The Impossible Dreams and Modest Reality of Restorative Justice

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The Impossible Dreams and Modest Reality of Restorative Justice

*Annalise Acorn, Compulsory Compassion: A Critique of Restorative Justice
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Reviewed by Malcolm Thorburn*

Our criminal justice system is not a thing of beauty. Over the past twenty years, there has been a growing chorus of voices, including many religious organizations,¹ aboriginal advocates,² feminist scholars,³ communitarians⁴ and others who say that it is too concerned with its own procedures and that it ignores the particular human needs and concerns of the people whose lives it so deeply affects. They are dissatisfied by the criminal law’s obsession with formal rules and

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² These include Mennonites: see e.g. Howard Zehr, Changing Lenses: A New Focus on Crime and Justice (Scottdale, Pa.: Herald Press, 1990); Quakers: see e.g. Tim Newell, Forgiving Justice: a Quaker Vision of Criminal Justice (London: Quaker Home Service, 2000); Presbyterians: see e.g. Virginia Mackey, Restorative Justice: Toward Nonviolence (Louisville, Ky: Presbyterian Justice Program, 1990); and Anglicans: see e.g. Archbishop Desmond Tutu, Truth and Reconciliation Commission of South Africa Report, vol. 1, “Chairperson’s Foreword” (Capetown: CTP Book Printers, 1998).
procedures, its total domination by the state, and its underlying assumption that imprisonment is the appropriate response to crime. Many of them have taken up the banner of “restorative justice” as a loose description for their more optimistic alternative, which they claim has deep roots in Christian theology, in ancient aboriginal conceptions of justice, in feminist ethics of care and in an anti-statist politics of community empowerment. They describe restorative justice as everything that traditional criminal justice is not: it is forward-looking, not backward-looking; contextual, not rule-governed; restorative, not punitive; relational, not isolating; and empowering of individuals and communities, not state dominated. “Restorative justice,” they say, “is a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.” Through this process of direct discussion among the participants, proponents claim, offenders will come to apologise for what they have done and offer reparation,


8. The most important article on the “community empowerment” movement is still Nils Christie, “Conflicts as Property” (1977) 17 Brit. J. Crim. 1.

victims will offer forgiveness, and their community\textsuperscript{10} will support them in developing what proponents call “right relation.”

The restorative justice movement has begun to pick up momentum in recent years, and Canada has been at the vanguard of that movement. The first modern experiment in victim-offender mediation was in Elmira, near Kitchener, Ontario in 1974,\textsuperscript{11} and the practice of aboriginal sentencing circles was developed in Canada, as recognised in 1992 in the landmark case of \textit{R. v. Moses}.\textsuperscript{12} Since then, the Supreme Court has formally endorsed the use of restorative justice in sentencing in the case of \textit{R. v. Gladue};\textsuperscript{13} Minister of Justice Irwin Cotler has pronounced restorative justice to be a “fundamental—and ultimately progressive—shift in how we view a criminal act”;\textsuperscript{14} and, for the past seven years, the federal government has sponsored annual “Restorative Justice Week”

\textsuperscript{10} This notion of “community” as used by restorative justice advocates is notoriously elusive. Andrew Ashworth challenges its vagueness in “Is Restorative Justice the Way Forward for Criminal Justice?” (2001) 54 Curr. Legal Probs. 347; see also Robert Weisberg “Restorative Justice and the Dangers of Community” (2003) Utah L. Rev. 343. Weisberg criticises the politics of community even more deeply. He suggests that restorative justice is simply covering up the fact that it has no practical alternative to state control of offenders by making vague references to “the community” and its ability to deal with these problems. Comparing this situation with the reliance on “community support” in the deinstitutionalization of the mentally ill in the 1970s, he suggests that this is a recipe for disaster.

\textsuperscript{11} By now, this has become a well-worn story. Mark Yantzi, a probation officer and Dave Worth, a worker for the Mennonite Central Committee thought that it would be useful to bring offenders to meet their victims in a “victim-offender mediation” session (VOM) and to make restitution to them for the harm they had caused. Yantzi and Worth then began by introducing two young offenders to the twenty-two victims of their vandalism. This experiment was judged to be a success by all concerned, so under the leadership of Edgar Epp, the Mennonite Central Committee began to create similar programs across North America in relation to petty crimes such as theft or minor vandalism.

