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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-

bution 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 everyday 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

under the rubric of laissez-faire capitalism—a capitalism that I believe should more aptly be termed *hypercapitalism*. This hypercapitalism is finally beginning to receive long-due criticism from sources as diverse as philanthropist-financier George Soros, who sounded the alarm in a 1997 *Atlantic Monthly* cover story;[1] to Robert Kuttner, whose critically acclaimed book, *Everything for Sale*, is subtitled the *Virtues and Limits of Markets*;[2] to the late Leonard Silk, economics reporter for the *New York Times* and *Newsweek*, a self-avowed capitalist who similarly questioned the unrelenting and single-minded manifestation of American capitalism after the cold war.[3]

This emerging critique, however, has not yet reached the U.S. Congress. A Republican Congress swept into office in 1992 proclaiming "laissez-faire" capitalism, even though their version of capitalism has little similarity to a pure laissez-faire model. They proposed rolling back federal regulatory power and reducing federal outlays from one-third to one-half in order to advance "the simple idea that people should be trusted to spend their own earnings and decide their own futures."[4] At the same time, Congress recommended increasing the federal military budget with its inefficient subsidy of industries. These proposals would supposedly help create a "just and compassionate society" but can easily be unmasked as corporate welfare at the expense of the working class. Although the Republican revolution was not entirely successful, it did push President Bill Clinton to endorse a welfare reform package that radically departs from our previous understanding of the relationship between the state and the family.

American-style capitalism helps perpetuate the class inequities among Americans while also undermining the interests of our economy as a whole. We cannibalize our most pre-

cious resource—the health and well-being of the next generation—to serve the interests of the ultrarich. Although American politicians applaud such results in the name of laissez-faire economics, no other Western industrialized country—nor even Adam Smith—would recognize these policies as laissez-faire. The answer, however, is not to strive to turn American-style capitalism into a purer laissez-faire model. The answer is to introduce a moral component into American capitalism that protects the most disadvantaged members of our society rather than only the ultrarich. Such a capitalism dominates the legal-economic landscape of Canada, western Europe, Great Britain, and Australia to a greater extent than it does in the United States.

Law schools and legal education in the United States often disregard the legal-economic structures of other countries. The proponents of the field labeled "law and economics" frequently rely on a distorted version of laissez-faire economics and make little reference to economic and legal systems outside those of the United States. In the purported name of laissez-faire capitalism, they applaud the hodgepodge of inadequate protection for American workers and families. Their distorted view of laissez-faire economics has also seeped into American legal decisions and statutory law.

The belief that government intervention in the workplace is inherently inefficient greatly influences many judges on the courts of appeals as well as the justices of the U.S. Supreme Court. Why we should care more about the economic freedom of entrepreneurs than the needs of workers is rarely addressed. As Jules L. Coleman noted in a stinging critique of the economic analysis of Judge Richard Posner's work, "[T]here is a difference between saying—if you want to promote utility or wealth then

these are the rules you should adopt—and saying—because these rules would promote utility or wealth in the abstract we should adopt them."[5] But as a scholar and as a judge, Posner repeatedly assumes that a rule is appropriate simply because it maximizes utility or wealth.

American law needs a more humane economic basis. The prevailing economics in law must be exposed so that we can question America's mindless devotion to its hypercapitalism. What exactly is the American version of capitalism? Should it promote efficiency and utility at the expense of all other values? Or is it possible to maintain a private marketplace while also recognizing the inherent limitations of entrepreneurs as decision makers? Does American law consistently follow a laissez-faire approach to the workplace, or is it inconsistently laissez-faire, to the detriment of the most underprivileged members of our society? Why do we withdraw benefits from welfare moms under the assumption that they are lazy and selfish and, at the same time, increase benefits to middle-class parents under the assumption that they deserve more leisure time and economic assistance in order to be effective parents? And who is harmed by these policies—only the poor or the entire middle class? Finally, can we structure state intervention so that utility does not become selfishness and efficiency does not become greed?

This book does not challenge the inherent value of capitalism, however. Predictions that capitalism will inevitably self-destruct seem especially ill founded these days. Nearly every Western nation is based on a capitalist economy, and the few remaining Communist regimes continue to founder. Moreover, many Western countries are turning to the United States as an economic model and are considering abandoning their long-standing support of the family and worker. If there is one thing

that we can safely predict, it is that the United States will remain firmly capitalistic and serve as a model for other countries trying to attain economic success.

