. Effron, Eran Halperin, Varda Liberman & Lee D. Ross, *Affirmation, Acknowledgment of In-Group Responsibility, Group-Based Guilt, and Support for Reparative Measures*, 101 J. PERSONALITY & SOC. PSYCH. 256, 257 (2011); Craig McGarty et al., *Group-Based Guilt as a Predictor of Commitment to Apology*, 44 BRIT. J. SOC. PSYCH. 659, 659 (2005).

those victims—and the implications of those expectations for their attitudes and behavior.<sup>34</sup>

In Part II, we explain how IHL authorizes lawful civilian casualties. In Part III, we review arguments for why states ought to provide amends for lawful civilian casualties. In other work, we have explored the interests of victims and families in receiving amends following lawful harm.<sup>35</sup> Here we focus primarily on the perspectives of service members. In particular, we posit that offering amends has the potential to address soldiers' emotional and moral injuries and contribute to the legitimacy and professionalization of the military. We explore the roles that remorse, moral values, emotion, self-legitimacy, expectations about how amends will impact public moral image, and a tendency to shift obligation to victims may play in shaping service members' responses to amends making.

In Part IV, the heart of the paper, we describe our empirical study of how U.S. service members view and respond to official responses to lawful civilian harm. Importantly, we find that most service members did not see the lawfulness of harm to civilians as a barrier to offering a response, nor did it preclude their feelings of remorse. In addition, we find substantial support for various aspects of amends—particularly for apologies and policy review in the aftermath of lawful harm. In contrast, service members tended to see a typical relatively low dollar solatia payment as an insufficient response to lawful harm. Our results also demonstrate the ways in which remorse, moral values, and emotion, along with a tendency to shift obligation to victims following an official response play important roles in the reactions of service members.

In Part V, we discuss the implications of our findings. We explore, in particular, the limits of simply identifying the actions that lead to civilian harm as lawful, as it is clear from our results that service members did not think that law or legality was the exclusive determinant of whether amends should be made. We explore service members' overall support and desire for amends and their dissatisfaction with the token solatia payment that we asked them to assess. And we consider our findings in the context of existing empirical research on the effects of amends making on the individuals and groups who offer amends, and with regard to the implications of our findings for important military objectives. In addition, we draw connections to other areas in which amends for lawful, but awful, harm might be appropriate. In Part VI, we briefly conclude.

## II. LAWFUL HARM

In distinguishing between lawful and unlawful acts in the armed conflict setting, International Humanitarian Law seeks to strike a fundamental balance between a military's ability to accomplish its objective of weakening or destroying opposition forces and the desire to maintain humanitarian restraint. Modern limitations on *jus in bello* (conduct in armed conflict) are predicated on the idea

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34. See Erica Zaiser & Roger Giner-Sorolla, *Saying Sorry: Shifting Obligation After Conciliatory Acts Satisfies Perpetrator Group Members*, 105 J. PERSONALITY & SOC. PSYCH. 585, 585 (2013).

35. Wexler & Robbennolt, *supra* note 10, at 124.



that armed conflict can be a legitimate enterprise that should be regulated rather than prohibited.

IHL permits the death of or serious harm to innocent civilians in two broad categories. First, under the principle of distinction or discrimination, soldiers may lawfully injure or kill members of other militaries or those engaged in active hostilities,<sup>36</sup> but they may not target innocent civilians. In operationalizing this principle, IHL permits reasonable mistakes that may result in civilian casualties. For instance, if a commander takes sufficient precautions to verify a target's identity and classification as a legitimate target,<sup>37</sup> the civilian's death is lawful even if it turns out that this assessment was wrong, and the target is revealed after the fact to have been an innocent civilian. Likewise, if a commander complies with requirements related to identifying a legal target but is still reasonably unaware of the presence of civilians, civilian deaths resulting from attacks on the target are lawful. One might argue in individual instances about the sufficiency of the precautions taken or the reasonableness of a given mistake. States, however, agree that so long as precautions are deemed sufficient or mistakes determined to be reasonable, the resulting harms to civilians are lawful so long as the military was abiding by rules governing distinction.

Second, the principle of proportionality has been interpreted to allow collateral damage or the incidental loss of civilian life when it is not excessive given the "concrete and direct military advantage anticipated."<sup>38</sup> In other words, if a military target is important enough, then anticipated civilian deaths, perhaps even extensive civilian deaths,<sup>39</sup> are allowed. Proceeding with an attack while aware of the risk of civilian deaths is not a per se violation of IHL.<sup>40</sup> If troops seek to engage, for example, in a bombing raid of a high value military site, the presence of civilians who will be killed does not automatically render the strike unlawful.<sup>41</sup>

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36. Though the means of doing so is "not unlimited." See Protocol I, *supra* note 8, arts. 22, 23, 36.

37. *Id.* art. 57(2)(a)(i).

38. *Id.* art. 51(5)(b).

39. See Samuel Estreicher, *Privileging Asymmetric Warfare (Part II)?: The "Proportionality" Principle Under International Humanitarian Law*, 12 CHI. J. INT'L L. 143, 152–53 (2011) (arguing Protocol I does not mandate proportionality between the expected civilian loss and "the extent of casualties and other damage inflicted by the enemy's assault," but rather that the former is not 'excessive' relative to "the 'military advantage anticipated.'").

40. While some courts challenge this understanding of IHL, the United States continues to hold this view. See Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT'L L. 79, 89–90 (2013).

41. It is worth noting the difficulties that military personnel, like other decision-makers, are likely to have in determining whether a particular act was justified or proportional, and in assessing the sufficiency of any precautions taken, including complications related to confirmation bias, self-serving bias, in-group effects, and other psychological phenomena. See CRAWFORD, *supra* note 1, at 163–65, 184 (discussing the difficulties inherent in judging proportionality and foreseeability); Shiri Krebs, *Rethinking Targeted Killing Policy: Reducing Uncertainty, Protecting Civilians from the Ravages of Both Terrorism and Counterterrorism*, 44 FLA. ST. UNIV. L. REV. 943, 943 (2017) (discussing the ambiguities and uncertainties in decision making with regard to targeted killing); JENNIFER K. ROBBENOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW* 6 (2016) (discussing the difficulty people have in assessing risks and making judgments of "reasonableness"); Ganesh Sitaraman & David Zions, *Behavioral War Powers*, 90 N.Y.U. L. REV. 516, 516 (2015) (raising similar issues in the context of presidential and congressional war powers).

In addition to rendering the deaths and injuries of civilians lawful under certain circumstances, IHL also currently contains no requirement for compensation, responsibility-taking, or apologies for those civilians who are affected by lawful combat activities. Nor, at this time, are such responses an emerging norm.<sup>42</sup> While several scholars have focused on the need to provide compensation to victims of lawful harm during armed conflict<sup>43</sup> and states will sometimes provide small monetary payments as an expression of sympathy to affected families—ad hoc disbursements known as condolence or solatia payments<sup>44</sup>—the international community is not currently inclined to transform this into an obligation to provide reparations.<sup>45</sup>

Encouraging voluntary adoption by states of amends programs for responding to lawful civilian harm might lay the groundwork for a norm shift.<sup>46</sup> Amends fit with emerging international and domestic practices to respect the needs of those adversely affected by human rights abuses and armed conflicts. For instance, our call for the provision of information regarding the events surrounding a civilian casualty stems from the same spirit as the newly emerging right to truth in the human rights context.<sup>47</sup> Yet this call considers the need for truth within an existing IHL framework that approaches human rights concerns—such as the

42. *Monetary Payments for Civilian Harm in International and National Practice*, CTR. FOR CIVILIANS IN CONFLICT (Oct. 2, 2013), <https://civiliansinconflict.org/blog/infographics-monetary-payments-for-civilian-harm-2> [<https://perma.cc/258J-59UR>] (providing a comprehensive listing of the few states providing payments).

43. ALPHONSE MULEEFU, REPARATION FOR VICTIMS OF COLLATERAL DAMAGE: A NORMATIVE AND THEORETICAL INQUIRY 131 (2014); Yaël Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict*, 42 VAND. J. TRANSNAT'L L. 181, 181 (2009); Minako Ichikawa Smart, *Compensation for Civilian Casualties in Armed Conflicts and Theory of Liability*, in *ECONOMICS OF WAR AND PEACE: ECONOMIC, LEGAL, AND POLITICAL PERSPECTIVES* 243, 243–59 (Benjamin E. Goldsmith & Jurgen Brauer eds., 2010); Sarah Holewinski, *Do Less Harm: Protecting and Compensating Civilians in War*, 92 FOREIGN AFFS. 14, 15 (2013).

44. U.S. FORCES, U.S. DEP'T DEF., MONEY AS A WEAPON SYSTEM AFGHANISTAN, USFOR-A PUB 1-06 at 13 (2009); U.S. DEP'T ARMY, Reg. 27-20, CLAIMS 55, 55 (2008), [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/pdf/web/r27\\_20.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r27_20.pdf) [<https://perma.cc/RA4Z-MBZ4>] (identifying the Federated States of Micronesia, Japan, Korea, and Thailand as countries with solatia payment customs); *Assistance for Civilian Casualties of War: Hearing Before a S. Subcomm. of the Comm. on Appropriations*, 111th Cong. 40–46 (2009) (statement of Jonathan Tracy, Assistant Director, National Institute of Military Justice) (describing the ad hoc nature of and insufficient funding for condolence payments); Jonathan Tracy, *Compensating Civilian Casualties: "I Am Sorry for Your Loss, and I Wish You Well in a Free Iraq."* CTR. FOR CIVILIANS IN CONFLICT (May 30, 2008), <https://civiliansinconflict.org/publications/policy/compensating-civilian-casualties-sorry-loss-wish-well-free-iraq/> [<https://perma.cc/2YDB-8WZM>].

45. See, e.g., Rainer Hofmann, *Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict*, reprinted in THE HAGUE CONFERENCE (2010): REPARATION FOR VICTIMS OF ARMED CONFLICT, INT'L L. ASS'N, art. 3, cmt. 1, at 6 & art. 4, cmt. 3, at 9 (2010) (noting that “the right to reparation—in whatever form—presupposes a violation of international law,” though leaving the door open to such an obligation in the future).

46. Murphy, Robbenolt & Wexler, *supra* note 17, at 137; see Wexler & Robbenolt, *supra* note 10, at 560.

47. See generally Off. of the U.N. High Comm'r for Hum. Rts., *Study on the Right to Truth: Promotion and Protection of Human Rights*, ¶ 34, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006). The right to truth, often invoked in response to enforced disappearances, “implies knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them.” *Id.* ¶ 3.

right to life and the right to human dignity—as flowing from a state which maintains the authority to use force and thus possesses the ability to abridge or limit those human rights in times of armed conflict.<sup>48</sup> Amends making fits with this notion of IHL as a compromise: an imperfect system which generally provides protections to noncombatants and some dignity to combatants in return for shielding the “essence of war,” that is, killing and confining combatants without due process.<sup>49</sup>

### III. AMENDS FOR LAWFUL HARM

It is tempting to focus narrowly on financial and other material compensation as the key elements of amends. And monetary amends can be important. But amends making might include a variety of reparative measures, such as expressions of remorse or sympathy, apologies, accounts or other information about what happened, promises of forbearance, rituals of condolence, or in-kind assistance or service.<sup>50</sup>

In some instances, of course, legal wrongdoing and liability will require amends making in some form—usually via compensation. In the case of civilians *lawfully* killed in the context of armed conflict, however, there is no legal obligation to compensate or make amends in any way. Amends making, therefore, will not be grounded in a legal claim of unlawfulness. Instead, any amends making that occurs will likely arise from an assessment of the needs of affected civilians, the soldiers involved, and the military more broadly, and whether amends will serve those needs.

In this project, we focus on the perspective of the soldiers—exploring service members’ views of and reactions to amends making for lawful civilian casualties. Military leaders and soldiers may have a range of reactions to the possibility of offering amends for lawful harm. On the one hand, injurers often find amends making difficult, as apologizing may take them out of their comfort zone and can be hard to do effectively.<sup>51</sup> They might be motivated to justify or deny

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48. See Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1621 (1984); Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT’L L. REV. 259, 259 (1989).

49. See Christopher Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, 33 PHIL. & PUB. AFFS. 148, 166 (2005) (quoting Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges From the “War on Terror,”* 27 FLETCHER F. WORLD AFFS. 55, 57).

50. LINDA RADZIK, MAKING AMENDS: ATONEMENT IN MORALITY, LAW, AND POLITICS 5 (2009); MARGARET URBAN WALKER, MORAL REPAIR: RECONSTRUCTING MORAL RELATIONS AFTER WRONGDOING 191 (2006); Jerry Goodstein, Ken Butterfield & Nathan Neale, *Moral Repair in the Workplace: A Qualitative Investigation and Inductive Model*, 138 J. BUS. ETHICS 17, 29 (2015); Holewinski, *supra* note 43, at 20. Apologies, in particular, are central to the content and process of making amends. See, e.g., Goodstein et. al., *supra*, at 19 (finding that apologies are frequently included in amends); see also Craig W. Blatz, Karina Schumann & Michael Ross, *Government Apologies for Historical Injustices*, 30 POL. PSYCH. 219, 221 (2009) (articulating elements of government apologies for past injustices).

51. See, e.g., CAROL TAVRIS & ELIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS 2, 222 (2007). On the other hand, *not* apologizing can allow the individual to preserve feelings of greater control, a greater sense of value integrity, and more positive self-esteem. Tyler G. Okimoto, Michael Wenzel & Kyli Hedrick, *Refusing to Apologize Can Have Psychological Benefits (and We Issue No Mea Culpa for This Research Finding)*, 43 EUR. J. SOC. PSYCH. 22, 22

the harm.<sup>52</sup> Harmdoers may not perceive the same need for amends as do victims.<sup>53</sup> In the context of armed conflict, security concerns may loom large. Legal obligations might be thought to exhaust or crowd out moral obligations.<sup>54</sup> And states may not want to set a precedent or imply legal responsibility.<sup>55</sup>

On the other hand, however, a range of reasons explains why states might want to overcome these barriers.<sup>56</sup> Addressing the needs of affected individuals and communities, for example, may allow the armed forces to more successfully win the “hearts and minds” of the relevant community, or to at least avoid encouraging people to align with forces on the other side.<sup>57</sup> In counterinsurgencies, fostering the support of local communities is thought to be fundamental to the success of any military objective. In particular, the allegiances of the local population have important implications for how information flows, or does not, to the military or the insurgents.<sup>58</sup> And the perceived legitimacy of, and support for, the military will be judged, in part, by how it responds to those it has harmed.<sup>59</sup> Solatia and condolence payments, therefore, are often thought of in instrumental terms.<sup>60</sup>

But beyond these instrumental aims, we suggest that offering amends can potentially play a role in addressing the guilt and moral injury that soldiers may experience when they are involved in or witness civilian casualties and can contribute to the professionalization of the military.

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(2013); Brent T. White, *Saving Face: The Benefits of Not Saying I'm Sorry*, 72 L. & CONTEMP. PROBS. 261, 266 (2009). Individuals vary in their proclivity to offer apologies. Andrew J. Howell, Raelyne L. Dopko, Jessica B. Turowski & Karen Buro, *The Disposition to Apologize*, 51 PERSONALITY & INDIVIDUAL DIFFERENCES 509, 513 (2011).

52. See, e.g., Wohl et al., *supra* note 27, at 5, 19.

53. See, e.g., Christopher P. Reinders Folmer, Peter Mascini & Joost M. Leunissen, *Rethinking Apology in Tort Litigation: Deficiencies in Comprehensiveness Undermine Remedial Effectiveness*, REV. L. & ECON., Feb. 2019, at 1, 5; Joost M. Leunissen, David De Cremer, Christopher P. Reinders Folmer & Marius van Dijke, *The Apology Mismatch: Asymmetries Between Victim's Need for Apologies and Perpetrator's Willingness to Apologize*, 49 J. EXP. SOC. PSYCH. 315, 322 (2013).

54. See Emad H. Atiq, *Why Motives Matter: Reframing the Crowding Out Effect of Legal Incentives*, 123 YALE L.J. 1070, 1084 (2014). See generally Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 J. ECON. SURV. 589, 600 (2001).

55. See, e.g., Harold G. Maier, *Ex Gratia Payments and the Iranian Airline Tragedy*, 83 AM. J. INT'L L. 325, 329 (1989).

56. See Wexler & Robbennolt, *supra* note 10, at 159–67.

57. Lyall et al., *Explaining Support*, *supra* note 25, at 680.

58. See STATHIS N. KALYVAS, *THE LOGIC OF VIOLENCE IN CIVIL WAR* 128 (2006); Luke N. Condra & Jacob Shapiro, *Who Takes the Blame? The Strategic Effects of Collateral Damage*, 56 AM. J. POL. SCI. 167, 169 (2012); see also Katarina Hoijs, *Al-Qaeda Issues Rare Apology After Land Mine Kills Bus Riders*, BLOOMBERG (Sept. 12, 2019), <https://www.bloomberg.com/news/articles/2019-09-12/al-qaeda-issues-rare-apology-after-landmine-kills-bus-passengers> [<https://perma.cc/7BSY-WFSC>].

59. See Lyall et al., *Explaining Support*, *supra* note 25, at 694 (finding no increase in support for the combatants offering the aid, but a decrease in support for rival combatants). For a related example from another context, see Sarah B. Lawsky, *Fairly Random: On Compensating Audited Taxpayers*, 41 CONN. L. REV. 161, 207 (2008) (suggesting that some compensation of those chosen for random tax audits is appropriate, not because those audits are unlawful or unfair, but because they are perceived to be unfair by taxpayers and public trust is important). See generally Tyler, *supra* note 14, at 394.

60. Currier, *supra* note 14 (describing tactical and strategic perspectives on condolence payments).

### A. *Emotional and Moral Needs*

Service members who cause harm to civilians often experience feelings of guilt or remorse for having caused that harm.<sup>61</sup> Distress associated with “agent regret” or “innocent guilt” can result even when the harm was not legally wrongful or the agent does not believe that his or her acts were wrongful.<sup>62</sup> Indeed, one of the themes that emerges from interviews with service members is that even when they have done “no wrong by war’s best standards, they often feel wracked by guilt, betrayal, and a need to make reparations.”<sup>63</sup> Guilt may even extend beyond the individual soldier or soldiers who were causally involved. Witnesses to civilian casualties may experience distress as well.<sup>64</sup> And “collective guilt” may be experienced by those who are members of the same group as those who have caused harm.<sup>65</sup>

61. See, e.g., Jacob K. Farnsworth, Kent D. Drescher, Jason A. Nieuwsma, Robyn B. Walser & Joseph M. Currier, *The Role for Moral Emotions in Military Trauma: Implications for the Study and Treatment of Moral Injury*, 18 REV. GEN. PSYCH. 249, 250 (2014); Philip Held et al., “I Knew It Was Wrong the Moment I Got the Order”: A Narrative Thematic Analysis of Moral Injury in Combat Veterans, 11 PSYCH. TRAUMA: THEORY, RSH., PRAC. & POL’Y 396, 396 (2019); Jeremy D. Jinkerson & Allison R. Battles, *Relationships Between Moral Injury Syndrome Model Variables in Combat Veterans*, 25 TRAUMATOLOGY 33, 33 (2019). Guilt is “an individual’s unpleasant emotional state associated with possible objections to his or her actions, inaction, circumstances, or intentions” and that is “based on the possibility that one may be in the wrong or that others may have such a perception.” Roy F. Baumeister, Arlene M. Stillwell & Todd F. Heatheron, *Guilt: An Interpersonal Approach*, 115 PSYCH. BULL. 243, 245 (1994). Face-to-face contact is not necessary for soldiers to experience guilt. For example, drone operators who never physically enter the combat zone can experience moral injury. See Herman Keizer Jr., *Stop Drone Strikes and the Moral Injury of Their Pilots*, FORT WORTH STAR-TELEGRAM (Feb. 10, 2015, 5:36 PM), <http://www.star-telegram.com/opinion/opn-columns-blogs/other-voices/article9702050.html> [<https://perma.cc/N4CB-P8FN>]; Eyal Press, *The Wounds of the Drone Warrior*, N.Y. TIMES MAG. (June 13, 2018), <https://www.nytimes.com/2018/06/13/magazine/veterans-ptsd-drone-warrior-wounds.html> [<https://perma.cc/64TU-TV5Z>].

