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Valuing Women: A Case Study

*Martha F. Davis**

Since the 1960s, feminists have worked on two fronts to address women's economic oppression. On the one hand, groups like the National Organization for Women ("NOW") and the Women's Economic Action League championed efforts to expand women's economic opportunities in the workplace by, for example, opening the building trades and other high-paying non-traditional jobs to women, and breaking through the glass ceiling in the corporate sector. On the other hand, another strand of feminists focused more explicitly on raising the status of women's traditional work, much of which remains unpaid. For this group, "wages for housework" has long been a rallying cry.¹

Not surprisingly, there has often been tension within the women's movement as to which of these approaches should have greater priority.² But both are necessary to comprehensively and permanently address women's economic plight. Indeed, the area of compensation for lost wages, discussed below, demonstrates that the two approaches are really simply two complimentary aspects of most women's lives. Rather than choose between a job and home responsibilities, most women have tried to shoulder both. For individual women in the real world, increased compensation and value for their work in both spheres is critical to their economic well-being. The following case study of the Victim Compensation Fund for the victims of the September 11, 2001 terrorist attacks illustrates these interrelationships and suggests that

greater vigilance in the area of compensation may lead to gains for women in terms of both economics and equality.

THE VICTIM FUND'S INITIAL APPROACH TO COMPENSATION

The September 11 Victim Compensation Fund (the "Victim Fund") was created pursuant to Title IV of the Air Transportation Safety and System Stabilization Act, 49 U.S. § 40101 (2001). The purpose of the Victim Fund is to provide compensation to eligible individuals who were physically injured as a result of the terrorist attacks of September 11, 2001, and compensation through a "personal representative" for those who died. Generally, eligibility is limited to those on the planes at the time of the crashes and individuals present at the World Trade Center, the Pentagon, or the site of the crash in Pennsylvania at the time of the crashes or shortly thereafter. According to the Victim Fund Administrator, "[t]he Fund is designed to provide a no-fault alternative to tort litigation for eligible claimants."³

Within the framework of the statutory authority creating the Victim Fund, the Victim Fund Administrator was given considerable latitude to develop approaches to victim compensation. On December 21, 2001 the Victim Fund promulgated an Interim Final Rule that, among other things, proposed to provide compensation for economic losses arising from the September 11 attacks as follows:

*Vice President and Legal Director of the NOW Legal Defense and Education Fund. I would like to thank Deborah Baumgarten for her assistance with this essay.

1. See generally Phoebe Jones Schellenberg, *Wages for House Work Campaign*, at www.payequity.net/WFH-Campaign/wfhcpgn.htm (last visited Apr. 21, 2002).

2. See generally SHEILA TOBIAS, *FACES OF FEMINISM* 209-11 (1997) (discussing fissures within the women's movement over definitions of equality).

3. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11,233, 11,235 (March 13, 2002) (codified at 28 C.F.R. part 104) (hereinafter Final Rule).

by compensating survivors of wage workers for lost wages;

by compensating survivors of non-wage workers for the replacement value of the deceased's services;

by compensating survivors of part-time workers for both the lost wage work and replacement services.⁴

This initial proposal did not propose to compensate survivors of full-time wage workers for the loss of the deceased's non-wage work in the home.⁵ Such work might include such tasks as housecleaning, cooking, car-pooling, lawn-mowing, caregiving, assisting children with school work or helping an older relative. In addition, the Victim Fund's proposed rule did not directly address whether the Victim Fund would use sex-specific or gender neutral worklife tables to set compensation levels.⁶ Press reports had suggested, however, that the Victim Fund was considering sex-based tables.⁷ Reliance on such sex-specific tables would provide women with lower average compensation than men, while use of blended worklife tables would lower men's average compensation below what they could expect under sex-specific tables.

ADVOCACY ON VICTIMS' COMPENSATION

On January 22, 2002, NOW Legal Defense and Education Fund submitted a comprehensive response to the proposed rule addressing both the Victim Fund's proposed approach to compensation for replacement services and the construction of worklife tables. On February 11, 2002, following a meeting with the Victim

Fund Administrator, the NOW Legal Defense joined with the Program on Gender, Work and Family at the Washington College of Law, American University, to submit additional comments concerning the valuation of home work and pointing out the discriminatory impact of failing to compensate for the home work of full-time workers. As set out in those submissions, ignoring the unpaid work performed by full-time workers raises sex discrimination concerns because women victims, especially mothers, are much more likely to have expended significant time on unpaid work. This injustice is compounded by the fact that the salaries of many women victims were depressed because of sex discrimination, and specifically because of the ways in which their unpaid work affected their workplace earnings.

