

## ARTICLES

# Sincere Apologies

## The Importance of the Offender's Guilt Feelings\*

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### 1 Introduction

The stronger position of the victim has led to new dynamics within the criminal justice process, such as the victim's statement of impact and alternative forms of dispute resolution such as victim-offender mediation. Within such a dynamic, the response from the offender becomes even more important. Ideal narratives of restorative justice refer to personal revelations brought on by the appeal on a human level, emotional admissions of guilt and tearful apologies. But many questions surround the topic of the emotional response of the offender, such as: could an offender have an obligation to feel guilty? Could there be further consequences to not providing the correct emotional response? To what extent can we be certain that an emotional response, whether that be guilt feelings, shame or otherwise, is sincere? Does it even matter whether or not the offender's apology is sincere?

This paper addresses that last issue: to what extent should the sincerity of the offender's guilt feelings matter to criminal procedure? In order to properly assess the question, I will first consider the cognitive element of emotions to explain why the emotional response of the offender matters at all. Building on that, I will focus on guilt in a discussion of the importance of guilt feelings in general and specifically within the context of criminal justice. Next, a discussion of apologies in the courtroom will show why it makes sense to value expressions of apology in criminal justice. I will however proceed to explain that the very reasons why sincere guilt feelings are so important to criminal justice also mean that we should tread carefully in aiming for them.

### 2 The cognitive element of emotions

If the sincerity of emotions matters, then of course we must first discuss why emotions matter. Contrary to the common parlance distinction between 'emotional' and 'rational,' which seems to understand emotions mainly as bodily feel-

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ings, within philosophical discussions emotions are quite unanimously viewed as positioned within the realm of cognition; of knowing, of thinking.<sup>1</sup>

One well-known argument for including a cognitive element in one's understanding of the emotions is that a cognitive element is needed to distinguish between various emotions. The affects of a pounding heart and a strong urge to flee (the latter already hardly a bodily change) can for example both be related to fear or to disgust, and we need the relevant cognition to determine which emotion we actually are experiencing. The most obvious reason for assigning a cognitive element to emotions is the fact that emotions have an object, they are '*about something*'.<sup>2</sup> Mere bodily feelings could be void of any clear direction, but an emotion is aimed at an object, for example the fact that John stole my car. This characteristic, which is commonly referred to as the *intentionality of emotions*, also provides a distinction between an *emotion* and a *mood* as moods do not have a specific object.<sup>3</sup> If emotions are about something, if they are a response to a situation or an event, then logically some cognitive element must link the event to whatever reaction occurs in our body. The fact that John stole my car could invoke anger, but it might also invoke pity (because he and I have been trying for months now to cure him from his kleptomania) or even relief (because I have several cars and he took the one I mind him taking the least). Similarly, a dangerous snake might provoke fear or curious interest. So, the same bodily changes can occur in a range of different emotions, and the same event can likewise cause a range of different emotions, but all these emotions are distinguished in our understanding (fear being different from curiosity, for example) by a certain cognitive element. This cognitive element is therefore held to be necessary for, and essential to, emotions.

So far, I have relied mostly on authors connected to the body of cognitive theories of emotion, for example Solomon and Nussbaum who understand emotions mainly as *judgments*. There is, however, a fruitful debate within the philosophy (and psychology) of emotions concerning the appropriate understanding of emotions and a possible cognitive element of emotions thereof. This discussion lies outside the scope of this paper. While these theories greatly differ in the shape and relative independence of such a cognitive element, they do agree that emo-

- 1 Correspondingly, the dominant approach within psychology, appraisal theory, regards emotions as containing specific patterns of appraisals: evaluations of significance for well-being. For an overview of appraisal theory, see Agnes Moors et al., 'Appraisal Theories of Emotion: State of the Art and Future Development,' *Emotion Review* 5(2) (2013): 119-24. Frijda's famous work on emotions as *action tendencies* falls within the appraisal approach: Nico Frijda, *The Emotions: Studies in Emotion and Social Interaction* (Cambridge: Cambridge University Press, 1986).
- 2 Robert Solomon, *Not Passion's Slave: Emotions and Choice* (Oxford: Oxford University Press, 2003), 3 and Martha Nussbaum, *Upheavals of Thought* (Cambridge: Cambridge University Press, 2001), 27.
- 3 Peter Goldie, *The Emotions: A Philosophical Exploration* (Oxford: Clarendon Press, 2000), 143 and Solomon, *Not Passion's Slave*, 3. On intentionality, see also Julien Deonna and Fabrice Teroni, *The Emotions: A Philosophical Introduction* (Abingdon: Routledge, 2012).

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tions are to some extent cognitive.<sup>4</sup> The claim here then is a very basic one: there is a cognitive element to emotions; emotions are therefore not necessarily irrational (even though they can be). The understanding of emotions should properly include a cognitive element in some form, whether that may be judgment, thought, appraisal or some other cognitive notion.<sup>5</sup> Even this basic claim shall be argued to have important implications for the emotion of guilt and criminal justice.

