

CHALIMONY: SEEKING EQUITY BETWEEN PARENTS OF CHILDREN WITH DISABILITIES AND CHRONIC ILLNESSES

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* Professor, University of Maryland School of Law. I would like to thank the University of Maryland School of Law for research grants. Many thanks for thoughts and feedback go to the members of my seminar on families with children with disabilities in 2007, 2008, and 2009; the participants in the First Annual Midwest Family Law Conference; and Dan Hatcher, Yoanna Moises, Rashida Manjoo, and Martha Ertman. Research assistance was provided by Timothy Costello, Katherine Earley, and Shikha B. Uppal, as well as by University of Maryland School of Law Reference Librarian Janet Sinder. Particular thanks to Teresa Schell for her excellent work on alimony. Finally, I am deeply grateful to the many people who helped educate me about the special strengths and weaknesses of families that include a child with a special caregiving need: my spouse, my kids, my siblings, and numerous friends, neighbors, and colleagues. Each one lives the truth that rearing children both sustains and drains.

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INTRODUCTION

In 2000, nearly three million American families included at least one child with a disability or chronic illness.¹ In many families, caring for these children puts unusual stresses on parents, who divorce or never form a shared household in unusually high numbers.² Principal caregiving parents, usually mothers, are much more likely than other parents not to be fully engaged in paid work. Their unusual family formation and maintenance patterns, coupled with their financial distress, should make these children and their families appear frequently in reported family law cases. Instead, they are specters, visible only at the margins of child support and alimony law. In this article, I propose to improve family law's responsiveness to these families through a new interparental financial remedy I call "chalimony."

As the word suggests, chalimony is concurrently about children and adults. The interdependency that characterizes parent-child relationships is well known. Interdependency captures the idea that parents and children never exist in a vacuum; they affect each other's lives and are affected simultaneously by the practices and attitudes of other people, communities, and institutions. A child does not survive or thrive without the care of one or more committed adults. Caring for the child changes the adult or adults who provide the care, and those adults, in turn, depend on the engagement of other adults and community institutions.³ Parents of children with disabilities or chronic illnesses are often particularly needy of support because of the dramatic impact of a child's condition on a parent's

1. GIL CROUSE, SARAH DOUGLAS & SUSAN HAUAN, U.S. DEP'T OF HEALTH & HUMAN SERVS., INDICATORS OF WELFARE DEPENDENCE: ANNUAL REPORT TO CONGRESS, at III-33 tbl. WORK 7 (2007) (finding that 7.4% of children under the age of eighteen reported an activity limitation), available at <http://aspe.hhs.gov/hsp/indicators07/index.htm>; QI WANG, U.S. CENSUS BUREAU, DISABILITY AND AMERICAN FAMILIES: 2000, at 4 tbl.2 (2005) (finding that 3.9% of families, or 2,840,735 families, include at least one child aged five to seventeen with a disability), available at <http://www.census.gov/prod/2005pubs/censr-23.pdf>.

2. See *infra* Part II.B.2.

3. Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315, 1315-22 (1994) (explaining the increasing role of grandparents in childrearing and proposing more recognition for those grandparents who provide support for parental caregivers); Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957, 957-58 (1999) [hereinafter Czapanskiy, *Interdependencies*] (describing interdependency theory, which postulates that children need caregivers, who in turn need support from other people and institutions). See MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 10 (2004) (arguing that traditional American notions of autonomy must be reevaluated in light of the inevitable dependency of adults who take care of children).

family stability and financial capacity.⁴ The role of family law in this area should be to support the caregiver or caregivers and to encourage the people and practices that help them thrive.⁵

I envision chalimony as a remedy addressing some of the economic loss experienced by caregiving parents of children with disabilities or chronic illnesses. Simultaneously, a desire to avoid paying chalimony could motivate the potential payor parent to share more fully the responsibility of providing the child with care. Chalimony would serve as an additional financial remedy, over and above child support and alimony. It would be awarded to caretaker parents of children with disabilities or chronic illnesses in situations where the child's care needs impair, either partially or totally, the labor force participation of the caretaker parent. Like child support and alimony, chalimony would be paid by the child's nonresident parent, assuming that parent has the ability to pay. Whether a chalimony award should be made and in what amount would be a case-specific determination.

In Part I, I describe what many children with disabilities or chronic illnesses and their parents experience as parents try to combine adequate care for the child with participation in the paid workforce. This section provides a detailed account of caring for a child with special healthcare needs, because the legal literature concerning child-family relationships contains little information about these families. In Part II, I describe the remedy of chalimony in more detail and discuss the kinds of families that would benefit from it. In Part III, I distinguish chalimony from the two other principal interparental financial remedies: child support and alimony. In Part IV, I justify chalimony on the basis of fairness to payor parents, to caregiving parents, and to their children.

This article introduces the idea of chalimony in part to expose the law's failure to develop adequate responses to the many issues facing families that include children with disabilities and chronic illnesses. While these families' unmet needs are also apparent in the areas of public benefits, employment, education, housing, and military life, these topics are beyond the scope of the current article. I also leave for another day a full discussion of the implementation of chalimony and focus instead on making the case that chalimony provides a partial remedy for the pressing needs of some of our society's most vulnerable families.

4. See *infra* Part I (discussing the impact on families of children with disabilities or chronic illnesses).

5. Czapaniski, *Interdependencies*, *supra* note 3, at 958 (“[A] proposed legal intervention is acceptable only when it supports caregivers in maximizing their ability to care for a child.”).

I.

WHAT DOES HAVING A CHILD WITH A DISABILITY OR CHRONIC ILLNESS MEAN TO A FAMILY'S LIFE?

Many people expect the life course of a family in the United States to be relatively predictable. Two adults enter into a relationship, establish a common household, perhaps marry, and have a child or two or maybe three. With the help and devotion of their parents, children experience the usual ups and downs, and leave home around the time they reach the age of eighteen. Eventually, they repeat this cycle with their own families.

A child with a disability or chronic illness upsets this life course from the moment the child is born or the condition or illness manifests. The hundreds of hours parents might have spent encouraging and enjoying a child's progress or focusing on the parents' relationships and work might now be dedicated to arranging medical care, identifying treatment options, accessing and providing treatment, and advocating with education and healthcare providers, insurance companies, and government agencies. The joys of raising the child are coupled with a series of stressors that may last throughout the child's minority and well into the child's adult years.

Depending on what definition is used, between six and eighteen percent of children in the United States live with a disability.⁶ Advances in treatment of newborns with low birth weight and other serious medical conditions have dramatically increased the number of families that include a child with a disability.⁷ Chronic illnesses such as asthma and diabetes are also more common today. As many as six million children have asthma, making it the most common pediatric health problem.⁸

About a quarter of children in households with incomes below the poverty line have disabilities such as vision impairments, hearing impairments, or learning disabilities.⁹ That translates into 15.8 to 19.9

6. Nancy E. Reichman, Hope Corman & Kelly Noonan, *Impact of Child Disability on the Family*, 12 *MATERNAL & CHILD HEALTH J.* 679, 679 (2008) ("Based on the best US data sources currently available, disability rates of non-institutionalized children have at least doubled since 1960. Thus, regardless of the exact definition or magnitude, it is clear that disabled children constitute a sizeable fraction of all children (between 6% and 18%, depending on the definition and data source), and that a large and growing number of American families now include children with some type of disability.").

7. Dennis Drotar, Maureen Hack, Gerry Taylor, Mark Schluchter, Laura Andreias & Nancy Klein, *The Impact of Extremely Low Birth Weight on the Families of School-Aged Children*, 117 *PEDIATRICS* 2006, 2007 (2006); Reichman, Corman & Noonan, *supra* note 6, at 679.

8. Alina Das, *The Asthma Crisis in Low-Income Communities of Color: Using the Law as a Tool for Promoting Public Health*, 31 *N.Y.U. REV. L. & SOC. CHANGE* 273, 276 (2007).

9. THE URBAN INST., *CHILDREN IN VULNERABLE FAMILIES: FACTS AND FIGURES 2* (2006) [hereinafter *CHILDREN IN VULNERABLE FAMILIES*] (finding that between twenty-two and twenty-seven percent of children living in households below the poverty line

million children. By comparison, about a fifth of non-poor children have such disabilities, or 11.9 to 13.6 million children.¹⁰ In the 2000 census, almost a tenth of families with children reported that a child in the household age fourteen or younger had a disability; the rate in non-Hispanic white families was 8.7%, while the rate in African-American families was 11.2% and in Hispanic households was 9.7%.¹¹

Public health and other medical researchers coined the term “child (or children) with special healthcare needs” (CSHCN) to describe most children with disabilities and chronic illnesses. The federal government defines CSHCN as “those [children] who have or are at increased risk for a chronic physical, developmental, behavioral, or emotional condition and who also require health and related services of a type or amount beyond that required by children generally.”¹²

According to the most recent survey of CSHCN, taken in 2004 and 2005, approximately 13.9% of all children are CSHCN, and 21.8% of households with children include at least one CSHCN.¹³ Both of these figures are higher than the comparable 2001 survey figures, when 12.8% of children were found to be CSHCN, and 20% of households with children were found to include a CSHCN.¹⁴

For the purposes of this article, CSHCN provides a useful shorthand. As discussed in further detail in Part II, *infra*, chalimony is a proposed relief intended for parents whose labor force participation is impaired as a result of caring for their child with a disability or chronic illness. Quite often, the parent of a CSHCN fits this description.

CSHCN impact their families in different ways depending on their condition, the community’s resources, and the characteristics of the particular child and family. However, one can broadly distinguish between two groups of CSHCN based on the nature of their caregiving demands. Some CSHCN require a substantial degree of care every single day. Other CSHCN have care needs that are less demanding on a daily basis, but they

experienced some “limitation,” including health impairments and learning disabilities, compared with seventeen to nineteen percent of non-poor children), *available at* http://www.urban.org/UploadedPDF/901016_vulnerablechildren.pdf; Kathryn Tout, Juliet Scarpa & Martha J. Zaslow, *Children of Current and Former Welfare Recipients: Similarly at Risk*, RESEARCH BRIEF (Child Trends, Wash., D.C.), Mar. 2002, at 3 fig.2 (finding that twenty-one percent of children currently receiving welfare benefits have a condition that limits their activity), *available at* <http://www.childtrends.org/files/leaversRB302.pdf>.

10. CHILDREN IN VULNERABLE FAMILIES, *supra* note 9, at 2.

11. WANG, *supra* note 1, at 15 & tbl.8.

12. HEALTH RES. & SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., THE NATIONAL SURVEY OF CHILDREN WITH SPECIAL HEALTH CARE NEEDS: CHARTBOOK 2005-2006, at 5 (2007) [hereinafter CHARTBOOK 2005-2006].

13. *Id.*

14. *Id.* at 10.

experience unpredictable moments of extremely poor health.¹⁵ Children on the autism spectrum fall into the former category, while children with asthma fall into the latter. Understanding these two prototypical conditions in some detail is helpful to understanding why chalmomy is needed.

A. *Autism Spectrum Disorder as a Case Study of Providing for a CSHCN*

Autism spectrum disorders affect approximately 86 out of every 10,000 children between the ages of three and seventeen.¹⁶ A majority of these children are estimated to be in the high-functioning range.¹⁷ Children on the autism spectrum have delayed or abnormal development in some aspect of their functioning, such as social, communication, behavior, cognition, or motor skills.¹⁸ Children with the most severe form of autism are “nonverbal, totally aloof, and highly repetitive.”¹⁹ High-functioning children with autism have difficulty acquiring language but generally achieve the capacity over time.²⁰ High-functioning children with Asperger syndrome, a mild form of autism spectrum disorder, have fewer symptoms and little difficulty with language.²¹

Treatment for autism spectrum disorders begins when a child is young and can be time-intensive as well as expensive. A highly regarded treatment called Applied Behavior Analysis (ABA), for example, involves up to forty hours a week of therapy, usually in the child’s home.²² Getting the resources to pay for the therapy can be as daunting as finding the time.²³ One guidebook for parents recommends helping a high-functioning

15. Of parents of CSHCN who reported cutting back or eliminating work hours, 46.8% reported that the child’s condition affected the child’s functional ability to perform daily activities “usually, often or a great deal,” and 23.8% reported that the child’s condition affected the child’s functional ability to perform daily activities moderately some of the time. *Id.* at 43.

16. Michael D. Kogan, Bonnie B. Strickland, Stephen J. Blumberg, Gopal K. Singh, James M. Perrin & Peter C. van Dyck, *A National Profile of the Health Care Experiences and Family Impact of Autism Spectrum Disorder Among Children in the United States, 2005-2006*, 122 PEDIATRICS 1149, 1149 (2008).

17. SALLY OZONOFF, GERALDINE DAWSON & JAMES MCPARTLAND, *A PARENT’S GUIDE TO ASPERGER SYNDROME AND HIGH-FUNCTIONING AUTISM: HOW TO MEET THE CHALLENGES AND HELP YOUR CHILD THRIVE* 9 (2002).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 77–80.

23. See Kimberly Johnson, *Soldiering On: Military Parents Battle the System to Help Their Autistic Kids*, U.S. NEWS & WORLD REP., Dec. 29, 2008, at 36 (describing the extreme time and expense of coordinating care for military families that include children with autism). For example, the health insurance program for military families covers only a few

child develop social skills by creating opportunities to practice skills at home using scripts, videotapes, and play dates.²⁴ Some children with autism spectrum disorders are aggressive and may hurt others or destroy things, while others are rigid about diet or daily routines.²⁵ Parents are advised to use behavioral techniques to address these issues, such as removing irritations in the environment that may cause disruptions or seeking professional help when necessary.²⁶ None of this is easy to arrange. As the handbook says, “one of [the] biggest challenges . . . is bringing all the therapy options together” to benefit the child, including social skills training, education, and medical treatment.²⁷ The chapter in the handbook on what to do at home is nearly thirty pages long.²⁸ It describes the detailed steps a parent should take to create a consistent environment that minimizes the child’s anxieties and confusion, so that the child can learn over time to use words to communicate instead of disruptive behaviors.²⁹

The time, energy, and money that parents commit to a child with an autism spectrum disorder are not the only issues they face. Some parents experience guilt or shame because of the child’s diagnosis or behavior.³⁰ Others experience a loss of self-esteem.³¹ The stress, anxiety, and depression that parents feel can impact their relationships with each other and with other family members.³² Maintaining focus in the workplace

hours a week of ABA, and families pay for additional services out of pocket. One family incurred treatment bills of more than \$100,000 over three years. The parent featured in the *U.S. News* article, Karen Driscoll, explained that ABA helped her son go from a non-verbal three-year-old to a “chatty” ten-year-old who has some social relationships and can attend school in a general classroom. Ms. Driscoll spent “countless” hours attempting to have the military pay for the treatment, which began at twenty hours per week initially and decreased over time to about ten hours per week. *Id.* See also Kogan, Strickland, Blumberg, Singh, Perrin & van Dyck, *supra* note 16, at 1149 (concluding that parents of children with autism spectrum disorder have greater financial, employment, and time burdens as compared to parents of children with other special healthcare needs).

