

# **Feminist Methods and Sources in Criminology and Criminal Justice**

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## **INTRODUCTION**

Are there research methods that are specifically feminist? This was a much-debated question within the social sciences in the late 20<sup>th</sup> century. Feminist researchers working in the fields of criminology and criminal justice have deployed a range of methodologies from standard positivist ones to the then newly emergent poststructuralist approaches. But one hesitates to call any of them specifically feminist methods. What can be said however, is that empirical methodologies deployed by feminists, especially statistical analyses that are alert to particular biases in the collection of data about say, domestic violence, have been important for making more accurate determinations of the scale of the problem of men's violence against women. Their contribution to the enormously difficult tasks of renaming that violence as serious crime and placing it on policy agendas cannot be underestimated. At the same time, poststructuralist and especially Foucauldian approaches exploring how different crimes by and mainly against women are processed in the criminal justice system and how they are discursively produced in criminology texts by non-feminist researchers and in the wider culture have also made invaluable contributions to criminological knowledge.

As for sources, feminists might examine criminological texts to see how criminologists and other 'experts' produce explanations of crime. Or they might read criminal law cases through a feminist lens, exploring their discursive production of offenders and victims and assessing verdicts, sentencing and the justice of criminal justice outcomes in various jurisdictions. Once again though, it cannot be said that there are specifically feminist sources. What can be said however, is that methodology became a highly fraught field, perhaps especially for feminist researchers. This was no 'you show me yours and I'll show you mine' pleasantly interactive scenario. *Fin de siecle* discussions about methods in the crime field were heated and sometimes grievously misleading especially when it came to assessing the impact of poststructuralism on the study of crime and criminal justice.

## A METHODOLOGICAL REVOLUTION

That there was a methodological revolution in the social sciences in the late 20<sup>th</sup> century is an empirical fact, one measurable by the sheer volume of work dedicated to challenging positivism that had held sway throughout the century. The revolution might have passed mainstream criminology by, many staunchly anti-postmodern criminologists continuing to turn out unreconstructed positivistic texts. But in the meantime, feminist and other critical researchers explored new approaches to social questions and criminological ones, approaches informed by a range of poststructuralist theories. Distinctions were now made between empirical methodologies, still important for determining the scale of different crime problems and 'empiricist' approaches which assume that statistics and graphs 'speak for themselves'.<sup>1</sup> Within feminist circles, some researchers adhered to so-called 'standpoint theory', believing feminist knowledge could only be produced from a woman's standpoint, a view contested by others on the ground that it was essentialist, universalising and ethnocentric. Who spoke for whom? Which voices were heard, which excluded?

Within criminology and perhaps especially within my own field of study — namely, all forms of sexed violence but with a focus on representations of men's violence against women — positivist criminology's multifactorial methods came under intense scrutiny. Add everything into the equation — background factors (indicatively a bad mum), poverty, drugs, pornography collections, precipitating factors (often an argument with a wife or girlfriend), eating habits was, and still is, the dominant positivistic approach to studying the 'criminal mind'. Reading criminological accounts of 'sex crimes' or serial killers and positivistic hypotheses testing of the capacity for violence committed by rigidly separated criminal and non-criminal groups has provided endless entertainment for my undergraduate students reined in poststructuralist methods.

A study of the 'intersexual nature of violent crimes' aimed at finding 'the extent to which violent crimes occur within or between the sexes' published in the journal *Criminology* is a classic case in point highlighting as it does the methodological muddle positivism gets into when it analyses crime. In the study two hypotheses are tested. The first is that male offending

is hypothesised to be an 'in-group phenomenon'. The second hypothesis is that women are more violent towards men than they are towards women, and men are more violent towards other men than they are towards women.<sup>2</sup> A 'baseline model' finds support for the hypotheses. Notwithstanding the study's own statistical tables indicating that men committed 85% of the 11,410 homicides in the sample, and 89% of over 5000 aggravated assaults, women are found to be more violent than men. In the face of its own statistics the study finds that 'F-M violent incidents occur relatively more often than M-F violent incidents (*once the greater propensity of males to assault has been controlled*).<sup>3</sup> With that propensity controlled, the researcher concludes that 'females' — (positivistic code for women) resort to serious violence against men 'more often than expected' while men resort to 'less serious forms of violence' against women.

