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# The Gender/Class Divide: Reproduction, Privilege, and the Workplace

June Carbone & Naomi Cahn\*

## I. INTRODUCTION

When Amy, an academic researcher, froze her eggs at age thirty-seven, what surprised her most was that the process “was far less expensive than I initially thought it was going to be. I was expecting to pay around \$12-15,000, however my final price tag was under \$8,000.”<sup>1</sup> What might have proved shocking to her, however, is that the poverty threshold in the United States in 2012 for one person was \$11,170.<sup>2</sup> And Amy was only looking at one aspect of the egg freezing process. Assuming she decides to use the eggs in an attempt to become pregnant, she’ll incur additional thousands of dollars in costs associated with assisted reproductive technology, and her ability to pay these costs (and the costs associated with the hoped-for pregnancy) reflects her economic status, her employment status, and her health insurance.

In this article, we consider the complexities that advances in the technology of egg freezing<sup>3</sup> pose for workplace equality. Today’s workplace rewards education and investment in the market potential

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<sup>1</sup> Amy, Posting to *Everything Egg Freezing*, EGGSURANCE, <http://www.eggsurance.com/knowledge-hub.aspx> (last visited May 21, 2013). See, e.g., Sarah Elizabeth Richards, *We Need to Talk About Our Eggs*, N.Y. TIMES (Oct. 22, 2012), [http://www.nytimes.com/2012/10/23/opinion/we-need-to-talk-about-our-eggs.html?\\_r=1](http://www.nytimes.com/2012/10/23/opinion/we-need-to-talk-about-our-eggs.html?_r=1); SARAH ELIZABETH RICHARDS, *MOTHERHOOD RESCHEDULED* (2013).

<sup>2</sup> *2012 HHS Poverty Guidelines: One Version of the [U.S.] Federal Poverty Measure*, U.S. DEP’T HEALTH & HUMAN SERVS., <http://aspe.hhs.gov/poverty/12poverty.shtml> (last updated Feb. 9, 2012).

<sup>3</sup> See *infra* notes 70-73 for further discussion of the medical aspects of egg freezing. While this article focuses on egg freezing, women’s health, and the workplace, another aspect of egg freezing involves its opportunities to create new families, particularly the implications of egg freezing for gay male couples. See, e.g., NAOMI CAHN, *THE NEW KINSHIP* (2013) (discussing egg donation and gay parents).

of both men and women. As this transformation has occurred in employment, well-educated women, like well-educated men, increasingly postpone childbearing.<sup>4</sup> Consequently, the middle class postpones family formation until they have attained a measure of financial security and the maturity to balance dual earner arrangements.<sup>5</sup> The result makes middle class women's lives much more like men's – the twenties have become a time to secure a career, the early thirties a time to prove one's worth in both employment and marriage markets, and the late thirties and forties a time to enjoy the benefits, with greater ability to combine work and family. At the same time, these developments increase class-based differences, as the women who do not complete college (and aren't even thinking about graduate school) bear children at different times in their life cycles, have less leverage with employers, and have different understandings about the appropriate tradeoffs between work and family, fathers and mothers, single and dual-parenting.

This article examines the reproductive-role assumptions underlying women's workforce participation and attempts to make visible the class dimension in the assumptions. It then considers the potential impact of egg freezing, which allows women to "bank" their eggs until they are ready to use them,<sup>6</sup> in the context of these assumptions. Middle class women today are engaged in a high stakes game of reproductive "chicken" (and egg). The longer they wait the more they can accomplish, and the better their odds for a good job, a stable intimate partnership, and the flexibility and income to combine career and family. The longer they wait, however, the more they risk not being able to bear children at all. Egg freezing offers a potential solution, and if every 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>7</sup>

Such a shift would also exacerbate the increasing class chasm between the educated third of the American workforce and everyone

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<sup>4</sup> See NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* (2010).

<sup>5</sup> See June Carbone & Naomi Cahn, *The End of Men or the Rebirth of Class?*, 93 B.U. L. REV. (forthcoming 2013).

<sup>6</sup> For an overview of some of the complex issues involved in egg freezing, see Adrienne Asch, *The Lessons of Oncofertility for Assisted Reproduction*, in *ONCOFERTILITY: ETHICAL, LEGAL, SOCIAL, AND MEDICAL PERSPECTIVES* 179 (Teresa K. Woodruff et al. eds. 2010); Angel Petropanagos, *Reproductive "Choice" and Egg Freezing*, in *ONCOFERTILITY: ETHICAL, LEGAL, SOCIAL, AND MEDICAL PERSPECTIVES* 221 (Teresa K. Woodruff et al. eds. 2010).

<sup>7</sup> *But see*, Karey Harwood, *Egg Freezing: A Breakthrough for Reproductive Autonomy*, 23 *BIOETHICS* 39, 46 (2009).

else. The effort to remake workforces to accommodate work and family has stalled. The greater the human capital of the employee, the more flexible the workforce she is likely to encounter. Less skilled women are more likely to be on their own, with less family and workplace support, and they often respond by cycling in and out of the labor force in accordance with their families' needs. We situate the egg freezing developments within the contexts of the gender and class developments that have remade women's lives.

First, this article contrasts the egg freezing's enormous potential benefits to individual women (and their partners) against the potential dangers. Once egg freezing takes hold as a valuable – and viable – option, pressures are likely to build to make it a *routine* one. A fertility industry eager to enhance its market share, it may well push its services without comprehensive assessment of the potential risks to the health of women and children.<sup>8</sup> Little federal regulation of the reproductive technology industry exists, and, given the novelty of egg freezing, few long-term studies have been able to assess its medical risks. Moreover, given the resistance to federal funding of reproductive issues, minimal public funds are likely to be available for the testing.

Second, the availability of egg freezing may make it that much harder to marshal coalitions to push for more family friendly workplaces. It is accordingly likely to exacerbate existing cultural, regional, and class divisions. Egg freezing is likely to remain an elite practice, well beyond the reach of working class women who can't afford to freeze their eggs, and who enjoy less workplace support for their family needs.<sup>9</sup> The result of technological advances in egg freezing will further marginalize those on the losing end of today's economy, reinforcing the growing disparity between families based on class. We

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<sup>8</sup> For an overview of the reproductive technology business, see DEBORA SPAR, *THE BABY BUSINESS: HOW MONEY AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* (2006); Jim Hawkins, *Doctors as Bankers: Evidence from Fertility Markets*, 84 TUL. L. REV. 841 (2010); Jim Hawkins, *Financing Fertility*, 47 HARV. J. ON LEGIS. 115 (2010); Jim Hawkins, *Selling ART: An Empirical Assessment of Advertising on Fertility Clinics' Websites*, 88 IND. L.J. (forthcoming 2013). While egg freezing contributes to the health of the reproductive technology industry, there has been little research on how advanced reproductive technologies, including in vitro fertilization, affect the long-term health of the patients and their children. See *infra* notes 70-75.

<sup>9</sup> While prices may decrease somewhat as egg freezing becomes more widespread, we suspect that it will still remain outside the financial reach of many women, unless it is covered by health insurance. Moreover, even if prices came down, studies show that routine access to health care, planning for reproduction, and consistent use of contraception all vary with income and education. See, e.g., NAOMI CAHN, *TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION* 136-37, 141 (2009); Tarun Jain & 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). There is no reason to expect that egg freezing will be any different.

predict that the overall effect will be to slow the needed remaking of workplace and family systems to better accommodate a changing relationship between work and family and reinforce the diverging socio-economic status and socializations of elite and working-class women. Ultimately, the cultural dilemmas inherent in egg freezing show the need to develop new models of success: for working class women, this means educational and employment opportunities that encourage them to delay childbearing, and for elite women, this means opportunities that foster earlier childbearing.

## II. INEQUALITY AND THE NEW MIDDLE CLASS MODEL

Greater income inequality in the United States is transforming the family lives of both the top and the bottom of the new American hierarchy. These disproportionate increases in pay at the top result from what Cornell economist Robert Frank calls a “winner-take-all” economy with more steeply banked hierarchies.<sup>10</sup> At the top, young people are engaged in a high stakes game of dating and mating, as they attempt to climb steeper career ladders. For some, the potential payoffs are enormous. In today’s world, the incomes of the top executives, venture capitalists, doctors, and lawyers are exponentially higher than those a few rungs lower in the same professions.<sup>11</sup> Moreover, breaking into and keeping plum professional positions—management jobs, tenure-track professorships, law firm partnerships—has become more competitive as the economy has stagnated. Doing so requires not just a college degree, but also the right graduate school, a succession of internships, long hours at work gaining an edge or establishing a professional pedigree, and often the willingness to travel and relocate. Employment studies indicate that working hours have become a marker of class.<sup>12</sup> In the more egalitarian sixties, management and union men had about the same amount of leisure time. Today, the most highly paid work the longest hours, and the top American women re-

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<sup>10</sup> ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER TAKE ALL SOCIETY: WHY THE FEW AT THE TOP GET SO MUCH MORE THAN THE REST OF US* (1996).

<sup>11</sup> The growth in income inequality has come largely from the increase in compensation for top executives and financial experts, with the five highest paid executives in large corporations, for example, enjoying increases in compensation that substantially exceed the increases for other executives and those in other occupations. From 1978 to 2011, CEO compensation increased more than 725 percent, a rise substantially greater than stock market growth and the painfully slow 5.7 percent growth in worker compensation over the same period, with the greatest growth coming in the period between 1993 and 2007. Lawrence Mishel & Natalie Sabadish, *CEO pay and the top 1%*, ECON. POL’Y INST. (May 2, 2012), <http://www.epi.org/publication/ib331-ceo-pay-top-1-percent/>.

<sup>12</sup> For a summary of this literature, see JUNE CARBONE & NAOMI CAHN, *FAMILY CLASSES*, (forthcoming 2013); Carbone & Cahn, *supra* note 5.

port the greatest number of work hours out of any women in the world.<sup>13</sup> This section discusses the interrelationship of the labor market with family roles.

