In this chapter we discuss how women have been variously included and represented in academic work published in the UK’s *Industrial Law Journal* from 1972–2013. On a historic view, the frequency with which women have been included as the subjects of research arguably coincides with contemporaneous social and political concerns. Their inclusion is also heavily dependent upon legal context and varies according to the application of empirical and/or doctrinal methods. Women are principally the subjects of research in stereotypical contexts relating to motherhood, marriage and a gendered perception of their participation in the labour market as problematic. Their representation in relation to such a constrained range of topics may impede the potential for labour law scholarship to conceive of women as workers more broadly. However, when this labour law scholarship engages strongly with issues of gender we find it is frequently enriched by empirical data and applies insights drawn from disciplines outside of law. Further, there is evidence to suggest that labour law scholars are increasingly using empirical methods to gather their own original data and develop specific, evidence-based critique. This latter approach appears particularly likely to explore gender from the perspective of the work women are employed to perform, and the contractual terms under which they are engaged. The implication is of a labour law empiricism moving beyond its ‘magpie’ traditions of using data from elsewhere, which seeks instead to explore gender as a social relation constructed through work. We argue that the trajectory of women in labour law scholarship examined here points towards the possibility of a more rounded account of women as subjects of labour law.

**A. Introduction**

Labour law has been accused of demonstrating an ‘unquestioned acceptance’ that its subjects are ‘male workers’.1 While the subjects of labour law are not necessarily

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1 *Journal of Law and Society*, Research Associate, Cardiff Law School and Lecturer, Cardiff Law School respectively.

explicitly characterised as male, gender-neutral representations of workers act to exclude and marginalise women. Equality law in the UK tackles sex difference between men and women on the basis of individual characteristics. However, ‘gender’ is an organising principle of the labour market; it is the expression of sex as social status. If workplaces are legally regarded as gender-neutral spaces, and if labour law is established as a realm where gender is not part of the picture, then the law denies the existence of social hierarchy based on sex. Under these circumstances, scholars of labour law might probe beneath the surface and expose the disconnections between legal rationality and real-life in order to critique legal assumptions of gender-neutrality. The most obvious examples emerge when the law assumes workers are free from the demands of domesticity. Legal reasoning thus proceeds from the conceptual starting point of an ‘ideal worker’ to whom women are much less likely to correspond than men. It is the false assumption in law, of workers as gender-neutral legal subjects, that has given rise to an extensive critique of labour law as ‘gender blind’. However, it need not follow that labour law scholarship is similarly afflicted by a disregard for gender. In scholarship, the inclusion of women as research subjects may differ from their construction as legal subjects through the texts, doctrine and practice of law.

Our research design explicitly sought to understand the position of women in labour law scholarship. Asking ‘the woman question’ is a method that aims to explore sites of exclusion or marginalisation in legal, social or institutional systems. We deliberately avoided comparing the representation of women with the representation of men. Rather we were guided by this question: When women are included in published work, how are they represented? We hoped to be able to elaborate on the assertion that labour law is gender blind by observing how women are constructed as subjects in published research, both in relation to legal issues and through the research methods used.

In the first part of this discussion we provide a retrospective overview of the shape and extent of the inclusion of women in labour law research. Our historic assessment suggests that the frequency of their inclusion is influenced by legal and political development as well as social change.

7 See Bartlett, n 4. Asking the ‘woman question’ is a method that spans three centuries and dates back to Mary Wollstonecraft’s Vindication of the Rights of Women (1792).
In the second part, we look at the issue of legal context. In a large majority of instances women have been represented in relation to marriage, maternity and variations thereof (including non-standard working patterns and highly feminised occupations such as caring and cleaning). Since the inclusion of women appears aligned to and constrained by these themes, there is a risk of gender being regarded as an aspect of social life which is merely imported into employment relations. On this view, women are ‘gendered’ through family structures and are put to work in the labour market in ways that naturally reflect a pre-existing sex-based hierarchy. However, family, home and kinship are not the only places where gender is shaped and the confinement of gender analysis to the family is itself a form of male bias. This raises questions about how scholarship might rightly pay attention to central statutory reference points relating to gender, without reinforcing the marginalisation of women as workers.

