

The background of the book cover is a collage of various US currency and official documents. At the top, a portion of a \$100 bill is visible, showing the eyes of Benjamin Franklin and the text 'WASHINGTON, D.'. Below this, there are horizontal bands of different denominations, including a \$20 bill with the number '900992' and a \$10 bill with the number 'L4211712'. A \$5 bill is also visible at the bottom with the number 'I23895367 A'. The collage is layered and semi-transparent, creating a textured, historical feel.

WASHINGTON, D.

AMERICAN LAW IN THE AGE OF
HYPERCAPITALISM

THE WORKER, THE FAMILY, AND THE STATE

RUTH COLKER

AMERICAN LAW IN THE AGE OF HYPERCAPITALISM

The Worker, the Family, and the State

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for Sammy, Julia, and Sasha,
and the other babies of 1997
May they thrive in a society that
genuinely respects its children

PREFACE

The idea for this book began to develop in the fall of 1988 when I visited the University of Toronto Faculty of Law. Like most Americans, I knew very little about Canadian law and society. I did not expect Canada's legal regime to differ much from ours, and I did expect its legal system to reflect a respect for our two hundred years of constitutional jurisprudence. What I learned about Canadian constitutional law was that its protection of individual rights differed markedly from the American model. For example, while the United States was involved in a bitter fight over affirmative action, Canada's Charter of Rights protected it. Whereas the United States was considering whether to adopt any federal family leave policy at all (and, of course, only unpaid leave), the government of Ontario was expanding its already generous family leave leg-

isolation to encompass the possibility of nearly one year of paid leave.

The possibility of a different balance among the state, the employer, and the family became even more apparent when I was asked to give the keynote address at a disability rights conference sponsored by Griffiths University in Brisbane, Australia, in 1996. Visiting Australia gave me an opportunity to learn more about how other common law countries had developed laws regarding disability discrimination. My research on the laws of Australia, Canada, and the recently passed law of Great Britain revealed great divergence among these countries. Although the United States was the first of these countries to pass a comprehensive statute to protect against disability discrimination, as interpreted by the courts its current protections are often the narrowest of these countries.

I also heard a different style of rhetoric in Australia, compared with the United States, in regard to the state's obligation to persons with disabilities. Whereas the United States' rhetoric is often based on the presumptions of a *laissez-faire* economy, Australia's rhetoric usually presumes that the state should have an active role in the lives of all its citizens.

This opportunity to study the legal systems of Canada and Australia gave me a new perspective on the presumptions of the American legal system. It has become commonplace in American law schools to presume that "law and economics" will dominate legal decisions with their consideration of utility and efficiency. Increasingly, we have not asked our students to consider the human values that underlie our choices within the law. This presumption also extends to the political arena, in which politicians compete over how much they can cut back on aid to poor mothers, without considering the impact on our next generation

of children. The debate about social welfare in Canada and Australia seems more embedded in the human values of love and compassion toward our present and next generation.

The subtitle of this book—*The Worker, the Family, and the State*—reflects the tripartite division that we usually see in the United States when we discuss the worker and the family. Although our usual presumption is that these categories are three separate units, it is time that we began to see that parenting *is* work and that the state *should* play a crucial role in easing the family responsibilities of parents, regardless of how much money they earn outside their home. Other countries have a more integrated notion of the worker, the family, and the state, but without moving toward a socialist economic system.

These comparative observations led me to conclude, reluctantly, that the United States has moved toward what in this book I term *hypercapitalism*—a capitalism that is overly enamored with laissez-faire economics and insufficiently concerned with our health and well-being. Fortunately, the tide may be turning. Even financier George Soros recently criticized America's devotion to hypercapitalism. Accordingly, I hope that this book arrives at a good moment in our national debate about the relationship between the citizen and the state and that I can help put back the needs of people into the American model of capitalism.

ACKNOWLEDGMENTS

The problem with writing acknowledgements is that one is bound to forget to thank lots of people who were of tremendous assistance. Casual conversations with colleagues at conferences, brief conversations in the halls of the law school, insightful comments from seminar students, and help in the library from whoever was at the reference desk at the moment helped make this book possible, yet my memories are not sufficiently specific to offer appropriate thanks. So, first, thanks to all the people who provide the background support in my life that I probably take too easily for granted.

As for those people whom I especially want to name, let me start with my editor at New York University Press, Niko Pfund. Even after becoming director of the press, Niko stayed faithful to my project. He's probably read some chapters more often

than I have. He sent me books and articles as well as captivating ideas. I hope I have been as responsive to his many suggestions as he has been responsive to my never-ending queries.