#### A. Marriage market disparities

The competition within “marriage markets” parallels the economic changes. Christine Schwartz observes that as “women’s labor force participation has grown, men may have begun to compete for high-earning women just as women have traditionally competed for high-earning men.” She shows that as men and women both consider potential mates’ earning power, the economically successful have become more likely to marry the similarly successful.<sup>14</sup> Men are increasingly looking for women who will “pull their own weight” in marriage. The largest changes, moreover, have occurred for the most ambitious. The highest income families show the greatest gains in overall income. This is partly because high earning men have become more likely to marry high earning women and partly because the women have become less likely to drop out of the labor market after marriage.<sup>15</sup> In today’s competitive world, high earning men may feel they need high earning partners to afford the good life in cities like New York, San Francisco, Chicago or D.C., and potentially find that delaying childbearing increases the odds of landing a high income mate *and* establishing the career credentials necessary to combine flexible hours with significant income.<sup>16</sup>

These changes have occurred in two overlapping waves. The first was heavily concentrated in the seventies. The combination of greater economic opportunities for women and greater control of reproduction (through contraception and abortion) encouraged young women to invest in their careers. Economists Claudia Goldin and Lawrence Katz found that in a few short years, legal changes that made abortion legal and contraception available on college campuses had a nearly immediate impact on the average age of marriage, overall fertility, and women’s ability to attend professional and graduate schools.<sup>17</sup> In the

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<sup>13</sup> For a summary of these developments, see CAHN & CARBONE, *supra* note 4, at 198.

<sup>14</sup> Christine R. Schwartz, *Earnings Inequality and the Changing Association between Spouses’ Earnings*, 115 AM. J. SOC. 1524 (2010).

<sup>15</sup> *Id.*

<sup>16</sup> Steve Sailer, *Value Voters*, AM. CONSERVATIVE (Feb. 11, 2008), <http://www.theamericanconservative.com/articles/value-voters/>.

<sup>17</sup> Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women’s Career and Marriage Decisions*, 110 J. POL. ECON. 730 (2002).

sixties, half of all college graduates were married by age 23. By the end of the seventies, that number had fallen to thirty percent.<sup>18</sup>

The second change accompanied the growth in income inequality that accelerated in the nineties. During that decade, the families at the top and bottom of the social order began to move in opposite directions. The age of marriage has risen steadily throughout the country as a whole, increasing most dramatically for college graduates. For those in these later marriages, divorce rates have fallen and measures of marital quality increased while the field of family law has attempted to respond to their needs.<sup>19</sup> Those on the losing end of the economic changes, however, have seen their divorce rates continue to rise, non-marital births rates increase, and their children lose ground in terms of parental time and resources.<sup>20</sup> Putting the trends together, the age of first birth is now younger than the age of first marriage, as marriage and childbearing no longer necessarily occur together.<sup>21</sup> Various surveys report that women as well as men place greater emphasis on a spouse's earning capacity in marriage.<sup>22</sup> For those who marry "well," the payoffs are greater than ever in terms of family income security in a stagnant economy, marital satisfaction, and the ability to produce "high-quality" children (with superlative opportunities at a time when class-based differences in expenditures on children have increased substantially).<sup>23</sup> It's a cold, cruel world out there and ambitious parents spend more than junior college tuition on the right preschools, music lessons, traveling athletic teams, and calculus tutors.<sup>24</sup> In such a world, reproduction becomes a high stakes game of chicken. Compet-

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<sup>18</sup> *Id.*

<sup>19</sup> CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA, 1960-2010* 156-59, 167 (2012) (discussing divorce rates and the concentration by class); *see also* Stephane Mechoulan, *Divorce Laws and the Structure of the American Family*, 35 J. LEGAL STUD. 143, 164 (2006); William Eskridge, *Family Law Pluralism*, 100 GEO. L.J. 1881 (2012).

<sup>20</sup> Sara McLanahan, *Diverging Destinies: How Children are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHICS 607 (2004).

<sup>21</sup> Kay Hymowitz, Jason S. Carroll, W. Bradford Wilcox, Kelleen Kaye, *Summary*, KNOT YET: THE BENEFITS AND COSTS OF DELAYED MARRIAGE IN AMERICA, <http://twentysomethingmarriage.org/summary/> (last visited May 21, 2013) [hereinafter KNOT YET].

<sup>22</sup> *See, e.g.*, David M. Buss, Todd K. Shakelford, Lee A. Kirkpatrick, & Randy J. Larsen, *A Half Century of Mate Preferences: The Cultural Evolution of Values*, 63 J. MARRIAGE & FAM. 491-503 (2001).

<sup>23</sup> On marital quality, *see* PAUL R. AMATO ET AL., *ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING* (2007). On the achievement gap in children, *see* Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY? RISING INEQUALITY AND THE UNCERTAIN LIFE CHANCES OF LOW-INCOME CHILDREN* (R. Murnane & G. Duncan eds., 2011).

<sup>24</sup> *See, e.g.*, CHRISTOPHER HAYES, *TWILIGHT OF THE ELITES: AMERICA AFTER MERITOCRACY* 39, 58 (2012).

itive and unequal societies are hardly new, but in other eras the men postponed marriage until they accumulated the success necessary to land a high-quality wife, and then married substantially younger women. Today, the age gap between spouses remains small.<sup>25</sup> The new regime counsels a similar strategy for both men and women: invest in the earning power of both sexes and delay marriage until the point of emotional maturity and financial independence.<sup>26</sup> Both men and women enhance their marital prospects if they postpone marriage until they have reached a measure of career success and financial stability. Indeed, top earning women have shown greater gains in the likelihood of marrying than any other group in society.<sup>27</sup>

As a result, the elite have shifted family formation, including both marriage and childbearing, into the late twenties and beyond. The new middle class family is one undertaken only after lengthy preparation, selection of the right partner and a conviction that, in bringing a child into the world, the parents are capable of vindicating the trust such a critical responsibility requires. This post-industrial family model, what we have labeled the “blue” life, invests in women and men and believes in delayed family formation until after young adults reach emotional and financial independence.<sup>28</sup> In the meantime, women have fought for the freedom to enter sexual relationships—with men and women—on terms of their choosing. Sex need no longer require openness to pregnancy; childbirth has replaced sexual relations as the “sacred” undertaking; and maturity and financial independence, rather than marriage or family form, have become the indicia of responsible parenthood.

Investment in career success, however, carries its own price. A much higher percentage of the population is single, and almost forty percent of Americans believe that marriage is outdated.<sup>29</sup> Yet, the vast majority will marry eventually. Before they do, however, middle class men and women will spend their twenties unmarried, often on their own, experimenting with different relationships and engaged in what may be a decade-long search for the right partner. This generation will grow up *before* they get married, and in the process, they will reach more informed and (hopefully) mature decisions on what kind of

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<sup>25</sup> Betsy Stevenson & Justin Wolfers, *Marriage and Divorce: Changes and Their Driving Forces*, 21 J. ECON. PERSPECTIVES 27, 31 (2007).

<sup>26</sup> CAHN & CARBONE, *supra* note 4.

<sup>27</sup> Michael Greenstone & Adam Looney, *The Marriage Gap: The Impact of Economic and Technological Change on Marriage Rates*, BROOKINGS INST. (Feb. 3, 2012), <http://www.brookings.edu/blogs/jobs/posts/2012/02/03-jobs-greenstone-looney>.

<sup>28</sup> CAHN & CARBONE, *supra* note 4.

<sup>29</sup> *The Decline of Marriage and Rise of New Families*, PEW RES. CTR. 1 (2010), <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>.

partner allows them to realize the family life they wish to create.<sup>30</sup> These patterns are more individualistic than the old institutional model, but while they do vary more than the breadwinner/homemaker model of the fifties, it is a mistake to think that they are based only on dewy-eyed romance.

Instead, today's marital partners search for a mate with shared values, and they are likely to be drawn to partners who can truly share their lives and their successes. Finding the right person, and settling into the right city and a secure position take more effort than marrying a high school sweetheart or the person who got you pregnant on prom night. Moreover, today many women give up on the gold ring and often the man who fathered their children, particularly if he cannot hold a steady job or does not help out with dishes and diapers while the mother works full-time.<sup>31</sup> With these changes, family structure has become a marker of class. The college-educated marry and bear children later than the less educated, while those with less education have become increasingly likely to bear children first. The non-marital birth rate has stayed at two percent for white college graduates over the last twenty-five years, and risen only slightly for college-educated racial minorities. During the same period, the non-marital birth rate has reached forty percent for the country as a whole. For women with less than a high school education it is seventy percent, while for college-educated women it is less than ten percent.<sup>32</sup> Divorce rates, which leveled off for college graduates after 1980, continued steeply upward for the working class, and the incidence of children raised in single-parent families is heavily concentrated in poorer

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<sup>30</sup> On the changing transitions to adulthood, see Elizabeth Fussell & Frank F. Furstenberg Jr., *The Transition to Adulthood during the 20th Century: Race, Nativity and Gender*, in *ON THE FRONTIER OF ADULTHOOD: THEORY, RESEARCH, & PUBLIC POLICY* 29 (Richard A. Settersten Jr. et al., eds., 2005) (noting that, for men of Western European origin, stable employment was a precursor to the ability to form a family, and in the first half of the twentieth century, such employment was generally attainable by age 20, but no longer is today). *THE PRICE OF INDEPENDENCE: THE ECONOMICS OF EARLY ADULTHOOD* (Sheldon Danziger & Cecilia Rouse eds., 2007).

<sup>31</sup> See, e.g., Sara S. McLanahan & Irwin Garfinkel, *The Fragile Families and Child Well-Being Study: Questions, Design and a Few Preliminary Results* 41 (Inst. for Res. on Poverty, Discussion Paper No. 1208-00, May 2000), available at <http://crcw.princeton.edu/workingpapers/WP00-07-McLanahan.pdf>; Kristen Hartnett & Arielle Kuperberg, *Education, Labor Markets and the Retreat from Marriage*, 90 *SOC. FORCES* 41 (2011); see also Liana C. Sayer, Paula England, Paul Allison, & Nicole Kangas, *She Left, He Left: How Employment and Satisfaction Affect Men's and Women's Decisions to Leave Marriages*, 116 *AM. J. SOC.* 1982 (May 2010).

