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# Empty Benefits: Employer-Sponsored Oocyte Cryopreservation and Potential for Employment Discrimination

By Ali L. Nicolette\*

## INTRODUCTION

Companies such as Apple and Facebook are beginning to follow large law firms<sup>1</sup> in offering their young female employees oocyte cryopreservation (“egg-freezing”) options as a perk for employment. The offer is enticing: freeze your eggs while you (and they) are young and healthy, work your way up in the company, and then have the eggs fertilized and implanted when you are financially stable and ready to start a family.<sup>2</sup> Postponing pregnancy, whether through egg-freezing or other

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1. Danielle Friedman, *Perk Up: Facebook and Apple Now Pay for Women to Freeze Eggs*, NBC.COM (Oct. 14, 2014, 1:48 AM), <http://www.nbcnews.com/news/us-news/perk-facebook-apple-now-pay-women-freeze-eggs-n225011> (“advocates say they’ve heard murmurs of large law, consulting, and finance firms helping to cover the costs, but no companies are broadcasting this support”); Elie Mystal, *Should Egg Freezing Be A Fringe Benefit Offered By Your Firm?*, ABOVE THE LAW (Apr. 22, 2013), <http://abovethelaw.com/2013/04/should-egg-freezing-be-a-fringe-benefit-offered-by-your-firm/>; see also Nadia Daneshvar, *The Cold Truth Behind Employer-Covered Social Egg-freezing*, ON THE EDGES OF SCIENCE AND LAW (Mar. 17, 2014), <http://blogs.kentlaw.iit.edu/islat/2014/03/17/the-cold-truth-behind-employer-covered-social-egg-freezing/>.

2. The second-wave of feminism (lasting through the 1980s) brought new opportunities for women and the idea that women “can have it all” became synonymous with the work-life balance of career and family. See Sue Thornham, *Second Wave Feminism*, in *THE ROUTLEDGE COMPANION TO FEMINISM AND POSTFEMINISM* 25 (Sarah Gamble, ed., 2002); but see Nado Aveling, *‘Having It All’ and the Discourse of Equal Opportunity: reflections on choices and changing perceptions*, 14(3) GEND. AND EDUC. 265, 265 (2002) (article analyzes earlier study that showed the combination of the demands of small children with the pressures of a challenging job was forcing women to put their careers “on hold.” “While these women have demonstrated that they can succeed on male terms, a number of competing discourses, coupled with a workplace culture that enshrined male patterns of participation as the norm, ensured that their work patterns essentially replicated the

means, allows some women to achieve equal career trajectories of their peers during their 20s and 30s.<sup>3</sup>

Oocyte cryopreservation is a new procedure with very low success rates.<sup>4</sup> Compared with freezing an already formed embryo, freezing an egg is complicated and fragile, often requiring multiple procedures. The procedure is also enormously costly, making this a procedure that many individuals may only attempt once despite its failure. The high cost also means this benefit is only available to an "elite" class of women who have the choice to postpone pregnancy and who can afford to leave the workforce later in life to raise a child.<sup>5</sup> Notwithstanding the concerns of cost, success, or access, there is also a risk of implicit discrimination and disparate impact in the workplace. Offering only female employees, at the exclusion of other employees, the "opportunity" to freeze their eggs and postpone parenthood, has the effect of disparate treatment for female employees.

In addition, only some individuals may be able to afford the tax implications of such a benefit. Its status as a nonnecessary/nonmedical procedure means it is not a "fringe benefit" under the Internal Revenue Code.<sup>6</sup> It would be taxed as an employee's gross income, and it is unclear whether employees fully understand the implications of such a "benefit." Some countries in Europe, such as Britain, refrain from offering the benefit for fear of discrimination: proposing a benefit available to only a small, select portion of employees based on age and gender.<sup>7</sup> There are also societal implications in having egg-freezing available only to an "elite" class.<sup>8</sup>

This note analyzes the complexities that employer-sponsored egg-freezing poses to female employees. The advancement of technology has exceeded the progression of the law and egg-freezing as an employee benefit is not yet been challenged as a potentially discriminating practice.

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employment patterns of women of an earlier generation"); and Alexis Grant, *Can today's career women really have it all?*, CHICAGO TRIBUNE (June 9, 2011), <http://www.chicago.tribune.com/lifestyles/ct-tribu-career-women-story-story.html#page=1>; and Kerima Greene, *Work-life balance: Can women have it all?*, CNBC.COM (July 7, 2014, 4:39 PM), <http://www.cnbc.com/id/101817054>; and Tina Karkera, *Stop Asking If Women Can Have It All*, HUFFINGTON POST (July 9, 2014, 3:42 PM), [http://www.huffingtonpost.com/tina-karkera/stop-asking-if-women-can-have-it-all\\_b\\_5569366.html](http://www.huffingtonpost.com/tina-karkera/stop-asking-if-women-can-have-it-all_b_5569366.html).

3. Friedman, *supra* note 2 (NBC was the first media outlet to cover the egg-freezing frenzy. They interviewed Brigitte Adams, an egg-freezing advocate and founder of the patient forum Eggsurance.com, who said, "Having a high-powered career and children is still a very hard thing to do," but freezing your eggs can help).

4. See Industry Response *infra* section I(A)(iv).

5. See Availability *infra* section II.

6. See Tax Complications *infra* section III(B).

7. Jessica Corsi, *Egg-freezing: the employment law issues*, LAWYER2B.COM (Nov. 5, 2014), <http://l2b.thelawyer.com/home/insight/egg-freezing-the-employment-law-issues/3027831.article>.

8. See Availability *infra* Part II.

This note attempts to explore the nuances<sup>9</sup> of employer-sponsored oocyte cryopreservation as well as the potential legal, social, and individualized implications for female employees. I posit that offering egg-freezing benefits to female employees is a form of implicit gender discrimination. Part I of this note discusses the basic metrics of oocyte cryopreservation, including process, cost, complications, a note on female fertility, and the rising popularity of egg-freezing as a fertility preservation process for non-necessary reasons. In Part II, I discuss the availability of egg-freezing for female employees in California, and provide commentary on the availability of such a procedure to female employees. I then look at the legal implications of offering such a benefit in Part III, including employment law and tax law complications. Part IV examines employers in the United Kingdom and discusses the cultural and legal landscapes that make egg-freezing an unnecessary and unviable employment benefit. Part V concludes with comments and views on the social policy of offering egg-freezing as an employee benefit.

## I. OOCYTE CRYOPRESERVATION: PROCEDURES AND RESPONSES

*[P]roviding women with all the relevant medical information does not necessarily mean that they are given full freedom of choice.*<sup>10</sup>

### A. OVERVIEW OF OOCYTE CRYOPRESERVATION

Oocyte cryopreservation originated as a response to the “‘complex ethical, social, legal, moral, and religious issues’ surrounding the fate of excess embryos” in fertility clinics.<sup>11</sup> It is important to note the distinction between oocyte cryopreservation and embryo cryopreservation. Embryo

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9. Glenn Cohen, Assistant Professor at Harvard Law School, imagines the potential “PR implications for the firm. Would potential female associates welcome this option knowing that they can work hard early on and still reproduce, if they so desire, later on? Or would they take this as a signal that the firm thinks that working there as an associate and pregnancy are incompatible? Would this option help remedy the deficits faced by women who want to have children on the partnership track or would it in fact exacerbate discrimination against women who do choose to have families early on while at the firm, with the thinking being ‘she could have waited.’ More generally, would this be a blow for or against gender equity at law firms?” Glenn Cohen, *Will Your Law Firm (or Other Employer) Pay for Your Egg-freezing? Should It?*, HARVARD LAW PETRIE-FLOM CENTER BILL OF HEALTH BLOG (Apr. 21, 2013), <http://blogs.law.harvard.edu/billofhealth/2013/04/21/will-your-law-firm-or-other-employer-pay-for-your-egg-freezing-should-it-online-abortion-and-reproductive-technology-symposium/>.

10. Shiri Shkedi-Rafid & Yael Hashiloni-Dolev, *Egg-freezing for Non-Medical Uses: The Lack of a Relational Approach to Autonomy in the New Israeli Policy and in Academic Discussion*, 38 J. MED. ETHICS 154, 157 (2012).

11. Gina Maranto, *Push for Social Egg-freezing: By whom? For whom?*, BIOPOLITICALTIMES.ORG (July 3, 2013), <http://www.biopoliticaltimes.org/article.php?id=6987>.

cryopreservation requires the presence of a partner or sperm donor, whereas oocyte cryopreservation alone allows a woman to freeze her unfertilized eggs for future use. According to the American Cancer Society, embryo freezing is currently "the most common and successful method of preserving a woman's fertility."<sup>12</sup> In order to freeze embryos, "eggs must be extracted, fertilized, frozen, and stored until such time as the woman is prepared to attempt to become pregnant . . . or to implant them into a surrogate."<sup>13</sup> The success rates for thawed embryos vary considerably and ranges from 35% to 90%.<sup>14</sup> This means that a woman must make a choice as to who will fertilize her eggs at the time of cryopreservation. In addition to the numerous requirements involved with embryo freezing, the law surrounding frozen embryos is murky and the last 20 years have seen an increase in litigation regarding ownership disputes and proper treatment of excess embryos.<sup>15</sup> Oocyte cryopreservation works as a kind of "insurance" against infertility. The woman is not required to choose a donor at the time of extraction, leaving her the freedom to preserve the eggs for when she is ready to choose a partner or donor. In addition, she does not have to worry about what to do with the unfertilized eggs if she doesn't use them because she can dispose of them unlike unused embryos. Thus, egg-freezing is an attractive option for many women to preserve fertility.