Theresa ("Tish") Zimmerman, my research assistant at the University of Pittsburgh School of Law, also offered enormous assistance. I wrote the first draft of this book while pregnant and had little inclination to walk all over the Pitt campus to find books and research material. Tish thus often served as my legs, spending many hours in the Economics Library finding material for me. After I gave birth, her diligence continued as she brought material to my home while I was on maternity leave from the office.

My colleagues Jules Lobel (law) and Lisa Brush (sociology) also deserve a special note of thanks. On our runs together, Jules helped me conceptualize the basic idea behind this book through his critique of capitalism. Lisa introduced me to writers in sociology who also use a sophisticated economic analysis. Both of them listened to my hypotheses and insights with patience and inquisitiveness. I hope this final product doesn't disappoint them.

And then there are the countless people who heard me deliver drafts of various chapters at conferences and were generous with their responses. Chapter 2 received some assistance from my Canadian colleagues at the University of Alberta, who invited me to write that chapter for a symposium on U.S. and Canadian constitutional law. My Australian colleagues, whom I met at a symposium on disability rights at Griffith University in Queensland, helped with the argument developed in chapter 3. Brian Doyle, a professor in Great Britain, also offered valuable assistance with that chapter. A workshop sponsored by the University of Illinois Law School gave me invaluable assistance for

both the first and third chapters and particularly helped me develop my definition of capitalism. The participants at a symposium sponsored by the *Yale Journal of Law and Feminism* in the fall of 1996 was critical to the development of the ideas in chapters 4 and 6. The participants at a symposium sponsored by the *Hastings Law Journal* in the winter of 1997 also helped me formulate the thesis of chapter 5. Finally, Daniel Posin (Tulane University) offered me a wonderfully constructive “blind” review at the final stages of the project. Thus, with help from colleagues in Canada, Great Britain, and Australia, as well as the United States, I feel fortunate to have been able to write this book in a truly multinational context.

The Document Technology Center at the University of Pittsburgh School of Law made a typically fine contribution to this project. The high quality of its work coupled with a miraculous turnaround time made writing pleasurable instead of drudgery. The financial support of the School of Law for this project is also greatly appreciated. Dean Peter Shane allowed me to use extra research assistance at a time of fiscal austerity and was flexible with my maternity leave so that I could finish this project. I was fortunate to finish this project with the support of my new home—the Ohio State University College of Law. Dean Gregory Williams agreed to support this project even before I had moved my family to Columbus, Ohio, and therefore made it possible for me to finish this project in Pittsburgh even while organizing a relocation to Columbus.

And as always, I would like to thank my family for their support while I wrote this book. My husband, Edward Eybel, helped take care of the children and the household chores while I pounded away on the keyboard; my five-year-old, Cara Colker-Eybel, learned to respect my office space so that she could play

computer games without ruining my work, and my infant, Samuel Colker-Eybel, cooperated by sitting quietly in his chair while I typed away. I feel fortunate to have been able to combine family, work, pregnancy, and childbirth while writing this book. I hope that we can develop policies that give more people the opportunities that I have had, to spend time with their children while experiencing a fulfilling career.

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THE TATTERED SAFETY NET

Isabelle Dumont, a legal immigrant to the United States from Haiti, works for the Bayer family. In return for taking care of their children while they are at work each day (from at least 8 A.M. until 6 P.M.), she is paid \$250 per week. When the family goes on vacation, she has her own (unpaid) vacation. Because she is not a U.S. citizen, Isabelle is not eligible for Medicaid, and she cannot afford private health insurance on her modest wages. Isabelle brings her own daughter, Medina, to work with her each day and finds it exhausting to juggle the child care responsibilities of another family's children along with those of her own. Isabelle is worried about retiring someday because the Bayers do not contribute to Social Security on her behalf. When she asks about this, Mrs. Bayer tells her it is in her best interest that they do not, because if

they did, Isabelle would also be responsible for Social Security taxes.

When Isabelle heard that the federal minimum wage was being raised, she asked Mr. Bayer if she was entitled to a pay increase. Mr. Bayer smiled and said, "You're not covered by federal wage and hour laws because you are a domestic worker." Because Isabelle's immigration status is dependent on her being employed with the Bayers, she has to look the other way when Mr. Bayer makes lewd comments or touches her in ways that she finds unwelcome.

Isabelle lives on the margins of American society. If she becomes pregnant again, she can expect no assistance from the state. Even if she becomes a U.S. citizen, she would have to work for an employer who employed more than fifty people in order to qualify for twelve weeks of unpaid leave (which she could never afford) after giving birth. Even her poor, native Haiti has better maternity benefits than the rich United States does. And her quality of life would fall even lower if she developed any of the disabilities that seem to run in her family—diabetes and hypertension in particular—because of the few health insurance benefits and work opportunities available to her.