### 3 Emotions reveal value

The cognitive element of emotions means that emotions have an important communicative value. They can reveal, to ourselves and to others, certain beliefs or values that we were not consciously aware of before the emotional episode occurs. This information might consist of no more than a somewhat vague realization that 'something important has just happened'<sup>6</sup> but it might also entail a re-evaluation of a certain situation, such as Stocker notes: 'before I heard you being slighted, I thought I no longer cared much for you. (...) Emotions can be more accurate and informing than reason and belief.'<sup>7</sup> Emotions, I would argue following Gardner, could have this effect by making one especially attentive to a certain subset of the facts, possibly overlooking other equally relevant ones. Gardner stresses that when one acts out of an emotion, one is driven to act by these highlighted facts rather than by the emotion itself.<sup>8</sup> The facts were there before, including one's evaluation (appraisal) thereof, but the emotion is highlighting them. Emotions can thus reveal to oneself that something or someone apparently has some kind of importance in one's life. I would also argue that eliciting emotions might work in a similar way, so that focusing on the relevant facts and values brings forth the emotion. The emotion in turn requires one to face up to those facts and values. Peacocke even claims that in this way 'emotions can make us accept a moral truth as true'.<sup>9</sup> By focusing our thoughts and driving us towards introspection and reflection, emotions can reveal value to oneself, and, once expressed, also to others. The fact that one experiences a certain emotion might show some-

4 For discussion and examples see, e.g., Deonna and Teroni who argue that emotions are best understood as *attitudes*, Deonna and Teroni, *Emotions*, 76-90; Jesse Prinz, 'Emotions, Embodiment, and Awareness,' in *Emotion and Consciousness*, eds. Lisa E. Feldman Barrett, Paula M. Niedenthal, and Piotr Winkielman (New York/London: The Guilford Press, 2005), 363-83 on embodiment and perceptual theories of emotion, and Daniel Hutto, 'Truly Enactive Emotion,' *Emotion Review* 4(2) (2012): 176-81 on embodied appraisal theory.

5 In addition to a cognitive element, I understand emotions to have a separate and necessary affective element as well. This argument however lies outside the scope of this paper. For further discussion see Michael Stocker and Elizabeth Hegeman, *Valuing emotions* (Cambridge, Cambridge University Press, 1996), 43-45 and 254, also Goldie, *Emotions*, 61.

6 Annette Baier, 'Feelings That Matter,' in *Thinking about Feeling*, ed. Robert C. Solomon (New York: Oxford University Press, 2004), 200.

7 Stocker and Hegeman, *Valuing emotions*, 64.

8 John Gardner, 'The Logic of Excuses and the Rationality of Emotions,' *The Journal of Value Inquiry* 43(3) (2009): 315-38.

9 Christopher Peacocke, *The Realm of Reason* (New York: Oxford University Press, 2004), 263.

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thing about one's values and beliefs,<sup>10</sup> but also about one's character. For instance, (apparently) *sincere*<sup>11</sup> guilt feelings (or the lack thereof) are often taken as a reflection of the (moral) character<sup>12</sup> of the wrongdoer, a point that will be relevant later in this paper. In this sense, emotions are *informative* to oneself and to others.

Of course, it is not necessarily the case that the information provided by an emotion is necessarily the most important, or the most accurate. The mere presence of an emotion that points to a certain judgement does not immediately make that judgement true.<sup>13</sup> For one thing, the emotion might be erroneous, based on a mistake. The emotion might also 'show *valuings* rather than value: how one values something, not the value something has or the value one takes it to have.'<sup>14</sup> Furthermore, one might misidentify or misinterpret one's own emotions or the values that they seem to reveal. Stocker puts it as follows:

'I am in no way claiming that emotions are always to be trusted about belief and reason. One's true position might be found only by discovering and overcoming distortions and other errors on both sides, leading to a compromise or new position. But this would take the evaluative information given by the original emotions seriously, even though in need of correction. In addition, the corrected evaluative view might be shown by the emotions one comes to only after discovering and overcoming errors both in one's earlier beliefs and reason and also in one's earlier emotions.'<sup>15</sup>

The fact that emotions can be in need of correction, Stocker argues, does not change the main point here: emotions do carry information about value, and we should take this emotional information seriously.

10 Stocker and Hegeman, *Valuing Emotions*, 68.

11 I understand a *sincere emotion* to be an emotion that is actually experienced by the agent at the moment in question. In most cases, this would imply that both the cognitive and affective elements are present.

12 This use of the word 'character' refers to a more classically philosophical, moral character sense of the word. The classical, moral character, however, is part and parcel of one's more general personality.

13 See for an interesting discussion on this topic Michael S. Moore, 'The Moral Worth of Retribution,' in *Responsibility, Character, and the Emotions*, ed. Ferdinand Schoeman (Cambridge: Cambridge University Press, 1987), 179–219. Moore claims that certain emotions, namely the virtuous emotions, point out moral truth. He claims that if a moral judgement is based on a virtuous emotion (such as guilt), we can trust that judgement. I would, however, reject the distinction between intrinsically virtuous and non-virtuous emotions, and therefore I reject this part of Moore's argument as well. The reasons for rejection of that distinction have been clearly explained in Kristján Kristjánsson, 'On the very idea of "Negative Emotions,'" *Journal for the Theory of Social Behaviour* 33(4) (2003): 351–64.

