

# Reproductive Technologies and the Law



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THIRD EDITION

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*JD: For Leah, first of the future*

*IGC: For Eli Adashi and Peter Barton Hutt,  
who both taught me so much in these areas*

*SM: For Asha and Aleena, the biggest source of joy*

*SS: For Michael, Ariana, Mateo, and Kelsey, who enrich my life*



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# Preface to the Third Edition

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The chief goal of reproductive technologies is addition. In the realm of family formation, people turn to assisted reproductive technologies (ART) to add children to their lives. When used in a medical or scientific realm, reproductive technologies add value to the health of an existing or emerging life. In the spirit of addition, this new edition welcomes three co-authors who add tremendous expertise, experience and enthusiasm to our joyful project. Each has taught, researched and written extensively in the ART field for many years, and each brings a unique perspective to the evolving range of issues and topics that cluster around reproductive medicine. Our new team is excited to launch this updated work in a field that is constantly evolving, beckoning us to keep pace with the law, science and policy surrounding reproductive technologies.

At last count, the world has welcomed over 8 million children born via ART. In some countries, conception and birth following in vitro fertilization accounts for 4 of every 100 babies born and worldwide usage grows each day. The increasing uptake of ART is addressed throughout the pages that follow by a host of new cases, statutes, policies and scholarly analyses. Along a parallel track, developments in the medical and scientific applications of reproductive technologies have surged, prompting us to add materials on emerging techniques such as germline gene editing, in vitro gametogenesis and mitochondrial replacement therapy. Public debate over the potential merits and harms of these technologies has swelled as well, a dialog we document in condensed fashion throughout the text. Since the last edition was published in 2013, the U.S. Supreme Court has upheld the fundamental right to marriage equality, a legal and social advancement inextricably linked to family formation through assisted conception. These and other changes in our field inspire us to continue teaching and learning about ART's impact on society.

We are very grateful to a talented cadre of supporters who joined our efforts to complete this edition. Many hours of research, editing, drafting and listening were performed collectively by the following individuals, together one great team. Heartfelt thanks to Jenny Du, Asia Evans, Isaac Green, Matt Kelly, Sophie Leff, Alexandra Marshall, Priya Menon, Stamatia Papakirk, Andrew Schaengold, Nikole Seay, Shamiaka Seburn, and Heather Skrabak. We give special thanks to our fearless editor, Elisabeth Ebben, whose steady support has stewarded this book project since it was a mere twinkle over 15 year ago.

The four of us give thanks and love to our partners, offspring and dear ones who endured our fretting over each word, each page, each decision. And most

importantly, we thank our students who supply us with the awesome opportunity to engage with you on these profound matters.

Judith Daar  
I. Glenn Cohen  
Seema Mohapatra  
Sonia M. Suter  
February 2022

# Preface to the Second Edition

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Tracking a field that is in constant motion poses unique challenges and opportunities. In the six years since the first edition of this book appeared, the field of assisted reproductive technologies (ART) has, at the same time, advanced, matured, stabilized and stalled. Each of these trajectories is explored alongside the particular area to which they attach. This new edition invites readers to plumb the origins of the world of assisted conception and then trace its development to the present day. Now that the world has welcomed more than 5 million children born via ART, and nearly 3 out of every 100 babies born in the United States are the product of assisted conception, the impact and import of the field cannot be overstated.

While the book contains an array of new cases, statutes, policies and commentaries, the fundamentals remain largely unchanged. ART continues to develop as an interdisciplinary field in which physicians and scientists work to create and improve techniques for family formation, and more recently medical therapy, while lawyers and lawmakers strive to understand and organize society's response to each new development. As more ART laws pepper the legal landscape, and demand for the technologies grow, so too will the need for informed practitioners who can represent the interests and needs of each stakeholder in the complicated equation. This book is designed to pique interest in ART as an academic discipline, as well as a robust and satisfying practice option.