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12. *Fertility and Women with Cancer*, AM. CANCER SOC'Y, <http://www.cancer.org/acs/groups/cid/documents/webcontent/acspc-041244-pdf.pdf> (last visited Jan. 25, 2015); see Seema Mohapatra, *Using Egg-freezing to Extend the Biological Clock: Fertility Insurance or False Hope?*, 8 HARV. L. & POL'Y REV. 381, 385 (2014).

13. Mohapatra, *supra* note 12, at 385; see Jaymeson S. Stroud, et al., *Effects of Cancer Treatment on Ovarian Function*, 92 FERTILITY & STERILITY 417, 425 (2009), available at [http://www.reproductivefacts.org/uploadedFiles/ASRM\\_Content/News\\_and\\_Publications/Selected\\_Articles\\_from\\_Fertility\\_and\\_Sterility/EffectsOfCancerTreatment.pdf](http://www.reproductivefacts.org/uploadedFiles/ASRM_Content/News_and_Publications/Selected_Articles_from_Fertility_and_Sterility/EffectsOfCancerTreatment.pdf).

14. Mohapatra, *supra* note 12, at 385; see Joan Paley Galst, Ph.D., *What's a Young Woman to Do? The Pros and Cons of Social Egg-freezing*, PATH2PARENTHOOD.ORG 1, available at [http://5e62f3a6d1638bf1b14d-5d806c6cef9f5da883ae68ded2a2e610.r20.cf2.rackcdn.com/uploaded/w/0e562143\\_whats-a-young-woman-to-do.pdf](http://5e62f3a6d1638bf1b14d-5d806c6cef9f5da883ae68ded2a2e610.r20.cf2.rackcdn.com/uploaded/w/0e562143_whats-a-young-woman-to-do.pdf) (last visited Mar. 19, 2016); see also Alexandra Sifferlin, *IVF Linked to More Birth Defects*, TIME.COM (Oct. 22, 2012), <http://healthland.time.com/2012/10/22/ivf-linked-to-more-birth-defects/> (reporting that "frozen embryos created through IVF were less likely to result in babies with birth defects than fresh embryos").

15. For further discussion on the characterization of frozen embryos, see Jill R. Gorny, *The Fate of Surplus Cryopreserved Embryos: What Is the Superior Alternative for their Disposition?*, 37 SUFFOLK U. L. REV. 459 (2004); Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169 (2004); 5-22 Treatise on Health Care Law § 22.04 (2008) ("As of July, 2006, at least 16 states have statutes or regulations explicitly addressing disposition of frozen embryos. These provisions sometimes prohibit or limit the ability to destroy the embryo or donate it for research. Most of the laws require, as part of the written informed consent, that the couple indicate their preference for disposition of frozen embryos, including instructions in the event of death, divorce, or decision not to proceed with implantation.").

Oocyte cryopreservation was originally tested as “fertility insurance” for young female cancer patients who, after chemotherapy, risked a high probability of infertility.<sup>16</sup> Tanya Selvaratnam, feminist and activist for women’s health, notes that when used in this way, egg-freezing can be “an incredible gift . . . a miracle,” avoiding the “piling-on of unwanted childlessness onto the original anguish of a cancer diagnosis.”<sup>17</sup> There are currently two methods of oocyte cryopreservation: slow freezing and ultrarapid freezing (vitrification).<sup>18</sup> Oocyte cryopreservation is more common and began after the introduction of the vitrification technique, and the birth of the first baby achieved using this method, in 2004.<sup>19</sup> In the past 10 years, vitrification has been refined to optimize oocyte survival after cryopreservation.<sup>20</sup> Due to the high water content of the oocyte, it freezes easily; however the high water content also makes it extremely fragile, making the process dependent on precision and highly skilled technicians.<sup>21</sup> Depending on the survival of the frozen eggs, a woman might need to undergo the process multiple times.<sup>22</sup>

#### i. Fertility

Fertility “insurance” is popular because the drop in female fertility in connection with aging is rapid<sup>23</sup> and age “has a unique, irreversible, and devastatingly negative effect on female fertility.”<sup>24</sup> By age 35, a woman loses about 95% of her eggs, and the remaining 5% deteriorate rapidly.<sup>25</sup> Fertility drops from 86% at age 20 to 52% at age 35, and then to 36% at age 40, and to only 5% at age 45.<sup>26</sup> This is an unfair reality for women who choose to utilize the oocyte cryopreservation process after age 30 to ensure against infertility because a single procedure may not extract any viable eggs due to deterioration.

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16. Robin Marantz Henig, *Should You Freeze Your Eggs?*, SLATE.COM (Sept. 30, 2014, 11:51 PM), [http://www.slate.com/articles/health\\_and\\_science/medical\\_examiner/2014/09/egg\\_freezing\\_marketing\\_campaigns\\_lie\\_about\\_success\\_rates\\_of\\_this\\_fertility.single.html](http://www.slate.com/articles/health_and_science/medical_examiner/2014/09/egg_freezing_marketing_campaigns_lie_about_success_rates_of_this_fertility.single.html).

17. *Id.*

18. See Debra A. Gook and David H. Edgar, *Human oocyte cryopreservation*, 13 HUM. REPROD. UPDATE 591, 592 (Sept. 2007).

19. Dominic Stoop, Ana Cobo, & Sherman Silber, *Fertility preservation for age-related fertility decline*, 384 THE LANCET 1311 (2014); see also L. Burmeister, G.T. Kovacs, and T. Osianlis, *First Australian pregnancy after ovarian tissue cryopreservation and subsequent autotransplantation*, 198 MED. J. AUST. 158-159 (2013).

20. Gook and Edgar, *supra* note 18, at 592.

21. *Id.*

22. See *Frequently Asked Questions*, CTR. FOR FERTILITY PRES. AT SHADY GROVE FERTILITY, <http://centerforfertilitypreservation.com/egg-freezing/frequently-asked-questions/> (last visited Feb. 7, 2015).

23. Mohapatra, *supra* note 12, at 384.

24. Gordan B. Kuttner, *Article on Delayed Childbearing Trends*, FERTILITYTODAY.ORG, [http://www.fertilitytoday.org/age\\_infertility.htm](http://www.fertilitytoday.org/age_infertility.htm) (follow “Read an Article on Delayed Childbearing Trends by Gordan Kuttner, MD” hyperlink) (last visited Jan. 25, 2015).

25. Galst, *supra* note 14, at 1.

26. Ronald Bailey, *The Ethics of Egg-freezing Freezing*, REASON.COM (May 22, 2012), <http://reason.com/archives/2012/05/22/the-ethics-of-freezing-eggs>.

The age of the patient at time of "egg retrieval" is also crucial. Optimal results for success are expected in patients who are younger than the threshold age of 36,<sup>27</sup> however most women currently do not use the technology until they are in their late 30s.<sup>28</sup> One study calculated that the "best estimate of the baby per egg rate for vitrification as currently practiced ... is 6.6%," and that younger women who harvest their eggs and store them for shorter time periods have much better odds at successful pregnancy.<sup>29</sup> Many women of good health are "foreseeing pregnancy at a more advanced age" and "cryopreservation techniques are increasingly used to safeguard their future chances of reproductive success."<sup>30</sup> This is not a true safeguard against infertility, however, since the effect of aging on a woman's ovarian function "causes a progressive loss of the finite pool of primordial follicles, ultimately resulting in menopause, and apart from the quantitative decline, an age-dependent decline in the quality of oocytes mainly as a result of increased chromosomal aneuploidy."<sup>31</sup> In essence, the average age of motherhood is increasing<sup>32</sup> but women's ovaries age at the same rate. The chances of a viable pregnancy decrease the older one is, regardless of the process.

## ii. Egg-freezing Process

The egg-freezing process takes approximately 4 to 6 weeks for a single retrieval.<sup>33</sup> The process of egg retrieval involves "2-4 weeks of self-administered hormone injections and birth control pills to temporarily turn off natural hormones"<sup>34</sup> and "10-14 days of hormone injections to stimulate the ovaries and ripen multiple eggs."<sup>35</sup> The treatments have been reported to cause "nausea, bloating, and discomfort," risk of "blood clots, organ failure[,] "hospitalization[,] "<sup>36</sup> and ovarian hyperstimulation syndrome.<sup>37</sup>

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27. Aylin Pelin Cil, M.D., Heejung Bang, Ph.D., and Kutluk Oktay, M.D., *Age-specific probability of live birth with oocyte cryopreservation: an individual patient data meta-analysis*, 100(2) FERTILITY AND STERILITY 6, 492, 497 (2013), available at [http://www.fertstert.org/article/S0015-0282\(13\)00519-0/pdf](http://www.fertstert.org/article/S0015-0282(13)00519-0/pdf).

28. Schuman, K. Copperman, C. A. McDonald, M. Acosta-La Greca, G. Witkin, *Trends in Age in Non Medical Oocyte Cryopreservation*, 96(3) FERTILITY AND STERILITY S152 (Sept. 2011), available at <http://www.fertstert.org/article/S0015-0282%2811%2901693-1/pdf>.

29. *Review of currently available publications addressing the efficacy of egg-freezing by vitrification*, CTR. FOR FERTILITY PRES. AT SHADY GROVE FERTILITY, available at [http://centerforfertilitypreservation.com/wp-content/uploads/2011/02/Oocyte\\_Vitrification\\_Review.pdf](http://centerforfertilitypreservation.com/wp-content/uploads/2011/02/Oocyte_Vitrification_Review.pdf) (last visited Feb. 7, 2015); Suzanne McGee, *Silicon Valley tries egg-freezing perks. How about just hiring more women?*, THEGUARDIAN.COM (Oct. 19, 2014, 12:00 PM), <http://www.theguardian.com/money/us-money-blog/2014/oct/19/silicon-valley-egg-freezing-perks-hiring-women-freezing-perks-hiring-women>.

30. Stoop, et al., *supra* note 19 at 1311.

31. *Id.* at 1312.

