

# EMOTIONS IN COURT

Should the criminal justice process be concerned with  
the offender's inner feelings?

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## **ABSTRACT**

This doctoral thesis aims to provide an answer to the question of why the criminal law should be concerned with the emotional response of the offender. Emotions have important instrumental aptness, such as the capacity to reveal a person's values to himself. Emotional obligations can exist within friendship, and even between strangers when the basic duty of respect has been breached. Emotions therefore have important roles to play in connection to wrongful acts between fellow citizens.

The emotions that are the most relevant to the committing of a wrong are guilt and shame. The thought content of guilt is responsibility for a wrong, while the thought content of shame focuses on a weakness of the self. In response to a wrong, guilt feelings distance the wrongdoer from the moral falsehood that was implicit in the offence, restoring relations with society. Shame might have similar beneficial effects, but it might also tie the wrongdoer closer to a personal weakness (which is only indirectly related to the wrong) and might therefore weaken the relationship with himself and society.

Preventing undesirable behavior is an aim of criminal law. Good criminal law should aim to persuade offenders to endorse the legal rule that was flouted by the offence. The law is not a suitable basis for citizen's emotional obligations, but emotions are particularly capable of allowing an offender to properly recognise certain reasons for obeying the law, such as moral reasons and reasons of respect for law. Guilt feelings in a setting of victim-offender mediation are very promising in this respect, while shame and humiliation run the risk of distancing the offender from his regard of himself as a moral person and society at large.

## ACKNOWLEDGEMENTS

There is an interesting contradiction inherent in the acknowledgements, which has been pointed out by a very distinguished scholar: while acknowledgements are generally the last content that the author will write, it is often the first content that a reader might read. (If you did not skip to this bit but instead read my introduction / conclusion first, well done. You belong in academia.) While writing these words, I am at the end of this journey, and looking forward to embarking on the next. It has by no means been an easy one, but I am ever thankful for the opportunity that I have been offered in being accepted to do doctoral research at the University of Oxford, and the many opportunities and experiences that come along the way.

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I am also aware of certain social conventions, especially within the University of Oxford, about 'making it to the list'. All I can say to that is: well done Molly Saunders-Scott, Emma Foster, Shu Ting Lee, Salvador Luque Martinez, Geri della

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The research before you has taken a long time to come into being, but I am very happy to be able to say that I am proud of this book. It has offered me a chance to develop my thoughts but also to make some important points about a topic which has enjoyed my particular interest for many years now: the proper aims of the criminal law, and in particular the engagement of the offender. I hope you, reader, will enjoy reading my thoughts.

Margreet Luth

*Rotterdam, August 2014*

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## Cases and statutes

### CASES

- *R. v Hobstaff* [1993] 14 Cr. App. R. (S.) 605 213
  - *R. v Perks* [2001] 1 Cr. App. R. (S.) 19 213
  - *U.S. v. Gementera* [9<sup>th</sup> Cir. 2004] 379 F. 3d. 596 **Error!**
- Bookmark not defined.**
- *HIRST V THE UNITED KINGDOM (NO 2)* [2005] ECHR 681 242

### STATUTES

- Art. 28.1 Wetboek van Strafvordering (Code of criminal process) (NL) 211
  - Art. 302 Wetboek van Strafvordering (Code of criminal process) (NL) 213
  - Kamerstuk 27632/3 19/03/2001 (NL) vi, 213
- Memorie van toelichting (Explanatory memorandum)*
- Art. 3 European Convention on Human Rights (ECHR) 241

## Introduction

In recent decades, the thinking about the position of various participants in the criminal legal process has changed. In the seventies, abolitionism argued to 'return the conflict to the directly involved parties' – understood as being the offender and, particularly, the victim.<sup>1</sup> More recently, the victim has indeed been awarded a more substantial position in the criminal legal process in many countries, of which the clearest example is the right to make a victim statement of impact.<sup>2</sup> Furthermore, restorative justice and victim offender mediation are becoming more prominent as alternatives to the traditional criminal legal process.<sup>3</sup> My previous research on the position of the victim in criminal law (Amsterdam, 2005) and restorative justice (Brussels, 2006) has led me to realise that a crucial element in (at least this kind of) thinking about the criminal law is the aim of eliciting *sincere feelings* (of guilt, mostly, but also of shame) from *the offender*.

The idea of eliciting sincere feelings from a citizen however immediately leads to certain questions such as why the state, and the criminal law in particular, should be concerned with this citizen's *inner feelings*. And if emotions are affective

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<sup>1</sup>Nils Christie. 'Conflicts as Property' (1977) 17 Br J Criminol 1-15

<sup>2</sup>In April 2012, the greatest political party in the Netherlands issued a proposal in which the victim statement of impact is extended to specifically include the victim's views on the appropriate measure of the sentence, Ard van der Steur: 'Laat slachtoffers in rechtszaal vrijuit spreken' <<http://www.vvd.nl/actueel/1774/laat-slachtoffers-in-rechtszaal-vrijuit-spreken>> accessed 17/04/2012. When the victim's statement of impact was introduced in the Dutch criminal legal system however, the victim's views on this matter were specifically excluded from the statement (as stated in the explanatory memorandum relating to the statute proposal, Kamerstuk 27632/3). Whatever one's views are on whether or not the victim deserves such a standing in the criminal legal process, this example shows that the position of the victim in criminal law is still in motion.

<sup>3</sup>... or as an integrated part thereof, see R. A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001).

reactions outside of our control, how could one ever be judged on the basis of one's emotions? Such questions require a more detailed discussion of the nature of emotions. My research into the nature of emotions however has led me to conclude that the emotions are not only relevant to the type of criminal legal thinking that is trying to increase the engagement of the offender (and/or the victim) with the criminal legal process, but to the proper functioning of traditional criminal legal process as well.

This research aims to provide an answer to the question of why and to what extent the feelings of the offender are relevant to the criminal justice process. In order to explain how emotions could be so relevant, this research will start with the nature of emotions, and how emotions are relevant to our judgements and actions. My discussion of the nature of emotions has drawn important insights from the works of Robert Solomon and Martha Nussbaum, even though my account of the elements of the emotions includes not only a cognitive but also an affective element. In discussing the value of emotions, Christopher Peacocke's claim that emotions can reveal moral truth is of vital importance, and Harry Frankfurt's work on *care* combined with Michael Stocker's insights, especially on friendship, explain the importance of an act out of an emotion. However, the relationship between strangers is conducted in a different narrative, which might not require emotional engagement. Surprisingly, Kant's *Critique of Practical Reason* will be shown to allow for an explanation of why and how emotional obligations might exist between persons, even between strangers.

This research will then focus on the particular emotions of guilt and shame in response to the committing of a wrong, and the possibility of emotional obligations

on the part of the wrongdoer. In this part of the research, the writings by Martha Nussbaum, Patricia Greenspan and Gabriele Taylor on shame and guilt will prove invaluable, and will reveal fundamental differences between these two emotions. Finally, this thesis will answer the question of how and why guilt and shame are relevant to the criminal law. This particular research has benefited greatly from the works of Anthony Duff and Joseph Raz. The discussion will be placed in an explanation of the proper aims of the good criminal law, which will be shown to include persuasion of the offender. It will be argued that the persuasive capabilities of emotions in the criminal justice process are such that criminal legal procedure should concern itself with the feelings of the offender, in particular with feelings of guilt and shame. A final discussion of relevant criminal legal practices and their effects on the emotions of the offender further explains and strengthens that claim.

## I. What is an emotion?

Before I can discuss how any emotions of the offender might be relevant to the criminal justice process, we first need a more detailed account of the nature of emotion. Throughout the ages, a lot of philosophical thought has been dedicated to this topic, for example by Aristotle and Spinoza. Aristotle's *Nicomachean Ethics* focuses on the golden mean, the virtue that is the middle ground between two opposite vices. Emotion (or passion) itself, he explains, and I agree, is not a vice nor a virtue in itself, for we are not praised or criticized for our emotions. Anger, for example, is the emotion, and the corresponding virtue is good temper: getting angry at the right person in the right circumstances.<sup>4</sup> Immanuel Kant on the other hand is well-known for arguing that emotions are merely 'inclinations' that distract one from one's moral duty.<sup>5</sup>

But what are the constitutive elements of an emotion? Should we see an emotion merely as an affective state, or as a cognitive process? I will argue that the emotion clearly has a cognitive element to it. In fact, after I have pursued that line of argument it might seem that feeling is not an essential element to emotions at all! I will however insist that emotions are made up of both a cognitive and an affective element, which are both distinct and necessary. My discussion of the constitutive

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<sup>4</sup>Aristotle, *The Nicomachean Ethics* (Oxford University Press, Oxford 2009), 72-4.

<sup>5</sup>See for example Immanuel Kant, 'Book I, Chapter III. Of the Motives of Pure Practical Reason' in Thomas Kingsmill Abbott (tr), *Kritik der praktischen Vernunft (The Critique of Practical Reason)* (1788).

elements of emotion will be greatly influenced by Robert Solomon, a surprise perhaps for those who are familiar with his work because Solomon famously insists that an emotion is a judgement and a judgement alone. I will show however that Solomon has left open the possibility of an affective element in emotion at different points in his argument. Other philosophers whose insights I have found very helpful in understanding the cognitive element of the emotions are Martha Nussbaum and Jerome Neu.

## 1. Marking out the territory

To start, I want to briefly mark out the territory here, with a discussion about the range of emotions and a few remarks about the object and cause.

### **Attitude, emotion, and emotional episode**

At this point I want to clarify the range of the emotions, for I want it to be clear what is exactly meant when in the remainder of this thesis it is said that a person feels ... (guilty, ashamed, and so on). Emotions will vary greatly in longevity and intensity, making them even more difficult to define. Furthermore, one need not always be conscious of the emotion, and the affect need not be present at all times.<sup>6</sup> In the case of an enduring emotion such as enduring anger one need not always even experience the affects of the emotion. The statement 'A feels E' can in this sense have

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<sup>6</sup>Peter Goldie, *The Emotions, A Philosophical Exploration* (Clarendon Press, Oxford 2000), 63-6, cf. Patricia S. Greenspan, *Emotions & Reasons* (Routledge, New York 1988), 26-7.

three meanings relating to the affect<sup>7</sup> of E:

1. A is in a state of E but is not affected by E at this moment
2. A is affected by E but is not reflectively aware of E
3. A is affected by E and is reflectively aware of E

It is clear from this statement that I allow for the possibility of subconscious emotions, a point which will be discussed later in this chapter. This explanation does however allow us to roughly distinguish emotions from notions such as character trait, mood and attitude on the one hand and emotional episode on the other. I do not mean to claim that any of these notions fit neatly in the three categories above, but they do provide us with a general idea.

I argue that character trait and attitude should be distinguished from emotion by the degree of affect that is experienced, ranging between 1 and 2. On the other hand, when we are reflectively aware of an emotion, this clearly indicates an emotional episode, but we need not be aware of the emotion to experience it in an emotional episode. The distinction between emotion and emotional episode thus lies somewhere between 2 and 3. This means that I do assume that an emotion can be present without conscious experience of the emotion at that particular time. 'Being jealous' can in this sense thus refer to 'being the jealous type' (character trait or attitude), it can mean that one is actually jealous in a relationship (emotion) and it can mean that one is currently feeling the pangs of jealousy (emotional episode).<sup>8</sup>

Without an occasional emotional episode, one cannot be said to have a certain

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<sup>7</sup>There exists, as I have stated above, some disagreement about the question of a separate and necessary affective element in the emotion. However, the fact that an emotion can *affect* the person who is experiencing the emotion I hold to be self-evident. The term *affect* should here be taken in that stance.

<sup>8</sup>Cf. Peter Goldie, *The Emotions, A Philosophical Exploration* (Clarendon Press, Oxford 2000), 13-4.

emotion, and without ever having a certain emotion one cannot be said to have a certain attitude.<sup>9</sup>

### **Object and cause**

I also need to make some remarks about the object and the cause of an emotion. A typical fact about emotions is that they have an object, they are '*about something*'.<sup>10</sup> Mere feelings can be void of any clear direction, but an emotion is aimed at an intentional object, for example *the fact that John stole my car*<sup>11</sup>. 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.

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Emotions also have a *cause*, which can be distinct from their object.<sup>13</sup> For example, drinking too much coffee can be the cause of the anger that is directed at the student who has failed to write her essay. Now of course the student's failure to produce the essay may be a cause in itself, making it a joint cause with the coffee overdose. However, if similar occurrences in the past did not produce this type of emotion that statement becomes less likely, and we can assume that the coffee was indeed the cause. It does not follow however, that the anger was not *real* because the

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<sup>9</sup>Cf. *ibid*, 69.

<sup>10</sup>Robert C. Solomon, *Not Passion's Slave, Emotions and Choice* (Oxford University Press, Oxford 2003), 3 and Martha C. Nussbaum, *Upheavals of thought* (Cambridge University Press, Cambridge 2001), 27.

<sup>11</sup>This example, taken from Solomon, already provides some ready clues about the cognitive element of emotion, which will be discussed in the next section.

<sup>12</sup>Peter Goldie, *The Emotions, A Philosophical Exploration* (Clarendon Press, Oxford 2000), 143 and Robert C. Solomon, *Not Passion's Slave, Emotions and Choice* (Oxford University Press, Oxford 2003), 3.

<sup>13</sup>The connection between emotion and object is a conceptual, not a causal one *ibid*, 6.

cause was different from the object. Solomon makes this point in *Emotions and Choice* (1973). He continues with the assertion that in a case where the cause is different from the object, the emotion will be abandoned if and when that fact is made clear to the person experiencing the emotion, but I do not agree with that last point. An emotion such as anger will be undoubtedly mediated by such an insight, but it might not vanish completely. The difference between Solomon's account and my own is probably due to the fact that I will allow for the possibility that the affect of an emotion is linked to my emotional engagement in the situation. Maybe before I did not care so much, but the coffee overdose has made me care more about whether or not people live up to the agreements they have entered into, such as students handing in their assignments. This issue will be elaborated at a later point, when I discuss the possibility of an affective element to emotion.

Another interesting point with regard to object and cause is made by Gabriele Taylor when she states that the object of emotions of self-assessment (such as pride, shame and guilt) is always the self.<sup>14</sup> The cause in these examples would then be an event which has made one focus on (certain aspects of) the self.

Now that I have laid out some groundwork about the scope and direction of the emotion, I can move on to a discussion about the constitutive elements. So what is it that makes up an emotion?

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<sup>14</sup>Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 1. I have to point out though, that the object of guilt is an act, which puts one *at odds* with one's self. See also *ibid*, 92 and chapter VI: Guilt.

## 2. THE COGNITIVE ELEMENT OF EMOTION

The claim that emotions contain a cognitive element has been paradigmatic in philosophical writings for years, so much so that I was almost inclined to take this claim as self-evident. Conversations with fellow students however have proven that this claim is far from being as self-evident as I once assumed.

The idea that emotions are simply the bodily changes that we undergo is often referred to as the James-Lange theory of emotions. This theory, published in 1884, was already criticized by Cannon in 1927, when he established that inducing the same bodily changes (injecting adrenaline, amongst others) will not produce the corresponding emotion. This demonstration led him to conclude that bodily feeling and emotion are not exactly the same thing.<sup>15</sup> Of course, even Kant's dismissive view of emotions (as desires which distract from reason) clearly implies that emotions are more than mere bodily feelings. But do emotions have a cognitive element?

One 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.<sup>16</sup> The most obvious reason for assigning a cognitive element to emotions however can be found in my remarks about the object of emotions. If emotions are *about* something, if they are a response to a situation or an event, then

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<sup>15</sup>Walter B. Cannon. 'The James-Lange Theory of Emotions: A Critical Examination and an Alternative Theory' (1927) 39(1) Am J Psychol 106-124.

<sup>16</sup>Justin Oakley, *Morality and the emotions* (Routledge, London 1992), 33.

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 utterly dislike the thing and I am well insured).<sup>17</sup> 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 I therefore hold to be necessary for, and essential to, emotions.

### **The nature of the cognitive element of emotions: thought**

Now that I have established the presence of a cognitive element in emotions, I must turn to a more difficult task: unraveling the nature of the cognitive element. Philosophical writings provide three main contenders: *judgement* (Solomon), *belief* (Taylor, Goldie), and *thought* (Neu).

In the example used above, *John stole my car*; we might say that the different emotions that might be caused by this event are the result of different *judgements* about this event. If for example I judge that John has wronged me, my emotional response will be anger, and other judgements might provoke different emotional responses. Solomon insists that the emotion *is* that judgement.<sup>18</sup> The distinction

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<sup>17</sup>Cf. Martha C. Nussbaum, *Upheavals of thought* (Cambridge University Press, Cambridge 2001), 28.

<sup>18</sup>Robert C. Solomon, *Not Passion's Slave, Emotions and Choice* (Oxford University Press, Oxford 2003), 8, italics in original.

between judgement and belief according to Solomon is that belief is too dispositional<sup>19</sup>, and lacks the necessary '*experimental component*'.<sup>20</sup> Solomon's account seems at first rather plausible. Every emotion does include some kind of evaluation, for example that the situation or person is dangerous. Most emotions can be clearly linked to either a positive or a negative evaluation. Also, a reasonable emotion excludes certain contradictory beliefs, for example the belief that not John but Anna stole my car. These contradictory beliefs would not allow me to make the same judgement.<sup>21</sup> A judgement is understood not as a single conviction but rather as a system of judgement. This system of judgement must necessarily lead to the corresponding emotion: Solomon insists that one cannot make all the judgements in a system of judgement and not have the emotion.<sup>22</sup>

Taylor argues for a distinction between two kinds of *belief* tied to emotion. The first is *identificatory belief*, which is, according to Taylor, what distinguishes emotions from each other. The second notion, *explanatory belief*, acts in two ways. It aims at explaining the identificatory belief itself ('the snake is poisonous and therefore dangerous, therefore I am afraid') but it can also make the emotion *intelligible* ('this is snake is not dangerous, but I suffered a snake bite as a child and that explains my emotional response'). What is interesting about Taylor's account is that it allows some room for something less than conscious judgement by stating that explanatory beliefs do not require the holder to be fully rational, only human and

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<sup>19</sup>ibid, 182.

<sup>20</sup>ibid, 112.

<sup>21</sup>ibid, 9, see also Christopher Peacocke, *The Realm of Reason* (Oxford University Press, New York 2004), 256.

<sup>22</sup>Robert C. Solomon, *Not Passion's Slave, Emotions and Choice* (Oxford University Press, Oxford 2003), 21.

natural in his feelings (a much less neat and precise notion, she admits).<sup>23</sup>

The difference between *judgement* and *belief* in this context is not immediately clear to me. If we are however to accept Solomon's distinction that emotions are the more propositional of the two, then I would be inclined to opt for *belief*. It seems to me that there will be quite a large range of judgements, beliefs, thoughts, *et cetera* involved in an emotion, and the concept of *judgement* seems a little too specific. But this choice might be irrelevant when we consider that the most relevant aspect of both judgement and belief is they are *actually held* at the time. Both exclude the possibility of an emotion without the corresponding judgement or without the corresponding belief.<sup>24</sup> Should an emotion without the corresponding judgement or belief be possible in a non-pathological way, appropriate or plausible even, then that would pose a problem for understanding the cognitive element of emotion as a form of judgement or belief.

I hold that it is possible to reasonably and appropriately have an emotion without the corresponding judgement or belief. There are two examples I want to discuss with regard to this claim. The first one is provided by Patricia Greenspan in her book *Practical Guilt* (1995) and envisages 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,

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<sup>23</sup>Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 1-14.

<sup>24</sup>Martha C. Nussbaum, *Upheavals of thought* (Cambridge University Press, Cambridge 2001), 28.

focusing on the memory of the event, trying to ascertain that this result could not have been foreseen. 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.<sup>25</sup> Now if the emotion precedes the judgement, how can the judgement be an essential element to it?

Now one might argue that Greenspan here simply uses a more developed notion of *judgement* and *belief*, and that this example will fit neatly in Solomon's theory as long as we grant him a more loose-fitting notion of judgement. To be sure, this example clearly assumes that the emotion will be adapted once the possibility for making a sound judgement has presented itself. That then brings us to a well-used example that I myself have referred to previously in this thesis, the example of fear of a snake. Following Goldie, I will use Darwin's description of an event in the zoo. Darwin was looking at an adder behind glass, standing very closely, reminding himself that the snake could not harm him. However, when the snake attacked, Darwin immediately recoiled.<sup>26</sup> In this case, the relevant belief (that there was no real danger) did not prevent the emotion from surfacing. Is the emotion therefore merely pathological, or irrational? I think that there is more to this example than irrationality. Goldie argues that the cognitive impenetrability of responses like this might be the 'evolutionary price' which is paid for speed of response. As has been shown by the above example, the emotion can even take place *in spite of* prior thought of the

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<sup>25</sup>Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 173, see also Patricia S. Greenspan, *Emotions & Reasons* (Routledge, New York 1988) and Martha C. Nussbaum, *Upheavals of thought* (Cambridge University Press, Cambridge 2001), 45.

<sup>26</sup>Quoted in Peter Goldie, *The Emotions, A Philosophical Exploration* (Clarendon Press, Oxford 2000), 110. This effect is labelled by Goldie as *cognitive impenetrability*, explaining that 'someone's emotion or emotional experience is cognitively penetrable only if it can be affected by his relevant beliefs.' *ibid*, 76.

contrary belief.<sup>27</sup> John Gardner explains in a similar example that such an emotion is reasonable in general, even though it is suboptimal in this particular case.<sup>28</sup> I would argue that although Darwin never really *believed* that the snake was going to pose any real threat to him, he was certainly *entertaining the thought* of being threatened by the snake at the time.<sup>29</sup> Jerome Neu in his excellent *A Tear is An Emotional Thing* (2000) states that '... we need not have patently false beliefs in order to be moved by fiction. We need only let ourselves go'.<sup>30</sup> Neu, following Spinoza's *Ethica*<sup>31</sup>, claims it is the *thought*, not the judgement or the belief that is essential to emotion. A similar example (that Neu refers to) is *fear of flying*, which may be real and persistent, even though we are fully aware of and even subscribe to the relevant contradictory judgements. Actual judgement or belief is not necessary for an emotion to reasonably occur; we need only to entertain the relevant thought.<sup>32</sup> On the basis of these arguments I propose the element of thought as the most suitable contender for the cognitive element in emotions.<sup>33</sup>

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<sup>27</sup>ibid, 110-1.

<sup>28</sup>John Gardner. 'The Logic of Excuses and the Rationality of Emotions' (2008), 8-11. See also Greenspan on *adaptiveness*, Patricia S. Greenspan, *Emotions & Reasons* (Routledge, New York 1988), 91.

<sup>29</sup>Cf. Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 157 and Martha C. Nussbaum, *Upheavals of thought* (Cambridge University Press, Cambridge 2001), 65 on *imagining the object*.

<sup>30</sup>Jerome Neu, *A Tear Is an Intellectual Thing* (Oxford University Press, New York 2000), 29-32.

<sup>31</sup>Baruch Spinoza, *Ethica* (1675).

<sup>32</sup>Foundations for this claim can also be found in *Rhetorica* where Aristotle claims that it is sufficient is to have the relevant '*phantasia*' (thought or mental image) and that belief is not required (quoted in Michael Stocker, *Valuing emotions* (Cambridge University Press, Cambridge 1996)), 38). Ronald de Sousa's remark that '*not all cognition is belief, perception is also a form of cognition*' provides a further possible basis, Ronald De Sousa, *The Rationality of Emotion* (MIT Press, Cambridge, Massachusetts 1987), 62). See also Justin D'Arms and Daniel Jacobson, 'The Moralistic Fallacy: On the 'Appropriateness' of Emotions' (2000) 61(1) *Philosophy and Phenomenological Research* 65-90, 67 and Peter Goldie, *The Emotions, A Philosophical Exploration* (Clarendon Press, Oxford 2000), 45.

<sup>33</sup>Compare also Peacocke's remarks on representational content Christopher Peacocke, *The Realm of Reason* (Oxford University Press, New York 2004), 256.

One concluding remark that I would like to just briefly state here, and which I will follow up at a later point: in the case of emotions, thought works both ways; an emotion might be brought on by focusing one's thoughts, but an emotion itself also focuses one's thoughts on a particular subset of facts of the situation.<sup>34</sup>

### **Subconscious emotions**

A possible counterargument to the notion of a cognitive element to emotion might be the existence of subconscious emotions. In the case of an subconscious emotion one experiences the affect of the emotion without actively entertaining the relevant thought. Grief and anger seem possible examples of emotions that might affect one subconsciously. Does this mean that thought is not a necessary element to emotion after all?

I would argue that emotions can be subconscious precisely because of the fact that thoughts can be. In order for the affect to occur, the thought content must be present even though we might not be aware of the thought at this particular moment in time. Nussbaum proposes that in fact a person might have very good reasons for not allowing herself to actively entertain these thoughts. Especially in the case of emotions that are (likely to be) uncomfortable, such as grief, a person may in fact be grieving already, but may not be ready to acknowledge this fact to herself because it is scary to experience the helplessness that comes with knowing someone is forever lost.<sup>35</sup> This person can be said to be experiencing subconscious grief if the person's

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<sup>34</sup>John Gardner. 'The Logic of Excuses and the Rationality of Emotions' (2008), 21.

<sup>35</sup>Martha C. Nussbaum, *Upheavals of thought* (Cambridge University Press, Cambridge 2001), 40 and 72, see also Justin D'Arms and Daniel Jacobson. 'The Moralistic Fallacy: On the 'Appropriateness' of Emotions' (2000) 61(1) *Philosophy and Phenomenological Research* 65-90, 77 for a similar example.

pattern of behaviour seems best explained by the subconscious emotion.<sup>36</sup> Nussbaum explains this phenomenon by stating that the imagining (entertaining the thought) need not be present in any particular *episode* of emotion, allowing for the possibility that we may have emotions that don't form part of our conscious awareness at all, so long as that is not the standard case and the propositional content persists throughout. She refers to this propositional content as *ongoing* or *background judgement* as opposed to *episodic* or *situational judgement*, which arises in the context of some particular situation. The corresponding background emotions need not be non-conscious, just as episodic or situational emotions need not be conscious, but frequently they will be.<sup>37</sup> This explains not only that but also how and why subconscious emotions might occur in relation to subconscious thought content.

### 3. Affect

Now that we have an account of the *cognitive* element of emotions, we can shed more light on the nature of the *affective* element. If emotions are feelings, it might be self-evident that there must be some feeling, some affective element involved. However, some of the philosophers that I have referred to in the last sections do not think that there is any separate affective element to emotions. The account of emotions which attempts to explain emotion purely (or mainly) in cognitive terms is known as the cognitive theory of emotions. Martha Nussbaum for example states that she believes

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<sup>36</sup>Martha C. Nussbaum, *Upheavals of thought* (Cambridge University Press, Cambridge 2001), 40.

<sup>37</sup>*ibid*, 67-71.

that all elements necessary for emotion can be labelled under the cognitive element. According to her, the cognitive element (which she refers to as judgement, but which I interpret as thought) has many of the 'kinetic properties' that one might assign to feeling.<sup>38</sup> Solomon on this topic claims that 'one cannot make all the judgements in a system of judgements and not have the emotion'.<sup>39</sup> However, even in this early work Solomon cannot deny the possibility that emotions essentially involve feelings.<sup>40</sup> And in the later essay *Thoughts and Feelings*, Solomon actually has had to come back from the notion that the only necessary element for emotions is a (system of) judgement. I will clarify that shortly.

The issue is a complex one, and I want to tackle it with the help of two examples. The first is an example of a *fading* emotion (grief) and the second one employs a *dispassionate* emotion (anger). Why are these especially relevant? If an emotion can *fade*, while the thought content remains intact, that might provide us with an important clue about the necessity of affect. Yet if on the other hand an emotion can be *dispassionate*, if it is possible to have an emotion without actually feeling it, then this would imply that an affective element might not be necessary.

### **A fading emotion**

Let us start with the first example, of *fading grief*. Like I stated above, the fact that emotion can fade might prove that an element of affect is necessary for emotions. In a case of *enduring* grief, it is obvious that the emotion is not felt in the same intensity at every moment, and even that the intensity will usually diminish after time.

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<sup>38</sup>ibid, 57-60.

<sup>39</sup>Robert C. Solomon, *Not Passion's Slave, Emotions and Choice* (Oxford University Press, Oxford 2003), 21.

<sup>40</sup>ibid, 5.

Does this prove the necessity of an affective element in emotions? In the very touching and insightful story that Nussbaum tells about the emotional processes that accompanied the death of her mother, she explains how and why the feelings of grief *faded* after a certain amount of time. She notes that her expectancies changed, for example that after a certain time she stopped thinking about calling her mother after a hard day. Also, the sights and situations that were in her mind linked to her mother, and that therefore would make the thought of her mother pop into her mind, gradually became linked to other people and new situations. Nussbaum thus relates the fading of grief primarily to the fact that one's thoughts about the object of the emotion themselves change. She claims that this is not due to an element of affect, but to the fact that one 'reweaves the fabric of one's life after a loss'.<sup>41</sup> Note how well my notion of *entertaining a thought* fits into Nussbaum's story (and might actually be seen as foundation for Nussbaum's claim): we might understand grief in such a way that as long as one is not actively entertaining the thought of the loss, we do not feel it so much, and when we do entertain the thought at a later stage the content of the thought itself might have been changed, due to our 'reweaving the fabric of our life'. I find Nussbaum's story and explanation a very plausible one, and I therefore find I have to agree with this conclusion: the fact that an emotion may fade can be sufficiently explained in terms of *thought* and does not provide any foundation for the necessity of the affective element of emotion.

### **Dispassionate emotion**

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<sup>41</sup>Martha C. Nussbaum, *Upheavals of thought* (Cambridge University Press, Cambridge 2001) 80-5, compare also her remarks about *changes in imagination*, *ibid*, 4.

The second case then, of *dispassionate* emotions. Like I stated above, if it is possible to have an emotion without feeling it, that might imply that there is no necessary affective element to emotion. Solomon is unclear on this topic. Although Solomon first notes that it is certainly possible to have an emotion without feeling anything<sup>42</sup>, he later argues that 'emotional judgements are "dispassionate" only in pathological circumstances'.<sup>43</sup> I will use an example of dispassionate anger to shed light on this matter.

Solomon (like Nussbaum) envisages such a strong link between the thought content and the affect of emotions, that the first cannot occur without the latter being present as well. Affect is therefore seen not as a separate element, but as part of the thought content. Now imagine a situation in which you are angry about something, say that John has wronged you. I would argue that even if all the necessary thought content is present, you might actually not feel angry at this point, perhaps because you are in fact grieving over a lost parent or simply because you are playing with your children. In line with my previous remarks about thought, one might assert that this situation can be explained in terms of *entertaining a thought* and say that the thought of the wrong is obviously not in your mind right now. I would contend however that the notion of entertaining a thought cannot provide a sufficient answer to this question, because even if the thought were to come to mind most vividly, for example because John happens to attend the funeral of your lost one, it would still be possible that you simply do not care enough at that point to actually *feel* angry. Yet if asked, you might very well respond that yes, you are in fact angry with John. I grant

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<sup>42</sup>Robert C. Solomon, *Not Passion's Slave, Emotions and Choice* (Oxford University Press, Oxford 2003), 5.

<sup>43</sup>*ibid*, 190.

that this scenario is a possible one, and I even agree that in such a scenario the emotion of anger should be deemed present, even without the affect. So have I just disproven my own argument, by proving that affect is not a necessary element of emotion? I have not; yet I have shown that affect need not occur when the relevant thought content is entertained, and that affect therefore must in some way be *separate* and *independent* from thought. Having the judgement without the affect is therefore not necessarily pathological, as Solomon states.

### **Care**

Now that I have proven that affect is a separate element in the emotions, I will explain why I also think that it is a necessary one. I grant that it is possible to have an emotion without feeling it. However, a claim that one has been really angry for weeks without *ever* having felt angry is surely implausible.<sup>44</sup> One must sometimes feel it. As I stated above<sup>45</sup>, there must be *episodes of affectivity* for us to speak of a genuine emotion. Solomon in his later writings also conceded to the conclusion that (pure) cognitive theory had in fact up to that point neglected feelings in emotions, yet he maintained that a cognitive element should be so interpreted that it captures the affective element within itself. He refers to these feelings as *judgements of the body*.<sup>46</sup> Apart from the fact that I find the notion of 'judgements of the body' very puzzling indeed, I argue that the example of dispassionate anger as shown above has clearly proven that affect cannot be explained in cognitive terms alone. It has been made

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<sup>44</sup>See also *ibid*, 5. Solomon states he does not know whether it makes sense so say one can have an emotion without *ever* feeling it. I argue that it does not.

<sup>45</sup> See 4.

<sup>46</sup>Robert C. Solomon, *Not Passion's Slave, Emotions and Choice* (Oxford University Press, Oxford 2003), 189-91.

clear that even though a thought is unchanged *and* entertained, the affect may not surface. So how to explain this affective element?

Michael Stocker explains that it is (a lack of) *emotional engagement* that causes dispassionate emotions. He states that even in the most straightforward example that Solomon uses, the example that John stole my car, it is still required that I *care* about the fact that John stole my car in order for me to become angry.<sup>47</sup> I might not care about this at all, for any number of reasons. According to Stocker, 'only when feeling-laden does judgement come anywhere near to being an emotion'<sup>48</sup> and '...care is essential for *engaging* the values and actions of [certain] emotions and the emotions themselves'.<sup>49</sup> Now we can make sense of the example of dispassionate anger: even when all the relevant and sufficient thoughts are there, I might not be emotionally engaged with the object of the emotion. To put it simply, maybe I just do not care enough to actually feel angry.

Or is this putting things too simply? Either you care about certain facts (thought content) or you do not; is that all there is to the affective element of the emotion? Surely not. In *The importance of what we care about* (1988), Harry Frankfurt explains that *caring* about something is *investing* in that something. If one cares about something (X), then one will *identify* with X in the sense that if X is getting better or worse, one will get better or worse as well; one has made oneself *vulnerable*. According to Frankfurt, caring is not a spur of the moment thing and one

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<sup>47</sup>Michael Stocker, *Valuing emotions* (Cambridge University Press, Cambridge 1996), 43.

<sup>48</sup>*ibid*, 45, see Peter Goldie, *The Emotions, A Philosophical Exploration* (Clarendon Press, Oxford 2000), 61 for a similar argument.

<sup>49</sup>Michael Stocker, *Valuing emotions* (Cambridge University Press, Cambridge 1996), 254, emphasis in original.

cannot simply decide to care about something.<sup>50</sup> Also, it is possible for people not to care about things that are actually quite important to them, if they do not recognise this importance. But if one cares about X, then X is important to one.<sup>51</sup>

Frankfurt also stresses that 'the fact that what a person cares about is a personal matter does not entail that *anything* goes'.<sup>52</sup> Sometimes it is appropriate to care about something, and sometimes it is not. According to Frankfurt, in order to care appropriately about X, X has to be *important*.<sup>53</sup> Now Frankfurt's understanding of *importance* entails more than some sort of 'independent value'. He explains that there are two distinct ways in which X might be important to one:

1. X might be important to one whether or not one cares about X
2. X might be important to one *because* one cares about X

It would be a serious mistake to think that the importance of an object to someone is not fully genuine unless it is independent of his caring about the object. Many people we care about most would not affect us in important ways if we did not care about them.<sup>54</sup>

It is possible to care about X, and *thereby* infuse X with genuine importance, when X was *not* important before one cared about X. Some things are important because and only because one cares about them, in fact, one is *making* them important

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<sup>50</sup>Harry G. Frankfurt, 'The importance of what we care about' in *The importance of what we care about* (Cambridge University Press, Cambridge 1988) 80-94, 83-4.

<sup>51</sup>*ibid*, 92.

<sup>52</sup>*ibid*, 91.

<sup>53</sup>Note that with this explanation of fitting objects of care, fittingness and aptness become rather conflated. Any importance that might make it *fitting* to care about an object also makes that care generally *apt*.

<sup>54</sup>*ibid*, 92.

by so caring.<sup>55</sup>

To conclude this section, we can draw three conclusions with regard to affect:

1. Affect is a separate element to emotion (separate from thought)<sup>56</sup>.
2. Affect is a necessary element to emotion, even though it need not be present all the time.
3. Affect can be understood as care; emotional engagement with the object of the emotion.

### **Relation between thought and affect**

The relationship between the two elements of *thought* and *affect* is complex and dynamic; they clearly interact with each other. One can entertain a thought which then leads to affect, but affect can also precede (at least conscious) thought. Goldie even at one point argues that normally we are first aware of our emotional response (feeling, affect) and later we try to make our feelings intelligible by incorporating them in the relevant set of thoughts. 'What really comes first is the emotional response

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<sup>55</sup>ibid, 92-3. Frankfurt goes on to say that certain objects are *not* worth caring about, and because care calls for a kind of integrity: 'it is suitable only to care about X when one is *able* to care about it'. ibid, 93-4, my emphasis. However, Frankfurt's notion of care, as it has been explained above, does not allow for a momentary, fleeting or insincere kind of care. Genuineness and sincerity seem to be included in Frankfurt's notion of care already. This is why I cannot but conclude that Frankfurt's criterion for determining the suitability of care is rather circular. It remains an important point however that some things are important because and only because one cares about them, even if I cannot properly determine the difference between unimportant things that *are* suitable objects of care and unimportant things that are *not*.

<sup>56</sup>Oakley and Goldie further insist on an element of *desire*, claiming that without desire certain emotions would lack a necessary element. According to Oakley, the cognition of the snake (cf. *belief*) and being in a state of agitation (cf. *affect*) would not necessarily amount to *fear*, it could also amount to a feeling of excitement experienced for example by a scientist at the first glimpse of a rare species of snake. Justin Oakley, *Morality and the emotions* (Routledge, London 1992), 27-8, en Peter Goldie, *The Emotions, A Philosophical Exploration* (Clarendon Press, Oxford 2000), 36-7. I would however hold that the element of desire (unlike affect) is incorporated within the cognitive element. In Oakley's example, the difference between fear and excitement could be explained by different thought content.

itself – the feeling of fear towards the snake – and not the thought that its bite is poisonous and the thought that poison would harm me.<sup>57</sup> I agree that emotions will sometimes or even often develop along this scenario, but I do think that certain basic thoughts (that this person is your partner, that there exists such a thing as a snake) must already be present for the affect to occur in the first place. I therefore see the two elements *thought* and *affect* as interacting simultaneously.

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<sup>57</sup>Peter Goldie, *The Emotions, A Philosophical Exploration* (Clarendon Press, Oxford 2000), 45.

#### 4. APPROPRIATENESS

Now we understand that emotions, when they occur, operate in a complex dynamic of cognition and affect, the next question focuses on appropriateness. How can it be determined which emotion(s) is (are) warranted, or perhaps we might even say defensible, in a given situation?<sup>58</sup>

First of all, the term 'appropriate' has different meanings. As D'Arms and Jacobson explain, there are in fact two senses of 'appropriate' which are commonly applied to emotions.<sup>59</sup> In the first sense of appropriate, what is meant is whether or not the facts of the case are *fitting* with this particular emotional response; if for example your neighbour has something that you have not and you consider this to be a negative state of affairs, then *envy* might be the emotional response that *fits* these facts. In this first sense, the emotion of envy might then seem to be appropriate, because the situation has the right features. But there is also a second, 'forward-looking' kind of appropriateness, which refers to an emotion which is not so much called for by the features of the case itself as it is *apt* for the subject to experience. *Aptness* is a kind of competency, which might also be *moral*. An example of a situation of aptness might be a response of *anger* when facing a physical attack by a much more powerful opponent. Fear might be the response that is the most fitting in

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<sup>58</sup>In various conversations about this particular topic, the issue of cultural variability often surfaced. The conversation then for example made a reference to Japanese shame culture, and how that would affect my ideas on guilt and shame. Interesting though the topic of cultural variability may be, it is well beyond the scope of this thesis and it is therefore not part of my discussion of appropriateness. Of course, socio-cultural norms do influence our understanding of an *appropriate* emotional response, and I do not wish to deny that. However, as has been stated above, in this thesis I want to restrict to discussion to my own (Western) socio-cultural context.

<sup>59</sup>Justin D'Arms and Daniel Jacobson. 'The Moralistic Fallacy: On the 'Appropriateness' of Emotions' (2000) 61(1) *Philosophy and Phenomenological Research* 65-90, 66.

such a case, but anger might give the subject the motivation and ability to defend himself. An emotional response of anger might in this case be more beneficial. There are therefore two senses of appropriateness at work<sup>60</sup>, one with backward-looking and one with forward-looking characteristics, which I will classify as *fittingness* and *aptness* respectively.<sup>61</sup>

### **Aptness**

First of all, by 'aptness' I mean to refer to a very general beneficial nature: in my view, an emotion is apt when it furthers one's interests or goals; the things that one cares about, or when it has some other effect that would generally be considered morally good. It is therefore a 'forward-looking' criterion and requires a kind of instrumentality.<sup>62</sup>

The distinction between 'fittingness' and 'aptness' has to a great degree been based on the discussion by D'Arms and Jacobson on appropriateness. My notion of aptness however slightly differs from what D'Arms and Jacobson classify as 'the second sense of appropriateness'. It seems that they include the possibility of emotions that are wrong *in principle*, and I do not think any emotion is wrong *per se*. D'Arms and Jacobson give the example of envy, and explain that under the second sense of appropriateness it might be considered inappropriate to feel envy, even when

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<sup>60</sup>See *ibid*, 75, although I do not agree with the idea of a 'moral emotion', as will be explained below.

<sup>61</sup>These terms are derived from See also Patricia S. Greenspan, *Emotions & Reasons* (Routledge, New York 1988), 8 on 'adaptiveness'.

<sup>62</sup>I am indebted to Greenspan's discussion of adaptiveness in this regard. Greenspan distinguishes emotional appropriateness, taken as implying a kind of 'backward-looking' justification - by the subject's 'perspectival situation' from practical 'adaptiveness', which appeals to a kind of 'forward-looking' justification, or justification by consequences - in particular, by the role of emotions as spurs to action. *ibid*, 8. I find the term 'adaptiveness' confusing, however, and instead prefer 'aptness'.

the features of the situation are fitting to an emotion of envy. They explain that one might think that for moral reasons, envy is simply a wrong emotion to have. D'Arms and Jacobson therefore distinguish between 'propriety' (fittingness) and 'correctness', or whether an emotion is 'wrong to feel'. They also provide the example of 'the coward who flees the crucial battle', and state that he 'is afraid, and acts upon or expresses it, when *fear isn't what to feel*... because the pre-eminent importance of the stakes makes it contrary to virtue to behave as admittedly fitting fear urges'.<sup>63</sup>

I do not need think that we should subscribe to the popular idea that some emotions are intrinsically more 'virtuous' than others<sup>64</sup>. As Aristotle noted, emotions (*passions*) are neither virtue nor vice.<sup>65</sup> Clarifying examples of this point have been provided by Hampton and Murphy, writing in dialogue in *Forgiveness and mercy* (1988). Feeling forgiving and feeling merciful would under the 'virtuous emotion' doctrine usually be regarded as intrinsically virtuous. However, we might interpret, as Hampton and Murphy do, a wrong as containing a certain message within it; a message stating that the victim of this wrong somehow *deserved* this hurtful or demeaning treatment. In light of this expressive view of wrongdoing, Murphy argues that forgiveness can actually be a sign of weakness if it means that the contemptuous message expressed by the wrong is too easily put aside.<sup>66</sup> Similarly, Hampton notes that the classically non-virtuous emotion of resentment can be regarded as something

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<sup>63</sup>Justin D'Arms and Daniel Jacobson. 'The Moralistic Fallacy: On the 'Appropriateness' of Emotions' (2000) 61(1) *Philosophy and Phenomenological Research* 65-90, 86, italics not in original.

<sup>64</sup>See for an example Michael S. Moore, 'The moral worth of retribution' in Ferdinand Schoeman (ed), *Responsibility, Character, and the Emotions* (Cambridge University Press, Cambridge 1987) 179-219.

<sup>65</sup>Aristotle, *The Nicomachean Ethics* (Oxford University Press, Oxford 2009), 28-9.

<sup>66</sup>Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press, Cambridge 1988), 34.

positive when it expresses an appropriate notion of self-worth: 'the ability to feel resentment following a wrongdoing depends upon one's having enough sense of one's own worth to believe that the treatment is inappropriate and worthy of protest.'<sup>67</sup> It is clear that the notion that emotions are intrinsically virtuous or non-virtuous has to be rejected.

I therefore do not think that any emotion is bad *in principle*, i.e. regardless of the facts of the case. Envy or resentment can in certain circumstances be quite (fitting and) expedient to have, and even emotions that are commonly regarded as positive or 'good' do not always work in one's favour. But I actually think that D'Arms and Jacobson might agree with me on that point, because in their explanation, the wrongness of the emotion of fear seems to lie in the *behaviour* that results from it, not in the emotion itself, and they also state that 'often it is better not to express or act on an emotion, less frequently it is better not to feel the emotion at all'. When discussing the emotion of envy, they explain that 'someone might (feel that) it is wrong to be envious' but they themselves do not actually seem to subscribe to that opinion. I therefore think that the difference between my notion of 'aptness' and D'Arms' and Jacobson's 'correctness' is actually quite small. But their notion of 'correctness' does include the possibility that an emotion is morally wrong in principle. This is something that I disagree with, which is why I prefer to speak of the 'moral aptness' of an emotion, rather than a 'good emotion'.

It can also be the case that a fitting size of an emotion *lacks aptness*. D'Arms and Jacobson in this context provide the example of a widow with young children,

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<sup>67</sup>ibid, 55, see also Patricia S. Greenspan, *Emotions & Reasons* (Routledge, New York 1988), 151 and T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press, Cambridge, Massachusetts 2008), 130 and 147.

who are dependent on her. For the sake of the children, whose development would be impeded by trauma, it might be considered *inappropriate* for the widow to indulge in the fitting amount of sorrow over the loss of her husband. Of course, this does not mean that the death of the husband is somehow less sad, or even that the widow should not feel any sadness at all.<sup>68</sup> But the feeling and the expression of a fitting amount of sadness that is warranted by the features of the case might well conflict with the widow's interests and goals.

Now I would argue that aptness can refer to the *shape* and the *size* of an emotion.<sup>69</sup> A particular kind of emotion can be quite apt to have in particular circumstances, but the example of the grieving widow has shown that it can be *inapt* to be affected by an emotion to a fitting degree. Grief itself would probably be apt in a mourning process, so the shape of the emotion clearly has some aptness. But the circumstances make it *inapt* to be affected by the grief to a degree where other relevant interests (i.e. the children) suffer from it. So while grief itself (shape) in this case might very well be apt, very deep grief (size) is not.

### **Fittingness**

Secondly, following D'Arms and Jacobson, I have explained fittingness as fitting the facts of the case. Similar to aptness, whether an emotion is fitting is not only determined by its shape but also by its size.<sup>70</sup> When the size of an emotion is unfitting, the emotion typically fits the thought content in principle (the emotion has

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<sup>68</sup>Justin D'Arms and Daniel Jacobson. 'The Moralistic Fallacy: On the 'Appropriateness' of Emotions' (2000) 61(1) Philosophy and Phenomenological Research 65-90, 77.

<sup>69</sup>See *ibid*, 73, but D'Arms and Jacobson only apply the dimensions of shape and size to 'the first sense of appropriateness': fittingness.

<sup>70</sup>*ibid*, 77.

'the right shape') but the emotional response is still deemed unfitting because it is an overreaction to this thought content. D'Arms and Jacobson posit that an emotion might be 'too large for the circumstances'. In the case of envy for example, if your possessions are almost as good as your rival's, 'then you would not be warranted in being much pained over such a trifling difference'.<sup>71</sup> Fittingness can therefore refer to the shape of the emotion, whether this sort of emotion fits the features of the case, as well as its size, whether the volume of the emotion fits these features. In terms of thought content and affect, the shape of the emotion is based on the present thought content, while the size of the emotion represents the degree of affect that is present in the emotional response.<sup>72</sup>

This would all appear rather straight-forward. Yet my analysis of the emotions again differs from the analysis of D'Arms and Jacobson, and this has consequences for our respective views on fittingness. D'Arms and Jacobson describe emotions in terms of *evaluative presentations*, but in this thesis I of course understand the emotions in terms of thought content and affect. Note then that according to my understanding of the emotion, the evaluation of the fittingness of the emotion requires further modification.

Imagine that the object of my envy does not in fact possess the quality for which I envy him, that I am mistaken in his situation. D'Arms and Jacobson state that

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<sup>71</sup>ibid, 74.

<sup>72</sup>I have argued above (20) that it is possible to imbue an unimportant object with importance by caring about it, and that it is difficult, if not impossible, to distinguish objects that are suitable from objects that are not suitable for being so imbued. I therefore do not see how one can properly criticise an emotion because the subject should not care about such things *in general*, even if one might properly be criticised for caring about an object *too much*. The very presence of the emotion suggests that the subject *does* care about this object and the fact that the subject cares about it has imbued this object with genuine importance. It is therefore fitting that there should be *some* affect, even if the amount of the affect may be too large.

the emotion of envy would then be unfitting, because it does not 'fit the world'.<sup>73</sup> However, in terms of thought content, as long as I am unaware of the fact that my rival does not possess the envied quality, the (unfounded) emotion of envy might still be regarded as fitting, because the shape of the emotion still fits the thought content.<sup>74</sup> The thought content however is not in correspondence with the actual facts of the case. I would term such an emotion fitting, but *erroneous*.