<sup>32</sup> Kimberly Daniels & R. Kelly Raley, *Educational Attainment, Romantic Relationships, and Non-Marital Fertility*, (unpublished research presented at Population Association of America meeting) (Apr. 1, 2010), available at <http://paa2010.princeton.edu/papers/101678>.

communities.<sup>33</sup> This means that for women, higher education not only produces greater income, it also increases women's opportunities to marry higher status men – albeit not immediately after college. That in turn increases the effects of class in defining marriage markets and in increasing inequality between families.<sup>34</sup>

To have access to the highest status men, a woman must complete her own education, hold a job, and avoid having a child until she meets the right partner. Tugging a two-year-old along can make dating difficult in most social classes, and it certainly complicates educational and career success.<sup>35</sup> It's particularly rare among the women who land the more economically successful men.<sup>36</sup> All of the evidence indicates that both the ability to complete higher education and the likelihood of avoiding an early unplanned birth have become more differentiated by class over the last fifteen years.<sup>37</sup> College education has become less affordable, and the likelihood of completion correlates more closely with parental income and education. Unplanned pregnancies have gone down substantially for college graduates while increasing for the poorest women. Unsurprisingly therefore, the age at which women first give birth has gone up steadily for women with college degrees, while remaining largely unchanged for less educated women.<sup>38</sup> For the poor and working class, the conclusion that the stable relationship with the secure economic foundation has become unattainable makes some of the steps to getting there, such as the postponement of childbearing, pointless or counterproductive. By contrast, avoiding early pregnancy and childbirth has emerged as a defining element of middle class life. It also means that the men and women with six figure incomes who marry each other have a substantial advantage over the less successful.<sup>39</sup>

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<sup>33</sup> See Murray, *supra* note 19, at 156 (white non-marital birth rates); *Id.* at 159, 167 (concentration by class).

<sup>34</sup> See, e.g., Carbone & Cahn, *supra* note 5. For a discussion of marriage markets among black women of different educational levels, see RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE (2011).

<sup>35</sup> See, e.g., KNOT YET, *supra* note 21, at 19 fig. 11.

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

<sup>37</sup> See, e.g., Rachel Benson Gold, *Rekindling Efforts to Prevent Unplanned Pregnancy: A Matter of "Equity and Common Sense"*, GUTTMACHER POL'Y REV., Summer 2006, at 2-3, available at <http://www.guttmacher.org/pubs/gpr/09/3/gpr090302.html>.

<sup>38</sup> Sara McLanahan, *Diverging Destinies: How Children are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHICS 607 (2004).

<sup>39</sup> See TIMOTHY NOAH, THE GREAT DIVERGENCE: AMERICA'S GROWING INEQUALITY CRISIS AND WHAT WE CAN DO ABOUT IT 55-56 (2012) ("Among married couples in the United States, [Christine R.] Schwartz calculated, earnings inequality would, from 1967-2005, be 25 to 30 percent lower were it not for that period's greater correlation between spouses' incomes.").

As they engage in multiple different relationships during their twenties and early thirties, the college-educated move towards their peak productivity—which is achieved during women’s most fertile childbearing years.

## B. Wage disparities among women

Over the last thirty years, the structure of the American workforce and the corresponding structure of American families have undergone dramatic change. The information economy rewards the more highly educated, women now outnumber men at all levels of education, women constitute almost one-half of the workforce, and business is realizing the value of “softer” management styles. Some have heralded the overall effect as women power; or, in the words of a spate of books and articles beginning in 2010, “the end of men.”<sup>40</sup> They point out that women appear to be closing the income gap and more women than ever out earn their husbands. While women now constitute almost one-half of the workforce, and more women than ever are in college and the workplace, nonetheless, in the public sphere, in the worlds of political power and managerial power, and in the executive suites, women are losing ground.<sup>41</sup> Moreover, a focus on women’s advances hides the greater inequality in society among men and among women. Income inequality throughout society is increasing. Indeed, the gendered wage gap increased in 2012,<sup>42</sup> more women than men live in poverty.<sup>43</sup> Women continue to earn less than men in most occupations, and the most female-dominated occupations—secretaries and administrative assistants, registered nurses, elementary and middle school teachers, cashiers, and retail salespeople<sup>44</sup>—are

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<sup>40</sup> See, e.g., Hanna Rosin, *The End of Men*, THE ATLANTIC (June 8, 2010, 9:00 AM), <http://www.theatlantic.com/magazine/archive/2010/07/the-end-of-men/8135/>.

<sup>41</sup> See, e.g., Carbone & Cahn, *supra* note 5; see also Frank Bass & Jennifer Oldham, *Wage Gap for U.S. Women Endures Even as Jobs Increase*, BLOOMBERG NEWS (Oct. 25, 2012, 12:00 AM), <http://www.bloomberg.com/news/2012-10-25/wage-gap-for-u-s-women-endures-even-as-jobs-increase.html> (noting that in only one occupation class do women actually outearn men – women who are “transportation, storage and distribution managers” earn \$1.02 for each \$1 earned by a man in the same job. By contrast, in finance, women earn fifty-five cents for every dollar that a man earns).

<sup>42</sup> Bonnie Kavoussi, *Gender Pay Gap Widened In 2012, Back To 2005 Levels*, HUFFINGTON POST (Feb. 14, 2013, 1:33 PM), [http://www.huffingtonpost.com/2013/02/13/gender-pay-gap-2012\\_n\\_2676944.html](http://www.huffingtonpost.com/2013/02/13/gender-pay-gap-2012_n_2676944.html).

<sup>43</sup> Carmen DeNavas-Walt et al., *Income, Poverty and Health Insurance Coverage in the United States: 2011*, U.S. DEPT COM. 14 tbl. 3 (Sept. 2012), <http://www.census.gov/prod/2012pubs/p60-243.pdf>.

<sup>44</sup> Heather Boushey, *The New Breadwinners*, SHRIVER REPORT tbl. 2 (2009), <http://www.shriverreport.com/awn/economy.php>.

comparatively low-paying, even though many of the positions require a college degree.<sup>45</sup>

Second, even if working class women could afford to freeze their eggs, their job trajectories are dramatically different. College-educated women plan childbearing in accordance with a career—they are more likely to wait to have children until they enjoy greater job security and benefits such as family and medical leave. As a result, when they decide to use those frozen eggs, they don't risk losing their jobs. As Sheryl Sandberg, the COO of Facebook points out, it is much easier to balance work and life with money.<sup>46</sup>

Working class women are more likely to put childbearing first (both in time and as a priority), and to cycle in and out of the labor market in accordance with their families' needs. Moreover, working class women, even if they find intrinsic motivation in their work, experience less supportive work environments. The U.S. Census Bureau reports 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>47</sup> In addition, 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>48</sup> Women who are able to take paid maternity leave also have higher wages than women who are unable to do so, even after controlling for relevant variables.<sup>49</sup>

In part because they enjoy more flexible workplaces but also in part because the price of leaving the workforce is so high in terms of income loss and harm to career advancement, middle-class women have become much more likely to remain employed both during pregnancy and after giving birth. According to the Census Bureau, twenty-eight percent of women with less than a high school degree worked during their first pregnancies in comparison with seventy percent of those with some college, and eighty-seven percent of women with a college degree (or higher).<sup>50</sup> Economist Heather Boushey

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<sup>45</sup> *May 2011 National Occupational Employment and Wage Estimates United States*, U.S. BUREAU OF LAB. STAT., [http://www.bls.gov/current/oes\\_nat.htm](http://www.bls.gov/current/oes_nat.htm) (last updated Mar. 29, 2012).

<sup>46</sup> See SHERYL SANDBERG, *LEAN IN* (2013).

<sup>47</sup> See Heather Boushey & Sarah Jane Glynn, *The Many Benefits of Paid Family and Medical Leave*, CTR. FOR AM. PROGRESS (Nov. 2, 2012), <http://www.americanprogress.org/issues/labor/report/2012/11/02/43651/the-many-benefits-of-paid-family-and-medical-leave/>.

<sup>48</sup> 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> [hereinafter *Maternity Leave*].

<sup>49</sup> See Boushey & Glynn, *supra* note 47.

<sup>50</sup> *Maternity Leave*, *supra* note 48, at 5 tbl. 2.

found that the “child penalty,” the effect of having a child on labor force participation rates, is negligible for highly educated women, while it is considerable for women with less education; the employment rate for women with less education who had children at home was 21.7% less than for those women with the same education who did not have children at home, while for women with a graduate degree, the penalty rate was 1.3%.<sup>51</sup> The disparity most likely reflects a number of factors: less-educated women are more likely to find that the cost of child care exceeds the amount of money they would make by working; with less-reliable child care, they may find it more difficult to stay employed; they are more likely to hold traditional values about women’s roles; they are less likely to be able to secure satisfying jobs; and the jobs they are able to find are less likely to be flexible about children’s illnesses or babysitting emergencies. Whatever the source, lesser income in turn reduces the resources that the parents can bring to childrearing.

Moreover, the timing issues allow upper middle class parents to invest more in their children; with secure jobs, flexibility, and higher incomes, upper middle class women can become even more helicopter-ish in their parenting. As sociologist Annette Lareau explains, middle-class and working-class families have different approaches to raising children.<sup>52</sup> Middle-class parenting is more likely to be characterized by intensive, highly organized child rearing, and it involves constant shuffling between baseball, tutoring, and dance. By contrast, working class parenting is more organic and less structured, with parents who are much less likely to intervene in their children’s lives. Accordingly, professional women may experience more tension between their images of parenting and the reality of their jobs. As Sherry Linkon, who co-directed the Center for Working-Class Studies at Youngstown State University for more than a decade, points out: “Even with less flexibility and power in their jobs, working-class women may be able to fit work life and home life together more smoothly, because family life involves fewer activities and less pressure for performance.”<sup>53</sup> Working class women may be less likely to perceive the same need to defer childbearing both because of differing needs to invest in their careers and the differing types of investments in chil-

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<sup>51</sup> Heather Boushey, *Are Women Opting Out? Debunking the Myth*, CTR. ECON. & POL’Y RES. 10-13 (2005), [http://www.cepr.net/documents/publications/opt\\_out\\_2005\\_11\\_2.pdf](http://www.cepr.net/documents/publications/opt_out_2005_11_2.pdf)

<sup>52</sup> E.g., ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* 76 (2d ed. 2011).

<sup>53</sup> Sherry Linkon, *Can Working-Class Women Have it All?*, WORKING CLASS PERSPECTIVES (Sept. 3, 2012), <http://workingclassstudies.wordpress.com/2012/09/03/can-working-class-women-have-it-all/>.

drearing. The result, however, is to increase the class divide between the children of the working and middle classes.

