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## EGG FREEZING ON COMPANY DOLLARS: MAKING BIOLOGICAL CLOCK IRRELEVANT?

*Madhumita Datta*

### I. INTRODUCTION

Critics chastise the technology industry in California's Silicon Valley for being unfriendly to women and people of color.<sup>1</sup> In an attempt to boost gender diversity, two of the technology giants of Silicon Valley, Apple and Facebook, announced in October 2014 that they would offer up to \$20,000 to cover the costs of freezing eggs so that female employees who want to pursue both motherhood and a serious career could conveniently "time" their pregnancy.<sup>2</sup> The announcement sparked immediate reactions from the media—some hailed the employers for being genuinely female-employee-friendly, while others chastised the employers for interfering with motherhood.<sup>3</sup>

This paper recognizes that egg freezing is not the only type of technologically advanced reproductive benefit offered by the employers. Employer-sponsored surrogacy benefits and in-vitro fertilization ("IVF") benefits are not uncommon in the Silicon Valley.<sup>4</sup> This paper, however, specifically focuses on employer-sponsored egg freezing because of two main reasons:

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<sup>1</sup> Max Chafkin, *The Ugly Truth about Silicon Valley's Diversity Problem*, FAST COMPANY (May 12, 2014), <https://www.fastcompany.com/3029444/the-ugly-truth-about-silicon-valleys-diversity-problem>; see also Cecilia Kang & Todd C. Frankel, *Silicon Valley Struggles to Hack its Diversity Problems*, WASHINGTON POST BUSINESS, (last visited July 16, 2015), [https://www.washingtonpost.com/business/economy/silicon-valley-struggles-to-hack-its-diversity-problem/2015/07/16/0b0144be-2053-11e5-84d5-eb37ee8eaa61\\_story.html](https://www.washingtonpost.com/business/economy/silicon-valley-struggles-to-hack-its-diversity-problem/2015/07/16/0b0144be-2053-11e5-84d5-eb37ee8eaa61_story.html).

<sup>2</sup> In October, 2015, Intel joined Facebook and Apple as another technology giant to offer egg-freezing benefit along with an array of other benefits, such as adoption assistance and in-vitro fertilization. See Rebecca Ruiz, *Intel overhauls fertility benefits, hopes to attract more women*, MASHABLE (October 20, 2015), <http://mashable.com/2015/10/20/intel-benefits-package/#IKc7iyYLPkqS>.

<sup>3</sup> Anita Little, *The Cold Truth Behind Silicon Valley's Egg Freezing*, MS. MAGAZINE BLOG (October 22, 2014), <http://msmagazine.com/blog/2014/10/22/the-cold-truth-behind-silicon-valleys-egg-freezing/>.

<sup>4</sup> Danielle Friedman, *Perk Up: Facebook and Apple Now Pay for Women to Freeze Eggs*, NBC NEWS, (last visited October 14, 2014), <http://www.nbcnews.com/news/us-news/perk-facebook-apple-now-pay-women-freeze-eggs-n225011>.

(1) unlike other reproductive benefits aiming to cure a biological deficiency such as infertility, employers promote egg freezing as an investment towards female employees' career success; and, (2) female employees may take advantage of this benefit for non-medical reasons to delay pregnancy and childbirth because of the lure of making the biological clock irrelevant on the employers' dime, perhaps ignoring the possible emotional costs of delaying motherhood.

Since this development is so recent, the consequences of offering and using egg freezing as a benefit remain yet unseen. This paper presents research data and analysis already available on issues directly or indirectly related to freezing eggs and uses that knowledge to advance discussion on those issues. Section I of this paper explores the various motivations for the employers to provide advanced reproductive benefits to women, such as, employee retention, corporate social responsibility, and avoidance of more controversial benefits like abortion assistance. Section II discusses whether freezing eggs for later fertilization is a biologically sound decision for young women from either a medical perspective or a social perspective. Section III conjectures the possibility of young women unwittingly entrapping themselves into a form of wage-and-benefit-driven servitude in exchange of the flexibility in timing their pregnancy. Section IV discusses whether offering egg freezing benefits to female employees exposes the employers to social and legal risks and liabilities. Section V briefly suggests a number of alternatives that employers can adopt to bring fundamental structural change in workplace culture to empower women even without, or in addition to, offering a benefit like egg freezing.

Finally, this paper concludes that women should not outsource the responsibility of striking a balance between a rewarding career and a fulfilling motherhood to their employers. Delaying motherhood to achieve other personal goals may produce negative consequences for women and the society in general. Instead of trying to dictate the most private decisions of an employee's life, employers should recognize parenthood as a natural phenomenon that may happen to both men and women within the span of their employment, and strive to design employee benefits that reflect a commitment to be supportive of parenthood.

## II. EMPLOYER MOTIVATION FOR OFFERING ADVANCED REPRODUCTIVE BENEFITS TO FEMALE EMPLOYEES

This section generically explores why employers design benefits exclusively for female employees. This section does not specifically consider the motivation behind offering a particular benefit like egg-freezing, because subsequent sections address that topic in detail. This section starts with recognizing that recent data show that a gender diversity problem exists in the Silicon Valley. The discussion then moves on to show how tailored benefits help in female employee retention in general, and how retention may serve the business goals of the Silicon Valley employers.

### A. The Gender Diversity Problem

Employers offer creative employee benefits almost as a norm rather than an exception in the technology-dominated Silicon Valley.<sup>5</sup> For example, Google famously offers their employees access to unlimited gourmet food and on-site massages free of cost.<sup>6</sup> Netflix offers unlimited vacation days, relying on the employees' inner motivation to achieve productivity. Facebook offers an on-site barbershop to accommodate the employees' grooming needs.<sup>7</sup> These benefits play a significant role in the overall appeal of the lifestyle and culture of the technology industry.<sup>8</sup> The technology industry is

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<sup>5</sup> Patrick May, *Silicon Valley Tech Companies Showering Employees with Great Perks*, SAN JOSE MERCURY NEWS, (December 19, 2015), [http://www.unionleader.com/apps/pbcs.dll/article?AID=/20151220/NEWS02/151229992/-1/mobile\\_sports&template=mobileart](http://www.unionleader.com/apps/pbcs.dll/article?AID=/20151220/NEWS02/151229992/-1/mobile_sports&template=mobileart).

<sup>6</sup> Victor Luckerson, *10 Most Lavish Job Perks in Silicon Valley*, TIME MAGAZINE, (last visited October 14, 2014), <http://time.com/3506815/10-best-job-perks/>.

