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# Transformative Illegality: How Condoms ‘Became Legal’ in Ireland, 1991–1993

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## Abstract

This paper examines Irish campaigns for condom access in the early 1990s. Against the backdrop of the AIDS crisis, activists campaigned against a law which would not allow condoms to be sold from ordinary commercial spaces or vending machines, and restricted sale to young people. Advancing a conception of ‘transformative illegality’, we show that illegal action was fundamental to the eventual legalisation of commercial condom sale. However, rather than foregrounding illegal condom sale as a mode of spectacular direct action, we show that tactics of illegal sale in the 1990s built on 20 years of everyday illegal sale within the Irish family planning movement. Everyday illegal sale was a long-term world-making practice, which gradually transformed condoms’ legal meanings, eventually enabling new forms of provocative and irreverent protest. Condoms ‘became legal’ when the state recognised modes of condom sale, gradually built up over many years and publicised in direct action and in the courts.

**Keywords** Activism · Condoms · Contraceptives · Family planning · Illegality · Ireland · Law · Social movements

## The Case of the Virgin Condom

On Saturday January 6, 1990, Detective-Sergeant John McKeown of Pearse Street Garda (police) Station entered the Virgin Megastore record shop on Aston Quay, near Temple Bar, in Dublin together with a female colleague. They watched as a young woman sold condoms to a young man from a black, semi-circular counter on

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the first floor.<sup>1</sup> McKeown then went to the counter himself, and bought a packet of three lubricated, non-coloured Mates condoms for 80 pence (Irish Times 1991a) The counter was leased from Virgin by the Irish Family Planning Association (IFPA), and staffed by their young volunteers. The IFPA sold condoms legally at its two city centre family planning clinics. However, it was a crime to sell them in an ordinary shop.<sup>2</sup> The law meant that condoms were not accessible to young people, particularly at the weekends when legal outlets were closed. The IFPA now argued that the AIDS crisis made this law untenable, and they established the stall in order to challenge it. In May 1990, the IFPA were prosecuted under s. 4 (1) of the Health (Family Planning) Act 1979.<sup>3</sup> The Act only permitted sale of contraceptives from designated spaces; pharmacies, doctors' offices, health board institutions and licensed family planning clinics. At the Virgin Megastore, the IFPA dealt in condoms from a small shop; a criminal offence. They were fined £400 in the District Court by Judge Oliver Macklin. They appealed the conviction, and appeared in the Circuit court on Valentine's Day, 1991. Later that month, Judge Sean O'Hanrahan increased the fine to £500, warning that they had 'got off lightly', (Irish Times 1991b) presumably because he had not imprisoned them. Any further offence would incur a fine of £5,000 plus £250 per day of continued illegal sale, and possible imprisonment.<sup>4</sup> Buoyed by international media coverage, the IFPA continued to sell at the Virgin Megastore in defiance of the judgment, arguing that, in the midst of the AIDS crisis they had "a duty to save people's lives" (Irish Independent 1991). Sales increased. Although they lost the case, their discursive mobilisation of illegal sale had important consequences for the law's constitutive power. The day after the Circuit Court judgment, the government announced its intention to change the law.

From 1990 to 1993, direct action campaigns such as this one crystallised connections between illegal condom sale and the eventual change in Irish law.<sup>5</sup> They included the 'case of the Virgin condom,' (Goggins 1991) and 'Condom Sense', which illegally installed condom vending machines in bars and nightclubs. In 1993, the law on condoms changed, and condoms could be sold legally with no restrictions as to place or conditions of sale. They became a deregulated, everyday consumer product. Although the effect of direct action campaigns on this deregulation are important, activists also built on a much longer history of campaigning through illegality. Years of campaigning for easier access to condoms had enabled a historical change from condoms as shameful objects of deviance, to everyday devices of health, care, and sexuality.

<sup>1</sup> We have chosen to provide limited information on our interviewees only in this research—initials and institutions, the latter being particularly critical to understanding their role in the events we described. Some of our interviewees were public figures and will be identifiable; indeed given the size of the networks involved and their role in the movement could not be given full anonymity (nor did they wish for their identity to be hidden in this research).

<sup>2</sup> Health (Family Planning) Act 1979, s (4) (1)(4).

<sup>3</sup> Health (Family Planning) Act 1979, s 14(1) as amended by s. 2 Health (Family Planning) (Amendment) Act 1985.

<sup>4</sup> Health (Family Planning) Act 1979, s 14(2).

<sup>5</sup> For detailed discussion of the background to legislative change, see Hug (1998).

This article explores the shift in the regulation of condoms in Ireland, as a process of 'becoming legal'. Legality is not exhausted by formal texts, or by the elite deliberations that generate them. So condoms did not 'become legal' only in the moments in which new legislation passed. 'Becoming legal' suggests a process in which the interactions of particular agents, across a range of political sites, transform the social nature of the object regulated by law, in turn changing the law itself; a process that combines spectacular moments and the slower pace of everydayness (Sitrin 2012). Condoms have attracted a plurality of meanings in Ireland, and in the early 1990s, these changed rapidly, eventually displacing those enshrined in state law. In articulating how condoms 'became legal', we concentrate on the transformative possibilities of illegality. Illegal condom distributors built illegal counter-publics which transformed condoms as legal objects. With time, and in a context of crisis, the law caught up with condoms' new identities, formalising pre-existing illegal relationships which had become too difficult to resist.

This paper is based on primary research conducted in Ireland between 2013 and 2015, and includes documentary research and qualitative interviews with 30 people active in condom distribution between the 1970s and the 1990s. Documentary sources involved newspaper archives, academic literature, legislation, court cases and the personal archive of Dr. Derek Freedman, housed at University College Dublin. Our interviewees were members of organisations such as the IFPA, AIDSWest and Condom Sense, mentioned in this paper, as well as students unions and older family planning clinics associated with Family Planning Services Ltd (FPS). Our interviews were loosely structured. While our questions were in part centred on legal issues, we also invited participants to talk to us more generally about the everyday experience of their practices. In the paper below, we bring together those different sources and reconstitute the story of condoms' 'becoming legal'. Our aim is both to retell this story in some of the complexity that has not previously been presented, and to use it as an entry point into a broader reflection on the relationship between illegality and legal change.

## Condoms and Irish Law in 1988

When it set up its first stall in the Virgin Megastore, the IFPA was just over 20 years old. Since the early 1970s, it had illegally distributed hundreds of thousands of condoms; in clinics, by mail order, from stalls and vending machines (Cloatre and Enright 2017).<sup>6</sup> In the 1970s, activists were resisting an absolute ban on condom sales (Cloatre and Enright 2017). Over 20 years, the landscape had changed. Until 1979, it was illegal to sell condoms, or import them for sale. The Health (Family Planning) Act 1979 partially liberalised the law on condom access; they could be purchased from a pharmacist once a doctor certified that they were supplied for

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<sup>6</sup> Other groups involved included non-profit distributors such as Family Planning Services Ltd (FPS) and its wholesaler Dearsley, the Irish Family Planning Association and a thriving network of related clinics, as well as Well Woman, and university students' unions.

‘bona fide family planning’ or other legitimate health purposes.<sup>7</sup> ‘Bona fide family planning’ implied that condoms were used for contraceptive purposes, within the marital family. There was no therapeutic reason for requiring this medical supervision. Doctors were installed as adjudicators of sexual conduct. The law, to that extent, reflected a ‘middle ground’ Catholic position; restricting access to condoms while acknowledging an emergent constitutional concept of adult privacy.<sup>8</sup> It also drew on new conceptions of public health, which justified access to contraception, albeit for married mothers using contraceptives as a last resort to avoid dangerous repeated pregnancies.