14 Stocker and Hegeman, *Valuing Emotions*, 59 (emphasis in original). The rather confusing distinction between 'how one values something' and 'the value one takes it to have' might refer to a difference between the value that something has to oneself for personal reasons and one's personal assessment of the objective value of that something.

15 Stocker and Hegeman, *Valuing Emotions*, 64.

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But what about emotions which might be both perfectly understandable (possibly appropriate<sup>16</sup> even) and erroneous, such as survivor's guilt or guilt feelings related to a situation in which one was in no way responsible for what occurred?<sup>17</sup> Patricia Greenspan discusses this point, envisaging a situation where one is involved in an unavoidable car accident in which a child is killed. Imagine that even the causal responsibility is limited in this case, for example that another car hit your car, causing your car to hit a child. According to Greenspan, the very fact that you need to assure yourself that you are not guilty will allow guilt feelings to surface. Any morally sensible person, she insists, would in her mind go over and over the facts of the case, focusing on the memory of the event, trying to ascertain that this result could not have been prevented. Greenspan stresses that the point is not that these thoughts should settle into a full-blown judgement of guilt but that emotional guilt properly precedes adequate evidence for such a judgement. In a line of thinking related to Williams' explanation of *moral luck*, however, we might even understand the personal connection here to be sufficient for appropriate guilt without full-fledged responsibility.<sup>18</sup> In that particular case, one's guilt feelings would not refer to one's responsibility for this accident, but they might still communicate something about the way one values one's own general responsibility in traffic and the value one places upon the life of a child. Emotions can thus be seen to contain information about value.

The fact that one experiences an emotion might then communicate valuable information to others. This information might be communicated intentionally by deliberate expression of the emotion, or unintentionally, unwittingly and even embarrassingly. Is the information that emotions reveal reliable, or can it be 'faked'? At this point, I need to clearly distinguish between the experience of an emotion and the expression of an emotion. The expression of emotions might be 'fake' in many ways. First of all, one does not actually have to experience an emotion to express it, of course, many theatre actors are very good at expressing emotions without experiencing them. Even the well-known theatrical trick of thinking about your lost pet when the scene calls for grief (being stood up at the altar) leads to a 'fake' expression in this sense, for even if grief is genuinely experienced, the emotion does not take the relevant facts as its object (being stood up) but is about something else entirely. And even if an emotion is real, genuinely experienced and about the relevant facts, the deliberate expression of it might still take away from its sincerity.<sup>19</sup> It is clear that the expression of emotions can be sincere and insincere (in various ways), but this is not the case for the information that is present in the emotion itself (being genuine and about the relevant facts). My claim here merely concerns these genuinely experienced emotions. When these

16 For further discussion see Justin D'Arms and Daniel Jacobson, 'The Moralistic Fallacy: On the "Appropriateness" of Emotions,' *Philosophy and Phenomenological Research* 61(1) (2000): 65-90.

17 I will discuss the elements of the emotion of guilt in further detail below.

18 Bernard Williams, 'Moral Luck,' in idem, *Moral luck: Philosophical Papers*, 1973-1980 (New York: Cambridge University Press, 1981), 20-39.

19 See Greenspan's argument about deliberate acting out of grief as defeating its purpose: Patricia Greenspan, *Emotions & Reasons* (New York: Routledge, 1988), 170-2.

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emotions occur, they do contain and convey information about value. In the following, I will get back to the issue of sincerity in connection with the expression of guilt feelings, the apology. But first I want to discuss the particular value of the emotion of guilt in the *offender of a crime*.

#### 4 The value of guilt feelings

So how are these arguments about the cognitive element of emotion and revealing value relevant to the offender in criminal justice? Of course one possible emotional response to having committed a crime, in fact the holy grail of many alternative justice conferences, is for the offender to feel guilty about having committed a wrong. But how should we understand the essence and the value of guilt feelings, particularly in this context?

I would argue that the cognitive element of the emotion of guilt is defined by a wrong (that is, an awareness that a wrong has been committed) and a personal responsibility for that wrong. Greenspan adds, however, that an emotion provoked by a wrong plus responsibility might just fall short of full-fledged guilt and consist of some kind of self-directed sorrow, unless we add an element of selfanger.<sup>20</sup> She uses a third-person thought experiment derived from Jonathan Edwards to explain how guilt feelings come about:

‘when a man’s conscience disapproves of his treatment of his neighbour, in the first place he is conscious, that if he were in his neighbour’s stead, he should resent such treatment from a sense of justice, or from a sense of uniformity and equality between treatment and resentment, and punishment (...) And then in the next place, he perceives that he is therefore not consistent with himself, in doing what he himself should resent in that case, and hence disapproves it, as being naturally averse to opposition himself.’<sup>21</sup>

The person experiencing guilt is by Greenspan (and Edwards) thus assumed to be ‘at odds with himself.’ I think that the analysis of guilt as being at odds with one’s own values is correct. This constitutes a fundamental difference between guilt and shame, as shame does not divide the self against itself in the way that guilt does.<sup>22</sup> Following Nussbaum, I understand *shame* as being about a *weakness of the self*, with the emotion responding to the exposing of that weakness.<sup>23</sup> The exposed weakness could be related to the committing of a wrong, of course, and such instances of shame are commonly referred to as *moral shame*.<sup>24</sup> There is,

20 Patricia Greenspan, *Practical Guilt* (Oxford: Oxford University Press, 1995), 128-30.

21 Greenspan, *Practical Guilt*, 128.

22 Greenspan, *Practical Guilt*, 134.

23 Martha Nussbaum, *Hiding from Humanity* (Princeton: Princeton University Press, 2004), 173, 207; see also John Rawls, ‘The Sense of Justice,’ *The Philosophical Review* 72(3) (1963): 281-305, esp. 295 and Jeffrie G. Murphy, ‘Shame Creeps through Guilt and Feels like Retribution,’ *Law and Philosophy* 18(4) (1999): 327-44.

