Special Issue Article

SEXUALITIES

Sexualities
2020, Vol. 23(8) 1362–1377

DOI: 10.1177/1363460719886733
journals.sagepub.com/home/sex
SAGE

Bareback sex, PrEP, *National AIDS Trust* v *NHS England* and the reality of gay sex

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Abstract

In this article, I use empirical data regarding the prevalence of bareback sex and the HIV treatment PrEP to argue that the High Court and Court of Appeal of England and Wales in *National AIDS Trust* v *NHS England*, have reflected the reality of gay sex. I argue that this case represents a shift in legal approaches to preventative sexual health methods that recognises the reality of gay male sexuality regarding the allocation of funding responsibility for the pre-exposure prophylaxis. I argue that the treatment, which prevents transmission of HIV, is a significant feature of gay and bisexual men's sexuality and has the potential to transform narratives surrounding personal agency and individual responsibility. This article uses doctrinal, theoretical and empirical analysis, to the conclusion that the case represents a significant step in the recognition of the reality of gay sex.

Keywords

AIDS, empirical research, gay and bisexual men, HIV, law, PrEP

Introduction

In November 2016, the Court of Appeal of England and Wales decided that it was within NHS England's (NHSE) power to fund the HIV prevention treatment commonly known as 'PrEP'. I will argue that this decision corresponds with a significant shift in approaches to preventative sexual health methods that better reflects the reality of gay and bisexual men's sexuality, particularly relevant to the bareback phenomenon. The article argues that PrEP is a transformative intervention to such behaviour in substantially reducing risk of sero-conversion. pre-exposure prophylaxis stops HIV transmission and is prescribed to those at a high risk because of the

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likelihood of having unprotected sex and has been described by Rendina et al. (2017) as the 'most promising biomedical prevention strategy to date'. Utilising doctrinal, theoretical, and empirical analysis, this piece will discuss the bareback phenomenon, the significance of the PrEP treatment, and the court's role in deciding which body may fund the treatment. Using the lived experiences of interview participants collected from a wider study, the relevance and impact of the treatment to the sexual lives of gay and bisexual men will become apparent, and as such, the significance of the decision regarding its funding, that reflects the reality of lived sexuality (Frasca and Ventuneac, 2012). The judgments in both the High Court and Court of Appeal call into question the fallible nature of 'condom only' personal responsibility – a question which the participants of this study often repeated, or claimed that they struggled to adhere to such a responsibility – and recognise the importance of protecting those at higher risk (Maine, 2016).

National AIDS Trust v *NHS England* [2016] EWHC 2005 concerns the allocation of healthcare funding and whether the larger regulatory body of NHSE or smaller local authorities should bear the cost of the provision of PrEP. The case was the first to clarify Parliament's intention regarding the allocation of preventative medical responsibilities. The Court of Appeal upheld the decision that NHSE, as a result of the National Health Service Act 2006, has a broadly preventative role in relation to HIV. As HIV is of ideational significance to gay sex and sexuality (Khan, 2014), the case represents judicial consideration of preventative treatment implicitly linked to bareback sex. Mowlabocus, in this special section, has discussed the distancing of the practice from PrEP in campaigns for its availability. I will argue, however, that PrEP is explicitly linked by the men who practice bareback, and this article will first demonstrate the significance of such practices. The AIDS epidemic of the 1980s and 1990s defined gay sex for a time, significantly affecting perspectives of personal responsibility and risk-taking. The bareback movement developed as a deliberate abandonment (Dean, 2009) of condom-mandated safe-sex ethics that encompasses a form of sexual liberation (Ashford, 2015). Bareback sex is defined as instances of unprotected anal sex between men, and is maintained as a pervasive cultural phenomena, antithetical to normative sexual discourse (Ashford, 2015: 196). PrEP has largely transformed discussions of bareback sex in North America (Cohen and Baden, 2012): due to privatised healthcare in the USA, many gay and bisexual men have had access to the treatment for some time. Uptake in the UK has been slower because of the nature and reliance on state-funded healthcare, which would not, until now, fund the treatment. Thus, the decision of the court demonstrates that the law and health service has recognised and reflected a treatment that facilitates the lived reality of bareback sex.