62. James M. Dubik, *Forward*, in SHERMAN, AFTERWAR, *supra* note 6, at xiv (noting that soldiers may internally “transform” actions “for which they are not culpable into transgressions worthy of blame.”); Jeffrey S. Helmreich, *Does “Sorry” Incriminate? Evidence, Harm, and the Protection of Apology*, 21 CORNELL J.L. & PUB. POL’Y 567, 583 (2012) (discussing “agent regret”); Christian Enemark, *Drones, Risk, and Moral Injury*, CRITICAL MIL. STUD. (2017) (“[I]nstances of killing that are deemed permissible by others . . . can be judged further by killers themselves in terms of whether killing feels morally right”); Anne-Marie Sondergaard Christensen, *The Role of Innocent Guilt in Post-Conflict Work*, 30 J. APPLIED PHIL. 365, 365 (2013) (describing “innocent guilt”); Bernard Williams, *Moral Luck*, in MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980, 20 (Bernard Williams ed., 1981) (discussing “agent regret”).

63. SHERMAN, *supra* note 15, at 7, 90, (“Other military personnel, whether sailors, soldiers, marines, or airmen, struggle with guilty feelings about past acts for which they are not legally or even morally culpable.”); *id.* at 107 (“Even if limited collateral damage is widely regarded as permissible within just war theory, those who incur it do not always live with it easily.”).

64. See, e.g., Kent D. Drescher et al., *An Exploration of the Viability and Usefulness of the Construct of Moral Injury in War Veterans*, 17 TRAUMATOLOGY 8, 11 (2011) (identifying bearing witness to acts that transgress moral beliefs as morally injurious); Litz et al., *supra* note 7.

65. See, e.g., Christensen, *supra* note 62, at 369–70; MARK A. FERGUSON & NYLA R. BRANSCOMBE, *The Social Psychology of Collective Guilt*, in COLLECTIVE EMOTIONS: PERSPECTIVES FROM PSYCHOLOGY, PHILOSOPHY, AND SOCIOLOGY 251 (Christian von Scheve & Mikko Salmela eds., 2014); Wohl et al., *supra* note 27; Anja Zimmermann, Dominic Abrams, Bertjan Doojsje & Antony S. R. Manstead, *Casual and Moral Responsibility: Antecedents and Consequences of Group-Based Guilt*, 41 EUR. J. SOC. PSYCH. 825, 825 (2011); see also Bertjan Doojsje, Nyla R. Branscombe, Russell Spears & Antony S. R. Manstead, *Guilty by Association: When One’s Group Has a Negative History*, 75 J. PERSONALITY & SOC. PSYCH. 872, 872 (1998).

Harm to civilians, in particular, may cause service members to wrestle with the conflicting moral values associated with the principles of distinction and proportionality,<sup>66</sup> the different norms that apply in civilian and military life,<sup>67</sup> the varying roles of civilians in arenas of armed conflict,<sup>68</sup> and the necessary evils<sup>69</sup> and tragic tradeoffs<sup>70</sup> of war—leading them to ultimately struggle with “the meaning of right and wrong.”<sup>71</sup> Causing or observing the death of a civilian, even when lawful, may create a significant “moral injury”<sup>72</sup> to the actor because harming civilians contravenes important values or beliefs, including a belief in a just world,<sup>73</sup> that “people get what they deserve,”<sup>74</sup> that killing civilians is wrong<sup>75</sup> and collateral damage should be minimized,<sup>76</sup> and that military service improves the world.<sup>77</sup> As Karl Marlantes writes: “Warriors suffer from wounds to their bodies, to be sure, but because they are involved in killing people, they also suffer

66. See Estreicher, *supra* note 39, at 146.

67. Dubik, *supra* note 62, at xiv (noting that “[w]ar is the realm of the paradoxical: the morally repugnant is the morally permissible, and even the morally necessary”); Tine Molendijk, *Toward an Interdisciplinary Conception of Moral Injury: From Unequivocal Guilt and Anger to Moral Conflict and Disorientation*, 51 NEW IDEAS PSYCH. 1, 1 (2018) (noting that “[a] soldier internalizes both civilian and military values . . . .”); see also Hanne M. Watkins & Simon Laham, *The Influence of War on Moral Judgments About Harm*, 49 EUR. J. SOC. PSYCH. 447, 447 (2019).

68. Consider, for example, civilians engaged in hostilities. See NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 11 (2009).

69. See Andrew Molinsky & Joshua Margolis, *Necessary Evils and Interpersonal Sensitivity in Organizations*, 30 ACAD. MGMT. REV. 245, 247 (2005) (“Necessary evils have three distinguishing characteristics: (1) a valued objective requires that they be done, hence making them necessary; (2) they inflict ineradicable harm, and they therefore entail evil; and (3) they are integral to the role the performer occupies, thus making them mandatory.”). See generally Joshua D. Margolis & Andrew Molinsky, *Navigating the Bind of Necessary Evils: Psychological Engagement and the Production of Interpersonally Sensitive Behavior*, 51 ACAD. MGMT. J. 847 (2008) (reviewing studies).

70. See Philip E. Tetlock, Ori V. Kristel, S. Beth Elson, Melanie C. Green & Jennifer S. Lerner, *The Psychology of the Unthinkable: Taboo Trade-Offs, Forbidden Base Rates, and Heretical Counterfactuals*, 78 J. PERS. & SOC. PSYCH. 853, 856 (2000) (defining a tragic tradeoff as one that pits sacred values against each other); see also Joshua D. Greene, Leigh E. Nystrom, Andrew D. Engell, John M. Darley & Jonathan D. Cohen, *The Neural Bases of Cognitive Conflict and Control in Moral Judgment*, 44 NEURON 389, 391 (2004) (exploring differences between “easy” and “hard” moral problems).

71. Molendijk, *supra* note 67, at 6.

72. Drescher et al., *supra* note 61, at 9; Shira Maguen & Brett Litz, *Moral Injury in Veterans of War*, 23 PTSD RSCH. Q. 1, 1 (2012); Jonathan Shay, *Moral Injury*, 16 INTERTEXTS 57, 58–59 (2012); Alison Flipse Vargas et al., *Moral Injury Themes in Combat Veterans’ Narrative Responses from the National Vietnam Veterans’ Readjustment Study*, 19 TRAUMATOLOGY 243, 248 (2013). Moral injury can be more fully defined as “[d]isruption in an individual’s confidence and expectations about one’s own or others’ motivation or capacity to behave in a just and ethical manner.” Drescher et al., *supra* note 64, at 9. Empirical evidence suggests that many soldiers experience moral injury. Farnsworth et al., *supra* note 61, at 250 (noting that the percentage is about 25%). For an individual example, see Filkins, *supra* note 2.

73. Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCH. BULL. 1030, 1030 (1978).

74. Litz et al., *supra* note 7, at 699.

75. Flipse Vargas et al., *supra* note 72, at 248; see also Hanne M. Watkins & Simon M. Laham, *The Principle of Discrimination: Investigating Perceptions of Soldiers*, 23 GRP. PROCESSES & INTERGROUP RELS. 3, 3 (2020).

76. SHERMAN, *supra* note 6, 79.

77. A. Nazarov et al., *Role of Morality in the Experience of Guilt and Shame Within the Armed Forces*, 132 ACTA PSYCHIATRICA SCANDINAVICA 4, 13 (2015).

from compromises with, or outright violations of, the moral norms of society and religion.<sup>78</sup> Soldiers are particularly at risk for moral injuries in modern non-traditional conflicts where distinguishing combatants and civilians is difficult.<sup>79</sup>

Causing harm—even lawful harm—and not addressing it can result in additional expressive harm.<sup>80</sup> And responding ineffectively to lawful but awful harm can be damaging as well. One soldier described being nearby when civilians were harmed in the crossfire of an attack on a high-value target in Iraq. He was then tasked with finding the family and making amends. Despite assessing the incident as justified harm, he felt the need to repair the effects of the harm. But the difficulties he experienced in trying to respond effectively left him feeling powerless and betrayed.<sup>81</sup>

In other contexts, feelings of guilt tend to be associated with increased support for amends making, including apologies and reparations.<sup>82</sup> And recent research on guilt, agent regret, and moral injury and its treatment suggests that amends-like responses to lawful harm might have a role to play in helping service members cope with the consequences of civilian casualties.<sup>83</sup> Mental health professionals have noted the lack of mechanisms available to service members for

78. KARL MARLANTES, *WHAT IT IS LIKE TO GO TO WAR*, at xi (2011).

79. Litz et al., *supra* note 7, at 696; Flipse Vargas et al., *supra* note 72, at 248. Moral injuries have been linked to other negative outcomes such as substance abuse and suicide. *See, e.g.*, Annabelle O. Bryan, Craig J. Bryan, Chad E. Morrow, Neysa Etienne & Bobbie Ray-Sannerud, *Moral Injury, Suicide Ideation, and Suicide Attempts in a Military Sample*, 20 *TRAUMATOLOGY* 154, 154 (2014); Kent D. Drescher, Jason A. Nieuwsma & Pamela J. Swales, *Morality and Moral Injury: Insights from Theology and Health Science*, *REFLECTIVE PRAC.: FORMATION & SUPERVISION MINISTRY* 50, 59 (2013); Shira Maguen, *Killing in Combat May Be Independently Associated with Suicidal Ideation*, 29 *DEPRESSION & ANXIETY* 918, 921 (2012); Shira Maguen et al., *The Impact of Reported Direct and Indirect Killing on Mental Health Symptoms in Iraq War Veterans*, 23 *J. TRAUMATIC STRESS* 86, 89 (2010); Sonya B. Norman & Shira Maguen, *Moral Injury*, U.S. DEP'T VETS. AFFS., [https://www.ptsd.va.gov/professional/treat/cooccurring/moral\\_injury.asp](https://www.ptsd.va.gov/professional/treat/cooccurring/moral_injury.asp) (last visited Jan. 19, 2021) [<https://perma.cc/J3Q4-5AFH>].

80. *See, e.g.*, Marc A. Cohen, *Apology as Self-Repair*, 21 *ETHIC. THEORY MORAL PRAC.* 585, 591 (2018).

81. SHERMAN, *supra* note 6, at 78–79. The soldier encountered obstacles in trying to meet the family's need for the bodies to be returned for burial, he was deeply disappointed in the solatia (\$750) authorized, and he was only able to provide death certificates that had been stamped "ENEMY." He felt that this experience violated his obligation "to minimize collateral damage in war and ameliorate its effects" as well as a more "intimate duty to a family he had come to know and care for." *Id.*

82. *See, e.g.*, Jesse A. Allpress, Fiona Kate Barlow, Rupert Brown & Winnifred R. Louis, *Atoning for Colonial Injustices: Group-Based Shame and Guilt Motivate Support for Reparations*, 4 *INT'L J. CONFLICT & VIOLENCE* 75, 86 (2010); Rupert Brown & Sabina Čehajić, *Dealing with the Past and Facing the Future: Mediators of the Effects of Collective Guilt and Shame in Bosnia and Herzegovina*, 38 *EUR. J. SOC. PSYCH.* 669, 678 (2008); Rupert Brown, Roberto González, Hanna Zagefka, Jorge Manzi & Sabina Čehajić, *Nuestra Culpa: Collective Guilt and Shame as Predictors of Reparation for Historical Wrongdoing*, 94 *J. PERSONALITY & SOC. PSYCH.* 75, 88 (2008); Čehajić-Clancy et al., *supra* note 33, at 267; Jorge Manzi & Roberto González, *Forgiveness and Reparation in Chile: The Role of Cognitive and Emotional Intergroup Antecedents*, 13 *PEACE & CONFLICT: J. PEACE PSYCH.* 71, 88 (2007); McGarty et al., *supra* note 33, at 676; Sven Zebel, Anja Zimmermann, G. Tendayi Viki & Bertjan Doosje, *Dehumanization and Guilt as Distinct but Related Predictors of Support for Reparation Policies*, 29 *POL. PSYCH.* 193, 206 (2008); Zimmermann et al., *supra* note 65, at 838. Wrongdoers who act intentionally experience less guilt and, consequently, are less inclined to apologize. Leunissen et al., *supra* note 53, at 316.

83. *See* Tracy, *supra* note 44, at 4.

making direct amends and the negative effects this can have on them.<sup>84</sup> Therapy for moral injury, therefore, relies on activities such as imagined conversations with or letter writing to victims.<sup>85</sup> Appropriate amends processes could provide a mechanism by which harm could be acknowledged and addressed in a more direct way.<sup>86</sup> Making amends has the potential to help soldiers see that “justice is balanced” and that repair is possible; help them reaffirm core values—respect for humanity, regarding military service as honorable, and the importance of protecting civilians; and enable them to shoulder appropriate responsibility<sup>87</sup> while reconciling their role in having caused harm with their own sense of positive self-regard.<sup>88</sup>

Soldiers, therefore, might benefit from making amends and might welcome the opportunity to participate in some way in an amends making response. As one veteran soldier noted, “I think a lot of us want to see them and say we are sorry. We don’t get that chance.”<sup>89</sup> Accordingly, a carefully developed process of making amends may satisfy, at least in part, the emotional needs of military personnel who may experience remorse and moral injury as a consequence of civilian casualties.

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84. See, e.g., Natalie Purcell, Kristine Burkman, Jessica Keyser, Phillip Fucella & Shira Maguen, *Healing from Moral Injury: A Qualitative Evaluation of the Impact of Killing Treatment for Combat Veterans*, 27 J. AGGRESSION, MALTREATMENT & TRAUMA 645, 665 (2018).

85. BRETT T. LITZ, LESLIE LEBOWITZ, MATT J. GRAY & WILLIAM P. NASH, ADAPTIVE DISCLOSURE: A NEW TREATMENT FOR MILITARY TRAUMA, LOSS, AND MORAL INJURY 4 (2016); Erin R. Smith, Jeanne M. Duax & Sheila A. M. Rauch, *Perceived Perpetration During Traumatic Events: Clinical Suggestions from Experts in Prolonged Exposure Therapy*, 20 COGNITIVE & BEHAV. PRAC. 461, 468 (2013).

86. See, e.g., Cohen, *supra* note 80, at 586–88 (discussing apology as a way to address expressive harm and “counteract” agent regret); Christensen, *supra* note 62, at 375–76 (discussing the need for post-conflict tools to address the suffering that evokes innocent guilt); see also Natalie Purcell, Brandon J. Griffin, Kristine Burkman & Shira Maguen, “Opening a Door to a New Life”: *The Role of Forgiveness in Healing from Moral Injury*, 9 FRONTIERS PSYCHIATRY 498 (2018).

87. See Daniel W. Tigard, *The Positive Value of Moral Distress*, 33 BIOETHICS 601, 604 (2019) (noting the utility of moral distress as an “ethical canary” that can lead to learning and reform, while acknowledging that such distress is sometimes too much to handle).

88. See, e.g., Held et al., *supra* note 61; LITZ ET AL., *supra* note 85, at 4; Litz et al., *supra* note 7, at 701; Purcell et al., *supra* note 86, at 498; Smith et al., *supra* note 85, at 469; Michael Wenzel, Lydia Woodyatt & Kyli Hedrick, *No Genuine Self-Forgiveness Without Accepting Responsibility: Value Reaffirmation as a Key to Maintaining Positive Self-Regard*, 42 EUR. J. SOC. PSYCH. 617, 624 (2012); Lydia Woodyatt & Michael Wenzel, *A Needs-Based Perspective on Self-Forgiveness: Addressing Threat to Moral Identity as a Means of Encouraging Interpersonal and Intrapersonal Restoration*, 50 J. EXPERIMENTAL SOC. PSYCH. 125, 126 (2014); see also Thomas P. Carpenter, Robert D. Carlisle & Jo-Ann Tsang, *Tipping the Scales: Conciliatory Behavior and the Morality of Self-Forgiveness*, 9 J. POSITIVE PSYCH. 389, 399–400 (2014) (finding that conciliatory behavior—including apologizing, making amends, offering restitution, and seeking forgiveness—increases self-forgiveness); Goodstein et al., *supra* note 50, at 26, 30 (finding that making amends can result in the maintenance or enhancing of “values, character, and standards,” self-forgiveness, self-respect, and self-improvement); Maria M. Steenkamp, William P. Nash, Leslie Lebowitz & Brett T. Litz, *How Best to Treat Deployment-Related Guilt and Shame: Commentary on Smith, Duax, and Rauch*, 20 COGNITIVE & BEHAV. PRAC. 471, 471 (2013).

89. Filkins, *supra* note 2, at 18; see also Purcell et al., *supra* note 86, at 489 (noting obstacles to direct amends in current system).



### B. Legitimacy

What happens in the aftermath of harm has implications for the legitimacy with which harmdoers are perceived.<sup>90</sup> Victims and their communities care about the circumstances and decisions that lead to harm.<sup>91</sup> But they also care about how they are treated in the aftermath of that harm. While state actors may focus their own attention on whether the decision to use force complied with the legal rules governing the use of force, victims or the public are less likely to be intimately familiar with those legal rules and, at the same time, likely to pay close attention to how state actors behave once harm has occurred.<sup>92</sup>

Consider how we react to “hit-and-run” drivers. Our reactions depend on whether the “hit” was intentional, negligent, or simply an accident. But the “problem with ‘hit-and-run’ driving is not just the colliding . . . but [also] the fleeing.”<sup>93</sup> Studies of the processes by which families are notified of harm to their loved ones also lend support to the notion that what happens after harm matters. One study, for example, found that families of homicide victims experienced more distress when the notification process was handled in an unsatisfactory way.<sup>94</sup> And both international and domestic law recognize the importance of what happens after harm in requiring medical assistance to the sick and wounded, as well as respect for dead bodies.<sup>95</sup>

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90. See John M. Darley & Thane S. Pittman, *The Psychology of Compensatory and Retributive Justice*, 7 PERS. & SOC. PSYCH. REV. 324, 324 (2003).

91. Nurit Shnabel & Arie Nadler, *A Needs-Based Model of Reconciliation: Satisfying the Differential Emotional Needs of Victim and Perpetrator as a Key to Promoting Reconciliation*, 94 J. PERSONALITY & SOC. PSYCH. 116, 117 (2008).

92. Tracey L. Meares et al., *Lawful or Fair? How Cops and Laypeople View Good Policing*, 105 J. CRIM. L. & CRIMINOLOGY 297, 304 (2015); see also Joshua M. Bentley, *What Counts as an Apology? Exploring Stakeholder Perceptions in a Hypothetical Organizational Crisis*, MGMT. COMM’N Q. 202, 204 (2017) (noting that operating within the law is “insufficient to establish social legitimacy.”).

93. Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903, 931 (2005); see also John Braithwaite & Declan Roche, *Responsibility and Restorative Justice*, in RESTORATIVE COMMUNITY JUSTICE: REPAIRING HARM AND TRANSFORMING COMMUNITIES 63, 72 (Gordon Bazemore & Mara Schiff eds., 2001) (noting the “intuition that with hit-and-run driving, the running is the greater evil than the hitting”). On reactive fault generally, see Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1195–1201 (1983) and Helmreich, *supra* note 62, at 583–84.

94. Martie P. Thompson, Fran H. Norris & R. Barry Ruback, *Comparative Distress Levels of Inner-City Family Members of Homicide Victims*, 11 J. TRAUMATIC STRESS 223, 233 (1998).

95. See, e.g., David Zucchino, *U.S. Troops Posed with Body Parts of Afghan Bombers*, L.A. TIMES (Apr. 18, 2012, 12:00 AM), <https://www.latimes.com/nation/la-xpm-2012-apr-18-la-na-afghan-photos-20120418-story.html> [<https://perma.cc/ZCS3-HT4Y>]; Matthias Gebauer & Hasnain Kazim, *The Kill Team Images: US Army Apologizes for Horrific Photos from Afghanistan*, SPIEGEL INT’L (Mar. 21, 2011, 6:11 PM), <http://www.spiegel.de/international/world/the-kill-team-images-us-army-apologizes-for-horrific-photos-from-afghanistan-a-752310.html> [<https://perma.cc/EK3G-QAS2>]. In the policing context, consider the failure to provide medical assistance and other disrespect for the bodies of victims. David A. Graham, *‘Insult to Homicide’: Cleveland Sues Tamir Rice’s Family for Ambulance Fees*, ATL. (Feb. 11, 2016), <http://www.theatlantic.com/national/archive/2016/02/cleveland-tamir-rice-bill/462354/> [<https://perma.cc/X3DK-H4VT>]; Julie Bosman & Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES (Aug. 23, 2014), [http://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html?\\_r=0](http://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html?_r=0) [<https://perma.cc/4MTR-YQAV>]; Melissa Macaya, Mike Hayes, Meg Warner, Helen Ragan & Adam Renton, *Former Atlanta Officer Kicked Rayshard Brooks After He Shot Him, DA Says*, CNN (June 17, 2020), [https://www.cnn.com/us/live-news/black-lives-matter-protests-06-17-2020/h\\_46538139c21281a59b1b6ec7](https://www.cnn.com/us/live-news/black-lives-matter-protests-06-17-2020/h_46538139c21281a59b1b6ec7)

The way that a harmdoer treats the harmed person after the injury has occurred can signal respect or disrespect. It can acknowledge the harm, or it can add insult to injury. How people are treated after an injury communicates something fundamental to them about how they are valued by the community and about their status within that community.<sup>96</sup> Offering amends is one way for authorities to communicate respect and reinforce norms. By doing so, authorities may improve the extent to which others see them as legitimate.<sup>97</sup> Authorities that are perceived as legitimate are more likely to garner the support and cooperation of the public for their mission and requirements.<sup>98</sup>

Authority-holders' sense of their own legitimacy<sup>99</sup> and belief that their authority is "justified, ethical and moral"<sup>100</sup> may be influenced in similar ways.<sup>101</sup> This self-legitimacy may also have implications for service members' reactions to amends making. In explaining why militaries should respond appropriately to civilian casualties, one U.S. Colonel noted that "we should hold ourselves to a higher standard because we are professionals, and we can be better than that."<sup>102</sup>

Research focusing on police officers has found that officer self-legitimacy is associated with officer support for cooperation and partnership between the police and the communities they serve,<sup>103</sup> greater restraint in the use of force,<sup>104</sup>

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ec8caf61 [https://perma.cc/2RCT-TZ59]; KIMBERLÉ WILLIAMS CRENSHAW & ANDREA J. RITCHIE., *CTR. INTERSECTIONALITY & SOC. POL'Y STUD.*, SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN 18 (2015).

96. See Tom R. Tyler, *Procedural Strategies for Gaining Deference: Increasing Social Harmony or Creating False Consciousness?*, in *SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS* 69, 80 (John M. Darley et al. eds., 2001).

97. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 119 (1988); Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process*, 29 *PERSONALITY & SOC. PSYCH. BULL.* 747, 749 (2003); Meares et al., *supra* note 92, at 334; Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 *ANN. REV. PSYCH.* 527, 538 (2001); see also Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—And Why It Matters*, 54 *WM. & MARY L. REV.* 1865, 1866 (2013). People are more likely to see an authority as legitimate when that authority's goals are perceived as aligned with those of the community and the authority is believed to have people's best interests at heart. Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 *PSYCH. PUB. POL'Y & L.* 78, 78 (2013).

98. ROBERT W. JACKMAN, *POWER WITHOUT FORCE: THE POLITICAL CAPACITY OF NATION-STATES* 22 (1993) ("[T]o be reasonably effective, institutions must have a moderate aura of legitimacy."); see also Tyler, *supra* note 14, at 379; CRAWFORD, *supra* note 1, at 83 (linking legitimacy to "success in counterinsurgency"). See generally Tom R. Tyler, Phillip Atiba Goff & Robert J. MacCoun, *The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement*, 16 *PSYCH. SCI. PUB. INT.* 75, 75–76 (2015).

99. See Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Procedural Justice*, 102 *J. CRIM. L. & CRIMINOLOGY* 119, 149–54 (2012) (discussing "power-holder legitimacy").

100. Ben Bradford & Paul Quinton, *Self-Legitimacy, Police Culture and Support for Democratic Policing in an English Constabulary*, 54 *BRIT. J. CRIMINOLOGY* 1023, 1026 (2014).

101. See generally Bottoms & Tankebe, *supra* note 99.

102. CRAWFORD, *supra* note 1, at 83 (quoting U.S. Colonel John Nicholson).

103. Scott E. Wolfe & Justin Nix, *The Alleged "Ferguson Effect" and Police Willingness to Engage in Community Partnership*, 40 *L. & HUM. BEHAV.* 1, 4, 7 (2016).

104. Justice Tankebe & Gorazd Meško, *Police Self-Legitimacy, Use of Force, and Pro-organizational Behavior in Slovenia*, in *TRUST AND LEGITIMACY IN CRIMINAL JUSTICE* 261, 271–72 (Gorazd Meško & Justice

support for procedural fairness in policing,<sup>105</sup> and commitment to their organizations.<sup>106</sup> Officers who feel self-legitimate tend to support a more democratic approach to policing—which includes “respecting the rights of others; using force proportionately; being open, honest, and accountable with the public; providing options for community participation; and working with the neighborhood to solve problems and reduce conflict.”<sup>107</sup> A similar positive relationship may exist between feelings of self-legitimacy and support for making amends for lawful civilian casualties.

### C. Image Repair

Service members’ reactions to amends for lawful civilian casualties may also be influenced by the way they perceive the potential for amends making to affect their public moral image. Moral image is central to identity.<sup>108</sup> When moral image is threatened—for example, when we have acted in a way that has caused harm—there is often a felt need to attempt to restore or improve our moral image.<sup>109</sup> One mechanism by which people attempt to improve their moral image is by making amends in some way.<sup>110</sup> And indeed, acts of apology can serve to alter others’ views of a harmdoer’s moral character and to repair trust.<sup>111</sup>

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Tankebe eds. 2015); Bradford & Quinton, *supra* note 100, at 1023; *see also* Phillip Atiba Goff, Liana Maris Epstein, Avital Mentovich & Kavita S. Reddy, *Illegitimacy is Dangerous: How Authorities Experience and React to Illegitimacy*, 4 PSYCH. 340, 343 (2013) (finding that officers who feel illegitimate experience more anxiety and fear); Rick Trinkner, Tom R. Tyler & Phillip Atiba Goff, *Justice from Within: The Relations Between a Procedurally Just Organizational Climate and Police Organizational Efficiency, Endorsement of Democratic Policing, and Officer Well-Being*, 22 PSYCH., PUB. POL’Y & L. 158, 160 (2016) (“When officers are confident in their authority, they feel that they are supposed to be in a position of authority and that the power they wield is normatively justified. As a result, when confronted with conflict, they are more likely to rely on their authority as officers of the law to diffuse tension. However, if officers’ feel their authority is undermined, they may be quicker to resort to coercion and force in order to maintain control over a situation. Thus, self-legitimized officers are in a better position to resolve conflict in safer and less stressful ways.”).

105. Bradford & Quinton, *supra* note 100, at 1032.

106. JUSTICE TANKEBE, RIGHTFUL AUTHORITY: EXPLORING THE STRUCTURE OF POLICE SELF-LEGITIMACY 3–5 (2010); Tankebe & Meško, *supra* note 104, at 275; *see also* Scott E. Wolfe & Justin Nix, *Does Self-Legitimacy Protect Against Supervisor Procedural Injustice?*, 44 CRIM. JUST. & BEHAV. 717, 726 (2017).

107. Trinkner et al., *supra* note 104, at 160.

108. *See* Nina Strohminger & Shaun Nichols, *The Essential Moral Self*, 131 COGNITION 159, 168 (2013); *see also* Karl Aquino & Americus Reed II, *The Self-Importance of Moral Identity*, 83 J. PERSONALITY & SOC. PSYCH. 1423, 1436 (2002).

109. Shnabel & Nadler, *supra* note 91, at 17.

110. Zaiser & Giner-Sorolla, *supra* note 34, at 590. On image and trust repair, *see generally* WILLIAM L. BENOIT, ACCOUNTS, EXCUSES AND APOLOGIES: IMAGE REPAIR THEORY AND RESEARCH (2d ed. 2014); KEITH MICHAEL HEARIT, CRISIS MANAGEMENT BY APOLOGY: CORPORATE RESPONSE TO ALLEGATIONS OF WRONGDOING 41 (2006); W. Timothy Coombs, *Protecting Organization Reputations During a Crisis: The Development and Application of Situational Crisis Communication Theory*, 10 CORP. REPUTATION REV. 163, 165 (2007); Nicole Gillespie & Graham Dietz, *Trust Repair After an Organization-Level Failure*, 34 ACAD. MGMT. REV. 127, 140 (2009).

111. *See, e.g.*, James R. Davis & Gregg J. Gold, *An Examination of Emotional Empathy, Attributions of Stability, and the Link Between Perceived Remorse and Forgiveness*, 50 PERSONALITY & INDIVIDUAL DIFFERENCES 392, 39–95 (2011); Arie Nadler & Ido Liviatan, *Intergroup Reconciliation: Effects of Adversary’s Expressions of Empathy, Responsibility, and Recipients’ Trust*, 32 PERSONALITY & SOC. PSYCH. BULL. 459, 460 (2006); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV.

Harmdoers' expectations about the effects of amends, however, are complex. Harmdoers can be motivated to make amends by a desire to improve their moral image, signaling that they do respect the violated norms or indicating personal growth. But they may also be concerned that apologizing, by connecting them to harmful behavior, will threaten their moral image.<sup>112</sup> These dueling motives are complicated by the fact that harmdoers may underestimate the potential positive effects of apologizing and overestimate the aversiveness of apologizing.<sup>113</sup>

Those who do believe that a conciliatory response will improve their group's moral image are more likely to be satisfied with that response.<sup>114</sup> Harmdoers also tend to be more willing to reconcile with those they have harmed when they believe that their public moral image is improved by the response.<sup>115</sup> Accordingly, we expect that service members who believe that the official response to the incident will improve public image will be more satisfied with that response.

#### D. *Obligation Shifting*

The restoration of the harmdoer that can result from offering amends can also result in a shifting of the burden to the victim of harm. Research suggests that those who offer amends may believe that their offering requires the victim(s) to accept their offer of amends, appreciate the effort they have made, offer forgiveness in return, and desist from making claims for repair.<sup>116</sup> Indeed, an apology "script" prescribes that an apology is to be followed by an acceptance of that apology and forgiveness of the offender.<sup>117</sup> In this way, amends could be interpreted by those offering them as communicating: "[W]e have done our part, and now it is your turn to forgive us."<sup>118</sup>

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460, 478 (2003); Jennifer K. Robbenolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333, 354–55 (2006).

112. See Karina Schumann, *The Psychology of Offering an Apology: Understanding the Barriers to Apologizing and How to Overcome Them*, 27 CURRENT DIRECTIONS PSYCH. SCI. 74, 75–76 (2018).

113. Leunissen et al., *supra* note 32, at 322.

114. Zaiser & Giner-Sorolla, *supra* note 34, at 5–6.

115. Shnabel & Nadler, *supra* note 91, 116–20. Similarly, harmdoers whose self-image or integrity is affirmed tend to offer better apologies. Karina Schumann, *An Affirmed Self and a Better Apology: The Effect of Self-Affirmation on Transgressors' Responses to Victims*, 54 J. EXPERIMENTAL SOC. PSYCH. 89, 91 (2014).

116. Zaiser & Giner-Sorolla, *supra* note 34, at 6. For a comedic example, see The Daily Show, *A Piece of the Reparations Pie*, YOUTUBE (Mar. 22, 2019), <https://www.youtube.com/watch?v=2a9rGhTtwAI> [<https://perma.cc/4Y5Y-ZAP5>].

117. See Mark Bennett & Christopher Dewberry, "I've Said I'm Sorry, Haven't I?" *A Study of the Identity Implications and Constraints that Apologies Create for Their Recipients*, 13 CURRENT PSYCH. 10, 10–12 (1994); Mandeep K. Dhami, *Effects of a Victim's Response to an Offender's Apology: When the Victim Becomes the Bad Guy*, 46 EUR. J. SOC. PSYCH. 110, 110 (2016); Dena M. Gromet & Tyler G. Okimoto, *Back into the Fold: The Influence of Offender Amends and Victim Forgiveness on Peer Reintegration*, 24 BUS. ETHICS Q. 411, 411 (2014); Jane L. Risen & Thomas Gilovich, *Target and Observer Differences in the Acceptance of Questionable Apologies*, 92 J. PERSONALITY & SOC. PSYCH. 418, 418 (2007).

118. Zaiser & Giner-Sorolla, *supra* note 34, at 6.

This inclination to engage in “obligation shifting” has been shown to increase satisfaction with conciliatory statements.<sup>119</sup> If responsibility shifts to the victim group, the conciliatory statement “settles” things between the groups and members of the offending group can now move on.<sup>120</sup> At the same time, however, obligation shifting decreases support for reparations.<sup>121</sup> To the extent that the matter is settled, any further obligation now rests on the shoulders of the victims and further repair from the offender group is not needed.<sup>122</sup>

#### IV. SERVICE MEMBERS & AMENDS

Here we explore service members’ reactions to official responses to lawful civilian harm and their expressed preferences for aspects of amends making following lawful harm.

##### A. *Method*

###### 1. *Respondents*

Our participants were 450 military service members who had served on active duty any time since the year 2000 and were recruited through Qualtrics Panels. As described in Table 1, participants came from all branches of the military; some were on active duty, others were retired or in the reserves; over half had deployed to a war zone during their service; and over one-third were wounded or injured during their military service.<sup>123</sup>

###### 2. *Design, Procedures, and Measures*

Respondents answered questions about their general support or opposition to aspects of amends making, their views about the morality and inevitability of civilian casualties, and their feelings of self-legitimacy.<sup>124</sup> Those respondents who had deployed to a combat zone completed the Moral Injury Questionnaire—Military Version, which assessed how frequently they experienced each of nineteen potentially morally injurious events.<sup>125</sup>

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119. *Id.* at 2, 6.

120. *Id.* at 6.

121. *Id.* at 32.

122. *Id.* at 7.

123. *See infra* Table 1. Demographics were largely uncorrelated with the study variables of interest. *See* Statistical Appendix—Demographics. Therefore, only exceptions are noted in the findings below; more information is provided in the statistical appendix.

124. A link for an optional virtual chat with a trained professional at the 24/7 National Veteran’s Crisis Line (a service for veterans implemented by professionals trained to address and confront situations of imminent threat) was provided to participants at the bottom of each page of the survey. At the end of the survey, each participant received a list of resources that contained military specific services and centers.

125. Joseph M. Currier, Jason M. Holland, Kent Drescher & David Foy, *Initial Psychometric Evaluation of the Moral Injury Questionnaire—Military Version*, 22 *CLINICAL PSYCH. & PSYCHOTHERAPY* 54, 54 (2015); *see also* Joseph M. Currier, Jason M. Holland & Jesse Malott, *Moral Injury, Meaning Making, and Mental Health in Returning Veterans*, 71 *J. CLINICAL PSYCH.* 229, 230 (2015).

Service members were also asked to read a scenario describing an incident in which a lawful military operation resulted in a civilian casualty. Participants were asked to imagine that they were part of the operation that was designed to clear and hold a strategically important building in a densely populated urban area in an ongoing armed conflict setting. The operation kills a civilian grandfather.<sup>126</sup>

TABLE 1: CHARACTERISTICS OF RESPONDENTS

Characteristic	%
Service Status	
Active Duty	53.8%
Reserves	4.2%
National Guard	6.5%
Retired/Veteran	35.4%
Have Deployed to Combat Zone	58.0%
Wounded or Injured <sup>127</sup>	36.4%
Branch of Military <sup>128</sup>	
Army	51.3%
Air Force	18.7%
Navy	17.6%
Marines	11.8%
Other (Coast Guard, Merchant Marine, Commissioned Corps)	5.1%

126. See the Appendix for full text of scenarios. We asked a member of the military to review and comment on our scenario and the questionnaire to ensure that it was realistic and that the questions that we asked would make sense to service members.

127. *Number of Disabled U.S. Veterans Rising*, CBS NEWS (May 11, 2008, 3:53 PM) <https://www.cbsnews.com/news/number-of-disabled-us-veterans-rising/> [<https://perma.cc/TPX2-3TAF>]. Surveys also report higher rates. See *War and Sacrifice in the Post-9/11 Era*, PEW RSCH. CTR. (Oct. 5, 2011), <https://www.pewsocial-trends.org/2011/10/05/war-and-sacrifice-in-the-post-911-era/> [<https://perma.cc/GZ7E-QR XR>] (finding that “one-in-six post-9/11 veterans (16%) report they were seriously injured while serving in the military”). We do not know whether respondents included mental injury in their reports. In the Pew survey, 37% of post-9/11 veterans reported that “whether or not they were formally diagnosed, they believe they have suffered from post-traumatic stress (PTS).” *Id.*

128. Members of the Army are overrepresented in this sample. In 2016, the breakdown was: Army = 36.6%; Air Force = 24.3%; Navy = 24.8%; Marines = 14.2%. DEP’T DEFENSE, 2016 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY iii-v (2016) (active duty service members only).

Education <sup>129</sup>	
Less than high school	< 1%
High school graduate/GED	19.8%
Some college	41.3%
Associate's degree	14.7%
Bachelor's degree	17.1%
Graduate or professional degree	6.0%
Female <sup>130</sup>	40.0%
Race/Ethnicity <sup>131</sup>	
White	66.4%
Black/African-American	13.6%
Hispanic/Latino(a)	7.1%
Asian-American	2.0%
Native Hawaiian or Pacific Islander	1.3%
American Indian or Alaska Native	0.9%
Multi-racial	6.2%
Some other race	2.0%
Age	17 to 77; mean = 31; median = 30

We manipulated two variables. First, we varied the way in which the government responded to the grandfather's death. In each version of the scenario, the government concluded that the operation was lawful, but in one version the government took no further action (No Response), in a second version a \$1,500 solatia payment was made to the family (Solatia),<sup>132</sup> and in a third version the government offered amends by acknowledging its role in the death, describing the steps that it had taken to minimize further civilian casualties, offering condolences, participating in efforts to study how to best reduce civilian casualties, and making a \$1,500 monetary payment to the family (Amends).

