

Punishing Rape

Feminisms and the Carceral Conversation

In May 2011, UK Minister of Justice Kenneth Clarke appeared on popular British current affairs radio program *Victoria Derbyshire*.¹ A long-standing and widely respected Conservative MP and former criminal barrister, he was there to discuss his plan to cut the prison population by halving the sentences of all people who pleaded guilty early (already, people received a “sentencing discount” of up to a third for an early guilty plea, and this plan would have increased the discount). The prison population had almost doubled in the previous twenty years (Ministry of Justice 2013), and Clarke saw cutting it as the first step of a reforming agenda which would facilitate a “rehabilitation revolution,” and also lead to cost savings at a time of widespread financial austerity.² By appearing on Derbyshire’s show, Clarke hoped to sell his policy as one which both served the interests of victims, who would not need to testify at trials, and the taxpayer, who would not need to pay for them. Derbyshire, however, had other ideas. She opened the segment by asking whether it was appropriate that this policy be applied to those convicted of serious sex offenses: “Many people believe you should make an exception for rapists. Why aren’t you?” She said that under these proposals, someone convicted of rape could serve just over a year in prison; such a short sentence would not just be an “insult” to victims, she argued, it would actively disincentivize them from reporting the crime. Clarke contested both the figure Derbyshire reached and the implications she drew from it, but listeners to the program seemed to agree with her. After pausing the interview for a brief break, Derbyshire returned and told Clarke that a number of people had phoned in to say that the proposal showed that the government cared more about “saving money than justice for victims.”

In his attempt to argue that sentences were not as light as Derbyshire implied, Clarke suggested that not all rapes were equally “serious,” a claim which Derbyshire contested:

DERBYSHIRE: If I had been raped, why would I be encouraged to go to the police when I know full well that the rapist could get just over a year in jail? Why would I put myself through the trauma, the examinations, the hell of it, when he might be out in fifteen months?

CLARKE: Well, I must stop you repeating this total nonsense . . . Assuming you and I are talking about rape in the ordinary conversational sense. Some man has forcefully, with a bit of violence—

DERBYSHIRE: Rape is rape, with respect.

CLARKE: No, it's not, and if an eighteen-year-old has sex with a fifteen-year-old and she's perfectly willing, that is rape. That's 'cause she's underage, can't consent. Anybody has sex with a fifteen-year-old, it's rape. So what you and I are talking about, we're talking about a man forcibly having sex with a woman and she doesn't want to. That is rape. Serious crime, of course it's a serious crime. And I'm very glad that people do now go to the police and report it. There used to be a taboo against it, in a crazy way.

Like much of the popular discourse around sexual violence, the conversation centered on a disputed definition and highlighted the many different meanings and functions which the word *rape* has in contemporary discourse. It is a term with a legal sense, as Clarke recognized, one which categorizes multiple different sorts of incidents.³ It also means something “in the ordinary conversational sense,” raising the question of who is participating in this conversation and under what conditions. Most importantly, the word serves as a marker of moral seriousness. To name an act as “rape” is, in most cases, to denounce it. It is for this reason that the phrase “rape is rape,” as used by Derbyshire, is both tautological and politically significant, a sign that the speaker understands the gravity of the act.

The incident is remembered regretfully by many in England and Wales who would like the prison population to be significantly lower.⁴ Clarke's comments proved controversial, and were attacked by political opponents and women's groups, ultimately resulting in the proposal being dropped. Over the subsequent months, the rehabilitation revolution stalled, and the next year Clarke was replaced as Secretary of State for Justice by Chris Grayling, a politician with a populist edge and a “tough justice” agenda. Under Grayling's leadership, significant cuts were made to legal aid and to prison staffing, without any accompanying reductions in the prison population. As a result, according to Her Majesty's (HM) Chief Inspector of Prisons (2015), rates of violence, suicide, and self-harm in prisons increased drastically. I have described this incident at length, however, because it is illustrative of penal trends which extend far beyond the jurisdiction of England and Wales. In discourse about punishment throughout the Global North, sexual violence functions as either a warning against, or a “silent exception” (Gruber 2020, 171) within, any calls for penal reform, reduction, or abolition. In this incident, Derbyshire positioned sexual offenses as the most serious of crimes, and

the idea of those who commit such offenses being helped by a policy designed to make the legal system operate more smoothly was enough to delegitimize its wider application.

