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Reforming the Illinois Criminal Code: Where the CLEAR Commission Stopped Short of Its Goals, 41 J. Marshall L. Rev. 741 (2008)

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REFORMING THE ILLINOIS CRIMINAL CODE: WHERE THE CLEAR COMMISSION STOPPED SHORT OF ITS GOALS

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I. INTRODUCTION

Imagine being sent to jail for having consensual sex with another unmarried adult or for exhibiting artwork that depicts the United States flag or for selling a video without a rating on the cover. All of that conduct is punishable by imprisonment under the current Illinois Criminal Code. If two unmarried adults have consensual intercourse with one another, they could face imprisonment for up to six months.[1] The exhibition of the State

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1. 720 ILL. COMP. STAT. 5/11-8 (2006).

flag or the United States flag with any word, figure, mark, or design placed on it can result in thirty days of jail time.[2] Anyone who sells or even rents a video movie that does not clearly display an official rating faces thirty days imprisonment.[3]

The Illinois Criminal Code includes several provisions that are outdated, unconstitutional, or plainly unnecessary. Those statutes clutter the Code and weaken its credibility, and the CLEAR Commission should have recommended that the Illinois legislature repeal them. Since the Criminal Code's last revision in 1961, the legislature not only has failed to repeal many outdated, unconstitutional, and unnecessary laws, it has also expanded the Code to add more criminal laws of questionable utility and constitutionality.[4] This has created an inefficient and confusing Code. The CLEAR Commission set out to clean up the Code – to make it more efficient and less confusing. Despite the Commission's work, even if the legislature accepts all of its recommendations, the Illinois Criminal Code will continue to contain several inappropriate statutes because the Commission failed to grapple with their repeal.

A criminal code should provide clear notice of what conduct the State prohibits. A code should be reserved for addressing behavior that society seriously seeks to deter and for offenses that truly are prosecuted. A code should be logical and reasonably understandable. Many criminal codes, including the Illinois Code, fail to achieve those goals and contain nonsensical, duplicative, and unnecessary laws.[5] Criminal law scholars generally agree that legislatures are no longer simply passing necessary and essential legislation "but rather have become 'offense factories' churning out more and more narrow, unnecessary, and often counterproductive new offenses."[6] Those scholars argue that the

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2. 720 ILL. COMP. STAT. 620/1 (2006).

3. 720 ILL. COMP. STAT. 395/3 (2006).

4. The 1961 Criminal Code contained 33 articles. In 2007, the Illinois Criminal Code contained 47 articles in addition to more than 80 *separate* acts creating other offenses.

5. For example, the federal criminal code has ballooned to contain over 4,000 crimes. GENE HEALY, GO DIRECTLY TO JAIL, THE CRIMINALIZATION OF ALMOST EVERYTHING vii (Gene Healy ed., Cato Institute 2004); *see also* Erik Luna, *Overextending the Criminal Law*, XXV CATO POLICY REPORT No. 6, 1, 15-16 (2003), *available at* http://www.cato.org/pubs/policy_report/v25n6/luna.pdf (discussing the effects of expanding criminal codes, giving examples of unnecessary criminal laws and providing the costs of over-criminalization).

6. *See* Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 634 (2005) (discussing problems with the trend of criminal code expansion in the United

churning trend is fueled by legislators' fear of appearing soft on crime.[7] The reforms to streamline the Illinois Code that took place over forty years ago have been weakened by the growing trend of adding more and more laws to the Criminal Code with each passing legislative session.[8]

Legislators need to be more vigilant when reviewing proposals to create new crimes du jour. Perhaps, as the scholars suggest, they are reluctant to do so because of real or perceived pressure not to be seen as being soft on crime. A 2003 Cato Policy Report noted that "[e]xperience has shown that being tough on crime wins elections, and a sure-fire way to look tough is to add a superfluous carjacking statute or boost the penalty for drug dealers, irrespective of the statute's normative justification or ultimate effect on society."[9] But, piecemeal enactment of criminal statutes inevitably impairs the clarity of the Code. Regardless of the cause of the proliferation of unnecessary laws in the Code, those laws should be repealed to better ensure that Illinois has a logical, concise, and consistent criminal code.

Illinois' criminal laws were first codified in 1819. In 1961, the Joint Committee to Revise the Illinois Criminal Code changed the Criminal Code, with the goal of creating a unified criminal code.[10] Although the Code had a chapter dedicated to criminal laws prior to 1961, the criminal laws of Illinois had been scattered throughout 148 chapters of statutes.[11] The 1961 revision achieved its purpose; it compiled criminal legislation in one location and streamlined its provisions. Since then, the Code has swollen in size. In 2007, the Code contained forty-seven articles and over eighty acts.[12] In 2004, the CLEAR Commission took on the task of

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States).

7. *Id.* at 644.

8. *Id.* at 635.

9. Luna, *supra* note 5, at 16.

10. 38 ILL. ANN. STAT. XIX, *Committee Foreward to Tentative Final Draft of the Proposed Illinois Revised Criminal Code of 1961* (West 1989). The Presidents of the Chicago Bar Association and the Illinois Bar Association appointed the Joint Committee to Revise the Illinois Criminal Code. The Committee consisted of sixteen members including lawyers, judges, prosecuting attorneys and law professors.

11. 38 ILL. ANN. STAT. XX.

12. Illinois Compiled Statutes, Chapter 720, Criminal Offenses, houses the criminal laws of the State. "Chapter 720 reflects no less than eighty-two Articles and Acts, with the principal measures such as homicide, kidnapping and theft in the Criminal Code of 1961 (Act 5) followed by a plethora of other Acts, many of which are similar to or overlap with offenses in Act 5." CLEAR Commission, Proposed Combined Commentary to the CLEAR Criminal Code Recommendation 1 (May 25, 2007) (unpublished paper, on file with CLEAR

updating the Illinois Criminal Code. This Article examines areas where the Commission should have gone further to complete its task.

The authors believe that to make the Code more fair and to limit the Code to include laws that are likely to be enforced, the CLEAR Commission should have taken further action to clarify the Illinois Criminal Code in three main areas. First, the CLEAR Commission should have recommended the repeal of outdated statutes that remain in Code. The retention of outdated statutes that are never enforced undermines society's confidence in the criminal justice system, as the public knows that some provisions in the Code simply will not be enforced. An ideal criminal code should reflect the norms of modern society and include laws that society cares to enforce. Second, this Article addresses statutes that unlawfully curtail free speech and personal liberties. The retention of those likely unconstitutional statutes in the Code lessens its credibility. Finally, this Article argues that laws based on isolated, exceptional incidents – and solely motivated by political reasons – should be eliminated from the Code. Provisions that have never been and likely never will be enforced do not serve any useful purpose. Several of those laws essentially serve to regulate consumer products, which is not the purpose of a criminal code. Addressing those three areas of the Criminal Code, as discussed below, would eliminate inappropriate criminal laws and better achieve the Commission's objectives.

II. A Criminal Code Should Be Up To Date

A criminal code should reflect the current values of the society it serves. To achieve that objective, the State must occasionally update its code. The CLEAR Commission took several steps to bring the Illinois Code up to date,[13] but more

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Commission Staff).

