In this final chapter, Constance Backhouse returns us full circle to the very questions posed by Jane Doe’s activism and the Garneau Sisters who followed her: what is a feminist response to sexual assault? As a historian, Constance looks back at harsh sentencing laws for convicted rapists, revealing how embedded they were and remain in racial fear of and hatred directed at Africans and African-Canadians. Looking forward, she argues that feminists should not support prisons and should continue to explore restorative justice options, advocating more, not less, delegation of self-governance to offenders, in contrast, perhaps, to the directions identified by Gillian Balfour and Janice Du Mont. Constance points to a 1974 Ontario decision that awarded compensation to the complainant as a criminal remedy as an example of how to ensure restitution for women. She urges us to divest from criminal law responses and instead invest in the creative possibilities for recognizing and reimagining the harm of rape that feminist artists and authors can offer.

“Imprisonment would be of no assistance to the accused.” The sentence leaped out at me as I waded through the 1,202 reported and unreported sexual assault judgments I had assembled for research I was doing into Canadian legal history. It was a statement from a judgment in the case of *Angione v R*, issued by the Hon Justice Edson Livingston Haines

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1 I am indebted to Carly Stringer and Sabina Mok for their research assistance. Financial support from the Social Sciences and Humanities Research Council of Canada, the Law Foundation of Ontario, the Trudeau Foundation, the Killam Trust, and the University of Ottawa is gratefully acknowledged. A preliminary version of this paper was presented at the conference on “Sexual Assault Law, Practice and Activism in a Post-Jane Doe Era” held at the University of Ottawa on 6 May 2009. I have benefited greatly from the input of the audience at that conference. I also want to thank Diana Majury and Marilyn Poitras for sharing their ideas with me.

2 For a fuller description of the larger research project that culminated in a book, see Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada, 1900–1975* (Toronto: Irwin Law, 2008).
and delivered in a courthouse in Windsor, Ontario, in 1974. It was pronounced in an era when feminists, including myself, were likely to be demanding more and longer prison sentences for rapists. However, by the first decade of the twenty-first century, I had learned some harrowing things about how our prisons operate and the irreparable damage they can reap. By the time I first came across Haines’s judgment in 2004, I had developed a growing respect for those who identify themselves as “prison abolitionists.” Haines’s earlier comment struck me as surprisingly prescient, and far and away ahead of most feminist sentiment of the time. It made me want to learn more about the case.

The woman involved (whose understandable desire for anonymity will leave me to refer to her as the “complainant”) was a twenty-three-year-old immigrant, who had come to Canada with her husband five years earlier from Eastern Europe. She worked as a hairdresser for Francesco Angione, a forty-year-old Italian-Canadian, who had opened a beauty salon in Windsor nine years earlier. Angione began to make unwelcome sexual overtures to the complainant on New Year’s Eve 1972, and his behaviour escalated that spring until, on 4 June 1973, he forced himself on his employee as they were closing up the salon at the end of the day. He locked the front door and grabbed her by the waist. At the preliminary inquiry, speaking English with some difficulty, the complainant testified: “He told me to make sex with him, I said no, because I’m married, I don’t want.” She fought back, and in the struggle both were bruised, scratched, and bloodied. Angione was unable to perpetrate full intercourse, and ejaculated on the complainant’s leg. She fled for home, and filed charges of attempted rape at the police station the next morning.

The matter never came to trial. The result can be laid, in part, at the feet of Angione’s lawyer Frank Montello, an Italian-Canadian known as “the Dean of Windsor’s criminal defence bar.” He counselled his client against trial as soon as he discovered that the case had been scheduled before Haines, a judge renowned for his notorious anti-offender sentiments. Montello advised Angione to plead guilty to the lesser offence of “indecent assault.” In fact, he told his client, “You didn’t win the lottery, you got the worst judge to try you … a reasonable doubt never factors

3  R v Angione (1976), 26 CCC (2d) 474 (Ont H Ct); R v Angione, Archives of Ontario, RG22-1890, May-Sept 1974.

4  For a detailed description of the decision, see Backhouse, supra note 2 at Chapter 10. The facts and quotations that follow are all drawn from the sources listed above.
into his decisions.” He cautioned Angione that if he went to trial before Haines, Angione “would do penitentiary time.”