\textsuperscript{12} (1992), 71 C.C.C. (3d) 347 (Y. Terr. Ct.).

\textsuperscript{13} [1999] 1 S.C.R. 688.


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celebrations across the country. Restorative justice is rightly called “the current ‘big idea’ in justice.”

Restorative justice is often presented as a “third way” for criminal justice, distinct from traditional theories of both retribution and rehabilitation. In opposition to retributivist accounts of criminal justice, restorative justice denies that there is any conceptual connection between retributive punishment and criminal justice. It has long been assumed that just as distributive justice tells us how we ought to distribute benefits and burdens within a community and corrective justice tells us how we ought to respond to the imposition of benefits and burdens in the interaction between individuals, retributive justice tells us how we ought to respond to criminal wrongdoing. From the Old Testament to Immanuel Kant to contemporary “just deserts” theories, the conceptual connection between retributive punishment and justice has been one of the central premises of criminal justice. By contrast, restorative justice advocates insist that “there is no positive value for justice in the very fact of the perpetrator’s suffering or sacrifice of well-being.” Rather than imposing the evil of punishment for its own sake, restorative justice responds to crime by urging offender, victim and their community to promote “right relation” among themselves.

15. Although it has been known as “Restorative Justice Week” for the past seven years, it was previously celebrated for many years as “Prisoners’ Sunday.” For more information on this event, see online: Correctional Service of Canada <http://www.csc-csc.gc.ca/text/forum/restore2004/kit/index_e.shtml>.


17. Indeed, it has been one of the great challenges of modern international criminal law to ensure that the guilty do not escape punishment. In Spanish, this is referred to as the wrong of “impunidad.”

This might sound familiar. Indeed, until quite recently, the dominant theme in criminal justice thinking over two hundred years was the rehabilitation of the offender. Since the birth of the modern prison in the early nineteenth century, many reformers have argued that the primary purpose of imprisonment should not be to punish the offender for past wrongs, but to reform him so that he will not re-offend. British Prison Commissioner Alexander Paterson summed up this position with the aphorism, “men are sent to prison as a punishment, not for punishment.” As has been widely documented, most famously by Foucault, many of the early advocates of the modern prison conceived of it not as an instrument of punishment, but as a mechanism for the moral re-education of the offender. Their rehabilitative ideal is built on the optimistic but slightly paternalistic assumption that “since the convict was not innately depraved but had failed to be trained to obedience by family, church, school, or community, he should be redeemed by the well-ordered routine of prison.” Imprisonment should instill in the offender the “internal point of view” toward the criminal law—teaching him that it deserves respect as a guardian of a legitimate social order. Failing that, we might still hope that, as de Tocqueville and de Beaumont somewhat less optimistically put it, “leaving prison he is not an honest man, but he has contracted honest habits.” Either way, the promise of the rehabilitative ideal is that once the process of re-education is over, we will no longer have to rely on brute force to ensure the offender’s compliance with the criminal law.

But restorative justice is not just another movement advocating a return to the rehabilitative ideal. For, unlike the early advocates of rehabilitation, restorative justice sees prison not as a solution to the problem of crime, but as one of its principal causes. In this way, restorative justice has much more in common with the prison abolition movement than it does with mainstream rehabilitation accounts of criminal justice. Crime, according to restorative justice, not only causes broken relationships between people, but is also very often a product of them as well. If we are to effect a permanent and stable solution to the problems of crime, restorative justice insists that we must attend to their root cause and mend the broken relationships between offender, victim and their community. Taking the offender away from his victim and the wider community and putting him in prison will not help to rebuild those relationships; it will only widen the alienation that already exists. Restorative justice proposes to do just the opposite: to bring the offender, his victims and their community together and allow them to repair those broken relationships through meaningful dialogue, acceptance of responsibility, reparations and forgiveness.