Derbyshire's response to Clarke's proposal provides a good example of mainstream feminist thought about the ideal response to sexual violence: that more punishment, more generously distributed, is the best route to justice. This position (sometimes known as "carceral feminism"; Bernstein 2007) has been heavily influenced by the desire of second-wave and radical feminists to reconstruct the state so that it protects women and children from the scourge of the patriarchy and of rape as its corollary and its weapon, and the position has had numerous victories in England and Wales, as well as elsewhere in the Global North.⁵ These legal successes include expanding the definition of rape so that it includes (for example) marital rape and date rapes, and introducing new offenses like the sexual grooming of children (McAlinden 2007a).⁶ Significant effort has also been expended on altering procedures in criminal trials, for instance, by tightly restricting the admissibility of sexual history evidence, removing the requirement for judges to warn juries against convicting on the basis of a woman's uncorroborated evidence, and securing anonymity for complainants. In part, these changes resulted from the recognition that trials can be extremely painful and invasive for victims, as is reflected in the widespread use of terms like "second rape" (Madigan and Gamble 1991), "judicial rape" (Lees 1993), and "secondary victimization" (Adler 1987) to describe how the process is experienced. These changes were also intended to alter judicial outcomes by making it more likely that victims would report their experiences and stay involved in the legal process, that offenders would be charged by the Crown Prosecution Service (CPS), and that convictions would be secured. Feminist campaigners have also fought to ensure that sexual offending is met by tougher punishments, both in order to persuade victims to follow through with prosecutions and in order to send a message about the cruelty of the crime (Goodmark 2018a; Martin 1998).

The attempt to achieve sexual and gender justice by increasing the state's power to punish sexual violations has been considerably successful on its own terms, as is illustrated by the increasing number of men convicted of sex offenses in prison and the lengthening sentences they serve. The prison population in England and Wales has more than doubled since 1970 (Sturge 2020), and at the same time the proportion of prisoners convicted of sex offenses has also increased. In 1980 in England and Wales, there were 1,100 people convicted of sex offenses in prison, making them 4 percent of the sentenced population; by 1990 there were over three thousand (7 percent) and by 2000 they were 10 percent of the prison population (R. Mann 2016).⁷ Following the passing of the Sexual Offences Act 2003, which introduced new offenses and extended sentence lengths, numbers increased even further, and the Ministry of Justice (2013) found that between 2004 and 2011, the number of people being sentenced for sex offenses increased by 31 percent and

the average custodial sentence length increased by thirteen months. The population therefore expanded significantly, and by its peak in 2018, 19 percent of all men in prison were serving a sentence for a sex offense (Ministry of Justice 2018). Numbers since then have dropped very slightly, but there are still significant numbers of people in prison for sex offenses: on December 31, 2021, there were 12,130 people serving an immediate custodial sentence for a sex offense, and they constituted just under 19 percent of the sentenced prison population (Ministry of Justice 2022a).

