Digital Disclosure: HIV Status, Mobile Dating Application Design and Legal Responsibility

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Location-based mobile dating applications are often one of the richest sources of personal information readily accessible to strangers on the internet and in many cases this information now extends to a user’s HIV status and the date of their most recent sexual health test. Drawing on qualitative data collected from dating application users, this article considers how these features construct sexual health in a manner which reinforces the uneven distribution of responsibility for preventing HIV transmission. Examining the current legal framework covering HIV transmission criminalisation in England and Wales, this piece aims to illustrate the importance of understanding how these applications are used in practice, if they are to be used at trial.

Keywords: HIV Disclosure; Criminal Law; Mobile Apps; Responsibility; Risk

# Introduction

Both the technological world of smartphones, location-aware applications and mobile data; and the biomedical world of HIV testing, treatment and prevention, have seen significant developments over the past decade. Smartphones have come to be in the pockets of the majority of those living in the UK,[[1]](#footnote-2) whilst over the same period scientific research has demonstrated the efficacy of treatment as a means of preventing the onward transmission of HIV.[[2]](#footnote-3) These concurrent developments have overlapped in a number of areas, particularly in the realm of online dating. Here, the influence that the internet might have on sexual health, risk taking, and responsibility has been a long-standing concern among healthcare practitioners and researchers,[[3]](#footnote-4) as well as in public discourse.[[4]](#footnote-5)

Whilst mobile phones already meant that people were much more readily contactable in recent decades compared to the decades prior; the increases in speed and bandwidth available to modern mobile data networks and the functionality of modern smartphones now mean that the ‘near-*instantaneous’* transmission of information-rich content is now a mundanity of everyday life for many.[[5]](#footnote-6) Mobile dating applications employ this capability, along with the location data that modern devices are able to provide, to broadcast each user’s profile to other users in a nearby proximity to them.[[6]](#footnote-7)

*Grindr* was one of the earliest of these location-based mobile dating applications and has maintained a position as a (if not *the*) market leader, not only among apps aimed at men who have sex with men, but among dating applications more generally.[[7]](#footnote-8) It has been joined by a range of competition, including other apps which target men who have sex with men specifically,[[8]](#footnote-9) and applications marketed at heterosexuals, other LGBT groups, and those with a general audience.[[9]](#footnote-10)

Since these applications came to market, it might be suggested that the pace of change and development has been slower and more conservative; particularly when contrasted to the rapid pace of change and turnover seen with dating websites across the mid-2000s.[[10]](#footnote-11) Similarly, there have been few major developments in the hardware that these applications rely on, the “smart” phone. Save that the features that make smartphones distinct from their “dumb” counterparts - ease of internet access, cameras and their picture quality, and the ability to download software – have been gradually refined.

Nevertheless, dating applications enjoy a continued popularity, both in general and particularly among young and LGBT people.[[11]](#footnote-12) The endurance of many of these applications for, in some cases, up to and over a decade is perhaps an indication of how they, like smartphones, have incrementally refined themselves in light of changing market conditions, new technological innovations, and the evolving social context surrounding their use.

This includes refinements in response to the aforementioned developments in the treatment and prevention of HIV. From 2012 onwards, many application developers began to include HIV disclosure features within applications. These, typically, introduced a dedicated section within a user’s profile where HIV and other sexual health information could be disclosed. Although it should be noted that these features have, for the most part, been introduced only on those applications marketed exclusively, or at least primarily, at men who have sex with men.[[12]](#footnote-13) Alongside HIV status, these features often promote regular HIV testing by including a section where users can disclose a date on which they were tested, with some applications implementing reminder features which prompt users to get tested at regular intervals. These features have proved a source of controversy in recent years, following the revelation that *Grindr* was sharing this information with third parties.[[13]](#footnote-14) However, these features continue to be used by many on *Grindr, Hornet,* and other dating applications.

## Relevance and Significance

Several studies have considered how HIV disclosure takes place on the internet.[[14]](#footnote-15) Furthermore, recent research has gone on to address how disclosure is taking place using dedicated disclosure features on dating website; which are similar, in some respects, to the features seen on dating application profiles.[[15]](#footnote-16) However, there has been little research, to date, which has addressed HIV disclosure within application profiles using these integrated disclosure features, particularly from a legal perspective. This article draws together technological and sociological discussion of online HIV disclosure and contributes to this discussion in two ways. Firstly, it brings a specifically legal perspective to these discussions by addressing how legal and social discourses on sexual responsibility might shape and be shaped by these new features. And second, it develops on existing research into website use by highlighting what is distinct about mobile applications; in particular, the impact of the content restrictions and limitations which app developers must conform to if their applications are to be listed on the leading application marketplaces.

I draw on qualitative survey responses from current application users in England and Wales and examine how these HIV status disclosure feature might shape discourses on risk and responsibility for preventing HIV transmission. Focusing on the current framework of HIV transmission criminalisation, I suggest that content restrictions create an environment where little can be said of *sex* and *desire* by developers and subsequently by users. Furthermore, I suggest that this is contributing to a culture of exclusion and stigmatisation, as well as to the unequal distribution of responsibility for preventing HIV transmission and promoting sexual health. I conclude by suggesting that, in this respect, applications may contribute to stereotypical, inaccurate and unhelpful narratives involving people living with HIV (“PLWHIV”) which, coupled with the current legal framework which criminalises “reckless” HIV transmission in the absence of status disclosure, creates an environment where disclosure is seen as a straightforward and unambiguous concept, when in fact it is anything but this.

# Methodology

The data presented in this article is taken from an ongoing doctoral project looking at the criminal law implications of dating application use and, in particular, the HIV disclosure features discussed above. Data was collected over a seven-month period from late 2018 to early 2019 using an online qualitative survey. Online survey methods have proved popular and effective at capturing accounts of everyday experiences, given that internet usage is now part of the everyday life for many, including those who are LGBT.[[16]](#footnote-17) When researching online issues such as dating application use, online methods have the potential to reduce privacy concerns and participant inhibitions.[[17]](#footnote-18) Although online methods can introduce barriers to participation by requiring internet access, this might be considered less of a concern when investigating behaviour which, itself, requires internet access, such as application use. Asynchronous online methods also have the potential to reach harder to reach groups of participants by being accessible at a time and place convenient to the participant, whilst not, inherently, presenting more ethical challenges that offline methods.[[18]](#footnote-19) Importantly for this project, many of the readily available online survey sites facilitate the inclusion of multimedia, including high quality visuals, in the data collection process.

Capitalising on this, the data collection survey used in this project employed visual stimuli, in the form of mock application profiles created using Adobe Photoshop. These were used to elicit responses from participants in the form of narratives describing the fictitious users of these profiles, as well as to frame and contextualise later, specific, questions. Two of the images were accompanied by a short written scenario so that, together, they formed a more traditional style of vignette.[[19]](#footnote-20) The five stimuli were designed to elicit broad discussion of different elements of application use and HIV disclosure on apps. This included: the impact of disclosure of an undetectable viral load; how profiles purporting to represent more than one person were assessed; and, in one of the two stimuli that were accompanied by a written vignette, participants’ reactions to non-disclosure of a positive HIV status.

One advantage of this kind of approach when addressing potentially sensitive topics, such as application use and HIV disclosure, is the reduced chance that participants will provide what they consider to be the socially desirable response.[[20]](#footnote-21) In this respect, there are some similarities between this vignette inspired approach and the more traditional style of vignette.[[21]](#footnote-22) By being scenario driven, both facilitate discussion of the practical experience of using applications whilst at the same time reducing the risk that participants will be concerned that their responses are embarrassing or controversial.[[22]](#footnote-23)

Using a combination of application-based and social media-based recruitment, 102 participants were recruited to take part in the project.. Participants were all current or recent application users,[[23]](#footnote-24) who had used apps in England and/or Wales, and who were aged 18 or older at time of participation.[[24]](#footnote-25) Participants ranged from those who had used apps for a relatively limited period (the shortest being 3 months) to those who had used them and their precursors since their introduction (>10 years).