Telling the story as I have just done might suggest that restorative justice is interested in victims and the community only as tools to help reintegrate the offender back into society, but advocates of restorative justice insist that this is not so. According to Braithwaite, one of the most prominent and prolific advocates of restorative justice, "[c]rime is an opportunity to prevent greater evils, to confront crime with a grace that transforms human lives to paths of loving and giving." Whereas the traditional response to crime focuses exclusively on the offender—his trial, his conviction and his imprisonment—restorative justice insists that we should give equal time and attention to the suffering of the victim and the community as well. Rather than have the state deal


directly with the offender, restorative justice proposes to bring all interested parties together to discuss how best to respond to the offender’s crime. The victim’s suffering and the community’s breakdown, just as much as the offender’s wrongdoing, ought to be the focus of discussion in these so-called “restorative encounters.” A truly restorative response to crime must not only seek to prevent recidivism, but must also address all of these broader concerns.

It is at this point that the restorative justice story starts to become rather vague. For although restorative justice clearly rejects punishment for its own sake and rehabilitation in state-run prisons as appropriate responses to crime, it is not nearly so obvious what it would put in their place. For although its aims are much more ambitious than those of traditional criminal justice—not only to reform the offender and to denounce his wrong, but also to establish “right relation” among the parties and to address the underlying social problems that contribute to crime—it actually provides far less guidance to participants as to how to achieve these ends. Although many restorative justice advocates suggest that certain measures—such as an apology from the offender, some form of reparations to the victim, some expression of forgiveness to the offender and a gesture of support to both sides from community representatives—are usually helpful steps toward achieving these ends, they still firmly emphasize that procedures must be adapted to the particular circumstances. But surely more guidance is required. It is not enough just to remove the parties from the cold formalities of the courtroom to the cozy setting of a restorative encounter and to wait for miracles to happen.

Further, if restorative justice is to deal not only with the particular offence but also with its underlying causes, this means that the participants in a restorative encounter must be given the jurisdiction to deal with these issues. But what sort of jurisdiction should be granted to such a group to deal with broader social issues such as poverty, poor education, substance abuse, and so on? Braithwaite provides the following unhelpful response, apparently suggesting that the group should be able to define its jurisdiction as broadly as it sees fit: “One answer to the ‘what is to be restored?’ question is whatever dimensions of restoration matter to the victims, offenders, and communities affected
by the crime. Stakeholder deliberation determines what restoration means in a specific context."27

Finally, and perhaps most importantly, restorative justice proposes not only to provide greater participant satisfaction, but also to generate just results. If we are to allow criminal offenders, their victims and their communities to propose appropriate responses to crime without any significant procedural constraints or checks, we must have clear criteria by which to determine when a proposed response is unjust or exploitative. Otherwise, the process will be an invitation to the unscrupulous to take advantage of others. What criteria does restorative justice provide to help determine if a particular outcome is unjust or exploitative? Once again, Braithwaite provides no real answer:

There is no consensus within the social movement for restorative justice on what should count as unjust outcomes. Most advocates want it to be a more modest philosophy than to aspire to settle this question. Rather, restorative justice should settle for the procedural requirement that the parties talk until they feel that harmony has been restored on the basis of a discussion of all the injustices they see as relevant to the case.28

Restorative justice, then, does not really provide a substantive theory of justice at all, but a sort of anti-theory. Rather than setting out a new way of structuring the state apparatus of criminal justice, it suggests that we dismantle that apparatus and leave it largely up to the interested parties to deal with the aftermath of crime as they see fit. In order to leave the interested parties free to decide on the precise structure of their deliberations and the nature of their response to the crime, these matters should not be encumbered by any formal state-imposed rules and procedures. Nor should there be any externally-imposed limits on the sorts of resolutions that they might come up with in response to a particular crime. In place of such formal procedures and criteria for just outcomes, restorative justice puts forward only some “core values” that participants are urged to promote. These values, we are told, “are about healing rather than hurting, moral learning, community participation

28. Ibid. at 73.
and community caring, respectful dialogue, forgiveness, responsibility, apology, and making amends."\textsuperscript{29}