<sup>7</sup> *Id.*

<sup>8</sup> Kaja Whitehouse, *Google hire highlights Wall St. talent problem*, USA TODAY, (March 24, 2015), <http://www.usatoday.com/story/money/2015/03/24/google-hires-morgan-stanley-cfo-ruth-poran-anthony-noto/70371968/>.

successfully eroding the talent base of the competing high-profile professional fields, such as law, medicine, finance, and private or public sector business administration.<sup>9</sup> For example, in 2014, 33% of the graduates from the Harvard Business School (“HBS”) went into financial careers, while 17% chose careers in the technology industry. Compared to that statistic, 44% of the HBS graduates chose finance, and 7% chose technology in 2007.<sup>10</sup> The conventional wisdom that Wall Street was the destination for the most lucrative career is no longer the truth, because youngsters as well as seasoned executives are recognizing that the technology industry can be as monetarily rewarding as Wall Street, and may even offer better overall job satisfaction.<sup>11</sup>

Despite its success in attracting bright minds, critics often point out that Silicon Valley suffers from a serious lack of racial and gender diversity in the employee base. The Valley employs a disproportionately low number of women and ethnic minorities.<sup>12</sup> In 2008, the San Jose Mercury News initiated a call for introspection to the Silicon Valley by sending Freedom of Information Act requests to the Valley’s fifteen largest employers.<sup>13</sup> Though largely unsuccessful on its own, San Jose Mercury News convinced CNN to pick up the thread in 2011. CNN launched its investigation on the topic of lack of diversity nationwide, and demanded data from twenty of the most influential technology companies, the Department of Labor, and the Equal Employment Opportunity Commission. Despite some initial resistance, a breakthrough came on May 25, 2014, when Google divulged its diversity data to the public, initiating a giant step forward towards transparency. As a result, other technology companies like LinkedIn, Facebook, Yahoo started to follow suit.<sup>14</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Brett Molina et al., *Morgan Stanley’s CFO Taking Same Role at Google*, USA TODAY, (March 24, 2015), <http://www.usatoday.com/story/tech/2015/03/24/porat-google-morgan-stanley/70368694/>.

<sup>12</sup> While the intersectionality of race and gender is recognized, this paper intentionally chooses to keep the focus on a gender-centric analysis, rather than a race-gender combined analysis.

<sup>13</sup> VIVEK WADHWA & FARAI CHIDEYA, *INNOVATING WOMEN: THE CHANGING FACE OF TECHNOLOGY* 196-97 (Diversions Books 2014).

<sup>14</sup> *Id.*

Self-reported data show that only 30% of each of Apple, Facebook, Twitter, and Google's respective global workforce is female.<sup>15</sup> Yahoo (37% women) and eBay (42% women) have slightly better numbers, which can be explained by the fact that Yahoo and eBay focus less on pure technology, and somewhat more on Internet-based commerce in general, where the pipeline supplies a greater number of female professionals. Female students enroll in the Science, Technology, Engineering and Mathematics ("STEM") fields in a disproportionately low percentage. Consequently, the STEM jobs see a shortage of skilled female professionals, worsening the diversity problem in STEM-specific areas.<sup>16</sup> For example, women constitute only 17% of Google's *technology* workforce in 2014.<sup>17</sup>

Recently, much research has been focused on the positive effect of diversity on corporate boards. The structure of corporate boards directly affects the lives of the employees and their families, and indirectly affect the lives of the consumers. Though not proved beyond skepticism, at least some studies have shown that more gender-diverse boards deliver measurably better financial performance.<sup>18</sup> According to a 2014 journal article, the United States lags behind achieving gender diversity in corporate boards compared to other developed countries of

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<sup>15</sup> Jessica Guyan & Elizabeth Weise, *Lack of diversity could undercut Silicon Valley*, USA TODAY, (August 15, 2014), <http://www.usatoday.com/story/tech/2014/06/26/silicon-valley-tech-diversity-white-asian-black-hispanic-google-facebook-yahoo/11372421/>.

<sup>16</sup> Kenneth Corbin, *Shortage of Female STEM Workers Hurts Tech Industry*, CIO, (April 25, 2014), <http://www.cio.com/article/2376783/continuing-education/continuing-education-shortage-of-female-stem-workers-hurts-tech-industry.html>.

<sup>17</sup> Murrey Jacobson, *Google finally discloses its diversity record, and it's not good*, PBS NEWSHOUR, (last visited May 28, 2014), <http://www.pbs.org/newshour/updates/google-discloses-workforce-diversity-data-good/>.

<sup>18</sup> See e.g. Policy & Impact Comm. of the Comm. for Econ. Dev., *Fulfilling the Promise: How More Women on Corporate Boards Would Make America and American Companies More Competitive* (August 6, 2014), <http://perma.cc/A57Y-8JWA> (committee concluding that the presence of women directors may be the key differentiator in future global success).

the world.<sup>19</sup> That position is not likely to improve without affirmative measures, such as ‘being intentional’ with hires and promotions of women,<sup>20</sup> because lack of gender diversity in the workforce in general means fewer women are available to join the corporate board in near future.<sup>21</sup> Therefore it makes sense for employers to target talented women for hiring and to “woo” them with attractive benefits.

### **B. Employers Attempt to Attract Women with Reproductive Benefits**

It is no secret that one of the biggest hurdles a professional woman of child-bearing age faces is the possibility of her career being derailed by pregnancy and subsequent parental responsibilities that may clash with her professional responsibilities. Reproductive and adoption benefits directly address the employers’ mission to hire and retain more female employees.<sup>22</sup> Furthermore, the technology industry has made a strong comeback from the recent economic recession that started in 2008.<sup>23</sup> Therefore, the technology industry is in a perfect position to experiment with creative benefits, including technologically-advanced reproductive benefits for women. Given the bleak statistics on gender diversity in Silicon Valley, offering stand-out reproductive benefits as a means to boost gender diversity appears to be a sensible decision. Still, though not completely unexpected, Apple and Facebook caused quite a

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<sup>19</sup> See generally Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377 (2014)

<sup>20</sup> Salle Yoo, *Uber GC Urges Leaders to ‘Be Intentional’ with Hires and Promotions*, THE RECORDER, (October 4, 2016), <http://www.therecorder.com/home/id=1202769191783/Uber-GC-Urges-Leaders-to-Be-Intentional-With-Hires-and-Promotions?mcode=1202618457271&curindex=1&slreturn=20160907134349>.

<sup>21</sup> Rhode & Packel, *supra* note 19, at 402.

<sup>22</sup> Eun Kyung Kim, *Intel expands fertility and adoption benefits to entice female employees*, TODAY, (last visited October 22, 2015), <http://www.today.com/parents/intel-expands-fertility-adoption-benefits-entice-female-employees-t51681>.

<sup>23</sup> Brandon Bailey, *Apple’s big year outshines mixed result for Silicon Valley*, SAN JOSE MERCURY NEWS, (July 27, 2012), [http://www.mercurynews.com/ci\\_20437255/apple-silicon-valley-15-sv150-biggest-companies-tech](http://www.mercurynews.com/ci_20437255/apple-silicon-valley-15-sv150-biggest-companies-tech).

2017]     *EGG FREEZING ON COMPANY DOLLARS*     125

stir on both traditional media and online social media by announcing in October 2014 that they would offer up to \$20,000 as a reproductive benefit option if women employees wished to freeze their eggs to have a better control over the timing of their pregnancy.<sup>24</sup> Both companies committed to implement the benefit right away. Employees do not have to show a medical reason to avail the benefit.<sup>25</sup>

The announcement provoked mixed reactions, with the negative reactions possibly outweighing positive or neutral reactions. For example, one article characterized the egg-freezing benefit as a “double edged sword” designed to attract talent, but also “to keep people in the office once they are there, mired in the quicksand of funky chairs, having productive conversations at hours that do not correlate with some child’s bedtime.”<sup>26</sup> Another columnist cautioned that “workplaces could be seen as paying women to put off childbearing,” and “[women] who choose to have babies earlier could be stigmatized as uncommitted to their careers.”<sup>27</sup>

While nobody denies that giving benefits to employees is a constructive step, the nature of the benefits reveals a lot about the employers’ ultimate motivation. Of course, Apple and Facebook claimed that providing reproductive benefits would not only directly affect their employees’ lives, but that it would benefit the society as a whole by empowering women, and thereby fulfilling the society’s expectation of corporate social

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<sup>24</sup> Danielle Friedman, *Perk Up: Facebook and Apple Now Pay for Women to Freeze Eggs*, NBC NEWS, (October 14, 2014), <http://www.nbcnews.com/news/us-news/perk-facebook-apple-now-pay-women-freeze-eggs-n225011>.