Thus does the positivist criminologist un-name the pervasive social problem of men's violence against women put onto the political and criminological agenda by feminist activists and researchers over the last three decades of the 20<sup>th</sup> century. Following the standard non-feminist script, he begins by transforming the lived experience of women who are battered and killed by male partners into aggregate data. Next, he translates the data into a location, say a 'home', a place where violent 'incidents' occur. Finally, women are blamed for the violence that takes place there. Women who do not 'comply' and 'submit' to men's demands spark off that perennial favourites with positivists — a 'cycle of violence' — and end up receiving 'minor' violence. Women might then end the cycle by resorting to 'serious' violence. Whether or not they do, men's responsibility for their own violence against women disappears down a deep tunnel of aggregate data, base models and reality-defying verbal gymnastics.<sup>4</sup> And so paradoxically, a study of 'intersexual' violence ends up de-sexing and de-gendering the very intersexual violence it set out to explore.

This is precisely the type of study Foucault was referring to when he asked in his famous 1975 interview, 'Prison Talk': 'Have you read any criminology texts?'.<sup>5</sup> He found them 'staggering' and failed to see 'how the discourse of criminology has been able to go on at this level'. But go on it has, notwithstanding decades of withering critiques of lumpen positivism and its insistent classifying and categorising methods dividing criminals from non-criminals, psychopaths from non-psychopaths etcetera, a methodology that remains oblivious to paradigm-changing work such as David Matza's brilliant conceptualisation of delinquency and drift over 50 years ago.<sup>6</sup> As for Foucault, there was not more towering figure within the newly

emergent critical criminologies of the late 20<sup>th</sup>-century. His pivotal book *Discipline and Punish* was instrumental in transforming sources and methods in the crime field. Following his lead, criminologists moved outside the prison to study *penality*, those extra-mural controls that keep folk subdued within cities now identified as carceral spaces. 'Social control' more generally and the 'psychiatrisation of dangerousness' more particularly became new foci of criminological research.<sup>7</sup> Equally if not more influential, was a key method that became associated with his name — foucauldian discourse analysis — the interrogation of the discursive productions of crimes, punishments, controls *and* of the criminology discipline itself. Exploring how sex, violence, crime are constituted in criminology texts, media, everyday speech and indeed, in all discursive fields linked to criminality broadly conceived and then problematising the taken for granted became the methods of choice for foucauldian feminists.<sup>8</sup>

## FOUCAULDIAN METHODOLOGY

It cannot be emphasised enough that it was much-maligned poststructuralist methodologies that were to instigate significant shifts in understandings of how to research crime. In my field for example, there was a shift away from the take-for-granted positivist category 'sex crime' to broader and more versatile concepts of 'sexed crime' or broader still, 'sexed violence'. These concepts are designed to disturb the complacency and self-evidence of so-called 'sex crime' such that crimes involving sexual violence are no longer readily classified quite so simply as 'sex crime' while others, notably the domestic or private variety, are left out of the equation. I defined 'sexed crime' very broadly as covering all forms of violence in which the gender or sex of the perpetrator or victim is relevant, including so-called 'domestic violence' as well as sexual assaults committed on men, women and sexual minorities.<sup>9</sup> But the critical point here is that the concept of 'sexed violence' operationalises the method Foucault calls 'problematization' which he defined as an attempt to 'make problematic and to throw into question the practices, the rules, the institutions, the habits and the self-evidences that have piled up for decades and decades'.<sup>10</sup> This included the breaching of the self-evidences of common sense and of criminological knowledge. Foucault's problematising methodologies open up inquiries into feminist issues he had no interest in — for example, whether explanations can be provided for men's violence that do not discursively erase it or, worse, deteriorate into excuses for it. It

enables a critical practice that could be applied to any bid in any discursive field to deny, explain away or obfuscate the unpalatable evidence of men's pervasive violence against women.