Second, to begin to explore the generalizability of any findings across legal justifications, we varied the circumstances surrounding the death of the grandfather to mirror three different situations in which the death could be considered

129. DOD breaks this down differently. In 2016, DOD reported: no high school = 0.2%; high school graduate/GED/some college = 91.2%; bachelor's degree = 6.9%; advanced degree = 1.1%. *Id.* at 41.

130. Women are overrepresented in our sample. In 2016, the military was 17% female (16% of active duty forces). *Id.* at 6 (not including the Coast Guard).

131. This distribution maps pretty well onto the demographics of the military overall: White = 70.6%; Black/African American = 17.1%; Asian-American = 4.2%; Native Hawaiian or Pacific Islander = 0.9%; American Indian or Alaska Native = 1.1%; Multi-racial = 2.5%; Hispanic/Latino(a) = 13.5%. *Id.* at 7–8 (does not include Coast Guard).

132. This payment was designed to be in the range of a typical symbolic solatia or condolence payment.

lawful. In one version, the potential risk to civilians was determined to satisfy proportionality analysis. In a second version, the civilian looked similar to a legitimate target and was targeted by mistake. In a third version, the civilian was killed despite reasonable precautions to avoid harm to civilians.<sup>133</sup>

Each service member was asked to respond to one of the resulting nine versions of the scenario, with the scenarios randomly assigned to participants. To gauge respondents' agreement with the premises of the scenario, we asked them to indicate the degree to which they agreed that the operation was lawful and that the grandfather was a civilian (and therefore not a legitimate target). Respondents seemed to agree with both premises. Specifically, they tended to agree that the operation was lawful ( $M = 3.79$ ,  $SD = 1.19$ ) and their level of agreement did not vary across the different versions of the scenario.<sup>134</sup> Similarly, respondents tended to agree that the grandfather was not a legitimate target, *i.e.*, that he was a civilian ( $M = 3.71$ ,  $SD = 1.22$ ). This judgment, however, varied somewhat by scenario. In all versions of the scenario, respondents tended to agree that the grandfather was a civilian, but this agreement was somewhat less clear when there was no response from the U.S. ( $M = 3.45$ ,  $SD = 1.18$ ) than when the U.S. offered a solatia payment ( $M = 3.85$ ,  $SD = 1.16$ ) or a more complete amends response ( $M = 3.83$ ,  $SD = 1.28$ ).<sup>135</sup>

Service members reported the guilt they would feel about the operation and how much they agreed that "Because the operation was lawful, the U.S. did not need to respond." They reported their emotional response to, their satisfaction

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133. The harm to the grandfather was not perceived as particularly intentional in any of the conditions ( $M = 2.05$ ,  $SD = 1.37$ ). This is consistent with the nature of the scenarios, which were structured such that harm to civilians was not the goal of the operation. Even so, there were differences in the degree to which the harm was perceived to be intentional across the different operations,  $F(2, 429) = 5.13$ ,  $p = .006$ . In particular, the harm was perceived to be less intentional where reasonable precautions were taken to prevent harm to civilians ( $M = 1.78$ ,  $SD = 1.21$ ) than where the harm was determined to be justified ( $M = 2.10$ ,  $SD = 1.35$ ) or there was a mistake of status ( $M = 2.29$ ,  $SD = 1.49$ ). This seems consistent with the fact that the operational planners described in the scenario were aware of the presence of the civilian in the justification scenario and that the individual harmed was targeted (though mistakenly) in the status scenario. In contrast, the reasonable precautions scenario described efforts made to avoid harming civilians. One reason that these sorts of calculated or justified risks may be perceived differently is that people are more likely to attribute intent to actors who cause foreseeable "side effects" when those effects are undesirable than when such effects are positive. Joshua Knobe, *Intentional Action and Side Effects in Ordinary Language*, 63 *ANALYSIS* 190, 190 (2003); *see also* Dean Pettit & Joshua Knobe, *The Pervasive Impact of Moral Judgment*, 24 *MIND & LANGUAGE* 586, 587 (2009).

134.  $F(2, 439) = 1.29$ ,  $p = .28$  (operation);  $F(2, 439) = 1.86$ ,  $p = .27$  (response). All analyses conducted to explore differences among more than two groups used the Tukey test. *See* GEOFFREY KEPPEL & SHELDON ZEDECK, *DATA ANALYSIS FOR RESEARCH DESIGNS* 174–76 (1989).

135.  $F(2, 439) = 5.00$ ,  $p = .007$ . In other words, when there was no response from the U.S. to the killing beyond a finding of lawfulness, respondents were more skeptical that the grandfather was really a civilian. Similarly, agreement that the grandfather was not a legitimate target was somewhat less clear when there was a mistake as to the grandfather's status ( $M = 3.47$ ,  $SD = 1.29$ ) as compared to when the operation was justified ( $M = 3.87$ ,  $SD = 1.12$ ) or reasonable precautions were taken ( $M = 3.79$ ,  $SD = 1.21$ ),  $F(2, 439) = 5.14$ ,  $p = .006$ . Open-ended comments that questioned the grandfather's civilian status came from those in the "status" or "no-response" conditions: "It's still unknown if the grandfather was a part of the attack" ("status"/"no response"); "it is harder to distinguish between a civilian and the enemy" ("status"); "if a 'civilian' family was living in a building with insurgents, they 100% supported the insurgents" ("no response"); "if the 'grandfather' was in a house where we were suppose [sic] to hit because he was 'house sitting' then obviously he has ties to the terrorist we are suppose [sic] to take down" ("status").



with, and the motives they perceived to underlie the official response. They answered questions about the effects they expected the response to have on the public moral image of the U.S. Respondents who were in conditions in which the official response included a monetary payment to the victim's family (either the solatia or amends condition;  $N = 298$ ) were asked to evaluate that payment.<sup>136</sup>

Service members indicated the degree to which they would want particular amends making opportunities, their perceptions of the degree to which the victim's family would desire or deserve aspects of amends (apology, explanation, compensation), and the degree to which they shifted obligation to the civilian victim's family and community.

Additional details about the questionnaire can be found in the Appendix.

## B. Findings

### 1. Is Lawfulness Seen as a Barrier to a Response?

As a threshold matter, most service members did not see the lawfulness of the harmdoing as a barrier to offering a response. Most service members (55%) disagreed with the notion that because harm is lawful, the U.S. does not need to respond, and an additional one in five neither agreed nor disagreed (20.5%).<sup>137</sup> In contrast, fewer than one in four (24.5%) thought that the lawfulness of the harm meant that there was no need to respond.<sup>138</sup>

Those service members who reported being deployed to a combat zone<sup>139</sup> and who were exposed to innocent deaths<sup>140</sup> showed very similar patterns. Among deployed service members, moreover, a statistically significant trend indicated increasing disagreement with the notion that lawfulness would preclude a response as exposure to innocent deaths increased.<sup>141</sup>

These views about the appropriateness of responding to lawful harm were related to service members' overall support for amends making for lawful civilian casualties: the more that service members believed that an official response was not precluded by the lawfulness of an operation, the more support they reported for amends making for lawful harm ( $r = -.39, p < .001$ ).

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136. Response options were "I do not support this type of payment;" "A payment is appropriate, but I believe the amount given is too large;" "This payment seems about right;" "I believe that a bigger payment should have been given;" and "Other (please describe)." See *infra* Section III.B.

137. 24.7% strongly disagreed; 30.3% disagreed somewhat.

138. 15.6% somewhat agreed; 8.9% strongly agreed.

139. Of those service members who had deployed to a combat zone, 55.8% disagreed with the notion that the lawfulness of the harm meant that there was no need to respond and 18.1% neither agreed nor disagreed; 26.1% agreed. Deployment status was not associated with assessments of the need to respond to lawful harm,  $t(447) = -.11, p = .91$ .

140. Of those service members who had seen or been involved in the death of one or more innocent persons during their deployment ( $N = 100$ ), 61% disagreed (33% strongly) with the notion that the lawfulness of the harm meant that there was no need to respond and 17% neither agreed nor disagreed; 22% agreed (only 5% strongly).

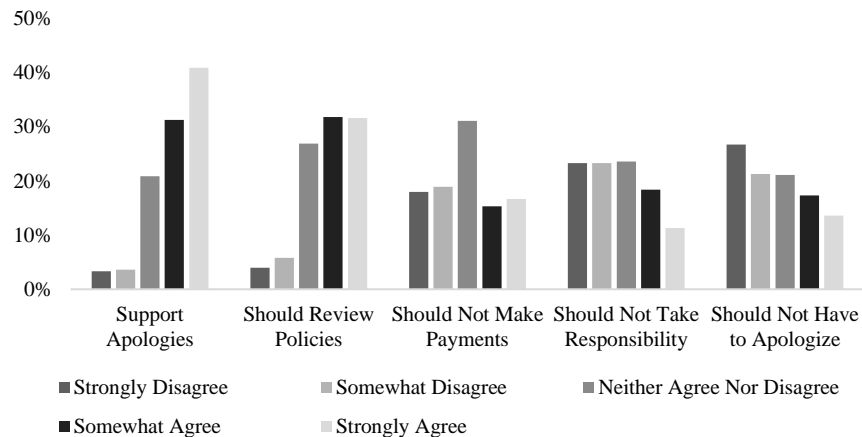
141.  $F(1,255) = 4.18, p = .042$ .

## 2. Service Member Support for Amends

More specifically, service members tended to show moderate levels of overall support for amends for lawful harm ( $M = 3.50$ ,  $SD = .87$ ). Greater consensus, however, emerged for some aspects of amends making than for others (see Figure 1). Service members most strongly supported offering apologies, with almost three-quarters of service members (72.2%) supporting apologies, and very few (6.9%) expressing a lack of support for apologies. While most supported apologies generally, there were more mixed views about whether the U.S. should have to apologize for lawful harm. While nearly half (48%) of our participants were not opposed to requisite apologies, nearly one-third (30.9%) believed that the U.S. should not have to apologize.

Service members expressed significant support for reviewing policies in the aftermath of lawful harm to civilians—with almost two-thirds of service members (63.4%) agreeing that such review should occur, and very few (9.8%) expressing a lack of support. Nearly half of service members (46.7%) disagreed with the notion that the U.S. should *not* take responsibility for lawful harm, but a substantial minority (29.7%) believed that not taking responsibility for lawful harm was appropriate. Finally, views of solatia payments generally were mixed, with service members almost evenly divided between those who supported payments (31.9%), opposed payments (36.9%), or neither agreed nor disagreed (31.1%).

FIGURE 1: SERVICE MEMBERS' SUPPORT FOR AMENDS



NOTE: Figure shows the percentage of all service members who agreed or disagreed with each aspect of amends making.

Service members' support for amends was strongly associated with their emotions and values (Table 2, Column A). The more remorse service members predicted they would feel following an operation like the one in our scenario, the more they supported amends ( $r = .39$ ,  $p < .001$ ). The more they believed that it

is wrong to kill civilians and the less they saw civilian casualties as inevitable and necessary, the more they supported amends ( $r = .36, p < .001$ ;  $r = -.22, < .001$ , respectively). In addition, the more service members' saw the victim's family in our example scenario as deserving of amends, the more they supported amends making generally ( $r = .56, p < .001$ ). Self-legitimacy was positively associated with support for amends making as well ( $r = .12, p = .013$ ), though this relationship was notably smaller.<sup>142</sup>

While service members who served in combat zones and those who did not were both generally supportive of amends, those who had deployed to a combat zone ( $M = 3.41, SD = .91$ ) were slightly less supportive of amends than those who had not ( $M = 3.62, SD = .81$ ).<sup>143</sup> For those service members deployed to combat zones, the more morally injurious experiences that they had while there, the less they supported amends for lawful harm ( $r = -.17, p = .006$ ). Service members who were wounded during their service also indicated less support for amends ( $M = 3.38, SD = .92$ ) than did service members who were not wounded ( $M = 3.58, SD = .84$ ).<sup>144</sup>

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142. This result was primarily driven by support for apologies ( $r = .19$ ).

143.  $t(448) = 2.48, p = .014$ .

144.  $t(445) = 2.39, p = .017$ .

TABLE 2: CORRELATIONS WITH SUPPORT AND DESIRE FOR AMENDS AND SATISFACTION WITH RESPONSE

	(A)	(B)	(C)
	Support for Amends	Desire for Amends	Satisfaction with Response
No Need to Respond if Lawful	<b>-.35</b>	<b>-.20</b>	<b>.21</b>
Remorse – Guilt Over Operation	<b>.39</b>	<b>.42</b>	<b>-.30</b>
Wrong to Kill Civilians	<b>.36</b>	<b>.26</b>	<b>-.17</b>
Civilian Casualties Inevitable	<b>-.22</b>	-.11	<b>.18</b>
Victim’s Family Deserves Amends	<b>.56</b>	<b>.66</b>	<b>-.25</b>
Victim’s Family Wants Amends	<b>.26</b>	<b>.34</b>	-.03
Victim’s Family Satisfied with Response	<b>-.33</b>	-.05	<b>.33</b>
Negative Feelings About Response	.04	<b>.32</b>	<b>-.31</b>
Positive Feelings About Response	<b>-.32</b>	-.02	<b>.54</b>
Obligation Shifting	<b>-.35</b>	<b>-.25</b>	<b>.38</b>
Response Improves Public Image	<b>-.11</b>	-.08	<b>.44</b>
Self-Legitimacy	<b>.12</b>	.09	<b>.13</b>
Morally Injurious Experiences (N = 261)	<b>-.17</b>	-.02	-.03

NOTE: Correlations that are statistically significant at  $p < .05$  are bolded. A more extensive correlation matrix can be found in the Appendix.

### 3. *Service Member Desire for Amends*

Service members indicated the extent to which they would desire different aspects of amends in response to a hypothetical instance of lawful harmdoing. Overall, service members expressed some desire for each aspect of amends (see Table 3). They expressed the greatest desire for the victim’s family to understand the reasons for the action they took, followed by a desire to apologize. Service members were least inclined to want to interact directly with the victim’s family, although there was still a moderate desire for this aspect of amends as well. Very few service members (5.3%) expressed absolutely no desire for any aspect of amends.

For each aspect of amends there were service members who expressed that they “very much” desired it. Approximately one-third of respondents very much wanted the family to understand their reasons (33.9%) or to apologize to the family (34.5%). More than a quarter very much wanted forgiveness from the family (29.0%) or a chance to explain (28.1%). And nearly a quarter (22.5%) very much wanted interaction with the victim’s family. At the same time, there were service members who expressed no desire for each of these same components. Nearly one quarter (24.1%) had no desire to interact with the family. One in five had no desire for the family’s forgiveness (19.8%) or a chance to explain (19.6%); 15.8% expressed no desire to apologize. And 9.4% expressed no desire for the victim’s family to understand the reasons for their actions.<sup>145</sup>

TABLE 3. SERVICE MEMBER DESIRE FOR AMENDS COMPONENTS

Amends Component	Extent Desired	Very Much	Not At All
Victim’s Family to Understand Reasons for the Action	3.60	33.9%	9.4%
Chance to Apologize	3.47	34.5%	15.8%
Chance to Explain the Circumstances	3.25	28.1%	19.6%
Forgiveness from the Victim’s Family	3.20	29.0%	19.8%
Chance to Interact with Victim’s Family	2.98	22.5%	24.1%

NOTE: Each amends component was assessed on a 5-point scale from “Not at All” to “Very Much.” Responses were coded so that higher numbers indicate more desire for that aspect of amends.

Service members’ desire for amends was associated with their individual perceptions of and reactions to the scenario (Table 2, Column B). Again, emotions and values played a prominent role. Remorse about the operation ( $r = .42$ ,  $p < .001$ ), believing that it is wrong to kill civilians ( $r = .26$ ,  $p < .001$ ), and believing that the family deserved amends ( $r = .66$ ,  $p < .001$ ) were strongly associated with a desire for amends. The more negative feelings the official response evoked for them ( $r = .32$ ,  $p < .001$ ), the more the service member desired amends.

The more service members supported amends making for lawful harm more generally, the more they desired amends in the instant case ( $r = .46$ ,  $p < .001$ ). Similarly, the less that service members believed that no official response was necessary given the lawfulness of the operation, the more they desired amends ( $r = -.20$ ,  $p < .001$ ).

145. Service members reported similar levels of desire for amends irrespective of which official response to the hypothetical incident they read. In other words, there was no evidence that the different response conditions—no response, solatia, or amends—influenced participants’ own desire for these aspects of amends,  $F(2, 439) = 1.39$ ,  $p = .250$ . Nor did the type of operation,  $F(2, 439) = .15$ ,  $p = .86$ . Similarly, service members’ desire for amends did not turn on their judgments of the lawfulness of the specific operation,  $r = -.04$ ,  $p = .42$ .

#### 4. *Service Member Assessments of Family's Desire for and Deservingness of Amends*

In addition to their own desire for amends, service members rated the extent to which they thought that the victim's family would desire and deserved an explanation about what happened, an apology, and monetary compensation (Table 4). The family was thought to desire each of these components of amends more than each was deserved. Although the family was thought to both desire and deserve all three of these components, they were expected to want or deserve an explanation and an apology more than they were expected to want and to deserve compensation.<sup>146</sup>

TABLE 4. ASSESSMENTS OF FAMILY'S DESIRE FOR AND DESERVINGNESS OF AMENDS COMPONENTS

Amends Component	Desires	Deserves	t
Explanation	4.20 (1.12)	3.87 (1.22)	5.54*
Apology	4.14 (1.18)	3.81 (1.30)	5.19*
Compensation	3.76 (1.30)	3.55 (1.34)	2.54*

NOTE: Each amends component was assessed on a 5-point scale from "Not at All" to "Very Much." Responses were coded so that higher numbers indicate more desire for or deservingness of the component. Standard deviations are in parentheses. Comparisons between assessments of the family's desire for and deservingness of each amends component were analyzed using paired-sample t-tests. \* =  $p < .05$ .

The nature of the official response influenced these judgments. When the official response consisted of a solatia payment or amends, the family was perceived to want amends more<sup>147</sup> and also to deserve amends more<sup>148</sup> than when there was no official response to the incident. This could be because service members assumed that if such a response was given, it must be because the family requested it,<sup>149</sup> the military determined that it was deserved, or both.<sup>150</sup>

#### 5. *Satisfaction with Official Responses*

Service members saw the different official responses as driven by different motivations.<sup>151</sup> In particular, a desire to project strength was seen as a stronger motivator of providing no response ( $M = 3.14$ ,  $SD = 1.21$ ) than it was of the amends response ( $M = 2.69$ ,  $SD = 1.35$ ).<sup>152</sup> In contrast, the more robust amends response was seen as more motivated by the desire to win hearts and minds

146.  $ps < .05$ . Explanation and apology did not differ from each other.

147.  $F(2, 440) = 5.36$ ,  $p = .003$ . No difference between solatia and amends.

148.  $F(2, 439) = 6.57$ ,  $p = .002$ . No difference between solatia and amends.