13. The CLEAR Commission recommended that the following outdated statutes be repealed: the Party Line Emergency Act, 720 ILL. COMP. STAT. 660/01-4 (2006), Barratry, 720 ILL. COMP. STAT. 5/32-11 (2006), and Maintenance, 720 ILL. COMP. STAT. 5/32-12 (2006). The Party Line Emergency Act prohibits "wilfully refus[ing] to yield or surrender the use of a party line to another person for the purpose of permitting such other person to report a fire or summon police, medical or other aid in case of emergency." 720 ILL. COMP. STAT. 660/2. The offense of barratry is committed when a person, "wickedly and willfully excites and stirs up actions or quarrels between the people of this State with a view to promote strife and contention." 720 ILL. COMP. STAT. 5/32-11. The offense of maintenance is committed when a person, "officiously intermeddles in an action that in no way belongs to or concerns that person, by maintaining or assisting either party, with money or

changes should have been recommended to modernize the Criminal Code. Retention of outdated provisions neither advances the Commission's goals of clarity and conciseness nor enhances the credibility of the Code. Two examples of outdated statutes that the CLEAR Commission kept in its final recommendation are the crimes of adultery and fornication. This Section discusses the history and purposes of those laws, how other states have repealed them, and United States Supreme Court jurisprudence that calls into question their constitutionality. It demonstrates that the Illinois adultery and fornication statutes are outdated, unenforced, and likely unconstitutional. The CLEAR Commission should have urged their repeal.

The offense of adultery is committed when two adults engage in open and notorious sexual intercourse and at least one of them is married.[14] The married person(s) always commits the offense; if one of the offenders is not married, the law requires that the unmarried offender know that the other person is married.[15] A violation of that statute is punishable by imprisonment for up to one year, a fine of up to $2,500, or both.[16]

The offense of fornication is committed when any person has open and notorious sexual intercourse with a person who is not his or her spouse.[17] A violation of that statute is punishable by imprisonment for up to six months, a fine of up to $1,500, or both.[18] Fornication is distinct from adultery because it is not necessary that either party be married for an offense to be committed.

American adultery and fornication laws stem from Puritan influence in Colonial America.[19] Adultery was not a criminal offense in England. The American Colonies initially made adultery a capital offense. Later, the punishment was lessened to whipping, flogging, branding, and, infamously, wearing a scarlet letter "A." Today, about half of the states still criminalize adultery, and nine criminalize sex between unmarried persons.[20]

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otherwise, to prosecute or defend the action, with a view to promote litigation." 720 ILL. COMP. STAT. 5/32-12.

14. 720 ILL. COMP. STAT. 5/11-7 (2006).

15. *Id.*

16. 730 ILL. COMP. STAT. 5/5-8-3(a)(1); 730 ILL. COMP. STAT. 5/5-9-1(a)(2).

17. 720 ILL. COMP. STAT. 5/11-8(a) (2006).

18. 730 ILL. COMP. STAT. 5/5-8-3(a)(2) (2006); 730 ILL. COMP. STAT. 5/5-9-1(a)(3) (2006).

19. Jeffrey R. Cohen, *A Vote for Decriminalizing Adultery*, 217 N.Y. L.J. NO. 20, 1 (Jan. 30, 1997).

20. Joseph Trybor & Jerry Thornton, *Alleged Trist Revives Rare Adultery Law*, CHI. TRIB., July 11, 1997, at Metro, 1.

The Illinois laws criminalizing adultery and fornication date back to the 1800s. The fact that the Illinois Criminal Code still contains them – nearly 200 years later – is puzzling.

The creation of the 1961 Illinois Criminal Code resulted in amendments to the adultery and fornication statutes rather than repeal, despite a trend in other states at that time to abolish those statutes. The most significant change made to the adultery and fornication statutes during the 1961 revision was the creation of a distinction between the penalties for adultery and fornication.[21] The 1961 Criminal Code Commissioners considered adultery to be a more serious crime than fornication because, they concluded, adultery was an affront to marital relationships and, more seriously, offended public peace.[22] The Commentary to the 1961 Code also noted that adultery might pose a danger to society because of the possibility that an enraged spouse would seek vengeance for the offense.[23] Today, adultery continues to be punished one grade more severely than fornication. The Commentary also highlighted the retention of the "open and notorious" provision in the fornication statutes, acknowledging that the purpose of the statutes was not to criminalize matters of "principally private moral concern."[24] The key concerns behind the adultery statute were "the scandalousness, the affront to public decency and the marital institution." Therefore, both the sexual intercourse or cohabitation and the absence of a marital relationship must be open and notorious.[25]

There is no recent case law evidencing any prosecutions for adultery and fornication in Illinois. A 2002 newspaper article reports that no one has been prosecuted for adultery in Illinois in the last forty years.[26] And over ten years ago, a spokesperson for the Office of the Cook County State's Attorney told the Chicago Tribune that the Office would not prosecute adultery offenses: "We're not going to get into charging adultery in Cook County. As prosecutors, we have to decide where we are going to apply the resources. The courts are already full."[27] He continued, "For the

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21. *See* 38 ILL. STAT. ANN. 11-7 (West 1979) (Commentary to the 1961 Criminal Code and revised by Charles H. Bowman in 1972).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Dan Savage, Swingers: A LOVE STORY; What "Pro-Family" Advocates Won't Tell You About the Couples Who Happily Share Each Other With Strangers, CHI. READER, Oct. 18, 2002, at 1.

27. Joseph Trybor & Jerry Thornton, Devine Won't Prosecute Adultery Case; Enforcing Law Seen as Problematic, Costly, CHI. TRIB., July 12, 1997, at

most part, adultery cases can be handled differently. It's a relationship problem. It's not an uncommon phenomenon in today's society. It's a behavior, and we're not going to go after it."[28] Indeed, prosecution for those offenses would be a waste of society's time and resources. In an adultery or fornication case, where the criminal behavior has likely occurred behind closed doors, prosecutors would be hard-pressed to prove a case and doing so would involve an invasion into the privacy of people's homes.

While those offenses have not been prosecuted in Illinois in many years, the police occasionally arrest persons for the offenses. The charges are then either dropped or a different offense is charged. For example, in 1997, Harvey police arrested a couple for fornication who were found having sex in a car that was viewable to nearby residents.[29] Prosecutors later changed the charges to public indecency.[30] Earlier that same year, Harvey police charged two others with adultery when a husband came home and found his wife in bed with another man.[31] The State declined to prosecute the offenses. A representative for the Cook County State's Attorney's office stated that fornication is a seldom-used charge because it could "conceivably be leveled against people in the privacy of their own homes."[32] The representative further stated that the State's Attorney's office should focus on murders, assaults, and other violent crimes.[33]

The reported Illinois cases enforcing the adultery and fornication statutes are outdated and downright silly by modern standards. They provide no support for the proposition that those laws should be retained. In an 1852 fornication case, the court stated that the purpose of prohibiting fornication was to "prohibit the public scandal and disgrace of the living together of persons of opposite sexes notoriously in illicit intimacy, which outrages public decency, having a demoralizing and debasing influence upon society."[34] In *People v. Potter*, a 1943 adultery case, the trial court found that the defendant had sex with a married but separated woman and sentenced the defendant to one year at a state penal

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28. *Id.*

29. Philip Franchine, *Pair Charged with Having Sex in Car*, CHI. SUN-TIMES, July 18, 1997, at 14.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Searls v. People, 13 Ill. 597, 598 (1852).

farm.[35] The court noted that the defendant's conviction was appropriate because his largely "immoral life was so brazen and notorious that every neighbor was cognizant of it."[36] The *Potter* court stated that the purpose of the adultery and fornication statutes was not to control private immoral behavior but rather to "conserve the public morals by the prevention of indecent and evil examples tending to debase and demoralize society and degrade the institution of marriage."[37] In modern times, that behavior does not elicit the public outcry that it may have caused in the 1800s, or even in the 1940s. Moreover, the adultery and fornication statutes hardly conserve public morals given that they are not enforced. While the preservation of marriage may be important to society, that aim should not be achieved through criminal sanction. Nor do the statutes serve any legitimate deterrent purpose, given that the most recent reported decision applying either statute is over fifty years old.