There is no space here to elaborate on Foucault's methodology for studying the interrelationship between power and knowledge and for undermining dominant knowledges. It is set out most clearly in two famous lectures he gave in 1976 called, simply, 'Two Lectures'. There he proclaimed his preference for 'local criticism', a form of criticism whose validity is 'not dependent on established regimes of thought', one which involves 'an insurrection of subjugated knowledges'.<sup>11</sup> What needs emphasis however, is that to assist with this new way of studying power he drafted five rules that he called 'methodological precautions'. In short, methodology was central to the new critical approach to criminality and penalty that he espoused. To consider just two of the 'precautions': the first shifts the focus from 'legitimate forms of power which have a single centre' to power at 'its extremities, at its outer limits at the point where it becomes capillary'; that is, at the local level where it is less legal in character, where it 'transgresses the rules of right' and becomes violent. Second, Foucault advised us to be less concerned with power at the level of conscious intention and more with its point of application where it produces its 'real effects'. Instead of asking who has power or why some people want to dominate ask how things work at the level of on-going subjugation, in 'the continuous and uninterrupted processes that subjugate bodies, direct gestures and regulate forms of behaviours'.<sup>12</sup> Asking how — how crime or violence is 'put into discourse' — not positivistic why questions was, he said, the way forward.<sup>13</sup>

It is this Foucauldian methodology, the bringing together of subjugated knowledges, focusing on what happens at the local level, say in intimate relationships as well as on the discursive and material effects of power that I have applied in my criminology teaching. I have expanded on it more fully elsewhere.<sup>14</sup> Suffice it to say that is a methodology which is crucial for hearing the voices of victims rather than perpetrators, for representing the silenced, for questioning speaking-for practices and challenging dominant discourses, including those of masculinist criminology.<sup>15</sup>

## FEMINIST METHODS IN CRIMINAL JUSTICE RESEARCH

Not that all feminist criminologists and socio-legal scholars were for Foucault. On the contrary, many spent a great deal of time being against him and trashing the work of feminist scholars who embraced his approach.<sup>16</sup> Indeed, it was in the criminal justice field more so than in criminology that the most heated feminist debates about methodology occurred. And the tipping point was always — ‘always already’, one of the phrases most irritating to anti-postmodernists — poststructuralist-inflected methods. Carol Smart’s work is a classic example of a much-maligned feminist foucauldian approach to criminal justice questions.

Smart’s *Feminism and the Power of Law*, one of the most influential feminist socio-legal texts ever written, is also one of the most misunderstood, coming in for sustained criticism that continues to this day. The sticking point has ever been her warning to feminist researchers and activists not to get too caught up in law reform, a warning widely misread as advocating a retreat from law and feminist legal activism. Time and again she has reasserted her conviction that law provided a ‘forum for articulating alternative visions and accounts’.<sup>17</sup> Her counsel to decentre law was ‘never meant to mean’ that feminists should refuse to engage with law. Despite misgivings about feminists investing too much in law reform, she was always of the view that law is an invaluable site of discursive struggle, of ‘endlessly valuable’ discursive work.<sup>18</sup> Even after uncovering the resistance of the legal profession to recognising child abuse as harmful, she never wavered from the conviction that law ‘understood in its widest meaning, is still one of the most important sites of engagement and counter-discourse’. The criminal justice system and legal practice still remained the most important—albeit ‘the most problematic’—sites for critical feminist interventions.<sup>19</sup>

Smart’s repeated and numerous clarifications notwithstanding, her critics continue to erroneously interpret her book as a call for inaction. Still today one finds unsupported claims that she urged feminists to ‘avoid’ the criminal justice system. Whether or not such claims can be attributable to the deleterious lingering effects of the anti-postmodern animus that spawned misinformed criticism of Smart’s work in the first place, what is clear is that her advocacy of construing law and the criminal justice system as sites on which to contest gendered constructions of women’s experiences was first and foremost a methodological intervention. And while Smart’s work typified the move away from empirical studies with their data collections, interviews and focus on ‘what works?’, she was not the only feminist researcher to turn to her attention to discursive representations of crimes committed by and

against women. Others focusing on the criminal justice system's gendering processes turned to new sources, notably Charlotte Mitra's stunning study of judicial constructions of father-daughter rape and Hilary Allen's equally seminal analysis of the 'discursive manoeuvres' deployed in British social work reports which rendered 'harmless' women who had been very violent, in particular towards children and.<sup>20</sup>

