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## The legal construction of poverty: gender, 'work' and the 'social contract'

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# THE LEGAL CONSTRUCTION OF POVERTY: GENDER, “WORK” AND THE “SOCIAL CONTRACT”

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## 1 Introduction

A late-20th century version of social contract theory has enormously influenced public policy initiatives regarding poverty taken by both conservative (Reagan/Thatcher) and so-called “third way” administrations (Clinton/Blair). This approach has been marketed globally, particularly in “developing nations”<sup>1</sup> such as South Africa. Central to this policy vision is a certain understanding of waged work and labour markets. As will subsequently be developed, a key characteristic of this understanding of waged work is that it ignores the fragmentation of labour markets and is oblivious to the gender implications of dual or fragmented labour markets. This distorted view of waged work is incorporated in one of the fundamental tenets of the new social contract, namely that single mothers must contribute to society by supporting their families as breadwinners in formal-sector waged work.<sup>2</sup> In return, these mothers theoretically acquire a sense of “dignity” and pride in the fact that they are “self-sufficient” and “independent”. This paper’s central claim is that, as decision makers translated the supposedly universal values of “dignity”, “self-sufficiency” and “independence” into policies, institutions, and legal rules, they consistently filled them with gendered content that ultimately reinforces the social and economic subordination of women. Specifically, policymakers did not incorporate the concept of dual labour markets into their

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<sup>1</sup> I recognise the problematic nature of current terminology used to describe economic levels. I use “developed” and “developing” countries quite tentatively, understanding the ways in which that formulation incorporates a Western perception of development.

<sup>2</sup> I distinguish several forms of work in this paper under two overarching headings of “subsistence work” and “caregiving work”. Of course, much has been written about the distinction between waged work and caregiving. See generally J Conaghan & K Rittich (eds) *Labour Law, Work and Family: Critical and Comparative Perspectives* (2005) and citations therein. However, as I have explored elsewhere, I have attempted to develop what I hope are more nuanced definitions of the various forms of work that women largely provide. As I use it here, the term “subsistence work” encompasses all forms of effort to produce and provide the means to maintain the subsistence needs of family members, that is, work that produces what society recognises as value. “Subsistence work” includes both “formal-sector waged work”, that is, employer-employee relationships within the formal sector (which often fragment into primary and secondary labour markets), and paid work in the informal sector, such as street vending, home laundering, *et cetera*. It also includes “non-waged work” that involves in-home production for consumption by the family, such as farming. “Caregiving work” includes effort expended to sustain and nurture family members, but which does not produce what society recognises as “value” or “potentially commodifiable value”. I discuss these definitions more fully in L Williams “Poor Women’s Work Experiences: Gaps in the ‘Work-Family’ Discussion” in J Conaghan & K Rittich (eds) *Labour Law, Work and Family* (2005) 195 195-214.

analyses, thereby ignoring the way in which marginalised populations interact with formal-sector waged work.

This paper has a limited scope and ambition. It is not an original research contribution. Rather, drawing on the rich, emerging literature in the field of law and poverty, as well as my own prior work, I attempted here to identify some framing themes and questions in the context of the Law and Poverty Colloquium to which this special issue of the *Stellenbosch Law Review* is dedicated. I hoped no more than to ignite discussion among the scholars, lawyers, and activists attending, who brought a wide range of perspectives and experiences to the conference. In what follows, I have reluctantly set aside several major considerations due to the constraints of time and space on a piece of this kind. For example, although I allude to distinctions between white women and women of colour, I focus on gender as the lens through which I present my themes, fully realising that I am not covering major racial considerations. In other work, I have discussed how – both in South Africa and the US – race, ethnicity, and class have also been defining factors in the social construction of poverty and, in particular, in the evolution of contemporary “social contract” approaches to social assistance policy.<sup>3</sup> In addition, due to the brevity of the piece, I emphasise the US experience and short-change the South African, about which I have also written elsewhere.<sup>4</sup> I believe the themes identified will resonate with the South African reader, and I hope the paper raises both useful and controversial thematic questions.

I begin with a brief description of the history of US welfare policy, later incorporating the experiences of poor women in “developing countries”. I then raise questions about several threads of that history and discuss how blindness toward gender consequences of social policy and legal rules:

- (i) Obscures the roots of poverty that are in part constructed by common law background legal rules of property, contract, tort, and family law. Of particular significance for this paper are the background rules of inheritance which create asset- or opportunity-inequality that undermines equal opportunity in waged work.
- (ii) Induces decision makers to ignore the conditions of and sex segregation in low-wage labour markets and the lack of upward mobility for poor women, thus appearing to legitimate the central, but flawed, assumption of neo-liberal poverty reduction policy (namely, that formal-sector waged work can and will provide adequate family support).

<sup>3</sup> I have previously written about the significant racial discrimination encoded in US social assistance or social insurance policy. See, for example, LA Williams “The Ideology of Division: Behavior Modification Welfare Reform Proposals” (1992) 102 *Yale LJ* 719 (providing a racial critique of state welfare initiatives prior to 1996); LA Williams “Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate” (1995) 22 *Fordham Urb LJ* 1159 (exposing the racial underpinning of US social assistance policy initiatives); LA Williams *Decades of Distortion: The Right’s 30-Year Assault on Welfare* Political Research Associates (1997). More recently, I have drawn connections between the racial dimensions of social assistance policy in the United States and South Africa in LA Williams “Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South African Analysis” (2005) 21 *SAJHR* 436.

<sup>4</sup> See, Williams (2005) *SAJHR* 436-472; LA Williams, “The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study” (2010) 3 *CCR* 141 141-199.

- (iii) Renders invisible what I call the non-formal sector subsistence work and caregiving work, and in particular ignores the contribution of this work to economic productivity and efficiency as conventionally understood.
- (iv) Fails to appreciate that the legal definitions characterising many poor women workers as “non-workers” reinforce an artificial dichotomy between waged work and social assistance receipt (a distinction often framed as independence *versus* dependence) and eliminates, by magical thinking, the alienation and subordination experienced by low-wage workers, particularly women, from poverty discourse.

How United States public policy historically has treated poor people, especially low-income single mothers and their children, reflects a particular understanding of the causes of poverty that is deeply embedded in US political culture. The US tradition of social welfare finds its genesis in the Elizabethan Poor Laws – concepts of local control, family responsibility, residency, and definitions of who is worthy or unworthy as determined by the non-poor were central to the framing of US social welfare policy. In brief, US social welfare policy historically has been based on the theory that poverty is caused by individual human failure and a deficit of “traditional” family values. Political leaders early in the 20th century often claimed that providing outdoor relief (assistance outside the context of a poorhouse or work house) would undermine poor people’s initiative and dignity. Some elements of the reformists’ movements tried to control the behaviour of – or “Americanize” – immigrant poor mothers who were felt to have inadequate moral values.<sup>5</sup> Importantly, public provision for poor women and children has historically reflected a tension between the conflicting imperatives of family care and waged work.

