

BACK TO THE GRIND: RETHINKING GRINDR'S ACCOUNTABILITY FOR USER CONTENT

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I. INTRODUCTION

The social networking application (“app”) Grindr facilitates inadvertent illicit activity among its adult users. Accordingly, the app should revise its platform, taking responsibility for the risks it creates. Grindr only legally permits adults to join, but underage users can easily circumvent its age restriction mechanisms, and the app markets indiscriminately towards a young demographic. In creating a Grindr profile, users may encounter just a single notification that the app is for adults only: the requirement of entering one’s birth date. As a result of its flimsy age verification process and its indiscriminate marketing, Grindr poses risks to both minors and adults. Minors who sign up for the app risk encountering predatory behavior, while adult users risk inadvertently engaging in criminal activity. The “Good Samaritan” clause of the Communications Decency Act¹ (“CDA”) grants apps like Grindr immunity from bad actors using their platforms to harm other users. However, the CDA, enacted at the dawn of the Internet, does not adequately police today’s complex and ever-evolving online world. In response to this conundrum, lawmakers have begun to express a newfound willingness to curtail CDA immunity, as a new law called FOSTA/SESTA illustrates. Further, and perhaps most importantly, online platforms have faced increased social pressure to self-regulate in recent years, which has led to a sea change among platforms like Facebook and Twitter.

Grindr creates particular risks for users because it prioritizes user anonymity and confidentiality. Because Grindr fails to market itself as an adults-only app, and thus invites illicit activity, it may not qualify for all of the CDA’s protections. Adults who dutifully comply with the app’s Terms and Conditions are nonetheless exposed to underage users, and in turn, legal risks. This quandary could be remedied in the courts, by the legislature, or voluntarily by Grindr itself; I encourage the third option. In an era of increased voluntary self-regulation among online platforms, Grindr should take responsibility for putting users at risk and strengthen its age verification process.²

¹ 47 U.S.C. § 230 (1996).

² I attempted to contact Grindr’s legal department several times while researching and writing this note. Unfortunately, my outreach attempts went unanswered.

II. BACKGROUND

A. WHAT IS GRINDR AND HOW DOES IT WORK?

Grindr, which was first launched in 2009, is the largest social networking mobile app for gay, bisexual, transgender, and queer people.³ Because many of its users are still in the proverbial closet, the app emphasizes user anonymity and confidentiality. Even Grindr's logo, a mask superimposed on a dark background, reflects the priority of secrecy.⁴ Users are not required to display their ages, names, or any photographs in their profiles. Unlike many other dating apps, which only permit users to interact once two users have both selected each other, Grindr allows users to see all other nearby users who are currently using the app. The app arranges other users' profiles based on their distance from the user, and a user may message anyone else on the app. Users may block or flag user profiles if they are uninterested in a particular user.⁵

In order to test whether Grindr's underage access concerns surface when a novice attempts to access and negotiate the site, I downloaded the app and created a profile for myself. As a heterosexual cisgender female, I do not fit within the app's target audience of men who have sex with men. As such, I benefitted from the app's anonymity protections, because I was able to create a basic profile with no photographs or identifying information. First, I downloaded the app from the Apple App Store; I was able to do so without seeing any notifications that the app was for adults only.⁶ Then, to create a profile, I was required to enter an email address, my date of birth, and to click "I agree" to the app's Terms and Conditions.⁷ The app did not verify my name, sexual orientation, gender identity, or age. Upon agreeing to the Terms and Conditions, I gained full access to the profiles of many nearby users, which listed the users' distance from me in feet or miles.⁸ I had the option to block other users from seeing my profile, and other users could block me from seeing theirs. I could also "Favorite" any users in whom I was particularly interested.

Grindr users have several different methods of communication. Users may message one another using text or photos. Users can also "Tap" other users to signal interest. Sending or exchanging photographs on Grindr is common, and users may create a private "Gallery" of photos to have available to send to others. Grindr users are not permitted to have nude

³ *Grindr: About*, GRINDR, <https://www.grindr.com/about/> (last visited Dec. 1, 2018).

⁴ See *infra* Appendix Exhibit A.

⁵ This information is based on my personal experiences exploring the app.

⁶ See *infra* Appendix Exhibit B: the App Store screen for downloading Grindr. Potential users can easily download the app without clicking further to learn more information. They can simply click the "Get" button, and the app will download on to their phone. If users do click on the Grindr logo to learn more, they will see the screen in Exhibit C, *infra* Appendix. This screen notes that the app's age rating is 17+. No further information about Grindr's age restriction is available unless the user scrolls down and clicks "more" to read a description of the app. At the very bottom of that screen, after lengthy descriptions of Grindr's various accolades and subscription services, the App Store notes that "Grindr and Grindr XTRA are for adults 18 years and older only. Photos depicting nudity or sex acts are strictly prohibited."

⁷ See *infra* Part A.III.

⁸ For an example of Grindr's iPhone home screen, see *infra* Appendix Exhibit D.

profile photos,⁹ but many privately exchange nude or explicit photos with other users.¹⁰ While I did not send messages to any Grindr users in the course of my research, I did receive some unsolicited messages and photographs from other users, some of which were quite graphic or explicit.¹¹ I was also “Tapped” by a number of users, despite having very little information and no photographs on my profile. One can extrapolate that a user with more information on his profile would likely experience even more user engagement than I did.

B. WHO USES GRINDR?

Having created a Grindr profile for myself, I set out to research the demographics of Grindr’s other users. Perhaps because of the app’s emphasis on secrecy, or perhaps because of its provocative nature, I discovered that there was very little dependable research on Grindr’s users available online. However, a few studies provided some relevant information.

In a 2016 survey of gay dating app users, 74 percent of respondents reported that they used Grindr,¹² making Grindr by far the most popular dating app for men who have sex with men (“MSM”).¹³ Respondents reported using Grindr frequently, with 50 percent of users reporting daily use, 26 percent reporting weekly use, and 24 percent reporting occasional use.¹⁴ Grindr was also the most likely of the apps in the survey to result in dates, with 13 percent reporting weekly dates via Grindr, and an additional 19 percent reporting monthly dates.¹⁵ The study also found that misrepresentation in user profiles appears to be “prolific” on dating apps for MSM, with 56.4 percent of survey respondents reporting that a date had used fake photos or a misleading description.¹⁶

An informal 2015 survey in the United Kingdom found that most Grindr users do not identify as exclusively gay.¹⁷ This survey found that the average

⁹ *Terms of Service*, GRINDR, <https://www.grindr.com/terms-of-service/> (last visited Nov. 3, 2018) (“You will NOT include offensive or pornographic materials, or materials that are harmful in Your Grindr Services personal profile page.”).

¹⁰ I personally received several such images, and acquaintances who regularly use Grindr have confirmed that explicit photo exchange is commonplace.

¹¹ To be fair, other messages I received were perfectly polite.

¹² *Gay Dating Apps Survey 2016*, TRAVEL GAY ASIA, <https://www.travelgayasia.com/gay-dating-apps-survey-2016/> (last visited Nov. 3, 2018). The survey involved 2,023 respondents, 87 percent of whom used one or more gay dating apps. Of the respondents, 38 percent lived in Europe, 27 percent in North America, 24 percent in Asia, 5 percent in Oceania, and 3 percent in Africa. Further information about survey methodology was not provided.

¹³ The majority of Grindr users are MSM, but some gender-nonconforming individuals and women also use Grindr, including trans women. Throughout this note, I will sometimes refer to Grindr users as MSM for simplicity’s sake, but I acknowledge that some Grindr users do identify as female or as gender-nonconforming.

¹⁴ *Gay Dating Apps Survey 2016*, *supra* note 12.

¹⁵ *Id.*

¹⁶ *Id.* There does not appear to be research comparing the amount of fraud or misrepresentation on Grindr to that on dating apps geared primarily towards heterosexual users. However, some studies suggest that deceit and fraud are common on dating apps generally. *See, e.g.*, Irina D. Manta, *Tinder Lies*, 54 WAKE FOREST L. REV. 207, 230 (2019) (noting that up to 80 percent of people lie on dating apps).

¹⁷ Gareth Williams, *We Asked Three Hundred Guys on Grindr How Gay They Are, and You’ll Be Surprised by the Answer*, PINK NEWS (Aug. 19, 2015, 3:42 PM), <https://www.pinknews.co.uk/2015/08/19/we-asked-300-guys-on-grindr-how-gay-they-are-and-youll-be-surprised-by-the-answer/>. The survey involved asking three hundred men via Grindr message how they self-identified on the Kinsey scale. Further demographic information on participants was unavailable.

Grindr user self-identified as a five on the Kinsey scale of sexual orientation, on which a zero is exclusively straight and a six is exclusively gay.¹⁸ Six was the second-most common response, followed by four.¹⁹ A survey Grindr conducted in 2014 supports those findings: in the Grindr survey, 53 percent of respondents had had sex with women in their lives.²⁰ Further, the survey found that 18 percent of Grindr users are still in the closet, and of that 18 percent, 6 percent say they never plan to come out at all.²¹ The survey also found that 36 percent of respondents had had less than ten sexual partners in their lives.²² Taken together, these findings suggest that, while Grindr users tend to be young, male, and gay or bisexual, they are diverse in many other ways.

C. WHAT LEGAL TERMS BIND GRINDR USERS?

After exploring Grindr's user demographics, I then turned to assess Grindr's legal terms, wondering whether the app's efforts to prevent illegal activity appeared reasonable and sufficient. Grindr users must select "I agree" to Grindr's Terms and Conditions of Service ("Terms and Conditions") in order to create a profile. In its Terms and Conditions, Grindr states clearly that it is available only to adults.²³ The Terms and Conditions also specify that Grindr is not responsible for its users' actions and interactions.²⁴ Further, they clarify that users may not include "offensive or pornographic materials" in their profiles.²⁵ Nor may users include material in their profiles that contains "video, audio, photographs, or images of any person under the age of eighteen (18) at all or any person over the age of eighteen (18) without his or her express permission."²⁶ The Terms and

The survey methodology was not particularly rigorous: it involved surveyors messaging random Grindr users a Kinsey scale image and asking them where on the scale they self-identified.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Matthew Tharrett, *Eighteen Percent of Grindr Users Are Still in the Closet, Six Percent Will Never Come Out*, QUEERTY (June 27, 2014, 4:06 PM), <https://www.queerty.com/18-percent-of-grindr-users-are-still-in-the-closet-six-percent-will-never-come-out-20140627>. The survey was conducted on June 16, 2014 and involved more than three thousand respondents. *Id.*

²¹ *Id.*

²² *Id.*

²³ *Terms of Service*, *supra* note 9. Grindr's age restrictions in full are as follows:

1. Age Restrictions and Safety. The Grindr Services are available only for adults (individuals aged 18 years or older).

1. No use by underage persons. No persons under the age of eighteen (18) years (twenty-one (21) years in places where eighteen (18) years is not the age of majority) may directly or indirectly view, possess or otherwise use the Grindr services.

