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Selling ART or Selling Out?: A Response to *Selling ART: An Empirical Assessment of Advertising on Fertility Clinics' Websites*¹

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Thinking back to our own health care experiences, most of us can still remember a time when we did not check out a medical provider's website before making an appointment. Instead, we simply obtained the referral from our primary physician's office, called the number listed, and made an appointment—or allowed them to do it for us. Such behaviors are getting to be more uncommon; in the words of Bob Dylan, “the times they are a-changin’.”² Patients are evolving into medical consumers who are increasingly able, willing, and eager to exercise choice, and assisted reproductive technology (ART) providers are welcoming them with open online arms.

The burgeoning of medical websites stands to radically alter the provision of medical services and the physician-patient relationship. When patients proactively page Dr. Google or Google doctors, a host of new questions arise. How should one characterize medical websites as informational spaces? What purposes could they serve, and what ends are they accomplishing? How do patients perceive and comprehend website text that simultaneously fulfills multiple goals, both complementary and conflicting, including advertising, informing patients about clinic practices and philosophies, providing medical advice, and recruiting gamete donors? Should standards be set and, if so, by whom, according to which priorities, and with what enforcement mechanism?

These and other absorbing queries are made more urgent by the fact that the Internet as an informational medium is by and large unregulated by state and federal law, meaning that many current guidelines originate from and are enforced by professional associations. It is hard to imagine a field of practice with a greater incentive to strike that perfect (often emotional) chord with patients than ART, or one with a core mission that carries such profound empathic tenor. Moreover, infertile individuals, particularly women, are especially likely to use the Internet for many purposes, from researching infertility and treatments³ to raising money for

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1. Jim Hawkins, *Selling ART: An Empirical Assessment of Advertising on Fertility Clinics' Websites*, 88 IND. L.J. 1147 (2013).

2. BOB DYLAN, *The Times They Are A-Changin'*, on THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).

3. See generally E.C. Haagen, W. Tuil, J. Hendriks, R.P.J. de Bruijn, D.D.M. Braat & J.A.M. Kremer, *Current Internet Use and Preferences of IVF and ICSI Patients*, 18 HUM. REPROD. 2073 (2003); Ariel Weissman, Lynda Gotlieb, Susan Ward, Ellen Greenblatt & Robert F. Casper, *Use of the Internet by Infertile Couples*, 73 FERTILITY & STERILITY 1179 (2000); N. Zillien, G. Haake, G. Fröhlich, T. Bense & D. Souren, *Internet Use of Fertility Patients: A Systematic Review of the Literature*, 8 J. REPROD. MED. & ENDOCRINOLOGY 281 (2011).

treatment.⁴ Accordingly, there is a significant need for interdisciplinary scholarly consideration of these issues. Jim Hawkins's article, *Selling ART: An Empirical Assessment of Advertising on Fertility Clinics' Websites*,⁵ is a seminal contribution to this conversation that not only provides some answers to the immediate question of what online practices fertility clinics do and should have but demonstrates that scholarly attention should be paid to a wide variety of clinic practices. How else would we determine whether clinics are merely "selling ART" or "selling out," compromising ethical principles for financial gain?

My remarks will address three areas: how the website as a commodified (and commodifying) space affects its message and purposes; the importance of empirical research on patients' lived experiences; and the article's seminal contributions of highlighting the diminished emphasis on success rates, the racialization of ART websites, and the current lack of an effective enforcement mechanism for online advertising practices. Critically, I am not using this Comment as an opportunity to point out flaws in Hawkins's piece per se; his article already makes such a rich contribution to ART literature. Moreover, I know that many of my concerns may very well be beyond the ambit of Hawkins's goals in his piece. Nonetheless, these observations usefully point to next steps.

As Hawkins astutely notes, a discourse of emotionality and commodification is a prominent theme in ART scholarship, embracing concerns ranging from the commercialization of reproductive capacity to the exploitation and manipulation of intended parents and gamete donors.⁶ Corresponding to this discourse of commercialization is a characterization of patients themselves as desperate and emotionally and fiscally vulnerable—scarcely a winning combination for autonomous decision making.⁷ This points to a potential fox-in-the-henhouse problem: Are clinics manipulating unwitting patients through the use of emotionally laden terms such as "dream" and "miracle" and images of jubilant, ART-built families? In answering this question, we have dual obligations: to fully explicate the sociological and communicative dimensions of clinic websites and their text, and to empirically verify if these characterizations of patients are in fact accurate and, if so, for whom and under what circumstances.