Girard and colleagues suggest that the impact of the changing landscape of HIV treatment and prevention, including treatment as prevention (“TasP”), is felt differently across different biosocialities, including generational groups of gay men.[[25]](#footnote-26) Whilst not an exact equivalent for generational status, the recruitment approach taken did produce some diversity in the age of participants. Participants ranged from the 18-24 age bracket to the 60 – 64 bracket, with the younger brackets generally more represented than older ones.[[26]](#footnote-27) Given this, it is notable that 76% of participants (n=77) reported being aware that an undetectable viral load means HIV cannot be transmitted through sex,[[27]](#footnote-28) prior to participating in the survey; which incorporated this information into one of the scenarios and provided additional information and links to further sources in the concluding questions and debrief. Whilst the design of the research means that these results do not aim to be generalisable to all application users, the high proportion of participants aware of TasP across all age brackets is notable given the behaviours and attitudes towards HIV and people living with HIV discussed below. [[28]](#footnote-29)

As with many qualitative surveys, there was some variation in the length and depth of the responses,[[29]](#footnote-30) however overall engagement with the visual stimuli task and the size of the sample provided a dataset from which I was able to generate several key insights. Responses were downloaded, in full, from the survey site and imported into NVivo where they were coded and thematically analysed.[[30]](#footnote-31) This paper focuses on several specific themes within the responses, relating to the how these new features are used, the design of dating applications and the impact that this might have on HIV disclosure, and how applications encourage certain forms of sexual responsibility. It then goes on to discuss the implications that these new features might have within the content of HIV transmission criminalisation in England and Wales.

# Application Use, Disclosure and Filtering Practices

When discussing the impact of HIV disclosure via application profiles, many participants indicated that disclosure did alter their perception of others and would often lead them to change their behaviour towards them. The nature of this change varied; from relatively minor changes to potentially quite stigmatising practices. A notable proportion of participants, although it should be emphasised not a majority, explicitly discussed avoiding contact with someone who disclosed that they were living with HIV:

The undetected [sic] puts me off other than than [sic] I would meet this person, but hiv undetectable or positive is a no go.[[31]](#footnote-32)

In addition to outright avoidance, other participants discussing the same stimuli – a profile which disclosed an undetectable viral load – stated that they would, in particular, avoid sexual contact with the character:

Keen to make a new friend, looks like they won’t kill me. Won’t be going to the bedroom due to HIV status m[sic], glad he’s homest[sic][[32]](#footnote-33)

If awareness of TasP had been lower among participants, attitudes and behaviour of this kind might be explained through confusion over the risks involved in sexual encounters with people living with HIV. However, both of the participants above were aware of TasP and, furthermore, the first participant in fact emphasised that despite ‘undetectable’ being distinct from ‘positive’ their personal ‘no go’ strategy remained persistent.

Avoidance strategies such as these may have a limited impact on transmission risk and safety, but a much more significant impact upon an individual’s sense ofsafety.[[33]](#footnote-34) Such strategies draw on a legacy of association between PLWHIV and infection risk,[[34]](#footnote-35) as well as individual anxieties. Many such anxieties were discussed by participants and drew on the principle that people living with HIV were ‘[n]ot good at prevention’.[[35]](#footnote-36) This attitude ran throughout much of the data, even where stimuli involved characters who disclosed an undetectable viral load. It often related to a perception that those living with HIV were more likely to engage in what was perceived as risky sexual behaviour:

[The character in the profile l]oves a load in them. Would be nervous to meet although I know what undetectable means.[[36]](#footnote-37)

The HIV related anxiety this participant demonstrates and the extent to which it shapes the avoidance behaviours discussed above also emphasises the quasi-marketplace dynamic of dating applications. Dating apps have been regularly described as a form of ‘window shopping’[[37]](#footnote-38), “online shopping”,[[38]](#footnote-39) and as akin to an ‘Argos catalogue’[[39]](#footnote-40) of men. Such conceptualisations may result, in part, from the ease with which users can browse, search and filter through those then encounter whilst using apps. In the same way that filtering through online retail sites has become central to e-commerce, filtering has been described as one the ‘central aspects of e-dating among gay men’ and reflects the extent to which online dating has been shaped by marketplace ideals including availability, competition and choice.[[40]](#footnote-41) The capacity that applications afford users to filter through and choose who to interact with and avoid is exemplified in the following excerpt. Discussing a vignette which centred on a character who had recently been diagnosed with gonorrhoea but who had received treatment and was awaiting an all-clear, the participant queried: ‘why take a chance when the app is full of other available people too’.[[41]](#footnote-42)

At present, it is not possible to use the filtering features available on many of the leading dating applications to filter based on HIV status.[[42]](#footnote-43) However, the design of dating applications still facilitates personal “filtering” behaviours such as the ones seen above. As Ahlm argues, ‘Grindr has a reputation as a hookup app in part because the design of the app facilitates this purpose’, even though the actual intentions reported by Grindr users are diverse and broader than this reputation suggests.[[43]](#footnote-44) Similarly, the design of profiles on these applications and how information is quickly and easily accessible to users facilitates personal filtering strategies – such as the ‘no go’ – even if the digital filters that are central to application use continue not to allow filtering based upon sexual health information.

## Identity v Behaviour

Although dating applications share many similarities with dating websites, there are noticeable distinctions between the two. In contrast to apps, the filtering tools on dating websites often do allow users to filter based on sexual health information, including based on HIV status.[[44]](#footnote-45) In addition, there are differences in the quantity of information that can be included in an app profile, designed to be viewed on a mobile device, compared to many webpages, which are designed to be viewed on a much larger screen.[[45]](#footnote-46) Dating websites also have fewer of the content restrictions of the kind discussed below. Another key theme developed from participants’ responses relates to the potential impact that these differences in quantity and content might have on participants’ assumptions and expectations around the behaviour of people living with HIV.

As noted above, some participants referred to the idea that PLWHIV were ineffective at prevention or implied a belief that they were more likely to engage in riskier behaviour. Other participants were more explicit about their expectations of risk-taking behaviour and a lack of “safe” behaviour by PLWHIV:

The status to me shows that's he's unsafe and takes risks. It doesn't bother me to[sic] much that he has it but if he takes risks then that could put me off. Putting the date on when he last got tests is a good idea.[[46]](#footnote-47)

Several participants did discuss HIV treatment’s preventative effect, including some who specifically highlighted how ‘[t]reatment as Prevention [can be] part of [an individual’s] safer sexual practices’.[[47]](#footnote-48) Whilst others spoke of an undetectable status reflecting the fact that someone living with HIV had ‘taken steps to reduce the harm to himself and others to effectively zero.’[[48]](#footnote-49) However, statements such as the one above appear to indicate that TasP is not seen as a risk reduction strategy in this way by all.

Another participant suggested that disclosure of an undetectable viral load in a profile showed that the person using the profile was ‘positive, undectable[sic] and that he has recently had unprotected sex’.[[49]](#footnote-50) Whilst the protection that TasP provides is limited to HIV, there has been a shift away from equating condomless sex with unprotected sex, due to the protection that TasP and PrEP can offer.[[50]](#footnote-51) Beliefs such as the ones seen here suggest that, despite this shift in language, many of those using applications continue to see sex through safe/unsafe binaries dependent upon condom use.[[51]](#footnote-52)

The notion that disclosing an undetectable status indicates particular behaviours, such as the non-use of condoms, may be seen to reflect the limits of what can be included in profiles. It also highlights how interaction on applications can be driven by culturally specific assumptions and expectations that may not be universally understood even among application users. Whilst it may be initially unsurprising that the participant above suggests that the character in the stimuli is sexually active – another participant explained that ‘Grindr is very much a “hook up” app and [it is] very difficult to meet guys for anything other than sex’[[52]](#footnote-53) – it is notable because, to this participant, disclosing the use of TasP (which they do not consider to be protection) implied the user was sexually active and did not make use of other forms of protection, such as condoms.

The extent to which the identities presented in profiles are read as indicating particular behaviours and sexual practices appears to concord with Spieldenner’s claim that ‘[g]ay men’s uses of online sex sites is often driven by identity markers’.[[53]](#footnote-54) These markers often focus on visual and aesthetic labels, which some have noted can result in forms of ‘aesthetic discrimination’ sharing some similarities with forms of racial, ageist and ableist discrimination.[[54]](#footnote-55) But, also, include what might otherwise be non-visible identities, as seen in this instance with HIV status.

The design of dating websites and applications is predicated on binaries based on identity labels such as these. Labels are selected or rejected when creating a profile,[[55]](#footnote-56) and then can be given effect through the filtering processes discussed above. Although HIV status is not reduced down to a single binary within application profiles, there are, still, a limited range of options available to choose from.[[56]](#footnote-57) Moreover, it appears that these labels do not prevent the condom-centric safety binary discussed above but, rather, feature within it.