2. You must be a legal adult. You hereby confirm and warrant that you are currently eighteen (18) years of age or over (twenty-one (21) years in places where eighteen (18) years is not the age of majority) and you are capable of lawfully entering into and performing all the obligations set forth in this agreement.

3. Safety. Grindr is not responsible for your use of the Grindr services or for the actions of other users with whom you may exchange information or have contact. Grindr does not conduct criminal background screenings of its users. Grindr does not verify the information provided by users with respect to users' health, physical condition, or otherwise. Grindr also is not responsible for activities or legal consequences of your use in locations which may attempt to criminalize or limit your personal interactions. You must make your own informed decisions about use of the application in your location and assess any potential adverse consequences.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

Conditions give Grindr the right to monitor user profiles for content, but wash Grindr's hands of any liability for profile content.²⁷

When it comes to receiving content from other Grindr users, the Terms and Conditions insist that "Grindr assumes no responsibility whatsoever in connection with or arising from User Content."²⁸ Users must agree to being "exposed to User Contents from a variety of sources," and acknowledge that "Grindr is not responsible for the accuracy, usefulness, safety, or intellectual property rights of or relating to such User Content."²⁹ That content may be "inaccurate, offensive, indecent or objectionable."³⁰ As with the content of user profiles, Grindr reserves the right to monitor or remove inappropriate content, but nonetheless assumes no responsibility to do so.³¹ The Terms and Conditions insist that "Grindr does not endorse and has no control over the content of User Content submitted by other Users."³²

In addition to these protections from user conduct liability, Grindr's Terms and Conditions also include a clause requiring users to arbitrate any disputes.³³ New Grindr users have the option to opt out of arbitration by emailing Grindr an opt-out notice within thirty days of accepting the Terms and Conditions; Grindr users who are not new may opt out within thirty days of the posting of the new terms.³⁴ Class action suits and jury trials are also forbidden.³⁵ Grindr's Terms and Conditions generally place all responsibility for user-generated content on users.

III. GRINDR AND COMMUNICATIONS DECENCY ACT IMMUNITY

A. THE COMMUNICATIONS DECENCY ACT IMMUNIZES PLATFORMS LIKE GRINDR

Grindr relies heavily on the CDA in claiming immunity from its users' actions. Congress first introduced the CDA in 1996 in response to the "rapidly developing array of Internet and other interactive computer services available to individual Americans."³⁶ At the time, the Internet and other interactive computer services were "flourish[ing], to the benefit of all Americans, with a minimum of government regulation."³⁷ In order to "promote the continued development of the Internet"³⁸ and to "preserve the

²⁷ *Id.* ("Grindr does not control the content of User Accounts and profiles. Grindr has the right, but does not have any obligation, to monitor such content for any purpose. . . . You are solely responsible for Your own User Content and the consequences of posting or publishing them.").

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* The only exceptions to the arbitration agreement are (1) if either party reasonably believes the other party has violated its intellectual property rights, or (2) if the claim can be settled in small claims court within the jurisdiction of such a court. *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ 47 U.S.C. § 230(a)(1) (1996).

³⁷ *Id.* § 230(a)(4).

³⁸ *Id.* § 230(b)(1).

vibrant and competitive free market that presently exists”³⁹ for providers of interactive computer services, Congress enacted the Good Samaritan clause of the CDA.⁴⁰ The Good Samaritan clause immunizes both providers and users of interactive computer services from liability for third-party content.⁴¹ This includes protecting service providers from liability for obscene or inappropriate user-posted content.⁴² To qualify for Section 230 protections, a party must satisfy the following three elements: (1) the party is an online service provider or user; (2) holding the party liable would treat it as the publisher or speaker of third-party content; and (3) the party did not develop or create, in whole or in part, the content at issue.⁴³ Under this regime, interactive computer service providers enjoy broad immunity from users’ behavior, including threatening or offensive language, and even dangerous in-person behavior escalating from online interactions.⁴⁴ Notably, companies can still be held liable for violating intellectual property laws and federal criminal statutes.⁴⁵

B. CDA IMMUNITY HAS BEEN EXTENSIVELY LITIGATED

A significant body of case law has developed since Congress first enacted the CDA, including a number of cases involving online dating or networking sites. In most cases, courts have found online service providers to be statutorily immune from charges brought under the CDA,⁴⁶ although some scholars suggest that “Section 230 immunity is not as definite as it once was.”⁴⁷ Jeff Kosseff, for example, argues that courts “are slowly enlarging

³⁹ *Id.* § 230(b)(2).

⁴⁰ *Id.* § 230(c). The Good Samaritan clause reads as follows:

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

⁴¹ *Id.*

⁴² *Id.* § 230(c)(2)(A).

⁴³ Varty Defterderian, Note, *Fair Housing Council v. Roommates.com: A New Path for Section 230 Immunity*, 24 BERKELEY TECH. L.J. 563, 567 (2009) (citing *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), the first federal circuit court interpretation of Section 230).

⁴⁴ See generally Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 FORDHAM L. REV. 401 (2017).

⁴⁵ 47 U.S.C. § 230(e)(1), (2) (1996); see also Ambika Doran & Tom Wyrwich, *Section 230 of the Communications Decency Act Turns 20*, LAW360 (Sept. 7, 2016, 12:27 PM), <https://www.law360.com/articles/836281/section-230-of-the-communications-decency-act-turns-20> [<http://perma.cc/4P5P-4FF7>].

⁴⁶ Doran & Wyrwich, *supra* note 45 (“‘All but a handful’ [of court decisions deciding Section 230 immunity] . . . ‘find that the website is entitled to immunity.’” (quoting *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 558 (N.C. Ct. App. 2012))). Doran and Wyrwich note, however, that “[c]ourts have yet to fully explore fact patterns that do not necessarily fall within the traditional confines of the immunity.” *Id.*

⁴⁷ Jeff Kosseff, *The Gradual Erosion of the Law that Shaped the Internet: Section 230’s Evolution Over Two Decades*, 18 COLUM. SCI. & TECH. L. REV. 1, 3, 23 (2016) (“[C]ourts have slowly eroded the once-absolute [Section 230] immunity by concluding that some online service providers encouraged or contributed to the user content, and therefore the user content was not ‘provided by another information content provider.’”).

the loopholes that allow plaintiffs' lawsuits against intermediaries to survive.⁷⁴⁸

One of the earliest cases involving the Good Samaritan clause was *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003). In *Carafano*, the court found the Internet dating service Matchmaker statutorily immune from any responsibility for a third-party user allegedly posting a false profile of an actress.⁴⁹ The court noted that Section 230(c) immunity is "quite robust."⁵⁰ In another case, *Doe v. Myspace, Inc.*, 528 F.3d 413 (5th Cir. 2008), a fourteen-year-old girl sued the online social network MySpace after an adult user she met on the site sexually assaulted her.⁵¹ The court held that the CDA's Good Samaritan provision barred her claims.⁵² One of the most recent beneficiaries of Section 230 immunity was Yelp, in whose favor the California Supreme Court recently held, finding that Yelp reviews are protected by the CDA.⁵³

There are, however, a handful of cases where courts have found that defendants did not qualify for Good Samaritan protections. In one such case, the court held that the CDA did not shield Yahoo! from liability for claims that it created false user profiles for its dating sites.⁵⁴ The court reasoned that the allegedly false profiles were not user-generated and thus did not qualify for Section 230 protections.⁵⁵

Further, in a particularly noteworthy case involving the website Roommates.com, the court held that Section 230 does not provide immunity when a website permits illegal activity.⁵⁶ In *Fair Housing Council v. Roommates.com*, the website required users to fill out a questionnaire divulging information about protected characteristics, including sex, family status, and sexual orientation.⁵⁷ By requiring users to divulge this information, Roommates.com ran afoul of the Fair Housing Act and state discrimination laws, which make it unlawful to ask certain discriminatory questions.⁵⁸ As such, Roommates.com did not qualify for CDA protection.⁵⁹

⁴⁸ *Id.* at 3 ("[A]s the amount of user-generated content has exponentially increased in recent years, courts have struggled with what was once viewed as bullet-proof immunity for online intermediaries.").

⁴⁹ *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003).

⁵⁰ *Id.* at 1123.

⁵¹ *Doe v. MySpace, Inc.*, 528 F.3d 413, 416 (5th Cir. 2008).

⁵² *Id.* at 418.

⁵³ See Sophia Cope, *California Supreme Court Strengthens Section 230 Protections for Online Speech*, ELECTRONIC FRONTIER FOUND. (July 24, 2018), <https://www.eff.org/deeplinks/2018/07/california-supreme-court-strengthens-section-230-protections-online-speech> (discussing *Hassell v. Bird*, 420 P.3d 776 (Cal. 2018), *cert. denied*, No. 18-506 (U.S. Oct. 18, 2018)).

⁵⁴ *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1262–63 (N.D. Cal. 2006), *aff'd*, 376 F. App'x. 775 (9th Cir. 2010).

⁵⁵ *Id.*

⁵⁶ *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1165 (9th Cir. 2008) (en banc).

⁵⁷ *Id.* at 1166.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1175; see also *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1197–98, 1201 (10th Cir. 2009) (holding that a website operator that solicited and then disclosed confidential personal data had "developed" that information and was thus precluded from CDA immunity).

Also noteworthy on the topic of dating websites and nondiscrimination are the dating website eHarmony's class action settlements regarding alleged discrimination against LGBT potential users. Although these settlements did not expressly involve the CDA's Good Samaritan provision, they held a dating website responsible for its discriminatory platform. In 2008, eHarmony agreed to open a site for gay and lesbian customers as part of the lawsuit settlement. It had previously excluded gay singles, claiming that the site was focused on finding marriage partners, and gay marriage was illegal in most

C. COURTS HAVE HELD THAT THE CDA IMMUNIZES GRINDR

Only a handful of cases involving Grindr have culminated in court opinions. Presumably, given Grindr's arbitration clause,⁶⁰ other claims involving the app have been handled outside of court. Grindr was created after much of the case law around the Good Samaritan clause had already been settled. However, there are still a few noteworthy cases involving Grindr and the CDA, the majority of which fall into one of two categories: impersonation or statutory rape. Generally, plaintiffs' claims in these cases have failed, with courts holding that the CDA immunizes Grindr from liability for user-generated content.