This new edition is the work product of many generous students, colleagues, assistants and readers who have contributed their insights and efforts to help produce a book that is worthy of today's ART enthusiast. First, I want to thank the countless students who have pondered the book's material and reached out to share their thoughts and comments, many of which are incorporated throughout the pages that follow. Next, enormous credit and gratitude go to my tireless research assistants who have exhibited nothing but good cheer in responding to myriad requests over several years. My sincere thanks to Gerrick Warrington, Megan Emmer, Michael Ruttle and Nelly Ispiryan, all RAs extraordinaire. Finally, our institution is enormously benefitted by the services of an outstanding staff, including two members who worked with me throughout the writing process. Special thanks to Jennifer Maniscalco for her consistently superb administrative assistance and Rosalie Robles for her keen editing eye. Above all, any modicum of success this book or its author enjoys is made possible by the loving support of my husband Eric and our four sons. You are the light in my life.

Judith Daar

May 2012





# Preface to the First Edition

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The world of assisted reproductive technologies is a relative newcomer to the law school curriculum, making its perceptible entrance only within the past two decades or so. Yet the discipline mixing law and assisted conception seems to have established firm roots, sustained by a nearly daily dose of activity somewhere around the globe. The study of reproductive technologies has branched out from its founding in the late 1970s with the introduction of in vitro fertilization, to a field that includes such emerging topics as posthumous reproduction, embryonic stem cell research and human cloning. These topics often take center stage in our political and social world, making them ideal for dissection in the law school classroom.

This casebook is designed to introduce our students to the essentials in science, medicine, law and ethics that underpin and shape each of the topics that combine to form the law of reproductive technologies. As each new technology is introduced, an effort is made to fully inform the reader about the clinical application of the technique—that is, how the procedure is used to treat patients facing infertility or produce advances in medical research. Once comfortable with the science, students can then contemplate the legal parameters that do or should accompany the technology. Since so much of the law in this area is either nascent or wholly unformed, students are free, and indeed encouraged, to design legal systems that meet the needs of patients, parents, children and society at large—participants all in the world of assisted reproduction.

A cautionary note about the intensity of feelings that often attaches to discussions about the essential core of this book. At the heart of reproductive technologies beats the debate over the moral status of the early human embryo, and no book could do justice to the topic without fully exposing the depth and complexity of that debate. Early on, and continuing throughout the book, students are asked to contemplate, and even reveal, their views on the status of early human life so as to shape the various lenses through which the class will see the panoply of issues that implicate embryonic development. In my experience, this classroom discussion has been among the richest, often displaying a wide range of views yet always breeding respect for difference and the rights of expression that follow.

Writing this book has been nothing short of glorious. The mysterious world of a law professor is filled with many joys, from watching students blossom in the classroom to advancing one's own fund of knowledge through dialogue with gifted colleagues. For my already ideal academic world, the experience of preparing this

casebook added an exquisite dimension that served to buoy my enthusiasm for this subject and for the art of writing in general. Though writing is a solitary sport, its very existence rests in the good graces of the many who patiently support the writer in her pursuit of the perfect turn of phrase. For me, those supporters were many and my gratitude is deep.

I want to first thank my dear friend Stacy Herman who assured me that she did indeed want to read the entire manuscript as each page slowly emerged from the printer. In her precious spare time, she diligently read every word, editing and making suggestions that undoubtedly added to the overall quality of the work. In life, such friends are rare and to be zealously cherished. Equal thanks are due Rosalie Robles, my law school assistant, who aided throughout the writing process, showing particular strength in helping secure permission to include works from the many folks whose writing I have relied upon to present a comprehensive view of the field.

Finally, and most importantly, I am profoundly grateful to my husband Eric, whose unconditional love and abiding support has been the pillar of my existence for nearly a quarter century. Together we have been blessed with the privilege of reproduction four times over, and with the birth of each son I gained a further appreciation for the quest of parenthood that, when elusive, can shake one to the core. I hope this book helps and inspires our students to probe deeply into that quest, whether for academic or personal satisfaction.

Judith Daar

May 2005

# Acknowledgments

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## Books and Articles

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