Although the American version of capitalism is far from pure laissez-faire because it tolerates state intervention in the marketplace, the American version is generally less protective of the worker and family than are the versions used in other parts of the Western world. Not all kinds of capitalism, however, assume that utility and efficiency for the entrepreneurial class must be the dominant principles. Some favor the welfare of the worker out of the conviction that such policies benefit both workers and the economy as a whole. But the appropriateness of the American version of capitalism is rarely questioned in jurisprudence, perhaps because so little work on American law makes reference to other legal regimes.

Laissez-faire arguments are advanced in the United States most aggressively when lawmakers or activists seek to extend protections to the less privileged members of our society, and they are ignored when politicians and others recommend greater protection for middle-class Americans. American law reflects neither a laissez-faire economy nor a social welfare state; instead, it has a capitalistic perspective that disproportionately benefits the entrepreneurial class and often relies on a moralistic agenda.

Other countries provide a larger social safety net to families and workers, not simply out of a desire to achieve greater class equity, but from a conviction that such policies benefit all society. Today's child who receives nurturing care from parents who have been provided with health insurance and paid maternal or paternal leave will be tomorrow's responsible member of the community. But even though such programs benefit the long-

term interests of society, it is unrealistic to expect employers to provide for free those benefits for the well-being of society. Rather, such decisions can be made only at a governmental level because "even in a market economy there are realms of human life where markets are imperfect, inappropriate, or unattainable."[6] Furthermore, the United States is virtually the only Western capitalist economy to leave the development of such policies primarily in the hands of entrepreneurs.

The point of this book is not that the United States should blindly adopt the policies of western European countries or Canada. Instead, the point is that a comparative investigation of the policies of other capitalist countries should lead us to modify our version of capitalism. By looking at examples of other capitalist economies, we can see the inequities and limitations of American capitalism. As I will show, even Adam Smith would give a failing grade to the economics underlying American law.

Laissez-Faire Legal Economics

Although public interest law grew substantially in the 1970s and early 1980s with a sharp critique of the state's treatment of the poor, the last decade has brought a heightened interest in laissez-faire economic principles in law. Nearly every law school in the United States has added a course on law and economics to its curriculum. In some schools, this is even a required course in which students are taught how to apply economic principles to law, under the assumption that American law has—and should have—a laissez-faire, capitalistic perspective. The teaching materials in this area seldom offer any critique of this increasingly dominant philosophy, and in the meantime, the law of the welfare state has vanished from many law school curricula. As

governmental assistance for society's less privileged members has become more unpopular, law schools have reorganized to focus on the law of the entrepreneurial class rather than the law of the poor. Students graduate from law school understanding the economics underlying the tax code (with its subsidies for the rich) but knowing nearly nothing about the economics underlying the new welfare laws.

The origins of law and economics in American law schools can be traced to Richard Posner, currently a judge on the U.S. Court of Appeals for the Seventh Circuit. In 1973, he published the first textbook treatise on the economic analysis of legal rules and institutions. Now in its fourth edition,[7] this book aspires to make his brand of law and economics the foundational principle for the entire legal system.

Unbalanced in the extreme, Posner's work presumes that the principles of value, utility, and efficiency should govern the analysis of law from an economic perspective based on the assumption that human behavior is rational. Acknowledging that a reader might have trouble with this view of human rationality, Posner offers some (unsubstantiated) generalizations about the predictive power of law and economics and concludes: "[S]o perhaps the assumption that people are rational maximizers of their satisfaction is not so unrealistic as the noneconomist might at first think."[8] Why we should choose the concepts of value, utility, and efficiency to measure the appropriateness of a particular set of laws is not something that Posner even cares to address.

Posner's work is parochial; he never refers to examples outside the United States, and much of his economic support is outdated as well. For example, in his brief discussion of Aid for Families with Dependent Children (AFDC), he states that such

programs "have been found to have surprisingly large negative effects on participation in the labor force—in the case of AFDC, participation by mothers."[9] His sole support is a chapter written by Martin Anderson in a book published in 1978 in which Anderson summarizes previously completed studies of behavior in the United States. These "facts" are supposed to be sufficient to allow the reader to assess the efficiency of AFDC.

The actual relationship between AFDC benefits and the mothers of young children seeking paid employment is much more complicated than Posner suggests. Examination of the social welfare programs in the United States and France reveals that we must also weigh the efficiency of social welfare payments within the structure of all assistance provided to the state for mothers of young children.[10] France effectively integrates women into the paid labor force after their children reach the age of three, by offering a system of time-limited transfer payments along with a system of extensive support to working families through universal public day care, universal medical insurance, universal family allowances, and federally mandated maternity leave. These programs are not exclusively based on need. Rather, they were created out of a conviction that all children—rich and poor—benefit from developing nurturing relationships with their parents in the first several years of life.