In the third part, we discuss how research methods are used. The labour law scholarship we examined appears highly likely to be informed by empirical data when it engages most strongly with issues of gender. However, the ways in which scholars have aligned empirical data with doctrinal assessment has shifted over time. In our sample, from the 2000s onwards, scholarship that engages strongly with issues of gender appears unlikely to rely solely upon doctrinal methods. There has been a corresponding movement towards combining doctrinal discussion with empirical data generated in the fields of economics, social policy and sociology. This opens up opportunities for evidence based critique of the gender blind assumptions set out in labour law. In more recent years, we find that primary empirical methods, in which the author generates original empirical data, are increasingly likely to be used. We identify an emerging trend for primary empirical methods to position women research subjects in the context of atypical work and traditionally gendered occupations. It therefore seems that this turn to empiricism coincides with increased concern for women as subjects of labour law who are gendered through work.

B. Women as Research Subjects in Labour Law Scholarship

Our enquiry focused on scholarship published in the UK’s *Industrial Law Journal* (*ILJ*) because it is ‘the leading periodical in its field’. It has published work since labour law was in its infancy as a distinct discipline, has traditionally taken a broad view of the discipline’s scope, and from its outset aimed to promote theoretical

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9 Taken from the *ILJ’s* introductory web page: www.oxfordjournals.org/our_journals/indlaw/about.html (last accessed 1 November 2014).
scholarship that was informed by practice, ‘the one helping to fashion the other and in turn being refashioned itself’.\textsuperscript{10} We searched the \textit{ILJ} for published material that made explicit use of the terms ‘woman or women’ or a female pronoun ‘she or her’, to identify where women were included in research, whether as primary or secondary subjects or in central or peripheral ways.\textsuperscript{11} We identified 844 relevant papers.\textsuperscript{12} Methodological limitations mean we cannot make general claims for ‘the state’ of empiricism in labour law scholarship or the position of women within the discipline on the basis of our findings. Searching for a limited range of words and phrases in a single publication is a blunt instrument, yet we are satisfied that the size of our sample is sufficiently large as to provide useful insights. Figure 1 shows the annual spread of these papers.

The number of published items we identified ranged between 8 and 34 per year and there was a yearly average of 20 items. Almost half of the relevant material took the form of articles, just under a third took the form of case reviews, and the remaining items were published as shorter notes or reviews. The fewest items were published in 1974. The mid-section of Figure 1 shows a significant increase in frequency in the mid to late 1990s, with a high point of 34 items reached in 1994 and 1995. It is notable that in the period following the financial crisis in 2008, the presence of women as research subjects in labour law scholarship appears to be in decline. Figure 2 offers an alternative representation of the annual total data as a series of peaks and troughs, showing smaller totals towards the centre of the grid.

\textsuperscript{10} B Hepple, ‘Our Aims’ (1972) \textit{1 Industrial Law Journal} 1, 1.


\textsuperscript{12} We are grateful to Cardiff Law School for financial assistance and to Abi Walbridge for her excellent research assistance.
The number of published items referring to women is considerably higher in the 1993–2013 period shown on the left-hand side than in the earlier period from 1972–1993 shown on the right. Structural factors such as evolving social mores and changes in the surrounding political landscape may account for periods of greater or lesser engagement with women as research subjects. We are cautious not to ascribe a causative link between the representation of women and political and legal influences; not only because of an appreciation that publication is influenced by editorial preference but also in light of the ‘time lag’ between political interest, policy development and legislative action.  

However, in order to explore the credibility of our findings we make a number of observations. Based on the patterns in our data, we have organised our assessment over four specific time periods. These are: the period between 1972–87 in which the frequency with which women

are represented is comparatively low; the period between 1987–2000 when representation grows strongly; the consolidation period of 2001–08; and the 2008–13 period of financial crisis in which the frequency of representation is in decline.