24 Greenspan, *Practical Guilt*, 126.

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however, no conceptual difference between moral shame and shame proper. Whether the degradation reflects a moral wrong or not, the final self-judgment of the agent is the same: ‘that he is a lesser person than he should be, for an in some way better person would not find himself in a position where he can be seen as he is or may be seen.’<sup>25</sup> The object of shame is then primary the *weakness of the self*, the wrongful act merely the means of exposure, whereas guilt takes a (responsibility for a) wrongful act as its intentional object.<sup>26</sup>

Guilt then, is a response to a wrong. If one acts against one’s own values or moral rules, then it makes sense that one would conclude that one has committed a wrong.<sup>27</sup> Importantly, the wrongdoer who actually and sincerely feels guilty thereby does not identify with the (lack of) values implied by the wrong. The act of the wrong therefore has a limited reflection on the (moral) character of the wrongdoer who feels guilty. The act would have reflected more substantially on the wrongdoer’s character if he did not feel guilty about it, but it is precisely the emotion of guilt that distances the wrongdoer from the wrong.<sup>28</sup>

This point about identification is important. Jean Hampton explains the committing of a wrongful act by an offender as asserting a false moral claim:

‘by victimising me, the wrongdoer has been declared with respect to me, acting as a superior who is permitted to use me for his own purposes. A false moral claim has been made. Morality has been denied.’<sup>29</sup>

The ‘false moral claim’ in a wrong would in any case consist of the claim that the wrongdoer is justified in his behaviour. The emotion of guilt however expresses the opposite: it reveals that the values of the wrongdoer to the extent that the wrongdoer agrees that the act was *wrong*. The wrongdoer who feels guilty thereby shows that he does not subscribe to the moral falsehood that was expressed by the wrongful act; he does not identify with the values that were expressed by the wrong. Instead, as Greenspan notes, a guilty self identifies with its judges.<sup>30</sup> This point about identification again illustrates a fundamental difference between guilt and shame. Shame is associated with the exposure of a (personal) weakness.<sup>31</sup> The view that the ashamed person takes of himself is therefore entirely different from the guilty person’s: a person who experiences shame sees the object of his shame as a part of him, which fits only too well with the person that he really is. In other words, he *identifies* with the object of the shame, he knows

25 Gabriele Taylor, *Pride, Shame and Guilt: Emotions of Self-Assessment* (Oxford: Clarendon Press, 1985), 76, although I do not agree with Taylor that any shame can be classified as a moral emotion.

26 Cf. Nussbaum, *Hiding from Humanity*, 184.

27 Greenspan, *Practical Guilt*, 120.

28 See also Taylor, *Pride, Shame and Guilt*, 92.

29 Jeffrie Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988), 125.

30 Greenspan, *Practical Guilt*, 135.

31 See Nussbaum, *Hiding from Humanity*, 173-84 and Taylor, *Pride, Shame and Guilt*, 52-57.

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that the object of the shame is a true reflection of his character but it is an aspect of his character which he views negatively. He agrees that this is a weakness of the self and he does not want to identify with this, but he does and he knows it. This weakness of the self is now exposed, giving him cause to hide it. A person who experiences guilt however has acted against his own values, he does not identify with the object of the guilt and does not regard it as a true reflection of his values.<sup>32</sup> When a cause for guilt is exposed therefore, I would argue that the wrongdoer has reason for a very different response. Instead of hiding his guilt feelings, he has reasons to assert them, publicize them<sup>33</sup> as the emergence of guilt feelings shows that the committing of the wrong does not adequately reflects the wrongdoer's character. It is relevant to note that the wrongful act itself, of course, still does reflect on the wrongdoer's person: he is the person who did that, he committed that wrong and in that sense the wrong is a part of him. The point is that sincere guilt feelings serve to *distance* oneself from that wrong, not erase it entirely.

Now what does that mean? It means that when a wrongdoer feels genuinely guilty, then that teaches us an important thing. It means that he does consider his act in some way wrongful, and that he feels in some way responsible for this wrong. In criminal law, this information is of course valuable to the offender (wrongdoer) himself, to any possible victims and to society at large.