In 1985, a new government passed the Health (Family Planning) (Amendment) Act—an Act of just one section, which amended the sales provisions in s. 4 of the Health (Family Planning) Act, 1979, further liberalising access to condoms. They could now be sold to adults, from a wider range of healthcare outlets, without prescription.<sup>9</sup> These outlets included family planning clinics, which had not been permitted to sell contraceptives under the original 1979 Act, but had continued to sell in defiance of the legislation. Nevertheless, sale remained an explicit site for state control of sexual autonomy, even as the range of moral gatekeepers to access was expanded (Desmond 2000). The then Health Minister was supportive of family planning, and had consulted with the IFPA and others on the need for legislative change.<sup>10</sup> However, the Catholic hierarchy and conservative laypeople condemned liberalisation as encouraging promiscuity among the young. Anxiety about transgressive youthful sexualities, and regard for the authority of the parental marital family prevailed.<sup>11</sup> The new Act expressly prohibited young people under the age of 18 from legally buying condoms without a prescription.<sup>12</sup> In addition, open, visible commercial sale of condoms using stalls, shops, vending machines or postal services remained illegal and condoms could not legally be distributed for free.<sup>13</sup> This was the law when the IFPA set up a stall to sell condoms to young people at the Virgin Megastore in 1988.

## Condoms: New Objects Under Law

Although condoms retained some stubborn attachment to conservative Catholic notions of promiscuity, their primary legal meanings shifted in 1985. Law now acknowledged some role for condoms in preventing unplanned pregnancy outside

<sup>7</sup> Health (Family Planning) Act 1979, s 4(1)(b)(ii). ‘Medical purposes’ likely referred to the prescription of the pill for non-contraceptive purposes e.g. as a menstrual ‘cycle regulator’.

<sup>8</sup> *McGee v. Attorney General* [1974] IR 282.

<sup>9</sup> Health (Family Planning) (Amendment) Act 1985, s 2, amending s 4(1) of the Health (Family Planning) Act 1979.

<sup>10</sup> See Memo of Meeting with Minister 21 March 1983, Freedman Archive UCED. The Freedman archive had not been fully catalogued at the time of access and therefore it is not possible to provide full citations.

<sup>11</sup> Donie Cassidy *Seanad Debates* vol. 107(7) (1986), col.678.

<sup>12</sup> Health (Family Planning) (Amendment) Act 1985, s 2.

<sup>13</sup> Health (Family Planning) Act 1979, s 4 (3).

marriage.<sup>14</sup> A highly contested abortion referendum in 1983 enabled this transition; paradoxically stabilising the political acceptability of contraceptive access. A conservative Catholic organisation, the Pro-Life Amendment Campaign, had successfully campaigned for the insertion of a wide-ranging foetal personhood provision into the Constitution—the Eighth Amendment—prohibiting abortion, and inaugurating a recurrent debate which dominated discourse on reproductive rights in Ireland for 35 years.<sup>15</sup> The role of policing virtuous motherhood was displaced from contraception onto the new constitutional prohibition on abortion. As one informant told us, “I think even by the early 80s even those who were fervently opposed to condoms kept their mouths shut” (DF, Director, Family Planning Services Ltd.; interview with authors, Dublin, June 25, 2014). The abortion law also created new justifications for extended access to contraception. In 1985, some supporters of liberalised access to contraception argued that it was a lesser evil than abortion, and a responsible counterpoint to it. Others maintained that it was a necessary safety net given the abortion ban.<sup>16</sup>

In hindsight, it is surprising that condoms remained within this reproductive framing as late as 1985. The first AIDS cases in Ireland were diagnosed in 1982. However, this crisis generated no immediate state liberalisation of condom access. AIDS was not mentioned in the legislative debates in 1985; indeed, sexually transmitted diseases were scarcely mentioned at all.<sup>17</sup> Even in the light of ongoing scientific controversies at the time about both the nature of AIDS itself, and the type of public health interventions it required (Epstein 1998), this is surprising. This silence may be explained by the fact that AIDS affected marginalised communities; heroin users in poor inner city communities, haemophiliacs, and gay men. Sex between men was criminalised until June of 1993, so that liberalising condom access for this demographic was framed as encouraging criminal activity.<sup>18</sup> Ambivalence around condom use was still reflected in a 1987 public education campaign on AIDS (Smyth 1998) which emphasised abstinence and fidelity rather than condom use (Smyth 1998; Nolan and Larkin 2016; Kerrigan 2017, 6). Like conservative Catholic groups,<sup>19</sup> the Minister for Health stressed that condoms, if used, were not “100% effective”.<sup>20</sup>

<sup>14</sup> The politics of unmarried motherhood in Ireland were especially fraught at the time; a teenage girl, Ann Lovett, had died in labour in Granard at the start of 1984, and Joanne Hayes, a single mother, had been subjected to a brutal effective infanticide inquiry later that year. However, these cases are not mentioned in the debates leading to the 1985 Act. See e.g. Michael D. Higgins *Seanad Debates* vol 107 (8) (1985), col. 796 and Monica Barnes *Dáil Debates* vol. 356(2) (1985), col. 265 discussing unmarried mothers in the abstract. For further discussion of these cases see Inglis (2002) and Maguire (2001).

<sup>15</sup> See further Smyth (2005) and Fletcher (2001).

<sup>16</sup> See for example Barry Desmond *Dáil Debates* vol. 355(12) (1985), col. 2586; Nuala Fennell *Dáil Debates* vol. 356 (1) (1985), col. 150; Mary Robinson *Seanad Debates* vol. 107(7) (1985), col.606.

<sup>17</sup> Health (Family Planning) (Amendment) Act 1985, s 2.

<sup>18</sup> On the early history of AIDS and gay rights activism in Ireland see McDonough (2017).

<sup>19</sup> See e.g. Children’s Protection Society. *67 Reasons Why Condoms Spread AIDS*. Dublin: Children’s Protection Society, 1991.

<sup>20</sup> Rory O’Hanlon, *Dáil Debates* vol. 373(4) (1987), col. 867.

You know, so they weren't really trying to promote a safer sex message really, it was just 'Let's put the fear of God into people and stop them doing bad things, whether that's drugs or sex' (ES, AIDS West, Galway. Interview with Máiréad Enright, Galway, June 26, 2014)

Such tensions reflected broader oppositions in the social framing of the link between condom use, AIDS and sexuality, and oppositions between the discourses of public health officials and AIDS activists that weren't unique to Ireland. Epstein summarises similar tensions in the 1980s US context, as follows: "While mainstream public health officials continued to counsel monogamy, the fledgling grassroots AIDS organizations put forward a different message that was both pragmatic and scientifically based: have as much sex as you like, as often as you like, with as many different people as you like, and as long as you follow a set of rules to prevent the transmission of HIV, you will be (almost entirely) safe" (1998, 97).

In Ireland, as late as 1990, the government insisted that the 1985 Act met public health needs for condoms.<sup>21</sup> The IFPA disagreed. By 1988, the IFPA was much more than an illegal distributor of contraceptives. As a non-profit organisation, it invested the proceeds of condom sales into providing a wider range of sexual health services establishing an authoritative public voice on these issues, with no real equal in government.

There would have been women coming into us, desperate for all sorts of things. They would have come in if they had sexually transmitted diseases they'd have come to us, if they had been raped they would have come to us, anybody would just, it was just that kind of ... there was so much ignorance that people didn't know where to go. If there was any publicity at all, you got all sorts of things coming into the family planning clinics (CD, education officer and CEO, IFPA, interview with authors, Dublin, February 27, 2014).

The IFPA developed a sophisticated response to AIDS. At its inner city Dublin clinics, it was beginning to see heroin users, haemophiliacs with HIV, and "people who certainly had partners who were HIV positive for whom condoms were an absolute life and death necessity" (CD, education officer and CEO, IFPA, interview with authors) and was incorporating their experience into its advocacy work. It benefitted from involvement in international networks such as those led by the International Planned Parenthood Federation, and its staff were exposed to research and advocacy from the United States.

Condoms' first transformation as legal objects in 1979—from instruments of female sexual transgression to contraceptives—was partly enabled because a new public health function for condoms was recognised in the context of family planning. For the IFPA in the mid-1980s, AIDS demanded a similar transformation: condoms could now be understood as life-saving device; together with public education they were a tool of mass prevention in the face of a fast-spreading epidemic affecting a range of people. Legal ambivalence around condoms, although liveable in the context of contraception, appeared unworkable in this new climate. The IFPA argued

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<sup>21</sup> Rory O'Hanlon, *Dáil Debates* vol. 394(8) (1990), col. 2017.

that condoms should no longer be treated only as contraceptives under law. They should be understood as prophylactics; as tools for 'safer sex' (Nolan and Larkin 2016, 259–260). It followed that the specialist regime of biomedical control that had mediated condom access had become untenable. From the 1970s, the family planning movement had rejected state control of condom access, aiming to make them available quickly and cheaply without regard to marital status, sexuality or religious commitment, and without undue scrutiny (Cloatre and Enright 2017). Now, the IFPA insisted on the renewed urgency of this shift in regime: the state control model was incompatible with public health imperatives that required fast, unmediated access and distribution of condoms to the largest possible number of people.