24. OZONOFF, DAWSON & MCPARTLAND, *supra* note 17, at 87.

25. *Id.* at 91.

26. *Id.* at 91–94.

27. *Id.* at 107. See Nancy E. Taylor, Shavaun M. Wall, Harriet Liebow, Christine A. Sabatino, Elizabeth M. Timberlake & Michaela Z. Farber, *Mother and Soldier: Raising a Child with a Disability in a Low-Income Military Family*, 72 *EXCEPTIONAL CHILD*. 83 (2005) (describing challenges for women in the military when coordinating care for children with disabilities).

28. OZONOFF, DAWSON & MCPARTLAND, *supra* note 17, at 130–57.

29. *Id.*

30. *Id.* at 155.

31. *Id.*

32. *Id.* See George Waddington, Tweaking “The Paradigm”: Mandating Counseling as Part of the Child Custody Process for Parents of Children with Special Health Care Needs (Dec. 28, 2009) (unpublished comment, on file with author) (describing research on the emotional states of parents learning that their child has a disability or chronic illness and advocating mandatory counseling before parents of CSHCN finalize custody

while managing family demands is also daunting, causing many parents to reduce their working hours or stop working outside the family altogether.³³

Stresses affecting families with children with disabilities often do not stop when the child reaches majority. If the child cannot live independently, the parents must decide whether to continue care at home or arrange for an alternative. Costs for supporting the child often continue. Planning for the child's future after the parents are gone is also a concern. Finally, many parents worry that their child will have a child of her own for whom they will become responsible.³⁴

B. Asthma as a Case Study of Providing for a CSHCN

For many children on the autism spectrum, the need for supervision and input from a caregiver is regular and predictable. Children with serious asthma present a rather different picture. Many children with asthma will be symptom-free on some days, extremely ill on others, and somewhere in between otherwise. Some of the variation depends on compliance with daily medication, exercise, and lifestyle regimes, while some depends on adjusting these regimes to the child's growth and experiences.

As many as six million children in the United States have asthma, making it the most common pediatric health problem³⁵ and the most common cause of school absences.³⁶ Asthma is also a significant public health issue. Symptoms can be severe, leading to emergency room visits³⁷ and even to the death of some children.³⁸ Like children with a number of

agreements); *infra* Part II.B.2.

33. Kogan, Strickland, Blumberg, Singh, Perrin & van Dyck, *supra* note 16, at 1153 (“[P]arents of more than half of CSHCN with ASD [autistic spectrum disorder] had to reduce or stop work to care for their child, and parents of >25% of CSHCN with ASD spend 10 hours weekly providing or coordinating their child’s care.”). See *infra* Part II.B.2.

34. See Elizabeth Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 825 (“[E]very disabled person is assumed to have an interest in procreation that conflicts with her parents’ effort to obtain sterilization . . .”).

35. LARA AKINBAMI, NAT’L CTR. FOR HEALTH STATISTICS, *ASTHMA PREVALENCE, HEALTH CARE USE AND MORTALITY: UNITED STATES, 2003-05* (2006), available at <http://www.cdc.gov/nchs/data/hestat/ashtma03-05/asthma03-05.htm>; WILLIAM E. BERGER, *ASTHMA FOR DUMMIES* 287 (2004); Das, *supra* note 8, at 276.

36. Eileen Donnelly, *Parents of Children with Asthma: An Examination of Family Hardiness, Family Stressors, and Family Functioning*, 9 J. PEDIATRIC NURSING 398, 398 (1994).

37. *Id.* at 398.

38. See Victoria W. Persky, Julie Slezak, Alicia Contreras, Laura Becker, Evan Hernandez, Viswanathan Ramakrishnan & Julie Piorkowski, *Relationships of Race and Socioeconomic Status with Prevalence, Severity, and Symptoms of Asthma in Chicago School Children*, 81 ANNALS ALLERGY, ASTHMA & IMMUNOLOGY 266, 266 (1998) (citing high asthma mortality rates in the Chicago area and discussing asthma severity among school children). See also AKINBAMI, *supra* note 35 (stating that 195 children died from

other chronic illnesses, children with asthma have good days and bad days, causing their caretaking parents to experience unusual stress.³⁹ Parents cannot always predict the kind of symptoms a child will have on a particular day or night. While caregivers must dedicate large amounts of time to the child's care, they have little control over when that time will be spent, and conflicts with work outside the home are inevitable. As one researcher put it: "Families are responsible for long-term management of a chronic condition that is characterized by unpredictable and irregular episodes. The entire family experiences anxiety, helplessness, illness restrictions, and the constant threat of a crisis requiring parental vigilance, sleepless nights, and frequent emergency trips to the hospital."⁴⁰

The best way to avoid asthma worsening in severity later in life is for the caregivers of children with asthma to seek and comply with "aggressive medical treatment," beginning with diagnosis at the earliest possible time.⁴¹ The recommended management strategy includes medication, monitoring, assessments, avoiding triggers, and seeking timely, appropriate medical assistance in response to changes in the child's health.⁴² Triggers can occur anywhere, including in the child's home, school, or daycare center; during recreational activities; or in the homes of friends or family members. Therefore, according to one parent education and assistance manual, caregivers must identify and try to eliminate triggers in every environment.⁴³ Attacks can happen anywhere the child goes, so caregivers

asthma in 2003).

39. See Madeleine U. Shalowitz, Tod Mijanovich, Carolyn A. Berry, Elizabeth Clark-Kauffman, Kelly A. Quinn & Elizabeth L. Perez, *Context Matters: A Community-Based Study of Maternal Mental Health, Life Stressors, Social Support, and Children's Asthma*, 117 PEDIATRICS 940, 941, 947 (2006) (discussing mental health consequences for mothers of children with disabilities).

40. Donnelly, *supra* note 36, at 400.

41. BERGER, *supra* note 35, at 290.

42. *Id.* at 293. See also Kate Stone Lombardi, *As Asthma Changes, So Do Parents*, N.Y. TIMES, Apr. 3, 1991, at A4 ("The focus of treating asthma has changed from dealing with acute emergencies to dealing with this every day," said Dr. James A. Pollowitz, chief emeritus of allergy at White Plains Hospital Center and medical adviser to the support group. "The shift has been out of the hospital, with a good deal of care moving into the home. The parents have become empowered, but with that has come a lot of pressure and responsibility.").

43. See BERGER, *supra* note 35, at 77-78, 82 (discussing the importance of recognizing asthma triggers and eliminating them from the home and other environments). See also Lombardi, *supra* note 42 ("A play date at a friend's house means careful screening for pets, a smoker or forbidden foods. Recess on a cold day can create difficulties in breathing. Gym class can be a constant source of stress."). The most difficult environment to control, however, may be the child's home if the child lives in a low-income community. See Das, *supra* note 8, at 288 ("When asthma is diagnosed, a doctor usually prescribes medication and treatment. However, such medication and treatment is often ineffective when the patient's home environment contains asthma triggers like mold, dust, and cockroaches. A thorough doctor usually informs the patient and her family that their home must be clean, dust-free, and protected from any other allergens that might trigger asthma. Yet even

are advised to develop an emergency plan with the child's teachers and daycare providers, including instructions on adjusting the child's medications and calling for emergency medical help.⁴⁴

At home, parents need to learn to manage diagnostic and treatment machinery as well as to monitor the child's condition and responses to medication.⁴⁵ Asthma can begin when a child is an infant. Until the child approaches school age, most medications must be administered by an adult. For example, nebulizer therapy requires the use of a face mask for proper delivery.⁴⁶ While a child's daycare provider, teacher, or school nurse can be taught to use a nebulizer, many caregivers are reluctant to entrust a young child to someone else during an asthma attack because the child's restricted breathing can induce anxiety that worsens the attack.⁴⁷

Given the child's need for care in an environment with minimal stress, the unpredictability of attacks, and the difficulties of ridding every environment of triggers, some parents of infants or young children with asthma decide to reduce their labor force participation.⁴⁸ Other parents lose pay or are fired when they miss work to respond to a child's asthma attack.⁴⁹

II.

WHAT DOES CHALIMONY OFFER TO PARENTS OF CSHCN?

The unusual caregiving responsibilities described in Part I often leave caregiving parents in poor shape financially. Chalimony would provide some financial relief where the child is in the care of a single parent whose market participation has been reduced or eliminated by the unusual caregiving requirements of the child.

A. *An Overview of Chalimony*

Chalimony would provide an interparental financial remedy designed

armed with that knowledge, many residents of apartment complexes in low-income communities of color can do little to change their indoor living environment on their own. Problems like roaches and vermin are often a building-wide phenomenon, and unseen holes in the walls and floor-boards make them difficult to contain. Mold and mildew often stem from leaky pipes and other problems beyond a tenant's capacity to repair. At some point, the landlord must intervene to fix these underlying problems.").

44. BERGER, *supra* note 35, at 294.

45. *See id.* at 293-94 (discussing parents' need for familiarity with peakflow meters, long-term preventative medication, and asthma assessment and management plans).

46. *Id.* at 296.

47. *See id.* (advising parents to focus on stress reduction techniques, such as cuddling, before administering asthma treatments that may provoke anxiety).

48. *See infra* notes 54-77 and accompanying text.

49. *See infra* notes 78-85 and accompanying text.

to replace some of the income lost by a parent or other caregiver⁵⁰ whose caregiving responsibilities for a CSHCN reduces or eliminates that parent's income-earning capacity. Caring for a CSHCN commonly diminishes the income-earning potential of the child's parent or parents because the child needs an unusual amount of attention, supervision, treatment, access to medical care providers, transportation to and from therapy, emergency interventions, and the like.⁵¹ Some fortunate parents live in communities with responsive schools and daycare centers, and some work for employers who are flexible about family responsibilities. Most are not in such a world, however, and they and their children experience poverty much more frequently than do families that include no CSHCN.

The parent or other caregiver seeking chalimony would make the claim in the same family law proceeding in which the court decides matters such as custody, child support, and alimony. Entitlement to the remedy would depend on the petitioner demonstrating that she⁵² is caring for a child with a disability or chronic illness and that meeting the child's special needs has reduced or eliminated the petitioner's income-earning capacity. The petitioner's evidence should include her own testimony about the child's situation and the petitioner's employment as well as evidence from the child's medical care providers and therapists.

Over time, some types of situations may be identified that would give rise to a rebuttable presumption that the caregiver is eligible for chalimony. For example, a child on the autism spectrum who is nonverbal and cannot regulate her own behavior is likely to need the close attention of an adult caregiver around the clock. In most such cases, the caregiving parent's capacity to earn a living while meeting the child's needs will be impaired, and a presumption should arise in favor of a chalimony award without the caregiving parent having to introduce evidence about the particular child's special needs or the specific degree of impairment caused by meeting the child's needs. The presumption, once it arises, should be rebuttable by evidence that, for example, the caregiver is suited for an unusually highly-paid and flexible occupation, the caregiver and child live in an unusually well-resourced community, or the respondent parent has taken on enough of the caregiving responsibilities such that the child's

50. Other caregivers could include people such as grandparents, stepparents, and other former partners of the parent of a CSHCN who have become responsible for the major share of care for the child. The caregiver's responsibility might be undertaken by agreement with the child's parent or parents, or as the result of a court order in a custody or dependency proceeding.

51. See *infra* Part II.B.1.

52. The *N.Y.U. Review of Law & Social Change* uses the generic feminine pronoun throughout its articles. Importantly, my chalimony proposal would apply to all parents regardless of their gender. But see *infra* Part IV.B (discussing the feminist arguments in favor of chalimony, given that the majority of primary caregivers are, in fact, women).

needs do not in fact impair the caregiver's earning capacity.

The respondent parent could defend against paying chalimony on several different grounds.⁵³ First, she might refute the evidence concerning the child's health or the consequences of the child's health on the caretaking parent's income-earning capacity. For example, if a child's severe asthma is being medically-managed successfully, the child's health condition may not impair the petitioner's income-earning capacity. If the child's asthma is not responsive to medical management, however, or if the child experiences frequent emergencies, the petitioning caregiver may be unable to sustain full-time employment, particularly if she is employed in an occupation with limited or no paid sick leave.

A second defense the respondent parent could assert is her availability as a caregiver. If the respondent parent of the child with severe asthma is available to attend to the child's emergencies, for example, then the petitioning caregiver should have less trouble sustaining employment despite having the larger share of responsibility for the child on a regular basis. If the child is on the autism spectrum and requires daily therapy sessions lasting several hours each, the caregiver is unlikely to be able to sustain anything more than part-time employment. If the respondent parent can be present for half of the sessions, however, the caregiver's employment potential should increase and the need for chalimony or the amount of chalimony needed should decline.

A third defense of the respondent parent might be her inability to pay. The remedy of chalimony should be imposed only on a parent whose income is sufficient for her self-support after paying any child support or alimony that is due. If the respondent parent is not in that position, the caregiver's economic need still exists, but the financial support must come from a source other than the child's parents. Having the remedy of chalimony in family law will sometimes result in money being transferred from one parent to the other; in other cases, the remedy will be a window into the world of needy families and will, hopefully, expose the importance of creating a public benefit that addresses their need.

B. The Chalimony Family

Under my proposal, a chalimony-eligible family would share two characteristics. First, the family would include a CSHCN, and the caregiving needs caused by the child's disability or chronic illness would

53. While the respondent is identified as a parent, there may be unusual cases in which a nonparent is found responsible for chalimony, just as there are rare situations now where nonparents are found responsible for paying child support. See Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Increased Mobility Creates Conflicts*, 36 FAM. L.Q. 515, 541 (2003) (noting that a person standing in loco parentis to a child may be charged with child support in some states).

have reduced a parent's market participation beyond the degree common for other caregiving parents. Second, at least one of the parents would not be living in the household with the child. As discussed in this section, a CSHCN is much more likely than other children to have parents who do not reside together. The parents of a CSHCN are also more likely than parents of other children to be unemployed or underemployed. Both issues may be attributable, at least in part, to the challenges faced by parents because of a child's poor health or disability, and both can leave the child unusually vulnerable to poverty or near-poverty. Where a child's economic situation could be alleviated through support from the child's nonresident parent, chalimony would be appropriate.