1. Low Representation: 1972–87

This time period takes account of material published during the Labour governments of Wilson and Callaghan and in the context of Margaret Thatcher’s election victories in 1979, 1983 and 1987. From the perspective of industrial relations these were difficult and turbulent years in which ‘The oil crisis, the new radicalism of the trade union leaders and Britain’s entry into the EEC all shook British politics’.14 Thatcher’s policies pursued the restriction of trade union power through law, the de-regulation of the individual employment relationship, and turned towards individualism in the structuring of employment rights.15 *ILJ* published scholarship reflected this shifting labour relations landscape and centred on the shift towards individual contractual rights, procedural changes and heightened scrutiny of trade union activity. Our findings suggest women were not frequently included in the context of these considerations. This is not to say that women and their engagement with law and the workplace were absent from academic scrutiny at this time,16 but rather they were missing from discussions in the *ILJ* of concerns that might be characterised as ‘mainstream’ or central to the discipline.

This period was also a time of intense and sustained change for women in the workplace and society more generally. The Equal Pay Act 1970 was developed, partly in anticipation of the UK joining the then EEC,17 but also motivated by increasing political agitation and social justice demands for the assimilation of women into the workplace on the same terms as men. The political ambitions of feminist lawyers and activists aspired to achieve much more than ‘a piece of the pie for women’, but they made significant headway in promoting equal opportunities and protection from less favourable treatment on grounds of sex.18 The Equal Pay Act 1970 and the Sex Discrimination Act 1975 came into force on 29 December 1975 and the increased reference to women in *ILJ* material in the late 1970s and

across the 1980s would therefore seem commensurate with a legislative period of specific relevance to women.\textsuperscript{19}

However, if legislative attempts to combat the impact of sex discrimination in the workplace are to explain the steady rise in scholarship through the 1980s credibly, we must also account for the sharp fall in published material representing women in 1974, 1979, and 1983. It is interesting that each of these occasions was an election year. This may suggest that women were afforded lesser prominence in the context of political priorities lying outside of the formal boundaries of law during this period.


Post-1987 the inclusion of women in labour law scholarship increased markedly and retained its prominence. This development appears to reflect two key issues. First, an intense political focus on the restructuring of the labour market and the privatisation of public services; secondly, an intense legal focus on gender equality—evident in ground-breaking case law developments relating to equal pay and sex discrimination.\textsuperscript{20} The ‘significant structural change’ that took place in the labour market is reflected in sustained scholarly engagement with issues of gender and inequality during this period.\textsuperscript{21} The post-war paradigm of the full-time, permanent worker became increasingly strained by women’s engagement with the paid labour market on part-time and fixed term bases. Apparently neutral practices and labour market policies were contested.\textsuperscript{22} As a result, the importance of indirect discrimination provisions came to the fore in \textit{ILJ} scholarship and case law developments at this time.\textsuperscript{23} There were major concerns about the particular disadvantage faced by women in a political climate that sought increased labour market competition, the fragmentation of established patterns of collective bargaining and the exposure of public sector services to tendering and cost-comparison regimes in order to facilitate wage reductions.\textsuperscript{24}


\textsuperscript{22} \textit{R v Secretary of State for Employment ex parte Seymour-Smith and Perez} [1999] 1 AC 554; \textit{R v Secretary of State for Employment ex parte Seymour-Smith and Perez} [2000] ICR 244.

\textsuperscript{23} \textit{Pearse v City of Bradford Metropolitan Council} [1988] IRLR 379; \textit{Greater Manchester Police Authority v Lea} [1990] IRLR 372; and \textit{Jones v Adjudication Officer} [1990] IRLR 533.

There is a significant quantitative leap forward in the frequency of women’s representation in the *ILJ* from 1994, the year in which the success of Pamela Enderby in her equal pay claim is reported.\(^{25}\) Indeed, 1994–95 is the period during which women are most frequently represented. It is marked by strong discussions of women in relation to equality law and pensions, part-time employment, equal pay and equal treatment.\(^{26}\) This high prominence precedes the 1997 election of the first Labour Government in Britain since the 1970s. Later peaks in frequency in 1998 and 2001 appear to correspond to the introduction of protections for part-time and fixed-term workers and the establishment of the UK’s first ever statutory minimum wage.\(^{27}\)

A significant proportion of material in this period draws on EU law. As shown in Figure 3, between 1987–92 the quantity of published material concerned with women in the context of UK jurisdictional issues remained fairly constant. However, it is in this period that the profile of women as subjects of EU law became markedly prominent. A significant explanatory factor for the increased reference to women as research subjects from 1987 to 2000 is the turn to EU law.