Furthermore, foucauldian-inflected discourse analysis is still being deployed by feminist researchers in areas Smart herself did not consider. For example, over the last 30 to 40 years, feminist law scholars and activists have launched trans-jurisdictional scathing critiques of the operation of provocation defences in hundreds of intimate partner femicide cases. The evidence unearthed by feminist scholars that these defences operate in profoundly sexed ways is unequivocal—for centuries and still today, the law of provocation has facilitated men's claims that sexual infidelity provides a moral warrant for murdering 'unfaithful' wives. It is notable that feminists have been at the forefront of reform movements to abolish provocation, for example, in some Australian jurisdictions which have banned the defence outright and in England and Wales where it has been replaced with a new defence that expressly excluded sexual infidelity as a trigger for loss of control. Both pre- and post-reform cases provide opportunities for continuing the endlessly valuable discursive work Smart advocated and practised in other fields of law. They are ideal sites for continuing the work of articulating alternative accounts of gendered relationships and challenging law's power to disqualify women's experiences of violence while privileging men's feelings and rights.<sup>21</sup>

Finally, while in my own work I continue to deploy foucauldian discourse to analyse the discursive construction of victims and perpetrators of intimate partner femicide, I am now using very different sources – Shakespeare's plays about men's possessive jealousy. *Othello*, *Cymbeline*, *Winter's Tale*, *Much Ado about Nothing* and *Merry Wives of Windsor* now feature in my criminological research, while *Titus Andronicus* provides a revealing critical gloss on the repercussions of slavishly following precedents that pass as moral 'warrants' for murder, indicatively wife-murder.<sup>22</sup> My most recent methodology then, is verbatim theatre weaving together citations from Shakespeare's plays with excerpts from trials of wife-killers. It is foucauldian discourse analysis with a Shakespearean twist that continues research I commenced some 25 years ago plotting how sex, violence and crime are 'put into discourse' in all kinds of discourses today.

## A HAPPY METHODOLOGICAL CONCLUSION?

As I mentioned at the start, discussions about methodology in the crime and criminal justice field are contentious. The discussion that took place after I delivered this paper at the Socio-Legal Studies Conference on Methods in Criminology and Criminal Justice held at the Institute of Advanced Legal Studies in November 2105 was no exception. One respondent took exception to my citing of Foucault's laughing critique of criminology's staggering texts. Which texts, he demanded to know, had Foucault actually read? Possibly worried that he might have read his, he missed what was obvious: Foucault was referring to self-fulfilling, endlessly circular positivist criminological texts and their assumptions about clearly delineated distinctions between criminal and non-criminal groups. That this type of criminology still has a powerful purchase today despite decades of critique became obvious later in the conference when a delegate delivered a paper referring to M-Fs and F-Ms in a manner that was just as mystifying about actual levels of violence committed by men and women as the study of the 'intersexual nature of violent crimes' I referred to earlier. Once again, the empirical fact that it is overwhelmingly men who commit violent crime disappeared behind a veneer of 'empirical' research. That no one in the audience noticed that this was exhibit A of the very positivist methodology I had critiqued in my paper earlier in the day is testimony to the power of positivist criminology and its reality-defying methodology to pass as truth.

