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Recommended Citation

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WHY RESTORATIVE JUSTICE IS NOT COMPULSORY COMPASSION: ANNALISE ACORN'S LABOUR OF LOVE LOST

A REVIEW OF *COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE*, ANNALISE E. ACORN,
(VANCOUVER: UNIVERSITY OF BRITISH COLUMBIA PRESS, 2004)

BRUCE ARCHIBALD*

Annalise Acorn has produced an immensely engaging book about love, sexuality and law, written with verve and élan;¹ however, it paints a hugely misleading picture of restorative justice that could be seriously damaging to what is arguably the most significant development in criminal justice since the emergence of the nation state. Restorative justice is changing the nature of criminal justice systems the world over.² The Canadian criminal justice system is a leader in this regard, though it is far from being alone.³ Simplistic and dysfunctional systems of punitive criminal justice are being altered and supplemented by restorative programs that are capable of obtaining high rates of offender compliance with sanctions⁴ as well as high rates of satisfaction for victims.⁵ Moreover, restorative justice, when judiciously used, has demonstrated a capacity for reductions in both recidivism rates⁶ and the costs of

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¹ Annalise E. Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: University of British Columbia Press, 2004).

² For a useful if somewhat dated bibliography, see Paul McCold, *Restorative Justice: An Annotated Bibliography* (Monsey, N.Y.: Criminal Justice Press, 1997). See also L. Walgrave, ed., *Repositioning Restorative Justice* (Portland: Willan Publishing, 2003).

³ For a recent treatment of restorative justice in Canada, see Law Commission of Canada, *Transforming Relationships through Participatory Justice* (Ottawa: Minister of Public Works and Government Services, 2003) [*Transforming Relationships*]; see also Bruce P. Archibald, "Citizen Participation in Canadian Criminal Justice: The Emergence of 'Inclusionary Adversarial' and 'Restorative' Models" in Stephen Gerard Coughlin & Dawn A. Russell, eds., *Citizenship and Citizen Participation in the Administration of Justice*, (Montreal: Canadian Institute for the Administration of Justice/Les Éditions Thémis, 2002) 147; and Church Council on Justice and Corrections (Canada), *Satisfying Justice: Safe Community Options that Attempt to Repair Harm from Crime and Reduce the Use of Length of Imprisonment* (Ottawa: Church Council on Justice and Corrections (Canada), 1996). Perhaps Canada's most famous contribution to the development of restorative justice practice is the adaptation of Aboriginal healing circles for criminal justice purposes: see, *inter alia*, Heino Lilles, "Circle Sentencing: Part of the Restorative Justice Continuum" in Allison Morris & Gabrielle Maxwell, eds., *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Portland: Hart Publishing, 2001) 161 [*Restorative Justice for Juveniles*]; Barry Stuart, "Circle Sentencing in Yukon Territory, Canada: A Partnership of the Community and the Criminal Justice System" (1996) 20 *Int. J. Comp. & Applied Crim. J.* 291; Curt Taylor Griffiths, "Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities" (1996) 20 *Int. J. Comp. & Applied Crim. J.* 195.

⁴ Jeff Latimer, Craig Dowden & Danielle Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis* (Canada, Department of Justice, Research and Statistics Division, 2001) [*A Meta-Analysis*].

⁵ For a broad empirical assessment of satisfaction with restorative justice outcomes see: Latimer, Dowden & Muise, *A Meta-Analysis*, *ibid.*; see also Paul McCold, "A Survey of Assessment Research on Mediation and Conferencing" in L. Walgrave, *Repositioning Restorative Justice*, *supra* note 2 at 67; and Leena Kurki, "Restorative and Community Justice in the United States" in Michael N. Tonry, ed., *Crime and Justice: A Review of Research*, vol. 27 (Chicago: University of Chicago Press, 2000) 235.

⁶ Allison Morris & Gabrielle Maxwell, "Family Group Conferences and Reoffending" in *Restorative Justice for Juveniles*, *supra* note 3 at 243.

criminal justice.⁷ Annalise Acorn's *Compulsory Compassion: A Critique of Restorative Justice* does not reflect these important realities. It is a peculiarly fascinating but fundamentally flawed book. The effort to demonstrate why this is the case is worthwhile, since the book is written with such an attractive style and enthusiastic energy that it could easily beguile the unwary reader into acceptance of its author's jaundiced assessment of restorative justice. The problems begin with the book's title. First, to be effective, restorative processes must be and are voluntary, not compulsory. Secondly, at its core, restorative justice is about accountability for wrongful behaviour, not about compassion.⁸ This critique, of course, may sound tedious by comparison to the alliteratively striking and paradoxically pointed description of restorative justice as "compulsory compassion." Nonetheless, the alluring appearances of this faulty nomenclature are dangerously deceiving.