In recent years, restorative justice has been subject to criticism of two very different kinds. The first sort has been levelled most often by criminologists, criminal lawyers and others who are interested in the design of criminal justice institutions. They have pointed to the dearth of reliable empirical data to support the claim that restorative justice tends to reduce recidivism. One of the most common arguments in favour of restorative justice is simply that "it works." But in the absence of any robust empirical data concerning its effect on recidivism of participants and on aggregate crime levels more generally, however, this claim is not very convincing.\textsuperscript{30} They have also raised questions about its lack of procedural protections for victims and vulnerable community members in the criminal justice system.\textsuperscript{31} One of the reasons why we so carefully keep the offender away from his victim in traditional criminal justice proceedings is that we do not trust him to act properly. If restorative justice proposes to bring him face to face with his victims, it is essential that this be done according to clear guidelines that ensure that no further damage will be done. Finally, they have expressed nothing short of alarm at what they see as the casual way that many restorative justice programs seem to disregard long-cherished principles of fairness, impartiality and accountability in criminal justice.\textsuperscript{32}

Restorative justice proceedings often give a significant degree of decision-making power over the offender to victims and affected

\textsuperscript{29} Ibid. at 6.

\textsuperscript{30} Some point out that it is far from clear that restorative justice reduces aggregate crime rates. Although there is some (still shaky) evidence supporting the claim that it reduces recidivism, little attention has been paid so far to its effects on third parties. Are they encouraged to commit crimes because of what they see as more lenient sentences? See Andrew von Hirsch, Andrew Ashworth & Clifford Shearing, "Specifying Aims and Limits for Restorative Justice: A 'Making Amends' Model?" in von Hirsch \textit{et al.}, \textit{supra} note 6 at 29. Statistics Canada is about to undertake a large-scale study on this matter: Sara Johnson, \textit{Restorative Justice Programs and Services in Criminal Matters: Summary of Consultations} (Ottawa: Statistics Canada, 2003).

\textsuperscript{31} von Hirsch, Ashworth & Shearing, \textit{supra} note 30.

\textsuperscript{32} Once again, the most thoughtful and concise criticisms on this point come from von Hirsch, Ashworth & Shearing, \textit{ibid}. 

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community members, but these individuals are not publicly accountable nor are they anything close to impartial. Restorative justice focuses exclusively on crafting a response to the particular offence that will bring about "right relation," but this means that questions of horizontal fairness (ensuring that similar offences will attract similar responses) and proportionality in sentencing are largely ignored. These criticisms have begun to have an effect. In recent years, a number of restorative justice proponents have reluctantly admitted that "restorative justice can trample the rights of offenders and victims, dominate them, lack procedural protections, and give police, families, or welfare professionals too much unaccountable power." In recent years, much of the recent literature on restorative justice has moved away from the blind boosterism of the early years toward a more nuanced discussion of these institutional design issues.

Acorn's text presents a second sort of critique. Rather than addressing particular problems in the design of restorative justice institutions, she challenges the viability of the very notion of justice as "right relation" as proposed by restorative justice. It is not really a conception of justice at all, she suggests, but an expression of our unwillingness to confront the grim realities of life that are the subject matter of any genuine form of justice. For justice—be it distributive justice, corrective justice or retributive justice—is a way of regulating the relations between people when we cannot count on the parties' feelings of compassion, equality and mutual respect. Although the "first best" way to govern the relations between people is usually for them to act according to feelings of compassion, equality and mutual respect, this is not always practicable. Sometimes, whether it is because of the hard-heartedness of the other party, because of the difficult history of the relationship or simply because it is not worth the emotional effort required, we must give up our dreams of compassionate "right relation" with one and all, and have recourse to the "second best" solution of abstract justice. Acorn writes:

Right-relation, explicated in terms of respect, mutuality, reciprocity, and regard, can serve equally well as a conception of love, and perhaps much better as a conception of love

33. Braithwaite, Responsive Regulation, supra note 27 at 106.
than of justice.... It is in this distinctive move that the case for restorative justice becomes tied to the age-old human hope for the convergence of love and justice. The purpose of this book is to explore the nuances of that hope and to attempt to expose it as not only illusory, but also dangerous. (22)

At root, she contends, restorative justice is attractive largely because it allows us to deny one of the ugliest facts about the world: that some people are so hardened, some relationships have such an awful history and (perhaps worst of all) sometimes we have other, more important priorities, that it does not make any sense to try to pursue compassionate “right relation.” But rather than recognising the fact that some relationships—such as those between most criminal offenders and their victims—will never be filled with heartfelt mutual concern and respect and simply getting on with the unglamorous business of dispensing formal justice, restorative justice indulges our age-old fantasy that by freeing ourselves from institutional constraints and trying just a little harder to be compassionate, we can transform all of our relationships into “right relation.”