As part of a plea bargain arrangement, Montello convinced his client to offer to make restitution instead of jail. Other judges might have balked at the idea, but Judge Haines was reputed to be a “maverick.” A Hamilton-born judge with working-class German and Scottish roots, Haines was also an “innovator” who loved to settle cases. He accepted the plea bargain deal and ordered Angione to forfeit $1,000 in cash, payable to the complainant. Judge Haines then wrote a decision in which he asserted that the criminal law could play an important new role in the “indemnification of the victim as an alternative to imprisonment.”

Legislation had been on the books since 1921 authorizing courts to order a convicted offender to make “restitution” to any person “injured” by the offence for the “actual damage or loss” they had suffered. Haines took this a step further and claimed that criminal courts could also quantify damages for “pain and suffering.” He noted that a restitution order made compensation of the victim part of the process of rehabilitation, and was much more useful than a fine to the government treasury. Haines’s novel efforts were short-lived. Before the decade was out, courts in Ontario, Manitoba, and Alberta all ruled that criminal courts had no authority to make financial awards to victims for pain and suffering. Other judges refused to follow the lead of the maverick judge, and the innovation was consigned to a mere blip on the radar.

Reading this unusual decision decades later, one could admittedly identify cautionary flags. Judge Haines noted that Angione could pay this sum because he was a businessman of “modest means” unlike many criminals who were usually “without funds.” He also noted that he was reluctant to order a prison sentence because it would ruin Angione’s “one-man business.” Both class and male privilege were at work here. A lighter penalty was bestowed on a man of financial means, who could claim a respectable family background and steady skilled employment. There was no indication that the principle of restitution was one that should be applied beyond this limited group. Yet despite that, Haines’s

5 Angione, supra note 3.
6 SC 1921, c 25, s 19. For more details, see Backhouse, Carnal Crimes at 278–79, 424.
7 Angione, supra note 3.
8 For details, see Backhouse, supra note 2 at 282, 424–25.
9 Angione, supra note 3.
decision stood in stark contrast to the advocacy that I, and many other feminists, were invoking in the 1970s and 1980s, demanding more jail penalties for rapists. Judge Haines's decision to opt for restitution was a step in an interesting new direction.

As I pondered the creativity of a lone male trial judge in Windsor in the mid-1970s, I began to ask myself whether I and other feminists had yet caught up. I queried whether we had taken up the task of properly interrogating the penalties attached to sexual assault, of searching for better, more effective, alternatives. As we struggle to eliminate sexual assault, one of the matters we most often neglect is the remedy. All of our efforts to bring more cases into the justice system, to eradicate the sexist underbelly and misogynist trappings of our laws as we process these cases, and to hold more rapists accountable in law, are only valuable insofar as we come up with a feminist remedy. Which takes us to the all-important question: what is a feminist remedy for sexual assault?

This preliminary paper poses more questions than answers, and represents only one feminist’s sense of a starting-off point. The debate needs to be engaged much more fully throughout our diverse feminist constituencies before we come close to identifying solid answers. This article is a cri de coeur to urge us all to grapple with an issue that I believe we continue to ignore at our peril.

CRIMINAL PENALTIES: AN HISTORICAL REVIEW
It may be useful to begin with a brief summary of the long-term historical framework of criminal sentences for sexual assault. It is worth remembering that the first criminal penalty attached to rape in Canada was capital punishment — death. Despite its draconian nature, it was rarely exacted. I have not been able to determine when the last execution for rape took place in Canada, but it appears at least that no one was executed after the 1841 union of Upper and Lower Canada. In 1873, Parliament added imprisonment from seven years to life as an