There was great impediments to people being able to use condoms at a time when governments round the world were actually paying money to people to promote condoms' use, to prevent the spread of HIV, we thought it was ridiculous that the law suggested you would have to go to your doctor. You've been to your doctor, you've convinced your doctor you needed them for bona fide family planning purposes, the doctor would give you a prescription, then you would have to take the prescription to the pharmacy, you've to find a pharmacist that was sympathetic to you, and that pharmacist then, if that pharmacist stocked condoms, would supply you with condoms. We saw it on a Saturday night at a disco, if you got turned on, then maybe this was a little bit too much to expect... (JO'B, youth officer and press officer, IFPA, interview with Máiréad Enright via Skype, March 19, 2014).

### **Illegal Sale at the Virgin Megastore: Remaking Condoms as Legal Objects**

The stall at Virgin supported the IFPA's efforts to dismantle the legal meanings attached to condoms and replace them with new ones. It built on work they were already doing in public education around AIDS, with healthcare workers, in schools and in the mass media. They were conscious that condoms were not accessible for all under the prevailing law.

We opened [the stall] up primarily with the idea that young people would find it much easier to go into a record store where there were other young people and buy condoms. But when we opened up, the store was inundated with people, like there would be a queue of people standing there which was amazing and they came from all around the country when they heard about it and they weren't young, they were all ages and some that were actually quite old and many of them complained that they found it difficult to get condoms where they were (JO'B, youth officer and press officer, IFPA, interview with Máiréad Enright via Skype, March 19, 2014).

In addition to making condoms accessible, however, the IFPA wanted to normalise their purchase; to frame them as a different object (Marshall 2003) to the controlled device they had become under decades of restrictive law. In doing so, they were



building on long-standing efforts by the contraceptive movement since the 1970s to destigmatise condom use, and normalise its presence through increased access and visibility. Although illegal condom distribution was a tried-and-tested strategy of the family planning movement (Cloatre and Enright 2017) the IFPA's use of commercial sites was new. However, it was inscribed in long-standing efforts by activists to negotiate the question of publicity in creating modes of illegal sale. For example, in the 1970s condom distribution began through mail order services; to ensure clients' privacy.<sup>22</sup> This older approach allowed condoms to be distributed even within prevailing structures of stigma.

[F]amily planning was embarrassing, it was like saying you had a sexually transmitted disease. It was like a 'woman's problem', you just didn't talk about it even (CD, education officer and CEO, IFPA, interview with authors, Dublin, February 27, 2014).

Now the IFPA wanted to dismantle those structures; making open, visible, public sale the new norm.

The IFPA's partnership with Virgin combined illegal sale with the normality and visibility of everyday consumerism in Dublin city centre. It necessarily raised the question of commodifying sexual health, and this generated important tensions within the movement. Of course, the political dimensions of sale on the market cannot be completely reduced to commodification under capitalism (Gibson-Graham 2008). However, commercial condom distributors undoubtedly saw AIDS awareness as an opportunity for market growth, and this inevitably generated difficulties.<sup>23</sup> In part, the IFPA's decision to sell condoms cheaply rather than distribute them for free was pragmatic; although manufacturers would sometimes give organisations supplies of free condoms, the IFPA could not stock a long-term stall for free, and so the stall needed to cover its costs, and contribute to the funding of the IFPA. Establishing a market in condoms was not wholly in the IFPA's interests. In particular, by emphasising condom purchase from ordinary retail outlets, the IFPA were undermining their own market in condoms; an essential income stream at a time when they received no state funding. In addition, sale in social and commercial spaces provided an important counter-point to the controlled spaces of sale permitted by law.

[T]he expectation really was the pubs would make them available but the real objective would be for supermarkets to have them available. So, that they would be something you could do in the normal run of course and pharmacies would still continue to sell them but on the open shelves as opposed to behind the counter. That was really the objective. Just to make them a normal thing that you buy. Which indeed is what they have become (T O'B, former

<sup>22</sup> For further detail see Cloatre and Enright (2017). The IFPA maintained a mail order service until the mid-1990s; T O'B.

<sup>23</sup> Marketing Plan for Ansell Products. 1987. Freedman Archive UCD.

CEO, Irish Family Planning Association (IFPA), interview with authors, June 24, 2014).

Although condoms were legally available from pharmacies they were often not on open display. Pharmacists' attitudes changed with time, but it was a conservative profession and many were initially opposed to sale. Purchasing could be a furtive, secretive experience, even for those young people who did not require a doctor's prescription. Customers often associated a visit to the pharmacy with shaming, judgment and the risk of arbitrary refusal of service.

[Pharmacists said] 'there's no way you're going to force us to sell condoms and we're not going to sell condoms,' and they'd shout at people who asked for them, like they'd embarrass them, they'd scream at them in the shop, 'Get out of here you dirty whatever' (CD, education officer and CEO, IFPA, interview with authors, Dublin, February 27, 2014).

It was significant that the IFPA sold Mates condoms. Developed in late 1987 as a new product by Virgin for the British market in the context of the AIDS crisis, mates were primarily designed and advertised as prophylactics. Retailers were asked to 'take part in the Fight Against Aids' by selling them at no profit, so that they would be available at half the price of Durex; the market leader.<sup>24</sup> The manner of the transaction was as important as the space and the product. Mates asked retailers to '*make condoms readily available, take out the embarrassment of purchase, and make them a part of everyday life*'.<sup>25</sup> At Virgin, condoms could be purchased from volunteers associated with the IFPA's new young people's clinic—aged 19 or 20—in an open, informal and non-hierarchical atmosphere:

[We] wanted to normalise how these things were actually seen, that it wasn't a big deal and I think that the biggest thing about the people selling, I think the biggest thing was that the people who were selling them were actually, this was matter of fact, it might have been a big deal for someone to buy a condom. In those days, they weren't, like now you go in, thanks to a change in law, you go in anywhere and there's condoms in the gas station, there's condoms in Tesco, you know, there's condoms all over the place. In those days there wasn't, like it was like, 'Ooh, that's a condom' (JO'B, youth officer and press officer, IFPA, interview with Máiréad Enright via Skype, March 19, 2014).

The IFPA's young activists were aware of the importance of legal change; in part they were politicised by events like the 1983 abortion referendum, which showed that activist groups (albeit conservative ones in that instance) could successfully campaign for laws reflecting their political beliefs. As well as altering public perceptions of condoms as legal objects, they aimed to exploit illegal sale to agitate for formal legal change. The government were stubbornly unresponsive to IFPA advocacy around condom law reform. The stall was a performance of political disobedience

<sup>24</sup> The Virgin Foundation Press Release. June 26th 1987. Freedman Archive UCD.

<sup>25</sup> Ibid.

and moral transgression. It dramatized the gap between the kinds of condom use (and sex) the state would officially condone, and the everyday sex lives of Irish people. By amplifying the consequences of the state's position, and the real need for change, it aimed to provoke a government response (Brennan 1985).<sup>26</sup> This was a complex strategy. It was difficult to provoke enforcement of the law. Illegal sale was generally tolerated by the state. Past attempts at prosecution were sparse, convictions rarer still, and police did not act unless a member of the public made a complaint (Cloatre and Enright 2017). One family planning clinic doctor reflecting on decades of experience recalled:

Well lookit, we kept our heads down as I said we just gave a service and nobody ever bothered us apart from the protests, you know, but nobody from the guards or anything ever came around, they weren't interested (JW, doctor, Galway Family Planning Clinic, interview with Máiréad Enright, Galway, June 27 2014).