<sup>25</sup> *Id.*

<sup>26</sup> Joanna Weiss, *Egg freezing message: Lean in, and save the kids for later*, THE BOSTON GLOBE, (last visited October 16, 2014), <http://www.bostonglobe.com/opinion/2014/10/16/egg-freezing-message-lean-and-save-kids-for-later/dKGaoRtjrszo8OozNbj45K/story.html>.

<sup>27</sup> Claire Cain Miller, *Freezing Eggs as Part of Employee Benefits: Some Women See Darker Messages*, THE NEW YORK TIMES, (last visited October 14, 2014), [http://www.nytimes.com/2014/10/15/upshot/egg-freezing-as-a-work-benefit-some-women-see-darker-message.html?\\_r=0&abt=0002&abg=1](http://www.nytimes.com/2014/10/15/upshot/egg-freezing-as-a-work-benefit-some-women-see-darker-message.html?_r=0&abt=0002&abg=1).

responsibility from the profit-making technology giants.<sup>28</sup> Still, it is legitimate to ask why the employers felt the need to interfere with a personal decision of their employees' lives regarding when to have children. A related concern is whether this benefit would have a coercive effect on women to delay pregnancy. A recent study in the United Kingdom revealed that a large number of managers avoids hiring younger women to avoid the cost of maternity leave.<sup>29</sup> Providing a benefit like egg-freezing may be another tool for the managers to avoid the immediate cost of maternity leave. Apple and Facebook did not address these concerns, and left it to the media to opine on employer motivation. Some of the media articles extended full-throated support towards Apple and Facebook. For example, one columnist lamented that "what's lost [in the flurry of negative comments] is that women at these companies, real people caught in the grips of the structural dilemma of work, fertility and their lives, are the ones asking for the benefit,"<sup>30</sup> and the technology companies are merely catering to that demand. However, this view seems to be the minority voice vis-a-vis the strong skepticism in the media.

Setting aside the particular pros and cons of a benefit like egg-freezing discussed later in this work,<sup>31</sup> providing pregnancy-related benefits is in general a proven way to earn women employees' loyalty,<sup>32</sup> as it eventually leads to better employee retention. Better retention logically extends to better return-on-investment for hiring and training. Moreover, it is arguably less controversial for the employers to provide assisted

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<sup>28</sup> Brett Molina & Elizabeth Weise, *Apple, Facebook to pay for women to freeze eggs*, USA TODAY, (last visited October 14, 2014), <http://www.usatoday.com/story/tech/2014/10/14/apple-facebook-eggs/17240953/>.

<sup>29</sup> *40% of managers avoid hiring younger women to get around maternity leave*, THE GUARDIAN, (last visited August 11, 2014), <https://www.theguardian.com/money/2014/aug/12/managers-avoid-hiring-younger-women-maternity-leave>.

<sup>30</sup> Michelle Quinn, *Criticism of Apple and Facebook's egg freezing benefit is misguided*, SAN JOSE MERCURY NEWS, (October 23, 2014), [http://www.mercurynews.com/michelle-quinn/ci\\_26786761/quinn-critics-apple-and-facebooks-egg-freezing-benefit](http://www.mercurynews.com/michelle-quinn/ci_26786761/quinn-critics-apple-and-facebooks-egg-freezing-benefit).

<sup>31</sup> See *infra* Section II.

<sup>32</sup> Mayan Rossin-Slater, Christopher J. Ruhm, & Jane Waldfogel, *The Effects of California's Paid Family Leave Program on Mothers' Leave-Taking and Subsequent Labor Market Outcomes*, 32(2) J. POLICY ANALYSIS & MANAGEMENT 224-245 (2013)

2017] *EGG FREEZING ON COMPANY DOLLARS* 127

reproduction benefits than to provide some other more controversial benefits like abortion coverage. The Supreme Court of the United States fueled the abortion debate anew in 2014 by upholding certain corporations' religion-based right to refuse abortion as an employee benefit.<sup>33</sup> The religion angle is less pronounced for an issue like freezing eggs for future childbirth than it is for abortion. Thus, the employers are more likely to experiment with assisted reproduction benefits than they would with other more politically controversial benefits.

In short, by offering a benefit like egg-freezing, employers may be effectively communicating that motherhood is somehow at odds with career advancement, though executives at the employers have more recently tried to portray the offering as a health benefit.<sup>34</sup> Irrespective of the employers' motivation, egg-freezing as a benefit needs to be evaluated from the employees' perspective too, as discussed below.

### III. BIOLOGICAL SOUNDNESS OF FREEZING EGGS

This section of the paper focuses narrowly on the negative sides of cryopreservation of eggs for later fertilization. First, this section emphasizes the biological risks associated with postponing childbirth to a later age. Then, the focus shifts to social implications of late parenthood.

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<sup>33</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2758 (2014) (holding that the Health and Human Services' (HHS) contraceptive mandate substantially burdens the exercise of religion under the Religion Freedom Restoration Act (RFRA)). The Court assumed that guaranteeing cost-free access to the four challenged contraceptive methods was a compelling governmental interest, but the Government failed to show that the mandate was the least restrictive means of furthering that interest. *Id.* at 2786.

<sup>34</sup> Charlotte Alter, *Sheryl Sandberg Explains Why Facebook Covers Egg-Freezing*, TIME MAGAZINE ONLINE EDITION, (April 15, 2015), <http://time.com/3835233/sheryl-sandberg-explains-why-facebook-covers-egg-freezing/>.

### A. Freezing Eggs Does Not Guarantee Later Success in Childbirth

Various forms of Assisted Reproductive Technologies (“ART”), such as, cryopreservation of eggs and sperms, in-vitro fertilization, (“IVF”) and embryo implantation, have made significant progress within the last fifty years. The first “test tube baby,” Louise Brown, was born in 1978 using IVF.<sup>35</sup> In April 2015, a breakthrough IVF treatment called “Augment,” that uses stem cell from a mother’s ovary, has successfully resulted in the birth of a healthy baby in Canada. Though still not available as a procedure in the United States, this new treatment promises to circumvent poor egg quality in a woman due to age or other physiological reasons.<sup>36</sup> However, while technological advancement raises hope for women with medical reasons to utilize assisted reproduction, it also opens the door for using technology for non-medical “scheduling” reasons.