![Figure 3: Jurisdictional basis of scholarship in which women are represented: UK, EU or rest of world (ROW)](image)

3. Consolidation: 2001–08

In this period the inclusion of women in labour law research remained consistently high. It is likely to be a reflection of the policy initiatives and statutory zeal

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\(^{25}\) *Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] IRLR 591.

\(^{26}\) Such as discussion of Council Directive 92/85/EEC concerning the implementation of measures to encourage improvements in the safety and health of pregnant workers, workers who have recently given birth and women who are breastfeeding (OJ L 348, 28.11.1992, 1–8).

of the Labour Governments of 1997–2001 and 2001–05. Increasingly, the rate of women’s labour market participation was a key plank of economic and social policy which subsequently has been characterised as carrying a ‘preoccupation with flexibility and employability’. It was with a wider economic and political objective of reducing child poverty, through parental engagement in paid work, that a new right to request flexible working was introduced with the purported intention that it would ease the challenges of combining paid work with caring responsibilities. Moreover, for the first time fathers were permitted statutory entitlement to paternity leave. The introduction of such ‘family friendly’ legislation is a central feature of scholarship in this period. Throughout the 2000s the balance of ILJ content shifts towards an increased proportion of full articles to case notes. The impact is that individual items of published research are longer and discussion of women is consequently less frequent but more sustained (where it occurs).


Our final observation is of a marked reduction in the frequency of material following the 2008 financial crisis. In the context of recession and austerity women are less frequently included as research subjects. Of note in the political backdrop to this period has been the Fawcett Society’s (unsuccessful) challenge to the budget reforms adopted by the Conservative/Liberal Democrat Coalition Government. Scholars of gender and labour law have noted that a sacrificing of equality has taken place in the name of austerity. Indeed, the development or regression of gender equality policy in the UK has been demonstrably linked to national economic performance. It may be the case that less frequent placing of women within labour law scholarship is a consequence of recession.

However, from the perspective of legal discourse, the potential to frame labour rights as human rights following the Human Rights Act 1998 may have promoted a partial supplanting of explicit reference to women by the gender-neutral inclinations of human rights law. A further explanation may lie in the turn towards a more pluralistic approach to matters of equality and anti-discrimination reflected

32  J Fudge, ‘Women Workers: Is Equality Enough?’ (2013) 2 feminists@law 1, 16.
in the establishment of the Equality and Human Rights Commission and subsequent Equality Act 2010. These developments reflect a prevailing view about the ineffectiveness of treating equality on a single-strand or ‘silo’ basis. A more conscious embrace of intersectionality has coincided with political scepticism at the idea that women can be identified with sufficient homogeneity as to genuinely constitute a social group. Fewer explicit mentions of women in the ILJ suggest that the employment experiences of men and women are no longer necessarily accepted as self-evidently different on the basis of sex; but may have polarised more sharply on the basis of age, race, ethnicity and migrant status. However, on an empirical basis it is evident that women’s distinctive contribution as providers of unpaid labour within the family continues to situate them differently to men within the labour market, however marginalised men or women may also be on grounds of race, ethnicity, migrant status or disability. In the context of the post-2008 financial crisis, it appears reasonable to echo concerns that specific issues of gender will become subsumed in a broader, over-arching approach to equality in labour law scholarship.

C. Motherhood, Marriage, Cooking and Casuals?
The Contextual Limits of Women’s Inclusion

Frequency alone is a crude measure of women’s representation in labour law scholarship. It tells us nothing about how fully women are represented and does not establish the manner of their inclusion. Therefore we devised search terms from words and phrases relating to issues that are frequently associated with gender stereotyping. These were:

— Relational: women’s social roles in relation to men and children as wives, mothers, widows, etc. The search terms were wife OR mother OR spouse OR widow* OR marri* OR family* OR child*.
— Biological: women’s distinctive biological characteristics relating to pregnancy, maternity and breastfeeding. The search terms were matern* OR pregnan* OR breast*.

37 Fudge, n 32, 10.
38 Fudge, n 6, 131.
Traditional occupation: women’s propensity for paid employment within a narrow range of occupations traditionally associated with unpaid work in the home such as cleaning, clerical, care and catering work. The search terms were domestic OR cook* OR clean* OR care* OR caring OR clerical OR secretar* OR cater* OR cashier.