The elimination of adultery and fornication from the Criminal Code would not foreclose punishment for lewd behavior. Offensive public sexual activity is punishable under other criminal statutes. Public indecency criminalizes the performance of sex acts in public.[38] The penalty for public indecency – imprisonment for less than one year – is the same as the penalty for adultery. Given that the behavior most offensive to society would still be punishable under the public indecency statute, the elimination of the outdated adultery and fornication statutes from the Code would not have a significant impact on either the deterrence or punishment of offensive public conduct.

Illinois is behind the times in failing to repeal its adultery and fornication statutes. At one point, many American jurisdictions punished consensual sexual acts between two unmarried adults. However, since 1955, when the American Law Institute drafted the Model Penal Code, which did not include those statutes, the trend in the states has been to repeal adultery and fornication laws. Following promulgation of the Model Penal Code, many states sought to revise their criminal codes and looked to the Model Code for guidance. The Commentary to the Model Penal Code noted that the drafters purposely omitted the adultery and fornication statutes because they did not believe that the statutes' purpose, to punish those who violate the community's standards of ethical behavior, was enough to justify penal

35. People v. Potter, 49 N.E.2d 307, 308 (Ill. App. Ct. 1943).
36. *Id.* at 310.
37. *Id.* at 309.
38. 720 ILL. COMP. STAT. 5/11-9 (2006).

sanctions.[39] The Commentary also noted that adultery and fornication laws generally had gone unenforced for quite some time.[40] The Institute wrote that when unenforced statutes are left in a code there is a potential for abuse through selective prosecution.[41] When those statutes remain on the books, there is a risk that they will be invoked, for example, to harass persons of different races or political figures.[42] The Commentary further stated that retaining but not enforcing these provisions could bring the penal law into "disrepute."[43] Given those concerns, and the belief that law enforcement's scarce resources should be used to prosecute crimes that directly harm other individuals, the Model Penal Code drafters decided to exclude adultery and fornication laws.[44]

Following the promulgation of the Model Penal Code, several states eliminated adultery and fornication statutes from their criminal codes. At least ten states, including California, Connecticut, Indiana, Kentucky, Maine, Maryland, Missouri, Nebraska, New Jersey and Oregon, have repealed their adultery statutes.[45] Likewise, seven states, Alabama, Kentucky, Maine, Maryland, New Jersey, Rhode Island and Oregon, as well as

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39. MODEL PENAL CODE § 213 note on adultery and fornication (Official Draft and Revised Comments 1980).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. At least nineteen states currently have laws criminalizing adultery: Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Kansas, Michigan, Minnesota, Mississippi, New Hampshire, North Carolina, Oklahoma, Rhode Island, South Carolina, Utah, Virginia, West Virginia, and Wisconsin. ALA. CODE § 13A-13-2 (2006); ARIZ. REV. STAT. ANN. § 13-1408 (2006); COLO. REV. STAT. § 18-6-501 (2006); FLA. STAT. § 798.01 (2006); GA. CODE ANN. § 16-6-19 (2006); IDAHO CODE ANN. § 18-6601 (2006); KAN. STAT. ANN. § 21-3507 (2006); MASS. GEN. LAWS CH. 272, § 14 (2006); MICH. COMP. LAWS § 750.29 (2004); MINN. STAT. § 609.36 (2006); MISS. CODE ANN. § 97-29-1 (2006); N.H. REV. STAT. ANN. § 645:3 (2006); N.Y. PENAL LAW § 255.17 (McKinney Supp. 2008); N.C. GEN. STAT. § 14-184 (2006); N.D. CENT. CODE § 12.1-20-09 (2006); OKLA. STAT. TIT. 21, § 871-72 (2006); R.I. GEN. LAWS § 11-6-2 (2006); S.C. CODE ANN. § 16-15-60 (2006); UTAH CODE ANN. § 76-7-103 (2006); VA. CODE ANN. § 18.2-365 (2006); W. VA. CODE § 61-8-3 (2006); WIS. STAT. § 944.16 (2005).Alabama retained its adultery statute, but the Commentary to that statute states, "While there is strong sentiment that adultery should not be regulated by criminal sanction, the committee was of the opinion that the political success of a proposal formally to abolish this crime would, at the present time, be doubtful." ALA. CODE § 13A-13-2, Commentary.

Washington D.C., have repealed fornication statutes.[46] The drafters of the Alabama Criminal Code further noted that this behavior is not considered criminal in most of the United States or the rest of the world.[47]

Despite the trend to repeal adultery and fornication statutes, some scholars have argued for their retention. They argue that those laws serve to deter immoral conduct and promote public health. Arguments for retention of fornication and adultery statutes include a state's interest in preventing disease, reducing extramarital births, and protecting the institution of marriage.[48] Furthermore, the proponents believe those laws shape societal norms, condemn immorality, and serve "as a strong barrier to action," regardless whether they are ever enforced.[49] One author has even gone so far as to suggest that instead of repealing those laws the public should be better informed of them, even if they are not enforced, to send a message of societal disapproval and to "driv[e] this immoral conduct underground."[50]

Those arguments are not persuasive. The facts are that few people likely know adultery and fornication constitute criminal behavior,[51] and that prosecutors in Illinois have not charged those offenses in decades. Thus, any deterrent effect from those statutes is likely a fiction. A law journal article correctly summarized the issue:

> Although modern society does not necessarily encourage adulterous behavior, it also does not view extramarital sex as a crime against the citizenry. Statistics indicate that a large part of that "citizenry" has, at some point, committed adultery. Reports show that approximately 50 percent of all husbands and 33-40 percent of all

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46. States that continue to criminalize fornication include Georgia, Idaho, Massachusetts, Mississippi, North Carolina, North Dakota, South Carolina, Utah, Virginia, and West Virginia. GA. CODE ANN. § 16-6-18 (2006); IDAHO CODE ANN. § 18-6603 (2006); MASS. GEN. LAWS CH. 272, § 18 (2006); MISS. CODE ANN. § 97-29-1 (2006); N.C. GEN. STAT. § 14-184 (2006); N.D. CENT. CODE § 12.1-20-08 (2006); S.C. CODE ANN. § 16-15-60 (2006); UTAH CODE ANN. § 76-7-104 (2006); VA. CODE ANN. § 18.2-344 (2006); W. VA. CODE ANN. § 61-8-3 (2006).

47. ALA. CODE § 13A-13-2, Commentary.

48. Traci Shallbetter Stratton, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 WASH. L. REV. 767, 797 (1998).

49. *Id.*

50. *Id.*

51. *See* Joanna Grossman, *Virginia Strikes Down State Fornication Law*, Jan. 25, 2005, http://www.cnn.com/2005/LAW/01/25/grossman.oldlaws/index.html (last visited August 18, 2008) (explaining that people do not know fornication is a crime).

> wives have engaged in extramarital intercourse. In the younger generations, the wives' percentage rises to that of the husbands' overall. Obviously, the deterrent effect of the adultery statute is nonexistent.[52]

Nor do the statutes advance any legitimate state interest. The State's interests of protecting citizens from disease and out-of-wedlock births are not supported by the statutory text itself. The statutes broadly prohibit all open and notorious sexual intercourse with anyone who is not one's spouse. They do not distinguish between healthy and unhealthy persons nor do they distinguish between fertile and infertile persons. Thus, the statutes are overbroad to the extent they are intended to advance those goals.

Not only are adultery and fornication statutes outdated and unenforced, but they are also likely unconstitutional. Since the 1961 Code was adopted, there have been significant developments in constitutional law surrounding the right to privacy. These decisions call into question the constitutionality of adultery and fornication statutes that remain on the books, including Illinois' statutes. The constitutional concerns that the adultery and fornication statutes present today were not evident in 1961 when Illinois last revised its Criminal Code.