Following the methodology outlined in the following section, the first part of this article will assess empirical data reflecting the lived reality of gay and bisexual men's sexuality, assessing the prevalence of bareback sex, and go on to discuss the potential of PrEP to transform discussions of intimacy. A discussion of the judicial reasoning in arriving at the final decision in the High Court and Court of Appeal

will follow, that will then analyse how the case represents a reflection of the lived realities of gay and bisexual men.

Methodology

Using empirical qualitative research with a group of gay and bisexual men based in the north east of England, this piece will demonstrate not only the significance of PrEP and HIV to their lived reality, but that of 'bareback sex' as an expression of sexuality and will therefore tease out the implications of the court's decision. The research utilised semi-structured interviews with 20 self-identified gay and bisexual men aged 20–55 years old. The interviews were conducted in 2016 in Newcastle-upon-Tyne city centre. These participants were collected through mixed-method sampling including online strategic and snowball sampling using the mobile app Grindr (Blackwell et al., 2014; Mowlabocus, 2010), and represent a mix of socio-economic backgrounds in the north east of England. Interviews were used in order to broadcast the voices of the queer men (Levy and Johnson, 2011), giving emphasis to their lived experiences and realities (Pope and Mays, 1995), in which the risk of HIV is a permanent feature of the gay sex environment (Frasca and Ventuneac, 2012).

The majority of the participants in this study were white, working-class and middle-class British gay men, local to the area: however, some participants originated from West Europe and South America. These demographics are typical of the area, which is a post-industrial city in north-east England, where 80% of residents are white (according to the 2011 census). Efforts were made to recruit a more diverse sample; however this was limited by the use of the online mobile application Grindr to recruit participants and the small sample size. The men in this article participated in a wider study assessing the impact of law reform on their sexual practice taking part in order to represent the views of those affected by the change and their perceptions of it. The group at highest-risk of HIV transmission are gay and bisexual men of colour (Feinstein et al., 2019; Fields et al., 2017): this may be attributed to systematic economic, social, and racial factors that may also cause a failure of PrEP to prevent transmission (Serota et al., 2018): as this study does not discuss such factors in relation to HIV sero-conversion, it cannot claim to focus entirely on the lived experiences of HIV transmission, but does instead aim to produce narratives and discourse regarding the role of law in the allocation of funding for PrEP. The study does recognise, however, that PrEP uptake may not always prevent HIV transmission, and those that do sero-convert while taking PrEP may instead fall victim to systematic factors such as economic precarity, housing instability, stigma, and racial discrimination (Serota et al., 2018). All of the participants were aware of the HIV prevention treatment and the decision to make it available in the UK's NHS healthcare system, meaning that the treatment would become freely available to those who fulfil the healthcare system's criteria for treatment. However, as this research primarily focuses on the treatment in relation to the provision of universal healthcare, such external factors are not

discussed and the research instead focuses on the lived experiences recounted by the participants.

The men who participated in this study self-identified as either gay or bisexual and were 'out of the closet'. They benefited from the UK's tolerant attitude towards homosexuality and were able to exercise sexual autonomy and pursue sexual partners. Participants were aware of the PrEP treatment and the risks associated with HIV transmission and were able to make their own choices regarding sexual practices and sexual health, while benefiting from freely available sexual health services in the city. The majority of participants were HIV-negative, however some were HIV-positive, which was discussed in the data.

In situating the researcher's identity in relation to the data, it is crucial to recognise and reflect on the dynamics of difference and power that are central to queer narratives. As a cis-gendered gay male researcher, I possess an ability to elicit insider perspectives from members of similar groups, such as gay men and bisexual men (LaSala, 2008). I do not claim to understand the lived experiences of HIV-positive individuals, yet have experience interviewing and researching in the area. All efforts were taken in order to eradicate any power imbalances and conduct research that effectively recounts and voices participants' experiences. Data collection was conducted in accordance with the Northumbria University Ethics Committee and follows the social justice theory of ethics, which focuses on the voices of marginalised populations (Simons, 2006), which therefore informs the analysis.