An initial attempt at a comprehensive definition of restorative justice would be helpful. This is something that Acorn expressly refuses to provide.⁹ In the absence of such assistance, one might offer the following: restorative justice is an approach to accountability for crime based on the restoration of balanced social relations and reparation of criminal harms that is rooted in values of equality, mutual respect and concern, and that uses deliberative processes involving crime victims, offenders, their respective supporters and representatives of the broader community under the guidance of authorized and skilled facilitators.¹⁰ This sort of analytical and pragmatic definition was not what initially attracted Acorn to restorative justice. She tells us in Chapter I — "The Seductive Vision of Restorative Justice: Right Relation, Reciprocity, Healing and Repair" — of how she was lured by what she saw in the restorative justice literature: "spiritually expansive ideals," "a loving aspiration to heal," "dramatic encounters between victims and offenders," justice "created and enacted by ... communities" and "the social redemption of both victim and perpetrator and their return — without stigma — to a position of acceptance and participation in the community."¹¹ It is true that overenthusiastic advocates of restorative justice sometimes make excessive claims on its behalf that engender false expectations. With such visions of rapture in mind, it is no surprise that Acorn became disillusioned by some incarnations of restorative justice in the

⁷ Gabrielle Maxwell & Allison Morris, "Restorative Justice and Reoffending" in Heather Strang & John Braithwaite, eds., *Restorative Justice: Philosophy to Practice* (Aldershot: Ashgate, 2000) 93 [*Philosophy to Practice*]; a recent empirical study on net widening in Canadian sentencing context, however, gives some cause for concern: see Julian V. Roberts & Thomas Gabor, "The Impact of Conditional Sentencing: Decarceration and Widening of the Net" (2004) 8 Can. Crim. L. Rev. 33.

⁸ Fred McElrea, "Taking Responsibility in Being Accountable" in Helen Bowen & Jim Consedine, eds., *Restorative Justice: Contemporary Themes and Practice* (Lytelton, N.Z.: Ploughshares Publications, 1999) 56.

⁹ Acorn, *supra* note 1 at 20.

¹⁰ Defining restorative justice is a controversial undertaking, but several definitions are conveniently at hand. A definition of restorative process current in U.N. circles reads: "any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party": *Basic Principles on the Use of Restorative Justice Program in Criminal Matters*, ECOSOC Res. 2000/14, UN ECOSOCOR, 2000, Supp. No. 1, E/2000/99, (2000). Another useful definition of restorative justice can be found in Jennifer J. Llewellyn & Robert Howse, *Restorative Justice: A Conceptual Framework* (Ottawa: Law Commission of Canada, 1998) [*Conceptual Framework*]. For discussion of the critical focus on transforming relationships, see Jennifer J. Llewellyn & Robert Howse, "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission" (1999) 49 U.T.L.J. 355; Llewellyn and Howse would regard the definition of restorative justice proposed in the text, which relates specifically to *criminal harms*, as inappropriately narrow.

¹¹ Acorn, *supra* note 1 at 2.

(theoretical) flesh. However, Acorn, with admirable candour, reveals how she abandoned her better instincts in this regard as she “had niggling but persistent embarrassment about [her] willingness to be seduced by the restorative justice movement.”¹² She says, “I remained unable to let go of my moral intuition that a just response to wrongdoing often involves ‘throwing the book’ at wrongdoers.”¹³ Aye, there’s the rub — punitive moralism can be seductive too. Acorn seems to turn her back on restorative justice after being taken by the views of William Ian Miller¹⁴ on the virtues of revenge.¹⁵

As the foregoing discussion hints, the main difficulty with the book, yet its primary source of intrigue and excitement, is Acorn’s desire to analyze justice through the overlapping lenses of love and (as we shall see below) sexuality. She states at the outset:

The primary aim of the book is to examine critically the aspiration of restorative justice to effect a practical and theoretical reconciliation between the values of love and compassion, on the one hand, and justice and accountability, on the other. Restorative justice offers a vision of justice as “tough love.”¹⁶