Nevertheless, campaigners continue to raise concerns about the proportion of rape offenses being prosecuted. Between 2007–8 and 2016–17, the number of convictions for rape in England and Wales rose by 48 percent, and over the same time period the proportion of the CPS caseload accounted for by violence against women and girls increased from 7 percent to 19 percent. In 2016–17, 5,190 rape prosecutions were recorded and 2,991 convictions were secured—both the highest numbers ever (CPS 2017). Since then, the number of prosecutions has fallen by 71 percent, reaching just 1,490 in the year to December 2020, and the number of convictions has more than halved to 1,074 (Topping and Barr 2021).⁸ A recent annual report published by the Victims’ Commissioner stated that less than 3 percent of rapes in England and Wales lead to someone being charged, let alone convicted, and warned that this “justice gap” hurts current victims and creates future ones:⁹

In effect, what we are witnessing is the de-criminalisation of rape. In doing so, we are failing to give justice to thousands of complainants. In some cases, we are enabling persistent predatory sex offenders to go on to reoffend in the knowledge that they are highly unlikely to be held to account. This is likely to mean we are creating more victims as a result of our failure to act. (Baird 2020, 16)

Cognizant of the reduction in prosecutions and convictions, the government published an end-to-end review of the criminal justice system response to rape which found that changes in prosecution practices mean that “too many rape victims do not receive the justice they deserve” (HM Government 2021, 3). Prime Minister Boris Johnson drew on similar rhetoric when he was questioned on *The Andrew Marr Show* on October 3, 2021, about the kidnap, rape, and murder of Sarah Everard by serving police officer Wayne Couzens: “What I want you to know is that we will stop at nothing to make sure that we get more rapists behind bars and that we have more successful prosecutions for rape and for sexual violence, because that is where I think things are going wrong.”

The feminist demand for punishment which Baird, Derbyshire, and Johnson echo has been criticized from many different angles. Liberals have argued that it damages due process and, in its desire to increase the rate of convictions, risks people’s right to a fair trial (McGlynn 2010, 2011).¹⁰ Sex positive and queer theorists have suggested that strengthening the regulatory power of the state risks criminalizing nonharmful but nonnormative sexual behavior (Butler 1997; Levine 2002).

Abolition feminists, informed by critical race theory and intersectionality, have argued against shackling the feminist movement to the carceral state (Davis 2013, 2017; Goodmark 2018a; Gruber 2020; Levine and Meiners 2020). Many restorative justice advocates argue that the retributive framework is limited and damaging, even in the cases of sex offenses (Ackerman and Levenson 2019; Zehr 1990). Finally, criminologists have highlighted that there is a limited evidence base for the ability of imprisonment to reduce reoffending, calling into question Baird's casual assumption that imprisonment reduces crime (Bales and Piquero 2012).

There are three strands to the most legitimate of these critiques. The first focuses on the power which the feminist push for punishment cedes to the state. Activists of the left assert that the state is an illegitimate, racist, (cis)sexist, and classist institution and is thus the wrong mechanism to use when dealing with the aftermath of sexual violence. They argue that the history of lynching in the United States and the racialized concerns about Asian grooming gangs in the United Kingdom reveal "the centrality of race to the political history of rape" (Freedman 2013, 2), and suggest that incarceration is concerned more with making money and controlling the racialized poor than it is with repairing harm.¹¹ Political liberals, who do not share this radical doubt in the state, nevertheless argue that its legitimacy is not a given and its punitive operations are unequally distributed. They question the self-professed benevolence of state intervention and argue that strong due process rights are necessary to protect people from excessive or biased state power, and they fear that the push to increase the numbers of convictions for sexual offenses risks skewing the balance too far in the opposite direction. Advocates of restorative justice argue that the state is preoccupied by its own bureaucratic functioning, and it takes the requirements of efficiency more seriously than it does the demands of justice (Zehr 1990). What matters is that it meets its own targets by ensuring that enough people are arrested, enough convictions are achieved, enough people are unlocked during the prison day, and enough money is saved, and it is much less invested in meeting the needs or respecting the desires of those more personally affected by the crime. (Ironically, the belief that the state was subordinating the needs of victims to its own bureaucratic requirements was at the core of Derbyshire's criticism of Clarke's money-saving proposal, but it led her to call for more punishment, not less state intervention.)