Atypical workers: women’s employment on the basis of atypical contractual terms, deviating from assumed norms of full time, permanent work through part-time working hours and ‘flexible’ forms of engagement. The search terms were ‘part time’* OR part-time* OR casual OR temp* OR flex* OR vulnerab*.

We investigated how frequently these terms applied in the 844 published items that included women as research subjects. As shown in Figure 4, although our range of search terms was limited, we could account for 74 per cent of all scholarship about women with these four lines of enquiry. Roughly a quarter of the material in which women were included also engaged in discussions about their relational identities in respect of marriage and motherhood (22 per cent). Mentions of pregnancy, maternity or breastfeeding placed women in the context of biological issues in 12 per cent of the research material. Women were constructed in the context of traditional occupations such as cleaning, caring and catering in almost a fifth of instances (18 per cent). In respect of our fourth gender category, atypical work, women were represented as research subjects in the context of discussions

Figure 4: Context of women’s inclusion 1972–2013

about part-time hours, temporary or casual contracts, flexible working and vulnerability in 22 per cent of the material. A quarter of the material (26 per cent) fell outside our gendered search terms and is categorised as ‘other’. A small element of this ‘other’ material discusses women as sexual subjects in the context of harassment claims but it is mainly concerned with issues that are likely to be assumed as gender-neutral, such as unfair dismissal.

In Figure 5, the results are shown by decade to illustrate how contextual emphasis has changed over time. Since our research covers the period 1972–2013, and the number of available years in the 1970s and 2010s are less than 10, we have presented the material on the basis of percentages in order to make comparisons.

Figure 5: Gendered contexts in which women are represented as research subjects. Comparison by decade
meaningful (note that material can fall into more than one category and therefore percentages will not add up to 100 per cent).

There are marked differences across the time periods. Viewed by decade, we can assert that, whilst our gendered categories are salient throughout, they have the greatest explanatory power regarding ILJ research published during the 1990s. However, viewed on the basis of each individual line of gender enquiry, it is apparent that there was a sharp variation of interest in atypical work between the 1970s and 1980s; a relatively stable regard for women in respect of traditional occupations across all time periods; a sharp decline in interest in biological issues between the 1990s and 2000s; and a sustained yet variable pattern of research about women in the context of relational issues, notwithstanding a particular increase in interest between the 1980s and 1990s. These results illustrate that at different times (and no doubt in response to different legal conundrums or statutory initiatives), the focus of labour law research on women and issues of gender is uneven.

Variations in the frequency with which labour law scholars have taken up issues reflects legal and political concern for the economic and cultural dynamics of gender expressed in relation to work and employment. As noted above, women barely feature in the context of discussions about atypical work in the 1970s; yet by the 2010s, 40 per cent of material in which women are research subjects places them in relation to issues of atypical working. Whereas women in the 1970s were frequently engaged in (what we would now label as) atypical labour market situations, labour scholarship concerns about atypical work focused on casualisation in traditionally male occupations such as dock work and the disruption of employment relations through temporary layoffs in manufacturing and engineering.

A significant increase in the representation of women in the context of both atypical employment and traditional occupations occurred in the 1980s. Much of this related to the dismantling of women’s jobs in the public sector and associated legal claims which arose in respect of outsourcing, redundancy and TUPE transfers. Part-time work was perceived as a dominant paradigm through which women were disadvantaged as atypical workers. Discussion of women in relation to flexible hours was limited, although the notion of ‘flexible work patterns’ is raised by Ewing in relation to poor pay, unpleasant conditions and a lack of employment security for women in homeworking occupations. However, in relation to temporary work, it is evident that even in the late 1980s discussion centres on women’s periodic entry and exit from the labour market in association with childbearing. There is little indication that women’s temporary working was regarded as a mainstream labour market issue.