As Spieldenner notes, binary thinking such as this often has the effect of delineating what is desirable and what undesirable: with sexual health this can be seen in the clean/dirty binary language often employed by dating website and application users.[[57]](#footnote-58) In this respect, the design of application profiles does appear to reinforce the idea that some HIV statuses are more “desirable” and “attractive” than others. It, furthermore, does little to challenge those concerns which are centred around expectations that those living with HIV are poor at prevention whilst, at the same time, suggesting that HIV disclosure is a straightforward process. This ignores the distinctions between offline disclosure, which might be multifaceted, conversation and dynamic, and online disclosure which is more likely to be standardised, indirect and formatted according to the restricted, closed-list approach taken by many application developers. In this respect, disclosure via application requires application users to conform to one form of sexual health, driven by disclosure and particular conceptions of *responsibility.*

## Cultures of Viral Surveillance

We encourage you to share your HIV status in your Hornet profile, and to keep it current. Disclosing your status is nothing to be ashamed of and it’s good for your health and the community. We can all work together to prevent HIV and reduce stigma.[[58]](#footnote-59)

As well as introducing disclosure features, application developers have proactively encouraged users to employ these features, through media releases,[[59]](#footnote-60) notifications, and reminders that tell users to update their own profiles. What stands out in the statement above, and others like it, is the extent to which it positions broadcasting one’s status as the method for maintaining health of both the user as an individual and the community of application users as a whole. That little distinction is made between what is good for the individual and what is good for the community is itself worthy of note. There is no ability within these applications as they currently operate to use these sexual health features, including test history functionality, privately - that is, without disclosing details to others - and in this respect the applications place pressure on their users to look after themselves, for the communal good.[[60]](#footnote-61)

Here it is important to note that HIV disclosure features and “test history” features were introduced concurrently on most applications that have them. Although the filtering and avoidance strategies discussed by participants were often centred around whether the profile disclosed being HIV positive or negative; several participants highlighted how this information was scrutinised in light of the (non-)recency of the test date listed:

I think that the test history section is useful to have shown as HIV is a big topic of discussion in the current climate. It makes people aware that they are responsible for themselves and make sure they are repeatedly getting tested and looking after themselves. However, it is also very easy to lie about these tests and dates and so should be taken with a pinch of salt.[[61]](#footnote-62)

The manner in which this participant discusses the test history section reflecting the sexual responsibility of those who use it highlights the extent to which being responsible is constructed as an identity which is temporary and constantly under scrutiny. For this participant, being responsible is not simply about knowledge regarding sexual health but about the process of ‘repeatedly getting tested’.

According to Lee and Sheon, gay men may using testing as part of their construction of themselves as ‘a reasonable and responsible person’, one who is not only more likely to get regularly tested but who avoids placing themselves at risk and takes care of their sexual health.[[62]](#footnote-63) The participant’s final comment on the possibility that the test history date can easily be updated speaks to a degree of mistrust concerning both information listed in app profiles and communicated directly through messages on the application:

[T]he best [the character in the vignette] can do is make it clear he's undetectable, provide a screenshot of some official confirmation so it's clear, and hope [the other character in the vignette] is knowledgeable enough to get that undetectable means no risk;[[63]](#footnote-64)

The men on dating apps seem to like playing games or lie a lot. So even if they said they’re all clear and tested I’d like to see a screenshot from their sexual health clinic test.[[64]](#footnote-65)

Although these participants were not directly critical of the inclusion of testing information in profiles, their responses further emphasise how the design of applications reinforces the desirability of certain forms of sexual health responsibility. Their perception that the information was not always accurate perhaps speaks to the ways in which this information acts as an identity marker and interacts with the desirability binaries noted by Spieldenner,[[65]](#footnote-66) thus creating the suspicion that dates are updated in order to attract others.

Whilst the responses above highlight how the inclusion of sexual health information in profiles can produce practical concerns over how such information can be checked and verified, the negative impact that these expectations can have was particularly emphasised by one participant who stated:

Test history adds stigma to HIV sufferers by distinguishing those that have HIV and those that haven’t. A culture is created whereby people that are HIV+ are seen as disgusting and wrong and a negative diagnoses is worn as a badge of honour.[[66]](#footnote-67)

The link that the participant quoted above draws between the test history function and the emotive attitude of disgust that he finds directed toward people living with HIV is significant considering the manner in which regular testing, and disclosure of it, is presented as the *responsible* response to the risk of HIV infection by application developers. The test history feature, testing reminders built into applications, and the urging to ‘keep it current’ present the need for ongoing management. The culture of surveillance this produces can be seen applying both to HIV- application users, who must maintain their negative status through repeated testing, and also to HIV+ users, for whom viral load testing becomes a marker of responsibility and health.[[67]](#footnote-68) Given this, the suggestion that a negative diagnosis acts as a “badge of honour” is also notable given that unreactive tests are only an indication of a negative status if the last risk exposure was outside the appropriate window period.[[68]](#footnote-69) As Race notes, ‘in the context of recent exposures, an HIV-negative antibody test result is not necessarily a reliable guide to infectivity – and may even be quite the opposite.’[[69]](#footnote-70)

Guta and colleagues suggest that detectable and undetectable are not merely clinical markers but also produce narratives of living with HIV whilst being ‘healthy, happy, fulfilled and virile’.[[70]](#footnote-71) An undetectable viral load is constructed as aspirational, feeding into a sense of empowerment and people living with HIV regaining freedom from the virus. However, it may also depersonalise people living with HIV to the role of vectors, in need of surveillance, monitoring and control. Such narratives excerpt significant social pressure on people living with HIV and tend to place responsibility for preventing HIV transmission primarily on the shoulders of people living with HIV.[[71]](#footnote-72)

As seen in the excerpts above, the emphasis on monitoring and maintaining viral states and viral load builds on discourses of responsibility and liberal individualism.[[72]](#footnote-73) Screenshots of texts from sexual health clinics, as well as delaying sex until after a future viral load test, were some of the strategies discussed by participants which capture how viral surveillance is pervasive among dating application users. It is notable that this surveillance relies not only on the disclosure features in profiles, but also the scrutiny of application users questioning and seeking evidence to support disclosed statuses, as part of the process which holds application users to account.[[73]](#footnote-74)

The design of the disclosure feature on applications can be seen contributing to these practices of accountability and the privatisation and individualisation of responsibility for preventing HIV transmission. Casting disclosure as an imperative, these applications construct HIV prevention as something carried out between individuals. Whilst this imperative might draw on discourses of community and community obligations, it does so without consideration of the broader social and cultural factors which impact HIV transmission.[[74]](#footnote-75)

Additionally, the disclosure that these applications enable is limited to a particular conceptualisation of sexual responsibility. As Mowlabocus and Lovelock have both noted within the context of PrEP provision by NHS England, the sexual health of men who have sex with men is often constructed as a matter of individual, rather and public, concern.[[75]](#footnote-76) This is particularly the case where these men might be constructed as breaching norms of “respectable” and “safe” homosexuality.[[76]](#footnote-77) Through imposing content restrictions, application marketplaces shape the design of applications, determining what can be said and what must remain silent. Which in some instances further impose and enforce these norms of *respectable* and *responsible* “good” sex onto application users.

# Content Restrictions and Discussing of Sex on Applications

As demonstrated above, several participants highlighted how the HIV disclosure features on applications are used by some as a means of navigating issues such as condom use or cessation, preferences for particular types of sex, and other issues related to, but beyond, HIV status. In this section, I discuss how such behaviour might be seen to be a consequence of restrictions governing the content of applications imposed on developers by many application marketplaces.[[77]](#footnote-78) In contrast to dating websites, including websites which have mobile sites, these restrictions typically prevent apps from including sexually explicit content. In response to these restrictions, many app developers include similarly phrased restrictions in their own terms of service. For example, *Grindr*’s terms of service include restrictions on:

…any information or material which a reasonable person could deem to be objectionable, defamatory, libelous[sic], offensive, obscene, indecent, pornographic, harassing, threatening, embarrassing, distressing, vulgar, hateful, racially or ethnically or otherwise offensive to any group or individual, intentionally misleading, false, or otherwise inappropriate, regardless of whether this material or its dissemination is unlawful[[78]](#footnote-79)

Whilst these restrictions have now been in place for several years, as Ashford has noted, they cannot reasonably be described as clear cut, nor do they seem to have eliminated the behaviour they seemingly target.[[79]](#footnote-80) They do, however, contribute to an environment where little can be said of the actual sexual *desires* that a user may have. It has been noted that the risk of public ostracization and other social pressures limit the extent to which users are explicit about their sexual desires.[[80]](#footnote-81) But these content restrictions also severely limit what can and cannot be said in a way which may contribute to the risk identities and the screening practices discussed above.