Even though Isabelle keeps hearing that America has great civil rights laws, they do not apply to her because she is part of the underpaid contingent workforce. She is hoping that her daughter will do well enough in school to win a college scholarship someday, but she has been warned that the special scholarship programs for racial minorities have been eliminated in her state following a recent Supreme Court decision. It does not seem fair to her that the Bayers are confident that their children will attend Harvard someday, since both parents are alumni of that institution. When Mr. Bayer sends in his contri-

tribution to the school each year, he chuckles that it is really his children's insurance policy.

Isabelle has considered trying to juggle school with a part-time job in order to become a licensed practical nurse. It is unlikely, however, that she would find the conditions in that profession any better than those in her current situation. Not only do licensed practical nurses have to perform more and more menial jobs because of the continual layoffs of nurses, but they also are not allowed to unionize because at their \$7 per hour wage, they are considered to be "supervisors" exempt from the labor law's protection. Ironically, highly paid professional employees like airline pilots are allowed to join a union. In the United States, it is hard to understand who is worker and who is management.

Isabelle has heard that the best nanny jobs these days involve working for people with political aspirations. Such employers actually seem to fear that they may someday be criticized for shirking their responsibilities to pay Social Security taxes. But these people also are not hiring recent immigrants. Indeed, some of them are actually hiring unemployed white elementary schoolteachers to cradle their infants. Isabelle has seen these high-priced nannies at the park—they have no idea how to calm a screaming infant or discipline a bratty child. Their academic degree, she realizes, makes them qualified in a way that she cannot match, despite her decades of child care experience. She is determined that her own daughter will have the credentials that matter in this capitalist society so that she, too, can hire someone to take care of her children. America is the land of opportunity, she remembers. Whose opportunities, she wonders. . . .

Isabelle's friends who emigrated to Canada report a different story. They have health insurance, and those who live in Quebec

receive some state support if they have children. In Canada, immigrants can work in child care centers where they actually earn a living wage with several paid weeks of vacation each year. (Isabelle has inquired about working at the local child care center, but the conditions and benefits are no better than at the Bayer residence.) From Isabelle's perspective in Haiti, North America looked like a uniform monolith. She is now beginning to wish she had heeded people's warnings that despite its thriving economy, America's version of capitalism is actually impoverished.

Isabelle's story goes virtually unheard in the United States. When Zoe Baird and Kimba Wood were unable to be confirmed as U.S. attorney general because they had employed noncitizen nannies, the political response was to expand the Social Security exemption for these wealthy employers rather than to try to improve the nannies' working conditions. Little thought was given to the fact that the United States' treatment of domestic workers harms the workers themselves as well as the country's next generation of children. Working parents scramble every-day to find safe and nurturing environments for their children, with almost no federal subsidy of child care, whereas wealthy parents receive increasing subsidies for their use of low-paid immigrant labor in their homes.

This book tells Isabelle's side of the story. Chapter 2 questions why affirmative action for privileged white people in the form of alumni preferences go unnoticed while affirmative action for racial minorities is criticized and said to contribute to the "stigmatization" of racial minorities. Why is no stigma attached to the privileges extended to the ultrarich? In chapter 3, I compare judicial interpretations of the Americans with Disabilities

Act with interpretations of similar statutes in Canada, Australia, and Great Britain. Although the United States was historically the leader in enacting protection against disability discrimination in employment, the United States is the only one of these countries that sometimes excludes from coverage people with insulin-dependent diabetes or hypertension. Why do U.S. courts render such narrow interpretations of disability discrimination law? In chapter 4, I discuss pregnancy-related issues, in which the United States consistently fails to provide meaningful protection to pregnant women, fetuses, or newborn children, in comparison with Canada and western Europe. Why does the United States not show more concern for the well-being of the next generation? Chapter 5 connects the homophobia underlying American law and the country's militaristic and moralistic style of capitalism. Why do the principles of *laissez-faire* capitalism disappear when issues involving gay men and lesbians arise under the law? In chapter 6, Isabelle's plight is connected to that of all unprotected workers in the United States—the contingent workforce consisting of nearly one-third of all American workers and especially women, the poor, racial minorities, and recent immigrants. Why does the United States consistently exclude the most underprivileged workers from meaningful workplace protection? The last chapter considers the story of Isabelle's daughter, Medina. She will be sorely disappointed if she expects the principles of *laissez-faire* capitalism to apply to her dreams and aspirations as the daughter of a legal immigrant. But if we use our imagination, we can conjure up a better life for Isabelle, Medina, and all of us who strive to combine family and work with the assistance of our government and society.

In each chapter, we see that the uniquely American response to the needs of the worker and the family is sometimes justified