1. *The Impact of a CSHCN on the Caregiving Parent's Economic Activity*

Children can have a broad range of disabilities and chronic illnesses, and the degree to which the child's situation affects the economic activity of a caregiving parent is highly variable.⁵⁴ According to the Census Bureau, the employment rate of householders with children was over eighty-three percent.⁵⁵ Where the household included a child with a disability, the employment rate of the householders dropped to 73.5%.⁵⁶ Mental and physical disabilities had comparable impacts: 68.1% of householders with a child with a physical disability were employed, compared to 74.8% of householders with a child with a mental disability.⁵⁷ According to the 2005-2006 National Survey of Children with Special Health Care Needs, nearly twenty-four percent of parents with a CSHCN reported cutting back work hours or leaving the workforce entirely because of the child's needs.⁵⁸

Caring for a child on the autism spectrum has a particularly severe impact on a parent's economic activity, even as compared to parents of children with other special emotional or physical needs.⁵⁹ Autism spectrum disorders are relatively common, affecting 5.6% of all children

54. See, e.g., Reichman, Corman & Noonan, *supra* note 6, at 680-82 (discussing the profound effect of a child with disability on the family's resource needs and availability). Cf. David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 166-69 (discussing differences in cultural conceptions of "handicap" and the impact these views have on implementation of the Education for All Handicapped Children Act).

55. WANG, *supra* note 1, at 16 fig.6.

56. *Id.*

57. *Id.*

58. CHARTBOOK 2005-2006, *supra* note 12, at 43.

59. See Kogan, Strickland, Blumberg, Singh, Perrin & van Dyck, *supra* note 16, at 1151 (stating that children with autism spectrum disorders have a greater impact on their families' finances than children with other kinds of special healthcare needs).

with some type of special healthcare need.⁶⁰ Approximately twenty-seven percent of parents of children on the autism spectrum spend ten hours or more a week giving or arranging care for their child, compared to seven percent of parents of children with other special health needs.⁶¹ Family members in approximately fifty-seven percent of families with children on the autism spectrum have to reduce or stop working because of the child's needs.⁶² These families face special difficulties in caring for their children, including problems accessing healthcare, difficulties coordinating services for the child, and trouble finding supportive services for the family.⁶³

A 1994 study examined families with children with vision, hearing, speech, and orthopedic impairments.⁶⁴ The authors compared these families to families that did not have a child with a disability, and they also compared the impact of each disability to the others. Generally, families that included a child with a disability had significantly lower incomes, earning on average \$15,000 to \$20,000 annually compared to \$20,000 to \$25,000 per year for families with non-disabled children.⁶⁵ Notably, the economic activity of parents varied substantially from one type of disability to another.⁶⁶ Families that included a child with visual and hearing impairments had lower family incomes, while families with a child who was deaf or had a physical disability had incomes similar to those of families without a child with a disability.⁶⁷ An important reason for these differences in family income was the number of parents in the workforce. Over half of the families of children with orthopedic and visual impairments had only one wage earner, which was true of less than two-fifths of the remaining families.⁶⁸

In general, families including a child with a disability are more likely to be poor than other families. According to the Census Bureau, the poverty rate in 1999 for families including children with disabilities was 21.8%, compared to 12.6% for other families.⁶⁹ Where the head of household was

60. *Id.* at 1151–52.

61. *Id.* at 1153.

62. *Id.*

63. *Id.*

64. Robert M. Hodapp & Diane V. Krasner, *Families of Children with Disabilities: Findings from a National Sample of Eighth-Grade Students*, 5 *EXCEPTIONALITY* 71, 72 (1994).

65. *Id.* at 76. See also Shirley L. Porterfield, *Work Choices of Mothers in Families with Children with Disabilities*, 64 *J. MARRIAGE & FAM.* 972, 972 (2002) (indicating that many women who are mothers of children with disabilities choose not to work full time resulting in lost income).

66. Hodapp & Krasner, *supra* note 64, at 76.

67. *Id.*

68. *Id.* at 77.

69. WANG, *supra* note 1, at 17 fig.7 (surveying families with children ages five through seventeen).

a single woman, 42.7% of families including children with disabilities lived in poverty, compared to 31.5% of other families.⁷⁰ Where the head of household was a single man, 23.5% of families with disabled children lived in poverty, compared to 16.6% of other families.⁷¹ Even families that included a married couple experienced higher rates of poverty when the family included a child with a disability: 10.7% lived in poverty compared to 6.3% of other married-couple families.⁷²

A child's disability or chronic illness can affect a parent's earning capacity so much that the family becomes eligible for public benefits such as Temporary Assistance for Needy Families (TANF). Studies in 1998 and 2001 examined the connection between a child's chronic illness or disability and the labor force participation of the child's mother.⁷³ Both studies found that mothers of children with disabilities or chronic illnesses were more likely than mothers of other children to have significant difficulties combining work with caring for their child.⁷⁴ Many more were relying on TANF.⁷⁵ Further, once receiving TANF, mothers of children with a disability were less likely to leave welfare.⁷⁶

Once a parent's economic activity is reduced because of the needs of the child, the parent may never catch up. The parent stands to suffer a lifetime loss of income-producing capacity due to time spent out of the labor force. Parents of children with disabilities who require permanent care will face difficulties combining caring for the adult child and engaging in full employment throughout their working lives.⁷⁷

Limitations on labor force participation and earnings potential affect

70. *Id.*

71. *Id.*

72. *Id.*

73. See Yoanna X. Moisesides, *I Just Need Help . . . TANF, the Deficit Reduction Act, and the New "Work-Eligible Individual,"* 11 J. GENDER, RACE & JUST. 17, 30-31 (2007) (noting that a significant percentage of families eligible for financial assistance under TANF include a child with a disability or chronic health problem); Nancy E. Reichman, Hope Corman & Kelly Noonan, *Effects of Child Health on Sources of Public Support* 8 (Nat'l Poverty Ctr. Working Paper Series, No. 04-16, 2004), available at <http://www.npc.umich.edu/publications/workingpaper04/paper16/04-16.pdf>.

74. See Reichman, Corman & Noonan, *supra* note 73.

75. *Id.*

76. *Id.*

77. See generally Sande L. Buhai, *Parental Support of Adult Children with Disabilities*, 91 MINN. L. REV. 710 (2007) (discussing which states impose legal duties on parents to care for their adult children with disabilities); Phillip McCallion & Sheldon S. Tobin, *Social Workers' Perceptions of Older Parents Caring at Home for Sons and Daughters with Developmental Disabilities*, 33 MENTAL RETARDATION 153 (1995) (discussing the need of older parents for great support from social services providers and the importance of involving siblings in care of adult with developmental disability); Luana Olivas, *Helping Them Rest in Peace: Confronting the Hidden Crisis Facing Aging Parents of Disabled Children*, 10 ELDER L.J. 393 (2002) (discussing the challenges faced by aging parents of adult children with disabilities in finding long-term care for their children).

most caretaking parents, most of whom are women. A “maternal wall” – gender discrimination experienced particularly by mothers – results from employment practices that are incompatible with caregiving practices.⁷⁸ The absence of adequate legal remedies to change discriminatory practices exacerbates the obstacles to workforce participation that mothers of children with disabilities confront.⁷⁹ Even if the “parent penalty” – or, more precisely, the “motherhood penalty” – were eliminated,⁸⁰ limitations would remain for many parents of CSHCN. A few examples help to make the point.

Requiring employers to provide equivalent pay and benefits for part-time workers is highly useful for caregivers whose children are in school or childcare.⁸¹ It does not open the doors to employment, however, for the caregiver whose child with autism needs constant supervision, since few communities provide adequate childcare.⁸² Also, requiring employers to provide a week of paid sick leave that may be used to care for a sick child would reduce the financial impact of ordinary childhood illnesses.⁸³ A

78. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 114–41 (2000) [hereinafter WILLIAMS, UNBENDING GENDER] (defining the ideal-worker norm—a parent working in the market economy and benefiting from a free flow of uncompensated family work—and suggesting models for equitable resource division upon divorce); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000) (arguing for a restructuring of paid work to provide a foundation for egalitarian conceptions of citizenship and care); Joan C. Williams, *Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence to Prove Gender Discrimination*, 7 EMP. RTS. & EMP. POL'Y J. 287 (2003) [hereinafter Williams, *Litigating the Glass Ceiling*] (defining the “maternal wall” as a bias against mothers in particular and providing guidance to practitioners on using evidence of cognitive bias in gender discrimination litigation); Joan C. Williams & Holly Cohen Cooper, *The Public Policy of Motherhood*, 60 J. SOC. ISSUES 849, 849 (2004) (acknowledging contradictions between the ideal worker and good mother and good father roles, and proposing a statute forbidding discrimination based on family responsibilities).

79. Williams, *Litigating the Glass Ceiling*, *supra* note 78.

80. See Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 204 (2001) (noting that mothers earn five to seven percent less per child than women who do not have children); Laura T. Kessler, *Keeping Discrimination Theory Front and Center in the Discourse over Work and Family Conflict*, 34 PEPP. L. REV. 313, 317–19 (2007) (arguing that mothers face unique gender discrimination in the workplace, and that such employer discrimination is one reason that women earn less than men).

81. See Williams & Cooper, *supra* note 78, at 857.

82. Guillermo Montes & Jill S. Halterman, *Child Care Problems and Employment Among Families with Preschool-Aged Children with Autism in the United States*, 122 PEDIATRICS 202, 202 (2008) (finding in a national survey that thirty-nine percent of parents of children with autism reported that childcare problems had “greatly affected” their employment decisions, compared with sixteen percent of parents of children at risk for autism and nine percent of parents of children who did not have autism).

83. See NAT'L P'SHIP FOR WOMEN & FAMILIES, GET WELL SOON: AMERICANS CAN'T AFFORD TO BE SICK 1–2 (2004) (explaining that parents without paid sick leave must choose between leaving a sick child home alone and putting the family's economic stability at risk), available at <http://www.nationalpartnership.org/site/DocServer/GetWellSoonReport.pdf?docID=342>; Montes & Halterman, *supra* note 82, at 202.

child with a chronic illness, however, is likely to have more than five days a year of illness, requiring parents to seek unpaid leave or risk losing their employment due to excessive absences.⁸⁴ Regardless of legal reforms, few employers will easily adjust to the needs of an employee with a child whose illness involves unpredictable crises.⁸⁵ Support structures designed for families of healthy children are simply insufficient to meet the needs of parents of CSHCN.

2. *Single-Parenting a CSHCN*

Many children with disabilities or chronic illnesses live with only one parent. Numerous studies have considered this phenomenon and examined how parenting a CSHCN affects the family structure. For example, researchers investigating the incidence of divorce among couples with a child with a disability or chronic illness found it “very likely that chronic or congenital health problems in children can help precipitate divorce among their parents.”⁸⁶ Specifically, children with disabilities between the ages of six and nine faced a 9.5% risk of parental divorce, compared to a 4.9% risk for non-disabled children.⁸⁷ In a study of eighth-graders with four disabilities, it was found that 20.1% had divorced or separated parents, compared to 15.3% of their non-disabled peers.⁸⁸

Children with certain disabling conditions or chronic health problems may be at greater risk of parental divorce than children with other disabilities or chronic health problems. One study found, for example, that parents of children with congenital heart disease, cerebral palsy, or blindness divorce at a rate two to three times higher than parents with

84. Despite the different needs experienced by people with disabilities and those without, the Supreme Court has found disparate impact claims under section 504 of the Rehabilitation Act unpersuasive. See *Alexander v. Choate*, 469 U.S. 287, 289–90, 309 (1985) (finding that Tennessee’s limiting of Medicaid payments for inpatient treatment to fourteen days a year did not violate section 504, despite its disparate impact on people with disabilities, who were more likely to require more than fourteen days of hospitalization a year when compared to people without disabilities).

85. See Julia Shearn & Stuart Todd, *Maternal Employment and Family Responsibilities: The Perspectives of Mothers of Children with Intellectual Disabilities*, 13 J. APPLIED RES. INTELL. DISABILITIES 109 (2000) (describing employer reactions to mothers attempting to combine employment with caring for their children with disabilities, including inflexibility when a child experienced a crisis).

86. Jane Mauldon, *Children’s Risk of Experiencing Divorce and Remarriage: Do Disabled Children Destabilize Marriages?*, 46 POPULATION STUD. 349, 360 (1992). See also Hope Corman & Robert Kaestner, *The Effects of Child Health on Marital Status and Family Structure*, 29 DEMOGRAPHY 389, 405 (1992) (“[Study results] provide robust evidence that having an unhealthy child decreases the likelihood that a woman will be married, regardless of the measure used for poor child health. . . . [U]nhealthy children are more likely to be raised only by their mothers and thus to suffer the consequences of single motherhood, such as poverty and poorer schooling outcomes.”).

87. *Id.* at 359.

88. Hodapp & Krasner, *supra* note 64, at 75–76.

children without these conditions.⁸⁹ These parents also divorce at a higher rate than parents whose children have asthma, a permanent deformity, or a lost limb.⁹⁰ Another study found that parents of children with attention deficit hyperactivity disorder (ADHD) were almost twice as likely to divorce as parents of children who did not have the condition.⁹¹

Unmarried parents of children with disabilities have similar experiences. A 2004 study found that having a child in poor health reduces by ten percent the probability that parents will be living together twelve to eighteen months after the child's birth.⁹² The study concluded that a child's poor health was a factor determinative of relationship survival for couples "whether married or not, indicating that the previous studies that focused on marriage and divorce told only part of the story."⁹³

Studies have also investigated whether single parents of CSHCN tend to marry after the child's birth. Researchers have generally found the answer to be no. A study of single mothers found that a significantly higher percentage of mothers of CSHCN remain single when compared with mothers of children without disabilities or chronic illnesses.⁹⁴ In sum, a child's chronic illness or disability has an undeniable impact on the decisions of parents about marriage and about living with each other and with the child.

III.

HOW WOULD CHALIMONY BE DIFFERENT FROM EXISTING FAMILY LAW REMEDIES?