There is an important sense, of course, in which restorative justice is built upon a conception of relational justice that can be explained in terms of “love” in the sense of *caritas* or compassion and it is often very demanding.¹⁷ However, in her critique of restorative justice, Acorn shifts between *eros* and *caritas* with a charming degree of abandon that is both disconcerting and analytically misleading. The trouble seems to begin with her (mis)use of the ideas of Martha Nussbaum.¹⁸ Acorn admits:

To a large extent I am attempting to transplant Nussbaum’s ideas into foreign soil. I am assuming it is possible to uproot her articulation of the relations between love, *eros*, compassion and fellow-feeling, on the one hand, and justice and morality, on the other, and plant them in the context of restorative justice.¹⁹

This horticultural/philosophical experiment, stimulating though it is, ultimately fails.²⁰ In some considerable measure this failure is linked to another methodological oddity about the book. Acorn purports to counter exaggerated restorative justice “stories” with those from great literature, in order to set the record straight about justice and the human condition. She relies extensively on the works of Jane Austen, Saul Bellow, Charles Dickens, George Eliot,

¹² *Ibid.* at 6.

¹³ *Ibid.*

¹⁴ Among others of Miller’s works, Acorn cites his “In Defense of Revenge” in Barbara A. Hanawalt & David Wallace, eds., *Medieval Crime and Social Control* (Minneapolis: University of Minnesota Press, 1999) 70 and *Faking It* (Cambridge: Cambridge University Press, 2003).

¹⁵ Acorn, *supra* note 1 at 23.

¹⁶ *Ibid.* at 18.

¹⁷ See e.g. Department of Saskatchewan Justice, “*Getting Smart about Getting Tough*”: *Saskatchewan’s Restorative Justice Initiative*, (Regina: Department of Saskatchewan Justice, 1997); or Nova Scotia Department of Justice, *Restorative Justice: A Program for Nova Scotia* (Halifax: Nova Scotia Department of Justice, 1998) [*Nova Scotia Restorative Justice Program*].

¹⁸ Heavy reliance is placed on Nussbaum’s fascinating work *Love’s Knowledge: Essays on Philosophy and Literature* (New York: Oxford University Press, 1990), especially the chapter “Steerforth’s Arm: Love and the Moral Point of View” at 335.

¹⁹ Acorn, *supra* note 1 at 23.

²⁰ Perhaps, in the business of philosophical transplants, Acorn might have contemplated the cautionary advice of Alan Watson in *Legal Transplants: An Approach to Comparative Law* (Charlottesville: University Press of Virginia, 1974).

Mark Twain and Sinclair Lewis for stories that in her view “ring truer” and “contradict the premises of restorative justice.”²¹ Thus we have the curious methodological spectacle of theoretical visions of restorative justice being critiqued, not on the basis of empirical study of the phenomenon as it operates concretely in jurisdictions around the globe, but rather in relation to ambiguous notions of love and justice culled from utterances of fictional characters, many struggling in a world of hideous Victorian values that, one hopes, the postmodern era may be in the process of transcending.

Chapter 2 rejoices in the ungainly title of “‘Essentially and Only a Matter of Love’: Justice and the Teachableness of Universal Love.”²² Acorn asserts that restorative justice “sees universal love as the primary fuel” for accomplishing feats of justice, aspiring “to harmonize the virtues, values and practices of love and justice.”²³ She relies heavily on the collection of essays edited by Michael L. Hadley,²⁴ which attempts to demonstrate the compatibility of restorative justice principles with the tenets of many of the world’s most respected spiritual and moral traditions, but also refers to similar statements by such leading lights of restorative justice as Herman Bianchi,²⁵ John Braithwaite²⁶ and Howard Zehr.²⁷ The argument here conveys the secularist impression that restorative justice is a naive religious movement that urges victims to sacrifice their interests to those of the offender and community through “love-talk” in the face of injustice.²⁸ She then associates the actions of Martin Luther King and Mahatma Gandhi (through remarks by Howard Zehr) with the ideas behind this dangerous restorative justice vision. Acorn’s alternative stories from literature that help us see through this “manipulative nature of the rhetoric of love” are a quotation from the Rev. Dr. Drew, the fawning toady of capitalism from Sinclair Lewis’ *Babbalanza*,²⁹ and the snippet of dialogue from a *tête-à-tête* between Catherine Morland and Henry Tilney in Jane Austen’s *Northanger Abbey*, directed toward the “teaching of the habit of love.”³⁰ All of this, though thought provoking, is more than a little overdrawn. While restorative justice processes often lead victims to identify or sympathize with offenders when working out restorative solutions, no responsible advocate of restorative justice requires forgiveness from the victim as a necessary part of restorative justice.³¹ Women’s organizations and restorative justice programs wrestle in a very practical fashion with the implications of the security, emotional

²¹ Acorn, *supra* note 1 at 24.