Although this was often not reflected in the stated goals of social assistance programs, such programs and their recipients have always been significantly connected to low-wage labour markets. Consider, for example, the predecessors to the first federally sanctioned program for single-parent families enacted in 1935 (Aid to Dependent Children and later Aid to Families with Dependent Children), the “Mother’s Pensions” or “Widow’s Pensions” Acts enacted in numerous states in the early 20th century. One goal of these programs was to provide cash assistance to enable single mothers to fulfil the “woman’s role” of homemaker, rather than placing their children in institutions. To avoid the stigma of immorality attached to unmarried mothers or deserted wives, the proponents of these programs highlighted an image of the worthy white widow. Programs were highly discretionary, allowing localities to exclude “immoral” women and women of colour.<sup>6</sup>

<sup>5</sup> L. Gordon *Pitied, But Not Entitled* (1994) 28, 45-46. Even widows were often scrutinised for their housekeeping, cleanliness, and moral habits. W Bell *Aid to Dependent Children* (1965) 29.

<sup>6</sup> Gordon *Pitied, But Not Entitled* 27. The National Congress of Mothers, in lobbying for mother’s aid, initially framed the program as providing support for mothers of “the race” (62-63). See also Bell *Aid to Dependent Children* 29-31, 34-35. Gordon *Pitied, But Not Entitled* 48 n 41, notes that in 1931, only 3% of recipients of mother’s pensions were African American.

But even for a “deserving” woman eligible for such assistance, the benefit amount was so low that she (and often her children), in order to survive, either had to do paid labour or to attach themselves to a male breadwinner, or both. It was always a feature of US social assistance programs that poor women needed to seek additional income by, for example, laundering, sewing, or taking in boarders. However, whenever a single mother *did* do waged work, usually in the informal economy, she was stigmatised and moved into the category of a “bad” mother.

Thus, poor women were faced with irreconcilable pressures: they were expected not to earn, yet they were required to earn; they were expected to be chaste, yet needed to find a man; they were expected to care for their children, yet they were forced to leave their children to perform paid labour.

These ideas and value judgments remain central to the contemporary version of social contract theory fashioned and deployed to support neo-liberal “welfare reform” in the US and the UK (now being touted throughout the globe). Espousing the values of dignity, self-sufficiency and independence as components of the social contract,<sup>7</sup> advocates of this social assistance model now assume that participation in formal-sector waged work can be and is the solution to poverty, the path to independence and the cornerstone for individual dignity and full social citizenship.<sup>8</sup> This framing of the problem presupposes an institutional structure within which a breadwinner’s paid labour in the formal sector provides for family subsistence, without incorporating the contribution of unpaid work to the production of wealth. More importantly, this approach is oblivious to distinctions between formal sector waged work, informal sector paid work and unpaid family work (which I have characterised and will later discuss as “subsistence work” and “caregiving work”).<sup>9</sup> In so doing, it fails to recognise the complexity of women’s, particularly poor women’s, work.

For example, in 1996 the US Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”)<sup>10</sup> replacing the Aid to Families with Dependent Children program (the major US cash assistance program for single parents, largely female-headed families) with the Temporary Assistance to Needy Families (“TANF”) program. The PRWORA contained two major provisions relating to mandatory work programs and the role of formal sector waged work in US poverty reduction policy for single

<sup>7</sup> See generally E Gillespie & B Schellhas (eds) *Contract with America: The Bold Plan by Rep. Newt Gingrich, Rep. Dick Armey and the House Republicans to Change the Nation* (1994), who state:

“*Contract with America* is an agreement and a covenant between our now elected representatives and the American people with whom we sought a common bond.” (6).

“[W]e require that welfare beneficiaries *work* so they can develop the *pride* and *self-sufficiency* that comes from holding a *productive job*.” (65) (emphasis added).

“[O]nce welfare recipients become *dependent* on public assistance, they are caught in the now-familiar welfare trap.” (67) (emphasis added).

<sup>8</sup> One could analyse the gendered nature of the social contract underlying the neo-liberal welfare policy from a number of perspectives, for example, concepts of what constitutes female respectability *versus* immorality or views of women’s sexual and reproductive independence. However, these are beyond the scope of this article.

<sup>9</sup> See n 2 and part 4 below.

<sup>10</sup> Pub L No 104-193, 110 Stat 2105, 42 USC § 601 *et seq.*

mothers and their families. First, states must require significant percentages of primarily single mothers who receive TANF to participate in designated work activities for 30 hours a week.<sup>11</sup> Virtually all forms of job and skill training, ie activities that would contribute to the upward mobility of single mothers, are excluded from the definition of “core work activity” for purposes of fulfilling the states’ mandate for work participation.<sup>12</sup> Specifically, the US Department of Health and Human Services’ final rule implementing the TANF reauthorisation does not include jobs skills training directly related to employment, education directly related to employment, or secondary school attendance for those who have not completed secondary school as “core work activities”.<sup>13</sup> In addition, activities that would address barriers to employment, such as mental health treatment or rehabilitation services, can only count toward work participation under the category of “job readiness assistance”, which many states limit to six weeks in any given year.<sup>14</sup>

Second, the PRWORA prohibits most claimants from receiving welfare for more than five years in one’s lifetime, and many states have an even shorter period of lifetime eligibility.<sup>15</sup> This restriction on the period of time a single mother and her family can receive governmental cash assistance rests on the assumption that formal sector waged work can and will provide adequate family support at all other times. In this sense, the PRWORA is the modern reincarnation of the idea that poverty is caused by human failure, in that a person is assumed to be able to overcome poverty by one’s own individual action of participating in waged work.

The PRWORA specifically incorporates a “social contract”, authorising states to require recipients to contract with the state through written “individual responsibility plans” (“IRPs”), which, among other things, set forth obligations of the individual recipient and services that the state is obligated to provide the recipient.<sup>16</sup> As of 1999, 33 states required recipients to sign “employability plans” (which focus exclusively on employment related issues), 35 states required “responsibility contracts” (which cover a variety of employment and non-employment obligations), and seventeen states require recipients to sign both.<sup>17</sup>

The rhetoric underlying this formulation of “welfare reform” was seemingly oblivious to gender (and racial) considerations. Instead, the debate

<sup>11</sup> 42 USC § 607(c)(1); 45 CFR § 261.31(a)(1).

<sup>12</sup> 42 USC § 607(c) and (d).

<sup>13</sup> 45 CFR § 261.31(b) and (c).

<sup>14</sup> Center on Budget and Policy Priorities, Center on Law and Social Policy *Implementing the TANF Changes in the Deficit Reduction Act* (2007) 17.

<sup>15</sup> 42 USC § 608 (a)(7) (2003); 45 CFR § 264.1 (a)(1).

<sup>16</sup> 42 USC § 608 (b).

<sup>17</sup> For more information visit *State Policy Documentation Project* <<http://s242739747.onlinehome.us/spdp/tanf/tanfapps.htm>> (accessed 19-05-2011). More recent data can be found by querying the *Welfare Rules Database* <<http://anfdata.urban.org/wrd/WRDWelcome.cfm>> (accessed 19-05-2011). A query of whether or not that state has a formal, written agreement listing the recipient’s responsibilities for the year 2009 was run by selecting “Query the Database” and the category “Contracts and Agreements” and the data element “ca\_exist”. Based on this query, as of 2009, 35 states required some form of contract. For a fuller discussion of IRPs, see CM Miller “The New Contract: Welfare Reform, Devolution, and Due Process” (2002) 61 *Md L Rev* 246.

relied on facially neutral (and therefore inevitably patriarchal) concepts of dignity, self-sufficiency and dependency,<sup>18</sup> without recognising that identical social assistance programs can have quite different consequences for various populations as I will show below.