Now one might say: what if an offender's guilt feelings are erroneous in the sense of the car accident described above? Imagine that while the offender committed the wrong and he does feel guilty about it, he does not feel responsible (because of a mental defect?) for committing the act. He might feel merely personally connected to it in the same way the driver, without any responsibility for the accident, was still personally connected to the death of a child. While this personal connection might result in appropriate guilt feelings, any conclusions concerning (moral) responsibility based on these guilt feelings would be unfounded. A large part of the understanding and explanation of such a particular situation will belong to the realm of psychology, but I would still think that even in the case of an erroneous guilt feeling there is valuable information being communicated, for example, the explanatory value of the offender's apparent understanding of the wrongfulness of the act. The importance of sincere guilt feelings in criminal law I would therefore argue to be the capacity to reveal information about the offender's values and normative position.

32 Taylor, *Pride, Shame and Guilt*, 92. See also Christopher Bennett, *The Apology Ritual: A Philosophical Theory of Punishment* (Cambridge: Cambridge University Press, 2008), 116 and Goffman (1971) quoted in J. Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989), 74: 'An apology is a gesture through which an individual splits himself in two parts, the part that is guilty of the offence and the part that disassociates itself from the delict and affirms a belief in the offended rule.'

33 There is empirical evidence to this effect as well, see, e.g., Andrew Howell, Jessica Turowski, and Karen Buro, 'Guilt, Empathy, and Apology,' *Personality and Individual Differences* 53(7) (2012): 917-22.

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## 5 Apologies in the courtroom

Considering this value of sincere guilt feelings, it comes as no surprise that criminal justice theories commonly attach meaning to the utterance of an apology, the common expression of guilt feelings, by the offender in criminal procedure. From a deontological perspective, a sincere apology would imply a greater respect for moral law than is suggested by the offence.<sup>34</sup> Apologies are also relevant to the more utilitarian concern of recidivism<sup>35</sup> and are commonly claimed to be important for the healing of victims.<sup>36</sup> It makes sense therefore to try to elicit these expressions. An even stronger position on the apology in criminal procedure is however represented by Duff and Bennett's ritual apology argument, in which an apology is *required*. This mandatory expression of apology is claimed to be of value even if it is insincere.<sup>37</sup>

'in intimate relationships, apologies have reconciliatory value only if they are sincere, in less intimate contexts (such as dealings with our fellow citizens) there is more room for purely formal apologies whose sincerity is not an issue. (...) as for the charge that to require someone to apologize is already to deny him the respect due to him as an autonomous citizen of a liberal polity, we must remember that he is not forced (how could he be?) to mean what he thus says. Instead, he is taking part in a public ritual, which has other dimensions of meaning than that of apology [i.e. repentance and reform] and whose apologetic dimension has a formality that is intended and well-known to leave the question of sincerity open.'<sup>38</sup>

The idea here is that an offender can be forced to offer an expression of apology as part of criminal procedure, whether or not he is sincere in this expression. Even if the offender does not experience the actual emotion, guilt, Duff claims that the ritual apology offered still has reconciliatory value. Bennett, in a further

- 34 Immanuel Kant, *Kant's Critique of Practical Reason and Other Works on the Theory of Ethics*, trans. Thomas Kingsmill Abbott, 4th rev. ed. (London: Kongmans, Green and Co., 1889). [Online] available from <http://oll.libertyfund.org/titles/360>.
- 35 Examples of studies linking apology to lower recidivism rates are Allison Morris and Gabrielle Maxwell, 'Restorative Justice in New Zealand: Family Group Conferences as a Case Study,' *Western Criminology Review* 1(1) (1998): 1-17 and June P. Tangney, Jeffrey Stewig, and Andres G. Martinez, 'Two Faces of Shame: The Roles of Shame and Guilt in Predicting Recidivism,' *Psychological Science* 25(3) (2014): 799-805. However, see also Stephanos Bibas and Richard Bierschbach, 'Integrating Remorse and Apology,' *Yale Law Journal* 114(85) (2004): 85-148, who argue that an apology in court does not warrant any presumptions about recidivism.
- 36 Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (London: Routledge, 2013), 18-19, but see also Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: UBC Press, 2004) for a more critical assessment of the restorative justice dynamic between victim and offender.
- 37 See Anthony Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001), 106-12; Bibas and Bierschbach, 'Integrating Remorse and Apology'; and Christopher Bennett, 'Taking the Sincerity out of Saying Sorry,' *Journal of Applied Philosophy* 23 (2006): 127-43. doi:10.1111/j.1468-5930.2006.00331.x.
- 38 Duff, *Punishment, Communication, and Community*, 110.

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development of the argument, claims that the apologetic ritual produces the good of *censure* and that it provides *formal reconciliation*.<sup>39</sup> The ritual apology argument is sophisticated and appealing, and for the purposes of this paper it is important to address it in more depth. Major aspects of this argument include the claim that (criminal) law should properly aim for formal reconciliation (Bennett) or moral reconciliation (Duff) and the claim that an insincere apology still somehow has value. As this paper is mainly concerned with the sincerity of emotions, the following discussion will mainly focus on the latter claim.