32. See Popularity *infra* at section I(B).

33. *Egg-freezing FAQs*, USC FERTILITY, <http://uscfertility.org/egg-freezing-faqs/fertility-preservation/egg-freezing-faqs/> (last visited Jan. 25, 2015).

34. This step can be skipped if there is urgency, such as prior to cancer therapy. *Id.*

35. *Id.*

36. Jessica Cussins, *Dear Facebook, Please Don't Tell Women to Lean In to Egg-freezing*,

Many fertility clinics will actually recommend that women avoid exercise and sexual activity during this time.<sup>38</sup> Throughout the hormone stimulation, “a woman must have multiple samples of blood taken along with periodic transvaginal ultrasounds.”<sup>39</sup>

Once the eggs are ready for retrieval, a needle is used to extract the eggs from the ovaries,<sup>40</sup> potentiating the “risk of internal bleeding and infection.”<sup>41</sup> The eggs are then immediately frozen using either the slow-freeze or vitrification method.<sup>42</sup> Freezing causes the outer layer of the egg to become harder than usual<sup>43</sup> and “multiple egg-retrieval cycles may be needed.”<sup>44</sup> In addition to the hardened outer layer, “damage can occur to the membrane of the egg as a result of ice crystals that form due to the freezing process” which “can potentially lead to rupture of the egg’s cellular membrane.”<sup>45</sup> The chance for success is higher with a greater number of eggs extracted, but there are still no guarantees.<sup>46</sup> Eggs may be frozen for at least 10 years<sup>47</sup> and, when desired, thawed and then fertilized with sperm. Fertilized eggs that successfully become viable embryos are then transferred back into the uterus, and the woman undergoes regular pregnancy tests to ensure the embryo implanted.<sup>48</sup>

According to the American Society for Reproductive Medicine (“ASRM”) a 38-year-old woman has a 5.4% chance of two frozen eggs leading to a live birth.<sup>49</sup> These are dismal success rates<sup>50</sup> and an agonizing

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BIOPOLITICALTIMES.ORG (Oct. 15, 2014) <http://www.biopoliticaltimes.org/article.php?id=8131>.

37. Mohapatra, *supra* note 12, at 385; see Kimberly M. Mutcherson, *Transformative Reproduction*, 16 J. GENDER RACE & JUST. 187, 224 (2013).

38. Mohapatra, *supra* note 12, at 385; see e.g., *The Egg Banking Process*, CTR. FOR FERTILITY PRESERVATION AT SHADY GROVE FERTILITY, <http://centerforfertilitypreservation.com/cancer-fertility/the-egg-freezing-process/> (last visited Jan. 25, 2015); *Getting Through the Two Week Wait*, SHADY GROVE FERTILITY, <http://www.shadygrovefertility.com/newsletter/two-week-wait> (last visited Jan. 25, 2015); *The IVF Process*, FERTILITY SPECIALISTS OF TEXAS, <http://www.fertilitytexas.com/ivf/the-ivf-process/> (last visited Jan. 25, 2015).

39. Mohapatra, *supra* note 12, at 386; see also Galst, *supra* note 14, at 2.

40. *Egg-freezing FAQs*, *supra* note 34; see also *IVF Procedures*, PACIFIC FERTILITY CTR., <http://www.pfcla.com/ivf-procedures/> (last visited Jan. 25, 2015) (website includes illustrations of the technique for reference).

41. Cussins, *supra* note 36.

42. *Egg-freezing FAQs*, *supra* note 34.

43. Galst, *supra* note 14, at 2.

44. Mohapatra, *supra* note 13, at 386.

45. *Id.*; see also Galst, *supra* note 14, at 2–3.

46. Galst, *supra* note 14, at 2–3.

47. *Egg-freezing FAQs*, *supra* note 34.

48. *IVF Cycle Details*, USC FERTILITY, <http://uscfertility.org/fertility-treatments/ivf-cycle-details/> (last visited Jan. 25, 2015).

49. Cil, et al., *supra* note 27, at 497.

50. See also Michele Goodwin, *Assisted Reproductive Technology and The Double Bind: The Illusory Choice of Motherhood*, 9 J. GEND. RACE & JUST. 1, 32 (2005) (Goodwin comments on the term “success” in relation to artificial reproduction: “Measuring success in the field of assisted reproductive technologies is more difficult than one would imagine. Congress spoke to the issue in 1992, but did so by promoting the technology rather than



reality considering that the average age of nonmedical egg-freezing customers in the U.S. is 37.4.<sup>51</sup> What “the dry statistics don’t take into account” is “the very real emotional strain and trauma that often accompanies artificial reproduction” and its frequent failures.<sup>52</sup>

### iii. Cost

While this technology promises a viable solution to infertility, the “high costs of egg-freezing will be an insurmountable barrier for most women.”<sup>53</sup> Depending on the provider, the costs are reported to run between \$9,000 and \$20,000 per cycle for the egg-freezing procedure “with additional costs of \$2,000 to \$4,000 per cycle for the drugs.”<sup>54</sup> Women are “likely to require several cycles to have the suggested number of eggs frozen to optimize the chance of success.”<sup>55</sup> The process of freezing does not include storage: storage fees alone, at approximately \$600 per year, could cost over \$6,000 for 10 years of storage.<sup>56</sup> Furthermore, the total cost estimate does not include the cost of the fertilization (in vitro fertilization, or “IVF”) procedure required to use the frozen eggs, which costs an average of approximately \$13,000.<sup>57</sup> Ultimately, the process of freezing storing, and implanting eggs can cost more than \$40,000,<sup>58</sup> none of which is covered by insurance if a woman opts to undergo the treatment for “social reasons.”<sup>59</sup>

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regulating the industry. In 1992, Congress passed the Fertility Clinic Success Rate and Certification Act (FCSCA), requiring the Centers for Disease Control to collect data on the success of reproductive technologies in the United States [citation omitted]. The Act was a proactive measure, acknowledging that the technology was available to produce babies through risk-laden clinical procedures. Despite this congressional foresight the measure was substantively deficient. Congress failed to give substantive meaning to the term ‘success,’ a term that is used as an abstraction in the reproductive industry to mean only that a pregnancy was accomplished.”).

51. Schuman, et al. *supra* note 28.

52. Pamela Mahoney Tsigdinos, *The tough truth about egg-freezing perks*, FORTUNE (Oct. 22, 2014, 12:23 PM), <http://fortune.com/2014/10/22/tough-truth-about-egg-freezing/>.

53. Mohapatra, *supra* note 12, at 386; see also June Carbone and Naomi Cahn, *The Gender/Class Divide: Reproduction, Privilege, and the Workplace*, 8 FIU L. REV. 287, 287–88 (2013).

54. Mohapatra, *supra* note 12, at 386; see Sarah Elizabeth Richards, *Do You Have to Be Rich to Freeze Your Eggs?*, SLATE.COM (Aug. 22, 2013, 2:19 PM), [http://www.slate.com/articles/double\\_x/doublex/2013/08/the\\_cost\\_of\\_egg\\_freezing\\_after\\_years\\_of\\_prohibitive\\_pricing\\_clinics\\_are.html](http://www.slate.com/articles/double_x/doublex/2013/08/the_cost_of_egg_freezing_after_years_of_prohibitive_pricing_clinics_are.html).

55. Galst, *supra* note 14, at 4.

56. *Id.*

57. *The Costs of Infertility Treatment*, RESOLVE.ORG, <http://www.resolve.org/family-building-options/making-treatment-affordable/the-costs-of-infertility-treatment.html> (last visited Jan. 25, 2015).

58. Jennifer Ludden, *Egg-freezing Puts The Biological Clock On Hold*, NPR.ORG (May 31, 2011, 12:01 AM), <http://www.npr.org/2011/05/31/136363039/egg-freezing-puts-the-biological-clock-on-hold>.

59. Galst, *supra* note 14, at 4 (“Social reasons” for oocyte cryopreservation include a desire to delay childbirth later in life and increasing the potential for conception); OXFORD MARTIN SCHOOL, INSTITUTE FOR SCIENCE AND ETHICS, *Freezing Eggs for Lifestyle Reasons* 2, [http://www.ise.ox.ac.uk/\\_data/assets/pdf\\_file/0008/9395/AJOB\\_commentaryFreezingeggsFINAL-Goold\\_and\\_Savulescu.pdf](http://www.ise.ox.ac.uk/_data/assets/pdf_file/0008/9395/AJOB_commentaryFreezingeggsFINAL-Goold_and_Savulescu.pdf) (last visited Mar. 6, 2015).

#### iv. Industry Response

The ASRM labeled oocyte cryopreservation as experimental until January 2013 because “the birth rate after thawing and insemination of frozen eggs was not as high as the birth rate from fresh or frozen embryos.”<sup>60</sup> As Dr. Joan Galst notes, there is currently “not enough accumulated data for women to make truly informed judgments and derive conclusions as to whether this technique can meet their needs and expectations” and advises that “oocyte cryopreservation offers a possibility, not a guarantee.”<sup>61</sup> While the ASRM has removed the experimental label, egg-freezing is still considered a novelty in the reproductive medical field due to a lack of long-term studies conducted on the possible risks.<sup>62</sup> In addition to a lack of data, there is little “federal regulation of the reproductive technology industry.”<sup>63</sup> Social “resistance to federal funding of reproductive issues” means “minimal public funds are likely to be available” for the long-term medical risk testing.<sup>64</sup> The American College of Obstetricians and Gynecologists (“ACOG”) and the ASRM note the lack of long-term risk studies and actively discourage egg-freezing procedures for elective, nonmedical reasons.<sup>65</sup> Additionally, the use of oocyte cryopreservation requires the utilization of in vitro fertilization, resulting in a greater risk of “multiple gestation, preterm birth and fetal anomalies.”<sup>66</sup> Despite the ASRM’s removal of the experimental label, the lack of long-term studies poses serious health risks to potential patients.