Herrick v. Grindr, 306 F. Supp. 3d 579 (S.D.N.Y. 2018), provides an example of an impersonation case. In *Herrick*, a former Grindr user sued the app after his ex-boyfriend impersonated him on the app, creating false profiles and encouraging other users to sexually assault the plaintiff.⁶¹ The plaintiff sued Grindr for defective design, alleging that it lacked built-in safety features and misled users into believing it could interdict impersonating profiles.⁶² The court dismissed the claim, holding that the CDA protected Grindr against such allegations.⁶³ The court further held that the plaintiff's misrepresentation claims failed on their merits because he did not allege any misleading or false statements by Grindr.⁶⁴

Saponaro v. Grindr, 93 F. Supp. 3d 319 (D.N.J. 2015), is an example of a statutory rape claim.⁶⁵ In *Saponaro*, an adult man sued Grindr after he was arrested for engaging in a sexual encounter with a minor Grindr user.⁶⁶ The plaintiff and the minor had engaged in a threesome with another adult male, who had arranged the liaison with the minor through Grindr.⁶⁷ The plaintiff argued that Grindr's negligent failure to enforce its age restriction directly caused his arrest.⁶⁸ The court dismissed the complaint, holding that the CDA barred the plaintiff's claim because it involved third-party-generated content on an online service provider.⁶⁹ The court also held that the plaintiff's claims of negligence failed as a matter of law, finding that Grindr was merely a conduit of the information published on its app and that its online questionnaire was facially benign.⁷⁰ In so determining, the court expressed

states at the time. Then, in 2010, eHarmony came under fire again for failing to link or cross-promote its site for gay and lesbian users with its heterosexual site. In another settlement, eHarmony agreed to link its two sites and unify subscriptions. See Samuel Axon, *eHarmony Settles Lawsuit, Will Merge Gay and Straight Dating Sites*, MASHABLE (Jan. 28, 2010), <https://mashable.com/2010/01/28/eharmony-lawsuit/#62F4GW63wSqZ>; Japhy Grant, *eHarmony Decides to Play Matchmaker to Gay Couples*, QUEERTY (Nov. 19, 2008, 1:11 PM), <https://www.queerty.com/eharmony-decides-to-play-matchmaker-to-gay-couples-20081119>.

⁶⁰ *Terms of Service*, *supra* note 9.

⁶¹ *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018). The false profiles allegedly described the plaintiff as being "interested in fetishistic sex, bondage, role playing, and rape fantasies," and they encouraged users to physically seek the plaintiff out at his home or workplace for sex. *Id.*

⁶² *Id.* at 584–86.

⁶³ *Id.* at 584, 601.

⁶⁴ *Id.* at 584.

⁶⁵ See also *Men in Jail After Thirteen-Year-Old Poses as Eighteen on Grindr in Layton*, QSALT LAKE (June 9, 2015), <https://qsaltlake.com/news/2015/06/09/men-in-jail-after-13-year-old-poses-as-18-grindr-layton-utah/>.

⁶⁶ *Saponaro v. Grindr, LLC*, 93 F. Supp. 3d 319, 321 (D.N.J. 2015).

⁶⁷ *Id.*

⁶⁸ *Id.* at 322.

⁶⁹ *Id.* at 322–23.

⁷⁰ *Id.* at 323–24.

its concern that “[h]olding interactive service providers liable for third-party communications would have chilling implications for free speech on the internet.”⁷¹

D. THE CDA HAS COME UNDER CRITICISM

While courts have seemingly granted Grindr and other networking sites broad protection under the CDA,⁷² the Act is not without its critics. Some argue that Section 230 immunity is too sweeping.⁷³ Danielle Keats Citron and Benjamin Wittes, for example, point out that the Internet is “out of whack” with the rest of the world with its broad immunity for service providers.⁷⁴ They argue that, if a physical location or business “arranged private rooms for strangers to meet, knowing that sexual predators were using its service to meet kids, [it] would have to do a great deal more than warn people to proceed ‘at their own peril’ to avoid liability when bad things happened.”⁷⁵ Citron and Wittes claim this broad liability for Internet predators is the opposite of what Congress had in mind when it enacted the CDA in 1996;⁷⁶ the CDA’s purpose was, in fact, to restrict access to sexually explicit material online.⁷⁷ The Good Samaritan clause was intended to ensure the participation of online providers in self-regulation; however, Citron and Wittes assert that courts have extended the safe harbor far beyond its intended purpose.⁷⁸ Courts’ overbroad interpretation of Section 230 has “left victims of online abuse with no leverage against site operators whose business models facilitate abuse.”⁷⁹ Accordingly, Section 230 should be amended to “eliminate the immunity for the worst actors,” such as those whose websites “encourage destructive online abuse,” or who know that their sites “are principally used for that purpose.”⁸⁰

⁷¹ *Id.* at 325.

Specifically, if social network hosts are faced with liability every time third-party communications on their networks result in harm, they are left with two extreme courses of action if they wish to ensure insulation from liability: either over-police their networks, taking down communications that might ultimately be harmless; or, strip users of the ability to post communications altogether. *Id.*

⁷² *But see* Kosseff, *supra* note 47, at 3 (“[C]ourts have slowly eroded the once-absolute [Section 230] immunity.”).

⁷³ *See, e.g.*, Citron & Wittes, *supra* note 44.

⁷⁴ *Id.* at 403.

⁷⁵ *Id.*; *see also* Defterderian, *supra* note 43, at 563–64 (“[O]nline service providers . . . receive immunity for behavior that would otherwise create liability in their brick-and-mortar counterparts.”).

⁷⁶ Citron & Wittes, *supra* note 44, at 403.

⁷⁷ *Id.* at 404–06. “The plain reality is that the ‘core policy of § 230(c)(1)’ was to protect ‘‘Good Samaritan’’ blocking and screening of offensive material.” *Id.* at 407 (quoting *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851–52 (9th Cir. 2016)). *But see* Defterderian, *supra* note 43, at 585 (“[C]o-author of Section 230 Senator Ron Wyden[] was weary of governmental regulation of the Internet. In discussing Section 230, he noted that ‘the Internet is the shining star of the information age, and Government censors must not be allowed to spoil its promise.’” (quoting 141 Cong. Rec. H8470 (daily ed., Aug. 4, 1995) (statement of Rep. Cox))).

⁷⁸ Citron & Wittes, *supra* note 44, at 403. “Platforms have been protected from liability even though they republished content knowing it might violate the law, encouraged users to post illegal content, changed their design and policies for the purpose of enabling illegal activity, or sold dangerous products.” *Id.* at 408 (internal citations omitted).

⁷⁹ *Id.* at 404. “There is no particular reason, even under current law, to treat the decision to give predators access to children as the act of a ‘publisher’ or ‘speaker.’ And it certainly is not the act of a Good Samaritan.” *Id.* at 418.

⁸⁰ *Id.* at 419. Citron and Wittes propose an amendment that mirrors Section 230’s existing exemption of federal law and intellectual property. The proposed amendment states:

Varty Defterderian also contends that the scope of Section 230 immunity could be curtailed.⁸¹ Defterderian notes that in *Roommates.com*, “[I]iability is premised not necessarily on the level of control a defendant had over the content at issue, but whether the defendant’s actions somehow created or lent itself to the illegality.”⁸² She expresses concern, however, that allowing courts to continue restricting Section 230’s breadth “chip[s] away at both the judicial efficiency of a safe harbor and the underlying need and reasoning for immunity.”⁸³ Instead, she asserts, such drastic changes to a statute should be left to the legislature.⁸⁴

Other critics raise concerns with Section 230 jurisprudence as it relates to website marketing.⁸⁵ In response to the 2007 decision *Doe v. SexSearch.com*, 502 F. Supp. 2d 719 (N.D. Ohio 2007), *aff’d*, 551 F.3d 412 (6th Cir. 2008),⁸⁶ Eric Goldman argues that a website could be held liable for representing that all members are over eighteen when it knows that they are not.⁸⁷ The plaintiff’s arguments in *SexSearch*, Goldman argues, were “lame

“Nothing in Section 230 shall be construed to limit or expand the application of civil or criminal liability for any website or other content host that purposefully encourages cyber stalking[,] . . . nonconsensual pornography, sex trafficking, child sexual exploitation, or that has knowledge that it principally hosts such material.” *Id.* (internal citations omitted).

Alternatively, Citron and Wittes propose a revision of Section 230(c)(1) that reads:

No provider or user of an interactive computer service that *takes reasonable steps to prevent or address unlawful uses of its services* shall be treated as the publisher or speaker of any information provided by another information content provider in any action arising out of the publication of content provided by that information content provider. *Id.* (emphasis in original).

This revision would continue to provide protection for platforms as long as they could prove that “their response to unlawful uses of their services was reasonable.” *Id.*

⁸¹ Defterderian, *supra* note 43, at 564. This note was published soon after the *Roommates.com* decision (Fair Hous. Council v. *Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (en banc)). In the years since this note’s publication, *Roommates.com* and its progeny have not significantly narrowed the scope of Section 230 immunity. Defterderian predicted such an outcome: “[T]he narrowing of the safe harbor will not affect most internet operations.” Defterderian, *supra* note 43, at 588; *see also* Eugene Volokh, *Ninth Circuit En Banc Opinion in Fair Housing Council v. Roommates.com, VOLOKH CONSPIRACY* (Apr. 3, 2008, 1:00 PM), <http://volokh.com/2008/04/03/ninth-circuit-en-banc-opinion-in-fair-housing-council-v-roommates-com/>.

⁸² Defterderian, *supra* note 43, at 573. In *Roommates.com*, “the court introduces the concept of ‘materially contributing’ to the illegality at issue as a way of differentiating between passive and active conduct.” *Id.* at 575.

⁸³ *Id.* at 582. “Such a manner of determining liability has the potential to erode both predictability and reliability of the law.” *Id.* at 583.

⁸⁴ *Id.* at 586.

⁸⁵ *See, e.g.*, Eric Goldman, *Website Isn’t Liable When Users Lie About Their Ages—Doe v. SexSearch*, TECH. & MKTG. L. BLOG (Aug. 25, 2007), https://blog.ericgoldman.org/archives/2007/08/website_isnt_li.htm.