### III. WHY EGG FREEZING?

Men continue to produce sperm throughout their lives; women have all of the eggs they will ever have at birth. While aging reduces the quality of both sperm and eggs, the absolute number of women's eggs decline over time and those that remain have larger number of chromosomal abnormalities. Egg freezing promises, literally, to stop the biological clock, preserving a woman's eggs from the ravages of time until she is ready to use them.<sup>54</sup> The fine print about potential side effects from the necessary medications to produce the eggs, the effect of freezing on egg quality, and the questionable likelihood of a resulting pregnancy is often too small to be seen (or heeded).

This is, fundamentally, a women's issue, albeit with larger implications for workplace equality. The workplace has long been built around men's lifestyles, as married fathers have been thought to be the most reliable employees. While fathers, too, experience increasing work-family tensions, the age-related decline in men's fertility is not as severe, and issues of workplace equality have generally not played a role in their decisions to preserve their sperm. Indeed, while technological advances have enabled men to freeze their sperm for more than half a century,<sup>55</sup> men generally bank their sperm more out of concern for issues such as infertility caused by cancer or in order to facilitate posthumous reproduction.<sup>56</sup> This section explores the promises and perils of egg freezing.

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<sup>54</sup> See, e.g., Jennifer Ludden, *Egg Freezing Puts the Biological Clock on Hold*, NAT'L PUBLIC RADIO (May 31, 2011 12:01 AM), available at <http://www.npr.org/2011/05/31/136363039/egg-freezing-puts-the-biological-clock-on-hold>.

<sup>55</sup> See CAHN, *supra* note 9; DAVID PLOTZ, *THE GENIUS FACTORY: THE CURIOUS HISTORY OF THE NOBEL PRIZE SPERM BANK* (2006).

<sup>56</sup> See, e.g., Frank Buckley, *Insurance Policy: Troops Freezing Sperm*, CNN (Jan. 30, 2003), <http://www.cnn.com/2003/HEALTH/01/30/military.fertility/index.html>. As possibilities for women to preserve their fertility have increased, women now have similar options as they face cancer treatments or go off to war. See, e.g., ONCOFERTILITY: ETHICAL, LEGAL, SOCIAL, AND MEDICAL PERSPECTIVES 179 (Teresa K. Woodruff et al. eds. 2010). And research has begun to show that men may have similar reproductive limitations as they age. See Susan Newman, *Should Young Men Freeze Their Young Sperm?*, PSYCHOL. TODAY (Nov. 8, 2012), <http://www.psychologytoday.com/blog/singletons/201211/should-young-men-freeze-their-young-sperm>.

### A. Egg freezing's promise<sup>57</sup>

Egg freezing offers the hope that women can have it all—career, desirable partner, healthy children—without biological limits on fertility. Proponents make that point explicitly: “it should be celebrated as another way in which technological progress is reducing and ameliorating inequalities between women and men, reproductive and otherwise.”<sup>58</sup> Indeed, one medical facility announces:

In essence egg banks are now coming of age. This can be particularly useful for a young woman, who is still pursuing career objectives and/or who has not yet found the partner of her dreams, or someone who is simply not ready to start her family for any of a myriad of reasons. In a sense, by removing eggs at a particular point in time, and freezing them for use in the future, it can be considered that the person is “insuring” against their biological clock running out by the time they are ready to become pregnant.<sup>59</sup>

The lure of freezing eggs allows women to defer childbearing until they are ready both personally and professionally. Having a child appears to become an even more deliberate choice that can be scheduled with nine months' notice: simply defrost, add sperm, and transfer upon demand. Women who wish to reproduce need not worry about calculating the period of their fertility, settling for a less desirable partner, or opting out of a promising career ladder before they are ready.<sup>60</sup>

As every student of the “mommy track” knows, departure from the model of full-time worker brings disproportionate decreases in benefits and pay. Rather than leave a grueling workplace in their late twenties or early thirties when they have children, women can continue working until they have achieved the stability they think they need for childbearing. The reason most professional women leave the work-

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<sup>57</sup> See Julian Savulescu & Imogen Goold, *Freezing Eggs for Lifestyle Reasons*, 8 AM. J. BIOETHICS 32 (2008); Imogen Goold & Julian Savulescu, *In Favour of Freezing Eggs for Non-Medical Reasons*, 23 BIOETHICS 47 (2009).

<sup>58</sup> Ronald Bailey, *The Ethics of Egg Freezing*, REASON (May 22, 2012), <http://reason.com/archives/2012/05/22/the-ethics-of-freezing-eggs>.

<sup>59</sup> *Introduction*, NY FERTILITY SERVS., [http://www.newyorkfertilityservices.com/index.php?option=com\\_content&view=article&id=10&Itemid=106&lang=en](http://www.newyorkfertilityservices.com/index.php?option=com_content&view=article&id=10&Itemid=106&lang=en) (last visited April 18, 2013).

<sup>60</sup> See Judith Shulevitz, *How Older Parenthood Will Upend American Society*, NEW REPUBLIC (Dec. 6, 2012), <http://www.tnr.com/article/politics/magazine/110861/how-older-parenthood-will-upend-american-society>; SINGLE MOTHERS BY CHOICE, <http://www.singlemothersbychoice.org/> (last visited June 28, 2013).

force is family-driven,<sup>61</sup> and, even though they may need to cut back on expenses, they can opt out because they have a partner who can pay the bills.<sup>62</sup> As sociologist Pamela Stone explains, women don't opt out so much as they are forced out by workplaces that don't respond to the flexibility they need.<sup>63</sup> If women can become more established in their workplaces and more financially secure, then they will be better able to manage the work-family balance and to demand the flexibility they need. The result looks very much like the much vaunted male workforce cycle—work hard in the peak childbearing years to establish a career and enjoy the mid-life slack that comes with university tenure, a management position, partnership status or entrepreneurial success. If women only defer childbearing long enough, they too can reap such rewards, using the benefits to invest in their “high quality” children rather than Ferraris or affairs.

Egg freezing also gives middle class women more time to find the perfect mate or decide on single parenthood. Women who wait can develop the maturity and stability necessary to continuing two-parent relationships and, as we explained above, will also have improved marital prospects if they achieve a greater measure of career success. It also appears to increase the alternatives for those women who give up on the prospect of ever finding “Mr. Right.”<sup>64</sup>

The promise of egg freezing for working class women, however, is minimal. Working class women are much more likely to be dependent on their own incomes, either because they are single parents or because their families need two incomes. At the same time, they are more likely to be forced out of the workplace when they become pregnant. Young women with limited educations or career investments find it easier to cycle in and out of low paying jobs than to negotiate paid leave or flexible hours. Moreover, almost half of all pregnancies are unintended: the U.S. leads the developed world with its lack of support for family planning, and with greater societal inequali-

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<sup>61</sup> See Sylvia Hewlett et al., *Off-Ramps and On-Ramps Revisited*, HARVARD BUS. REV., June 2010, at 30, available at <http://hbr.org/2010/06/off-ramps-and-on-ramps-revisited/ar/1>.

<sup>62</sup> See KARINE MOE & DIANE SHANDY, GLASS CEILINGS AND 100-HOUR COUPLES: WHAT THE OPT-OUT PHENOMENON CAN TEACH US ABOUT WORK AND FAMILY 29-30 (2009).

<sup>63</sup> 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/>.

<sup>64</sup> Women may give up on meeting Mr. Right because they have found Ms. Right instead, or they may decide to become single parents. In either situation, egg freezing can provide a promise of future fertility. Nonetheless, the egg freezing does not guarantee successful reproduction and the promise may turn out to be illusory in light of the risks beyond the medical procedures themselves, such as the frozen eggs not maturing into babies and the consequences of pregnancy later in life).

ty, the possibility of a later planned pregnancy has increasingly become associated only with the better educated and well off.<sup>65</sup> Egg freezing has little appeal for women with a child already in tow, and it is likely to be beyond the reach of groups who have trouble managing fertility. While we would like to see egg freezing as a universally subsidized health care option for those women facing cancer or other treatments that that will render them infertile,<sup>66</sup> women in an inflexible and low-paying job are probably less likely to see the advantages of postponing childbearing.

## B. Reproductive choice

For women who want to choose when to become pregnant, preserving fertility appears to truly further reproductive autonomy.<sup>67</sup> Like the pill, advances in reproductive technology do allow women more control over their fertility, seemingly ensuring that they do not find themselves facing a series of “distinctly unfunny”<sup>68</sup> medical options as their biological clocks run out of time. The promise of the reproductive technologies—producing babies—now goes well beyond curing infertility. We can imagine a continuum of procreative choices, ranging from birth control at one end and the advanced technologies at the other end, with a range of decisions on childbearing in between and a variety of legal protections for each of these decisions. Indeed, the egg freezing industry is self-consciously embracing the label of reproductive choice, analogizing the technology to the birth control pill.<sup>69</sup>

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<sup>65</sup> See Gladys Martinez et al., *Fertility of Men and Women Aged 15-44 Years in the United States: National Survey of Family Growth, 2006-2010*, NAT'L HEALTH STAT. REPS. fig. 3 (Apr. 12, 2012), <http://www.cdc.gov/nchs/data/nhsr/nhsr051.pdf> (showing that younger ages of childbearing are associated with poverty, and more than 50% of women with less than a high school education had a child before the age of 20, compared to only 4% of those with at least a college degree); James B. Kelleher, *Unplanned Pregnancies Rising Among Poor U.S. Women: Study*, REUTERS (Aug. 24, 2011, 12:19 AM), <http://www.reuters.com/article/2011/08/24/us-study-pregnancy-idUSTRE77N0SS20110824>.

<sup>66</sup> Men who cryopreserve their sperm based on illness may receive insurance coverage. See California Cryobank, *Will Insurance Pay for Sperm Banking if You Have Cancer?*, SPERMCENTER.COM (Sept. 10, 2010, 3:32 PM), <http://www.spermcenter.com/content/will-insurance-pay-sperm-banking-if-you-have-cancer-0>; Daniel H. Williams, *Sperm Banking and the Cancer Patient*, 2 THER. ADV. UROLOGY 19, 25 (2010), [http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3126065/pdf/10.1177\\_1756287210368279.pdf](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3126065/pdf/10.1177_1756287210368279.pdf).