#### B. POPULARITY

One of the reasons for the popularity of egg-freezing is the rise in female professionalism and a lack of marriageable partners.<sup>67</sup> June Carbone and Naomi Cahn, legal scholars and law professors, identify “marriage market disparities” as a driving force behind the growing popularity of egg-freezing for young professional women<sup>68</sup> and believe it offers a potential solution to this disparity. They suggest that, “if every

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60. John A. Robertson, *Egg-freezing and egg banking: empowerment and alienation in assisted reproduction*, 24 J. OF THE LAW AND THE BIOSCIENCES 1, 2 (2014). See also Practice Comm. Am. Soc’y of Reprod. Med. (“ASRM”) and the Soc’y for Assisted Reprod. Tech., *Mature Oocyte Cryopreservation: A Guideline*, 99 FERTILITY & STERILITY 37 (2013).

61. Galst, *supra* note 14, at 5.

62. Carbone and Cahn, *supra* note 53. Carbone and Cahn advise the reader to also consider, Karcy Harwood, *Egg-Freezing: A Breakthrough for Reproductive Autonomy*, 23 BIOETHICS 39, 46 (2009) (article explores the potential for commercial exploitation of women’s desire to prolong reproductive independence).

63. Carbone and Cahn, *supra* note 53, at 289.

64. *Id.*

65. *Id.*

66. *Id.*

67. Lisa Wade, PhD, *Egg-Freezing Isn’t the Feminist Issue You Think It Is*, THE SOC’Y PAGES (Nov. 10, 2014, 9:00AM), <http://thesocietypages.org/socimages/2014/11/10/egg-freezing-isnt-the-feminist-issue-you-think-it-is/>.

68. Carbone and Cahn, *supra* note 53, at 291.

ambitious young woman banked her eggs by college graduation, the gender revolution that started with contraception and abortion would be complete—upper middle class women could more fully adopt a male life style.<sup>69</sup> In this context, egg-freezing can offer young women the opportunity to reach career equality with their male counterparts. A career and motherhood are not exclusive choices for women, especially when that choice is notably absent from conversations about men, and “the option for a woman to delay a family until she is further up the career ladder” is an enticing offer.<sup>70</sup> USC’s Fertility Center website declares: “Egg-freezing effectively suspends the ever-present ticking of the reproductive biological clock, giving women more choices than ever before.”<sup>71</sup>

Companies like EggBanxx,<sup>72</sup> a national fertility network, are using this rising popularity to market their services to young professionals. They host cocktail parties, complete with free drinks, appetizers, and presentations, which resemble networking events for hip investment firms.<sup>73</sup> The services are aimed at young professional women in their late 20s and 30s and wine is generously poured while promoting the process as a way to stop the biological clock.<sup>74</sup> Clearly missing from these “informational” sessions is a look at the costs and statistics of success rates, as described above,<sup>75</sup> promoted instead as an evening of ‘The Three F’s: Fun, Fertility, and Freezing’—no F’s left over for ‘Failure Rates.’<sup>76</sup> Patient “advocates” for companies such as EggBanxx will aggressively email the women who attend the events, offering “special financing plans and a \$500 discount for signing up by the end of the month.”<sup>77</sup> A typical follow-up email includes the tag line: “Hoping to help you chill and have no regrets” and “[t]he future you will thank you!”<sup>78</sup> The “no regrets” aspect of that guarantee is questionable.

The lack of supportive maternity leave is another factor influencing the popularity of egg-freezing. American companies, compared to those in Europe, offer very little paid maternity leave.<sup>79</sup> The Family Medical Leave

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69. Carbone and Cahn, *supra* note 53, at 288.

70. Corsi, *supra* note 7.

71. *Egg-freezing FAQs*, *supra* note 33.

72. EggBanxx advertises itself as “the first national network of doctors who offer egg-freezing for fertility preservation and makes egg-freezing affordable with easy, convenient financing.” EggBanxx is a member of FertilityAuthority, a national fertility network organizer that includes such websites as FertileThoughts.com, IVFAdvantage.com, EggFreezingCosts.com, GenderSelectionAuthority.com, and HowMuchDoesIVFCost.com. EGGBANXX.COM, <https://www.eggbanxx.com/> (last visited Mar. 6, 2015).

73. Henig, *supra* note 16.

74. *Id.*

75. See Egg-freezing Process, *infra* Part I(A)(ii) and Cost, *infra* Part I(A)(iii).

76. Henig, *supra* note 16.

77. *Id.*

78. *Id.*

79. Katy Hall and Chris Spurlock, *Paid Parental Leave: U.S. vs. The World (INFOGRAPHIC)*, HUFFINGTONPOST.COM (Feb. 4, 2013, 5:28 PM), [http://www.huffingtonpost.com/2013/02/04/maternity-leave-paid-parental-leave-\\_n\\_2617284.html](http://www.huffingtonpost.com/2013/02/04/maternity-leave-paid-parental-leave-_n_2617284.html).

Act of 1993 (“FMLA”) guarantees that new parents will retain their job for 12 weeks after the arrival of a new baby, but they do not have to be paid during that time and many exemptions and qualifications apply.<sup>80</sup> Only about 16% of employers offer fully paid maternity leave<sup>81</sup> and many families take on significant debt around the birth of a child.<sup>82</sup> A 2000 study of employees who utilized FMLA established that over half of workers who took leave with less than full pay reported that they had difficulty making ends meet, and over a quarter of them (29%) borrowed money.<sup>83</sup> Almost 40% put off paying bills or cut short their leave time.<sup>84</sup> Approximately 3.5 million eligible workers needed to use their leave time under FMLA but were unable because they were unable to afford the time off.<sup>85</sup> The lack of paid, supportive maternity leave “is part of multiple factors that make child-bearing very expensive to women specifically.”<sup>86</sup> When faced with the “choice” of financial ruin or postponing motherhood, many young female employees will “choose” the latter.

Another reason for the rising popularity of egg-freezing is the upward trend of postponed motherhood. Many mothers “encouraged us to be different from them” and not get married or have children at a young age.<sup>87</sup> One woman explains that her mother “really encouraged me to live life to the fullest and focus on my own dreams and development before thinking about having children.”<sup>88</sup> Similarly, Laura Dawn, a Brooklyn-based creative director, said, “My mother frequently told me kids would ‘ruin my life’ and encouraged me to get an education and get out of Iowa.”<sup>89</sup> As one woman notes, “[n]o one told us *not* to become mothers while pursuing our ambitions,” instead, “[t]hey focused on telling us what *else* we could do.”<sup>90</sup> Today, “[n]early one-in-five American women ends her childbearing years without having borne a child, compared with one-in-ten in the 1970s.”<sup>91</sup>

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80. See 29 U.S.C. § 2612.

81. Annie Finnigan, *Everyone but U.S.: The State of Maternity Leave*, WORKING MOTHER, <http://www.workingmother.com/best-companies/everyone-us-state-maternity-leave> (last visited Mar. 4, 2015).

82. Bryce Covert, *Too Often, a New Baby Brings Big Debt*, THE NATION (May 15, 2012), <http://www.thenation.com/article/167897/too-often-new-baby-brings-big-debt#>.

83. U.S. DEP’T OF LABOR, *Family Medical Leave Act Study – Section 4.2.3 Impact of Pay Loss on Leave-Takers* (2001), available at <http://www.dol.gov/asp/archive/reports/fmla/chapter4.htm#4.2.3>.

84. *Id.*

85. U.S. DEP’T OF LABOR, *Family Medical Leave Act Study – Chapter 2 Employees’ Use of Leave* (2001), available at <http://www.dol.gov/asp/archive/reports/fmla/chapter2.htm#2.2>.

86. Quote from Emily Martin, Vice President of the National Women’s Law Center, Covert *supra* note 82.

87. TANYA SELVARATNAM, *THE BIG LIE: MOTHERHOOD, FEMINISM, AND THE REALITY OF THE BIOLOGICAL CLOCK* 15 (2014).

88. *Id.*

89. *Id.*

90. *Id.* at 36.

91. Gretchen Livingston and D’vera Cohn, *Childlessness Up Among All Women; Down*

This means that there were roughly “1.9 million childless women ages 40-44 in 2008, compared with nearly 580,000 in 1976.”<sup>92</sup> It appears we took their advice to heart.

## II. AVAILABILITY OF CRYOPRESERVATION SERVICES FOR FEMALE EMPLOYEES IN CALIFORNIA

The availability of egg-freezing for employees is limited to those with employers who are willing to cover part of the cost. Even if a woman has health insurance, egg-freezing is not a guaranteed covered option for fertility treatment. Without insurance coverage for the procedure, employees are left to pay the remainder of any costs<sup>93</sup> associated with multiple procedures, considering the employer's intended cost cap. The lack of insurance coverage also limits the practice to employees whose jobs carry robust benefits and who have access to adequate childcare and family support. Even if the promise that freezing her eggs in her twenties in order to postpone childbirth and advance her career was not already hindered by limited success and cost, women in lower paying jobs normally do not have the luxury of postponing childbirth. Even if a small employer paying minimum wage were to offer such an extravagant benefit to employees, lower paid women typically do not have the support necessary to utilize the procedure, including lack of paid leave and opportunities for job mobility and security. The availability of oocyte cryopreservation to employees is limited indeed.

California Health & Safety Code § 1374.55 and California Insurance Code § 10119.6 require specified group health care service plan contracts and health insurance policies to offer coverage for the treatment of infertility, except in vitro fertilization.<sup>94</sup> As reported by the National Conference of State Legislatures, the law establishes the following: requires every plan to communicate the availability of coverage to its members; defines infertility, treatment for infertility and in vitro fertilization; and clarifies that religious employers are not required to offer coverage for forms of treatment that are inconsistent with the organization's religious and ethical principles.<sup>95</sup> Infertility is defined as either “(1) the presence of a demonstrated condition recognized by a licensed physician and surgeon as a cause of infertility, or (2) the inability

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*Among Women with Advanced Degrees*, PEW RESEARCH CENTER (June 25, 2010), <http://www.pewsocialtrends.org/2010/06/25/childlessness-up-among-all-women-down-among-women-with-advanced-degrees/>.