The recently enacted Personal Responsibility and Work Opportunity Act incorporated one piece of the French system—time-limited transfer payments—without incorporating the broader picture of general state support for all families. The economic assumption underlying this change is that AFDC payments created a disincentive for poor single mothers to seek paid employment. Although time-limited transfer payments are supposed to eliminate this disincentive, without an accompanying social

safety net, they are unlikely to achieve the effectiveness of the French model. Poor, single mothers will still be unlikely to pursue paid employment while their children are young. What are they to do with their children while they are at work? Can they expect to earn more than their child care, transportation, and medical costs (since their children will lose access to free medical care after their mother accepts employment in an uninsured industry)? And where are these jobs that they are supposed to be able to find? Should these people serve as domestic workers in other people's households while abandoning their own children during the day?

A comparative examination also reveals that U.S.law, despite its "profamily" rhetoric, is generally much less supportive of parenting than are the laws of other countries. We must wonder why U.S. policy is generally so determined to push the parents of young children into paid labor. In Sweden, incentives to mothers to join the paid labor force do not appear until the child reaches the age of eighteen months.[11] In France, incentives to enter the paid labor force are offered only after children reach the age of three. But the United States offers little support to any families (poor or middle class) for a parent to stay home to care for a child.

As a result, the United States has the highest rate of any country of labor force participation by young mothers, with the net result being a marked decline in their sleep and free time. On average, married, college-educated, working women with young children have seven fewer hours of passive leisure and sleep than do their male partners. One can only imagine the sleep deprivation of the many poor women who raise children on their own. The quality of life for women and their children, however, has no place in law and economics. In the name of effi-

ciency, the United States encourages all adults to participate in the paid labor force while offering little state support for child care. The disproportionate negative consequences for the quality of life for women and their children receive scant attention.

Why should we as a society encourage parents of young children to enter the paid labor force in larger numbers? A common response is that we should be encouraging primary parents, who are disproportionately women, to return to the labor force in order to promote economic equality between women and men. Gaps in labor force participation arguably hurt women's economic earning power, although this response assumes that men's lives are the norm to which women should aspire. Alternatively, we could try to create policies that encourage fathers and mothers to spend equal amounts of time caring for their children. Instead of encouraging women to work without interruption, we could encourage men to interrupt their labor force participation. This solution would improve the quality of care available to children and also increase the primary parent's leisure time. It is a solution premised on the needs of all parents and their children, not just the parents and children of a particular socioeconomic class.

Most other Western countries have chosen to value the quality of life of women and children over their coerced entry into the paid labor force. Sweden, for example, has tried to create social and economic policies that help fathers spend more time with their children. Led by the unrealistic assumptions of law and economics, U.S. welfare policies contribute to the deterioration of the lives of women and children. Oddly, law and economics ignores the quality of our next generation as the external effect of this policy.

Readers who are interested in alternative perspectives on law and economics currently have few sources of guidance in law. Nearly all the published teaching materials are structured around considerations of efficiency and utility maximization, with no comparisons with other economic systems or jurisprudential perspectives.[12]

The only modest exception to this trend is a slim paperback by Robin Paul Malloy entitled *Law and Economics: A Comparative Approach to Theory and Practice*. This book's notion of "comparative" is to share with the reader a variety of theoretical perspectives that one might use in thinking about the connection between law and economics. It does not rely exclusively on a laissez-faire, capitalistic perspective but, instead, exposes the reader to liberalism, communitarianism, libertarianism, and other economic philosophies. Six pages are even devoted to critical legal theory, and other sections of the book attempt to reveal the ideological bias of conservative law and economics. All the cases that are chosen for the readers' examination, however, are from the United States and tend to reflect a laissez-faire view of law and economics. It is unlikely that students could offer a sophisticated critique of law and economics based on these scant materials.

As each of these books states in its preface or introduction, law and economics is an increasingly popular area of study in American law schools. Some believe that "law and economics is the most important development in the field of law in the last fifty years."[13] But what has not been said often enough is that this field is parochial and narrow in its consideration of the relationship between law and economics. In this book, I respond to the narrowness of the field by examining some core areas of American law in comparison with that of other countries to show how American law purports to favor laissez-faire policies while, in fact, protect-

ing the rich at the expense of the quality of life for most members of our society. Rather than applaud the application of economic principles to law, I will show the inconsistent and morally offensive ways in which these principles have been applied to American law. It is time to add a discussion of fairness and equity to the study of law and economics rather than focus exclusively on efficiency and utility. The quality of our lives depends on it.