The analysis in this article will focus on both the empirical qualitative data collected, and the judicial discussion in the cases. The data were coded using NVivo software and analysed producing narratives relating to bareback sex and the affects of PrEP, which, when paired with the decision of the courts, produced the article's argument. Such an approach will highlight the voices of the affected by the decision and the reasoning used in the decision itself in order to reflect the significance of HIV and PrEP, and the role of the judiciary in allowing its funding in the UK. This focus on the law will be used in order to consider a radical reading of PrEP and its meaning to gay men. PrEP's significance in medicine has been previously examined (see Cohen and Baden, 2012), while this queer methodological task lies in making visible the lived experiences of queer identities and voices (Giffney, 2004) analysed in conjunction with legal analysis.

The significance of bareback sex to gay and bisexual men

In the discussion of sexual practice and identity, participants often discussed instances of bareback sex, noting it to be a source of exhilaration and pleasure. An exploration of this behaviour and identity is an important aspect in assessing the significance of PrEP to the lived experience and narratives of its users in constructing its impact on sexuality. Many participants called for the availability of PrEP in order to provide reassurance and to reduce anxiety regarding HIV

transmission, viewing the decision of the courts to be a beneficial step towards greater sexual freedoms, and many noted the implications this may have in the distinct erotic behaviour of barebacking (Dean, 2009).

Bareback sex, instances of condomless sex, either pursued or incidental, is for many gay and bisexual men a popular and frequent practice (Ashford, 2015). Participants discussed their enjoyment and seeking out of the practice and situations that lead to it taking place. One participant discusses incidences in which he participates in bareback sex, transgressing sexual norms:

> I would have to say, put hand on heart, I would love to say it's safe but it's not always safe, it's the mood, the situation and the mood that takes you, erm, I think alcohol has a huge impact on it, or if you know I'm going to the sauna or the cruising area straight after a night out, the likelihood of having safe sex, in the sauna yeah it's going to happen, you know, in a cruising area, probably gonna say no hope in hell's chance. (Gay man, 44)

Bareback sex has developed from mere instances of sexual behaviour into a radical act of identity formation in the wake of the HIV and AIDS epidemic and the development of anti-retroviral drugs. The 'barebacker' is an identity that exists as an oppositional character to the homonormative (Duggan, 2002), relying on practices and subcultures that have *formed* as a result of stigma and condemnation (Mowlabocus, 2010: 157). The foregoing quotation discusses the use of public sex environments and venues (such as cruising grounds and saunas/bathhouses), and the occurrence of bareback in these environments, which are highly sexualised. The participant, in practising such sexual behaviours, fails to 'identify as the good gay citizen of HIV prevention to the degree that they can alienate themselves from the transgressive jouissance of unprotected sex' (Russell, 2005: 156). As such, he not only transgresses public/private boundaries in having sex outside the home, but transgresses boundaries regarding risk and safety in the practice of bareback sex. He goes on to say that if PrEP was available on the NHS, he would continue to bareback, facilitating the enjoyment of sexual autonomy with reduced risk of HIV transmission. Another participant confirms this experience of bareback, constructing it as an act of uninhibited desire: 'unprotected sex, it is fascinating, I have had this discussion with my partner, sometimes when I am that horny, that horned up, that anything, anything will do at the moment,' (Gay man, 36). Bareback is thus constructed as a transgressive, liberating action that occurs in the heat of the moment.

A further participant reflected this, noting instances of bareback sex taking place, abandoning condoms:

> Erm, I would say that I use condoms 8 times out of 10, erm, the people that I don't do it with is either because I'm drunk (which is an awful, terrible thing to say!) either because I'm drunk or because I know them and their sexual practices anyway, so, yeah. (Gay man, 30)

When sex occurs after alcohol or drug use, lowered inhibitions can lead to failure in condom use (Gilmore et al., 2012), which presents a conjunction between intentional and incidental bareback sex. As part of the user's everyday routine, PrEP is less likely to fail, and therefore provides extra protection in occasions where inhibitions are lowered and risky sex may occur. However, this presupposes PrEP's own form of personal, uninterrupted responsibility, and the capability to take a daily dose, may be criticised as relying on homonormative discourse, as gay and bisexual men are held responsible for the protection of themselves. PrEP may also be beneficial for those who have difficulty communicating with their sexual partners (including those who practice anonymous sex, or sex work), experience high levels of anxiety, or have specific concerns about the interpersonal connotations of condom use (Rendina et al., 2017).