This sentimental indulgence becomes dangerous, Acorn contends, when it forms the basis of criminal justice policy. For restorative justice is not just a private delusion; it purports to be an account of criminal justice that counsels the most vulnerable members of society—victims of crime and their communities—to lower their guard and to deal directly with criminal offenders instead of passing this dangerous business over to the state. Restorative justice suggests to victims and their communities that their compassion and trust toward criminal offenders will be rewarded with genuine respect, contrition and reparations from offenders and the creation of harmonious relations within the community. This, Acorn suggests, is irresponsible, hypocritical and dangerous. The much more likely result of such an outpouring of compassion and trust by victims is that the restorative process will simply add insult to injury: victims will be duped, manipulated or outright rejected by the offenders to whom they reach out. But instead of looking out for the victims and their communities, she argues, advocates of restorative justice are more interested in protecting their own beautiful illusions about the ultimate goodness of criminal
offenders and the possibility of their redemption through love and compassion.

"Novelists," Acorn writes, "are perhaps the most important source for this work" (23). At first, the thought that a theory of criminal justice should be judged by its fit with our favourite novels seems suspect, but given the sort of attack that Acorn means to wage against restorative justice, it makes a good deal of sense. For she is not interested in refuting empirical claims about the effect of restorative justice on recidivism, nor is she primarily interested in conceptual arguments about the political legitimacy of its proposed institutions of criminal justice. She means to explore the many ways that restorative justice urges us to deceive ourselves, to create beautiful fantasies about the world while denying any inconvenient facts that might disturb that image. In short, her claim is that restorative justice is a form of what Milan Kundera would call "kitsch." It is an appeal to our desire to affirm the whole world without having to accept any of its faults—a desire that Kundera says is constantly encouraged by politicians and challenged by great novelists. He writes:

The feeling induced by kitsch must be a kind the multitudes can share. Kitsch may not, therefore, depend on an unusual situation; it must derive from the basic images people have engraved in their memories: the ungrateful daughter, the neglected father, children running on the grass, the motherland betrayed, first love. Kitsch causes two tears to flow in quick succession. The first tear says: How nice to see children running on the grass! The second tear says: How nice to be moved together with all mankind, by children running on the grass! It is the second tear that makes kitsch kitsch. The brotherhood of man on earth will be possible only on a base of kitsch.34

It is the novelist, who revels in the singular, the unusual and the ironic who is the enemy of these simple illusions. So how better to reveal the kitschiness of restorative justice rhetoric than to remind us of the honest and simple truths revealed by the stories of Dickens, Twain, Eliot, Austen and others?

Acorn uses critical self-reflection and close readings of some great works of literature to highlight three sorts of restorative justice kitsch

that track the three ways in which love and compassion are inappropriate to the dispensation of criminal justice. First is the claim by Christian advocates of restorative justice that victims and communities can and should extend universal love toward offenders. They suggest that just as Jesus Christ redeemed humanity by loving every person regardless of her faults, so too, we can redeem offenders by extending universal love to them. Second is the suggestion that the face-to-face encounter, truth-telling and emotional release involved in the restorative encounter can work a sort of “magic” that allows the parties to transcend their built-up animosities and frustrations and achieve “right relation” with one another. Finally, the third way that restorative justice succumbs to kitsch is in the suggestion made by a number of feminist writers that those who act on the basis of spontaneous love (particularly erotic love) and compassion are actually more likely to adjudicate justly than are the law’s impartial decision-makers applying abstract principles.

A great many restorative justice advocates appeal to Christian ideals of universal love. Quakers, Mennonites, Presbyterians, Anglicans and other religious groups have all been inspired by their faith to promote the idea of justice through universal love and forgiveness. For example, Zehr, the director of the Mennonite Central Committee and one of the most prolific advocates of restorative justice, writes: “Jesus urges us to love not just our own kind but also our enemies and to practice forgiveness.”