<sup>67</sup> See Asch, *supra* note 6, at 181. For discussions of reproductive autonomy and infertility, see Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1462–68 (2008).

<sup>68</sup> See Shulevitz, *supra* note 60.

<sup>69</sup> *What is Egg Freezing?*, EGGSURANCE, <http://www.eggsurance.com/what-is-egg-freezing.aspx> (last visited June 29, 2013) (“Similar to the pill, egg freezing enables women to control their reproductive future”); Kate Lunau, *Thirty-Seven and Counting*, MACLEAN'S (Oct.

Consider what happened in 2001, when the American Society for Reproductive Medicine (ASRM)<sup>70</sup> decided to launch an infertility awareness campaign in 2001, emphasizing that a number of factors—ranging from smoking to age—affect infertility. It was concerned that a discussion of age might, on the one hand, be seen as encouraging adolescent pregnancy, and, on the other hand, as castigating women. And, once the ASRM rolled out these “Protect your Fertility” advertisements, the National Organization for Women viewed this as a “scare campaign.”<sup>71</sup> Advertisements, like those involving a baby bottle shaped like an hourglass, were viewed as giving the impression that younger women must “hurry up and have kids” or give up and never have them, claimed Kim Gandy, the head of the National Organization for Women.<sup>72</sup> Others saw the message as telling women that they should not be too ambitious, and should return to their homemaking roles.<sup>73</sup> Lisa Marcus, a thirty-seven year-old women’s studies professor undergoing infertility treatment, asked in the Women’s Review of Books, “Do I blame my infertility on my desire to divorce destiny from biology, to nurture a career rather than a child? Not for a minute. But the popular press is doing a number on women who’ve delayed motherhood.”<sup>74</sup>

But the campaign was recognizing the reality that fertility, and infertility, are poorly understood. Sex education in the United States, deeply embroiled in the culture wars, focuses on controlling fertility, not on a life-course understanding of infertility.<sup>75</sup> In a 2012 study of U.S. university students, eighty-three percent of women and ninety-one percent of men inaccurately estimated the age at which women experience a slight dip in fertility, while two-thirds of women and eighty-one percent of men were inaccurate when it came to the age at

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27, 2012 8:00 AM), <http://www2.macleans.ca/2012/10/27/thirty-seven-and-counting/>. This suggests the answer to the more fundamental, jurisprudential question of whether the choice to enhance fertility is equivalent to the choice to inhibit fertility.

<sup>70</sup> The ASRM has approximately 9,000 members, 7,000 of whom are physicians, and published a leading obstetrics/gynecology scholarly journal, *Fertility and Sterility*. See AM. SOC’Y FOR REPROD. MED., <http://www.asrm.org/detail.aspx?id=35> (last visited June 28, 2013).

<sup>71</sup> LIZA MUNDY, EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING MEN, WOMEN, AND THE WORLD 43 (2007) (quoting Kim Gandy, then president of the National Organization for Women); see Claudia Kalb, *Should you Have Your Baby Now*, NEWSWEEK, Aug. 13, 2001, at 40.

<sup>72</sup> Nancy Gibbs, *Making Time For A Baby*, TIME, Apr. 15, 2002, at 48.

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

<sup>74</sup> Lisa Marcus, *Fertility Goddess*, 20 WOMEN’S REV. OF BOOKS 15 (2003) (reviewing ALICE DOMAR & ALICE LESCH KELLY, MIND/BODY GUIDE TO ENHANCING FERTILITY AND COPING WITH INFERTILITY (2002)), available at [http://www.accessmylibrary.com/coms2/summary\\_0286-2773630\\_ITM](http://www.accessmylibrary.com/coms2/summary_0286-2773630_ITM).

<sup>75</sup> See, e.g., CAHN & CARBONE, *supra* note 4, at 107; Naomi Cahn & June Carbone, *Deep Purple: Shades of American Family Law*, 110 W. VA. L. REV. 459 (2007).

which it steeply decreases.<sup>76</sup> An accurate understanding of fertility, however, would leave many women profoundly depressed. Scientists do not fully understand what affects male or female fertility, they cannot make accurate individual predictions in the absence of efforts to get pregnant and often not even then, and any woman who wanted to maximize her chances of childbirth should begin trying well before the current average age of marriage or first birth in the United States.

No more: Egg freezing promises to do away with biological constraints and reorient women's lives to match the cycles of the male-oriented workplaces they have won the right to enter.<sup>77</sup> The ability to freeze eggs is not just a neutral technological advance, but is yet another symbol of class privilege, an ability to choose to have children at the right time, when partnership and job align. Egg freezing provides an option other than single motherhood for women who have not yet the right partner.<sup>78</sup> Many arrive at single motherhood only after intensively seeking to find a partner.<sup>79</sup>

Parenthood arrives differently for women with different levels of education. The unintentional pregnancy rate is higher for women who are unmarried, young, and poor, and unintended pregnancy appears to have long-term effects on the mother's continuation of education and workforce participation along with the children's life chances.<sup>80</sup> Egg freezing does not solve these socioeconomic problems, and, as this article argues, may actually exacerbate them.

### C. The Perils

If egg freezing offers hope for those caught in the new, more competitive efforts to gain a foothold in elite circles, the biggest fear is that the hope will prove illusory and undermine better targeted efforts to create family-friendly workplaces for all parents. The promise of autonomy – the option to create a family at the time of your choos-

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<sup>76</sup> Brennan D. Peterson et al., *Fertility Awareness and Parenting Attitudes Among American Male and Female Undergraduate University Students*, 27 HUMAN REPRODUCTION 1375, 1379 (2012).

<sup>77</sup> One prominent reproductive fertility practice advertises its own trademarked "Personal Egg Banking," noting that egg freezing allows younger women to bank their eggs until they are ready to start their families. Andrew Dorfman, *Egg Freezing Joins the Mainstream*, GENETICS & IVF INST. (Nov. 2012), <http://www.givf.com/specialfeatures/enewsnovember2012.shtml>.

<sup>78</sup> See, e.g., RICHARDS, *supra* note 1, at 110 (reporting on a study of 240 women considering egg freezing which "found that nearly 60 percent said they would consider single motherhood if they hadn't found a partner").

<sup>79</sup> Jessica Yadegaran, *No Mr. Right? More Women Start Families via Artificial Insemination*, CENTRAL VALLEY MOMS (Aug. 16, 2012), <http://centralvalleymoms.com/2010/08/16/no-mr-right-more-women-start-families-via-artificial-insemination/>.

<sup>80</sup> Adam Thomas, *Policy Solutions for Preventing Unplanned Pregnancy*, BROOKINGS INST. (Mar. 2012), <http://www.brookings.edu/research/reports/2012/03/unplanned-pregnancy-thomas>.

ing—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.<sup>81</sup> Its promise of permitting women to delay fertility<sup>82</sup> reinforces culturally masculine work norms and lifestyle priorities.

Before turning to the economic inequalities and distortions that egg freezing may cause, we want to acknowledge a series of other problems relating to the medicine. These objections, such as the potentially false hope<sup>83</sup> that the eggs will actually lead to children, the potential harm to children from frozen eggs, and medical risks from the egg retrieval process and advanced maternal age pregnancy are profound, and much further study is needed concerning the safety of the underlying procedures, the promises of pregnancy rates, and the risks to mother and child.<sup>84</sup> Even though the American Society for Reproductive Medicine has now removed the “experimental” label from egg freezing, and the new technology of vitrification has helped enhance success rates, few studies exist on the long-term implications of egg freezing medically and psychologically.<sup>85</sup> Approximately one-quarter of women will exhibit ovarian hyperstimulation syndrome, with symptoms that may range from mild nausea to, in more severe cases, blood clots and kidney failure.<sup>86</sup> Some of these issues might be

<sup>81</sup> See Petropanagos, *supra* note 6, at 232.

<sup>82</sup> See Luden, *supra* note 54.

<sup>83</sup> See Alison Motluk, *Growth of Egg Freezing Blurs “Experimental” Label*, 476 NATURE 382 (2011) (probabilities that egg freezing will lead to a child); see also Hallie Levine Sklar, *Babies After 40: The Hidden Health Risks of Mid-Life Pregnancy*, HEALTH (May 18, 2009), <http://www.health.com/health/article/0,,20411699,00.html> (stating older women who get pregnant are also likely to have more health problems).

<sup>84</sup> See, e.g., Charlotte Shubert, *Egg Freezing Enters Clinical Mainstream*, SCI. AM. (Oct. 23, 2012), <http://www.scientificamerican.com/article.cfm?id=egg-freezing-enters-clinical-mainstream>.

<sup>85</sup> *Mature Oocyte Preservation: A Guideline*, 99 FERTILITY & STERILITY 37, available at [http://www.asrm.org/uploadedFiles/ASRM\\_Content/News\\_and\\_Publications/Practice\\_Guidelines/Committee\\_Opinions/Ovarian\\_tissue\\_and\\_oocyte\(1\).pdf](http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Committee_Opinions/Ovarian_tissue_and_oocyte(1).pdf). For example, there are only four randomized studies of the pregnancy success rates for fresh v. frozen eggs, and the ASRM cautions that it is unclear that the results of these trials can be generalized. *Id.* at 3. On vitrification, see, e.g., Rebecca Dana, *The Vitrification Fertility Option*, DAILY BEAST (Jan. 23, 2012), <http://www.thedailybeast.com/newsweek/2012/01/22/the-vitrification-fertility-option.html>.

<sup>86</sup> *Ovarian Hyperstimulation Syndrome*, MAYO CLINIC (Jan. 15, 2011); see Dorothy E. Roberts, *The Social Context of Oncofertility*, 61 DEPAUL L. REV. 777, 788-89 (2012) (the hormones “have been associated with short- and long-term injuries, including ovarian hyperstimulation syndrome, ovarian cysts, infection, bleeding, kidney failure, stroke, cancer, and infertility. Despite evidence of medical risks, there are no registries or studies that track the long-term health outcomes of egg donors, nor any state or federal regulation requiring the fertility industry to investigate and report these risks.”). For anecdotal evidence of the medical risks involved in egg donation (the stimulation procedures are the same, regardless of whether the woman is freezing or donating the eggs), see Allison Motluk, *Is Egg Donation Dangerous?*, MAISONNEUVE (Jan. 21, 2013), <http://maisonneuve.org/pressroom/article/2013/jan/21/egg-donation-dangerous/>.

dealt with through informed consent.<sup>87</sup> As a practical matter, however, informed consent is meaningless for risks that even scientists cannot assess. They cannot determine with any confidence at this stage how fertility with frozen eggs compares with a woman's fertility through natural means, or the effect of age on an individual's prospects for a healthy birth. New research may shed greater light on the success rates and risks associated with egg freezing, but the willingness to fund comprehensive research and regulation in this area is in doubt.<sup>88</sup> Moreover, some concerns, such as a potential increase in cancer risk,<sup>89</sup> cannot easily be wished away.