The data on women's unpaid work in the home is telling, illustrating the extent to which distinct gender roles and responsibilities persist outside of the paid workforce.⁸ Working mothers work on average more than eighty hours a week when their unpaid work is counted - more than nearly all working Americans.⁹ Time-use analyses further demonstrate the gulf between the amount of unpaid work performed by full-time working women and men: full-time working women perform on average approximately 290 more hours of unpaid work than men each year.¹⁰

Indeed, the persistent gender gap in wages arises in part from women's substantial unpaid work responsibilities. Jobs that demand long hours are typically male-dominated, and are more highly compensated than female-dominated positions.¹¹ Women who shoulder signifi-

4. September 11th Victim Compensation Fund at 2001, 66 Fed. Reg. 66,274, 66,286 (Dec. 21, 2001) (codified at 28 C.F.A. pt. 104) (compensation for economic losses, including replacement services). Replacement services are intended to replace the non-wage work contributions of victims that have been lost as a result of the attacks. *Id.*

5. The rationale behind the initial proposal's treatment of non-wage work is not easy to discern. In fact, the proposal deviates from the usual approach adopted by courts compensating for personal injury. In those contexts, courts typically value both wage work and non-wage work of the particular plaintiff or victim without regard to whether the worker was full-time, part-time or outside the workforce entirely.

6. Worklife tables estimate future earnings based on, among other things, data concerning the length of expected future worklife.

7. See, e.g., Stephanie Saul, *Less for Women? Work Life Statistics May Limit Sept. 11 Fund Payouts to Victims*, NEWS-

DAY, A05, Jan. 4, 2002 (stating that Victim Fund plans to use gender-based worklife statistics).

8. See generally ARLIE HOCHSCHILD, *SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989) (discussing working women's unpaid household services and caregiving).

9. ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 22 (2001) (citing time-use literature).

10. Liana C. Sayer, Table 1, *Women's and Men's Hours per Day in Nonmarket Tasks by Employment Status, 1998* (prepared 2002) (on file at NOW Legal Defense).

11. See, e.g., JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2001).

cant family responsibilities cannot become the “ideal” full-time workers who command the highest salaries. Professional women on the so-called “mommy track” may manage to work full-time, but have foregone the wages, job security and economic growth potential of a more lucrative professional career, and thus experience a significant reduction in the value of their present paid employment and future economic potential.¹²

During a meeting with NOW Legal Defense attorneys to discuss the Victim Fund’s approaches to valuing unpaid work, the Victim Fund Administrator expressed concern that U.S. government data valuing such work was not readily available.¹³ To the extent that U.S. government data is lacking, it seems to reflect latent biases in data collection and a stubborn unwillingness to acknowledge the significance of women’s contributions in the home. Indeed, the significance of unpaid work has long been recognized by the international community. The United States lags behind other comparable countries in collecting time-use data – an approach that nations have taken as a precursor to calculating the gross national value of home work.¹⁴ Such studies have already been completed in Canada and Australia, among others. In Australia, for example, the government found that in 1997 its citizens “undertook 19.5 billion hours of unpaid work . . . value[d] at \$\$240-260 billion . . . about two-thirds [of which] was contributed by women.”¹⁵ The United Nations has also endorsed the importance of attention to unpaid work.¹⁶

12. See Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305, 313-14 (1999) (discussing the debate surrounding the “mommy-track” for working mothers). This “forebearance loss” is frequently valued in divorce and wrongful death litigation in assessing the true cost of a career woman’s performance of unpaid work.

13. Meeting with Kenneth Feinberg, Victim Compensation Fund Administrator, NOW Legal Defense, Feb. 4, 2002.

14. While the United States has not yet begun an official time-use study, one is planned for 2003, conducted by the U.S. Bureau of Labor Statistics. See BLS, ATUS: FREQUENTLY ASKED QUESTIONS, at <http://www.bls.gov/tus/atus-fawa.htm#QA4> (last visited Feb. 9, 2002).

15. See Australian Bureau of Statistics, 2001 Census of Population and Housing, *Unpaid Work*, at <http://www.abs.gov.au/852563C300810973/01A2AD9C4129099685CA256A9D0025C521>; Statistics Canada, *Households’ Unpaid Work: Measurement and Valuation* (2001), available at <http://www.statcan.ca/English/ads/89-549-XPE/hslld.htm>.

In addition to addressing the women’s issues raised by the failure to appropriately value replacement services, NOW Legal Defense argued that rather than employ sex-based worklife tables to determine compensation, the Victim Fund should use either blended (i.e., gender-neutral) tables or use male tables to set compensation rates for claimants’ economic losses, regardless of their sex. Reliance on sex-based tables would penalize many individual women by imposing sex-based predictions about average worklife expectancy that underestimate their own worklife. Further, sex-based tables simply serve to project any current wage discrimination into the future, and incorporate the assumption that our society’s vigorous efforts to combat sex discrimination in the present will be unsuccessful.

THE FINAL RULE

The Victim Funds’ Final Rule was promulgated on March 7, 2002.¹⁷ In response to the concerns raised by NOW Legal Defense, the Victim Fund indicated that (1) claimants may present individualized data regarding replacement services, i.e., the cost of replacing non-wage work, at a compensation hearing¹⁸; and (2) male worklife tables will be used to ascertain compensation rates for all claimants.