The IFPA had a good relationship with the police. The Virgin stall was operating for 2 years before the police took any action, only doing so at the behest of unidentified conservative members of the public.<sup>27</sup> Until prosecution, it was difficult to force the state to acknowledge its own contradictory position. At the same time, the IFPA were confident of a reaction:

I think there's a certain sense that when you're doing something that we knew what we were doing and we would work out the rationale for it a little bit later on. But I do think that we, I think that it was inevitable that they were going to come after us. I was surprised that they didn't come after us about some of the other things like the youth clinic and things like that, but it was more trickier for them to get us on those things, but yeah, I think we knew that they were coming (JO'B, youth officer and press officer, IFPA, interview with Máiréad Enright via Skype, March 19, 2014.)

The Virgin stall was distinctive because it was a self-conscious exercise in sale as direct action. The IFPA, unlike other groups, was once reluctant to pursue this tactic (Rynne, 134–137). Until the late 1980s it was less a protest organisation than a medical charity, and its executive committee were, in the words of younger activists, “liberals”, willing to take risks with their own careers by their association with family planning, but at the same time “serious medical professionals” and “not law-breakers by any stretch of the imagination” (CD, education officer and CEO, IFPA, interview with authors). Direct action risked the organisation's stability. The 1985 Act's recognition of family planning clinics meant that the IFPA no longer occupied a pure ‘outlaw’ role in relation to condom distribution. At least some of its sales were legal. It was now in a liminal zone, and this raised the stakes of prosecution,

<sup>26</sup> Previous legislative debates had acknowledged the role of open illegal distribution of condoms in fomenting law reform; Rynne (2005, 141).

<sup>27</sup> A first summons was issued in September 1989 in respect of a sale in 1989, but the prosecution was dismissed because it had not been brought in time; (Irish Press 1990).

both for those staff depending on the IFPA for the livelihoods and the poor communities they served.

And it was pretty tough because I told you that the situation financially, this wasn't a rich organisation, it was always really precarious whether we'd make the next year, so the idea of haemorrhaging money not just because you have an active political wing but your active political wing is incurring fines that were rather steep for us in those days, it meant that you had a board of directors, those board of directors were running two clinics that a lot of people depend upon for their basic contraceptive services [...] one of the things that was rather heartening that there was a political commitment (JO'B, youth officer and press officer, IFPA, interview with Máiréad Enright via Skype, March 19, 2014).

### Bringing Condoms to the Courtroom

In addition, the courts were difficult places for reproductive rights activists by 1988. Pro-life organisations were using the new constitutional prohibition on abortion to pursue a campaign of punitive litigation against groups counselling and giving information to women travelling to the UK to terminate pregnancies. The Society for the Protection of the Unborn Child (SPUC) succeeded in closing Open Door Counselling by pursuing a successful constitutional action against them, imposing severe costs on Well Woman in the same litigation.<sup>28</sup> A little after the Virgin stall opened, SPUC took action against student unions for distributing abortion information.<sup>29</sup> Open illegal sale could have created similar difficulties for the IFPA. Employees and clients at the IFPA clinics were sometimes harassed or attacked by conservative religious protestors, or received threatening mail and phone calls, particularly when they began to work on AIDS and sex education. '*Generally it was a very tough atmosphere and one in which there wasn't a lot of cause for optimism and celebration.*' (JO'B, youth officer and press officer, IFPA, interview with Máiréad Enright). In the end, when prosecution came, it was at the insistence of conservative activists:

Then they brought the court case and if you were found guilty, which we obviously were going to be found guilty, it didn't matter, they didn't, it was all just a farce, they were forced by anti-contraceptive groups to take this court case. The Minister for Health didn't want to take it, the Minister for Justice didn't want to take it, the legal people that were representing them in court... (CD, education officer and CEO, IFPA, interview with authors, Dublin, February 27, 2014)

<sup>28</sup> *The Attorney General (SPUC) v. Open Door Counselling Ltd* [1988] IR593. The legal effects of this judgment lingered until 1995. Of course, this case in turn sparked illegal disobedience; first in the conversion of Open Door to a telephone information line, and then in the formation of the Women's Information Network, which illegally distributed abortion information.

<sup>29</sup> *SPUC v Grogan* [1989] IR 753.

However, once prosecuted in 1991, the IFPA welcomed the opportunity a trial provided to stage a public critique of the condom laws (McCann 1992, 1998; De Poorter, 2013; Paris 2011). They built on their argument that condoms should be understood as ‘prophylactics’ to mount a defence; arguing that they were selling condoms for the purpose of stopping the spread of a disease, whereas the Act only applied to the sale of contraceptives, defined in the Act as ‘any appliance, instrument, drug, preparation or thing designed, prepared or intended to prevent pregnancy resulting from sexual intercourse between human beings’.<sup>30</sup> They called an expert medical witness from Berkeley to testify on the prophylactic uses of condoms. They also called a married man, a HIV positive haemophiliac, who had had a vasectomy for contraceptive purposes, but still used condoms to protect his wife from contracting the virus during sex.<sup>31</sup> They called Richard Branson, the owner of Virgin, to explain why he allowed condom sale on his premises. Finally, they called a Department of Health official as a witness, to confirm the government’s own support of the use of condoms for this purpose (Irish Times 1991a). As well as allowing the IFPA to articulate these policy arguments, the courtroom allowed space for humour. Although this probably irritated the judge, who ‘*felt in some way that we might be making fun of the law*’ (JO’B, youth officer and press officer, IFPA, interview with Máiréad Enright) it also helped to degrade the censorious forces underpinning it (Bahktin 1968, 20).

[The] journalists they were cracked up laughing, between being cracked up laughing, not wanting to get in trouble and thrown out by the judge and feeling that copy was just great, that this was hilarious, you know, like, so this was, I would say it was court as real advocacy theatre and everybody did a great job... (JO’B, youth officer and press officer, IFPA, interview with Máiréad Enright via Skype, March 19, 2014)

On appeal, the IFPA might have hoped for deeper engagement with their arguments. However, one interviewee, herself a lawyer, remembered the judgment as a damp squib.

So like it was very funny the day of the judgment I said I’ll go into hear what he had to say and the IFPA thought that there was going to be this big, long judgment that would interpret the law and blah, blah, blah and ... then The Boss [the judge’s nickname] came out and he said ‘Dismissed [...] That’s it! Mega judgment!...[...] Yeah but nothing, I mean it wasn’t an earthshattering moment, you know....’” (CF, lawyer and former chair, IFPA, interview with Máiréad Enright, Dublin, May 27 2014)

Nevertheless, the case had real repercussions outside the courtroom. The IFPA worked to attract public attention for the case; they saw the case as ‘writing copy for the media’ (JO’B, youth officer and press officer, IFPA, interview with Máiréad Enright.). They engaged the well-known street performer, The Diceman, to pose on the Ha’Penny Bridge dressed in a condom costume. They called boisterous protests outside the

<sup>30</sup> Health (Family Planning) Act 1979, s 1 as amended.

<sup>31</sup> The young man died before the Circuit Court Appeal.

parliament and the court building. By calling Richard Branson as a witness, the IFPA ensured global media coverage for their arguments; one informant recalled that he was so famous that the police gave him an escort from Dublin Airport to the court (CD, education officer and CEO, IFPA, interview with authors, February 27, 2014). The band U2 also publicly offered to pay the IFPA's fine, and spoke out against the law.

Happy to say that we did a press conference afterwards in the Virgin Megastore, and there was huge publicity, like this was something that was bouncing round the world, like we were covered in Australia, it was mentioned in the United States of America, on TV on Good Morning America, it was all over the newspapers.[...] You know, I heard that people were not too happy in the department of foreign affairs when the various embassies around the world were like, 'Oh, my God, there's another thing that the Irish are so backward that these condom laws,' but that was part of our objective: to let people know what the law was (JOB, youth officer and press officer, IFPA, interview with Máiréad Enright via Skype, March 19, 2014).

The media attention embarrassed the government, and IFPA activists enjoyed making them a laughing stock before an international audience. A day after the Circuit Court judgment the Minister for Health<sup>32</sup> announced he would revisit the 1985 Act. Subsequent Oireachtas debates recognised the case as a catalyst for law reform.<sup>33</sup> In order to maintain pressure on the government, the IFPA kept the stall open in spite of the fine.<sup>34</sup>

We felt really that if we were to be prosecuted again, it wouldn't hurt and it wouldn't do any harm either so we just kept going. There was no reason to stop yet. The government had promised legislation, hadn't yet delivered it, therefore the need for the counter in a practical sense for the individuals who are buying condoms from that counter hadn't gone away as the alternative sources of supply were not yet readily available although they were beginning, other people were beginning to say "To hell with this, I'll start selling condoms." But imagine if we had stopped the counter and then the law hadn't followed. So I can't remember exactly how long it went for but it certainly didn't stop with the court order it, it continued (T O'B, former CEO, Irish Family Planning Association (IFPA), interview with authors, June 24, 2014).