Internationally, Quaker activists such as Newell in England, Presbyterians such as Mackey in the United States, and Anglicans such as Archbishop Tutu of South Africa have all been influential in promoting the vision of universal love in restorative justice. In particular, many restorative justice advocates have pointed to Mohandas Gandhi and Martin Luther King as examples of people who used universal love toward their oppressors as a tool of political change.

37. Mackey, supra note 1.
38. Archbishop Desmond Tutu, supra note 1.
Acorn suggests that this Christian rhetoric of universal love toward one's oppressor is delusional. First, as she illustrates with a reading of Jane Austen's *Northanger Abbey*, it is impossible to manufacture genuine feelings of love simply by an act of will. We can, of course, pretend to love people we hardly know or whom we have reason to detest, but it is not in the nature of love that the genuine article can be manufactured so easily. But that is not all. For not only do we fail to achieve real love when extending it to one and all, we also work against the cause of progressive change. For if we love and make peace with tyrants without first struggling to end their tyranny, we only serve to entrench their power. Mohandas Gandhi and Martin Luther King, she suggests, were not taken in by the rhetoric of universal love. Rather, they made the astute political calculation that the rhetoric of universal love would be the most effective tool for political change in the particular conditions in which they found themselves. Had they been faced with a different enemy with fewer scruples than the British in India or the U.S. government in the southern states, it would have been foolish to use methods of non-violent protest—as the protestors in Tien an men Square so quickly and tragically found out. Love extended even to one's oppressor leads all too often to martyrdom rather than political change. Some may choose to martyr themselves for a cause but it is foolish and irresponsible, Acorn suggests, for restorative justice advocates to urge others to do so.

An equally important but perhaps even less plausible sort of kitsch proffered by advocates of restorative justice is to be found in their claims about the "magic" of the restorative encounter. She quotes Brunk:

[O]ffenders, victims, families, mediators, judges and lawyers who participate all speak of the 'magic' or 'deeply spiritual' aspects of the events which take place when offenders come to terms with the pain they have inflicted on victims or their families and express repentance, or when victims experience personal healing from offenders' acts of repentance, and from their own ability to forgive."

Brunk is not alone in giving serious attention to the claim that restorative encounters can indeed work miracles and bring about otherwise unimaginable resolutions to the differences between offenders, victims and their communities. Bianchi tells stories of hardened criminals who volunteer to take care of their victims and of murderers who volunteer to work in the third world to atone for their wrongs;40 Braithwaite recounts stories of drug-addicted robbers who change their ways as a result of a restorative justice conference;41 and Umbreit describes how a burglar and his victims might reconcile over a pasta dinner prepared by the burglar.42 These stories of miraculous transformation are so patently preposterous that it is hard to know what to make of them. Nevertheless, they seem to play a large part in restorative justice advocacy, so Acorn is right to spend the time she does pointing out their flaws.

The stories recounted by Bianchi, Braithwaite, Umbreit and others are painted in such broad brushstrokes that the reader is left without any sense of the details that might explain these apparently “miraculous” transformations. Acorn turns to novelists and their eye for the important details of life to show up the kitschiness of these apparent miracles. We like to think that the miracle of reconciliation is the end of the story but, as Acorn’s readings of her favourite novels reminds us, nothing is ever quite so simple. Mark Twain reminds us that we should pay attention not only to the way people say they have been changed by the restorative encounter, but also to the way that they act in the future. In The Adventures of Huckleberry Finn, he recounts the story of Huck’s father who, when caught stealing money from his son to buy alcohol, swears that he is a changed man who will never do it again. When he is found later that evening doing precisely the same thing, the common-sense judge recognises just how silly he had been to put trust in the father’s promise to mend his ways. Twain writes: “The judge he felt kind of sore. He said he reckoned a body could reform the old man with

40. Both stories are from CBC Radio, “Justice as Sanctuary” Ideas (27 October 1997).
42. Mark Umbreit, Handbook of Victim Offender Mediation (San Francisco: Jossy-Bass, 2001) at 89.
a shotgun, maybe, but he didn’t know no other way.”