Particularly notable is that, unlike dating websites, dating applications do not provide users with an adequate mechanism for discussing *how* they have sex. Ashford notes that even on older websites there were means for users to describe the type of sex that they were looking for, including whether they had safe(r) sex ‘always’, ‘sometimes’, or ‘never’, although there too the rise of the ‘barebacker identity’ has created socio-legal challenges concerning the distinction between acts and identities.[[81]](#footnote-82) Nevertheless, applications have not approached the issue of safe(r) sex in the same fashion or addressed it to the same extent as dating websites. Profiles do not detail the *messy* reality of users’ sexual motivations, which – on a sexual front – are packaged up in the nondescript realms of the phrase: ‘right now’, ‘top’ ‘bottom’ ect.[[82]](#footnote-83) The only exception to this is the free-form section of profiles, although this remains subject to similar vague rules and to the scrutiny and regulation of application developers.

As such, sexual health can be seen as an identity marker, reflecting who the user is, rather than a behavioural marker, reflecting particular sexual acts and the risks associated with these. When participants, as discussed above, perceive of those with undetectable viral loads as ‘unsafe and [taking] risks’[[83]](#footnote-84) this lack of ability to discuss sexual practices has a very real impact on the ability of those living with HIV to use these applications without stereotyping, ostracization and exclusion.

Robinson has suggested that more attention needs to be given to *how* sexual risk taking and responsibility is carried out and, in particular, how the design of digital technologies can shape discourses of safety and responsibility.[[84]](#footnote-85) As he highlights, the design of dating websites and the filtering tools on them ‘marks HIV status and sexual practices as parts of a person, their profile, and how they are treated.[[85]](#footnote-86) However, the additional content restrictions discussed here appear to, moreover, limit discussion of sexual practices and produce narrow conceptualisations of safety and responsibility. By preventing sexual practices from being discussed overtly within user profiles, it might be argued that, applications further reduce risk to an identity or label assigned to some users, and in so doing produce narratives of *risky men* rather than *risky behaviours*.[[86]](#footnote-87)

It seems that, in contrast to the message promoted by many of these applications that disclosure is about combatting stigma and promoting community health, the design of many mobile dating applications contributes to the individualisation of sexual responsibility and the Othering of people living with HIV. This is perhaps unsurprising, as Flowers put it: ‘[w]hat appears to be happening is that with the advent of each new technological “advance”, the locations of “risk” multiply, and perhaps most importantly, the location of the “greatest risk” significantly shifts to smaller and smaller numbers of people.’[[87]](#footnote-88) Whilst the technological advances Flowers spoke of were primarily biopharmaceutical, in the form of antibody testing, treatment and PEP, it might be suggested that the digital advances which allow for the rapid dissemination of information-rich content are similarly likely to produce narrow conceptualisations of who is responsible and who isn’t. Given that gay men report using newer technologies such as PrEP to achieve intimacy in different ways,[[88]](#footnote-89) that applications construct a particularly narrow conceptualisation of how to have sex “responsibly” is highly problematic.

# Legal Constructions of Responsibility in HIV Transmission Cases

Having highlighted above how many dating applications impose restrictions on the content that can be included in a user’s profile and how some users report using this limited information as part of avoidance strategies, in this section I discuss the implications that this might have under the current framework of HIV criminalisation. I argue that by limiting the extent to which users are able to discuss sexual acts,[[89]](#footnote-90) application marketplaces, and in turn, developers, limit the extent to which individual transmission risks can be communicated on dating applications. Rather than providing space for risks to be discussed, presenting risks as things to be negotiated and taken (or not taken) by all those who are sexually active, this may contribute to the perception that risk(iness) is an inherent characteristic of some application users.

There may be some potentially positive outcomes to this. Race notes that TasP can offer PLWHIV new ways to self-identify centred around viral load and non-infectivity, beyond the HIV-Positive/Negative binary.[[90]](#footnote-91) However, the potentially unhelpful and significant impact that such a focus might have within the context of the criminal law must also be taken into consideration.

The criminal law continues to unequally distribute responsibility for preventing HIV transmission. With the most, if not all, of this responsibility placed onto the shoulders of people living with HIV. Since *Dica* in 2004, the criminal law’s response to HIV transmission has been centred on the Offences Against the Person Act and has approached HIV transmission as a physical harm, rather than as a sexual offence.[[91]](#footnote-92) Since that point, what constitutes sufficient awareness of transmission risk, on the part of the defendant, to give rise to liability; and what constitutes sufficient disclosure of that risk to eliminate liability has remained somewhat unclear.[[92]](#footnote-93)

The Court of Appeal established in *Konzani* that there would be a limited range of situations where there would not need to be direct disclosure by the defendant to the complainant, whether verbally or non-verbally, for the consent to the risk of HIV transmission to nevertheless be genuine.[[93]](#footnote-94) For instance, where the complainant and defendant meet whilst the defendant is being treated for HIV. The CoA’s recognition of such circumstances has been overshadowed, however, by the ruling in the same case that ‘silence in these circumstances is incongruous with honesty, or with a genuine belief that there is informed consent.’[[94]](#footnote-95) Although these two principles are presented as concordant within the judgement, as part of a broader expectation of informed consent, it can be argued that the former is undermined the latter.[[95]](#footnote-96) By constructing silence as inherently dishonest, the courts are in fact limiting the defendant’s ability to discharge their obligation to ensure that their sexual partners are properly informed of transmission risk in circumstances where this is necessary.

Some have expressed concern that indirect forms of informed consent such as this might lead to people living with HIV assuming that they need not disclose at all, where, for example, their status is generally and publicly known. In part, such concerns seem predicated on the desire not to place responsibility for preventing HIV transmission on the shoulders of HIV- individuals.[[96]](#footnote-97) The rationale behind this being that consent is undermined if ‘the victim must first have known to ask the right question’.[[97]](#footnote-98)

However, as Ryan has pointed out, the exception provided in *Konzani* does little to remove the requirement for the defendant to ensure that their partners do have sufficient knowledge.[[98]](#footnote-99) Instead, the exception might be better described as a route to preventing wilful blindness on the part of HIV- people to disclosure which *has* taken place, albeit in perhaps an indirect manner. It is worth noting that, drawing on Sedgwick’s work, a similar ‘privilege of unknowing’ has been discussed in relation to the growing number of sexual offence cases involving allegations of gender identity deception.[[99]](#footnote-100) Ignoring this imbalance of responsibility for sexual health and placing the majority, if not all, of the responsibility for preventing infections on the shoulders of people living with HIV assumes that disclosure takes place in a somewhat idealised setting.[[100]](#footnote-101)

Cherkassky suggests that ‘it may be more logical to keep the burden on the defendant to check that the victim is aware of the situation’.[[101]](#footnote-102) However, as Ryan points out, the sexual context within which this discussion takes place is hardly a site of dispassion,[[102]](#footnote-103) and there is clearly a need to acknowledge the *messy* reality of sexual encounters when the law becomes involved with them.[[103]](#footnote-104) The suggestion that ‘the responsibility of those who are ill to inform their consorts that they differ from the norm in being HIV positive, … is their responsibility alone’[[104]](#footnote-105) ignores the practicalities of having such discussions. This is particularly the case online, and on dating applications, which come with their own norms, practices and expectations such as the ones discussed above.

There is little recognition that sexual interactions that carry the risk of HIV transmission are, by their very nature, dynamic interactions between two or more people.[[105]](#footnote-106) The current law on HIV transmission pays little attention to issues of public health and constructs transmission predominantly as a legal concern,[[106]](#footnote-107) it downplays the shared responsibility placed on those who are sexually active, individually and *as a body* to reduce HIV transmissions.[[107]](#footnote-108) Dating applications play into this by constructing responsible sexual health as something that individuals must do *on their own* rather than *together*.

The inequity of the current law, placing all responsibility for transmission on the shoulders of people living with HIV, has been widely noted.[[108]](#footnote-109) With this in mind, what applications might misrepresent if viewed in isolation, at trial or by police subsequent to a complaint, is the quite static way that profiles on these applications convey what is otherwise a fluctuating process.[[109]](#footnote-110) What constitutes risk takes on a different meaning in different contexts, the discourses surrounding sexual responsibility and HIV infection have the tendency to take qualitative assessments of risk and develop them into personalised characteristics, producing the *high-risk* individual. However, this language does little to help us communicate the risks incumbent in individual actions,[[110]](#footnote-111) and may lead to gay men being misconstrued as “risky” sexual actors on account of their application use.