There is clearly a value in censure, in a public rejection of the offence as a wrongful act, but the criminal process itself and the verdict would already supply an element of censure. The specific added value of the ritual apology must lie elsewhere, and this value is found in the idea of formal or moral reconciliation. Bennett explains that the main difference between his account and the theory supplied by Duff is that while Duff aims for genuine repentance (moral reconciliation),<sup>40</sup> Bennett's theory 'unequivocally eschews moral reconciliation as the aim of penal policy (though it welcomes such reconciliation if it comes about as part of the process).'<sup>41</sup> In other words, while Duff is aiming for moral reconciliation (in Duff's terms: persuading the offender of the values of the community), Bennett himself holds that aiming for sincere repentance is not the 'business' of the state and that formal reconciliation is all the state can legitimately pursue. This discussion mainly lies outside the scope of this paper, but it supplies the background for the apology ritual, which is supposed to be instrumental in providing this reconciliation.

The ritual apology consists of certain necessary steps or elements. In Duff's proposal, these might include the actual utterance of an apology, but would most importantly involve reparation and community sentences.<sup>42</sup> In Bennett's proposal the ritual apology consist of the amends that 'the offender ought to be motivated to undertake if [he] were appropriately sorry'<sup>43</sup> (Bennett specifically excludes a public 'show of remorse').<sup>44</sup> If the offender performs all the necessary steps of the apology ritual, so the argument goes, he should be considered to be formally reconciled with the community. To both authors, however, it is of crucial importance to conceive of this ritual as that of an apology; as evidenced by phrases such as 'what matters is that the wrongdoer apologizes' (Duff<sup>45</sup>) and 'Using the symbolism of apology rather than merely blaming allows the state to say something about what the appropriate response to condemnation is' (Bennet<sup>46</sup>). The question remains why a (possibly insincere) ritual apology should be taken to

39 Bennett, 'Taking the Sincerity out of Saying Sorry.' See also Bibas and Bierschbach. 'Integrating Remorse and Apology,' who argue for the apology for similar reasons.

40 Duff, *Punishment, Communication, and Community*, 80-82, 107-8.

41 Bennett, 'Taking the Sincerity out of Saying Sorry,' 141.

42 Duff, *Punishment, Communication, and Community*, 106-112.

43 Bennett, *Apology Ritual*, 146.

44 Bennett, *Apology Ritual*, 148.

45 Duff, *Punishment, Communication, and Community*, 110.

46 Bennett, *Apology Ritual*, 174.

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justifiably have such consequences. My argument here is that the justifications for ascribing such value to the ritual apology still refer back to the *sincere* emotion of guilt.<sup>47</sup> Unlike Duff and Bennett claim, I aim to show that sincerity still plays a major part in the justification and meaning of the apology ritual.

How is it that the apology ritual still depends on the sincere emotion of guilt? I have explained above how Duff and Bennet differ in their aim for moral versus formal reconciliation respectively. I would argue that the meaning of the genuine emotional response of guilt underlies both accounts, but I will start with the argument provided by Bennett as this is the more challenging and the more developed of the two. Bennett claims to draw on intuitive ideas of blame and apology, and to use them as *symbols*.<sup>48</sup> However, I think (and will explain below) that when a theory is based upon the symbolic importance of the apology, the meaning of this symbol is, at least in part, derived from what that symbol is a symbol of: actual sincere apology including sincere feelings of guilt.<sup>49</sup> While I will admit that it is possible to participate in a ritual without fully engaging emotionally, the meaning of the ritual does depend in part on these emotions. Why should this be so?

Bennett explains the notion of ritual using the example of *prayer*. I think that this example is very informative as to why the value of the apology ritual is in fact dependent on the genuine thing, so I will discuss Bennett's example. Bennett argues that in the case of a requirement to participate in a ritual of prayer, the actual requirement consists of a sequence of actions, for example kneeling and addressing certain words to one's God. Bennett explains that emotional engagement or actual feeling is not required, but that the form of the ritual does express the appropriate attitude that a person should have in prayer. Kneeling, for example, expresses that one should acknowledge the greatness of one's God. Bennett's claim here is that the ritual is prescriptive in the sense that the appropriate attitude is conveyed through the form of the ritual, and that the participant will perform the ritual of prayer better if he does adopt the appropriate attitude, if he is actually sincere in his emotions towards his God. But the requirement to participate in the ritual is met simply by performing the required sequence of actions, regardless of whether the participant is actually sincere, or whether he is merely performing these actions because he is required to do so.<sup>50</sup>

According to Bennett, the offender having completed the apologetic ritual must now be regarded as having the same civic standing as his fellow citizens. Even though these fellow citizens may still be at odds with him morally, it is not their place to continue to condemn him. Bennett points out that there is a difference

47 Duff mainly refers to remorse of repentance, for the purposes of this paper these terms can be considered interchangeable.

48 Bennett, *Apology Ritual*, 171.

49 See also Raz' explanation of symbolic importance in Joseph Raz, 'Respecting People,' in idem, *Value, Respect, and Attachment* (Cambridge: Cambridge University Press, 2001), 172-74. This symbolic importance is not unconnected to the meaning that the object which is being used as a symbol has in society.