In the meantime, feminist researchers continue to deploy a range of methodologies to more accurately plot crime patterns, particularly patterns of violence against women and children that are under-represented in official statistics. Empirical methods, especially contextualised counting, remains an important methodology for feminist criminologists. Contextualised counting focuses on who is doing what to whom and why. In relation to so-called 'domestic' or 'intimate' homicide, for example, it pays attention to the circumstances of the killing and to symmetrical and asymmetrical patterns of perpetrators and victims. Most crucially, it pays attention to the victim herself, going so far as to name her, analyse contextual factors such as her relationship with her killer, her lived experience prior to the homicide and her failed attempts save her own life. Such a methodology can produce findings quite at odds with those found in official crime surveys. It's not just a question of emphasis, indicatively the Home Office's persistent emphasis that it is men, not women (in the official parlance, 'males'



and ‘females’) who are overrepresented in crime statistics; that men account for the majority of victims of violent crime, homicide included. Sometimes, as in the case of intimate partner femicide, the numbers don’t even match up, with ‘official’ statistics considerably lower than those produced by feminist researchers. When this happens, dead women are discounted, literally and metaphorically.

Fortunately though, feminist researchers on social media are ensuring that femicide statistics have a prominent place on criminological and political agendas. Karen Ingala Smith’s ‘Counting Dead Women’ Campaign stand as eloquent testimony to what one woman can do in her spare time – name and count the number of women killed by men every year in the UK.<sup>23</sup> The establishment in February 2015 of a Femicide Census, a data base which Ingala Smith helped instigate, is a critically important feminist intervention that will provide a far more accurate knowledge basis about the extent of femicide than is currently available.<sup>24</sup> At the same time, established researchers such as Sylvia Walby are continuing to develop sophisticated post-positivist empirical methodologies, beginning with more sensitive interview techniques (that ensure victims are interviewed separately from violent partners) and now using an ‘improved methodology to include the experiences of high-frequency victims’ by removing the cap on the number of crimes included and taking account of ‘all data points’.<sup>25</sup> Once again, the effect will be the delivery of a more accurate picture of the extent and patterns of violence against women. Combining the research initiatives of feminist social media activists with those of established researchers will move us closer to fulfilling the goal of generations of feminists of getting that violence recognised as a first-order political problem. It will also provide an exemplary case study of the ‘insurrection of subjugated knowledges’, that union of ‘popular’ and ‘erudite’ knowledges that Foucault advocated as methodologically essential for establishing ‘a historical knowledge of struggles’ – say feminist ones against masculinist criminology – and making use of that knowledge tactically today.<sup>26</sup>

## FOOTNOTES

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<sup>1</sup> Maureen Cain’s work on methodology was pivotal. See also her, ‘Towards Transgression: New Directions in Feminist Criminology’ (1990) 18 *International Journal of the Sociology of Law* 1.

<sup>2</sup> R M O’Brien, ‘Exploring the Intersexual Nature of Violent Crime’ (1988) 26 *Criminology* 154.

<sup>3</sup> Ibid 160 (my emphasis).

<sup>4</sup> Ibid 166-7.