⁸⁶ In this case, the Sixth Circuit affirmed the trial court’s dismissal of a case against the online dating site SexSearch.com (“SexSearch”) for failure to state a claim. In *SexSearch*, the adult defendant (“Doe”) had sexual relations with a user who described herself as an eighteen-year-old female but was actually fourteen years old. Doe sued SexSearch after he was arrested and charged for unlawful conduct with a minor. On appeal, the Sixth Circuit affirmed that Doe had failed to state a claim; it did not reach the alternative question of whether the CDA provides SexSearch with immunity from suit. *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 731 (N.D. Ohio 2007), *aff’d* 551 F.3d 412 (6th Cir. 2008).

Notably, in *Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398, 409–10 (6th Cir. 2014), the Sixth Circuit declined to adopt the trial court’s “overly inclusive” interpretation of Section 230 in *SexSearch*. In *Jones*, the court held that the *SexSearch* trial court implied “an overly exclusive interpretation of ‘development’ would exclude all publishing, editorial, and screening functions of a website operator from the set of actions that the term denotes.” *Id.* In *SexSearch*, the court argued, the district court failed to grasp the crucial distinction between “taking actions (traditional to publishers) that are necessary to the display of unwelcome and actionable content and, on the other hand, responsibility for what makes the displayed content illegal or actionable.” *Id.* at 414.

⁸⁷ Goldman, *supra* note 85. Goldman’s commentary does not involve the dicta in the *SexSearch* trial court decision that was overturned in *Jones*.

and futile,” but the case exposes an unexplored area of Section 230.⁸⁸ Goldman asserts that marketing statements claiming all users of a website are adults, when in fact underage users lie about their age to access the site, may be protected by Section 230.⁸⁹ This is “troublesome,”⁹⁰ he says, and merits further inquiry.

IV. A NEW AGE OF ONLINE PLATFORM ACCOUNTABILITY

A. ONLINE SERVICE PROVIDERS ARE ACKNOWLEDGING RESPONSIBILITY

In recent years, online service providers have begun taking more responsibility for user content that is shared via their platforms. Reconsidering accountability for platforms like Grindr is worthwhile in this changing context. Section 230 aside, many online service providers are changing their platforms in response to consumer pressure.

Instagram, for example, has changed its platform several times in the past few years in an effort to protect users’ mental health and safety.⁹¹ Concerns about protecting young people seem to have factored heavily into the decision to enact these changes.⁹² In 2016, Instagram installed features like a report button and a filter for negative comments, citing its “[h]uge responsibility’ to protect young people” as a chief reason.⁹³ Its public policy director acknowledged that the app, though an online platform, has a responsibility to help users offline as well.⁹⁴ In August 2018, Instagram and Facebook rolled out features to help users limit their screen time, in response to concerns that the apps were addictive.⁹⁵ These features bore a resemblance to similar features unveiled by Apple and Google several months prior.⁹⁶ Both Facebook and Instagram cited their responsibility to protect users as a reason for unrolling these changes.⁹⁷

Facebook has started to look at its accountability differently in other ways, too. After significant press coverage of Facebook’s role in the 2016 presidential election, CEO Mark Zuckerberg admitted that the company is

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Instagram: “Huge Responsibility” to Protect Young People*, BBC NEWS (Nov. 30, 2016), <https://www.bbc.com/news/av/technology-38158682/instagram-huge-responsibility-to-protect-young-people>.

⁹² *Id.* (“[Public Policy Director] Nicky Jackson Colaco tells The World At One the company takes issues of child protection and body image very seriously.”).

⁹³ *Id.*

⁹⁴ *Id.* at 2:30.

⁹⁵ Kurt Wagner, *Facebook and Instagram Are Making It Easier to Spend Less Time on Facebook and Instagram. But Why?*, RECODE (Aug. 1, 2018, 7:00 AM), <https://www.recode.net/2018/8/1/17637428/facebook-instagram-time-well-spent-screen-time>. For example, Instagram unveiled a feature telling users “You’re All Caught Up” once they have viewed all posts from the last two days. *Introducing “You’re All Caught Up” in Feed*, INSTAGRAM (July 2, 2018), <https://instagram-press.com/blog/2018/07/02/introducing-youre-all-caught-up-in-feed/>.

⁹⁶ Wagner, *supra* note 95.

⁹⁷ *Id.*

“responsible for the content” on its platform.⁹⁸ He also said that Facebook needs to take a “broader view” of its responsibility in the world—including, perhaps, proactively removing objectionable content.⁹⁹ His statements represent a “departure from how [I]nternet companies have traditionally viewed themselves—as neutral platforms generally not responsible for what people post and share on their services.”¹⁰⁰ Previously, Facebook had repeatedly claimed that it is not a media company and that it takes no responsibility for user-posted content on the platform.¹⁰¹

Twitter has followed suit as well: on several occasions in 2018, Twitter removed accounts affiliated with, *inter alia*, conspiracy theorist Alex Jones and his website, InfoWars.¹⁰² Jones had shared theories that the Sandy Hook school shooting was a hoax and that 9/11 was an inside job.¹⁰³ The “permanent suspension” of these accounts followed public outcry: initially, YouTube, Facebook, and Spotify banned Jones’ platforms, while Twitter only suspended some of Jones’ privileges.¹⁰⁴ Twitter CEO Jack Dorsey had previously insisted that Twitter would not “succumb and simply react to outside pressure,” in apparent reference to other platforms banning Jones.¹⁰⁵

Amazon, Google, and others have also accepted more responsibility for content on their platforms of late. In response to social pressure, Amazon recently deleted products on its platform that featured Nazi and white supremacist symbolism.¹⁰⁶ Similarly, Google changed its search algorithm to demote “fake news” and conspiracy theories within its results,¹⁰⁷ such as removing neo-Nazi sites from appearing when users searched for whether the Holocaust was real.¹⁰⁸ These companies and others continue to take more accountability for what happens on their platforms, in response to mounting pressure from users.

B. THE LEGISLATIVE LANDSCAPE IS CHANGING

A new law called FOSTA/SESTA (“SESTA”), signed into law in April 2018, may also be changing the landscape of Internet provider

⁹⁸ Facebook Is “Responsible for the Content” on Its Platform, Zuckerberg Says, PBS (Apr. 10, 2018, 5:12 PM), <https://www.pbs.org/newshour/nation/facebook-is-responsible-for-the-content-on-its-platform-zuckerberg-says>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Matt Weinberger, *Mark Zuckerberg Just Renounced a Core Piece of Silicon Valley Wisdom—and It Could Come Back to Bite Facebook (FB)*, BUS. INSIDER (Apr. 10, 2018, 1:30 PM), <https://www.businessinsider.com/mark-zuckerberg-facebook-is-responsible-for-the-content-on-its-platform-2018-4>.

¹⁰² Avie Schneider, *Twitter Bans Alex Jones and InfoWars; Cites Abusive Behavior*, NPR (Sept. 6, 2018, 5:34 PM), <https://www.npr.org/2018/09/06/645352618/twitter-bans-alex-jones-and-infowars-cites-abusive-behavior>; see also Oliver Darcy & Rob McLean, *Twitter Bans More InfoWars Accounts*, CNN (Oct. 23, 2018, 8:45 PM), <https://edition.cnn.com/2018/10/22/media/twitter-infowars-alex-jones>.

¹⁰³ Schneider, *supra* note 102.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Kate Conger, *Amazon Removes Products Featuring Nazi Symbols*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/technology/amazon-removes-nazi-supremacist.html>.

¹⁰⁷ Jennifer Calfas, *Google Is Changing Its Search Algorithm to Combat Fake News*, FORTUNE (Apr. 25, 2017), <http://fortune.com/2017/04/25/google-search-algorithm-fake-news/>.

¹⁰⁸ Erik Ortiz, *Google Changes Algorithm, Scrubs Neo-Nazi Site Disputing Holocaust in Top Search*, NBC (Dec. 27, 2016, 11:17 AM), <https://www.nbcnews.com/tech/internet/google-changes-algorithm-scrubs-neo-nazi-site-disputing-holocaust-top-n700506>.

accountability.¹⁰⁹ The law holds accountable those Internet service providers that facilitate sex trafficking, creating an exception to Section 230 immunity.¹¹⁰ In response to SESTA, some websites removed content that could trigger violations: for example, Craigslist deleted its personal ad section, and Backpage.com was shut down.¹¹¹ Several Internet-based escort services, dating websites, and Reddit threads also shut down immediately.¹¹² Although SESTA's efficacy in protecting sex workers has been hotly debated,¹¹³ the law does raise interesting questions about Section 230's application to sexually explicit material. Indeed, SESTA allows for legal action against any platform found to be "knowingly assisting, supporting, or facilitating" advertisements for sex work.¹¹⁴ Accordingly, "preemptive overreaction seems to be the preferred model" for Internet platforms in approaching the new law.¹¹⁵ Such a provision sets an intriguing precedent for platforms like Grindr, on which users frequently exchange sexually explicit content. Commercial sex work and child pornography can be distinguished from other sex crimes in that they both involve commercial activity, whereas other sex crimes ostensibly are not profit-motivated. SESTA can be easily analogized to the child pornography context; a similar provision could hold platforms like Grindr accountable for facilitating child pornography exchange.

In the midst of this changing legislative landscape, the public and some government officials have been placing increased pressure on online platforms to self-monitor. German Chancellor Angela Merkel, for example, stated in a July 2018 press conference that social media platforms should take responsibility for the content on their networks.¹¹⁶ She told reporters that "[e]veryone who operates such big platforms should be responsible for certain standards being adhered to on them."¹¹⁷ Moreover, corporate social responsibility is a determinant of business success in competitive markets.¹¹⁸

¹⁰⁹ SESTA, the Senate bill, stands for the Stop Enabling Sex Traffickers Act, and FOSTA, the House bill, stands for Allow States and Victims to Fight Online Sex Trafficking Act. Aja Romero, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet As We Know It*, VOX (July 2, 2018, 1:08 PM), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>.

¹¹⁰ *Id.*; Shea M. Rhodes, Jamie Pizzi & Sarah K. Robinson, *SESTA/FOSTA Imposes Accountability on Internet Service Providers, Remains Misinterpreted by Many*, HILL (May 22, 2018, 8:15 AM), <https://thehill.com/blogs/congress-blog/judicial/388694-sesta-fosta-imposes-accountability-on-internet-service-providers>.