The 30-year-old participant in the foregoing extract implicitly notes the ways in which his sexual behaviour is impacted by sexual health campaigns that enforce mandatory condom use, that echoes Mowlabocus's statement that 'the discursive framework of HIV prevention work has forestalled any recognition of unprotected sex as a personal choice' (Mowlabocus, 2010: 154). This may reiterate the traditional heteronormative position that the 'the mere fact of gay sex is held to be dangerous for other people' (Watney, 1988: 49) and as such feeds into safe-sex discourse which mandates the use of condoms. Such a mandate, as noted by Duggan (2002) relies on the ability of LGBTQ individuals to make rational, responsible choices, which may rely on homonormative discourse, through the allocation of individualistic personal responsibility, reliant on the ability of queer individuals to make rational, practical, and economic choices. The provision of PrEP, however, may allow for a renegotiation of such responsibility, reliant on the assumption of the universal availability of the treatment. However, this is not to assume that PrEP will always be effective (Serota et al., 2018), and as such it is important to recognise the social, economic, and systematic factors that may lead to sero-conversion, along with the disparities in availability and use of the treatment (notably the geographic disparity in provision in different NHS Trusts and local authorities). Those who sero-convert when PrEP is available are not to be seen as inherently 'risky' but may be failed by the homonormative logic that allocates safe-sex responsibility on queer individuals.

In the development of the bareback subculture, PrEP may be viewed as an intervention that has led to the increased visibility and viability of the action. The notion of PrEP and bareback sex as a choice is reliant on sexual agency and the ability to make informed choices regarding it. The following participant paid for his own access to PrEP, reverting 'risky' sex into protected sex:

> 'Er, no . . . not that I would consider risky because of those aspects, my partners, as far as I'm aware don't have HIV, my casual partners don't, er, those that are, or that have declared, confirmed, or been told that they're undetected, er, I have protected sex all the time because I'm on PrEP, so most risks are eliminated anyway. Strangers I always

> use condoms with, er, if it breaks I've got PrEP so I'm hopefully covered.' (Bisexual man, 28)

This participant constantly protects himself as he revaluates and mitigates risk as an important feature of bareback sex. PrEP may amount to an intervention that has transformed the barebacking scene, in bringing the practice to the foreground of men's sexuality, particularly represented in pornography (Dean, 2009: 103). PrEP, for this participant, amounts to constant protection, allowing for instances of bareback sex. As noted by Dean (2015: 228), the history of medicalising homosexuality has embarked on a significant new phase in adoption of PrEP and its burgeoning significance as a tool for gay and bisexual men. For the participant just quoted, PrEP regains personal choice over sexual health: rejecting the safer sex moral value that is connected with the assumption of risk for gay and bisexual men (Ávila, 2015: 525). This represents the significance of NHSE taking funding responsibility for deviation from the institutionalised condom-mandated intercourse that has evolved into the presumed standard for homosexual intimacy (Frasca and Ventuneac, 2012), that has potential to further a sexual health revolution (Dean, 2015: 237) by the confirmation of state power to fund such treatment that allowed for mitigation of 'safe-sex' behaviour. The potential of PrEP in enabling not only a sexual health revolution, but as an enabler of intimacy will now be discussed.

PrEP as enabling intimacy

NHS-funded PrEP may also have the potential to further reform thinking regarding bareback sex as an enabler of intimacy, creating further freedom to bareback outside of condom-mandated discourse. Bareback may be seen as an inevitable factor of gay sexuality which the participant in the following extract notes as important within sero-discordant relationships:

> You've got people who are in very committed relationships where one is HIV-positive or one has AIDS and the other is HIV-negative, so you know, why should they not have the opportunities to have a relationship in the way that everybody else has a relationship, in those circumstances, I do think that making drugs like that available, you know can really help people. (Gay man, 33)