149. Our scenarios indicated that the "family filed the necessary paperwork" to obtain the solatia payment.

150. See *infra* Appendix – Survey Questions

151. A MANOVA on all nine possible motives revealed a multivariate effect of response, no effect of operation, and no interaction. For possible motives other than the three reported here, there was no effect of response.

152.  $F(2,438) = 4.40$ ,  $p = .013$ . Solatia fell in between.

( $M = 3.31, SD = 1.35$ )<sup>153</sup> and concern for public image ( $M = 3.69, SD = 1.29$ )<sup>154</sup> than was no response (hearts and minds:  $M = 2.79, SD = 1.26$ ; public image:  $M = 3.24, SD = 1.27$ ).

Overall, service members were somewhat satisfied ( $M = 3.60, SD = 1.19$ ) with the official responses to the incident.<sup>155</sup> At the same time, however, they expressed an overall tendency to think that more needed to be done to repair the relationship with the victim's family ( $M = 3.68, SD = 1.08$ )<sup>156</sup> and expected that the family would be somewhat dissatisfied with the official response ( $M = 2.18, SD = 1.27$ ).<sup>157</sup> Not surprisingly, the less guilt service members anticipated ( $r = -.30, p < .001$ ), and the more positive ( $r = .54, p < .001$ ) and less negative feelings ( $r = -.31, p < .001$ ) the response engendered, the more satisfied they were with that response (Table 2, Column C).

More specifically, however, service members were more satisfied with the official response to the incident when there was no response beyond a finding of lawfulness ( $M = 3.80, SD = 1.03$ ) as compared to a response involving a solatia payment ( $M = 3.48, SD = 1.20$ ) or more robust amends ( $M = 3.51, SD = 1.31$ ).<sup>158</sup>

Perhaps not surprisingly, the reasons for this lower level of satisfaction with solatia and amends appear to be multifaceted and complex. First, as compared to the condition in which there was no official response to the incident, respondents expected to experience more guilt about the harm when a solatia payment was offered.<sup>159</sup> Interestingly, this might be partially explained by the fact that the nature of the official response influenced respondents' inferences about whether

153.  $F(2,438) = 5.61, p = .004$ . Solatia fell in between.

154.  $F(2,438) = 4.37, p = .013$ . Solatia fell in between.

155. Over half (58.24%) of respondents were somewhat or extremely satisfied with the response. Male respondents ( $M = 3.69, SD = 1.14$ ) were slightly more likely to be satisfied with the response than female respondents ( $M = 3.44, SD = 1.25$ ),  $F(1, 444) = 4.89, p = .028$ .

156. More than half of the respondents (59.2%) agreed or strongly agreed that more needed to be done. The nature of the official response did not significantly influence the degree to which respondents thought more needed to be done.  $F(2, 440) = 2.27, p = .10$ . Nor did the nature of the operation.  $F(2, 440) = 1.85, p = .16$ .

157. Male service members tended to believe that the family would be more satisfied with the response ( $M = 2.29, SD = 1.29$ ) than did female service members ( $M = 2.03, SD = 1.24$ ).  $F(4,443) = 4.58, p = .033$ .

158.  $F(2, 440) = 3.25, p = .040$ . Tukey follow-ups marginally significant for each.

159.  $F(2, 439) = 4.54, p = .011$ . Amends response did not differ significantly from either. The nature of the response also influenced the extent to which negative feelings were engendered by the response. Specifically, a solatia payment in response to the harm generated more negative feelings ( $M = 2.23, SD = 1.10$ ) than did a most robust amends response ( $M = 1.88, SD = .96$ ).  $F(2,438) = 4.25, p = .015$ . No response ( $M = 2.02, SD = 1.03$ ) was in between and not significantly different from either. Note that levels of reported negative emotion were not particularly high in any of the conditions (2 = slightly describes my feelings). When the operation involved a mistake of status the official response generated more negative feelings than it did in the condition in which reasonable precautions were taken.  $F(2,438) = 3.30, p = .038$ . The operation in which the strike was justified was in between and not significantly different from either. This effect may be explained by differences in the degree to which the harm was perceived to be intentional across the different operations.  $F(2, 429) = 5.13, p = .006$ . Recall that the operation involving a mistake of status involved the intentional targeting of an individual. See *supra* note 133 and accompanying text. When assessments of intent were controlled, the effect of the nature of the operation on negative feelings became non-significant.  $F(2, 436) = 1.67, p = .19$ . There was no effect of condition on *positive* feelings about the response.

the victim was really a civilian.<sup>160</sup> Indeed, there was a significant correlation between a belief that the victim was a civilian and reported remorse ( $r = .25$ ,  $p < .001$ ). Moreover, when assessments of the victim's status as a civilian are controlled, the influence of the nature of the official response on remorse becomes only marginally significant.<sup>161</sup>

In addition, service members appeared to be dissatisfied with the token amount (\$1,500) of the payment offered in the solatia and amends conditions. While a few service members were opposed to solatia or condolence payments in general (16.5%) or thought that the payment was too large (6.1%),<sup>162</sup> the largest group of respondents (46.8%) in these conditions believed that the payment should have been *larger*. Only one in five (20.5%) believed that the payment was "about right."<sup>163</sup> Approximately 10% of respondents marked "other." Of these, a few indicated in their answer a call for a larger payment; some indicated that their assessment of the payment would depend on factors such as the specific country, its GDP, and the exchange rate; some expressed mixed feelings about monetary payments; and others expressed a desire for other sorts of reparation (such as providing a job, safe passage out of the country, an apology, a letter expressing remorse, participation in a funeral, or making sure that the family has a safe place to live). Service members who were more supportive of amends making more generally tended to be even more critical of the monetary payments described in the scenario.<sup>164</sup>

Notably, respondents who believed that the payment was too small predicted that they would experience more guilt than those who thought that the payment was about right or did not support monetary payments, and more guilt than those who viewed the scenario in which there was no response (and no payment) at all.<sup>165</sup> Respondents who believed that the payment was too small were also less satisfied with the response than those who thought that the size of the payment was appropriate, and less satisfied with the response than those who viewed the scenario in which there was no response (and no payment) at all.<sup>166</sup> Importantly, those who felt that the size of the payment was appropriate were

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160. *See id.* Recall that respondents largely agreed with the assertion that the victim was a civilian in all three conditions. The official decision not to respond, however, slightly reduced this agreement.

161.  $F(2,444) = 2.50$ ,  $p = .08$ .

162. Given the small numbers of respondents who either did not support solatia payments generally or thought that even this modest solatia payment was too big, we combined these two groups into a single group for subsequent analyses.

163. Of those asked and who chose something other than "other"—18.4% did not support giving payments, 6.7% believed that the payment was too large; 22.8% thought the payment was about right; and 52.1% thought that a larger payment should have been given.

164.  $\chi^2(2) = 37.96$ ,  $p < .001$  (median split on support for amends). Most of those above the median in support for amends thought that the payment was too small (66.7%), with fewer finding the payment appropriate (17.6%) or not supporting such payments or thinking that the payment was too large (15.8%). In contrast, notably fewer of those with below median support for amends thought that the payment was too small (28.4%), while nearly a third thought that the payment was appropriate (31.4%) and a plurality did not support solatia payments or thought that the payment was too large (40.2%).

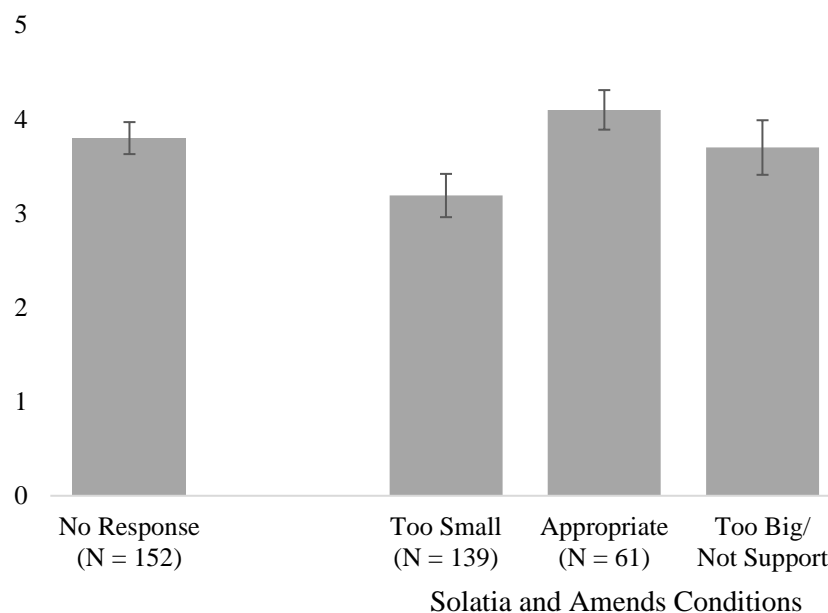
165.  $F(3,414) = 9.78$ ,  $p < .001$ .

166.  $F(3,415) = 11.23$ ,  $p < .001$ .



more satisfied with the response than were those in the no response condition (Figure 2).<sup>167</sup>

FIGURE 2. SERVICE MEMBER SATISFACTION WITH RESPONSE



NOTE. Error bars show 95% confidence intervals. Satisfaction with response measured on a 5-point scale with higher numbers indicating greater degrees of satisfaction. Solatia and Amends conditions combined and grouped by evaluation of the monetary payment.

Overall, the more service members supported amends generally, the less satisfied they were with the official response ( $r = -.25, p < .001$ ).<sup>168</sup> But the relationship between support for amends and less satisfaction held true only in the solatia and amends conditions; when there was no official response, there was no difference in satisfaction between those who were higher and lower in support for amends.<sup>169</sup> Or, to look at it another way, service members who did not support amends were equally satisfied in each of the response conditions.<sup>170</sup> In contrast, service members who supported amends generally were less satisfied in the solatia payment and amends conditions (Figure 3).<sup>171</sup>

167. Follow up  $p < .05$ .

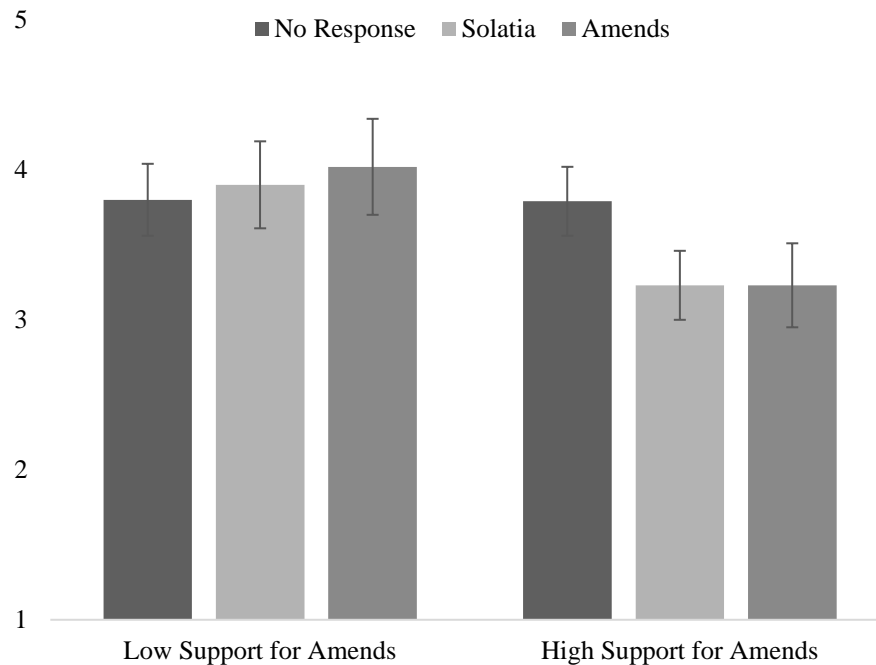
168. The more the service member supported amends generally, the less positive the official response made them feel.  $r = -.32, p < .001$ .

169. Interaction between response condition and support for amends,  $F(2, 443) = 4.72, p = .009$ .

170.  $F(2, 176) = .59, p = .55$ .

171.  $F(2, 267) = 6.10, p = .003$ .

FIGURE 3. SERVICE MEMBER SATISFACTION WITH RESPONSE



NOTE. Error bars show 95% confidence intervals. Satisfaction with response measured on a 5-point scale with higher numbers indicating greater degrees of satisfaction.

#### 6. *Obligation Shifting*

Service members varied in their inclination to shift obligation to the victim's family ( $M = 2.92$ ;  $range = 1$  to  $5$ ;  $SD = .75$ ).<sup>172</sup> Consistent with prior research finding that obligation shifting is associated with less support for reparations,<sup>173</sup> the more service members tended to shift obligation to the victim's family, the less they supported amends generally ( $r = -.35$ ,  $p < .001$ ), the less they desired additional amends ( $r = -.25$ ,  $p < .001$ ), the less they thought the family deserved amends ( $r = .31$ ,  $p < .001$ ), and the more satisfied they were with the official response ( $r = .38$ ,  $p < .001$ ).

Obligation shifting was also associated with service members' evaluations of the monetary payment. Recall the overall tendency for service members to believe that the payment made in the solatia and amends conditions was too small.<sup>174</sup> Service members who shifted obligation to the victim's family were

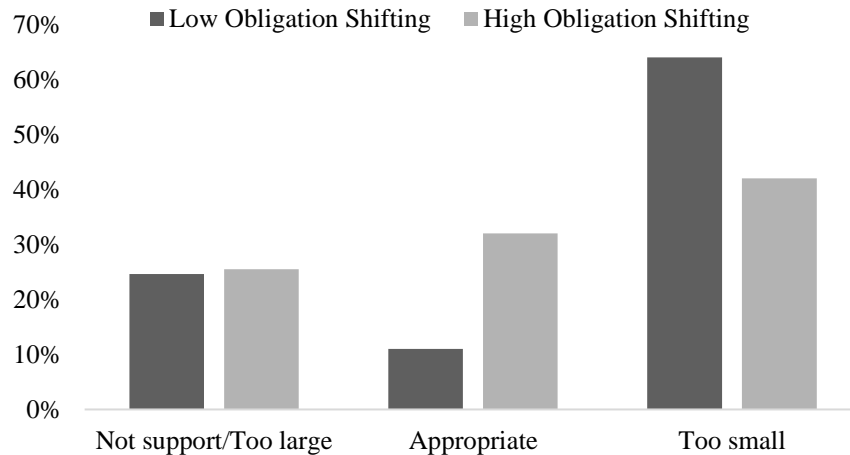
172. Those high in self-legitimacy were more likely to shift obligation.  $r = .17$ ,  $p < .001$ .

173. Zaiser & Giner-Sorolla, *supra* note 34, at 7.

174. See *supra* note 164 and accompanying text.

less likely to think that the payment should have been bigger and more likely to be satisfied with the existing payment (see Figure 4).<sup>175</sup>

FIGURE 4. ASSOCIATION BETWEEN OBLIGATION SHIFTING AND ASSESSMENT OF MONETARY PAYMENT



Contrary to prior research, there was no evidence that different official responses resulted in different degrees of obligation shifting.<sup>176</sup>

### 7. *Public Image*

Consistent with prior research, the more service members expected the official response to positively affect the public image of the military in the eyes of the international community, the more satisfied they were with the response ( $r = .44, p < .001$ ). There was no evidence that the nature of the official response influenced the extent to which service members believed that the response would result in a positive moral image overall.<sup>177</sup> But the more service members supported amends, the less they thought that the official response would improve public image ( $r = -.11, p = .02$ ). Again, reactions to the size of the monetary payment played a role. Service members who thought that the payment was appropriate were more likely to believe that the response would improve public image than were those who thought the payment was too small, those who did not support monetary payments or thought the payment was too big, or those in the no response condition.<sup>178</sup>

175.  $\chi^2(3) = 18.82, p < .001$ .

176.  $F(2, 440) = 1.77, p = .17$ .

177.  $F(2, 440) = .75, p = .47$ . Those high in self-legitimacy were more likely to believe that the official response would positively affect public image,  $r = .30, p < .001$ .

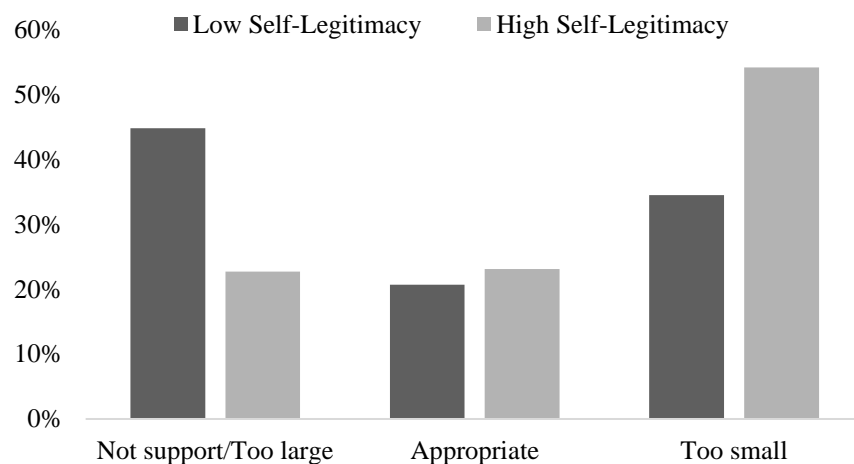
178.  $F(3, 415) = 4.93, p = .002$ .

### 8. *Self-Legitimacy*

Self-legitimacy was positively associated with support for amends making ( $r = .12, p = .013$ )<sup>179</sup> and with satisfaction with the official response, but these correlations were relatively small. Service members who were higher in self-legitimacy were less likely to react to the official response with negative emotion ( $r = -.30, p < .001$ ), but also more likely to believe that more still needed to be done to repair relations with the local community ( $r = .15, p = .002$ ).

Self-legitimacy was also associated with service members' evaluations of the monetary payment.<sup>180</sup> Service members who were low in self-legitimacy were more likely to oppose monetary payments or to think that the payment in our hypothetical case was too large. In contrast, service members who were high in self-legitimacy were more likely to believe that the payment was too small (Figure 5).

FIGURE 5. ASSOCIATION BETWEEN SELF-LEGITIMACY AND ASSESSMENT OF MONETARY PAYMENT



### 9. *Moral Injury*

As noted above, deployed service members who reported more morally injurious experiences were slightly less supportive of amends for lawful harm ( $r = -.17, p = .006$ ). Those with greater exposure to morally injurious experiences were also more likely to react to the response with negative emotion ( $r = .42, p < .001$ ), but were no more or less satisfied with the official response than those who experienced fewer morally injurious events.

179. This result was primarily driven by support for apologies ( $r = .19$ ).

180.  $\chi^2(3) = 7.05, p < .030$ .

## V. DISCUSSION

Our exploration of the views and reactions of service members to the offering of amends for lawful civilian casualties is illuminating. Our results demonstrate the limits of legality in defining the role of amends, show relatively strong support for amends making among members of the armed forces, and reveal the ways in which remorse, moral values, and affective reactions to the ways that their organization responds to lawful civilian casualties play a role in service members' views. In addition, these results contribute to a growing understanding of obligation shifting on harmdoers' views of and reactions to amends making.