Twain’s story of momentary redemption followed by a return to old ways is deeply funny because it plays on our heartfelt desire to believe in miracles. But it is a sharp weapon against all forms of kitsch because it disturbs our dewy-eyed trust in miraculous redemptions without replacing it with lazy cynicism that people can never change.

Finally, Acorn confronts the third sort of kitsch at work in restorative justice: its claim that spontaneous (erotic) love and compassion are the soundest foundations for just adjudication. In the chapter dealing with the relationship between eros and justice, the reader is tempted to ask why she bothered. This question is the most tangentially related to restorative justice (does anyone think that the parties to a restorative encounter are supposed to feel erotic love for one another?), and her treatment of it is the least satisfying. As Acorn readily admits, the authors whose work she criticises, such as Nussbaum and Heyward, are not advocates of restorative justice at all. Does it matter to Acorn’s larger point whether or not Nussbaum is correct in her interpretation of Smith’s Theory of Moral Sentiments? Heyward’s contention that “lovemaking is justice-making” might seem superficially more relevant, but the argument in favour of this proposition is hardly deserving of the care and attention Acorn gives to it. Surely nothing sensible can be said in response to such trivialities as the following:

Can sadomasochistic eroticism be a relational conduit through which we move toward mutuality . . . ? The answer is that it must be. Because we can reach each other and God only from where we are here and now."

Finally Acorn turns her attention from erotic love to compassion and its relation to justice. It is here that she brings her hitherto rather abstract arguments back down to earth and tries to catch restorative justice on the horns of a dilemma. For restorative justice promises to achieve great things—not only to rehabilitate the offender and denounce his wrong, but also to create right relations between the parties and to

deal with some of the underlying social causes of crime—simply by bringing interested parties together and freeing them from formal constraints on their deliberations, thereby allowing human compassion to work its magic. But what sort of compassion does restorative justice plan to rely on? If it is spontaneous compassion, Acorn suggests that will most likely lead to deeply unjust results. And if we mean to rely on a more cultivated, disciplined sort of compassion, we shall find that this is impossible, for “compassion resembles love: to demand it is a good way to kill it.”

Following Aristotle’s treatment of pity in the *Rhetoric*, Acorn argues that spontaneous compassion does not necessarily flow toward the most deserving. Rather, we tend to feel compassion in proportion to the depth of their suffering, what we take to be their moral blamelessness and their similarity to ourselves. Although we probably don’t need Aristotle to observe that people are more spontaneously inclined to feel sympathy for the victims of a dramatic *tsunami* than they are to the much less dramatic suffering of malaria and tuberculosis victims in Africa, or that white middle-class people are less likely to feel compassion for Arab immigrants caught up in the post-9/11 dragnet than they are for people more like themselves, Acorn’s observation is still astute: undisciplined compassion is not an appropriate guide for justice.

Acorn then turns her attention to a more refined and disciplined form of compassion—one that helps us to recognise the complex inner lives of others, that helps us to see beyond the hierarchies and small differences that drive us apart and that grants us the humility to recognise the shared humanity in everyone. This sort of compassion is certainly


46. On the way that public sympathy and giving rises and falls with dramatic television coverage of a disaster, see Ginger Thompson, Nazila Fathi & Stephanie Strom “Asia’s Deadly Waves: Earlier Disasters; For Honduras and Iran, World’s Aid Evaporated” *New York Times* (11 January 2005) at A1.

helpful when deciding questions that can change people’s lives.\textsuperscript{48} But there is no way that we can demand it of the participants in a restorative encounter. The participants in such an encounter are most likely going to be ordinary people who, if they feel compassion at all, will feel the sort of undisciplined compassion that leads us toward partiality and unfairness. The only way that such a sober and careful form of compassion might enter into the restorative deliberations is if we require it. But this, Acorn contends, brings us up against the core objection to restorative justice urged by this book: Compulsory compassion is an oxymoron. . . . Restorative justice, rather than relying on spontaneous compassion (which, as we have seen, has little relation to justice), relies on the possibility of inculcating in its participants a more morally elevated practice of compassion. But can institutions of justice demand compassion from the parties to a conflict? (137)