In 2013, journalist Sarah Elizabeth Richards published a book on “rescheduled motherhood,”<sup>37</sup> whose introductory marketing excerpt on the Amazon.com website reads:

[h]ow would you live your life if you could stop your biological clock? If you could be free of the "baby panic" that has tormented an entire generation of women who postponed motherhood to pursue careers or find the right mate? Would you date better? Marry later? Relax more? [This book] tells the stories of four women—including [the author] herself—who attempt to turn back time by freezing their eggs

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<sup>35</sup> Alice Park, *Exclusive: Meet the World's First Baby Born with an Assist from Stem Cells*, TIME, (last visited May 7, 2015), <http://time.com/3849127/baby-stem-cells-augment-ivf/>.

<sup>36</sup> *Id.*

<sup>37</sup> AMAZON, [https://www.amazon.com/Motherhood-Rescheduled-Frontier-Freezing-Women/dp/141656702X/ref=sr\\_1\\_1?ie=UTF8&qid=1477244301&sr=81&keywords=Motherhood%2C+Rescheduled](https://www.amazon.com/Motherhood-Rescheduled-Frontier-Freezing-Women/dp/141656702X/ref=sr_1_1?ie=UTF8&qid=1477244301&sr=81&keywords=Motherhood%2C+Rescheduled) (last visited November 11, 2016) (*referring to Sarah Elizabeth Richards, Motherhood Rescheduled: The New Frontier of Egg Freezing and the Women Who Tried It* (Simon & Schuster 2013)).

2017] *EGG FREEZING ON COMPANY DOLLARS* 129

and chart a new course through their thirties and forties.<sup>38</sup>

This description probably echoes the thoughts of a large number on modern women, who are more willing to delay motherhood, and instead put their faith in reproductive technology. The medical world is far more cautious, particularly when there is no legitimate medical reason to choose assisted reproduction just to delay parenthood.

In 2013, the Practice Committees of the American Society of Reproductive Medicine (“ASRM”) and the Society for Assisted Reproductive Technology released a guideline declaring that fertilization and pregnancy rates are similar irrespective of whether fresh eggs (oocytes) or frozen eggs are used.<sup>39</sup> The guideline removed the “experimental” label from the procedure of assisted fertilization using frozen eggs. At the same time, however, the ASRM cautioned that:

Marketing this technology for the purpose of deferring childbearing may give women false hope. . . . In particular, there is concern regarding the success rates in women in the late reproductive years who may be the most interested in this application. . . . Patients who wish to pursue this technology should be carefully counseled about age and clinic-specific success rates of oocyte cryopreservation vs. conceiving on her own and risks, costs, and alternatives to using this approach.<sup>40</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> Practice Committees, American Society for Reproductive Medicine & Society for Assisted Reproductive Technology, *Mature oocyte cryopreservation: a guideline* 99 No. 1 FERTILITY & STERILITY (October 22, 2012), [http://www.socrei.org/uploadedFiles/ASRM\\_Content/News\\_and\\_Publications/Practice\\_Guidelines/Committee\\_Opinions/Ovarian\\_tissue\\_and\\_oocyte\(1\).pdf](http://www.socrei.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Committee_Opinions/Ovarian_tissue_and_oocyte(1).pdf).

<sup>40</sup> *Id.*

Clearly, ASRM does not endorse widespread for the sole purpose of circumventing reproductive aging in healthy women. The American College of Obstetricians and Gynecologists (“ACOG”) also shares the same cautious view.<sup>41</sup> Moreover, critics point out that egg-freezing involves bodily risks (weeks of hormone injection and undergoing an outpatient surgery) and high rates of failure<sup>42</sup> that may physically and emotionally scar women. One critic simply puts this issue in the form of a question: “[t]he bottom line is: [h]ow much of nature can we really bend?”<sup>43</sup> Critics are justifiably worried that despite the cautious approach of the medical world, easy access to the news of technological advancement in the media would give young women a false sense of control over their child-bearing potential, making age a far less significant factor in their decision-making process.

Author Tanya Selvaratnam brought the issue of age-related fertility decline to the forefront in her book, which was published in 2014.<sup>44</sup> Sharing her personal ordeal with failed attempts at delayed motherhood, she reminded women not to set their personal goals based on the misconception that “if they have trouble, then science will find a way to give them a child.”<sup>45</sup> In short, the message of the book is that modern women may sabotage themselves by over-relying on technology and undermining the importance of biological constraints.

As a woman ages, the quantity and quality of her eggs decrease, and the odds increase that she will be unable to conceive, suffer a miscarriage, or give birth to a child with

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<sup>41</sup> Josephine Johnston & Miriam Zoll, *Is Freezing Your Eggs Dangerous? A Primer*, NEW REPUBLIC, (November 1, 2014), <http://www.newrepublic.com/article/120077/dangers-and-realities-egg-freezing>.

<sup>42</sup> Rene Almeling, Joanna Radin & Sarah S. Richardson, Egg-freezing a better deal for companies than for women, CNN, (last visited October 20, 2014), <http://www.cnn.com/2014/10/20/opinion/almeling-radin-richardson-egg-freezing/>.

<sup>43</sup> Robin Marantz Henig, *Should You Freeze Your Eggs*, SLATE, (September 30, 2014), [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).

<sup>44</sup> *See generally*, TANYA SELVARATNAM, *THE BIG LIE: MOTHERHOOD, FEMINISM, AND THE REALITY OF THE BIOLOGICAL CLOCK* (2014).

<sup>45</sup> *Id.* at 35.

chromosomal abnormalities.<sup>46</sup> It is crucial for the women to understand that by freezing eggs they might increase their chances of overcoming the issue of aging ovaries, but that is only one factor of fertility success. Even with a young fertilized egg, a healthy pregnancy may not result because of other significant biological factors, such as, an aging womb and/or an aging fallopian tube. Studies conducted in Europe on frozen (vitrified) eggs from donors under the age of thirty found that women's pregnancy success rates ranged from 36% to 61%.<sup>47</sup> A fertility calculator developed by researchers at New York Medical College and the University of California Davis estimates that a woman who freezes 15 eggs at the age of 30 has about a 30% chance of giving birth to a child if she uses the frozen eggs. A woman who freezes 25 eggs at the age of 30 has about a 40% chance of giving birth to a child, the calculator estimates.<sup>48</sup> So, there should be no ambiguity in the woman's minds that freezing eggs even at a younger age is *not* a ticket to a successful later pregnancy.

### B. Social Implications of Late Parenthood

Even with a successful pregnancy and childbirth from a frozen egg, many social issues of raising a child at an advanced age remain unaddressed. An older parent<sup>49</sup> may lack the mental

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<sup>46</sup> Kerry Lynn Macintosh, *Teaching about the Biological Clock: Age-Related Fertility Decline and Sex Education*, 22 UCLA WOMEN'S L. J. 1, 4 (2015).

<sup>47</sup> Rachel Rettner, *5 Things Every woman Should Know About Egg Freezing*, LIVE SCIENCE, (last visited October 23, 2014), [http://www.huffingtonpost.com/2014/10/24/egg-freezing-facts\\_n\\_6041190.html](http://www.huffingtonpost.com/2014/10/24/egg-freezing-facts_n_6041190.html).