Through the 1970s, 1980s and 1990s there was a sustained interest in including women as research subjects in the context of biological issues. It reflects growing awareness of the incompatibility of working norms with the circumstances of pregnancy and maternity which were thrown into sharp relief by Upex and Morris in 1981. In their critique of the maternity rights regime, they demonstrated that few women were capable of benefitting from these rights due to length of service and national insurance contributions requirements. In conclusion, they caution against ‘arguments about the burden on the hard-pressed small business’, which points to the burgeoning trajectory of economic influence that we see in labour market considerations of the 1980s.

An engagement with women as research subjects in the context of biological characteristics falls sharply between the 1990s and 2000s to 6 per cent from its prior position at 27 per cent of research which includes women. From the 2000s onwards we see a general decline in the representation of women in the context of both biological and relational issues. However, whilst the scholarship may have moved on this has not corresponded with an improvement in the real-life treatment of pregnant workers. In 2005, the Equal Opportunities Commission found that almost half of all pregnant workers in Great Britain would experience ‘some form of disadvantage at work’. In November 2013, the Equality and Human Rights Commission announced that it will conduct a fresh comprehensive inquiry into the scale of pregnancy and maternity discrimination in light of concerns that the problem has not improved.

We found that 35 per cent of the material published in the 1970s considered women in the context of their social roles and relations to men in the domestic sphere as wives, widows or mothers. Applying the lens of gender, scholarship often took an interest in women’s status in the context of these relational identities and subjected social security regimes to examination, critique and doctrinal investigation. It is in the 1990s that discussion of women in the context of their relation to men and families is at a height. There is a concentration of scholarship in relation to pension reform and motherhood. Issues relating to biological issues crystallise in discussions about the Pregnant Workers Directive and a raft of claims for protection from dismissal due to pregnancy or pregnancy-related illness. In the 2000s, discussions of so-called family friendly legal provisions such as the right to request flexible working are reflected in the positioning of women in the context

46 Ibid, 238.
47 EOC, ‘Greater Expectations: EOC’s Investigation into Pregnancy Discrimination’ (Manchester, EOC, June 2005).
50 Council Directive 92/85/EEC concerning the implementation of measures to encourage improvements in the safety and health of pregnant workers, workers who have recently given birth and women who are breastfeeding (OJ L 348, 28.11.1992, 1–8).
of domestic relations. Scholarship published in the current decade of the 2010s retains a similar level of concern for women as research subjects in the context of their familial relations as wives, widows and mothers as scholarship did back in the 1970s. However, conceptions of women as financial dependents appear to have shifted away from a focus on their reliance on male partners to a focus on their dependence upon state support and wage subsidy.\(^{52}\)

Our findings, in respect of relational and biological aspects of gender, suggest that women have been defined sharply in labour law scholarship by social roles and relations that are ostensibly external to the workplace and located in familial structures. In recent years, however, there has been a decline in the representation of women in the context of biology and relational status. By contrast, a concern for women in the context of traditional occupations and atypical work has increased. It is particularly in the 2010s that labour law scholarship positions women as research subjects in relation to gendered issues arising on account of the type of work that women do and the way in which they participate in the labour market. These two aspects of gender are conceptually anchored within the workplace. It is arguable, therefore, that women are increasingly represented in labour law scholarship on the basis of the construction of gender through work.

D. The Use of Empirical Methods

To examine the methodological approaches in use we selected a sub-set of 60 papers from our original sample on the basis of being the items that most strongly engaged with gender. We assessed all 60 papers on an individual basis to identify a dominant methodological approach in order to classify each paper within one of three deliberately broad categories:

— Doctrinal: centred on textual analysis of cases and legislation, concerned with ‘what the law is’ and, classically, appearing to stand apart from the social realities of lived existence.\(^{53}\)

— Law in context: legal analysis drawing upon empirical insights emanating from outside the law. This method sets law in its broader societal, historical, political or industrial relations context and is often used to critique the law’s adequacy in reflecting or responding to the lived experiences of its subjects.

— Primary empirical: where the author engages in the construction of original empirical data. This could take a number of forms, such as qualitative enquiries on the basis of participant interviews or focus groups or fresh analysis of pre-existing quantitative datasets to produce entirely new insights.