Supreme Court decisions over the past half-century have recognized an individual's constitutional right to privacy. The Court has placed limits on when states can constitutionally regulate private behavior between two consenting adults. Although the Supreme Court has not addressed adultery and fornication statutes, the Court has struck down similar laws, and if a challenge were made to those statutes today, they would not withstand the challenge.

The Supreme Court's 1965 decision in *Griswold v. Connecticut* is the "most pertinent beginning point" for a discussion about the Court's jurisprudence addressing an individual's constitutional right to privacy in connection with personal sexual conduct.[53] Notably, the Illinois Code's 1961 revision took place four years before *Griswold*.

In *Griswold*, the Court considered the constitutionality of a Connecticut law that prohibited the use of contraceptives or assisting with the use of contraceptives.[54] Directors from a Planned Parenthood league were convicted under that law for

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52. *See* Cohen, *supra* note 19 (examining the reality of how many men and women participate in extramarital affairs).

53. Lawrence v. Texas, 539 U.S. 558, 564 (2003).

54. Griswold v. Connecticut, 381 U.S. 479, 480 (1965).

giving "information, instruction, and medical advice to married persons as to the means of preventing conception."[55] The directors challenged the validity of the law under which they were convicted as an unconstitutional infringement on their rights to privacy.[56] Connecticut argued that there is no right to privacy in the Constitution.[57]

The Supreme Court agreed with the directors, holding that the Bill of Rights creates various "zones of privacy."[58] The Court explained, for example, that the First Amendment creates a zone of privacy concerning the right of association; the Third Amendment creates a zone of privacy prohibiting quartering soldiers; the Fourth Amendment creates a zone of privacy against unreasonable searches and seizures; and the Fifth Amendment creates a zone of privacy against self-incrimination.[59] The Court reasoned that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[60] It also determined that the right to privacy predated the Bill of Rights.[61] The Court determined that a zone of privacy existed concerning the use of contraceptives by a husband and wife.[62] That ruling "placed emphasis on the marriage relation and the protected space of the marital bedroom."[63] *Griswold*, therefore, set precedent that a married couple's decision whether to use contraceptives during sexual intercourse is a protected, private act but it did not expressly extend that privacy right outside of the marital relationship.[64]

Less than ten years later, however, the Court recognized that the right to privacy extends to the use of contraceptives by unmarried persons. In *Eisenstadt v. Baird*, the Court invalidated a Massachusetts statute that prohibited distributing contraceptives to unmarried persons.[65] While Eisenstadt was decided on Equal Protection grounds, the Court recognized, with respect to unmarried persons, the "fundamental proposition that

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55. *Id.*
56. *Id.*
57. *Id.* at 481.
58. *Id.* at 484.
59. *Id.* at 484-85.
60. *Id.* at 484.
61. *Id.* at 486.
62. *Id.* at 485.
63. *Lawrence*, 539 U.S. at 565.
64. *Id.*
65. 405 U.S. 438, 454-55 (1972).

the law impaired the exercise of their personal rights."[66] The Court expressly noted: "'If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[67] The Court also quoted *Stanley v. Georgia*, stating "'also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.'"[68] While *Eisenstadt* merely applied the Court's holding in *Griswold* to unmarried persons pursuant to the dictates of the Equal Protection Clause, the decision reconfirmed that the Constitution provides a right to privacy relating to sexual conduct outside of the marital relationship.

Following *Griswold* and *Eisenstadt*, the next major Supreme Court decision addressing a constitutional right to privacy was *Roe v. Wade*.[69] In *Roe*, the Court, for the first time, explained that the Fourteenth Amendment also provides a protected zone of privacy.[70] In *Roe*, an unmarried, pregnant woman who wished to terminate her pregnancy challenged the constitutionality of a Texas law that prohibited abortions except for the purpose of saving the life of the mother.[71] The Supreme Court, in one of its most well-known and controversial decisions, struck down the Texas law.[72] The Court gave a full explanation of the underpinnings of the constitutional right to privacy.[73] First, it recognized that although:

> [t]he Constitution does not explicitly mention any right of privacy . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution . . . . [T]he roots of that right [may be found] in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.[74]

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66. *Lawrence*, 539 U.S. at 565.
67. *Eisenstadt*, 405 U.S. at 453 (internal citations omitted).
68. *Id.* at 454 (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (internal quotations omitted).
69. 410 U.S. 113 (1973).
70. *Id.* at 152-54.
71. *Id.* at 120.
72. *Id.* at 166.
73. *Id.* at 152-54.
74. *Id.* at 152 (internal citations omitted).

Next, the Court made clear that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy."[75] It then stated that "the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education."[76] Specifically, the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[77] *Roe*, therefore, continued the extension of the right to privacy outside of marriage and clarified the constitutional bases for the right to privacy.

After *Roe*, the Court again confronted a sexual-privacy case concerning contraceptives in *Carey v. Population Services Int'l.*[78] The Court held unconstitutional a New York law forbidding the distribution of contraceptive devices to persons under sixteen years of age.[79] The Court repeated its view on the constitutional underpinnings of the right to privacy:

> Although "[t]he Constitution does not explicitly mention any right of privacy," the Court has recognized that one aspect of the "liberty" protected by the *Due Process Clause of the Fourteenth Amendment* is "a right of personal privacy, or a guarantee of certain areas or zones of privacy."[80]

It then discussed the instances where a right to privacy had been found to exist:

> While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions "relating to marriage, procreation, contraception, family relationships and child rearing and education."[81]

In *Carey*, the Court extended its holdings in *Griswold* and *Eisenstadt* to minors.[82] It confirmed that the right to privacy protects against government intrusion into an individual's decisions regarding procreation and contraception – two matters

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75. *Id.* (internal citation omitted)
76. *Id.* at 152-53 (internal citations omitted).
77. *Id.* at 153.
78. Carey v. Population Serv. Int'l, 431 U.S. 678 (1977).
79. *Id.* at 681-82.
80. *Id.* at 684-85 (emphasis added).
81. *Id.* at 685 (internal citations omitted).
82. *Id.* at 691-99.

directly relating to sexual conduct – and clarified that the Fourteenth Amendment provides another basis for that determination.[83] In addition, in a footnote, the Court stated that it never before had "definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [sexual] behavior among adults."[84]

That question was considered in the 1986 decision *Bowers v. Hardwick*, which addressed the constitutionality of the Georgia sodomy statute.[85] In *Bowers*, the Court declined to expand the protection offered to personal decisions relating to sexual conduct.[86] A homosexual man who had been arrested for engaging in sodomy "by committing that act with another adult male in the bedroom of respondent's home" challenged the constitutionality of the Georgia law.[87] The Court upheld the statute.[88] It found that sodomy had been prohibited by criminal laws since ancient times.[89] As far as constitutional protection, the Court held that there is no protected right to engage in a particular sexual act.[90] Legal scholars criticized the *Bowers* decision and the Court itself later observed that it had caused "uncertainty, for the precedents before and after its issuance contradict[ed] its central holding."[91] On that basis, *Bowers* should be viewed as an aberration in the sexual-privacy line of cases rather than a link in their chain.