## 2 Background legal rules construct poverty

The above described reductions in social welfare benefits and reliance on low-waged work as the source of family support assumes that entry into the generic “labour market” is the silver bullet that allows single mothers to have “equal opportunity” to succeed. That assumption is false and is based on an understanding of our legal system that ignores how historically and culturally contingent legal rules have skewed distributive effects, in particular, negative consequences for women, minorities, and other subordinated groups.

The dominant political discourse in Western nations, reinforced by our legal cultures, teaches that poverty arises naturally and that the legal system bears no responsibility for causing it. Private law concepts of family, tort, property, and freedom of contract are made to appear as the necessary and neutral framework of social and economic power relations, arising independently of law. The dominant political culture denies that these background rules privilege any group or have anything to do with allocating wealth or income. The role of law in distributing property, valuing waged labour, and consequently devaluing other forms of “subsistence work” and “caregiving work”,<sup>19</sup> is almost always invisible.

In fact, the stubborn persistence of poverty, in both developed and developing countries, results in significant part from political and legal decisions and institutions that generate and sustain a sharply unequal distribution of wealth and resources. The substantive content and distributive effects of a wide range of legal entitlements are not matters of accident; rather they are chosen, and reflect and enact distinct political values. Legal entitlements are created by human actors who make moral or philosophical decisions, explicitly or implicitly, about who is deserving or undeserving, who is worthy of reward within a chosen economic structure. The politics of race, gender, and class are filtered through these choices. Far from being natural or neutral, legal rules, norms, and practices play a central role in maintaining poverty by perpetuating

<sup>18</sup> House of Representatives *Welfare and Medicaid Reform Act of 1996: Report of the Committee on the Budget House of Representatives to accompany HR 36734* (1996) HR Rep 104-651, reprinted in 1996 USCCAN 2183:

“It [the current welfare system] traps recipients in a cycle of *dependency*. It undermines the values of *work* and family that form the foundation of America’s communities.” (HR Rep 104-651 3; 1996 USCCAN 2184 (emphasis added)).

“The welfare system contradicts fundamental American values that ought to be encouraged and rewarded: *work*, family, personal responsibility, and *self-sufficiency*. Instead, the system subsidizes dysfunctional behavior.” (HR Rep 104-651 4; 1996 USCCAN 2185 (emphasis added)).

“As welfare discourages *work*, it encourages long-term *dependency*.” (HR Rep 104-651 4; 1996 USCCAN 2185 (emphasis added)).

<sup>19</sup> See part 4 below.

and by according cultural legitimacy to severe wealth inequality, privileging certain interests and disadvantaging others.<sup>20</sup>

Legal rules also shape social roles by assigning power and responsibility in social relationships, whether in the workplace, landlord/tenant structure or within the family,<sup>21</sup> always eroding the independence of some in favour of empowering others. For example, those with greater property rights generally have greater bargaining power in the market; they are more capable of living without or replacing elsewhere the goods that the other participant in the bargain has to trade or offer.

Contrary to the dominant political imagery, which effaces the power of the state in structuring social life, the state has always intervened in social life through the design and enforcement of non-neutral, value-laden entitlements established by market-structuring background rules. The question is not when or whether government should step in; the question is rather whose interests, and what distribution of power, are protected by these entitlements.

One specific illustration that is important to the understanding of waged work as a focus of poverty reduction is reflected in the inheritance law in many countries. Building on prior legal definitions of “private property” (notably, in the US, developed at a time when only moneyed white males could own property or had the right to vote), inheritance law provides protections for wealthy individuals’ economic interests. Through the rules on ownership and succession, the law privileges those with wealth by allowing them to maintain and pass on their assets to their chosen heirs. Thus the heirs of those originally able to own or purchase property are, likewise, economically privileged.

The ramifications of these common law principles are evident in gender (as well as racial) income disparity. For example, the vast majority of women and people of colour in many western developed nations do not have resources. Put differently, most resources, in the form of assets, are controlled primarily by white men. Thus, those with the major amount of assets can invest and continue to generate income for themselves and their families, income that is not based on their own formal sector waged work. The continuation of privileges, benefits and inheritance are classic examples of legal entitlements guaranteed by the state. The wealthy and their children have choices that those without resources simply do not have.

The mainstream legal concept of “equal opportunity”, particularly within the formal-sector waged work force, ignores the imbalance and the privilege derived from “asset advantage” and the resulting disadvantage for those previously discriminated against because of gender, disability, sexual

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<sup>20</sup> An overview of the strand of critical legal realism that focuses on background rules is provided in DM Davis & K Klare “Transformative Constitutionalism and the Common and Customary Law” (2010) 26 *SAJHR* 403 435-449. See also D Kennedy “The Stakes of Law, or Hale and Foucault!” in D Kennedy *Sexy Dressing Etc.: Essays on the Power and Politics of Cultural Identity* (1993) 83 83-125; KE Klare “Legal Theory and Democratic Reconstruction: Reflections on 1989” (1991) 25 *University of British Columbia LR* 69 69-103.

<sup>21</sup> FE Olsen “The Myth of State Intervention in the Family” (1985) 18 *University of Michigan JL Reform* 835 835-864.

orientation or race.<sup>22</sup> Those without assets are treated as if they were on an equal footing within the formal sector waged work setting. Once any person has been given an “equal” opportunity to compete for a job, the appearance of imbalance is obscured. Thus popular culture often ignores the role of legal institutions in reproducing hierarchy and thereby preventing the emergence of a gender/racial/class-neutral world of “equal opportunity”. But any conception of equal right to employment opportunities and pay that ignores the legal rules which determine what assets various social groups are able to bring to the labour market is theoretically deficient. To correct this error requires a re-examination of the traditional common law of property that perpetuates the asset, or “opportunity” inequality, something that is simply not factored into the debate about poverty reduction.

A similar analysis applies in many of the so-called “developing countries” where legal systems establish that men hold much, if not all, of the land and other asset wealth.<sup>23</sup> The continuing power of the background rules of inheritance is dramatically illustrated by the landmark case of *Bhe v Magistrate, Khayelitsha*<sup>24</sup> in which the South African Constitutional Court exposed the colonialist imposition of racial hierarchy or white supremacy by maintaining separate black/white systems of inheritance. Specifically, the Court exposed the power of inheritance apartheid<sup>25</sup> and customary law as applied to blacks (or at least the reified version of customary law imposed by the colonist oligarchy) and its central importance in fostering and sustaining male supremacy and the total economic marginalisation of women.<sup>26</sup>

### 3 Segmented labour markets

One result of this unequal opportunity structure partially created by the legal background rules is that poor women, and particularly poor women of colour, do not have the resources to develop sufficient human capital to obtain living-wage employment. They are relegated to the lowest wage level and highly unstable jobs and have difficulty obtaining training and education that would facilitate upward mobility.