## Vending Machines and Condom Sense

Despite the immediate political reaction to the Virgin case, it was some time before a condoms Bill was introduced in the Oireachtas, and new legislation (discussed below) was not passed until the summer of 1992. In the meantime, Condom Sense,

<sup>32</sup> Rory O'Hanlon TD was now the Minister for Health. He had voted against the 1985 Act, on the basis that it made condoms too easily available to young people.

<sup>33</sup> Des Hanafin, *Dáil Debates* vol. 128(1) (1991), col. 52.

<sup>34</sup> It was significant, in this respect, that the case involved a fine, rather than a constitutional injunction, as in the abortion referral cases.

a short-lived direct action campaign launched on St. Valentine's Day 1992. They installed condom vending machines in pubs and clubs across the country, arguing they were essential to public health in the midst of the AIDS crisis. (*Irish Times* 1992) By late 1992, they had installed 140 condom machines, to limited police response.<sup>35</sup> Condom Sense's members identified as AIDS activists rather than as family planning activists: the condoms movement diversified as the global crisis redefined the stakes of condoms. The project encompassed voluntary groups such as Cork AIDS Alliance<sup>36</sup> and AIDS West in Galway.<sup>37</sup> Like the IFPA, AIDS West volunteers were engaged in public sex education. They wanted to normalise access to condoms; in their case by distributing them for free in nightclubs, at parties, and from high street stalls.

We did, we'd have stands and we'd give out leaflets and we'd give out condoms. We found it obviously a very serious issue, there was always a kind of vibe towards light-heartedness about it as well, with balloons or people in costumes or ... And we'd have done anything to be noticed and make an impact. So we weren't campaigning as such, we were certainly trying to spread condoms as much as possible (ES, AIDS West, Galway. Interview with Máiréad Enright, Galway, June 26, 2014).

Condom Sense allowed these volunteers to mount a 'direct challenge to the law' (BS, former nightclub owner, Galway, interview with authors, Galway, February 24, 2014). They aimed to ensure that machines were installed at locations in large towns as well as cities. It could play on and amplify awareness of rural connections to AIDS to shift common sense around condom access. For example, one activist told this story of the installation of condom machine at University College Galway for World AIDS Day in December 1992.

[W]e were about to install the two vending machines in the university in the changing rooms, in the toilets, one in the men's and one in the women's toilets very close to the library so very, very central. I went to the President of the University and I said to him 'Look it's Irish AIDS day coming up, there will be a funeral in Galway this week for somebody who has died of AIDS.' [...] I said 'AIDS is a reality in Ireland'. I told the President 'Look we've had a student die and there is a guy about to be buried this week in Galway so we just can't turn a blind eye to it but I would like, this is not going to be official but I would like you to know and I would like you to let the buildings office know that these are going to be put in, in the men's toilet and the women's toilet.' Anyway he said 'OK I kind of hear you' type of thing. [...] The next thing I knew I had a phone call from the Vice President from Buildings saying 'I hear what's going to happen' and all the rest of it and 'I just want to run it by you and just let me

<sup>35</sup> Hillen, Sean 1992. Clubs defying law by installing condom machines. *Irish Times*, 14 July.

<sup>36</sup> Cork Aids Alliance, now the Sexual Health Centre, was founded in Cork in 1987.

<sup>37</sup> Cáirde, now AIDS West, was founded in Galway in 1987 as a support group for people living with AIDS and their families. AIDS West began to receive health board and central government funding for its educational work at this time, but maintained a careful distance between its educational work and its connections to Condom Sense. See further Joyce (2010).

know exactly which toilets' and all the rest of it so I told him. I just put down the phone and I roared laughing to myself, I said 'This is great' (AS, formerly AIDS West, Galway. Interview with authors, Dublin, February 26, 2014)

Legislators tended to suggest that interest in vending machines indicated residual shame around purchase: it likely also represented a desire for privacy and discretion.<sup>38</sup> At the same time, vending machines combined visibility and provocation, the possibility of advertising, and the opportunity for purchase without engaging with potentially hostile interlocutors. Especially in social spaces they represented public acknowledgment of the possibility of spur-of-the-moment sex between strangers. At once inert and ostentatious, vending machines attracted conservative backlash. For example, a former student activist at Trinity College Dublin remembered that the condom machine located there was regularly vandalised, despite a supportive student body (IB, formerly Trinity College Dublin Students Union. Interview with authors, Dublin, February 28, 2014). The stakes of condom machines were high: as technologies, they represented a significant transformation in the underlying model of sexual health proposed. The new model they suggested embedded the demands of a changing society, that was redefining sexuality, and that activists were working with. The model proposed shifted from a system centred on the medical institution to one of market distribution that was breaking apart the spatial, temporal, but also symbolic limitations previously placed on sexual health, and sexuality (Davies 2015). Condom Sense played on the machines' latent ability to provoke.

Prosecution rarely followed installation of condom machines,<sup>39</sup> but informants recalled that they were sometimes emptied or seized by police if complaints were received. Several activists described tensions that emerged around the installation of one machine in a Galway nightclub. Condom Sense promoted the machine in local newspapers, and the club became a focus of conservative religious protest, including condemnation from the Bishop of Galway. He maintained that by installing the machine, Condom Sense had '*corrupted the youth of the diocese*' (BS, interview with authors). This intervention sparked police action.

There was a squad car outside the nightclub for the night with two special branch detectives in it. Meanwhile the nightclub across the street was well known as the main disco where you could get drugs in the city, you know, and there was nobody going in raiding that but the one, you know, where you were getting condoms was (AS, formerly AIDS West, Galway. Interview with authors, Dublin, February 26, 2014).

Condom Sense activists engaged energetically in a play of disobedience and enforcement with police and other authority figures. They had ready supplies of free condoms, and machines, sometimes stored in their own homes, and could respond quickly when the police acted.

<sup>38</sup> See for example Richard Bruton Dáil Debates vol. 422(4) (1992), col. 748; Sean Power, Dáil Debates vol. 422(4) (1992), col. 769; Avril Doyle *Seanad Debates* vol. 133(19) (1992), col. 2161.

<sup>39</sup> On a failed attempt to prosecute the Well Woman clinic in 1983 see (Irish Press 1983; Irish Press 1984) University authorities sometimes confiscated condom machines—see (Irish Times 1991c).



Because we were breaking the law the guards would come in and take the condom machines out, you know...and then we would put them in again and they would take them out and they would put them in again. They said 'Listen we are only doing it because we are told to do it here, you know, please make our job a lot easier and make your work a lot more relaxed by not putting them in' and I said 'No it's a point of principle here' (BS, former nightclub owner, Galway, interview with authors, Galway, February 24, 2014)

Condom Sense's actions piled further pressure onto a system that the Virgin Megastore stall had already weakened. As such actions continued to demonstrate the inadequacies of both the law itself, and its enforcement, the legal system began to respond and adjust.

### 1992–1993: Intensification, Retrenchment and De-regulation

The 1992 Act, when it came, was framed as a response to AIDS (Kennedy 1992). It provided that condoms ('contraceptive sheaths')<sup>40</sup> could be sold to anyone over the age of 17 in most ordinary retail locations, including shops or pubs.<sup>41</sup> However, the Act retained an age limit<sup>42</sup>; unmarried young people under the age of 17 would still require a doctor's prescription to legally purchase a condom.<sup>43</sup> It also retained a prohibition on vending machine sales as well as from mobile outlets, street vendors or in schools, sports centres, and youth clubs.<sup>44</sup> Free distribution of condoms remained largely illegal.<sup>45</sup> The exclusion of vending machines from the 1992 legislation was controversial, even in parliament.<sup>46</sup> Even before Condom Sense's efforts, the family planning movement and student unions had used vending machines; since at least the early 1980s. The newly-established National AIDS Strategy Committee, (Department of Health 2000, 29) and the state medical officer responsible for AIDS policy<sup>47</sup> recommended that it should be legal to distribute condoms for free, and to sell them from vending machines. However, the government would not separate condom distribution from the legal presumption of supervision. The new Minister for Health<sup>48</sup> said he was deferring to parents concerned that the availability of

<sup>40</sup> Arguably female condoms did not come within this definition, as they were not 'sheaths'.