<sup>48</sup> *Id.*

<sup>49</sup> Though there is no specific age to determine if a parent is "old," conventional wisdom is that a woman may be too old to become a first time mother once she crosses forty, *see e.g.* Stacie Krajchir, *Fortyhood: Why You're Too Old to Have a Baby After 40*, HUFFINGTON POST (December 19, 2013), [http://www.huffingtonpost.com/stacie-krajchir/why-youre-too-old-to-have-a-baby-after-40\\_b\\_4339322.html](http://www.huffingtonpost.com/stacie-krajchir/why-youre-too-old-to-have-a-baby-after-40_b_4339322.html). *But see* Jeffrey Kluger, *Too Old to Be a Dad?* TIME MAGAZINE (April 11, 2013), <http://healthland.time.com/2013/04/11/too-old-to-be-a-dad/> (In contrast, for

and physical energy to raise a child. In the late eighties, Monica B. Morris explored the issue of late parenthood in-depth.<sup>50</sup> Her research showed that generational mismatch because of an unusually large age difference between a parent and his or her child may bring undesired emotional burdens into the parent-child relationship. For example, a young child of a parent much older than the parents of his/her peers may feel socially embarrassed.<sup>51</sup> Additionally, the child can also feel emotionally insecure thinking that she would lose her parents much earlier than her peers would.<sup>52</sup> Ms. Morris reiterated her thoughts in a more recent op-ed,<sup>53</sup> urging mothers who have attained “policymaking roles in business and government” to push for support “other than financial” to fulfill the need to spend more time with their late-born children so that the children get emotional reassurance.<sup>54</sup>

A recent article by Judith Shulevitz<sup>55</sup> pointed out how the growing trend toward later parenthood since 1970 coincides with a rise in neurocognitive and developmental disorders among children.<sup>56</sup> The article shares data that show that the average age of a woman becoming a mother for the first time has shifted by 4 years (from 21 years to 25.1 years) between 1970 and 2014 in the United States.<sup>57</sup> The article emphasized though that this is not a women-only problem, but a problem for society, as both men and women are choosing late parenthood to accommodate other priorities in life.<sup>58</sup> Employers may be

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men, since the biological concerns are relatively less pronounced, it is harder to define “old”).

<sup>50</sup> See generally, MONICA B. MORRIS, *LAST-CHANCE CHILDREN: GROWING UP WITH OLDER PARENTS* (1988).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Monica B. Morris, *Why older is not always better for mom and dad*, *LOS ANGELES TIMES*, (last visited January 14, 2011), <http://articles.latimes.com/2011/jan/14/opinion/la-oe-morris-old-parents-20110114>.

<sup>54</sup> *Id.*

<sup>55</sup> Judith Shulevitz, *The Grayest Generation: How Older Parenthood Will Upend American Society*, *THE NEW REPUBLIC*, (December 5, 2012), <http://www.newrepublic.com/article/politics/magazine/110861/how-older-parenthood-will-upend-american-society>

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

short-sighted to encourage late parenthood that may prove costly not only for the women, but for society in general. Moreover, when employees let the employers interfere with their lives in a fundamental way, society as a whole endorses the culture of servitude.

#### IV. INCENTIVIZING EMPLOYEES WITH CONDITIONAL BENEFITS

This section focuses on the employer-employee relationship that is based on the classic doctrinal principles of contracts and agency and how employee benefits affect that relationship. Though the phrase itself is pejorative, “wage slavery”<sup>59</sup> is a legally and socially accepted form of employment in the post-industrialized world, where the employee’s livelihood depends on the wage earned by selling labor to the employer. When an employee willingly accepts constraints on his or her life, such as being physically present at the workplace at certain times of the day, while away from his or her family, imposed by the employer in exchange of a regular salary, then the employer is not in apparent violation of any fundamental employee right.

Employment benefits on top of a regular salary are largely discretionary on the part of the employer. In some sense, the term “benefit” takes away the negative connotation (of the employee sacrificing his/her autonomy) that is associated with the term “wage.” So, for the employer, it is a winning strategy to design an employee’s total compensation package with emphasis on benefits and possibly lowering the wage component of the package. But mere change in labeling does not make the arrangement much different from wage-driven servitude—it merely shifts the mechanism of binding the employee to the employer. The next two subsections address the need to balance employers’ business interests with the employees’ personal interests.

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<sup>59</sup> Richard D. Wolff, *Anti-Slavery and Anti-Capitalism*, DEMOCRACY AT WORK, (December 15, 2006), <http://www.rdwolff.com/content/anti-slavery-and-anti-capitalism>.

### A. Reproductive Benefits Yield Cost-Positive Results for Employers

As discussed at the beginning of this paper, Silicon Valley is well-known for its innovative benefits that to a large extent define the Valley's image for the rest of the world.<sup>60</sup> Silicon Valley employers like to flaunt their on-campus volleyball courts, nap pods, massage rooms, and free gourmet eateries. Free perks have recently even attracted the Internal Revenue Service's ("IRS") attention. The IRS is reportedly considering whether fringe benefits like free food are taxable.<sup>61</sup> Still, the culture of lavish benefits runs strong in the Valley, and arguably attracts talent. Sophisticated employers have figured out a way to make the benefits yield a net cost-positive result for themselves. For example, University of Tampa researchers did a cost versus benefit analysis on Google in 2009 that revealed that that food expenses alone cost Google \$63 million in 2008 for just its U.S. based employees.<sup>62</sup> That translates to \$5,000 per year per employee. However, the productivity extracted from the employees by providing free food so that they do not have to leave the campus is likely much greater than \$5,000 year.<sup>63</sup> Though Google touts the free food offering as a benefit that saves time and resource for the employee, so that the employees can channel their energy to a more productive pursuit,<sup>64</sup> a cynic may see this as Google's attempt to confine the employees to their desk the entire day as a modern day reincarnation of benefit-driven servitude.

It is too premature to do a cost-benefit analysis on the egg-freezing perks announced by Apple and Facebook in late 2014. In October 2015, Intel joined Apple and Facebook as the

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<sup>60</sup> See *supra* Section II, A.

<sup>61</sup> Patrick May, *No free meals? IRS considers taxing perks at Google, other tech firms*, SAN JOSE MERCURY NEWS, (last visited April 9, 2013), [http://www.mercurynews.com/ci\\_22982220/irs-is-looking-into-whether-free-meals-at](http://www.mercurynews.com/ci_22982220/irs-is-looking-into-whether-free-meals-at).

<sup>62</sup> Ronald Kuntze & Erika Matulich, *Google: searching for value*, J. CASE RESEARCH IN BUS. & ECON. 1, 5 (2009), <http://www.aabri.com/manuscripts/09429.pdf>.

<sup>63</sup> *Id.*

<sup>64</sup> David Burks, *The Real Reason Google Serves All That Free Food*, FORBES, (July 2, 2015), <http://www.forbes.com/sites/davidburkus/2015/07/02/the-real-reason-google-serves-all-that-free-food/#7bc815853e3b>.

third big technology company to offer egg-freezing benefits to their female employees.<sup>65</sup> Though Intel's announcement was not focused on the egg-freezing benefit—rather Intel announced that they are overhauling their entire package of benefits for “employees who are looking to grow their family”<sup>66</sup>—the inclusion of egg-freezing in the benefit overhaul indicates that it may become a growing trend at least in the Silicon Valley. Thus, it is not unreasonable to assume that employers, especially the resourceful technology companies, do not lose money in offering egg-freezing benefits.

