



# Test tube families

*Why the fertility market needs legal regulation*

Naomi R. Cahn

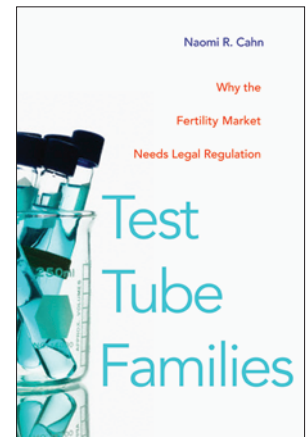
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**W**ild west. Brave new world. Playing God. Each of these phrases has become a symbolic and common way to describe the increasing use of assisted reproduction to build families. Technology has taken family building from the bedroom to the laboratory; from heterosexual married couples to same-sex couples and even single individuals; from a private act to an oftentimes public transaction; from an intimate relationship between two people to a medical procedure, involving three, four, or five participants, with sperm donation, egg donation, embryo donation, and surrogacy gaining in popularity from year to year.

Such rapid and extreme change in family formation has evolved in just over three decades. Merely thirty-one years ago, in 1978, the era of assisted reproductive technology (ART) was ushered in with the birth of Louise Brown, the “first test tube baby.” Since that time society has, in fits and starts, struggled to adapt to and accommodate new family structures and these new ways of creating families. The law, in particular, continues to react slowly and inconsistently to the challenges raised by assisted reproduction. In her book, *Test tube families: why the fertility market needs legal regulation*, legal scholar Naomi Cahn examines the key legal issues in reproductive technology, focusing not only on the technologies themselves but also on the range of participants.

With ART resulting in nearly a quarter of a million births annually worldwide, it comes as no surprise that 29 countries have detailed, national regulations for ART (1). What is surprising, however, is that in the United States, where in 2006, 54,656 infants were born as a result of ART (2), no comprehensive federal regulatory scheme exists, and at best, only piecemeal state reg-

ulation has been enacted. Cahn discusses how the politics of reproductive technology have served as an impediment to the development of policy in ART. She suggests that ART is here to stay, and rather than focusing on a redefinition of the legal meaning of family, public policy should instead focus on three key areas: market, parentage, and disclosure. Her suggestion is that the law need not become involved in the “easy” cases, in which private arrangements and agreements and autonomous decision making might be effective, but should focus more on “legal default” positions to address those situations in which private agreements and arrangements fail or are inadequate. Additionally, she recommends a multitiered regulatory scheme with authority allocated between the federal and state governments as well as the professional societies.

Cahn, a lawyer and family law professor as well as a self-proclaimed “player in the fertility game,” is well situated to consider and make recommendations for regulation of the fertility industry, and she does so cogently, sensitively, and logically in *Test tube families*. Through a feminist lens and with the common threads of markets, relationships, and identity woven throughout the 12 chapters, Cahn considers not only the broad social implications of ART but also the more specific perspectives of all the stakeholders in ART — from the fertility specialists to the children conceived and all the donors, recipients (married, single, gay, and lesbian), and surrogates in between. Throughout the book she strives to balance what at times might be conflicting perspectives, in an attempt to identify some regulatory points of consensus.

She also tackles the difficult issue of access to ART based on race, socioeconomic

status, and gender, identifying three critical barriers to reproduction: medical infertility, cultural infertility, and structural infertility. Cahn argues that the latter two are perpetuated by anachronistic and inflexible laws and the reality that “[m]oney buys choices in infertility treatment.”

Given the sweeping scope of her discussion, the appeal of *Test tube families* is quite broad; it would appeal to consumers of ART and academics in family law, health law, the social sciences, and medicine as well as practitioners and policy makers. The recommendations Cahn puts forth in the final part of the book, relating back to her three core themes of market regulation, parentage determinations, and identity issues for children of ART, will resonate with a range of readers. While some of her recommendations, particularly those related to identity disclosure of donors, reflect some personal bias rather than an empirical foundation, each provides a valuable and necessary launching pad for further discussion.

*Test tube families* makes an important contribution to the discourse about new ways of making families and the technology that facilitates family formation. Cahn lays out salient considerations for regulation of a still burgeoning field, which take into account the fluidity of technology, politics, and cultural attitudes. She clearly states the case for “why the fertility market needs regulation.”

1. Jones, H.W., Jr., and Cohen, J. 2007. IFFS Surveillance 07. *Fertil. Steril.* 87(Suppl. 1):1–76.
2. Centers for Disease Control and Prevention, American Society for Reproductive Medicine, and Society for Assisted Reproductive Technology. 2008. *2006 Assisted reproductive technology success rates: national summary and fertility clinic reports*. Department of Health and Human Services, Centers for Disease Control and Prevention. Atlanta, Georgia, USA.