A. *The Limits of Legality*

Our context is that of lawful harm—which occupies a distinctive place in both the scholarship on legal responses to harmdoing<sup>181</sup> and the effects of amends making.<sup>182</sup> In particular, the lawfulness of the actions that led to the harm complicates traditional accounts of why responding is appropriate.<sup>183</sup> We have, however, identified a range of victim and state-oriented justifications for state amends making in the aftermath of lawful harmdoing.<sup>184</sup>

While the category of lawful harm is distinctive and important, determining which cases fall into the category is not always straightforward or agreed upon. Facts can be uncertain and contested, a problem that is compounded by a lack of transparency about decision-making and outcomes.<sup>185</sup> Observers grapple with how to apply and balance the principles of discrimination and proportionality when it comes to harder cases. Differing interpretations of the law and a tendency to push the boundaries of what is lawful also contribute to circumstances in which determinations of legality are highly contested.<sup>186</sup> Ascertaining the relevant circumstances, such as whether the injured person was a “civilian” or whether the harm took place during “armed conflict” can be complicated.

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181. See Murphy et al., *supra* note 17, at 547.

182. Ferguson & Branscombe, *supra* note 65, at 257.

183. Murphy et al., *supra* note 17.

184. *Id.*; Wexler & Robbennolt, *supra* note 10, at 149–67.

185. Gen. Assembly, Hum. Rts. Council, Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), Study on Targeted Killings, ¶ 3, A/HRC/14/24/Add.6 (2010) [hereinafter Alston] (arguing that states have “failed to specify the legal justification for their policies, to disclose the safeguards in place to ensure that targeted killings are in fact legal and accurate, or to provide accountability mechanisms for violations. Most troublingly, they have refused to disclose who has been killed, for what reason, and with what collateral consequences.”); Shiri Krebs, *Designing International Fact-Finding: Facts, Alternative Facts, and National Identities*, 41 *FORDHAM INT’L L.J.* 337, 337 (2018) (describing how contradictory narratives develop and explaining how psychological processes can inhibit the ability of fact-finding initiatives to establish a shared set of facts); Shiri Krebs, *The Legalization of Truth in International Fact-Finding*, 18 *CHI. J. INT’L L.* 83, 83 (2017).

186. Alston, *supra* note 185, ¶ 3 (“The result has been the displacement of clear legal standards with a vaguely defined license to kill, and the creation of a major accountability vacuum.”); see also, e.g., Krebs, *The Legalization of Truth*, *supra* note 185 (reporting experimental results); Shiri Krebs, *Law Wars: Experimental Data on the Impact of Legal Labels on Wartime Event Beliefs*, 11 *HARV. NAT’L SEC. J.* 106, 106 (2020). Relevant law, its interpretation, or how it is enforced may also change over time. Take, for example, changes over time in

Take, for example, determinations of civilian status. A dichotomous distinction between combatants and civilians does not capture the complexities of modern armed conflict.<sup>187</sup> In fact, IHL allows civilians to be direct targets when, and for so long as, they are directly engaging in hostilities. While IHL treaties do not fully define the parameters of what it means to directly participate in hostilities, such participation is understood to include acts such as capturing, guarding, or killing members of the military; restricting military deployment by disrupting power supplies or transportation paths; or providing targeting intelligence for an attack.<sup>188</sup> Similarly, military personnel are entitled to use lethal force against civilians in response to hostile intent, which has been defined as “threat of imminent force.”<sup>189</sup> In recent conflicts like Afghanistan, the U.S. military has inflicted many civilian casualties after making hostile intent determinations.<sup>190</sup> And civilians who shield military personnel and military objects present a difficult case, with some civilians acting to do so voluntarily and others involuntarily, and with states differing as to the status of such individuals and whether they are to be included in calculations of collateral damage.<sup>191</sup>

In addition to the difficulties in establishing shared notions of the bounds of law and the application of law to contested facts, notions of legality also seem to be insufficient for laypeople evaluating this sort of potentially lawful, but awful conduct. In one experimental study of public reactions to a civilian casualty incident, participants’ “willingness to condemn the soldiers or support prosecuting them” did not turn on the determination of the lawfulness of the underlying conduct.<sup>192</sup> In contrast, determinations about whether *moral* standards were violated did more work in influencing judgments about prosecution, condemnation, and compensation.<sup>193</sup> These results are consistent with our findings that moral values—such as beliefs in the wrongfulness or inevitability of civilian casualties

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approaches to the use of chokeholds in U.S. policing. Alexander Nieves, *California to Ban Chokeholds, Independently Review Police Shootings Under Newly Signed Laws*, POLITICO (Sept. 30, 2020), <https://www.politico.com/states/california/story/2020/09/30/newsom-to-sign-chokehold-ban-police-shooting-oversight-bill-1319013> [<https://perma.cc/JSR5-KXZZ>]; *How Decades of Bans on Police Chokeholds Have Fallen Short*, NPR (June 16, 2020), <https://www.npr.org/2020/06/16/877527974/how-decades-of-bans-on-police-chokeholds-have-fallen-short> [<https://perma.cc/SXT5-RGEF>].

187. See Alston, *supra* note 185, ¶¶ 65–69; Krebs, *Designing International Fact-Finding*, *supra* note 180; Krebs, *Rethinking Targeted Killing Policy*, *supra* note 41, at 957.

188. MELZER, *supra* note 68, at 48.

189. CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B: STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES, enclosure L, ¶ 4(d) (June 13, 2005). Such imminent force has not been well defined, but the standing rules of engagement note that “imminent” is “not necessarily . . . immediate or instantaneous.” *Id.* at enclosure A, ¶ 3(g). That hostile intent may, but need not be, related to the armed conflict in any way.

190. INT’L HUM. RTS. CLINIC, HARV. L. SCH., TACKLING TOUGH CALLS: LESSONS FROM RECENT CONFLICTS ON HOSTILE INTENT AND CIVILIAN PROTECTION 2 (Mar. 2016).

191. JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING, at E-2–3 (Apr. 13, 2007).

192. Krebs, *The Legalization of Truth*, *supra* note 185, at 125. Note that lawfulness did affect their willingness to compensate the victims such that “respondents were *more* willing to compensate the victims when told that the soldiers *did not violate* the law, than when they were told the soldiers *did violate* the law.” *Id.*

193. *Id.* at 128.

or the victims' deservingness of amends—play an important role in service members' judgments and views of amends.

Note, too, that while those who are authorized to use force commonly evaluate their own actions in terms of the legality of those actions,<sup>194</sup> public judgments of legitimacy will draw on perceptions that go beyond whether the behavior was legal.<sup>195</sup> In crafting good policy, therefore, legal compliance matters, but decision makers should also consider a broader range of factors in working toward legitimacy.<sup>196</sup> This notion may be reflected in a comment by one of our participants: "For clarification: I believe that the military should not HAVE to apologize for justified civilian collateral damage, however I recognize that it is necessary." Necessary, perhaps, because amends making for harm, even though that harm is a result of lawful action, may have a role to play in improving community perceptions of legitimacy.<sup>197</sup>

Consistent with the limits of legality displayed by laypeople, the lawfulness of the harm was also an insufficient marker for the service members who took part in our study. Recall that our experimental context was one in which the legality of the harm was relatively uncontested, that is, the lawfulness of the operation was specified in the scenario and largely accepted by respondents.<sup>198</sup> Interestingly, most respondents did not find the legality of the activity to undercut the need for an official state response when that activity caused harm. This was true across all participants,<sup>199</sup> for those service members who had served in combat zones,<sup>200</sup> and for those service members who had seen or been involved in situations involving the death of one or more innocent victims.<sup>201</sup> Indeed, rejection of legality as a barrier increased as service members had more experience with the deaths of innocent parties.<sup>202</sup> Thus, even among those service members with experiences closest to those at issue here, the legality of the actions that led to the harm were not generally seen as precluding an appropriate response. In addition, across the versions of our lawful harm scenario, respondents tended to believe that more needed to be done in responding to the harm.<sup>203</sup>

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194. See *supra* notes 140–41. One of our respondents: "as long as the rules of engagement are followed you have done nothing legally wrong." See Bottoms & Tankebe, *supra* note 99; Bradford & Quinton, *supra* note 100.

195. See *supra* notes 143–45; Bottoms & Tankebe, *supra* note 99; Bradford & Quinton, *supra* note 100. Tyler et al., *supra* note 98, at 87; Tankebe & Meško, *supra* note 104, at 263 ("Yet legality is not sufficient to establish legitimacy; in addition to legality, those in power must also be able to convince themselves that their claims to legitimacy is justified in terms of a society's shared values and beliefs."); see also Bentley, *supra* note 92, at 204 (noting that operating within the law is "insufficient to establish social legitimacy.").

196. See Meares et al., *supra* note 92, at 304–05 (arguing that it is important "for police to focus upon two benchmarks of performance: (1) behaving in ways that are consistent with the law, and (2) acting so as to create and maintain the popular view that they are legitimate, and their conduct appropriate, within the communities where they work when exercising their policing authority.").

197. See Wexler & Robbennolt, *supra* note 10, at 160–61.

198. See *supra* notes 137–38; Murphy et al., *supra* note 17, at 550.

199. See *supra* note 145.

200. See *supra* note 139.

201. See *supra* note 140.

202. See *supra* note 141.

203. See *supra* note 156.

The legality of the harmdoing, moreover, did not preclude service members from expecting to feel guilty about the incident. This anticipation of guilt is consistent with notions of “agent regret” or “innocent guilt” and reflects struggles with the contradictions of war—for example, the sense that civilian casualties are inevitable and necessary, but also wrongful.<sup>204</sup> While service members may not have been legally liable for lawful harm, they still seemed to feel responsible to those who were harmed.

Many soldiers, in reflecting on their combat experiences, echo these paradoxes. For example, one soldier wrote about his experience: “I know that our decision was right and, given the outcome, that it was also wrong.”<sup>205</sup> Similarly, interviews with Dutch veterans revealed that they often switched between saying ‘I did wrong’ and ‘I didn’t do anything wrong[,]’ struggled to distinguish “culpable guilt” and “not-culpable” guilt, or strained to differentiate responsibility and blameworthiness.<sup>206</sup> Characterizing a decision or an action as simply “legal,” to many soldiers is an explanation that is “inadequate for such morally significant actions.”<sup>207</sup>

That the lawfulness of the harm-producing activity was not seen as ruling out an official response, that service members expected to feel guilty about having acted in a way that caused harm, and the role played by moral values all imply that law does not operate here as an on/off switch that exclusively determines the need for official amends. While labeling conduct as “lawful” does have meaningful consequences, such labeling does not preclude a felt need for amends making.

### B. *Support and Desire for Amends*

Indeed, service members overall showed considerable support for amends making in the aftermath of lawful harm to civilians. Substantial support was expressed for apologies and policy reviews, some support for taking responsibility, and more mixed support for making monetary payments. This suggests that many members of the military might welcome, or at least not oppose, some forms of

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204. Service members’ responses on these two items were not significantly correlated ( $r = -.020, p = .668$ )—meaning that service members could believe that it is wrong to kill civilians *and also* independently believe that civilian casualties are inevitable and necessary. Interestingly, service members who were higher in self-legitimacy more strongly endorsed each of these notions ( $r = .25$ , wrong to kill civilians;  $r = .13$ , civilian casualties inevitable).

205. Timothy Kudo, *On War and Redemption*, in *WAR AND MORAL INJURY: A READER* 79, 80 (Robert Emmet Meagher & Douglas A. Pryer eds., 2018).

206. Molendijk, *supra* note 67, at 6.

207. See, e.g., Pete Kilner, *Leadership, War, and Moral Injury*, in *WAR AND MORAL INJURY: A READER* 95, 96 (Robert Emmet Meagher & Douglas A. Pryer eds., 2018); see also SHERMAN, *supra* note 15, at 109 (describing a shooting that “was regarded as within the rules of engagement,” but noting that “this far from settled the question in [the soldier’s] own eyes of his moral responsibility and guilt.”). For another example from a different context, consider reactions to sex harassment that is not unlawful. Lucy Flores, *Joe Biden and the Apologies That Weren’t*, N.Y. TIMES (Apr. 29, 2019), [https://www.nytimes.com/2019/04/29/opinion/joe-biden-lucy-flores-apology.html?emc=edit\\_th\\_190430&nl=todaysheadlines&nli=158090370430](https://www.nytimes.com/2019/04/29/opinion/joe-biden-lucy-flores-apology.html?emc=edit_th_190430&nl=todaysheadlines&nli=158090370430) [https://perma.cc/KW43-6NTH].



more robust amends making for lawful harm to civilians. And support for procedures such as policy reviews, in particular, suggests views that run counter to recent rollbacks of civilian casualty reporting practices.<sup>208</sup>

Service members also indicated their own desire for various aspects of amends, including understanding, apologies, providing explanations, forgiveness, and interaction with the victim's family. While some service members expressed no desire for each of these components of amends, most indicated some desire and many indicated considerable desire for these aspects of amends. The fact that service members wanted, in particular, the victims to understand the reasons for their actions is consistent with the motivations of harmdoers more generally.<sup>209</sup> Similarly, service members indicated a fair amount of support for solatia payments, with many service members supporting higher payments than the one given here (\$1,500)<sup>210</sup> and supporting other mechanisms for repairing harm and assisting victims as well (including apologies, jobs, housing, safe passage, and participation in rituals like funerals).

Interestingly, service members tended to be dissatisfied with the token amount of the monetary payment in the solatia and amends versions of our scenarios.<sup>211</sup> Why might this be so?

One possibility is that service members simply saw the payments as insufficient compensation, even though such payments are generally styled by states as symbolic payments that are *not* focused on compensation.<sup>212</sup> A few respondents provided comments that noted their specific dissatisfaction with the size of the payment and evoked the notion of compensation. For example, one respondent indicated that, "I don't feel that a small sum of money would make up for the loss. That amount wouldn't even provide proper burial." Another noted: "Witnessed many scenarios such as this in which families were compensated for loss of life and property but i feel the amounts were rather insulting in many cases." Others referenced factors that might be thought to influence the purchasing power of the payment, including the local economy or GDP. And, other respondents expressed a general sense that more money or different kinds of repair would be preferable instead of, or in addition to, the monetary payment:

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208. Stephen Losey, *Trump Ends Some Types of Civilian Casualty Reporting*, AIR FORCE TIMES (Mar. 8, 2019), <https://www.airforcetimes.com/news/your-air-force/2019/03/08/trump-ends-some-types-of-civilian-casualty-reporting/> [https://perma.cc/5P7F-ATVU].

209. See generally Gabrielle S. Adams & M. Ena Inesi, *Impediments to Forgiveness: Victim and Transgressor Attributions of Intent and Guilt*, 111 J. PERSONALITY & SOC. PSYCH. 866 (2016); Shnabel & Nadler, *supra* note 91, at 117.

210. Condolence payments are varied and ad hoc. See, e.g., Cora Currier, *How the U.S. Paid for Death and Damage in Afghanistan*, INTERCEPT (Feb. 27, 2015, 8:22 AM), <https://theintercept.com/2015/02/27/payments-civilians-afghanistan/> [https://perma.cc/8P7B-2FBK]; Danielle Moylan, *How Much for Your Child? Afghan Condolence Payments Draw Scrutiny*, NEWSWEEK (April 9, 2016, 3:29 PM), <https://www.newsweek.com/2016/04/22/afghanistan-condolence-payments-kunduz-doctors-without-borders-airstrike-us-446017.html> [https://perma.cc/4RHP-XKKZ].

211. See also Tracy, *supra* note 44 (describing Iraqi reactions to the amount of condolence payments).

212. See Khan & Gopal, *supra* note 1; U.S. FORCES AFG., USFOR-A PUB 1-06, MONEY AS A WEAPON SYSTEM AFGHANISTAN, at 13-14 (2009). See generally Bachar, *supra* note 19, at 411 (noting that symbolic payments may be "unsatisfactory, even insulting, compared to the scope of injury.").

- A different reparation should be made, job, or safe passage out of the country.
- Payment to family and participation in funeral[;] make sure family has place to live.
- Apology and a larger payment
- There should be a letter written by our president to the family that shows the US remorse and money of \$100,000.

Another possible explanation for this dissatisfaction might be that service members found that making a comparison between the life of the victim and any monetary payment to be illegitimate or “taboo.”<sup>213</sup> That is, to the extent that solatia payments evoke a tradeoff between human lives and dollars, such payments may be inherently distasteful. Indeed, several of our participants expressed this sort of discomfort:

- Putting a monetary value on the man in question seems more callous in the face of his death. Another form of repayment may have been more acceptable.
- No amount of money can compensate for the death of a loved one . . . ever.
- Hard to put a price on a [loss] of life.
- I understand that collateral damage happens but any amount of money for a family members life is a kick in the nuts. . . . I have mixed feelings on this.
- There is no price for a human life. It’s insulting to put a price on the grandfather. Money will help them though.
- I don’t know what the value of a human life is. There isn’t an amount to replace him. It’s hard to decide what payment would suffice.
- No payment will ever be enough to bring the grandfather back.
- I don’t believe a payment could compensate the loss and it almost seems an insult to do so, however I believe it is better than ignoring the problem.
- I believe the government thinks it can pay for its mistakes and that is WRONG

Note, too, that several of these service members articulated their sense of the incommensurability between lives and dollars, while simultaneously recognizing the potential value of monetary payments (for example, that it would “help” or would be “better than ignoring” the situation).<sup>214</sup>

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213. Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-Offs: Reactions to Transactions that Transgress the Spheres of Justice*, 18 POL. PSYCH. 255, 256 (1997); Philip E. Tetlock, Orié V. Kristel, S. Beth Elson, Melanie C. Green & Jennifer S. Lerner, *The Psychology of the Unthinkable: Taboo Trade Offs, Forbidden Base Rates, and Heretical Counterfactuals*, 78 J. PERSONALITY & SOC. PSYCH. 853, 854 (2000); see also Bachar, *supra* note 19, at 412 (noting that symbolic payments might signal “an attempt . . . to trivialize the gravity of the injury” or be viewed as a “license to injure” or “cost of doing business[.]”).

214. On the recipient side, cultural differences may be relevant to how symbolic monetary payments are received. See, e.g., George E. Irani & Nathan C. Funk, *Rituals of Reconciliation: Arab-Islamic Perspectives*, 20 ARAB STUD. Q. 53, 66 (1998) (explaining that in some cultures “the symbolic significance of compensation is at least as important as the substance of the payment. The exchange of money or goods substitutes for the exchange

Overall, our findings suggest that, while not all service members would welcome efforts to make amends, many would embrace the possibility of taking steps to make amends with those who are injured.<sup>215</sup> Because variation existed among service members in the extent to which they wanted aspects of amends such as the chance to apologize or explain, or the opportunity to interact with the victim's family, it might make sense to develop flexible policies that take into account the needs and preferences of individual service members as to their participation in amends making processes.<sup>216</sup> More broadly, vast majorities of respondents supported (or had no opinion about) apologies and post-incident reviews and most had no objection to taking responsibility. Amends making, therefore, may serve the needs of many service members and is unlikely to lead to backlash, erode service member respect for military institutions, or cause other types of institutional breakdown.

### C. *Moral and Emotional Needs*

Service members' remorse over having caused harm, their moral values, and their affective responses to how their organization responded to the harm all played a role in how they thought about amends making. These values and emotions were related to the degree to which service members supported amends policies generally, desired to make amends themselves following a lawful civilian casualty, or were satisfied with how the organization responded to such an event.<sup>217</sup> Paying attention to how amends making and the moral and emotional needs of its soldiers interrelate, therefore, should be of interest to a military that values the well-being of its soldiers.

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of death; the family that forsakes revenge gains in standing, while the family of the murderer is humbled and indebted by this act of forbearance and magnanimity"). See Deborah R. Hensler, *Money Talks: Searching for Justice Through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417, 431 (2003).