PrEP may be used in sero-discordant relationships, in which one partner is HIV-positive and one partner is HIV-negative, to remove chances of transmission and facilitate bareback sex as a presumed standard of intimacy. In order to have a 'normalised' relationship, the participant draws on notions of conventional standards that assume condomless sex as a signifier of intimacy, removed from negative unsafe connotations. This reflects the importance afforded to safety within a relationship as the participant links standard relationship conventions with disease-free relationships as recognised by law (Westwood, 2013). This demonstrates the importance of such sex as a transaction of intimacy, with PrEP creating a chemical

guarantee from transmission in place of a physical latex barrier. One such participant noted the importance of bareback sex as demonstrative of relationship ideals:

Participant: With my partner I have bareback sex and use condoms with everyone else.
Researcher: Everyone else? Okay, why is that?
Participant: Because of protection, and bb [bareback] because we love, and want to be, be able to have sex without protection if there are no issues about catching stuff. (Gay man, 36)

This recognises bareback sex with one's partner as a sign of trust and intimacy, as stated by LaSala (2004), and as a facilitation of such intimacy, rejecting the risk associated with instances of bareback sex which may be associated with sero-discordant relationships. This represents PrEP as an intervention to the barebacking subculture that significantly alters perceptions of its risk, allowing PrEP-users to 'fuck without fear', the slogan of a controversial PrEP campaign from the Los Angeles LGBT Centre. This is reflected by the participant who wishes to do so, without the possibility of 'catching stuff' (although this recognises the implication of other STIs being contracted).

Participation in risky sex contributes to the perception of bareback as a liberation from traditional discourses through seeking out uninhibited pleasure, while being relevant to sero-discordant relationships. A participant in a sero-discordant relationship reflected on the risks associated with bareback sex with his partner and others:

Participant: Uhm, we have, uhm, well we don't use condoms, obviously, uhm, I do with other people, I am HIV-positive but I am on medication so I look after my health very well and I always have antibiotics in the house so I very rarely have STDs and if I ever have a really, really crazy time, we, I take antibiotics, I don't even bother going to the doctor, and I am on medication so I have zero viral load so I know I'm safe and all that kind of that, so I do have incredibly risky sex shall we say, but I am very aware of what I am doing and how I am doing it and what risks are involved.
Researcher: And is your partner positive or negative?
Participant: He's negative, and again he's aware of it [positive status] and I go out of my way to look after him, he's aware of everything too. (Gay man, 46)

For this participant, it is 'obvious' that within a relationship, condoms will not be used, demonstrating an assumption of uninhibited intimacy, and recognises his participation in bareback sex as 'incredibly risky'. Baeten et al.'s 2012 study has made it clear that PrEP is a relevant consideration for those in sero-discordant relationships as a means of inhibiting the transmission of HIV between partners.

While this participant is aware of his viral load and therefore his undetectable status,[1] he maintains an open dialogue with his partner regarding his sexual practices and any chance of infection. The recognition of the risks involved in his sexual practices and an awareness of the consequences demonstrate the commitment to and existence of sexual practices outside of the heteronormative boundaries advocated by law and society (Mowlabocus, 2010). Using these narratives that confirm the use and significance of PrEP as a reality of gay sex, PrEP may be seen as transformative in enabling bareback sex in a reduced risk context, being particularly relevant to sero-discordant relationships. Following from this empirical analysis, the reasoning used in the High Court and Court of Appeal will be discussed.

The decision of the court

Having discussed the significance of PrEP and bareback sex to the lives of gay and bisexual men, I will now discuss the case in which it was decided that NHSE has the power to fund the treatment. The National AIDS Trust, a well-established charity committed to supporting those in the UK living with HIV and AIDS initiated proceedings against NHS England in response to NHSE's refusal to fund the drug Truvada (the most common brand of PrEP). The case concerned an assessment of the responsibilities and burdens allocated by the National Health Service Act 2006, and concluded that an ever increased focus on preventative medicines was one of the decisive factors in allocating responsibility.

In the first instance in the English and Welsh High Court, the NHS argued that it did not have the power to fund the treatment as it did not have preventative health functions usually reserved for local authorities. NHSE stated that PrEP is 'squarely for preventative medicine in the field of sexually transmitted diseases this is now the sole task of local authorities' (*National AIDS Trust* v *NHS England* [2016]: paragraph 2). The Local Government Authority, however, argued that this would lead to illogical, inefficient consequences, due to NHSE's greater developed HIV policy, and their lack of funding for preventative health. The High Court followed the Authority's argument and focused on the preventative duties of the health service in order to allocate funding responsibility.