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- <sup>5</sup> Michel Foucault, 'Prison Talk' in C Gordon (ed) *Power/Knowledge: Michel Foucault* (Harvester Press, 1980)
- <sup>6</sup> David Matza, *Delinquency and Drift* (Wiley, 1964).
- <sup>7</sup> See Adrian Howe *Punish and Critique: Towards a Feminist Analysis of Penalty* (Routledge, 1994).
- <sup>8</sup> See Adrian Howe *Sex, Violence and Crime - Foucault and the Man's Question* (Routledge, 2008). See also Howe, 'Law out of Context (or: Who's Afraid of Sex and Violence in Legal Education) (2000a) 25 *Alternative Law Journal*, 274 and Howe, 'Postmodern Criminology and its Feminist Discontents' (2000b) 33 *Australian and New Zealand Journal of Criminology* 221.
- <sup>9</sup> See further Adrian Howe, *Sexed Crime in the News* (Federation Press, 1998).
- <sup>10</sup> Quoted in Keith Gandall, 'Michel Foucault: Intellectual Works and Politics' (1986) 67 *Telos* 127.
- <sup>11</sup> Foucault, 'Two Lectures' in Foucault, *Society Must be Defended* (Penguin, 2003) p 7.
- <sup>12</sup> *Ibid* 27-28.
- <sup>13</sup> Foucault, *The History of Sexuality: An Introduction* (Allen Lane, 1979) 11.
- <sup>14</sup> See Chapters two and three in Howe, *Sex, Violence and Crime* above n 8.
- <sup>15</sup> See eg the critique of masculinist criminology by Ngaire Naffine, 'Criminal Conversation' (1995) VI *Law and Critique* 193. See also Howe, 'Addressing Child Sexual Assault in Australian Aboriginal Communities—The Politics of White Voice' (2009) 30 *Australian Feminist Law Journal* 41.
- <sup>16</sup> See Caroline Ramazanoglu (ed) *Up Against Foucault: Explorations of Some Tensions Between Foucault and Feminism* (Routledge, 1993).
- <sup>17</sup> Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 88.
- <sup>18</sup> Carol Smart, 'Reflection' (2012) 20 *Feminist Legal Studies* 161 at 162-16. See Also Howe,
- <sup>19</sup> Carol Smart 'A History of Ambivalence and Conflict in the Discursive Construction of the 'Child Victim' of Sexual Abuse' (1999) 8 *Social & Legal Studies* 391 at 392 and 407. See also Howe, 'Mastering Emotions or Still Losing Control?—Seeking Public Engagement with Sexual Infidelity Homicide', (2013) 21 *Feminist Legal Studies* 141.
- <sup>20</sup> Charlotte Mitra, 'Judicial Discourse on Father-Daughter Incest Appeal Cases' (1987) 15 *International Journal of the Sociology of Law* 121; Hilary Allen 'Rendering them Harmless: The Professional Portrayal of Women Charged with Serious Violent Crimes' in Pat Carlen and Anne Worrall (eds), *Gender, Crime and Justice* (Open University Press, 1987) 81. See also the research cited in chap 6 in Howe, *Sex, Violence and Crime* above n 8.
- <sup>21</sup> See eg Rosemary Hunter and Danielle Tyson, 'The Implementation of Feminist Law Reforms: The Case of Post-Provocation Sentencing' forthcoming.
- <sup>22</sup> 'Othello on Trial—Engaging with the "Extra-Academic Outside World', *Queen Mary Human Rights Law Review* forthcoming April 2016, 'Dramatising Intimate Femicide—Petitions, Plays, Public Engagement (with a Shakespearean Gloss)' (2014) 26 *Canadian Journal of Women and the Law* 276; 'Mastering Emotions or Still Losing Control?—Seeking Public Engagement with Sexual Infidelity Homicide' (2013) 21 *Feminist Legal Studies* 21 141; "'Red Mist" Homicide—Sexual Infidelity and the English Law of Murder (Glossing *Titus Andronicus*)' (2013) 3 *Legal Studies* 407; 'Enduring Fictions of Possession—Sexual Infidelity and Homicidal Rage in Shakespeare and Late Modernity (glossing *Othello*)' (2102) 21 *Griffith Law Review* 772; 'A Right to Passions? Compassion's Sexed Asymmetry and a Minor *Comedy of Errors*' (2012) 23 *Law and Critique* 83.
- <sup>23</sup> I discuss Ingala Smith's work in Howe, 'Fatal Love' (2014) 2(1) *Griffith Journal of Law and Human Dignity* 4.
- <sup>24</sup> Radhika Sanghani, 'Nearly half of British women killed by men die at the hands of partners', *The Telegraph*, 12 February 2015.
- <sup>25</sup> Sylvia Walby et al, 'Is Violent Crime Increasing or Decreasing? A New Methodology to Measure Repeat Attacks Making Visible the Significance of Gender and Domestic Relations' *British Journal of Criminology* Advance Access published February 3, 2016. See also Walby and Andrew Myhill, 'New Survey Methodologies in Researching Violence Against Women' (2001) 41 *British Journal of Criminology* 502.
- <sup>26</sup> Foucault, above n 11 at 7-8. See the extended discussion in Chapter 3 of Howe, *Sex, Violence and Crime* above n 8.