¹¹¹ Rhodes et al., *supra* note 110.

¹¹² Romero, *supra* note 109.

¹¹³ The law has been widely decried in many circles. SESTA targets consensual sex work in addition to sex trafficking; critics argue that it conflates consensual and nonconsensual sex work. Romero, *supra* note 109. As such, many argue, the law makes consensual sex work more dangerous. Because sex workers can no longer advertise their services online, where they can vet potential clients, many are now forced to engage in street-based sex work, which is generally considered more dangerous. *Id.* Critics also worry the law could chill free speech outside the bill's target zone. *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Riham Alkousaa & Michelle Martin, *Social Media Platforms Must Take Responsibility for Content: Merkel*, U.S. NEWS (July 20, 2018, 8:39 AM), <https://www.usnews.com/news/world/articles/2018-07-20/social-media-platforms-must-take-responsibility-for-content-merkel>.

¹¹⁷ *Id.*

¹¹⁸ Eunil Park, Ki Joon Kim & Sang Jib Kwon, *Corporate Social Responsibility as a Determinant of Consumer Loyalty: An Examination of Ethical Standard, Satisfaction, and Trust*, 76 J. BUS. RES. 8, 8 (2017), <https://www.sciencedirect.com/science/article/pii/S0148296317300784>.

Even if Section 230 provides legal immunity to online platforms, consumer perceptions of a platform's social responsibility shape user satisfaction and loyalty.¹¹⁹ Attitudes towards online platform accountability seem to be shifting among both lawmakers and the public, suggesting that perhaps CDA immunity will not remain as sweeping as it currently is.

V. HOW GRINDR HARMS UNDERAGE USERS

Despite Grindr's Terms and Conditions insisting the contrary, both case law and anecdotal evidence suggest that plenty of Grindr users are younger than eighteen.¹²⁰ The only restrictions on underage users creating a Grindr account are entering one's birth date and accepting the Terms & Conditions;¹²¹ both are easily circumvented. Grindr's emphasis on anonymity makes it easy for underage users to go unnoticed. Users are not required to include a picture or list their age in their profile to interact with other users. Grindr may seem like a fun, exciting online platform where young men who are curious about other men can spend time—indeed, for many young men, it likely serves exactly that purpose. However, Grindr poses a number of risks to those underage teens who make their way on to the platform. Indeed, by marketing itself to young MSM without meaningfully blocking users who are under eighteen, Grindr creates a platform that facilitates harm to minors.

A. GRINDR EXPOSES MINORS TO PREDATORY ADULTS

By making it easy for minors to create profiles, Grindr facilitates adult predators' access to underage users, putting minors at risk of sexual assault.¹²² Grindr-facilitated sexual assault is not a rare phenomenon.¹²³ In fact, an entire website exists devoted to sharing Grindr horror stories.¹²⁴ The website asserts that Grindr crimes are particularly heinous “[n]ot only

¹¹⁹ *Id.*

¹²⁰ See, e.g., Anya Crittenton, *Former Bus Driver Makes Child Porn of Fifteen-Year-Old Student, Gets Life in Prison*, GAY STAR NEWS (Dec. 7, 2018, 12:19 AM), <https://www.gaystarnews.com/article/school-employee-life-in-prison-child-porn/#gs.qac06x0> (noting that the adult defendant met the fifteen-year-old victim via Grindr). There are also threads on the anonymous discussion website Reddit on which underage Grindr users discuss their tactics for creating profiles. See, e.g., SadScorpio336, Comment to *Should I Report Minors on Grindr?*, REDDIT, https://www.reddit.com/r/askgaybros/comments/930w9q/should_i_report_minors_on_grindr/ (last visited Mar. 5, 2019) (“I was using Grindr at that age [sixteen or seventeen]. [Blocking underage users is] just a waste of your time, because we just keep making new accounts. Lmaoo.”).

¹²¹ See *supra* Part B.I.

¹²² *There Are a Lot of Child Sexual Assaults on Grindr. Here's Why*, SAFER KID, <https://www.saferkid.com/blog/there-are-a-lot-of-child-sexual-assaults-on-grindr-here-s-why> (last visited Nov. 21, 2018) (“If [a minor] says he is 13, he is told that he cannot use the app. But then he can immediately change his age to 18, and voila, he's an adult and can freely hookup [sic] with men on Grindr.”); see also, e.g., *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) (describing the sexual assault of a fourteen-year-old girl by an adult man she met online). Although this case involved MySpace, not Grindr, the same immunity applies to Grindr: the CDA shields the platform from any liability if predators use it to facilitate sexual assault.

¹²³ See, e.g., Noah Michelson, *Me Too: The Difficult Truths About Gay Men and Sexual Assault*, HUFFINGTON POST (Oct. 16, 2017, 3:33 PM), https://www.huffingtonpost.com/entry/sexual-assault-gay-men_us_59e4badfe4b04d1d51834114; *There Are a Lot of Child Sexual Assaults on Grindr. Here's Why*, *supra* note 122.

¹²⁴ Jacob Shelton, *Terrifying Grindr Horror Stories*, RANKER, <https://www.ranker.com/list/grindr-horror-stories/jacob-shelton> (last visited Nov. 21, 2018).

because of the trust that's betrayed between closeted men, but also because of the young age of some of the victims."¹²⁵

Critics are dubious of Grindr's motives, claiming that Grindr intentionally makes signing up easy for prospective users, including those who are underage, because having more users benefits the company's bottom line.¹²⁶ The more users Grindr has, the higher its profits: 75 percent of its revenue comes from its subscription services, and 25 percent comes from its advertisers.¹²⁷ Both revenue sources ostensibly depend on having a large user population. Interestingly, Grindr announced in August 2018 that it planned to go public.¹²⁸ Apparently, it had been courting investors by revealing that it had been "continuously profitable" for three years based on premium subscriptions.¹²⁹ Critics argue that Grindr has an incentive to turn a blind eye to underage users because those additional users increase its profits.¹³⁰

B. MINORS RISK BEING OUTED

According to a 2014 survey, 18 percent of Grindr users are still in the closet.¹³¹ Further, nearly a third of survey respondents revealed that they were using Grindr before they came out.¹³² It is likely that the percentage of underage Grindr users who are not yet out is even higher.¹³³ According to a 2013 survey, the median age at which gay men first told someone about their sexuality was eighteen; for bisexual respondents, it was twenty.¹³⁴ Many have come out to some people in their lives, but not others; for example, only 59 percent of survey respondents had told one or both of their parents.¹³⁵ Their fears of coming out may not be unfounded: 39 percent of respondents say that at some point in their lives they were rejected by a family member or close friend because of their sexual orientation or gender identity.¹³⁶ These findings suggest that, of those minors who use Grindr, many are still in the closet to at least some people.¹³⁷

Grindr makes it all too easy for a gay, bisexual, or curious young man to be outed. If any of his peers use the app, a user with identifiable information

¹²⁵ *Id.*

¹²⁶ *There Are a Lot of Child Sexual Assaults on Grindr. Here's Why*, *supra* note 122 ("If Grindr made their sign up process more convoluted, less people would sign up, and they would get less money. And that's at least one of the reasons Grindr exists. To get money for shareholders of Grindr.").

¹²⁷ Mitchell Hall, *Up Close and Personal: Q&A with Grindr Founder Joel Simkhai*, PC MAG. (July 23, 2013, 8:00 AM), <https://www.pcmag.com/article2/0,2817,2421919,00.asp>.

¹²⁸ Camilla Hodgson & Hannah Kuchler, *World's Most Popular Gay Dating App Grindr to Go Public*, FIN. TIMES (Aug. 30, 2018), <https://www.ft.com/content/95aa3ef2-ac48-11e8-89a1-e5de165fa619>.

¹²⁹ *Id.*

¹³⁰ *There Are a Lot of Child Sexual Assaults on Grindr. Here's Why*, *supra* note 122.

¹³¹ Tharrett, *supra* note 20.

¹³² *Id.*

¹³³ *A Survey of LGBT Americans*, PEW RESEARCH CTR. (June 13, 2013), <http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/>. The survey involved a nationally representative sample of 1,197 LGBT adults. *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Out Online: The Experiences of LGBT Youth on the Internet*, GLSEN (July 10, 2013), <https://www.glsen.org/press/study-finds-lgbt-youth-face-greater-harassment-online> [hereinafter GLSEN] (noting that, of LGBT youth who were not out to peers in person, more than half had used the Internet to interact with other LGBT people).

in his profile could be spotted and outed to those peers. Mean-spirited teens could create a Grindr profile for the purpose of discovering which of their peers use the app.¹³⁸ Even having the Grindr app on one's phone is a potential source of outing.¹³⁹

In facilitating the premature outing of users, particularly underage users, Grindr aids the violation of users' right to privacy. Courts have held that the right to privacy includes the right to non-disclosure of a minor's sexual orientation within the home.¹⁴⁰ Indeed, the Third Circuit has noted that "matters of personal intimacy are protected from threats of disclosure by the right to privacy,"¹⁴¹ and "[i]t is difficult to imagine a more private matter than one's sexuality."¹⁴² While minors are arguably assuming the risk of inadvertent outing by creating a Grindr profile, Grindr should still contend with the moral considerations of outing vulnerable young people.

Outing can have severe consequences for any lesbian, gay, bisexual, or transgender ("LGBT") individual, and minors are especially vulnerable to negative outcomes.¹⁴³ Minors who are outed to their families can face mistreatment such as abuse, homelessness, and attempts at "conversion therapy."¹⁴⁴ If outed to their peers, minors may face bullying, threats, and a decline in school performance.¹⁴⁵ Outed LGBT teens in the workforce may also face employment discrimination or harassment.¹⁴⁶ These consequences can cause serious harm to minors' mental and physical wellbeing.¹⁴⁷

¹³⁸ On the other hand, Grindr might argue that those users assumed the risk of outing by posting and otherwise using the site.

¹³⁹ Notably, Grindr does offer users the option of a more innocuous logo to replace the mask logo on users' phone home screens. See Dan Avery, *Grindr Users in LGBT-Unfriendly Countries Can Now Change Their App Icon to Look Like Something Else*, NEWNOWNEXT (Nov. 29, 2017), <http://www.newnownext.com/grindr-users-in-lgbt-unfriendly-countries-can-now-change-their-app-icon-to-look-like-something-else/11/2017/>.