92. *Id.*

93. See Kenan Omurtag & G. David Adamson, *The Affordable Care Act's Impact on Fertility Care*, 99 FERTILITY & STERILITY 3 (2013) (minimum insurance coverage required under the ACA does not cover infertility services).

94. *State Laws Related to Insurance Coverage for Infertility Treatment*, NAT'L CONFERENCE OF STATE LEGISLATURES (updated June 2014), <http://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx>.

95. *Id.*

to conceive a pregnancy or to carry a pregnancy to a live birth after a year or more of regular sexual relations without contraception.”<sup>96</sup> Thus, the statute does not include egg-freezing procedures for nonnecessary reasons, such as postponing childbearing during crucial career building years, meaning the procedure must be categorized as an out-of-pocket expense.

Unless an employer offers to subsidize the cost of oocyte cryopreservation, most workingwomen cannot afford this procedure. Egg-freezing for “nonnecessary” reasons will most likely remain out of reach for working class women who are unable to afford the procedure and who are afforded less workplace support for their family needs.<sup>97</sup> Lack of financial support is a highly rated factor for lack of equality in access to egg-freezing procedures. As Sheryl Sandberg, the COO of Facebook points out, “it is much easier to balance work and life with money.”<sup>98</sup> While the cost of the procedure may decrease as availability and popularity rise, it is likely that it will remain outside the financial reach of many women.<sup>99</sup>

In addition, “even if working class women could afford to freeze their eggs, their job trajectories are dramatically different.”<sup>100</sup> For example, “[c]ollege-educated women plan childbearing in accordance with a career” and “are more likely to wait to have children until they enjoy greater job security and benefits such as family and medical leave.”<sup>101</sup> Working class women, on the other hand, are more likely to put childbearing first and to return to work as the needs of their families evolve.<sup>102</sup> Moreover, working class women rarely experience the kind of workplace support systems offered to new mothers in better-paid positions.<sup>103</sup> These less supportive work environments are illustrated by a U.S. Census Bureau report that “almost two-thirds of new mothers with a college degree or higher received any kind of paid maternity leave, compared with less than one-fifth of those without a high school degree.”<sup>104</sup>

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96. CAL. HEALTH & SAFETY CODE § 1374.55(b).

97. Carbone and Cahn, *supra* note 54, at 289.

98. See SHERYL SANDBERG, *LEAN IN* (2013).

99. Carbone and Cahn, *supra* note 53, at 289. In addition to financial hurdles, many women do not have meaningful access to reproductive health services or family planning. Carbone and Cahn, *supra* note 53, at n. 9 (“There is no reason to expect that egg-freezing will be any different” in its disparity of access to poorer women); see, e.g., NAOMI CAHN, *TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION* 136–37, 141 (2009); Tarun Jain and Mark D. Hornstein, *Disparities in access to infertility services in a state with mandated insurance coverage*, 84 *FERTILITY & STERILITY* 221 (2005); Arthur Greil, et al., *Race-Ethnicity and Medical Services for Infertility: Stratified Reproduction in a Population-based Sample of U.S. Women*, 52 *J. HEALTH & SOC. BEH.* 493, 496, 504 (2011).

100. Carbone and Cahn, *supra* note 53, at 297.

101. *Id.*

102. See SANDBERG *supra* note 98.

103. *Id.*

104. See Heather Boushey and Sarah Jane Glynn, *The Many Benefits of Paid Family and Medical Leave*, *CTR. AM. PROGRESS* (Nov. 2, 2012) <https://www.americanprogress.org/issues/labor/report/2012/11/02/43651/the-many-benefits-of-paid-family-and-medical-leave/>.

Furthermore, "women with less than a high school education were four times more likely to be let go during their pregnancies or within twelve weeks after the birth of their first child than were women with a college education."<sup>105</sup> Even if cost was not a factor in receiving an egg-freezing procedure to delay childbearing, it is unlikely that a woman in a low-paid, low-support position will be given the benefits she needs upon pregnancy at any age. Pregnancy for a working-class woman means risking her job. The option to delay a family and pursue a career is offered in a discriminatory way due to the structure of our labor force. Therefore, the working-class women would benefit the most from the procedure cannot afford it; and even if they could, their jobs would be at stake due to the pregnancy. Thus, access to egg-freezing procedures is not likely to be available to working-class women, regardless of cost.<sup>106</sup>

### III. OFFERING CRYOPRESERVATION AS A BENEFIT: LEGAL IMPLICATIONS

#### A. EMPLOYMENT LAW AND POTENTIAL FOR DISCRIMINATION

Title VII of the Civil Rights Act of 1964 ("Title VII") declares that it is illegal to discriminate against someone on the basis of race, color, religion, national origin or sex.<sup>107</sup> Title VII protects employees who work for an employer who retains at least fifteen employees, employment agencies,<sup>108</sup> training programs and labor organizations.<sup>109</sup> Title VII's reach applies to state, local and federal government.<sup>110</sup> The Pregnancy Discrimination Act amended Title VII to add discrimination on the basis of pregnancy, childbirth, or related medical conditions.<sup>111</sup> Federal law requires that "women affected by pregnancy, childbirth or related medical conditions be treated the same as other persons not so affected but similar in their ability or inability to work for all employment-related purposes, including receipt of benefits under fringe benefit programs."<sup>112</sup> Currently,

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105. Carbone and Cahn, *supra* note 53, at 297; see Lynda Laughlin, *Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2008*, U.S. DEP'T COM. 11 tbl. 7 (Oct. 2011), <http://www.census.gov/prod/2011pubs/p70-128.pdf>.

106. See also Goodwin, *supra* note 51 (Goodwin identifies the implied discrimination against all women raised by the benefit of egg-freezing. In this context, she says, "women are not proscribed options but rather are provided options that are not real choices," and that these choices are actually the "harsh realities of family life in a culture that has no structures in place to allow women—and men—to balance work and child-rearing." Pulling back from the determination of availability of egg-freezing for lower-income women, we must also scrutinize whether having employers subsidize egg-freezing for higher income women means offering those women a choice between keeping, or losing, their job).

107. 42 U.S.C. § 2000e-2(a)(1) (Title VII of the Civil Rights Act) (1964).

108. 42 U.S.C. § 2000e-2(b).

109. 42 U.S.C. § 2000e-2(d).

110. 42 U.S.C. §§ 2000e-7, 2000e-6(b).

111. Pregnancy Discrimination Act, 92 Stat. 2076 (1978).

112. The seven states that have not yet enacted laws restricting discrimination based on

only seven states have failed to enact laws preventing discrimination on basis of pregnancy for private employers.<sup>113</sup>

The California Fair Employment and Housing Act prohibits employment discrimination on the basis of sex, which is “explicitly defined to include discrimination on the basis of pregnancy, childbirth, breastfeeding, or related medical conditions.”<sup>114</sup> This law applies to employers with five or more employees, except religious non-profit organizations.<sup>115</sup> Women temporarily disabled by pregnancy, childbirth, or related medical conditions are entitled to unpaid leave for as long as they remain disabled, up to 4 months.<sup>116</sup> During that period, the employer must provide the employee with the same level of health insurance coverage she received prior to taking leave. Employers are also required to make “reasonable accommodations” for employees who have work-related limitations stemming from pregnancy, childbirth or a related medical condition.<sup>117</sup> This may include temporary transfer to a less strenuous or less hazardous position, if an employee so requests upon the advice of her health care provider.<sup>118</sup> If the employer has a policy or practice of transferring temporarily disabled employees to less strenuous positions for the duration of their disability, the employer must do the same for its pregnant employees.<sup>119</sup>

Almost half of all working women in western countries experience pregnancy-based discrimination, including being denied training opportunities, changes to job descriptions, criticism of their performance or appearance, reduced working hours and dismissal without good reason after the announcement of pregnancy.<sup>120</sup> The number of charges alleging pregnancy discrimination filed with the U.S. Equal Employment Opportunity Commission (“EEOC”) increased by 41.1% between 2000 and 2010.<sup>121</sup> Since 2007, the EEOC has sought and obtained significant

pregnancy for private employers include: Alabama, Georgia, Indiana, Mississippi, Nevada, North Carolina, and South Dakota. Thomas E. Perez, *Employment Protections For Workers Who Are Pregnant or Nursing*, U.S. DEP’T OF LABOR, <http://www.dol.gov/wb/maps/> (last visited Jan. 30, 2016); see 42 U.S.C. § 2000e(k).

113. *Id.*

114. *Id.*; CAL. GOV’T CODE §§ 12926(r)(1), 12940(a)-(d).

115. CAL. GOV’T CODE § 12926(d).

116. CAL. GOV’T CODE § 12945(A)(1)-(2).

117. CAL. GOV’T CODE § 12945(3)(A).

118. CAL. GOV’T CODE § 12945(3)(C).

119. CAL. GOV’T CODE § 12945(3)(B); Perez, *supra* note 113.

120. Liisa Makela, *A Narrative Approach to Pregnancy-related Discrimination and Leader-follower Relationships*, 19 GENDER, WORK AND ORG. 677, 680 (2012).