50 Bennett, 'Taking the Sincerity out of Saying Sorry,' 132-33 and 140.

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between a formal reconciliation with the offender as a fellow citizen, and the moral reconciliation with the offender as a moral agent. While the last might not be achieved, the offender is restored in his civic or legal status.<sup>51</sup> According to Bennett, the apologetic ritual thus constitutes a ‘performative’ act in law, which changes one’s status merely through the performance of certain actions. But why employ the symbolism of the apology for this performative act? In answering this question, Bennett cannot avoid having to refer back to the ‘original’ that the ritual apology is a symbol of:

‘using the symbolism of apology (...) allows the state to say something about what the appropriate response to condemnation is. (...) He ought to react by feeling the sort of guilt or remorse that would find a satisfying expression in undertaking the penance that he has been set. (...) this account suggests that instead we draw on the symbolism of apology to express condemnation. Because it recommends making the offender act as she would were she seriously sorry for her offence, we can call this theory of punishment the Apology Ritual.’<sup>52</sup>

These remarks by Bennett clearly show that even though Bennett claims that he has separated the apology from the sincere emotion, the symbol that he argues the ritual apology to be is still connected to what the apology originally represents: a sincere emotion of guilt. I would also argue that this is actually no different in the example of the ritual of prayer that Bennett employed. For while all that some external authority could require of the ritual of prayer is that the person praying goes through the motions, it is part of the understanding of prayer that one actually engages in the ritual with the appropriate attitude, and to a believer that means that he actually addresses his God. The ritual is supposed to help him to engage in this appropriate attitude, the folding of hands for example and the closing of the eyes assist him in focusing his attention on his God.<sup>53</sup> Also, if he did simply go through the motions, without actually thinking of his God, without actually addressing the entity that he considers to be the higher being, the enterprise could be considered quite meaningless and even cynical.<sup>54</sup> The meaning of the ritual of prayer, at least in part, is based on the appropriate attitude: addressing one’s God. The meaning of the apology ritual, I would argue, is similarly connected to actual, sincere guilt feelings. Employing the symbolism of

51 Bennett, ‘Taking the Sincerity out of Saying Sorry,’ 136.

52 Bennett, *Apology Ritual*, 146.

53 This understanding of the religious ritual might be up for debate; some people might say you can only participate meaningfully in the ritual when you are already in the right attitude from the start. I think that a ritual is a process that can allow one to develop the appropriate attitude by going through the motions, for example by assuming the correct body posture. This second interpretation of the ritual leaves more room for our present purposes, because it allows for the possibility that an insincerely expressed apology has some kind of value.

54 See Acorn, *Compulsory Compassion* and P.H. Robinson, “The Virtues of Restorative Processes: The Vices of “Restorative Justice,”” *Utah Law Review* (2003): 375-388 for similar criticism on a cynical attitude in the offender within restorative justice.

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the apology includes drawing on the meaning of sincere guilt feelings. If it is not the business of the state to aim for moral reconciliation or repentance but the aim here is simply to communicate censure, as Bennett claims,<sup>55</sup> then I would argue that the symbolism of the apology is not a fitting one. The meaning of the apology depends on certain elements (sincere guilt) that this ritual does not, and does not even aim to, fulfil.

This, however, leaves open the possibility of a ritual apology which does aim for sincere guilt feelings or repentance. This is Duff's argument:

'What began as a punishment inflicted on him in order to induce repentance becomes a punishment (a fully fledged penance) that he accepts or wills for himself as an expression of that penance. This is the proper aim of punishment as penance.'<sup>56</sup>

What then makes this (Duff's) ritual apology different from the 'traditional' apology, I would argue, is that in the latter case the apology is considered to be meaningless if the person who apologizes does so insincerely. The ritual apology allows for the possibility that one enters it insincerely, but, by going through the ritual, is stimulated to experience sincere emotions, whether one actually achieves them or not. The ritual apology can therefore be performed by both a sincere and an insincere offender. The value that Duff's ritual, enforced apology would add to the criminal justice process, is then that this ritual aims to persuade the offender of the wrongness of the offence, which Duff also sees as the proper aim of punishment.<sup>57</sup> Once he is so persuaded, the offender who entered the ritual insincerely, is now performing it with sincerity. While Duff admits that not every offender will be open to this persuasion, he insists that 'the aim internal to censure is that of persuading the wrongdoer to recognize and repent his wrongdoing'.<sup>58</sup> The next question is then whether the enforced ritual apology does in fact recommend a sincere action, repentance, to the offender.

## 6 Recommending guilt feelings by requiring apologies

Would a mandatory participation in an apology ritual be an appropriate way to recommend guilt feelings? I would argue that it is not, for several reasons which I will now explain. Firstly, I would point out that to be forced to publicly express a moral opinion regardless of whether or not it is your own, would primarily be humiliating.<sup>59</sup> Duff argues that the offender is still treated with the proper respect for his autonomy because he is not required to mean what he says.<sup>60</sup> I

55 Bennett, *Apology Ritual*, 146.

56 Duff, *Punishment, Communication, and Community*, 111.

57 Duff, *Punishment, Communication, and Community*, 82.

58 Duff, *Punishment, Communication, and Community*, 81-82.

59 Nussbaum, *Hiding from humanity*, 204.

60 Duff, *Punishment, Communication, and Community*, 110.

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would argue however that putting an offender in a position where he is forced to make a moral statement *whether or not* he believes this statement to be true shows a clear disregard for his moral opinions, even if they are virtuous. I therefore do not think that the argument that an offender is not forced to mean what he says protects the ritual apology from the criticism of being humiliating. And if this ritual is humiliating, then feelings of humiliation might well ‘crowd out’ any possible reflection on the object of guilt. Humiliation (and shame) can be particularly urgent because, as I explained above, they focus on the *self* (rather than on an act, as guilt does)<sup>61</sup> and because the object of the humiliation is taking place here and now (where the object of the guilt feelings is in the past).<sup>62</sup>