### **Erroneous thought**

An erroneous emotion is not necessarily inappropriate because it still fits the thought content, even if the thought content does not fit the facts. Now one might argue that even if an erroneous emotion fits, surely it can only be inapt (and therefore inappropriate) to be mistaken about the facts? I however do not think that erroneous emotions necessarily lack aptness either. In the case of erroneous envy, it might easily be conceded that it seems rather counter-productive to envy another for a quality that the other does not, in fact, possess. However, imagine being erroneously happy for someone who, for example, you think has a great new job when in fact she was rejected. You are of course mistaken but this emotion might still be beneficial to you in some way. It might make you happy; it might give you the incentive to finally look for a new job yourself. An erroneous emotion might therefore be both fitting and have some aptness which makes it appropriate.

For why would an erroneous emotion, in which the relevant thought content does not 'fit the world', *necessarily* be inappropriate? As long as it has some aptness,

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<sup>73</sup>ibid, 73.

<sup>74</sup>See also Greenspan on perceptual warrant, Patricia S. Greenspan, *Emotions & Reasons* (Routledge, New York 1988), 83-4.

I fail to see why it should be so. There are even some cases where one is 'better off not knowing', particularly when the facts of the situation will not be improved by one knowing about them and the resulting fitting emotion would be a particularly unpleasant one. The resulting relief or lack of sadness might not fit the actual facts of the case but it might be all the more apt precisely for that reason. An erroneous emotion is risky, though. Since one is, in fact, mistaken about the facts of the case there is always a chance that one's misconceptions might leave one somehow vulnerable. In general, one might be best equipped to deal with reality when one is not mistaken about the facts. I am merely claiming that an erroneous emotion might be perfectly appropriate in certain circumstances, not that any action based upon an erroneous emotion is therefore justified as well. Furthermore, it should be clear that when one is informed about the actual facts, maintaining the emotion would not be fitting (and probably not apt either) and therefore probably inappropriate.<sup>75</sup>

I conclude that there is a difference between an erroneous emotion and an emotion which is based on thought that does correspond to the facts, but the difference does not lie in (in)appropriateness. An erroneous emotion is vulnerable to being exposed as erroneous, and is therefore fragile in a way that a 'factual' emotion is not. We might even classify an erroneous emotion as being indefensible, but as long as the subject is unaware that the thought content which lies at the base of the emotion is in fact erroneous, the emotion need not be inappropriate.

### **Lack of evidence**

Secondly, it can hardly be maintained that it is only possible to experience

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<sup>75</sup>Cf. contradictory belief, above, 8.

appropriate emotions when they are based on the complete facts and absolute truth, when often the absolute truth is not entirely clear and the emotion is typically based on only a relevant subset of the facts.<sup>76</sup> Lack of evidence does not preclude an appropriate emotional response.

On this topic, Greenspan provides the example of being confronted with a 'hard sell' broker, who is insistent and appears to be overeager. This might lead one to be suspicious about entering into business with him (in terms of *thought* content I would say that one entertains the thought that doing business with him might cause one injury). Even without further evidence about the broker's actual reputation, an initial suspicion and discomfort seems to be appropriate. Further enquiry about the broker might prove him to be perfectly trustworthy in business dealings, but even if he later turned out to be trustworthy, that does not render the initial suspicion inappropriate.<sup>77</sup> It does signify that one should suspend a definitive *judgement*, since there is not enough evidence to substantiate the related thought content. As before, the emotion itself is quite appropriate, when acting on it might or might not be.

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<sup>76</sup>See also above, 9.

<sup>77</sup>Patricia S. Greenspan, *Emotions & Reasons* (Routledge, New York 1988), 88-91.

### **Appropriateness as both fitness and aptness**

The term appropriate does encompass both the meanings of *fit* and *apt*, since *proper* or the Latin *proprius* relates to 'one's own' or a characteristic (*fittingness*), whereas *appropriation* carries the meaning of making something *suitable* or *competent* for a particular purpose (*aptness*), or to take for one's own use. It seems therefore that the notion of appropriateness does comprise both the forward- and the backward-looking meaning, but in the remainder of this thesis I will clarify, if relevant, whether I am referring to the fitness or the aptness of the emotion. I have also explained that any given situation can give rise to a large range of appropriate emotional responses. Now I grant that within that range, some emotions will have higher degrees of fittingness and aptness, and might therefore be regarded as *more* appropriate (even if other emotions are not thereby *inappropriate*). Another way of making this point about the size of emotions is by explaining that emotions should be *proportionate* to thought content (reasons) for them<sup>78</sup>. Both the shape and the size of the emotion may be linked to the (perceived) importance of relevant thought content. To argue that one emotion has a better shape than another is a claim about the importance of certain thought content over certain other thought content, and likewise, to criticize an emotion's proportionality is to make a claim about the importance of the thought content that lies at the base of this emotion. In other words, these are *value-claims*. Emotions are clearly linked to value; for example, the affective element of the emotion is inextricably bound to whatever one cares about, whatever one values. But emotions also shape characters and relationships, and allow us to

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<sup>78</sup>Compare Joseph Raz, 'When We Are Ourselves: The Active and the Passive' in Joseph Raz (ed), *Engaging Reason: On the Theory of Value and Action* (Oxford University Press, Oxford 1999) 5-21, 15.

recognise value. These topics will be discussed in the next chapter.

## II. THE VALUE OF EMOTIONS

It has become clear in the last chapter that evaluations of emotions contain value-claims, not only about the value of emotions but also about the importance of the relevant facts. A degree of appropriateness can be understood in terms of the importance of the relevant facts, related thought content, and the aptness of the emotion itself. Determining the appropriateness of any emotion, or determining which range of emotions might be appropriate in certain circumstances, therefore entails a value-claim.

The notion that emotions themselves have a value might seem self-explanatory, for 'positive' emotions tend to make a person happy, which is certainly a value of sorts. 'Negative' emotions such as grief, guilt or shame however usually only make a person feel bad. How can such 'negative' emotions still have any positive value? I should note at this point that the distinction between 'positive' and 'negative' emotions does not refer to intrinsically non-virtuous emotions. As I explained in the last chapter, there is no such thing as a virtuous or vicious emotion *as a matter of principle*.<sup>79</sup> I would argue, however, that emotions do have value in other ways. It is not so difficult to show that emotions have a certain instrumental value, which I have referred to as aptness in my previous discussion on appropriateness. As has been stated above, emotions can focus one's thoughts, for example, or work in a special

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<sup>79</sup>See above, 24.

motivating capacity, distinct from (but working alongside) objective reasoning. Most importantly however, emotions can reveal crucial information to ourselves and others, making them indispensable in interpersonal relationships.

## 1. Emotions provide reasons to act

Greenspan states that the discomfort (element of *affect*) provides a *rational* 'push from behind' in the generation of action from emotion.<sup>80</sup> Imagine that X has insulted you, and that you are angry about it. Greenspan suggests that such a feeling of anger might then be required to maintain a kind of dignity. Any lesser response would imply you are letting yourself 'be walked over'.<sup>81</sup> You therefore conclude that you ought to get back at X:

'to the extent that I am uncomfortable about not yet acting on it, the thought that I ought to get back at X is not something I can simply drop or ignore, in the way that I could drop or ignore an affectless desire or belief, to avoid having to act. ... the threat of continuing discomfort, in short, supplies a self-interested and pressing reason for action from the agent's standpoint.'<sup>82</sup>

Greenspan thus argues that the emotion provides a *discomfort* and thereby a motivation or a reason (not a justification)<sup>83</sup> to act. John Gardner however has a

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<sup>80</sup>Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 154.

<sup>81</sup>Patricia S. Greenspan, *Emotions & Reasons* (Routledge, New York 1988), 159.

<sup>82</sup>*ibid*, 151, cf Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press, Cambridge 1988), 34.

<sup>83</sup>Issues such as justification and appropriateness will have to be discussed at a later point. Here however, I want to restrict this point to the mere claim that emotions provide reasons to act. They might be good reasons, or they might be bad reasons, but they are reasons nonetheless.

slightly different explanation. He points out that our emotions make us especially attentive to a certain subset of the facts, possibly overlooking other equally relevant ones. He stresses that when we then act, we are driven to act *by these facts* rather than by the emotion itself.<sup>84</sup> In terms of the different elements of the emotion, I understand this process as the element of *affect* influencing the element of *thought*.<sup>85</sup>

These two explanations into the reason-providing capacity of the emotions seem quite different, one focusing on the thought content and the other on the affect of the emotion. The respective explanations might however be understood as complementing each other. I will explain this point using the (quite problematic) emotion of grief. This emotion is problematic because it seems that the interrelation between the affective and cognitive element of emotion can create a downwards spiral. The emotion of grief, as Greenspan notes, is 'an extreme form of self-sustaining sorrow', because it does not seem to generate any other action than the expression of the grief. But when one tries to understand the motivating characteristic of emotions mainly in terms of an escape from discomfort, as Greenspan does, this action seems, at first, very self-defeating. The expression of grief only gives rise to a 'wallowing in grief in a way that *increases* discomfort'.<sup>86</sup> So it seems difficult to understand the expression of grief in terms of an *escape* from discomfort, and we might instead understand grief as follows: the thoughts make one sad, which leads one to express one's sadness, which focuses one's thoughts on the sadness and the sad thought content, which makes one even more sad. Understanding grief as an affect which

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<sup>84</sup>John Gardner. 'The Logic of Excuses and the Rationality of Emotions' (2008), 41.

<sup>85</sup>This also means that in order for this process to take place, the element of affect has to be present.

<sup>86</sup>Patricia S. Greenspan, *Emotions & Reasons* (Routledge, New York 1988), 167-8.

*focuses one's thoughts* on the loss therefore does seem to fit with the possible consequence of 'wallowing'.<sup>87</sup>

While I therefore find Gardner's account the more persuasive one, the two need not be incompatible.<sup>88</sup> For it might be that in a case such as grief the possible discomfort of not focusing on the sad facts is even greater than the discomfort caused by grief. Also, there is surely a certain satisfaction, sad as it may be, in the act of unabashedly wallowing in sorrow. So even though in what follows I will understand the reason-providing capacity of emotions mainly in terms of focusing thought, I do think this capacity of emotions might also be understood in terms of an escape from discomfort.

### **Emotions express and determine character**

The interpretation of the motivating characteristic of emotions in terms of focusing thought also sheds light on the question of why it is not always easy to properly distinguish between an act that was motivated by an emotion from an act that was motivated by certain facts of the case. For as we can see now, it might very well be both at the same time: maybe the facts were there, but without the presence of the emotion these particular facts would have not received the amount of attention and priority that was bestowed on them in light of the emotion. An emotion focuses thought on certain aspects of a particular situation and will therefore bring one to

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<sup>87</sup>It has been noted in the previous chapter that the emotion of thoughts work both ways: focusing on certain thoughts can elicit an emotion, but an emotion also focuses the mind on certain thoughts. In the case of grief this can have the very sad effect of a downward spiral.

<sup>88</sup>Greenspan does suggest another possibility, which is that the expression is meant to elicit the emotion now, causing discomfort, in order to prevent later discomfort. I am unconvinced by this explanation, much as Greenspan herself it seems. I would argue such a working process of the emotion is too 'planned out' to be convincing.

evaluate this situation differently than one might have if one were experiencing another emotion, or no emotion in particular. The emotion of fear is a good example of this effect, as fear is well-known to highlight possible sources of danger. Emotions might thus focus attention on certain aspects and influence one's evaluation.

In fact, emotions allow us in this way to discriminate between rationally indifferent alternatives. If my sister borrows my bicycle without asking and then manages to get into a minor car accident, damaging the bicycle but coming away unscathed herself, I have reason both to be angry and to be relieved that she is all right. Which emotion then actually 'grabs hold' of me<sup>89</sup> is an expression of what I care about, and of my character. If I am a very generous person I might not care so much about the fact that she damaged my bike, but if I am a stickler for the rules I might be very angry and focus on the fact that she was never in any danger but she wrongly took and damaged what was mine.<sup>90</sup> The point is that my emotions allow me to express my character, and my character itself is determined by the general tendencies in my emotional responses.

Stocker makes a related claim when he argues that people with correct emotions are typically well placed to make correct evaluations, and that people who have incorrect emotions are typically poorly placed to do so.<sup>91</sup> But this statement by Stocker means no more than that emotions allow one to recognise what was already the better evaluation, independent of emotions. In my view however, the better evaluation is *a function* of one's emotions, one's emotions *make* this the better option

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<sup>89</sup>Michael Stocker. 'Emotional Thoughts' (1987) 24(1) American Philosophical Quarterly 59-69, 62-3.

<sup>90</sup>Joseph Raz, 'When We Are Ourselves: The Active and the Passive' in Joseph Raz (ed), *Engaging Reason: On the Theory of Value and Action* (Oxford University Press, Oxford 1999) 5-21, 6.

<sup>91</sup>Michael Stocker, *Valuing emotions* (Cambridge University Press, Cambridge 1996), 136.

(remember that the options are rationally indifferent). One's emotions respond to what Raz calls 'expressive reasons' because the action that they require expresses one's character.<sup>92</sup> Sometimes an emotional response only makes sense from a certain character, and then the emotional response is the very thing that contributes to that character. Emotions therefore allow us to develop and express our character, and what we care about.

### **Emotion as a reason to act**

When you are angry, you might lash out. You might give two different explanations for your action. You might say: "I was angry, therefore I hit him", or you might explain that you saw him insulting your sister. The first is an emotional example, the latter refers to a reason. One generally has other options though, after an insult. One might also ask for an apology or even walk away. The emotion is what singles this option out from the other options. The emotion is what focused one's attention *on the reasons for this option*, and what made this option the one that was acted upon. Emotions have reasons behind them, and they highlight their reasons in one's mind, allowing for a full focus on that particular subset of the facts. This focus makes other relevant reasons, perhaps inhibitions, fade by comparison. This focus allows one to act. Emotions and evaluative judgements together generate action.

At this point I want to return to the example of Charles Darwin recoiling from a snake in a zoo. Remember the snake was behind glass and posed no real threat whatsoever. The process is the same as above; I would explain Darwin's reaction in

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<sup>92</sup>Joseph Raz, *The Authority of Law, Essays on Law and Morality* (Oxford University Press, Oxford 1979), 255.

terms of certain relevant facts (snakes are dangerous, snake is attacking) taking precedence over others (there is a glass wall between me and the snake). I will grant that such a reaction is closer to a reflex than to a lengthy thought-process, but the point remains the same: the emotion of fear 'lifted' certain facts out from the entire body of relevant facts, and the consequent action was motivated by these priority facts alone.

The role of emotion 'is a special one, however, since emotional evaluations motivate by way of *affect* rather than assent.'<sup>93</sup> This conclusion also explains what makes action out of emotion so '*fundamentally different*'.<sup>94</sup> The emotion makes the inclination to take a certain action harder to resist, by focusing our thoughts on the reasons we have for the action. Any reasons we might have not to act, or to act differently, 'fall from view'.

Emotions might provide incentives, but they do not provide any *justification* for action. When I punish you because you wronged me and I am angry about it, then that means that I have a pressing reason to act on the *judgement* that you wronged me and therefore deserve some kind of consequence. Emotions thus provide *reasons*, not a *justification*, for action. In the example of Darwin, the fact that his action (recoiling) was quite unnecessary serves to illustrate this point.

## 2. Emotions reveal value

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<sup>93</sup>Patricia S. Greenspan, *Emotions & Reasons* (Routledge, New York 1988), 175.

<sup>94</sup>Peter Goldie, *The Emotions, A Philosophical Exploration* (Clarendon Press, Oxford 2000), 40.

Another important feature of emotions is that they can reveal to us certain beliefs or values that we were not consciously aware of at the time. The information might consist of no more than a somewhat vague realisation that 'something important has just happened'<sup>95</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>96</sup> Emotions can thus reveal that something or someone apparently has some kind of importance in one's life, an importance that one was not aware of up until that point in time. This issue seems fairly straightforward in itself, and I am sure that many (if not all) people have personally encountered such an experience.

### **Emotional information**

Emotions can reveal value to ourselves, but also to others. The fact that one experiences a certain emotion might show something about one's values and beliefs<sup>97</sup>, but also about one's character. For instance, we all know examples of cases where (apparently) *sincere*<sup>98</sup> guilt feelings (or the lack thereof) are taken as a reflection of the (moral) character<sup>99</sup> of the wrongdoer, a point which will be taken up in more detail

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<sup>95</sup>Annette Baier, 'Feelings That Matter' in Robert C. Solomon (ed), *Thinking about Feeling* (Oxford University Press, New York 2004) 200, 200.

<sup>96</sup>Michael Stocker, *Valuing emotions* (Cambridge University Press, Cambridge 1996), 64.

<sup>97</sup>*ibid*, 68.

<sup>98</sup>I define a *sincere emotion* as an emotion which is actually experienced by the agent at the moment in question. In most cases, as we have seen, this will imply that both the elements of *thought* and *affect* are present.

<sup>99</sup>This use of the word 'character' refers to a more classically philosophical, moral character sense of the word. In this thesis, I mainly use the word 'character' to refer to a broader concept that one might also refer to as 'personality'. The classical, moral character however is part and parcel of one's more general personality.

later in this thesis. In this sense, emotions are *informative* to yourself and to others.

Of course, it is not necessarily the case that the subset of facts which is highlighted 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>100</sup> For one thing, the emotion might be erroneous, based on a mistake.<sup>101</sup> But 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>102</sup> In other words, the *size* of the emotion might be disproportionate.<sup>103</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>104</sup>

The fact that emotional information can be (and frequently is) misinterpreted, does not change the main point here: emotions do carry this information, and we should

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<sup>100</sup>See for an interesting discussion on this topic Michael S. Moore, 'The moral worth of retribution' in Ferdinand Schoeman (ed), *Responsibility, Character, and the Emotions* (Cambridge University Press, Cambridge 1987) 179-219. Moore does claim that certain emotions, namely the virtuous emotions, point out moral truth. If a moral judgement is based on a virtuous emotion (such as guilt), we can trust that judgement. I have explained above that I reject the distinction between intrinsically virtuous en non-virtuous emotions, and therefore I reject Moore's argument as well.

<sup>101</sup>See above, 28.

<sup>102</sup>Michael Stocker, *Valuing emotions* (Cambridge University Press, Cambridge 1996), 59, emphasis in original.

<sup>103</sup>See above, 26.

<sup>104</sup>Michael Stocker, *Valuing emotions* (Cambridge University Press, Cambridge 1996), 64.

take this emotional information seriously.

### **The politics of emotions**

The fact that you experience an emotion might 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 want 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, theatre actors are very good at it. 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.

I will clarify this point with an example. Take grief. The emotion of grief came up earlier in this chapter, when I described how the focus on the source of the grief can lead to a downward spiral, and that the expression of grief does not (immediately) seem to aid in relieving discomfort. Grief can however be (used as) a social tool, in various ways. As Greenspan explains, the expression of grief can serve to communicate a sense of loss to oneself or to others, and indeed this expression might be considered obligatory 'either for the sake of one's own ideal self-image or as a way

of honouring the dead'.<sup>105</sup> She adds that this social obligation extends beyond mere conventional behaviour at funerals, and might be thought of as something that is owed to the deceased. Notably, Greenspan stresses that to truly fulfil this obligation, the mere *belief* (or *thought*) that one has lost someone important is not enough, *feeling* is what the griever requires of himself. Emotions might be used as a social tool, and the possibilities range from an insincere portrayal of (unfelt) emotions to deliberately putting a sincerely experienced emotional state into action. For similar reasons, but more ominously, Solomon describes emotions as being essentially 'political', adding that 'many emotions are about power, persuasion, manipulation, and intimidation'.<sup>106</sup>

It might however be crucial to the expression of certain emotions that the agent does not consciously employ them. Again, in the example of grief, the aim of honouring the deceased might be frustrated by an expression of grief *for that purpose*, for one might argue that what is owed to the deceased is *sincere* grief, the *affect* of pain at the loss of this person, not merely the expression of such pain. In order to fulfil that obligation, one would perhaps have to be 'blind' to the effects of grief behaviour. According to Greenspan, *deliberate* acting out of grief would then be seen as defeating its purpose.<sup>107</sup> I think this is a very complicated point. I do think that one can sincerely express an emotion both out of sincere feeling and in (full or partial) consciousness of the effect of such an expression, and that this consciousness does not necessarily diminish or nullify the sincerity of the emotion. Happiness, for example, can be expressed sincerely and deliberately, in order to share and possibly

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<sup>105</sup>Patricia S. Greenspan, *Emotions & Reasons* (Routledge, New York 1988), 170.

<sup>106</sup>Robert C. Solomon, *Not Passion's Slave, Emotions and Choice* (Oxford University Press, Oxford 2003), 153.

<sup>107</sup>*ibid*, 172.

accumulate happiness.<sup>108</sup> That does not mean that one is not truly happy. However, there might be cases in which Greenspan is right. For now, I will grant that *to the extent* that an emotion such as grief is expressed *with the deliberate aim* of achieving some kind of social effect, the *sincere expression* of the grief might be diminished.

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). I would therefore like to limit the analysis to these 'real' emotions. When these emotions occur, they do convey information to ourselves and to others and we would do well to pay attention.

### **Changing convictions**

The most interesting possibility when it comes the revealing properties of emotions is mentioned by Peacocke, who states that 'emotions can make us accept a moral truth as true'.<sup>109</sup> He describes the possibility of rejecting a moral truth: '... even though it was inferable from other information we had never, until this point, accepted the moral truth as true'.<sup>110</sup> An emotion could then bring us to accept this moral truth. How would that work? When we first have an emotional response, 'then, in self-interpretation, when we become reflectively aware of this feeling towards the object of the emotion, we also normally seek to make it intelligible by looking for explanations'.<sup>111</sup>

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<sup>108</sup>As is the saying in many languages, including Dutch: *shared happiness is double happiness, shared grief is half the grief*.

<sup>109</sup>Christopher Peacocke, *The Realm of Reason* (Oxford University Press, New York 2004), 263.

<sup>110</sup>*ibid*, 264.

<sup>111</sup>Peter Goldie, *The Emotions, A Philosophical Exploration* (Clarendon Press, Oxford 2000), 45, see also Taylor on identificatory and explanatory beliefs, Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 2-3.

Again, we might say, the emotion brings one to focus on certain facts, trying to find an explanation for the occurrence of this (unexpected) emotion. We might also say that one looks for 'corroborating evidence', much as one would if one were to test the veracity of other perceptual information.<sup>112</sup> One may find none, and stick to one's convictions. One may however also find that under the influence of the emotion one can no longer ignore the facts that had been staring one in the face, and that one is now forced to accept the moral truth as true. It is important to note that this capability of emotions, to change one's convictions, is only possible in the case that one had already been presented with the relevant facts (but had not recognised them as such until this point). The emotion itself does again not justify the change of conviction, but it brings a certain subset of facts to one's particular attention; it is the confrontation with these facts which leads to the acceptance of the moral truth. The possibility that emotions may allow one to accept moral truth will become highly relevant later in this thesis when I argue that emotions such as guilt and shame might lead a wrongdoer to retrospectively recognise the act as wrong.

### 3. Voluntary control

How is it that emotions can be so particularly revealing of one's values and one's character? How can we draw conclusions from emotions? When an emotion occurs, then the person who experiences this emotion is showing emotional engagement with

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<sup>112</sup>Ronald De Sousa, 'Emotions, What I Know, What I'd Like to Think I Know, and What I'd Like to Think' in Robert C. Solomon (ed), *Thinking about Feeling* (Oxford University Press, New York 2004) 61, 75.

a specific set of relevant facts. Guilt for example responds to a *responsibility* for a *wrong*<sup>113</sup>, which means that a person who is feeling guilty shows that he (at least at that point in time) recognises that he was responsible for an act which he (now) recognises as wrong and that he views these facts as important enough to warrant his particular attention. These conclusions, however brief the emotional experience might be, may in that moment be drawn from the occurrence of the emotion of guilt. The fact that such conclusions may be drawn from emotions depends partly on the fact that emotions are to a relevant degree *outside our voluntary control*<sup>114</sup>; these emotions happen to us whether we want them to or not. They speak clearly to us and to others of the thoughts and affects that underlie them. Since we cannot *choose to feel*, we cannot experience these emotions without subscribing to the related thought content and we cannot simply decide to be affected by something if it does not hold any importance to us.

### **We cannot choose to feel**

The extent of this claim requires clarification, however, because I have stated above that emotions might be elicited by focusing on certain facts. Surely that implies a kind of control. Take again the example of Darwin in the zoo<sup>115</sup>. The example shows that Darwin tried to exert control over his own emotional state by concentrating on certain facts and reasons. His attempt failed.<sup>116</sup>

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<sup>113</sup>This classification of guilt will be clarified below in chapter V: Guilt.

<sup>114</sup>Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 113.

<sup>115</sup>See above, 10.

<sup>116</sup>The example of Darwin in the zoo also sheds a different light on a very interesting point that Goldie makes about *cognitive impenetrability*. Goldie claims that an emotion 'is cognitively penetrable only if it can be affected by his relevant beliefs', and that in the case of Darwin, the fear was obviously cognitively impenetrable because the emotional response took place *in spite of* prior

I have mentioned that emotions can possibly be elicited by focusing on certain thoughts, and Darwin's act of reminding himself that he was not in danger probably constituted such an attempt. Now I would interpret Darwin's failure to control his emotional response as follows: while one might choose to focus on certain thoughts, whether or not one is *affected* by certain thoughts is not normally something that one can simply choose<sup>117</sup>. Other information, such as the snake's dangerous qualities, might affect us in particular and this danger might evoke the emotion of fear. The emotion that takes the forefront, in particular the affective element of that emotion, determines which reasons will be highlighted in my mind and in this way contributes to my response. This emotion responds to my character, it responds to who I am and what I care about.<sup>118</sup> One cannot simply choose to care about something<sup>119</sup>, and one cannot simply choose to be convinced by certain facts.<sup>120</sup> Of course the elements of emotion are thought and affect, and they are not the same as being convinced by certain facts. It is clear that we can decide to think about something, and that therefore

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thought. Peter Goldie, *The Emotions, A Philosophical Exploration* (Clarendon Press, Oxford 2000), 76 and 110-11.

I think that Goldie touches upon an important point here, but in light of our conclusions so far we have to opt for a different interpretation. Emotion, as I have shown, has a necessary cognitive element, which would rather exclude the possibility of 'cognitive impenetrability'. I would explain this example in terms of limited voluntary control of affect.

<sup>117</sup>Michael Stocker. 'Emotional Thoughts' (1987) 24(1) *American Philosophical Quarterly* 59-69, 62-3.

<sup>118</sup>In fact, it does more than that. By determining my response the emotions actually further shapes my character, further shapes what kind of person I am.

<sup>119</sup>Harry G. Frankfurt, 'The importance of what we care about' in *The importance of what we care about* (Cambridge University Press, Cambridge 1988) 80-94, 83-5.

<sup>120</sup>The question of whether or not and to what degree one can decide to believe is, of course, a topic of much philosophical discussion which is outside of the scope of my thesis, so I will have to limit myself to the claim that it is not normally possible to simply decide to believe. Grounds for this claim can be found in Neil Levy. 'Doxastic Responsibility' (2007) 155(1) *Synthese* 127-155, 133-4, see also Joseph Raz, 'When We Are Ourselves: The Active and the Passive' in Joseph Raz (ed), *Engaging Reason: On the Theory of Value and Action* (Oxford University Press, Oxford 1999) 5-21 and Bernard Williams, 'Deciding to believe' in *Problems of the self: Philosophical Papers, 1956-1972* (Cambridge University Press, Cambridge 1976), 136.

we are thinking about it. But that does not amount to voluntary control over emotions. For although we can probably tell ourselves anything we like, and imagine (most) anything we like, we cannot thereby decide to be affected by such thoughts, and how.<sup>121</sup> Even if something is 'objectively' very important to you in the sense that it has a huge impact on your life, there might always be circumstances in which you simply cannot seem to care enough to be affected by it.<sup>122</sup> Remember also that even if John stole your car, and you have all the necessary thought content for anger, you might still not *feel* angry (i.e. not be affected) if you for example are grieving about the death of your mother. And who is to say that you should?

We can thus choose to focus on the relevant thought content for anger, but we do not thereby effectively *choose to be angry* because the affective element of the emotion is, by its nature, not open to that kind of choosing. In this sense, deciding to feel is similar to deciding to believe. It (generally) lies beyond one's *control*. The philosophical literature on this topic is vast and I cannot properly do it justice here. The main point however I hope to have clarified sufficiently: an emotion by its nature is not something that we have voluntary control over; we cannot effectively *choose to feel*.

### **Indirect control over emotions**

There is room for some indirect control over emotions however. Greenspan claims that even if emotions cannot directly be produced by will, they are still controllable enough by acts of attention (focusing on the related subset of facts, for

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<sup>121</sup>Joseph Raz, 'When We Are Ourselves: The Active and the Passive' in Joseph Raz (ed), *Engaging Reason: On the Theory of Value and Action* (Oxford University Press, Oxford 1999) 5-21, 13-4.

<sup>122</sup>See my discussion of Frankfurt's ideas about *care*, 17.

example) 'to be suitable objects of practical ought at least in some cases'.<sup>123</sup> The point is that we do have some control over the thought element of our emotions, especially by focusing on particular thought content. It is even more common to alleviate one's emotions, anger or sadness for example, by trying to take the focus away from the related thought content. Particularly in cases of anger, the mere decision to try to lighten the anger might cause the anger to abate.<sup>124</sup> One does have some indirect control over one's emotions therefore, and especially by deliberately focusing thought towards or away from the related thought content one can influence one's emotional responses.

Apart from thought content, one can also have some influence over certain *causes* of the emotions.<sup>125</sup> If you, for example, are more likely to get angry when you have had too much coffee, then you might be considered to have had control over your anger to the extent in which it was caused by the coffee overdose (alcohol of course provides a similar example). To some extent, you may therefore even have some indirect control over the affect of emotions, especially if you willingly put yourself in a situation where you know that a certain thought content will affect you, and you would not normally be so affected. It might furthermore be possible to *cultivate* one's own tendency to be more or less affected by certain thought content.<sup>126</sup>

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<sup>123</sup>Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 141-2. Greenspan does however concede that ordering oneself or someone else to feel guilty might defeat the point, or worse, 'it would seem to undermine the moral significance of the emotion'. More on this point in chapter II Emotions and value.

<sup>124</sup>Joseph Raz, 'When We Are Ourselves: The Active and the Passive' in Joseph Raz (ed), *Engaging Reason: On the Theory of Value and Action* (Oxford University Press, Oxford 1999) 5-21, 14.

<sup>125</sup>See above, 4.

<sup>126</sup>Patricia S. Greenspan, *Emotions & Reasons* (Routledge, New York 1988), 173 and Joseph Raz, 'When We Are Ourselves: The Active and the Passive' in Joseph Raz (ed), *Engaging Reason: On the Theory of Value and Action* (Oxford University Press, Oxford 1999) 5-21, 14, see also Michael Stocker. 'Values and Purposes: The Limits of Teleology and the Ends of Friendship' (1981) 78(12) *The Journal of Philosophy* 747-765 <<http://www.jstor.org/stable/2026245>> on

A person might undertake a long-term project to cultivate his own dispositions towards an emotion, and thereby gain some control over this emotion.<sup>127</sup> It is important to note however that this kind of control is merely indirect, for once you have put yourself into that particular situation, or once you succeeded in cultivating yourself in that particular way, the emotion will respond to the situation or your cultivated disposition and will again not be under your immediate control.

Even though one can in general not choose to feel an emotion, there is, I conclude, some degree of influence that one can exercise in this respect. Such cases are however the exception and they can lead only to an indirect kind of control, because emotions are never under our *immediate control*. My claim therefore remains the same: we cannot choose to feel, and that is why emotions are so particularly revealing of one's actual thoughts, convictions and character.

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habituation, esp 760 and Harry G. Frankfurt, 'The importance of what we care about' in *The importance of what we care about* (Cambridge University Press, Cambridge 1988) 80-94, 85.

<sup>127</sup>Justin D'Arms and Daniel Jacobson. 'The Moralistic Fallacy: On the 'Appropriateness' of Emotions' (2000) 61(1) *Philosophy and Phenomenological Research* 65-90, 76.

### III. EMOTIONS BETWEEN PERSONS

Because emotions provide information on values, thoughts, convictions and character, they are particularly useful in social relationships. In fact, the more meaningful kinds of social relationships such as friendship would not be possible without emotions, in particular without affect. Between strangers, however, there is in principle no obligation of any sort of emotional response towards each other.

#### 1. Friendship

Stocker explains that the emotional element is crucial for the understanding of an act.<sup>128</sup> He quotes Strawson's claim that to a certain extent 'the benefit or injury [of our behaviour] resides mainly or entirely in the manifestation of attitude itself'.<sup>129</sup> This means that the emotion from which an act is done has a significant impact on the value of the act. In an earlier paper, *The Limits of Teleology and the Ends of Friendship* (1981), Stocker explained that in order to properly describe an act out of friendliness, such as visiting your friend in hospital, more than the teleological concerns, or the purpose of the act, are needed. Any teleological understanding of the

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<sup>128</sup>Michael Stocker, *Valuing emotions* (Cambridge University Press, Cambridge 1996), 153.

<sup>129</sup>ibid, 158. Original quote in P. F. Strawson, 'Freedom and Resentment' in Gary Watson (ed), *Free Will* (Oxford University Press, New York 2003) 59, 63.

act (such as 'to cheer him up' for instance) fails to properly capture the essence of an act done out of friendship. The explanation 'to cheer him up' fails, because you could have many other reasons to try and cheer up your friend; you might even have been hired to do so. In order to properly understand such an act, therefore, the teleological concerns need to be complemented with the notion of acting *out of* something, in this case: *friendship*.<sup>130</sup>

But what is this 'friendship'? How can it be understood in terms that are not merely the aggregate of teleological concerns? It seems that acting with concern, kindness and hope for a better outcome is not quite enough, on top of all that, one has to *act out of friendship*. But what does acting out of friendship mean, if not sufficiently understood as an activity that has kind and concerned thoughts behind it?<sup>131</sup> An answer to this question, I believe, lies in Stocker's discussion of 'habituation': 'For in doing and redoing an activity, urged on with praise and blame, with explanations of the point, the person often comes to see and "feel" the point of the activity, and more importantly to value the activity itself.'<sup>132</sup> So one does not start out as proper friends, and one kind act does not make two people friends. Early on in the friendship acts done *for the sake of*<sup>133</sup> the friendship might be more common, but by

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<sup>130</sup>Michael Stocker. 'Values and Purposes: The Limits of Teleology and the Ends of Friendship' (1981) 78 (12) *The Journal of Philosophy* 747-765, 750-3.

<sup>131</sup>Michael Stocker, *Valuing emotions* (Cambridge University Press, Cambridge 1996), 174.

<sup>132</sup>Michael Stocker. 'Values and Purposes: The Limits of Teleology and the Ends of Friendship' (1981) 78(12) *The Journal of Philosophy* 747-765, 760.

<sup>133</sup>Here we touch upon the difference between acting *for the sake of friendship* (teleological) and acting *out of friendship*, or *for the sake of the friend*. It is not uncommon that an agent does something really only because he realises that friendship requires him to do it. However, Stocker stresses that in such a case (and like cases) what is lacking is a suggestion that this agent is 'acting out of, or even with, liking or concern for the other person.' The agent is rather acting out of concern for the relationship. 'And, as should be clear, concern for the friendship is different from concern for the friend.' This is not to say that the two cannot be combined in certain cases, but it is important to see that they are different. *ibid*, 755-8.

doing the friendly acts a 'transfer of evaluative allegiance to the friend' might take place, whereby the friend himself becomes a source of value. At that point, argues Stocker, a 'character' is formed which allows the friendly person to act out of friendship. This means that we can understand friendship in terms of character. Stocker even notes the possibility that friendship cannot be the goal of the friendly act (acting for the sake of friendship), instead, the friendly act is done 'naturally', simply expressing one's character. 'The character of a person who has become friendly has changed.'<sup>134</sup> Similarly, Raz explains that friendship is an *expressive reason* for friendly acts. 'Expressive reasons are so called because the actions they require express the relationship or attitude involved. The fact that the agent regards himself as bound by such reasons is a criterion for his being a friend.'<sup>135</sup> The acts 'naturally' performed from and in line with the character of 'a friend' can involve purposive, teleological acts as well. The point however is that the character of friendship now provides a general focus and a background which constitutes the acts as their proper sort: friendly acts.<sup>136</sup> And this is how friendship can constitute a friendly act, for we understand that this act would not be the same without the background character of friendship, which binds a friend to the expressive reasons of friendship.

It needs to be pointed out that the use of the term 'character' here is different

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<sup>134</sup>ibid, 760.

<sup>135</sup>Joseph Raz, *The Authority of Law, Essays on Law and Morality* (Oxford University Press, Oxford 1979), 255.

<sup>136</sup>Michael Stocker. 'Values and Purposes: The Limits of Teleology and the Ends of Friendship' (1981) 78(12) *The Journal of Philosophy* 747-765, 760. Note that Stocker explains the character structure of friendship in terms of one's possible goals being determined by the friendship, which therefore gives content and direction to one's life. The understanding of friendship as put forward by Stocker shares obvious points of resemblance to Frankfurt's notion of care (see above, 20)

from the sense in which I have used it before, which referred to one's moral character or more generally to one's personality: a moody character, a friendly person, *et cetera*. 'Character', in Stocker's explanation, refers to a role, a quality, a capacity; one might thus understand 'character' almost in a theatrical sense of the term. A character in a play has a specific role to play in the interaction, and is usually fitted out with the characteristics and temperaments that are suited (apt) for that role.<sup>137</sup> So even if one had always been kind and friendly in the classical sense of character, one might not have had the quality of being someone's *friend*. It is that quality which allows one to 'play the part' of a friend, one cannot properly be a friend without having the requisite quality, role, character.

In light of this discussion on habituation and character, I would not only argue that friendship is properly understood in terms of character, but also that Stocker's notion of character shows significant similarities to Frankfurt's notion of *care*: notably, the idea that one identifies with what one cares about and that care implies a more substantial and permanent commitment than a single act. Taking on the role of a friend is such a commitment. In order to avoid confusion I shall refer to this theatrical sense of character as a *role*, but it needs to be understood that this *role* implies certain requisite characteristics, a kind of commitment, and is not something that can simply be 'shaken off' (although it can be weakened over time).

### **What counts for friendship, counts for emotions in general**

I argue that emotions operate in a similar vein as Stocker's understanding of

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<sup>137</sup>The fact that I am referring to the theatre here should not be taken to suggest that a character can be 'taken on' and 'shaken off' in the same sense as an actor performs his role and then steps out of it after the performance. I rather mean to refer to a theatre character from an internal point of view of the narrative of the play, the role that a character has to play within the story. And as the theatre allegory shows, the character will 'work' better in the narrative if he is fitted out with the requisite emotions to help him fulfil his role.

friendship, and that Stocker in fact notes this possibility as well. He explains that in the case of emotions, similarly to friendship, it is impossible to take part, to know what to do, and to know what others are doing, without that emotion.<sup>138</sup> Stocker also argues that emotions cannot be properly understood in terms of their purpose, for the same reasons as friendship cannot; in fact, he notes that emotions and their actions are often importantly lacking in purpose.<sup>139</sup> Furthermore, emotions share with the attitude of friendship the same possibility of what Stocker refers to as 'missing the goal by aiming at it'. He explains that if you act *for the sake of* hatred, for example, you might engage in action that keeps your hatred alive or do something because you feel your hatred requires it. If you act *out of* hate for a another person however, this implies that you care (negatively) about that person: you want to harm him.<sup>140</sup>

Emotions are therefore relevantly similar to the attitude of friendship as used by Stocker. And as was earlier stated about friendship, what makes an emotional act an emotional act is not its purpose but precisely the emotion behind it.<sup>141</sup> This means that emotions (help) constitute acts, and it also explains the difference between an act out of anger and joy: it is precisely the emotion behind it that makes these acts different, even if ostensibly (to an uninformed onlooker) they might look the same.

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<sup>138</sup>Michael Stocker, *Valuing emotions* (Cambridge University Press, Cambridge 1996), 174.

<sup>139</sup>*Purpose* is obviously not the same as what I have earlier referred to as *aptness*. While an emotion might be very apt in certain circumstances, it is not felt *for that purpose*; one does not feel angry *in order to* become aware of one's own (perceived) rights, but a feeling of anger might reveal them.

<sup>140</sup>This point shows that it can be the case that in order for an act out of an emotion to have the intended teleological effect, the emotion itself cannot be the aim, or at least that to the degree that the emotion itself is the aim of an act *out of* that emotion, the act will misfire. See also my discussion on expressions of grief above, 43.

<sup>141</sup>Michael Stocker. 'Values and Purposes: The Limits of Teleology and the Ends of Friendship' (1981) 78(12) *The Journal of Philosophy* 747-765, 758-9.

### **Inter-personal social relationships require emotions**

Meaningful inter-personal social relationships are impossible without emotions. This point is famously explained by Peter Strawson in his essay *Freedom and Resentment*. In this essay, he states that 'being involved in inter-personal relationships as we normally understand them precisely is being exposed to the range of reactive attitudes and feelings that is in question'.<sup>142</sup> Emotions are part of this 'range of reactive attitudes and feelings' that Strawson places so centrally in the social relationship. Furthermore, he argues that we could never do without these 'personal reactive attitudes', since they involve the nature of human commitment. He adds: 'it is useless to ask whether it would not be rational for us to do what it is not in our nature to (be able to) do'.<sup>143</sup> In other words, emotions are essential to inter-personal (or: social) relationships, which are essential to human life. Stocker explains that even though social relationships might exist without the relevant emotions, 'when they do they are defective'.<sup>144</sup> Social relationships are therefore only complete when the relevant emotions are in play, which means that emotions in social relationships act as a constituent.

The relational context then provides an added or even a different meaning to acts. A particular act of criticism, for example, is different and has a different meaning within certain relationships, and might even only be possible within certain (personal)

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<sup>142</sup>P. F. Strawson, 'Freedom and Resentment' in Gary Watson (ed), *Free Will* (Oxford University Press, New York 2003) 59, 68-9.

<sup>143</sup>ibid 74, see for similar arguments Michael Stocker, *Valuing emotions* (Cambridge University Press, Cambridge 1996), 82 and Justin Oakley, *Morality and the emotions* (Routledge, London 1992), 63.

<sup>144</sup>Michael Stocker, *Valuing emotions* (Cambridge University Press, Cambridge 1996), 177.

social relationships.<sup>145</sup> Similarly, an intimate act might constitute something wholly intrusive and inappropriate outside the context of an intimate relationship. The fact that certain acts might not be possible outside of certain relationships means that these acts are, in part, *constituted* by that relationship. And the relationship is, as I have stated, constituted (in part) by the relevant emotions. Emotions thus have a constitutive value to both acts and social inter-personal relationships.<sup>146</sup>

## 2. Emotions between strangers

Emotions thus constitute friendship. Friendship cannot be done without some kind of *affect*. This point is shown by so-called *vicarious* emotions, which means that when one's friend is sad, it is a measure of friendship that one then is also sad oneself. But of course, your relational ties to a friend are very different from your relationship to a *stranger*.

Being a fellow human being is a role<sup>147</sup> as well, one that comes with certain qualities, but as such there is no obligation of *affect*. One does not *care* about strangers in the same way as one cares about friends (or enemies, for that matter); nor does one have reason to. How do emotions feature (if they have a role to play at all) in the relationship between strangers, who are no more to each other than mere fellow human beings?

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<sup>145</sup>ibid, 174.

<sup>146</sup>Emotions therefore have an intrinsic as well as an instrumental value to interpersonal relationships.

<sup>147</sup>Of course, this is not a role that one could ever 'take on', one simply *has* this role in this world.

## Respect for the law

I think that, surprisingly, Immanuel Kant might provide us with the basis for an answer to that question. In the *Grundlegung zur Metaphysik der Sitten* (1785), Kant is well-known to view emotions as nothing but distractions from reason. However, in his *Kritik der praktischen Vernunft* (1788) there does seem to be an interpretation of respect that allows us to understand how emotions might come in. Kant explains that *respect for the moral law*<sup>148</sup> is the only feeling<sup>149</sup> (!) that we can know *a priori* and of which we can perceive the necessity. This feeling, which is produced by reason, hinders certain opposing inclinations to morality and therefore motivates action in accordance with the moral law.<sup>150</sup> Respect for the moral law, Kant claims, cannot be 'reckoned' in either pleasure or pain, but it produces 'moral interest': an interest in obedience to the moral law.

Kant also explains how one becomes aware of one's feeling of respect for the moral law. According to Kant, the 'pain' of submission to the moral law is accompanied by 'something elevating', which Kant interprets as 'self-approbation'. With self-approbation comes the realisation that one apparently has the capacity for taking an interest in the moral law:

... submission to the law<sup>151</sup> ... contains in it no pleasure, but on the contrary, so far, pain in the action. On the other hand, however, as this constraint is exercised merely by the legislation of our own reason, and this subjective effect on feeling, inasmuch as pure practical reason is the sole cause of it,

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<sup>148</sup>Kant terms this as 'respect for law', but it is clear that he is referring to 'respect for moral law'. Law and moral law are not quite the same thing, of course.

<sup>149</sup>At first, Kant seems hesitant to refer to respect for the law as a feeling, referring to it as 'a positive, though indirect effect of moral law on feeling', but later he terms it the moral feeling (for there is only one moral feeling, respect for the law).

<sup>150</sup>This can be understood in terms of focusing one's thought.

<sup>151</sup>In this work, Kant uses the terms 'law' and 'moral law' interchangeably.

may be called in this respect self-approbation, since we recognize ourselves as determined thereto solely by the law without any interest, *and are now conscious of a quite different interest subjectively produced thereby*, and which is purely practical and free; and our taking this interest in an action of duty is not suggested by any inclination, but is commanded and actually brought about by reason through the practical law; whence this feeling obtains a special name, that of respect.<sup>152</sup>

I would argue that what Kant here describes is *care*, in the sense of an awareness that something is important. We realise that we are moved by consideration for the moral law, hence we now see that we apparently have respect for the moral law, i.e. that we *care* about the moral law. Remember that while care is related to affect, *caring* about something does not necessarily mean that one is *affected* by that something, it rather means that one considers that thing *important*. Moreover, Kant describes respect for moral law as 'the capacity of taking an interest in the law'. And what else is caring about something other than being able to take an interest in it? I conclude that it makes sense to understand respect for the moral law as *care* about the moral law.<sup>153</sup>

It would, however, also make sense to understand respect for the moral law as an *attitude*. An attitude has been identified as related to emotion, but without the affect. Being in love, for example, might in this way be contrasted to *feeling in love*, which refers to the moment when the related emotion actually affects one. Having respect for the moral law might function in the same way, in the background, as an attitude. Now these two options are not mutually exclusive; one might rationally agree that certain moral rules are important and therefore have an attitude of respect

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<sup>152</sup>Immanuel Kant, Book I, Chapter III. *Of the Motives of Pure Practical Reason* in Thomas Kingsmill Abbott (tr), *Kritik der praktischen Vernunft (The Critique of Practical Reason)* (1788), my emphasis.

<sup>153</sup>Note however that care *as such* does not imply or require any emotional response.

towards the moral law. The point is that both of these options are compatible with the idea of *affective neutrality*, as I will explain in the next section.

### **Affect**

Of course, I do not subscribe to Kant's analysis of emotions. I do not agree that emotions are only distractions from reason; I think that they are based on *thoughts*, thoughts which might very well be responsive to reason. This is another reason why I found the above quote so interesting: in my view, it explains the very moment that one is *affected* by submission to the moral law. Respect for the moral law might be interpreted as care about the moral law or as an attitude, *feeling* respect for the moral law is being *affected* by it. The 'pain' of this submission to the moral law is however balanced by the 'elation' of self-appraisal, rendering our 'feelings' about the moral law *affectively neutral*. This may mean that the moral law does not inspire any discernible affect in us, but it does *not* mean that this affect is non-existent. I argue that this affect, even if it does not serve to make one feel happy or sad, does still function to *focus one's thoughts* when it presents itself. This explains how respect for the moral law can motivate action: by focusing thought on the subset of facts relevant to respect for the moral law, rather than on the reasons one might have *not* to respect the moral law.

### **A moral person**

As we have seen in the discussion on care<sup>154</sup>, to care about something is to *identify* with something. And Kant's work actually allows for that same interpretation

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<sup>154</sup>See above, 17.

of respect for the moral law. For Kant explains respect for the moral law also in terms of one's self-regard as a rational creature (humanity).

Has not every even moderately honourable man sometimes found that, where by an otherwise inoffensive lie he might either have withdrawn himself from an unpleasant business, or even have procured some advantages for a loved and well-deserving friend, he has avoided it solely lest he should despise himself secretly in his own eyes? When an upright man is in the greatest distress, which he might have avoided if he could only have disregarded duty, is he not sustained by the consciousness that he has maintained humanity in its proper dignity in his own person and honoured it, that he has no reason to be ashamed of himself in his own sight, or to dread the inward glance of self-examination?<sup>155</sup>

Kant even adds that 'such is the nature of pure practical reason.'<sup>156</sup> The person in this example clearly identifies with the thought of himself as a moral person. He considers this important, and so his self-regard (which according to Kant is a good thing only insofar as it is based on morality, which it is in this case) acts as a motive to follow duty instead of temptation. It is important to note that one cannot take any pride out of the fact that one follows duty, for then *pride* would be the reason to follow duty, rather than duty itself. Any act in accordance with the moral law, that is brought on by an inclination, is *legal* but not *moral* in Kant's eyes; it has no moral worth.<sup>157</sup> But if a person acts out of regard for himself *as a moral person*, then that action is done out of respect for the moral law. Since it is a duty to act out of respect for the moral law, there is no basis for *pride*.