Laissez-Faire Legal Decisions

Law and economics is not just an academic discipline. Judge Posner's ascendancy to the bench reflects its direct influence on the law. In the hands of conservative judges, principles of efficiency and utility are used to the disservice of all and especially the less privileged members of our society. The dramatic influence of these principles on law is documented throughout this book, but a few brief examples give a hint of their impact.

Justice Antonin Scalia enlists these principles to argue that the government should not be allowed to implement affirmative action programs because no group in society can claim to have been subjected to an acute disadvantaged status in the past that entitles it to preferential treatment today. In a racial reverse discrimination case brought by a white contractor against the city of Richmond, Virginia, Scalia wrote:

> The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, "created equal," who were discriminated against. . . . Racial preferences appear to "even the score" (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered

> in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace.[14]

Similarly, in a gender reverse discrimination case brought by Paul Johnson, a male blue-collar worker, against a city transportation authority, Scalia argued that the state has no right to decide to protect the employment interests of Diane Joyce, a female blue-collar worker over Johnson at the defendant's workplace. On behalf of Johnson, Scalia noted: "The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent."[15]

Justice Scalia's opinions consistently protect the affluent at the expense of the disadvantaged. For example, he would have been willing to allow the state of Virginia to maintain its exclusively male military college[16] (nevertheless in 1997, the Virginia Military Institute admitted women as part of its freshman class) while forbidding a transportation agency from providing the most modest preference to allow, for the first time, a female blue-collar worker to seek a supervisory position.[17] But why should the state of Virginia be allowed to privilege men over women who seek military training? Such a result is inefficient, presuming the inherent superiority of men over women. And certainly no coherent historical argument can be made that men need or deserve such special protection. Scalia's concern for fairness and efficiency enters his decisions only when the group challenging preferential treatment is white men. Scalia should be able to use his laissez-faire lens to see that it is inefficient for the government to deny military training opportunities to women under the stereotypical assumption that they are inherently unqualified for military service. It is not simply unfair to women to deny them these opportunities, but according to lais-

sez-faire principles, the long-term interests of society suffer from such inefficient policies.

Judge Frank Easterbrook, who sits with Judge Posner on the Seventh Circuit, invoked the most striking statement of the efficiency principle, in an employment law case: "Greed is the foundation of much economic activity, and Adam Smith told us that each person's pursuit of his own interests drives the economic system to produce more and better goods and services for all."[18] Citing that principle, Easterbrook sided with an entrepreneur against a worker whose loyalty was demanded despite his employer's blatantly illegal behavior.

Easterbrook, like Scalia and Posner, however, misreads Adam Smith. Smith never romanticized the role of the state in the economy. Nor did he romanticize what we can expect from the entrepreneurial class. Rather, he propounded a laissez-faire perspective because he believed that the entrepreneurial class would try to dominate the state for its own benefit, and indeed, America's distorted invocation of laissez-faire economics has proved Smith to be largely correct. Even the courts are sometimes complicit in the conspiracy to aid the entrepreneurial class. In the hands of law and economics, we get the worst of laissez-faire economics—legal protection of only the entrepreneurial class—to the detriment of the long-term interests of society as a whole.

Laissez-Faire Statutory Law

Although many parts of the 1995 Republican Congress's Contract with America were premised on laissez-faire capitalism, the Personal Responsibility and Work Opportunity Act, enacted in 1996, is the best example of its influence on American statutory

law. This statute radically changed America's response to poor families by eliminating financial assistance as an entitlement. Federal assistance now is given to the states in the form of block grants that specify how this money can be allocated. The centerpiece of the legislation is the requirement that assistance be time limited. Anyone who fails to find employment within a specified time period (usually two years) will be denied further assistance, even if that person is responsible for raising young children.

Children rights' advocates are holding their breath, waiting to find out what the consequences for America's children will be. At first, Speaker of the House Newt Gingrich suggested that more children could enter orphanages, proceeding from his naive assumption that orphanages are healthy and economical places in which to raise children. (One wonders, given Gingrich's antigovernment sentiments, why he believes that the government should pay people to take care of children in orphanages rather than provide financial assistance to parents so that they can raise their own children.) It is now generally assumed that foster care may have to deal with the overflow children, since foster care assistance has not (yet) been included as part of the states' block grants. (It is still part of the federal budget's "entitlements.")