Hawkins's primary focus on these websites is as advertising mediums.⁸ Yet, they are inescapably "something more." I hunger for additional commentary on how these websites are strategically constructed to reflect certain patient perceptions (of attainable parentage, of lovable children, of caring professionals), how they communicate these and other messages and construct specific realities, and what affective contours—emotions, judgments, and so on—these constructed realities foster, strengthen, suppress, and undermine. I challenge scholars to critically examine and frame infertility as a lived experience and to situate clinic

4. See, e.g., Tara Parker-Pope, *Patients, Too, Turn to the Internet for Fund-Raising*, N.Y. TIMES WELL BLOG, (Nov. 21, 2011, 5:04 PM), <http://well.blogs.nytimes.com/2011/11/21/patients-too-turn-to-the-internet-for-fund-raising/>.

5. Hawkins, *supra* note 1.

6. *Id.*

7. See Jody Lyneé Madeira, *Woman Scorned?: Resurrecting Infertile Women's Decision-Making Autonomy*, 71 MD. L. REV. 339, 346–54 (2012).

8. Hawkins, *supra* note 1.

websites within that particular context, ascertaining whether clinic websites address infertile individuals as patients or consumers and in what ways, identifying clinic websites' intended and actual roles in the treatment experience and elucidating how websites construct infertility as a medical condition and fertility treatment as a medical or elective service. Such research should be interdisciplinary; communication, sociolinguistics, and gender studies would have much to contribute.

It matters how websites are situated within the lived experience of infertility; this line of inquiry can help us make sense of myriad potential impacts. For every patient that is motivated to contact the clinic by warm, ostensibly comforting pictures of couples cuddling newborns, there might be another with a very different outlook. Perhaps infertility has made them more skeptical or cynical of promises held out by images of chubby babies and happy families, and these prompts trigger not excitement and yearning but anger and resentment. Similarly, it would be fascinating to know how the use of babies in clinic advertising affects patients, especially given most patients' reluctance to encounter pregnant women or families with young infants and many clinics' willingness to ban children from waiting rooms to increase patient comfort.⁹ Does it matter whether babies are pictured with parents or without; are patients more drawn to the image if the baby is unattached and could therefore be theirs? And why would clinic websites speak of ART pregnancies as "miracles"—precious but rare or unusual occurrences—when clinics also want to communicate that their treatments are effective and that patients are likely to conceive with treatment?¹⁰ Are patient testimonials particularly salient for fertility patients because the infertility community's norms favor personal disclosure and encourage Internet research, blogging, and consultation of dedicated online forums?¹¹

Hawkins's article implicitly touches upon these constructive concerns; to observe and comment upon websites' advertising functions is to acknowledge that socially constructive processes are at work.¹² His methodology focuses on the websites' home and about pages, prioritizing analytical comprehensiveness over depth.¹³ Future studies would benefit from an expanded survey of website content:

9. LIZA MUNDY, EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING OUR WORLD xix (2007) ("[M]any clinics forbid babies in the waiting room, so as not to make the contrast between those who have children and those who want them quite so stark and merciless.").

10. Hawkins, *supra* note 1, at 1149.

11. See sources cited *supra* note 3.

12. Indeed, postmodernist social critiques have long incorporated analyses of advertising and consumption in their focus on commodification, manipulation, and power relations, using the theories of Karl Marx, Max Weber, and Emile Durkheim. MARK GOTTDIENER, NEW FORMS OF CONSUMPTION: CONSUMERS, CULTURE & COMMODIFICATION 3–6 (2000); see also Jess Benhabib & Alberto Bisin, *Social Construction of Preferences: Advertising*, in THE HANDBOOK OF SOCIAL ECONOMICS 201, 201–18 (Jess Benhabib, Matthew O. Jackson & Alberto Bisin, eds., 2010). This is a core theme in the work of philosopher Jean Baudrillard. See generally JEAN BAUDRILLARD, THE SYSTEM OF OBJECTS (James Benedict trans., Verso 2005) (1968) (giving a cultural critique of the consumer and commodification).

13. Hawkins, *supra* note 1, at 1150–52.

What sorts of informational resources do sites offer, and do they provide additional services such as a patient forum, links to other resources, a document download portal, or instructional videos? Only then can we get a more comprehensive picture of how clinics expect patients to use their websites and whether patients take advantage of these opportunities.