The court recognises the treatment as significant progress in HIV transmission reduction, taking into account the need to go beyond condoms. Mr Justice Green states that: 'after more than 30 years it is clear that such efforts will only achieve a limited amount and there remains a cohort of largely resistant individuals who are at significant risk of transmitting the virus or contracting it themselves' (*National AIDS Trust* v *NHS England* [2016]: paragraph 19). The recognition that a significant population may benefit from its funding, due to their 'resistance' to the dominant safe-sex methods demonstrates the significance of the treatment in relation to those non-normative identities and practices recounted in the earlier part of this article. The High Court ruled that the provision of PrEP did fall within the capabilities of the NHS, using a purposive interpretation of the 2006 Act in order to highlight a focus on preventative healthcare. In paragraph 17, Green rejects

NHSE's argument as it would exclude preventative treatments from public health functions, and therefore would strip NHSE of all its powers to commission such treatment. This, he states, would be inconsistent with the 2006 Act and therefore NHS's purpose in providing national healthcare.

The health service then appealed the outcome, maintaining that Local Authorities had the power to commission the treatment (*R (National AIDS Trust and Local Government Association)* v *NHS Commissioning Board* [2016] EWCA Civ 1100). NHSE's appeal was unanimously dismissed in the Court of Appeal, creating the sole piece of judicial guidance on NHSE's duties under the 2006 Act (Hurley, 2019). Although confirming NHSE's power to fund PrEP, all three judges rejected the High Court's reasoning as an incorrect reading of the Act, and instead ruled that NHSE's power arises from the Commissioning Regulations (NHS, 2012), which contain a duty to provide specialist, nationwide HIV treatment.

The judges interpreted PrEP as falling within the definition of 'specialist HIV treatment', construed as a treatment for those infected with HIV. Schedule 4, paragraph 17 of the Regulations confirmed this definition, construing preventative HIV treatment to be included in the provision of a specialist HIV service care. PrEP is prescribed in anticipation of infection of HIV: the treatment anticipates the person being in contact with the virus 'but which does not ''bite'' until the virus is present in the body and the person ''is infected''' (paragraph 68). Therefore, PrEP was constructed as treatment for those in contact with the virus, despite not being 'infected', and was read as specialist HIV treatment. The judges thus conclude that it is NHS England's *decision* whether to provide the drug, yet it is solely within NHSE's power to do so. Following the Court of Appeal's judgment, the NHS announced it would be trialling the treatment to 10,000 people throughout the country, known as the PrEP Impact Trial.

Courts reflecting reality

The confirmation of NHSE's power to commission PrEP, a treatment linked to non-normative sexuality represents an advance in judicial approaches to sexuality, as the judiciary contemplates individuals resistant to traditional 'safe' sex methods. This corresponds with a focus on integrated health systems and the functioning of PrEP as a means to reduce HIV transmission rates. The outcome of the case received considerable media coverage and public reaction. One participant discussed this reaction, recognising the ways in which the treatment was framed as a 'lifestyle' choice, echoing the homophobic language of the 1990s during the AIDS crisis:

> I think, erm, the way it was presented in the media as well, sort of . . . demonised people who need PrEP because they were saying all these other worthy people, treatment for other diseases, weren't gonna be funded because of this, but it's, it's a matter of public health, and it would help prevent transmission of HIV, which is very important. (Gay man, 21)

The participant notes HIV to be an issue of public health. This reflects the nature of HIV as a condition with which gay and bisexual men are historically and ideationally linked (Khan, 2014), yet one that can ultimately affect any persons. As such, it is important to note the parallels between the treatment's intended recipient and the barebacker identity bringing discussion of personal responsibility and harm reduction into discussion: this reflects the notion that HIV may be a consequence of 'bad', irresponsible and risky sexual behaviour.