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10 For a more detailed analysis of the sentences prior to 1975, see Backhouse, supra note 2 at 278–82, 424–35.
11 See, for example, An Act for Consolidating and Amending the Statutes in this Province Relative to Offences Against the Person, 4 & 5 Vict. (1841), c 27 (Province of Canada): “Every person convicted of the crime of rape shall suffer death as a felon.”
12 Macdonald Papers, National Archives of Canada, MG 26A, Letterbook 11, no 854, 8 June 1868 letter from John A Macdonald to William Johnston Ritchie, Chief Justice, Nova Scotia. All convicted rapists were offered royal clemency to commute their sentences.
alternate penalty, but refused to remove the capital penalty from the statute books. The thinking that lay behind this was deeply racist. Canada's first Prime Minister, Sir John A Macdonald explained, “We have thought it well … to continue [the death penalty for rape] on account of the frequency of rape committed by negroes of whom we have too many in Upper Canada. They are very prone to felonious assaults on white women: if the sentence and imprisonment were not very severe there would be a great dread of the people taking the law into their own hands.”

The two options — capital punishment and a maximum of life imprisonment — found their way into Canada's first Criminal Code in 1892. Preliminary research suggests that during the twentieth century neither penalty was popular in practice. No one was hanged, and life terms were imposed exceedingly rarely. Most judges tended to order terms of five to ten years' imprisonment, although occasionally they dispensed terms as high as twenty-five years, and as low as eighteen months.

The absence of capital sentences in practice provoked no discernible push for a legislative repeal of the death penalty. Instead, Parliament moved to compensate for a perceived lenience on the bench by adding the penalty of whipping. Corporal punishment, specifically whipping, had been available for male offenders convicted of sexual crimes such as incest, gross indecency, indecent assault on a female, indecent assault on a male, and carnal knowledge of a girl under fourteen, since the cre-

13 An Act to Amend the Act Respecting Offences Against the Person, 38 & 39 Vict. (1873), c 94 (Dominion of Canada).
14 Macdonald Papers, 8 June 1868.
15 Criminal Code, 1892, SC 1892, c 29, s 267: “Every one who commits rape is guilty of an indictable offence and liable to suffer death, or imprisonment for life.” Attempts were punishable by a maximum of seven years' imprisonment under s 268. See also RSC 1906, c 146, ss 299 and 300.
16 For a more detailed discussion of the research findings drawn from a research sample of 1,202 reported and archival sexual assault cases from across Canada for the years 1900 to 1975, see Backhouse, supra note 2 at 6–8, 281, 425–28.
17 In R v DeYoung, Liddiard and Darling (1927), 60 OLR 155 (CA), the court noted that the death penalty was no longer imposed “in practice.” For a rare example of a trial judge pronouncing the death sentence in a rape case, see R v McCathern (1927), 60 OLR 334 (CA); the appellate court reduced the sentence to twenty years and twenty lashes. For details on some of the unusual cases where life imprisonment was ordered, see Backhouse, supra note 2 at 426.
18 For examples, see Backhouse, ibid at 426–28.
ation of the first *Criminal Code*.\(^{19}\) Rape had apparently been excluded in deference to its already severe capital penalty. In 1921, the decision was taken to add whipping as a new penalty for the crime of rape in recognition that courts never, in practice, imposed capital punishment.\(^{20}\)

Unlike capital punishment, which was not enforced, and life imprisonment, which was rarely enforced, whipping was imposed. The *Criminal Code* stipulated that whipping was to be administered with a “cat o’ nine tails” in the number of lashes stipulated by the sentencing judge.\(^{21}\) Judges ordered as few as five, and as many as thirty, lashes along with imprisonment, in some cases.\(^{22}\) However, the propriety of corporal punishment was hotly contested, and such penalties became much rarer over time.\(^{23}\) A Joint Committee of the Senate and the House of Commons on Capital and Corporal Punishment and Lotteries noted in 1956 that the courts rarely ordered whipping anymore, and recommended its complete abolition.\(^{24}\) Parliament did not heed the call.

Other major changes, however, swept in at the mid-century mark. A harsh new approach to sentencing rapists was introduced in 1948. That year Parliament provided that individuals convicted of specific sexual offences, who were also found to be “criminal sexual psychopaths,” could be sentenced to *indeterminate* periods in a penitentiary.\(^{25}\) The sentence had to be based upon psychiatric evidence that the offender’s “course of misconduct in sexual matters” indicated “a lack of power to control his sexual impulses,” and that he was “likely to attack or other-

\(^{19}\) *Criminal Code*, 1892, SC 1892, c 29, s 957. See also RSC 1906, c 146, s 1060. Gross indecency was removed from the list by SC 1953–54, c 51, and incest by SC 1972, c 13, s 10.