The Court overruled *Bowers* in 2003 in *Lawrence v. Texas*.[92] In *Lawrence*, the Supreme Court struck down a Texas sodomy statute, reasoning that the liberty at stake concerned behavior between two consenting adults, which is inherently private and should not be subject to government intervention.[93] The Court held that *Bowers* was incorrectly decided, and overruled *Bowers*'s holding that the Due Process Clause of the Fourteenth Amendment does not include a fundamental right for homosexuals to engage in consensual sodomy, even in the privacy of their own homes.[94]

In reaching its decision in *Lawrence*, the Court reviewed its

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83. *Id.*at 687-88.
84. *Id.* at 695 n.17.
85. 478 U.S. 186, 190 (1986).
86. *Id.* at 195-96.
87. *Id.* at 187-88.
88. *Id.* at 196.
89. *Id.* at 192.
90. *Id.* at 195-96.
91. *Lawrence*, 539 U.S. at 577.
92. *Id.* at 578.
93. *Id.*
94. *Id.*; *Bowers*, 478 U.S. at 196.

prior decisions defining the scope of liberty rights as they relate to sexual conduct.[95] The Court stated that in the past half century there had been "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[96] The Court emphasized that states should not define boundaries of personal adult relationships when there is no risk of injury; adults should be able to conduct their private lives within their own homes without fear of criminal prosecution.[97] The Court stressed that the conduct at issue was between two consenting adults who were "entitled to respect for their private lives," and held that the Due Process Clause gives them the full right to engage in that conduct without intervention from the government.[98] The Court reasoned, "our obligation is to define the liberty of all, not to mandate our own moral code."[99]

In light of the Supreme Court's decision in *Lawrence* striking down the Texas sodomy statute, adultery and fornication statutes would not withstand a constitutional challenge today.[100] Adultery and fornication statutes, similar to sodomy statutes, seek to regulate private consensual behavior between adults. A core underpinning of the Court's decision in *Lawrence* is that individuals have a right to engage in private sexual behavior in their homes without government intrusion.[101] Because adultery and fornication statutes seek to regulate similar private consensual behavior between adults, the statutes would not survive scrutiny under *Lawrence.*

Even before the Supreme Court's decision in *Lawrence*, states had begun to question the constitutionality of their adultery and fornication statutes. In 1994, the Supreme Judicial Court of Massachusetts stated, in *dicta* that the State's fornication statute was of "doubtful constitutionality."[102] Prior to *Lawrence*, the Supreme Court of Georgia recognized that its state constitution protected private consensual sexual behavior between two adults,

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95. *Lawrence*, 539 U.S. at 564-66.
96. *Id.* at 572.
97. *Id.* at 578.
98. *Id.*
99. *Id.* at 571 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992)).
100. Conversely, in *Oliverson v. W. Valley City*, 875 F. Supp. 1465, 1486-87 (D. Utah 1994), decided before the Supreme Court's decision in *Lawrence*, the District Court in Utah upheld an adultery statute, finding that an individual does not have a privacy right to engage in extramarital relationships.
101. *Lawrence*, 539 U.S. at 567.
102. Att'y Gen. v. Desilets, 636 N.E.2d 233, 240 (Mass. 1994).

and held the Georgia sodomy statute unconstitutional.[103]

Since *Lawrence*, some state courts have held adultery and fornication statutes unconstitutional. In 2005, the Supreme Court of Virginia held that its fornication statute was unconstitutional in light of *Lawrence*.[104] The court found that the statute infringed on rights guaranteed under the Due Process Clause of the Fourteenth Amendment because the statute criminalized private consensual sexual behavior between adults.[105] In 2005, a North Dakota district court judge issued a decision holding the state's adultery statute unconstitutional under the federal and state constitutions.[106] While the judge cited to *Lawrence*, he based his decision on the state and federal equal protection clauses, rather than the Due Process Clause, because the state statute treated similarly situated individuals differently.[107]

In light of the decision in *Lawrence*, the trend in other states, and the fact that adultery and fornication have been crimes in name only for decades, the CLEAR Commission should have recommended their repeal. Regulation of private morals should be beyond the reach of the Criminal Code. The right of people to engage in private, consensual, non-commercial sexual behavior is quite clear after *Lawrence*.[108] Maintaining statutes that are unenforced, outdated, and potentially unconstitutional serves no purpose but to clutter an already extensive criminal code.

The CLEAR Commission debated whether to recommend repeal of the Illinois adultery and fornication statutes. The Commission initially decided to recommend repeal. Once the CLEAR Commission's entire recommendation was drafted, however, concern was expressed that proposed repeal of those statutes might be a political flashpoint and could generate opposition to the bill as a whole. Ultimately, the CLEAR Commission decided to retain those statutes in its recommendation due to that political concern. The Commission should have stuck to its initial recommendation. Legislators need to be willing to take a stand and be prepared to make some changes to the Criminal Code to ensure that it changes with the times and passes constitutional muster. Adultery and fornication laws are archaic and unconstitutional and their retention serves no purpose.

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103. Powell v. State, 510 S.E.2d 18, 21-22 (Ga. 1998).
104. Martin v. Ziherl, 607 S.E.2d 367, 370-71 (Va. 2005).
105. *Id.*
106. State v. Penn, No. 09-4-K-3625-1 (N.D. Dist. Ct. Feb. 28, 2005).
107. *Id.* at 8-9.
108. *Lawrence*, 539 U.S. at 578.

III. UNCONSTITUTIONAL CRIMINAL LAWS THAT INFRINGE UPON THE RIGHT TO FREE SPEECH DO NOT BELONG IN THE CODE

Unconstitutional laws should not be in the Criminal Code because they are unenforceable and undermine the credibility of the Code. The Illinois Criminal Code currently includes five laws that likely would not withstand challenge under the First Amendment. These laws are the Flag Desecration Act,[109] the Draft Card Mutilation Act,[110] the Violent Video Games Law,[111] the Sexually Explicit Video Games Law,[112] and Disorderly Conduct at a Funeral or Memorial Service.[113] The retention of unconstitutional provisions in a criminal code creates confusion and uncertainty concerning what constitutes criminal conduct and does not further the purpose of the Criminal Code. The CLEAR Commission should have proposed to eliminate these provisions from the Code, because they violate the First Amendment.[114]

A. The Flag Desecration Act

The United States Supreme Court has issued two recent decisions reversing convictions under flag desecration statutes as unconstitutional under the First Amendment.[115] Following those decisions, it is doubtful that any flag desecration act could be enforced consistent with the First Amendment. Despite that, the Illinois Criminal Code still contains a provision – the Illinois Flag Desecration Act – criminalizing the desecration of the State and United States flags. That Act should be repealed.

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109. 720 ILL. COMP. STAT. 620/0.01-5 (2006).
110. 720 ILL. COMP. STAT. 595/0.01-1 (2006).
111. 720 ILL. COMP. STAT. 5/12A-1 (2006).
112. 720 ILL. COMP. STAT. 5/12B-1 (2006).
113. 720 ILL. COMP. STAT. 5/26-6 (2006).
114. The CLEAR Commission took some steps to eliminate potentially unconstitutional provisions from the Code. For example, the Commission recommended repeal of a portion of the unlawful visitation statute, 720 ILL. COMP. STAT. 5/10-5.5(h), that the Illinois Supreme Court has held unconstitutional. *See* CLEAR Commission, *supra* note 12, at 23. Likewise, the Commission recommended repeal of portions of the Illinois Controlled Substances Act and the Discrimination in Sale of Real Estate Act which have been held unconstitutional. *Id.* at 92, 102. A federal court sitting in Illinois held that 720 ILL. COMP. STAT. 570/315 was unconstitutional in *Knoll Pharm. Co. v. Sherman*, 57 F. Supp. 2d. 615, 622 (N.D. Ill. 1999). The Seventh Circuit Court of Appeals held 720 ILL. COMP. STAT. 590/1(d) unconstitutional in *Pearson v. Edgar*, 153 F.3d 397, 405 (7th Cir. 1998).
115. United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989). In each case the Court held the statute at issue unconstitutional as applied to the individual defendant, but declined to hold the statute unconstitutional on its face.