The negative media backlash against the case (Borland and Spencer, 2016) is picked upon by another participant, providing an insight into the framing of the drug as a 'lifestyle' choice. As the participant notes, the negative backlash against the case stems from moral concerns of promiscuity and immorality over pragmatic decisions based on lived experience:

> And immediately across all the papers saying that the NHS shouldn't be funding a promiscuity pill instead of cancer treatments, which I thought was highly unfair . . . er, when it's not the case of promiscuity, it's more the case of (A) the cost of treating someone if you do get HIV and (B) it's a pill every day, the same as if you would take to stop getting pregnant . . . er, and it's not the fact you're promiscuous, it's the fact that HIV is more dominant among gay men, always has been. (Bisexual man, 28)

In recognising that men who have sex with men are more likely to become infected, the participant reflects Green's statement that there are groups who are 'resistant' (paragraph 19) to other methods of HIV prevention. Therefore, the decision represents the reality of gay sex as an understanding and acceptance that such behaviour may take place and recognises that the National Health Service has power to fund such preventative treatment as a conduit to that behaviour. The participant also notes that the cost of treating HIV for the rest of a patient's life outweighs the nationwide provision of PrEP, as was touched on in the judgment (paragraph 108). Such funding concerns also add to the notion of PrEP removing a healthcare burden, in which the recipient precludes the cost of HIV treatment and furthers notions of good HIV citizenship. Such good citizenship may reflect Rubin's 'sexual hierarchy' (1984), in that PrEP has the potential to alter the sexual hierarchy, in which practices that had previously been castigated as immoral or risky become normalised. Unprotected homosexual sex had previously been 'unjustifiable' (1984: 151) according to Rubins's theory of socio-sexual value as it poses a risk to health. PrEP, however, may alter such perceptions of risk, enabling the act of bareback sex as its risk is diminished. Taking this into consideration, it is possible to reconceptualise the hierarchy, in which risk mitigation allows for normalisation of apparent non-normative sexual behaviour. This therefore represents the potential of PrEP, yet also the importance of the case in positively attributing responsibility for its funding, demonstrating judicial reflection on preventative sexual health matters as they considered that individuals were imminently expected to have unprotected sex (paragraph 61).

The discussion of sex marks a change in legal discourse following the recent legal shift that has focused on desexualised familial rights and the coupled structure of marriage (Ashford, 2015; Barker, 2013), instead focusing on public health and sexuality. One participant contrasted the provision of PrEP to same-sex marriage demonstrating how the decision represents an advance in judicial decisions that more accurately reflects his actions and choices above that of marriage:

> If some sort of prevention, as effective as PrEP is right now, if this can become the established thing in the same way that contraception was, I look at that as a bigger advantage for my gay rights, my personal gay rights, as a gay man, than marriage, erm, my personal rights I see as to what extent am I free to do what I want, erm, without judgement or negative and unequal effect if you like, and something like that, would affect my day to day life much more than same-sex marriage. (Gay man, 25)

This participant views PrEP as a higher priority than the right to marry, and as such, the decision of the court is, for this participant, a better reflection of his sexuality than marital relationships. The protection afforded may facilitate bareback sex and therefore contributes to notions and discourses of personal freedom and sexual choice. PrEP has the potential to alter dominant views of safety and relationship boundaries, moving on from the presumed, risk-free monogamy that marriage promotes (Cobb, 2010). The normalisation of PrEP may allow for, and further, social acceptance of a pluralised understanding of sex and prevention methods, recognising PrEP as enabling more nuanced understandings of bareback sex as significant risk of transmission and HIV stigma is taken away. However, the participant confirms Dean's statement that for gay men to acknowledge a desire for bareback sex goes against 'community norms' (Dean, 2015: 237). This contrasts to the images of responsibility and maturity used in support of same-sex marriage, and instead focuses on the sexual liberation of bareback sex.

For those participants in sero-discordant relationships, the court has reflected the reality of their sex, particularly as the HIV-positive participant and his partner represent the individuals stipulated in the Court of Appeal, as a person *immediately* expected to have sex with an infected person. This validates the use of PrEP as an enabler of intimacy, and further corresponding with NHS policy aimed at treating HIV and halting transmission. In this, the HIV-positive partner receives ART (antiretroviral therapy) and the HIV-negative partner may take PrEP. This emphasises the importance of substantial and thorough HIV services, in which care is taken in the prevention and treatment of the virus, reducing the burden on the state. In reducing the burden of bareback sex, PrEP is justified by the good public health and financial incentives it creates, furthering the potential of PrEP to transform narratives regarding sexual behaviour and therefore reflect the importance of thorough HIV services, recognised by law as the appropriate funder of the treatment.