I argue that we can understand respect for the moral law both in terms of *care*

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<sup>155</sup>Immanuel Kant, Book I, Chapter III. *Of the Motives of Pure Practical Reason* in Thomas Kingsmill Abbott (tr), *Kritik der praktischen Vernunft (The Critique of Practical Reason)* (1788). Note the references to shame and (by implication) guilt.

<sup>156</sup>ibid.

<sup>157</sup>ibid.

and as self-regard as a moral person, although I need to make an important distinction: while every person is required to care about the moral law, there is no obligation to develop a substantive self-regard of oneself as a moral person. This is one step further, so to speak. In fact, I would argue that one who identifies with respect for the moral law has in fact a relation to *himself* which is not unlike friendship.<sup>158</sup> It requires that one cares about one's own self-image as a moral person sufficiently to be affected by it, and if one has established such a relation with oneself I would therefore understand that as an emotional relationship.

I do also think that the example above shows that *habituation* is important when it comes to respect for the moral law. Respect for the moral law might be a matter of degree; one might accept the normative value of some moral reasons but not of others. By exercising (and re-exercising) respect for the moral law however, one comes to have, and comes to *see oneself as having*, a respectful character; one comes to see oneself as a moral person, as least to the degree that one accepts the moral law.<sup>159</sup> This point is related to Kant's insistence that an action in accordance with the moral law but brought on by some inclination has no moral worth. Of course, I would not argue that an act caused by *any* emotional response should therefore be so disqualified, but I will agree that the motive matters for the relationship with oneself as a moral person. If one performs an action *in accordance* with morality, but with the *primary motive* of pleasing a friend, say, then to the extent that one's motive

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<sup>158</sup>See also T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press, Cambridge, Massachusetts 2008), 154.

<sup>159</sup>Michael Stocker. 'Values and Purposes: The Limits of Teleology and the Ends of Friendship' (1981) 78(12) *The Journal of Philosophy* 747-765 on habituation, esp 760 and Harry G. Frankfurt, 'The importance of what we care about' in *The importance of what we care about* (Cambridge University Press, Cambridge 1988) 80-94, 85.

is different from respect for moral reasons, one's relationship with oneself as a moral person is not developed or reaffirmed. One develops this particular relationship only by performing acts *out of* respect for moral reasons. Importantly, however, once this self-regard as a moral person has been established, then one has expressive reasons to act in a way that is fitting to this self-regard. 160

### **Moral person (fact) versus moral person (attitude)**

By explaining the idea of *respect for the moral law*, I have explained how being responsive to moral reasoning might shape one's character and allow one to self-identify as a moral person. But I must take care not to conflate the terms here. Even a person who does not care about certain moral reasons, might still be a rational human being. I am referring of course to the difference between someone who only respects others because he is deterred by the possibility of negative consequences, and someone who respects others because he believes he should. The first one still is a rational human being, deserving of all the entitlements that that status entails, but he does not have a *moral attitude* (with respect to these moral reasons, at least). If this person acts in accordance with moral reasons, he is not thereby developing or affirming any substantive self-regard *as a moral person*. 161

### **Respect for persons**

As Raz explains however, this respect for moral law is not the same as respect

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<sup>160</sup>Joseph Raz, *The Authority of Law, Essays on Law and Morality* (Oxford University Press, Oxford 1979), 255.

<sup>161</sup>See T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press, Cambridge, Massachusetts 2008), 154: 'One cannot, so to speak, be one's own friend.'

for persons<sup>162</sup>: a general respect which is unrelated to appreciation, the kind of respect that one would owe any stranger in the same degree.<sup>163</sup> Raz bases his argument on the Kantian requirement of treating persons as ends in themselves<sup>164</sup>, and explains that persons have value because they are valuers. This value is not a realised value; it is rather a potential:

Just as the fact that an object has intrinsic value marks a potential in it, the potential of being engaged with in the right way, so the status of being someone of value in oneself marks a potential in one, the potential to engage with value in the right way, and be thereby enriched or improved, etc. Therefore, valuers are of value in themselves.<sup>165</sup>

Next, Raz explains that there are three stages of responding to value, which are (1) the appropriate psychological acknowledgement of value or regarding objects in ways consistent with their value, (2) to preserve what is of value, and (3) to engage with value in appropriate ways.<sup>166</sup> Respecting value belongs to the first two stages, appropriate acknowledgement and preservation. If one does not personally care for something of value, one might not engage with the value in such a way that the potential is realised, but then still the basic reason that something being of value imposes, is that one should (acknowledge and) protect the value in order to protect

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<sup>162</sup>Joseph Raz, 'Respecting people' in *Value, Respect, and Attachment* (Cambridge University Press, Cambridge 2001) 124-175, 135.

<sup>163</sup>ibid, 159. See also Stephen L. Darwall. 'Two Kinds of Respect' (1977) 88(1) *Ethics* 36-49, although I do agree with Raz that the difference between Darwall's appraisal respect and recognition respect is more related to the type of object than to a different *kind* of respect, Joseph Raz, 'Respecting people' in *Value, Respect, and Attachment* (Cambridge University Press, Cambridge 2001) 124-175, 137, note 17.

<sup>164</sup>Joseph Raz, 'Respecting people' in *Value, Respect, and Attachment* (Cambridge University Press, Cambridge 2001), 138-9.

<sup>165</sup>ibid, 157.

<sup>166</sup>ibid, 161-2.

the possibility of that realisation. One therefore has a general (moral) reason to respect value, e.g. to refrain from harming persons.<sup>167</sup>

Raz explains that respecting persons is not an emotion but a way of conducting oneself and (more indirectly) of being disposed to conduct oneself towards persons, 'though it may be based on a belief and be accompanied (at least occasionally) by certain feelings'.<sup>168</sup> As with respect for moral law, I would call respect for persons an *attitude*, which might on occasion affect one. I agree with Raz that respect for persons has a different object than the Kantian respect for moral law<sup>169</sup>. However, Kant and Raz do agree on a moral duty to treat persons as ends in themselves, i.e. to respect people, and the respect that both Kant and Raz refer to works in the same way: an attitude which can affect one. Respecting persons is therefore a central moral duty in both accounts, and it is that duty which underlies the relation between strangers: basic respect or concern.<sup>170</sup>

### **Narratives of commitment**

Respect for persons is then a requisite characteristic of the role of fellow human beings in dealing with strangers. This role is actually based on a relation, that of fellow human beings, but it, of course, cannot be *taken on* or *rejected*: every person is born as a human being among others; concern for others is a general moral duty.

Morality commands a duty of basic respect between strangers, but this is a

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<sup>167</sup>ibid, 167-8.

<sup>168</sup>ibid, 138.

<sup>169</sup>ibid, 135.

<sup>170</sup>See also T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press, Cambridge, Massachusetts 2008), 140-1.

kind of a duty that one will want to rid oneself of; one will want to get it over with. One is not investing in a relationship in any meaningful sense of the term, it is mainly experienced as a burden. Although fellow human beings certainly stand in a kind of relation to each other, this kind of relation cannot be lumped together with the range of meaningful inter-personal relationships that are so important to life, and which would *not* be possible without emotions. This kind of social inter-personal relationship is very different from the way that fellow human beings relate to each other as strangers.

[...] respecting people is relatively indifferent to how many love them, how creative they are, how much they contribute to humanity, etc. And this is why it is a more stringent duty than the one we have, in normal circumstances, towards a glass of water. This is also why it is less extensive than the duties of a friend, a lover, a parent, or an employer. They all value, or ought to value, the person they are so related to. The bulk of humanity need only respect him or her.<sup>171</sup>

One might also understand these two different ways of relating to another, 'friend' versus 'stranger', as being conducted in a different *narrative*: one attitude creates value in one's life where the other is mainly understood as a burden.<sup>172</sup> Within the first narrative, one is happy to emotionally engage and to invest in the relationship, but within the second narrative one would rather fulfil one's duty of respect for the moral law and then move on.<sup>173</sup> One is *committed* to inter-personal relationships, but

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<sup>171</sup>Joseph Raz, 'Respecting people' in *Value, Respect, and Attachment* (Cambridge University Press, Cambridge 2001) 124-175, 170.

<sup>172</sup>The idea of respect as a burden correlates to Kant's remark that respect involves the 'pain' of submission to the law. Of course, this pain is cancelled out by the 'elevation' of self-approbation, rendering respect a neutral attitude.

<sup>173</sup>See Barbara Herman, *The Practice of Moral Judgment*, Harvard University Press, Cambridge, Massachusetts 1993), esp 'Obligation and Performance'. Herman would not agree that one should apply both these narratives for different kinds of engagement, instead she claims that all duty should be seen within a Kantian account of morality which, as she claims, allows for the kind of engagement with values that I understand as being located within the narrative surrounding inter-

not to strangers. For inter-personal relationships, emotions are crucial and constitutive; the relation between strangers is merely classified in terms of respect for the moral law and does not normally entail any particular affect.

### **The moral relationship is not an emotional one**

It is clear now that the moral relationship between strangers is very different from an emotionally engaged personal relationship such as friendship. The relation between strangers is not defined by any emotional engagement but simply by the fact that we are in this world as fellow rational beings, and as such owe each other basic respect. There are no emotions necessarily involved in being a respectful stranger.

We can see now however, that emotions might *come into play*, even if they are not necessary. I have argued that it is possible for one's cognitive respect for the moral law to develop into a self-regard of oneself as a moral person. In this way, one has incorporated respect for morality into one's own self-image; one *identifies* oneself as *a moral person*. While this self-identification need not necessarily involve any emotions either, it makes one vulnerable to threats to that self-image. When a self-identifying moral person commits a moral wrong, an emotional response might be helpful or even necessary to restore or maintain the attitude of respect for the moral law, or one's own self-regard as a moral person. How affect can fulfil this restorative function will be the topic of the next section.

### 3. Emotional obligations

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personal relationships.

Emotions constitute and nurture social relationships, such as friendship. A substantial social relationship without the relevant emotions is defective and might not even exist.<sup>174</sup> Raz explains that within a relationship, one has relational reasons for action. Not being able to conform with these relational reasons (acting against the friendship) is a source of an emotional response<sup>175</sup> which may be appropriate to share with the other person in the relationship.<sup>176</sup> I would claim, first of all, that friendship can both provide reasons for having a particular emotional response<sup>177</sup>, and that not being able to conform with any relational reason in friendship makes the expression of a secondary emotional response, a response to the acting that was not in accordance with friendship, appropriate. But I would extend that claim and argue that since emotions are constitutive to friendship, either one of these emotional responses can be an obligation of friendship.

Friendship carries emotional obligations in two related ways; firstly, without affect this relationship does not even exist, and secondly, emotional obligations will arise within the day to day functioning of this relationship. We might call them constitutive obligations: they are the defining part of a relationship<sup>178</sup>, but they can also be called for within the relationship. Two persons who are mere strangers to each other might be seen to be lacking such a social relationship, and thereby not have any emotional obligations towards each other. I will explain however that even though

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<sup>174</sup>See above, 57.

<sup>175</sup>Raz terms this emotional response *regret*.

<sup>176</sup>Joseph Raz, 'Reasons in Conflict' in Raz, Joseph (ed), *From normativity to responsibility* (Oxford University Press, Oxford 2011), 189.

<sup>177</sup>Raz explicitly grants the possibility an extension to reasons for emotions, *ibid*, 174-5.

<sup>178</sup>Cf Raz' 'root reason', *ibid*, 174.

emotions might not be required in the normal functioning of respect for morality, a breach of that respect might constitute a kind of tie that is based on relational reasons and therefore comes with emotional obligations.

### **The importance of particular thought content**

Firstly, I want to shortly explain what a particular emotional obligation means. We have seen that based on the large range of possible thought content that a certain event might elicit, the range of emotions which might be appropriate in the face of that event is very large as well. The existence of an emotional obligation would then mean that one particular thought (or set of facts or thought) should take precedence in the attention of the person who has this obligation. More so, because it is an emotional obligation, not just a thought requirement, this person has an obligation to engage with these particular thoughts or facts, to not simply 'coldly' consider them but to actually care about them. One can of course have emotional obligations towards others, but one might even have such emotional obligations towards oneself.

But in light of the fact that one does not have direct voluntary control over emotions<sup>179</sup>, what does it mean when one does not, or cannot, (fully) comply with the emotional obligation? In a case of contractual obligations, for example, one party might simply demand and expect that the other party complies with the contract, if and when such compliance is within the other party's control. However, since an emotion is not the kind of thing that one can voluntarily choose, an emotional

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<sup>179</sup>See above, 47.

obligation cannot be taken in the same vein.

I have explained that emotions can be required within the context of a relationship, a role or a character that one holds or claims to hold. The consequence of being unable to fulfil an emotional obligation is then not so much an expectation of compliance, but rather a re-evaluation of that relationship or character. Since you fail to provide the obligatory emotional response, do you (still) have the requisite characteristics for the role that you (claim to) occupy, the character that you (yourself or others) thought you had? The underlying relationship or character, which provided the foundation for the emotional obligation, is thus itself questioned by a failure to fulfil the relevant emotional obligation.

### **Emotional obligations of friendship**

A requisite element of friendship is concern, or care, for one's friends. This is not merely a subjective interpretation on my part; even though particular instances of friendship might be different, there exists a valid normative ideal of friendship which provides a framework of understanding for these particular instances. The normative ideal sets the standards according to which these particular instances are more or less 'perfect' examples of friendship.<sup>180</sup> A crucial element of this normative ideal is, as I have stated, that you care about your friends. Now let us remind ourselves what care actually is:

A person who cares about something is, as it were, invested in it. He *identifies* himself with what he cares about in the sense that he makes himself vulnerable to losses and susceptible to benefits depending upon

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<sup>180</sup>T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press, Cambridge, Massachusetts 2008), 133-4.

whether what he cares about is diminished or enhanced. Thus he concerns himself with what concerns it, giving particular attention to such things and directing his behaviour accordingly.<sup>181</sup>

Imagine that I suffer the loss of a loved one, say a parent. Would my friends then be expected, even required, to feel genuinely sad for me at the funeral? Would they, as friends, have a kind of obligation (barring exceptional circumstances) to feel sad? I think that they would. Of course, friendship is formed within a certain cultural context. This cultural pattern determines appropriate and inappropriate behavioural responses in a friendship, and what exactly is considered appropriate may differ from one culture to another. As Joseph Raz states however, 'common to all of them and part of the very concept of friendship is the fact that the fitting action is required of a friend regardless of whether or not he desires to perform it.'<sup>182</sup>

In this (western) society which has shaped my idea of friendship, I hold that *care* is an essential element to any meaningful friendship. Without any kind of *care*, I do not think that friendship can be said to exist in any meaningful sense of the term. Therefore, I expect my friends, *as my friends*, to *care* about my welfare, and to be saddened by my sorrow even if they will personally never miss my parent in their life. If they *care* about me, they have therefore made themselves *vulnerable* to my grief, as Frankfurt explained. In fact, if they are not saddened by my sorrow but instead are indifferent or even express some 'schadenfreude', then (barring exceptional circumstances) I will see this as proof that they are not my friend at all, since they

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<sup>181</sup>Harry G. Frankfurt. 'Freedom of the will and the concept of a person' (1971) 68 The Journal of Philosophy 5-25, 83.

<sup>182</sup>Joseph Raz, *The Authority of Law, Essays on Law and Morality* (Oxford University Press, Oxford 1979), 255.

obviously do not care that I am hurting, or even see this as a source of contentment. As my friend, they have a relational obligation to be sad. Now, they might express their sadness in different ways or maybe not at all, but that is not the point. The point is that my friends do have an obligation to feel sadness, and that (failing a special explanation) this obligation arises *out of our friendship* and *because they are my friends*. As my friends, they should pay particular attention to my loss and my sorrow, especially when this thought content becomes even more poignant, for example at the funeral. As my friends, they should therefore feel sad. If they are not sad, unless there is some very special reason why they should not be, they do not fulfil the constitutive obligation of friendship, which is to care about me.<sup>183</sup>

Again, the point is not that anybody who is not sad about my parent's death has therefore somehow wronged me. Many people do not care about me and I am not thereby wronged. The point is however that friendship is, in part, constituted by fitting emotional responses and that the lack of these emotional responses will leave our friendship defective. It is not the case that I now decide no longer to consider my unsympathetic friend a *friend*, as if were some kind of punishment, it is rather the case that without appropriate emotional responses we need to question whether our friendship actually *exists*. The consequence of a failure to care as such will therefore normally not be a liability to compensation of any kind on the part of the person who fails to care, but rather that the position of this person, his character, role or relationship will be re-evaluated.<sup>184</sup> I will not assume that this person can simply choose to suddenly have this kind of concern for me, but I might consider him or her

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<sup>183</sup>See also John Rawls. 'The Sense of Justice' (1963) 72(3) *The Philosophical Review* 281-305, 297.

<sup>184</sup>See also T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press, Cambridge, Massachusetts 2008), esp 128-34.

a person that I would rather avoid in the future. Both one's *character* and *one's role* (as friend) might thus be questioned as a result of the failure to comply with emotional obligations.

There is some redress possible for a friend who has failed in his emotional obligation. In some cases, one might also be able to distance oneself from one's failure to be so affected, and request that this failure to feel should not be taken to reflect on one's character or performance in one's role (as friend). One might for example offer an explanation as to why one failed to be affected by a friend's sorrow. One might also apologise, and explain that one *now* feels that one was *wrong* not to care. However, even if one in retrospect genuinely feels that one *should* have been affected by a friend's sorrow, the very fact that one was not does throw a suspicion of defectiveness on the relationship.<sup>185</sup>

## **Grief**

We can now also make more sense of Greenspan's claim that grief is an emotion that one might require *of oneself*.<sup>186</sup> Greenspan's obligation of grief clearly entails more than a focus on certain thought content. She explains that grief is something that one can demand of oneself, perhaps 'to fulfil an ideal of emotional sensitivity'.<sup>187</sup> She stresses that it is not merely the expression or the thought content, but the actual *feeling* that is required in this case.

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<sup>185</sup>Much more on this topic later, in the discussion of guilt and identification (104).

<sup>186</sup>See above, 43.

<sup>187</sup>Patricia S. Greenspan, *Emotions & Reasons* (Routledge, New York 1988), 151 and 170.

In light of the above, I would argue that if one regards oneself as someone who genuinely cares about his loved ones (and it would be rather illogical not to), and one wants to maintain this self-image, then one will be obliged to be *affected* by the loss of a loved one. If one finds oneself not so affected, then (barring exceptional circumstances) one would have to conclude that this person was, in fact, not a loved one at all, or perhaps that one only cares about oneself. Seeking to fulfil one's own obligation to feel grief is therefore seeking to confirm one's own self-image, as someone who is capable of genuine care for his loved ones. Similarly, we can now also make further sense of the claim that a deliberate acting out of grief would defeat its purpose<sup>188</sup>, since this would not re-affirm one's own self-image as one who cares about his loved ones (it might only reveal that one cares about other people's opinions of oneself).

### **Emotional obligations between strangers**

Between strangers, as fellow human beings, there is of course no such obligation to feel genuine sorrow for a stranger's loss. The relation between fellow rational human beings is defined by a general duty of respect for persons which is not based on emotional engagement. Relational reasons however can be based on this general concern for the other as well as on a relationship.<sup>189</sup> While this general concern is impersonal and owed to any other person, any act which denies another person this basic respect (a wrong) affects specific others and establishes a certain tie, a link, between the wrongdoer and the others who are affected by the wrong (the

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<sup>188</sup>ibid, 172. See also my discussion on the politics of emotions, above, 42.

<sup>189</sup>Joseph Raz, 'Reasons in Conflict' in Raz, Joseph (ed), *From normativity to responsibility* (Oxford University Press, Oxford 2011), 189

victims)<sup>190</sup>. This link of course does not represent the kind of substantial social relationship that friendship does; it is a tie that will undoubtedly be experienced negatively but the wrongdoer and the victim are still bound to each other in a specific way that is different from the generic concern that one owes any other person. This tie between wrongdoer and victim can be the foundation for an emotional obligation, albeit a different one from the obligations of friendship.

The emotional obligations of friendship constitute and nurture the relationship, which one, as a friend, is committed to pursue. The emotional obligation after a wrong, on the other hand, takes place within a different narrative of commitment<sup>191</sup>, that between strangers, within which one will want to see one's obligations fulfilled in order to move on. The wrongdoer might owe an emotional response to the victim, but this obligation, even if it is fulfilled, does not serve to nurture the relationship between offender and victim but instead may work towards a situation where both parties can move on. The resulting relation, after the wrongdoer has provided all that he owes the victim, might be said to resemble as close as possible the normal relation between strangers, even though this one wrongdoer will of course always maintain a special position to the victim as the one who infringed the victim's rights, and vice versa.

If one fails to have the emotional engagement characteristic of friendship, then one is not a friend, but even if one should fail to respect one's basic duties of concern towards others, one still retains one's status as a fellow human being; the wrongdoer himself is still owed concern by others. The wrongdoer does however appear to show a lack of respect for persons that in itself puts his position as a respectful stranger into

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<sup>190</sup>I want to stress that the term 'victim' here should be interpreted broadly, not in the narrow legal (courtroom) sense.

<sup>191</sup>See above, 68.

question. Thus while he maintains his status as a fellow human being his position might yet be subject to some form of alteration. In the same way that an emotion provides valuable information about one's values and character, the lack of an emotional response might (barring exceptional circumstances) be taken to imply certain information as well. The lack of an emotional response to one's committing of a moral wrong implies that either (1) that one does not consider one's act to be wrong, or (2) a lack of concern with the moral rules that apply to this act.

### **Self-deception and weakness**

If one does not consider one's (wrongful) act to be wrong, then that means that one has failed to be persuaded by the moral reasons that make this act wrong. One does not have to be lacking completely in moral character, but one is (currently) not responsive to *these* moral rules.<sup>192</sup> The wrongdoer is usually not wholly irrational either, he is responding to reasons *as he sees them*. The wrongdoer might be under the influence of rational thought 'jammers' such as self-deception or weakness of the will. Self-deception depends on the very capacity to allow one to think that one is acting rationally, and weakness of the will might be rationalized in any number of ways ('she does not really mind', 'it is not a problem, really...')<sup>193</sup> In such a case, when one commits a moral wrong, one is normally aware of what moral reason requires but under the interfering influence of these 'jammers' one fails to properly recognise these moral reasons. It might also be possible that one is simply not very bright and has

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<sup>192</sup>Joseph Raz. 'Explaining normativity, on rationality and the justification of reason.' (1999) 12(4) *Ratio* (new series) 354-379, esp note 4.

<sup>193</sup>Joseph Raz, 'When We Are Ourselves: The Active and the Passive' in Joseph Raz (ed), *Engaging Reason: On the Theory of Value and Action* (Oxford University Press, Oxford 1999) 5-21, 16-17.

failed to draw the correct conclusion from the applicable moral reasons of respect for persons.<sup>194</sup> In such cases, it would seem that one cannot (at at least not *initially*) be expected to experience the emotions that are relevant to the committing of wrongs, such as guilt or shame, because the thought content simply does not fit.<sup>195</sup>

Therefore, if one genuinely does not *know* the applicable moral reasons, then one cannot be said to have the according emotional obligation. But if one does (deep down) know the moral reasons but fails to be persuaded by them under the influence of weakness of the will or self-deception for example, then one might have an emotional obligation on the basis of a relationship or other-related concern. Failing to comply with the emotional obligation could result in a negative judgement of character. One might therefore be given such a negative judgement based on the fact that one fails to properly recognise the moral reasons that one *is* aware of, even if one is currently being self-deceptive or rationalising against these moral reasons. The wrongdoer who fails to be persuaded by moral reasons that he does know is subject to emotional obligations, but the wrongdoer who genuinely does not know the applicable moral reasons is not.

Self-deception and weakness of the will have different relevance to the emotional obligation, and Raz is right to distinguish between the two. If a person is under the influence of self-deception (or wishful thinking), he is not focusing on the appropriate thought content, even though this thought content is present in the facts of the situation. The emotional obligation would then mean that certain thought

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<sup>194</sup>Joseph Raz. 'Explaining normativity, on rationality and the justification of reason.' (1999) 12(4) Ratio (new series) 354-379, 358.

<sup>195</sup>I will discuss which emotions are the most fitting responses to moral wrongs below, in chapter IV: Emotional responses to a wrong.

content (in the case of a wrongdoer: that the act was wrong) should take precedence in the attention of the person who is obliged to feel. In the case of a wrongdoer who is self-deceptive, an emotional obligation would target this self-deception.

It might also be the case that a wrongdoer commits a wrong under the influence of weakness of the will (or impetuosity). That would imply that while the relevant thought content is present in the mind of the wrongdoer and might even be in focus, he is not being affected by it because certain rationalizations allow him to deny the *importance* of this thought content, the importance of these moral reasons.<sup>196</sup> Frankfurt explained that some things are important, *whether or not* we care about them. Moral reasons are such things. Furthermore, Frankfurt noted that some people do not care about important things because they fail to realise the importance of these things.<sup>197</sup> The wrongdoer's emotional obligation then requires him to recognise that the applicable moral reasons *are* important, and that the fact that he committed a moral wrong is so important that he should be affected by the thought of it. The emotional obligation can therefore target both the element of thought (in cases of self-deception) and the affective element (in cases of weakness of the will).

### **The aptness of emotional obligations**

Emotional obligations do also have a clear aptness; they can be very helpful. As long as one does generally care about the justifiability of one's actions, as I think that people who are generally responsive to reason do, one might be brought to understand that the act was, in fact, wrong. It has been argued in this thesis that

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<sup>196</sup>Joseph Raz. 'Explaining normativity, on rationality and the justification of reason.' (1999) 12(4) Ratio (new series), 17.

<sup>197</sup>See above, 17.

emotions might be instrumental in getting one to accept moral truth. Peacocke explained that 'emotions can make us accept a moral truth as true'.<sup>198</sup> Our emotion, being responsive to reason (and therefore also to *moral* reasons) responds, and we are (at first) at a loss to understand our own emotional response. It may seem that we are *passively* under the influence of some irrationality, but when we investigate we become consciously aware of facts that should have been obvious, but which we had failed to recognise as such. Of course, this scenario assumes that 'deep down' one did already know that one's act was wrong, but one simply failed to consciously accept that truth. Otherwise, the emotion would not have been able to *affect* one. But I think that this is exactly how the interaction between emotions and morality works: in the more complicated cases, one might be in doubt about what the right course of action would be. Emotions can then be helpful in pointing out one course of action, and when one investigates in an attempt to explain one's emotional response, one might come to see the reasons for it. Our emotional response to a moral wrong might thus allow us to recognise the act as a moral wrong. In cases where one fails to recognise moral truth because one is under the influence of self-deception or a weakness of the will, 'deep down' one does already know the relevant moral reasons, but one is acting irrationally while still being responsive to reason.<sup>199</sup> Similarly, in cases where one is not affected by certain thought content, an emotional response might reveal the apparent importance of this thought content. The aptness of the emotional obligation is thus that it might allow one to recognise moral truth.

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<sup>198</sup>Christopher Peacocke, *The Realm of Reason* (Oxford University Press, New York 2004), 263.

<sup>199</sup>Joseph Raz, 'When We Are Ourselves: The Active and the Passive' in Joseph Raz (ed), *Engaging Reason: On the Theory of Value and Action* (Oxford University Press, Oxford 1999) 5-21, 16-7.



### **How is the wrongdoer's position altered?**

I have explained that one's basic moral relation to a wrongdoer is not open to substantial change.<sup>200</sup> But Scanlon points out that there is some room for modification even in our default attitudes towards strangers. There is a range of interactions with others that are morally important but not owed unconditionally to everyone. It might be appropriate for us to refuse to interact with the wrongdoer altogether, and to suspend our readiness to enter into any relationship with them that *is* based on emotional engagement.<sup>201</sup> We might appropriately *resent* the wrongdoer, or dismiss him completely. All these examples entail a modification in relation to the default relationship that we have with strangers.<sup>202</sup>

The victim of a wrong already has a more specific tie to the wrongdoer than the mere relation between strangers provides. The victim has been wronged by a specific person, who has denied the victim's right to basic respect. Fulfilment of all obligations that have arisen from this wrongful act (compensation, emotional obligations) might result in something that resembles the default relation with a stranger. The resulting connection between victim and wrongdoer however will never be quite the same as the default relationship between strangers, because there will always be the committing of the wrong by this person that sets the wrongdoer apart from any other mere stranger. Based on that fact, it would seem entirely appropriate for the victim to avoid or resent the wrongdoer, and this extends to others who are

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<sup>200</sup>See also Joseph Raz, 'Respecting people' in *Value, Respect, and Attachment* (Cambridge University Press, Cambridge 2001) 124-175, 158.

<sup>201</sup>T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press, Cambridge, Massachusetts 2008), 143.

<sup>202</sup>*ibid*, 141.

connected to the victim and who are thereby affected by the wrong.<sup>203</sup> For a third party who is not in any way affected by or concerned with the wrong however, it might be considered inappropriate to significantly alter his position with relation to the wrongdoer who has fulfilled his obligations after a wrong. And yet, even if a particular wrong did not directly concern oneself or one's social connections, the lack of respect which speaks from such a wrong might still provide a legitimate reason for concern.

A failure to fulfil one's (emotional) obligations can have far-reaching consequences. If the wrongdoer does not fulfil his emotional obligation, then he is *blameworthy* for not sufficiently caring about these moral reasons.<sup>204</sup> If a wrongdoer fails to properly recognise the applicable moral reasons, then this fact provides valuable information about this person and it might have consequences for his role as a respectful stranger. The failure to fulfil the emotional obligation reveals the wrongdoer's values and character to be lacking in general concern for others. This lack of respect for persons, especially in severe wrongs, is an appropriate cause of concern to any other fellow human being who might encounter the wrongdoer.<sup>205</sup> Of course, people who are in some kind of relationship with the wrongdoer or with the victim have more cause to amend their relation with the wrongdoer on the basis of his lack of concern for another person. But I hold that if a particular person is apparently not (sufficiently) concerned with the proper respect for another person, then that fact is potentially relevant to anyone who interacts with this person in any

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<sup>203</sup>ibid, 145-6

<sup>204</sup>Even if such blame has no effect on the status of the wrongdoer as a rational human being, that does not make him any less blameworthy, see *ibid* on the moral relation, 139-52.

<sup>205</sup>Cf. R. A. Duff. 'Blame, moral standing and the legitimacy of the criminal trial' (2010) 23(2) *Ratio* 123-140, 126.

way. Any relation with this person might therefore be modified on the basis of the fact that this person apparently lacks a basic respect for others.<sup>206</sup>

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<sup>206</sup>Of course, the law does not have this option. The law cannot resent wrongdoers or disregard any of the entitlements that they might have as citizens. In fact, the 'apparent lack of care for the justifiability of one's actions' itself is not a reason for criminal punishment, although 'wanton disregard for the rights of others' might allow for a judgement of 'gross negligence'. However, the law should not 'write off' wrongdoers either, therefore even though the law might not be able to 'blame' offenders for not having the required emotional responses, the law might still be required to treat offenders *as if* they are responsive to moral reasons. I will continue my discussion on that topic in chapter VII Emotional obligations and the law.

## IV. EMOTIONAL RESPONSES TO A WRONG

In the previous chapter, I have shown that relational reasons might be the basis for emotional obligations. Even two people who initially are mere strangers to each other can be tied together by the committing of a wrong, and some emotional obligations can also rise from this connection. The emotional obligations are not only fitting, but they can also have some aptness: they can assist in the repairing of social relations both with the victim (who might return to a position resembling 'mere stranger' as close as possible) and with others who are in a relationship with the wrongdoer. The following chapters will provide a closer analysis of the particular emotions that might be in play.

Which emotions then are the most appropriate for the wrongdoer with regard to the moral wrong that he has committed? Gabriele Taylor describes 'emotions of self-assessment', which occur when a person has deviated from the norm and thereby has altered his or her standing in the world.<sup>207</sup> She identifies as emotions of self-assessment pride, shame and guilt, but pride is linked to a positive deviation from the norm, when of course we need only consider negative deviations. It is not that guilt and shame are the only appropriate emotional responses to a wrong, in fact, in some subcultures a breach of the rules of society might be regarded a source of pride. I am however interested in the emotions that might possibly be required or helpful from a

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<sup>207</sup>Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 1.

moral perspective, in which breaking the law is regarded negatively. Guilt and shame are therefore obvious candidates.<sup>208</sup> They are however not the only fitting negative responses to a wrong. One might also consider remorse for example, or regret, embarrassment or humiliation. I will briefly explore these emotions and the similarities and differences between them, in order to clarify why I want to focus on the analysis of shame and guilt for the purposes of this thesis.

### 1. Guilt, regret and remorse

The requisite thought content of the emotion of *guilt*, I would argue, is a *wrong* plus *responsibility* for that wrong. In guilt, an agent knows himself to be personally responsible, even if only in part, for what he (now) recognises as a wrong. Simple *regret*, understood as a recognition that something bad has happened, also looks back to a past event which is viewed negatively, but it lacks the element of personal responsibility which is present in guilt.<sup>209</sup> *Agent-regret* however does include a very personal connection to the wrong; one was the agent of the wrongful act. So how does agent-regret compare with guilt?

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<sup>208</sup>See also the quote by Kant, above 62, which can easily be interpreted to refer to guilt, and specifically mentions shame.

<sup>209</sup>Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 135.

## Agent-regret

According to Williams, agent-regret is 'a regret which a person can only feel towards his own past actions'<sup>210</sup>, and it therefore does clearly have an element of personal responsibility. Williams explains that agent-regret is not limited to voluntary actions, and can occur even in deeply accidental forms of agency. Referring back to the earlier example of the driver who, through no fault of his own, runs over a child<sup>211</sup>: this person might experience agent-regret as well. In fact, his causal connection to the accident is something that should pain the driver, according to Williams, who argues that we would doubt the driver who 'too blandly or readily' shrugs off his part in the accident. The point is 'that there is something special about his relation to this happening, something which cannot merely be eliminated by the consideration that it was not his fault'.<sup>212</sup> The wrongs that you do, even those which were not your fault, leave a shadow over your life.

According to Williams, in agent-regret 'the relevant consciousness of having done the harmful thing is basically that of its having happened as a consequence of one's acts, together with the thought that the cost of it can in the circumstance be fairly allocated to one's account'.<sup>213</sup> Now one might wonder at the added value of the emotion of guilt over agent-regret, for in both cases one has done something which one himself considers to be a negative thing and one is affected by the thought of the part which one played in bringing about this badness. There is a crucial difference,

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<sup>210</sup>Bernard Williams, 'Moral Luck' in *Moral luck : philosophical papers, 1973-1980* (Cambridge University Press, New York 1981), 27.

<sup>211</sup>See above, 9.

<sup>212</sup>Bernard Williams, 'Moral Luck' in *Moral luck : philosophical papers, 1973-1980* (Cambridge University Press, New York 1981), 28.

<sup>213</sup>ibid, 28.

however. In agent-regret, one did not *wish* for this outcome. The driver who faultlessly runs over a child never chose to act against his own values, never wanted the child to be hurt. Even Anna Karenina's infidelity, explains Williams, could have been justified if things had turned out the way she had hoped for.<sup>214</sup> In agent-regret, one might well be responsible for a wrong but one was striving for something else, something good. If this good thing had occurred, then it might have justified one's actions, but it did not and all that is left is regret. One does however come away with one's sense of value intact; one had wanted the right thing, or one had at least not wanted the wrong thing that did occur.<sup>215</sup>

Guilt, unlike agent-regret, includes those occasions when we know that we have consciously and willfully acted against our own values, we *wanted* the wrongful outcome. These thoughts can make one doubt one's own moral compass: why did I do that, why did I want that, it is wrong! Such occasions make one doubt one's capacity to deal with the moral challenges of life. Such reflections and confusion are a part of the guilt feeling, but interestingly, it is the very emotion of guilt that can then provide a buoy to the ones who doubt their own ability to swim. For it is the very fact that guilt occurs which proves that one *does* still subscribe to the moral value which was flaunted by the wrongful act. The feeling of guilt itself is based on the thought that you have acted against your own values, and while you may have neglected or denied them in doing the wrong, feelings of guilt put these values squarely back into focus.<sup>216</sup>

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<sup>214</sup>ibid, 28.

<sup>215</sup>Compare ibid, 30: 'beyond their will'.

<sup>216</sup>The next chapter will provide a more detailed discussion of the emotion of guilt, including this argument.

## Remorse

*Remorse* might also be explained as agent-regret, limited to voluntary acts, similar to guilt.<sup>217</sup> Indeed, remorse and guilt are very similar, and can sometimes be used interchangeably.<sup>218</sup> The difference between remorse and guilt is hard to pinpoint and might be said to be mostly a matter of focus: remorse being more tightly tied to the negative event, and guilt focusing on a negative assessment of the self and responsibility. A clearer difference might be that both remorse and agent-regret involve a wish to undo the wrong that one has done.<sup>219</sup> An agent who is feeling guilty may still abide by her choices, as shall become clear in what follows.<sup>220</sup> The possible relevance for the emotions from the viewpoint of moral law necessitates a stronger link between the object of the emotion (the breaking of the norm, the offence) and the person of the wrongdoer (his self-image) than either regret or remorse can offer. The wrong sheds doubt on the moral identity of the wrongdoer, which is captured by the emotion of guilt and imbues this emotion with a particular aptness. These arguments lead to the emotion of guilt being the more promising and relevant in the wrongdoer with respect to a past wrong, for the purposes of this thesis.

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<sup>217</sup>ibid, 30. See also Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 135, who argues that remorse does not involve a negative self-assessment.

<sup>218</sup>See for example R.A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001)

<sup>219</sup>Bernard Williams, 'Moral Luck' in *Moral luck : philosophical papers, 1973-1980* (Cambridge University Press, New York 1981), 30

<sup>220</sup>See also Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 135.

## 2. SHAME, EMBARRASSMENT AND HUMILIATION

Where guilt focuses on the personal responsibility for a wrong, *shame* is about the *exposure* of a *weakness*.<sup>221</sup> One is confronted with a self-image which is less than what one had hoped or thought or aspired to be; one has let oneself down. Shame can occur in public or in private.

The exposed weakness might or might not be related to the committing of a wrong, of course. I will elaborate on what Greenspan calls *moral shame*, by which she refers to shame that is caused by a wrongful act, whether that be in the context of an inter-personal relationship or between strangers.<sup>222</sup> While moral shame might not be very different from general shame on a conceptual level, it has a particular aptness. In order to further clarify the scope of this emotion, it is again useful to briefly discuss two emotions that are related yet distinguishable from shame: embarrassment and humiliation. In a way, these emotions might be placed in a continuum, with embarrassment being less severe than shame, which in turn is less severe than humiliation.

### **Embarrassment**

Embarrassment is very much about public exposure, but much less about a weakness. Embarrassment arises typically in a particular social setting, in which one

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<sup>221</sup>Martha C. Nussbaum, *Hiding from Humanity* (Princeton University Press, Princeton 2004), 173, 207, see also John Rawls. 'The Sense of Justice' (1963) 72(3) *The Philosophical Review* 281-305, 295 and Jeffrie G. Murphy. 'Shame Creeps through Guilt and Feels like Retribution' (1999) 18(4) *Law and Philosophy* 327-344. The public element in shame is a debated issue. I will discuss this issue further in my detailed analysis of shame, in chapter 7.

<sup>222</sup>Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 126.

feels out of place, and might not reflect a personal weakness at all. The negative assessment only reflects on one *in this situation*, not on one's general self-image.<sup>223</sup> Nussbaum notes for example that it is embarrassing to forget someone's name when one is talking to that person, but that the same forgetfulness is generally not embarrassing at all when talking to a third party. If this forgetfulness points to a more structural weakness, such as 'absence of due attentiveness or the beginning of mental decay', forgetting someone's name even when speaking to a third party might be a cause for shame. Its simple occurrence however can at maximum cause embarrassment.<sup>224</sup>

### **Humiliation**

On the other end of the spectrum we find humiliation. Humiliation is described by Nussbaum as the *active, public part of shame*. Humiliation also entails the added idea that something *has been done* to the person in order to make this person experience the humiliation. The humiliated person is on the receiving end of another person's behaviour. Acts of deliberate shaming can, in severe cases, correspond to humiliation. According to Nussbaum then, humiliation differs from shame in the fact that it is *done to another*, and to the degree that it is more severe and necessarily public (shame can be public as well, but it might not be). She adds that the result of acts of humiliation might not always be a feeling of shame, but that causing a feeling of shame is their purpose.<sup>225</sup> I agree with the general direction of Nussbaum's

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<sup>223</sup>Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 75.

<sup>224</sup>Martha C. Nussbaum, *Hiding from Humanity* (Princeton University Press, Princeton 2004), 204.

<sup>225</sup>*ibid*, 203-4.

classification of humiliation, and I also agree that the exact point where severe, public shame turns into humiliation will be hard to establish. However, theoretically, I see possibilities *for causing another to feel shame*, whether or not the causing of shame is the direct or the only intent of one's action, without such shaming being necessarily humiliating. Nussbaum's understanding of humiliation does not seem to leave much room for such a possibility.

Taylor's interpretation of humiliation offers another helpful perspective. Taylor explains that in humiliation one's view of himself as having *fallen* from a higher to a lower position is crucial. It does not matter whether or not one agrees with this lower position, in other words whether or not one identifies with the weakness that was the target of the humiliation (this might be an important difference because, as will be shown in the more detailed discussion on shame, below, in feeling shame one *does* identify with a weakness). What matters mostly in humiliation is that the agent is aware that the audience will regard him as *presumptuous* because he had occupied a higher position and had given himself out to be something that he is not. His fall makes him look ludicrous, and it is this awareness that he is seen as having been presumptuous that is essential to humiliation.<sup>226</sup>

I think both analyses by Nussbaum and Taylor add to a proper understanding of what humiliation is. I think humiliation is necessarily public, plus it always involves a degradation which is 'done to you', which at the least exposes the very practical weakness that you are somehow subordinate to the person or institution who is degrading you. Humiliation is therefore very much about public weakness, but it

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<sup>226</sup>Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 67.

might be less of a reflection on your *self-image*, on a weakness of the self. Also, you have somehow opened yourself up to the possibility of this degradation, which means you were claiming a position that you were not entitled to.

I will lastly illustrate the differences between the embarrassment, shame and humiliation by repeating an example. In the above, I have described Nussbaum's example of forgetting someone's name. Remember that such forgetfulness is only embarrassing when talking to the person whose name one has forgotten, and only shameful if it points to an actual weakness or disability. Now what would make this forgetfulness humiliating, is if some third party were to actively try to expose this weakness of yours, for example by publicly asking 'do you actually know the name of this person we are talking to?' (This situation could hardly lead to mere embarrassment as the question implies a structural forgetfulness on your part.) A third party publicly drawing attention to your weakness is deliberately placing you in an inferior, weaker position. Humiliation therefore is not so much about the uncovering of a weakness of the self, even though it might well include that, but rather about exerting power over another and being placed in an inferior position.

### 3. Guilt and shame

Guilt and shame then are the emotions which will be explored for their possible aptness as responses to wrongdoing in this thesis. Guilt reflects on a past wrongdoing, and shame can do the same. When reflecting on a wrongdoing, there is also a sense of regret involved in both emotions, a recognition of error, an awareness that you

have acted against yourself. Both shame and guilt then highlight the contrast between the wrongful act and the person who you want to be, and might in that way allow you to find your way back.

These emotions, guilt and shame, also have a special part to play within a relationship. When people are involved in some special relationship, like friendship, and a wrong occurs between them, guilt and shame could reaffirm shared values and the importance of the relationship (which was or had seemed diminished by the wrongful act). These emotions might bring the relationship closer to how it was before the wrong, even if a complete return to previous conditions might not always be possible. Between people who are merely tied by the committing of a wrong, feelings of guilt and / or shame about the wrong might aid in loosening the ties that have resulted from the wrong. Since the particular connection which has at its base the committing of a wrong is likely to be a source of discomfort, expressing guilt and / or shame has a propensity to relieve that uncomfortable connection.<sup>227</sup> How exactly do guilt and shame function, both in private and in the context of a relationship, or simply between people, after a wrong? In the next two chapters, I will analyse guilt and shame in turn.

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<sup>227</sup>See also above, 34.

## V. GUILT

What is guilt? First of all, I am of not course not referring to the state of *being* guilty, of having committed a wrong, but to the emotion: *feeling* guilty. The requisite thought content of guilt is constituted 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 self-anger.<sup>228</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>229</sup>

How does this quotation, in light of my earlier statements about the necessary elements of the emotion, add to an analysis of the emotion of guilt?

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<sup>228</sup>Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 128-30.

<sup>229</sup>*ibid*, 128.

## 1. Responsibility for a wrong

The person experiencing guilt is by Greenspan (and Edwards) 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 (although shame does contrast the self with an ideal, but more on that later).<sup>230</sup> This point is of course related to the claim that guilt 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>231</sup> Such an act can be wrong in terms of one's underlying personal relationship, such as friendship, but the act can also be a breach of a basic respect for persons.

I want to point out however that the wrongdoer who actually feels guilty, thereby does *not* identify with the (lack of) values implied by the wrong, and that 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>232</sup> I will elaborate on this point below.

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<sup>230</sup>ibid, 134.

<sup>231</sup>See also ibid, 120.

<sup>232</sup>See also Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 92.

### **How guilt feels**

In experiencing guilt feelings, you realise that you carry responsibility for something that you consider to be *wrong*, something that goes against your values. Perhaps you even remember how it felt at that precise moment when you *wanted* the wrong, when you wished for the wrong and made it happen. It is this memory which is particularly unsettling: one is confronted with a different image of oneself as a person who wanted the wrong, but, looking back, this desire does not at all fit one's own values. It seems unthinkable that you wanted this, but you clearly remember doing so. Does it mean that you do not really have the values you thought you had?

In fact, here again we see a similarity between guilt and shame, since shame will be explained to present one with a contrasting self-image in a similar way. Shame however then forces one to recognise that negative self-image as fitting; it forces one to identify with that negative self-image. Guilt feelings do the opposite. The fact that you feel sincerely guilty clearly shows that you are at odds with yourself, that you acted against yourself, that you still see the wrong as a *wrong*. Feeling guilty might then feel like a confusing process of doubting and re-establishing your own (moral) values, placed against the background of the knowledge that you *wanted wrong*.

### **Guilt without fault**

Moral dilemmas can provide interesting examples of appropriate guilt without full moral responsibility, or fault. A wrongful act has been committed, but the agent is *excused* by a lack of fault.<sup>233</sup>

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<sup>233</sup>T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard

In order to clarify the issue of moral dilemmas, I will discuss a well-known example: Foot's railway signalman. Imagine a moving train that cannot be stopped, but only turned to another line by operating the points. A signalman guides the train down a line where one workman is trapped and killed, thereby saving the lives of five other workmen who were trapped on the other line and who would have been killed if the train had come down their way. The signalman is causally responsible for the death of the one workman, but we would probably say that the death was not his fault.<sup>234</sup>

The first question is whether or not a feeling of guilt is appropriate in this case. In light of my earlier comments on entertaining a thought versus holding an actual judgement or belief, it should be clear that I would consider guilt to be a fitting emotion under these circumstances. The signalman does not actually have to be convinced of his own moral responsibility or fault, he need only *entertain the thought* in order for the emotion of guilt to be possibly appropriate.<sup>235</sup> But even if the signalman is fully aware of the fact that he was not *at fault*, a feeling of guilt might still be *fitting*. Even though he did save the five others, it was still his action that killed the one workman. And causing the death of another person is still a wrong, even if the signalman is excused by the circumstances. In fact, he even chose to commit this wrong; he actively flipped the switch. If it was not for him, this one workman would

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University Press, Cambridge, Massachusetts 2008), 13, Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 176, see also J. L. Austin. 'A Plea for Excuses: The Presidential Address' (1956) 57 *Proceedings of the Aristotelian Society* 1-30.

<sup>234</sup>A fault might be a character flaw such as a tendency to be careless for example, or a lack of proper concern for another's well-being.

<sup>235</sup>See also Herbert Morris, 'Nonmoral Guilt' in Ferdinand Schoeman (ed), *Responsibility, Character, and the Emotions* (Cambridge University Press, Cambridge 1987) 220-240, 220 and Michael S. Moore, 'The moral worth of retribution' in Ferdinand Schoeman (ed), *Responsibility, Character, and the Emotions* (Cambridge University Press, Cambridge 1987) 179-219, 204.

not have died (if not for him, several others would have died of course, but that does not entirely erase the fact that the signalman played an active part in this workman's death). The signalman might be excused by the circumstances, but as has been stated in the previous discussion of agent regret, this kind of active participation in another person's death does leave a shadow over one's life. The signalman is still *causally* responsible for a wrong, which makes a feeling of guilt at least fitting.<sup>236</sup>

One might wonder at the *aptness* of the emotion of guilt in such a case, though. The aptness of guilt might for example be located in clarifying one's moral values to oneself, in the sense that feelings of guilt might allow one to realise that what one did (having self-deceptively rationalised one's intuitive objections away) was contrary to the moral standards that one adheres to. But Foot's railway signalman does not require any such clarification; the (general) wrongness of the act of causing the death of another was quite clear to him already. But the emotion of guilt might serve to distance the signalman from the act, and make it very clear that this act should not be taken as reflecting on his character. Therein lies the aptness of the emotion: it serves as an explanation of the values of the wrongdoer. One might argue that the circumstances of the case already make it abundantly clear that this act should *not* be held against the signalman, and that might be the case. That does not change the fact however that in principle the signalman is still *answerable* for his behaviour, even if he was not fully (not morally but merely causally) *responsible* for this wrong.