It is also noteworthy that dating applications continue to engage in HIV exceptionalism, picking out the risk of HIV transmission above and beyond other sexually transmitted infections, some of which may be less readily treated, and which may have quite serious consequences.[[111]](#footnote-112) Similarly, the law also continues to focus, primarily, on the risks relating to HIV.[[112]](#footnote-113) Even then, the limited range of case law on reckless HIV transmission[[113]](#footnote-114) means that the law is still rooted in an understanding of HIV that predates awareness that U=U and arguably was still relatively early into the age of HIV as a lifelong, rather than life limiting, condition.[[114]](#footnote-115)

Within this context, the overall design and architecture of the applications, particularly the design of user profiles, leaves much to be desired. In particular, there is a need to overcome the *responsible/irresponsible* framing of users, as well as a need to address this changing medical/sexual health context.[[115]](#footnote-116) But most importantly, from a legal standpoint, if applications are becoming more open to sexualised content, as the introduction of sexual labels such as “top” and “vers” in a recent update seems to indicate, there needs to be greater recognition of the differing ways that users seek pleasure with one another and consequently take risks.

Criminalisation of reckless transmission in England and Wales is limited to instances where transmission has actually occurred, meaning that where individuals have an undetectable viral load and are therefore unable to transmit the virus no offence is committed in instances of non-disclosure or deception regarding HIV status.[[116]](#footnote-117) Although few participants made reference to the legal implications of non-disclosure, one response which did might indicate that the legal framework covering HIV is poorly understood:

[The character in the vignette] has a legal obligation to disclose his status if he knows what it is I understand his reasons not wanting to publish it due to the stigma surrounding HIV but not disclosing it would be worse for the stigma I know undetectable means it cannot be spread however he still has the legal obligation to disclose it[[117]](#footnote-118)

Such misunderstandings may be seen as the product of an environment, as seen here across many dating applications, where there is a focus on disclosure as *the* means of sexual responsibility. Rather than one where disclosure is one potential tool in the sexual actor’s repertoire.

Furthermore, although the majority of participants in this project were aware of TasP, it should be noted a significant minority were not. Additionally, some reported being aware, but remained doubtful or uncertain about TasP’s effectiveness. Several also emphasised that they felt under-informed about these issues and suggested that additional educational material addressing TasP and U=U was needed. Further research may wish to consider how confusion over TasP influences beliefs about the criminal law among gay men, and how widespread misunderstandings over both are. Even if limited in scope, such beliefs might significantly alter behaviour on an individual scale and might lead to misunderstandings about the exact nature of obligations under the law.[[118]](#footnote-119) It is also possible that, should people in such circumstances discover their partner’s HIV status subsequently and still continue to hold these beliefs around criminal responsibility, then silence and non-disclosure by users who are undetectable may continue to result in complaints to the police, further contributing to the stigma directed toward people living with HIV that the law plays a part in.[[119]](#footnote-120)

# Conclusions

Kane Race notes that, ‘the infrastructures of urban gay life have traditionally been predicated on encounters with strangers’.[[120]](#footnote-121) If true then we have perhaps never before had the potential to access as much information on these strangers as we do today. Whether stood waiting for a bus or in a queue at a coffee shop,[[121]](#footnote-122) we can access a library of information on others; including, where listed, their HIV status and their reported last sexual health check, nearly instantaneously, silently and without them ever knowing that we did.

Whilst this may provide an opportunity to develop a more trusting and supportive environment within which to discuss sexual health,[[122]](#footnote-123) it is clear that this is not always the case and that applications contribute towards a specific understanding of sexual responsibility which is individualistic, potentially ineffective, and quite probably highly stigmatising.

The relationship between mobile dating application use and our understanding of HIV risk and responsibility is complex, shaped by the concurrent development of both over the past decade. What I have attempted to draw out in this article is how the conceptualisation of responsibility that applications appear to be developing is poorly suited to the aim of preventing HIV transmission. Instead of descriptions of *behaviour,* as seen on some dating websites*,* the status disclosure feature on dating applications appears to further construct sexual health as part of a user’s *identity.* Moreover, the design of applications and avoidance of sexually explicit materials in publicly visible profiles contributes to sharp distinctions between those who are acting responsibly in service to their own and the community good and those who are irresponsible, undesirable and reckless. Therefore, although applications might continue to be described as ‘window shopping’[[123]](#footnote-124), “online shopping”,[[124]](#footnote-125) or as an ‘Argos catalogue’[[125]](#footnote-126) *of men*; the complex, disorderly and sometimes illogical realities of *sex* and *desire* are subsumed within identity, contributing to sharp distinctions between those who are acting responsibly in service to their own and the community good and those who are irresponsible, undesirable and reckless.

As discussed above, there is longstanding disagreement, too, within legal commentary surrounding the meaning of sexual responsibility and how it should be distributed between those who are labelled as complainant and defendant should cases come to trial. The manner in which dating applications fail to account for the different ways users might seek pleasure and engage in erotic acts may further misrepresent the meaning of responsibility, as well as the nature and extent of the necessary disclosure practices required by the criminal law’s response to HIV, and in so doing may shape legal conceptualisations of risk, responsibility and culpability in counterproductive ways. At a time when public health discourse surrounding responsibility developing in a new direction, with campaigns such as the “It Starts with Me” campaign shifting away from language which places the majority of responsibility on those living with the virus, applications may also require an update.