In deciding that the NHS can fund the treatment, the judges fell short of stating that it *should* do so, as that may represent an unease or unwillingness to validate a treatment related to radical sex. Justice Green states how it is not within his

jurisdiction to confirm the quality of the decision, while Lord Justice Underhill explicitly states his unease and his uncertainty whether the provision of PrEP falls within the reasonable requirements of comprehensive HIV treatment. Thus, their justification and allocation of funding for PrEP does not necessarily represent a favourable view of the lived reality of sex and sexuality, but may instead represent a long tradition of harm reduction measures, allocating funding in order to reduce the harm of a practice, despite the 'immoral' notions attached. Other examples, such as needle exchanges and anti-doping measures in sport often focus on reducing the burden of risky behaviours, not necessarily stopping them (Kayser and Tolleneer, 2017). Despite their reluctance, it is important to note not only the effectiveness of PrEP with regards to harm reduction, but also the impact of the decision, in recognising the inevitability of certain behaviours that carry a risk of transmission.

The decision is indicative of the new way of recognising risky sexual behaviours and reassessing long-held 'truths' of sexual health rhetoric in the diminishing centrality of the condom and the need for novel strategies that go beyond them (Goldhammer and Mayer, 2011). This radical upgrade can be compared to the provision of preventative contraceptive pills as a means of managing risk around heterosexual contraception (Dean, 2015: 237) and create a new 'sexual revolution'. The normalisation of PrEP use becomes an essential part of reducing HIV infection rates, evident from the drop in HIV rates in major cities where men are self-funding their PrEP, such as London, (Nwokolo et al., 2017). However, this goes further to enable bareback sex as its subversive risk element is diminished, in turn allowing for greater intimacy and agency between sexual partners, and thus represents a significant shift for gay and bisexual men's sexual reality. This may further correspond with a re-evaluation of Rubin's sexual hierarchy in which bareback sex becomes justified because of the treatment. The judicial reflection on the preventative responsibilities of the NHS and the potential of PrEP represent a conclusion in line with the reality of gay men's sexuality that encompasses 'bareback' and non-normative sex.

Conclusion

This article has highlighted the significance of PrEP in relation to the lived experiences of gay and bisexual men's sexuality and the potential consequences of the 2016 decision as to its funding. The article has demonstrated the significance of bareback sex as an act of sexual expression and liberation following an established trend in the literature. PrEP has been discussed as an enabler of intimacy and a potentially transformative treatment, and the discussion of the court in recognising that the NHS can fund the treatment has been analysed.

PrEP's effectiveness has been shown in a recent Public Health England study, with a 99% effective protection rate (Dean, 2015) and a 32% drop in diagnoses since 2014, (Bosely, 2017). The World Health Organisation has also added PrEP to a list of 'essential' medicines (Avert, 2017), while the PrEP Impact Trial was expanded from 10,000 to 26,000 places in March 2019, however it is still not freely available on the NHS. The cost-effectiveness of PrEP gives weight to the

High Court and Court of Appeal's decision and further demonstrates its wide-reaching significance, in line with NHSE's policy considerations.

As shown in the empirical data, bareback sex is a focal point in many gay and bisexual men's lives, and the decision of the court represents the context in which PrEP becomes significant. It is clear from the data that gay and bisexual men are regularly constructing new ways to mitigate risk and experience their sexuality. The court's ruling represents a significant development in health care and judicial recognition of sexuality that contributes to sexual liberation. The judicial consideration of the effects of PrEP, coupled with the significance of bareback sex and HIV to the lived reality of gay and bisexual men, reflects the importance of the decision as potentially transformative and represents a significant development in discussions of sexuality and sexual health.

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Note

1. Undetectable being the term used for an undetectable viral load leading to a very low chance of passing HIV to a partner in condomless sex (Rodger, 2016).

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