The example of moral dilemmas thus highlights an important distinction between a mere causal responsibility, without *fault*, and the kind of responsibility that

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<sup>236</sup>Of course, the railway signalman might also experience feelings of agent regret; I do not see the two as being mutually exclusive. However, guilt in particular responds to the thought content that one has acted against oneself.

includes a *fault* on the part of the agent. In both cases however, guilt might be appropriate (or at least fitting)<sup>237</sup>, which is why the emotion of guilt cannot properly be understood as a wrong plus a fault. The thought content of *responsibility* more appropriately reflects the wrongdoer's personal connection to the wrong.<sup>238</sup> I therefore hold that the requisite thought content of the emotion of guilt is made up by *responsibility* for a *wrong*.

## 2. How guilt reveals value

I have stated above that emotions reveal value, to ourselves and to others. In the case of guilt, this characteristic of the emotion is particularly important. Guilt is one of the rare emotions that can persuade us of a moral truth that we had not been willing to accept until our own guilt feelings made this moral assertion impossible to deny.<sup>239</sup>

How could such a revelation manifest itself? In order to explain this point, I will use a hypothetical variation of a typical restorative justice success story, derived from Annalise Acorn's *Compulsory Compassion* (2004).<sup>240</sup> This story tells of the restorative encounter between the offender, a burglar, and his victims. In the burglar's

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<sup>237</sup>Whether or not the agent was *at fault* will however obviously have implications for the emotional *obligations* of guilt feelings, as I will discuss below.

<sup>238</sup>In cases where there is not even a personal connection, it is likely that *regret* would be appropriate rather than *guilt*.

<sup>239</sup>Christopher Peacocke, *The Realm of Reason* (Oxford University Press, New York 2004), esp. 263-4.

<sup>240</sup>Restorative Justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.' Tony F. Marshall, 'Restorative Justice, an Overview' Research Development and Statistics Directorate (Office, Home ), 5.

interpretation of the crime, the family has not undergone any substantial suffering, since their goods were well insured. All they have to do is declare the losses and they will be reimbursed. The offender has even convinced himself that the family may even be better off as a result. We can see in this story how the offender chooses (consciously or subconsciously) to focus on a certain subset of the facts, a subset which seems to negate the seriousness of the offence. Now, instead of awarding punishment, which would be an impersonal penalty for violating a legal norm and which would allow the offender to maintain his current focus and his current interpretation of the offence, restorative justice compels the offender to confront the victims and to learn how serious their suffering actually was. In other words, the focus is switched to another subset of the facts of the case. The family explains the fear that they felt when they found out that a burglar had invaded their home, their safe haven. Sticking to narrative stereotypes, Acorn describes how the father is suffering from sleepless nights after the events, tormented by the idea that he cannot protect his family, and that the mother is now both afraid to go out and to stay at home. Moreover, one particular stolen item can never be replaced; it was an heirloom, given to the mother by her grandmother before dying. As a further result of the crime, the children suffer from anxieties and are not doing well in school. The laments of the victimised family cause a change in the attitude of the offender: he now pities the victims, and recognises himself as the causal agent of their suffering. This inspires him to feel guilty, to apologise and to want to make amends.<sup>241</sup>

In this story, additional information is brought to the offender's attention, which opens up the possibility that the offender was genuinely unaware of the

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<sup>241</sup>Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (UBC Press, Vancouver 2004), 152.

wrongness of the offence. However, I would consider it much more likely that even though the specific details of the family's suffering were unknown to the offender, he was in general aware of the fact that a burglary in one's home constitutes an intrusion of a sphere that is normally protected and private, and that the loss of personal objects is inconvenient and unsettling at best. Also, the general moral concept of the wrongness of burglary would at least be present.<sup>242</sup> I would then argue that even though the wrongness of the offence was inferable from the information that was available to the offender, he, for some reason, did not properly acknowledge this fact as *wrong*.<sup>243</sup> Being confronted with the requisite subset of facts and under the influence of the pangs of guilt, the offender now has to admit to himself that his action *was* wrong, and important enough to care about. I want to stress that a mere cognitive focus on the suffering of the victims here would be unlikely to have produced the same result in this story, for their suffering might, in the mind of the offender, still be outbalanced by the fact that they are well insured. It is the *affect*, the experience of the *emotion* of guilt that finally tips the scale, which places the focus squarely on the family's suffering, and which counteracts the self-deception and rationalizations that the offender was entertaining in his mind. It is the *feeling* of guilt that forces the offender to admit to himself that his actions were *wrong*, and that he in fact already *believes* them to be wrong. For how else could he be experiencing these pangs of guilt? This story illustrates how I interpret Peacocke's claim that emotions can make us accept a moral truth. In her discussion of emotions of self-assessment, Taylor makes a claim which in my view underlines exactly this point:

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<sup>242</sup>Christopher Peacocke, *The Realm of Reason* (Oxford University Press, New York 2004), 261.

<sup>243</sup>The offender was either self-deceptive or weak, see above, 78.

The experience of an emotion of self-assessment is also a happening which changes the state of things. The change is in the view the agent takes of himself. Starting from a set of beliefs or assumptions about himself, his conceptions of some event or state of affairs is such that he has to formulate beliefs about himself which conflict with the ones he held initially; so he has to alter his view of himself.<sup>244</sup>

It is in this sense that the emotion of guilt can be informative and persuasive, at least to oneself. But I have claimed that guilt is also informative to others, which I will explain in the next section.

### **Guilt and identification**

At this point I want to elaborate on the important issue of guilt and identification. I have mentioned earlier in this thesis that a wrong can be understood as a 'false moral claim' which expresses a kind of moral falsehood, i.e. that the wrongdoer is justified in his behaviour.<sup>245</sup> The emotion of guilt however expresses the opposite: it shows a thought content which is based on the fact 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>246</sup>

The point about identification again illustrates a fundamental difference between guilt and shame. Shame is, as will be explained in further detail below,

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<sup>244</sup>Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 15.

<sup>245</sup>Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press, Cambridge 1988), 125. See also above, 24 and a further explanation below, 112.

<sup>246</sup>Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 135.

associated with the exposure of a weakness. 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 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 (and which 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>247</sup> When a cause for guilt is exposed therefore, I would argue that the agent's reaction will quite different. Instead of hiding his guilt feelings, he will assert them, publicize them as the emergence of guilt feelings shows that the committing of the wrong does not adequately reflects the wrongdoer's character.<sup>248</sup> It is relevant to note that the wrongful act itself, of course, still reflects on the wrongdoer's identity: 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 from one's identity.

A person's held values are relevant in social relationships, and guilt provides

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<sup>247</sup>Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 92. See also C. Bennett, *The Apology Ritual, A Philosophical Theory of Punishment* (Cambridge University Press, Cambridge 2008), 116 and Goffman (1971) quoted in J. Braithwaite, *Crime, shame and reintegration* (Cambridge University Press, Cambridge 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.'

<sup>248</sup>See also Jeffrie G. Murphy. 'Well Excuse Me! - Remorse, Apology and Criminal Sentencing' (Arizona State Law Journal Symposium 2005) 1-25, 6 and Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (UBC Press, Vancouver 2004), 61-2 on the popular culture of apology.

insight and information about these values. Because guilt feelings distance a person from the associated wrongdoing, it makes sense for him to be very open about his feelings of guilt.

### 3. The obligation of guilt

In the previous section on the emotional obligations within relationships, I have identified this obligation as based on certain characteristics or the role of the person who is under said obligation. Friendship requires substantive emotional engagement, whereas one's role as a fellow human being as such requires no more (and no less) than respect for morality. There is however, I have argued, a specific bond between the wrongdoer and any person who has been wronged (the victim), and this connection might also serve as the base for an emotional obligation of feeling guilty. This obligation would take the form of a claim that (1) the associated thought content should be of sufficient importance to be in focus and (2) that the wrongdoer should be affected by this thought content. If the wrongdoer does not fulfil the obligation to feel guilty, then his position, his role or his character will be re-evaluated. What does that imply for the emotion of guilt within friendship (or other emotional relationships) and between strangers who are connected by a wrong?

#### **Guilt within friendship**

Imagine that John has wronged Tina; let us say that he has told ugly lies about her. Let us also imagine that John and Tina are *friends*. I have explained that a wrong

constitutes a moral falsehood, in this case the claim that John is justified in spreading lies about Tina. The friendship between John and Tina now creates an obligation for John to feel guilty, which in this case would consist of (1) the requisite thought content that the telling of lies is *wrong*, (2) the requisite thought content that he, John, was *responsible* for telling these lies, and (3) the requisite affect. A failure to provide the emotion of guilt on the part of John will not only reflect on his relationship with Tina, but also on John's character.

In this example, there are different relationships and roles at stake. First of all, there is the friendship of John and Tina. As I have explained in chapter III, the requisite characteristic of friendship is that John *cares* about Tina, and that he therefore should not want to hurt her. Now hypothetically, it might be that John does not agree that telling lies is wrong *per se*, but he does agree that he has shown less than adequate care for Tina by telling ugly lies about her, which hurt her feelings and other people's opinion of her. Now in principle, this leaves certain requisite characteristics of the friendly relationship between John and Tina intact, because John *does* care about her. Tina now needs to decide if she wants to be friends with a person who is less than truthful. In fact, since there is exposure and vulnerability in intimacy such as friendship, I would argue that it is dangerous to oneself to become intimate with a person whose values (in general) one does not share.<sup>249</sup> Continuing a friendship with such a person might also indicate self-deception or a weakness on the part of Tina.<sup>250</sup>

However, even if the friendly relationship between John and Tina remains

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<sup>249</sup>Martha C. Nussbaum, *Hiding from Humanity* (Princeton University Press, Princeton 2004), 216.

<sup>250</sup>T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press, Cambridge, Massachusetts 2008), 130.

intact, the fact that John does not feel guilty about telling lies *as such* reflects on this character: he is not a truthful person. My point is that John's position is affected in different ways: his guilt feelings (or the absence thereof) reflect not only on his relationship with Tina and on his role as a friend but also on his own character and his performance as a fellow human being. This is because a wrongful act can carry in it several moral falsehoods; in this case one might be that it is permissible to lie, and another might be that it is permissible to hurt a friend. Correspondingly, in this case John can feel guilty about *hurting* a friend, lying *about a friend*, or he can feel guilty about lying *as such*. In order to understand John's position, Tina needs to know what it is exactly that John feels guilty *about*.

Interestingly, it is precisely because we have limited *voluntary control* over emotions, that we can draw such conclusions from emotional experiences.<sup>251</sup> If a wrongdoer does feel genuinely guilty, then we can infer from that fact that he too (now) believes that his act was wrong. The mere utterance of such a conviction might be unreliable, and indeed it has been negated by the very fact that he committed the wrong. However if one genuinely *feels* guilty, this emotion clearly shows that the wrongful act is now *recognised as such*.<sup>252</sup>

However, it is of course not enough for one to simply feel the emotion; a mere private guilt feeling on John's part would leave many of the moral falsehoods, implied by the wrongful act, intact. Furthermore, a mere private guilt feeling can hardly be expected to have any significant effect on the friendship, which by its very nature is reciprocal. John has acted in ways that make it seem like he is not, or no longer, Tina's

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<sup>251</sup>Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 113.

<sup>252</sup>Of course, this evokes the interesting question of being able to distinguish *genuine* from *insincere* guilt. I will discuss that issue in a later section. See below, 123.

friend. The ties of friendship have been weakened by his act. John's guilt feelings might serve to reject the message implied in the wrongful act and repair the ties of friendship to a degree, but they can only be expected to have this effect if Tina is aware of the fact that John is feeling guilty. An expressed emotion of guilt thus carries valuable information about the relationship and about the person, which might lead to reparation or to alteration of the friendship. John's role as Tina's friend obliges him not only to feel guilty about his wrongdoings, but also to express those guilt feelings.

### **Obligations of guilt between strangers**

Strangers of course do not have a substantive emotional engagement such as friendship between them. What is the role of guilt between strangers? The moral relationship between strangers is not based on any emotional affect, and does not normally need any affect to function. As I explained above, this relationship exists in a different narrative; a narrative in which one does not invest in a meaningful relationship with another person but rather fulfils one's duties and moves on. There is however one exception: to the point that one self-identifies *as a moral person*, it might be understood that this relationship *with oneself* is developed and reaffirmed every time one chooses to follow moral reasons for their own sake.<sup>253</sup> This

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<sup>253</sup>See **A moral person**

As we have seen in the discussion on care, to care about something is to *identify* with something. And Kant's work actually allows for that same interpretation of respect for the moral law. For Kant explains respect for the moral law also in terms

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of one's self-regard as a rational creature (humanity).

Has not every even moderately honourable man sometimes found that, where by an otherwise inoffensive lie he might either have withdrawn himself from an unpleasant business, or even have procured some advantages for a loved and well-deserving friend, he has avoided it solely lest he should despise himself secretly in his own eyes? When an upright man is in the greatest distress, which he might have avoided if he could only have disregarded duty, is he not sustained by the consciousness that he has maintained humanity in its proper dignity in his own person and honoured it, that he has no reason to be ashamed of himself in his own sight, or to dread the inward glance of self-examination?

Kant even adds that 'such is the nature of pure practical reason.' The person in this example clearly identifies with the thought of himself as a moral person. He considers this important, and so his self-regard (which according to Kant is a good thing only insofar as it is based on morality, which it is in this case) acts as a motive to follow duty instead of temptation. It is important to note that one cannot take any pride out of the fact that one follows duty, for then *pride* would be the reason to follow duty, rather than duty itself. Any act in accordance with the moral law, that is brought on by an inclination, is *legal* but not *moral* in Kant's eyes; it has no moral worth. But if a person acts out of regard for himself *as a moral person*, then that action is done out of respect for the moral law. Since it is a duty to act out of respect for the moral law, there is no basis for *pride*.

I argue that we can understand respect for the moral law both in terms of *care* and as self-regard as a moral person, although I need to make an important distinction: while every person is required to care about the moral law, there is no obligation to develop a substantive self-regard of oneself as a moral person. This is one step further, so to speak. In fact, I would argue that one who identifies with respect for the moral law has in fact a relation to *himself* which is not unlike friendship. It requires that one cares about one's own self-image as a moral person sufficiently to be affected by it, and if one has established such a relation with oneself I would therefore understand that as an emotional relationship.

I do also think that the example above shows that *habituation* is important when it comes to respect for the moral law. Respect for the moral law might be a matter of degree; one might accept the normative value of some moral reasons but not of others. By exercising (and re-exercising) respect for the moral law however, one comes to have, and comes to *see oneself as having*, a respectful character; one comes to see oneself as a moral person, at least to the degree that one accepts the moral law. This point is related to Kant's insistence that an action in accordance with the moral law but brought on by some inclination has no moral worth. Of course, I would not argue that an act caused by *any* emotional response should therefore be so disqualified, but I will agree that the motive matters for the relationship with oneself as a moral person. If one performs an action *in accordance* with morality, but with the *primary motive* of pleasing a friend, say, then to the extent that one's motive is different from respect for moral reasons, one's relationship with oneself as a moral person is not developed or reaffirmed. One develops this particular relationship only by performing acts *out of* respect for moral reasons. Importantly, however, once this self-regard as a moral person has been established, then one has expressive reasons to act in a way that is fitting to this self-regard.

#### **Moral person (fact) versus moral person (attitude)**

By explaining the idea of *respect for the moral law*, I have explained how being responsive to moral reasoning might shape one's character and allow one to self-identify as a moral person. But I must take care not to conflate the terms here. Even a person who does not care about certain moral reasons, might still be a rational human being. I am referring of course to the difference between someone who only respects others because he is deterred by the possibility of negative

relationship does function within the same kind of narrative as the emotional relationship. When a wrong has been committed, there are therefore two relevant relations in play: (1) the tie to between the wrongdoer and the victim, and (2) the wrongdoer's self-identification as a moral person (relationship with oneself as a moral person). These relations function in different narratives: in the first case, the tie will be considered a burden that the parties will want to relinquish themselves of, so that the relation between them can revert, as closely as possible, back to the previously held relation of mere strangers; the second relation, if it exists, is a substantive one which the subject will aim to nurture.

When a wrong has been committed, there might be several 'moral messages' implicit in the wrong, such as:

- the relevant moral rules do not apply to the wrongdoer *vis-a-vis* any stranger; or
- the relevant moral rules do not apply to the wrongdoer *vis-a-vis* the victim (implying that the victim somehow is a lesser person than others).

Both the tie between the wrongdoer and the victim and the wrongdoer's self-identification as a moral person give grounds for an obligation to feel guilty. This obligation of guilt would then imply that (1) the act was *wrong*, (2) that the wrongdoer is *responsible* for this wrong, and (3) that (the responsibility for) this wrong is so important that the wrongdoer should care enough about it to be affected. In some cases, the wrong might not actually be important enough to care about, or one might have good reason to be pre-occupied with other thought content. In a case where a

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consequences, and someone who respects others because he believes he should. The first one still is a rational human being, deserving of all the entitlements that that status entails, but he does not have a *moral attitude* (with respect to these moral reasons, at least). If this person acts in accordance with moral reasons, he is not thereby developing or affirming any substantive self-regard *as a moral person.*, 62.

victim is genuinely harmed however, it is hard to see how such a wrong could not be important enough to care about (barring exceptional circumstances).

A wrongdoer who expresses sincere guilt feelings may then allow both himself and the victim to move on. In that sense, their 'relation' is 'repaired'. The fact that the obligation on the part of the wrongdoer to feel guilty is based on and influences the tie between the wrongdoer and the victim, not just the wrongdoer alone, can be shown by the importance of this obligation for the victim. The victim (and anyone in close relation to the victim) in particular will be affected by such an expression of guilt, especially in more severe cases. The wrong is an important event in the victim's life, something that the victim will have to come to terms with.<sup>254</sup> The obligation to feel guilty, deeply embedded within the bonds that tie the victim to the wrongdoer, negates the moral falsehood that the wrongdoer need not be concerned with the victim's rights. In the words of Jean Hampton:

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<sup>254</sup>T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press, Cambridge, Massachusetts 2008), 159.

... 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>255</sup>

The obligation to feel guilty denies the implication that the victim is of lower moral worth than the wrongdoer.<sup>256</sup> Of course, the victim might have other things on his mind and might not actually confront the wrongdoer in these terms. My point however is that there is an obligation to feel guilty embedded in the terms of this particular tie; the one between the wrongdoer and the victim. Because this obligation concerns the ties between the wrongdoer and the victim, not just the wrongdoer himself, the emotional obligation of guilt extends to an expression of the guilt feelings, as was the case with guilt between friends. A failure to show guilt feelings on the part of the wrongdoer will keep this relation of discomfort in place, and the position of the wrongdoer with respect to third parties might be affected as well. As Scanlon has pointed out, there is a default relationship between strangers, and even this very basic relationship allows room for some modification. If a wrongdoer does not feel guilty at all, then that shows at least that he does not recognise the moral rights of the victim in particular, or it might show that he does not recognise these particular moral rights, or moral rights in general, with respect to any other person. Of course this information, especially the first explanation thereof, gives the victim (and anyone in close relation to the victim) good reason to avoid this person in the future. But a general lack of respect for persons might also give third parties good reasons to refuse to interact

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<sup>255</sup>Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press, Cambridge 1988), 125.

<sup>256</sup>*ibid*, 44.

with the wrongdoer altogether, or merely to refuse to enter into any substantive emotional relationship with the wrongdoer, or to *resent* him and even 'write him off' completely.<sup>257</sup> The obligation to feel guilty, based on the tie between the wrongdoer and the victim, thus aims to negate the moral falsehoods that were implicit in the wrong and aids the repair (as far as possible) to the 'normal' relations, before the wrong occurred.

Secondly, I have explained that an emotional response is an obligation that might flow from one's relationship with *oneself*, if one identifies oneself as a moral person.<sup>258</sup> When a person who has a substantive self-regard as a moral person commits a moral wrong, he then has to ask himself whether the moral falsehoods that speak from this moral wrong apply to him. If he does not feel guilty, then he has to conclude that he is not the moral person that he thought he was. Even if he considers the wrong only a minor one, he might only have an obligation to feel guilty to a correspondingly minor degree, but the feeling should not be absent. This relationship with oneself, if it is substantively established, is an emotional relationship, and a substantive self-regard *as a moral person* cannot normally be maintained in light of a failure to feel guilty after one has committed a moral wrong. One difference however between the emotional obligation based on the tie between the wrongdoer and the victim, versus the wrongdoer's relational ties with *himself*, his self-image, is that the second obligation might not extend to *expression* of these guilt feelings, since the very act of acknowledging one's own guilt feelings is informing oneself of them.

I conclude that between strangers, the committing of a wrong establishes a tie

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<sup>257</sup>T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press, Cambridge, Massachusetts 2008), 141-3.

<sup>258</sup>See above, 62.

between the wrongdoer and the victim which provides the basis for an obligation to feel guilty on the part of the wrongdoer. The expression of guilt negates the moral falsehoods implicit in the wrong and contributes to a state of affairs where both the wrongdoer and the victim might move on. A failure to feel guilty on the part of the wrongdoer might affect his status as a 'respectful stranger' and might also give third parties reason to avoid interaction with him. A wrongdoer who identifies as a moral person also has an obligation to feel guilty towards himself, in order to maintain his own self-image as a moral person.<sup>259</sup>

### **The obligation of guilt without fault**

I have argued above that the example of the railway signalman shows that guilt is not properly understood as a wrong plus a *fault*, since even without a fault a personal connection to a wrong might make a feeling of guilt entirely appropriate. I therefore offered a wrong plus responsibility as a more accurate understanding of the cognitive content of guilt.

A different question is whether or not the signalman *has an obligation* to feel guilty, even if he is without *fault* in the matter. This is a more complicated point. Greenspan does argue that in a case of a moral dilemma, where the agent was only presented with wrong options, the emotion of guilt can be required. She argues that a moral dilemma does involve *some* responsibility for a *particular* wrong, 'insofar as the agent chooses a wrong option in the knowledge that it is wrong and carries through on the choice by voluntary action.'<sup>260</sup>

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<sup>259</sup>See also R. A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001), 28.

<sup>260</sup>Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 181.

I have explained that an emotional obligation, in my view and in short, is a value-claim of the associated thought content and the affect. This would include *every element* of the associated thought content: if a person is responsible for an act, but that act is not wrongful, we would hardly expect an obligation of guilt. In this case, it is clear that a wrongful act has been committed: a workman has been killed by a deliberate act. The fact that this option represented the lesser of two evils to the agent (the signalman), and that his act can therefore be excused, does not make it any less wrongful. The agent is also still responsible for his act, albeit in a limited and merely causal fashion. Any obligation on the basis of this act, I would argue, is limited to the same extent. This has a substantial effect on the kinds of obligation that I would deem appropriate. In a case like the railway signalman example, I would argue that an *explanation* might be part of this obligation, but an actual emotional response is not.

### **The need for an explanation**

Greenspan makes this point in *Practical Guilt*. She argues that the wrongful act (for the act was still wrong, even though the signalman was excused) has at least *tainted* the agent (has put a kind of suspicion on him). Greenspan continues with the claim that an agent who is so tainted has a real need to clear himself in the eyes of others. Others, according to Greenspan, do have a reason to be suspicious. 'At a minimum they have a reason to demand an *explanation*.'<sup>261</sup>

The point about the need for an explanation is intriguing. We have seen in the example of John and Tina that a wrong can be associated with different moral messages. In the railway signalman example, one such associated moral falsehood

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<sup>261</sup> *ibid*, 178.

might be that it is permissible to cause the death of a worker on the tracks. Now, if the signalman felt guilty, he would thereby show that he is affected by (thoughts of) responsibility for a wrong. The emotion of guilt might therefore be understood to convey, among others, the agent's conviction that the act was indeed *wrong*. In other words, the emotion of guilt would renounce, among others, the false moral claim that it is permissible to cause the death of a worker on the tracks.<sup>262</sup>

I have explained that although a feeling of guilt might be an appropriate (or at least a fitting) emotional response, the options of voluntarily providing the emotion of guilt are limited because of the fact that affect is not by its nature within one's control. The signalman cannot force himself to feel guilty. But if he does not feel guilty at all, then the false moral claim that it is permissible to cause the death of a worker on the tracks still stands; this moral falsehood, implied in the committing of the wrong, has not been explicitly denied. This seems to me to be the very taint that Greenspan speaks of.<sup>263</sup> To prevent others from identifying him with this moral falsehood, the signalman might try to distance himself from this moral falsehood in other ways than by the expression of sincere guilt feelings. An explanation then serves to distance oneself from the false moral message that was implied in the wrongful act.<sup>264</sup>

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<sup>262</sup>See also Herbert Morris, 'Nonmoral Guilt' in Ferdinand Schoeman (ed), *Responsibility, Character, and the Emotions* (Cambridge University Press, Cambridge 1987) 220-240, esp. 222 and 237.

<sup>263</sup>See also my discussion of agent regret, above 87 and Bernard Williams, 'Moral Luck' in *Moral luck : philosophical papers, 1973-1980* (Cambridge University Press, New York 1981), 28. In 'A Plea for Excuses: The Presidential Address' (1956) 57 *Proceedings of the Aristotelian Society* 1-30, J. L. Austin explains that in the case of excuses, it is often unclear what exactly the agent is excused from. Such ambiguity can also result in a remaining 'taint'.

<sup>264</sup>See also R. A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001), 94 for a somewhat different view. Duff argues that even when one 'intentionally but justifiably' harms another, one is required to apologize since a failure to apologize 'would fail to show [the victim] the respect and concern due to her'. Duff however allows for 'ritual expressions of the apology' that do not necessarily require guilt feelings. He is therefore not

The explanation given by a wrongdoer could therefore tie him closer or distance him from the wrongful act. I have explained earlier in this thesis that even if one cannot be said to be in full immediate control of one's emotions, or perhaps precisely because one normally lacks control over one's emotions, others might (and frequently do) judge a person for his or her emotional response, because of the values or character that speaks from this response.<sup>265</sup> In the case of a moral dilemma, this means that one might feel the need to explain oneself, to avoid a possible negative judgement.

Greenspan argued that others also have a reason to demand such an explanation, and I would argue that this demand would be aimed at a moral message that is then thought to be implicit in the wrongful act. Similarly to the emotional obligation, which aims to confirm a certain thought content associated with that emotion, an obligation of an explanation in this case would aim for a refutation of that (false) moral message. It asks the signalman to confirm that he still shares the opinion that it is wrong to cause the death of a workman in the tracks. Is the signalman under an obligation to explain himself? To the extent that the signalman has been tainted by suspicion, I grant that he might have good *reasons* to explain himself, to reaffirm his shared values to others and even to reaffirm his own values to himself. However, the consequence of a failure to provide an explanation for a *wrong without fault* does not in itself prove anything: the only consequence is that the taint of suspicion remains. The suspicion remains unconfirmed because the excusing

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claiming that one who intentionally but justifiably harms another is required *to feel guilty*, but merely seems to require an expression reaffirming the concern and respect due to the victim. This expression might be very similar to the explanation that I argue would be required in such a case.

<sup>265</sup>See above, 47 and 108.

circumstances still allow for a different explanation than the moral falsehood that is implicit in the wrongful act. A moral dilemma therefore does not allow for an emotional obligation of guilt in the way that a 'common' moral wrong does: it merely provides good reasons to offer an explanation for your behaviour, but no obligation as such. (Appropriate) guilt feelings might provide this explanation, but words may explain the agent's values as well; the wrongdoer who commits 'the best possible' wrong in the face of a moral dilemma has no obligation to feel guilty.

#### 4. On the apology

I have discussed under what circumstances the obligation to feel guilty might arise, and why. I have also explained the possible value of the emotion of guilt, and how it can repair and be informative to (emotional) social relationships as well as (principally non-emotional) moral relationships. However, it is one thing to actually be experiencing an emotion, and quite another to communicate that fact. The socio-culturally determined conventional method of communicating guilt feelings, in this society and the ones like it at least, is by *apologising*. In this section, I therefore want to discuss the apology.

What exactly is an apology? What shape does it take? One can say: 'I apologise', with or without a clarification of what exactly one is apologising for. Also, the expression 'I'm sorry' seems to have the same meaning in some cases. Although the latter appears to indicate some kind of sadness, I would argue, in line with the above explanation of the requisite thought content of guilt, that an apology reflects

the judgement that the agent is responsible for a wrong rather than a communication of the agent's sadness. Now the agent might very well be sad about the fact that he is responsible for a wrong, but in cases where the words 'I'm sorry' primarily mean to express sadness we do not normally classify them as an apology. Also, some verbal expression is required. Whereas a lot of communicative action can take place non-verbally, I do not see how one could successfully apologise with a mere hand-gesture or even the addition of tears. The appropriate form for an apology is quite specific, and quite ritualized in that sense.

### **Apology as a speech act**

But there is much more to the apology than the mere verbal manifestation of guilt feelings. An apology is expressed *deliberately*, it *means* to communicate certain content. In fact, the apology is an example of the class of utterances where 'saying it makes it so', which are colloquially known as *speech acts*. When one utters 'I apologise', one has in fact done so *by saying it*. One might have also been chopping wood, but this has been done irrespective of whether or not one speaks of it.

Speech acts are quite common, for example 'I declare', 'I promise', and 'I command' are other examples of (possible) speech acts, and they do come with their own set of rules. One needs for instance to have the proper authority to be able to perform a speech act. Anyone can declare two people married but the legal consequence of this declaration depends on quite a few requirements of procedure, among which the legal demand that the person who is doing the declaring must have the authority to do so. In the case of an apology, one can only apologise for something that was in the past, and that one had some kind of responsibility for. One cannot, for

example, effectively apologise for the laws of gravity.<sup>266</sup>

What does an apology *mean*? The literature on speech acts distinguishes *natural meaning*, for example: 'these clouds mean rain', from *speaker meaning*, for example: 'My, isn't the grass remarkably green today' which does not so much mean to convey an appreciation of the colour of the vegetation but might rather express the fact that one is feeling uncomfortable with the current topic of conversation.<sup>267</sup> Speaker meaning can thus refer to something else than the literal meaning of the utterance; the speaker can mean to convey a different, implied message. Most importantly, there is in speaker meaning a kind of intentionality: one is not merely showing one's feelings (like inadvertently blushing for example), one actually *intends* to communicate a certain content. However, we are not always free to decide what we want our utterances to *mean*. In fact, with respect to certain speech acts such as the apology, we have rather little manoeuvring space in the matter. Austin, who is most renowned for his work on this field, explains that:

... a good many of these verbal procedures [*i.e. speech acts*] are designed for use by people who hold certain beliefs or have certain feelings or intentions. And if you use one of the formulae when you do not have the requisite thoughts or feelings or intentions then there is an abuse of procedure, there is insincerity.<sup>268</sup>

The apology is such a formula; a ritualized expression that has a certain fixed meaning. So we are not free to decide what we intend our apology to 'speaker mean' we have

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<sup>266</sup>J. L. Austin. 'Performative Utterances' (1979) 3 Philosophical Papers (Oxford UP) 233-252 and Mitchell Green, 'Speech Acts', *The Stanford Encyclopedia of Philosophy* (Spring 2009 Edition), Edward N. Zalta (ed.), <<http://plato.stanford.edu/archives/spr2009/entries/speech-acts/>>.

<sup>267</sup>J. L. Austin. 'Performative Utterances' (1979) 3 Philosophical Papers (Oxford UP) 233-252.

<sup>268</sup>J. L. Austin. 'Performative Utterances' (1979) 3 Philosophical Papers (Oxford UP) 233-252, my emphasis.

to abide by the socio-cultural understandings of the expression. However, even though these are largely pre-determined, I do think that there can be some confusion as to what the apology means to convey.

I argue that the apology reflects one's understanding of a past event, a wrong that one admits responsibility for. Now one might or might not be *affected by feelings* of guilt, yet by apologising one admits responsibility for a past wrong. Explicit in the apology is thus the evaluation of *past* behaviour. Much more indirectly, but often (mis)understood in this very sense<sup>269</sup>, does the apology convey the promise of *adapting future behaviour*. It would make sense to assume that a wrongdoer, who (now) regards his past act as wrong, will refrain from such an act in the future. In fact, I have argued that one of the values of emotions is *revealing* value, so I agree with Greenspan that the emotion of guilt might serve 'as a way of keeping oneself alert to certain significant subsets of the available evidence, in the first instance for their potential bearing on future moral action'.<sup>270</sup> However, in my view the apology is not meant to reflect future behaviour. In fact, since it is meant to convey guilt and guilt feelings, the apology is backward-looking as a matter of principle. The formula for the apology states, as I have explained, a certain requisite position of the speaker, and that requisite position includes a past wrong. One cannot apologise for a future wrongdoing.<sup>271</sup> The 'promise' that future behaviour will be adapted according to the insights revealed in the expression of guilt feelings is therefore only indirectly related

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<sup>269</sup>Patricia S. Greenspan, *Emotions & Reasons* (Routledge, New York 1988), 113 and Jeffrie G. Murphy. 'Well Excuse Me! - Remorse, Apology and Criminal Sentencing' (Arizona State Law Journal Symposium 2005) 1-25.

<sup>270</sup>Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 170.

<sup>271</sup>Mitchell Green, 'Speech Acts', *The Stanford Encyclopedia of Philosophy* (Spring 2009 Edition), Edward N. Zalta (ed.), <<http://plato.stanford.edu/archives/spr2009/entries/speech-acts/>>.

to the apology.<sup>272</sup> The fact that the apology directly relates to a *past* wrong, and only indirectly to *future* moral acts is in my view the cause of some confusion, for example in Murphy when he states that 'we are generally interested in apologies only to the degree that we believe that they are sincere external signs of repentance and remorse and reliable indicators of future atonement'.<sup>273</sup>

Does a future wrongdoing then prove, with hindsight, that the apology was insincerely given? I do not think this is necessarily the case either. At the time of the apology the wrongdoer might have been convinced of the wrongfulness of his act and sincerely affected by his own guilt feelings. Yet I have explained how emotions can *fade*, and how they be *dispassionate*.<sup>274</sup> It is not impossible therefore for a wrongdoer to offer an apology *sincerely* but later, when he is not quite so affected by feelings of guilt for whatever reason, to commit the same wrong again. For this reason, I would argue that the committing of a wrong *after* one has apologised for a similar wrong does not conclusively prove that the past apology was offered insincerely. I would however think that the wrongdoer in such a case has at least drawn a kind of suspicion upon himself, whereby people have a reason to suspect that the apology was insincere. Such a suspicion would be all the more strong when for example the time lapse between the apology and the second wrong was relatively short, as it is improbable that a sincere emotion of guilt can fade so quickly.

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<sup>272</sup>See J. L. Austin, *How to do things with words* (Clarendon Press, Oxford 1975), 46 for a slightly different view on the apology and the promise of future behaviour. Austin does include a commitment 'to do something subsequently' in his understanding of the apology. However, as I have explained that at the time of a sincere apology, the agent does consider the object of the apology wrongful it makes sense to assume that the agent is, at that time at least, committed to avoiding that act in the future. Austin's account is therefore not wholly opposed to mine.

<sup>273</sup>Jeffrie G. Murphy. 'Well Excuse Me! - Remorse, Apology and Criminal Sentencing' (Arizona State Law Journal Symposium 2005) 1-25.

<sup>274</sup>See above, 15 and 16.

## 5. Sincerity

But why does it matter at all that an apology (or the emotion or value that it reflects) is *sincere*? Can we not just take the apology at face value and be done with it? In criminal procedure, of course, offenders (or suspects who admit to *being* guilty) will often be asked to express guilt feelings or to apologise for the damage they have caused. Is the *sincerity* of the expression of guilt feelings important, and does this importance vary between friendship and a more ritualized setting, such as in a courtroom between strangers? I will start with an analysis of the apology in everyday social interaction, and then discuss whether an apology between two persons who are merely tied together by the committing of a wrong is any different. In general speech act literature, it is not immediately clear what the exact status of sincerity in the speech act is. According to Searle, the rules governing speech acts are not regulative but constitutive. That means that these rules define the conditions under which a specific speech act can be said to occur. Searle's view would then imply that an insincere apology is not an apology *at all*, because sincerity is a condition of the apology. However, it is unclear from Searle's account what exactly the consequence of a breach of constitutive rules in speech acts is.<sup>275</sup> Austin indicates that we should not say that an insincere apology was not in fact an apology. In his view, a person who offers an apology insincerely did in fact apologise but the apology was

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<sup>275</sup>John R. Searle, *Speech Acts* (Cambridge University Press, Cambridge 1969), 33, 41.

'hollow'.<sup>276</sup> Now one might argue that if an apology is not blatantly insincere, the wrongdoer can effectively apologise by communicating his (non-existent) guilt feelings even when he does not feel guilty. But I would agree that such an apology would be *hollow*, and that brings us to the question of whether a hollow apology has any value. And what is the difference then between a *sincere* and a *hollow* apology?

The reasons for the need for sincerity in the expression of guilt feelings are based in the thought content that these sincere guilt feelings reveal, i.e. that the agent truly admits responsibility for a wrong. Between friends and other meaningful social relationships, we will need this kind of sincerity. Tina needs to know that John genuinely feels that hurting her by telling ugly lies was wrong, so she can be more comfortable in viewing him as a friend. We need accurate information about our friends' values and character to make an informed decision whether or not we do want to engage in a friendship with them. As Frankfurt stated, *caring* for something or someone is accepting a kind of vulnerability, exposing oneself and even identifying oneself with the thing or person that one cares about. It is therefore potentially dangerous to become intimate with someone who does not share your values.<sup>277</sup> This is important enough to require that an apology, when it is given in a context of intimacy, be sincere. A hollow apology in this sense can be classified as a lie, because the speaker admits to certain values and affects that he, in fact, does not have. If these values or affects are a requisite characteristic for a position that this person holds, or a relationship that he is in, other people will be misled into believing that this person

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<sup>276</sup>J. L. Austin. 'Performative Utterances' (1979) 3 Philosophical Papers (Oxford UP) 233-252.

<sup>277</sup>Martha C. Nussbaum, *Hiding from Humanity* (Princeton University Press, Princeton 2004), 216.

is a suitable candidate for such a position or relationship.<sup>278</sup>

### **Apology between strangers**

Even though this discussion of the apology has been based on the interpersonal relationship, the practice of the apology between strangers need not be all that different. Several authors have argued that the moral falsehood which was publicly expressed by the moral wrong, that the wrongdoer is somehow superior to the victim and may the victim for his own purposes for example, can be denied and therefore rectified by a public apology, even if it is hollow.<sup>279</sup> I do not deny that the public (hollow) apology might have such an effect, but I would like to point out that any setting in which such a public apology would be called for, is likely to already have vindicated the victim's rights by other means, such as an equally public denunciation of the wrong that was committed. So while a public denunciation of one's behaviour is a value of the hollow apology, it might in context not be much of an added value.

Furthermore, I have argued that the default moral relationship between strangers does allow for some modification, even if these changes are less substantial than they might be in an emotional relationship. If the wrongdoer is sincerely feeling guilty, such modifications might not be appropriate, depending on the moral wrong. They might still be appropriate for the victim, who has a specific tie to the wrongdoer

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<sup>278</sup>Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press, Cambridge 1988), 84-5.

<sup>279</sup>See R. A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001); Stephanos Bibas and Richard A. Bierschbach. 'Integrating Remorse and Apology' (2004) 114(85) Yale Law J 85-148; C. Bennett. 'Taking the sincerity out of saying sorry' (2006) 23 Journal of Applied Philosophy 127-143 on the ritual apology.

and whose relation to the wrongdoer will never be, in the end, quite the same as it was before the committing of the wrong. For a third party (with no connections to the victim) however, things are different. If the moral wrong was not too serious and the wrongdoer does feel sincerely guilty then at least at first glance it does not seem fair for a third party to refuse any further interaction with the wrongdoer, as the wrong should not be taken to reflect on his character.<sup>280</sup> However, if we do allow for the possibility of a hollow apology, then we deprive the wrongdoer of the one specific tool that is available to him to express his sincere feelings of guilt: the apology. This means that even after an apology, any third party has no way of knowing if, for example, the wrongdoer does really consider himself superior to others in the sense that he lacks a proper respect for persons. They might therefore decide to refuse any further interaction with the wrongdoer anyway, just to be sure.

Of course, I am well aware of the fact that apologies, between strangers as well as between friends, are often expressed insincerely. It is not always possible to distinguish a sincere apology from a hollow one, in fact, more often than not, it is impossible. However, my point here is that if we do allow for the possibility of a successful yet hollow apology, the negative side-effects might be greater than the value of a hollow apology itself. We might be hollowing out the entire concept of the apology.

At this point, I merely wanted to point out some preliminary arguments surrounding the ritual apology. Later in this thesis, I will discuss the importance of emotions in criminal court, which will allow for a more extensive discussion of the

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<sup>280</sup>See also Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press, Cambridge 1988), 84-5.

ritual apology as well.<sup>281</sup> To conclude my general exploration of the guilt feeling, I shall now turn to the question of how one might appropriately overcome it.

## 6. Redemption from guilt

I want to briefly examine the redress against guilt; how to overcome the guilt feeling. Of course, by this is meant not to simply ignore the relevant subset of facts that made the feeling of guilt an appropriate response, or to cultivate oneself not to be *affected* by these facts. I rather mean what it would take for the agent to arrive at a position where the emotion of guilt would *no longer be appropriate*.

In guilt, it is clear that it would actually be quite hard, if not to say impossible, to alter the facts that made an emotional response of guilt fitting in the first place: guilt reflects a past act as a matter of principle, and what is done is done. The agent is responsible for a past wrong, and this fact itself cannot be changed by any future behaviour. In a way therefore, the emotion of guilt, once appropriate, will always remain so because the thought content stays intact, the *shape* of the emotion fits and will remain fitting.

On the other hand, I would argue that it is entirely possible that the agent might arrive at a point where the affect of the guilt feelings is appropriately reduced, in some cases even to a point where it can be said to be negligible. In this respect, it is therefore possible to overcome guilt in a way.

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<sup>281</sup>See below, 234.

### **Making up for a wrong**

Affect can be appropriately reduced by the passing of time, for example<sup>282</sup>, especially when the wrongful act was not considered by the agent and those around him to be particularly important. Guilt feelings, as any emotion, might fade over time and this can be explained in terms of certain relevant thoughts triggering the emotion. For John, there are many circumstances which might trigger guilt feelings about his dealings with Tina, not in the least spending time with Tina herself, but also spending time with the people to whom John told the lies about Tina. The fact that John told lies might for a time be very significant to their relationship. But over time, even 'the fabric' of this relationship gets to be rewoven, and new, more recent, and hopefully happier memories will take the place of the hurtful ones.<sup>283</sup> This does not mean that the thought content for guilt is erased, it is still true that John told those ugly lies, and at times when he is confronted with that awareness, he may still experience pangs of guilt. But there may after time be a lot of happier thought content to focus on, which means that feelings of guilt might arise less frequently and when they do, they may be less severe. Even John himself has perhaps had a chance to prove to himself that he does follow his own moral compass when confronted with a challenge. This realisation is juxtaposed with the memory of his committing a wrong and makes it easier to bear, relieves the inner turmoil. The more important a wrongful act is understood to be, the more reason for it to come up in thought and conversation, and the harder it will be to put the related guilt feelings in the background and overwrite them with happier experiences.

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<sup>282</sup>See my discussion on fading emotions above, 15.

<sup>283</sup>Martha C. Nussbaum, *Upheavals of thought* (Cambridge University Press, Cambridge 2001) 80-5, compare also her remarks about *changes in imagination*, *ibid*, 4.

There is also the common notion of 'making up' for a wrong that one has committed, a redress, a repayment even.<sup>284</sup> This implies that the agent 'owes something', and it is generally assumed that he owes it at least to the victim. Also, any such repayment will have to properly address the wrong that has been done.<sup>285</sup> Now if that wrong can somehow be reversed, then of course that would serve towards redress. One might attempt, as much as possible, to recreate the situation as it was before the wrongful act, without the wrong. In our example of John and Tina, John can take it upon himself to talk to anyone who has heard the lies he had spread about Tina, and rectify them. A thief can return the stolen items. The smaller the consequences of the wrongful act, the less important it might seem to be and the easier it is for such a wrongful act to fade into the background. Counteracting the consequences of a wrongful act therefore serves to reduce the affect of guilt feelings.

But of course such compensation, however helpful to a victim, does not alter the fact that the agent was responsible for committing a wrong. That knowledge is still imprinted in his self-image, and it will certainly remain part of the relationship between John and Tina, no matter how vehemently John admits that the ugly stories were lies. That thought content, the fact that John has (at one time) acted against his own values, remains intact, and the emotion of guilt will therefore remain fitting to that act. Also, not all wrongs can be reversed of course, and in many cases there is simply no way to 'undo' what one has done. In such cases, even a reduction in affect may never be entirely fitting.

Now this notion of 'making up for a wrong' is very complicated indeed, and

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<sup>284</sup>See for an example Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 90.

<sup>285</sup>Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 133.

part of a much wider discussion of criminal law and the justification of punishment which is well beyond the scope of this thesis. But a criminal offender can be, and frequently is, *punished* for the wrong he has committed, and such a punishment is also sometimes referred to as *repayment*. If criminal punishment does qualify as repayment, then maybe it can effectively reduce the affect of guilt feelings.

For now, in the very general topic of redemption from appropriate guilt feelings, my conclusions are that:

(1) the *thought content* of guilt can not really be taken away and will therefore remain in place as appropriate grounds for guilt feelings; however

(2) the *affect* of guilt might be appropriately reduced, for example by the passing of time or 'making up for' the wrong in some way. Some wrongs are, however, too serious to ever be 'undone', and it is hard to see how the affect of guilt for such wrongs can ever be appropriately reduced.

## VI. SHAME

In the previous chapter, I have provided a detailed discussion of feelings of guilt. In this chapter, I want to explore the other emotion that I have identified as being a possibly relevant response to the committing of a moral wrong: shame. The emotion of shame, as I understand it, is about the *exposure* of a *weakness*. Shame is a social and very complex emotion, that can refer to different sets of thought content. In this chapter I will explain the nature of the emotion of shame, drawing heavily on the works of Martha Nussbaum<sup>286</sup> and Gabriele Taylor<sup>287</sup>.

First of all, shame is based on an exposure of the self<sup>288</sup> and primarily reflects on a *weakness (of the self)*, rather than primarily reflecting on the wrongfulness (of the act), in the way that guilt does. Nussbaum explains that although we will normally have learnt to cover our weaknesses, they will sometimes be exposed. Shame, in her view, is then 'the painful emotion that responds to that uncovering'.<sup>289</sup> Similarly, Taylor notes that in shame one is *seen* as deviating from some norm. But instead of focusing on the question of the justification of the deviation (or whether or not the deviation constituted a *wrong*) shame focuses on the *self*, which means that a feeling of shame indicates that one feels that one has lost *status* as a consequence of this

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<sup>286</sup>Martha C. Nussbaum, *Hiding from Humanity* (Princeton University Press, Princeton 2004).

<sup>287</sup>Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985).

<sup>288</sup>Martha C. Nussbaum, *Hiding from Humanity* (Princeton University Press, Princeton 2004), 184.

<sup>289</sup>*ibid*, 173.

deviation<sup>290</sup>, or that one has simply let oneself down in some way. These points already show the large structural differences between the emotions of guilt and shame. I will draw many more such comparisons throughout this chapter and the next one. Of course, if the responsibility for a wrong, which elicits guilt, points to a weakness, in someone's character perhaps, the requisite thought content for shame would be present as well as the requisite thought content for guilt, and both emotions might be appropriate at the same time. However, my first meaning here is to explain what characterises shame in particular, and this is that shame is about a *weakness of the self*.

### 1. Weakness of the self

One identifies with the object of one's shame differently than with the object of a guilt feeling, as illustrated by this quote from Gabriele Taylor's *Pride, shame and guilt*:

If feelings of guilt concentrate on the deed or the omission then the thought that some repayment is in place here as it is not in the case of shame. If I have done wrong there is some way in which I can 'make up' for it, if only by suffering punishment. But how can I possibly make up for what I now see I am? There are no steps that suggest themselves here. There is nothing to be done, and it is best to withdraw and not to be seen. This is the typical reaction when feeling shame. Neither punishment nor forgiveness can here perform a function.<sup>291</sup>

Greenspan adds to this that shame does not seem to put a person 'at odds with

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<sup>290</sup>For Taylor, shame necessarily includes some belief on one's part about one's social standing and some kind of degradation. Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 52-57.

<sup>291</sup>*ibid*, 90.

himself' in the way that guilt does.<sup>292</sup> So what is it exactly that we identify with in feeling shame? I have explained above that a feeling of guilt can be a confusing process of re-establishing the values which one has flouted, and that it serves to distance one from the moral message that was implicit in the wrongdoing.<sup>293</sup> In feeling shame however, I argue that one is ashamed because one somehow feels that a weakness in one is uncovered. This weakness is something that one *does* actually identify with, one feels that this weakness is somehow connected to oneself, as a part of oneself. One therefore *identifies* with the object of the shame unlike one would with the object of a feeling of guilt, because the object of shame points to a *weakness* in one that one (grudgingly) recognises or acknowledges:

Thus, where shame focuses on defect or imperfection, and thus on some aspect of the very being of the person who feels it, guilt focuses on an action (or a wish to act), but not need extend to the entirety of the agent, seeing the agent as utterly inadequate.<sup>294</sup>

In feeling shame, one feels *inadequate*; one does not live up to the expectations that one puts on oneself or that have been put on one by others. It therefore follows that one is already aware of these norms or expectations. Similarly to the feeling of guilt, then, the emotion of shame can serve to bring into focus these expectations or norms that one already subscribes to, but that one might not have consciously acknowledged up until this point. Shame however significantly differs from guilt in the sense that in shame one sees the weakness that is the object of the

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<sup>292</sup>Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 130.

<sup>293</sup>See above, 104.