²² *Ibid.* at 27.

²³ *Ibid.*

²⁴ Michael L. Hadley, *The Spiritual Roots of Restorative Justice* (Albany: State University of New York Press, 2001).

²⁵ Herman Bianchi, *Justice as Sanctuary: Toward a New System of Crime Control*, (Bloomington: Indiana University Press, 1994) [*Justice as Sanctuary*].

²⁶ John Braithwaite’s “Repentance Rituals and Restorative Justice” (2000) 8 J. Pol. Phil. 115 and *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002).

²⁷ Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale, Pa.: Herald Press, 1990).

²⁸ Acorn, *supra* note 1 at 33.

²⁹ *Ibid.* at 32.

³⁰ *Ibid.* at 43.

³¹ See Richard Young, “Integrating a Multi-Victim Perspective into Criminal Justice Through Restorative Justice Conferences” in Adam Crawford & Jo Goodey, eds., *Integrating a Victim Perspective within Criminal Justice: International Debates* (Dartmouth: Ashgate, 2000) 227; Mary Achilles & Howard Zehr, “Restorative Justice for Crime Victims: The Promise, The Challenge” in Gordon Bazemore & Mara Schiff, eds., *Restorative Community Justice: Repairing Harm and Transforming Communities* (Cincinnati: Anderson Publishing, 2001) 87; and Llewellyn & Howse, *Conceptual Framework*, *supra* note 10.

and other concerns of vulnerable victims in relation to restorative justice.³² Indeed, established restorative justice programs in Canada are carefully structured under the *Criminal Code*³³ and *Youth Criminal Justice Act*³⁴ in ways that protect the interests of participants and promote the ends of justice in a very pragmatic manner and do not comport with the “impractical idealism” of the religious zealot portrayed by Acorn.³⁵

Chapter 3 purports to undermine the “Three Pillars of Restorative Optimism.”³⁶ The first of these is what Acorn sees as the cavalier attitude toward the principle of proportionality in an appropriate response to criminal harms — she believes that in a restorative approach there is no “payback” for getting caught. This is a variant of the familiar argument that restorative justice is “soft on crime.”³⁷ The second shaky pillar, in Acorn’s view, is the faith restorative justice advocates have in the power of a restorative “encounter” to transform offenders into cooperative and well motivated members of society. The third false pillar of restorative optimism is what Acorn perceives as a misplaced confidence that the process will heal the pain and anger of victims. There is a grain of truth in all of these charges — some restorative justice enthusiasts make claims that cannot be sustained. However, cautious supporters of restorative justice see these issues differently. Firstly, most restorative justice practitioners acknowledge that not all crimes or criminals can be dealt with through restorative process as a matter of criminal law and of sound restorative theory.³⁸ Furthermore, restorative justice outcomes often impose burdens that are just as onerous as sentences in the mainstream justice system (think conditional discharge). Therefore restorative justice conferences can, and do, respond to concerns about proportionality between criminal harm and a just societal response equally effectively as a sentencing judge.³⁹ Secondly, sophisticated facilitators of the restorative justice process no longer put their faith in a one-off encounter involving victims, offenders, their supporters and community representatives, although those may still happen.⁴⁰

³² See Julie Stubbs, “Domestic Violence and Women’s Safety: Feminist Challenges to Restorative Justice” and Ruth Busch, “Domestic Violence and Restorative Justice Initiatives: Who Pays if We Get it Wrong” in Heather Strang & John Braithwaite, eds., *Restorative Justice and Family Violence* (Cambridge: Cambridge University Press, 2002) 42 and 223. In Nova Scotia, there is a moratorium on the use of restorative justice in family violence cases, and the matter is currently the subject of delicately structured public consultation process.

³³ *Criminal Code of Canada*, R.S.C. 1985, c. C-46 [*Criminal Code*].

³⁴ S.A. 2002, c. 1.

³⁵ See Bruce P. Archibald, “Coordinating Canada’s Restorative and Inclusionary Models of Criminal Justice: The Legal Profession and the Exercise of Discretion under a Reflexive Rule of Law” 9 *Can. Crim. L. Rev.* [forthcoming in 2005].

³⁶ Acorn, *supra* note 1 at 47.