\(^{20}\) An Act to Amend the Criminal Code, SC 1921, c 25, s 4 amended s 299 to read: “Every one who commits rape is guilty of an indictable offence and liable to suffer death or to imprisonment for life and to be whipped.” See also An Act to Amend the Criminal Code, SC 1920, c 43, s 7, applying whipping to the offence of attempted rape. These penalties were continued in RSC 1927, c 36, s 1060; SC 1938, c 44, s 52.

\(^{21}\) SC 1900, c 46, s 957 provided that a “cat o’ nine tails” should be used unless some other instrument was specified in the sentence.

\(^{22}\) For a more detailed discussion of the cases where whipping was ordered, see Backhouse, supra note 2 at 281, 428–29.

\(^{23}\) Ibid.

\(^{24}\) Senate Debates, 27 June 1956 at 873.

\(^{25}\) *Criminal Code*, SC 1948, c 39, s 43, amending s 1054A. The accused first had to be convicted of indecent assault on a female, indecent assault on a male, rape, attempted rape, carnal knowledge of a girl under fourteen or between fourteen and sixteen, or attempted carnal knowledge of a girl under fourteen. See also SC 1953–54, c 51, ss 659, 661–67, which added buggery, bestiality, and gross indecency to the list of offences. See also SC 1959, c 41, s 30.
wise inflict injury, loss, pain or other evil” on others.26 In subsequent
tears, the term was changed to “dangerous sexual offender” and then
to “dangerous offender.” Reflecting the contentiousness of the concept,
the criteria for designation also went through a series of tortured al-
terations.27 The shocking thing was that the federal government never
offered treatment programs for dangerous sexual offenders until 1971,
and thereafter the treatment that was provided was largely ineffective
and inhumane.28

Another major change occurred in 1954 when, as part of a sweep-
ing general overhaul of the Criminal Code, Parliament finally repealed
the death penalty for rape.29 “The twin remaining penalties of maximum
life imprisonment and whipping remained in force until 1982, when
they too fell victim to the waves of rape law revision inspired by fem-
inist demands for reform.30 That year, Parliament eliminated the term
“rape,” and restructured a range of sexual crimes into a “three-tiered”
offence of “sexual assault.”31 Whipping was abolished, and significantly

26 The psychiatric evidence had to come from at least two psychiatrists, one of them
ominated by the minister of justice. The minister had to review the case every three
tears to determine if altered conditions warranted release.
27 SC 1960–61, c 43, ss 32–40 expanded the definition of “dangerous sexual offender”
to “a person who, by his conduct in any sexual matter, has shown a failure to control
his sexual impulses, and who is likely to cause injury, pain or other evil to any per-
son, through failure in the future to control his sexual impulses or is likely to com-
m art a further sexual offence.” It required annual detention reviews by the minister of
justice, SC 1968–69, c 38, ss 76–80 changed the definition of “dangerous sexual of-
fender” to remove the phrase “or is likely to commit a further sexual offence.” See also
RSC 1970, c C-34, ss 687, 689–95. The name was changed to “dangerous offender” in
28 See Elise Chenier, “The Criminal Sexual Psychopath in Canada: Sex, Psychiatry and
the Law at Mid-Century” (2003) 20 Can Bulletin Med Hist 75; Elise Chenier, “Strang-
er in Our Midst: Male Sexual ‘Deviancy’ in Postwar Ontario” (PhD Thesis, Queen’s
University, 2001); now published as Strangers in Our Midst: Sexual Deviancy in Post-
war Ontario (Toronto: University of Toronto Press, 2008); Backhouse, supra note 2 at
430, 432–34.
29 Criminal Code, SC 1953–54, c 51, s 136: “Every one who commits rape is guilty of an
indictable offence and is liable to imprisonment for life and to be whipped.” Attempt-
ed rape saw an increase in the maximum penalty to ten years’ imprisonment, with
whipping: s 137.
30 RSC 1970, c C-34, ss 144, 145 continued the penalties found in the 1954 Code. The
next rounds of legislative revision to rape law, commencing in 1975, and continuing
through 1982, 1987, 1992, and 1997 were responsive to feminist lobbying that demand-
ed the removal of some of the sexist elements in the law. For further details, see Back-
house, supra note 2 at 294–97.
31 An Act to Amend the Criminal Code in Relation to Sexual Offences and Other Offences
Against the Person, SC 1980–81–82, c 125, s 19.
lower penalties were established for forms of sexual assault deemed less serious. The remaining historical penalty — maximum life imprisonment — was retained only for the top tier of “aggravated sexual assault,” which was defined as sexual assault in which the offender wounded, maimed, disfigured, or endangered the life of the complainant. The mid-level tier, which encompassed sexual assaults with a weapon, threats to a third party, multiple assailants, or causing bodily harm, was allocated a maximum penalty of fourteen years. The lowest tier of sexual assault drew a maximum penalty of five years.