Beyond basic issues concerning the health risks for women and potential offspring, egg freezing raises fundamental ethical, economic, practical, and legal problems: The impact of egg freezing on the emergence of the family as a marker of class. Egg freezing is only available to women who can afford to pay and who can make the choice to wait to have children. Women who have career opportunities are most likely to postpone childbearing. Women with higher levels of education are older when they have their first child: more than one-third of college educated women had a first birth at age thirty or older compared to approximately ten percent of women without a college education (3.5%–10.7%), and college-educated women have lower birth rates.<sup>90</sup> Given the wage structure, it is only these women who can afford to pay for elective procedures such as egg freezing.

Reflecting the underlying expense of our health-care system, the United States has among the highest costs for an ART treatment cycle in the developed world; one cycle in Sweden, England, Japan, and numerous other countries is less than half that of a comparable cycle in the United States.<sup>91</sup> The charge for a single in vitro fertilization cycle in the United States is typically between \$10,000-\$20,000 (not includ-

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<sup>87</sup> For a critique of informed consent in the reproductive context see Pamela Laufer-Ukeles, *Reproductive Choices and Informed Consent: Fetal Interests, Women's Identity, and Relational Autonomy*, 37 AM. J.L. & MED. 567 (2011).

<sup>88</sup> The fertility industry is only lightly regulated in the United States. See, e.g., CAHN, *supra* note 9; *Financing Fertility*, *supra* note 9, at 116; *Selling ART*, *supra* note 9. On political obstacles to research, see June Carbone & Naomi Cahn, *Embryo Fundamentalism*, 18 WM. & MARY BILL OF RTS. J. 1015, 1016 (2010).

<sup>89</sup> See, e.g., F.E. Van Leewuen et al., *Risk of Borderline and Invasive Ovarian Tumours after Ovarian Stimulation for in vitro Fertilization in a Large Dutch Cohort*, 26 HUM. REPROD. 3465 (2011), available at <http://www.ncbi.nlm.nih.gov/pubmed/22031719>.

<sup>90</sup> Martinez et al., *supra* note 65, at 6.

<sup>91</sup> Mark P. Connolly, Stijn Hoorens, & Georgina M. Chambers, *The Costs and Consequences of Assisted Reproductive Technology: An Economic Perspective*, 16 HUM. REPROD. HUMAN REPRODUCTION UPDATE 603, 605 (2010).

ing storage of eggs or, where they are created, embryos).<sup>92</sup> About eight percent of women in the United States will seek some type of infertility service during their lifetimes, and approximately 6 million women have problems becoming, or staying, pregnant.<sup>93</sup> While infertility (typically defined as the failure to become pregnant within a year of ceasing to use contraceptives) is actually higher among women without a college education,<sup>94</sup> these women are less likely and able to seek higher tech interventions because of the cost.<sup>95</sup> Even in the comparatively few states with mandated insurance coverage, the majority of women accessing such care are white, highly educated, and wealthy.<sup>96</sup> A state's income predicts the availability of infertility services; availability correlates with utilization of those services; and a state's educational levels directly predicts utilization.<sup>97</sup>

Indeed, regardless of race, women with a higher socioeconomic status, measured by advanced education, household income, and insurance coverage, are more likely to use sophisticated infertility services, such as in vitro fertilization. One study found that approximately 30% of those who were under 300% of the poverty level were likely to seek infertility services, compared to 50% of women above 300% of the poverty level.<sup>98</sup> While income may not affect the initial decision to seek *advice* about infertility, income has a clear effect on who seeks *access* to the more intensive forms of treatment.<sup>99</sup> Women with higher

<sup>92</sup> Valarie Blake, *It's an ART not a Science: State-Mandated Insurance Coverage of Assisted Reproductive Technologies and Legal Implications for Gay and Unmarried Persons*, 12 MINN. J. L. SCI. & TECH. 651, 659 (2011).

<sup>93</sup> *Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Reports 2008*, CTNS. FOR DISEASE CONTROL & PREVENTION 3 (2010), [http://www.cdc.gov/art/ART2008/PDF/ART\\_2008\\_Full.pdf](http://www.cdc.gov/art/ART2008/PDF/ART_2008_Full.pdf); *Fertility, Family Planning, and Reproductive Health of U.S. Women: Data from the 2002 National Survey of Family Growth*, CTNS. FOR DISEASE CONTROL & PREVENTION 137 (Dec. 2005), [http://www.cdc.gov/nchs/data/series/sr\\_23\\_025.pdf](http://www.cdc.gov/nchs/data/series/sr_23_025.pdf) (Table 98).

<sup>94</sup> Tarun Jain, *Socioeconomic and Racial Disparities Among Infertility Patients Seeking Care*, 85 FERTILITY & STERILITY 876, 879-78 (2006) (“[W]omen with and without a high school diploma had a higher prevalence of infertility than women with a bachelor’s degree or higher (8.1% percent, 8.5% percent, and 5.6% percent, respectively).”).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 878; Tarun Jain & Mark D. Hornstein, *Disparities in Access to Infertility Services in a State with Mandated Insurance Coverage*, 84 FERTILITY & STERILITY 221 (2005); Molly Shanley & Adrienne Asch, *Involuntary Childlessness, Reproductive Technology, and Social Justice: The Medical Mask on Social Illness*, 34 SIGNS 851, 856-57 (2009); Connolly et al., *supra* note 91, at 607.

<sup>97</sup> Ahmad O. Hammoud et al., *In Vitro Fertilization Availability and Utilization in the United States: A Study of Demographic, Social, and Economic Factors*, 91 FERTILITY & STERILITY 1630 (2009).

<sup>98</sup> Anjani Chandra & Elizabeth Hervey Stephen, *Infertility Service Use Among U.S. Women: 1995 and 2002*, 93 FERTILITY & STERILITY 725, 728 (2010).

<sup>99</sup> J. Farley Ordozensky Staniec & Natalie J. Webb, *Utilization of Infertility Services: How Much Does Money Matter?*, 42 HEALTH SERVS. RES. 971, 982-83 (2007); Connolly et al., *supra*

incomes are more likely to choose surgery or some form of ART compared to women of lower income.<sup>100</sup> ART is particularly important because more than 1% of all U.S. births result from IVF,<sup>101</sup> and, of course, frozen eggs can only be used through IVF. Notwithstanding efforts by fertility clinics to make reproductive technology more available through egg sharing and other programs, IVF is mostly available to wealthier women. As Dorothy Roberts notes, “Gender, class, and race inequities help determine the reproductive options available to women, such as a woman’s access to assisted reproductive technology (ART), and the consequences that a woman’s childbearing decisions have for her, her family, and her community.”<sup>102</sup>

We suspect that if egg freezing were to become routine, it would do so in a way that exacerbates existing inequalities by facilitating elite women’s career advancement without changing the underlying structure and economic inequalities of the workplace. IVF clinics, eager to expand their clientele, might target young women, with college students a prime target. They might offer enticing discounts: bank your eggs with us today, promise to donate any unused eggs in the future and we will write off fifty percent or more of the egg freezing cost.<sup>103</sup> The clinics would attract what is likely to become a captive audience: The young women who bank their eggs would then have to return to the same clinics to use them. Even if the women could transfer the eggs elsewhere,<sup>104</sup> the clinics could easily build in incentives for the women to use their IVF services. Moreover, healthy eggs from young women with the “right” racial, physical and academic attributes are often hard to come by; the clinics could invest in producing a new source of eggs for transfer to those women who didn’t plan ahead by banking their own.<sup>105</sup> It is not hard to imagine egg freezing

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note 91, at 607; James F. Smith et al., *Socioeconomic Disparities in the Use and Success of Fertility Treatments: Analysis of Data from a Prospective Cohort in the United States*, 96 *FERTILITY & STERILITY* 95 (2011); see generally Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 *BERKELEY J. GENDER L. & JUST.* 18, 36-38 (2008); Hammoud, *supra* note 97.

<sup>100</sup> Staniec & Webb, *supra* note 99, at 983. ART was defined as intrauterine insemination, IVF, and similar medical interventions. *Id.* at 976.

<sup>101</sup> Bradley J. Van Voorhis, *In Vitro Fertilization*, 356 *NEW ENGL. J. MED.* 379, 379 (2007).

<sup>102</sup> Roberts, *supra* note 86, at 778.

<sup>103</sup> Clinics already offer discounts for egg sharing. See, e.g., *Egg Sharing Program*, COOPER INST., <http://www.houstonfertilitysolutions.com/egg-sharing-program/> (last visited June 29, 2013).

<sup>104</sup> See *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989).

<sup>105</sup> For more on the existing market in eggs, see, e.g., Aaron D. Levine, *Self-Regulation, Compensation, and the Ethical Recruitment of Oocyte Donors*, HASTINGS CTR. REP. (2010), [http://www.thehastingscenter.org/Publications/HCR/Detail.aspx?id=4549&utm\\_source=Vocus&utm\\_medium=Email&utm\\_campaign=HCR032410PR](http://www.thehastingscenter.org/Publications/HCR/Detail.aspx?id=4549&utm_source=Vocus&utm_medium=Email&utm_campaign=HCR032410PR); Shan Li, *Asian Women Command Premium Prices for Egg Donation in U.S.*, L.A. TIMES (May 4, 2012), <http://articles.latimes.com/2012/may/04/business/la-fi-egg-donation-20120504>.

ads flooding college campuses, heavily targeting the most elite women.<sup>106</sup>

#### D. Changing reproduction

If egg freezing were to become routine for those who could afford it, it could transform the way elite women think about reproduction and turn existing class differences into a chasm. It would make sense to time egg retrieval and freezing for a period when women's reproductive capacities are at their height, probably in the late teens or early twenties. While the medical procedures involved in egg freezing involve medicines that stimulate the ovaries and sedation for retrieving eggs,<sup>107</sup> women's work schedules are, if all goes well,<sup>108</sup> only minimally affected and for students, the procedure could be conveniently scheduled over the summer or spring break. The availability of the eggs may then encourage women who have them safely in the freezer to become even more likely to postpone reproduction into the period when greater age makes birth defects more common. A still fertile woman planning to conceive for the first time at thirty-six or thirty-seven might prefer to use her frozen genetic material rather than risk reproducing the natural way. At that point, IVF might also become routine and with it genetic testing. Doctors already use pre-implantation genetic diagnosis (PGD) in high-risk patients to screen embryos for genetic defects. In older women, they sometimes use PGD to decide which fertilized eggs to implant in a woman's uterus, using the genetic testing to determine which embryos are most likely to thrive. Older women and fertility patients, however, often produce only a small number of viable embryos.