³⁷ Richard Delgado, “Good Bye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice” (2000) 52 *Stanford L. Rev.* 751.

³⁸ See the classification of offences in the *Nova Scotia Restorative Justice Program*, *supra* note 17; *pace* Jacques Derrida, *On Cosmopolitanism and Forgiveness*, trans. by Mark Dooley & Michael Hughes (London: Routledge, 2001); Herman Bianchi, *Justice as Sanctuary*, *supra* note 25; see also my colleague Jennifer Llewellyn (with Robert Howse), *Conceptual Framework*, *supra* note 10. The South African Truth and Reconciliation Commission dealt with crimes not as a matter of criminal law but rather as a political matter in a process of societal reconciliation after a period of civil war.

³⁹ Kathleen Daley, “Revisiting the Relationship between Retributive and Restorative Justice” in John Braithwaite & Heather Strang, eds., *Philosophy to Practice*, *supra* note 7 at 93.

⁴⁰ See John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002); but see also Don Clairmont, *The Nova Scotia Restorative Justice Initiative: Year One Evaluation Report*, (Bedford, N.S.: Pilot Research, 2001) (available from the Nova Scotia Department of Justice) at 63-78 for a description of the practical difficulties of shifting from an ADR/mediation model to a true restorative conferencing model of alternative dispute resolution. See also Clairmont’s

Restorative process can and often does involve thorough preparatory meetings of facilitators with victims and offenders, separately, before any conference, and can also require a careful canvassing of appropriate community representatives who have treatment or other resources to bring to the table.⁴¹ This is not simply a matter of a belief in the transformative magic of an encounter that can be debunked by reference to the ineffective repentance of Huck's father Pap following his sentencing for drunken crimes in Mark Twain's *Huckleberry Finn*.⁴² Thirdly, practitioners of restorative justice are well aware that, while some victims find a healing psychological and reparative balm in the conferencing process, other victims do not and the latter must not be coerced into a restorative encounter. Yet such victims should not, by virtue of their understandable refusal to participate, have a veto over restorative process. Nonetheless, it is an enduring myth held by opponents of restorative justice that most victims harbour punitive desires for revenge,⁴³ and Acorn sustains this myth by reference to mutually antagonistic characters in George Eliot's *Romola*.⁴⁴

Acorn's Chapter 4 is entitled "Sentimental Justice: The Unearned Emotions of Restorative Justice."⁴⁵ It begins with a quotation from George Orwell's *The Road to Wigan Pier*: "This is the inevitable fate of the sentimentalist. All his opinions change to their opposites at the first brush of reality."⁴⁶ Perhaps an attentive reader of Acorn's book might forgive me for thinking that Acorn should apply this adage to herself, as an apparent "reformed" adept of restorative justice. Be that as it may, this is a fascinating but unsatisfying chapter that raises high expectations at the outset as Acorn also cites Reinhold Niebuhr: "Love must be regarded as the final flower and fruit of justice. When it is substituted for justice it degenerates into sentimentality and may become the accomplice of tyranny."⁴⁷ There follows an interesting and critical discussion of the evils of sentimentality in art and law, of Robert Solomon's defence of the sentimentality in *Uncle Tom's Cabin*⁴⁸ and of Saul Bellow's treatment of the need for understanding the emotional dimensions of a trial through his main character in

subsequent evaluations: *The Nova Scotia Restorative Justice Initiative: Core Outcomes — Year Two Evaluation Report*, (Bedford, N.S.: Pilot Research, 2002); and Don Clairmont, *The Nova Scotia Restorative Justice Initiative — Year Three Interim Report*, Reports prepared for the National Crime Prevention Centre, August 2003 (Ottawa, Department of Public Safety and Emergency Preparedness Canada, 2003) at 24.

⁴¹ For examples of restorative justice practice standards, see Law Commission of Canada, *Transforming Relationships*, *supra* note 3; David B. Moore & John MacDonald, *Community Conferencing Kit* (Bondi Beach, New South Wales: Transformative Justice Australia, 1998); Paul McCold & Benjamin Wachtel, *Restorative Policing Experiment: The Bethlehem Pennsylvania Police Family Group Conferencing Project* (Pipersville, Pa.: U.S. Department of Justice/National Institute of Justice, 1998), online: International Institute for Restorative Justice Practices <www.restorativepractice.org> including "Community Group Conferencing Evaluation Forms"; Barry Stuart, "Guiding Principles for Designing Peace Making Circles" in Gordon Bazemore & Mara Schiff, *Restorative Community Justice: Repairing Harm and Transforming Communities*, (Cincinnati: Anderson Publishing, 2001) 219.