In the US, as noted above, social welfare programs never provided sufficient income to sustain poor families. Therefore, many single mothers either combined some form of formal- or informal-sector paid work with receipt

<sup>22</sup> See generally ML Oliver & TM Shapiro *Black Wealth, White Wealth: A New Perspective on Racial Inequality* (1995).

<sup>23</sup> For a discussion of this issue in Latin America, see generally CD Deere & M Léon *Empowering Women: Land and Property Rights in Latin America* (2001).

<sup>24</sup> *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 BCLR 1 (CC).

<sup>25</sup> See the discussion of the centrality of the rights to human dignity and equality (paras 48-51, 71-73).

<sup>26</sup> The consolidated cases were brought by African women who were next of kin under the Intestate Succession Act 81 of 1987 applicable to whites, but were barred from inheriting by the primogeniture principle of customary law. In holding that the rule of primogeniture was unconstitutional, the Court stated:

“The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.” (Para 78).

of social benefits or cycled between formal sector, low-wage work and social assistance programs. Studies performed immediately preceding the 1996 passage of PRWORA documented that receipt of welfare and waged work were inextricably intertwined, giving the lie to the widely held assumption that welfare recipients are a separate and distinct category from formal sector paid workers. A majority of women receiving governmental social assistance benefits move in and out of low-wage work on a regular basis.<sup>27</sup> However, they never escape welfare for the jobs and programs available to higher and more regular earners.

Far from recipients of governmental social assistance being unwilling to work, these studies suggest that most recipients, even before the stringent work requirements mandated by PRWORA, preferred and endeavoured to earn wages despite the most trying personal circumstances. Their efforts are frequently frustrated by barriers for which legal rules and public policies are responsible. The problem, by and large, is not lack of work-effort, but the legal and social structure of low-wage labour markets. Often, poor people cannot find employment for which they are qualified. Even in times of low unemployment, low-wage work conditions are so precarious as to guarantee that many low-wage earners will periodically cycle through periods of unemployment. Low-wage jobs in the US and many other developed nations pay below-subsistence wages (thereby ensuring that workers cannot provide for their families) and provide little or no training or advancement opportunities. They have the least family-necessary benefits, such as health insurance, sick days and vacation time. They typically have inflexible work schedules, allowing no adjustment for the caregiving needs of low-income families who do not have nannies or others available to care for their children and elders (resulting in frequent job loss). In addition, low-wage employers often induce employee turnover to depress wages and prevent vesting of benefits. Far from providing a site for self-actualisation, independence, autonomy, and empowerment, these jobs generate alienation, depression, poverty within wage-work, and disempowerment.

<sup>27</sup> One study found that of the 64% of women on Aid to Families with Dependent Children for the first time who left the rolls within two years, almost half left for waged work. But of those who left, three-quarters eventually returned; 45% returned within a year. See LD Pavetti *The Dynamics of Welfare and Work: Exploring the Process by Which Young Women Work Their Way Off Welfare* (1993) PhD thesis JFK School of Government, Harvard University. Another study found that 70% of Aid to Families with Dependent Children recipients participated in some way in the waged labour force over a two-year period: 20% combined paid work and welfare, 23% worked intermittently, receiving welfare between jobs, 7% worked limited hours and looked for more paid work, and 23% searched for, but could not obtain, paid work. The women in this study held an average of 1.7 paid jobs over the two-year period and spent an average of sixteen weeks looking for paid work. R Spalter-Roth *Making Work Pay: The Real Employment Opportunities of Single Mothers Participating in the AFDC Program* (1994).

If one used "point in time" data, ie counting the percentage of those on a given day both receiving welfare and participating in wage work, there appears to be very little overlap, figures showing only about 7% of welfare recipients are also in paid labour. Staff of the House Committee on Ways and Means *Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means* 104th Cong 2nd Sess (1996) 474. But this type of data collection does not take into account the "cyclical welfare/work population".

For example, according to the US 2000<sup>28</sup> census, millions of full-time, year-round workers in waged work in the formal economy live below the officially designated poverty wage. Women predominate in the lowest wage-work positions. Of the 25 occupations with the lowest median earnings, nineteen are predominantly filled by women, in both the full-time and part-time categories. The percentage of workers in these occupations who are women is often in the 80-95% range. For the average-sized family receiving TANF benefits (a single mother with two children), the *median* earnings of women working full-time, year-round in eighteen of these occupations is below the designated, and quite conservative, federal poverty level. Reflecting poor women's history, these occupations fall into categories such as maids and housecleaning attendants (1.12 million), child care workers (1.19 million), waitresses (1.04 million), cashiers (1.7 million), and a variety of food preparation and serving jobs (including fast food, cafeteria, and counter attendant jobs).<sup>29</sup>

A 2003 study that focused specifically on US low-income, single-parent household-heads found that 78.2% of those in waged work were concentrated in four typically low-income occupations: service, administrative support and clerical, sales, and operators, fabricators and labourers. That figure rose to 81% for single mothers. When broken down by industry classifications, 71% of low-income single mothers worked in services or retail trade compared to 53.1% of low-income single fathers. The percentage of all single parents participating in low-wage work rose from 60.4% to 69.0% after the social protection reductions (PRWORA) in 1996. However, the number of low-income, single-mother household-heads increased even more dramatically, from 58.5% to 68.1%. Only 7.3% of all single-parent household-heads were affiliated with unions, with an even smaller figure for women.<sup>30</sup>

The legal rules and patterns of gender discrimination and job segregation that make low-wage labour markets so hostile to women workers are virtually

<sup>28</sup> As of the publication date of this paper, commensurate data from the 2010 census has not been made available. However, based on the C DeNavaz-Walt, BD Proctor & JC Smith (US Census Bureau) *Income, Poverty, and Health Insurance Coverage in the United States, 2008: Current Population Reports* (September 2009) P60-236(RV), and Detailed Tables – Table HIMC-01, 4,495 million households in which at least one member of the household worked at a full-time job more than 50 weeks per year had median income less than \$25 000. Of that 1.031 million had income less than \$15 000. US Census Bureau *The 2011 Statistical Abstract, The National Data Book, Income, Expenditures, Poverty, and Wealth: Table 691 – Money Income of Households – Distribution by Income Level and Selected Characteristics, 2008* (2011) <<http://www.census.gov/compendia/statab/2011/tables/11s0691.pdf>> (accessed 15-05-2011).

<sup>29</sup> Data compiled from: D Weinberg *Evidence From Census 2000 About Earnings by Detailed Occupation for Men and Women* Census 2000 Special Reports CENSR-15 (2004) 9; US Census Bureau “TABLE 1: Earnings Distribution of All US Year-Round Full-Time Workers by Occupation: 1999” (02-06-2004) *US Census Bureau* <<http://www.census.gov/population/cen2000/phc-t33/tab01.pdf>> (accessed 05-08-2011); US Census Bureau “TABLE 3: Earning Distribution of the Female US Year-Round Full-Time Workers by Occupation: 1999” (02-06-2004) *US Census Bureau* <<http://www.census.gov/population/cen2000/phc-t33/tab03.pdf>> (accessed 05-08-2011); US Census Bureau “Income: TABLE 2: Earnings by Detailed Occupation: 1999: United States, Both Sexes” (03-06-2010) *US Census Bureau* <<http://www.census.gov/hhes/www/income/data/earnings/call2usfemale.html>> (accessed 15-05-2011).