The 60 papers were chosen on the basis of being those in which our search terms for gender issues were found most frequently. It is perhaps unsurprising that the two years in which the very highest scoring papers were found were published during the 1990s. However, the annual spread of the 60 papers shows a clear trend towards research with a strong gender focus being published in more recent years (see Figure 6). We can infer from this that, despite the post-financial crisis reduction in the frequency with which women are explicitly recognised as subjects of research, more recent scholarship which has engaged with women has done so in a manner which affords gender a central or sustained focus.

Our assessment of method found that a majority of work did not take a solely doctrinal approach (see Figure 7). Either through the use of ‘law in context’
methods (42 per cent) or through the application of ‘primary empirical’ methods (15 per cent) scholarship was largely empirically informed (combined total 57 per cent). ‘Law in context’ methods were particularly prominent and occurred most frequently in discussions about equality law. ‘Law in context’ methods were based on gathering empirical insights developed outside of the formal boundaries of law to foreground or contextualise a discussion of gender and issues of women’s labour market participation. Public policy reports, peer-reviewed social science journal articles and government commissioned research all featured centrally.

A critical site of convergence amongst feminist lawyers is the commitment to interrogate flawed assumptions of institutional or structural gender neutrality. Conaghan has argued that it is virtually impossible to make a gendered critique of law without ‘some engagement with the lives and experiences of “actual women”’. It is through the application of empirical data that the realities of the labour market and experiences of employment can inform a gendered assessment of labour law. Our findings in respect of ‘law in context’ methods mark out a ‘magpie’ tendency within the discipline. It appears that labour law scholars are keen to draw on empirical knowledge generated elsewhere, in recognition that work/employment is not only a legal issue but also ‘a broader social activity’ that is about more than economics alone.

The number of examples where ‘primary empirical’ methods were used was small and represented just 15 per cent of material. However, this scholarship notably placed women at the centre of the research through techniques that included reassessing pre-existing quantitative data from a distinctly feminist perspective, directly quoting the words that women used to describe their lived experiences or by gathering original interview data. In research that used ‘primary empirical’ methods, labour law scholars were finding ways to generate their own assessments of the realities of working life for women and combine this with doctrinal knowledge. Simon Deakin has suggested that empirical research undertaken by labour lawyers can provide a more complete account of the impact of labour law than is possible by drawing on assessments made by researchers in other fields. For example, scholars of industrial relations focus on aspects of the labour market where regulation is prominent but do not give prominence to the regulatory role of law, sociologists consider law as a form of social ordering that is largely external to the workplace, while economists tend to view the impact of law as self-reinforcing and

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without sufficient consideration of how rights are actually claimed, behaviours changed or legal rules accommodated in labour market decision-making.\textsuperscript{58}

In our sample, ‘primary empirical’ methods were most likely to be used to examine women as research subjects in the context of atypical work (see Figure 8). This suggests there are connections between how women are regarded as legal subjects and how they are constructed as subjects in research. Primary empirical methods reveal and support the proposition that atypical work, an apparently gender-neutral concern of hours, pay and contractual variation, is in fact an intensely gendered construct. Through the empirical examination of atypical work, women are framed as subjects of all labour laws (or at least as equally their subject as men) including mainstream contractual concerns.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure8.png}
\caption{Method in use and gender context}
\end{figure}

By way of contrast, it was the research that only applied doctrinal methods, which was most likely to consider women in respect of biological issues. Doctrinal scholarship was also the least likely to place a discussion of women in the context of atypical work. This is an interesting finding, not least because it supports our assessment of ‘primary empirical’ techniques as inclined towards a conception of women that is broader than as subjects of a narrow category of laws relating to maternity rights or equal treatment. Solely doctrinal research that was highly engaged with issues of gender tended to view women as an explicit group of rights-holders in relation to marriage, maternity and familial structures. Notwithstanding its undoubted merits in providing a robust critique of legal provisions, its methodological form followed the law in incorporating women as a social group with distinct needs who rely on distinct legal provision to facilitate their participation in the labour market.