121. Deborah L. Brake and Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL’Y 67, 68 (2013); EQUAL EMP’T OPPORTUNITY COMM’N, *Pregnancy Discrimination Charges EEOC & FEPAs Combined: FY 1997-FY 2011* (2011), available at <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm>; see NAT’L P’SHP FOR WOMEN & FAMILIES,



damages in pregnancy discrimination cases.<sup>122</sup> In 2012, the EEOC released a draft “strategic plan” that included “accommodating pregnancy when women have been forced onto unpaid leave after being denied accommodations routinely provided to similarly situated employees” among the “emerging issues” it plans to target.<sup>123</sup> In regards to the “voluntary” aspect of certain employer-sponsored benefits, the EEOC filed two suits last year against employers who were conducting voluntary wellness plans but requiring employees to submit to medical examinations, and inquiries that “were neither job-related nor consistent with business necessity.”<sup>124</sup>

While it is too early to determine the impact that egg-freezing benefits will have on employment discrimination claims, it is likely the EEOC will not view the benefit favorably. Nontraditional benefits such as egg-freezing opens the door to concerns about “whether it’s a ‘fair’ perk to offer when only a small percentage of employees may take advantage of it.”<sup>125</sup> In addition, women who decide not to participate in the benefit may worry how that decision will be received by management: “are they sending a message that they are not willing to put their career ahead of family?”<sup>126</sup> Opting out may signal that you are less committed to your job than women who decide to take advantage of the benefit. Conversely, companies with this kind of policy (egg-freezing) risk promoting the idea “that a woman needs to postpone having children in order to succeed in the workplace.”<sup>127</sup> This could make employers liable to potential discrimination claims.

In *Price Waterhouse v. Hopkins*,<sup>128</sup> the Supreme Court ruled that “[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch-22: out of a job if they behave aggressively and out of a job if they do

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*The Pregnancy Discrimination Act: Where We Stand 30 Years Later* 12 (2008) (noting an increase in discrimination claims filed by women of color); see also N. Woodward, *Pregnancy Discrimination Grows*, 50(7) HR MAG. 78–83 (2005) (noting increase in pregnancy discrimination cases filed with EEOC).

122. Brake and Grossman, *supra* note 121, at 69.

123. *Id.*

124. Keith R. McMurdy, *It's Not Easy Having Plans: Revising Benefits Can Give Rise to Other Claims*, EMPLOYEE BENEFITS LEGAL BLOG (Oct. 16, 2014), <https://web.archive.org/web/20141018003416/http://employeebenefits.foxrothschild.com/2014/10/articles/welfare-plans/its-not-easy-having-plans-revising-benefits-can-give-rise-to-other-claims/bb>).

125. Kelly Phillips Erb, *Apple Seeds Perk Wars, Adds Egg-freezing As Employee Benefit*, FORBES.COM (Oct. 17, 2014, 8:01 PM), <http://www.forbes.com/sites/kellyphillipserb/2014/10/17/apple-seeds-perk-wars-adds-egg-freezing-as-employeebenefit/#637c26701985>.

126. *Id.*

127. BBC NEWS, *Should employees pay for women to freeze their eggs?* (Oct. 15, 2014, 6:20 AM) (Quote from Daisy Sands, head of policy at the Fawcett Society, a group that campaigns for equality for women), <http://www.bbc.com/news/business-29621957>.

128. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

not.”<sup>129</sup> Here, egg-freezing benefits can be interpreted either as “tacit encouragement to pursue cryopreservation, or as a warning that child-rearing could jeopardize opportunities for advancement.”<sup>130</sup> According to the Court, Title VII “was designed to lift women out of the double bind<sup>131</sup> imposed in the labor force.”<sup>132</sup> Writing for the Court, Justice Brennan wrote that:

we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women.”<sup>133</sup>

Offering egg-freezing benefits to female employees reinforces gender stereotypes by conveying the message that success is male-gendered and male-centered. The Supreme Court validated female employees’ claims that “stereotyping and mixed social and employment messages create untenable double binds with severe consequences, including the possibility of being fired, semi-permanently unemployed, and maligned within a profession.”<sup>134</sup> Although the Supreme Court’s recognition of the double bind theory in employment relations validated women’s claims of discrimination<sup>135</sup> in such contexts “public policy refuses to hold law firms, corporations, and universities accountable for soft discrimination.”<sup>136</sup> To date, however, there is no case law determining the potential discrimination toward women who opt out of an egg-freezing benefit.

Intentional discrimination suits involve claims of discrimination against people on the basis of race, gender, pregnancy, and more.<sup>137</sup> In the case of employers such as Facebook and Apple, it may be difficult to conceptualize a manager incentivizing an employee to freeze her eggs at

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129. 490 U.S. at 251.

130. Christina L. Lewis, Retaining Talent with Cryopreservation Benefit is Risky, Law360 (Nov. 5, 2014, 10:37 AM), <http://www.law360.com/articles/592817/retaining-talent-with-cryopreservation-benefit-is-risky>.

131. See Goodwin, *supra* note 57 at 13 (“In judicial opinions and academic scholarship, lawyers apply double bind theory to describe social and legal paradoxes that may burden constitutional rights”).

132. Price Waterhouse, 490 U.S. 228, at 251.

133. *Id.* (quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13 (1978)).

134. Goodwin, *supra* note 51, at 15; see e.g. Price Waterhouse, 490 U.S. at 251.

135. Goodwin, *supra* note 51, at 15.

136. *Id.*, at 2 (Goodwin defines “soft discrimination” as discrimination that “exists without an actual act committed against a woman” and “therefore might be difficult to prove in traditional modes of adjudication. In these instances, “the perception of discrimination is subjective . . .”); see also Victor Li, *Oh, Baby! 3 Steps Up*, ABA JOURNAL, June 2015, at 32 (“For many female attorneys, maternity leave can be the equivalent of a poisoned chalice—offered as a benefit, but damaging to a career.”).

137. See 42 U.S.C. § 2000e-2(a)(1).

the risk of losing her job.<sup>138</sup> Disparate discrimination impact suits involve allegations of employment practices that have no discriminatory intent, yet have a disproportionately negative effect on a certain group, such as egg-freezing.<sup>139</sup> Despite the fact that disparate impact claims can be more difficult to argue because they require substantive statistics and data,<sup>140</sup> there is currently heightened scrutiny around pregnancy-related discrimination and mega-employers like Apple and Facebook will be unable to shrug scrutiny.<sup>141</sup> It is easier to foresee, however, “that over time, employees who freeze their eggs could become more likely to advance than those who choose to raise children mid-career, whether or not the employer had this intention.”<sup>142</sup> A discrimination claim is viable if the cryopreservation benefit creates implied pressure that steers women toward delaying motherhood, if it leads to a situation in which working mothers advance more slowly than their childless counterparts, or if it has the effect of discouraging women from remaining in the workplace all together.<sup>143</sup> PowerToFly President Katherine Zaleski admitted she “secretly rolled [her] eyes at a mother who couldn’t make it to last minute drinks with [her] and [the] team” and that she “questioned [the mother’s] ‘commitment’” to the company.<sup>144</sup> Not surprisingly, Zaleski “didn’t disagree when another female editor said we should hurry up and fire another woman before she ‘got pregnant.’”<sup>145</sup> Employer-sponsored egg-freezing benefits will more likely than not bring disparate discrimination impact claims in the future.

#### i. Solutions

Companies that wish to endorse the egg-freezing benefit can prevent implicit discrimination through marketing options. Employee benefits that include cryopreservation coverage should be communicated through “carefully considered messaging” and supported through robust processes that monitor the effect that the policy has on employee demographics and advancements.<sup>146</sup> An effective and significant avenue for communication is employee-handbooks.<sup>147</sup> An effectively worded employee handbook can minimize employer liability by carefully delineating the intentions behind

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138. Lewis, *supra* note 130.

139. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“The Act [Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation”).

140. Lewis, *supra* note 130.

141. *Id.*; see *Employment Law and Potential for Discrimination supra* Part III(A).

142. Lewis, *supra* note 130.

143. *Id.*

144. Katherine Zaleski, *Female company president: “I’m sorry to all the mothers I worked with”*, *FORTUNE* (Mar. 3, 2015, 6:12 AM), <http://fortune.com/2015/03/03/female-company-president-im-sorry-to-all-the-mothers-i-used-to-work-with/>.

145. *Id.*

146. Lewis, *supra* note 130.

147. *Id.*

offering such a benefit.<sup>148</sup> Employers should also think carefully about how to announce the establishment of egg-freezing benefits and should consider language that emphasizes a firmly rooted “mission to empower female employees with a choice” and emphasize that “it is not meant to signal limited opportunities for those women who choose to have a family.”<sup>149</sup> Employers who choose to implement this benefit should also carefully monitor “trends and changes in the promotion timelines of its female employees and intervene if any unintended impacts take shape.”<sup>150</sup> In addition, employers should ask the following questions:

Does a statistical analysis show that women who do not have families advance further or faster in the workplace? Are women with children seeing more limited opportunities? If the answer is yes, then a creative plaintiff attorney would not have much difficulty arguing that the company discriminates against women who choose to have children, as evidenced by the company's egg-freezing policy, which can be viewed as an overt attempt to discourage pregnancy.<sup>151</sup>

Employers must proceed with caution as they investigate the addition of an egg-freezing benefit to their employees' benefits package. Proceeding without caution may produce unintended consequences and unwanted legal liabilities.

These solutions, while touting fairness on the surface, have an underlying coercive nature. The aforementioned solutions focus on how the employer can appear more neutral and “empowering” toward its female employees, rather than on how to adequately support and compensate “employees at all levels, and support for parents of both sexes as they balance work and family life.”<sup>152</sup> Further, the companies could address the pay gap between male and female employees: A study by Joint Venture Silicon Valley found that men with graduate or professional degrees earn 73% more than do women with the same qualifications.<sup>153</sup> Companies could diversify their executive positions. Currently, Silicon Valley and the United States have abysmal female leadership statistics: at the top 10 Silicon Valley firms, only 17% of executives and top managers are women; only 45% of U.S.-based technology have at least one woman in leadership.<sup>154</sup> In addition, companies hoping to retain female talent can

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148. Lewis, *supra* note 130.