<sup>30</sup> A Jones-DeWeever, J Peterson & X Song *Before & After Welfare Reform: The Work and Well-Being of Low-Income Single Parent Families* (2003) 11 (Table 2.1), 15 (Table 2.3), 16 (Table 2.4), 19 (Table 2.5). I am here referring to the data from August 1999-February 2000. National union density at the time was 13.5%.

invisible in the discourse of neo-liberal welfare reform.<sup>31</sup> When advocated in South Africa, the problematic nature of the argument that formal sector waged work is the solution to poverty is even more stark. South Africa is faced not just with segmented labour markets, but with the lack of *any* formal sector jobs for a substantial percentage of its population.<sup>32</sup>

However, ignoring these factors enables neo-liberal policymakers and ideologues to advance with a straight-face the plainly false thesis, a product of wishful thinking, that income from formal sector waged work is sufficient to provide adequate family support to all who are willing to work. Both the legal effacement of “work” outside of the formal sector waged work structure and the factually unsupportable and intellectually dishonest “welfare-dependency thesis” provide cover for this myth.

#### 4 Value is created outside the wage-work sector

As noted earlier, the version of the social contract theory invoked to support neo-liberal welfare reform privileges formal sector waged work as the site for creating value and producing dignity, self-sufficiency and independence. This framing of a primary answer to poverty ignores the vast amounts of work performed by women, particularly poor women, outside of the formal sector. Yet women’s work in all of its complexity creates wealth and contributes to society. Formal sector production could not occur without women’s unwaged work. That such work often fails to promote the definitions of dignity, self-sufficiency and independence contained in neo-liberal social assistance policy results not from any intrinsic lack of worth, but from legal structures and social practices that devalue it and deny its importance.

In my effort to de-center formal-sector waged work in the neo-liberal social contract discussion, I have used two terms, not mutually exclusive, to describe effort expended to sustain, nurture and develop human beings – “subsistence work” and “caregiving work”.<sup>33</sup> Recall that “subsistence work” includes formal- and informal-sector paid work and in-home production for consumption by the family, while “caregiving work” includes effort expended to sustain and nurture family members.<sup>34</sup>

Unpaid labour, particularly the unpaid labour of women in the home, is an indispensable factor in the production of social wealth. Specifically,

<sup>31</sup> Note the earlier discussion of the restrictions in the US Department of Health and Human Services’ final rule implementing the TANF reauthorisation that severely restricts states’ ability to provide education and training that might assist a mother in low-waged work to develop upward mobility, as such programs are not considered “core work activities”.

<sup>32</sup> In South Africa, depending on the definition of unemployment, between 23.6% and 32.5% of the working age population are unemployed – not as a result of lack of initiative, but rather the lack of job-availability (a legacy of colonialism and apartheid). The Presidency of Republic of South Africa *Development Indicators* (2009) 21, 26.

<sup>33</sup> See n 2 above.

<sup>34</sup> Some activities cross these categorical lines, for example, grooming children for school might be seen as both caregiving (nurturing – imparting pride and self-respect) and as subsistence work (socialisation as investment in the family’s human capital). In addition, the distinction between women’s work “in the home” and women’s work “outside the home”, while significant for some analytical purposes, cross-cuts these categories. For example, in-home craft production for barter or sale would be subsistence work, whereas transporting children to the doctor would be caregiving.

unpaid subsistence and caregiving work subsidises the production of value in the formal economy. Mainstream economic theory and social policy has historically ignored this and, consequently, is oblivious to the gender consequences of a system that relies on unpaid labour in the home to support formal sector waged work.<sup>35</sup> Firms cannot function to produce value without socialised, clothed, and fed workers appearing at the factory gate. If the formal wage were truly a “family wage”, employers would be paying for a share of the unpaid labour upon which they rely. However, for well-known reasons that I cannot explore here, it is highly doubtful that waged work fully compensates the unpaid labour in the home on which it depends. Legal rules and policies tacitly based on the assumption that unpaid labour in the home will subsidise the formal economy devalue women, particularly poor women, and exclude them from genuine participation in the social contract.

Whether in the informal economy, subsistence farming, in-kind bartering or caregiving, the vast majority of “work” performed in the world, particularly by poor women, is performed outside of the formal sector. However, the role that poor women play both as subsistence workers outside of the formal sector and as caregivers historically has been, and continues to be, largely denigrated by the mainstream in most societies and by contemporary legal systems.

As noted, many poor women in the affluent Western nations frequently move in and out of low-wage work in the formal economy – holding jobs that routinely create barriers to women fulfilling their caregiving work. A wealth of scholarship<sup>36</sup> criticises the tensions between these competing work demands and points out that the version of the social contract that supports neo-liberal welfare policy renders invisible the caregiving needs of poor single-parent families in Western nations.<sup>37</sup>

The absence of any attention to or appreciation of women’s experiences of work in the marketing of neo-liberal social contract theory to developing and post-colonial countries is equally unpardonable. Poor mothers in the rest of the world still largely work in subsistence agricultural and, to a lesser extent,

<sup>35</sup> There are some promising new conceptual and research developments in this area. See, for example, JE Stiglitz, A Sen & J-P Fitoussi *Report by the Commission on the Measurement of Economic Performance and Social Progress* (2009), specifically 40, where the authors state:

“Many services that households produce for themselves are not recognized in official income and production measures, yet they constitute an important aspect of economic activity. While their exclusion from official measures reflects uncertainty about data more than it does conceptual dissent, more and more systematic work in this area should be undertaken.”

<sup>36</sup> See, for example, Conaghan & Rittich (eds) *Labour Law, Work, and Family*; ND Zatz “Supporting Workers by Accounting for Care” (2011) 5 *Harv L & Pol’y Rev* 5 (also available as ND Zatz *Supporting Workers by Accounting for Care* UCLA School of Law Research Paper No 11-17 (2011) <<http://ssrn.com/abstract=1852707>> (accessed 06-14-2011)); PB Edelman “Changing the Subject: From Welfare to Poverty to a Living Income” (2009) 4 *NWJL & Soc Pol’y* 14; DE Roberts “Welfare Reform and Economic Freedom: Low-Income Mothers’ Decisions About Work at Home and in the Market” (2004) 44 *Santa Clara L Rev* 1029.