It is widely understood that qualitative empirical study by labour law scholars in the 1960s, 1970s and 1980s was fundamental to understandings of employment and industrial relations in Britain.\textsuperscript{59} However, as discussed earlier, women were less frequently represented in the ground-breaking research work of this period. Yet the results of analysis set out in Figure 9 show that when research in this period was highly focused on gender, it was most likely to take an empirical approach through ‘law in context’ methods. This reflects Deakin’s observation that the core of labour law is ‘interdisciplinarity’.\textsuperscript{60}

![Figure 9: Methods used by decade](image)

Nevertheless, it is particularly striking that the use of doctrinal methods increases so rapidly in our sample between the 1980s and 1990s. This finding illustrates that it was not until the 1990s that the main body of scholarship with a strong gender focus conceived of women solely through the use of doctrinal methods. It suggests a legacy of claims-making through the courts in matters of gender equality during the period, reflected in scholarship recognising women as subjects of labour law without reference to external sources but instead attempting to give doctrinal coherence to the large number of judicial decisions at this time.

Subsequently, it seems that empirically informed methods became a more popular way to include women in research which is highly engaged with gender. Deakin notes that it was in the 1980s that labour law scholarship observed a general shift towards quantitative data that reflected the growing influence of economic approaches,\textsuperscript{61} as well as political expectations for evidence that labour law reforms met social policy objectives including flexibility, efficiency, employability, productivity and employment. Certainly by the mid-1990s, the influence of women’s participation in paid work on labour market structures, and the turn towards

\textsuperscript{59} Ibid, 310.


quantitative, comprehensive workforce studies, were acknowledged in labour law scholarship, often in the same work.\textsuperscript{62}

It is, however, most notable that it is against a background of declining frequency of the inclusion of women in the post-financial crisis years that ‘primary empirical’ methods are most likely to be used. It appears to be increasingly likely that scholars of labour law are exploring gender as an empirical consequence of the forms of employment contract that women enter into, the types of work they typically are engaged in and the dynamic relation of labour law to their working lives.

\textbf{E. Conclusion}

Our analysis of 40 years of labour law scholarship in the \textit{Industrial Law Journal} shows that through their participation and engagement as research subjects, women are very much part of the labour law scholarship story in the UK.

The gender-blind traditions and reputation of labour law itself has not prevented the representation of women on the basis of historical and legislative developments. However, their inclusion as research subjects has varied by subject matter and method and is firmly associated with gendered discussions that typically focus on motherhood, marriage and variations thereof. Latterly, in the context of atypical work and female-centric occupations such as care work and cleaning, such representation is more likely to address the indirect rather than the direct ‘biological’ basis of women’s perceived difference from men. Furthermore, scholarship about women is largely reflective of statutory provisions which might be characterised as ‘gender specific’ because they purportedly promote the inclusion of women in the labour market.

We find that from the 2000s there has been a marked decrease in research that seeks to understand gender by solely relying upon doctrinal analysis. It appears that the majority of labour law scholarship engaging with gender is empirically informed, often drawing on data and insights from outside law to foreground or contextualise subsequent analysis. To a lesser extent, we observed scholars engaging in the construction of primary empirical data. While our analysis demonstrates the visibility of women within the discipline, the contexts of their representation tends to be anchored in discussions of aspects of gender that have served to stereotype women, exclude them and subject them to less favourable treatment. The discipline has, rightly, paid attention to the position of women in respect of gender-specific concerns. It would seem that without attention to method, such a narrow focus paradoxically impedes the potential for labour law scholarship to conceive of women as workers more broadly. Our findings attest

to the importance of empirical work in revealing sites of women’s exclusion and speaking to the lived realities of women workers.

Our own method consciously avoided a comparison between the representation of women and the representation of men as the subjects of labour law research. We have found it more satisfactory to anchor an assessment of women as research subjects to a consideration of women as subjects of labour law. The benchmark then is not that the representation of women is quantitatively ‘equal’ to men but that it is sufficiently ‘full’ to enable labour law scholarship to effectively critique the repertoire of law as it relates to all work and all workers.

Labour law scholarship appears highly likely to be informed by empirical methods when it engages most strongly with issues of gender. To an increasing extent, labour law scholars are combining doctrinal insight with primary empirical study and original empirical data. This suggests that empirical methods have the potential to include working women as research subjects in ways that more roundly perceive them as the subjects of labour law. The implication is that labour law scholarship can move beyond its empirical ‘magpie’ approach of using data from elsewhere. The trajectory of women in labour law scholarship points to the possibility of a fuller account of women as subjects of labour law.