The second, related, strand is that criminalizing and punishing sexual violations allows the state to police the most personal part of our lives, and in so doing it takes something intimate and uses it for its own purposes. Many of these criticisms come from feminists, who are concerned about the state wresting something that happened to women from their control and using their stories as evidence but not allowing them to have a voice (McGlynn and Westmarland 2019). This is not a tender way to treat something painful, and it often involves twisting and simplifying a complex event so that it fits legalistic categories. Much is obscured when calculating which acts are illegal and merit punishment, and when sifting

people into the binary classes of victim and offender. Convictions are harder to achieve when those who are hurt do not fit the limiting criteria of the “ideal victim” (Christie 1986; Hohl and Stanko 2015), leaving the harm which has been done to them unrecognized by the state. At the same time, being convicted has permanent labeling effects on men who are found guilty of committing wrongs.¹² As restorative justice theorist Howard Zehr (1990, 69) argues, legal guilt has a “sticky, indelible quality,” and it is hard for people whose wrongdoing has been publicly recorded to wash themselves clean.

The third strand is in many ways the simplest. It critiques the urge to punish. Criminologist and abolitionist Nils Christie (1981) famously called punishment a “pain delivery system,” and he alongside a great many other abolitionists and advocates of restorative justice argued that deliberately inflicting pain is always wrong. In their eyes, retributive punishment is simply legally sanctioned revenge, and it contributes neither to accountability nor to justice (Sered 2019).

Advocates of retributivism, however, would argue that many of these alleged problems with punishment are in fact its virtues. They would say that it is right that punishment should be ceded to the state, as the most authoritative institution we have and as one which acts on behalf of the community with the impartiality which comes from distance (Hampton 1991, 1693–94). They would say that the application of a condemnatory label to a complex event is the point of criminalization and punishment. To them, one function of punishment is to denounce, and denunciation necessarily involves placing something into the category of wrongness (Duff 2011). Finally, they would say that the infliction of pain adds both a symbolic and a material emphasis to this denunciation (Feinberg 1965; Von Hirsch 1993). Their logic is simple. If we want to respond to sexual violence in a way that shows that it is serious, and if the way we deal with serious crimes is through state imprisonment, it follows that people who commit sexual violence should be imprisoned (Martin 1998). In Derbyshire’s straightforward language, “Rape is rape,” and it is by imprisoning people that we send that condemnatory message.

The simplicity of this logic has enabled a lack of curiosity about the nature and experience of punishment. Feminist advocates have tended to stop at the gates of the prison and have paid very little attention to what happens inside it. This is a mistake. Simply replicating established methods of moral communication does not mean that we are sending the message that we intend to, and we need to understand the form a message takes if we want to understand what it says. Furthermore, those who advocate for more punishment have a special responsibility to understand the effects this punishment has, and the worlds it creates. To argue that those who push for more imprisonment have a responsibility to understand prisons is not to say that modern prisons are what people involved in the feminist movement wanted. Current forms of imprisonment are a product of many historical phenomena—the growth of mass incarceration, shifts in criminal justice policy and practice, the local histories of individual prisons, recent budget and staffing

cuts, to name but a few—but if the goal of your activism is to send more people to prison for longer, and you do this in a world in which prisons look like they currently do, then it is unsurprising that this form of imprisonment is the outcome. Prisons are part of our communities, and they are also, sometimes, the products of our political engagement. For both reasons, it is incumbent on us as citizens and as feminists to understand, critique, and intervene in them.

The purpose of this book is therefore to offer a rich empirical account of one of the worlds created by the feminist push for punishment—HMP Stafford, an English prison for men convicted of sex offenses—and to describe what it communicated to prisoners about their offending and their moral status. While it is based on ethnographic work conducted in one medium-sized prison in one country, the argument which this book presents—that we should pay more attention to the messages which prisons send—has relevance wherever imprisonment is used as a denunciatory technique. My aim in presenting this ethnography is not to evaluate Stafford's contribution to justice, nor do I intend to take an explicit position in the debate among feminists about the role punishment should play in their world-making. Instead, the goal is to provide a thick description of one of the worlds produced by the deliberate attempt to punish people for sexual violence in a way which speaks to and is informed by literature on the messages we send through punishment, and which hopes to inform and engage with all sides of the debate.