215. Some reason exists to hope that the Biden Administration will support efforts to respond effectively to civilian casualties. While President Biden has not spoken directly about solatia payments or making amends for civilian casualties, he has supported efforts to keep national security actors accountable and been vocal about his opposition to civilian casualties and other harms imposed by the U.S. military. As a presidential candidate, Biden promised to "restore greater transparency in our military operations, including policies instituted during the Obama-Biden administration to reduce civilian casualties." Joseph R. Biden, *Why America Must Lead Again*, FOREIGN AFFAIRS (Mar./Apr. 2020), <https://www.foreignaffairs.com/articles/united-states/2020-01-23/why-america-must-lead-again> [<https://perma.cc/UNZ8-XEDD>].

216. See generally Bachar, *supra* note 19, at 413–17 (noting that there is typically "minimal interaction between soldiers and victims" and a lack of attention to victim's perspective in the current system); Jeremy Joseph, *Mediation in War: Winning Hearts and Minds Using Mediated Condolence Payments*, 23 NEGOT. J. 219, 238 (2007); Jonathan Tracy, *Responsibility to Pay: Compensating Civilian Casualties of War*, 15 HUM. RTS. BRIEF 1, 4 (2007) (arguing that the "recognition a family receives will mean more coming from someone wearing the same uniform as the person who harmed the loved one."). We have similarly argued that amends making ought to be flexible as to victims' needs. See Wexler & Robbennolt, *supra* note 10, at 182.

217. This is consistent with prior work showing the relationship between personal morality and law-related behavior. See e.g., Tyler & Jackson, *supra* note 97; see also TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 44 (1992).

Our study is an initial foray into the role of moral injury in reactions to the possibility of amends making for lawful harm.<sup>218</sup> We found that the more service members were exposed to morally injurious experiences during their deployment, the lower their sense of self-legitimacy. This seems consistent with the nature of moral injury.<sup>219</sup> But exposure to morally injurious experiences did not influence service members' satisfaction with different official responses, their own desire for amends, or the extent to which they engaged in obligation shifting. And more morally injurious experiences related to *less* support for amends. Our data, therefore, do not suggest that this group supports amends making or wants to participate in it any *more* than service members who have not had these experiences. That is not to say that aspects of amends making might not be therapeutic, even if not explicitly sought after by this group more than others. This question should continue to be more thoroughly addressed by those exploring the role of amends in treatments for moral injury.<sup>220</sup>

Note also that we measured exposure to potentially morally injurious *experiences*, not *symptoms* of moral injury. Future research using different methods might focus instead or in addition on symptoms of moral injury using more recently developed moral injury measures.<sup>221</sup>

#### D. *Obligation Shifting*

Prior research has suggested that harmdoers may impose an obligation on the victims of harm to accept, forgive, cooperate, move on, or relinquish their claims against the harmdoer.<sup>222</sup> Our findings confirm the association between obligation shifting and reactions to, desire to engage in, and support for amends making. Overall, the more respondents shifted obligation to victims, the more satisfied they were with the official response and the less they desired or supported amends. In the same vein, the more service members shifted obligation to victims, the more satisfied they tended to be with the solatia payment in our scenarios—a payment that many service members found to be inadequate overall.

But contrary to past studies, we did not find that more conciliatory official responses (solatia and amends) resulted in increased obligation shifting. Some contextual differences are worth noting. In particular, prior studies on obligation

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218. Edgar Jones, *The Art of Medicine: Moral Injury in Times of War*, 391 LANCET 1766, 1767 (2018) (“Less research has been done into the ways in which institutions can reduce the risk of its [moral injury] occurrence.”).

219. See Tyler & Jackson, *supra* note 97.

220. See Litz et al., *supra* note 7, at 701; Smith et al., *supra* note 85, at 462; Steenkamp, *supra* note 88, at 471; Worthington & Langberg, *supra* note 25, at 275.

221. See Danielle S. Berke, Nora Kline, Jessica Carney, Julie D. Yeterian & Brett T. Litz, *Treating Moral Injury in Military Members and Veterans*, in TREATING PTSD IN MILITARY PERSONNEL 382, 384 (Bret A. Moore & Walter E. Penk, 2nd ed. 2019); Abby L. Braitman et al., *Psychometric Properties of a Modified Moral Injury Questionnaire in a Military Population*, 24 TRAUMATOLOGY 301 (2018); Harold G. Koenig, Nagy A. Youssef & Michelle Pearcee, *Assessment of Moral Injury in Veterans and Active Duty Military Personnel with PTSD: A Review*, 10 FRONTIERS PSYCH. 1, 2 (2019).

222. Zaiser & Giner-Sorolla, *supra* note 34.

shifting have examined amends making for historical injustices, comparing apology statements and reparations to a control condition in which these responses (apology and reparations) were explicitly ruled out.<sup>223</sup> Zaiser and Giner-Sorella note that it is less clear “how apologetic acts compare with completely not addressing the issue in the first place,” and raise the possibility that “apologies may actually be less obligation shifting than truly doing nothing.”<sup>224</sup>

Our study provided a more direct comparison between solatia and amends responses and no response. The fact that we find no differences in obligation shifting may suggest that apologetic acts are no more or less likely to produce obligation shifting than doing nothing. It is also possible that respondents’ negative reactions to the size of the monetary payments in the solatia and amends conditions<sup>225</sup> impeded the shifting of obligation. Or there may be important differences between the historic injustices examined in prior work and the specific harmful acts explored here or that flow from our explicit consideration of lawful harm. Future research should explore each of these possibilities to help develop our understanding of whether and under what circumstances apologetic acts shift apologizers’ perceived obligations.

#### *E. Self-Legitimacy*

The self-legitimacy of the service members—that is, their own feelings of legitimacy in their authority—may also have a role to play in how the service members themselves respond to official amends making.<sup>226</sup> Our findings are largely consistent with prior work investigating self-legitimacy in police officers. In particular, that work has found that officers’ sense of self-legitimacy is associated with their sense of procedural fairness in, and a democratic approach to, policing, including being open with, honest with, and accounting to the public.<sup>227</sup> Consistent with these findings, we find that service members who felt more self-legitimacy were more supportive of amends policies, more likely to think that more needed to be done or that the victim’s family would want amends, more dissatisfied with the monetary payment, and likely to see more positive effects (and fewer negative effects) of amends.<sup>228</sup> At the same time, these correlations are relatively modest.

Prior work with police officers has also found that officer self-legitimacy is associated with greater commitment to their organizations.<sup>229</sup> In addition, for

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223. *Id.*

224. *Id.*

225. *Id.*

226. Also relevant are service members’ perceptions of their legitimacy in the eyes of members of the local community, victims, and victims’ families. Prior work with police officers has found that both how officers view the relevant rules and their perceptions of how they are perceived by the community they serve influence their perceptions of their own safety and their anxiety. Goff et al., *supra* note 104, at 343. Future work should explore the role of these perceptions in this context as well.

227. *Id.*

228. *See supra* note 164.

229. *See supra* note 226 and accompanying text.

both police officers and military personnel, assessments of self-legitimacy are associated with rule following (including “following job requirements, complying with organizational rules, and voluntarily deferring to organizational policies”).<sup>230</sup> Consistent with this work, we found that service members who felt higher self-legitimacy seemed to be more accepting of both the operation and the official response to it. In particular, service members who were higher in self-legitimacy were more likely to believe that the operation was appropriate and expressed more satisfaction with the official response—consistent with the commitment to and trust in the organization, and the deference to organizational policies that is associated with self-legitimacy.<sup>231</sup>

This sort of self-regulation is crucial for militaries in which military culture<sup>232</sup> and military codes<sup>233</sup> play a key role in ensuring that soldiers respect the societal responsibility that comes with the right to use force.<sup>234</sup> Military professionalism—and legitimacy—serve to emphasize this responsibility<sup>235</sup> and encourage rule following even when the rules seem counterintuitive or counterproductive.<sup>236</sup> Moreover, as with police officers, self-legitimacy may play a role in encouraging restraint in the use of force against civilians.<sup>237</sup> These possibilities

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230. Tom R. Tyler, Patrick E. Callahan & Jeffrey Frost, *Armed, and Dangerous (?): Motivating Rule Adherence Among Agents of Social Control*, 41 L. & SOC'Y REV. 457, 474 (2007); see also Tom R. Tyler & Steven L. Blader, *Can Businesses Effectively Regulate Employee Conduct? The Antecedents of Rule Following in Work Settings*, 48 ACAD. MGMT. J. 1143, 1144, 1157–48 (tbls.1–2 (2005) (finding that employee self-legitimacy is associated with rule following). Similarly, research has found that service members' (and police officers') perception that the values of their organization and their own values are congruent is associated with rule adherence. Tyler & Blader, *supra*, at 474–75 tbl.1, 479, 481.

231. Wolfe & Nix, *Does Self-Legitimacy Protect*, *supra* note 106, at 726.

232. See SAMUEL R. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL MILITARY RELATIONS* 9 (1957). For all professions, this includes the belief that “to be a professional is to make a moral commitment, a commitment to use one’s skills and knowledge, in part at least, for the society’s well-being.” Paul R. Camenisch, *On Being a Professional, Morally Speaking*, in *MORAL RESPONSIBILITY AND THE PROFESSIONS* 42, 49 (Bernard Baumrin & Benjamin Freedman eds., 1983).

233. See Ernest Greenwood, *Attributes of a Profession*, in *MORAL RESPONSIBILITY IN THE PROFESSIONS* 20, 23 (Bernard Baumrin & Benjamin Freedman eds., 1983).

234. See HUNTINGTON, *supra* note 232, at 9; Tyler et al., *supra* note 230, at 458–59, 479; see also Camenisch, *supra* note 232, at 49.

235. See Emile Durkheim, *Professional Ethics and Civic Morals*, in *MORAL RESPONSIBILITY AND THE PROFESSIONS* 33, 38–39 (Bernard Baumrin & Benjamin Freedman eds., 1983).

236. Kutz, *supra* note 49, at 167. On military professionalism, see TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 6 (1992). States have ever-increasing reasons to care about professionalism as militaries often perform a variety of other functions besides their traditional combat role. Samuel P. Huntington, *Keynote: Non-Traditional Roles for the U.S. Military*, in *NON-COMBAT ROLES FOR THE U.S. MILITARY IN THE POST-COLD WAR ERA* 3, 5, 10 (James R. Graham ed., 1994); ALAN J. VICK, DAVID T. ORLETSKY, ABRAM N. SHULSKY & JOHN STILLION, *PREPARING THE U.S. AIRFORCE FOR MILITARY OPERATIONS OTHER THAN WAR* 10 (1997), [http://www.rand.org/content/dam/rand/pubs/monograph\\_reports/MR842/MR842\\_chap2.pdf](http://www.rand.org/content/dam/rand/pubs/monograph_reports/MR842/MR842_chap2.pdf) [<https://perma.cc/2ZTZ-5SYJ>].

237. Tankebe & Meško, *supra* note 101, at 262, 266–73; see also Wexler & Robbennolt, *supra* note 10, at 168 n.304.

underscore the importance of recruiting for and fostering appropriate self-legitimacy among service members.<sup>238</sup>

#### F. *The Role of Public Image*

The official responses we explored here did not differentially impact service members' expectations about the effects on public moral image overall, perhaps reflecting the perceived capacity of amends making to simultaneously threaten and repair moral image. At the same time, however, the subgroup of service members who found the monetary payments in the solatia and amends conditions to be appropriate did tend to expect amends making to have more positive effects on public moral image. And, consistent with past research, expectations about how the response would influence public image affected service members' satisfaction with the response; service members who believed that a particular response would improve public moral image, were more satisfied with that response.<sup>239</sup>

### VI. CONCLUSION

The present study is, to our knowledge, the first empirical study of the responses of military personnel to the possibility of amends making for lawful civilian harms in armed conflict settings. Our results highlight the potential for amends making as a response to lawful wrongdoing from the perspective of military service members, suggesting its role as part of appropriate responding to lawful but awful harm to civilians.

This first foray into service member reactions to amends making raises a host of further empirical questions. Consider just a few examples. Our participants seemed to make inferences about the facts of our hypothetical operation (for example, whether the victim was a civilian) from the nature of the official response to the harm. Additional research that explores the range of responses officials make to lawful harm and the ways in which those responses are perceived would help us to understand the nature of these inferences. Our findings about service member dissatisfaction with the monetary payments in our scenarios—generally finding them insufficient—suggests that exploring payments of different forms or sizes or other modes of repair would be instructive. Reactions to amends making in situations in which the state's determination of the lawfulness of its actions is more contested, may provide some interesting contrasts. Future research could also explore how amends are perceived by broader audiences, including the U.S. public, foreign states, and others, and comparisons made to service members' expectations about the effects of amends making on the public image of their institutions. And important work needs to be done to

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238. Some antecedents of self-legitimacy may include organizational justice, supervisor behavior, and perception of policies. *See, e.g.*, Trinkner et al., *supra* note 104, at 158, 161, 167; Goff et al., *supra* note 104, at 340, 343.

239. *See supra* Section III.C.

further explore the responses of victims (and their families and communities) to amends making by state institutions.

While this project most directly explores reactions to amends making for lawful harm inflicted in armed conflict settings, our findings are also relevant to other settings in which the law permits harm to others. The most closely related setting is the use of force by police officers.<sup>240</sup> The law countenances the use of lethal force by police officers in a variety of settings, including self-defense,<sup>241</sup> as a means of protecting third parties,<sup>242</sup> as the result of a reasonable mistake,<sup>243</sup> or in the course of responding to an imminent threat posed by someone else.<sup>244</sup> When harm results, even from the lawful use of force, the police face many of the same considerations of community relations, emotional and moral injury, professionalism, and legitimacy that arise in the armed conflict setting.<sup>245</sup>

Thus, we suggest that institutions explore processes for making amends for lawful harm. Making amends through mechanisms such as acknowledgement, apologies, policy review, and other support may provide an effective mechanism for addressing the harm caused by lawful conduct in a range of settings.

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240. See Meares et al., *supra* note 92, at 300, 304. For another perspective on the limits on law and policing, see Nirej Sekhon, *Police and the Limit of Law*, 119 COLUMBIA L. REV. 1711 (2019).

241. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

242. AMNESTY INTERNATIONAL, DEADLY FORCE: POLICE USE OF LETHAL FORCE IN THE UNITED STATES (2015), [https://www.amnestyusa.org/sites/default/files/aiusa\\_deadlyforcereportjune2015.pdf](https://www.amnestyusa.org/sites/default/files/aiusa_deadlyforcereportjune2015.pdf) [<https://perma.cc/NB6T-5XUV>].

243. See, e.g., *Scott v. Harris*, 550 U.S. 372, 383 (2007).

244. See, e.g., Mitchell J. Edlund, *In the Heat of the Chase: Determining Substantive Due Process Violations Within the Framework of Police Pursuits When an Innocent Bystander is Injured*, 30 VAL. U. L. REV. 161, 161, 166 (1995).

245. See Winnifred R. Louis, Catherine E. Amiot & Emma F. Thomas, *Collective Harms: Developing the Perspective of the Perpetrator*, 21 PEACE & CONFLICT 306, 308 (2015) (noting that police who shoot in the line of duty might suffer similar consequences to those who kill in combat); Meares et al., *supra* note 92, at 304.



## APPENDIX—SCENARIOS

[Proportionality Analysis: Imagine that you are a member of U.S. ground forces engaged in an on-going armed conflict. You are located in a densely populated urban area and you have been tasked with effectively clearing and holding a building important for both its tactical advantages and because it is an opponent strong hold. Intelligence reports, including pattern of life assessments, suggest that several high-level oppositional operational planners as well as oppositional fighters occupy the building. At least one civilian family also still lives in the building. The grandfather of this family seldom leaves the building.]

[Misidentification: Imagine that you are a member of U.S. ground forces engaged in an on-going armed conflict. You are located in a densely populated urban area and you have been tasked with targeting several high-level oppositional operational planners. Intelligence reports, including pattern of life assessments, suggest that these planners as well as oppositional fighters are present in a particular building. Effectively clearing and holding this building is important for both its tactical advantages and because it is an opponent strong hold.]

[Reasonable Precautions: Imagine that you are a member of U.S. ground forces engaged in an on-going armed conflict. You are located in a densely populated urban area and you have been tasked with effectively clearing and holding a building important for both its tactical advantages and because it is an opponent strong hold. Intelligence reports, including pattern of life assessments, suggest that several high-level oppositional operational planners as well as oppositional fighters occupy the building. At least one civilian family also still lives in the building.]

You have learned that this afternoon is your last opportunity to clear the building and take out the planners before they depart for a destination where you will have little opportunity of successfully striking them.

[Proportionality Analysis: With awareness that your efforts to kill the operational leaders will risk the civilian in the building, your embedded JAG says that proportionality analysis is satisfied. You wait for the rest of the family to depart the building, then launch an offensive and successfully kill the operational planner. The grandfather is killed as part of the explosions. You were not aiming for him, but you accepted this as a possible outcome before you began the operation.]

[Misidentification: Based on your intelligence, you launch an offensive to kill the operational planners. Unbeknownst to you, the planners and oppositional fighters had secretly departed town the day before and a civilian, a grandfather and respected elder was house sitting for the planners. The grandfather looks very similar to one of the planners and visual identification efforts had led you to believe that the operational planners were present in the building. The grandfather is killed in the explosion. An autopsy confirmed the misidentification.]

[Reasonable Precautions: You take reasonable precautions to avoid harm to civilians including waiting for the civilian family to depart the building, then launch an offensive and successfully kill the operational planners. Unbeknownst

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to you, and despite your best efforts, one of the civilians, a grandfather and respected local elder, had not left the building prior to the attack. The grandfather is killed in the explosions.]

[No Response: In response to local outrage regarding the death of the grandfather, a respected local elder, the U.S. government conducted a brief investigation. They concluded the operation was lawful and the matter was closed. No further action was taken.]

[Solatia: In response to local outrage regarding the death of the grandfather, a respected local elder, the U.S. government conducted a brief investigation. They concluded the operation was lawful. The family filed the necessary paperwork with the U.S. government and received a \$1,500 payment.]

[Amends: In response to local outrage regarding the death of the grandfather, a respected local elder, the U.S. government conducted a brief investigation. They concluded the operation was lawful. The government then acknowledged its role in causing the grandfather's death, outlined the steps it had taken to minimize civilian casualties, and offered sympathies in a local ceremony. The soldiers involved in the operation and the grandfather's death also expressed their condolences. The government provided information about this incident to a task force responsible for fathering and assessing data that will be used to inform recommendation about how to further reduce civilian casualties as much as possible. The family filed the necessary paperwork with the U.S. government and received a \$1,500 payment.]

## APPENDIX—SURVEY QUESTIONS

Views of Amends. Service members were asked to indicate their general support or opposition to amends making for lawful harm via apologizing (2 items), monetary payments, reviewing policies in order to improve processes in the future, and taking responsibility. These five items were combined into a single scale ( $\alpha = .76$ ).

I support the U.S. apologizing to civilians for the lawful harm done by such operations.

When harm to civilians occurs legally, the U.S. should not have to apologize.

The U.S. should not make payments to families following lawful civilian casualties.

After lawful harm to a civilian occurs, the U.S. should review its policies to improve its processes in the future.

The U.S. should not take responsibility for harm to civilians when the military actions taken were lawful.