<sup>294</sup>Martha C. Nussbaum, *Hiding from Humanity* (Princeton University Press, Princeton 2004), 207.

shame as *a part of oneself*, something that one knows to reveal a truth about oneself. One therefore identifies with the object of the emotion of shame. An agent experiencing guilt, however, will deny that the moral message that is implied by the object of the feeling of guilt, the moral wrong, reveals a truth about his values. In actuality, the very fact that one feels guilty serves to distance one from the object of the guilt, the moral wrong that one does not identify with. Shame acts differently; shame confirms the connection between the person and the weakness.

### **Self-esteem and self-respect**

The relation of shame to guilt can be clarified by the analogy of the contrast between self-esteem and self-respect. In Michael Walzer's discussion of this issue<sup>295</sup>, he argues that self-esteem is a *relational concept*, in which one person's level of self-esteem is inversely related to another's: should one's level of self-esteem be based on the quantity of one's possessions, then one's self-esteem will be diminished by the arrival of a neighbour with a larger quantity of the same. Self-respect, however, can equally be enjoyed by all, one person's enjoyment of it does not affect another's. Walzer also explains that self-esteem is thereby more closely connected to rank, meaning that persons from lower ranks in society cannot have much self-esteem, whereas these lower ranks can have self-respect, measured by a different standard than higher ranks.

Now, we might say that shame stands to guilt as self-esteem stands to self-respect. Shame arrives with the recognition of not having lived up to a certain personal standard, but this standard can be influenced by the standards, expectations

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<sup>295</sup>Michael Walzer, 'Self-esteem and Self-respect', in *Spheres of justice* (Basic Books, New York 1983)

and behaviour of one's peers. Shame is a recognition of a lacking in personal estimability, but who and what is deemed estimable is determined in comparison with others. There is no shame in performing equally to your peers, there is self-esteem in performing better. Self-esteem and shame are therefore directly dependent on the qualities of others around you.

The standards for guilt and self-respect are not wholly independent from the standards of other people: what is considered wrong and respectful might and does change over time and across cultures. However, the important point here is the absence of an inverse relationship: if one person has self-respect, this does not diminish his peers' self-respect. Similarly, the wrongfulness of an act does not directly diminish other wrongs. Although habituation might, over time, change standards of acceptable behaviour and wrongs committed in a group might evoke questions regarding responsibility and peer pressure, the standard of wrongness itself does not have the kind of inverse relationship to others that self-esteem and shame do.

As with guilt towards oneself for not acting in accordance with one's own self-image as a respectful person, one might also be ashamed of oneself for not having lived up to some personal standard. And as with guilt, this kind of shame might affect one in private and might have nothing to do with a loss of status in the eyes of others. Distinctive from guilt, however, is the fact that the standards that one applies to oneself are more dependent on the qualities of others. I will be able to discuss the issue of *private shame* more clearly in connection with the second element of the emotion, that of *being seen*.

## 2. Being seen

In the above, I have alluded to some ways in which shame has an element of *exposure*, of *being seen*.<sup>296</sup> Now the understanding and the importance of this *being seen* are not self-evident. While Nussbaum for example states that shame is about the *uncovering* of a weakness, Stocker claims that the presence of an audience is not in fact a constitutive element to shame but that shame reflects first of all a not living up to one's own ideals.<sup>297</sup> Similarly, Williams argues that is it not the being seen but the recognition of a disadvantage which is central to shame, because shame responds to a kind of 'unprotectedness or a loss of power'. This is a kind of exposure for which an actual onlooker, a second viewer, is not necessary according to Williams.<sup>298</sup> So what exactly is the function of *being seen* in shame?

### **Shift in viewpoint**

A person who is ashamed feels himself degraded, not what he hoped or thought he was. He has failed to live up to his own expectations. The feeling of shame therefore implies a contrast, a mirror, an observer-viewpoint that is presented to the agent. In this observer-viewpoint, he is less than he hoped or thought or unthinkingly assumed he was. Now this may not be a revelation to the agent at all, it may only be a reminder. An audience may or not be actually present, which is why, I believe,

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<sup>296</sup>Martha C. Nussbaum, *Hiding from Humanity* (Princeton University Press, Princeton 2004), 173, Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 64.

<sup>297</sup>Michael Stocker, *Valuing emotions* (Cambridge University Press, Cambridge 1996), 219.

<sup>298</sup>Bernard Williams, *Shame and Necessity* (University of California Press, Berkeley, Oxford 1993), 220-1.

Williams and Stocker do not regard the audience a necessary element at all. The audience however is a metaphor for this shift in viewpoint, where the second viewpoint includes a negative assessment:

There is then, this point to the metaphors of an audience and of being seen: they reflect the structural features of the agent's becoming aware of the discrepancy between her own assumption about her state or action and a possible detached observer-description of this state or action, and of her further being aware that she ought not to be in a position where she could be so seen, where such a description at least appears to fit.<sup>299</sup>

The contrast between the agent's own assumptions and the observer-description of the same object is what I understand to be the point of *exposure*, of *being seen*. This descriptive contrast and shift is in my view constitutive to the emotion of shame.

I will clarify this last point with an example taken from personal experience. My friend Tom asked me to return some library books for him, which were quite some time overdue. Jokingly he said that he considered himself as *renting* books rather than borrowing them, as he was always late in returning the books and always paid a fine because of it. However, he could not stand 'the lady's look' (the librarian) when he did return the books, so would I please return them for him? However seriously we should take Tom's light-hearted interpretation of himself as a *renter* of library books, I do believe this example shows exactly the kind of contrast that is constitutive to shame. For as long as Tom can regard himself as a *renter* of these library books, he regards his keeping the library books past their due date as a

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<sup>299</sup> Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 66.

conscious action for which he pays (by incurring a fine). The contrasting view however is that Tom is forgetful or lazy, causing him to repeatedly break a rule of the library which is that one returns the books in time so that one's fellow readers also have access to them. This contrasting view is one of *weakness*, and in the very moment where Tom would be confronted with 'the lady', the librarian, he would have to make this shift to the contrasting view. 'The lady' is in this example a very real manifestation of the audience and the observer-description of this actions, and the reason why Tom would not return the books himself was the awareness that being confronted with this observer-description would result in his feeling ashamed. This shift in viewpoint is therefore a necessary part of shame; the moment when one is confronted with a different image of oneself, an image of weakness.

### **Relation to the audience**

There is more to say about the role of the audience. For one might be ashamed even if the audience views one with approval, and on the other hand a negative view of the audience does not necessitate shame. In order to elucidate my explanation of the role of the audience, which is largely based on Taylor's account, I will follow Taylor in using the example of Cordelia, daughter to King Lear in the famous play by Shakespeare. As is well-known, King Lear asks his three daughters to profess their love for him, in order to receive an equal share of the inheritance. The two elder daughters provide extremely flattering, yet insincere, accounts and are both rewarded. Cordelia however refuses this public display of love and is banned. What is the connection between Cordelia's story and the role of the audience in shame?

Taylor points out that in this case, there is an actual audience: King Lear, his

family and court. Now the audience should probably be understood as cynical: they know exactly why the eldest daughters have provided their insincere accounts and expect the same of Cordelia. So Cordelia realises that if she were to do the same as her sisters, she would *be seen* by the audience as being no better than her sisters. But Cordelia actually regards herself as better than her sisters (in this regard, at least) and even though she *does* love her father she will not *be seen to* lie to gain personal profit. This means that Cordelia does not identify with the audience's view of her as being on a par with her sisters. From a higher order point of view however, Cordelia understands that the people in the audience consider self-interest and personal gain to be the proper reasons for action in this case. If she were now to provide the speech that she is asked to provide, then she would *see herself as being seen* as one of them, associated with that worthless lot. This she would consider shameful, and 'shame prevents her from acting as she is cynically expected to do'.<sup>300</sup>

This example shows that there are two distinguishable points of view of the audience. The first point of view audience may be friendly or hostile or even indifferent to the agent. The attitude of the audience towards the agent should therefore not be confused with the agent's attitude towards himself, which in the case of shame can only be negative as shame reflects a weakness. Even if the audience regards the agent negatively, there need not be any cause for shame: if the agent in turn has a very negative view of the audience, he might be perfectly content not to gain their approval. But of course the different attitudes of the audience will result in different manifestations of shame.

The second point of view audience reflects on the relation between the agent

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<sup>300</sup>ibid, 62.

and the first point of view audience. In shame, this relation is always viewed negatively: 'to be so seen is to be exposed, for the agent should not be seen in this way.' Now the audience's judgement might or might not coincide with the negative self-evaluation of the agent. If the agent does agree with the negative judgement of the audience, then it makes sense that shame is appropriate. However, if the agent is met with approval yet he is still ashamed about the exposure of some weakness then it must mean that there is something else wrong in being so seen.<sup>301</sup>

So if an agent feels shame even though he is regarded positively by the relevant audience then this can only mean that he believes that their approval is somehow degrading. If on the other hand he regards the audience's seeing him as hostile, and he is thereby ashamed, then this will imply that he takes very seriously (at least at the time) the normative evaluations in the light of which he is seen so disapprovingly. And if the audience sees him with indifference then it follows that he either believes that the audience does not think him worthy of attention and that this is demeaning, or that in this situation he should not be seen at all. There is therefore a clear connection between the nature of the agent's self-critical judgement and the way in which he *is seen*.<sup>302</sup>

In this section I have explained that shame requires a shift in in self-evaluation, one is somehow less than one had thought one was. This shift is what is indicated by the necessary element of *exposure* or *being seen* in shame. *Being seen* does however also account for different manifestations of shame according to different ways of being seen. Shame from being seen approvingly is different than shame resulting

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<sup>301</sup>ibid, 64-5.

<sup>302</sup>Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 134.

from a negative attitude. It is therefore not always true that a person who feels shame does not identify with his judges, as Greenspan states.<sup>303</sup> In fact, shame might be the result of such an identification if the judges (the audience) approve of something one himself regards as a weakness, putting himself on a par with this weak audience. The crucial point remains that shame responds to the *exposure* of a *weakness*.

### **Private shame**

Of course, no physical audience needs to be present, in fact the exposure of shame might be limited to oneself. In such a case, no public loss of status has taken place<sup>304</sup> but you regard yourself as having let yourself down in some way. The self-image that you had and aspire to is confronted with an image of personal failure, which forces you to see yourself in a different light. I will clarify private shame and the contrast with private guilt by way of example. Imagine a person who has committed a theft, let us say a woman has picked the pockets of a man at the bus stop, and has stolen the man's wallet. Back in the comfort of her home, the excitement of danger and fear of being caught subside, and a different emotional reflection sets in. If this emotion takes the shape of guilt, then that would mean that the woman recognises the theft as a wrong, and that she has committed a wrong. If her emotional response instead of, or in addition to, guilt is one of shame, then that would entail that the theft to her is evidence of a weakness. To be ashamed of something means to view that something as (connected to) a weakness of the self.

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<sup>303</sup>ibid, 134-5.

<sup>304</sup>Contra Taylor, 's claim that shame necessarily includes some kind of social degradation. Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 52-57.

The woman might well be ashamed of the theft. If she is, then that means that the theft has exposed something in her that she *herself* regards as a weakness; a habitual akratic disregard for moral rules for example, poor impulse control, or the awareness of kleptomaniac tendencies. Whatever the weakness may be, it is important to note that she considers it a weakness which she identifies with, which she regards as an exposure of herself. My claim at the start of this chapter, that shame primarily focuses on the weakness of the self, whereas guilt focuses on the wrongfulness of the act, should be seen in this light. Of course, a wrongful act might cause shame as well as guilt, but the proper object of shame is the weakness of the self which is evidenced by the act.

On the other hand, the woman might feel guilty about committing a theft, without feeling ashamed of it, if she recognises the theft as wrong but she does not view the theft as exposing a weakness on her part. Perhaps this was a one time occurrence, brought on by opportunity, and while she feels guilty about having committed a wrong, she might reject that particular image of herself. She might sincerely not regard the theft, even though she did commit it, as a reflection of a weakness in herself, and therefore would not regard the theft as an exposure of the self. I even think it possible for shame to occur without guilt, if for example a theft of bread is committed out of poverty and the necessity to feed a dependent child, which might (in one's own mind at least) diminish the necessary element of responsibility for the wrong. Any ensuing sense of shame might however be inextricably linked with being poor and unable to be a good provider for the child, and it might be difficult to extricate any shame over having committed a wrong from

such a complex situation.<sup>305</sup>

The point about identification is again important. I have explained that a person who feels guilty *does not* identify with the object of the guilt feeling, where the person who feels ashamed *does* experience identification. So how would it be possible to experience both guilt and shame about the same act, if one requires identification and the other denies it? The point is that the object of both emotions is, slightly but significantly, different. One might recognise the wrongfulness of the act, and therefore not identify with the (lack of) values that speaks from the act, while at the same time recognising that the act is a manifestation of a weakness on one's own part, be it akrasia or something else. In such a case, one would not identify with the moral message of the wrongful act, but one would identify with the evidence of weakness that this act portrays about the self.

Shame might occur in private, but even then it is, as I have explained above, influenced by the qualities of our peers. The expectations that we have of ourselves are influenced by people around us, people with whom we identify, groups who we consider ourselves to be part of. In shame, we feel as if we have let ourselves down, but if everyone disappoints in the same manner then it seems the bar was set too high to begin with, and perhaps it would be advisable to lower one's standards somewhat. There is no shame in being unable to reach a certain goal when none of your peers seem to be able to get there, yet if everyone else seems to be able to do it, so should you. Even without an audience, private shame is therefore influenced by one's social surroundings.

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<sup>305</sup>See also primitive shame, 149.

### 3. Affect and appropriateness of shame

Now that I have identified the *thought content* of shame as the exposure of a weakness, I want to briefly discuss the *affect* of shame. I would argue that shame by its very nature is an emotion that will probably affect one if the thought content is fitting. I have argued that an emotion will affect one if one cares about this thought content, and how can it not be appropriate (fitting as well as suitable) to care about one's self?

One might imagine cases where one appropriately does not care about the fact that an audience views one negatively, but the above explanation of *being seen* has shown that in such cases one has such a low opinion of the audience that one does not consider their negative regard an exposure of one's weakness. So in that case, I would argue that the thought content is not present at all, and that it is therefore the *shape* of the emotion that does not fit.

Of course it is very possible to be affected by the exposure of a weakness rather too much. The appropriate size of shame will depend on the relevance of the audience and the weakness to one's self. As I have stated above, even though there is normally a point at which such affect becomes too great for the facts of the case, it is very hard to precisely pinpoint that moment.<sup>306</sup> The aptness of shame, even though it is a painful emotion, would normally be found in a clearer understanding of one's own weaknesses and the corresponding greater ability to address them.

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<sup>306</sup>See above, 26.

#### 4. Shame and value

In earlier chapters, I have explained that emotions can focus thought and reveal value. Shame can also reveal value, in that it brings one's weaknesses into focus. Taylor points to two primary links between shame and value. Firstly, she explains that in order to be able to feel shame at all, a sense of value is required. An agent who does in no way value himself can hardly experience a shift in viewpoint to an even less positive self-image. But furthermore, the emotion of shame itself serves to highlight and protect one's self and thereby one's values.<sup>307</sup> Shame exposes a weakness. The revelation of this negative value to oneself can allow one to identify that weakness and pursue change. Shame can in this sense be constructive and motivate a pursuit of valuable ideals.<sup>308</sup> Shame can thus be informative and even constructive to oneself. The weakness that caused the shame is of course informative to inter-personal social relationships as well, in that it is relevant for these relationships what a person's weaknesses are, and thereby which personal values he appreciates. And if a person is morally very weak than that may even be relevant to others who are no more to him than fellow human beings.

There is however a peculiar internal conflict in shame. For at the same time as the weakness is exposed and acknowledged as a negative value, which should distance one from that negative value, shame ties this negative value even closer to the agent who is feeling ashamed by identifying the agent with this weakness, and

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<sup>307</sup>Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 81.

<sup>308</sup>Martha C. Nussbaum, *Hiding from Humanity* (Princeton University Press, Princeton 2004), 208.

thereby revealing this negative value as part of the agent's self. Similarly, in social relationships, even though the exposure of a weakness affecting that relationship might allow one to make an effort to strengthen this relationship, the relationship has first been exposed as weaker than it should have been. In this manner, shame initially distances a person from the relationship.

### **Moral shame**

Not all that can be assessed as a weakness, however, reflects the breaking of a moral norm. One might be ashamed of not having achieved a certain ideal professional position for example, or one might be ashamed about getting caught rather than about the fact that one is exposed as a thief, thinking that it is perfectly acceptable to be a thief, but not at all acceptable to be a bad one. This leads Greenspan (and others) to distinguish between (natural) shame and moral shame, in which the latter seems to indicate the kind of shame can follow an act that is morally wrong. In this sense, moral shame would only be that kind of shame that might arise in circumstances where guilt might also be appropriate.

Although of course it is useful for the particular purposes of this thesis to distinguish between shame that is caused by a moral wrong and other kinds of shame, I have to point out that I do not see a conceptual difference in the emotion *itself*; the difference is not based on a different *kind* of the shame feeling. Whether the degradation reflects a moral wrong or not, the final self-judgement 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>309</sup>

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<sup>309</sup>Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford

Shame can appropriately follow just about any experience of a (perceived) weakness. This might also be a weakness which others might have regarded with indifference or even regarded positively, maybe perceiving it as a strength.

Moral shame then, is only the judgement that takes as its object a *moral* weakness, and it therefore indirectly implies thought content that one has committed a wrongful act. But it also implies that one *cares* about the fact that one is (or may be) seen to be less of a moral person than one should be. This means that one cares about one's *image* as a moral person. And it means more than that. For surely a feeling of shame that occurs when a person *only* cares about *other people's* image of himself as a moral person, when in fact he himself does not care at all about the fact that he has failed to live up to moral standards, i.e. he himself does not have any substantive self-regard as a moral person, would be considered cynical and not qualify as moral shame. This means that moral shame is necessarily connected to an established self-image as a moral person. Moral shame would therefore only affect a person who identifies with respect for moral law, who has developed a substantive self-regard as a moral person, and who cares about regarding himself as a moral person.

### **Primitive shame**

There is another possible distinction in shame that I do want to mention. Nussbaum argues that shame properly precedes an awareness of the 'normal perspective of the particular social value-system in which we dwell'. This claim leads to an important point about *primitive shame*, which further proves the complexity of the emotion of shame and which will be relevant to the arguments concerning

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1985), 76, although I do not agree with Taylor that any shame can be classified as a moral emotion.

emotions in legal practice. For shame, Nussbaum explains, is not only connected to the norms of society or the personal self-ideals that one tries to live up to, it also reflects one's frustrations as a result of one's basic humanness. Any frustration that is based on one's awareness of himself as a finite being that is nonetheless met with great demands and expectations can lead one to experience primitive shame. This kind of shame reflects therefore not an awareness that one is a lesser person than one should be, but rather a frustration of narcissistic needs.<sup>310</sup> In one's narcissistic expectations of comfort, security and safety one might therefore experience *primitive* shame when these expectations are frustrated.

The point is that primitive shame affects everyone, because imperfection is inherent in the human condition. We should be able to accept our own imperfections and humanness, so that primitive shame will not cloud our judgement. Yet if we cannot properly 'weed out' primitive shame from our assessments, then the feeling of shame which we had thought reflected a failure to live up to some beautiful moral ideal, might actually represent something much more primitive which is irrelevant to the ideal in question.<sup>311</sup> The explanation of primitive shame shows how and why shame is particularly elusive. Shame might be constantly present in all of us, and it might be difficult, even for oneself, to pinpoint the exact object of an occurring instance of the emotion of shame.<sup>312</sup>

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<sup>310</sup>Martha C. Nussbaum, *Hiding from Humanity* (Princeton University Press, Princeton 2004), 173.

<sup>311</sup>*ibid*, 220.

<sup>312</sup>The issue of primitive shame will also be relevant in the discussion of shaming sentences, below, 252.

## 5. Obligations of shame

It has been made clear in the above that a large range of perceived weaknesses can supply the required thought content for shame. They do not have to constitute a moral wrong. Yet, I have indicated that the fact that one feels shame does point to one's experience of a weakness, a negative value. Shame therefore also reveals values, and I have stated that these values are important to social and moral relationships.

In the previous chapter, I have explained that I think that one can have an obligation to feel guilty, based upon the requisite characteristics of a position that the other holds, or a relationship that one has with the other. Even the ties that bind (initially) mere strangers after the committing of a wrong allow for such an obligation, albeit that the consequences of a failure to fulfil the emotional obligation may be limited. Can we understand an obligation of shame in a similar way? 'You should be ashamed of yourself' certainly is a common enough way of saying things. So what does it mean?

### **Weakness and valuable pursuits**

Shame is, I have argued, based on the exposure of a weakness, a shift which forces you and/or others to view you in a different light, an image of weakness. The initial image (be it a public image or a self-image, or both) is one that you had at least aspired to, and possibly even one that you thought (consciously or subconsciously) you had attained. This initial image is disrupted, broken by a contrasting image of failure. Shame responds to that shift, to that contrast.

If someone feels ashamed then an image of that person has arisen which is in

some way less than what that person had hoped or thought he was. If someone does not feel ashamed about failing a certain standard, if a person does not respond to the second image of weakness, then this person thereby shows that he or she did not initially adhere to the supposed first (ideal) image. This might be because the person does not agree with the standard in question, or it might be that he or she never considered herself the kind of person who would live up to that standard. Both shame and the lack of it, therefore, expose one's (previous) self-image and one's aspirations.

So what then is an obligation to feel shame? As in the above discussion of guilt, I argue that such an obligation should be understood as a value-claim, but in the case of shame this claim specifically concerns personal estimability and aspirations. 'You should be ashamed of yourself' is a claim about another person, a claim that the other *should want to be better*. It is not only a claim about the value of the standard in question, it is also a claim about what or who that person should aspire to be. Similar to guilt then, the obligation to be ashamed is an obligation to *recognise* a weakness and to be *affected* by that weakness. It requires you to admit, if only to yourself, that you do, in fact, have a particular weakness and that this weakness is making you a lesser person than you should have been.

An emotional obligation is, as I have explained above, linked to a desire to affirm or preserve one's self-image or role. Shame implies a shift in perspective to focus one's attention on a weakness in this respect, forcing one to face up to the fact that one currently does not live to the relevant standards. And these standards are, of course, standards that one does subscribe to and aspires to meet, otherwise there would be no shift in perspective present and hence no relevant thought content for shame. Shame then, similar to guilt, also carries within it a kind of reaffirmation: your

own valuing of these pursuits is confirmed, for why should you be ashamed of being a bad friend (for example) if you did not value being a good friend in the first place?

### **Owing yourself**

The last remark points to the fact that shame can be based on a relationship, in this case friendship. I would however state that shame, by its nature, is always, at least in part, based on one's own self-image, because it responds to a weakness *of the self*. I have stated above that a wrongdoer can have an obligation to feel guilty towards himself, based on his own self-image as a moral person, which could not be maintained if any feelings of guilt should be absent.<sup>313</sup> This particular obligation would however only apply if the wrongdoer has developed a substantive self-image of himself as a moral person, which may or may not be the case. Shame is different. The very fact that shame occurs reveals a threat to a self-image that the person, who experiences the shame feelings, has placed a value on. In this sense, shame is always owed, at least in part, to oneself.

Shame therefore always affects one personally, touches one's own self. The obligation to feel shame is very different from an obligation to feel guilty, which focuses on a wrongful act. An obligation of shame would mean an obligation for a person to focus on a certain negative description of (some part of) *himself*, which he in fact *does* identify with, and which degrades him, shows him to be a lesser person than he thought or hoped or seemed to be. The point is that an obligation to feel shame does not so much entail a demand to renounce a wrong, but rather to renounce a part

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<sup>313</sup> ... barring exceptional circumstances. See also above, 113.

of *oneself*. Now however bad this weakness may be, and however praiseworthy therefore any incentive to stimulate change in this respect, there is a difference between renouncing a wrongful act which you have committed and renouncing a part of *yourself*. Such an assessment of one's self requires a large vulnerability on one's part.

Secondly, I would point to the fact that guilt at least reflects on a *wrong*, whereas shame can reflect on anything that is perceived as a weakness. This includes traits or characteristics or positions that do not constitute a wrong at all, such as poverty or a disability. Now one might argue that this need not be a problem, as long as one restricts oneself to what Greenspan called 'moral shame' and only require one to be ashamed about a moral wrong. The point however is that an obligation to feel shame does not focus the wrongdoer's reflections on a moral wrong, as shame is always about a *weakness*. And the weakness that lay at the foundation of the moral wrong might be many things at the same time: being a bad friend or being selfish, but also being poor or being socially awkward. Not every weakness should result in an obligation to feel ashamed .

### **Shame between friends**

Let us go back for a moment to the example of Tina and John, in order to see practically how an obligation to feel guilty might differ from an obligation to feel shame. Remember that John had told ugly lies about Tina. An obligation of *guilt* from John, I have argued, requires John to acknowledge that telling ugly lies about Tina is *wrong*, and to *care* about the fact that he has wronged her (as a friend). But the bonds of friendship might as well provide an obligation to feel shame. This depends on the

underlying reason for telling the lies: John might for example crave attention to the point that he invents stories. Any underlying weakness which has acted as a cause for telling the lies can be the object of shame feelings. An obligation to feel shame then is a demand to recognise that weakness, and recognise that this weakness is an impediment to a valuable pursuit, in this case John's friendship with Tina. If John does experience shame over telling lies about Tina, one interpretation then is that John, in experiencing shame, recognises both that he has a weakness which is negatively affecting his relationship with Tina, and that he does value this relationship. John's shame would in that case reaffirm to himself and to others that he does in fact value his friendship with Tina, and allow him to recommit to his pursuit of being a good friend to her. In this sense, shame feelings carry a similar opportunity to guilt feelings, which serve to reaffirm one's values to oneself and to others and allow one to distance oneself from the moral message implicit in the wrong.<sup>314</sup> The occurrence of feelings of shame would then serve to reaffirm the fact that one values the relationship which was damaged by the shameful act.

But there are several important issues, particularly concerning the aptness of shame, which must be addressed. First of all I have explained how a guilt feeling, or the lack thereof, can reveal one's values or at least whether one considers a certain act to be wrong or not. Shame feelings, and the absence of them, might similarly reveal values. However, whether or not they do and if so, which values they reveal, might be more difficult to understand, even for the person who is experiencing the shame. John might be very ashamed about telling lies, but this might not reflect on his relationship with Tina. He might be ashamed at the thought of considering himself *a*

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<sup>314</sup>See above, 112.

*liar* (if he does regard that as a weakness of his) and therefore be genuinely ashamed, yet that shame would not be connected to his friendship with Tina. If asked, however, John would surely explain that he is ashamed of these lies. On the other hand, John might not be ashamed about the lies if he considers telling them to be a one time error, a slip unconnected to a weakness of his. The necessary elements of shame require a weakness to be relevant to the act in question, otherwise the act will not be a suitable cause for shame. John might object to the assumption that his act revealed a weakness: it might have been a one time mistake that he does not see as reflecting on himself at all. In addition, he might not consider himself a bad friend to Tina at all; he might feel that the many times when he has gone out of his way to help her make him a good friend to Tina, regardless of the fact that he has now made the error of telling lies about her.<sup>315</sup> In this second case, John clearly values his friendship with Tina. These two examples show that John might both feel ashamed without caring for his relationship with Tina, and he might not feel ashamed while caring very much about his relationship with Tina. My first point here is that when one feels guilty, one is revealed to share a particular value, namely that something is wrong. In feeling shame the connection between the shame and the shared value is weaker, because the emotion does not reflect directly on wrongness but on weakness and valuable pursuits, and it can be a number of different weaknesses and pursuits at the same time that are relevant. It is therefore a lot more difficult to pinpoint exactly which values are revealed by an instance of shame<sup>316</sup>, and the mere occurrence of shame within a

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<sup>315</sup>One single error on John's part might not be grounds for an obligation of shame, yet if he commits the same error time and time again then then he might have to question his own ability to be a good friend. Not being able to maintain a friendship might of course easily be considered a weakness, and as such an object of shame.

<sup>316</sup>To clarify, this is not a question of sincerity but a rather a difficulty of genuine shame, which might be very complex even for the person who experiences the shame to unravel.

relationship does not necessarily point to the fact that one cares about the relationship, or that one sees the relationship in question as important.

A second issue is the aforementioned one of primitive shame. No one is perfect, and none of us are likely to be a perfect friend, either. It might well be the case that one should feel ashamed about telling lies about one's friend, but as emotions have an ability to focus one's thoughts<sup>317</sup>, and shame might focus one's thoughts on one's various weaknesses, risks of primitive shame do occur. Apart from being unhelpful in themselves, feelings of primitive shame further obscure the values connected to shame feelings, and therefore add force to the first point of opacity.

Lastly, and perhaps most importantly, I want to point out that while shame might allow for the recognition of a valuable pursuit, it first makes it a lot harder for a person to get there. Regardless of the issue of opacity, let us assume for argumentative purposes that John's shame feelings do reveal that John highly values his relationship with Tina. At the same time as revealing John's commitment to this friendship however, shame reveals to Tina and most importantly to John himself that John has a weakness, which he identifies with, which is a part of him, and which is an impediment to this friendship. Shame reveals to John that he is less than a proper friend, that he is defective as a friend. His shame feelings also show him that he cares about this friendship, and give him a clearer understanding of his weakness and a greater ability to respond to them, perhaps, but they can have this kind of aptness only by first marking John out to be *defective*. Nussbaum notes in this context that there are dangers involved in personal defects<sup>318</sup>, and this example illustrates that kind of

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<sup>317</sup>See above, 35-36.

<sup>318</sup>Martha C. Nussbaum, *Hiding from Humanity* (Princeton University Press, Princeton 2004), 214.

danger: the fact that shame might weaken the very friendship that the obligation to feel shame was based upon.

But this last point is a complicated one. For surely, one might say, it is the weakness *itself* which is potentially damaging to the relationship, not the emotion of shame? Is it not so that, by uncovering an existing weakness in John, shame reveals valuable information to Tina and to John, who might focus their efforts in strengthening this relationship all the better now that they know where the weakness lies? I do not deny that shame can reveal valuable information, but I am concerned by the affect of shame on the person who is experiencing it, and my concern is related to the aforementioned issue of *identification*. I have explained that guilt reveals one's own values to oneself and allows one to distance oneself from the wrongfulness of the act that one has committed. Shame sends a rather more mixed message: it confirms one's valuing of a particular pursuit but also shows one how one is failing to achieve it because of a personal weakness. Under the influence of shame feelings, John might start to identify with the image of himself as a bad friend, as someone who craves attention so much he is willing to lie to get it, *et cetera*. I have explained above that establishing friendship involves a kind of habituation, and that an established friendship provides expressive reasons to act as a friend.<sup>319</sup> But if John starts to doubt his own role as a friend, if the notion of being a good friend to Tina is making less of a contribution to his self-image, if he no longer identifies, or identifies to a lesser degree with being Tina's friend then surely he would have fewer expressive reasons to act as a friend? The more the weakness shapes the self-image, the harder it will be to address it. Shame therefore has a very mixed aptness of showing us our

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<sup>319</sup>See above, 54.

own goals and what is impeding us from getting there, while at the same time impressing this weakness onto our self-image, making it that much harder to overcome. Guilt allows one to distance oneself from the wrong, while shame, initially at least, ties one closer to the weakness which underlies it, further distancing one from the valuable pursuit.

### **Shame between strangers**

Would an obligation of shame be possible between strangers, and would such an obligation have similar issues as the ones noted above, or might the absence of friendship possibly improve the aptness of shame?

I will start with a reminder about guilt between strangers. The moral relation between strangers is based on respect for the moral law, and reasons not to harm another person. I have explained that the bonds between a wrongdoer and a victim, however unwelcome, might allow for emotional obligations. Obligations of guilt then require a wrongdoer to recognise that (1) the act was *wrong*, (2) that he is *responsible* for this wrong, and (3) that the wrong is important (enough for him to be affected by it). The obligation of guilt denies the moral falsehood that the wrongdoer was justified in his treatment of the victim.

Shame, I think, is a different matter. I have stated above that shame is always, at least in part, owed to oneself, in defence of an established self-image or role. There might be several ways in which a wrongdoing might threaten one's self-image or role: one might have an established self-image as a moral person, for example, or one might be some kind of role-model, like a teacher. It is also possible that a wrongdoing threatens one's professional credibility, if one for example is a police officer. There

are numerous ways in which a wrongdoing can trigger a contrasting self-image and elicit shame. However, the obligation to feel shame does not seem to be based on a relation between the wrongdoer and the victim, but rather based on the wrongdoer's self-image and his own position. The obligation of shame denies that this behaviour (the wrong) was worthy of the wrongdoer, it insists that the wrongdoer should aim to be better than his actions imply. I would argue that an obligation of shame, following a wrongdoing between strangers, is based on the person of the wrongdoer himself rather than on a relation between wrongdoer and victim.

But an obligation of shame based on one's own self-image as a moral person is hardly irrelevant. A wrongdoer who has a substantive self-regard as a moral person is required to recognise that he values his self-image as a moral person; that his behaviour does not agree with that of a moral person; that a weakness is preventing him from living up to his ideal of being a moral person. The obligation of shame might then allow him to strengthen his resolve.<sup>320</sup>

However, the issues of shame that arose in the context of friendship are also relevant in this case. First of all, if a wrongdoer does not have any substantive self-regard as a moral person (or moral role-model, or similar), his self-image might not provide the necessary contrast between the act and his aspirations to provide sufficient grounds for shame. Such a wrongdoer might still feel shame, related for example to the fact that he was caught, or to the fact that he is making his mother cry. But shame over being a bad thief or a bad son are very different from moral shame, and most importantly one might try to make up for these kinds of weaknesses in ways

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<sup>320</sup>As with an obligation of guilt feelings based on one's self image, I would argue that this obligation does not extend to an expression of the emotion of shame.

that have nothing to do with being a morally better person. In the aforementioned examples, a thief might try to become a better thief and not get caught in the future, and a bad son might resolve to buy his mother flowers every week. As has been explained above, shame is more opaque than guilt and even if a wrongdoer does value a self-image as a moral person, many other self-images (a good son, an intelligent man) might come into play and blur the values and pursuits related to moral shame.

Secondly, a wrongdoer who experiences moral shame is confronted with the fact that he is less of a moral person than he thought he was. He might feel that he is less of a moral person than he ought to be, and strengthen his resolve to become better, perhaps, but in the words of Taylor: 'how can I possibly make up for what I now see I am?'<sup>321</sup> The wrongdoer might also learn to self-identify as a rule-breaker, as weak, as not belonging to the 'community of law-abiding citizens'.<sup>322</sup>

The point here is again that the connection between shame and the moral wrong is indirect and a lot less tangible than the conceptual connection between guilt and wrong. A feeling of guilt refers to a responsibility for a wrong as its object, but a feeling of shame, even if it is *caused* by a moral wrong, always has the *self* as the object of the emotion. And the moral wrong might expose a range of different (perceived) weaknesses in the self, such as incompetence, poverty, and also moral weaknesses. While a feeling of shame caused by the exposure of a moral wrong might therefore be attached to a moral weakness and allow the agent to feel moral shame,

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<sup>321</sup>Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 90.

<sup>322</sup>A meaningful discussion of the question of whether or not law-abiding citizens really do form a community, with shared values and to what degree they are shared, and what the terms of membership are in such a community, is beyond the scope of this thesis. My point here is that a person might self-identify with other people on the basis of shared values or following the same set of rules, and that shame might negatively impact the degree to which this person self-identifies as such. See also below, 173.

there is likely to be a lot of other relevant thought content present that might just as well elicit an emotion of shame but which is attached to another, non-moral, weakness. And especially in the kind of contexts where an obligation to feel shame affects a wrongdoer in a public setting, such as a courtroom, there will likely be other fitting thought content referring to the inferior position of the person who is (being) exposed. It might be that in such a setting the likelihood of non-moral shame is greater than the likelihood of moral shame.<sup>323</sup>

### **Opaque and distancing**

Even if one does feel guilty about a wrong, one need not necessarily also feel shame. And even if one does feel shame about committing a wrong, this shame might reflect something very different than a desire to be a moral person, or a true friend. It is clear that shame is a much more opaque emotion, but that is not all: as shame reflects on the *self* it potentially targets something much deeper and more unsettling. Even in friendship, there is always a danger in shame, in revealing that someone is somehow weak or defective, or that he is a bad friend, for example.<sup>324</sup> An obligation of shame risks damaging one's self-image or a relationship on a very fundamental level, which is not quite true in the case of an obligation to feel guilty. In the very obligation to feel guilty, one is given a chance to distance oneself from the wrong and reaffirm the values of the relationship. Shame however forces one to acknowledge one's defectiveness (as a person, in a relationship) and identify with this defectiveness, which in effect weakens one's self-image and distances one from the relationship.

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<sup>323</sup>This point will be elaborated in my discussion of guilt and shame in legal practice, chapter VIII.

<sup>324</sup>Martha C. Nussbaum, *Hiding from Humanity* (Princeton University Press, Princeton 2004), 214.

The same goes for shame within the moral relationship with oneself. I have argued that it is possible for a person to develop a substantive self-regard *as a moral person*, and that guilt feelings might be something that one requires of oneself in order to maintain one's self-image. Shame however will have a different effect on one's self-image. Moral shame occurs when one has (is seen to have) failed to live up to the standards of a moral person; when a moral weakness in one's self is exposed. So first of all, in order to be affected by this kind of shame, one must subscribe to the image of oneself as a moral person. But then the shame shows that one is in fact *defective* as a moral person, that one does not live up to the relevant standards. While this might eventually allow one to get a clearer evaluation of the standards which one must try harder next time to live up to in order to fulfil the ideal-image of a moral person, shame does so initially by focusing one's attention on the fact that one *is not* fulfilling this self-image right now. One currently has a weakness which is incompatible with one's self-regard as a moral person. One's self-regard as a moral person can therefore not be maintained. It is then not only the weakness itself which acts as an impediment to the valuable pursuit of being a moral person, but also the fact that one no longer, or at least to a lesser degree, identifies with being a moral person. This is an important point. It means that while feelings of shame might support one's efforts to bring one's behaviour in line with one's (more ideal) self-image, shame will do so in ways that actually weaken one's identification with that more ideal self-image. In the context of moral shame, we might say that while one might, under the influence of moral shame, have a better understanding of the weaknesses which are preventing one from being a moral person (including a corresponding better ability to address these weaknesses), one might at the same time

be made to identify to a lesser degree with the image of a moral person, one's self-image as a moral person might be weakened, leaving one with fewer reasons to even try to live up to that particular ideal.<sup>325</sup> The emotion of shame can in this way weaken the very basis that it is built upon.

## 6. On expressing shame

Based on the fact that the obligation of shame is mostly rooted within one's relationship to oneself, I see the obligation to *express* shame feelings as rather more limited than the obligation to express feelings of guilt. For what would an obligation of expressing shame to oneself accomplish? Surely, an obligation of shame to oneself is either the same as an obligation to express that feeling to oneself, or it is unnecessary.<sup>326</sup> But what about obligations to express shame to others? Would John have an obligation to express shame to Tina? I think that John, in light of his friendship with Tina, certainly owes her an *explanation* of some sorts, and that he should recognise and admit to her that his behaviour (telling ugly lies about Tina) has no place within a proper friendship, if he wants this friendship to continue. However, John admitting that his behaviour is not in line with his role as Tina's friend, even if he would add that he strongly values his relationship with Tina, does not add up to feelings of shame about this behaviour, for I have shown that John might be convinced that while this particular behaviour was admittedly not that of a proper

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<sup>325</sup>See also Bas van Stokkom. 'Moral emotions in restorative justice conferences: Managing shame, designing empathy' (2002) 6(3) *Theoretical Criminology* 339-360, 340.

<sup>326</sup>Cf. expressing guilt to oneself, above, 114.

friend, on the whole his treatment of Tina has been more than sufficient to consider himself a real friend to Tina. As I have explained, shame requires an added element of weakness, and it is this weakness which one might not be obliged to disclose. Should the weakness in question be sufficiently exposed already, then a substantive relationship, such as friendship, might be the basis of an obligation to admit that said weakness is acting as an impediment to the relationship and that one will strive to overcome it. Friendship can therefore possibly provide the basis for an obligation of shame, but only under certain circumstances. Since I have argued that shame feelings between strangers are mostly based on obligations towards one's own self-image, I see the obligations for expressing shame between strangers as correspondingly limited. But should we have obligation, or even a simple wish, of such an expression, how do we express shame to others? I would say that there is no clear convention on how to express shame, and furthermore, that such an expression can not be classified as a speech act. Saying that one is ashamed does not make it so. Confusingly however, the words 'I am sorry' do come to mind, as an expression of a kind of regret that is closely linked to shame. It seems that following these words 'I am sorry', some further enquiry as to what exactly is meant by the utterance is recommended. But why would anyone want to express shame feelings, unless to fulfil an emotional obligation? I would argue that one would most likely not express the emotion at all, as shame by its very nature is something one will want to hide.<sup>327</sup>

### **Response to exposure**

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<sup>327</sup>See also Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 90: 'It is best to withdraw and not to be seen'.

I think that the expression of shame is very different from the expression of guilt. In the case of shame, if the object of that shame, the weakness in the self, is uncovered, we will try to hide it again, to cover it back up. We will often try to hide ourselves. I would even argue that we will also try to hide our shame, as shame is being interpreted as a further weakness, as part of the exposure. If one had been a somehow better person, one would not now find oneself in this position, with one's weaknesses exposed. But on a more fundamental level, a consistently better person would not have had any weaknesses at all<sup>328</sup>.

When a cause for guilt is exposed however, I would argue that one's reaction will be quite different. As has been stated above, instead of hiding one's guilt, one will want to assert it, publicize it.<sup>329</sup> I have argued that in cases of sincere guilt, the public assertion of that guilt is explained by the fact that the person who feels guilty does not want others to identify him with the wrong that he committed. The fact that he actually feels guilty distances him from such a judgement and prevents the wrongful act from reflecting on his character. I would therefore argue that the emotion of guilt itself will be something that the guilty person is likely (possibly even wise) to want to publicly assert, which is not true in the case of shame.

Shame, as I have explained, reflects on a *weakness of the self*. One identifies with this weakness. The emotion of shame, unlike guilt, therefore ties one closer to the weakness even as one regards this weakness negatively. One has no immediate reason to want to express one's shame since it would only draw further attention to

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<sup>328</sup>An impossibility of the human condition, to be sure, but such thoughts are the cause of primitive shame.

<sup>329</sup>See also Jeffrie G. Murphy. 'Well Excuse Me! - Remorse, Apology and Criminal Sentencing' (Arizona State Law Journal Symposium 2005) 1-25 6 and Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (UBC Press, Vancouver 2004), 61-2 on the popular culture of apology.

one's weakness.

### **Commitment to change**

The main reason why one might express shame is therefore an indirect one: as part of an expressed commitment to change. The fact that one is ashamed of (a part of) oneself does not in itself mean that one will pursue change. However, if one does want to convince another person that one's commitment to change is sincere, then one might express *shame* at the trait or characteristic that one would aim to change. This is because sincere shame does view said trait or characteristic negatively; sees it as a weakness. The expression of shame feelings might then serve to 'prove' that one does indeed regard this trait or characteristic very negatively, which, if true, would make an actual commitment to change much more likely. However, since I have pointed out several times that such an expression would also (and maybe primarily) serve to tie one closer to said weakness, such an expression of shame might only be advisable if the weakness is distinctly out in the open already.

Interestingly, we have now seen that both the expression of guilt and the expression of shame are connected with a commitment to change, albeit indirectly in both cases. *Sincerity* in shame only directly reflects on the thought content that one is seeing oneself in a more negative light, that a weakness of the self has been revealed. Because shame is relatively opaque however, it might be very hard, even for oneself, to assess what exactly one is ashamed of, which weakness (out of many possible weaknesses, even the imperfection of the human condition) is the object of the occurring instance of shame. Indirectly, a sincere expression of shame might support an expressed commitment to change, yet even if one is sincerely ashamed of a

weakness this does not in itself necessitate a pursuit of change. One might also start to identify with the weakness, or try to cover the weakness up rather than addressing it. Even if one could be said to be sincerely ashamed, it will remain unclear what exactly one's shame reflects and even sincere shame does not have any necessary consequences for future behaviour (but neither does guilt). It is clear though that even sincere shame does not provide the explanation of the wrongdoer's values to the same extent that guilt feelings can offer, because shame is the more opaque of the two.

So how can one overcome shame? I have explained that merely ignoring the thought content that provides the basis for the feeling of shame will not do: I want to know what it would take for one to arrive at a position where the emotion of shame would *no longer be fitting*. Now in the case of guilt we have seen that the relevant thought content (responsibility for a wrong) cannot so easily be taken away. In shame, however, the thought content is supplied by the exposure of a weakness, and this offers more possibilities of eradicating the object of the emotion, i.e. the weakness. However, I want to stress that such an eradication will necessarily take *time*, as in any case when one is trying to eradicate a weakness from one's self. This is by definition not something that can be done in the blink of an eye. In trying to remove the relevant thought content of shame, one has two options: one can either focus on the *weakness* itself, or one can try to limit the *exposure*. At the moment of occurrence of the shame, there is nothing that one can do about it. The weakness is something that one identifies with, and the weakness is revealed, even if it may only be revealed to oneself. This accounts for the feeling of helplessness that generally accompanies shame.<sup>330</sup> The weakness may of course be addressed by becoming (trying to become) a better person. Instead of trying to better oneself, however, one might also change one's standards and decide that the standards by which one previously considered oneself weak or defective are not the right standards by which one should judge oneself.<sup>331</sup> One might even succeed in changing oneself

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<sup>330</sup>Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 68, 90.

<sup>331</sup>*ibid*, 68.

to the point where one does not identify with this weakness any more, and one might succeed in changing one's standards. This means that, unlike guilt, the relevant thought content for shame might actually be taken away over time, alleviating one of the burden of shame entirely.

Alternatively however, one might choose to focus on the *exposure*, even though this is a more risky strategy as exposure of one's weaknesses is not always within one's control. But by performing excellently in other areas, one might draw attention, even one's own attention, away from one's own weaknesses or make up for them in other ways that confirm one's self-esteem or role but do not target the initial weakness. This means that unlike guilt, which can only be influenced by action which targets the object of the guilt feelings, shame can in a way be alleviated by addressing other other areas.<sup>332</sup> Again, these possible remedies for shame inevitably take time, however, and will therefore not provide any immediate redress from the exposure of a weakness.

Finally, the affect of shame can not so easily be taken away effectively. Whereas in guilt I have argued that the only possible redemption was in effectively alleviating the affect of the guilt feelings, in shame I have shown that if the thought content (shape) is fitting, it will also be fitting for one to be affected by it, since shame always reflects on the self. In shame, it is less possible to 'reweave the structure of one's life' (like in overcoming grief or guilt<sup>333</sup>) because the object of shame will always remain important: it concerns the self. Any effective changes in the affect of shame therefore, will have to be the result of a change in the relevant *thought content*,

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<sup>332</sup>Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 133.

<sup>333</sup>For my notes on overcoming grief, see above, 15 and on guilt, see 127.

but it is possible, over time and through change, to find redemption from shame.

## 8. Shame, guilt, and identifying with values

To conclude these discussions of guilt and shame, I want to draw out the issue of identification and shared values in the context of earlier discussions on habituation, self-image and expressive reasons. I have explained that certain roles and relationships, such as friendship and a self-image as a moral person, are developed by habituation: by acting in line with a capacity, one comes over time to regard oneself as such, e.g. a friend or a moral person. As one now regards oneself in this capacity, one feels bound by certain expressive reasons relating to that capacity. Indeed, the fact that one regards oneself bound by such reasons is now a criterion for one having this capacity in the first place.<sup>334</sup>

### **Wrongs and self-image**

An act which goes against one's role or relationship of course has a damaging effect by itself: if one's actions are not in line with the expressive reasons of friendship, for example, then one at least gives the impression of not considering oneself bound by these reasons and therefore, the impression of not being a friend at all. The emotions of guilt and shame build upon this process. Firstly, guilt feelings show that one *does* consider oneself bound by the expressive reasons of friendship; one has acted against oneself as a friend. The emotion of guilt then negates the impression

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<sup>334</sup>See above, 53 and 63.

that one is not a true friend, and in that way serves to restore the friendship, which was damaged by the acts in question. Shame might also serve to show that one does not consider one's own actions as those of a true friend: shame shows that one has let oneself down. In that way, shame does show that one still agrees with the expressive reasons of friendship, however, shame also exposes a weakness which currently impedes one from being a proper friend. While one still agrees that, in order to lay claim to the capacity of friendship, such acts would be required, one also has to admit that one is currently unable to meet these requirements. This acknowledgement might diminish the degree to which one regards oneself as a friend, and thereby remove the expressive reasons relating to the friendship. One may then agree that, as a friend, one would be bound by expressive reasons, but since one now questions one's own capacity as a friend, one also questions whether one is still bound in this way.

The same process affects one's self-image as a moral person, which is developed by acting out of respect for moral reasons, and, once established, provides expressive reasons to act in line with being a moral person. When one's commitment to moral values is questioned by a wrongful act, guilt feelings might serve to reaffirm this commitment. Shame, however, further questions one's capacity for living up to moral ideals and might thereby diminish one's self-image as a moral person, leaving one with fewer (or without) expressive reasons to act as a moral person.

### **Identification with others**

Another interesting and relevant possibility concerns the identification with others, and others' values. If one identifies with others as part of a group or subculture

for example, then one has expressive reasons for acting in line with this group or cultural identity. The same goes for a person whose identification with others is based on shared values. A thorough discussion of the idea of a 'community of values' would require a discussion about questions such as what kind of community this may be, which kinds of values are essential, if some values could be more important than others, how to establish membership and the possibilities of dissent, for example. I cannot pursue all these questions here, but I will simply state that it is possible for a person to identify with others based on, perceived or actual, shared values.<sup>335</sup> This kind of identification is relevant to one's own self-image, and is likely to be affected by emotions such as guilt and shame.