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9. Tinder being the most notable example, alongside other apps such as Hinge and Bumble. [↑](#footnote-ref-10)
10. For instance, compare the longevity of Grindr and other dating applications to websites such as Gay.com and Gaydar.uk, which were themselves market leaders for a time. See, Andrew DJ Shield, ‘Grindr Culture: Intersectional and Socio-Sexual’ (2018) 18 Ephemera 149; Furthermore, for a brief history of some of these developments, see, Adam Bloodworth, ‘What Is Gaydar? Does It Work like Other Gay Dating Apps, and Can I Join for Free?’ (*Pink News*, 9 March 2018) <www.pinknews.co.uk/2018/03/09/gaydar-gay-dating-app/> accessed 26 August 2019; See, also, Sharif Mowlabocus, *Gaydar Culture : Gay Men Technology and Embodiment in the Digital Age* (Ashgate 2010). [↑](#footnote-ref-11)
11. For general commentary, see, Mowlabocus, *Gaydar Culture : Gay Men Technology and Embodiment in the Digital Age* (n 10); Barrie Gunter, ‘The Study of Online Relationships and Dating’ in William H Dutton (ed), *The Oxford Handbook of Internet Studies* (Oxford University Press 2013); Mark McCormack, ‘The Role of Smartphones and Technology in Sexual and Romantic Lives’ (2015); Michael Rosenfeld, ‘Are Tinder and Dating Apps Changing Dating and Mating in the USA?’ in Jennifer Van Hook, Susan M McHale and Valarie King (eds), *Families and Technology* (Springer 2018). [↑](#footnote-ref-12)
12. For two notable examples, see, Hornet Networks, ‘With Hornet, Gays Can Now Play Safe on Gay Mobile Social Networks’ (*PR Newswire*, 20 January 2012) <www.prnewswire.com/news-releases/with-hornet-gays-can-now-play-safe-on-gay-mobile-social-networks-137800183.html> accessed 26 August 2019; Grindr LLC, ‘New to Grindr Profiles: HIV Status and Last Test Date Fields’ (9 November 2016) This could originally be found at <www.grindr.com/blog/new-grindr-profiles-hiv-status-last-test-date/> but which has now been removed. An archived version can be accessed at: <web.archive.org/web/20161115044007/www.grindr.com/blog/new-grindr-profiles-hiv-status-last-test-date/> accessed 26 August 2019. [↑](#footnote-ref-13)
13. See, Julia Belluz, ‘Grindr Is Revealing Its Users’ HIV Status to Third-Party Companies’ (*Vox*, 3 April 2018) <https://www.vox.com/2018/4/2/17189078/grindr-hiv-status-data-sharing-privacy> accessed 26 August 2019. [↑](#footnote-ref-14)
14. See, for instance, Mark Davis and others, ‘Sex and the Internet: Gay Men, Risk Reduction and Serostatus’ (2006) 8 Culture, Health & Sexuality 2; Jef St. de Lore and others, ‘HIV Disclosure and Subsequent Sexual Behaviors Among Men Who Have Sex with Men Who Meet Online’ (2012) 59 Journal of Homosexuality 592. [↑](#footnote-ref-15)
15. Kane Race, ‘Click Here for HIV Status: Shifting Templates of Sexual Negotiation’ (2010) 3 Emotion, Space and Society 7; Brandon Andrew Robinson, ‘Doing Sexual Responsibility: HIV, Risk Discourses, Trust, and Gay Men Interacting Online’ (2018) 61 Sociological Perspectives 383. [↑](#footnote-ref-16)
16. Ellen DB Riggle, Sharon S Rostosky and C Stuart Reedy, ‘Online Surveys for BGLT Research: Issues and Techniques.’ (2005) 49 Journal of Homosexuality 1; Chris Ashford, ‘Queer Theory, Cyber-Ethnographies and Researching Online Sex Environments’ (2009) 18 Information and Communications Technology Law 297; Grant Blank and Bianca C Reisdorf, ‘The Participatory Web: A User Perspective on Web 2.0’ (2012) 15 Information Communication and Society 537. [↑](#footnote-ref-17)
17. See, John Suler, ‘The Online Disinhibition Effect’ (2004) 7 CyberPsychology & Behavior 321; and, more generally; Helene Snee and others, ‘Digital Methods as Mainstream Methodology’ in Helene Snee and others (eds), *Digital methods for social science : an interdisciplinary guide to research innovation* (Palgrave Macmillan 2016). [↑](#footnote-ref-18)
18. Online research does have particular ethical challenges; however, it can also alleviate some of the challenges of offline research. Some areas where close attention may need to be paid include data protection and anonymity, due to the involvement of metadata, and attention should also be given to ensuring effective informed consent is obtained and spamming is avoided during recruitment. See, generally, Riggle, Rostosky and Reedy (n 16); Mary Ann Chiasson and others, ‘HIV Behavioral Research Online’ (2006) 83 Journal of Urban Health 73; Rosie Harding and Elizabeth Peel, ‘Surveying Sexualities: Internet Research with Non-Heterosexuals’ (2007) 17 Feminism and Psychology 277; Annette Markham and Elizabeth Buchanan, ‘Ethical Decision-Making and Internet Research’ (Association of Internet Researchers Working Committee 2012). [↑](#footnote-ref-19)
19. This shares some similarities with the story completion technique discussed in Virginia Braun and Victoria Clarke, *Successful Qualitative Research* (Sage 2013) 142–147; and the subsquent use of this approach outlined in, Victoria Clarke and others, ‘Editorial Introduction to the Special Issue: Using Story Completion Methods in Qualitative Research’ (2019) 16 Qualitative Research in Psychology 1. [↑](#footnote-ref-20)
20. Braun and Clarke (n 19) 144–145. [↑](#footnote-ref-21)
21. See, generally, Rhidian Hughes and Meg Huby, ‘The Construction and Interpretation of Vignettes in Social Research’ (2004) 11 Social Work & Social Sciences Review 36; Alan Bryman, *Social Research Methods* (5th edn, Oxford University Press 2016) 259–260. [↑](#footnote-ref-22)
22. Christine Barter and Emma Renold, ‘The Use of Vignettes in Qualitative Research’ [1999] Social Research Update; Niamh Maguire and others, ‘Using Vignette Methodology to Research the Process of Breach Comparatively’ (2015) 7 European Journal of Probation 241, 245. [↑](#footnote-ref-23)
23. What consitutes a current users may be more contested that first appearences might indicate. See, Jed R Brubaker, Mike Ananny and Kate Crawford, ‘Departing Glances: A Sociotechnical Account of “Leaving” Grindr’ (2016) 18 New Media & Society 373. In this project participants needed to have used a mobile dating application at least once in the past three years. This was done so as not to exclude those with infrequent usage habits whilst still maintaining general awareness of the issues being investigated. [↑](#footnote-ref-24)
24. Age requirements on applications typically restrict usage by those under 18, although the effectiveness of these measures is questionable. See, for instance, Kath Albury and Paul Byron, ‘Safe on My Phone? Same-Sex Attracted Young People’s Negotiations of Intimacy, Visibility, and Risk on Digital Hook-Up Apps’ (2016) 2 Social Media and Society 8, particularly at, 8. [↑](#footnote-ref-25)
25. Gabriel Girard and others, ‘Is HIV Prevention Creating New Biosocialities among Gay Men? Treatment as Prevention and Pre-Exposure Prophylaxis in Canada’ (2019) 41 Sociology of Health and Illness 484. [↑](#footnote-ref-26)
26. The age diversity of the participants in the project may be reflective of general trends in the uptake of online dating which remains most popular among younger age groups. However, it must be noted that there is insufficient research demonstrating that these trends apply to LGBT specific online dating to make firm conclusions. See, generally, Arron Smith and Monica Anderson, ‘5 Facts about Online Dating’ (*Pew Research*, 29 February 2016) <http://www.pewresearch.org/fact-tank/2016/02/29/5-facts-about-online-dating/> accessed 30 November 2019. [↑](#footnote-ref-27)
27. Often summarised in the phrase “Undetectable = Untransmittable” or “U=U”. [↑](#footnote-ref-28)
28. Reported awareness was >60% across all age brackets. 18% of participants (n=18) reported no prior awareness, with 7% (n=7) responding other. Some of the explanations provided with the latter response are discussed further below. [↑](#footnote-ref-29)
29. Gareth Terry and Virginia Braun, ‘Short but Often Sweet’ in Virginia Braun, Victoria Clarke and Debra Grey (eds), *Collecting qualitative data : a practical guide to textual, media and virtual techniques* (Cambridge University Press 2016). [↑](#footnote-ref-30)
30. Virgina Braun and Clarke Victoria, ‘Using Thematic Analysis in Psychology’ (2006) 3 Qualitative Research in Psychology 77; Braun and Clarke (n 19). [↑](#footnote-ref-31)