This result is clearly a victory for women, and another step along the road to creating a fair, equitable and non-discriminatory compensation system generally. As for the issue of home work, individual assessments are always

16. See, e.g., Platform for Action, § 206 (f) and (g), in *Report of the World Conference on Women* (Beijing, Sept. 4-15, 1996) available at <http://www.un.org/esq/gopher-data/conf/fwcw/off/a-20.en> (unpaid work by women as key area for policy intervention by national governments); U.N. WORLD CONFERENCE TO REVIEW AND APPRAISE THE ACHIEVEMENTS OF THE UNITED NATIONS DECADE FOR WOMEN: EQUALITY, DEVELOPMENT AND PEACE, NAIROBI FORWARD-LOOKING STRATEGIES FOR THE ADVANCEMENT OF WOMEN at ¶ 21, U.N. Sales No. E.85.IV.10 (1985) (priority attention should be given to creation of shared parental responsibilities and household tasks between women and men, as “conducive to the attainment of women’s and men’s self-reliance and to the development of future human resources”); see generally Joke Sweibel, *Unpaid Work and Policy-Making: Towards a Broader Perspective of Work and Employment*, DESA Discussion Paper No. 4, at Part III (discussing United Nations attention to recognition of unpaid work by women).

17. Final Rule, *supra* note 3.

18. Final Rule, *supra* note 3, at 11,239.

the best-tailored and most accurate approaches to compensation. Under that approach, for example, an individual man who is significantly engaged in work in the home would be rewarded, rather than penalized because the rest of his sex has less model behavior. Monitoring of individual awards is still necessary to minimize bias, but this approach has the potential to truly award compensation where compensation is due.

While compensating all victims for their home work is a positive result, it is not unprecedented. For example, unpaid work has long been quantified and assigned value in wrongful death litigation, where it is routinely compensated as an economic loss.¹⁹ In contrast, the adoption of male tables for all victims is an innovative approach that, it appears, has not been employed in other compensation contexts by courts or insurers.

The rationale for using male tables is twofold. First, national sympathies demand that, given the horrors of September 11, compensation be as generous as possible. Male worklife tables provide the highest compensation among the range of available approaches. Second, crediting the argument that women's salaries have been depressed due to discriminatory factors, the only way to avoid perpetuating that discrimination is to remove those depressed salaries from the equation entirely. Relying on male tables does just that – and in fact, puts forward a salary scheme that would presumably be attainable by women if discrimination were not a factor.

IDEAS FOR THE FUTURE

Compensation for loss or injury is an area that is often technical, individual and hidden from view. To the extent that it is controlled privately by insurers, it is seldom scrutinized and evaluated, and certainly not with respect to broad classes of insureds. Yet the losses for

which society compensates are, by definition, those things that society values. The Victim Fund provided a public forum for debating and defining those values. The baseline that ultimately emerged after give and take between advocates and the Victim Fund Administrator is one which will benefit individual women claimants, and which contributes to longstanding efforts by feminists to assign value to women's contributions outside of wage work.

In particular, the Victim Fund guidelines – particularly the use of male worklife tables – should be cited by litigators seeking compensation for injuries incurred by women; the Victim Fund's approach provides a clear precedent for using male compensation tables in a judicial context. Similarly, it is no small matter that a federal agency—the Victim Fund—has explicitly recognized the value of non-wage work and the reality of the second shift in devising its compensation scheme. Once the Department of Labor and Census Bureau begin collecting aggregate data on these non-wage contributions to the economy, the next step will be to assign value to the contributions and begin considering them as part of the nation's Gross National Product. Again, the Victims' Compensation Fund approach is a harbinger of what might be in the future: a society which recognizes and values all work, whether in the home or in the workplace.

Importantly, because women make significant contributions in both the home and the workplace, the Victim Fund treats women fairly in both spheres. The Victim Fund recognizes that almost no one operates solely in one arena – engaged solely in wage work or solely contributing to home life. Perhaps the most important contribution that the Victim Fund makes, then, is that in moving toward healing the wounds of September 11, it acknowledges the full scope of women's real lives.

19. See *ASSESSING FAMILY LOSS IN WRONGFUL DEATH LITIGATION: THE SPECIAL ROLES OF LOST SERVICES AND PERSONAL CONSUMPTION* 143-57 (Thomas R. Ireland & Thomas O. Depperschmidt, eds., 1999); see also *Cramer v. Kuhns*, 630 N.Y.S.2d 128, 133 (1995) (“We have along considered an injured plaintiff's loss of household services to be a quantitative economic loss separate and apart from pain and

suffering.”); *DeLong v. County of Erie*, 455 N.Y.S.2d 887, 893 (1982), *aff'd*, 457 N.E.2d 717 (N.Y. 1983) (“It has long been recognized that pecuniary advantage results as well from parental nurture and care, from physical, moral and intellectual training, and that the loss of those benefits may be considered within the calculation of ‘pecuniary injury.’”).