To understand the contribution chalimony would make to family economic well-being, it is essential to understand the financial remedies currently available for single parents. Family law provides two forms of interparental transfers: child support and alimony (also called spousal support).⁹⁵

A single parent with a minor child in the household has a claim for child support from the non-custodial parent. How much child support is

89. J.M. Joesch & K.R. Smith, *Children's Health and Their Mothers' Risk of Divorce or Separation*, 44 SOC. BIOLOGY 159, 164 (1997).

90. *Id.*

91. Brian T. Wymbs, William E. Pelham, Jr., Brooke S.G. Molina, Elizabeth M. Gnagy, Tracey K. Wilson & Joel B. Greenhouse, *Rate and Predictors of Divorce Among Parents of Youths with ADHD*, 76 J. CONSULTING & CLINICAL PSYCHOL. 735, 741 (2008).

92. Nancy E. Reichman, Hope Corman & Kelly Noonan, *Effects of Child Health on Parents' Relationship Status*, 41 DEMOGRAPHY 569, 582 (2004).

93. *Id.* at 583.

94. Corman & Kaestner, *supra* note 86, at 405.

95. A third post-marital financial remedy—the allocation of marital property—is not explicitly part of this discussion because any income generated by such property counts as income to the parent who owns the property.

awarded depends on a state's child support guidelines. In general, the guidelines set the obligation of each parent at approximately the same level as the amount that parent would spend on the child if the child and both parents were living in the same household. Alimony, by contrast, is a claim of one former spouse against the other.⁹⁶ While criteria for the award of alimony vary from state to state, ordinarily an award is solely to support the recipient; it is not calculated to help the alimony recipient support another person.

Missing from both child support and spousal support is a recognition of the interrelationship between the child's needs and the custodial parent's capacity for self-support. Where a child has a serious health problem, as discussed earlier, caring for the child often impairs the caregiving parent's economic activity. The notion that the financial situation of the child is unrelated to the financial situation of the caregiving parent is a fiction. Under the current regime of child support and alimony, however, there is usually little consideration given to the custodial parent's loss of productivity. There are rare circumstances where the law increases the money available to the child's household because of the child's negative impact on the caretaking parent's economic activity, but the remedy is spectral and hard to achieve.

Chalimony is proposed as a targeted remedy for a caregiver's present and future lost economic productivity. Chalimony would be awarded to supplement rather than replace any child support and spousal support available under the current regimes.

A. Chalimony Is a Different Remedy from Child Support

At least since the late 1980s,⁹⁷ child support has been based on the idea

96. The requirement of a prior marriage as an eligibility criterion for alimony or spousal support exists in every state but Washington, where alimony or spousal support can be awarded to an eligible person who was in a marriage-like relationship with the payor. WASH. REV. CODE ANN. § 26.09.090 (West 2009) (authorizing awards to domestic partners).

97. Most states made substantial changes in child support law and practice in the 1980s and 1990s in response to changes in federal law conditioning federal funds for Aid to Families with Dependent Children and then TANF on state adoption of child support guidelines, expedited case processing, and improved information sharing, among other items. See, e.g., Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2346 (codified as amended in scattered sections of 42 U.S.C.); Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, Stat. 1321 (codified as amended in scattered sections of 42 U.S.C.). See also Ira Mark Ellman & Tara O'Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107, 111-13 (2008) (describing the federal role in the development of child support guidelines' requirements); Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519 (1996) (describing changes required by Congress in 1996 in the establishment and enforcement of child support); Jane C. Venohr & Robert G. Williams, *The Implementation and Periodic Review of State Child Support Guidelines*, 33 FAM. L.Q. 7, 9-30 (1999) (describing state responses to federal requirements regarding child support guidelines).

that both parents are responsible for supporting their child.⁹⁸ In principle, under current guidelines, the non-custodial parent's support duty equals the expenses incurred by that parent while sharing a household with the child.⁹⁹ The precise level of support is based on average parental expenditures, rather than on the history of spending practices by the parents in the case. Each parent is responsible solely for the support of the child; unless alimony is also ordered, neither parent is responsible for the support of the other parent.¹⁰⁰

Both parents are expected to contribute to the child's support.¹⁰¹ In most states, this "income-sharing" principle is expressed through dividing the base amount of child support between the two parents in proportion to their incomes.¹⁰² For example, if one parent earns \$2000 a month and the other earns \$1000 a month, the higher earning parent provides two-thirds of the basic child support and the lower earning parent provides one-third. In addition to the basic child support obligation, most states increase child support obligations to cover certain medical expenses, unusual educational or travel expenses, daycare costs, and the like.¹⁰³ Like the basic child support obligation, these add-ons ordinarily are allocated between the parents in proportion to their incomes.¹⁰⁴

An award of chalimony would not replace the child support award. Instead, an award of chalimony would provide some relief for the parent whose income production is impaired because of meeting the unusual caretaking needs of a CSHCN. In other words, chalimony would take into account the interdependent reality of the child's needs and caregiver's capacity in a way that child support, as currently configured, does not, since child support, by design, focuses solely on the child and ignores the parent's situation.¹⁰⁵

98. Ellman & Ellman, *supra* note 97, at 137 (suggesting that dual parent obligation expresses "a social consensus that both parents have a moral obligation to support their children, even if the child lives primarily with one parent")

99. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, at ch. 1 (2002) [hereinafter PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION]. See Ellman & Ellman, *supra* note 97, at 138–39 (describing the "dual-obligation" component of child support as ensuring that the non-custodial parent pays a fair share of expenses incurred by the custodial parent); Venohr & Williams, *supra* note 97, at 13–14.

100. See *Younis v. Farooqi*, 597 F. Supp. 2d 552, 555 (D. Md. 2009) ("The purpose [of child support] is not . . . to benefit the other parent."); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 99, at § 5 (discussing how to allocate financial losses that arise at the dissolution of a marriage according to equitable principles that are consistent and predictable in application).

101. See Ellman & Ellman, *supra* note 97, at 137–38.

102. See Venohr & Williams, *supra* note 97, at 13.

103. See *id.* at 19–20.

104. See *id.*

105. See Ellman & Ellman, *supra* note 97, at 114 ("[The law] assumes that dollars are

According to Ira and Tara Ellman, there is widespread opposition to the use of child support to maintain the child's caregiving parent.¹⁰⁶ Chalimony provides a conceptual response to these concerns. It would recognize and address an inadequacy within the system rather than cloak parental support under the rubric of child support.

Another significant difference between child support and chalimony emerges from an examination of the child support system in practice. For a number of reasons, the federal government induced states to adopt child support laws that require, in most cases, that the amount of child support be established formulaically; deviations, which require consideration of the needs of individual children or the financial situation of particular parents, should be rare.¹⁰⁷ A claim for chalimony, by contrast, would require the court to consider the seriousness of the health problems of the specific child and the impact of that child's problems on the specific caregiver's earning capacity.

Of course, the general differences between child support and chalimony do not determine the outcome in every case. Child support is sometimes used to address problems that arise when a child's disabling condition or chronic illness affects the labor force participation of the caregiver. One must consider, therefore, whether changing child support generally is preferable to creating a new remedy in chalimony. If child support formulas were revised with the goal of providing for the child's minimum well-being, for example, as urged by the Ellmans,¹⁰⁸ chalimony would be necessary in fewer cases because more recipient households would be provided with a larger amount of child support. Even if such wholesale reform efforts were successful, however, some households with a CSHCN would still have financial problems because of the impact of the

true to their label—that child support dollars benefit only the obligor's children and alimony dollars benefit only the parent.”). The Ellmans reach this conclusion while observing how the law ignores the improvement in the child's standard of living when the custodial parent marries someone with substantial income; the same point applies, however, when the custodial parent's income declines.

106. See *id.* at 138–39, 146–47 (explaining that the “earner's priority principle” arises from the broad acceptance of the claim that an obligor parent owes a duty to share her income with the child but no responsibility to decrease her standard of living for the benefit of the child's other parent).

107. See 42 U.S.C. § 667 (2006); *Clark v. Superior Court*, 73 Cal. Rptr. 2d 53, 57–58, 62–63 (Ct. App. 1998) (finding no due process right for parents to have appointed counsel in child support cases because, given the mathematical nature of child support formulas, the likelihood of an erroneous result is small, and therefore the tax expense of state-funded counsel would outweigh the benefits); Irwin Garfinkel, Daniel R. Meyer & Sara S. McLanahan, *A Brief History of Child Support Policies in the United States*, in *FATHERS UNDER FIRE* 21–23 (Irwin Garfinkel, Sara S. McLanahan, Daniel R. Meyer & Judith A. Seltzer eds., 1998) (arguing that race and class bias in child support awards led to the establishment of a standardized system); Venohr & Williams, *supra* note 97, at 25–26 (noting that deviations are entered in a relatively small minority of cases in most states).

108. See, e.g., Ellman & Ellman, *supra* note 97, at 131–37.

child's needs on the caregiving parent's earning capacity. Furthermore, under child support doctrine as it currently exists, some caregiving parents of CSHCN are at risk of receiving even less than might be expected. Specifically, courts can impute income to the caregiving parent or can restrict opportunities for upward deviations from the current formulaic guidelines.

1. *Imputation of Income*

Most states have adopted the dual obligation principle under which child support is the responsibility of both parents, allocated in proportion to their incomes.¹⁰⁹ The labor force participation of both parents is therefore determinative of their respective child support obligations.¹¹⁰ If one parent is not participating in the labor force to the fullest extent possible, the other parent's share of the total parental support will be higher. One remedy for this arguably unfair allocation of support is the imputation of income to the parent who is earning too little. In most states, such imputation is permissible when a parent's labor force participation should produce more income, based on the parent's education and experience.¹¹¹ When income is imputed, allocation of the child support obligation is based on the parent's potential income, rather than her actual income. As a result, the parent's proportional share of the child support obligation increases, with the likely result that the child's household experiences a decrease in its economic well-being.

If a parent's labor force participation is low because of the unusual care requirements of a CSHCN, imputation of income puts an undue share of the child support burden on that parent's shoulders. Few states, however, immunize parents from imputation because of their caregiving responsibilities for a CSHCN. Some states offer a few exceptions that may benefit a caregiving parent. Imputation generally is not permitted, for example, where a child is too young for professional childcare to be a reasonable alternative to parental care. What "too young" means varies by state and ranges from a low of two years to a high of six years.¹¹² A

109. See *supra* notes 101–04 and accompanying text.

110. See, e.g., MD. CODE ANN., FAM. LAW § 12-204 (LexisNexis 2008); MINN. STAT. ANN. § 518.A34 (West 2008); W. VA. CODE § 48-13-201 (LexisNexis 2004). See also PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 99, at ch. 3 glossary (defining income shares); Ellman & Ellman, *supra* note 97, at 118–23 (describing how the conventional method of child support calculation works in practice).

111. See, e.g., FLA. STAT. ANN. § 61.30(2)(b) (West 2009); MD. CODE ANN., FAM. LAW § 12-204(b); MINN. STAT. ANN. § 518.A34.

112. See, e.g., FLA. STAT. ANN. § 61.30(2)(b) (“[T]he court may refuse to impute income to a parent if the court finds it necessary for the parent to stay home with the child who is the subject of a child support calculation.”); MD. CODE ANN., FAM. LAW § 12-204(b)(2)(ii) (“A determination of potential income may not be made for a person who . . . is caring for a child under the age of 2 years for whom the parents are jointly and severally

minority of states also prohibit or discourage imputation in situations where the parent's labor force participation is decreased due to caretaking responsibilities for a CSHCN.¹¹³ In Colorado, for example, a court found imputing full-time income to be inappropriate where the mother was working part time and staying home during the day to care for her child with Down syndrome.¹¹⁴ In another case, imputation of full-time employment income was impermissible where the mother worked only thirty-two hours a week so that she could take the parties' child, who had cerebral palsy, to physical therapy.¹¹⁵

The imputation decision may be left to the discretion of the trial court. In a Maryland case, for example, the caretaking mother testified that she left full-time employment in part because the parties' son was experiencing substantial difficulties due to ADHD.¹¹⁶ The mother quit her job shortly after her child began attending a new school. His prior school had not allowed him to return because of his ADHD-related behavior problems.¹¹⁷

responsible."); *Kraisinger v. Kraisinger*, 928 A.2d 333, 342–43 (Pa. Super. Ct. 2007) (holding that, under the nurturing parent doctrine, the court did not abuse its discretion by refusing to impute income to the custodial parent until her youngest child was in school full time, approximately at age six).

113. *See, e.g.*, N.D. ADMIN. CODE § 75-02-04.1-07(4)(c) (2008) (allowing consideration of the "unusual emotional or physical needs" of a minor child in imputation); OHIO REV. STAT. ANN. § 3119.01(B)(11)(a)(viii) (West 2005) (permitting imputation of income to address the "special needs" of a child); S.C. CODE ANN. § 114-4720(A)(5) (2009) (allowing the presence of a "handicapped" child to be considered in decision regarding imputation); UTAH CODE ANN. § 78B-12-203(7)(d) (West 2008) (placing limits on imputation if unusual emotional and physical needs of a child require a parent's presence at home); VA. CODE ANN. § 20-108.1(3) (2009) ("[I]ncome may not be imputed to the custodial parent when a child is not in school, child care services are not available and the cost of such child care services are not included in the computation . . .").

114. *In re Marriage of Pote*, 847 P.2d 246, 247–48 (Colo. Ct. App. 1993).

115. *In re Foss*, 30 P.3d 850, 852 (Colo. Ct. App. 2000). *See Myers v. Myers*, No. 0330-94-2, 1994 WL 510066, at *1–2 (Va. Ct. App. Sept. 20, 1994) (finding no abuse of discretion in court's decision to consider a mother's caretaking responsibilities for her daughter with a mental disability as a cost to her and therefore within the statutory factors considered in determining the proper child support award).

116. *Dunlap v. Fiorenza*, 738 A.2d 312, 314–15 (Md. Ct. Spec. App. 1999).