Feminists have rarely taken a consistent position in the debates about the evolving criminal penalties for sexual assault. In the early twentieth century, the National Council of Women of Canada both refused to endorse, and then advocated, castration of some sex offenders, at the same time that it opposed whipping as a debasement of both the rapist and the jailer. The Royal Commission on the Status of Women critiqued whipping in 1970 as “cruel and degrading.” Some feminists argued — successfully — that judges should be imposing higher sentences for sexual assault because harsher penalties might more fully signify society’s repugnance for rape. Others have argued — also successfully, ironically — that the maximum prison terms should be reduced in the Criminal Code because lower penalties might result in an

32 Ibid at s 246.3.
33 Ibid at s 246.2. This tier included sexual assaults where the offender (a) carries, uses, or threatens to use a weapon or an imitation thereof; (b) threatens to cause bodily harm to a person other than the complainant; (c) causes bodily harm to the complainant; or (d) is a party to the offence with any other person.
34 Ibid at s 246.1. This tier was undefined, and included all forms of sexual assault not described in the middle and top tier offences.
37 Much of the anti-rape activism of the second-wave Canadian women’s movement still remains undocumented, but I was one of a number of feminists who personally advocated more and lengthier prison sentences, in my public lectures to women’s organizations and clubs, media interviews, and in high school, college, and university classrooms. See also Dianne Kinnon, Report on Sexual Assault in Canada (Ottawa: Canadian Advisory Council on the Status of Women, 1981), who argued that “sentencing often does not reflect the seriousness of the crime” (at 34), and recommended that “penalties must be brought in line” (at 79).
increase in convictions.\textsuperscript{38} A very few dissenting feminists have argued for reduced penalties in their own right, rather than as an instrumental tool to put more men behind bars.\textsuperscript{39} At the Jane Doe conference, some speakers (including Madam Justice Claire L'Heureux-Dubé) critiqued courts of appeal for reducing prison sentences for rapists, while others (including Jane Doe) described themselves as prison-abolitionists. What is largely missing from these conflicting positions is an attempt to identify a remedy that we could confidently classify as feminist.

**A FEMINIST REMEDY FOR SEXUAL ASSAULT: WHAT WOULD IT LOOK LIKE?**

As we struggle with this complicated question, it may be less difficult at the outset to consider what a feminist remedy is not. With the greatest of respect to those who continue to believe that long prison sentences are useful, I would like to pose some cautionary questions. Have we considered the dangers of locking up large numbers of violent sex offenders in institutions that are steeped in cultures of masculinist excess? In prisons that are dehumanizing, racist, homophobic, and inherently violent themselves? If prisons disproportionately house the poor, the mentally ill, and members of racially subordinated communities, can we in good conscience continue to accept such institutions as part of a feminist strategy to eliminate rape? Shouldn’t we insist that a feminist penalty must not have a disparate impact on the basis of race, ethnicity, class, disability, or sexual identity?

At the time the *Angione* case was decided, it was already quite clear that prisons neither deterred would-be criminals nor rehabilitated convicted offenders.\textsuperscript{40} Criminologists then and now have insisted that there is no demonstrable connection between harsh prison penalties

\textsuperscript{38} Lorenne MG Clark & Debra J Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women’s Press, 1977), attempted to redefine rape as a crime of violence against women, rather than sexuality, and to argue for a range of penalties with some less severe options as a way of inclining more judges and jurors to convict.