The Illinois Flag Desecration Act prohibits placing for display, exposing to public view, manufacturing or selling a State or United States flag with any word, design or advertisement placed on the flag or affixed to the flag.[116] That behavior is punishable by imprisonment for up to thirty days, a fine of up to $1500, or both.[117] The Act also criminalizes publicly mutilating, defacing, defiling or trampling a State or United States flag or intentionally displaying either of those flags on the ground.[118] That behavior is punishable by imprisonment for one to three years, a fine up to $25,000, or both.[119] Mutilation of a flag, which includes flag burning, has received the most interpretation and scrutiny by courts.

State legislatures first enacted laws prohibiting the destruction of flags in the late 1800s.[120] Those statutes were enacted for two reasons: to prevent the commercial use of the flag, and to prevent its desecration.[121] The latter concern stemmed from the fact that during the political campaigns of those times, supporters of competing political parties sometimes desecrated the United States flag to show contempt for the other party.[122] Illinois first passed a statute criminalizing conduct concerning destruction of flags in 1899, but that statute was held unconstitutional a year later by the Illinois Supreme Court.[123] The legislature re-enacted a flag desecration act in 1907.[124] That statute evolved into the current Illinois Flag Desecration Act.[125]

The United States Supreme Court has held that laws prohibiting the desecration of flags, like the Illinois Act, infringe

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116. *See* 720 ILL. COMP. STAT. 620/1 (2006) (The sale and manufacture subsection is very broad and prohibits exposing to public view, manufacturing, selling, exposing for sale, giving away, possessing for sale or to give away for any purpose, "any article or substance, being an article of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise upon which has been printed, painted, attached, or otherwise placed a representation of any such flag, standard, color, or ensign, to advertise, call attention to, decorate, mark or distinguish the article or substance on which so placed . . . .").

117. 730 ILL. COMP. STAT. 5/5-8-3 (2006); 730 ILL. COMP. STAT. 5/5-9-1(a)(3) (2006).

118. 720 ILL. COMP. STAT. 620/1.

119. 730 ILL. COMP. STAT. 5/5-8-1(a)(7) (2006); 730 ILL. COMP. STAT. 5/5-9-1(a)(1).

120. People v. Lindsay, 282 N.E.2d 431, 433 (Ill. 1972).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 434.

125. 720 ILL. COMP. STAT. 620/0.01-5 (2006).

on free speech rights in certain contexts. In 1989, in *Texas v. Johnson*, the United States Supreme Court overturned a conviction under Texas law for burning an American flag, holding that the conviction violated the First Amendment.[126] The Texas law "expressly prohibited only those acts of physical desecration 'that the actor knows will seriously offend' onlookers."[127] Mr. Johnson burned the flag as part of a political demonstration that coincided with a meeting of the Republican Party to re-nominate President Reagan.[128] In determining whether the statute was constitutional, the Court first decided whether Johnson's act of burning the flag was expressive conduct within the realm of First Amendment protection.[129] All action taken with respect to a flag is not necessarily expressive, and the Court was required to consider the conduct in the context in which it occurred.[130] The Court found that the defendant's actions were expressive given his reason for burning the flag and the events surrounding the burning, namely a demonstration coinciding with the Republican Party's meeting.[131]

The Court next considered whether the State's interest in punishing that behavior could justify the law's intrusion upon First Amendment rights. The State presented two interests: preventing breaches of the peace, and preserving the flag as a symbol of nationhood and national unity.[132] No breach of the peace occurred with the defendant's demonstration, leading the Court to conclude that this case did not involve the State's interest to maintain order.[133] Moreover, the Court rejected the State's claim holding:

> [T]hat an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." It would be odd indeed to conclude *both* that "if it is the speaker's opinion that gives offense, that consequence is a reason for

126. 491 U.S. at 418.
127. *Eichman*, 496 U.S. at 315.
128. *Johnson*, 491 U.S. at 406.
129. *Id.* at 403.
130. *Id.* at 405.
131. *Id.* at 406.
132. *Id.*
133. *Id.* at 410.

> according it constitutional protection," *and* that the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.[134]

The Court also determined that the conduct at issue – burning the flag to express dissatisfaction with the policies of the Federal Government – did not fall under the "fighting words" exception because "no reasonable on-looker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs."[135]

The Court then considered whether the State's interest in preserving the flag as a symbol of national unity could justify the conviction.[136] The Court held that it could not. It found that:

> [T]he State's asserted interest 'in preserving the flag as a symbol of nationhood and national unity,' was an interest related 'to the suppression of free expression' within the meaning of *O'Brien* because the State's concern with protecting the flag's symbolic meaning is implicated 'only when a person's treatment of the flag communicates some message.'[137]

The Court stated that the "bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[138] Thus, the Court found the statute unconstitutional as applied to that defendant, and held that his conviction could not stand.[139]

After *Johnson*, Congress passed the Flag Protection Act of 1989.[140] This federal Act replaced the existing federal flag-burning law. Congress expressed concern that the law on the books at that time might be held unconstitutional after *Johnson* because it addressed the content of the speech at issue, as did the Texas law at issue in *Johnson*.[141] The 1989 Act was written more broadly than the prior federal statute or the Texas law at issue in *Johnson*, and did not target "expressive conduct on the basis of the content of its message."[142] The Act was immediately challenged in

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134. *Id.* at 408-09.
135. *Id.* at 409.
136. *Id.*
137. *Eichman*, 496 U.S. at 314.
138. *Johnson*, 491 U.S. at 414.
139. *Id.* at 420.
140. 18 U.S.C. § 700 (2006).
141. *Eichman*, 496 U.S. at 314 n.3.
142. *Id.* at 315.

United States v. Eichman, which involved several individuals who had been arrested and convicted for setting fire to American flags in protest of the Act and other government policies.[143]

The Supreme Court found the federal Flag Protection Act of 1989 to be unconstitutional as applied to the defendants in that case.[144] The Court rejected the government's argument that it has an interest in "'protecting the physical integrity of the flag under all circumstances' in order to safeguard the flag's identity 'as the unique and unalloyed symbol of the nation.'"[145] The Court concluded:

> Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest is "related 'to the suppression of free expression,'[146] and concerned with the content of such expression."[147]

The Court held the Act was unconstitutional as applied to the defendants:

> Although Congress cast the Flag Protection Act in somewhat broader terms than the Texas statute at issue in *Johnson*, the Act still suffers from the same fundamental flaw; it suppresses expression out of concern for its likely communicative impact. Despite the Act's wider scope, its restriction on expression cannot be "justified without reference to the content of the regulated speech."[148]

The Court also declined to reconsider its determination in *Johnson* that flag burning does not fall under the "fighting words" exception to the First Amendment.[149] In conclusion, the Court stated:

> We are aware that desecration of the flag is deeply offensive to many. But the same might be said, for example, of virulent ethnic and religious epithets, vulgar repudiations of the draft, and scurrilous caricatures .... Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.[150]

Under *Johnson* and *Eichman*, the Illinois Flag Desecration

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143. *Id.* at 312.
144. *Id.*
145. *Id.* at 315.
146. *Johnson*, 491 U.S. at 407.
147. *Eichman*, 496 U.S. at 315.
148. *Id.* at 317-18 (quoting Boos v. Barry, 485 U.S. 312, 320 (1988)).
149. *Id.* at 315.
150. *Id.* at 318-19.