117. *Id.* A popular book that provides background about the caregiving demands on parents with a child with ADHD is *Taking Charge of ADHD* by Russell A. Barkley. According to Barkley, a child with ADHD, like a child with an autism spectrum disorder, needs consistent, daily help from a caregiver who can provide executive functioning, interact with schools, and supervise activities ranging from social life to education. Like a child with asthma or other chronic illness, a child with ADHD can experience episodic and unpredictable events that require immediate and unplanned involvement by the caregiver. That may occur because a child with ADHD is often lacking in impulse control and sometimes is explosive. *See RUSSELL A. BARKLEY, TAKING CHARGE OF ADHD* 89–105 (2005). For example, in *Dunlap*, Justin was suspended because he brought a weapon to school, an unexpected event that revealed his impulsiveness and, simultaneously, left his mother unable to rely on the daily school experience to help organize Justin's time and provide alternative supervision for a predictable number of hours a day. 738 A.2d at 314–15. My own experience coraising a child with less severe ADHD issues than Justin has

The mother took responsibility for his daily supervision, his tutoring program, and his therapy. The trial court decided to attribute to the mother her former income from full-time employment, and that decision was upheld on appeal.¹¹⁸ The appellate court's rationale demonstrates that it perceived no distinction between the caretaking responsibilities of parents with CSHCN and other parents:

“[The mother] stopped work because she felt Justin needed her at home. Since that appears to have helped, we have some sympathy for that position. Unfortunately, were we to apply [that] litmus test, every mother (and some fathers) could stop working because it would be better to raise the children (especially at a younger age). Our world does not permit this. Two income families are the norm, and single parents cannot stay home and take care of the children.”¹¹⁹

The court's willingness to characterize the mother's decision as one choice among a range of caretaking options, rather than her only viable option, is emblematic of the obstacles facing custodial parents of CSHCN on the imputation of income issue. Further, even in states that discourage imputation of income to custodial parents of CSHCN, immunizing the custodial parent only protects the parent from experiencing a reduction in child support. It does not give the custodial parent the increase in household income that would be achieved through chalmomy.

2. *Upward Deviations*

Even if parents caring for CSHCN were immunized from imputation of income, child support would not provide the extra resources that caregivers with reduced earning capacity need. Extra resources could be provided through a child support award greater than the presumptively correct amount under the guideline (an “upward deviation”). In most states, however, the presumptively correct child support amount is only increased to account for unusual expenses directly incurred for the child, such as extraordinary medical expenses, tutoring, or special childcare facilities.¹²⁰ Upward deviation from statutory mandates to alleviate the

made me sensitive to the unusual level of parental involvement my child needed, which required an unusual level of parental flexibility. One indicator of the difficulties associated with raising a child with ADHD is reflected in the unusually high divorce rates of their parents. See Wymbs, Pelham, Molina, Gnagy, Wilson & Greenhouse, *supra* note 91, at 735.

118. *Dunlap*, 738 A.2d at 315–17.

119. *Id.* at 316 (quoting lower court decision) (second alteration in original).

120. See, e.g., *Miller v. Jacobsen*, 714 N.W.2d 69, 78–80 (S.D. 2006) (permitting deviation to require a father to contribute to cost of van and other costs of caregiving for son with a disability); *Gilland v. Gilland*, No. M2002-02276-COA-R3, 2004 WL 2585885, at *11–12 (Tenn. Ct. App. Nov. 9, 2004) (permitting deviation because a child with a disability requiring tube-feeding had higher medical expenses); *Kogon v. Keenan*, No. 0603-92-4,

impact of a CSHCN on the caregiving parent's economic productivity is rarely permissible.

Only Florida appears to explicitly allow upward deviation based on the custodial parent's unusual caregiving responsibilities for a CSHCN. In one case, for example, a noncustodial father of a child with a disability was required to pay a child support supplement when he moved farther away from the child's home and reduced his caretaking time with the child.¹²¹ In other states, increases can be obtained, if at all, only by a demonstration that the presumptively correct guidelines amount would be unjust or inappropriate in the particular case. Under that standard, a few courts have increased child support as a way of replacing the custodial parent's lost income.¹²²

The scarcity of case law is revealing. Along with the absence of favorable statutes, the absence of case law suggests that caregiving parents generally do not seek an upward deviation to compensate for their decreased earning capacity. The process for asserting deviation claims may help to explain this phenomenon. A very large number of custodial parents use the "IV-D" system (named for Title IV-D of the Social Security Act) when seeking to establish, modify, or enforce child support.¹²³ Their legal representation is provided by publicly-funded attorneys managing a high volume of cases.¹²⁴ Given their caseloads and

1993 WL 129315, at *1 (Va. Ct. App. Apr. 27, 1993) ("[T]he expense of a private tutor for a child with a learning disability results from a mental condition of the child and is, therefore, a factor to be considered in determining whether to deviate from the presumptive amount of child support . . ."). See also CHARTBOOK 2005-2006, *supra* note 12, at 39 ("Families of over half of CSHCN reported spending \$250 or more on health care in the previous year for the care of their CSHCN. The families of 13 percent of CSHCN spent between \$501 and \$1,000, and the families of 20 percent of children spent more than \$1,000.").

121. *Kuttas v. Ritter*, 879 So. 2d 3, 5 (Fla. Dist. Ct. App. 2004).

122. See *Kitchen v. Kitchen*, No. CA2002-12-298, 2004 WL 486105, at *1-3 (Ohio Ct. App. Mar. 15, 2004) (upholding upward deviation where "appellant provided little or no childcare for the minor child, the minor child had extensive medical needs, and because of the child's needs it would be inappropriate for [the custodial parent] to work outside the home"); *Hamilton v. Hamilton*, 667 N.E.2d 1256, 1258, 1261 (Ohio Ct. App. 1995) (upholding increase in child support where a custodial parent's caretaking responsibilities were extreme, as a result of the physical condition of the child, and where the custodial parent needed paid respite care in lieu of the noncustodial parent assuming a greater caretaking role).

123. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT ENFORCEMENT, FY 2008 PRELIMINARY REPORT (2009) (reporting that IV-D agencies had caseloads totaling 15.7 million cases in fiscal year 2008), available at http://www.acf.hhs.gov/programs/cse/pubs/2009/reports/preliminary_report_fy2008/#figure 1.

124. See Barbara Glesner Fines, *From Representing "Clients" to Serving "Recipients": Transforming the Role of the IV-D Child Support Enforcement Attorney*, 67 FORDHAM L. REV. 2155, 2159 (1999) (explaining that caseloads far exceed what IV-D counsel can handle in most states).

the IV-D system's need to process a huge volume of cases,¹²⁵ it seems highly unlikely that IV-D attorneys will have the capacity or inclination to seek unusual outcomes for their clients through deviation motions, even in deserving cases.

An Ohio case involving one of the rare upward deviations is a good example of the difficulties the custodial parent faces in the current litigation system.¹²⁶ When the parents were divorced, the court initially granted an upward deviation to the mother of a child with cerebral palsy and other serious illnesses because the child could not walk, feed, or bathe herself, and her mother could not leave the house for work. A year later, at the behest of the father, the local child support agency asked the court to reduce the child support in light of the father's other financial obligations. No mention was made of the reasons that, a year earlier, an upward deviation had been approved. Only when the mother objected did the court examine the administrative decision and decide, after two hearings, that the increased support payments should be continued.¹²⁷

B. Alimony Is Not an Equivalent Remedy to Chalimony

Historically, ecclesiastical courts awarded alimony to provide economic sustenance to wives who were separated from their husbands, and courts sometimes included money for the support of children in the wife's care.¹²⁸ In modern times, alimony, also known as spousal support or maintenance, is provided solely to support the separated or former spouse.

Unlike alimony, chalimony is based on the interdependent reality affecting caregivers whose income-earning capacity is diminished or eliminated because they are meeting the unusual care needs of their children. Chalimony would provide a different kind of support, designed to ameliorate the child's impact on the caregiving parent's participation in the workforce. Further, chalimony, unlike alimony, would be available regardless of the marital status of the CSHCN's parents.¹²⁹

125. Indeed, complaints that IV-D staff fail to meet even the basic needs of custodial parents are not unknown. See *Blessing v. Freestone*, 520 U.S. 329 (1997) (rejecting the plaintiffs' claim that they were deprived of access to child support because of deficiencies in Arizona's child support system, including staff shortages, and holding that individual IV-D beneficiaries have no cause of action to challenge a state's failure to achieve "substantial compliance" with its requirements).

126. See *Kitchen*, 2004 WL 486105, at *1-3.

127. *Id.* at *1.

128. Chester G. Vernier & John B. Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 *LAW & CONTEMP. PROBS.* 197, 199 (1939) ("While provision for the custody and maintenance of the children was without the province of the Ecclesiastical judge, the husband's obligation to support the children was not ignored in fixing the amount which he could appropriately be called upon to pay for the wife's support.").

129. See Ann Laquer Estin, *Ordinary Cohabitation*, 76 *NOTRE DAME L. REV.* 1381,

In the past, alimony was awarded where a former spouse was left in need at the end of a marriage.¹³⁰ Need is no longer the primary rationale for alimony because of changes in married women's employment patterns and no-fault divorce system's bias toward a clean break between the parties.¹³¹ Where alimony is awarded now, the rationale is most commonly one of rehabilitation; that is, a short-term award of money from the higher-earning spouse to the lower-earning spouse during the time necessary for that spouse to become gainfully employed.¹³² Where rehabilitation is impossible, or where the income obtainable after rehabilitation is still extremely low relative to the income of the payor spouse after a long marriage, indefinite alimony may be awarded.¹³³

Indefinite alimony is sometimes awarded to parents of a CSHCN who have been unable to participate fully in the labor market. In two cases from Tennessee, indefinite alimony awards were upheld in light of the likely impossibility of rehabilitation where the payee spouse was caring for a child with a disability.¹³⁴ Nonetheless, although it is possible for indefinite alimony to be authorized in these circumstances under applicable statutes,¹³⁵ it appears more common for courts to deny indefinite alimony to parents of children with disabilities than to grant it.¹³⁶

1395–400 (2001) (detailing property divisions and cohabitant compensation upon divorce).

130. See IRA MARK ELLMAN, PAUL M. KURTZ, ELIZABETH S. SCOTT, LOIS A. WEITHORN & BRIAN BIX, *FAMILY LAW: CASES, TEXT, PROBLEMS* 363–67 (4th ed. 2004) (detailing the historical foundation of alimony at common law and explaining modern trends toward dependency payments).

131. J. Thomas Oldham, *Changes in the Economic Consequences of Divorces, 1958–2008*, 42 *FAM. L.Q.* 419, 431–33 (2008) (discussing women's increased labor market participation and the attendant benefits of an equitable property division and a clean break between the parties upon divorce).

132. *Id.*

133. See ELLMAN, KURTZ, SCOTT, WEITHORN & BIX, *supra* note 130, at 366–67 (describing maintenance payments owed to spouses unable to provide for their basic needs).

134. See, e.g., *Sizemore v. Sizemore*, Nos. E2005-01166-COA-R3-CV, E2006-01456-COA-R3-CV, 2007 WL 2198358, at *3–4 (Tenn. Ct. App. July 30, 2007) (upholding an award of indefinite alimony to a spouse caring for the couple's child with severe autism); *McCloud v. McCloud*, No. 01-A-01-9303-CV00096, 1993 WL 295021, at *1–2 (Tenn. Ct. App. Aug. 4, 1993) (awarding indefinite alimony where the wife spent more than twenty years of the dissolved marriage caring for the couple's child with a disability).

135. See, e.g., MD. CODE ANN., *FAM. LAW* § 11-106(c) (West 2006) (authorizing awards of indefinite alimony where it is unreasonable to expect progress towards self-sufficiency due to disability); TEX. *FAM. CODE ANN.* § 8.054(b) (Vernon 2006) (authorizing an alimony award for the duration of the child's disability); UNIF. MARRIAGE & DIVORCE ACT § 308 (1973) (granting discretion to award alimony deemed “just” to custodians of children whose conditions make working outside the home inappropriate).

136. See, e.g., *Dees v. Dees*, 887 A.2d 429, 435 (Conn. App. Ct. 2006) (denying three year extension of alimony to the mother of a child with a disability because such an award would not further the rehabilitative purposes of alimony); *Malin v. Mininberg*, 837 A.2d 178, 212–13 (Md. Ct. Spec. App. 2003) (awarding five years of alimony payments); *Ingram v. Ingram*, No. 2-03-059-CV, 2004 WL 928210, at *1 (Tex. Ct. App. Apr. 29, 2004)

An alternative rationale for alimony, proposed in the ALI Principles, is that a spouse suffers a compensable loss during marriage that can be remedied only by the payment of money from one spouse to the other after the marriage ends.¹³⁷ Florida has used this approach in at least two cases to support permanent alimony awards to former spouses whose care of a CSHCN during the marriage left them unable to support themselves.¹³⁸

At first blush, the Florida cases suggest that alimony law could be revised under the ALI approach so as to eliminate the need for chialimony. Unfortunately, this is not the case. First, under the ALI approach, payments for a compensable loss are available only to parental caretakers of CSHCN who were formerly married to the child's other parent or who were in a coresident marriage-like relationship for a substantial period of time.¹³⁹ However, an unusually high percentage of women who give birth to a CSHCN never form a common household with or marry the child's father.¹⁴⁰ The ALI approach also includes nothing about compensatory payments to nonparents. Chialimony could be awardable to nonparents such as grandparents who are caring for a CSHCN.

Furthermore, the compensation available under the ALI Principles is only for financial losses sustained because of events during the marriage or marriage-like relationship, including the "disproportionate share of caretaker responsibility for children or other persons to whom the spouses have a moral obligation."¹⁴¹ A child's disability or chronic illness may begin after the marriage or relationship ends, or its impact on the

(awarding twelve months of alimony to the mother of an adult child with a disability).

137. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 99, at § 5.02(3)(a)–(b).

138. See *Smyth v. Smyth*, 959 So. 2d 414, 415–16 (Fla. Dist. Ct. App. 2007) (holding that an alimony award of \$250 a month was too low when the mother stayed home to care for the child with a disability and two other children of the marriage and could not at that time resume her career while husband's career was "largely unhindered" by parenthood); *Reeves v. Reeves*, 821 So. 2d 333, 335 (Fla. Dist. Ct. App. 2002) (awarding permanent alimony to compensate the wife for her lost income during the time she cared for the couple's child with a disability).

139. See, e.g., Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815 (2005) (arguing that contractual obligations attendant to marriage should not be enforced upon long-term cohabitants); Lisa Glennon, *Obligations Between Adult Partners: Moving from Form to Function?*, 22 INT'L J.L., POL'Y & FAM. 22 (2008) (arguing that marital status continues to carry determinative weight in family law jurisprudence); Nancy Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353 (arguing that domestic partners should have equal status to married couples). See generally JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW (2000) (describing shifting conceptions of the family unit from a focus on partnering to parenting).