If you feel part of a 'community of values', then any act against those values questions that identity. Others might even call you to account, stating that they do not agree with your actions, and if they are the people whom you previously identified with because of shared values, then you have to question if you can still identify with these people; if their values are still aligned with your own. Of course, your own doubts about your identification with this value-group are influenced by other's opinions on this issue: it is hard to maintain a self-image as belonging to a value-group if none of the others, whom you perceive to be part of that group, consider you to share their values.

Guilt first of all shows you that you do still subscribe to these values; you do still share values with these others, and you do still belong with them. Since it matters that the others, with whom you identify, agree that you do still share these values, you

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<sup>335</sup>I cannot deny that one might even imagine sharing values with others based on very different criteria, such as socio-economical background, education or ethnicity, but such forms of identification run the risk of conflation and are vulnerable in many other ways besides acts against shared values. My claims here specifically address identification with others based on shared values.

might have to offer some kind of explanation to these others, and perhaps even some kind of compensation. But an expressed emotion of guilt might serve to provide such an explanation, showing to these relevant others that you still share their values, and allow these others to accept and regard you as a person whose values they share. An emotion of guilt might therefore contribute to a reaffirmation of your identification with others' shared values, and confirm your expressive reasons for acting in line with this self-image.

How does shame influence your identification with other's values after a contrary act has put this identification into question? I have explained that shame has some issues with opacity, and that an emotion of shame might primarily reflect the fact that one has been caught for example, not the fact that one acted against the shared values in the first place. But, for the sake of argument, let us assume that shame shows to you that you do value seeing yourself as being 'in league' with these others (based on shared values), that you do regard yourself as sharing these values with these others and you have let yourself down by acting against them. In this way, shame might show to yourself and others that you at least have a desire to belong there. But shame also exposes the fact that you actually feel 'out of your league', that you are somehow weak and that this weakness is preventing you from living up to the identity of shared values. Something in you is lacking, something is inferior compared to these relevant others, who do (as far as you know) live up to the ideal identity of shared values that you cannot live up to. You can try to act as if you belong with these others, and maybe over time you will, but right now, you do not feel as if you belong with them. This diminishes your own self-image as identified with others based on shared values, and leaves you with fewer expressive reasons to act according

to these shared values.

Of course, one clearly has reasons to act according to one's own values. But in addition to these, one might have expressive reasons to act according to a self-image based on a perception of oneself as belonging to others with shared values. They are 'your kind', you identify with them, you belong in their category, whatever value-based category that may be. After you have committed an act which goes against these shared values, guilt has the propensity to reaffirm your status as belonging with these others, while shame works to show you that these others are, indeed, different from you. This is how guilt might reinforce expressive reasons based on shared values, while shame can diminish your own sense of value-based belonging, thereby diminishing the related expressive reasons to act according to those shared values.

## VII. EMOTIONAL OBLIGATIONS AND THE LAW

In this thesis so far, I have discussed emotions focusing on the role of emotions in human interaction and self-image after a wrong. The specific emotions of guilt and shame can have certain kinds of aptness; most importantly (for the purposes of this thesis) revealing value to oneself and to others and restoring relationships and self-image. They can also affect one in negative ways, by diminishing one's self-image; this is a propensity of shame in particular. I have shown that one can have an emotional obligation towards oneself or another, based on a relationship or a role that one occupies, and that after a wrong, obligations of shame and guilt might both occur with their own specific object, cognitive content and affect.

Now then, why do I think that these emotions are relevant for the law? Can emotional obligations perhaps be based on the law itself, or on our role as citizens? I will show that this is not the case: the law, or one's role as a citizen, does not provide a suitable base for an emotional obligation. However, I will show that guilt and shame affect our attitudes toward the law and towards society and those within it in such a way that it would be wise to take these emotions into account. Furthermore, I will argue that the law should attempt to *persuade* citizens to act in accordance with the law, and that the persuasive properties of the emotions deserve proper recognition in light of this aim.

### 1. Freedom of conscience

Firstly, I will explain why one's role as a citizen does not provide a suitable ground for an emotional obligation. One might assume that it does, since there are commonly certain privileges and duties associated with one's status as a citizen. An act which is not in accordance with those duties might then provide a basis for an obligation to provide an emotional response, based on one's role as a citizen, or put in a different way, the relationship between the state and a citizen.<sup>336</sup> Such an argument should be rejected, however. There are limits to what the liberal state can do to persons. John Stuart Mill famously articulated the harm principle in his 1869 essay *On Liberty*: '... the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.' The citizen's own good is not a sufficient ground for the exercise of power over him against his will. A person therefore cannot be forced to do or to refrain from anything merely because others believe that to do so would be right, or wise, or better for him. Mill adds that '[t]hese are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise.'<sup>337</sup>

These famous and now widely accepted principles of liberalism state that the

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<sup>336</sup>This topic can be connected to the question of the existence of a general obligation to obey the law. If such an obligation exists, then the act of breaking the law would, by itself, count as a (more abstract) wrong, in addition to the possible wrongfulness of the act itself. This abstract wrong could then possibly be the object or cause of an emotional obligation, based on the relationship between the citizen and the state. I would argue however, that even if such a general obligation to obey the law did exist, the principle of freedom of conscience would thwart the emotional obligation based on a general obligation to obey the law. I will therefore not be considering the issue of a general obligation to obey the law in this thesis. For a thorough explanation of this issue and various arguments on the topic, see Green, Leslie, 'Legal Obligation and Authority', *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/win2012/entries/legal-obligation/>>.

<sup>337</sup>John Stuart Mill, 'On Liberty' in Mary Warnock (ed), *Utilitarianism and On Liberty* (Blackwell Publishing, Oxford 2003).

citizen is sovereign in matters that concern only himself. This of course includes the citizen's conscience, and Mill continues with an elaborate discussion of the *liberty of thought and discussion* (also known as the *freedom of conscience*), which is particularly relevant for the purposes of this thesis. He explains that human liberty comprises firstly the 'inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion'. This first element of human liberty has obvious implications for the ability of the state to provide the foundation for an emotion obligation of a person.

I have explained emotions as a combination of thought and affect elements. The thought content of any emotion will almost certainly include content that can be described as part of one's 'conscience', a point which is exemplified by Solomon's remarks on emotions as judgements.<sup>338</sup> In the cases of shame and guilt feelings, the thought content which should count as being exempted from state scrutiny is (for shame) at least the judgement that a certain trait represents a weakness, and (for guilt) and that a certain act is wrong. The act may in fact be morally wrong and a trait might in fact represent a weakness, but according to the rights that the citizen has vis-a-vis the state it must be allowed for the citizen to disagree on that point.

Of course, not all facts are so 'exempted', for not all facts are a matter of human conscience. So-called *brute facts* for example (facts which are facts in and of themselves<sup>339</sup>) do not qualify for agreement or disagreement. So even though guilt and shame will almost certainly contain thought content that lies within the scope of

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<sup>338</sup> Robert C. Solomon, *Not Passion's Slave, Emotions and Choice* (Oxford University Press, Oxford 2003), 8. See also above, 8.

<sup>339</sup> G. E. M. Anscombe. 'On Brute facts' (1958) 18 *Analysis* 69-72.

the freedom of conscience, it might be theoretically possible that the thought content corresponding to a certain emotion consists only of such 'neutral facts'.<sup>340</sup> I should point out that the *decision* which facts are, and which are not, a matter of human conscience is itself of course a decision which falls within the scope of the freedom of conscience. Yet, this still leaves open the theoretical possibility of a 'neutral' emotion. Also, I have explained that emotions in fact do not need to be based on a *judgement* or a *belief*; they can be based on a mere *thought*.<sup>341</sup> An obligation to entertain a certain thought, without accepting the corresponding judgement or belief, might not conflict with one's freedom of conscience. I conclude that the element of thought is only partially covered by the freedom of conscience, because these thoughts need not actually be held in judgement or belief and the thought content of an emotion might theoretically be neutral.

However, any emotional obligation would still also have a necessary element of affect, and this element is of crucial importance in connection with the principle of freedom of conscience. I have explained affect in terms of *care*. Following Frankfurt, I have explained that in order to care about something, that something has to be *important*. Yet this importance is not merely some kind of 'independent value'; some things are important because and only because one cares about them. In fact, by so caring, one imbues this object with genuine importance.<sup>342</sup> While it is likely that not 'anything goes' in terms of deciding which objects are suitable for such a

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<sup>340</sup>I do hold this possibility to be merely theoretical, however. Not only is an emotion which consists only of 'neutral' thought content hard to imagine, but furthermore, I can see no reason why there would ever be a point to the obligation of such a 'value-free' emotion.

<sup>341</sup>See above, 11.

<sup>342</sup>Harry G. Frankfurt, 'The importance of what we care about' in *The importance of what we care about* (Cambridge University Press, Cambridge 1988) 80-94, 92-3.

'status update', I have explained that a clear and proper distinction between appropriate and inappropriate care is hard, if not impossible, to make.<sup>343</sup> More importantly however, Frankfurt makes the point that *caring* about something is a matter of one's personal *identity*: 'Insofar as the person's life is in whole or in part *devoted* to anything, rather than being merely a sequence of events whose themes and structures he makes no effort to fashion, it is devoted to this'.<sup>344</sup> This formulation clearly corresponds to the second element of human liberty, as formulated by Mill, which is the liberty of 'tastes and pursuits; of framing the plan of our life to suit our own character'.<sup>345</sup> The decision how to frame one's life concerns oneself primarily, and as long as no others are harmed by this pursuit one should be free in this decision. The decision 'what to care about' lies well within the scope of human conscience, and any obligation, based on one's role as a citizen, to experience affect, would clearly conflict with the principle of freedom of conscience. So even if an obligation of *thought* might in some (mainly hypothetical) cases be possible, in one's role *as citizen* one enjoys a freedom of conscience which thwarts the *affective* element of the emotional obligation.

I conclude that one's role as a citizen does not provide any emotional obligations. Any relevant emotion in this context will generally refer to thought content which is part of the freedom of conscience that the citizen enjoys vis-a-vis the state. Even if the emotion would contain no such thought content or the citizen does not need to actually accept or subscribe to that content, the question of whether

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<sup>343</sup>See above, 17.

<sup>344</sup>Harry G. Frankfurt, 'The importance of what we care about' in *The importance of what we care about* (Cambridge University Press, Cambridge 1988), 83.

<sup>345</sup>John Stuart Mill, 'On Liberty' in Mary Warnock (ed), *Utilitarianism and On Liberty* (Blackwell Publishing, Oxford 2003).

or not the citizen should be affected by said thought content clearly falls under his freedom of conscience. An emotional obligation based on one's role as a citizen would necessarily entail forcing an opinion upon the citizen about fundamental life choices and pursuits which do not conflict with the harm principle. The principle of freedom of conscience prohibits this kind of coercion.

## 2. Respect for law

Even if the offender's role as a citizen does not provide a suitable ground for emotional obligations, it is clear that an offender can have emotional obligations based on his relationships, role or self-image. And one's self-image may in fact be connected to an attitude towards to law. Raz discusses an attitude towards the law which in my view corresponds to my earlier discussion of the possibility of developing a self-regard *as a moral person*, and that is the attitude of having *respect for law*.<sup>346</sup>

Respect for law is explained by Raz to consist of two components: (primarily) cognitive respect and (primarily) practical respect. The difference between the two is that cognitive respect consists in the appropriate cognitions concerning the moral value of the law, and that practical respect is a disposition to obey the law. The difference between these two components of respect is of less interest to my argument, but what is very interesting is that Raz specifically includes the appropriate *'affective*

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<sup>346</sup>ibid, 250.

and practical inclinations and dispositions'<sup>347</sup> in his definitions of cognitive and practical respect. Cognitive respect may for example include 'pride that the law of one's country is by and large enlightened and progressive'<sup>348</sup>, and practical respect can entail 'shame and guilt if one breaks the law'.<sup>349</sup> Respect for law is therefore at least partly understood in emotional terms, including a particular relevance of shame and guilt.

### **Friendship and respect for law**

I will argue that respect for law, as Raz explains it, is very similar to the substantive self-regard as a moral person which I discussed in chapter III. In fact, Raz draws an analogy between respect for law and friendship which supports that claim. As we have seen, friendship provides expressive reasons for the actions that are fitting to the relationship and against unfitting ones.<sup>350</sup> These reasons are expressive of the friendship, and the fact that one regards oneself as bound by these expressive reasons is the very thing that makes one a friend. Emotions both respond to these reasons, and act as expressive reasons in themselves.

Even though there are obvious differences between friendship and respect for law, such as the fact that friendship is mutual where respect for law is not, Raz points to important similarities between the two notions:

(a) Friends have reasons which others do not. Similarly, one who respects the law has reasons which others do not. One who has a substantive attitude of respect

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<sup>347</sup>ibid, 250, my emphasis.

<sup>348</sup>ibid, 251.

<sup>349</sup>ibid, 252.

<sup>350</sup>See above, 54.

for law expresses his respect for the law 'in obeying it, in respecting institutions and symbols connected with it, and in avoiding questioning it on every occasion. (b) It is morally permissible not to have any friends at all, and similarly it is morally permissible not to have any moral attitude towards the law. It is however impermissible to have respect for a very 'wicked' law<sup>351</sup> and one is not allowed to have an attitude of *disrespect* for a just law either.<sup>352</sup> (c) One's choice of friends is revealing of one's (moral) character. Of course, whether or not one has an attitude of respect for law is revealing of one's character as well. (d) Both the obligations of friendship and of respect for law are self-imposed. Raz stresses that both friendship and respect for law are very complex and they 'cannot be created by an act of commitment. They have to grow, develop, and cement over time.'<sup>353</sup>

This analogy shows that respect for law has important similarities with friendship, and therefore with the notion of a self-respect as a moral person as well.<sup>354</sup> One's actions out of (cognitive) respect for the law allow one over time to internalise this respect for law in a more practical fashion. While respect for law, I would argue, can be affectively neutral<sup>355</sup> in the same way as one's self-regard as a moral person normally is, it is open to threats in the same way too. That means that when one acts contrary to one's own respect for the law, one's identification with respect for law can be weakened. Furthermore, guilt and shame can respond to that

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<sup>351</sup>Raz names a legal system based on Apartheid as an example.

<sup>352</sup>ibid, 259, note 6. Raz also points out that there are cases of qualified friendship (colleague friends) and similarly one can have a qualified respect for the law (on all matters except for women's rights, for example).

<sup>353</sup>ibid, 255-59. At 256, note that Raz' understanding of growing commitment corresponds to Frankfurt's notion of care (above, 17).

<sup>354</sup>See above, 62.

<sup>355</sup>Raz even refers to it as a 'somewhat self-satisfied and complacent attitude to the law'. ibid, 261.

breach of respect, as Raz himself had already pointed out.<sup>356</sup> An established self-image connected with respect for law means that an emotional obligation can be based on respect for law in the same way as it can be based on one's self-regard as a moral person, namely in response to the breach of one's attitude of respect or self-image as a moral person.<sup>357</sup> The attitude of respect for law therefore creates an obligation to oneself in the same way as a substantive self-regard as a moral person does, and it functions as an expressive reason to act out of respect for the law in the same way that one's self-image as a moral person is an expressive reason to act out of moral reasons.<sup>358</sup> While one therefore does not have any emotional obligations *as a citizen*, emotional obligations in response to breaking the law can exist for the person who has developed a substantive *respect for law*, and the emotional responses of guilt and shame are relevant to the attitude of respect for law.

When an offence has been committed, the offender might (or might not) experience emotions of guilt and shame as a result. These emotions can be part of an emotional obligation in light of one's respect for law and their presence or absence might reveal to oneself whether or not one actually has such a respect for law. An offence might be understood as leaving a taint of disrespect for law on the offender, and we have seen that emotions of guilt and shame might contribute to removing such a taint, yet, particularly in the case of shame, might also negatively affect one's

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<sup>356</sup>ibid, 252.

<sup>357</sup>Raz explains that '... for the person who respects the law there is an obligation to obey. His respect is the source of his obligation.' ibid, 260.

<sup>358</sup>See also John Deigh, *Emotions, Values, and the Law* (Oxford University Press, Oxford 2008), esp 138-58 about the notion of an emotional bond to the law, which Deigh claims can explain rule-following behaviour. Deigh however seems to understand the emotional bond merely in terms of its cognitive aspect and misses therefore in my view the necessary element which distinguishes the emotional bond: affect.

position. Guilt feelings might confirm that one does, in fact, still have this attitude of respect for law and that one has acted against oneself. Shame feelings might confirm one's positive evaluation of the attitude of respect for law; one would like to regard oneself as having this attitude, but at the same time they reveal that currently one does not quite measure up to respect for law. Respect for law provides one with expressive reasons for acting in accordance with the law, and a diminished attitude of respect for law therefore diminishes one's reasons for acting in accordance with the law.

### **Identification with society**

Interestingly, respect for law is explained by Raz to be related to identification with society:

Respect for law is an aspect of identification with society (the reverse of alienation). Here we come to the root of our analogy. A person identifying himself with his society, feeling that it is his and that he belongs to it, is loyal to his society. His loyalty may express itself, among other ways, in respect for the law of the community. Friendship likewise presupposes mutual loyalty and there is therefore little surprise that both friendship and respect for law give rise to expressive reasons.<sup>359</sup>

This kind of identification with society is in turn very similar to the notion of identification with others, as was explained in the previous chapter.<sup>360</sup> It is possible to identify with others, to feel like you belong with them, in the same way as Raz explains the feeling of belonging to a society. If one identifies oneself with a society, and one sees the law as the proper law of that society<sup>361</sup>, then one's identification with society might express itself in respect for law.

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<sup>359</sup>ibid, 259. Raz adds that respect for law is not inseparable from identification with society however, and that one might show one's loyalty in other ways, ibid, 260.

<sup>360</sup>See above, 173.

<sup>361</sup>If one sees the law as oppressive to the society that one identifies with, then one's loyalty might be more properly expressed by defiance of the law. ibid, 261.

I think this is an important point, as it reveals the link between one's identification with society and one's attitude of respect for law. Identifying with (others in) society might provide expressive reasons to act in accordance with the law, and it also explains why breaking the law can be perceived in terms of a lack of loyalty to society (although that may not be the case at all). One might show one's loyalty to society in other ways, but a developed attitude of respect for law certainly implies an identification with society and its laws. This also means that a diminished identification with society might affect one's attitude of respect for law. The connection certainly is not a direct one, as Raz clearly explains, but one's identification with society is clearly relevant to the development of a substantive attitude of respect for law.

### **Emotions affect attitudes towards law**

Although the law, or one's role as a citizen, does not provide an emotional obligation after a wrong, it has been made clear that emotional obligations can follow from a substantive attitude of respect for law. The occurrence of guilt and shame in particular can reaffirm or weaken one's commitment to this respect for law, and are therefore relevant to one's expressive reasons for following the law.

Not every person has developed an attitude of respect for law, of course, nor is there a moral obligation to do so<sup>362</sup>. Furthermore, there might be many different reasons to follow the law, moral or prudential reasons for example, and having a respect for law is not a necessary requirement for bringing one's acts in line with the law. Yet for the person who has developed a substantive self-regard of respect for law,

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<sup>362</sup>See above, 63.

committing a wrong creates emotional obligations based on that self-regard. The effects of guilt and shame on such a self-regard have been extensively discussed in chapters V and VI. I argue that shame and guilt after a wrong are very relevant to an established attitude of respect for law, and, for that reason, relevant to the law itself.

### 3. Law as persuasion

The first ground for my argument that the emotions of the offender with respect to a wrong are relevant to the law is therefore that these emotions can restore or weaken the offender's attitude of respect for law, which, if one has developed this attitude, provides expressive reasons to act in line with the law. However, one might well argue that this particular relevance is not very strong, since it is only indirectly related to the law (via one's attitude to the law) and only applies to those persons who have established a substantive attitude of respect for law. There are further grounds for the relevance of emotions to the law, however, and they are to be found in the persuasive capacity of emotions. In this section, I will explain that one of the proper aims of the law is to *persuade* persons to *endorse* the legal rule and that, for this aim, the persuasive capacity of emotions is too great to be ignored.

#### **Organising society by endorsement**

I regard law as a social institution which is used to organize society.<sup>363</sup>

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<sup>363</sup>This is of course a positivist claim. It is well beyond the scope of this thesis to mount a defence of

There can be human societies which are not governed by law at all. But if a society is subject to a legal system then that system is the most important institutionalized system to which it is subjected. The law provides the general framework within which social life takes place. It is a system for guiding behaviour and for settling disputes which claims supreme authority to interfere with any kind of activity. It also regularly either supports or restricts the creation and practice of other norms in the society. By making these claims the law claims to provide the general framework for the conduct of all aspects of social life and sets itself up as the supreme guardian of society.<sup>364</sup>

The above quote by Raz implies that one of the law's primary functions in organising society is preventing undesirable behaviour, and securing desirable behaviour.<sup>365</sup> It does so, among others, by setting legal rules which influence behaviour. This point is related to a very influential argument made by H.L.A. Hart in his *The Concept of Law*; that of the internal point of view. A person who makes an internal statement about the law uses the law as a standard for guiding and evaluating his own and other's behaviour.<sup>366</sup> A statement from an internal point of view is therefore a 'full-blooded normative' statement; one holds the law to be morally just.<sup>367</sup> However, for the purposes of the law it is not necessary that a person takes the internal point of view, it is simply required that one's behaviour is guided by it.

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positivist legal theory as opposed to natural law theory, or to defend any particular view on positivism. But as my argument is that the emotional response of the offender is relevant to the proper aims of the criminal law, I need to explain my reasons for identifying these aims as such. I will therefore provide a short explanation of a positivist understanding of law that will function as a background for my argument.

<sup>364</sup>Joseph Raz, *The Authority of Law, Essays on Law and Morality* (Oxford University Press, Oxford 1979), 120-1.

<sup>365</sup>ibid, 169. This function is primary carried out by the criminal law and the law of torts. The behaviour in question is not undesirable in the sense that it is so morally, it is undesirable in that it is so regarded *by the law*.

<sup>366</sup>H. L. A. Hart, *The concept of law* (Oxford University Press, Oxford 1994), 99.

<sup>367</sup>Joseph Raz, *The Authority of Law, Essays on Law and Morality* (Oxford University Press, Oxford 1979), 154.

The aim of the law to guide behaviour is more properly captured by the notion of *endorsement*, which includes a disposition to make internal statements, but, crucially, does not necessarily mean that one approves of the legal rule *morally*. 'A man may hold a rule to be morally justified and he may endorse it for this reason. But equally a man may endorse and follow it for any other reason, or for no reason at all.'<sup>368</sup> Preventing undesirable behaviour and securing desirable behaviour, which has been identified as one of the primary aims of the law, is then accomplished by getting the people to *endorse* the legal rule.

### **Normative inclusion by censure**

Respect for persons is a fundamental moral requirement<sup>369</sup>, and I therefore argue that if any law is to be good, it needs at least to conform to the principle of respect for persons. I do not think that it would be possible to develop an exhaustive set of requirements for a 'good law', but I do hold it to be self-evident that there is at least one standard that a good law should live up to, and that is respect for persons. This means that the law should treat persons as human beings who are responsive to reason and that no citizen who is responsive to reason should be normatively excluded by the law.

Following Duff, I argue that one is normatively excluded from society to the extent that one is treated, either deliberately or in fact, as if the values of society do

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<sup>368</sup>ibid, 155. Furthermore, Raz insists that it is possible to make such a statement in a normative way without committing to said rule, without endorsing the rule. The most common example is that of explaining this rule to another person, accepting it as a normative rule but without considering oneself to be bound by this rule. Raz has to concede however that such a statement about any rule, which he calls statements from a point of view, would not be possible without the existence of full-bloodied normative statements about that rule, ibid, 158.

<sup>369</sup>See above, 66.

not apply in one's case; as if one's autonomy, freedom or privacy is unimportant or as if one does not share in the obligations that follow from these values.<sup>370</sup> In some cases, such exclusion might be justified; perhaps one is not a responsible human being, in the sense that one is not generally responsive to reason, because of a mental disability for example. But a responsible citizen may not be so excluded. Duff explains that in order to treat citizens as responsible members of the normative community, it is important to *censure* a person who breaks the law:

The criminal law declares certain kinds of conduct to be wrong – to be criminal. But if the law, or the society in whose name it speaks, is to mean what it thus says, it is committed to censuring those who nonetheless engage in such conduct. To remain silent in the face of their crimes would be to undermine – by implication to go back on – its declaration that such conduct is wrong.

We can add further weight to this conceptual point by saying that such censure of conduct declared to be wrong is owed to its victims, as manifesting that concern for them and for their wronged condition that the declaration itself expressed. It is owed to the society whose values the law claims to embody, as showing that those values are taken seriously. And it is owed to the offenders themselves, since an honest response to another's wrongdoing, a response that respects him as a responsible moral agent, is criticism or censure of that wrongdoing. To take crimes seriously (as the law purports to take them seriously in declaring them to be wrong) as the wrongdoings of responsible agents is to be committed to those who commit them.<sup>371</sup>

Duff thus claims that *censure* is what criminal law owes to the victim, the society, and even to the offender himself. We can make sense of that point in terms of exclusion from the normative community: if an offender fails to be censured for his offence, then he is treated as if these norms do not apply to him.<sup>372</sup> Again, this

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<sup>370</sup>R. A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001), 76.

<sup>371</sup>*ibid.*, 28-9.

<sup>372</sup>It might also be possible to make this point by referring to the fact that a law is not *in force* if it is

exception may in fact be justified because of some mental disability. But if the offender is a responsible human being, then he should be censured for breaking the law in recognition of the fact that these rules do apply to him. A failure to do so would implicitly state that the norms which apply to the rest of society do not apply to the offender, thereby implying that the offender does not belong to the normative community and possibly alienating him or her from society.

Scanlon explains that it is not simply the case that *blame* is owed to the offender, it is rather that blame may not be withheld from the offender 'on the ground that he or she is not a responsible agent whose actions have meaning'.<sup>373</sup> Failing to censure an offender might then be seen to either deny that the agent is a responsible agent or to confirm the moral falsehood that was implicit in the offence.<sup>374</sup> In other words: censure, at least, is *necessary* to maintain the offender's inclusion in the normative community, even if this censure merely takes the shape of a statement of disapproval without any aim to inflict suffering.<sup>375</sup>

### **Persuading the offender**

The state may be justified in censuring the offender, but I want to take that

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not effectively enforced within the community. I think however that a law might theoretically be considered to be in force when it enforces its rules only on a sufficiently significant part of the community. I therefore think that the justification of censure can only be based on an argument like normative inclusiveness, which I do not think is a requirement for law in general but, as I have argued, is a requirement for any *good law*.

<sup>373</sup>T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press, Cambridge, Massachusetts 2008), 170.

<sup>374</sup>See also above, 110-112.

<sup>375</sup>In addition to one of the above messages, a failure to censure an offender might also be seen to entail an implicit statement about the victim, that the victim was not protected by the norms that were breached by the offence. This kind of implicit statement about the status of the victim certainly counts as a moral falsehood, and as such deserves to be corrected. Censure of the offender might then also serve to correct the moral falsehood concerning the rights of the victim. This particular moral falsehood might however theoretically be rectified in other ways, by other reaffirming statements addressed to the victim and by the guilty verdict itself, for example.

claim one step further and argue that a proper aim of good criminal law is to *persuade* the offender. I have stated above that if any law is to be good, it needs at least to conform to the principle of respect for persons. Duff explains that this principle, if it does rank as a principle of good law-making and law-applying that stems from law's very nature, determines not only the ends the state can pursue, but also the means by which these can properly be pursued. If respect for persons is a principle of law, which, I have argued, it must be for any *good* law, then it must address its citizens as agents who are responsive to reason.

If the law is to treat and address the citizens as responsible members of the political community (a community whose defining values include that of autonomy), its aim cannot be merely to bring about that they conform their conduct to the law's requirements. ... Its aim must instead be to persuade them to refrain from criminal wrongdoing because they realize it is wrong. *That* aim can of its nature be achieved only by a communicative process that seeks to bring citizens to recognize and to accept not just that certain kind of conduct are 'prohibited' by the law but that and why such conduct is wrong.<sup>376</sup>

I am however not sure that the law necessarily needs to demand that citizens behave in accordance with the law *because* they realise that not doing so is wrong. The law does not require its citizens to be motivated by moral reasons or the validity of the law. It simply claims that the existence of legal rules is a reason for conforming one's behaviour.<sup>377</sup> This claim is compatible with the notion that the criminal law should try to persuade offenders to recognise some of the reasons for behaving in

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<sup>376</sup>R. A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001), 81.

<sup>377</sup>Joseph Raz, *The Authority of Law, Essays on Law and Morality* (Oxford University Press, Oxford 1979), 30. See also John Tasioulas. 'Punishment and Repentance' (2006) 81 *Philosophy* 279-322.

accordance with the law, but not with the claim that the criminal law should persuade offenders to refrain from wrongdoing *because it is wrong*. If the act in question is wrong, then the wrongfulness might of course serve as a reason for the offender to endorse the legal rule<sup>378</sup>. The state might therefore have reason to point out the moral merit of the legal rule in order to persuade the offender to endorse it. But the law in general merely requires the offender to conform his behaviour to the legal rule; it does not require him to be motivated by the fact that the offence is *wrong*. The aim of endorsement is compatible with this view, because even if endorsement of a rule means that one uses the rule 'regularly in guiding, evaluating and criticizing those actions to which the rule applies', one may endorse the rule for any reason, not just moral reasons.<sup>379</sup>

The claim that persuading the offender to endorse the legal rule that has been flouted by his offence is a proper aim of good criminal law does not mean that the law need only aim to persuade the offender when there is a real, or even any, chance that the offender might be open to such persuasion. Even if the offender remains entirely unmoved, the *good law*, which does have respect for persons as a defining principle, should still address him as a person who is responsive to reason, which means that the law should continue to address the offender in terms of the reasons against the offence. As a society, we cannot give up on people, and the law is not allowed to give up on one of its citizens either.<sup>380</sup> This does not mean that an offender

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<sup>378</sup>ibid, 155.

<sup>379</sup>ibid, 154-5.

<sup>380</sup>Duff claims that it this aim of persuasion might be owed to the victim or to the values that have been flouted by the offence. R. A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001), 82. I hold these reasons to be more indirect however, since it would theoretically be possible to publicly declare the act an offence or even morally wrong (vindicating the victim and reaffirming society's values) without aiming to persuade the offender.

should be somehow coerced into accepting any of the reasons that the state might thus point out to him: he has the right to freedom of conscience and should be free to disagree on any or all of the reasons. My point is merely that the state should maintain its aim of persuasion, because of and within the limits of the rights and duties that the offender has as a responsible citizen.

The criminal law provides sanctions as alternative reasons for conforming one's behaviour to the law, even if one fails to be motivated by the relevant yet independent (moral) reasons. An offender however has shown himself, by the committing of the offence, to be less than optimally responsive to these reasons. If the offender is in fact wholly unresponsive to reason, then it is likely that he cannot be held responsible for breaking the law (unless he was in some earlier way responsible for the fact that he is now unresponsive to reason). But if an offender shows himself to be generally responsive to reason, then it makes sense for the law to point these reasons out to him.

There are at least three kinds of reasons that the offender could have responded to: (1) moral reasons; (2) avoiding sanctions; and (3) being guided by the standard set by the law<sup>381</sup>. I argue that if Raz is right in his claim that securing desirable behaviour is a function of the law, then the law should try to persuade the offender to let his own behaviour be guided by the legal rule. Of course a single occurrence is then not enough: in order to satisfy the requirement of the function of securing desirable behaviour, the aim of the law should be for the offender to be

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The reason for such an aim of persuasion has to be found in the proper treatment of the offender himself.

<sup>381</sup>When one cannot quite oversee the consequences and relevant facts of a decision, and uses the law as a guideline for one's actions (perhaps assuming that there must be a good reason for it), one is guided by the standard set by the law. Not so much because one is persuaded by the moral worth of this law, but rather by default.

*disposed* to allow himself to be guided by the legal rule. In other words, if it is true that preventing undesirable behaviour and securing desirable behaviour is a function of law, then one of the proper aims of good criminal law is to persuade the offender to endorse the legal rule.

#### 4. The role of emotions in persuading the offender

Emotions can play a part in persuading the offender to endorse the legal rule. It has been shown at various points in this thesis that the emotions are crucial in focusing thought and allowing one to recognise one's own values, or moral truth.<sup>382</sup> Emotions can similarly allow one to recognise what action respect for law would have required, if one failed to properly recognise this before. Remember that it is not necessarily the case that an offence proves that the offender is wholly unresponsive to the various kinds of reasons against committing the offence. It does mean that one is currently unresponsive to those reasons, the reasons against committing the offence, yet one might still be responsive to reasons *as one sees them*. Self-deception or weakness of the will might be temporarily interfering with one's capacity to recognise the reasons for obeying the law as persuasive,<sup>383</sup> but as long as one is still generally responsive to reason, one might be brought to recognise these reasons and be persuaded by them.

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<sup>382</sup>See above, 36.

<sup>383</sup>The possibility that the offender, not being very bright, has simply failed to draw the logical conclusion from the relevant reasons is less likely, since legal rules are supposed to be publicly ascertainable standards. See Joseph Raz. 'Explaining normativity, on rationality and the justification of reason.' (1999) 12(4) *Ratio* (new series) 354-379, 358 for the first point, and *Legal Positivism and the Sources of Law*, Joseph Raz, *The Authority of Law, Essays on Law and Morality* (Oxford University Press, Oxford 1979), 37-52 for the latter. My claim is however not that when people commit offences they are necessarily under the influence of moral self-deception or weakness of the will. The reasons *for* committing a crime are undoubtedly very complex and are probably more successfully researched in the field of psychology and sociology. I am merely concerned with the reasons for obeying the law, and how the criminal law might benefit from the persuasive effect of emotions in such a way that an offender is more likely to take those reasons into account.

## How emotions persuade

Now let us remind ourselves how emotions can actually have this persuading capacity. In chapter II of this thesis, I have noted how the fact that one feels a certain (strong and unexpected) emotion in relation to a certain object or a certain person can make one realise that one actually *cares* about this object or this person.<sup>384</sup> Emotions can in that way reveal to oneself that this object or this person apparently has some kind of importance in one's life, an importance that one was not aware of up until that point in time when one became aware of one's emotional response. An emotion might thus reveal one's values, one's priorities to oneself. It undeniably shows you what you care about.<sup>385</sup>

Secondly, I have explained how emotions can change one's convictions, or at least the extent to which one is aware of them. A very common scenario: one experiences an emotional response which one does not quite understand but which focuses one's thoughts on the object of the emotion. One then starts looking for an explanation for the emotional response and finds that one can no longer ignore the facts that should have been obvious. One is now forced to accept the importance of those facts, and the judgement that follows logically from them.<sup>386</sup> This can be a

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<sup>384</sup>Cf. Michael Stocker, *Valuing emotions* (Cambridge University Press, Cambridge 1996), 64: '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>385</sup>See Another important feature of emotions is that they can reveal to us certain beliefs or values that we were not consciously aware of at the time. The information might consist of no more than a somewhat vague realisation that 'something important has just happened' 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.' Emotions can thus reveal that something or someone apparently has some kind of importance in one's life, an importance that one was not aware of up until that point in time. This issue seems fairly straightforward in itself, and I am sure that many (if not all) people have personally encountered such an experience.  
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<sup>386</sup>Peter Goldie, *The Emotions, A Philosophical Exploration* (Clarendon Press, Oxford 2000), 45, see

moral truth<sup>387</sup>, but also a more practical observation such as when one's overwhelming relief at the cancellation of some appointment shows just how much one had been dreading the event. One may not have been consciously aware of one's reluctance, one might have even self-deceptively been telling oneself not to worry, but in the face of overwhelming relief one is forced to accept one's own negative evaluation of the event.<sup>388</sup> The very fact that one is affected by the emotion proves of course that one really had this (moral) conviction all along, but the point is that one changes one's conscious convictions. This means that emotions can be particularly relevant in the cases of self-deception and weakness of the will that I described above: the emotional response allows one to overcome these 'jamming devices' and forces one to recognise what one (subconsciously) already knew, or had accepted as a persuasive reason.

Emotions can thus act in a persuasive capacity which is highly relevant to the criminal law. But even if emotions might be used to persuade an offender, one might argue that there are other ways to accomplish such persuasion, which do not rely on the persuasive effects of the offender's *emotions*. In reply to this argument I would like to point out that I have shown that emotions can also draw attention *away* from the relevant thought content of the offence, and towards one's own weakness, for example<sup>389</sup>, or lead to alienation or primitive shame.<sup>390</sup> If the criminal law fails to show sufficient concern for the emotional response of the offender, it might be

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also Taylor on identificatory and explanatory beliefs, Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 2-3.

<sup>387</sup>Christopher Peacocke, *The Realm of Reason* (Oxford University Press, New York 2004), 263-4.

<sup>388</sup>See also above, 45 and 104.

<sup>389</sup>See above, 162.

<sup>390</sup>See above, 149.

counteracting its own aim of persuading the offender to endorse the legal rule.

These two reasons together explain why the criminal law should be concerned with the emotions of the offender, even if it can not require a specific emotional response from the offender. In order to effectively prevent undesirable behaviour, the criminal law should make room for the emotional responses that are apt to persuade an offender of the reasons against committing the offence. And it should at least concern itself with emotions in the sense that it conducts its process in a way that does not pre-empt the offender's possibilities for persuasion.

In the remainder of this chapter, I will mainly focus on the first point and explain how guilt and shame might attach themselves to different reasons for obeying the law. The following chapter will be dedicated to an evaluation of different possible practices which might allow (or are even aimed at allowing) the emotional response of the offender to have an impact on his disposition to obey the law. I will then show that some of these practices are actually likely to have counter-productive effects, thereby illustrating the importance of the second reason why the criminal law should be concerned with the feelings of the offender.

### **Reasons supported by guilt**

I have distinguished three different kinds of reasons for compliance with the law: (1) moral reasons; (2) prudential reasons; and (3) reasons out of respect for law.<sup>391</sup> In my earlier discussion of guilt and shame I have provided quite elaborate analyses of how the emotions of guilt and shame attach themselves to moral reasons. In a case of a moral wrong, the offender may have not acknowledged his offence as

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<sup>391</sup>See above, 195.

wrong and therefore the wrongness of the act may have failed to persuade the offender, even though the evidence that the offence was, in fact, morally wrong is present and available to the offender. I have provided the example of a victim-offender dialogue, and I explained that being confronted with the requisite subset of facts and under the influence of the pangs of guilt, the offender might have to admit to himself that his action was truly wrong.

A mere cognitive focus on the suffering of the victims here would be unlikely to have produced the same result, as the offender might self-deceptively undervalue the negative effects of his offence. It is the affect of guilt that tips the scale and forces the offender to admit to himself that his actions were *wrong*, and that he in fact *believes* them to be wrong. For how else could he be experiencing these pangs of guilt?<sup>392</sup> Guilt feelings could therefore convince the offender that there is a moral reason against committing the offence, and that he himself actually already subscribes to this moral reason. This realisation will support endorsement of the legal rule.

Another option deserves a short mention: I have explained how one can develop a substantive self-regard as a moral person, and how this self-regard as a moral person functions as an expressive reason for the following of moral rules. The emotion of guilt has been shown to reaffirm this self-image, and can in that way support the expressive reasons one has to follow moral rules. If an offender has a substantive self-regard as a moral person, guilt feelings will therefore also strengthen his disposition to follow moral rules as an expression of his self-image. Guilt feelings

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<sup>392</sup>See I have stated above that emotions reveal value, to ourselves and to others. In the case of guilt, this characteristic of the emotion is particularly important. Guilt is one of the rare emotions that can persuade us of a moral truth that we had not been willing to accept until our own guilt feelings made this moral assertion impossible to deny., 101.

might therefore allow an offender to recognise moral reasons in two ways: (1) guilt feelings can make an offender aware of the fact that he already accepts the moral reasons which should have deterred him from committing the offence, and (2) they might strengthen one's self-regard as a moral person which serves itself as an expressive reason to recognise and follow moral rules.

Prudential reasons are the second kind of reason for obeying the legal rule, but these are less likely to be supported by guilt feelings in the same way that moral reasons might be. Prudential reasons include legal as well as social sanctions.<sup>393</sup> The emotion of guilt is constituted by a wrong plus responsibility for that wrong, but incurring a sanction in itself does not constitute a wrong. Guilt feelings are therefore unlikely to support the recognition of prudential reasons.

A last kind of reason for obeying the law has been identified in the attitude of respect for law. If one has developed an attitude of respect for law, then this respect functions as an expressive reason for obeying the law.<sup>394</sup> If a person who has an attitude of respect for law commits an offence, then he has acted contrary to this attitude. The guilt feelings then serve to focus his attention on the fact that he does place a value on obedience to the law, as any person who has developed this attitude must do, or else this attitude could not have been developed. By breaking the law, he has therefore acted contrary to his own convictions and is not consistent with himself.<sup>395</sup> Guilt feelings draw attention to this inconsistency and affectively support one's attitude of respect for law, which forces the offender (if he has developed this

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<sup>393</sup>Joseph Raz, *The Authority of Law, Essays on Law and Morality* (Oxford University Press, Oxford 1979), 242-3.

<sup>394</sup>See above, from 181.

<sup>395</sup>See also Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 128.

attitude) to recognise his attitude of respect for law as a reason to obey to law.

One final point in this regard is that guilt feelings might also reinforce one's identification with society. Raz has explained that respect for law is 'but one aspect of a complex attitude and style of life'<sup>396</sup> and that one's loyalty to society might be manifested by respect for law. The offence might in the same vein be seen as proof of alienation from society, putting a 'taint' on the offender's loyalty to society, in the offender's own eyes as well as in the eyes of others. Feelings of guilt might then serve to distance the offender from this taint and in this way reinforce the offender's recognition of his loyalty to society. If the offender expresses his loyalty to society by respect for law, then a stronger (or repaired, anyway) recognition of loyalty to society provides a reinforcement and stronger recognition of the attitude of respect for law.

### **Reasons supported by shame**

The three different kinds of reasons for compliance with the law: (1) moral reasons; (2) prudential reasons; and (3) respect for law, can also be supported by shame feelings. It is however clear from the earlier discussion of shame<sup>397</sup> that I hold shame to be the more problematic emotion in this regard, even if shame is surely not entirely without aptness when it comes to supporting reasons for compliance with the law.

With regard to moral reasons, shame has been shown to attach itself only indirectly to a moral wrong. Shame reflects on a *weakness of the self*, and responds

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<sup>396</sup>Joseph Raz, *The Authority of Law, Essays on Law and Morality* (Oxford University Press, Oxford 1979), 259.

<sup>397</sup>See chapter VI: Shame, especially the discussion of redemption from shame, 169.

to the exposure of that weakness. The weakness in question might be a moral weakness, in which cases concerning the emotion of shame could highlight the fact that one is not living up to certain moral standards, which one does place a value on, otherwise one would not feel shame at not living up to these standards. Shame exposes a weakness. The revelation of this negative value to oneself can allow one to identify that weakness and pursue change. The fact that one feels shame proves that one cares about being seen<sup>398</sup> as a moral person, and one way of restoring one's image would be to endorse the legal rule. Shame might therefore also bring an offender to endorse the legal rule that was flouted by the offence.

There are two caveats however. First of all, since shame takes a weakness of the *self* as its object; moral shame will only affect a person who has developed a substantive self-regard as a moral person. One might however be responsive to moral reasons without having developed such a self-regard, and in this case moral shame will not have any persuasive effects. Secondly, while guilt feelings lead one to recognise moral reasons, moral shame initially leads one to recognise a moral *weakness* in the self. One's self-regard as a moral person might act as an expressive reason for following moral rules, and thereby act in accordance with the corresponding legal rule but shame, unlike guilt, actually serves to distance one from that self-regard. Shame might therefore also weaken one's self-regard as a moral person and therefore impede expressive reasons for following moral rules.

Prudential reasons seem obviously linked to shame, as many sanctions involve 'shaming' the offender either deliberately or unintentionally. But the question

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<sup>398</sup>In the context of moral shame, this includes caring about seeing *oneself* as a moral person, not simply about *being seen* as a moral person. See my discussion of moral shame above, 147.

that I am asking is a different one: can the emotion of shame *support recognition* of prudential reasons? By being sanctioned, whether by legal or by social sanction, the offender is publicly marked as not having lived up to standard. Shame does not focus one's thoughts on the sanction as a prudential reason however, it focuses one's thoughts on the weakness of the self. Feelings of shame induced by sanctions might be based on the thought content of (the exposure of) one's moral failure, which as I have explained might allow one to pursue change. But shame then supports *moral reasons*, and does not act to support one's recognition of prudential reasons.

Preserving one's standing in society is a prudential reason for obeying the law. Shame might force one to recognise that one is being seen as having a lower standing in society because of the offence and one might then by shame be persuaded to work towards restoring one's standing in society. However, shame has a double-sided effect, as I explained earlier<sup>399</sup>, and the fact that one has been shown to not live up to a certain standing in society can diminish one's expressive reasons for acting in line with that standing. Secondly, even if one is motivated to restore one's standing in society, then endorsing the legal rule would merely be *one* way of doing so, and there might be other, easier or quicker, methods to achieve the same. If one suffers from *moral shame*, then one might be motivated to better oneself. With respect to shame supporting *prudential reasons* however, one might be differently motivated. One might actually not care so much about actually *being qualified* for a better standing in society but only care about the fact that one is *seen* to be so qualified. This means that one might also simply be motivated not to get caught next time, or to improve one's standing in society by performing excellently in other areas. My point is that when shame is

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<sup>399</sup>See above, 163.

moral shame, then the reasons that it supports are moral reasons and not prudential reasons. The fact that shame works by revealing a weakness in the self means that to the degree that shame might highlight a prudential reason, it initially diminishes its importance as a reason. Finally, even if one is still motivated by shame to work on the weakness in the self, the persuasion to endorse the legal rule is but one of the effects that shame could have. One might also be more motivated to hide the weakness in the self either by excellence in other areas or by avoiding getting caught. I cannot deny that there is a theoretical possibility that shame might motivate an offender to endorse the legal rule for prudential reasons, but I hold the aptness of shame in this regard to be minimal. I think the more important argument here is the opposite conclusion: the explanation that shame might diminish the importance of prudential reasons to obey the law.

Finally, shame might also support respect for law as a reason to obey the law. If one has developed an attitude of respect for law, then shame might serve to make one realise that one does place a value on respect for law and that one has failed to live up to the standards of one who has an attitude of respect for law. Shame draws attention to one's own *weakness* in not being able to keep one's behaviour in line with one's respect for law, which might convince one to try harder next time. Shame might then reinforce one's resolve to be motivated by respect for law.

Note however that this is a very different scenario from the working of guilt. Guilt feelings force one to recognise that one does in fact have an attitude of respect for law, despite the fact that one has committed an offence. One does not identify with the message / value implicit in the offence; one in fact identifies with the value of respect for law. Guilt brings respect for law as an expressive reason back into focus.

Shame feelings, however, focus on a weakness, a weakness that one *does* identify with. This means that feeling shame with regard to one's attitude of respect for law means that one is forced to agree that one *is* in fact weaker than the standard of the attitude of respect for law would require, that one does not 'deserve' to see oneself as having developed a substantive attitude of respect for law. While this of course might motivate one to try to enforce one's attitude of respect for law over time, one might also decide to lower one's standards, deciding that if it is apparently impossible for one to live up to these standards there is no point in holding oneself to them. And if one no longer sees oneself as having an attitude of respect for law, respect for law will no longer count as a reason to obey the law.

This last point is of course also very relevant to the offender's identification with society. Raz explains that one who identifies with his society is loyal to his society, and that respect for law is a way of expressing that loyalty.<sup>400</sup> In terms of shame and guilt, guilt feelings reveal that while one has committed an act contrary to that loyalty, one does in fact still identify with society because one does regard the act as *wrong*. Shame on the other hand reveals that one's loyalty is weak; and this is not a question of one single act either since shame reveals a weakness in the self. Shame forces one to question the extent to which one identifies with society. One might decide that society's standards are apparently too high to live up to considering one's own weakness, and thus alienate one from society. The greater the alienation between oneself and society, the smaller the importance of loyalty to society and respect for law will be in terms of providing reasons to obey the law.

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<sup>400</sup>Joseph Raz, *The Authority of Law, Essays on Law and Morality* (Oxford University Press, Oxford 1979), 259-60.

### **The persuasive value of guilt and shame**

In these last sections, I have explained how the emotions of guilt and shame might persuade an offender to endorse the legal rule that was flouted by the offence. While both emotions have the capacity to be persuasive in this way, it is clear that shame comes with important risks of distancing one from society and from a more ideal self-image. Guilt acts as a direct reminder of one's (moral) values, bringing them into focus and making it impossible not to take them into account. Shame focuses on a weakness in the self and can therefore only indirectly, by making one realise that one importantly lacks certain necessary qualities, bring (moral) value into focus.<sup>401</sup> The fact that shame exposes one's weakness might motivate one to work harder to live up to standard but it might also motivate one to adjust one's standards or simply to prevent being seen<sup>402</sup>, while one continues not living up to standard.

A second important effect of guilt and shame relates to *identification*.<sup>403</sup> I have explained how feelings of guilt might reinforce one's understanding of one's own loyalty to society, as guilt feelings can clearly reveal to oneself that one really feels that one should have expressed this loyalty in one's actions, for example by respect for law. Shame however reveals a weakness in one's standing in society. Even though shame might then motivate one to try to enhance one's standing, it does so by first revealing to one that one is currently in some important way alienated from society.