31. Participant 401353-401344-41903701. [↑](#footnote-ref-32)
32. Participant 401353-401344-41901554 [↑](#footnote-ref-33)
33. Adam H Bourne and Margaret A Robson, ‘Perceiving Risk and (Re)Constructing Safety: The Lived Experience of Having “safe” Sex’ (2009) 11 Health, Risk and Society 283. [↑](#footnote-ref-34)
34. See, Asha Persson, ‘Non/Infectious Corporealities: Tensions in the Biomedical Era of “HIV Normalisation”’ (2013) 35 Sociology of Health and Illness 1065. [↑](#footnote-ref-35)
35. Participant 401353-401344-41516378. [↑](#footnote-ref-36)
36. Participant 401353-401344-42837958. The participant’s reference to a ‘load’ in this context being a reference to ejaculate and indicating that the participant expects that the user of this profile engages in condomless sex. [↑](#footnote-ref-37)
37. Senthorun Raj, ‘Grindring Justice’, *Northumbria University LGBT History Month Series* (2019). [↑](#footnote-ref-38)
38. Kane Race, *The Gay Science: Intimate Experiments with the Problem of HIV* (Routledge 2017) 53. [↑](#footnote-ref-39)
39. Chris Fox, ‘10 Years of Grindr: A Rocky Relationship’ (*BBC News*, 25 March 2019) <www.bbc.co.uk/news/technology-47668951> accessed 26 August 2019. [↑](#footnote-ref-40)
40. Mark Davis and others, ‘E-Dating, Identity and HIV Prevention: Theorising Sexualities, Risk and Network Society’ (2006) 28 Sociology of Health and Illness 457, 457; and, also, Race, ‘Click Here for HIV Status: Shifting Templates of Sexual Negotiation’ (n 15) 10. [↑](#footnote-ref-41)
41. Participant 401353-401344-41917008 [↑](#footnote-ref-42)
42. Although, such a feature does seem to have been, at the least, considered by some application developers in the past. See, for example, Bobby Rae, ‘Is Grindr about to Introduce a HIV Filter?’ (*Pink News*, 11 July 2016) <https://www.pinknews.co.uk/2016/07/11/is-grindr-about-to-introduce-a-hiv-filter/> accessed 5 December 2019. [↑](#footnote-ref-43)
43. Jody Ahlm, ‘Respectable Promiscuity: Digital Cruising in an Era of Queer Liberalism’ (2017) 20 Sexualities 364, in particular, 368. [↑](#footnote-ref-44)
44. See, Race, ‘Click Here for HIV Status: Shifting Templates of Sexual Negotiation’ (n 15); Robinson (n 15). [↑](#footnote-ref-45)
45. Although it should also be noted that many dating websites have also developed mobile versions, which might be viewed as distinct in their own regards. [↑](#footnote-ref-46)
46. Participant 401353-401344-42326141. [↑](#footnote-ref-47)
47. Participant 401353-401344-43543939. [↑](#footnote-ref-48)
48. Participant 401353-401344-41613134. [↑](#footnote-ref-49)
49. Participant 401353-401344-42414609. [↑](#footnote-ref-50)
50. Todd Heywood, ‘CDC to Stop Using “Unprotected Sex” for “Condomless Sex”’ (*Plus*, 13 February 2014) <www.hivplusmag.com/research/2014/02/13/cdc-stop-using-unprotected-sex-condomless-sex> accessed 26 August 2019. [↑](#footnote-ref-51)
51. All-or-nothing thinking regarding sexual health has been noted by many. For instance, see, Dwayne C Turner, *Risky Sex* (Columbia University Press 1997) xiii. [↑](#footnote-ref-52)
52. Participant 401353-401344-40688721. [↑](#footnote-ref-53)
53. Andrew Spieldenner, ‘PrEP Whores and HIV Prevention: The Queer Communication of HIV Pre-Exposure Prophylaxis (PrEP)’ (2016) 63 Journal of Homosexuality 1685, 1691. [↑](#footnote-ref-54)
54. Guido Noto La Diega, ‘Grinding Privacy in the Internet of Bodies’ in Ronald Leenes and others (eds), *Data Protection and Privacy* (Hart Publishing 2019) 14–15. [↑](#footnote-ref-55)
55. Or in some instances, omitted, if users are given such an option. [↑](#footnote-ref-56)
56. For example, the application Hornet allows users to select from four options: ‘Negative’, ‘Negative, on PrEP’, ‘Positive’, and ‘Positive, undetectable’, as well as the option not to list a status. See, ‘Know Your Status: What Do the Different KYS Options Mean?’ (*Hornet*) <https://hornet.com/about/know-your-status/> accessed 15 August 2019. These options are typical of other applications, although there is a degree of variation. [↑](#footnote-ref-57)
57. See, generally, Spieldenner (n 53). [↑](#footnote-ref-58)
58. ‘Know Your Status: What Do the Different KYS Options Mean?’ (n 56). [↑](#footnote-ref-59)
59. Grindr LLC (n 12). [↑](#footnote-ref-60)
60. Race, ‘Click Here for HIV Status: Shifting Templates of Sexual Negotiation’ (n 15) 13. [↑](#footnote-ref-61)
61. Participant 401353-401344-41483556. [↑](#footnote-ref-62)
62. Seung Hee Lee and Nicolas Sheon, ‘Responsibility and Risk: Accounts of Reasons for Seeking an HIV Test’ (2008) 30 Sociology of Health and Illness 167, 172. [↑](#footnote-ref-63)
63. Participant 401353-401344-41917008. [↑](#footnote-ref-64)
64. Participant 401353-401344-41514592. [↑](#footnote-ref-65)
65. Spieldenner (n 53). [↑](#footnote-ref-66)
66. Participant 401353-401344-40159327. [↑](#footnote-ref-67)
67. This surveillance may interact with and complement forms of self-surveillance and self-management observed in HIV and Viral Load testing campaigns. See, Niels van Doorn, ‘Treatment Is Prevention: HIV, Emergency and the Biopolitics of Viral Containment’ (2013) 27 Cultural Studies 901, 916–917. [↑](#footnote-ref-68)
68. British Association for Sexual Health and HIV (BASHH); Expert Advisory Group on AIDS (EAGA), ‘Time Period for HIV Testing (HIV Window Period)’ (*Department of Health and Social Care (gov.uk)*, 21 October 2014) <www.gov.uk/government/publications/time-period-for-hiv-testing-position-statement> accessed 26 August 2019. [↑](#footnote-ref-69)
69. Race, ‘Click Here for HIV Status: Shifting Templates of Sexual Negotiation’ (n 15) 8. [↑](#footnote-ref-70)
70. Adrian Guta, Stuart J Murray and Marilou Gagnon, ‘HIV, Viral Suppression and New Technologies of Surveillance and Control’ (2016) 22 Body & Society 82, 97. [↑](#footnote-ref-71)
71. In particular, those narratives that make reference to TasP offering the potential of an AIDS free generation. See, Guta, Murray and Gagnon (n 70) 89; See, also, Daniel Grace and others, ‘Becoming “Undetectable”: Longitudinal Narratives of Gay Men’s Sex Lives After a Recent HIV Diagnosis’ (2015) 27 AIDS Education and Prevention 333. [↑](#footnote-ref-72)
72. See, Barry D Adam, ‘Constructing the Neoliberal Sexual Actor: Responsibility and Care of the Self in the Discourse of Barebackers’ (2005) 7 Culture, Health and Sexuality 333. [↑](#footnote-ref-73)
73. Robinson (n 15). [↑](#footnote-ref-74)
74. See, generally, Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge-Cavendish 2007). [↑](#footnote-ref-75)
75. Michael Lovelock, ‘Sex, Death and Austerity: Resurgent Homophobia in the British Tabloid Press’ (2018) 35 Critical Studies in Media Communication 225; Sharif Mowlabocus, ‘“What a Skewed Sense of Values”: Discussing PreP in the British Press’ [2019] Sexualities. [↑](#footnote-ref-76)
76. Lovelock (n 75) 226–236; drawing on, Yuvraj Joshi, ‘Respectable Queerness’ (2012) 43 Columbia Human Rights Law Review 415; and, Chris Ashford, ‘Bareback Sex, Queer Legal Theory, and Evolving Socio-Legal Contexts’ (2015) 18 Sexualities 195. [↑](#footnote-ref-77)
77. Jenna Wortham, ‘Apple Bans Some Apps for Sex-Tinged Content’ *The New York Times* (New York, 22 February 2010). [↑](#footnote-ref-78)
78. Grindr LLC, ‘Grindr Terms and Conditions of Service’ (2018) para 8.3.12 <www.grindr.com/terms-of-service/> accessed 26 August 2019. [↑](#footnote-ref-79)
79. Chris Ashford, ‘Bareback, Grindr and a New Censorship?’ (*Law and Sexuality*, 5 June 2016) <https://lawandsexuality.wordpress.com/2016/06/05/bareback-grindr-and-a-new-censorship/> accessed 26 August 2019. [↑](#footnote-ref-80)
80. Courtney Blackwell, Jeremy Birnholtz and Charles Abbott, ‘Seeing and Being Seen: Co-Situation and Impression Formation Using Grindr, a Location-Aware Gay Dating App’ (2015) 17 New Media & Society 1117. [↑](#footnote-ref-81)
81. Ashford, ‘Bareback Sex, Queer Legal Theory, and Evolving Socio-Legal Contexts’ (n 76), in particular, 196. [↑](#footnote-ref-82)
82. A similar point about the lack of legal recognition of the messy reality of sex in gender deception cases can be found in Victoria Brooks and Jack Clayton Thompson, ‘Dude Looks Like a Lady: Gender Deception, Consent and Ethics’ (2019) 83 The Journal of Criminal Law 258. [↑](#footnote-ref-83)