<sup>37</sup> Even within the PRWORA, the concept of “work” is highly contextual and contested. For example, providing child care services (whether paid or unpaid) to another TANF recipient so that she can participate in a community service program is a “work activity”, whereas providing care to your own children is not. More generally, lack of pay does not disqualify an activity from being defined as “work”, as unpaid community service constitutes a “core work activity”. See generally ND Zatz “Welfare to What?” (2006) 57 *Hastings LJ* 1131. The “worker” versus “non-worker” distinction is highly ideological, drawing upon and developing the messages of the legal culture generally.

domestic work. Of the 6.39 billion people in the world, only 0.9 billion live in the 50 developed countries, less than one-sixth of the world's population. Five billion live in developing countries. As of 2005, 1.4 billion people lived on less than \$1.25 a day, the international poverty level. About 75% of the world's poor people live in rural areas and depend on agriculture for their livelihood.<sup>38</sup>

Women comprise, on average, 43% of the agricultural labour force in developing countries, ranging from 20% in Latin America to 50% in Eastern Asia and sub-Saharan Africa.<sup>39</sup> They do so primarily through small-scale cultivation for household consumption. After harvest, poor women provide much of the labour for storage, handling, stocking and processing. The number of poor female-headed households has significantly increased, largely because of the HIV/AIDS epidemic in some developing countries,<sup>40</sup> resulting in what certain international organisations have termed a “feminization of agriculture”.<sup>41</sup> Yet, because much of women's work in crop production consists of unpaid labour for family consumption rather than for market sale, it is unrecorded in labour statistics.

While waged work in the formal sector does provide a source of income for many poor families within developing countries, the vast majority of poor people, and especially poor women, provide for their families through small-scale production for sale (for example, fruits and vegetables, sewn goods), domestic work, subsistence agriculture and other forms of subsistence work, and support from family and community networks, all of which falls outside of the formal economy. These strategies for family subsistence are not limited to rural areas; urban dwellers also engage in backyard farming and animal husbandry.

This work is, of course, on top of caregiving work that is quite different from that experienced in developed countries; for example, collecting firewood and water for many hours each day, primarily women's tasks. In developing countries, women can spend up to two hours each day on these tasks, and several times longer in deforested areas. In addition, households are

<sup>38</sup> Bread for the World Institute “Hunger and Poverty Facts” (undated) *Bread for the World* <<http://www.bread.org/hunger/global/facts.html>> (accessed 15-05-2011); A Rahman “Rural Development is Key to Tackling Global Poverty” (2004) *Choike.org* <[http://www.choike.org/nuevo\\_eng/informes/2459.html](http://www.choike.org/nuevo_eng/informes/2459.html)> (accessed 15-05-2011); United Nations Development Programme (“UNDP”) *Human Development Report 2003 – Millennium Development Goals: A Compact Among Nations to End Human Poverty* (2003) 91 <[http://hdr.undp.org/en/media/hdr03\\_complete.pdf](http://hdr.undp.org/en/media/hdr03_complete.pdf)> (accessed 15-05-2011).

<sup>39</sup> United Nations Food and Agriculture Organization (“FAO”) *The State of Food and Agriculture, 2010-2011: Women in Agriculture, Closing the Gender Gap for Development* (2011) 5-8 <<http://www.fao.org/docrep/013/i2050e/i2050e.pdf>> (accessed 15-05-2011). In sub-Saharan Africa, women contribute 60-80% of the labour in food production both for household consumption and for sale. FAO Economic and Social Department *Rural Women and Food Security: Current Situation and Perspectives* (1998) 2.1 <<http://www.fao.org/DOCREP/003/W8376E/w8376e02.htm>> (accessed 15-05-2011).

<sup>40</sup> A joint FAO and UNAIDS study found that since 1985, AIDS has killed approximately 7 million agricultural workers, often a family's main provider, and will probably kill another 16 million by 2020. D Taponzis (FAO & UNAIDS) *Addressing the Impact of HIV/AIDS on Ministries of Agriculture: Focus on Eastern and Southern Africa* (2003) 1 <<http://www.fao.org/hiv/aids/publications/moa.pdf>> (accessed 15-05-2011).

<sup>41</sup> UNDP and FAO “Gender and Biodiversity Management: India” in *Sharing Innovative Experiments 5: Examples of Successful Initiatives in Agriculture and Rural Development in the South* (2011) 296 294-312 <[http://ssc.undp.org/uploads/media/foreword\\_Content.pdf](http://ssc.undp.org/uploads/media/foreword_Content.pdf)> (accessed 24-11-2011).

responding to poverty caused by the loss of formal sector jobs by increasing home-based production of goods previously purchased in the market. This burden predominantly falls on women.<sup>42</sup>

Unfortunately, Western governments are not alone in devaluing poor mothers' caregiving and non-formal sector subsistence work and assuming that installing a "work ethic" in poor people will provide the means for them to support their families in the formal sector. I have previously written about South Africa's Expanded Public Works Programme ("EPWP"), which provides very short term employment and for which one of the major target populations are women.<sup>43</sup> Interestingly, the government's reasons given for embracing the public works model are reminiscent of previously quoted neo-liberal social contract rhetoric assuming formal sector wage work as the source of independence, dignity and self-reliance and ignoring caregiving and other subsistence work.<sup>44</sup>

Public works programs, properly implemented, can be an important tool in reducing poverty. But the unproblematised incorporation of Western neo-liberal constructions of "dignity", "self-sufficiency", and "dependency" once again denigrates the multiple forms of work that poor women perform and ignores the dependent and subordinated status of low-wage formal-sector work in this picture.<sup>45</sup>

## 5 Legal construction of identities: Defining independence

While assuming that single mothers should participate in formal sector subsistence work and that low-wage labour will provide a site of dignity, US social welfare programs for "worthy" claimants, ie Social Security and particularly the Unemployment Insurance program, legally define poor subsistence workers and even many formal sector low-wage workers as "non-workers". Rather than giving dignity to poor women, legal constructions undermine dignity, re-position poor women as dependent and lazy, and erase the dependency inherent in wage work.

Social welfare policies and statutes are typically based on the fiction that the people who are the subjects of these laws and policies have fixed identities independent of law (for example, a person who is, in medical terms, permanently disabled from waged work). But drafting and administering welfare laws are political practices with discursive as well as instrumental consequences. Legal discourses and practices create meanings and identities.

<sup>42</sup> For example, in Bulgaria, the share of home-based production for own consumption in household income doubled from 14.1% in 1990 to 27.5% in 1995. M González de la Rocha *Private Adjustments: Household Responses to the Erosion of Work* UNDP/SEPED Conference Paper Series (2000) 25.

<sup>43</sup> Williams (2005) *SAJHR* 460-462.

<sup>44</sup> P Stober "Getting Down to Business" *Mail & Guardian Online* (16-04-2004) <<http://mg.co.za/article/2004-04-16-getting-down-to-business>> (accessed 30-11-2011); F Haffajee "Ideals of an African Utopia Hamper the BIG, Big Time" *Mail & Guardian Online* (15-05-2003) <<http://mg.co.za/article/2003-05-30-ideals-of-an-african-utopia-hamper-the-big-time>> (accessed 30-11-2011). See also President T Mbeki "Address to the National Council of Provinces, 11 November 2003" (03-09-2004) *Department of International Relations and Cooperations of the RSA* <<http://www.dirco.gov.za/docs/speeches/2003/mbek1111.htm>> (accessed 15-05-2011).

<sup>45</sup> See part 5 below.

Social welfare-related legal practices partially construct the identities of deserving and undeserving claimants.