149. *Id.*

150. *Id.*

151. *Id.*

152. Corsi, *supra* note 7.

153. Faine Greenwood, *Gender: Women and Men – Pay inequity in Silicon Valley* JOINT VENTURE OF SILICON VALLEY, (Feb. 7, 2014), <http://peninsulapress.com/jointventure2014/?p=159>.

154. Bryce Covert, *The One Area Where Silicon Valley Lags Behind the Rest Of The*

shift the emphasis to the quality of work completed over the number of hours logged in the office. This would make it easier for new parents to work from home and build their family, and female employees would not have to utilize the risky and costly oocyte cryopreservation procedure. If companies like Apple and Facebook are attempting to retain female employees to boost their diversity numbers, a more effective approach is to offer more supportive maternity and paternity leave and pay female employees the same as male employees. Simply touting the opportunity to postpone motherhood, while not mentioning a similar "benefit" to male employees, is a coercive and discriminatory practice.

### B. TAX COMPLICATIONS

While there is little law surrounding the potential discriminatory effects of offering an egg-freezing benefit to female employees, there is plenty of established law regarding the taxation of employee benefits. Offering egg-freezing as an employee benefit raises questions about how it is taxed: Do the companies alert employees to the potential gross income tax implications of accepting such a benefit, or do they advertise it as a "fringe" benefit? In addition, with companies such as Facebook and Apple challenging the current definition of "taxable benefit," we can speculate how the Internal Revenue Service ("IRS") will react to new boundaries in employee benefits. For example, in 2002, the IRS announced that it would no longer tax frequent flyer miles earned during business travel.<sup>155</sup> Also, in 2011, the IRS reversed its position enforcing a 1989 rule that taxed employer-issued cell-phones as compensation: employer-issued cell-phones are now considered a *de minimis* benefit and excluded from income.<sup>156</sup> In light of these policy changes, employers, Congress, and the IRS may be forced to reconsider the way in which benefits are administered and taxed while employees will face tough decisions about whether those benefits are worth the tax implications.<sup>157</sup> Although egg-freezing is not currently per se excluded<sup>158</sup> from gross income as a designated fringe benefit, it is reasonable to expect changes to tax law as employers begin offering innovative forms of benefits to their employees.

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World, THINKPROGRESS.ORG (July 28, 2014, 11:29 AM), <http://thinkprogress.org/economy/2014/07/28/3464777/technology-women-leadership/>.

155. INTERNAL REVENUE SERVICE, *Announcement 2002-18: Frequent Flyer Miles Attributable to Business or Official Travel*, <http://www.irs.gov/pub/irs-drop/a-02-18.pdf>.

156. Office of Federal, State, and Local Governments, *Fringe Benefit Guide*, INTERNAL REVENUE SERVICE 14 (2014), available at <http://www.irs.gov/pub/irs-pdf/p5137.pdf>.

157. Erb, *supra* note 125.

158. See I.R.C. § 132(a)(1)-(8) (certain fringe benefits excluded from gross income include no-additional-cost service, qualified employee discount, working condition fringe, *de minimis* fringe, qualified transportation fringe, qualified moving expense reimbursement, qualified retirement planning services, or qualified military base realignment and closure fringe).

### i. Fringe Benefits

The IRS designates two categories of fringe benefits: working condition fringe and *de minimis* fringe. Working condition fringe benefits are defined as “any property or services provided to an employee of the employer to the extent that, if the employee paid for such property or services, such payment would be allowable as a deduction”<sup>159</sup> for business expenses<sup>160</sup> or for depreciation.<sup>161</sup> A *de minimis* fringe benefit is defined as “any property or service the value of which is . . . so small as to make accounting for it unreasonable or administratively impracticable.”<sup>162</sup> These fringe benefits are excluded from an employee’s gross income, meaning the employee receives the benefit without having to pay a monetary tax.<sup>163</sup>

For example, employer-provided meals are the most commonly invoked fringe benefit. Employer-provided meals can remain untaxed if they are served for certain noncompensatory reasons for the “convenience of the employer.”<sup>164</sup> The “convenience of the employer” test was pivotal in determining the exclusion or inclusion of certain fringe benefits offered by employers. In the case of *Boyd Gaming Corporation v. Commissioner of the Internal Revenue*, the Ninth Circuit considered the question of whether “there really is a ‘free lunch.’”<sup>165</sup> The petitioners, a hotel and casino, required their employees to remain on the business premises for the duration of their work shift.<sup>166</sup> They argued this was for security and logistical reasons, and therefore provided their employees with free meals at on-site cafeterias.<sup>167</sup> They further argued that the free meals meet the statutory test for *de minimis* fringe benefits “because they were furnished to ‘more than half’ the employees for the ‘convenience of the employer.’”<sup>168</sup> The court in *Boyd* determined that it was “inappropriate to second guess” employers’ business judgment and that “Boyd was required to and did support its closed campus policy with adequate evidence of legitimate business reasons.”<sup>169</sup> The deduction was granted.

Companies like Apple and Facebook can potentially utilize the “convenience for the employer” test should the IRS make a change to the code and view egg-freezing as a *de minimis* benefit. The result would be a shelter for female employees who would otherwise be forced to pay income

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159. I.R.C. § 132(d).

160. See I.R.C. § 162.

161. See I.R.C. § 167.

162. I.R.C. § 132(e)(1).

163. I.R.C. § 132(a).

164. I.R.C. § 119(a)-(b).

165. *Boyd Gaming Corp. v. Comm’r of the Internal Revenue*, 177 F.3d 1096, 1097 (9th Cir. 1999).

166. *Id.*

167. *Id.*

168. *Id.*; see also I.R.C. §§ 132(e) and 119(a), (b)(4).

169. 177 F.3d at 1101.

tax on the benefit conferred upon them by their employer. It is highly unlikely, however, that the IRS will view the high cost and risk of egg-freezing as "so small as to make accounting for it unreasonable or administratively impracticable." The \$20,000 price tag of an oocyte cryopreservation treatment is not the equivalent of the complementary fruit basket Congress had in mind when drafting this statute.<sup>170</sup> It is possible, however, that tax law will evolve with the addition of new practice models by employers. Thus, female employees who choose to utilize the egg-freezing services offered by their employer will be taxed on the total cost of the benefit conferred.

#### ii. Qualified Medical Expenses

"[T]ypically, [health insurance] plan coverage is determined by the carrier and not the employer."<sup>171</sup> While employers have the option to select plans based on the benefit level they wish to offer their employees, she says, "they don't determine specific benefits inside each plan."<sup>172</sup> In addition, qualifying medical expenses in typical plans do not include elective procedures.<sup>173</sup> If a healthcare plan does not offer a specific benefit for which an employee needs or wants, they must pay the cost of the procedure out of pocket.<sup>174</sup> Payments or reimbursements of specific, qualified medical expenses are typically excluded from income and, thus, not subject to income tax.<sup>175</sup> Qualifying medical expenses are those expenses for "the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body."<sup>176</sup> Elective egg-freezing in the absence of a specific infertility diagnosis would not qualify as a deductible medical expense for this purpose.<sup>177</sup> Thus, employees who choose to utilize the benefit will be unable to deduct the cost from their gross income.

### IV. UNITED KINGDOM: ANALYSIS OF CURRENT LEGAL LANDSCAPE AND RECEPTION

*The European Society of Human Reproduction and Embryology ("ESHRE") task force on ethics and law recommends that "oocyte cryopreservation should be available for the prevention of age-related infertility and that a fertility specialist should refrain from passing judgment on a woman's motives to do so."*<sup>178</sup>

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170. Erb, *supra* note 125.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. I.R.C. § 106.

176. I.R.C. § 213(d)(1)(A).

177. Erb, *supra* note 126.

178. Stoop, et al., *supra* note 19 at 1311 (citing ESHRE Task Force on Ethics, *Oocyte*

The Equality of Act of 2010<sup>179</sup> was enacted in the United Kingdom in response to the growing concern over employment disparity.<sup>180</sup> In an interview with *The Guardian*, one woman shared that, “[f]our days after telling my line manager, an equity partner, of my pregnancy I was placed in a redundancy consultation.”<sup>181</sup> “BB” in London shared a similar story:

Since being pregnant and returning to work, it has been assumed that my priorities lie elsewhere. I am not ever asked to attend any functions that require travel or evenings, even though I work in public affairs and this is part of the job. Once I returned to work after maternity leave, my responsibilities have consistently been eroded, despite consistently positive feedback about the quality of my work. I don’t have enough to do to fill my day now.<sup>182</sup>

Pregnancy discrimination, while distinct from the possible implied discrimination in offering oocyte cryopreservation to female employees, is similar in many ways. A female employee, such as “BB” cited above, who is denied a promotion due to “perceived ‘maternal’ responsibilities” can now bring discrimination claims under the Equality Act.<sup>183</sup>

The primary purpose of the Act was to consolidate the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Disability Discrimination Act 1995.<sup>184</sup> The Equality Act requires equal treatment in access to employment as well as private and public services,<sup>185</sup> regardless of the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex, and sexual orientation.<sup>186</sup> In addition, there are special protections for pregnant women.<sup>187</sup> Part 5, Chapter 1, Section 39 of the Act further provides that an employer “must not discriminate” or “victimise [sic]” an employee as to the employee’s “terms of employment,” “in the way

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*cryopreservation for age-related fertility loss*, 27 HUM. REPROD. 1231, 1231–1237 (May 2012).

179. Equality Act 2010, c. 15, §§ 4–12 (U.K.).

180. Christopher Hope & Tom Ross, *Britain embraces ‘positive action’ to abolish workplace discrimination*, TELEGRAPH, Dec. 2, 2010, <http://www.telegraph.co.uk/news/uknews/8177872/Britain-embraces-positive-action-to-abolish-workplace-discrimination.html>.