83. See the quote from Participant 401353-401344-42326141, at n 46. [↑](#footnote-ref-84)
84. Robinson (n 15). [↑](#footnote-ref-85)
85. Robinson (n 15) 12. [↑](#footnote-ref-86)
86. Paul Flowers, Barbara Duncan and Jamie Frankis, ‘Community, Responsibility and Culpability: HIV Risk-Management amongst Scottish Gay Men’ (2000) 10 Journal of Community and Applied Social Psychology 285. [↑](#footnote-ref-87)
87. Paul Flowers, ‘Gay Men and HIV/AIDS Risk Management’ (2001) 5 Health 50, 68. [↑](#footnote-ref-88)
88. Alexander Maine, ‘Bareback Sex, PrEP, National AIDS Trust v NHS England and the Reality of Gay Sex’ [2019] Sexualities. [↑](#footnote-ref-89)
89. In particular, the restrictions limiting discussion of unprotected anal intercourse. Although the extent to which unprotected is, in this context, being used synonymously with condomless should be considered. [↑](#footnote-ref-90)
90. Kane Race, ‘“Party and Play”: Online Hook-up Devices and the Emergence of PNP Practices among Gay Men’ (2015) 18 Sexualities 253. [↑](#footnote-ref-91)
91. Offences Against the Person Act 1861, in particular, ss 18 and 20; See, *R v Dica* [2004] EWCA Crim 1103; *R v Konzani (Feston)* [2005] EWCA Crim 706; and, more recently, *R v Rowe* [2018] EWCA Crim 2688. [↑](#footnote-ref-92)
92. See, for instance, Matthew Weait, ‘Knowledge, Autonomy and Consent: R v Konzani’ [2005] Criminal Law Review 763; Samantha Ryan, ‘Risk-Taking, Recklessness and HIV Transmission: Accommodating the Reality of Sexual Transmission of HIV within a Justifiable Approach to Criminal Liability’ (2007) 28 Liverpool Law Review 215; Catherine Dodds, Adam Bourne and Matthew Weait, ‘Responses to Criminal Prosecutions for HIV Transmission among Gay Men with HIV in England and Wales’ (2009) 17 Reproductive Health Matters 135. [↑](#footnote-ref-93)
93. *R. v Konzani (Feston)* (n 91) [44]. [↑](#footnote-ref-94)
94. *R. v Konzani (Feston)* (n 91) [42]. ‘[T]hese circumstances’ refering generally to situations where there is a risk of transmission via a sexual act. [↑](#footnote-ref-95)
95. Alternatively, it could be argued that the former may undermine the latter. See, Lisa Cherkassky, ‘Being Informed: The Complexities of Knowledge, Deception and Consent When Transmitting HIV’ (2010) 74 The Journal of Criminal Law 242. [↑](#footnote-ref-96)
96. Cherkassky (n 95). [↑](#footnote-ref-97)
97. Amanda Clough, ‘Conditional Consent and Purposeful Deception’ (2018) 82 The Journal of Criminal Law 178, 189. [↑](#footnote-ref-98)
98. Samantha Ryan, ‘Disclosure and HIV Transmission’ (2015) 79 The Journal of Criminal Law 395; see, also, Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 74) 191. [↑](#footnote-ref-99)
99. Alex Sharpe, ‘The Ethicality of the Demand for (Trans)Parency in Sexual Relations’ (2017) 43 Australian Feminist Law Journal 161, 165. [↑](#footnote-ref-100)
100. Grace and others (n 71). [↑](#footnote-ref-101)
101. Cherkassky (n 95) 254. [↑](#footnote-ref-102)
102. Ryan (n 92) 247. [↑](#footnote-ref-103)
103. A point made in relation to gender identity cases by Brooks and Thompson (n 82). [↑](#footnote-ref-104)
104. George R Mawhinney, ‘To Be Ill or to Kill: The Criminality of Contagion’ (2013) 77 The Journal of Criminal Law 202, 203. [↑](#footnote-ref-105)
105. Matthew Weait, ‘Unsafe Law: Health, Rights and the Legal Response to HIV’ (2013) 9 International Journal of Law in Context 535; Robinson (n 15). [↑](#footnote-ref-106)
106. Chris Ashford, ‘(Homo)Normative Legal Discourse’ [2011] Durham Law Review 77; Leslie P Francis and John G Francis, ‘Criminalizing Health-Related Behaviors Dangerous to Others? Disease Transmission, Transmission-Facilitation, and the Importance of Trust’ (2012) 6 Criminal Law and Philosophy 47. [↑](#footnote-ref-107)
107. Scott Burris and Matthew Weait, ‘Criminalisation and the Moral Responsibility for Sexual Transmission of HIV’, *Third Meeting of the Technical Advisory Group on the Global Commission on HIV and the Law* (2012). [↑](#footnote-ref-108)
108. See, among others, M Weait and Y Azad, ‘The Criminalization of HIV Transmission in England and Wales: Questions of Law and Policy’ (2005) 10 HIV AIDS Policy Law Rev 1; Francis and Francis (n 106); Bridget Haire and John Kaldor, ‘HIV Transmission Law in the Age of Treatment-as-Prevention’ (2015) 41 Journal of Medical Ethics 982. [↑](#footnote-ref-109)
109. See, generally, Kane Race, ‘Framing Responsibility: HIV, Biomedical Prevention, and the Performativity of the Law’ (2012) 9 Journal of Bioethical Inquiry 327. [↑](#footnote-ref-110)
110. For discussion of conceptualisation of risk, generally, see, Gerd Gigerenzer, *Reckoning with Risk : Learning to Live with Uncertainty* (Penguin 2003); Sven Ove Hansson, ‘Risk and Ethics’ in Tim Lewens (ed) (ed), *Risk: Philosophical Perspectives* (Routledge 2007). [↑](#footnote-ref-111)
111. For instance, hepatitis and syphilis. See Weait, ‘Knowledge, Autonomy and Consent: R v Konzani’ (n 92) 770. [↑](#footnote-ref-112)
112. For discussion of HIV exceptionalism and the lack of prosecutions, generally, see, Francis and Francis (n 106); Although, it should be noted that there have been limited examples of other prosecutions, see, for example, James Roebuck, ‘Criminal Liability for Transmission of Herpes Simplex Virus.’ (2014) 78 Journal of Criminal Law 294; *R v Golding (David)* [2014] EWCA Crim 889; and, also; *R v Marangwanda (Peace)* [2009] EWCA Crim 60. [↑](#footnote-ref-113)
113. Although of course there has been a significant development in the law surrounding intentional transmission, see, *R v Rowe* (n 91); And, also, Holly Watt, ‘Man Found Guilty of Trying to Infect 10 Grindr Dates with HIV’ *The Guardian* (London, 15 November 2017); Furthermore, for commentary, see, Cameron Giles, ‘Daryll Rowe’s Sentence Could Change the Law’s Approach to HIV Transmission’ (*The Conversation*, 19 April 2018) <https://theconversation.com/daryll-rowes-sentence-could-change-the-laws-approach-to-hiv-transmission-95307> accessed 15 August 2018. [↑](#footnote-ref-114)
114. John G Francis and Leslie P Francis, ‘HIV Treatment as Prevention: Not an Argument for Continuing Criminalisation of HIV Transmission’ (2013) 9 International Journal of Law in Context 520. [↑](#footnote-ref-115)
115. One participant highlighted that they were “more scared on gono”: Participant 401353-401344-40160792. [↑](#footnote-ref-116)
116. Although it should be noted that, as HIV criminalisation has developed through case law there is a significant role played by the CPS in ensuring that inappropriate prosecutions are not brought, see, David Hughes, ‘The Criminal Transmission of HIV: Issues with Condom Use and Viral Load’ (2014) 54 Medicine, Science and the Law 187. [↑](#footnote-ref-117)
117. Participant 401353-401344-42091302. [↑](#footnote-ref-118)
118. See, Dodds, Bourne and Weait (n 92), who noted similar points in interviews with HIV+ men. . [↑](#footnote-ref-119)
119. For instance, it has been noted that in some instances investigations into transmission cases may have been overly ardent even where it is clear that no offence has been committed because there was no transmission. See, Emily Jay Nicholls and Marsha Rosengarten (eds), ‘Witness Seminar: The Criminalisation of HIV Transmission in the UK’, *Disentangling European HIV/AIDS Policies: Activism, Citizenship and Health (EUROPACH)* (2019), in particular the discussion on page 31. [↑](#footnote-ref-120)
120. Race, *The Gay Science: Intimate Experiments with the Problem of HIV* (n 38) 174. [↑](#footnote-ref-121)
121. Sharif Mowlabocus, ‘Horny at the Bus Stop , Paranoid in the Cul-de-Sac: Sex, Technology and Public Space’ in Gavin Brown and Kath Browne (eds), *The Routledge Research Companion to Geographies of Sex and Sexualities* (Routledge 2016). [↑](#footnote-ref-122)
122. Mark Davis and others, ‘Location, Safety and (Non) Strangers in Gay Men’s Narratives on “Hook-up” Apps’ (2016) 19 Sexualities 836, in particular, 846. [↑](#footnote-ref-123)
123. Raj (n 37). [↑](#footnote-ref-124)
124. Race, *The Gay Science: Intimate Experiments with the Problem of HIV* (n 38) 53. [↑](#footnote-ref-125)
125. Fox (n 39). [↑](#footnote-ref-126)