As in most Western nations, the US legal discourse defines “worker”, for purposes of determining eligibility for benefits under programs such as Unemployment Insurance (“UI”) based on an artificial dichotomy between formal sector waged workers and welfare recipients. For example, through minimum earnings requirements and disqualifying reasons for termination, UI rules exclude many low-waged workers, including significant numbers of single mothers, from the definition of “employee” and such workers are rendered ineligible for unemployment insurance.<sup>46</sup> Many of the single mothers who move from welfare to unstable wage labour in secondary labour markets and then lose their jobs, find that they are *ineligible* for UI benefits and have no choice but to reapply for social assistance benefits. Indeed, in 41 of the 50 US states, men are more likely to receive UI than women.<sup>47</sup> In one study of women-maintained families in which the mother was employed for at least three months, almost three times as many families turned to welfare as turned to UI. In another study of 1 200 single mothers who received welfare for at least two months in a 24 month period, 43% also worked, averaging just about half-time. However, only 11% of those who worked later qualified for UI. They returned to welfare as their “unemployment insurance”.

The 1996 imposition of a five-year lifetime limitation on receipt of TANF has substantially reduced single mothers’ ability to utilise TANF as their “unemployment insurance” when they become unemployed. However, in spite of that, a recent study shows that the percentage of low-educated single mothers entering a spell of unemployment who reported receipt of unemployment receipt *fell* from 28.7% in the years 1990-1994 to 21.4% in the years 2001-2005.<sup>48</sup> Among other factors, this decrease is based on the fact that the jobs that low-educated single mothers largely hold tend not to “lay-off” workers in the traditional sense, but use informal shifts in hours and other means associated with secondary labour markets to induce “voluntary” quits (see part 3 above), thereby disqualifying the individual from eligibility for unemployment insurance. As a result, the only social assistance that many of these unemployed single mothers were receiving was food stamps under the Supplemental Nutrition Assistance Program.<sup>49</sup>

<sup>46</sup> For example, two-fifths of high-wage unemployed receive UI, as compared to less than one-fifth of low-wage unemployed (note that 60% of low-wage workers are women). V Lovell & C Hill *Today’s Women Workers: Shut Out of Yesterday’s Unemployment Insurance System* (2001) 1. Women are four times more likely to be working part-time during their prime earning years than men, and 25 US states deny UI benefits to part-time workers. National Employment Law Project *Why Unemployment Insurance Matters to Working Women and Families: An Important Tool in the Work-Family Balance* (2004) 1 <[http://nelp.3cdn.net/160e9cc27e3f2a6d6e\\_bwm6b5dz6.pdf](http://nelp.3cdn.net/160e9cc27e3f2a6d6e_bwm6b5dz6.pdf)> (accessed 19-05-2011). Because only fifteen states allow individuals who must leave their employment because of compelling family circumstances to receive UI benefits, women who leave are 32% less likely than men to receive benefits (National Employment Law Project *Why Unemployment Insurance Matters* 1).

<sup>47</sup> National Employment Law Project *Why Unemployment Insurance Matters* 1.

<sup>48</sup> HL Shaefer & L Wu *Unemployment Insurance and Low-Educated Single Working Mothers Before and After Welfare Reform* Upjohn Institute Working Paper No 11-173 (2011) 9.

<sup>49</sup> 5-7.

By denying many low-wage earning mothers transitional support when they become unemployed, UI law *constructs* them as persons who are “not attached to the labour force”, that is, as social deviants who cause their own poverty by refusing to work and who therefore are unworthy of assistance from society. They then are viewed as “dependent” on the state and the economic dependency on employers that is a structural feature of low-wage labour markets is rendered invisible. In other words, the power of legal discourse creates a disconnect between people’s *self-understanding as workers* and society’s *recognition of them as non-workers*. Like the background rules that divide the family and the market into independent “private” spheres, separated from “state-imposed” social programs, social welfare laws create and reinforce identities and images that deeply influence welfare policy debates.<sup>50</sup>

The conceptual bifurcation of wage work and welfare receipt performs the discursive magic of severing the concept of dependency from any connection to the sale of labour power in the market, erasing the alienation and subordination that characterise low-wage work. The legal system defines who is a worker, ie who is independent, and then legal discourse stigmatises those who fail to meet the legal definition of “worker” as trapped in dependency. Dependency becomes a concept excised from market structure. Likewise there is no concept of independence outside the formal sector market structure (unless one has sufficient wealth of one’s own or through a male-breadwinner so that wage work is not required).<sup>51</sup>

My contention is that the low-wage experiences of many women reinforce increased dependency both in the work setting and in domestic situations. However, by defining “dependency” as “reliance on welfare” and excluding capital-labour relations from the concept of dependency, current discourse on welfare policy has largely ignored the structure of low-wage work.

For example, Lourdes Benería and Martha Roldán,<sup>52</sup> in discussing the increase in female employment in Mexican industries, note that firms prefer women workers for certain tasks because they assume stereotypical female characteristics: that women workers will be reliable and stable, able to follow

<sup>50</sup> That is not to say that imaginative re-envisioning of legal rules cannot make a difference to thousands and perhaps hundreds of thousands of people. It is worth noting that, at the point of his highest popularity (immediately after taking office), President Obama included very progressive, often quite technical, changes to the UI system in his stimulus package – changes that are barely known to the general public. He provided \$7 billion to states for three years if they modernised their UI systems in several ways. One-third of this amount was made available to states if they changed their system to count wages in the quarter immediately prior to the quarter in which the unemployed person files for benefits. This method of computing wages has a major impact on low-wage workers who move in and out of unstable secondary labour market jobs on a regular basis. The remaining two thirds was made available to states if they revised their system in two of four possible ways, each of which benefits women and/or low-wage workers: provide that a person shall not be disqualified because she is seeking part-time work in certain circumstances; provide that a person shall not be disqualified if she left her job for “compelling family reasons” which includes domestic violence, the illness or disability of an immediate family member, or to accompany a spouse changing employment; provide that benefits shall be available to a person taking an approved training program; and provide allowances for dependents. American Recovery & Reinvestment Act of 2009, PL 111-5 [HR1], February 17, 2009, 123 Stat 115.

<sup>51</sup> N Fraser & L Gordon “A Genealogy of Dependency: Tracing a Keyword of the Welfare State” (1994) 19 *Signs: Journal of Women in Culture and Society* 309 314-319.

<sup>52</sup> L Benería & M Roldán *The Crossroads of Class and Gender: Industrial Homework, Subcontracting, and Household Dynamics in Mexico City* (1987) 40-74.

orders, and less troublesome; will do careful manual work; and will have discipline and patience. Some employers stated that single mothers were “among their ‘best workers’ because their responsibility as heads of households implies that they cannot rely on anybody else for family subsistence”.<sup>53</sup>

In discussing Mexican industrial homework, the authors noted that the structure of homework is based on and reinforces pre-existing social relations and gendered division of labour within the domestic unit. Likewise they discuss how homework, which is unstable and offers little security, develops relationships of dependency by workers both on jobbers (those who distribute the homework) and on other sites of production outside of the homeworker’s “control”. The authors conclude that “society’s and women’s own perception of themselves as secondary income earners prepares them for involvement in unstable and low-pay jobs”.<sup>54</sup>

Karen Hossfeld,<sup>55</sup> studying the model of labour control in Silicon Valley for female electrical production workers who are primarily immigrants, notes that supervisors affirm the workers’ sense of their factory jobs as non-feminine. The supervisors then use flirting and dating as “refeminization” strategies, subtly undermining the desire to file conditions complaints or join unions. Likewise, she notes the workers’ internalisation or acceptance of capital’s relegation of immigrants to secondary status in labour markets.