Act is unconstitutional. It prohibits conduct similar to the conduct addressed in the Texas and federal laws, and, like those statutes, "suppresses expression out of concern for its likely communicative impact."[151] Moreover, the interests which the State has advanced to justify that statute are the same as the interests presented as justification by the governments, and rejected by the Court, in *Johnson* and *Eichman*.[152]

Despite the likelihood that the Illinois Flag Desecration Act is unconstitutional, Illinois police continue to charge persons under the statute. In 2003, a Jonesboro man pleaded guilty to the offense and served two weeks in prison for burning an American flag outside of his residence.[153] At that time, a spokesperson for the American Civil Liberties Union commented on the arrest and expressed surprise that the offense could still be prosecuted given the Supreme Court's rulings concerning other flag desecration statutes.[154] In 1989, a Virginia schoolteacher was arrested and charged with felony desecration when she stepped on an American flag that was part of an exhibit at the School of the Art Institute of Chicago.[155] After much public debate and protest, the State *nolle prossed* the charges against the schoolteacher.[156] Cases that have been prosecuted under the Illinois Flag Desecration Act, dating before the Supreme Court's decisions, have involved minimal fines and prison sentences and the majority of those convictions were

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151. *Id.* at 317.

152. In *Sutherland v. DeWulf*, 323 F. Supp. 740, 744 (S.D. Ill. 1971), the State asserted that the Act was necessary to preserve public peace and to preserve the flag as a symbol of unity. When the Court scrutinized those same interests in *Johnson*, it found the State's interest in preserving the flag as a symbol was related to the suppression of expression and therefore unconstitutional. 491 U.S. at 420. In *Sutherland*, the court upheld the constitutionality of the Illinois flag desecration statute as applied to the defendants where the defendants had burned a flag in front of a federal building. 323 F. Supp. at 741.

153. *Downstate flag burner gets 14-day sentence*, CHI. TRIB., Dec. 5, 2003, at 13.

154. *Id.*

155. A. Dahleen Glanton, *Tourist Teacher Charged with Stepping on Flag*, CHI. TRIB., Mar. 5, 1989, at 3.

156. *See* Interview by Jennifer Dlugosz with Lawrence Schaner, Esq., in Chicago, Ill. (Nov. 28, 2007) (statements of the defense attorney representing the schoolteacher who was charged criminally for stepping on a flag). The exhibit was controversial at the time. Memorandum from Interview with L. Schaner, Esq. by Jennifer Dlugosz, (Nov. 28, 2007) (on file with author). When the schoolteacher stepped on the flag, a Vietnam veteran was standing close by and stated he wanted to make a citizens arrest. *Id.* Two plainclothes police officers standing nearby escorted the schoolteacher to the police station. *Id.*

ultimately overturned.[157]

B. Draft Card Mutilation Act

The CLEAR Commission likewise should have recommended repeal of the Draft Card Mutilation Act. The Act infringes on free speech, is outdated and is duplicative of federal law.

The Draft Card Mutilation Act makes it a crime to knowingly destroy or mutilate a valid registration certificate or any other valid certificate issued under the Military Selective Service Act of 1967.[158] A violation of the statute is a Class 4 felony and is punishable by imprisonment for one to three years, a fine of up to $25,000, or both.[159] Illinois enacted the Draft Card Mutilation Act in 1968.[160] No other state in the nation currently criminalizes that behavior. Draft registration is governed by the federal government's Selective Service System. Federal law prohibits knowingly destroying or mutilating any registration certificate or any alien's certificate of nonresidence.[161]

If there ever was a legitimate government interest in prosecuting those who mutilate draft cards, that interest no longer exists. It does not appear that Illinois has ever sought to enforce the Act. There is not a single reported Illinois case addressing the Draft Card Mutilation Act, and the authors have not been able to uncover any evidence of recent arrests under the law.[162]

The federal government last used the draft in 1973 at the end of the Vietnam War.[163] In 1975, registration for the draft was suspended; however, in 1980, President Carter reinstated draft registration.[164] Currently, males over eighteen are required to

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157. *See Lindsay*, 282 N.E.2d at 431-32 (reporting that defendants were fined seventy-five dollars); *see also* People v. Von Rosen, 147 N.E.2d 327, 328-29 (Ill. 1958) (noting that defendants were fined fifty dollars and the Illinois Supreme Court reversed their convictions); *People v. Meyers*, 321 N.E.2d 142, 142-43 (Ill. App. Ct. 1974) (detailing that defendant was fined fifty dollars, and the appellate court reversed judgment).

158. 720 ILL. COMP. STAT. 595/1 (1993).

159. 730 ILL. COMP. STAT. 5/5-8-1(a)(7) (1993); 730 ILL. COMP. STAT. 5/5-9-1(a)(1)(1995).

160. Draft Card Mutilation Act, 720 ILL. COMP. STAT. 595/1 (1993) (effective Aug. 20, 1968).

161. 50 U.S.C. § 462 (2006).

162. A search of Illinois periodicals and internet sources confirmed this conclusion.

163. Burt Constable, *If Military Draft Returns, This Suburban Office Knows Where We Are*, DAILY HERALD, Jan. 9, 2003, at 11.

164. Debra Pickett, *Hell no, we won't go . . . although you never know*, CHI. SUN-TIMES, Sept. 23, 2001, at 14.

register with the Selective Service.[165] However, the draft has not been used in over thirty years - since the early 1970s the military has been all-volunteer.[166] The Selective Service reports that it no longer issues draft cards; rather, it issues proof of registration that has "nothing to do with the draft."[167] The Selective Service removed the requirement that an individual carry proof of registration at all times in 1974.[168] Moreover, the Justice Department is not currently prosecuting men who fail to register.[169] Given that draft cards are no longer issued, the Selective Service no longer requires men to carry proof of registration, and failure to register is no longer prosecuted; the statute is unnecessary.

Nor could the Act withstand constitutional scrutiny after *Johnson*.[170] The only time the Supreme Court considered a case involving the mutilation of a draft card was almost forty-years ago, before *Johnson*. In 1968, in *United States v. O'Brien*, the Court considered the constitutionality of a prosecution for burning a draft card under federal law.[171] The Court upheld the law, reasoning that Congress "has a legitimate and substantial interest in preventing [a draft card's] wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and willfully destroy or mutilate them."[172] The Court emphasized that the defendant was convicted solely for making his registration unavailable.[173]

Today, because registrants are no longer required to carry proof of registration, the "legitimate and substantial interest" found in *O'Brien* no longer exists. Thus, the State's only possible remaining reason to prohibit draft card mutilation would be to suppress the content of that expressive conduct, which is unlawful.[174] Indeed, in *Eichman* the Court cited "vulgar repudiations of the draft" as an example of conduct which is offensive to some, but nonetheless protected by the First

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165. *Id.*
166. Constable, *supra* note 163, at 11.
167. Selective Service System, http://www.sss.gov/FSdraftcd.htm (last visited Nov. 23, 2007).
168. *Id.*
169. Constable, *supra* note 163, at 11.
170. *Johnson*, 491 U.S. at 420.
171. 391 U.S. 367 (1968).
172. *Id.* at 380.
173. *Id.*
174. *See Johnson*, 491 U.S. at 416 (reasoning that a state cannot suppress expressive conduct that does not threaten disturbing the peace).

Amendment.[175] The Draft Card Mutilation Act would not withstand constitutional challenge after *Johnson* and *Eichman*.

Finally, if draft certificates were ever used again, anyone who mutilated a certificate could still be prosecuted for that offense by the federal government if the federal law is found to pass constitutional muster. The Illinois Act is pointless, and thus should be repealed.

When CLEAR Commissioners discussed the Draft Card Mutilation Act, many expressed the view that the statute should be repealed. The Commission determined not to recommend repeal out of concern for political reaction. Despite the view of many Commissioners that the Act should be repealed, the Commission decided to recommend that the Act be retained, but relocated to Article 26, Disorderly Conduct. The Commission should have recommended repeal of the Act. It protects no legitimate State interest and could not withstand constitutional challenge.