⁴² Acorn, *supra* note 1 at 67.

⁴³ See Mica Estrada-Hollenbeck, "Forgiving in the Face of Injustice: Victims' and Perpetrators' Perspectives" in Burt Galoway & Joe Hudson, eds., *Restorative Justice: International Perspectives*, (Monsey, N.Y.: Criminal Justice Press, 1996) 303.

⁴⁴ Acorn, *supra* note 1 at 76.

⁴⁵ *Ibid.* at 78.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Robert C. Solomon, *A Passion for Justice: Emotions and the Origins of the Social Contract* (Lanham, Md.: Rowman and Littlefield, 1995) discussing Harriet Beecher Stowe, *Uncle Tom's Cabin or Life among the Lowly* (New York: Penguin, York, 1986) (reprint).

Herzog.⁴⁹ This ambivalent stance in relation to sentimentality becomes the spongy springboard for a discussion of the sentimental treatment of “success stories” in the restorative literature. Acorn is right that the restorative justice literature is replete with testimonials as to the power of restorative justice conferences and with fictional accounts of restorative justice “best practices” or perhaps “ideal outcomes.” Herman Bianchi is taken to task by Acorn, with considerable justification, for providing an example of what he regards as an admirable restorative justice story that has an emotional and melodramatic catharsis flowing from circumstances that involve an unrealistic time frame after a homicide.⁵⁰ Daniel VanNess and Karen Heetderks Strong are similarly (and rightly) pilloried for putting an unsustainable restorative justice spin on the story from Homer’s *The Iliad* where Priam petitions Achilles for the body of Hector.⁵¹ All of this, however, seems exaggerated in its significance for restorative justice. If all there were to restorative justice was a sentimentality that perverted justice in a kind of collective and lawless emotional tyranny, Acorn’s invocation of Niebuhr might be helpful. But the kind of restorative justice programs that are emerging around the world are far more procedurally balanced and regulated than this. It’s too bad that such reports don’t make a “good story.” Moreover, one can easily accept the notion that unbridled sentimentality can pervert justice, whether restorative or punitive. Surely the emotional and sentimental treatment of punitive justice in the world of the *Terminator* (or exaggerated stories from “great literature” where the bad guy gets his inevitable comeuppance) is equally as appalling as the sentimentality that can distort restorative justice.

The provocative title of Acorn’s Chapter 5 is “‘Lovemaking is Justice-Making’: The Idealization of Eros and the Eroticization of Justice.”⁵² Acorn correctly identifies the notion of “right relation” as a foundational concern of restorative justice, but argues it contains a “strong undercurrent of eroticism.”⁵³ She supports this tantalizing assertion with the views of the lesbian, feminist theologian Carter Heyward who is said to credit the erotic impulse with “inspiring us toward greater mutuality and by giving us an intense experiential understanding of mutuality, help[ing] us to transcend patterns of injustice.”⁵⁴ Heywood is afterward quoted for the claim that “[g]ood sex involves us more fully in the struggle for justice.”⁵⁵ Acorn also cites Martha Nussbaum for the proposition that “[t]he fulfilling and passionate erotic relationship provides the most highly idealized vision of right relation.”⁵⁶ As an admirer of Martha Nussbaum’s work on educational theory, I am pleased to take these views of hers on passion under advisement, and I found Acorn’s summary of her discussions of Adam Smith’s *A Theory of Moral Sentiments* and the twisted intimate relations of Charles Dickens’ characters in *David Copperfield* to be quite instructive. Nonetheless, I am not sure

⁴⁹ Acorn, *supra* note 1 at 85.

⁵⁰ *Ibid.* at 87-91. Use of restorative conferencing in relation to culpable homicide in Canada, of course, would occur not as an alternative to trial and imprisonment, but, if at all, in the correctional or parole context after sentencing. See *Nova Scotia Restorative Justice Program*, *supra* note 17; or Law Commission of Canada, *Communities and the Challenge of Conflict: Perspectives on Restorative Justice*, Video recording (Ottawa: Law Commission of Canada, 2000).

⁵¹ Acorn, *supra* note 1 at 91-98

⁵² *Ibid.* at 99.

⁵³ *Ibid.*

⁵⁴ *Ibid.* Among others of Heward’s works cited is *Touching Our Strength: The Erotic as Power and the Love of God* (San Francisco: Harper & Row, 1989).