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<sup>401</sup>See also Bernard Williams, *Shame and Necessity* (University of California Press, Berkeley, Oxford 1993), 222.

<sup>402</sup>This might in fact be considered the most natural response to shame, see Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 90: 'It is best to withdraw and not to be seen'. See also 166.

<sup>403</sup>See also above, 173.

Where guilt can act to reinforce one's sense of identification with society, shame will in first instance mainly draw attention to one's alienation, diminishing the importance of respect for law as an expressive reason to endorse the legal rule. I conclude that both guilt and shame feelings can act in support one's proper recognition of the various reasons to obey the law, but that shame might also impede, initially at least, this recognition. As these emotions have a clear impact on the aim of the law to persuade people to endorse the legal rule, both these emotions should obviously be of concern to the criminal law. In addition to the need for the law to at least passively take note of the ways in which these emotions might be influencing the offender, I argue that the law should in fact make active use of these emotions in the aim of persuading the offender to endorse the legal rule. In the following chapter, I will discuss ways in which the law might adopt such an active stance, and 'make room' for the emotions of the offender.

## VIII. GUILT AND SHAME IN LEGAL PRACTICE

In the last chapter, I have argued that if it is correct that it is a primary function of the law to prevent undesirable behaviour and secure desirable behaviour, a function which is mainly exercised by criminal law, then the *good* criminal law should aim to persuade the offender to endorse the legal rule that was flouted by the offence. This thesis has developed an elaborate analysis of emotions and among the insights derived from this analysis was the claim that emotions can reveal value and change one's convictions. Shame on the other hand, while it can have this positive effect, has also been shown to possibly distance one from these values or from society. My argument is that there are two reasons why the criminal law should concern itself with the emotions of the offender: first of all, the criminal law should be aware of and avoid the possible distancing effects of emotions, in particular shame. Secondly, the aptness of emotions for persuading the offender to endorse the legal rule is simply too great to ignore. The state cannot legitimately *require* an emotional response from the offender, but it can and should make room for them.

I have explained how emotions might support reasons for obeying the law. I have not yet explained however what I mean by claiming that the law should 'make room' for these emotions. In this chapter, I will explain how I think the law can make room for emotions by discussing different legal practices and the way in which they influence the surfacing or the effects of emotions. This will also provide more practical content to my claim that legal practices and emotions can alienate an

offender from society and thereby from one of the reasons for obeying the law.<sup>404</sup>

First of all, I need to discuss what the general conditions are for eliciting emotions.

### **Eliciting emotions**

In this thesis, I have explained that emotions can focus one's thoughts, but that the experience of emotions can on the other hand be influenced by focusing one's thoughts on the relevant thought content.<sup>405</sup> This means that eliciting an emotion may be attempted by trying to accomplish a focus on certain thought content, in oneself or in another. Secondly, if an offender is not affected by that thought content, it may be the case that he does not consider this thought content sufficiently important and that he therefore does not care about it.<sup>406</sup> In such a case, emotions may be elicited by pointing the importance of said thought content out to him. Basically, an emotion may therefore be elicited by *engagement with relevant thought content*. For eliciting guilt, that would mean aiming for engagement with the thought of responsibility for a wrongdoing, and for moral shame it would mean revealing someone to be morally weak.<sup>407</sup>

Of course, emotions cannot be summoned by acts of will, and neither can they be forced upon another.<sup>408</sup> But it may be possible to engage an offender with the relevant thought content, and perhaps this could even be done by merely pointing the

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<sup>404</sup>See also Joseph Raz, *The Authority of Law, Essays on Law and Morality* (Oxford University Press, Oxford 1979), 176-7.

<sup>405</sup>See above, 9 and 36.

<sup>406</sup>See above, 17.

<sup>407</sup>I have explained that since shame is connected to the *self* and involves standards that one already subscribes to, I do not see a lot of room for *not* being affected when the relevant thought content is present. See also above, 163.

<sup>408</sup>And even if emotions could be forced upon another person, the state would not be allowed to do this to a citizen. See VII.1 Freedom of conscience.

relevant facts out to him. I do not think that there can be anything necessarily wrong with eliciting emotions by pointing out facts, and in fact the circumstances of situations and current legal practices might be seen to elicit emotions already. An important abolitionist<sup>409</sup> line of critique of the legal process might point to the fact that the traditional criminal legal process, by alienating victims and offenders, impedes the surfacing of helpful kinds of emotions and stimulates the kind of emotions that might alienate the offender from society instead. I will first discuss the possibility of alienation being present in traditional legal procedure, before considering several alternative procedural approaches and discussing whether or not these alternatives might allow for a more productive use of the offender's emotions.

### 1. Practical exclusion

In the previous chapter I have explained how normative exclusion might alienate the offender from society.<sup>410</sup> Duff also points to a kind of practical exclusion which can have the very same effect, stating that offenders are 'excluded insofar as their trial is an alien process that they cannot understand and in which they play no real part'.<sup>411</sup> I think that it is true that traditional criminal law proceedings have a way of alienating

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<sup>409</sup>The abolitionism movement in criminal law is based on the moral conviction that criminal law is an inadequate response to conflict in social life. Abolitionism is highly critical of criminalization and punishment, the prison system in particular.

<sup>410</sup>See above, 190.

<sup>411</sup>R. A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001), 77. The term that Duff uses for this kind of exclusion is *linguistic* exclusion, but considering his word choice, in particular the phrase 'in which they play no real part' I think that he is really referring to something broader than mere linguistic exclusion.

both the victim and the offender, as has been explained by Nils Christie in his famous article *Conflicts as property* (1977). This article lies at the basis of what first sparked my interest in the engagement of the offender in criminal proceedings and it will be highly relevant in understanding the possible role of emotions in the criminal law. I will therefore provide a short explanation of Christie's views.

### **Conflicts as property**

In the criminal legal process, Christie argues, both 'original' parties of the offence, being the victim and the offender, lose control of the proceedings by being *represented* by the state and by legal professionals.<sup>412</sup> The offence is redefined in terms of its *legal relevance*, irrespective of the 'human' relevance that the offence might have to these parties. According to Christie, the victim is a particularly heavy loser; not only is the compensation in the form of punishment paid to the state or society as a whole, the state is also taking away the chance to *participate* in dealing with the offence.<sup>413</sup> But Christie argues that the biggest loser here is actually society at large, losing an opportunity for *norm-clarification*. Christie stresses the possibility of the conflict to be a source of learning, and how the determination of specific blameworthiness in concrete cases would provide opportunities for a continuous discussion on the values of the law.<sup>414</sup> A further point that has been identified by Christie is the loss of an opportunity for 'demythologising' the offender. In order to come to terms with the wrong, the victim will need to form an understanding of what

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<sup>412</sup>Nils Christie. 'Conflicts as Property' (1977) 17 Br J Criminol 1-15, 3.

<sup>413</sup>*ibid*, 7-8.

<sup>414</sup>*ibid*, 8.

has happened, and this includes to need for an understanding of the offender as a person. Without any human contact with the offender, the victim will have no choice but to create an understanding of the offender using classical stereotypes of the kind of person who would commit a crime.<sup>415</sup> These stereotypes will affirm the victim's and society's anxiety level and misconceptions.

Christie also mentions that the offender in modern criminal legal procedure has lost one of the most important opportunities for being forgiven. If the victim were to have a substantial part in dealing with an offence, the focus of the discussion would, according to Christie, be on the harm that the victim has suffered and how the loss could be compensated or restored. The offender, who in the traditional criminal procedure will usually mostly be a listener, i.e. will listen to other people while they are determining 'his' facts and 'his' punishment, gets a chance to participate in a discussion of how he could contribute in the restoration of the loss.<sup>416</sup>

### **Alienating people**

I do not concur with the entirety of the views that are explained in Christie's article. Christie, being an abolitionist, understands offences almost solely in terms of a conflict between victim and offender. The idea of understanding a criminal wrong as a primarily private conflict underestimates in my view the importance that the committing of an offence can have for society at large. Furthermore, the focus of this article is very much on the standing of the *victim* in criminal law. Whether the victim should have any substantial position in the criminal procedure at all is however a

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<sup>415</sup>ibid, 8.

<sup>416</sup>ibid, 9.

much debated topic and in any case well beyond the scope of this thesis.

And yet this article does provide a very enlightening discussion of how traditional criminal law proceedings might alienate both the victim and the offender (or better: the accused, as long as there has not been any guilty verdict). It is clear that a state of alienation from the proceedings, or lack of engagement on the part of the accused, cannot provide a fertile ground for the development of most of those emotional responses that might persuade a person to take proper account of the reasons to obey the law. The possibilities for a sufficient engagement with the *relevant* thought content, at least to guilt and moral shame, are minimal. Criminal trials therefore do not allow room for the surfacing of those emotions in the offender which, I have argued, should be considered the most helpful in persuading the offender to endorse the legal rule that was flouted by the offence.

On the other hand, it should be obvious that a criminal trial allows ample space for emotions of shame based on society's disapproval. By being singled out, physically in a chair designated for the accused, one is shown as someone who is at least suspected of not being up to standard. Whether one then believes oneself to be guilty or not, there is therefore ample room for the thought content 'that [one] is a lesser person than [one] should be, for an in some way better person would not find himself in a position where he can be seen as [one now] is or may be seen.'<sup>417</sup> I have explained that while such emotions might theoretically focus thought content on *moral reasons* for obeying the law, or reasons flowing from one's attitude of respect for law, they can only do so if one has in fact developed a substantive self-regard as

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<sup>417</sup>Gabriele Taylor, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985), 76.

a moral person or an attitude of respect for law. If one has not, then one cannot be so affected. This shame, brought on by the realisation of the fact that one is seen as (possibly) deviant from society's norms, might still persuade one to take prudential reasons into account. The accused might then decide to endorse the legal rule in order to preserve his standing in society. The problem with this scenario however, is that through shame, the accused has first been made aware of the fact that he has *lost* standing in society. This means that the very reason for endorsing the legal rule, *preserving* one's status in society, might lose some or even all of its potential influence on the accused. If this is correct, then the criminal legal process would seem to fail to elicit the emotional responses of the right kind, meaning that they might persuade an offender to endorse the legal rule, and instead elicit the wrong<sup>418</sup> kinds of emotion which might negatively influence the offender's identification with society and thereby also his attitude of respect for law, if he had developed such an attitude.

Now there might be good reasons for representing the accused in criminal court, such as the requirement of giving the accused, who might be lay person, a fair trial.<sup>419</sup> But I have shown that traditional criminal trials have the potential to alienate the accused from society and from at least some reasons for obeying the law, while failing to allow for an engagement with the thought content relevant to the emotions which I have explained have the most persuasive aptness, in particular guilt and moral shame. Christie's explanation about the alienation occurring in the criminal law process therefore provides a reason to investigate whether the criminal law process

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<sup>418</sup>Of course, no emotions is wrong *in principle*, but this emotion may be called wrong in light of the aim of persuading offenders to endorse the legal rule, to which this emotion is not conducive. See also above, 24.

<sup>419</sup>In the Netherlands, an offender is not allowed to represent himself in criminal court. Article 28.1 Wetboek van Strafvordering (Code of Criminal Process).

can be modified within the requirements of fair trial, to allow room for the development of those emotions which have some aptness in persuading the persons to obey the law. And I argue that this is precisely what the criminal law should do, because its proper aims include not only to censure the offender for the wrong that he has committed but also to *persuade* persons, whether or not they might be open to such persuasion, to properly take account of the reasons against committing the offence. The criminal law cannot afford not to show proper concern for the emotions, as traditional criminal proceedings already provide ample space for the kinds of emotions that alienate the offender (or the accused) and thereby diminish the importance of at least some reasons to obey the law, such as preserving one's standing in society. The impact of the emotions on the good criminal law's proper aim of persuading the offender is therefore simply too great to ignore.

There are several practices, both existent and theoretical, which either aim to make a constructive use of the offender's emotions, or might be used for this aim. I will discuss four such practices in turn: the victim impact statement; restorative justice; a ritual of apology; and shaming sentences. The discussion of these topics will provide a basic answer to the question how the criminal law could, as I have termed it, 'make room for emotions'.

## 2. Victim Impact Statements

The victim statement of impact is also known as a victim personal statement (VPS). Affecting the emotions of the offender is not one of the primary purposes of the victim impact statement. According to the Crown Prosecution Service website, the victim personal statement is mainly meant to 'give victims the opportunity to state how the crime has affected them - physically, emotionally, psychologically, financially or in any other way', and this information can then be used by the court to inform the decision on sentencing.<sup>420</sup> The Dutch explanatory memorandum relating to statute 302 Wetboek van Strafvordering (Code of Criminal Process) which first allowed victims and surviving relatives to make a victim statement of impact in Dutch criminal courts, states this same reason for implementing this kind of statement. However, the Dutch explanatory memorandum also states that the portrayal of the effects of the offence might bring the offender to realise what he is being blamed for, a realisation which might prevent re-offending.<sup>421</sup> The memorandum here refers to, I would argue, the relevant thought content for guilt. I think that the VPS might focus on at least some relevant thought content for guilt: bringing out the negative effects

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<sup>420</sup>Crown Prosecution Service. 'Victim Personal Statements'

<[http://www.cps.gov.uk/legal/v\\_to\\_z/victim\\_personal\\_statements/](http://www.cps.gov.uk/legal/v_to_z/victim_personal_statements/)> accessed 02/04/2012.

There are other purposes listed, such as an opportunity for the victim to state whether he requires information about, for example, the progress of the case. An information request can however be done in different ways, but in order for the court to take the effects of the offence on the victim into account when making a decision on sentencing, the information on the effects of the offence on the victim must be presented to the court in the proper form, i.e. the victim personal statement, in accordance with *R. v Hobstaff* (1993). It should also be noted that the opinion of the victim as to what the sentence should be, is irrelevant (as stated in *R. v Perks* (2001) and in *Kamerstuk 27632/3*, see note below). This leads me to conclude that providing the information of how the offence has affected the victim for sentencing purposes is the main purpose of the victim impact statement, at least from the legal professionals' point of view.

<sup>421</sup>*Kamerstuk 27632/3*, 19/03/2001: *Memorie van toelichting bij indiening wetsvoorstel spreekrecht voor slachtoffers en nabestaanden* (Explanatory memorandum relating to the proposed bill concerning a victim statement of impact for victims and surviving relatives).

on the victim, which constitute a wrong. The VPS might therefore focus attention on the importance of the wrong. But is the VPS likely to sufficiently engage the offender with this relevant thought content?

I think that the answer to this question partly depends on how the VPS is communicated to the offender. If the VPS is a written document which is mainly dealt with by the accused's legal counsel, and hardly by the offender himself, I doubt that the VPS can sufficiently engage the offender to experience the emotional episode. If the victim appears in court to deliver such a statement, or if the VPS is recorded on video, the opportunities for engagement might be higher.

A generally moral offender might then, confronted with the moral reasons drawn out by the VPS, be brought to recognise the moral rules against the offence and be brought to endorse the legal rule. If an offender genuinely does not subscribe to these moral reasons however, then I fail to see how the offender could be positively influenced by the victim's story. In terms of reasons connected to respect for law, I see no obvious ties in the VPS to the offender's loyalty to the community, so I do not think that respect for law as a reason to obey the law is supported by the VPS in any specific way. The VPS might also benefit the offender in the sense that it might provide him with some information as to how he might make restitution. Making restitution would possibly strengthen the offender's ties with the community, and might therefore indirectly strengthen reasons of respect for law.

There are clearly some ways in which the VPS might make a productive use of the emotions of the offender. The issue remains however that a VPS is a one-sided expression, and it is not necessary for the offender to respond. This probably limits the emotional engagement of the offender. As Duff and Christie explained, to engage

the offender with the criminal court process it might be preferable to engage the offender in a dialogue. Restorative justice and victim-offender mediation represent attempts to do just that.

### 3. Restorative justice

Restorative justice is a term which is used to describe a range of approaches, theory and movements. A common element in various forms of restorative justice is an attempt to propose 'a fundamental change in our manner of viewing and responding to criminal acts and troublesome behaviour'.<sup>422</sup> A commonly quoted 'working definition' has been derived from Tony Marshall: 'Restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future'.<sup>423</sup> Partly based on the ideas of Christie which were discussed earlier in this chapter, restorative justice is therefore typified by the stronger engagement of the victim and the offender in the response to the offence.

Even if restorative justice is commonly understood to focus on the healing of the victim<sup>424</sup>, it might also provide a very fertile breeding-ground for emotional responses such as guilt and moral shame in the offender. In fact, the restorative justice

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<sup>422</sup>Gerry Johnstone, *Restorative Justice: ideas, values, debates* (Willan Publishing, Cullompton, UK 2002), 6.

<sup>423</sup>E-mail, Marshall to McCold, 1997. Quoted in among others J. Braithwaite. 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 25 *Crime and Justice* 1-127, 6.

<sup>424</sup>Nils Christie. 'Conflicts as Property' (1977) 17 *Br J Criminol* 1-15 already included this explicit focus on the victim. See also Gerry Johnstone, *Restorative Justice: ideas, values, debates* (Willan Publishing, Cullompton, UK 2002), 18-9.

argument has very close similarities to the way in which I explained how emotions might bring an offender to endorse the legal rule. Johnstone explains that the argument is often portrayed as follows:

... in order to commit offences and live with their behaviour, criminals must construct elaborate rationalizations for their actions. For example, they convince themselves that they are not really hurting anyone (their victims are big businesses or are insured and so can afford the losses) or that their victim 'deserved it'. According to proponents of restorative justice, conventional punitive justice, by keeping the victim and the offender apart, does little or nothing to penetrate these rationalizations and may even reinforce them. Restorative justice, on the other hand, by bringing offenders and victims together and promoting respectful dialogue between them, makes these rationalizations more difficult to sustain. Hence, it is concluded, such theories predict that restorative justices will reduce crime more than existing criminal justice practices.<sup>425</sup>

Johnstone's explanation of restorative justice's countervailing effects on the offender's rationalizations of his offence are clearly in line with the persuasive power of emotions, which I explained earlier in this thesis. Restorative justice might then be a very promising practice in light of aim of good criminal law to persuade the offender to endorse the legal rule.<sup>426</sup>

There are many different practices which might be called restorative, and some of these are criticized for being essentially retributive and punitive programmes simply being 'repackaged as restorative justice'.<sup>427</sup> Some focus on a more individual

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<sup>425</sup>ibid, 22. See also J. Braithwaite. 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 25 *Crime and Justice* 1-127, 47.

<sup>426</sup>There are certain problematic issues connected to (forms of) restorative justice, such as a loss of procedural protection and net-widening. These issues, while important, are beyond the scope of this thesis and I will not discuss them here. For a short explanation see Gerry Johnstone, *Restorative Justice: ideas, values, debates* (Willan Publishing, Cullompton, UK 2002), esp 29-32.

<sup>427</sup>See for example Loraine Gelsthorpe and Allison Morris. 'Something old, something borrowed, something blue, but something new? A comment on the prospects for restorative justice under the Crime and Disorder Act 1998' (2000) *Criminal Law Review on the Crime and Disorder Act 1998*.

victim-offender dialogue, but many proponents of restorative justice insist on family or community conferences where both the victim and the offender, supported by, or in the presence of, family and community come together to discuss the offence. These 'shaming conferences' are based on the theory of 'reintegrative shaming' which was developed by Braithwaite in his influential *Crime, shame and reintegration* (1989). Since I think that the victim-offender dialogue will appeal to different emotional thought content than shaming conferences, I will discuss them in turn.

### **Victim-offender dialogue**

In the victim-offender dialogue, victim and offender are brought together in a face-to-face encounter, usually under the guidance and in the presence of a mediator, to discuss the offence. This practice is also known as victim-offender mediation. Participation in this dialogue is voluntary, and it can of course only take place if the offender has admitted that he is guilty of the offence. The mediator is supposed to refrain from imposing his own interpretation or solution upon the victim and the offender, but should instead encourage them to tell their stories<sup>428</sup>, to talk about the impact of the offence and the events leading up to the offence, and to ask questions.<sup>429</sup> Eventually, the victim and the offender together come up with an agreement on how the offender will make restitutions. This restitution could, in some theories of victim-offender mediation, even include an agreement to undergo

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<sup>428</sup>Storytelling is by many proponents of restorative justice seen as an important part of dealing with the aftermath of an offence, see J. R. Gehm. 'Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks' (1998) 1(1) *Western Criminology Review* [Online].

<sup>429</sup>Gerry Johnstone, *Restorative Justice: ideas, values, debates* (Willan Publishing, Cullompton, UK 2002), 3.

punishment.<sup>430</sup>

Restorative justice in general, and the victim-offender dialogue in particular, seem to provide a perfect opportunity for the emotions of the offender to persuade him to endorse the legal rule. It has been explained above that the very idea behind restorative justice is that the offender, faced with the actual consequences of the offence, can no longer sustain the rationalizations he had formed when committing the offence. These rationalizations might of course be seen as the very self-deceptive thought processes which prevented the offender from recognising (some of) the reasons for obeying the law. The very real confrontation with the plight of the victim engages the offender with the relevant thought content: that he is responsible for the victim's current plight and that his action was wrong. A victim-offender dialogue might then, in an ideal form, represent the fertile breeding-ground for the emotion of guilt in the offender that I have argued the law should aim for.<sup>431</sup>

However, victim-offender mediation might also elicit very different emotional responses, as Acorn explains in *Compulsory compassion* (2004). Acorn claims that restorative justice fails to consider the possibility that the offender might enjoy the victim's suffering while knowing that the proper and expected response is compassion and remorse.<sup>432</sup> Secondly and more importantly, Acorn explains how the dynamics of the restorative encounter might focus attention on the suffering of the offender, rather than the suffering of the victim which was meant to focus the offender's thoughts on the relevant thought content for guilt. Acorn explains that the most

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<sup>430</sup>See for example R. A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001), 106.

<sup>431</sup>See also my discussion of the typical restorative success story, above 101.

<sup>432</sup>Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (UBC Press, Vancouver 2004), 147-8.

important base for the victim's compassion for the offender is his present suffering, either because he is made to experience painful emotions in the restorative encounter, or because the offender's 'story' included revelations of a 'lifetime of misery'. The offender's suffering is urgent and immediate, and thus overshadows the past suffering of the victim.<sup>433</sup> There are further reasons why the suffering of the offender might be the focus of the restorative encounter, rather than the suffering of the victim, such as the dramatic breakthrough and the promise for positive transformation that speak from the offender's suffering. These might produce a sense of euphoria which in itself focuses thought towards these positive outcomes and away from the relevant thought content for guilt. Finally, the suffering of the offender is the only suffering that the victim currently has the power to end. It therefore takes precedence as the focus of the restorative encounter.<sup>434</sup> I think that Acorn describes a very plausible account of the restorative victim-offender dialogue, and restorative justice needs to find an answer, perhaps in the proper training of mediators, to maintain the focus on the relevant thought content of guilt in the restorative encounter. Of course, restorative justice has as one of its aims to 'demythologize' the offender<sup>435</sup>, which means that telling the offender's life story is inherently part of the restorative encounter, as will be thought content relevant to the victim's compassion for the offender.

The dangers of a shift away from the relevant thought content for guilt are exacerbated by the promise of an immediate reward for the offender, in the form of a lesser punishment. The fact that restorative justice is based on a theory which aims to

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<sup>433</sup>ibid, 154.

<sup>434</sup>ibid, 158.

<sup>435</sup>See Nils Christie. 'Conflicts as Property' (1977) 17 Br J Criminol 1-15, 8 and the discussion earlier in this chapter.

find a response to criminal offences other than the punitive one, means that the sentence following a process of mediation should according to the theory be more lenient. Another possible reason for a more lenient sentence is that the mediation is understood to be a burden in itself, since the emotions elicited in the offender during mediation are painful. Some, like Duff, argue that these emotions and the process of mediation should therefore be seen as punishment in itself.<sup>436</sup> If the emotional process counts as punishment in itself, then it makes sense that the consequent punitive sentence should be lowered accordingly. I would argue against understanding the use of the emotions of guilt and shame as deliberate infliction of suffering, as I will explain below<sup>437</sup>, and I therefore do not agree that the use of these emotions should be understood as punitive. The fact remains however that the inherent focus of restorative justice on non-punitive restoration efforts might lead offenders to regard restoration primarily as a means of obtaining a lenient sentence.<sup>438</sup> This means that instead of focusing one's thoughts on the relevant thought content for guilt, offenders are incentivised by the promise of an immediate reward, and without the risk of painful emotional experiences, to participate in a restorative encounter without properly engaging with the relevant thought content for guilt, and merely telling the victim what the victim wants to hear.

An offender who does not, and neither would upon reflection, support the

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<sup>436</sup>R. A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001), 96-9. Of course, Duff argues that mediation itself should be seen as punishment, but I would argue that since it is not the deliberate aim of the use of emotions such as guilt and shame to inflict suffering, mediation and the use of potentially painful emotions should not count as punishment. I will discuss this claim below, in VIII.7 Painful emotions and punishment.

<sup>437</sup>See 258.

<sup>438</sup>See for example Sharon Levrant and others. 'Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?' (1999) 45(1) *Crime & Delinquency* 3-27, 20.

applicable moral reasons will therefore benefit from mediation in the sense that he will probably be offered a more lenient sentence, without risking having to experience the admittedly painful emotions of guilt. As this offender does not subscribe to the moral rule, he will not experience any pangs of guilt or moral shame. On the other hand, an offender who does in general subscribe to these moral reasons, but who has for some reason ignored them in this case, has two options: sincerely engage with the relevant thought content, which might be painful, or simply tell the victim what he wants to hear. Both these options will result in the same more lenient sentence. If this offender has developed a substantive attitude as a moral person, guilt feelings are something he might still require of himself to maintain his own self-image. The morally persuadable offender who has not developed such a moral self-image however, does not seem to have any reason to choose to suffer guilt feelings over simply expressing an empty apology and receiving the same more lenient sentence. In fact, the obvious appeal to his self-interest might actually frame the interactive dynamic of restorative justice, which might cause the offender to focus on his own needs, rather than actively engaging with the relevant thought content of guilt. Any development of sincere guilt feelings might be pre-empted by the promise of a reward, and this might even affect an offender who has developed such a moral self-regard.<sup>439</sup> This might even lead the morally persuadable offender to become more cynical, rather than to be persuaded to endorse the legal rule.<sup>440</sup>

The restorative encounter has some beneficial possibilities in cases where an

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<sup>439</sup>See also Jeffrie G. Murphy. 'Well Excuse Me! - Remorse, Apology and Criminal Sentencing' (Arizona State Law Journal Symposium 2005) 1-25, 25.

<sup>440</sup>R. Delgado. 'Goodbye to Hammurabi: Analysing the Atavistic Appeal of Restorative Justice' (2000) 52 Stanford Law Review 751-775, 766.

offender has already been persuaded that his acts were wrong. As long as the victim accepts the offender's sincerity (which might not be tenable in the long run, due to the corrupting effects of the immediate reward of a more lenient sentence, see above) the restorative encounter does allow the already persuaded offender to express his guilt feelings directly to the victim and to be informed as to how to make restitution. His sincere expressions of guilt might in fact be seen as (partly) restoring since they contradict the moral falsehood that was implicit in the offence and therefore reaffirm the moral status of the victim.<sup>441</sup>

I conclude that a victim-offender dialogue *in principle* might elicit the emotional responses that support moral reasons as a reason for obeying the law. In fact, the engagement of the offender is very promising in this respect. It is clear however that the promise of an immediate reward in the form of a more lenient sentence corrupts the possible beneficial effects of the victim-offender dialogue in terms of providing a fertile breeding-ground for guilt feelings. This pay-off benefits mainly the unpersuadable offender, while pre-empting the morally persuadable offender's engagement with the relevant thought content of responsibility for a wrong and, in the long run, might undermine the credibility of these encounters and diminish the beneficial effects for the already persuaded offender. In terms of the persuasive powers of the emotions, the only type of offender who might be persuaded to endorse the legal rule because of the restorative encounter, the morally persuadable offender, is because of this promise of a reward incentivised to play along instead. While I see the victim-offender dialogue as a very promising approach to allowing space for the generation of guilt feelings, I think that such encounters should not include the

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<sup>441</sup>See above, 104.

promise of an immediate reward, in terms of a more lenient sentence or other self-serving benefits, apart from an opportunity for moral growth and restoration.

### **Shaming conferences**

Fear of shame is, as Braithwaite points out, an important reason to obey the law.<sup>442</sup> Shame builds conscience.<sup>443</sup> According to his influential theory of reintegrative shaming therefore, the emotion of *shame* is what is needed to break through the offender's rationalizations of his wrongful action.<sup>444</sup> It is important to note that reintegrative shaming is distinguished by Braithwaite from stigmatization, by which he means to avoid the negative, alienating effects of shame. According to Braithwaite, reintegrative shaming is based on expressions of community disapproval followed by gestures of re-acceptance into the community, while stigmatization creates a class of outcasts. He insists that the deviance label should be 'applied to the behaviour rather than the person', and that shaming should be 'done under the assumption that the disapproved behaviour is transient, performed by an essentially good person.'<sup>445</sup>

Braithwaite rejects the effects of stigmatization partly because, as he rightly points out, when one becomes an outcast then one can easily reject one's rejectors, i.e. reject the standards that one is being held to, and then 'the shame no longer

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<sup>442</sup>J. Braithwaite, *Crime, shame and reintegration* (Cambridge University Press, Cambridge 1989), 69-70.

<sup>443</sup>*ibid*, 72-3.

<sup>444</sup>J. Braithwaite. 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 25 *Crime and Justice* 1-127, 48-9.

<sup>445</sup>J. Braithwaite, *Crime, shame and reintegration* (Cambridge University Press, Cambridge 1989), 55.

matters'.<sup>446</sup> The crucial factor of Braithwaite's reintegrative shaming is that it is followed by reconciliation; a forgiveness ceremony and a welcome back into the community, which he claims builds conscience, and commitment to the law.<sup>447</sup>

The main issue with this theory of reintegrative shaming should be clear from my earlier discussions of guilt and shame: Braithwaite mistakenly does not distinguish between the two.<sup>448</sup> Taking an act rather than a whole person as its object is distinctive of guilt, not of shame, which is, as I have explained, conceptually linked to the exposure of a weakness in the *self*. Nussbaum therefore rightly, if only tentatively, concludes that 'Braithwaite's ideas are quite unconnected to traditional notions of shaming [...], and rather part of the universe of guilt'.<sup>449</sup> Braithwaite later admits that 'a profound deficiency' of reintegrative shaming as it was originally developed, 'is that it is just a theory of shaming, with the emotion of shame left undertheorized'.<sup>450</sup> However, many interpretations of restorative justice still see shaming as an important restorative process<sup>451</sup>, and I therefore want to discuss the effects of shaming conferences.

The core idea of a shaming conference is explained very well by Braithwaite himself:

The effectiveness of shaming is often enhanced by shame being directed not only at the individual offender but also at her family, or her company if she

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<sup>446</sup>ibid, 55.

<sup>447</sup>ibid, 72-3 and 81.

<sup>448</sup>ibid, 75.

<sup>449</sup>Martha C. Nussbaum, *Hiding from Humanity* (Princeton University Press, Princeton 2004), 241.

<sup>450</sup>J. Braithwaite. 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 25 *Crime and Justice* 1-127, 43.

<sup>451</sup>See for example the explanation of restorative justice in Gerry Johnstone, *Restorative Justice: ideas, values, debates* (Willan Publishing, Cullompton, UK 2002).

is a corporate criminal. When a collectivity as well as an individual is shamed, collectivities are put on notice as to their responsibility to exercise informal control over their members, and the moralizing impact of shame is multiplied. [...] From the standpoint of the offender, the strategy of rejecting her rejectors may resuscitate her own self-esteem, but her loved ones or colleagues will soon let her know that sinking deeper into the deviant role will only exacerbate the shame they are feeling on her behalf.<sup>452</sup>

The idea of shaming conferences thus acknowledges that shame can alienate an offender from moral norms and from society, and aims to counteract this alienation by targeting the persons that an offender cares about instead.<sup>453</sup> The idea is that this will make it impossible for the offender to 'reject his rejectors' and that he is thereby forced to acknowledge the moral wrong. But is this really what shaming the offender's loved ones can hope to accomplish? I have explained that shame can take as its object a moral weakness, and that it can then be classified as moral shame.<sup>454</sup> I have also explained that moral shame might allow one to identify a moral weakness and pursue change.<sup>455</sup> Even if I have also argued that shame is elusive and (initially) distancing<sup>456</sup>, a practice of reintegrative shaming might focus on the right kind of shame and have the right kind of effect: motivating the pursuit of change.

I will argue however that moral shame is not the kind of shame that reintegrative shaming is likely to elicit. This is exemplified by Braithwaite himself when he states that 'the offender may have a shield that deflects the shame, only to find the deflected shame spears through the heart of his mother who quietly sobs

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<sup>452</sup>J. Braithwaite, *Crime, shame and reintegration* (Cambridge University Press, Cambridge 1989), 83.

<sup>453</sup>See also J. Braithwaite. 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 25 *Crime and Justice* 1-127, 48-9.

<sup>454</sup>See above, 147.

<sup>455</sup>See above, 202.

<sup>456</sup>See above, 162.

beside him'. He observes that it is the shame of a loved one that then affects the offender, even if the shaming that was directed at his person failed to affect him.<sup>457</sup> I would argue that if an offender is affected in this way, through the suffering of a loved one, the present thought content is not likely to be focused on a moral weakness but rather on being a disappointment as a brother, or as a son. I have explained that when shame is not moral shame, it might be relieved not by endorsing the (moral or legal) rule but rather by making up for one's under-performance by excelling in other ways which are relevant to being a good brother, or a good son. One might still be motivated to pursue moral change, if moral goodness is linked to one's understanding of what it means to be a good brother, or a good son, but the link between this kind of shame and the endorsement of the moral rule that was flouted by the offence is a lot less tangible. Furthermore, while I agree that fear of shame might function as a prudential reason to obey the law, I do not think that shaming an offender then supports persuasion of this reason. Shaming is more likely, as I explained, to attach itself to one's failures for example as a son, as a brother, or as a colleague.<sup>458</sup>

I have also explained that shame, by distancing one from some ideal self-image, attacks the very relationship that it is built upon.<sup>459</sup> Braithwaite admits this possibility when he notes that 'the strategy of rejecting her rejectors may resuscitate [the offender's] own self-esteem', but then claims that this problem can be solved by

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<sup>457</sup>ibid, 48-9.

<sup>458</sup>Acorn argues that the real power of the family influence might be that the offender realises that he has displeased people who have far greater power over him than the victim or the state. Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (UBC Press, Vancouver 2004), 148-9. This recognition might be brought on by the process of reintegrative shaming, but it for example obviously does not include the use the emotion of shame in the offender, but rather a fear of extra-legal punishment.

<sup>459</sup>See above, 162.

also shaming the offender's loved ones or colleagues.<sup>460</sup> Apart from fairness objections to being shamed for another's offence, it seems to me that shaming loved ones or colleagues also attacks the very relationship the offender has with them. An offender is revealed to be 'a bad son', 'a bad colleague', someone who does not live up to the standards of the family or the company. Family ties may often be strong but they can surely be weakened, and especially in the case of a business-relationship I think that one possible solution to the shame that is caused by the offender is for the company or business partner to simply cut the existing ties with the offender altogether. I think therefore that the fact that shame attacks the very relationship that it is built upon represents a problem for the theory of reintegrative shaming.

Lastly, the fact that shame is elusive is particularly problematic for reintegrative shaming. As Nussbaum points out, we are all subject to primitive shame, which is connected to the very fact of our own humanness and basic inadequacy. It might be this kind of shame that is involved in the shaming of an offender, without the participants realising it.

... [this] does not mean that when society holds out certain norms and asks people to live up to them, shaming them when they do not, those norms are never valuable and good. [...] But thinking about the infantile roots of shame does inform us that society's shaming behaviour is not to be easily trusted, or taken at face value. It can easily get out of control, and it will be difficult both to keep it tethered to genuinely valuable norms and to calibrate it properly. Behind the parade of moralism and high ideals, often there is likely to be something much more primitive going on to which the precise content of the ideals in question, and their normative value, is basically irrelevant.<sup>461</sup>

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<sup>460</sup>J. Braithwaite, *Crime, shame and reintegration* (Cambridge University Press, Cambridge 1989), 83, also quoted above.

<sup>461</sup>Martha C. Nussbaum, *Hiding from Humanity* (Princeton University Press, Princeton 2004), 220.

In terms of the differences between different types of offender, I have argued that shame can only positively affect an offender who has developed a substantive self-regard as a moral person or who identifies with respect for law. I think that restorative shaming however does not focus on the thought content relevant to these emotions but instead focuses on the ties that one has to the people who are shamed along with oneself. These ties might be reinforced in other ways than by endorsing the legal rule. Furthermore, the shaming might well weaken these ties. If these ties are then weakened as a direct result of actions performed in name of the state or society, the shaming, I think that one might be alienated from that state or that society. Respect for law then loses its importance as a reason to obey the law.<sup>462</sup> The unpersuadable offender has nothing to gain from shaming either, but his ties to important people around him may also be weakened. The same goes for the offender who is already persuaded.

I do think that the emotional response of shame might *in principle* persuade an offender who has developed a substantive self-regard as a moral person or who identifies with respect for law to endorse the legal rule. However, I think that shaming conferences are not the right approach, and I am not sure that any kind of deliberate shaming can avoid the issues that I have explained here. If an offender himself is shamed, one natural response would be to reject the rejecters, as Braithwaite himself acknowledges. And if the shaming is then directed at the offender's loved ones instead, it targets something else than moral shame or a shame that is based on respect for law.

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<sup>462</sup>This might explain the finding by Gelsthorpe that one important predictor for re-offending rates was that offenders would re-offend less when they reported 'not feeling shamed at the family group conference'. Loraine Gelsthorpe and Allison Morris. 'Something old, something borrowed, something blue, but something new? A comment on the prospects for restorative justice under the Crime and Disorder Act 1998' (2000) *Criminal Law Review*, 21-2.

Shaming conferences are therefore only very weakly and indirectly linked to the emotional responses of shame that I have argued might be helpful in persuading an offender to endorse the legal rule. Shaming might even weaken the bonds between the offender's loved ones and himself, and as a consequence the ties between the offender and society. This might diminish the offender's identification with society, and thus the importance of respect for law as a reason to obey the law. It should be clear from this discussion that I do not hold shaming conferences to be very promising in supporting the aim of persuading the offender to follow the law. However, a constructive dialogue between victim and offender, which is not based on threats or the promise of a more lenient sentence, might not only have beneficial affects to both the victim and the offender, but might also strengthen the offender's reasons for upholding the law. This means that a victim-offender dialogue can, under certain conditions, be used to support the law's aim of persuading the offender to follow the legal rule. In such a dialogue, the expression of the apology will have a clear place, and might even be required as part of the restoration agreement. But the apology comes with a particular set of concerns, which I will now discuss.

#### 4. The apology ritual

In criminal legal theory, some arguments have been developed in favour of a ritual apology, which basically means that the offender utters, or is even forced to utter, the expression that is normally understood to convey an apology, and that this expression then has some kind of effect; making some kind of difference to the standing of the

offender in the criminal legal process.<sup>463</sup> Importantly, it is argued that for the ritual apology to have this effect, it is not necessary (though it might be preferred) that the offender be *sincere* in his apologetic expression. While the apology ritual is not part of established legal practice<sup>464</sup>, I think that the apology ritual is importantly connected to the emotions of guilt and shame in the victim-offender dialogue, which is why I want to discuss it here.

First of all, it might be argued that an insincere apology is not an apology at all, because sincerity is a constitutive condition of the speech act of apologising.<sup>465</sup> For the sake of argument however, we might tentatively concede to the notion of a *hollow* or insincere apology, provided that there is any value to such a notion.<sup>466</sup> I will argue however that if there is any real added value to the insincere ritual apology, then that value can only be that it might lead to genuine feelings of guilt or moral shame. This claim might seem very counter-intuitive, since the ritual apology is said to be typified by the fact that it need not be sincere. I will therefore first explain my claim that the real value of the ritual apology lies in the fact that it might elicit genuine feelings of guilt, and then I will discuss whether I think that the ritual apology might actually provide engagement with the relevant thought content for guilt or moral shame.

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<sup>463</sup>See R. A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001); C. Bennett, 'Taking the sincerity out of saying sorry' (2006) 23 *Journal of Applied Philosophy* 127-143; C. Bennett, *The Apology Ritual, A Philosophical Theory of Punishment* (Cambridge University Press, Cambridge 2008).

<sup>464</sup>While less-than-sincere apologies might be common in any human discourse, the idea or practice that an offender should benefit from an insincere apology is not.

<sup>465</sup>John R. Searle, *Speech Acts* (Cambridge University Press, Cambridge 1969), 33, 41.

<sup>466</sup>J. L. Austin, 'Performative Utterances' (1979) 3 *Philosophical Papers* (Oxford UP) 233-252. See also above, 119.

### **Apology as a ritual**

I have explained above why sincerity is important in the apology: other people want to know if the offender distances himself from the moral falsehood that was implicit in the offence.<sup>467</sup> An apology is a speech act which conveys these feelings of guilt. Greenspan in fact specifically addresses the issue of genuine emotions in the criminal law. In the case of an offender, an actual negative feeling is required as proof that the offender has actually been affected by the negative evaluation of his act, which he now subscribes to:

No doubt we insist on feeling, in real-life cases of the sort, partly just to help us determine whether any observed changes in personality and life are genuine and reliable, on the assumption that feeling is one of the less malleable signs of belief and behaviour tendencies.<sup>468</sup>

Anthony Duff however claims that an apology need not be sincere. In Duff's theory of punishment as communication, in which mediation plays an important part, and in the victim-offender dialogue in general, the apology plays a crucial role. It is clear however that, at least in the setting of a victim-offender dialogue, a sincere apology cannot easily be distinguished from a faked display of guilt feelings. And as far as the law is concerned, if we cannot distinguish between a sincere and an insincere apology, then the consequences of the offering of a sincere apology cannot be any different than the consequences of an insincere one. So if an insincere apology is meaningless, the criminal law must treat any apology to be so if it cannot tell a sincere from an insincere apology. The apology occupies a central place in Duff's

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<sup>467</sup>See above, 123.

<sup>468</sup>Patricia S. Greenspan, *Emotions & Reasons* (Routledge, New York 1988), 113.

theory of law as communication, and Duff therefore cannot but argue that even an insincere apology has some value to it, and he does so by allowing for the notion of a *ritual apology*.

... 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>469</sup>

So even if the offender does not experience the actual emotion, guilt, Duff claims that the ritual apology offered still has reconciliatory value. But why should that be so? I have explained that sincere guilt feelings distance an offender from the moral falsehood that was implicit in the offence. If the offender does not feel guilty, there is still a taint on him; a suspicion that he in fact does believe that either the rules do not apply to him, or that any person who was victimized by the offence has no standing to be protected by the respective legal rule. It then seems counter-intuitive at least that suddenly we would settle for a possibly hollow apology.

Unfortunately, Duff does not elaborate on what exactly the value of an insincere apology ritual would be. Christopher Bennett however has on the basis of Duff's ideas developed a more substantial account of the apology ritual, which

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<sup>469</sup>R. A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001), 110. Duff even claims that the infliction of punishment should be understood as such a kind of public apology, see *Punishment as penance* *ibid*, 106-12. Whether or not the infliction of punishment can be understood as taking part in a public ritual of apology, my focus here is on an analysis of the possible value of such an enforced, possibly insincere and therefore hollow apology.

provides the necessary content to the notion of the ritual apology between fellow citizens. Bennett claims that even if an apology is not sincere, certain important benefits are still to be expected from it. First, Bennett claims, the apologetic ritual produces the good of *censure*.<sup>470</sup> By forcing the offender to express an apology, the authority publicly renounces the offender's act as a wrong. Bennett also claims that this kind of public support might be more valuable to the victim than a change of heart in the offender. Even though, Bennett argues, in the case of a clearly forced apology the victim lacks the satisfaction that comes with seeing the offender take the victim's side, being at odds with himself, the victim does gain something that might even be more important. This is the confirmation of society that they are on the victim's side and that they will not accept or tolerate such an act to be committed against the victim. Bennett even claims that if a victim would have to choose between the authorities taking her side or the offender's genuine apology, the victim would probably opt for the state to be on the victim's side.<sup>471</sup> I have previously acknowledged the importance of identification with society.<sup>472</sup> I would argue however that the conviction of the offender itself, which precedes the requirement to apologise, is a more meaningful expression of public support than forcing the offender to display an opinion that is not his own. By convicting the offender, society has already sided with the victim, and I do not see what an enforced apology would substantially add to that. So even though censure and expressing support for the victim might well be considered good things, the real value of the ritual apology has

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<sup>470</sup>See also above, 191.

<sup>471</sup>C. Bennett. 'Taking the sincerity out of saying sorry' (2006) 23 *Journal of Applied Philosophy* 127-143, 134-5. See also Stephanos Bibas and Richard A. Bierschbach. 'Integrating Remorse and Apology' (2004) 114(85) *Yale Law J* 85-148 who argue for the apology for similar reasons.

<sup>472</sup>See above, 181.

to lie elsewhere.

Secondly, the ritual apology is claimed by Bennett to provide *formal reconciliation*. If the ritual apology can achieve some kind of reconciliation for the offender, then that might provide a valuable addition to the conviction and the victim-offender dialogue.<sup>473</sup> 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. According to Bennett, emotional engagement or actual feeling is not required, but 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

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<sup>473</sup>The term *formal* refers to the possible criticism that the state cannot legitimately enforce a sincere opinion onto the offender, see also my discussion on the freedom of conscience, from 177. Bennett argues that it is not the authority's business to censure an insincere apology. If the offender met all the requirements that the state can legitimately set for him, some kind of reconciliation has to follow. This is what Bennett refers to as *formal* reconciliation. C. Bennett. 'Taking the sincerity out of saying sorry' (2006) 23 *Journal of Applied Philosophy* 127-143, 136 and 140. See also C. Bennett, *The Apology Ritual, A Philosophical Theory of Punishment* (Cambridge University Press, Cambridge 2008), 197.

do so.<sup>474</sup>

According to Bennett, the offender 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 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>475</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.

This last point is intriguing. Bennett points out that the performative act (comparable to a speech act) is actually familiar in the law. He argues that in this sense, the apologetic ritual is not very different from other performative acts such as marriage or signing a contract or a cheque.<sup>476</sup> Now I will grant of course that certain 'ritualised' actions do exist in the law and that there are consequences attached to these rituals, but I would like to point out that in these cases some further behaviour is actually required on the part of the parties bound by the agreement. In the case of signing a contract, the parties do actually have to fulfil the terms the terms of the contract. A ritual apology does not seem to place any new obligation on the offender however, as I have argued that one can only apologise for an act of the past.<sup>477</sup> It

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<sup>474</sup>C. Bennett. 'Taking the sincerity out of saying sorry' (2006) 23 Journal of Applied Philosophy 127-143, 132-3 ad 140.

<sup>475</sup>ibid, 136.

<sup>476</sup>ibid, 137.

<sup>477</sup>I must grant a concession to this argument. If the ritual apology might be seen to include a *promise* that the offender will not re-offend in the future, then such a promise would create an obligation to obey the law. In that sense, the ritual apology would create new obligations for the offender.

would seem then that the ritual apology only creates new responsibilities for the victim and society, who are now supposed to accept being reconciled with the offender. The fact that the ritual apology therefore does not seem to create any new duties for the offender but does create a duty for the victim and the community (to accept the offender as reconciled) seems unbalanced if there is no added value to the ritual apology. So what is that value?

### **Eliciting guilt feelings by ritual apology**

Bennett argues that the main difference between his account and that of Duff is that while Duff aims for genuine repentance, 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>478</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. I will argue however that Bennett's and Duff's views are not so different as Bennett seems to argue, and that the aim for the genuine emotional response of guilt underlies both accounts, granted that Bennett displays a very nuanced position.

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But then we are back to the question of constitutive conditions of speech acts: does a promise really count as a promise if one is merely forced to utter the words? I would think not. It also seems that the consequences of re-offending are not significantly different with or without prior ritual apology. The offender's position with regard to his obligation to obey the law therefore does not seem to be substantially changed by the ritual apology, as least not in any way which is comparable to the rights and duties that are created by marriage and business contracts. See also Stephanos Bibas and Richard A. Bierschbach. 'Integrating Remorse and Apology' (2004) 114(85) Yale Law J 85-148, who argue that an apology in court does not warrant any presumptions about recidivism.

<sup>478</sup>C. Bennett. 'Taking the sincerity out of saying sorry' (2006) 23 Journal of Applied Philosophy 127-143, 141.

Bennett claims to draw on intuitive ideas of blame and apology, and to use them as *symbols*.<sup>479</sup> However, I would argue that when a theory is based upon the symbolic importance of the apology, the meaning of this symbol is derived from what the symbol refers to: actual sincere apology including sincere feelings of guilt.<sup>480</sup> While I will admit that it is possible to participate in a ritual without fully engaging emotionally, the meaning of the ritual does refer to these emotions. Bennett himself concedes that one might question the fact that he would employ the apology at all if its use is merely symbolic. Then, in answering this possible criticism, 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>481</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

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<sup>479</sup>C. Bennett, *The Apology Ritual, A Philosophical Theory of Punishment* (Cambridge University Press, Cambridge 2008), 171.

<sup>480</sup>See also Raz' explanation of symbolic importance in Joseph Raz, 'Respecting people' in *Value, Respect, and Attachment* (Cambridge University Press, Cambridge 2001) 124-175, 172-4. This symbolic importance is not unconnected to the meaning that the object which is being used as a symbol has in society.

<sup>481</sup>C. Bennett, *The Apology Ritual, A Philosophical Theory of Punishment* (Cambridge University Press, Cambridge 2008), 146.