¹⁴⁰ See, e.g., *Sterling v. Borough of Minersville*, 232 F.3d 190, 192, 196 (3d Cir. 2000) (holding that a police officer's threat to disclose an arrestee's suspected sexual orientation violated the young man's constitutional right to privacy); cf. *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1195 (C.D. Cal. 2007) (holding that a school's "compelling state interest" in explaining a student's disciplinary suspension to her mother outweighed the student's right not to be outed in her home). In *Nguon*, the court noted that the student's mother was likely already aware of the student's sexual orientation at the time of the disclosure. 517 F. Supp. 2d at 1193. The school nonetheless acknowledged that the student had a protected privacy interest in the non-disclosure of her sexual identity. *Id.* at 1195. It further noted that coming to terms with her sexuality took a "heavy emotional and psychological toll" on the student, and that passage into adulthood is "more difficult for gay students" than for heterosexual students. *Id.* at 1199.

¹⁴¹ *Sterling*, 232 F.3d at 192.

¹⁴² *Id.* at 196.

¹⁴³ Tyler Snell, *LGBTQ Youth Face Higher Online Risks*, CONNECT SAFELY (June 27, 2016), <https://www.connectsafely.org/lgbtq-youth-face-higher-online-risks/>.

¹⁴⁴ *Statistics You Should Know About Gay and Transgender Students*, PFLAG NYC, <http://www.pflagnyc.org/safeschools/statistics> (last visited Nov. 30, 2018). This site notes that half of gay males experience a negative parental reaction when they come out, and in 26 percent of those cases, the young man is thrown out of his home. *Id.* Further, 25–50 percent of homeless youth are LGBT, and are on the streets because of their sexual orientation or gender identity. *Id.*

¹⁴⁵ *Id.*; GLSEN, *supra* note 137. The GLSEN study, which included 5680 students, found that LGBT youth are more likely than their heterosexual counterparts to be bullied or harassed online or via text message, and to report feeling unsafe online, at school, and while traveling to and from school. GLSEN, *supra* note 137. The study also found that online victimization contributes to lower self-esteem and higher levels of depression in LGBT youth. *Id.*

¹⁴⁶ *2017 Workplace Equality Fact Sheet*, OUT & EQUAL, <http://outandequal.org/2017-workplace-equality-fact-sheet/> (last visited Nov. 30, 2018).

¹⁴⁷ GLSEN, *supra* note 137; see also *Sterling v. Borough of Minersville*, 232 F.3d 190, 193 (3d Cir. 2000) (noting that the arrestee took his own life after police officers threatened to tell his grandfather about his alleged sexual orientation); *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1199 (C.D. Cal. 2007) (noting that the student engaged in self-mutilation and contemplated suicide after school administrators outed her to her parents).

C. MINORS RISK IMPERSONATION AND REVENGE PORN

Grindr’s platform allows bad actors to impersonate others or circulate “revenge porn,” creating significant risks for adult and underage users alike. Malicious users may create accounts impersonating others, encouraging unwitting users to harass or assault a victim.¹⁴⁸ They can also create false accounts for the purpose of anonymously bullying or outing peers who use the app. While teens sending nude photos of themselves or others is technically illegal, many teens nonetheless engage in “sexting”—sending sexually explicit text messages and photographs.¹⁴⁹ Notably, sexting is more prevalent within LGBT communities than among heterosexuals.¹⁵⁰ Grindr makes it easier for bad actors to either create false profiles or obtain pornographic photographs from users, with serious harmful effects.

D. MINORS FACE SEXUAL HEALTH RISKS

Those minors who ultimately engage in Grindr-facilitated sexual encounters face sexual health risks, a vulnerability exacerbated by the app’s emphasis on anonymous sex. According to one 2017 study, only 59.1% of MSM who use dating apps report using a condom with sexual partners they meet on the Internet.¹⁵¹ A 2007 study found that young MSM aged sixteen to twenty-four were particularly likely to engage in unprotected sex, with only 53 percent reporting consistent condom use.¹⁵² MSM comprise the largest population of people living with Human Immunodeficiency Virus (“HIV”) in the United States, and they account for the majority of new HIV diagnoses.¹⁵³ Further aggravating young Grindr users’ risk of sexually transmitted infection (“STI”) and HIV transmission is the paltry state of sex education in the United States: as of 2016, only thirteen states required that sex education be medically accurate, whereas thirty-seven required that abstinence information be provided.¹⁵⁴ Thus, many of Grindr’s underage

¹⁴⁸ See *supra* notes 61–64 and accompanying text (describing *Herrick v. Grindr LLC*, 306 F. Supp. 3d 579 (S.D.N.Y. 2018), in which the plaintiff’s ex-boyfriend used false Grindr profiles to encourage unsuspecting users to harass and assault the plaintiff); see also Nic Holas, *The Imposters of Hookup Apps: ‘I’m HIV+ and Like to Infect Young Guys’*, OUT (July 18, 2016, 10:02 AM), <https://www.out.com/out-exclusives/2016/7/18/imposters-hookup-apps-im-hiv-infect-young-guys>.

¹⁴⁹ See, e.g., Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMM.LAW CONSPICUOUS 1, 2 (2009) (noting that sexting among teens is “far from uncommon”); Kimberlianne Podlas, *The “Legal Epidemiology” of the Teen Sexting Epidemic: How the Media Influenced a Legislative Outbreak*, 12 U. PITT. J. TECH. L. & POL’Y 1, 17–22 (2011) (discussing the prevalence of teen sexting).

¹⁵⁰ Derek E. Bombauer, *Exposed*, 98 MINN. L. REV. 2025, 2034–35 (2014) (citing researcher Holly Jacobs’ finding that 74.8% of LGBT survey respondents had sent a sext, compared with 53.3% of heterosexual respondents).

¹⁵¹ Darren L. Whitfield et al., *Grindr, Scruff, and on the Hunt: Predictors of Condomless Anal Sex, Internet Use, and Mobile Application Use Among Men Who Have Sex with Men*, 11 AM. J. MEN’S HEALTH 755, 781 (2017). The study involved 546 participants living in Denver, Colorado. *Id.* at 778.

¹⁵² Robert Garofolo et al., *Tip of the Iceberg: Young Men Who Have Sex with Men, the Internet, and HIV Risk*, 97 AM. J. PUB. HEALTH 1113, 1114 (2007). The study involved a sample of 270 men aged sixteen to twenty-four living in Chicago, Illinois. *Id.* at 1113. The study also noted that forty-seven percent of respondents reported having sexual partners who were four or more years older than themselves. *Id.* at 1114.

¹⁵³ Whitfield et al., *supra* note 151, at 775 (“While MSM represent about 4% of the adult U.S. population, MSM accounted for 67% of all new HIV diagnoses in 2014.”).

¹⁵⁴ Kelli Stidham Hall et al., *The State of Sex Education in the United States*, 58 J. ADOLESCENT HEALTH 595, 595 (2016); *What’s the State of Sex Education in the U.S.?*, PLANNED PARENTHOOD,

users are likely not well-educated on the importance of condom use when they begin having anonymous sexual encounters.

Further, Grindr use may negatively impact mental health: the app itself can become addictive, and while it may provide short-term excitement, it may also contribute to depression in the long term.¹⁵⁵ A study of 200,000 iPhone users found that 77 percent of Grindr users felt regret after using the app, which was a higher percentage than for any other app.¹⁵⁶ Of course, internalized homophobia or closeted status could account for some of the reported regret users felt. Nonetheless, taken together, these findings suggest that Grindr poses numerous risks to minors' mental and physical health.

VI. HOW INTERACTIONS WITH MINORS HARM ADULT GRINDR USERS

Grindr also exposes well-intentioned adult users to risks because the app is accessible to underage users. Grindr's prioritization of user anonymity, paired with its marketing towards young people without validating users' ages, creates opportunities for inadvertently illegal interactions between adult and underage users, resulting in penalties for good-faith actors. Chief among these risks are statutory rape and unwitting receipt or possession of child pornography.

A. USERS MAY INADVERTENTLY POSSESS CHILD PORNOGRAPHY

Grindr makes it easy for users to send, receive, or exchange nude and pornographic photos. Accordingly, adult users may unwittingly receive images that constitute child pornography from underage users. As I learned from my own experience using the app, users send nude photos, especially those colloquially known as "dick pics," quite frequently.¹⁵⁷ These photos may be requested or, as they were in my case, unsolicited. Although adult Grindr users may not be aware of minors' ages nor intend to possess child pornography, they can nonetheless wind up possessing child pornography because Grindr does not block underage users in a meaningful way. Grindr's prioritization of anonymity exacerbates the likelihood of inadvertent child pornography possession. Given that users are not required to post photographs of their faces, and their ages are not validated, it can be nearly impossible to tell which "dick pic" came from a seventeen-year-old and which came from a nineteen-year-old. Many users' profiles feature only a headless torso; others include no photograph at all. Despite this reality, possession of these explicit photographs constitutes a federal crime carrying

<https://www.plannedparenthood.org/learn/for-educators/whats-state-sex-education-us> (last visited Nov. 30, 2018).

¹⁵⁵ Jack Turban, *We Need to Talk About How Grindr Is Affecting Gay Men's Mental Health*, VOX (Apr. 4, 2018, 9:50 AM), <https://www.vox.com/science-and-health/2018/4/4/17177058/grindr-gay-mental-health-psychiatrist>.

¹⁵⁶ *App Ratings*, CTR. HUMANE TECH., <http://humanetech.com/app-ratings/> (last visited Nov. 30, 2018).

¹⁵⁷ See also Clyde Engle, *Ten Things I Learned About Gay Hook-Up Culture from My Day on Grindr*, ELITE DAILY (Feb. 19, 2016), <https://www.elitedaily.com/dating/gay-hook-up-culture-grindr/1354315>.

a sentence between five and twenty years.¹⁵⁸ By failing to place insurmountable barriers on underage users joining its platform, Grindr essentially sets up well-meaning adult users for criminal charges.