\textsuperscript{39} See, for example, a public lecture by Christine Boyle, "Women and Criminal Law Reform" delivered in October of 1987 at the University of Western Ontario, critiquing feminists’ failure to scrutinize the inhumanity of prisons. See also the race-based critique of Dianne L Martin, "Casualties of the Criminal Justice System: Women and Justice under the War on Drugs" (1993) 6 CJWL 305; Dianne L Martin, "Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies" (1998) 36 Osgoode Hall LJ 151. See also Laureen Snider, "The Potential of the Criminal Justice System to Promote Feminist Concerns" (1990) 10 Stud L Pol’y & Soc 143; "Feminism, Punishment, and the Potential for Empowerment" (1994) 9 Can J L & Soc 75.

\textsuperscript{40} For more details on the literature and the jurisprudence recognizing this, see Backhouse, *supra note* 2 at 281–82, 433–34.
and deterrence.\textsuperscript{41} Instead, prisons are breeding grounds for cruelty, hatred, disease, self-mutilation, and suicide. Prisons are institutions that are filled with fear, illness, and caustic brutality themselves.\textsuperscript{42} If prisons are designed to make our society safer, they fail abysmally since they turn out offenders who are more dysfunctional, more prone to criminal activity, than before. Furthermore, do we know what is being administered to sex offenders in the way of therapy and counselling? Have we interrogated the so-called “treatment” provided to rapists in prison, to ask if it dismantles coercive male sexuality in ways that are respectful of feminist ideals?

Prisoners testifying in Canadian courts have offered terrifying documentation about the grim consequences of solitary confinement — the torture that it inflicts upon the human mind and spirit, and the appalling insanity and psychopathic rage that can result. Buried in small concrete vaults, beaten and tear-gassed by guards, segregated prisoners experience hallucinations and psychotic disorders that provoke unrelenting loathing and hatred.\textsuperscript{43} Yet we know that rapists often serve long stretches of solitary confinement because the guards cannot guarantee their safety within prisons that are, to all practical purposes, ungovernable.

We have known ever since Susan Brownmiller published \textit{Against Our Will: Men, Women and Rape}, that sexual assault runs rampant in prison. Inmates consistently target rapists, youth, and individuals perceived as “feminine” or “homosexual” for brutal sexual abuse.\textsuperscript{44} How can it be a feminist remedy to consign rapists to institutions where they are at grave risk of rape themselves? If we are against rape, we are against all rape. If we are against violence, can we advocate sending offenders to prisons that are steeped in brutality, where lawlessness

\textsuperscript{41} For reference to the expert testimony of Dr Anthony Doob, one of Canada’s leading criminologists, on the inefficacy of prison sentences, see \textit{Regina v Hamilton} (2003), 172 CCC (3d) 114 (Ont Sup Ct).

\textsuperscript{42} See, for example, Angela Y Davis, \textit{Are Prisons Obsolete?} (New York: Seven Stories Press, 2003).

\textsuperscript{43} See, for example, the vivid testimony given by Jack McCann and fellow inmates at the trial of \textit{McCann et al v R} (1975), 29 CCC (2d) 337, 68 DLR (3d) 661 (Fed Ct (TD)), where the penal conditions surrounding solitary confinement were found to constitute “cruel and unusual punishment” under the \textit{Canadian Bill of Rights}. For more details, see Michael Jackson, \textit{Prisoners of Isolation} (Toronto: University of Toronto Press, 1983) at 42–80. See also Claire Culhane, \textit{No Longer Barred from Prison: Social Injustice in Canada} (Montreal: Black Rose Books, 1991).

\textsuperscript{44} Susan Brownmiller, \textit{Against Our Will: Men, Women and Rape} (New York: Bantam, 1975) at 285–97.
Justice Haines concluded in Angione that “Imprisonment would be of no benefit to the accused.” As feminists, we need to reflect on the accuracy of that diagnosis. Indeed, we need to ask ourselves whether imprisonment of rapists “would be of no benefit” to the rest of us too.