<sup>41</sup> Condom Power; the first specialist condom shop in Dublin opened months after the law passed (Young 1993).

<sup>42</sup> Health (Family Planning) (Amendment) Act 1992, s 5(1)(a).

<sup>43</sup> Health (Family Planning) (Amendment) Act 1992, s 4(1)(b)(2).

<sup>44</sup> Health (Family Planning) (Amendment) Act 1992, s 5(1)(b).

<sup>45</sup> An exception was made under the Health (Family Planning) Regulations 1992 for certain health board programmes connected with AIDS prevention. S.I. No. 312/1992, passed 29 October 1992.

<sup>46</sup> Proinsias de Rossa *Dáil Debates* vol. 422(4) (1992). col. 764; 8 July; Alan Shatter, *Dáil Debates* vol. 422(4) (1992). col. 782; David Norris *Seanad Debates* vol 133 (19) (1992), col. 2157; John A. Murphy *Seanad Debates* vol 133 (19) (1992), col. 2168.

<sup>47</sup> Proinsias de Rossa *Dáil Debates* vol. 422(4) (1992). col. 764.

<sup>48</sup> As a Labour Senator, the Minister for Health, John O'Connell TD, had supported one of the first reforming Bills on contraceptive access.

condoms “arouses curiosity and orientates the children towards sex”.<sup>49</sup> Senior Catholic bishops condemned any liberalisation of the condom law, and the government appeared to defer to them. The 1992 Act was an uneasy retrenchment; if awareness of AIDS intensified a sense of the futility of restricting access to condoms, it did not extinguish the desire for controls.

The Act had not been in force for a year when a new government announced that it would be reviewed. The new Minister for Health<sup>50</sup> proposed legislation “to deal swiftly with the availability of condoms in the fight against AIDS”.<sup>51</sup> He held meetings with AIDS groups. He also facilitated the IFPA’s first formal meetings with the Department of Health and gave them their first public grant.

It went from a situation where the government assiduously pursued the IFPA and fined it, to the position where the government was spending considerable sums of money promoting effective use of condoms... So as a social journey it was very quick in the end, it was a long time coming (...) within two years from being fined £500 for selling a packet of condoms to the government investing at the time I think it was close on IR£400,000 on a TV campaign promoting the use of condoms (T O’B, former CEO, Irish Family Planning Association (IFPA), interview with authors, June 24, 2014)

The prohibition on vending machine sales was removed, as was the age limit for purchase. Rather than engage in complex amendments to the contraception legislation, and the protracted debates that might accompany them, the 1993 Act took condoms outside the legislative definition of contraception and its associated controls. They were now, as the IFPA had wanted, regulated primarily as prophylactics, and as such, as ordinary consumer objects. In a nod to early concerns about children’s access to condoms, the Minister retained a residual power to determine where machines could be located.<sup>52</sup> Condoms became an entirely new kind of legal object; removed from their previous networks of control. This legislation passed without need for a vote; the House was in full agreement.

The Minister for Health insisted he would have introduced the Bill even without the AIDS crisis.<sup>53</sup> Of course, at that time, the old discourses of sexual impropriety underpinning legislative restrictions on contraceptive access were unravelling. First, sex between men had also been decriminalised; indeed the final stage debates on decriminalisation happened in the same week as the parliamentary debates on the 1993 Act. Second, the Church’s status had declined. Early in 1992 the Catholic hierarchy carried considerable influence with the government as with the public. Later that year, it was undermined by the first of a series of scandals when Eamonn Casey, the Bishop who denounced Condom Sense activism in Galway, was revealed to have fathered a child with his housekeeper. As they had previously done, activists worked

<sup>49</sup> John O’Connell TD interviewed on RTE Television, 2 July 1992. <http://www.rte.ie/archives/2017/0628/886177-condoms-more-widely-available/> (Accessed October 2, 2018).

<sup>50</sup> Brendan Howlin had been a vocal opponent of the 1992 Act.

<sup>51</sup> Brendan Howlin, *Dáil Debates* vol. 431(8) (1993), col. 1785.

<sup>52</sup> Health (Family Planning)(Amendment) Act 1993, s 3(1).

<sup>53</sup> Brendan Howlin, *Dáil Debates* vol. 431(8) (1993), col. 1743.

with and against societal events to transform the possibilities of legal change. Condom distributors, and particularly younger activists frustrated by the power of the church, were always willing to puncture their interventions. Interviewees recalled anti-clerical jokes which allowed them to undermine the church's interventions:

... if you remember, we had “a bishop a day to keep the condoms away”, we had different bishops coming out, all lining up as part of an organised campaign to warn politicians that they couldn't change the law on these things. And I think that there was a genuine feeling that a lot of the politicians were too scared of getting a belt of the crozier as they used to say, than they were about being scared of the electorate, and our job I think was to ... make fun of them (JOB former press officer, IFPA, interview with Máiréad Enright via Skype, March 19, 2014).

Another joked that Bishop Casey's cataclysmic fall from grace provided a marketing opportunity:

That was very funny like, you know... Anyway we came up with an idea of having a line of condoms that we would market called ‘Just in Caseys!’ I know it's bad but anyway! (AS, formerly AIDS West, Galway. Interview with authors, Dublin, February 26, 2014)

Even as some conservative discourses were challenged and unsettled, AIDS allowed condoms to be positively defined in ways which left others untouched. The re-definition of condoms left the wider law on contraception intact; contraceptives remained under medical regulation. To underscore the completeness of this shift from contraceptive to prophylactic, we can note the near-absence of discussion of women's reproductive freedom from the 1993 debates on liberalisation. The AIDS crisis is not, of course, the origin of lawmakers' silence around women, pregnancy and birth. As noted above, from the insertion of Eighth Amendment into the Constitution in 1983, abortion law bore the moral weight of regulating women's bodies; for both liberal and conservative law-makers. 1992 was an important year for the resulting abortion law. In the *X Case*,<sup>54</sup> the Supreme Court considered whether the Eighth Amendment allowed the state to prevent a 14-year-old, pregnant through rape, from terminating a pregnancy abroad. This was addressed, after much public protest, by referendum, not ensuring the right to access abortion in Ireland, but solidifying women's right to travel and receive abortion information (Smyth 1998, 1992). Women's reproductive freedoms had reached an impasse; they could obtain contraceptives from their doctor at home, or an abortion abroad.<sup>55</sup> AIDS produced the international and institutional framings that gave condoms a new urgent identity as a prophylactic, ensuring that they could be regulated without up-ending this painful settlement. TDs (MPs), including Liz O'Donnell, suggested that AIDS allowed

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<sup>54</sup> *Attorney General v. X* [1992] IESC 1.

<sup>55</sup> It is instructive that, as part of a suite of public health measures following the repeal of the Eighth Amendment in 2018, the Irish government is proposing to make contraceptives other than condoms freely and universally available.

legislators to bypass questions of women’s reproductive rights which might otherwise trouble them:

It is strange that the impetus which drives this legislation is not a loosening up of the law restricting access to reproductive freedom for women, but part of a comprehensive and very welcome anti-AIDS initiative. I am tempted to indulge in irony, and the only reason condoms are being liberated from the law with regard to family planning restrictions is not to allow reproductive freedom to women but to prevent the spread of HIV and AIDS...I wonder if this legislation would be going through unopposed if it were not for the threat of HIV and AIDS.<sup>56</sup>

### ‘Becoming legal’, and the Process of Transformative Illegality

It is clear from our discussion that illegal activism eventually enabled legal transformation (Mulqueen and Tataryn 2012). We do not seek here to make a claim about simple causation: of course, broader context, social changes and unexpected events created favourable conditions. However, legal transformation was only made possible because of relentless illegal activism, and the foundations it had built. Although governments and judges to directly adopt activists’ arguments about law, eventually state institutions adopted their methods. New legislation in 1992 and 1993 did not invent new channels for condom distribution. ‘Legalisation’ in 1993 was not a simple incorporation or enrollment of activist distributors into established mainstream, presumptively legal, healthcare provision. More than a regularization of transgression, it was a reactive wholesale recognition of a market in goods and services built at the periphery of the legal order, and a translation of its tactics into governmental practices. One of our informants observed that in 1993, the government didn’t ‘do’ anything (DF, doctor, FPS)—deregulation represented the government’s withdrawal from the effort to discipline condoms. The story of condoms in Ireland is the story of, in Marina Sitrin’s words “what happens when the state becomes cognizant of a society moving ahead without it” (Sitrin 2012, 8). Illegal activism enabled this shift, and made its enactment possible.