B. USERS MAY INADVERTENTLY COMMIT STATUTORY RAPE

Grindr facilitates unwitting sexual encounters between well-meaning adult users and minors, putting the adult users at risk for statutory rape charges. A quick Google or Westlaw search yields a bounty of Grindr-initiated statutory rape cases, running the spectrum from defendants who were fully aware that their partner was underage, to those who seemingly had no idea.¹⁵⁹ In one case, a twenty-two-year-old man met a fifteen-year-old boy through Grindr; following a sexual liaison, the adult was charged with statutory rape.¹⁶⁰ The minor testified that the adult was aware of his age and that the two had discussed it multiple times.¹⁶¹ The court sentenced the adult to three years of community control and classified him as a Tier II Sexual Offender.¹⁶² In another case, a gay adult film star was sentenced to 17.5 years for the statutory rape of a fourteen-year-old boy he met on a Grindr-esque dating app, Jack'd.¹⁶³ While the facts of this offense were particularly egregious,¹⁶⁴ it is noteworthy that the same minor had been involved in multiple other cases involving adult men whom he met on dating apps.¹⁶⁵ One of those men died by suicide before standing trial.¹⁶⁶

The issue of Grindr-facilitated statutory rape is particularly nuanced because it involves a degree of personal choice and responsibility. While Grindr first introduces the adult-minor pair, the users ultimately choose to engage in an in-person sexual encounter. This affords them the opportunity to discuss and verify each other's ages. Courts are unlikely to be sympathetic to a mistake-of-age defense under these circumstances.¹⁶⁷ In similar cases, courts have noted that "the danger that a member of [a networking site] could be a minor is open and obvious"; thus, such a site has no duty to warn users that they might be interacting with someone underage.¹⁶⁸ Although Grindr

¹⁵⁸ 18 U.S.C. § 2252(a)(2) (2019) (criminalizing the receipt of a visual depiction involving the "use of a minor engaging in sexually explicit conduct"); *id.* § 2252(b)(1) (imposing a sentence on anyone who violates subsection (a)(2)).

¹⁵⁹ See, e.g., *Saponaro v. Grindr*, 93 F. Supp. 3d 319 (D.N.J. 2015); *supra* notes 66–71 and accompanying text; Privatediscreet29, Comment to *Should I Report Minors on Grindr?*, REDDIT, https://www.reddit.com/r/askgaybros/comments/930w9q/should_i_report_minors_on_grindr/ (last visited Mar. 5, 2019) ("[Underage users] are putting us at risk. I know a guy that got 10 years for hooking up with a minor on a [sic] app like Grindr.>").

¹⁶⁰ *State v. Kuruc*, No. 15CA0088-M, 2017 WL 2428113, at *6 (Ohio Ct. App. June 5, 2017) (noting that "[t]he victim admitted that Grindr requires users to be 18 years old and that, when he downloaded the application onto his phone, he falsified his birthdate to gain access to it").

¹⁶¹ *Id.* at *7.

¹⁶² *Id.* at *1.

¹⁶³ Sean Mandell, *Gay Adult Film Star Mike Dozer Sentenced to 17.5 Years for Raping Fourteen-Year-Old Boy*, TOWLEROAD (Mar. 3, 2016), <http://www.towleroad.com/2016/03/mike-dozer/>.

¹⁶⁴ For example, the defendant failed to disclose his HIV-positive status to the victim. *Id.*

¹⁶⁵ Jay Barmann, *Petaluma Man Arrested for Sex with Teen He Met on Grindr*, SFIST (June 29, 2017, 1:00 PM), http://sfist.com/2017/06/29/petaluma_man_arrested_for_sex_with.php.

¹⁶⁶ *Id.*

¹⁶⁷ For a relevant case, see *Doe v. SexSearch.com*, 502 F. Supp. 2d 719 (N.D. Ohio 2007), *aff'd*, 551 F.3d 412 (6th Cir. 2008) and *supra* note 86 and accompanying text.

¹⁶⁸ *Doe v. SexSearch.com*, 551 F.3d 412, 420 (6th Cir. 2008).

Internet users' anonymity and potential for false personal representations are well known. *Doe* was familiar with the registration process and knew that SexSearch did nothing more than asking members to

increases the likelihood of inadvertent statutory rape, holding it accountable for these incidents presents challenges due to the individual responsibility these encounters also involve.

VII. THE BENEFITS OF GRINDR

While Grindr creates many risks for underage users, the app also provides some unique benefits to LGBT minors. The same anonymity protections that allow underage users to fly under the radar also provide important safety functions. Coming out is not always a safe option for LGBT minors.¹⁶⁹ Indeed, four in ten say the community in which they live does not accept LGBT people,¹⁷⁰ and of those minors who come out, more than one in four are forced to leave their homes.¹⁷¹ Not surprisingly, seventy-three percent of LGBT youth say they are more honest about themselves online than in the real world.¹⁷² Closeted users may explore their sexuality through Grindr under the veil of confidentiality, thus avoiding the negative outcomes that often accompany coming out.

Some commentators have argued that the problem is not Grindr but rather the fact that LGBT youth have few other outlets to express their desires.¹⁷³ Grindr provides a platform for questioning youths to meet other people like them without exposing their identities. The app creates opportunities for them to explore their sexuality that might not otherwise have existed. Further, it connects them with more potential partners in a relatively small dating pool.¹⁷⁴

check a box indicating that they are at least eighteen. Furthermore, even if there was a duty to warn, the statement in the Terms and Conditions that SexSearch could not verify members' information could be seen as a satisfaction of that duty. *Id.*

¹⁶⁹ See *supra* Part E.II.

¹⁷⁰ *Growing Up LGBT in America*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/youth-report/view-and-share-statistics> (last visited Feb. 6, 2019).

¹⁷¹ *The Cost of Coming Out: LGBT Youth Homelessness*, LESLEY U., <https://lesley.edu/article/the-cost-of-coming-out-lgbt-youth-homelessness> (last visited Feb. 6, 2019) (explaining that forty percent of homeless youth identify as LGBT).

¹⁷² *Growing up LGBT in America*, *supra* note 170.

¹⁷³ S. E. Smith, *The Real Problem with Children Using Hookup Apps*, DAILY DOT (Sept. 2, 2014, 11:30 AM), <https://www.dailydot.com/via/grindr-child-molesters-teen-sexual-assault-problem/> (“[T]he problem with children using hookup apps lies not in the fact that their ages aren’t being verified, but in that they’re experiencing larger sexual and personal experiences and emotions that aren’t being addressed.”); see also Nova_dos, Comment to *Should I Report Minors on Grindr?*, REDDIT, https://www.reddit.com/r/askgaybros/comments/930w9q/should_i_report_minors_on_grindr/ (last visited Mar. 5, 2019) (“[T]here is literally no other way of finding other gay guys in the area [for minors like me] . . . gay groups really aren’t a thing here it’s isolating and incredibly painful and there is only so much a counselor can do.”).

¹⁷⁴ Age gaps in homosexual couples tend to be much larger than in heterosexual couples, often due to the limited number of available partners, and there is much debate over the ethics of such relationships. Compare Steven Blum, *Why Have Massive Age Differences Long Been Common in Gay Dating*, MEL MAG. (2018), <https://melmagazine.com/en-us/story/why-have-massive-age-differences-long-been-common-in-gay-dating> (arguing that, although both partners may consider their relationship to be consensual at the time, the younger partner is at risk for victimization due to the unequal power distribution), with Samantha Allen, *Freaking Out About Age Gaps in Gay Relationships Is Homophobic*, DAILY BEAST (Jan. 9, 2015, 5:45 AM), <https://www.thedailybeast.com/freaking-out-about-age-gaps-in-gay-relationships-is-homophobic> (arguing that associating homosexuality with pedophilia has long been a homophobic tactic, and pointing out that older straight men often date much-younger women without being accused of pedophilia).

Grindr can also be educational and sex-positive. The app allows users the option to display their HIV status,¹⁷⁵ facilitating users' ability to serosort accordingly.¹⁷⁶ Users can also share the date of their most recent STI test,¹⁷⁷ whether or not they take PrEP,¹⁷⁸ and for those users who are HIV-positive, whether their viral load is undetectable.¹⁷⁹ Additionally, the app allows users to create testing reminders at time intervals of their choosing, and includes a section entitled "Sexual Health FAQ."¹⁸⁰ This section features a search bar and sexual health-related information, available in a panoply of languages.¹⁸¹ This feature is an important resource, particularly for users with limited access to sexual education. Finally, Grindr occasionally features clickable pop-up ads that allow users to find the closest clinic for STI testing.¹⁸² In a world where reliable sexual health information can be confusing and difficult to access, these educational features benefit adult and underage users alike.

VIII. POTENTIAL SOLUTIONS

In exploring potential solutions, I will focus mainly on those solutions that create obstacles to child pornography exchange on Grindr. My ultimate goal in doing so is to abolish all underage users from the app. This way, law- and Terms and Conditions-abiding adults will not risk unwittingly interacting with minors. Although Grindr provides some benefits to underage users, those same benefits could be achieved by an age-appropriate, youth-focused sexual education and networking app. Grindr, with its focus on facilitating sexual encounters between adults, is not an appropriate place for underage users to explore their sexuality.

My decision to focus on ending child pornography exchange may be surprising, because statutory rape and health risks to minors arguably pose a more serious threat to users. Indeed, there is a dearth of cases in which adult Grindr users have actually been prosecuted for inadvertent child

¹⁷⁵ See *infra* Appendix Exhibit E. Among the "Sexual Health" profile options available to users is "HIV Status." Users may select "Do Not Show," "Negative," "Negative, on PrEP," "Positive," or "Positive, Undetectable." Grindr faced a scandal related to this profile option in April 2018, when it acknowledged that it had been sharing encrypted data about users' HIV status with third party companies. Scott Neuman & Camila Domonoske, *Grindr Admits It Shared HIV Status of Users*, NPR: THE TWO WAY (Apr. 3, 2018, 3:47 AM), <https://www.npr.org/sections/thetwo-way/2018/04/03/599069424/grindr-admits-it-shared-hiv-status-of-users>.

¹⁷⁶ Serosorting is the act of choosing partners with one's same HIV status. Serosorting can reduce HIV transmission rates among HIV-negative individuals. *HIV Risk Reduction Tool: Choosing Partners with the Same HIV Status (Serosorting)*, CDC, https://www.cdc.gov/hivrisk/decreased_risk/communication/same_status.html (last visited Feb. 5, 2019). Further, serosorting helps HIV-positive individuals to find partners who are also HIV-positive, so that they may engage in sexual activity without risking further transmission of the virus. *Id.*

¹⁷⁷ Another available "Sexual Health" profile option is "Last Tested Date." See *infra* Appendix Exhibit E. Users may choose to display the month of their most recent STI test, and may select partners based on how recently other users were checked.

¹⁷⁸ See *infra* Appendix Exhibit E. Pre-exposure prophylaxis, or PrEP, is a medicine that HIV-negative individuals can take to prevent HIV. *HIV Risk Reduction Tool*, *supra* note 176.