⁵⁵ Acorn, *ibid.* at 115.

⁵⁶ *Ibid.* at 99.

what to make of Acorn's later castigation of Heyward for irresponsibly defining "justice in terms of embrace primarily as a strategy for valorizing lesbian sex."⁵⁷ What I am confident of, however, is that these concerns form no component of the standard canons of restorative justice. Acorn acknowledges that neither Heyward or Nussbaum are proponents of restorative justice, and in footnote five to the chapter admits that her extension of Nussbaum's views to a relationship between desire and justice "may seem a bit of a stretch."⁵⁸

What is most disturbing about Chapter 5 is that Heyward is described as an apologist for "a trendy version of the age-old advice to the battered woman to keep trying to make it work"⁵⁹ and that this sentiment is then ascribed to restorative justice. Acorn does indeed point to an unfortunate sexist illustration of "restorative justice" advanced by Charles Colson,⁶⁰ however this should not be the basis for tarring restorative justice with such a damning brush. This is a hot button issue that divides women's groups around the world on restorative justice and requires careful treatment.⁶¹ In the Aboriginal community of Hollow Water, Manitoba, healing circles were used (in a complex twelve stage process that occurred over many months) to deal with long-standing and widespread intergenerational sexual abuse in families, but that example is unique in the annals of restorative justice.⁶² Restorative justice conferencing has reportedly been used in cases of sexual assault of varying seriousness in some Canadian jurisdictions. On the other hand, in Nova Scotia there is a moratorium on the use of restorative conferencing in sexual assault and family violence cases, despite the well-known phenomenon of stays and acquittals caused by recanting complainants in criminal trials, which can arguably leave battered women more vulnerable than the use of restorative justice processes.⁶³ Whatever the outcome of the policy debates over the propriety of restorative justice in situations of family violence, Acorn leaves the impression that "right relation" for restorative justice means Heyward's "mutual embrace" and that this implies forcing battered women to literally embrace their batterers. I know of no responsible restorative justice program or facilitator who would take this position. To suggest that this is the case, under the heading "the eroticization of justice," is inflammatory, if not perverse. Somewhat disappointingly, however, at the end of the chapter, Acorn merely concludes: "Sex is sex. It isn't stability, loyalty, industry, creativity, or justice."⁶⁴ This may be "TMI" (too much information) — in any event, if it is true, perhaps restorative justice is exonerated from guilt by association with Carter Heyward.

⁵⁷ *Ibid.* at 118.

⁵⁸ *Ibid.* at 179-80.

⁵⁹ *Ibid.* at 116.

⁶⁰ Charles W. Colson, *Justice that Restores* (Wheaton, Ill.: Tyndale House Publishers, 2001), where Colson describes the virtues of restorative justice that he discovered while serving prison time after Watergate.

⁶¹ See Trina Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale L.J.* 1545; Lisa G. Lerman, "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women" (1984) 7 *Harv. Women's L.J.* 57; and the references *supra* note 32.

⁶² Mylène Jaccoud, "Restoring Justice in Native Communities in Canada" in Lode Walgrave, ed., *Restorative Justice for Juveniles: Potentialities, Risks and Problems* (Leuven, Belgium: Leuven University Press, 1998) 285.

⁶³ P. Michael Cantlon, *Women's Equality in the Canadian Criminal Justice System: Something Less than a Fair Shake* (M.A. Thesis, Dalhousie University, Halifax, 1999).

⁶⁴ Acorn, *supra* note 1 at 160.