The epilogue to \textit{Compulsory Compassion} is a short but fervent exhortation to set aside our self-indulgent utopian dreams of restorative justice and their talk of universal love, magical encounters and compassionate adjudication. Instead, Acorn implores us, we should return to the familiar goals of criminal justice with renewed vigour, a clearer sense of purpose and (perhaps the most quixotic goal of all) better government funding. Instead of the false utopia of restorative justice, Acorn envisages an “alternative utopia” where

\textit{[p]risons are meaningfully rehabilitative as well as seriously punitive. They inflict suffering on offenders as a matter of justice, restrain the liberty of offenders as a matter of protection, and extend assistance to help offenders make better lives for themselves as a matter of common sense and humanity. (161)}

She also suggests that the state should pay closer attention to victims’ rights by explaining the workings of the system to them, giving them proper counselling and providing them with a forum in which to tell their story. She insists, however, that under no circumstances should we bring victims and offenders together to work things out themselves.

\textsuperscript{48} This is the sort of cultivated sympathy—the result of a long and thorough liberal education—that Martha Nussbaum extols as an essential ingredient to good adjudication in \textit{Poetic Justice: The Literary Imagination and Public Life} (Boston: Beacon Press, 1995).
It is at this point that I think Acorn’s argument fails. She makes a compelling case that the restorative justice ideal of “right relation” is largely the product of our unwillingness to accept some grim facts of life, and that it is the most vulnerable members of our society — viz., the victims of crime — who pay the price to maintain this illusion. But it would be a serious mistake to assume that all restorative justice programs should be closed simply because their theoretical foundations are flimsy. We can — and surely must — distinguish between the grandiose claims of restorative justice theorists and the practical realities of restorative justice programs as they now exist. If there is any sense to the rhetoric of restorative justice (and I believe there is), it does not lie in its claim to being an altogether new form of justice based on “right relation.” Rather, restorative justice makes an important contribution to criminal justice literature in two much humbler ways: first, as a reminder to heed the emotional needs of all participants in the criminal justice system; and second, as a plea for restraint in the use of the criminal sanction.

A number of writers have pointed out recently that restorative justice and traditional criminal justice are not nearly so starkly opposed to one another as one might assume from reading restorative justice theory. Indeed, there is now a slowly growing literature advocating piecemeal improvements to traditional criminal justice procedures by incorporating a variety of procedures that pay more attention to the victims and the suffering they have endured, that encourage offenders to reflect on the wrongs they have done and to apologise directly to their victims, and that allow judges to take some of this into account when sentencing the offender. Although Acorn is surely right to be skeptical that the parties will regularly be able to muster genuine and lasting feelings of compassion, apology and remorse within a restorative encounter, this is no reason to give up on the enterprise altogether. In

49. On the importance of this distinction, see Kathleen Daly, “Mind the Gap: Restorative Justice in Theory and Practice” in von Hirsch et al., supra note 6.
some cases, where the parties have expressed a strong desire to make peace with one another, they may be able to derive a good deal of satisfaction from the encounter. It would be perverse and highly paternalistic to prevent them from doing so.

Finally, in its weakest form, restorative justice is a simple plea for restraint in the use of the criminal sanction. Even if we have no confidence whatsoever in the magical powers of restorative encounters to effect any positive change, we might still be wise to heed its call to reduce the use of imprisonment as a response to criminal conduct. In an age when rates of incarceration have reached historic highs in many jurisdictions (particularly in the United States) but crime rates have not been noticeably affected, this is surely wise counsel.

52. Numbers in Canada have begun to fall recently, though the numbers in the United States and Britain have continued to rise. For Canadian statistics, see Correctional Services of Canada, “Speakers Binder,” online: Correctional Service Canada <http://www.csc-scc.gc.ca/text/pbclt/guideorateur/7_e.shtml>; for U.S. and U.K. numbers, see David Garland, *The Culture of Control* (Chicago: University of Chicago Press, 2001) (Appendix).

53. Indeed, given the enormous cost—and remarkably poor success record—of high incarceration rates in the United States, it is remarkable that there has not been greater interest in alternatives to prison. Some of the historical and cultural reasons for this peculiar trend are explored in James Q. Whitman, *Harsh Justice* (New York: Oxford University Press, 2003).