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From the very beginning of my fieldwork in Stafford, it was evident that this was a world which was saturated by an overriding consciousness of prisoners' criminal convictions and their moral implications. When I stood on wings, trying to talk to prisoners about their life in prison, they would often tell me, unprompted, that they weren't a "real sex offender"—because they said that what had happened was more nuanced than the totalizing label implied, or because they said they weren't guilty, or because they said they had done it but they would never do anything like it again. Others told me about the devastating feelings of guilt and shame which had accompanied their offending, but they also spoke of their hope that people might be able to see beyond their pasts and recognize them for the good men they believed themselves to be now. Almost everyone I spoke to feared that they would be judged seriously on release and would struggle to escape the legal and social repercussions of their conviction. Many talked with emotion about having been abandoned by families and friends following their arrest and trial; others said that their families had stood by them but been harassed by members of the public or targeted by Social Services as a result. Almost all prisoners felt that at least some prison staff judged them for their offenses, and the few who detected no judgment praised staff for their superhuman compassion.

But prisoners' deep reflections on justice were knottier than this implied account of unmerited punishment. In some cases, they struggled to balance their

belief that they deserved some form of punishment with their insistence that the form their actual punishment had taken was excessive and unjust. Even those who resisted the moral condemnation which directly targeted them demonstrated similar condemnation toward others, frequently telling me that other prisoners were dangerous, irredeemable, or “creepy,” and sometimes bemoaning that these other monsters had not received a more severe punishment. Nestled within these contradictory instincts about the condemnation which different people deserved was a complex ongoing conversation about what it means, and what it should mean, to have been convicted of causing sexual harm. This conversation permeated the prison and seeped into every corner of prisoners’ lives within it. This is not to say that prisoners only talked about their convictions and their resulting stigmatized identities as “sex offenders”; in fact, the men in Stafford were often at pains to tell me that their interests and preoccupations were “normal,” and certainly much of what people discussed on a day-to-day basis—television shows, pool games, exercise regimes—was prosaic and familiar. Nevertheless, prisoners’ shaming convictions were ever-present on the wings of Stafford. They shaped how prisoners thought about their lives, how they interacted with their peers and with prison officers, and how they talked to me, a young female researcher.

This book argues that Stafford functioned as a morally communicative institution—that is, as an institution which said something to prisoners about who they were and what they had done. It argues that being punished in Stafford imparted an exclusionary and stigmatizing message—that you are an inherent sexual offender, a bad person, a dangerous object—with the effect that most prisoners focused their energy on challenging the label rather than engaging with the moral connotations, meaning, and effect of the offense. This is not to say that anyone intended to send this message. Staff in Stafford were reluctant to acknowledge the criminal convictions which lay at the heart of the prison and worked hard to avoid displaying punitive or judgmental impulses. Nevertheless, (almost) everyone in Stafford was there because they had been convicted of a sexual crime, and this unavoidably shaped how they thought about and adapted to their sentence.

The concept of moral communication is properly introduced in chapter 2, “Communicating Badly.” This chapter argues that we need to understand imprisonment’s condemnatory functions and effects and draws together literature by sociologists of imprisonment and penal theorists to explore the potential messages which Stafford could send to its prisoners. It then briefly describes HMP Stafford and the fieldwork for this project, with a particular focus on the experience of being a young female ethnographer conducting research in a prison for men convicted of sex offenses. Chapter 3, “Distorting Institutions,” is the first properly empirical chapter, and it argues that there was a gap between the offenses (most) prisoners had committed, the convictions they had received, and the stories they told about their offenses. It is well known that many men convicted of sex offenses maintain that they are not guilty of their convictions, and this was also the case for