181. Siri Srinivas, *In their own words: women who faced demotions after maternity leave*, THE GUARDIAN, Jan. 6, 2015, <http://www.theguardian.com/money/us-moneyblog/2015/jan/06/mommy-track-maternity-leave-careers>.

182. *Id.*

183. *Sex Discrimination and Frozen Eggs in the Workplace*, GILBERT LAW GROUP (Oct. 17, 2014), <http://gilbertlegal.net/2014/10/sex-discrimination-pregnancy/>.

184. Includes three major statutory instruments protecting discrimination in employment on grounds of religion or belief, sexual orientation and age. EQUALITY ACT OF 2010: EXPLANATORY NOTES 2–3 (Apr. 8, 2010), available at [http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpgaen\\_20100015\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpgaen_20100015_en.pdf).

185. Equality Act 2010, c. 15, §§ 28–31 (U.K.).

186. Equality Act 2010, c. 15, §§ 4–12 (U.K.).

187. Equality Act 2010, c. 15, § 18 (U.K.).



[employer] affords [employee] access, or by not affording [employee] access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility, or service,” or “by subjecting [employee] to any other detriment.”<sup>188</sup>

In its most basic form, the Act “provides that men must not be treated less favourably [sic] than a woman in the same circumstances.”<sup>189</sup> Employers in the U.K. who offer to pay for egg-freezing but do not offer similar services, such as sperm freezing, to their male employees could amount to “direct (and unlawful) sex discrimination.”<sup>190</sup> Employment law experts in the U.K. warn that,

[i]f this kind of perk comes over to the UK it is potentially a red rag to a bull and opens up a series of employment law questions. There’s an implication that the employer wants to determine when and what age a woman should conceive a baby. It could discourage women having children at a younger age. It risks sending the message that natural pregnancy is incompatible with being a high performing employee.<sup>191</sup>

The risk of offering such a benefit to female employees in the U.K. is a violation of the Equality Act of 2010. Again, should employers choose to offer such a benefit, they must also “invest in clear communication, mentoring and assessment of employees at all levels, and support for parents of both sexes as they balance work and family life.”<sup>192</sup> Rather than offering oocyte cryopreservation to their female employees, however, the U.K. instead offers shared parental leave, which is aimed at encouraging employers to offer support for working parents in order to balance family and employment.<sup>193</sup>

For UK£200 (the equivalent to about US\$300), London-based fertility center Create Fertility will “offer businesswomen fertility tests in their lunch hour.”<sup>194</sup> Emily Brooke, founder of company Blaze, is considering offering egg-freezing benefits to her employees because “[i]t

188. Equality Act 2010, c. 15.5.1, § 39(2)(a)-(d), (3) (U.K.).

189. Corsi, *supra* note 7.

190. *Id.*

191. Nicola Sullivan, *Egg-freezing perks will not work in the UK, said employment lawyer*, RECRUITER (Oct. 20, 2014), <http://www.recruiter.co.uk/news/2014/10/egg-freezing-perks-will-not-work-in-the-uk-said-employment-lawyer/>.

192. Corsi, *supra* note 7.

193. *Shared Parental Leave and Pay*, UK.GOV, <https://www.gov.uk/shared-parental-leave-and-pay/overview> (last visited Jan. 14, 2015). In addition, consider Sweden, where a gender-neutral paid parental-leave allowance makes it easier for both sexes to balance work and family life. Because Sweden’s mothers and fathers are encouraged to share the responsibilities of work and family life, it’s no surprise that Sweden ranks in the top five of the World Economic Forum’s Global Gender Gap Index.” Lewis, *supra* note 126.

194. Rhiannon Mills, *UK Firms Consider Paying for Egg-freezing*, SKY NEWS (Oct. 19, 2014, 6:28 AM), <http://news.sky.com/story/1355951/uk-firms-consider-paying-for-egg-freezing>.

just gives you a little bit more freedom and takes the pressure off later on in life.”<sup>195</sup> She further explained, “[t]he women in my team are just as ambitious as I am, they work incredibly hard and I wouldn’t expect them to take up the opportunity [of freezing their eggs], I wouldn’t want them to necessarily, but I would like them to have the option.”<sup>196</sup> According to the Human Fertilisation and Embryology Authority (“HFEA”), there has been a clear increase in the number of women seeking to freeze their eggs for “non-necessary” reasons in recent years.<sup>197</sup> In 2012, 580 women underwent oocyte cryopreservation procedures, up from 284 in 2009.<sup>198</sup> The popularity in the U.K. is less based on coercive choice than on an individual desire to find a stable career and parent.

## V. EGG-FREEZING POLICY: GENDER EQUITY OR LARGER GENDER DISPARITY?

*The promise of autonomy—the option to create a family at the time of your choosing—may become just another form of coercive motherhood: freeze your eggs or infertility will be your fault, freeze your eggs so you can be a good employee on someone else’s (gendered) terms. Its promise of permitting women to delay fertility reinforces culturally masculine work norms and lifestyle priorities.*<sup>199</sup>

Despite the enactment of Title VII, the Pregnancy Discrimination Act, the California Fair Housing and Equality Act, the Equality Act of 2010 in the U.K., and the advancement of women in the workforce and higher education,<sup>200</sup> “women everywhere continue to be placed on the mommy track.”<sup>201</sup> As sociologist Pamela Stone explains, women don’t “opt out” of their careers so much as they are “forced out” by employers who fail to

195. Mills, *supra* note 194.

196. *Id.*

197. Leah McLaren, *How Women are ‘Freezing’ the Biological Clock*, NEWSWEEK (Aug. 17, 2014, 11:43 AM), <http://www.newsweek.com/2014/08/15/how-women-are-freezing-biological-clock-263339.html>.

198. *Id.*

199. Carbone and Cahn, *supra* note 53, at 304–305; see also Angel Petropoulos, *Reproductive “Choice” and Egg-freezing*, ONCOFERTILITY: ETHICAL, LEGAL, SOC., & MED. PERSPECTIVES 232 (Teresa K. Woodruff et al. eds. 2010).

200. Between 1970 and 2010, the percentage of bachelor degrees earned by women rose by 43.1% to 57.2%, and is projected to be 58% in 2020. During that same time, the percentage of master’s degrees earned by women rose from 38.8% to 60.3%, and the percentage of doctoral degrees earned by women rose from 9.6% to 51.7%. According to the Bureau of Labor Statistics, women comprise 53.5% of the labor force. *Table 283: Degrees Conferred by Degree-granting Institutions, by Levell of Degree and sex of Student: Selected Years, 1869-70 through 2020-21*, NAT’L CTR. FOR EDUC. STATISTICS, [http://nces.ed.gov/programs/digest/d11/tables/dt11\\_283.asp](http://nces.ed.gov/programs/digest/d11/tables/dt11_283.asp) (last visited Mar. 4, 2015); U.S. DEP’T. OF LABOR, *Table 3: Employment Status of the Civilian Noninstitutional Population by Age, Sex, and Race, Annual Averages 2011* (2015), <http://www.bls.gov/cps/cpsaat03.htm>.

201. Srinivas, *supra* note 181.

respond to the needs of new parenthood.<sup>202</sup> Stone found that women were often forced to “choose” between motherhood and their career, despite the women being highly educated and successful.<sup>203</sup> Apple promotes the new egg-freezing perk as focusing on “empowering women ‘to do the best work of their lives as they care for loved ones and raise their families.’”<sup>204</sup> Employers like Apple and Facebook are finding innovating ways of forcing female employees to choose potentially harmful “benefits.”

While only a small percentage of women may actually participate in the benefit, it still places the burden on women rather than men to think about when to have children and the potential impact on their career. The gender pay gap:

has more or less closed for women in their 20s, but the pay gap leaps up for women in their 30s and that’s because after having children, many women are forced to downgrade their level of seniority and pay, as the jobs they were doing previously are simply not available on a flexible basis. Freezing eggs is not the answer.<sup>205</sup>

Gender disparity will not be improved with the introduction of this perk to employee benefits. It will simply reinforce gender stereotypes, employment discrimination, unequal employment opportunities, and the oppression of the female body.

## CONCLUSION

Oocyte cryopreservation is an amazing advancement in reproductive technology. It allows individuals to choose when and how to have a child, allows young individuals to postpone pregnancy in light of advancing a career, and allows others the peace of mind knowing they have “fertility insurance” for the future. When employers begin advertising egg-freezing as a perk for employment, however, it begins to look suspect. Not only does oocyte cryopreservation inspire disparate treatment of employees, but it is a benefit in name only. With dismal success rates, lack of access to most families, and the chance of paying the price of the “benefit” in your taxes, egg-freezing is more of an empty benefit than a perk. In addition, having employers offer such a benefit to employees does not address the core needs of our new mothers and families. We need to focus on “different strategies, which focus on support for child-rearing rather than just fertility,” which “should result in healthier families, less need for egg-

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202. See PAMELA STONE, *OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME* (2008); Meghan Casserly, *Why is “Opting Out” a bad Word for Women?*, FORBES (Feb. 28, 2012, 11:23 AM), <http://www.forbes.com/sites/meghancasserly/2012/02/28/why-is-opting-out-a-bad-word-for-women/>.

203. Casserly, *supra* note 202.

204. Corsi, *supra* note 7.

205. BBC NEWS, *Should Employees Pay for Women to Freeze Their Eggs?* (Oct. 15, 2014, 6:20 AM), <http://www.bbc.com/news/business-29621957>.

freezing, and more equal access to reproductive technology.”<sup>206</sup> Holistic solutions include strengthening the Family Medical Leave Act, supporting women who wish to incorporate motherhood into their lives and career, and offering equal supportive services to all families regardless of income. Egg-freezing should be more than an empty benefit; it should be the promise of greater freedom and individuality.

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206. Carbone and Cahn, *supra* note 53, at 316.