¹⁷⁹ See *infra* Appendix Exhibit E. An undetectable viral load means that there are so few copies of the HIV virus in a person's blood that today's monitoring tests are unable to detect them, which significantly reduces the risk of transmitting the virus. Emily Land, *Fact Sheet: Undetectable Viral Load*, BETA (Nov. 4, 2013), <https://betablog.org/fact-sheet-undetectable-viral-load/>.

¹⁸⁰ See *infra* Appendix Exhibit E.

¹⁸¹ *Id.*

¹⁸² I personally observed these ads while familiarizing myself with the app. Acquaintances who regularly use Grindr confirmed that these ads occasionally pop up.

pornography possession. However, focusing on banning underage Grindr users due to child pornography concerns is relatively straightforward. Further, minimizing the number of minors able to access Grindr will have the side effect of decreasing statutory rape encounters and other risks in the process. Statutory rape, on the other hand, is a complicated legal problem to solve, because of the offline interaction and individual decision-making it involves. As such, my main focus will be to encourage Grindr's accountability for child pornography, with the added bonus of also reducing statutory rape and other negative outcomes.

A. PARTIES COULD BRING LEGAL ACTION AGAINST GRINDR

One potential strategy for combating the aforementioned concerns is to bring legal action against Grindr. Although no plaintiff yet has successfully sued Grindr for CDA-related infractions, creative new arguments may have more sway. Most of the published cases against Grindr involve parties alleging that Grindr failed to warn users that others might misuse the app,¹⁸³ or that it failed to adequately enforce the app's age restriction.¹⁸⁴ Courts have not found these arguments convincing.¹⁸⁵ In the future, however, parties could argue that Grindr's marketing is to blame. It is possible to download Grindr without seeing any notice that the app is for adults only.¹⁸⁶ Grindr's App Store download screen, meanwhile, is filled with enticing images of sexy young men.¹⁸⁷ The "About" section of Grindr's website also makes no mention of the fact that users must legally be eighteen or older.¹⁸⁸ A potential user who declines to click through for more information in the App Store¹⁸⁹ or carefully read the Terms and Conditions¹⁹⁰ will encounter just one alert that the app is for adults only: the requirement that the user enter his birth date upon creating a profile.

Parties could contend that Grindr does not explicitly market itself as an adults-only app, and thus invites illegal conduct. For instance, under the *Roommates.com* precedent,¹⁹¹ Grindr may not qualify for CDA protections. Grindr has created a platform that is particularly appealing to minors, and then turns a blind eye when those minors send photographs that constitute child pornography to unwitting adults. Thus, Grindr is essentially a conduit for criminality, which places it outside the protections of the CDA's Good Samaritan clause. Parties making these legal arguments in court may have more success than other parties have in prior suits against Grindr.

¹⁸³ See, e.g., *Herrick v. Grindr LLC*, 306 F. Supp. 3d 579, 585–86 (S.D.N.Y. 2018); *supra* notes 61–64 and accompanying text.

¹⁸⁴ See, e.g., *Saponaro v. Grindr*, 93 F. Supp. 3d 319 (D.N.J. 2015); *supra* notes 66–71 and accompanying text.

¹⁸⁵ *Id.* at 322; *Herrick*, 306 F. Supp. 3d at 601.

¹⁸⁶ See *supra* note 6 and accompanying text.

¹⁸⁷ See *infra* Appendix Exhibits B–C.

¹⁸⁸ See *Grindr: About*, *supra* note 3. For example, the webpage describes Grindr as an app for “gay, bi, trans, and queer people,” rather than “gay, bi, trans, and queer adults.” *Id.* (emphasis added).

¹⁸⁹ See *supra* note 6 and accompanying text.

¹⁹⁰ See *supra* Part B.III.

¹⁹¹ See generally *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

B. LAWMAKERS COULD AMEND THE CDA

Alternatively, lawmakers could amend the CDA so that platforms like Grindr do not qualify for immunity unless they take concrete steps to prevent harm. While this option may have seemed impossible several years ago, SESTA's passage dramatically shifted the possibilities for altering CDA immunity.¹⁹² SESTA opened up a new avenue for holding platforms' feet to the proverbial flame, if those platforms invite user conduct that harms others. A CDA amendment that withholds Grindr's immunity would be particularly analogous to SESTA because both pieces of legislation would involve protecting minors from sex crimes. The amendment could, for example, bar Good Samaritan protections from platforms on which users frequently exchange sexually explicit photographs, if those platforms fail to require meaningful age verification. That way, Grindr would no longer qualify for Section 230 immunity unless it ramped up its age verification process. Such an amendment could be added as a subsection to 47 U.S.C. § 230(c)(2)(A), providing an exception to the otherwise blanket protection for online content providers.

C. GRINDR COULD MAKE VOLUNTARY CHANGES UNDER SOCIAL PRESSURE

Legal arguments aside, parties can pressure Grindr to take more accountability for the dangers its platform creates by citing today's changing landscape of online service provider responsibility.¹⁹³ This may be the best strategy for Grindr's reputation and may also be the most effective and user-oriented approach. Platforms like Facebook, Twitter, and Instagram have been voluntarily making changes to keep their users safer in response to public outcry.¹⁹⁴ Grindr could acknowledge its role in facilitating harm to minors and adults, and could take steps to more effectively block minors from its platform.¹⁹⁵ For example, such steps could include creating a less flimsy age validation process than simply entering one's birthday. The platform could also require approval for any photographs users intend to add to their "Gallery,"¹⁹⁶ or at least screen such photographs through a filter that could flag potentially underage users. In doing so, Grindr would protect its users, improve its reputation, and join the online platform accountability movement.

IX. CONCLUSION

When it first introduced the CDA in 1996, Congress likely did not envision a smartphone application on which men sought sex with other men

¹⁹² See *supra* Part D.II.

¹⁹³ See *supra* Part D.I.

¹⁹⁴ *Id.*

¹⁹⁵ This might be a particularly wise move in light of Grindr's own recent scandal, in which the platform admitted it had shared its users' HIV status with third parties. See Neuman & Domonoske, *supra* note 175.

¹⁹⁶ See *supra* Part B.I.

by exchanging dick pics and location data. Technology has come a long way, and the law ought to evolve along with technological advances.

Section 230 of the CDA incentivizes inattention and willful blindness among online service providers, and currently, it is not nimble enough to effectively deal with modern-day Internet use. However, Grindr may not qualify for CDA protections in the first place because it invites illegal behavior. Further, Congress has recently exhibited a newfound willingness to impose stricter regulations on online platforms, paving the way for future legislation that could compel apps like Grindr to make changes. Additionally, social pressure has proven quite effective at persuading online platforms to self-regulate. Online platforms like Facebook and Twitter have become increasingly willing of late to take accountability for user-generated content. Grindr should follow suit, accept accountability for its platform's shortcomings, and enforce stricter age verification requirements, before legal intervention forces it to grind to a halt.

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Exhibit A: Grindr App Logo



Exhibit B: Grindr App in the Apple App Store



Exhibit C: Additional Information on Grindr in the App Store

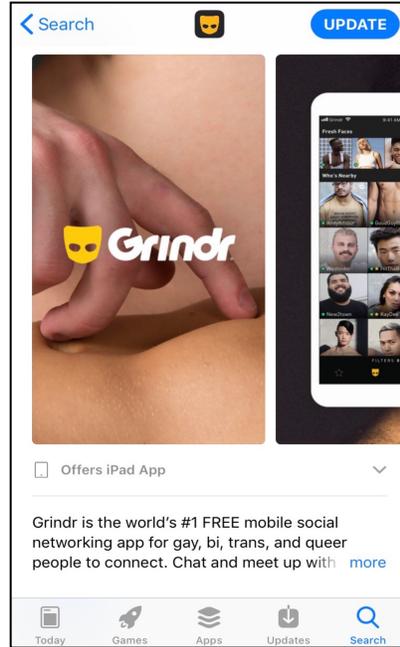
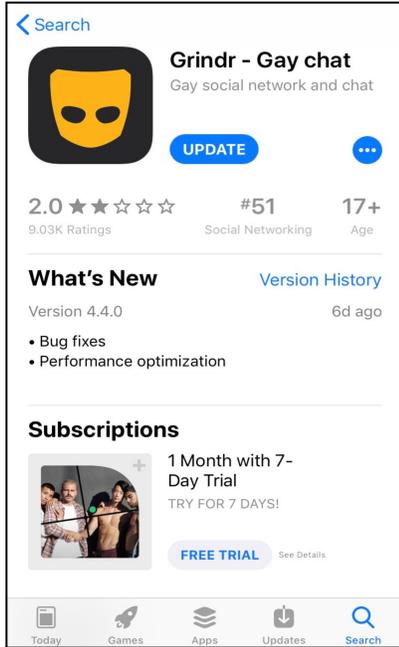


Exhibit D: Grindr Home Screen¹⁹⁷



¹⁹⁷ *Why Does Grindr Use a Mask for Its Logo?*, GAY UK, <https://www.thegayuk.com/why-does-grindr-use-a-mask-for-its-logo/> (last visited Dec. 3, 2018).

Exhibit E: Sexual Health and HIV Status Profile Options

This screenshot shows the 'Edit Profile' screen with the 'HIV Status' section expanded. The top bar includes a back arrow, 'Edit Profile', and a 'Save' button. The profile fields shown are: Ethnicity, Relationship Status, My Tribes (None >), and I'm Looking For (None >). Below these are sections for IDENTITY, Gender (>), and Pronouns (>). The 'HIV Status' section is highlighted in orange and contains four options: 'Do Not Show', 'Negative', 'Negative, on PrEP' (which is selected), and 'Positive' (with the subtext 'Positive, Undetectable'). A 'Done' button is located at the bottom right of the HIV status options.

This screenshot shows the 'Edit Profile' screen with the 'SEXUAL HEALTH' section expanded. The top bar includes a back arrow, 'Edit Profile', and a 'Save' button. The profile fields shown are: My Tribes (None >) and I'm Looking For (None >). Below these are sections for IDENTITY, Gender (>), and Pronouns (>). The 'SEXUAL HEALTH' section is expanded to show: 'HIV Status', 'Last Tested Date', 'Testing Reminders' (with 'Enter Test Date' input), and 'Sexual Health FAQ' (>). A descriptive text for the FAQ reads: 'Learn more about HIV, PrEP, getting tested for sexually transmitted infections (STIs), and other frequently asked questions.'