Chapter 6, entitled “Compulsory Compassion: Justice, Fellow-Feeling and the Restorative Encounter”⁶⁵ is filled with fascinating food for thought. Acorn begins, once again, with Martha Nussbaum, this time analyzing her views on compassion as the basic social emotion.⁶⁶ Finding that the existence of serious suffering, blamelessness and identification with the suffering of others are an unreliable guide to adjudication, Acorn convincingly concludes that Nussbaum’s basis for compassion is insufficient for judicial decision-making in relation to the imposition of penalties — compulsory compassion from judges is paradoxical and problematic.⁶⁷ Acorn then turns to what she sees as the basis for compassion in the restorative justice literature. She correctly identifies a sense that compassion in this context involves humility in the “recognition of oneself and others as vulnerable to suffering and as competent agents of repair.”⁶⁸ Moreover, restorative justice promotes an understanding of compassion that is “paradigmatically mutual” and sees right relation in terms of mutual respect (to which I would add dignity).⁶⁹ Then Acorn goes off the rails. Harking back to Miller again, she points to the fakeability of remorse on the part of the offender. Referring to George Eliot once more (this time to *Scenes of Clerical Life*), she stresses the potential *schadenfreude* of the victim who takes joy in the deserved suffering of the offender. These examples are intended to counter stories of successful “restorative encounters”⁷⁰ from the restorative justice literature. Moreover, the context once again is the assumption that the “encounter” is compulsory and that both offenders and victims are pressured into being compassionate with one another in the face of mean-spirited human nature. There are two problems with this account. Firstly, there is virtually unanimous empirical evidence from evaluations of restorative justice programs that victims and offenders emerged more satisfied from restorative conferencing than from a criminal trials in similar circumstances.⁷¹ More importantly, restorative conferences, by conceptual definition and by law, must be voluntary for both offenders and victims.⁷² No experienced restorative justice program administrator would swear that no offender and no victim ever feels pressure to participate in a restorative conference from time to time or that all participants always emerge satisfied. However, real restorative justice is always voluntary in a significant sense — it is not compulsory compassion. Those charged with criminal offences, and victims who can be called as witness in criminal trials, must often make difficult and constrained choices, but if they opt for restorative process under these circumstances, it is morally, legally and practically different from compulsion.

Acorn’s book concludes with an “Epilogue: Restorative Justice — ‘The Fire with Which We Must Play.’”⁷³ It recaps some of the emotional ground upon which the book is based, implies that restorative justice is unrealistically utopian, associates restorative justice with the kind of pacifism that Niebuhr criticizes for capitulating to tyranny and expresses a sanguine preference for punitive justice despite an acknowledgment that the prison system

⁶⁵ *Ibid.* at 120.

⁶⁶ *Ibid.* at 121.

⁶⁷ *Ibid.* at 122-35.

⁶⁸ *Ibid.* at 158.

⁶⁹ *Ibid.* at 135-42.

⁷⁰ *Ibid.* at 151.

⁷¹ *Supra* note 3. Sorry to have to repeat this, but it is important and comes out of Acorn’s discussion here.

⁷² See s. 10 of the *Youth Criminal Justice Act*, *supra* note 34 and s. 717 of the *Criminal Code*, *supra* note 33. These and other due process requirements applicable to extra-judicial sanctions or alternative measures under which restorative justice programs in Canada operate.

⁷³ Acorn, *supra* note 1 at 160.

has failed us and makes criminals more dangerous. This is over the top. Part of the problem may be that Acorn thinks restorative justice, if adopted as a model of criminal justice, must be a complete substitute for the mainstream criminal justice system, or at least that is what she believes advocates of restorative justice claim. But in Canada we are beyond that. Our youth and adult criminal justice systems have embraced restorative justice to a considerable degree, but only in relation to appropriate cases and where discretionary decision-making is structured in ways which promote both the principle of voluntariness and due process safeguards. This is not compulsory compassion. Rather it is voluntary choice of an alternative form of justice that has been proven effective in certain, but by no means all, circumstances. This is the oil to calm the troubled waters of criminal justice with which we ought to play (and perforce are playing).

I am glad that I read Annalise Acorn's book. It was a stimulating and thought provoking read. But it put me in mind of Arthur Koestler, the communist who became disillusioned, who went rabidly anti-leftist and who wrote such classics as *The God that Failed*⁷⁴ and *Darkness at Noon*.⁷⁵ Of course, history has vindicated Koestler and could so favour Acorn — but I doubt that it will. Restorative justice is strongly rooted in core democratic values and processes. It is not to be confused with some repressive technique of totalitarian injustice, despite Acorn's invocation of Niebuhr. I also learned a lot from reading *Compulsory Compassion*, though I alternated between being entertained and infuriated. Others who read the book are likely to enjoy it because of its engaging style and apparent erudition. However, they should not be under the illusion that it represents a measured assessment of restorative justice or that most people involved in the administration of restorative justice in Canada would recognize the "compulsory compassion" she describes as the restorative justice they know. The projection of Acorn's diminished vision of restorative justice through the overlapping lenses of love and sexuality distorts the picture and renders the resulting spectacle obscure.

⁷⁴ Arthur Koestler *et al.*, *The God that Failed: Six Studies in Communism* (London: Hamish Hamilton, 1950).

⁷⁵ Arthur Koestler, *Darkness at Noon* (New York: The Modern Library, 1941).