Using the same analogy as Google's free food perks, it may be possible to prove that making young women fully devote the highest productive years of their lives without taking a maternity leave may generate greater revenue for the companies than the cost of providing the reproductive benefits. Additionally, cost calculations are likely to factor in the possibility of some women moving to a different company by the time they actually have their babies using the frozen eggs. That would be a net positive for the benefit-providing employer in terms of harnessing productivity and goodwill at the same time.

It is true that controlling the timing of pregnancy allows for the possibility for women to pursue their career undistracted and uninterrupted. This control might eventually address the wage gap and career advancement disparity that today's female employees suffer from and complain about.<sup>67</sup> But as discussed in the previous section and again in this section, that control over the time of pregnancy comes at a biological and social cost to the employee, while the employer still ensures its own “benefit.”

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<sup>65</sup> Kristen Bellstrom, *Intel quadruples fertility benefits*, FORTUNE, (October 20, 2015), <http://fortune.com/2015/10/20/intel-quadruples-fertility-benefits/>.

<sup>66</sup> Intel's offering includes adoption assistance and IVF. See Ogden M. Reid, *Top Intel Perks: Intel Expands Family Benefits in U.S.* (October 19, 2015), <https://blogs.intel.com/jobs/2015/10/19/intel-expands-family-benefits/>.

<sup>67</sup> See Press Release, CareerBuilder, *More Women Reporting a Disparity in Pay and Career Advancement Today, CareerBuilder Survey Finds* (March 23, 2011), <http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?sd=3%2F24%2F2011&id=pr625&ed=12%2F31%2F2011>.

Therefore, lawmakers may need to help to restore the balance of interests.

### **B. Legislative Reform Needed to Protect Employees' Interests**

Author Tanya Selvaratnam suggests widespread and candid conversation about the biological clock issue involving all the relevant parties, including women who are considering delayed childbirth, as well as fertility doctors, adoption counselors, reproductive health professionals, celebrities, feminists, journalists, and sociologists.<sup>68</sup> Selvaratnam did not specifically include lawmakers or employers in her list, perhaps because her book came out in early 2014, i.e., before the egg-freezing benefit announcement from the technology companies in October 2014.

Conversations need to continue between the employers, directly or through the insurance companies, and fertility doctors, reproductive health professionals, employment lawyers, human resource professionals, sociologists, and economists. Legislative push can effectuate and expedite this conversation. All the stakeholders would have incentive to engage in the conversation if lawmakers demand compliance. For example, the aforementioned Macintosh paper<sup>69</sup> suggests the importance of teaching about biological clock preferably through mandatory sex education in schools. As an illustration of her point, Macintosh proposes that California State Legislature amend the Education Code Section 51993(b) to recite: “[c]ommencing in grade seven, instruction and materials shall provide information about threats to fertility, including age-related fertility decline in women.”<sup>70</sup> Similar amendments can be suggested for the employers, obligating them to provide candid information about the pros and cons of freezing eggs if the employers choose to offer egg-freezing benefits.

Another avenue to protect the employees' interest may involve legally mandating the employers to be completely transparent about their expectations while offering benefits like egg-freezing for non-medical reasons. Not availing the egg freezing option and choosing to take a maternity leave should

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<sup>68</sup> SELVARATNAM, *supra* note 44.

<sup>69</sup> Macintosh, *supra* note 46, at 14.

<sup>70</sup> *Id.*

2017] *EGG FREEZING ON COMPANY DOLLARS* 137

not be allowed to be grounds for not advancing women in their career within the company. If employers discriminate based on not choosing to delay motherhood, federal and state laws should provide a cause of action for employees to sue their employers. Employers should also be legally prevented from down on existing benefits related to pregnancy, childbirth, parenthood, and infertility treatment because of the introduction of the new reproductive benefits like egg-freezing. It might be of interest to point out to the employers that they are not free from risks and liabilities for their offer to cover egg-freezing costs as a benefit.

## **V. EMPLOYER RISKS IN OFFERING EGG-FREEZING BENEFITS**

This section of the paper briefly and selectively touches upon some of the risks and liabilities that even a well-meaning employer may encounter by offering a benefit like egg-freezing. First, egg-freezing benefits are offered to female employees only. Therefore, male employees may feel discriminated against. Second, providing egg-freezing as a benefit may increase liability insurance for the employers. Lastly, assisted reproduction like egg-freezing is fraught with complexities that employers may not be prepared to handle.

### **A. Reverse Gender Discrimination Criticism**

Competing demands of a career and parenthood is not an issue unique to women. A recent scientific study revealed that men's sperm is more likely to encounter harmful genetic mutations as they grow older. The risks include older men's sperm leading to children born with increased propensity to autism, bi-polar disorder, and schizophrenia.<sup>71</sup> Therefore, if not only for the fairness of equal benefits for both sexes, male employees now have a data-backed reasonable ground to legally demand sperm-freezing benefits from the employers offering egg-freezing benefits to female employees.

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<sup>71</sup> See Charlotte Schubert, *Male biological clock possibly linked to autism, other disorders*, 14 NATURE MEDICINE 1170 (2008).

Apple and Facebook did not make it public whether they are offering sperm-freezing benefits to male employees too. However, it is likely that while calculating the cost to the company for offering egg-freezing benefits, Apple and Facebook mostly considered the number of female employees only, and did not factor in the huge number of male employees in their workforce. If an employer is forced to offer similar benefits to male employees just to fend off the potential criticism of reverse gender discrimination, then it might become economically untenable for the employer to even offer the egg-freezing benefits. Employers may also face other legal liabilities that would potentially increase their operating cost, as discussed below.

### **B. Legal Liability for the Employer**

If a lucrative benefit like egg-freezing is offered to female employees only, then it seems like an Equal Protection violation that facially discriminates against certain employees based on a quasi-suspect classification such as gender. Professor Glenn Cohen<sup>72</sup> expressed concern that such perks would potentially divide the workplace into three categories: men, women, and women who want to procreate without delay. In 2013, even before Apple and Facebook announced their egg-freezing perks, Cohen blogged about the rumor that at least one prominent American Law 100 firm would pay for women to freeze their eggs in order to delay pregnancy. Professor Cohen questioned whether a benefit like egg-freezing would potentially be “a blow for or against gender equity at law firms.”<sup>73</sup> The question posed by Professor Cohen remains largely unanswered, as law firms chose not to publicize widely even if they offered egg-freezing benefits. Therefore, one is left to wonder whether the decision not to publicize the offering of the egg-freezing benefit, motivated only by a wish to avoid potential public and perhaps even internal backlash, or whether the law firms spotted

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<sup>72</sup> Glenn Cohen, *Will Your Law Firm (or Other Employer) Pay for Your Egg Freezing? Should It?* ONLINE ABORTION AND REPRODUCTIVE TECHNOLOGY SYMPOSIUM (April 13, 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/>.

<sup>73</sup> *Id.*

legal liability issues as an employer that the tech companies failed to see or chose to be willfully blind to.

Various liability issues become apparent without much examination. First, as discussed above, offering to pay for women to freeze their eggs, but not offering to pay for men to freeze their sperm can amount to illegal sex discrimination. Second, the intrusive nature of the perk threatens to violate an employee's fundamental right of privacy and the associated right of reproductive autonomy. Third, offering a benefit like egg-freezing can be perceived as a thinly veiled mandate to coerce a young woman to delay pregnancy in order to demonstrate sufficient commitment to her career.