A focus on the constructed nature of clinic websites raises the question of whether clinic websites exploit patient vulnerabilities. In his article, Hawkins utilizes the rational actor model of decision making to question whether prospective patients are able to make sense of website information in a welfare-maximizing fashion.¹⁴ In the past, I have questioned the assumptions of such models of rationality and whether they are appropriate in contexts as affect-laden as medical decision making.¹⁵ Fortunately, Hawkins cautions against assuming that patients are irrational in any unique way.¹⁶ Is it not rational, however, for patients to act on intense but stable desires to conceive by consulting clinic websites and perhaps accepting their invitations to inquire further? Similarly, the frequency of certain website attributes may tell us more about clinic expectations—anticipated patient usage behaviors and anticipated patient needs and desires—than whether patients are erroneously relying upon certain website attributes and whether clinics are capitalizing on these “mistakes.” Empirical studies involving patients themselves are likely the best source of answers to these types of questions.

My remarks thus far reflect my enthusiasm for and commitment to social constructionism; I acknowledge that most lie outside the ambit of Hawkins’s already ambitious article and are directed towards future scholarship. I wish to devote the remainder of this Comment to highlighting the three most important contributions that I believe Hawkins’s article makes to ART scholarship.

First, Hawkins’s observations regarding the websites’ surprising lack of focus on success rates are very provocative. His conclusions yield many future lines of empirical inquiry, such as whether patients rely on or trust clinic reporting of success rates and whether individual clinics’ success rates are no longer as meaningful given their increasing uniformity, dulling the competitive edge that clinics can gain from reporting their success rates and creating a need to incorporate other inducements such as patient testimonials.

Second, Hawkins does an admirable job of providing evidence that clinic websites do in fact racialize ART, whitewashing fertility treatment by relying overwhelmingly on images of white babies and intended parents (who are cared for by mostly white nurses and white physicians). We need not consider whether this is the result of something so dramatic (and unlikely) as a bad motive or professional conspiracy; rather, we should accept it as an unfortunately predictable consequence of a medical establishment in which minorities have at best been underrepresented and at worse excluded as patients and practitioners. Hawkins’s research strongly suggests that this overutilization of white families in clinic advertising may contribute to a self-fulfilling prophecy, where fertility clinics that have a majority of white patients try to reach out to additional individuals in that target

14. *Id.* at 1154.

15. *See* Madeira, *supra* note 7.

16. Hawkins, *supra* note 1, at 1154.

demographic.¹⁷ But what seems like a sound business decision can easily become an exclusionary practice. It is imperative that steps be taken to further study this phenomenon, with the end goal of correcting these racial imbalances as soon as possible and in as many ways as possible. It would be an effective and comparatively easy first step for clinics to diversify their website images. Though a seemingly superficial change, employing a racially inclusive image pool will have profound constructionist consequences, rendering it more likely that minorities will see others like themselves when perusing a clinic website. In a similar vein, it is shocking that so few clinics advertise multilingual services, which is critical for informed consent practices. It seems likely that such resources might be more available within academic clinics attached to universities or practices affiliated with hospitals. This, too, has not received the scholarly attention that it deserves, and I ardently hope that Hawkins's research sparks additional interest in this important topic.

Finally, Hawkins's sobering conclusions regarding the ineffectiveness of attempts by professional associations such as the American Society of Reproductive Medicine (ASRM) and the Society for Assisted Reproductive Technology (SART) to enforce their own guidelines for advertising certainly deserve of much more extensive attention. The problem is not only that ASRM and SART guidelines lack teeth to bite noncompliant practitioners and clinics, but also that it is questionable whether these associations are even bothering to bark at recalcitrant parties. Guidelines that are seldom enforced lack a deterrent effect, and an ultimate consequence of expulsion may seem severe to some but may not carry much weight for others. While I question whether a regulatory approach is really most effective or appropriate, creative scholars can readily identify other options. We should not forget that patients are the parties who are most likely to look at these websites and thus could play a potentially important enforcement role. A grassroots movement could partner with infertility organizations with extensive roots in patient communities, such as RESOLVE, to educate patients as to best practices and encourage them to actively express their preferences and vote with their dollars. Investigative journalism pieces would also raise significant awareness of these issues and their importance outside the infertility community.

In conclusion, Hawkins's article is the type of scholarship that not only reaches interesting conclusions but stands to effect profound change—interdisciplinary approaches, empirical assessment, and compelling narratives of vulnerability and inequality. I eagerly look forward to the conversations that it and similar pieces will start.

17. *Id.* at 1170.