I suspect that, at its core, much of our historic commitment to prisons has been based on what penologists describe as the principle of “retribution” or “vengeance.” This is what we hear endlessly from media interviews with family and friends of victims of crime, who criticize what they perceive to be lenient prison sentences. “An eye for an eye,” and so forth. The legitimacy of vengeance is rarely contested, but should feminists be so confident of its value? It may have historic origins that run centuries deep, but is it truly an “innate” and “immutable” need? Can we imagine a world in which feminists critique the social construction of this emotion called “vengeance”? Is vengeance something feminists should work to reduce? Conversely, are “compassion” and “hope” human feelings feminists should prefer? Do victims’ rights and offenders’ needs always have to be lined up on opposite sides?

Another long-standing principle of penology has been labelled “denunciation” — in this case, a desire to have society recognize sexual assault as a heinous crime, and to create a sentence that publicly marks the full harm done. This seems less contestable as a fundamental feature of what we might come to identify as a feminist remedy. It is important to signal symbolically that sexual assault is grievously wrong, and has enormous consequences. More complicated is the question of how we can best communicate our collective denunciation of sexual assault. Is it possible to separate denunciation and retribution? Can we accomplish the legitimate goal of denunciation while not inflicting disproportionate harm in the process of symbolic public shaming? What, apart from long prison sentences, might feminists imagine instead? What if we were to take some of the money now used for building and maintaining segregation prison cells, and use it to retain the services of talented feminist artists and writers? Could their concerted efforts produce a more fulsome and effective public commemoration of the harm 45 For a discussion of the absence of due process and rule of law within prisons, see Debra Parkes, “A Prisoners’ Charter? Reflections on Prisoner Litigation under the Canadian Charter of Rights and Freedoms” (2007) 40 UBC L Rev 629; Debra Parkes, “Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws” (2004) 13 Temp Political & Civil Rights L Rev 71.
of sexual assault?

Is “restitution,” like denunciation, another principle that feminists can support? Those who have been sexual assaulted often have physical and psychological injuries and costs that should not fall on their shoulders. The legal system has traditionally forced wrong-doers to pay those they harm an award of quantified pecuniary damages. Many of us agree that sexual assault perpetrators should pay for their crimes. We have rightly critiqued the civil justice system for the sexist thinking that diminishes the calculation of damages owed to female (and male) survivors of sexual assault. However, we also need to ask whether compensatory remedies must always be paid by the perpetrator of the crime individually. If so, there are inherent class biases built into this remedy, for only those who are assaulted by offenders with assets can obtain compensation. Is it preferable to have those who have suffered injury from sexual assault be compensated by the wider society?

Criminal injuries compensation boards have been set up in most provinces in recognition that victims of crime should be aided financially from public revenues. These systems are deeply flawed in design and execution, but the concept itself may hold great promise. Feminists should ask ourselves whether we might profitably focus increased energy toward substantial improvement in this direction. We should also look more closely at some of the “alternate dispute resolution” (ADR) processes that have been created to compensate victims of institutional sexual abuse. Is there a way to restructure future ADR processes so that they become explicitly feminist?46 What would that mean? How might we construct feminist applications for redress, create feminist rules of evidence and procedure, select feminist adjudicators, and develop feminist forms of ADR decision making?

Female victims of sexual crime often complain that money is not an appropriate tool, and that the commercialization of this harm can be deeply insulting. Still others insist that money is the coin of the realm, that it offers the fullest recognition one can have of the harm based on our society’s most deeply held principles. Is money a feminist remedy, or an insult to feminist thinking? Are there other ways of achieving “restitution” that are not monetary? Survivors of sexual assault contin-

ue to suffer untold pain from the stigma that so unfairly results in self-blame and societal condemnation. Are there restitution projects that would help to eradicate this undeserved stigma?