Activists achieved this through oppositional politics which sought to disrupt the norms that kept an exclusionary law in place, both through latent resistance, and moments of accelerated protest. It is common in the social movements literature to describe the stakes of these politics in terms of ‘framing’; social movements attack and de-stabilise the meanings underpinning a shared cultural code, replacing them with more liveable alternatives (Jameson 1981; Armstrong and Bernstein 2008; Polletta and Jasper 2001). Moments of discursive purchase, when government adopts the language of activists, compress timelines, creating an impression of sudden change: if we focus primarily on the legislative debates, it appears that

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<sup>56</sup> Liz O’Donnell, *Dáil Debates* vol. 431(8) (1993), col. 1743. See also the contribution of Kathy Honan to that debate.

an intractable conflict over condoms' legality abruptly dissolved in 1993, as government eventually acknowledged the AIDS crisis and engaged with the new discourse of sex as a public health issue requiring access to condoms. This suddenness also appears in the recollections of some interviewees. One Condom Sense activist, who had been avidly installing condom machines in Galway, remembered himself as left with *'an electric drill in my hand and nowhere to go kind of thing'* (PS, Condom Sense, Interview with authors, Galway, February 26, 2014). Another explained the sense that change happened overnight:

[Albert Reynolds] was Taoiseach at the time yes. Yeah he was around anyway and the RTE cameraman and interviewer with him anyway but he came up to me and of course he had the big smile and everything for me, you know, and I grabbed his hand and I just wouldn't let go of it and your man got his sound bite and it was 'When are you going to change the laws on condom availability?' or 'condom availability in vending machines?' or something like that and he spluttered and flustered and said something like 'Well we are looking into it' or whatever and that of course hit the main evening news, the six o'clock and the nine o'clock evening news and of course, you know, your mother and your aunt and everybody else is looking at all of this. [...] Then I was out of the country at Easter in 1993 for work and I was coming back on a Sunday and I came back via London and I had been in Italy and there was somebody beside me reading the Sunday Independent and at a certain stage I couldn't... I said 'Can I borrow your newspaper please?' and it said that the law had been changed. I had been away for the guts of a week or something like that and I was on a high. It was just fabulous. I just remember thinking 'Yeah we can change things' (AS, formerly AIDS West, Galway. Interview with authors, Dublin, February 26, 2014).

Similarly, if we work backwards from these moments of declared change, we can point to episodes in which the pace of change accelerated. As episodes of illegal direct action, the Virgin case and Condom Sense were moments of such acceleration: they destabilised the relationship between the condom law and its opponents, opening up fissures in the legal order. They showed up the limits of the law by provoking state backlash, retrenchment and enforcement; the judgments against the IFPA in 1991, the encounters with police, the failed attempt to enforce restrictive 'compromise' legislation in 1992. These state responses raised public consciousness around the law's incoherence, exposed the authorities' reluctance to enforce it, and heightened demand for eventual legislative change. In Tsing's language, the Virgin Case and Condom Sense demonstrate how 'heterogeneous and unequal encounters can lead to new arrangements of culture and power' (Tsing 2004, 5).

But beneath these dramatic episodes, at their origins and in the networks that made them possible, is a slower, but deeper and more important role for illegal activism in the process of legal change. 'Transformative illegality' is not confined to heightened phases of change. It also encompasses the processes that capacitate those moments. Both the Virgin case and Condom Sense drew on longer-term everyday practices of illegal sale patiently assembled and stabilised over decades in the shadow of criminalisation, enduring since the 1970s despite the formal terms of law

(Cloatre and Enright 2017). We can think of illegal sale as a 'world-making' practice (Delaney 2011, 20), started in the 1970s and embraced by a new generation of activists in the 1990s (Gamson 1989, 37).

You know. Because I mean I live out in the country now... and on our road there are empty Durex packets and it blows my mind that it's become so normal in Ireland that you can have an empty Durex packet on our road. I mean condoms just did not figure in our life up to that.... So condoms kind of, in quite a short period of time, condoms just became OK in Irish life. I think our contribution was just putting them on tables so people could see them and giving them to people (ES, AIDS West, Galway. Interview with Máiréad Enright, Galway, June 26, 2014).

World-making tactics went further: through illegal sale, activists assembled and crafted new market spaces, socialities, and new common senses for condoms, which drew on alternative sources of legitimacy, and resisted and challenged the conservative logics of market control transmitted in elite legal discourse. The state presented the condom as heavily-controlled contraceptive, an emblem of an unsettled privacy which still carried some religious charge, and residues of its earlier associations with vice and corruption. Illegal sale placed condoms in alternative non-state social, market and public health spaces in which new kinds of condom transactions materialised. They transplanted condoms from spaces controlled by biomedicine as institution, to those of 'managed consumerism' (Bury and Taylor 2008). Stalls and machines opened what Davies calls "a prospect of a sexual health clinic without walls." (Davies 2015, 407) in which spatiotemporal limits could be lifted to better meet public health necessities. When condom sale was manifested as '*a plain, everyday life decision, not a moral dilemma*' (CF, interview with authors) condoms turned into a different kind of object in the everyday. Activists' persistent pursuit of this open everyday model of sale made continued enforcement of the old law incoherent, and eventually untenable. When, in the 1990s, condom activists demanded formal legal change they were already, through the labour of their predecessors, working with a different legal object than the family planning movement of the 1970s when it first embarked on illegal condom sales. This shift in condoms' meaning—from abject to commonplace object—had always been an ongoing irritant to restrictive laws. Now, in the 1990s, heavily-publicised spectacular direct action brought these new meanings into direct contact with a law intended for something different. 'Becoming legal' is, at various times in its life, a kind of performance. As we have written elsewhere (Cloatre and Enright 2017), in the 1970s at an early stage in the history of the tactic of illegal sale, it took performance, by activists and by the state, witnessed by others, to make the illegal sale of condoms appear mundane even though law's tolerance was not guaranteed. In the 1990s it took spectacular performance to undo that carefully-constructed mundanity; making condom sale suddenly visible to the legal system in challenging or disruptive ways. But the important performance does not belong only to that spectacular moment of direct action; there is no binary split between performance and the everyday. Rather there is a generative nexus between them. The spectacle depends for its effect on the everyday drama of sale. As Lefebvre (1990, 95) writes, 'exceptional activities benefit from the richness

acquired on the level of everyday life; sometimes they contribute to that richness, at other times they prey upon it and suck it dry; they do not produce it.<sup>57</sup>

A changing social and political context was also favourable to illegal activists' project coming to fruition: '*Much as the IFPA would like to claim "Well, we did that." It is not true. It was a whole sea change going on.*' (TO'B, former CEO, IFPA, interview with authors). But activists also learnt to work with social change and unexpected events, and to pave the way for a possibility of a fully 'legal' existence for condoms. By the 1990s illegal condom distribution had achieved a kind of steady latent co-existence of competing legal worlds, but had not collapsed the barriers between them. The state would tolerate, but not recognise the alternative legal meanings for condoms circulating in illegal spaces, or incorporate them into its own policy deliberations. The final steps towards legal change were co-constituted by external unforeseen and catastrophic events, organised responses to those events, and long-standing deliberate planning to destabilise a governmental order. As examples, the changing semiotics of condoms (Tavory and Swidler 2009) were the result of both intentional strategies of normalisation, and of broader contextual transformations of sexuality and sexual health in Ireland. The AIDS crisis demanded the transformation of condoms as a legal object, accelerating the recognition and legitimation of illegal distribution practices. Under the influence of AIDS, what appeared to be an impasse was an ultimately transformative encounter between the state's conservative national project and the gripping demands of a global crisis. AIDS destabilised the state's resolve, and its capacity, to subject condom distribution to discipline, and activists seized that moment to increase their pressure. At the same time, they had been able to engage with the AIDS crisis in a way the state had not been able (or willing) to. As a result, in 1993, the state was compelled to rely on activist groups that had been sidelined for decades; enrolling them to develop its new AIDS strategies. Activists were able to mobilise the sexual health expertise and competences obtained, precisely by their illegal activity, to reorganise. They took up new roles in the course of their encounter with the state, positioning themselves, within the state's own networks, as elite public health experts, and as respectable mediators of condom access in their own right.