Increasing the expenditures for foster care while decreasing the expenditures for welfare, however, does not square with all laissez-faire economists. Some laissez-faire proponents object to any state intervention on behalf of children, including state support for foster care. When confronted with the dire consequences of such an approach, however, one free-market economist was forced to admit that "of course, some children will die" while their parents tried to learn the lessons of free-market economics and limit the production of children.[19] This apparently is

an acceptable result in a system in which laissez-faire economics is the only recognized value. The long-term interests of our children is irrelevant.

Although other countries have used time-limited assistance to poor families, no other Western country has tried to do so within a system of extreme laissez-faire capitalism. Instead, they have created effective programs that nearly guarantee employment to parents after their youngest child reaches the age of two or three. Cash assistance is eliminated because other programs, like state-subsidized child care and job training, have taken their place. These programs target all parents out of the conviction that the state is responsible for safeguarding the health and well-being of the next generation.

An overview of governmental intervention into the lives of workers and the family can reveal the values that underlie American social policy. American law benefits the interests of a small elite in American society. That is, American law has two tiers. Programs of social insurance like Social Security are valued highly in the United States, and programs of social assistance like AFDC are disparaged. A comprehensive review of American social policy shows that middle-class men and women who conform to traditional gender roles often benefit under American social policy at the expense of other, less valued individuals and families. Although these "others"—racial minorities, poor people, single mothers, and gays and lesbians—constitute a majority of people in our society, American social policy is often trapped in a nineteenth-century conception of society that "fit[s] and reinforce[s] the family wage system, with men as breadwinners and women as primary caretakers, domestic workers and secondary wage earners."[20] It is time to move into the twenty-first century with a more flexible understanding of

the family and the individual person, with social programs that satisfy this social reality.

Capitalism Is Not Capitalism Is Not Capitalism

The U.S. Constitution was based on a particular brand of capitalism—that of Adam Smith[21]—with its laissez-faire expectations that the government would not interfere with the private ownership of capital. Hence, the Fifth Amendment to the U.S. Constitution protects people's right to own and control private property.

Adam Smith's model has little in common with the current Gingrich-style economic model. Smith's objection to government interference in the economy rested on the assumption that merchants would control government and thereby impose restraints that would serve their self-interest. He worried that government interference in the marketplace "unchains the selfishness of humanity and permits it to do harm to the community rather than working for the public benefit."[22] Smith "feared monopoly power far more than he feared unwarranted government intervention in the market mechanism."[23] Smith lived in the days of robber barons and worried about their monopoly influence on government and society. If the government had not been a government of merchants but instead represented the working people, Smith might not have been as opposed to governmental intervention in the workplace. It is wrong, therefore, to use Smith's philosophy as an excuse to undermine the limited protections legislated on behalf of workers and the family. Yet while purporting to draw on the work of Adam Smith, modern American capitalism has not been willing to use the state as a weapon against the selfishness of the mer-

chant class. Instead, American law is premised on the assumption that welfare moms, not entrepreneurs, are selfish.

American hypercapitalism mirrors the evils that concerned Adam Smith. Its intervention often does the greatest disservice to the most underprivileged members of our society. For example, if we look more closely at government intervention in the workplace, we see that the most disadvantaged workers—domestic and agricultural workers—are usually excluded from coverage. When President Clinton had trouble finding a nominee for attorney general who had complied with the minimal protections provided by Social Security law for domestic employees, Congress reacted by broadening the exclusion (for the benefit of the upper class) without even considering its impact on domestic workers. The much-heralded Family and Medical Leave Act applies only to those workers who can afford to take unpaid leave and also happen to work for the 5 percent of American corporations that employ more than fifty employees.

Meanwhile, by reducing cash payments and imposing time limitations on benefits, the new welfare law makes it even more difficult for poor women to choose to stay home and care for their young children. This is treatment blatantly preferential to the upper class in contrast to the poor. (I say upper class rather than middle class because it is generally only the upper class that can afford to pay for the services of domestic workers or take extended unpaid leaves from work. The needs of the middle class for universal health insurance, government-subsidized childcare, and paid parenting leave have not been addressed by Congress or the president.) If such policies that disproportionately benefit the upper class are the inevitable result of laissez-faire economics, then one must question the morality of laissez-faire economics. If such policies are not inevitable, then they

should be noted and changed to create a more equitable society. No other Western industrialized nation tips the balance so far against the interests of the poor and the middle class as the United States does.