And what can we learn from those who have begun to experiment with “restorative justice” alternatives to the current criminal system? Influenced by Aboriginal perspectives in part, these programs have occasionally offered useful options, and have other times been critiqued by feminists for their inability to surmount male sexual privilege. Is this a promising direction? Could we imagine restorative justice remedies in which offenders were required to take responsibility for setting the terms of their own penalties, rather than having all the terms imposed by external agencies? Recognizing that we must guard against manipulation and shamming that often can mar offender participation, can we explore options that would encourage perpetrators to take more responsibility for the harms they have caused?

Penalties are assessed case by case under our current legal system, and imposed individual by individual on people who are scrutinized by lawyers, court officials, and judges seeking to measure criminal responsibility. Yet rarely do we inquire fully into the life experiences that bring offenders to these deplorable situations. We know full well from the backgrounds of criminalized women that agonizing histories of abuse precede most of their acts. Is it so different for male offenders? If we find out that it is not, can feminists fairly ignore the emotional, physical, and sexual violence during childhood and adolescence that goes into creating the men who commit sexual assault? We speak of the offender’s debt to the sexually assaulted woman and to society at large, but shouldn't we also make the penalty reflect society's debt to the criminal? And if sexual assault originates within a deeply rooted culture of misogyny, can individualized penalties ever hope to address systemic problems? How can we develop a penalty that goes to the root of the act, attacking the causes of sexual assault rather than the symptoms? Can we conceive of a penalty that will contribute to a reduction in misogyny and sexism, one that will also avoid any reinforcement of masculinist cultures and behaviours?

Why have feminists for so long failed to interrogate the issue of remedies for sexual assault deeply? Have we been overwhelmed with the efforts of trying to address the needs of women and children who have been sexually abused, an immense and compelling project saddled with too few resources and too little societal support? Have we not had the stomach to turn to offenders and ask what feminists should do with them? Have we simply been bewildered as to how to construct femin-
ist answers to this difficult question? We need to consider what barriers impede us in this task, and how we can dismantle them. It is not acceptable to say — this can wait. We have waited too long already.

I am conscious that I have demanded much, while offering little in the way of clear-cut direction. So I would like to close with an imaginary tale.

_In the year 2010, in celebration of the “50th anniversary” of the second wave feminist movements in Canada and Quebec, the newly elected government of the Feminist Party of Canada chose to release immediately from prison all of the inmates who could be designated as non-violent. The millions of dollars freed up from the budget for corrections — over $110,000 per inmate released per year — were turned over to the newly established “Feminist Action-Research Institute [FARI].”

Jane Doe, the first president if the FARI, appointed a shockingly diverse cast of characters to serve as a board of directors, and opened store-front offices stretching across Canada, from urban centres like Vancouver, Montreal, and St. John’s, to smaller, rural communities like Lumsden, Leamington, and Pincher Creek.

FARI hired hundreds of grass-roots activists and counsellors from the anti-violence-against-women movement, and paired them with feminists from a cross-section of disciplines: sociologists, criminologists, psychologists, psychiatrists, social workers, physicians, lawyers, and historians. Some observers expressed amazement that so many feminists had infiltrated these traditionally male-stream fields. Feminists just smiled. Feminist artists, authors, playwrights, film-makers, dancers, and musicians were added to the group to ensure that no one would think that FARI intended business as usual.

The FARI mission? To eliminate sexual assault from the culture, to provide redress to survivors, and to find treatments that would fully rehabilitate

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47 Canadian feminists selected 2010 to celebrate the “50th birthday” for second-wave feminism because historians trace the origins of this wave to 1960, with the founding of the Voice of Women in both Anglophone and Francophone Canadian communities. Building upon this, the decade of the 1960s witnessed the appointment of the Royal Commission on the Status of Women, the establishment of the Fédération des Femmes du Québec, and the Association féminine d’ éducation et action sociale, and the creation of a large number of “women’s liberation” groups across the country. (The second wave is described as “second” because there was a “first wave” that ran from the late nineteenth to the early twentieth century.)

Inspired by the freshness of the task, bolstered by full funding for the first time in their lives, and energized by the collective decision to put aside old schisms within the movement, the feminists seized upon the ambitious mandate with glee. Interviewed by a feminist journalist from the National Feminist Post, who inquired why more of the staff were not daunted by the scope of the project, Jane Doe scoffed: “How could we fail? Look around you. Can feminists possibly do worse?”