A second issue is what precisely we are recommending by employing the apology ritual. Following Duff, I will distinguish several types of offender.<sup>63</sup> The defiant offender I understand to be the kind of offender who does not feel guilty, and who would neither upon reflection be inclined to do so. This offender is simply met with a demand to publicly lie about his moral convictions. Why would that recommend a sincere action to him? This would rather seem to recommend a cynical ‘ticking the boxes’ exercise. A second type of offender is the persuadable offender who currently does not, but who might upon reflection be inclined to feel guilty. This type of offender represents a more complicated issue. I have explained above that emotions can reveal value to oneself by focusing attention on a certain subset of facts and values, highlighting them in one’s mind, and that emotions in turn can be elicited by focusing on the relevant facts and values. It is not unimaginable that a persuadable offender might be under the influence of ‘jammers’ such as self-deception or weakness of the will, interfering with his capacity to recognize his wrongful act as wrong.<sup>64</sup> An explanation of the facts of the case and his own involvement might then bring the persuadable offender to focus on the relevant subset of emotions and experience genuine guilt feelings, which might in turn persuade him to face up to the fact that he already knows that he committed a wrong. Such a personal process of reflection is, however, necessarily uncomfortable and possibly even painful. The persuadable offender is therefore presented with a choice between entering such a possibly painful process of reflection, or to refrain from doing so and opting to simply express the apology insincerely. The ritual apology does not seem to offer many reasons to choose to suffer guilt feelings over simply expressing an empty apology and avoiding this painful reflection. It is not clear why the ritual apology should be understood as recommending the former over the latter.

61 Nussbaum, *Hiding from humanity*, 184.

62 Acorn, *Compulsory Compassion*, 156-58 also comments on the dominance of this present humiliation of the offender as the focus of restorative proceedings, over the offender’s past wrongful acts.

63 Duff, *Punishment, Communication, and Community*, 115-25.

64 Joseph Raz, ‘When We Are Ourselves: The Active and the Passive,’ in *Engaging Reason: On the Theory of Value and Action*, ed. Joseph Raz (Oxford: Oxford University Press, 1999), 5-21.

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A third type of offender, following Duff, would be the already repentant offender. I would argue that this offender actually stands to (partly) lose an important opportunity in the ritual apology, and that is the opportunity to communicate his sincere guilt feelings. For it is obvious that if the offender is required to apologize, the victim and society at large might then have very good reason to regard any apology expressed by the offender as insincere, since they cannot properly distinguish between the two. This means that the truly repentant offender has been left with fewer means of expressing his genuine guilt feelings, since all apologetic expression will be regarded as insincere, ‘devaluing the general currency of repentance and remorse.<sup>65</sup> If the offender is actually and truly remorseful and apologetic, he then has lost an important way of communicating this emotion to the victim and society. In terms of the communicative value of guilt feelings, this denies the repentant offender an important opportunity to publicly distance himself from the false moral claim that was suggested by the offence. He cannot explain and reject this wrongdoing as not accurately reflecting his identity. The victim and society, for whom the offender’s sincere guilt feelings carry valuable information, are in turn denied the opportunity to learn about the offender’s normative position and values. Instead of recommending a sincere action, I would argue that the apology ritual in fact recommends ‘ticking the boxes’ and that it takes away an important opportunity to clearly communicate genuine, sincere guilt feelings.

## 7 Conclusion

Emotions reveal value, and sincere guilt feelings clearly have important communicative value. Sincere guilt feelings serve to express and clarify a wrongdoer’s normative position; distancing him from the false moral message that was implicit in the committing of the wrongful act. Guilt feelings are therefore informative to victims of wrongs and the community as a whole, and even to wrongdoers themselves as a clear confrontation with their own values and their role in flouting them. For this reason, and for the possible impact on re-offending and healing properties to the victim, sincere expressions of guilt feelings should and do concern criminal justice. We cannot force offenders to be sincere in their apologetic expressions, but we can design criminal justice processes with sincerity in mind. Part of such a design would be an attempt to refrain from pre-empting an offender’s moral growth and to allow him the means for communicating sincere guilt feelings, should he have them.

A sincere apology is a good thing. Offenders sometimes want to apologize, and if they do then they clearly should. However, a forced expression of apology in

65 Jeffrie G. Murphy ‘Well Excuse Me! – Remorse, Apology and Criminal Sentencing,’ *Arizona State Law Journal Symposium* 38(2) (2006): 14. Murphy refers to offering a reward (more lenient sentence) for apologizing, which Duff specifically excludes (*Duff, Punishment, Communication, and Community*, 120). I would hold, however, that the same dynamics apply because the sincere expression is being devalued to be on a par with the insincere one.

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terms of an apology ritual seems to devalue the sincere expression and to take away an important opportunity for repentant offenders to communicate their sincerity. In light of the importance of sincerity I would therefore argue against mandatory expressions of apology such as the ritual apology.