With PGD and eggs frozen while the woman was young, potential parents are able to pick from this much larger supply of healthy eggs. They could, when they are ready, fertilize all the eggs, and select for the embryos with the most promising genetic profile. If that occurs, we will have arrived at the science fiction world depicted in the 1997

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On the other hand, extra eggs might also facilitate what Kim Mutcherson calls a "gateway" to different forms of ART. Women, for example, might want to donate the extra eggs to gay friends or relatives, infertile siblings, same-sex partners, or others who today find assisted reproductive prohibitively expensive but might become more likely to use it if donor eggs were more readily available.

<sup>106</sup> For a discussion of existing egg sharing practices, see Joshua U. Klein & M. V. Sauer, *Ethics in Egg Donation: Past, Present, and Future*, 28 SEMINARS IN REPROD. MED. 322 (2010).

<sup>107</sup> See *About the Egg Freezing Process*, NYU FERTILITY CENTER (2013), [http://www.nyufertilitycenter.org/egg\\_freezing/cryopreservation\\_process](http://www.nyufertilitycenter.org/egg_freezing/cryopreservation_process).

<sup>108</sup> And, of course, there is no guarantee that it will. See, e.g., Miram Zoll, *Don't Freeze Your Eggs Quite Yet*, SLATE (May 24, 2013), [http://www.slate.com/blogs/xx\\_factor/2013/05/24/flash\\_freezing\\_eggs\\_vitrification\\_sounds\\_nice\\_but\\_the\\_science\\_behind\\_assisted.html](http://www.slate.com/blogs/xx_factor/2013/05/24/flash_freezing_eggs_vitrification_sounds_nice_but_the_science_behind_assisted.html).

film *Gattaca*, in which parents use PGD to choose their best possible genetic offspring and the society discriminates against those with the wrong genetic codes.<sup>109</sup> Even without having seen actors Ethan Hawke and Judd Law model the consequences, it is easy to imagine the results. The new genetic elite might effectively eliminate diseases such as Tay-Sachs (already down significantly in the United States and Israel)<sup>110</sup> or Downs' syndrome (ninety percent of those carrying infants who test positive for the syndrome abort),<sup>111</sup> as well as select against genes for everything from baldness<sup>112</sup> to short stature.<sup>113</sup> In such a society, freezing eggs would become a rite of passage into adulthood, and IVF would be the only responsible way to have children without the risk of preventable birth defects. The differences between those who embrace the new system and those who either cannot or will not become profound, exacerbating disparities in health, academic success, and financial achievement

#### IV. THE WAY FORWARD: TECHNOLOGY OUTPACING THE LAW

Egg freezing poses complex dilemmas from medical, legal, and economic perspectives.<sup>114</sup> By reinforcing the possibility of having it all—children and career success—it may make those at the top even more resistant to change. Competitive firms can simply subsidize freezing women's eggs—the costs of egg freezing is trivial for employees with six figure plus salaries—and deflect what might otherwise be pressure for greater accommodation of family needs. Women may gain greater access to the executive suite, but with even greater pressures to do so only by complying with the same terms traditionally imposed on men.<sup>115</sup>

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<sup>109</sup> Prenatal testing and PGD screening are already available, but increased amounts of egg freezing increases the number of people who may choose PGD given that few women not at risk for devastating birth defects would choose to use IVF solely for screening purposes. Egg freezing, however, requires use of IVF to produce a pregnancy, and genetic screening is a relatively small additional step.

<sup>110</sup> Marilyn Marchione, *AP: Genetic Disease Testing Leads Some Adults Not to Have Kids*, USA TODAY (Feb. 17, 2010, 8:32 PM), [http://usatoday30.usatoday.com/news/health/2010-02-17-genetic-testing\\_N.htm](http://usatoday30.usatoday.com/news/health/2010-02-17-genetic-testing_N.htm).

<sup>111</sup> Ross Douthat, *Eugenics, Past and Future*, N.Y. TIMES, June 9, 2012, <http://www.nytimes.com/2012/06/10/opinion/sunday/douthat-eugenics-past-and-future.html>. Note that those opposing abortion often choose not to have the test.

<sup>112</sup> *Baldness Gene Discovered: 1 in 7 Men at Risk*, SCIENCEDAILY (Oct. 13, 2008), <http://www.sciencedaily.com/releases/2008/10/081012164437.htm>.

<sup>113</sup> *Women's Menstruation Genes Found*, BBC NEWS (May 17, 2009, 12:02 AM), <http://news.bbc.co.uk/2/hi/health/8046457.stm>.

<sup>114</sup> See generally Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1060–71 (2002) (describing the slow legal acceptance of the use of donor sperm).

<sup>115</sup> E.g., HANNA ROSIN, *THE END OF MEN* 261 (2012).

### A. Protecting Reproductive Autonomy

Notwithstanding its negatives, egg freezing can assume a positive role along the continuum of reproductive control that ranges from restricting fertility through contraception and abortion to enhancing fertility through advanced reproductive technologies. At the least, egg freezing provides enormous hope to women whose reproductive capabilities are compromised by cancer.

If society were to subsidize and encourage the procedure more generally, then first, and most fundamentally, such support would need to be designed to address the different fertility risks women face. For poor women, egg freezing possibilities must be placed in the context of more general difficulties with accessing health care. Michele Goodwin reports that poor and minority women experience greater rates of infertility than do better-off women because of their greater exposure to environmental risks,<sup>116</sup> greater incidence of untreated sexually transmitted diseases,<sup>117</sup> and poorer health aggravated by the lack of quality health care.<sup>118</sup> Elite women, in contrast, are more likely to face fertility issues because of greater age. Addressing *all* women's fertility requires a more systematic approach to health care, regardless of income.

Second, this requires more comprehensive sex education, so that women and men develop better understandings of their bodies, reproduction, and the biological clock. Thinking about the end of fertility,

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<sup>116</sup> Harmful environmental agents have been linked to sterility, infertility, cancer, and many other chronic illnesses. *See, e.g.*, Robert Brent, *Environmental Causes of Human Congenital Malformations: The Pediatrician's Role in Dealing with These Complex Clinical Problems Caused by a Multiplicity of Environmental and Genetic Factors*, 113 PEDIATRICS 957, 957 (2004) (discussing the environmental hazards "that have been documented to produce congenital malformations and reproductive effects"); Robert Brent et al., *A Pediatric Perspective on the Unique Vulnerability and Resilience of the Embryo and the Child to Environmental Toxicants: The Importance of Rigorous Research Concerning Age and Agent*, 113 PEDIATRICS 935, 935 (2004) (expressing concern about "the increased susceptibility of the embryo, infant, and child to environmental toxicants"); Robert W. Miller, *How Environmental Hazards in Childhood Have Been Discovered: Carcinogens, Teratogens, Neurotoxicants, and Others*, 113 PEDIATRICS 945, 945 (2004) (concluding that "environmental hazards cause adverse health effects that include sterility, infertility, embryotoxicity, low birth weight, skin lesions, neurodevelopmental defects, immunological disorders, cancer, and fear of late effects").

<sup>117</sup> Sexually transmitted diseases result in infertility, increased risk of hysterectomy, subfertility, ectopic pregnancies, and chronic pelvic pain. *See, e.g.*, Robert L. Brent & Michael Weitzman, *The Pediatrician's Role and Responsibility in Educating Parents About Environmental Risks*, 113 PEDIATRICS 1167, 1171 (2004) ("Sexually transmitted disease can be life-threatening, cause infertility or sterility, and increase the risk of cervical cancer"); Naderah Pourat et al., *Medicaid Managed Care and STDs: Missed Opportunities to Control the Epidemic*, 21 HEALTH AFF. 228, 229 (2002) (finding "[t]he burden of illness from STDs is exacerbated by infertility, pregnancy complications, cancer, and a greater susceptibility to HIV infection").

<sup>118</sup> Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1718-19 (2008).

in their late teens, before many have even begun to think about readiness for reproduction, can be a paradoxical exercise. Awareness of the potentially life long effects of sexually transmitted diseases and means of protection is valuable at any age. Increased awareness needs to start early, particularly since the poorest and most vulnerable women also begin sexual activity at the youngest ages.

Indeed, looking solely at the issue of age-related infertility, many women, regardless of their educational level, simply don't know enough about how age will affect their fertility. One important solution, short of promoting egg freezing, is better fertility education about everything from abstinence to IVF, so that women and men have a better understanding of their fertility options. Improved knowledge may, in the short term, increase demand for egg freezing, but it may, in the long term, result in increasing pressure to change the workplace with improved understandings of the relationship between employment pressures and delayed childbearing.

Third, before further promotion of egg freezing, more funds are needed for research on the impact on women's health of the egg-production procedures, as well as on the "take-home" rate of babies from frozen eggs. Finally, while there is public funding for various forms of contraception, there is no comparable support for reproductive technologies to increase fertility. Insurance companies typically will not fund egg retrieval, freezing, storage, or IVF, leaving women to finance the procedures on their own. One option is to equalize the economic field. The existence of health insurance is similarly an important factor in pursuing treatment options. Even if the insurance does not cover all infertility-related medical procedure, it is strongly correlated with treatment. So is income.<sup>119</sup> In states that required the most comprehensive insurance coverage, patients were almost three times as likely to use IVF.<sup>120</sup> Other methods of providing subsidization, such as through tax credits<sup>121</sup>, are less direct and, therefore, less useful to lower income families, whose tax burden is typically smaller. A more limited expansion of health-care coverage would include insurance for egg freezing related to cancer or other reproductive-related illnesses.<sup>122</sup>

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<sup>119</sup> See Staniec & Webb, *supra* note 99, at 981; Lynn White, Julia Mcuillan, & Arthur L Greil, *Explaining Disparities in Treatment Seeking: The Case of Infertility*, 85 FERTILITY & STERILITY 853 (2006).