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>482</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. The value of a requirement to undergo the ritual of prayer is partly to be found in the fact that it helps to induce the proper attitude, and I would argue that the value of the requirement to undergo the ritual of apology, if there is any, must also be found in the fact that it might help the offender to arrive at genuine guilt (or moral shame). Duff does not deny this fact, stating that:

What began as a punishment inflicted on him in order to induce repentance<sup>483</sup> 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>484</sup>

Even though the sincere emotion might not always be achieved, the ritual apology does in part derive its meaning from the fact that it aims for sincere feelings

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<sup>482</sup>I admit that my understanding of the religious ritual might be debatable; some people might say you can only participate meaningfully in the ritual when you are already in the right attitude from the start. However, I think a ritual is a process that can allow one to develop the appropriate attitude by going through the motions. This second interpretation of the ritual leaves more room for our present purposes, because it allows the apology to be of value to the unrepentant offender, as both Duff and Bennett claim.

<sup>483</sup>I.e. guilt feelings.

<sup>484</sup>R. A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001), 111.

of guilt, and neither Duff nor Bennett denies that. What then makes the 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 apologises does so insincerely. The ritual apology however 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. It is important to realise that the value that the ritual, enforced apology according to my account adds to the victim-offender dialogue, if any, is that this ritual might help in stimulating sincere feelings of guilt or moral shame. The next question is then whether the enforced apology actually might elicit these emotional responses.

### **Eliciting guilt through shame and humiliation**

How an *enforced* apology might elicit sincere guilt feelings or moral shame is however less obvious than it at first glance would appear. I am not convinced that the thought content that the apology ritual focuses on, is the same as the relevant thought content for guilt feelings or moral shame. Remember the ritual of prayer; according to Bennett, this ritual might entail requiring behaviour such as kneeling, to express the greatness of God and the praying person's own humility before one's God.<sup>485</sup> I will agree that an action such as kneeling might elicit thoughts of humility in the believer. But is the same mechanism true for the enforced ritual apology? I do not think that this is so. Let us now think of the behaviour that would be required in the

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<sup>485</sup>C. Bennett. 'Taking the sincerity out of saying sorry' (2006) 23 Journal of Applied Philosophy 127-143, 132.

ritual apology. This would be, it seems to me, the expression of apology, i.e. 'I am sorry, I apologise', and in certain cases the making of amends. However, it seems to me that forcing someone to express an opinion that is not his own, will in the first place induce feelings of shame rather than eliciting feelings of guilt directly.<sup>486</sup> In fact, this ritual might even be providing the relevant thought content for humiliation since it denies one choice over something that goes to the essence of one's human rights, one's freedom of expression.<sup>487</sup>

How is this different from the prayer ritual? I would argue that, for the believer, there is no shame in humbling oneself before one's God, as God is simply seen to be on a very different plane than human beings are. But to subject oneself to an enforced apology, when it has to be expressed to a fellow citizen, the victim, is at least partly shameful if one does not agree with the opinion that one is thus forced to state.<sup>488</sup> I have argued above that it is unlikely that requiring shame will lead to guilt feelings, since there is a lot of other thought content present; thought content that may appear more pressing than the relevant thought content for guilt.<sup>489</sup> Furthermore, shame focuses on the person of the offender, not on his act. And humiliation, the deliberate degrading of the offender, in particular, carries thought content of a separation between the offender and the humiliators: the offender's factual weakness relative to those who are humiliating him, and who are doing so as representatives of society.

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<sup>486</sup>Jeffrie G. Murphy. 'Well Excuse Me! - Remorse, Apology and Criminal Sentencing' (Arizona State Law Journal Symposium 2005) 1-25, 21.

<sup>487</sup>See also Martha C. Nussbaum, *Hiding from Humanity* (Princeton University Press, Princeton 2004), 205-6. I will elaborate on the argument about freedom of expression later in this section.

<sup>488</sup>The difference between the prayer and the apology ritual may have been masked by the fact that the prayer ritual is supposed to effect feelings of humility, while the humiliating thought content in the apology ritual might lead away from the relevant thought content for guilt.

<sup>489</sup>See VIII.2 Does shame lead to guilt?

Such alienation from society is obviously not a very promising approach to persuade the offender to endorse the legal rule either, not in the least because it might diminish any respect for law that the offender might have, and which might have served as a reason to obey the law.

A state is not justified in humiliating its citizens since the degradation that is inherent in humiliation is in conflict with the basic respect for persons.<sup>490</sup> It is not surprising therefore, that degrading treatment is prohibited by the European Convention on Human Rights.<sup>491</sup> It might however be possible to shame someone without humiliating them. If humiliation is the public part of shame, as I have argued following Nussbaum, then requiring an apology in a one-on-one setting, i.e. victim-offender dialogue, might provide a way of shaming without humiliating the offender, conditional upon the fact that the ritual is not degrading to the offender. But then of course the required apology cannot be the public affair, with the public impact, that Duff and Bennett propose. Furthermore, I would argue that even in a less exposed setting, requiring another person to apologise would still be in violation of his freedom of expression.

### **Freedom of expression**

Allowing for the possibility of an insincere apology is also argued to defend the ritual apology against the possible criticism that in requiring offenders to offer a *sincere* apology we fail to respect them as fellow citizens. The critique here is that the state should not enforce certain opinions onto its citizens, who should be free to

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<sup>490</sup>ibid, 204-6 and 282.

<sup>491</sup>*Article 3*: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

decide for themselves what values they do and do not agree with. Duff's and Bennett's counter-argument to this critique is that by allowing for the possibility of a ritual apology, the offender is not forced to *mean* what he thus says. His individual integrity is therefore left intact. Duff argues that the ritual apology could have a place or value within the law, without the state necessarily 'inquiring into the conditions of one's very soul'.<sup>492</sup>

I argue however that the ritual apology does run counter to the freedom of expression. To explain this point, I will refer again to the writings of John Stuart Mill. Mill stresses that the freedom of expression is 'practically inseparable' from the freedom of thought. Mill explains that to limit the freedom of expression is to stifle an opinion, and first of all, we can never be sure that the opinion that we are stifling is a false opinion, and secondly, even if we could be sure, stifling a false opinion would still be wrong.<sup>493</sup> To deny that an opinion might be true is to assume one's own infallibility, Mill explains. The assumption of infallibility, which Mill strongly rejects, is not merely a certainty of the truth of one's convictions, but also to decide on those matters for others, without allowing others to hear possible arguments against these convictions. Even if a silenced opinion is false, it might still, and Mill claims it often does, contain 'a portion of truth'. And since even the general opinion (which is supposedly 'protected' by stifling a contradictory one) rarely or never reflects the whole truth, stifling a contradictory opinion then has the effect of preventing this

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<sup>492</sup> Andrew Von Hirsch, *Censure and sanctions* (Clarendon Press, Oxford 1993), 72, R. A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001), 110, Jeffrie G. Murphy. 'Well Excuse Me! - Remorse, Apology and Criminal Sentencing' (Arizona State Law Journal Symposium 2005) 1-25 8, C. Bennett. 'Taking the sincerity out of saying sorry' (2006) 23 *Journal of Applied Philosophy* 127-143, 130.

<sup>493</sup> John Stuart Mill, 'On Liberty' in Mary Warnock (ed), *Utilitarianism and On Liberty* (Blackwell Publishing, Oxford 2003)

remainder of truth to surface. And finally even if the general, received opinion does reflect the whole truth, it should still be allowed to confront and discuss this opinion or the opinion will be hardly more than a prejudice. The comprehension of the opinion and the reasons behind it will be lost. Mill argues for this reason that even if an opinion is fully received and generally accepted, it should not be allowed to 'slumber' and even if no-one disagrees with it, Mill hopes that the 'teachers of mankind' will then provide a substitute for such a confrontation.

The above explains briefly but substantially the reasons for the importance of freedom of expression. A consequence of the principles of freedom of conscience and expression is that the state is not only forbidden from stifling unwelcome opinions, it is also forbidden from forcing an individual to express a welcome one *against his will*. I conclude that even though there might be a ritualistic aspect to the expression of the apology and even some kind of value to that ritual in itself, regardless of whether or not it is offered sincerely, forcing an offender to undergo such a *ritual of apology* is an infringement of his basic freedom of expression. I think that this is a strong argument against forcing an offender to undergo the ritual of apology, and it explains why I think that the ritual of apology entails a focus on thought content relevant to humiliation rather than the thought content relevant to guilt feelings.

### **The problem with pay-off**

There is another important issue with the ritual apology, and that is connected to the promise of an immediate reward and the benefits and disadvantage that the apology ritual provides to the offender. Let us assume for the sake of argument that the apology ritual might yet stimulate a focus on the thought content for guilt and

moral shame.<sup>494</sup> I have explained however that by genuinely and sincerely engaging with this thought content, the offender runs the risk of exposing himself to possibly painful emotions. If we now allow offenders in the victim-offender dialogue to achieve the same result both by sincerely and insincerely apologising, are we then not in fact encouraging an *insincere* action? An insincere apology has the very same effect as the genuine expression, without the risk of discomfort that comes with genuine guilt or moral shame. This point allows Murphy to conclude that the state 'pre-empts my own struggle toward genuine moral repentance by appealing to my selfish nature and offering me a reward for an apology or some other expression of remorse.'<sup>495</sup>

There is another aspect to this issue. It is obvious that if the offender gains an advantage from apologising, or if he is forced to do so, we thus have very good reason to suspect her reasons for expressing the apology. 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 now has no way of expressing his genuine remorse, since all expressions of remorse will be regarded as insincere. If the offender is actually and truly remorseful and apologetic, he then has no way of making this clear to the victim.

I have to conclude that the ritual apology provides importantly different incentives and consequences to different offenders, depending on their moral position

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<sup>494</sup>See for example Stephanos Bibas and Richard A. Bierschbach. 'Integrating Remorse and Apology' (2004) 114(85) Yale Law J 85-148 who argue that an apology extracted from the offender in criminal court by a promise of a more lenient sentence might 'drive home awareness of wrongs'.

<sup>495</sup>Jeffrie G. Murphy. 'Well Excuse Me! - Remorse, Apology and Criminal Sentencing' (Arizona State Law Journal Symposium 2005) 1-25, 25.

with respect to the unlawful act. The ritual apology will not provide any engagement with the relevant thought content for guilt and moral shame to the unpersuadable offender, but it will present him with the immediate pay-off of some sort of reconciliation. If possible, it might even make such an offender more cynical as he learns to associate the apology with insincerity. An offender who might yet be persuaded of the importance of the relevant moral or legal rules, I would argue, actually has a lot to lose in the apology ritual. While the aim of the ritual apology might be in theory that the offender comes to be persuaded by genuine feelings of guilt and moral shame, in practice the apology ritual recommends an insincere expression to him by offering him the same reward without the risking the possible 'pangs of remorse' that might be the consequence of genuine emotional engagement. In this way, the focus on eliciting a probably insincere apology in the victim-offender dialogue could actually pre-empt both the sincere apologetic expression and the moral growth of the offender. If this offender has developed a substantive self-regard as a moral person, then his self-image might be weakened by the exposure of himself as less than a moral person. This means that the morally persuadable offender too could be left more cynical by exposure to the apology ritual. Combined with the detrimental effects of the humiliation that are inherent in the public apology ritual I think that there is more relevant thought content present for the offender to start to label himself as an immoral person than to reaffirm his commitment to his moral self-image and pursue positive moral change.

An offender might, in general, have developed an attitude of respect for law as a way of expressing his identification with society. This attitude might be helpful in persuading him to uphold the legal rule. The humiliation of the ritual apology

however, being forced to express an opinion whether or not one agrees with it, inflicted on the offender *in name of* society, might clearly alienate the offender from society to the extent that respect for law fails to be a reason to obey the law. And finally the already persuaded offender stands to lose, as I have explained above, any real way of communicating his sincere guilt feelings to the victim.

A sincere apology is a good thing. Offenders sometimes want to apologise, and if they do then they clearly should. However, if we award an instant pay-off to such an expression of apology, I am afraid that the noise created by the feedback will outweigh the benefits of a sincere apology, 'devaluing the general currency of repentance and remorse'.<sup>496</sup> The only option to counter-act this detrimental effect would seem to be to let the expression of apology be without any immediate pay-off in terms of its effect on the punishment that will be imposed, and the amends that will be required. While this might remove an important incentive for the offender to participate in victim-offender mediation at all, I think that the only way to protect the valuable aims of the victim-offender dialogue is by offering the offender no reward other than an opportunity for moral growth and a chance to explain himself to the victim.<sup>497</sup>

## 5. Shaming sentences

The last practice that I want to discuss is the shaming sentence. I will discuss a

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<sup>496</sup>ibid, 14.

<sup>497</sup>It is clear however that victim-offender mediation under these circumstances can never play the crucial role that is required by the theories of punishment as developed by Duff and Bennett, because for their theories it is necessary that the apology has substantive consequences in terms of reconciliation.

particular case, *US v. Gementera*<sup>498</sup>, because I think that this case explains very well both how a shaming sentence might be thought to be able to persuade the offender to obey the law, and why such a sentence is actually very unlikely to engage the offender with the right kind of thought content. First of all, a shaming sentence is different from Braithwaite's idea of reintegrative shaming. Reintegrative shaming, according to Braithwaite, tries to use shame within a context of support and respect for persons.<sup>499</sup> Shaming sentences, I will argue, are different.

Firstly, to shortly sketch the case: Shawn Gementera stole mail from mailboxes in San Francisco and was caught red-handed. Twenty-four years old at the time, he already had a substantial criminal history. He pleaded guilty to mail theft, and was eventually convicted to a minimum of two months imprisonment. After that, he could be released under supervision, under certain conditions. These included that Gementera should observe postal patrons visiting the 'lost or missing mail' window, write letters of apology to any identifiable victims of his crime, and deliver several lectures at a local school. In addition to these requirements, he also had to stand in front of a post office for one whole day, i.e. 8 hours, with a sign or sandwich board that stated: 'I stole mail; this is my punishment.' Gementera tried to challenge this last condition on the grounds that the purpose of the condition was to humiliate him. The judge, at the sentencing hearing, had remarked:

[He] needs to understand the disapproval that society has for this kind of conduct, and that's the idea behind the humiliation. And it should be

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<sup>498</sup>U.S. v. Gementera [9<sup>th</sup> Cir. 2004] 379 F. 3d. 596. Thom Brooks. 'Shame on You, Shame on Me? Nussbaum on Shame and Punishment' (2006) discusses the same case, but I disagree with his interpretation of Nussbaum's claim that shame can lead to guilt. See my earlier discussion in VIII.2 Does shame lead to guilt?

<sup>499</sup>Martha C. Nussbaum, *Hiding from Humanity* (Princeton University Press, Princeton 2004), 239-40. Braithwaite insists that he does not favour 'shaming penalties' in personal correspondence.

humiliation of having to stand and be labelled in front of people coming and going from a post office as somebody who has stolen the mail.

However, the sentence was upheld, because the court of appeals established that the point of the public exposure of Gementera and his offence to his victims was not humiliation, but rather rehabilitation. The district court had been particularly concerned with the fact that Gementera seems unrepentant because he regarded mail theft a victimless crime. By this public exposure, the court tried to make Gementera understand that 'his conduct has palpable significance to real people within his community' and to break through the illusion of the defendant that mail theft is victimless or not serious.<sup>500</sup>

It is interesting that the court of appeals refers to Braithwaite's theory of reintegrative shaming in their defence of this shaming sentence. They argue that 'while the district court's sandwich board condition was somewhat crude, and by itself could entail risk of social withdrawal and stigmatization', it is highly significant that it was coupled with requirements such as writing apologies and lecturing at a high school. The court of appeal therefore claims not to consider just the one shaming sentence, but rather a whole set of requirements which taken together 'allow Gementera to repair his relationship with society.'

I however do not see the persuasive appeal of this kind of shaming sentence. I have already remarked that it is not in accordance with Braithwaite's theory of reintegrative shaming, since the shaming itself (even if it is followed by other

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<sup>500</sup>Humiliation is therefore supposed to cancel out Gementera's self-deception and allow him to recognise that his act was not victimless. Note how close this argument comes to the way in which I have explained the persuasive power of emotions. However, it should be clear that I do not agree that humiliation can have these persuasive effects.

requirements which are meant to get Gementera 'back in touch' with society) is not done in a context of respect for persons. Secondly, I would argue that the thought content that is present in forcing another person to wear a sign exposing his offence is not the thought content of guilt or moral shame. Rather, Gementera is shown as weak, forced into a position that he clearly does not want to be in, quite literally labelled as a thief, cast out by society. In other words, he is humiliated. This shaming sentence clearly represents the very stigmatization that Braithwaite warned against, and I therefore disagree with the court of appeal that such a sentence would be in line with the theory of reintegrative shaming.<sup>501</sup> Furthermore, as Hawkins (dissenting) rightly points out, humiliation does not cease to be humiliation when combined with other punishment.

Not only was this shaming sentence clearly humiliating, it is also hard to imagine any shaming sentence which would not be humiliating. Nussbaum has explained humiliation as 'the active, public part of shame [...] with the added idea that something has been done to the person who feels it.'<sup>502</sup> This deliberate public infliction of shame is the essence of a shaming sentence, and any shaming sentence will therefore necessarily be humiliating. This thought content of humiliation is what the shaming sentence then focuses on, not the thought content of guilt or moral shame. Furthermore, in humiliation the dangers of primitive shame are even more present

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<sup>501</sup>Furthermore, the other conditions that Gementera was required to fulfil are not at all compatible with Braithwaite's ritual of forgiveness and reacceptance into the community that according to Braithwaite distinguish reintegrative shaming from stigmatization. J. Braithwaite, *Crime, shame and reintegration* (Cambridge University Press, Cambridge 1989), 55. See also Dan M. Kahan. 'What Do Alternative Sanctions Mean?' (1996) 63 *University of Chicago Law Review* and Dan M. Kahan. 'What's Really Wrong with Shaming Sanctions' (2006) *Texas Law Review*, Vol.84, 2075-2096, 2006, who in my opinion makes the same mistaken assumption that shaming sanctions are compatible with restorative justice and reintegrative shaming. See also Martha C. Nussbaum, *Hiding from Humanity* (Princeton University Press, Princeton 2004), 237-9.

<sup>502</sup>ibid, 203-4.

than in reintegrative shaming. Nussbaum suggests that 'the stigmatizing behaviour in which all societies engage is typically an aggressive reaction to infantile narcissism and the shame born of our own incompleteness.'<sup>503</sup> We lash out in response to this infantile narcissism, and shaming sentences then make offenders into easy victims. If the needs of infantile narcissism are behind and met by the degradation of others in shaming sentences, then Nussbaum is right in stating that 'the precise content of the ideals in question, and their normative value, is basically irrelevant.'<sup>504</sup>

How might this kind of humiliation affect the offender in terms of a productive emotional response? The answer to this question can be short, since in my view no offender will stand to gain anything from shaming sentences. The only thing that humiliation can accomplish is to alienate the offender further from society, thereby diminishing any reason of respect for law that the offender might have had to obey the law.<sup>505</sup>

But there is yet another negative effect which humiliation might well have, and that concerns the offender who regards himself as a moral person. I have explained that the development of the attitude of self-regard as a moral person is not a matter of one single conscious act, it rather grows and develops over time. By acting

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<sup>503</sup>ibid, 219.

<sup>504</sup>ibid, 220. See also James Q. Whitman. 'What Is Wrong with Inflicting Shame Sanctions?' (1998) 107 Yale L.J. 1055-1092, who makes a related point when he explains shaming as a kind of 'lynch justice'.

<sup>505</sup>As another example of humiliation I want to briefly refer to Raz' explanation of how the having the right to vote carries symbolic importance as identifying one as a member of a political community Joseph Raz, 'Respecting people' in *Value, Respect, and Attachment* (Cambridge University Press, Cambridge 2001) 124-175, 172. If prisoners do not have the right to vote, as is the case in the UK, they are thereby labelled as second-class citizens. Denying prisoners the right to vote might therefore also be understood as a kind of humiliation which alienates an offender from society and diminishes the reasons of respect for law. See also *Hirst v the United Kingdom* (No 2) [2005] ECHR 681.

out of respect for moral rules one comes to see oneself *as a moral* person.<sup>506</sup> However, the distancing effects of humiliation might weaken this self-regard for obvious reasons. If one is clearly not treated as a moral person (in terms of others respecting one's basic rights) one might very well be less inclined to view oneself as a moral person who has expressive reasons to respect other persons. I therefore conclude that humiliation of an offender by the state is particularly detrimental to the offender's self-regard as a moral or law-abiding person, which might have served as a reason for obeying the law.

## **6. ROOM FOR EMOTIONS IN CRIMINAL LEGAL PROCEDURE**

It is clear that attempting to find ways for the law to allow some space for the development of guilt feelings is very difficult. Eliciting moral shame might be even impossible due to the strong links to other varieties of shame and their detrimental effects. Also, it has become clear that some attempts in this direction run counter to the freedom of expression and a basic respect for persons, and should therefore not be part of the laws of any good society. But even if legal practices stay within these bounds, they might still offer the most benefits to the unpersuadable offender while negatively affecting the persuadable or already persuaded offender, which is certainly not the intention. Most importantly however, these practices might offer the wrong incentives to or elicit the wrong kinds of emotional responses from any offender who might yet be persuaded to endorse the legal rule, thereby pre-empting his

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<sup>506</sup>See above, 63.

opportunities for moral growth or distancing him from society.

But that is not to say that it is impossible to elicit guilt feelings in legal practice. I have explained that the victim-offender dialogue is actually very promising in this respect, at least if it is not corrupted by the promise of an immediate reward in return for cooperation or apology. I am aware that without such a reward, victim-offender mediation is left without an important incentive for the offender to participate, but this might be the only way to preserve the persuasive effects of the emotion of guilt in the victim-offender dialogue.

Also, I would like to point out that I have not found any legal practice which aims to elicit emotions based on an attitude of respect for law. Perhaps this is because the law would not be the proper place to elicit these kinds of emotions; perhaps the proponents of restorative justice are right when they claim that justice is a much wider, social issue.<sup>507</sup> It has become clear however from the above discussion of the way in which these different legal practices might interact with emotions, thereby influencing the offender's reasons to obey the law, that the law has good reason to be concerned with the feelings of the offender, and should even attempt to make good use of them. Adapting procedure in light of these insights are what I would call 'making room' for emotions in criminal legal procedure.

## 7. Painful emotions and punishment

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<sup>507</sup>Gerry Johnstone, *Restorative Justice: ideas, values, debates* (Willan Publishing, Cullompton, UK 2002), 8-9. See also R. A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001), 184-8 and R. A. Duff. 'Blame, moral standing and the legitimacy of the criminal trial' (2010) 23(2) *Ratio* 123-140, 138-40.

Before I turn to the conclusions of this thesis, I want to address a possible criticism to the law's deliberate use of the offender's emotions, which I have argued for in this thesis. One might say that eliciting emotions such as guilt and shame is painful to the offender and should therefore count as punishment. Duff, in fact, counts *repentance* as punishment for this very reason, and Greenspan also claims that guilt involves a kind of self-punishment.<sup>508</sup> This would mean that my argument for a constructive use of emotions would require the support of a justification of punishment. Providing such a justification is no easy task: while it is common for the criminal law to respond to an offence by way of exerting punishment, the question of justification of the deliberate infliction of suffering by the state onto the offender (whether it can be justified at all, as well as how it may be) is a much debated one in the field of philosophy of law.

One approach is the retributive justification which is often partly based on Kant's ideas<sup>509</sup>, another is a consequentialist approach which goes back to Bentham.<sup>510</sup> The most common approaches attempt to combine these two theories in some fashion: the most famous example of such a combination theory is known as side-constrained consequentialism and has been developed by Hart.<sup>511</sup> Expressive

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<sup>508</sup>R. A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001), 107 and Patricia S. Greenspan, *Practical Guilt* (Oxford University Press, Oxford 1995), 133.

<sup>509</sup>Immanuel Kant, *The metaphysics of morals* (Cambridge University Press, Cambridge 1996), see also Herbert Morris. 'Persons and Punishment' (1968) 52(4) *The Monist* 475-501 and J. Cottingham. 'Varieties of Retribution' (1979) 29 *Philosophical Quarterly* 238-246.

<sup>510</sup>Jeremy Bentham, *An introduction to the principles of morals and legislation* (Methuen, London 1982).

<sup>511</sup>See H. L. A. Hart, *Punishment and Responsibility* (Clarendon Press, Oxford 1968).

theories of punishment provide yet another attempt at justification<sup>512</sup>, and then some authors would argue that it is not possible to properly justify punishment at all.<sup>513</sup> The development or even the endorsement of a particular theory of justification of punishment lies beyond the scope of this thesis. I think that very good work has been done in the development of expressive theories, especially by Von Hirsch, Duff and Tasioulas,<sup>514</sup> and I have based my ideas on censure partly on their thoughts. But I do agree with the criticism by Hanna that expressive theories fail to explain why punishment (the deliberate infliction of suffering) is a *necessary* rather than merely a *conventional* way of expressing criticism.<sup>515</sup>

I am not convinced that there is, ultimately, sufficient justification for the deliberate infliction of suffering (as a primary aim) in response to a breach of law. None of the theories mentioned above have I found ultimately satisfying. But for the purposes of this thesis, I do not think that a general justification of punishment will be a necessary condition to my argument about the relevance of emotions to criminal legal procedure, because using guilt and shame with the aim of persuading the offender should, in my view, not count as punishment.

Following Hanna, I would like to point out that I have argued for guilt and shame not because they are painful, but because they might have persuasive

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<sup>512</sup>J. Feinberg, 'The Expressive Function of Punishment' in *Doing and Deserving* (Princeton University Press, Princeton 1970) 95-188.

<sup>513</sup>See Louk Hulsman. 'Critical Criminology and the Concept of Crime' (1986) 10 *Contemporary Crises* 63-79; Nils Christie. 'Conflicts as Property' (1977) 17 *Br J Criminol* 1-15.

<sup>514</sup>Andrew Von Hirsch, *Censure and sanctions* (Clarendon Press, Oxford 1993); R. A. Duff, *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001); John Tasioulas. 'Punishment and Repentance' (2006) 81 *Philosophy* 279-322. Duff of course would not agree that his account should be labelled as expressive; since he incorporates the response of the offender he identifies his account as *communicative*. His account however still suffers from the particular pitfalls of expressive theories of punishment which I will discuss below.

<sup>515</sup>Nathan Hanna. 'Say What? A Critique of Expressive Retributivism' (2007) 2007 *Law and Philosophy*.

properties.

When we criticize someone for acting wrongly, we are trying to get him to recognize the fact that he has done wrong and we are trying to get him to adopt a negative attitude towards the wrong. Suffering that results from the adoption of such an attitude may be desirable, not *qua* suffering, but as evidence of the attitude. Criticizing a wrongdoer with the expectation or in the hope that he will undergo such suffering therefore seems rather different from aiming to make him suffer. The suffering that attends such attitudes need not be thought desirable either in itself or as a means to something else, but rather as a reflection of certain attitudes – its origins are important, not its intrinsic character as suffering (if the latter were the case, we could just as well inflict suffering in other ways). We can aim at getting wrongdoers to adopt the attitudes that cause this suffering without aiming to make them suffer, even if the adoption of those attitudes causes suffering.<sup>516</sup>

In my view, the criminal law should concern itself with the emotions of the offender because of their persuasive properties. I have argued that shame can negatively influence the offender's disposition to endorse legal rules and this argument does not rest on *eliciting* shame, quite the opposite. Even if shame would count as punishment, then, the argument that the criminal law should be concerned with some feelings of the offender (at least with shame) still stands.

But my argument of course includes much more than a warning about the possible negative effects of shame. I have argued that the criminal law may and even should make *active use* of the persuasive properties of guilt (and, to a lesser extent, shame) in an aim to get the offender to endorse the legal rule that was flouted by the offence, which I have termed making room for emotions. If these emotions are necessarily painful and should therefore count as punishment, then that would pose a

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<sup>516</sup>Nathan Hanna. 'Say What? A Critique of Expressive Retributivism' (2007) 2007 *Law and Philosophy*, 22-3. I do not quite understand what Hanna (on the same page) means by his remark that 'there is nothing absurd in the idea of an offender who remorselessly and unrepentantly recognizes that he has done wrong', unless he means that an offender might not consider his offence at all important and is therefore not affected by the thought of the wrong. Affect, however, is not necessarily *pain*.

problem for my argument. But while I do think that guilt and shame are painful, and perhaps even necessarily so, I do not think the pain that is included in these emotions is necessary for the purpose that these emotions are to serve. Guilt and shame, in my account, are meant to *focus the offender's thoughts* and reveal his own values and subconscious convictions to him. In this way, the emotions are meant to counteract cognitive 'jammers' such as self-deception and weakness of the will which are preventing the offender from recognising the reasons for obeying the law. Affect, but not pain, is necessary for these emotions to have the propensity to persuade the offender to endorse the legal rule.

Punishment, I would argue, aims to inflict suffering. The use of the emotions of guilt and shame need not do any such thing, as these emotions primarily aim to focus one's thoughts. The fact that these emotions involve a negative evaluation of oneself or one's behaviour might be considered to make these emotions necessarily painful, but this need not involve more than the basic detached notion that comes with being criticised. The offender does not need to feel any genuine pain to be affected by guilt and shame.<sup>517</sup> The deliberate infliction of pain is therefore not a necessary part of the use of emotions to persuade the offender to endorse the legal rule that was flouted by his offence. This means that my argument for the use of emotions in criminal law with the aim of persuading the offender to endorse the legal rule that was flouted by the offence does not require a general justification of punishment.

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<sup>517</sup>In *ibid*, 22-3, Hanna claims that 'there is nothing absurd in the idea of an offender who remorselessly and unrepentantly recognizes that he has done wrong.' I am a little puzzled by this remark, but Hanna might mean that an offender might not consider his offence at all important and is therefore not affected by the thought of the wrong. Affect is necessary for an emotion to have a persuasive effect. Affect, however, is not necessarily *pain*, and I have shown that even an affectively neutral emotion can still have the ability to focus one's thought. See above, 61.

## CONCLUSIONS

This main question of this thesis is to what extent the emotions of the offender should be considered relevant to the criminal justice process. This question concerns the nature of the emotion itself, and the fact that the emotion is subject to critical analysis is reflected in the title: Emotions in court. In this conclusion of the thesis, I will firstly answer the main research question, followed by an outline of the research findings that have provided the foundations for this answer. I will then discuss further research which might be based on the findings of this thesis, and finally place these findings into a broader context.

This thesis has found that emotions can not only persuade a person to follow the law, but that the offender's emotions can also create a (further) rift between an offender and society, diminishing important reasons an offender might have for adapting his behaviour to the law. In order to succeed in its aim of persuading persons to follow legal rules, the law therefore has need to make room for the offender's emotions in criminal legal procedure. The short answer to the main research question concerning the relevance of the offender's emotions is therefore that the criminal justice process should be concerned with the feelings of the offender. In fact, the emotions of the offender are so relevant that criminal legal procedure cannot afford to neglect them.

How did this research arrive at the above conclusions? Emotions have been found to be far more than irrational distractions from reason; emotions have necessary elements of thought and affect. The thought content has to be in the focus of one's

attention and one has to care about this content for an emotional episode to appropriately occur. The fact that our emotions show a degree of care means that emotions can provide information to ourselves and to others about what we care about, and what we value. But this research has also shown that emotions also have a *persuasive capability*: emotions can persuade one to accept and recognize certain truths or facts which one had not recognized before. Emotions can direct one's thoughts to certain (moral) reasons for behaviour, putting them squarely into focus and allowing one to realise that one in fact holds these reasons to be important.

It is unsurprising that emotions have an important part to play in social life; they inform oneself and others about a person's values and character. Emotions in fact play a large part in determining character. One's character and emotional responses can change and be conditioned over time, but one cannot simply choose to feel differently any more than one could simply change one's character. The fact that one cannot choose one's emotions contributes to the explanation of why emotions betray so much of one's character and values.

Emotions are a constitutive element of certain social relations, which means that these social relations cannot be said to exist without certain emotional responses between the persons in this relation. Friendship, of course, is a case in point. This explains why friendship and other meaningful social relationships can provide the basis of emotional obligations to another person. The relationship between strangers however is not constituted by emotional responses. Friendship and one's behaviour towards strangers are conducted within different frameworks, which I have referred to as different narratives of commitment. In friendship and other meaningful social relationships, one wants to show the right kinds of behaviour and emotional responses,

and these only serve to strengthen and solidify the relationship. Between strangers, there is no established relationship to strengthen or maintain, and adapting one's behaviour to acceptable norms might even be viewed as a burden. And yet, emotional obligations might even exist between strangers. The relations between strangers are established by respect for persons. When this respect is flouted by the committing of a wrong, emotional obligations on the part of the offender might arise toward the victim(s) and even towards himself. By explaining the idea of *respect for the moral law*, I have explained how being responsive to moral reasoning might shape one's character and allow one to self-identify as a moral person. When one then commits a wrong, one puts this self-image into question. Emotional responses might then be necessary to maintain one's self-image, which means that one would have an emotional obligation towards oneself. In all cases where one faces moral requirements, self-deception and weakness might cause one to diverge from moral rules, even when one would normally be tended to follow them. Certain emotions, such as guilt and shame, can focus a person's attention on the reasons to follow moral rules and can therefore persuade him to stick to the moral law.

This research has distinguished guilt and shame as the two emotions which have the greatest fittingness and aptness with respect to a (criminal) wrong. An agent who feels guilty has committed an act that he himself classifies as a wrong; the agent has therefore acted against his own values and, if he has developed a substantive identity as a moral person, against his identity as well. This explanation shows how emotional obligations of guilt might arise between friends and even between strangers. But guilt also has a particular aptness with respect to wrongful behaviour. It can persuade a wrongdoer of the importance of the moral rules that the wrong had flouted,

and it can show himself and others that he does hold these moral rules to be important. In this way, guilt can distance the wrongdoer from the moral message that was implicit in the wrongful act, distancing him from the wrongful behaviour and help repair the damaged ties with others and society.

While shame also has possible beneficial effects as a response to one's own wrongdoing, there are clear differences between shame and guilt. Shame has been identified as the exposure of a weakness. This weakness is something that one actually identifies with; one sees it as a part of one's self. If shame is moral shame, and therefore focuses one's attentions on one's moral weakness, shame might well provide one with the motive and the means to pursue change and become a better person. However, since shame exposes this weakness it in fact ties one closer to the weakness that is the object of shame. Furthermore, I have explained that shame is particularly elusive, and combined with the possible risks of primitive shame might potentially target something much deeper and more unsettling. The risks of shame negatively affecting the moral relation to other fellow human beings and one's own self-image as a moral person have been a recurring theme throughout the discussion of shame in this research.

While this research has shown that the law cannot provide a suitable basis for emotional obligations, the particular aptness of the emotions does make emotions relevant to the law. Emotions, guilt and shame in particular, can firstly persuade a person to follow the law, and can secondly create a (further) rift between an offender and society, negatively effecting the reasons an offender might have to abide by the law in the future. This research has identified the aim of persuading persons to abide by the legal rule as one of the aims of the criminal law, and emotions such as guilt

and shame have been shown to be highly influential in this regard, both in positive and negative ways. It therefore makes sense for the criminal law to aim to prevent the negative, distancing emotions, and instead make room for the emotions that are conducive in persuading the offender to obey the law. The main research question of this thesis, which is whether or not the offender's emotions should be taken into account by the criminal justice process, is therefore answered affirmatively.

The remaining question is how criminal legal procedure might set about making room for the offender's emotions. It has been argued in this thesis that traditional criminal legal procedure might contain many distancing, humiliating elements which will not support the law's aim of persuasion. A more direct contact between victim and offender has been shown to be more promising in the context of providing thought content relating to the reasons for abiding by the law. The emotion of shame, while clearly providing chances of positive effects, has been shown to carry risks of misdirection and furthering distance. A focus on the thought content of guilt however, in a more direct dialogue between offender and victim, has been shown to entail promising possibilities for the offender and the victim, and might be well suited to support the law's aim of persuading the offender to abide by the legal rule.

My recommendations for further research would therefore be the development of legal practices which can provide such a thought focus on the relevant thought content for feelings of guilt. In this thesis, I have provided some valuable insight for these developments, including the alienating effects of shaming and, perhaps most importantly, the detrimental effects of the promise of an immediate reward for expressions of guilt. Furthermore, as this research is theoretical and philosophical in nature, it would be helpful to combine the insights from this thesis

with psychological and criminological research on the topic.

Current social discussion on crime has a strong focus on the victim. The literature on restorative justice, victim-offender mediation, shaming conferences and other alternatives to the traditional criminal law answer to conflict and criminal behaviour is also mainly focused on the person of the victim: the victim's needs, the effects on the victim, the emotional welfare and healing of the victim, and making room for a stronger standing of the victim in the criminal legal process. This research has aimed to discuss and bring into focus the emotional responses of the person of the offender, which have been shown to be clearly relevant to the criminal justice process. Taking the offender's feelings into account will therefore strengthen criminal legal procedure, benefiting not only the parties concerned, but also the law itself and society as a whole.

## LITERATURE

- Acorn, Annalise, *Compulsory Compassion: A Critique of Restorative Justice* (UBC Press, Vancouver 2004).
- Anscombe, G. E. M., 'On Brute facts' (1958) 18 *Analysis* 69-72.
- Aristotle, *The Nicomachean Ethics* (Oxford University Press, Oxford 2009).
- Austin, J. L., 'A Plea for Excuses: The Presidential Address' (1956) 57 *Proceedings of the Aristotelian Society* 1-30 <<http://www.jstor.org/stable/4544570>>.
- Austin, J. L., *How to do things with words* (Clarendon Press, Oxford 1975).
- Austin, J. L., 'Performative Utterances' (1979) 3 *Philosophical Papers* (Oxford UP) 233-252.
- Baier, Annette, 'Feelings That Matter' in Solomon, Robert C. (ed), *Thinking about Feeling* (Oxford University Press, New York 2004).
- Bennett, C., 'Taking the sincerity out of saying sorry' (2006) 23 *Journal of Applied Philosophy* 127-143.
- Bennett, C., *The Apology Ritual, A Philosophical Theory of Punishment* (Cambridge University Press, Cambridge 2008).
- Bentham, Jeremy, *An introduction to the principles of morals and legislation* (Methuen, London 1982).
- Bibas, Stephanos and Richard A. Bierschbach, 'Integrating Remorse and Apology' (2004) 114(85) *Yale Law J* 85-148.
- Braithwaite, J., *Crime, shame and reintegration* (Cambridge University Press, Cambridge 1989).
- Braithwaite, J., 'Restorative justice and a better future' (1996) *Dalhousie Law Review*.
- Braithwaite, J., 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 25 *Crime and Justice* 1-127.
- Brooks, Thom, 'Shame on You, Shame on Me? Nussbaum on Shame and Punishment' (2006) <<http://ssrn.com/paper=889702>>.
- Cannon, Walter B., 'The James-Lange Theory of Emotions: A Critical Examination and an Alternative Theory' (1927) 39(1) *Am J Psychol* 106-124 <<http://www.jstor.org/stable/1415404>>.
- Christie, Nils, 'Conflicts as Property' (1977) 17 *Br J Criminol* 1-15.

- Cottingham, J., 'Varieties of Retribution' (1979) 29 *Philosophical Quarterly* 238-246.
- D'Arms, Justin and Daniel Jacobson, 'The Moralistic Fallacy: On the 'Appropriateness' of Emotions' (2000) 61(1) *Philosophy and Phenomenological Research* 65-90.
- Dagger, Richard, 'Playing Fair with Punishment' (1993) 103(3) *Ethics* 473-488.
- Darwall, Stephen L., 'Two Kinds of Respect' (1977) 88(1) *Ethics* 36-49.
- De Sousa, Ronald, *The Rationality of Emotion* (MIT Press, Cambridge, Massachusetts 1987).
- De Sousa, Ronald, 'Emotions, What I Know, What I'd Like to Think I Know, and What I'd Like to Think' in Solomon, Robert C. (ed), *Thinking about Feeling* (Oxford University Press, New York 2004).
- Deigh, John, *Emotions, Values, and the Law* (Oxford University Press, Oxford 2008).
- Delgado, R., 'Goodbye to Hammurabi: Analysing the Atavistic Appeal of Restorative Justice' (2000) 52 *Stanford Law Review* 751-775.
- Devlin, Patrick, *The enforcement of morals* (Oxford University Press, Oxford 1965).
- Duff, R. A., 'Blame, moral standing and the legitimacy of the criminal trial' (2010) 23(2) *Ratio* 123-140.
- Duff, R. A., *Punishment, Communication, and Community* (Oxford University Press, Oxford 2001).
- Feinberg, J., 'The Expressive Function of Punishment' in *Doing and Deserving* (Princeton University Press, Princeton 1970).
- Fischer, John Martin, 'The Importance of the Frankfurt-Style Argument' (2007) 57(228) *The Philosophical Quarterly* 464-471.
- Frankfurt, Harry G., 'The importance of what we care about' in *The importance of what we care about* (Cambridge University Press, Cambridge 1988).
- Frankfurt, Harry G., 'Freedom of the will and the concept of a person' (1971) 68 *The Journal of Philosophy* 5-25.
- Frankfurt, Harry G., 'Alternate Possibilities and Moral Responsibility' (1969) 66(23) *The Journal of Philosophy* 829-839 <<http://www.jstor.org/stable/2023833>>.
- Gardner, John, 'The Logic of Excuses and the Rationality of Emotions' (2008) <<http://ssrn.com/paper=1261764>>.
- Gehm, J. R., 'Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks' (1998) 1(1) *Western Criminology Review* [Online].

- Gelsthorpe, Loraine and Allison Morris, 'Something old, something borrowed, something blue, but something new? A comment on the prospects for restorative justice under the Crime and Disorder Act 1998' (2000) *Criminal Law Review*.
- Goldie, Peter, *The Emotions, A Philosophical Exploration* (Clarendon Press, Oxford 2000).
- Gordon, Robert M., *The structure of emotions* (Cambridge University Press, New York 1987).
- Green, Leslie, 'Legal Obligation and Authority', *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/win2012/entries/legal-obligation/>.
- Green, Mitchell, 'Speech Acts', *The Stanford Encyclopedia of Philosophy (Spring 2009 Edition)*, Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/spr2009/entries/speech-acts/>.
- Greenspan, Patricia S., *Emotions & Reasons* (Routledge, New York 1988).
- Greenspan, Patricia S., *Practical Guilt* (Oxford University Press, Oxford 1995).
- Hanna, Nathan, 'Say What? A Critique of Expressive Retributivism' (2007) *2007 Law and Philosophy* <http://www.springerlink.com/content/a877730qwv3x52r9/>.
- Hart, H. L. A., *Law, liberty and morality* (Oxford University Press, London 1963).
- Hart, H. L. A., *Punishment and Responsibility* (Clarendon Press, Oxford 1968).
- Hart, H. L. A., *The concept of law* (Oxford University Press, Oxford 1994).
- Herman, Barbara, *The Practice of Moral Judgment* (Harvard University Press, Cambridge, Massachusetts 1993).
- Hulsman, Louk, 'Critical Criminology and the Concept of Crime' (1986) *10 Contemporary Crises* 63-79.
- Johnstone, Gerry, *Restorative Justice: ideas, values, debates* (Willan Publishing, Cullompton, UK 2002).
- Kahan, Dan M., 'What Do Alternative Sanctions Mean?' (1996) *63 University of Chicago Law Review* <http://ssrn.com/paper=1286855>.
- Kahan, Dan M., 'What's Really Wrong with Shaming Sanctions' (2006) *Texas Law Review*, Vol.84, 2075-2096, 2006 <http://ssrn.com/paper=914503>.
- Kant, Immanuel, 'Book I, Chapter III. Of the Motives of Pure Practical Reason' in Kingsmill Abbott, Thomas (tr), *Kritik der praktischen Vernunft (The Critique of Practical Reason)* (1788).
- Kant, Immanuel, *The metaphysics of morals* (Cambridge University Press, Cambridge 1996).
- Levrant, Sharon and others, 'Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?' (1999) *45(1) Crime & Delinquency* 3-27.
- Levy, Neil, 'Doxastic Responsibility' (2007) *155(1) Synthese* 127-155

<<http://www.jstor.org/stable/27653480>>.

- Tony F. Marshall, 'Restorative Justice, an Overview' Research Development and Statistics Directorate (Office, Home )
- Mill, John Stuart, 'On Liberty' in Warnock, Mary (ed), *Utilitarianism and On Liberty* (Blackwell Publishing, Oxford 2003).
- Moore, Michael S., 'The moral worth of retribution' in Schoeman, Ferdinand (ed), *Responsibility, Character, and the Emotions* (Cambridge University Press, Cambridge 1987).
- Morris, Herbert, 'Persons and Punishment' (1968) 52(4) *The Monist* 475-501.
- Morris, Herbert, 'Nonmoral Guilt' in Schoeman, Ferdinand (ed), *Responsibility, Character, and the Emotions* (Cambridge University Press, Cambridge 1987).
- Morris, Herbert, 'Some further reflections on guilt and punishment' (1999) 18 *Law and Philosophy* 363-378.
- Murphy, Jeffrie G. and Jean Hampton, *Forgiveness and Mercy* (Cambridge University Press, Cambridge 1988).
- Murphy, Jeffrie G., 'Shame Creeps through Guilt and Feels like Retribution' (1999) 18(4) *Law and Philosophy* 327-344.
- Murphy, Jeffrie G., 'Well Excuse Me! - Remorse, Apology and Criminal Sentencing' (Arizona State Law Journal Symposium 2005) 1-25.
- Neu, Jerome, *A Tear Is an Intellectual Thing* (Oxford University Press, New York 2000).
- Nussbaum, Martha C., *Upheavals of thought* (Cambridge University Press, Cambridge 2001).
- Nussbaum, Martha C., *Hiding from Humanity* (Princeton University Press, Princeton 2004).
- Oakley, Justin, *Morality and the emotions* (Routledge, London 1992).
- Peacocke, Christopher, *The Realm of Reason* (Oxford University Press, New York 2004).
- Rawls, John, 'The Sense of Justice' (1963) 72(3) *The Philosophical Review* 281-305  
<<http://www.jstor.org/stable/2183165>>.
- Raz, Joseph, *The Authority of Law, Essays on Law and Morality* (Oxford University Press, Oxford 1979).
- Raz, Joseph, 'Explaining normativity, on rationality and the justification of reason.' (1999) 12(4) *Ratio* (new series) 354-379.
- Raz, Joseph, 'When We Are Ourselves: The Active and the Passive' in Raz, Joseph (ed), *Engaging Reason: On the Theory of Value and Action* (Oxford University Press, Oxford 1999).
- Raz, Joseph, 'Respecting people' in *Value, Respect, and Attachment* (Cambridge University Press, Cambridge 2001).

- Raz, Joseph, 'Reasons in Conflict' in Raz, Joseph (ed), *From normativity to responsibility* (Oxford University Press, Oxford 2011)
- Sabini, John and Mauri Silver, 'Emotions, responsibility, and character' in Schoeman, Ferdinand (ed), *Responsibility, Character, and the Emotions: New Essays in Moral Psychology* (Cambridge University Press, New York 1987).
- Scanlon, T. M., *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press, Cambridge, Massachusetts 2008).
- Searle, John R., *Speech Acts* (Cambridge University Press, Cambridge 1969).
- Solomon, Robert C., *Not Passion's Slave, Emotions and Choice* (Oxford University Press, Oxford 2003).
- Spinoza, Baruch, *Ethica* (1675) <<http://www.despinoza.nl/ethica/spinoza-ethica.pdf>>.
- Stocker, Michael, 'Emotional Thoughts' (1987) 24(1) *American Philosophical Quarterly* 59-69 <<http://www.jstor.org/stable/20014174>>.
- Stocker, Michael, 'Values and Purposes: The Limits of Teleology and the Ends of Friendship' (1981) 78(12) *The Journal of Philosophy* 747-765 <<http://www.jstor.org/stable/2026245>>.
- Stocker, Michael, *Valuing emotions* (Cambridge University Press, Cambridge 1996).
- Stocker, Michael, 'Responsibility Especially for Beliefs' (1982) 91(363) *Mind* 398-417 <<http://www.jstor.org/stable/2253228>>.
- Stokkom, Bas van, 'Moral emotions in restorative justice conferences: Managing shame, designing empathy' (2002) 6(3) *Theoretical Criminology* 339-360.
- Strawson, P. F., 'Freedom and Resentment' in Watson, Gary (ed), *Free Will* (Oxford University Press, New York 2003).
- Tasioulas, John, 'Punishment and Repentance' (2006) 81 *Philosophy* 279-322.
- Taylor, Gabriele, *Pride, shame and guilt: emotions of self-assessment* (Clarendon Press, Oxford 1985).
- Von Hirsch, Andrew, *Censure and sanctions* (Clarendon Press, Oxford 1993).
- Watson, Gary, 'Two Faces of Responsibility' in Watson, Gary (ed), *Agency and Answerability* (Clarendon Press, Oxford 2004).
- Walzer, Michael, 'Self-esteem and Self-respect', in *Spheres of justice* (Basic Books, New York 1983)

Whitman, James Q., 'What Is Wrong with Inflicting Shame Sanctions?' (1998) 107 Yale L.J. 1055-1092.

Williams, Bernard, 'Deciding to believe' in *Problems of the self: Philosophical Papers, 1956-1972* (Cambridge University Press, Cambridge 1976).

Williams, Bernard, 'Moral Luck' in *Moral luck : philosophical papers, 1973-1980* (Cambridge University Press, New York 1981)

Williams, Bernard, *Shame and Necessity* (University of California Press, Berkeley, Oxford 1993).