As discussed in the previous section on legislative reform,<sup>74</sup> the employer needs to be absolutely transparent about their expectations vis-à-vis the advanced reproductive benefits. This not only protects the employees' interests, but also somewhat shields the employers from liability and litigation risk. Still, the employer remains potentially liable for malfunction or failure of the benefit. For example, if a female employee gets physically injured during the medical procedure of egg extraction for freezing, or suffers from undesired side effects caused by the hormone therapy that is often associated with egg retrieval, the employer might have to bear the cost of remedial treatment, even though these illustrative scenarios are outside of a typical workers' compensation benefits. Consequently, the employer's liability insurance premiums may rise, lowering the profit margin for the company. For a public company, shareholders may object to a controversial benefit package that not only lowers profit margin, but also potentially affects market goodwill, both of which are against the bedrock corporate principle of shareholder wealth maximization ("SWM").<sup>75</sup> Furthermore, assisted reproduction technologies,

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<sup>74</sup> See *supra* Section IV, B.

<sup>75</sup> See Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1435 n. 42 (1994); see also George A. Mocsary, *The Future of Shareholder Wealth Maximization*, LIBRARY OF LAW & LIBERTY (December 2, 2013), <http://www.libertylawsite.org/liberty-forum/the-future-of-shareholder-wealth-maximization/>.

like egg or sperm freezing, have their own set of complexities, as discussed below, which would eventually lead to enhanced liability insurance for the employer.

## **VI. KEY TO EMPLOYEE EMPOWERMENT IS FLEXIBILITY**

If Silicon Valley truly wants to be an innovative problem solver, it should realize that alternative benefits exist, including but not limited to, flexible work hours, caregiving leaves, on-site and/or subsidized day care, and adoption assistance, that might be less controversial and more effective in terms of female employee engagement and retention. Providing a technological solution like freezing eggs as an employment benefit reinforces the message that the employers see a dissonance between the biological clock and the overlapping period of peak productivity in a female employee's life. This simplistic view, particularly when coming from a sophisticated industry like the Silicon Valley tech industry, is rather discouraging for its lack of appreciation of multidimensionality of worker productivity. On the other hand, it is possible that perhaps the Silicon Valley's overly optimistic outlook and fascination with engineering and technological solution to societal problems led to the egg-freezing benefit offer in the first place. This section of the paper encourages the employers to make fundamental changes to the structure of work to accommodate women's reproductive and parenting years, such as generous parental leave, no loss of career advancement opportunities due to pregnancy, and flexibility to work from home when required. Employers need to have a holistic approach to employee productivity rooted in reality, as discussed below, rather than trying to "solve" the "problem" of balancing work and parenthood.

### **A. Flexibility Leads to High Productivity Amongst Working Parents**

A study conducted by the Federal Reserve Bank of St. Louis, published in 2014, analyzed productivity of 10,000 highly-skilled individuals (men and women economists) with and without families over the course of 30 years.<sup>76</sup> The paper

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<sup>76</sup> Mathias Krapf, Heinrich W. Ursprung & Christian Zimmerman, *Parenthood and Productivity of Highly Skilled Labor: Evidence from the*

2017] *EGG FREEZING ON COMPANY DOLLARS* 141

presented that men and women with two or more children are more productive over the course of their career than those who do not have children.<sup>77</sup> This result, though seemingly counterintuitive at first glance, actually corroborates the conventional wisdom that the more responsibility one is able to handle, the more efficient one becomes.

It is noteworthy that in the above study, the individuals surveyed were largely from the academia, enjoying a high degree of flexibility and autonomy in how they work. Studies from various fields almost universally recognize that flexibility is the key to productivity worldwide. In 2012, the International Labour Organization (“ILO”) published a study conducted by the Department of Economics and Labor Studies at the Penn State University, which concluded that it is a “win-win” for both the employer and the employee when employers allow the employees to exercise some control over how, when, and where they work in a typical workday.<sup>78</sup> The study recognized that the upfront direct cost to firms to offer flexible time to each worker may seem unrealistic, but the return-on-investment in terms of market goodwill (that directly affects stock performance for a publicly held company and may attract talents to both publicly and privately held companies) and employee retention makes it worthwhile for the companies to keep the flexibility option open at least on a context-sensitive case-by-case basis.<sup>79</sup> While the ILO report focused on flexibility in general, other studies, which focused more on particular benefits, such as on-site child-care and subsidized dependent care, have also generally supported this finding. For example, one study reported that child care services decrease employee absences by 20 to 30% and reduce

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*Groves of Academe* at 1 (Abstract), Fed. Reserve Bank of St. Louis, Research Division, Working Paper Series, 2014), <https://research.stlouisfed.org/wp/2014/2014-001.pdf>

<sup>77</sup> *Id.*

<sup>78</sup> Lonnie Golden, International Labour Organizations, Conditions of Work & Emp. Branch, *The effects of working time on productivity and firm performance: a research synthesis paper*, CONDITIONS OF WORK & EMP. SERIES NO. 33 at 8 (2012), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_187307.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_187307.pdf)

<sup>79</sup> *Id.* at 2.

turnover by 37 to 60%.<sup>80</sup> Another study showed that an average business with 250 employees could save \$75,000 per year in lost work time by subsidizing care for employees' sick children.<sup>81</sup> In sum, no one solution fits every employee's needs, and employers should pay attention to the already available research data to offer benefits that encourage current and would-be working parents. Egg-freezing may remain among the options offered to an employee, as long as other medical cryopreservation needs are also supported, such as cord blood freezing, embryo freezing, etc. In that respect, Intel's 2015 offering seems to be more insightful than Facebook and Apple's 2014 offering, as Intel's offering facially appears to be more family-oriented than just career-oriented.<sup>82</sup> Of course, Intel had the advantage of observing the backlash received by Apple and Facebook's egg-freezing offering a year ahead, and had the opportunity to act in a less controversial way. Still, if other companies follow Intel's template of broader array of benefits, including but certainly not limited to egg-freezing, the employee community as a whole is likely to be benefitted.

### **B. Employees Should Choose the Benefit That Is Best-Suited to Their Situation**

Extending the concept of flexibility to reproductive benefits, employers should consider letting individual employees choose what kind of benefit would fit their life and career ambition, rather than offering certain types of benefits like egg-freezing that are fraught with controversial messages open to interpretation. For example, instead of giving certain benefits to women only, employers may offer flexibility to both

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<sup>80</sup> Karen Shellenback, *Child Care & Parent Productivity: Making the Business Case*, Cornell University: Cornell Cooperative Extension 1 (Dec. 2004),

<http://s3.amazonaws.com/mildredwarner.org/attachments/000/000/074/original/154-21008542.pdf>.

<sup>81</sup> Windecker-Nelson, Elizabeth and MacDermid, Shelley M., *Child Care: It's Good Business. The Indiana Tool-Kit for Employers and Community Planners* (1998). Center for Families Publications. Paper 7. <http://docs.lib.purdue.edu/cffpub/7/>.