## Conclusion

Illegality conditioned both the making of condoms' new identities over the years, and the ultimate shift in their relationship to the law. Through illegal action, activists redefined the shape that sexual health would take, away from the medical elite, and towards the possibilities—and in turn the limitations—offered by market liberalisation. Activists' use of illegal sale in the 1970s had opened some spaces within the law; in the 1990s, illegal action would demonstrate the incoherence of the law and its unfitness to solving the brutal health crisis that AIDS had triggered. Transformative illegality underlines the dual temporality of

<sup>57</sup> We are grateful to the anonymous reviewer for *Feminist Legal Studies* for prompting this reflection.

'becoming legal', as both spectacular moment, and everyday process; it demonstrates the everyday features of legal 'revolutions' (Sitrin 2012). Even if the performance of everydayness is less visible than heralded 'moments' of legislative change or spectacular disruption, the myriad trajectories that constitute the grey area of slow, emergent transformation are central to legal change. In the story of condoms in Ireland, transformative illegality appears as a world-making practice, that transformed objects and their meanings, and created new possibilities to demonstrate the incoherence of the law and the possibilities of a better system.

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## References

- Armstrong, Elizabeth, and Mary Bernstein. 2008. Culture, power and institutions. *Sociological Theory* 26: 74–99.
- Bakhtin, Mikhail. 1968. *Rabelais and his world*. Cambridge, MA: MIT Press.
- Brennan, Pat. 1985. *What's all the fuss about?*. Dublin: Irish Press.
- Bury, Michael, and David Taylor. 2008. Towards a theory of care transition: From medical dominance to managed consumerism. *Social Theory & Health* 6: 201–219.
- Children's Protection Society. 1991. *67 Reasons why condoms spread AIDS*. Dublin: Children's Protection Society.
- Cloatre, Emilie, and Máiréad Enright. 2017. "On the perimeter of the lawful": Enduring illegality in the Irish family planning movement, 1972–198. *Journal of Law and Society* 44 (4): 471–500.
- Davies, Mark. 2015. After the clinic: Researching sexual health technology in context. *Culture, Health and Sexuality* 17: 398–411.
- De Poorter, Ben. 2013. The upside of losing. *Columbia Law Review* 113: 817–862.
- Delaney, David. 2011. *The spatial, the legal and the pragmatics of worldmaking*. London: Routledge.
- Department of Health and Children. 2000. *AIDS Strategy 2000: Report of the National AIDS Strategy Committee*. Dublin: Department of Health and Children.
- Desmond, Barry. 2000. *Finally and in conclusion: A political memoir*. Dublin: New Island Books.
- Epstein, Steven. 1998. *Impure science: AIDS, activism and the politics of knowledge*. Berkeley: University of California Press.
- Fletcher, Ruth. 2001. Post-colonial fragments: Representations of abortion in Irish law and politics. *Journal of Law and Society* 28: 568–589.
- Gamson, Joshua. 1989. Silence, death and the invisible enemy: AIDS activism and social movement "Newness". *Social Problems* 36: 351–367.
- Gibson-Graham, J.K. 2008. Diverse economies: Performative practices for 'other worlds'. *Progress in Human Geography* 32: 613–632.
- Goggins, C.J. 1991. *The case of the virgin condom*. Dublin: Irish Times.
- Hug, Chrystel. 1998. *The politics of sexual morality in Ireland*. London: Palgrave.
- Inglis, Tom. 2002. Sexual transgression and scapegoats: A case study from modern Ireland. *Sexualities* 5: 5–25.
- Irish Independent. 1991. *Taoiseach pledges new condoms law*. Dublin: Irish Independent.



- Irish Press. 1983. *Family clinic move*. Dublin: Irish Press.
- Irish Press. 1984. *Selling charge adjourned*. Dublin: Irish Press.
- Irish Press. 1990. *Contraceptive prosecution*. Dublin: Irish Press.
- Irish Times. 1991a. *Ruling on condom sale brings calls for new law*. Dublin: Irish Times.
- Irish Times. 1991b. *Condom machine removed*. Dublin: Irish Times.
- Irish Times. 1992. *Group installs condom vending machines*. Dublin: Irish Times.
- Jameson, Fredric. 1981. *The political unconscious: Narrative as a socially symbolic act*. Ithaca: Cornell University Press.
- Joyce, Maria. 2010. *A brave stand: The history of AIDS West* (on file with the authors).
- Kennedy, Geraldine. 1992. *Contraceptive legislation review gets under way*. Dublin: Irish Times.
- Kerrigan, Páraic. 2017. *Out-ing AIDS: The Irish civil gay rights movement's response to the AIDS crisis (1984–1988)*. *Media History* 1–15. <https://www.tandfonline.com/doi/abs/10.1080/13688804.2017.1367652>.
- Lefebvre, Henri. 1990. *Critique of everyday life*. London: Verso.
- Maguire, Moira J. 2001. The changing face of Catholic Ireland. *Feminist Studies* 27: 335–358.
- Marshall, Anna-Maria. 2003. Injustice frames, legality, and the everyday construction of sexual harassment. *Law & Social Inquiry* 28: 659–689.
- McCann, Michael. 1992. Reform litigation on trial. *Law & Social Movements* 4: 715–747.
- McCann, Michael. 1998. How does law matter for social movements? in *How does law matter? Fundamental issues in law & society research*, ed. Bryant Garth and Austin Sarat, 76–108. Evanston: Northwestern.
- McDonagh, Patrick James. 2017. Homosexuals are revolting: Gays and Lesbians in the Republic of Ireland 1970s–1990s. *Stuidi Irlandesi* 7: 65–91.
- Mulqueen, Tara, and Anastasia Tataryn. 2012. Don't occupy this movement: Thinking law in social movements. *Law and Critique* 23: 283–298.
- Nolan, Ann, and Fiona Larkin. 2016. Vectors of transnationality in the adoption of a liberal public health response to HIV and AIDS in Ireland. *Global Social Policy* 16: 253–267.
- Paris, Michael. 2011. Legal mobilization and the politics of reform: Lessons from school finance litigation in Kentucky, 1984–1995. *Law and Social Inquiry* 26: 631–681.
- Polletta, Francesca, and James Jasper. 2001. Collective identity and social movements. *Annals of the American Society of Political and Social Science* 27: 283–305.
- Rynne, Andrew. 2005. *The vasectomy doctor*. Cork: Mercier Press.
- Sitrin, Marina. 2012. *Everyday revolutions: Horizontalism and autonomy in Argentina*. London: Zed Books.
- Smyth, Ailbhe. 1992. A sadistic farce: Women and abortion in the Republic of Ireland 1992. In *The abortion papers Ireland*, ed. Ailbhe Smyth, 7–24. Dublin: Attic Press.
- Smyth, Fiona. 1998. Cultural constraints on the delivery of HIV/AIDS prevention in Ireland. *Social Science and Medicine* 46: 661–672.
- Smyth, Lisa. 2005. *Abortion and nation: The politics of reproduction in contemporary Ireland*. London: Ashgate.
- Tavory, Iddo, and Ann Swidler. 2009. Condom semiotics: Meaning and condom use in rural Malawi. *American Sociological Review* 74: 171–189.
- Tsing, Anna. 2004. *Friction: An ethnography of global connection*. Princeton: Princeton University Press.
- Young, Garry. 1993. Condoms? Disgusting: I'll have a ribbed pack. *Independent* 3, June.