<sup>120</sup> Jain, *supra* note 94, at 878.

<sup>121</sup> See, e.g., I. Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing, IVF Decrease Adoption Rates and Should It Matter?*, 95 MINN. L. REV. 485, 500 n. 78 (2010).

<sup>122</sup> This creates the risk of reinforcing a cultural dichotomy towards egg freezing, which approves of cancer patients' attempts to preserve their reproductive options, while negatively

While the Affordable Care Act guarantees contraceptive coverage, and provides improved maternity benefits,<sup>123</sup> it does not address reproductive technology, even though low-income women are more likely to face infertility.<sup>124</sup> Women already have higher out-of-pocket health care costs than men, and they may, because of gender, be required to pay higher premiums.<sup>125</sup> Additional medical expenses are burdensome.

## B. Addressing the real issue

Beyond medical risks and affordability concerns, the most critical issues framed explicitly and implicitly by egg freezing focus on work, family, and class: the lack of economic opportunity for non-middle class women as well as the impact of egg freezing in perpetuating non-supportive workplaces for middle class women. The lure of egg freezing for some women and its utter irrelevance for others is based on the economic realities of the workplace for men and women, along with cultural expectations surrounding men, women, marriage, and childbearing.

Developing improved work-life strategies, ranging from paid parental leave to improved child care options, can help all workers, regardless of income. Beyond that, more specific strategies are needed for workers at different socioeconomic levels. Remaking the workforce can facilitate childbearing at an earlier age for middle-class women.<sup>126</sup> This means changing attitudes towards interrupted careers, ensuring that absences related to child-rearing do not derail professional trajectories. Professional women and men might well benefit from greater ability to have children first, then resume promising ca-

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judging healthy women who do so. See Lauren Martin, *Anticipating Infertility: Egg Freezing, Genetic Preservation, and Risk*, 24 GENDER & SOC. 526 (2010).

<sup>123</sup> Jessica Arons & Lindsay Rosenthal, *The Health Insurance Compensation Gap: How Unequal Health Care Coverage for Women Increases the Gender Wage Gap*, CTR. FOR AM. PROGRESS (Apr. 12, 2012), <http://www.americanprogress.org/issues/women/report/2012/04/16/11429/the-health-insurance-compensation-gap/>.

<sup>124</sup> E.g., Adrienne Riegle, *Income Disparities in Medical Help Seeking for Infertility* (2012), available at <http://paa2012.princeton.edu/papers/122270>; Maurizio Maculoso, et al., *A Public Health Focus on Infertility Prevention, Detection, and Management*, 93 FERTILITY & STERILITY 16 (2010) (suggesting the data are inconclusive). For a discussion of the normative question of whether IVF services should be subsidized, see Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393; Cohen & Chen, *supra* note 121; CAHN, *supra* note 9.

<sup>125</sup> See also *Health Insurance*, NAT'L WOMEN'S LAW CTR., <http://www.nwlc.org/our-issues/health-care-%2526-reproductive-rights/health-care-reform/health-insurance> (last visited June 28, 2013).

<sup>126</sup> See KAREY HARWOOD, *THE INFERTILITY TREADMILL: FEMINIST ETHICS, PERSONAL CHOICE, AND THE USE OF REPRODUCTIVE TECHNOLOGIES* (2007); CAHN & CARBONE, *supra* note 4, at 209.

reers. The major stumbling blocks to these efforts, however, may be the nature of elite marriage markets and the difficulty of marshaling support for work-family issues, even for elite women.<sup>127</sup> Few career track women have settled on the “right” partner at the time of their peak fertility and, although elite women are more likely to work in family-supportive workplaces, even they have difficulties with work-life balance.

Moreover, women already feel the “mommy imperative,” and the dilemma of emphasizing the risks of infertility with age is that women will experience even more pressure to have children. The problem becomes balancing more information and awareness with ensuring career opportunities.

Addressing inadequate economic opportunities and remaking education can facilitate childbearing at a later age for working class women, providing encouragement for establishing job stability before having children. In the short run, however, the more important efforts may be to help reintegrate younger mothers into the workforce. Supporting motherhood rather than delaying it offers more immediate promise for the least advantaged women, who increasingly have children without marriage, careers or planning. In the longer run, however systematic contraception and an improving economy will help ensure that working class children have more economically stable families and futures. Such efforts (regardless of egg freezing) have little hope of success, however, in the absence of societal efforts to address economic inequality.<sup>128</sup>

One effort, important for all working men and women, is improved family leave. While top female earners are already the most likely to have access to both unpaid and paid family leave, increased support helps move the ideal worker model away from delayed childbearing by making leave more routine. It can also increase men’s participation in parenting.<sup>129</sup> Moreover, because lower income women are more likely to be fired or to quit when they give birth, expanded family leave can promote stronger workforce attachment. The benefits are not, of course, just for employees. Employers would save time

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<sup>127</sup> See, e.g., Anne-Marie Slaughter, *Why Women Still Can't Have it All*, THE ATLANTIC (June 13, 2012), <http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/>; Jena McGregor, *When Maternity Leave Doesn't Mean 'Out of the Office'*, WASH. POST (Feb. 20, 2013), [http://www.washingtonpost.com/national/on-leadership/when-maternity-leave-doesnt-mean-out-of-office/2013/02/20/6411339e-7b6d-11e2-9a75-dab0201670da\\_story.html](http://www.washingtonpost.com/national/on-leadership/when-maternity-leave-doesnt-mean-out-of-office/2013/02/20/6411339e-7b6d-11e2-9a75-dab0201670da_story.html).

<sup>128</sup> See CARBONE & CAHN, *supra* note 12, at 28.

<sup>129</sup> Eileen Appelbaum & Ruth Milkman, *Leaves That Pay: Employer and Worker Experiences with Paid Family Leave in California*, PAID FAM. LEAVE CAL. 17 (2011), [http://www.paidfamilyleave.org/pdf/leaves\\_that\\_pay.pdf](http://www.paidfamilyleave.org/pdf/leaves_that_pay.pdf).

and resources with reduced turnover rates, and after experience with a comparable program in California, employers overwhelmingly reported either positive or no noticeable impact.<sup>130</sup>

Numerous possibilities have been proposed for reforming the current system. These options range from a change in the size of employers who are covered so that workplaces of twenty-five or more would be required to provide benefits to expanding coverage to part-time workers or those who have not worked for one full year for the same employer. In the alternative, European style “flexicurity” programs could help reintegrate women who quit or are fired because of family needs back into the workforce when they are ready to do so.

The most appealing programs provide broad, at least partially paid coverage. They transform family leave, which is currently funded solely by employers, into social insurance. In such a system, both employees and employers contribute a portion of their wages into a program that is comparable to Social Security in its coverage and administration, and might even be administered by the Social Security Administration. Although it may be called Social Security Cares<sup>131</sup> or the FAMILY Act,<sup>132</sup> the basic principle is the same: employers and employees would pay a small portion of their wages to fund a federally-administered family leave program. The type and length of leave would remain substantially similar to that available under the FMLA. Employees’ eligibility would, however, be based on the number of quarters worked, rather than the time worked for any individual employer, so they would remain eligible, regardless of whether they had just begun working for a new employer. While the FMLA provides job protection, the proposed social insurance programs vary as to whether this would be a benefit. Most fundamentally, however, the program would provide partial (or full) wage replacement so that workers could take paid leave, and they would do so without placing the burden disproportionately on the employers who might respond by cutting employment.

Workers at different socioeconomic levels would experience the reform differently. Higher-income employees might be encouraged to have children at a younger age because they would become eligible

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<sup>130</sup> National Partnership for Women and Families, *The Case for a National Family and Medical Leave Insurance Program (The FAMILY Act)*, NAT’L P’SHP WOMEN & FAM 3 (Feb. 2013), [http://www.nationalpartnership.org/site/DocServer/FAMILY\\_Act\\_Fact\\_Sheet.pdf?docID=11821](http://www.nationalpartnership.org/site/DocServer/FAMILY_Act_Fact_Sheet.pdf?docID=11821); Appelbaum & Milkman, *supra* note 129.

<sup>131</sup> Ann O’Leary, Matt Chayt, & Eve Weissman, *Social Security Cares: Why America is Ready for Paid Family and Medical Leave*, CTR. AM. PROGRESS (Sept. 2012), <http://www.americanprogress.org/issues/labor/report/2012/09/27/39331/social-security-cares>.

<sup>132</sup> *The Case for a National Family and Medical Leave Insurance Program*, *supra* note 130, at 1.

for paid leave earlier, and lower-income employees might be encouraged to continue working through pregnancy and after the birth of their children.<sup>133</sup>

## V. CONCLUSION

These different strategies, which focus on support for child-rearing rather than just fertility, should result in healthier families, less need for egg freezing, and more equal access to reproductive technology. Our choices on the regulation of reproduction are integrally related to our cultural and political context.<sup>134</sup> The issue of egg freezing should not be isolated from a larger discussion of the changes remaking our families and our lives.

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<sup>133</sup> Of course, improved work-life balance is important for single people and non-parent workers. See, e.g., Jena McGregor, *Single, Childless, and Want Work-Life Balance? How Taboo*, WASH. POST (March 6, 2013), [http://www.washingtonpost.com/national/on-leadership/single-childless-and-want-work-life-balance-how-taboo/2013/03/06/c0fc9750-8672-11e2-9d71-f0feafdd1394\\_story.html](http://www.washingtonpost.com/national/on-leadership/single-childless-and-want-work-life-balance-how-taboo/2013/03/06/c0fc9750-8672-11e2-9d71-f0feafdd1394_story.html). This article is focused, however, on working parents (or would-be parents).

<sup>134</sup> See Kim Mutcherson, *Foreword: The Promises and Pitfalls of Procreation*, 42 RUTGERS L.J. 589 (2011).