140. See *supra* notes 92–94 and accompanying text.

141. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 99, at § 5.02(3)(a).

caregiving parent's economic activity may continue or change as the child ages or the condition changes. Modification of the ALI compensatory award is not permissible in either case. Finally, the duration of the ALI compensatory award may be too short, since it is related to the duration of the marriage or relationship and not to the duration of the child's impact on the caregiver's economic activity.¹⁴²

IV.

HOW CAN CHALIMONY BE JUSTIFIED TO THE MEMBERS OF THE AFFECTED FAMILIES?

Successful childrearing depends on the child's needs, the capacities of the child's parents or other caregivers, and the responsiveness of the community, employers, and the government. Just as children differ from one another, the demands they make on their parents, other caretakers, and on their wider communities also differ. Understanding the needs of each CSHCN is a vital first step, but one also needs to understand the capacities and limitations of the child's parents or caretakers and their community support system.

Two examples illustrate the point. A child with autism who lives in a community where special education is well-funded may fare better than a child whose educational opportunities are restricted, and the stress the child's parents experience may be more manageable. That child's outcome is likely to be even better if a parent or other caregiver has the resources to spend substantial time at home helping the child learn appropriate behaviors and language skills. Conversely, a child with asthma living in a low-income community is more likely to encounter mold and other triggers in her home. When the child gets ill and misses school, the caregiving parent will miss work and, because low-wage jobs rarely have paid sick leave, the family's income will decrease.¹⁴³ The parent may even be fired for missing work, particularly if absences become a regular occurrence.

Chalimony would be a way to improve the fit between CSHCN and the resources they need for success. As explored in the next three sections, chalimony can be justified on grounds of economic fairness, gender equity,

142. Teresa Schell, *Alimony Determinations When Divorcing Couple Has a Disabled Child* (Dec. 19, 2008) (unpublished comment, on file with author) (discussing the unavailability of alimony to parents caring for children with disabilities and chronic illnesses in most cases and arguing for a modified ALI approach).

143. See Paul J. Chung, Craig Garfield, Marc N. Elliot, Colleen Carey, Carl Erikson & Mark A. Schuster, *Need for and Use of Family Leave Among Parents of Children with Special Health Care Needs*, 119 *PEDIATRICS* 1047, 1050 (2007) ("On average in the past 12 months, children stayed home from school or child care 20 days because of illness, had 12 doctor or emergency department visits, had 1.7 hospitalizations . . . spent 23 nights in the hospital . . . 33% of parents missed a week of work or less, 30% missed 1 to 4 weeks, and 18% missed [more than] 4 weeks. During their longest leave, 60% received at least some pay from their employers.").

and child welfare.

A. *Economic Fairness and Persuading the Chalimony Payor*

The costs of disability and illness must fall somewhere. Some scholars have argued that society can morally place responsibility on parents for the costs associated with a child who has a disability or chronic illness.¹⁴⁴ Assuming this to be true, chalimony challenges whether this responsibility can fairly be put on only one of the two parents. Unless the legal system intervenes, the costs will fall on whichever parent incurs them initially, inevitably the parent with whom the child lives. Chalimony would permit these costs to be redistributed more equitably between the parents.

Conversations about fair allocation of the costs of disability have occurred in the employment context, but they have yet to occur in family law. I turn, therefore, to employment conversations to address the question of whether we should continue imposing the economic costs associated with a child's disability or chronic illness solely on the caregiving parent. In the area of employment discrimination, employers are required to accept responsibility for some of the costs of employing a person with a disability through what is termed an "accommodation."¹⁴⁵ In the chalimony context, the burden imposed upon the payor parent can be analogized to the costs imposed upon employers to accommodate employees with disabilities.

Employers are not required to cover every cost that might make it possible for a person with a disability to engage in employment. Instead, the degree of their responsibility depends on what is reasonable.¹⁴⁶ The

144. Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117, 142-43 (1999) ("It might be objected that when directed against parents, wrongful life suits unfairly penalize those parents whose offspring suffer greater disabilities than most but who acted no differently from parents whose offspring are better off. In some cases, this objection will be implausible where the plaintiff claims the parents neglected special, demonstrable risks that they, specifically, would bear an inordinately burdened child. . . . One line maintains that this disproportionate burden is not unfair as each set of parents, *ex hypothesi*, freely undertook the risk that their child's life might be overburdened.")

145. See Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101-12113 (West 2010) (prohibiting employers from discriminating against a "qualified individual" on the basis of disability and defining discrimination to include the failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability"). See generally U.S. Equal Employment Opportunity Comm'n, Disability Discrimination, <http://www.eeoc.gov/laws/types/disability.cfm> (last visited May 12, 2010) (discussing reasonable accommodations for employees with disabilities).

146. See *supra* note 145. See also Francine J. Lipman, *Enabling Work for People with Disabilities: A Post-integrationist Revision of Underutilized Tax Incentives*, 53 AM. U. L. REV. 393 (2003) (arguing that employers and the government should eliminate the "reasonableness" test in favor of tax incentives to encourage mainstream employment of persons with disabilities, arguing that the potential social benefits outweigh the costs government and employers would shoulder).

meaning of that notoriously indeterminate word is the subject of an article by Michael Stein, in which he proposes that employers should be required to bear the whole cost of an accommodation only if the accommodation is wholly efficient or semi-efficient.¹⁴⁷

An accommodation is wholly efficient where the costs of employing the person with a disability do not diminish the employer's profit from the work of that employee. Wholly efficient accommodations occur where, once accommodated, the employee with a disability is more productive than non-disabled employees.¹⁴⁸

An accommodation is semi-efficient where the cost of accommodation reduces the employer's profits, but the employer still acquires a net gain from employing the person with a disability.¹⁴⁹ Stein proposes that employers should bear the costs of semi-efficient accommodations, even where an employer's profit is diminished nearly to zero. However, where the employer is losing money by employing the person with a disability but both society and the person with a disability experiences a benefit from the employment, the employer should receive a subsidy to pay for the necessary accommodations. In that case, the accommodation is "socially efficient," and it is in the state's self-interest to subsidize the costs.¹⁵⁰

Where the accommodation is wholly inefficient, no accommodation should be required. Wholly inefficient accommodations occur where the only benefit from employment accrues to the person with a disability and no benefit accrues to society as a whole.¹⁵¹

For my purposes, the "employee with a disability" can be analogized to the parent who has primary responsibility for the CSHCN and the "employer" can be analogized to the other parent. If the child had no disability or chronic illness, the financial responsibility of one parent to the other would be limited to child support and alimony. The "accommodation" is chalimony, the additional payment to the caregiver to enable her to continue providing care to the child without experiencing all of the associated financial loss.

Considering whether chalimony is a wholly efficient accommodation in a particular situation is not possible. Every parent-child relationship is unique, and it is unsavory at best to compare the efficiency of a particular caregiving relationship against another. The more useful inquiry is whether chalimony is semi-efficient; that is, whether the payor parent receives a benefit of more than zero value from the work of the caregiver.

147. Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79 (2003).

148. *Id.* at 145–51.

149. *Id.* at 167–77.

150. *Id.* at 174–77.

151. *Id.* at 178.

The net benefit to the payor parent is quantifiable and should account for the opportunity costs of the payor parent and the costs of substitute care.

One way to measure whether chalmomy is a semi-efficient accommodation is to weigh the cost of providing chalmomy against the opportunity cost to the payor parent of leaving the workforce to provide care to the child. Both parents are responsible for the care of their child.¹⁵² Maintaining a separate household does not relieve the non-custodial parent of this responsibility. Theoretically, the caregiver can surrender custody of the child to the other parent at any time, and the other parent would have to rearrange her life to ensure the child receives proper care. If the payor parent can earn more than the price of chalmomy as a fully productive economic actor, chalmomy is a semi-efficient remedy. Thus, where the payor parent's opportunity costs exceed her chalmomy obligation, the payor parent should perceive chalmomy as fair.

An alternative method involves weighing the potential obligation of each parent if the child were surrendered to the state and the parents were responsible for reimbursing the state for the costs of care. Costs vary from one locality to another, but all have some requirement for parents to continue to provide support for children in the care of the state.¹⁵³ Where the chalmomy obligation costs less than the amount of reimbursing the state for the child's care, chalmomy is semi-efficient.

Yet another measure of chalmomy's efficiency could come through comparing chalmomy payments to the cost to the payor parent of providing substitute care. First one must assume that a paid caregiver could provide care in lieu of the caregiving parent. This is a significant assumption, given the resistance of schools, medical providers, and therapists to working with non-parents.¹⁵⁴ If the parents divide the cost of care in proportion to their earnings (or potential earnings, in the case of

152. That is, both parents can be charged with neglect if they fail to provide for the child's care, regardless of whether both parents reside with the child, and the parental rights of each can be terminated if the parent fails to comply with a plan for reunification. *See, e.g.,* T.M. v. Superior Court, No. A126318, 2009 WL 4931589, at *5 (Cal. Ct. App. Dec. 21, 2009) (finding that to preserve parental rights, the noncustodial parent must participate in reunification services); *In re* N.D., No. F054508, 2008 WL 4368862, at *2 (Cal. Ct. App. Sept. 26, 2008) ("Noncustodial parents have duties to care for and protect their children similar to those held by custodial parents."); *In re* Children of T.R., 750 N.W.2d 656, 666 (Minn. 2008) (holding that the noncustodial parent's parental rights could not be terminated where the county had failed to provide him with reunification services comparable to those provided to custodial parent). Voluntary abandonment of parental responsibility is not a legal option except in certain unusual circumstances and then only with judicial or other state approval. *See* Margaret M. Mahoney, *Permanence and Parenthood: The Case for Abolishing the Adoption Annulment Doctrine*, 42 IND. L. REV. 639, 643 (2009).

153. *See* Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 CARDOZO L. REV. 1797, 1807-08 (2006).

154. *See infra* notes 177-82 and accompanying text.

the caregiving parent), and that cost exceeds chalimony, then chalimony is semi-efficient.

Even if chalimony is semi-efficient for some parents, many parents will not be able to afford it. Interestingly, Stein's work suggests an approach for addressing this problem. First, no employer is required to make an accommodation which is not affordable in the particular business environment.¹⁵⁵ A parent can make the same argument with respect to her financial situation. Second, as mentioned previously, there are socially efficient accommodations that should be made through expenditures by both the employer and the state.¹⁵⁶ In other words, where a caregiving parent is eligible for chalimony, but the non-custodial parent is unable to pay all or part of the obligation, the state should be called upon to subsidize the child's household through public benefits.¹⁵⁷ In that situation, the chalimony inquiry reveals a need that cannot be met through private resources.¹⁵⁸

B. Gender Fairness: Chalimony and the Woman Question

The first step of feminist methodology is to ask the woman question:¹⁵⁹ how would chalimony affect the well-being of women of all kinds? Since

155. Stein, *supra* note 147, at 89–90.

156. *See id.* at 174–77 (arguing that where accommodations are not efficient, it is in the state's interest to compensate the losing employer).

157. *See* Moisesides, *supra* note 73, at 32–33 (explaining how the majority of states exempted parents of children with disabilities from TANF work requirements or labeled care of dependent children a community service activity for TANF purposes).

158. Of course, no matter how well-accepted this proposal for chalimony might become, it is essential to acknowledge its limits as a system for alleviating child poverty. It is no better than child support or alimony in terms of actually putting resources into the child's household where the parents are economically unable to comply. *See* Karen Syma Czapanskiy, *ALI Child Support Principles: A Lesson in Public Policy and Truth-Telling*, 8 DUKE J. GENDER L. & POL'Y 259, 264–66 (2001) (arguing that child support law, no matter how generous to the child's household, does not alleviate child poverty in practice when obligor parents make so little money that their child support obligation, if paid, leaves them in extreme poverty; in such circumstances, many obligor parents will make only partial payments, reduce their labor force activity, or disappear as far as they are able from the lives of their children). Families with CSHCN in general, and the remedy of chalimony in particular, serve as a lens through which to consider the larger question of the interconnections of social welfare or social insurance systems and family law financial remedies. *See* Anne Alstott, *Private Tragedies? Family Law as Social Insurance* 1 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 09-64, 2009) (“[F]amily law forms part of a larger system of public law—a social insurance system that allocates the risk of life events like disability, family breakup, mental illness, substance abuse, and parental poverty. . . . [Family] law creates distributive rules that help determine which choices are bad ones—and whose bad luck carries ruinous consequences.”), available at <http://ssrn.com/abstract=1491629>.

159. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837–49 (1990) (proposing asking the “woman question,” i.e. identifying and challenging those elements of existing legal doctrine that leave out or disadvantage women and members of other excluded groups, as the first step in feminist analysis).

most caregivers of CSHCN are women, assuring that chalmomy does not disadvantage women is crucial to persuading caregivers that chalmomy would be a fair system.

For some feminists, chalmomy will be noncontroversial because it is a way to compensate women for their caregiving, to elevate the status of caregiving, and to ensure that women do not pay too high a price for leaving the market to care for their children.¹⁶⁰ However, honoring the caregiving that women do, while essential, is not without its dangers, most particularly where caring and justice do not fundamentally overlap and interact.¹⁶¹ Chalmomy is a classic example. If chalmomy raises a mother of a CSHCN out of poverty, does she lose her standing to complain that family, community, and employment practices leave her tied to the child for the rest of her life, regardless of whether she would prefer to do something else with her life?

Other feminists, emphasizing the importance of market work to and for women, have focused on the work-family conflicts that continue disproportionately to affect women,¹⁶² even as the percentage of mothers in the workplace on a full-time basis rises.¹⁶³ One of their concerns is that financing care work reinforces gender stereotypes about women as mothers.¹⁶⁴ Some advocate changes in employment practices to accommodate care work.¹⁶⁵ Some stress changes in the allocation of care work within the family.¹⁶⁶ Some are concerned with changing legal regimes

160. Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 60–64 (2002). See also MONA HARRINGTON, CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS 101–18 (1999) (arguing that equality requires using social policy to redistribute costs of traditionally uncompensated women's work among employers and taxpayers).

161. See ROBIN WEST, CARING FOR JUSTICE 81 (1997) (“Relationships of care, untempered by the demands of justice, resulting in the creation of injured, harmed, exhausted, compromised, and self-loathing ‘giving selves,’ rather than in genuinely compassionate and giving individuals, are ubiquitous in this society, and it is far more often women than men who are injured by them.”). See also *id.* at 9, 24–25, 36–38 (arguing that traditional jurisprudence has failed to protect against the damaging potential of intimate connection).

162. Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 56–59 (2005).

163. Most women are engaged in paid labor, regardless of their marital status and childcare responsibilities. Michael Selmi, *Care, Work, and the Road to Equality: A Commentary on Fineman and Williams*, 76 CHI.-KENT L. REV. 1557, 1558–59 (2001).

164. *Id.* at 1562 (“[F]inding ways to enable women to spend more time caring for dependants would have the likely effect of reinforcing gender stereotypes, in particular reinforcing the idea that care work is women’s work.”).

165. See WILLIAMS, UNBENDING GENDER, *supra* note 78, at 237 (discussing the Family Medical Leave Act). See generally Schultz, *supra* note 78 (exploring the redistribution of paid work as a means to achieving social justice).

166. LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 111 (2006). See also HARRINGTON, *supra* note 160, at 163–79 (advocating a change in the allocation of care work within the family).

and social practices, such as public benefits¹⁶⁷ and the length of the school day.¹⁶⁸ Most agree that changes must occur in all three realms for women and men to stand on equal footing in the world. Some scholars have documented that, where women with graduate degrees have married men with similar educational backgrounds, male-female equality has improved in terms of income, employment opportunities, and the sharing of care work in the home.¹⁶⁹

Something missing from ongoing feminist conversations, however, is how different children can be when it comes to their demands for care work and how such differences affect the material lives of their mothers and their fathers. In a perfect world, employment, family, and social practices would support and facilitate the lives of all parents who need to be responsible simultaneously at home and at work. But this is not a perfect world. While important changes have been made to facilitate the lives of many working parents, not all kids are the same. Part of asking the woman question in the chalimony context, therefore, demands that we stop essentializing children. Chalimony is one way to recognize that the novel demands of caregiving for a CSHCN require a novel solution.¹⁷⁰

It is easy to attack feminists who argue that work/family conflicts can be resolved for all women in the same manner that they have been resolved for privileged women, given the different social, family, and employment practices present across classes. Children's caregiving

167. See generally Karen Syma Czapanskiy, *Parents, Children, and Work-First Welfare Reform: Where Is the C in TANF?*, 61 MD. L. REV. 308 (2002) [hereinafter Czapanskiy, *Where Is the C in TANF?*]; Karen Syma Czapanskiy, *Unemployment Insurance Reform for Moms*, 44 SANTA CLARA L. REV. 1093 (2004); Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers' Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029 (2004).

168. Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 DUKE J. GENDER L. & POL'Y 7, 24–25 (2006).

169. *Id.* at 13–17. Another tack, taken by Laura Kessler, is to envision care work as a transgressive practice when it is done by people or in a way that stands in opposition to politically- and socially-accepted caregiving practices. See generally Kessler, *supra* note 162. Parents who reduce their market work to care for a CSHCN may fall within this category because they do not comply with the modern norm that women with children should be in the market unless they have a private source of income (usually a high-income husband) on which to rely.

170. See Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1448–51 (2001) (arguing that some of our modern social practices in regard to motherhood put the child on a pedestal and require parents, particularly mothers, to structure their lives around activities that are far from the core of care work that most children need). I do not disagree with Williams; rather, I am arguing instead that a child with ADHD often has more need of supervision around homework than other children, and, in many communities, finding a way to commodify or delegate that supervision is not possible. Helping a child succeed in basic educational requirements is at the center of a parent's tasks, while making sure the child has an after-school activity every day of the week is not, regardless of what parent advice magazines may say.

demands, however, often require mothers of CSHCN to balance these competing factors in somewhat different ways. Where parental care is the best solution for these children, their mothers are set apart from most other mothers, the vast majority of whom now work outside the home throughout their children's lives. Mothers of CSHCN might prefer—in fact usually do prefer—to do what most mothers do.¹⁷¹ However, in order for these mothers to have the opportunity to be responsible simultaneously at home and at work, changes must occur to employment, social, and family practices that perhaps even feminists have yet to imagine.

In terms of employment practices, as discussed previously, mothers of children with disabilities and chronic illnesses have difficulties getting and keeping jobs. While some employers have begun to adapt to parents' caretaking requirements, the need for change remains for parents of CSHCN who cannot as readily separate the market from the family. For example, it is unlawful to discriminate against parents because of their association with a person with a disability. Where all employees may take sick leave to care for an ailing family member, therefore, a parent of a child with a chronic illness can take sick leave as well. When that child is ill more than the average three times a year, however, the parent can be fired for excess absenteeism.¹⁷² Further, fewer than half of all employers provide any paid sick leave, depriving parents of children with chronic illnesses of the opportunity to care for a sick child and still get paid.¹⁷³ In the quite different employment realm of the military, when the child of a uniformed service member has special needs, the military can decide not to make a transfer to a new assignment because of the child's needs, regardless of whether the service member wants to incur the resulting detriment to her career.¹⁷⁴

171. See Anne L. Alstott, *What Does a Fair Society Owe Children—and Their Parents?*, 72 *FORDHAM L. REV.* 1941, 1963–78 (2004) (arguing that society has the right to enforce a “no exit” duty on parents even when parents have good claim to exercising autonomy to pursue other paths than taking care of their children, provided that society supports parents in their caretaking efforts); Shearn & Todd, *supra* note 85 (arguing that mothers of children with disabilities are confined throughout their working lives to unsatisfactory employment conditions incompatible with their personal aspirations).

172. See LAURA ROTHSTEIN, *DISABILITY LAW: CASES, MATERIALS, PROBLEMS* 73 (4th ed. 2006) (explaining that the employer would not be required to allow the employee time off to assist with treatment for a family member with a disability).

173. See Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men and Responsibility*, 4 *U. ST. THOMAS L.J.* 573, 580–82 (2007) (explaining that, although many employers have made some improvements in how they deal with work-family conflicts, employers should be faulted for failing to change practices governing sick leave and discrimination against mothers). Both of these issues are highly important to parents with a CSHCN.

174. See Lisa A. Elder, *A Double-Edged Sword: Life for a Military Family with a Disabled Child* 19–20 (2008) (unpublished comment, on file with author) (describing the Exceptional Family Member Program, which takes account of the unique situation of each military family but greatly limits where a service member is able to be assigned and thereby

In terms of family practices, gendered parental roles govern in families of CSHCN. Mothers continue to behave as draftees, while fathers are even more likely to treat themselves as volunteer parents who are free to exempt themselves from performing an equal share of parenting functions.¹⁷⁵ This phenomenon is evident from statistics documenting the unusually high rates of divorce in these families, the unusually low rate of formation of co-resident households after a CSHCN is born, and research showing the frequency with which fathers of CSHCN define their parenting role exclusively in traditional breadwinner terms.¹⁷⁶

Social practices also differentiate families with a CSHCN from other families. Even more than for most parents, social practices require parents of a CSHCN to be full-time chief executive officers and first responders. For example, parents of children who require special education services must initiate the process and consent to evaluations, and they are expected to participate in planning, assessment, and review meetings, as well as negotiate with the school to ensure compliance.¹⁷⁷ Medical care providers rarely visit the child at school or at day care,¹⁷⁸ instead, a parent—and not a

threatens to jeopardize her career).

175. Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1415–16 (1991). See also Selmi, *supra* note 173, at 593–94 (explaining that men’s behavior as child caregivers has changed, with many men now doing more but, on average, still nothing like fifty-fifty). Selmi further notes:

As should be clear, none of the common excuses for why men have not made more changes in their behavior can withstand careful scrutiny. Men have access to leave, are not likely to suffer greater penalties than women for taking that leave, and the various costs of leave—or the costs of child care—cannot explain why women continue to have overwhelming responsibility for life outside of the workplace.

Id. at 595.

176. See Waddington, *supra* note 32 (describing research on unusually gendered parenting practices among parents of CSHCN and advocating mandatory counseling before parents of CSHCN finalize custody agreements).

177. See 20 U.S.C. § 1414(d) (2006) (requiring states to give opportunities for parental participation in devising individualized education program under the Individuals with Disabilities Education Act); *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2491–93 (2009) (holding that the Individuals with Disabilities Education Act permits claims by parents for reimbursement of the cost of private school and special education treatment). See also Engel, *supra* note 54, at 168 (explaining that the Individuals with Disabilities Education Act requires beneficiaries of the legislation to participate continuously in its implementation); Theresa Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 TENN. L. REV. 295, 351–54 (1993) (arguing that, because of systemic failures to meet the needs of children with emotional disabilities in the classroom, parental involvement in special education requires substantial effort but produces less benefit than systemic reform); Cynthia Godsoe, *Caught Between Two Systems: How Exceptional Children in Out-of-Home Care Are Denied Equality in Education*, 19 YALE L. & POL’Y REV. 81, 84–85 (2000) (explaining that the child’s parent must initiate the Individuals with Disabilities Education Act process even when a child is not living at home because the child lacks standing to do so).

178. A rare alternative has been developed in Birmingham, Alabama, where children with and without disabilities participate in a preschool program that includes therapists who

parent substitute—is expected to bring the child to the provider’s office.¹⁷⁹ Even where treatment is provided in the home, parents must devote considerable time to monitoring and compliance. For example, parents of young children with autism spectrum disorders may need to be present to participate in the treatment protocol for up to forty hours a week.¹⁸⁰ Few daycare providers are trained to provide the services that a child with severe asthma might need,¹⁸¹ and schools are accustomed to calling parents when a child with an explosive personality disorder acts out, yet again, at school.¹⁸² In short, where other parents can delegate or commodify some of their care work, such options frequently are unavailable to parents of CSHCN.

Chalimony would not directly attack social or employment practices that make labor market participation more difficult for parents of CSHCN. Instead, it would provide a family law remedy that, in appropriate cases, moves some of the costs of reduced labor market participation from the caregiving parent to the other parent. This is a classic feminist technique for confronting the continuing phenomenon of unequal and gendered care work within families.¹⁸³ As an empirical matter, it is probably impossible to know whether a post hoc remedy such as chalimony gives men any incentive to increase their care work during marriage or cohabitation, but chalimony could conceivably create an incentive structure for more equitable parenting, at least when parents are not living together. Regardless, chalimony expresses an equality ideal that should be at the heart of family law.¹⁸⁴ If chalimony succeeded in shifting care-work

work with the children during the day. United Cerebral Palsy of Greater Birmingham, Hand in Hand, <http://www.ucpbham.com/our-programs/hand-in-hand.html> (last visited May 12, 2010).

179. See Joan C. Williams & Shauna L. Shames, *Mothers' Dreams: Abortion and the High Price of Motherhood*, 6 U. PA. J. CONST. L. 818, 829 (2004) (“How does the United States deliver [comprehensive and holistic medical and mental healthcare] services? They deliver them through a system of moms in cars.”).

180. See Elder, *supra* note 174, at 5–7 (detailing the employment and financial limitations that primary caregivers, usually mothers, face in ensuring that the needs of a child with a disability are met).

181. See Czapanskiy, *Where Is the C in TANF?*, *supra* note 167 (describing the unavailability of childcare for infants requiring individualized care); Moises, *supra* note 73, at 29–30 (describing a mother’s difficulty in finding childcare providers with the medical knowledge and expertise to administer regularly-dosed medications and monitor a child’s activities).

182. For a discussion of a mother’s decision to leave work and home school her child after repeated incidents of bad behavior, see *supra* notes 116–19 and accompanying text.

183. See Williams, *supra* note 170, at 1452–54 (proposing imposing some of the costs of unequal parenthood on the higher-income spouse as a way of honoring the care work of mothers who do not work in the market and, equally, as a way of incentivizing their spouses to encourage them into the market).

184. See MCCLAIN, *supra* note 166, at 117–90 (arguing that family law and constitutional law must reflect public values of sex equality and norms of equal rights and responsibilities within marriage).

patterns, it would create further financial incentives for more men to join women in the struggle to make all caregiving parents full and equal participants in the workforce.

C. *Why Chalimony Would Work Fairly for Kids*

This article has discussed parents' financial perspectives on raising children with disabilities and chronic illnesses. Still missing from the discussion is how the children might want to be seen and how their parents want them to be seen. When consulted, children with disabilities and their caretakers explain that they want to be viewed as people, not labeled as their illness or disability.¹⁸⁵ Chalimony, if it is to be a useful remedy, must contribute to this vision.

The story of a high school basketball player helps to illustrate this point.¹⁸⁶ Matt was born with retinal problems, and both of his eyes were removed before he finished sixth grade. His parents, over his objections, sent him to a high school for the blind, but he soon convinced them to let him transfer to a non-specialized school. Once there, he wanted to participate in the basketball team that his older brother coached. As Matt's mother said, "He aches to be treated normal. Not 'He does so great for a blind kid!' Just normal." Matt attended every practice, learned to shoot free throws, cheered the team at every game, and made friends. Shortly before the end of the season, the coach arranged for him to shoot all of the team's free throws at a game at a charity tournament. At the next and last game of the tournament, he was scheduled to do it again. With ten seconds left to play and Matt's team down by one, the best player on the team got fouled. Rather than take the shots himself, he called in Matt. The opposing team's fans, who had been cheering Matt up until then, went silent. According to Matt's coach, "That might have been the best moment of all for Matt For once, he was just normal." He made both shots, the team won, and Matt went from being the blind basketball player to being "Shooter," as normal as he could be.¹⁸⁷

If Matt were in the care of a single parent who received only child support and short-term rehabilitative alimony, would Matt have had the same opportunity to be "just normal"? Probably not. The care he needed

185. See Engel, *supra* note 54, at 180–84 (discussing strength-based, rather than deficit-focused, approaches to working with children with disabilities). See generally DAVID M. ENGEL & FRANK W. MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES* (2003).

186. Rick Reilly, *Matt Steven Can't See the Hoop, but He'll Still Take the Last Shot*, *ESPN MAG.*, Mar. 29, 2009, at 88, 88. Participation in sports can be so important for people with disabilities that the right to participate in sports has been identified as a human right. See Michael Stein, *Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 *B.U. INT'L L.J.* 249, 264–66, 269–72 (2009).

187. Reilly, *supra* note 186, at 88.

during his illnesses and surgeries would have impaired his mother's labor force participation early in his life. Her employment issues would have caused her earning potential to decrease for the duration of her career. Even when she resumed paid work at a suboptimal wage, Matt's blindness would likely have increased his need for routine care, including help with homework, transport, hygiene, and eating. With decreased financial resources and limited time for work, his mother might not have had time or energy to support his athletic ambitions.