a third of the men I interviewed (a proportion consistent with other research on the categorical claims of innocence of men convicted of sex offenses; Hood et al. 2002; Kennedy and Grubin 1992). However, even the men who believed that they were guilty rarely felt that their convictions properly accounted for what they had done. Researchers have normally considered the gap between prisoners' convictions and their narratives to be a product of individual cognitive distortions, but this chapter describes three ways in which it was produced by the institutional context—by the legal system which selected them for admission into the prison, the staining label which it placed on them, and the rehabilitative regime which tried to reshape them. Not all prisoners responded to the context in the same way, however. In chapters 4 and 5, “Managing Guilt” and “Maintaining Innocence,” I outline how prisoners tried to “do their time” while also adjusting to the shame of their convictions, and I do this by offering a typology of adaptive styles. In so doing, I show the intimate connections between the messages the prison sent and the way it used power over prisoners, and argue that the resulting moral conversation was confusingly framed.

Chapter 6, “Moralizing Boundaries,” shifts to describe what prison officers, as the group of prison staff with the most contact with and power over prisoners, communicated to them. It argues that officers' vision of professional behavior discouraged them from talking to prisoners about their offenses, but it also led them to maintain strict moral and relational barriers which sent their own exclusionary message. Chapter 7, “Denying Community,” moves to describe social relationships among prisoners, and it argues that the pressures of living among people convicted of deeply staining offenses, while also being convicted of similar offenses, pushed people to try to ignore them. If one goal of imprisonment is to show that offenses matter, it is a great irony that they produce environments which pressure people not to acknowledge them. Finally, chapter 8, “Judging Prisons,” concludes by pulling together the book's arguments about the effectiveness of imprisonment as a communicative response to sexual violence, and suggesting both alternatives to imprisonment and ways of improving it.

The book's empirical focus is everyday life in prison, and it focuses mostly on the dimensions of prison life which prison sociology has deemed most significant: prisoners' adaptations to the sentence and relationships with prison officers and their fellow prisoners. Some readers may find it surprising that it pays less attention to the sorts of ritualized spaces (treatment programs, courtrooms, or meetings with probation officers) in which penal actors engage in deliberate and vocalized forms of moral training. My reasons for this are threefold. First, other work has already considered the ways in which these spaces shape how people, including people convicted of sex offenses, feel about themselves (e.g., Digard 2010; Hawker-Dawson forthcoming; K. Hudson 2005; Lacombe 2008; Waldram 2012), whereas much less research has been conducted on the more prosaic dimensions of moral communication (although a significant exception is Schinkel 2014a, 2014b).

Second, one goal of this book is to bring the questions of justice raised by feminist scholars and penal theorists into conversation with prison sociology, and to do this it seems most effective to focus on the areas already explored by prison sociologists. Third, and most importantly, everyday life matters hugely to those in prison, and ritualized interactions are not the only ones which communicate meaning. While many people in prison complete some sort of treatment during their sentence, many do not, and even those who complete it most intensively spend much more time on the wings talking to officers and other prisoners than they do in treatment programs formally reflecting on their moral identities. In arguing for the significance of the everyday, I am following in the footsteps of Gresham Sykes, the father of prison sociology, with whose words I finish the chapter:

[P]resent knowledge of human behavior is sufficient to let us say that whatever the influence of imprisonment on the man held captive may be, it will be a product of the pattern of social interaction which the prisoner enters into day after day, year after year, and not of the details of prison architecture, brief exhortations to reform, or sporadic attacks on the “prison problem.” The particular pattern of social interaction into which the inmate enters is, in turn, part of a complex social system with its own norms, values, and methods of control; and any attempt to reform the prison—and thus to reform the criminal—which ignores this social system of the prison is as futile of the labors of Sisyphus. The extent to which the existing social system works in the direction of the prisoner’s deterioration rather than his rehabilitation; the extent to which the system can be changed; the extent to which we are willing to change it—these are the issues which confront us and not the recalcitrance of the individual inmate. ([1958] 2007, 134)