Civilian Casualties. Two items measured service members' views of civilian casualties. One item assessed agreement with the statement "I think it is wrong to kill civilians." A second item assessed agreement with the statement "Civilian casualties are an inevitable and necessary cost of war." These two items were not significantly correlated ( $r = -.02$ ,  $p = .67$ ).

Moral Injury Questionnaire—Military Version.<sup>246</sup> A nineteen item scale assessed exposure to potentially morally injurious war zone experiences. Service members who served in combat zones were asked to indicate how frequently they had experienced each in the context of their deployment(s) on a scale in which 1 = Never, 2 = Seldom, 3 = Sometimes, and 4 = Often. The items were combined into a single scale ( $\alpha = .92$ ).<sup>247</sup>

Service members experienced a range of exposure to these potentially morally injurious events. Some service members reported no exposure to any of the events ( $N = 30$ ; 11.6%), others reported significant exposure, with 13.9% ( $N = 36$ ) having mean scores that were above the mid-point (2.5) of the scale and 2.4% ( $N = 6$ ) with mean scores greater than 3.<sup>248</sup> Not surprisingly, service members who had more morally injurious experiences during their deployment were

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246. Currier et al., *supra* note 125, at 54, 229.

247. *See id.* at 58 (finding support for a single factor model).

248. Service members who were wounded ( $M = 1.91$ ,  $SD = .59$ ) during their service reported greater exposure to potentially morally injurious events during their service than did those who were not wounded ( $M = 1.57$ ,  $SD = .57$ ),  $t(255) = -4.57$ ,  $p < .001$ . Veterans and retired service members ( $M = 1.86$ ,  $SD = .58$ ) reported experiencing more potentially morally injurious events than did those who were currently on active duty ( $M = 1.66$ ,  $SD = .63$ ),  $F(2, 256) = 3.73$ ,  $p = .025$ . There were also some differences in the degree to which service members had experienced morally injurious events across branches of the military,  $F(4, 254) = 2.93$ ,  $p = .022$ .

less likely to feel self-legitimate than those who were deployed but had fewer morally injurious experiences ( $r = -.35, p < .001$ ).<sup>249</sup>

Things I saw or experienced in the war left me feeling betrayed or let-down by military/political leaders.

I did things in the war that betrayed my personal values.

There were times in the war that I saw or engaged in revenge or retribution for things that happened.

I had an encounter(s) with the enemy that made him or her seem more “human” and made my job more difficult.

I saw or was involved in violations of rules of engagement.

I saw or was involved in the death(s) of an innocent in the war.

I feel guilt over failing to save the life of someone in the war.

I had to make decisions in the war at times when I didn’t know the right thing to do.

I feel guilt for surviving when others didn’t.

I saw or was involved in violence that was out of proportion to the event.

I saw or was involved in the death(s) of children.

I experienced tragic warzone events that were chaotic and beyond my control.

I sometimes treated civilians more harshly than was necessary.

I felt betrayed or let down by trusted civilians during the war.

I saw or was involved in a “friendly-fire” incident.

I destroyed civilian property unnecessarily during the war.

Seeing so much death has changed me.

I made mistakes in the warzone that led to injury or death.

I came to realize during the war that I enjoyed violence.

Self-Legitimacy.<sup>250</sup> Five items were used to assess the degree to which service members saw themselves as legitimate authority figures. Items were adapted from previous studies for use in this context by, for example, changing references to law enforcement to references to the U.S. military. The items all loaded on a single component and were combined into a single scale ( $\alpha = .80$ ).<sup>251</sup>

249. There was a small, but significant correlation with the belief that it is wrong to kill civilians, with those exposed to more morally injurious experiences being less likely to endorse this view ( $r = -.16, p = .012$ ).

250. Trinkner et al., *supra* note 104, at 161; Wolfe & Nix, *The Alleged “Ferguson Effect”*, *supra* note 100, at 1; Wolfe & Nix, *Does Self-Legitimacy Protect*, *supra* note 106, at 717. Items were adapted for use in this context by, for example, changing references to law enforcement to references to the U.S. military.

251. This factor accounted for 56% of the variance; loadings  $> .64$ . A scale measuring the congruence between the service member’s values and goals and those of their organization ( $\alpha = .89$ ) and two items about trust in others and trust in self to live up to their values were highly correlated with self-legitimacy—and are not analyzed further. Tyler et al., *supra* note 230, at 487; William P. Nash et al., *Psychometric Evaluation of the Moral Injury Events Scale*, 178 MILITARY MED. 646, 647 (2013); see also Craig J. Bryan et al., *Measuring Moral Injury: Psychometric Properties of the Moral Injury Events Scale in Two Military Samples*, 23 ASSESSMENT 557, 558 (2016).

I have confidence in the authority vested in me as a member of the U.S. military.

As a member of the U.S. military, I believe I occupy a position of special importance in society.

I believe that, in an armed conflict setting, civilians should always do what I tell them as long as my orders are lawful.

I am confident I have enough authority to do my job well.

I believe that the U.S. military is capable of providing security for the areas in which it is deployed.

Remorse. Respondents were asked to indicate how guilty they would feel and how guilty a typical soldier would feel. These two items were combined into a single scale ( $\alpha = .77$ ).

Service Members' Desire for Amends. Service members were asked to assess the degree to which they would want particular amends making opportunities: a change to interact with the victim's family, a chance to explain the circumstances to the victim's family, a chance to apologize to the victim's family, forgiveness from the victim's family, and for the victim's family to understand the reasons for the action taken. These five items were combined into a single scale ( $\alpha = .89$ ).<sup>252</sup>

Emotional Reactions to Response. Nine items were used to assess service members' emotional reactions to the official response to the incident. Service members were asked to indicate the extent to which the response made them feel relieved, moral, angry, fair, guilty, betrayed, immoral, proud, or ashamed on a 5-point scale running from "Does not describe my feelings" to "Clearly describes my feelings." These items loaded on two factors and were combined into two scales: negative emotions (betrayed, angry, ashamed, guilty, and immoral;  $\alpha = .89$ ) and positive emotions (proud, moral, relieved, fair;  $\alpha = .85$ ).<sup>253</sup>

Motives. Service members were asked to evaluate nine possible motives for the official response to the incident.

To what extent do you think the U.S. response to this incident was motivated by . . .

- . . . a need to avoid reprisal or retaliation
- . . . regret for the harm done
- . . . a desire to clear the conscience
- . . . concern for public image
- . . . pressure from non-governmental organizations (NGOs)

252. This factor accounted for 70% of the variance; loadings  $> .72$ .

253. These results are consistent with prior research on emotion that has found that positive and negative emotion are separate dimensions. See, e.g., Ed Diener & Robert A. Emmons, *The Independence of Positive and Negative Affect*, 47 *J. PERSONALITY & SOC. PSYCH.* 1105, 1105 (1985). These two factors accounted for 70% of the variance; loadings  $> .67$ .

- . . . the desire to win hearts and minds
- . . . legal requirements
- . . . desire to project strength
- . . . pressure from the country in which this incident occurred

Family Desires and Deserts. Three items measured respondents' perceptions of the degree to which the victim's family would desire aspects of amends (apology, explanation, compensation). Similarly, three items measured respondents' perceptions of the degree to which the victim's family deserved these same aspects of amends. Each set of three items loaded on a separate factor.<sup>254</sup> Thus, each set was combined into a single scale (family desires amends,  $\alpha = .72$ ; family deserves amends,  $\alpha = .83$ ). Respondents were also asked to assess how satisfied they thought the victim's family was likely to be with the official response.

Obligation Shifting.<sup>255</sup> Five items measured the degree to which service members shifted obligation to the civilian victim's family and community. The items all loaded on a single component and were combined into a single scale ( $\alpha = .74$ ).<sup>256</sup>

- The grandfather's family should appreciate the response by the U.S.
- The grandfather's family ought to accept the U.S. response.
- The grandfather's family should forgive the U.S.
- The grandfather's family ought to get over what happened.
- People in the country in which this incident occurred should want to be closer allies with the U.S. following the response.

Public Image. Ten items measured the extent to which respondents expected the response to improve the public moral image of the U.S. in the eyes of other countries ( $\alpha = .75$ ).

- The response signaled to the international community that the U.S. will try to avoid incidents like this in the future.
- The response tells the international community that the U.S. is to blame for what happened.
- The response lets the international community know that the U.S. takes responsibility for what happened.
- Other countries will see the U.S. as a fair country because of this response.
- Other countries will view the U.S. more negatively as a result of the response. (reverse coded)
- The response will show other countries that the U.S. is not responsible for what happened to the grandfather.

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254. These two factors accounted for 71% of the variance; loadings  $> .75$ .

255. Several items from Zaiser & Giner-Sorolla, *supra* note 34, at 2.

256. This factor accounted for 50% of the variance; loadings  $> .59$ .

People in other countries will approve of the U.S. government's response in this case.

People in other countries will see the U.S. as moral because of this response.

People in other countries will see the U.S. as weak because of this response. (reverse coded)

Other countries will view the U.S. more positively because of this response.

TABLE A1. SCALES - DESCRIPTIVE STATISTICS

Scale	M	SD	Min	Max	$\alpha$
Appropriateness of Operation	3.70	1.00	1	5	.81
Remorse about Operation	3.45	1.12	1	5	.77
Public Moral Image	3.11	.75	1	5	.77
Positive Emotional Response	2.41	1.08	1	5	.85
Negative Emotional Response	2.05	1.04	1	5	.89
Belief that Family Desires Amends	4.03	.96	1	5	.72
Belief that Family Deserves Amends	3.75	1.12	1	5	.83
Service Member Desire for Amends	3.31	1.19	1	5	.89
Obligation Shifting	2.92	.75	1	5	.74
Service Member Support for Amends	3.50	1.19	1	5	.89
Moral Injury Q – Military Version	1.74	.61	1	3.37	.92
Self-Legitimacy	4.20	.75	1	5	.80



TABLE A2. CORRELATIONS AMONG SERVICE MEMBER PERCEPTIONS OF AND ATTITUDES ABOUT AMENDS FOR LAWFUL CIVILIAN CASUALTIES

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)
(1) Support for Amends	—															
(2) Desire for Amends	.46	—														
(3) Satisfaction with Response	-.25	-.15	—													
(4) No Need to Respond If Lawful	-.35	-.20	.21	—												
(5) Remorse – Guilt Over Operation	.39	.42	-.30	-.23	—											
(6) Wrong to Kill Civilians	.36	.26	-.17	-.23	.27	—										
(7) Civilian Casualties Inevitable	-.22	.11	.18	.12	.11	-.02	—									
(8) Victim's Family Deserves Amends	.56	.66	-.25	.31	.44	.36	-.18	—								
(9) Victim's Family Wants Amends	.26	.34	-.03	-.02	.20	.25	.02	-.43	—							
(10) Victim's Family Satisfied with Response	-.33	.05	.33	.08	-.11	-.20	.02	-.12	-.23	—						
(11) Negative Feelings About Response	.04	.32	-.31	-.20	.35	.10	-.13	.26	-.09	.09	—					
(12) Positive Feelings About Response	-.32	-.02	.54	.16	-.23	-.17	.12	-.19	-.08	.35	-.12	—				
(13) Obligation Shifting	-.35	-.25	.38	.28	-.33	-.20	.14	-.15	-.01	.21	-.40	.44	—			
(14) Response Improves Public Image	-.11	-.08	.44	.20	-.17	-.00	.07	-.13	-.02	.23	-.40	.42	.56	—		
(15) Self-Legitimacy	.12	.09	.13	.07	.02	.25	.13	.07	.29	-.13	-.30	.09	.17	.30	—	
(16) Morally Injurious Experiences (N = 261)	-.17	-.02	-.03	-.09	-.02	-.16	.04	-.04	-.25	.11	.42	.06	.01	-.15	-.35	—

NOTE: Correlations that are statistically significant at  $p < .05$  are bolded.

### STATISTICAL APPENDIX—DEMOGRAPHICS

*Exposure to Morally Injurious Experiences.* There was no significant association between exposure to potentially morally injurious experiences and gender,<sup>257</sup> age,<sup>258</sup> race,<sup>259</sup> educational attainment,<sup>260</sup> or whether or not the service member was married.<sup>261</sup> Veterans and retired service members reported experiencing more potentially morally injurious events than did those who were currently on active duty.<sup>262</sup> There were also some differences in the degree to which

257.  $t(255) = .75, p = .46$ .

258.  $r = .11, p = .07$ .

259.  $t(256) = .77, p = .45$ .

260.  $F(4,253) = 2.11, p = .08$ .

261.  $t(256) = 1.39, p = .17$ .

262.  $F(2, 256) = 3.73, p = .025$ . Veteran/Retired ( $M = 1.86, SD = .58$ ); active duty ( $M = 1.66, SD = .63$ ). Reserves/guard ( $m = 1.61, sd = .10$ ).

service members had experienced morally injurious events across branches of the military.<sup>263</sup> Service members who were wounded during their service reported greater exposure to potentially morally injurious events during their service than did those who were not wounded.<sup>264</sup>

*Support for Amends.* Demographic characteristics did not tend to be associated with service members' general support for amends. There was no association with gender,<sup>265</sup> age,<sup>266</sup> race,<sup>267</sup> educational attainment,<sup>268</sup> whether or not the service member was married,<sup>269</sup> active duty status,<sup>270</sup> or branch of service.<sup>271</sup> Service members who were wounded or injured during their service<sup>272</sup> and those who had more morally injurious experiences<sup>273</sup> were less supportive of amends.

*Desire for Amends.* Demographic characteristics did not tend to be associated with service members' desire for amends. There was no association with gender,<sup>274</sup> age,<sup>275</sup> race,<sup>276</sup> educational attainment,<sup>277</sup> whether the service member was married,<sup>278</sup> active duty status,<sup>279</sup> branch of service,<sup>280</sup> whether or not the service member was wounded during their service,<sup>281</sup> or the extent to which the service member was exposed to morally injurious experiences.<sup>282</sup>

*Expectations about Family's Reactions.* Demographic characteristics did not tend to be associated with service members' assessments of the family's deservingness of or desire for amends, or with the family's expected satisfaction with the response. There were no associations with age,<sup>283</sup> race,<sup>284</sup> educational attainment,<sup>285</sup> whether the service member was married,<sup>286</sup> active duty status,<sup>287</sup>

263.  $F(4,254) = 2.93, p = .022$ .

264.  $t(255) = -4.57, p < .001$ . Wounded ( $M = 1.91, SD = .59$ ); not wounded ( $M = 1.57, SD = .57$ ).

265.  $t(445) = -1.32, p = .19$ .

266.  $r = -.06, p = .21$ .

267.  $t(446) = -.55, p = .59$ .

268.  $F(5,443) = .33, p = .86$ .

269.  $t(446) = 1.36, p = .17$ .

270.  $F(2,446) = 1.14, p = .32$ .

271. A one-way ANOVA resulted in a significant effect of military branch,  $F(4, 444) = 2.51, p = .041$ . Follow-up tests using the Tukey test, however, revealed no significant pairwise differences.

272.  $t(445) = 2.39, p = .017$ . Wounded ( $M = 3.38, SD = .92$ ); not wounded ( $M = 3.58, SD = .84$ ).

273.  $r = -.17, p = .006$ .

274.  $t(443) = -.85, p = .40$ .

275.  $r = -.03, p = .52$ .

276.  $t(444) = -.45, p = .65$ .

277.  $F(4,441) = .23, p = .92$ .

278.  $t(444) = .27, p = .79$ .

279.  $F(2,444) = .91, p = .40$ .

280.  $F(4,442) = .90, p = .46$ .

281.  $t(443) = .07, p = .94$ .

282.  $r = -.02, p = .75$ .

283.  $r = .01, p = .77$  (deserves);  $r = .02, p = .76$  (wants);  $r = -.01, p = .81$  (satisfaction).

284.  $t(444) = -.28, p = .78$  (deserves);  $t(445) = .77, p = .44$  (wants);  $t(445) = -.08, p = .94$  (satisfaction).

285.  $F(4,441) = .44, p = .78$  (deserves);  $F(4,442) = .64, p = .64$  (wants);  $F(4,442) = 1.59, p = .18$  (satisfaction).

286.  $t(444) = .06, p = .96$  (deserves);  $t(445) = .27, p = .79$  (wants);  $t(445) = .38, p = .70$  (satisfaction).

287.  $F(2,444) = 2.01, p = .14$  (deserves);  $F(2,445) = 2.02, p = .13$  (wants);  $F(2,445) = 1.40, p = .25$  (satisfaction).

branch of service,<sup>288</sup> or whether or not the service member was wounded during their service.<sup>289</sup> Gender was not associated with assessments of the family's deservingness of or desire for amends,<sup>290</sup> though male service members thought that the family would be more satisfied with the response than female service members.<sup>291</sup> For those service members deployed to combat zones, the extent to which they were exposed to morally injurious experiences was not associated with their assessments of the family's deservingness of amends or expected satisfaction with the response;<sup>292</sup> the more service members were exposed to morally injurious experiences, however, the less they thought family members would want amends.<sup>293</sup>

*Satisfaction with Response.* Demographic characteristics were generally not associated with satisfaction with the official response. There was no association with age,<sup>294</sup> race,<sup>295</sup> educational attainment,<sup>296</sup> whether the service member was married,<sup>297</sup> active duty status,<sup>298</sup> whether the service member was affiliated with the Army, Navy, Air Force, or Marines,<sup>299</sup> or whether or not the service member was wounded during their service.<sup>300</sup> Male respondents ( $M = 3.7$ ,  $SD = 1.14$ ) were slightly more likely to be satisfied with the response than female respondents ( $M = 3.4$ ,  $SD = 1.25$ ).<sup>301</sup>

288.  $F(4,442) = 2.38$ ,  $p = .051$  (deserves);  $F(4,443) = 1.73$ ,  $p = .14$  (wants);  $F(1,444) = 2.61$ ,  $p = .035$  (satisfaction). While the overall test for family satisfaction was statistically significant (and the overall test for family dessert approached significance), follow up analyses using the Tukey test did not find any significant differences between branches.

289.  $t(443) = -.23$ ,  $p = .82$  (deserves);  $t(444) = -1.18$ ,  $p = .24$  (wants);  $t(444) = -.14$ ,  $p = .89$  (satisfaction).

290.  $t(443) = .49$ ,  $p = .62$  (deserves);  $t(444) = -.33$ ,  $p = .74$  (wants).

291.  $t(444) = 2.14$ ,  $p = .033$ . Neither gender thought that the family would be particularly satisfied. Male ( $M = 2.29$ ,  $SD = 1.29$ ); female ( $M = 2.03$ ,  $SD = 1.24$ ).

292.  $r = -.04$ ,  $p = .56$  (deserves),  $r = 1.06$ ,  $p = .09$  (satisfaction).

293.  $r = -.25$ ,  $p < .001$ .

294.  $r = .01$ ,  $p = .91$ .

295.  $t(445) = -.33$ ,  $p = .70$ .

296.  $F(4, 442) = 1.16$ ,  $p = .33$ .

297.  $t(445) = -1.39$ ,  $p = .17$ .

298.  $F(2, 445) = 2.27$ ,  $p = .11$ .

299.  $F(4, 443) = 3.24$ ,  $p < .012$ . There were no differences in satisfaction with the official response among members of the Army, Navy, Air Force or Marines. All  $ps > .05$ . Service members from "other" branches were more satisfied than were members of the Navy, Air Force, and Marines.  $p < .05$

300.  $F(1, 444) = -.93$ ,  $p = .35$ .

301.  $t(444) = 2.17$ ,  $p = .030$ .