With the financial support of chalmomy, Matt's mother would be able to work fewer hours without sacrificing financial security. Her increased time and energy could then be used to support Matt's efforts just to be a kid. Alternatively, faced with the prospect of paying chalmomy, Matt's father might have decided to share equally in Matt's caretaking responsibilities. Together, Matt's parents would have had the time and energy to support him better.

Chalmomy would treat the parents of a CSHCN like Matt differently from the parents of children who have no similar issues. Chalmomy would account for the specificity of their situation. The goal is not, however, to treat a child with a disability or chronic illness differently from her peers. The goal, instead, is to give the caregiving parent the opportunity to treat that child the same as her peers.¹⁸⁸ Without chalmomy, the caregiving parent must struggle to balance work and caretaking, to the detriment of both responsibilities. In effect, without chalmomy, the parent and child experience a conflict of interest.¹⁸⁹

Chalmomy would be a means of mediating that conflict. The caregiving parent usually must spend at least some time making sure that the child gets the therapeutic services the child needs. Yet the parent need not invest in the most time-consuming versions of those services.

188. One is reminded of the famous example by Amartya Sen about the differences in treatment required for a person in a wheelchair to achieve equality in terms of mobility with a person who has full use of her legs. See Martha C. Nussbaum, *Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 74 (2007) [hereinafter Nussbaum, *Constitutions and Capabilities*] (citing Amartya Sen, *Equality of What?*, in 1 THE TANNER LECTURES ON HUMAN VALUES 195, 203–04 (Sterling M. McMurrin ed., 1980)). See also RUTH COLKER, *WHEN IS SEPARATE UNEQUAL? A DISABILITY PERSPECTIVE* 10–38 (2009) (arguing that an equality model for persons with disabilities may require separate treatment consonant with anti-subordination principles). See generally MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006) [hereinafter NUSSBAUM, *FRONTIERS OF JUSTICE*] (arguing that justice for persons with disabilities requires that society aid persons with disabilities in achieving the core capabilities essential to human thriving).

189. Economic conflicts are not the only conflict between parents and their children with disabilities. Scholars have questioned whether parents should face wrongful life liability, which attaches to a medical practitioner who negligently fails to avoid the birth of a child with a serious disability, if they choose to bear a child knowing that the child will have a serious disability. See Shiffrin, *supra* note 144, at 119–41 (explicating philosophical and moral rationales for wrongful life liability).

Likewise, the parent need not invest in accessing the full range of activities usually available to other children in the family, school, or neighborhood. Without chalimony, every extra investment in the child comes at the expense of the parent's economic security or human capital development. Chalimony, by improving the parent's financial well-being, could provide the parent with some time to help the child to be just a child, as opposed to being just a CSHCN.

Martha Nussbaum explores the parent-child conflict to some degree in her writings on justice for people with disabilities.¹⁹⁰ In the human rights context, Nussbaum has argued for a normative capabilities approach, which "holds that a key task of a nation's constitution, and the legal tradition that interprets it, is to secure for all citizens the prerequisites of a life worthy of human dignity—a core group of 'capabilities'—in areas of central importance to human life."¹⁹¹ The role of government "is not just to produce internal capabilities, but, instead, to produce what [Nussbaum] call[s] 'combined capabilities': internal capabilities combined with suitable external circumstances to select the function in question."¹⁹² Government may satisfy its role through provision of direct services or through the regulation of private relationships.¹⁹³ Nussbaum suggests measuring government's success or failure on an individual level, rather than assessing whether the populace has adequate opportunities to use its capabilities in the aggregate.¹⁹⁴ She also stresses that the opportunity to achieve each capability is equally important, so success with respect to one capability does not eliminate the need to address the others.¹⁹⁵

Nussbaum's list of essential capabilities has evolved over time. In abbreviated form, the list now includes ten capabilities: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species (interaction with nature); play; and control over one's environment.¹⁹⁶ With respect to people with disabilities, Nussbaum asserts that we should "work tirelessly to bring all children with disabilities up to the same threshold of capability that we set for other citizens," so that people with disabilities may enjoy full equality of

190. See generally NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 188.

191. Nussbaum, *Constitutions and Capabilities*, *supra* note 188, at 7.

192. *Id.* at 12.

193. See *id.*

194. See *id.* at 14.

195. *Id.* See also Anita Silvers & Michael Ashley Stein, *Disability and the Social Contract*, 74 U. CHI. L. REV. 1615, 1621–23 (2007) (reviewing NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 188).

196. Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, FEMINIST ECON., July 2003, at 33, 40–42 (2003). See also Samuel Freeman, *Frontiers of Justice: The Capabilities Approach vs. Contractarianism*, 85 TEX. L. REV. 385, 385–95 (2006) (reviewing NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 188).

citizenship.¹⁹⁷ To achieve this goal, she focuses on care. Without adequate care, people with disabilities are unable to access any of the capabilities Nussbaum considers essential for human development, beginning with life itself.¹⁹⁸ For some people with disabilities, adequate care allows them to develop their emotional lives, or their imagination and thought. If adequate care is unattainable, no such progress is likely, regardless of the nature of a person's disability.

Nussbaum is certainly correct that CSHCN require lots of adult time, attention, and energy. She also appreciates that caregiving for a child with a disability is hard work, work that can interfere with the caregiver's achieving her own potential in the world.¹⁹⁹ She argues that social policies must support caregivers, but she also acknowledges that the needs of caregivers and their dependents are not readily reconciled: "Caregivers frequently lose out in all sorts of ways through bad arrangements. Their health suffers; their emotional equanimity is sorely compromised; they lose many other capabilities they otherwise would have had."²⁰⁰ Nussbaum concedes, "A decent society cannot ensure that all caregivers actually have happy lives," but she suggests as a compromise position that government assure caregivers attain "a threshold level of capability in each of the key areas."²⁰¹

In sum, Nussbaum argues that every person with a disability must be provided with the opportunity to develop the core capabilities central to being human. Doing so requires a caregiver sacrifice her own opportunities to develop those capabilities, but that sacrifice should not be absolute. To achieve a threshold level of each capability, government must provide caregivers with adequate financial resources and a meaningful choice about the role that care for dependents will play in their lives.²⁰²

But, what does choice mean in this context? Clearly, economic provision is fundamental to the exercise of choice, since resources enable a caregiver to be responsible simultaneously at home and at work.²⁰³ But how should government respond if a caregiver chooses to provide a dependent child with less time, energy, and attention than the child needs in order to develop and exercise her capabilities? Assuming that society

197. NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 188, at 190.

198. *Id.* at 168–69.

199. *See id.* at 170–71 (arguing that caregivers may not be able to achieve their own capabilities because of their caretaking responsibilities).

200. *Id.* at 170.

201. *Id.*

202. *Id.* at 170–71.

203. *See id.* at 210–15 (arguing that family care work should be financially remunerated, that social policies should support the compatibility of caregiving and workforce participation, and that the importance of caregiving should be emphasized in our public education system).

provides the caregiver with the resources to reach her own threshold, may society justly allow the caregiver to choose to provide less than optimal care for the child?

This is not a rhetorical question. Helping a child to reach her full potential requires a tremendous commitment of parental time, energy, and resources, particularly when the child has a disability or chronic illness. While many parents make necessary sacrifices, as a matter of justice, the conflict of interest cannot be ignored. Nussbaum limits her proposed remedies to reform of community practices and social welfare programs.²⁰⁴ We should also be examining the ways that families operate. We must examine the messages we send to all parents, not just primary caregivers. Chalimony communicates an ethos of shared responsibility that is lacking today.

Our legal structures, community practices, and family relationships too often communicate to the noncustodial parent that she has an unconstrained opportunity to choose how much time, energy, and commitment she offers her child. Parents who are not fully engaged in their child's care enjoy unconstrained opportunities for full development of their own capabilities. They can operate as "ideal workers."²⁰⁵ They may enjoy time, energy, and resources for recreation and play, as well as for human connections. Simultaneously, they retain the opportunity to have a relationship with the child through visitation, if they choose to exercise that right.²⁰⁶ Their only mandatory responsibilities for the child are financial and avoiding neglect or abuse, and the financial responsibility does not include support of the caregiving parent. In short, these parents enjoy the freedom to realize their capabilities that Nussbaum says is essential to humanity, yet we do not ask them to contribute to realizing that freedom for the caregiving parent.

Chalimony would give the caregiving parent a role in structuring her choices.²⁰⁷ If she finds that the time, energy, and commitment her child

204. See generally, e.g., MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000) (examining some of the impacts of caregiving on the lives of women who live in societies that lack most mediating resources). While Nussbaum focuses on how societies must change to give women freedom to develop their capabilities, her examples expose how the absence of those opportunities put women in daily conflict with their children. In the world Nussbaum describes, women's decisions to spend time with their children come at the expense of market labor necessary to the women's present and future economic survival.

205. See WILLIAMS, *UNBENDING GENDER*, *supra* note 78, at 114–41 (defining the ideal-worker norm—a parent working in the market economy and benefiting from a free flow of uncompensated family work—and suggesting models for equitable resource division upon divorce).

206. See Czapanskiy, *supra* note 175, at 1415–16 (discussing the volunteer father / draftee mother family law construct).

207. The notion that moving beyond individual claims to examining relationships with others is a key to resolving issues affecting people with disabilities has been explored in

requires is consistent with her selfhood, chalmomy would provide some of the economic requisites. If she prefers a life that combines caregiving with other pursuits, including market work,²⁰⁸ chalmomy would be a tool to persuade the other parent to share in caregiving work and, perhaps, to share in the political work necessary to change community and employment practices.²⁰⁹

While chalmomy might succeed in ameliorating disparities between the parents of a CSHCN, disparities among CSHCN remain unaddressed. A child whose noncustodial parent has the resources to pay chalmomy would have greater access to caregiving resources than a child of poorer parents. One must question whether this is a fair result. One response is that differentiating among children based on their parents' economic well-being is commonplace in family law. For example, child support varies based on the parents' economic resources. The law has not embraced an egalitarian ideal mandating the same number of dollars of parental support per child.²¹⁰

While chalmomy can be justified on that basis alone, the unequal allocation of economic resources among children remains troubling. Yet, chalmomy may provide a model for equitable resource division that could prove paradigmatic. Chalmomy highlights the need for changes in social, employment, and family practices to permit caregivers the option of participating responsibly in the care of their children while still participating in the market. A model can be found in several communities that confronted welfare reform through exploring what works for families when a single parent enters the market. Those few communities attempted to coordinate employment, childcare, and transportation so that the parents could be responsible simultaneously at home and at work.²¹¹

other contexts by Martha Minow. See Martha Minow, *Accommodating Integration*, 157 U. PA. L. REV. PENNUMBRA 1, 1-4 (2008) (examining how the process of identifying problems and solutions for individual disabled persons obscures the creation of "positive externalities" for other disabled persons incidentally benefitted).

208. This goal is quite difficult to attain at present. See Moisesides, *supra* note 73, at 29-30 (describing the difficulty for one mother receiving TANF of finding work that both helped her to build her job skills and accommodated the time off she required to care for her child with a disability). See also Shearn & Todd, *supra* note 85 (finding that the overwhelming majority of mothers of children with disabilities have unsatisfactory employment conditions that are incompatible with their personal aspirations).

209. Nussbaum has been criticized for failing to provide principled ways to allocate resources when there are competing and fully justified capabilities claims by different people for the same resource. Silvers & Stein, *supra* note 195, at 1638-39. Just such a conflict arises in the chalmomy context when the co-resident parent persuades the nonresident parent to provide more of the caregiving effort, but the child prefers spending time with the custodial parent.

210. See Ellman & Ellman, *supra* note 97, at 118-28 (detailing the traditional model for child support calculations, and advocating a shift from a backward-looking to a forward-looking model).

211. Czapanskiy, *Where is the C in TANF?*, *supra* note 167, at 332-33 & nn.122-24

Chalimony is an acknowledgment that the same goal must be achieved for families caring for a CSHCN. Once family law embraces this goal, perhaps change in arenas such as public benefits, employment, childcare, and education will follow.

CONCLUSION

Every parent-child relationship is unique, unusual, and special. For the relationship to benefit the child, the parent or primary caregiver must have family and community support, as well as access to economic sustenance. No parent or caregiver can do the job alone.

A CSHCN may make unusual demands on family and community relationships. It is not easy to assure that a such a child can access the ordinary childhood experiences that many take for granted. Nor is it a simple matter for parents to assure that the child has the medical and nonmedical care and resources essential to living and thriving. Compounding these already formidable obstacles are the challenges facing the caregiving parent of maintaining meaningful interpersonal relationships and participating in the labor force.

Child support is designed to provide the child with resources equivalent to the financial support that the average child would receive if the child's parents lived together. Alimony is designed to meet the needs of the former marital partner, at least temporarily. Neither remedy takes into account the unusual and demanding situation of a parent raising a CSHCN. Chalimony is designed to bridge that gap.

It has become commonplace among policymakers and service providers working with families of CSHCN to insist that the best way to help the child is to focus on the entire family.²¹² A family focus, as a result, has become the hallmark of first class social services delivery systems. However, the same approach has yet to influence the financial aspects of family law. Policymakers continue to address child support and alimony separately, ignoring the interdependent interplay between the child's unusual caregiving needs and the caregiver's opportunities to make a living.

(describing welfare-to-work programs in communities where partnerships were formed by the welfare agency with employers, transportation providers, childcare centers, and community organizations to ensure that welfare recipients facing difficult transition problems would have access to an integrated system including employment, transportation, and childcare).

212. See PRIME MINISTER'S STRATEGY UNIT, IMPROVING THE LIFE CHANCES OF DISABLED PEOPLE: FINAL REPORT 121-24 (2005), available at <http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/disability.pdf>; Minow, *supra* note 207 (discussing relational approaches to identifying problems and solutions for persons with disabilities); Reichman, Corman & Noonan, *supra* note 6, at 680-82 (discussing the profound effect a child with a disability has on the family's resource needs and availability).

Chalimony would more equitably allocate the financial burdens of caregiving from the perspective of both the payor and the caretaking parent. It provides incentives for parents to work together so that they may each participate in the child's care and in the workforce. It also increases incentives for both parents to advocate for changes in employment, education, childcare, and community practices that will make it possible for children with special needs to access the care they deserve. Finally, it provides an economic structure necessary for parents of children with disabilities and chronic illnesses to enjoy a little more parental time and energy—time not just to address their child's condition, but also time to have some fun just being a parent.