<sup>82</sup> See Intel New Fact Sheet, Intel Announces Industry-Leading Enhancements to U.S. Benefits; Support Diverse Needs of Working Moms and Dads (October 20, 2015), [http://download.intel.com/newsroom/kits/diversity/pdfs/Intel\\_Expanded\\_Benefits\\_FactSheet.pdf](http://download.intel.com/newsroom/kits/diversity/pdfs/Intel_Expanded_Benefits_FactSheet.pdf).

men and women to support a peer marriage (also known as shared earning/shared parenting marriage). Peer marriage is a marriage format that has worked for many working couples, where both partners commit at the onset of their marriage to share the responsibility for earning money, meeting needs of childcare, and perform household chores equally.<sup>83</sup> Facebook Chief Operating Officer Sheryl Sandberg and her late husband Dave Goldberg, Chief Executive Officer of an Internet-based survey company, were well-known examples of celebrities who successfully upheld the effectiveness of a peer marriage. In her book “Lean In,” Sandberg famously said that a key to her success was making her husband a “real partner.”<sup>84</sup>

In an article addressing egg-freezing, columnist Anna North cautioned that “[freezing eggs] doesn’t solve the problem that a woman may not be able to get time off from work during her peak childbearing years, or that she may stunt her career growth (and thus her ability to provide for future children) if she takes such time. And reforms that might actually solve this problem — paid leave, flexible work schedules, anti-discrimination laws, equal pay — seem to get little political traction.”<sup>85</sup> Ms. North urges employers to imagine some more communal solutions. She reminds that some women might choose to freeze their eggs until they find a better partner to raise a child together with their partners, but for a single parent, man or woman, subsidized child care might help more to raise their children on their own. Ms. North also suggests a broader definition of *family*, including “broader social and legal

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<sup>83</sup> Pepper Schwartz, *Modernizing Marriage*, PSYCHOLOGY TODAY, (September 1, 1994), <https://www.psychologytoday.com/articles/199409/modernizing-marriage>.

<sup>84</sup> It is somewhat ironic that Sandberg’s own company, Facebook, is one of the pioneers of the egg-freezing benefit mired in controversy. See Sheryl Sandberg, *Make Your Partner A Real Partner*, Chapter Eight, *Lean In: Women, Work, and the Will to Lead*, 104-120 (Alfred A. Knopf, 2013).

<sup>85</sup> Anna North, *The Problem with Egg Freezing*, TAKING NOTES, THE NEW YORK TIMES BLOG, (last visited March 15, 2015), <http://takingnote.blogs.nytimes.com/2015/03/20/the-problem-with-egg-freezing/>.

acceptance of non-marital living and parenting relationships.”<sup>86</sup> For example, grandparents are often involved in helping with childcare. If the caregiving grandparent falls sick, an employee should be able to take advantage of her childcare leave to take care of the ailing grandparent. In short, flexibility is the key for an employee to simultaneously balancing a career and a family, and the employers should recognize that in adopting their policies and benefits.

The technology companies providing egg-freezing as a benefit emphasized that it was just one of the many family-friendly benefits they offered employees, including other perks like “baby cash” to spend on baby-specific needs such as diapers, car seats, and meals.<sup>87</sup> They offer benefits to the adoptive and same-sex parents as well.<sup>88</sup> In fact, while announcing the egg-freezing benefit in October 2014, an Apple spokesperson said: “[w]e want to empower women at Apple to do the best work of their lives as they care for loved ones and raise their families.”<sup>89</sup> Still, the language of the announcement itself could have been made more thoughtful if Apple said that it wanted to empower both men and women in caring for their loved ones. Biologically, pregnancy is unique to one gender, but childcare does not have to be. Therefore, employers might better cater to the societal need by focusing on childcare related benefits if they want to truly empower men and women equally.

Ultimately “chosen motherhood”<sup>90</sup> defines the real liberation. When a woman chooses to become a mother, free of society’s or employers’ demands, the whole experience of motherhood becomes rewarding.<sup>91</sup> A woman may choose to

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<sup>86</sup> *Id.*

<sup>87</sup> Ann Carrns, *Parental Leave Policies at Some Big Technology Firms*, NEW YORK TIMES, (last visited February 25, 2013), [http://bucks.blogs.nytimes.com/2013/02/25/parental-leave-policies-at-some-big-technology-firms/?\\_r=0](http://bucks.blogs.nytimes.com/2013/02/25/parental-leave-policies-at-some-big-technology-firms/?_r=0).

<sup>88</sup> *Id.*

<sup>89</sup> Anushay Hossein, *Pregnant Pause: We Should Applaud Facebook and Apple For Paying Women to Freeze Their Eggs*, FORBES, (October 15, 2015), <http://www.forbes.com/sites/anushayhossain/2014/10/15/pressing-pause-we-should-applaud-facebook-and-apple-for-paying-women-to-freeze-their-eggs/>.

<sup>90</sup> BETTY FRIENDAN, *LIFE SO FAR: A MEMOIR*, 201 (Simon & Schuster Paperback Edition 2000).

<sup>91</sup> See Andrea O’Reilly, *Encyclopedia of Motherhood, Vol. 1, 1-* at 275 (Sage Publications, Inc. 2010) (citing Simone de Beauvoir, *The Second Sex* (1989)).

2017] *EGG FREEZING ON COMPANY DOLLARS* 145

freeze her eggs. She should realize, however, that she cannot freeze time. Pregnancy and childbirth are just the preliminary steps in a long journey of parenthood that demands a lot of time and energy over a much longer period of her life. Therefore, delaying pregnancy does not solve her ‘problem’ of simultaneously managing her family and her career. Rather, delaying pregnancy may actually deprive her of the opportunity to start developing earlier in her career the critical skills of time management and workload sharing with partners that are lifelong assets both at work and at home.

The employers’ role should be limited to being supportive of that chosen motherhood, irrespective of *when* that choice is exercised by a female employee. Offering an innovative benefit like covering the cost of freezing eggs is acceptable so long as the employer is cognizant about its limited authority to dictate the employee’s constitutionally protected individual rights of privacy and reproductive autonomy. Employers should not refrain from offering a comprehensive array of alternative benefits and career advancement options for men and women, because freezing eggs is not an advisable or applicable choice for everyone.

## VII. CONCLUSION

Silicon Valley technology giants like Apple, Facebook, and Intel are pioneering the trend of offering female employees the option to delay motherhood by freezing eggs. Employers are promoting egg-freezing as a tool for female employees to take control of their career, rather than promoting it as a health-related benefit to address infertility. A young woman may be lured by the sense of freedom and empowerment that comes with the possibility of countering the tyranny of the biological clock by freezing her eggs, particularly when the employer is paying. However, despite significant progress in reproductive technology, research shows that freezing eggs does not guarantee a successful healthy childbirth later in time.

This paper concludes that ultimately the burden remains on women themselves to exercise with caution the choice of freezing their eggs to delay pregnancy and childbirth. While

society should commend and encourage employers for fashioning innovative ideas for accommodating women's careers, allowing an employer to have a significant say in the most private decisions of their employees' lives, such as when one should start a family, may have more negative consequences for women in the workplace than positive. Employers should recognize that in order to be truly supportive of women's careers, they should encourage proven productivity-enhancing tools for working parents, both men and women, such as flexible work hours, paid family leave, and, on-site childcare facilities.