Chandra Mohanty<sup>56</sup> describes how Indian lacemakers have internalised ideologies that define them as “non-workers” whose work is “leisure time activity”. They view themselves as selling products rather than labour, and are invisible as workers in census figures. Mohanty contrasts these homeworkers to Hossfeld’s immigrant women in Silicon Valley and migrant women in Britain who work in family firms as an extension of their family role, and concludes that “[i]n all these cases, ideas of *flexibility*, *temporality*, *invisibility* and *domesticity* in the naturalization of categories of work are crucial in the construction of Third-World women as an appropriate and cheap labor force”.<sup>57</sup>

Several themes emerge from these studies that are instructive in providing a critique of low-wage labour markets as part of an anti-poverty agenda. First, the structure of low-wage paid labour often legitimates and reinforces existing patterns of gender subordination and dependency within the family and supports existing racial hierarchies. Second, the structure of low-wage labour contributes to and constructs increased “dependency” of women in the workplace, and a devaluing of all of women’s work, both paid and unpaid. This dependency creates a constant fragility of the work experience, in the actual job site and in the self-construction and expectations of women workers.

<sup>53</sup> 48.

<sup>54</sup> 71.

<sup>55</sup> K Hossfeld “‘Their Logic against Them’: Contradictions in Sex, Race and Class in Silicon Valley” in KB Ward (ed) *Women Workers and Global Restructuring* (1990) 149 149-178.

<sup>56</sup> CT Mohanty “Women Workers and Capitalist Scripts: Ideologies of Domination, Common Interests and the Politics of Solidarity” in MJ Alexander & CT Mohanty (eds) *Feminist Genealogies, Colonial Legacies, Democratic Futures* (1997) 3 3-29.

<sup>57</sup> 20 (original emphasis).

However, a critical understanding of this construction of dependency has been largely absent from the debate about “welfare reform”. In that discourse, dependence is synonymous with receipt of social assistance benefits, and independence is constructed as being in waged work. Yet as Nancy Fraser and Linda Gordon<sup>58</sup> have set out, prior to the rise of industrial capitalism, the definition of dependence was that of being subordinate to someone else or gaining one’s livelihood by working for someone else. Virtually everyone was considered dependent; there was no deviancy associated with the concept. Only those owning sufficient property to live without working were deemed independent.

With the rise of industrial capitalism, as white male workers demanded electoral rights, they expanded and reconstructed the concept of economic independence to include wage labour. Economic inequality or relationships of subordination among white men no longer created dependency, capital-labour relations were exempted from dependency relations. In abolishing capitalist economic dependency by definition, and in “legally abolishing” political-exclusion dependency, many believed that structural bases of dependency had been eliminated in the US.

In contrast, the concept of dependency became tied to exclusion from wage work and receipt of social welfare programs. Rather than dependence being viewed as normal and pervasive, it was viewed as deviant, and resulting from individual fault. Both conservatives and liberals increasingly did not question that independence was good, and tied to wage work, failing to incorporate or recognise how the structure of low-wage labour contributes to creating increased “dependency” of women.

The jurisprudence of the South African Constitutional Court is instructive in illustrating how the abstract concepts of “independence” and “dignity” can be filled with meanings that result in quite different redistributive effects than that of the neo-liberal social contract. *Khosa v Minister of Social Development*<sup>59</sup> was the first Constitutional Court case directly to address the constitutional provisions relating to the socio-economic right to social security. In finding that the statutory exclusion of permanent residents from specific social programs violated the South African Constitution, the Constitutional Court recognised that reliance on other family members for support may have serious negative consequences for poor families. Rather than viewing receipt of a state social grant as creating dependency, the Court in *Khosa* saw social grants as a way to ensure the dignity of a recipient who would otherwise be dependent on the family:

“The exclusion of permanent residents in need of social-security programmes forces them into relationships of *dependency* upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa. These families or dependants, who may be in need of social assistance themselves, are asked to shoulder burdens not asked of other citizens. The denial of the welfare benefits therefore impacts not only on permanent residents without other means of support, but also on the families, friends and communities with whom they have contact. Apart from the undue burden that this places on those who take on this

<sup>58</sup> Fraser & Gordon (1994) *Signs* 312-327.

<sup>59</sup> 2004 6 SA 505 (CC).

responsibility, it is likely to have a serious impact on the *dignity* of the permanent residents concerned who are cast in the role of supplicants.<sup>60</sup>

## 6 Conclusion

Drawing on the contributions of many colleagues, I have attempted in this paper to articulate three central themes or assumptions that can usefully inform our discussions going forward. First, legal rules and discourses play a significant role in constructing society's understanding of poverty. Second, the rules historically in place in our societies work to keep people in poverty rather than to ameliorate their situation. And, third, contemporary neo-liberal social contract discourse – based in part on these embedded legal understandings – is an ideological initiative that legitimises and sustains gender subordination (among other forms of illegitimate hierarchy and domination). It is difficult to imagine a hopeful future either in law or social policy unless we can counteract the grip of this initiative on policy making.

### SUMMARY

This paper attempts to provide a broad thematic framework for discussing critical and sometimes controversial issues in the field of law and poverty. Using gender as the lens through which to view a late 20th century version of social contract theory, the paper discusses how blindness toward gender consequences of social policy and legal rules: (i) obscures the roots of poverty that are in part constructed by common law background legal rules of property, contract, tort, and family law; (ii) induces decision makers to ignore the conditions of and sex segregation in low-wage labour markets and the lack of upward mobility for poor women, thus appearing to legitimate the central, but flawed, assumption of neo-liberal poverty reduction policy (namely, that formal sector waged work can and will provide adequate family support); (iii) renders invisible non-formal sector “subsistence work” and “caregiving work,” as defined herein, and in particular ignores the contribution of this work to economic productivity and efficiency as conventionally understood; and (iv) fails to appreciate that the legal definitions characterising many poor women workers as “non-workers” reinforce an artificial dichotomy between waged work and social assistance receipt (a distinction often framed as independence *versus* dependence) and eliminates by magical thinking the alienation and subordination experienced by low-wage workers, particularly women, from poverty discourse.

I articulate three central themes or assumptions that can usefully inform our discussions going forward. First, legal rules and discourses play a significant role in constructing society's understanding of poverty. Second, the rules historically in place in our societies work to keep people in poverty rather than to ameliorate their situation. And, third, contemporary neo-liberal social contract discourse – based in part on these embedded legal understandings – is an ideological initiative that legitimises and sustains gender subordination (among other forms of illegitimate hierarchy and domination).

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<sup>60</sup> Para 76 (emphasis added).