Some economists—whose work is ignored by conservative law and economics—have a more realistic assessment of the way in which the economy works. The British economist John Maynard Keynes, for example, did not accept the premise that unemployment for qualified workers was antithetical to capitalism. Nor did he accept the premise that wages were determined entirely rationally under a capitalist system. Nonetheless, American law is based primarily on assumptions contrary to how the "economy in which we live actually works."[24]

Academic economists have carefully explored the validity of those assumptions on which proponents of laissez-faire economics rely. They have concluded that there is no evidence that social protection programs negatively affect the labor market's flexibility or the speed of the labor market's adjustment. In addition, they have concluded that the absence of social protection policies—like mandatory health insurance—does have a negative impact on people's well-being.[25] In other words, government intervention in the workplace can serve the long-term interests of all society. Law and economics is wrong to assume that government intervention in the private marketplace necessarily detracts from the efficiency of the market.

Similarly, academic economists have disputed the Republicans' claim that "welfare spending and other forms of social protection inevitably lead to inefficient allocation of resources and undermine economic growth."[26] The social market economies of northern Europe have consistently produced higher gross domestic products (GDP) than the United States' or Great Britain's econ-

omy has. Although one might argue that these economies would have operated even better had they used more laissez-faire principles, the evidence does not support this claim. Social market arrangements have actually facilitated wage restraint as well as contributed to economic efficiency and growth through worker training and other investments in human capital. The United States has not facilitated long-term investment in human capital through social market protection. If our choices were based on a careful study of the experience of other countries rather than unexamined rhetoric, we might make different and more humane choices. We might make choices that benefit both workers and the long-term interests of society.

It is possible to incorporate human values into capitalism by providing basic rights to workers. Canada, Australia, and various European countries have attempted to structure their societies based on that understanding. (Great Britain appears once again to be in a transition—away from [Milton] Friedman-like economics and back toward Keynes.) Recent U.S. statutory law accompanied by narrow interpretations of that law, however, has made such a reconciliation virtually impossible. It is time to learn from our trading partners who have managed to combine healthy capitalistic economies with basic protections for workers. Only in the parochial literature of law and economics does laissez-faire capitalism exist in the United States. But other versions of capitalism are well accepted by academic economists and are thriving in countries outside the United States.

The Future

Law and economics often presumes that a free market with little or no state intervention is in society's best interest because a

free market best allows workers and owners to use their human capital. But an employee who is identifiable as a member of a racial minority group may not be given an opportunity to demonstrate his or her abilities. Similarly, a person's disability, family responsibilities, or pregnancy may make it difficult for him or her to participate effectively in the labor market. Does capitalism mean that we must structure our employment rules under the assumption that those problems do not really exist or that they are relatively unimportant? Or can capitalism incorporate an understanding of these problems and develop an effective response? Finally, is it even fair to describe American capitalism as evenhandedly following a laissez-faire model?

The United States need not abandon capitalism to provide appropriate protections for employees at the workplace. But citizens and workers in the United States are often unaware of the choices available in capitalism. Capitalism need not be based on assumptions contrary to the world in which we live. As in Canada and much of western Europe, capitalism can be based on the understanding that workers face arbitrary discrimination, disability and illness, and child care and family responsibilities. The law of employment can make capitalism operate more efficiently by enabling employees to shoulder these responsibilities effectively rather than denying that these responsibilities are commonplace for most American workers. A humane capitalism should be possible.

To develop such a capitalism in the United States, we need to expand the voices that are considered to include those schooled in the practical implications of law and social policy. Economist Alan Enhrehalt argues that such voices are crucial to this discussion because they do not rely on unrealistic postulates borrowed from theoretical economics:

> Market economics enshrines choice and lionizes the individual. Carried to its furthest extreme, it all but suggests that anything the individual really feels like doing can't be wrong. . . . As the mantra for millions of Americans, perhaps most of a generation, this set of ideas is entitled to some respect. But it need not be taken at face value, and mastery of algebra should not be a prerequisite for discussing it.[27]

This book describes the economics that underlies American law, but without formulas or charts. The picture that it paints is taken from the real world in which we live, not from a set of assumptions about the behavior of fictional humans. We must examine this picture closely if we are to create a more humane capitalism. Only then will Isabelle's side of the story be reflected in our national policies concerning workers and families.