C. Recent Unconstitutional Legislation

The Flag Desecration Act and the Draft Card Mutilation Act are not the only statutes in the Illinois Code that infringe on First Amendment rights. Between 2005 and 2006, the Illinois legislature created three laws that it knew would likely be found unconstitutional. Two of those laws were held unconstitutionally vague before they even went into effect: the Violent Video Games Law and the Sexually Explicit Video Games Law.[176] The CLEAR Commission should have recommended the repeal of those statutes. The third law, Disorderly Conduct at a Funeral or Memorial Service, has not yet been challenged, but likely will face tough constitutional scrutiny because of its potential to infringe upon free speech rights.

In 2005, the Illinois legislature passed two statutes regulating the sale and rental of video games.[177] Debates on the

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175. *Eichman*, 496 U.S. at 318-19.

176. 720 ILL. COMP. STAT. 5/12A-1 to 12A-25 (2007); 720 ILL. COMP. STAT. 5/12B-1 to 12B-35 (2007).

177. *See* Violent Video Games Law, 720 ILL. COMP. STAT. 5/12A-15 (2006) (prohibiting the sale or rental of violent video games to minors and also requires labeling of all violent video games); *see also* Sexually Explicit Video Games Law, 720 ILL. COMP. STAT. 5/12B-15 (2006) (restricting the sale or rental of sexually explicit video games to minors, requiring all such games to be labeled, and requiring the posting of video games rating system near the area where games are displayed, at the information desk, and at the point of purchase).

floor of the House and Senate revealed concerns among several legislators that those laws would be found unconstitutional and that the State would be forced to defend a challenge to the laws' constitutionality and pay attorneys' fees when the lawsuit was lost in federal court.[178] Senator Cullerton noted federal courts had already struck down similar statutes enacted in other states and had awarded hundreds of thousands of dollars in attorneys' fees against the states.[179] Senator Jacobs stated he would vote for the bill because it was a political bill, "[w]e know it's going to get killed by the courts and it may cost us a half million dollars to fight it, but I'm going to do it, just so that I don't have it show up in a mail piece."[180] Despite concern about its constitutionality, the bill passed the Senate 52-5, with one senator voting present.[181] A similar debate on constitutionality occurred in the House, but the bill passed with ninety-one representatives voting in favor, nineteen voting against, six voting present and two representatives not voting at all.[182]

Before the video game laws went into effect, a challenge was made to their constitutionality. In *Entertainment Software Association v. Blagojevich*, the United States District Court for the Northern District of Illinois permanently enjoined the enforcement of both statutes, finding that portions of the statutes violated the First Amendment.[183] The CLEAR Commission was aware of the decision in *Entertainment Software Association*, but did not recommend the repeal of those provisions; instead, the CLEAR

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178. *See* Transcript of Ill. S. Debate, at 118-129, 94th Gen. Assembly (May 19, 2005) (detailing debates of the various views that the act is unconstitutional, not created well, and a limitation on free speech); *see also* Transcript of Ill. H.R. Debate, at 19-85, 94th Gen. Assemb. (Mar. 16, 2005) (observing debates in the House over concerns that courts have found no link between videos and violence, there is no compelling state interest, and the act is an attempt to restrict the sale of video games).

179. Transcript of Ill. S. Debate, *supra* note 179, at 122-23 (statement of Sen. Cullerton) (noting that the state of Washington, city of Indianapolis, and city of St. Louis had similar statutes which were struck down by federal courts).

180. *Id.* at 126 (statement of Sen. Jacobs).

181. Transcript of Ill. S. Debate, *supra* note 179, at 129.

182. Transcript of Ill. H.R. Debate, *supra* note 179, at 85.

183. 404 F. Supp. 2d 1051, 1083 (N.D. Ill. 2005). Specifically, the court found that the definition of "violent video games" under the Violent Video Games Law was unconstitutionally vague and that the statute was not narrowly tailored to serve a compelling governmental purpose. *Id.* at 1077. The court also found that the Sexually Explicit Video Games Law, and particularly the law's definition of "sexually explicit" were vague and not narrowly tailored. *Id.* at 1080. The court held that the statute's sale, rental, and check-out provisions were unconstitutional. *Id.* at 1081.

Commission merely recommended that they be relocated within the Criminal Code.[184] The Commission should have recommended their repeal.

In 2006, the Illinois legislature passed another statute of questionable constitutionality that criminalizes disorderly conduct at a funeral or memorial service.[185] The statute makes it a crime knowingly to perform specific disruptive behavior within two-hundred feet of any funeral site thirty minutes before or after a funeral.[186] Congress has passed a similar law, the Respect for America's Fallen Heroes Act, which applies to certain cemeteries on federal property.[187] Similar statutes have been passed in several other states as well.[188] The Illinois legislature, and many other states, passed those statutes in part as a response to the actions of a group from Kansas that has picketed at military funerals and has yelled hateful messages at the families of the fallen soldiers during the services as part of a protest against homosexuality.[189] Scholars and legislators have questioned whether those statutes are constitutional.[190] Legislative debate surrounding the passing of the Illinois statute revealed that legislators were cognizant of potential constitutional problems and attempted to draft a statute that could pass constitutional muster.[191]

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184. The CLEAR Commission recommended the relocation of the Violent Video Games Law to the end of Article 12, Bodily Harm, and the relocation of the Sexually Explicit Video Games Law to the end of Article 11, Sex Offenses.

185. 720 ILL. COMP. STAT. 5/26-6 (2006).

186. *Id.* This statute prohibits loud singing, chanting, noisemaking, visual images that convey fighting words or threats, and obstructing the entrance or exit of a funeral site. *Id.*

187. 38 U.S.C. § 2413 (2006).

188. ARK. CODE ANN. § 5-71-230 (2007); KAN. STAT. ANN. § 21-4015 (1996); MD. CODE ANN., CRIM. LAW § 10-205 (Supp. 2007); MINN. STAT. § 609.501 (Supp. 2008); MO. REV. STAT. § 578.501 (LexisNexis 2007); 18 PA. STAT. ANN. 7517 (Supp. 2007); TEX. PENAL CODE ANN. § 42.055 (Supp. 2007).

189. Rebecca Bland, Note, *The Respect for America's Fallen Heroes Act: Conflicting Interests Raise Hell with the First Amendment*, 75 U.M.K.C. L. REV. 523, 523 (2007). The picketers are part of the Westboro Baptist Church of Topeka, Kansas. *Id.* They believe that God is punishing America for tolerating homosexuality. *Id.* The picketers often display signs and scream at grieving families. *Id.*

190. *See* Ronald K.L. Collins & David K. Hudson Jr., *A funeral or free speech? Laws Against Funeral Protests Strike at the First Amendment*, LEGAL TIMES, Apr. 17, 2006; *see also* Transcript of Ill. S. Debate, at 30-31, 94th Gen. Assembly (Apr. 5, 2006) (statement of Sen. Wilhelmi) (arguing that people can speak out in different locations without disrespecting the right to be laid to rest with honor in a peaceful atmosphere).

191. *See* Transcript of Ill. S. Debate, *supra* note 189, at 130-38 (detailing the

The disorderly conduct at a funeral statute raises constitutional concerns because it infringes on free speech rights in public places, is vague and overbroad, and can be applied to punish content-based speech.[192] First, the statute prohibits disorderly conduct within two-hundred feet of any funeral site, which can include public cemeteries, sidewalks, streets and parks. Statutes that prohibit free speech in public places are subject to careful scrutiny.[193] Second, in its effort to ensure constitutionality, the legislature drafted the statute broadly and made no distinction between the messages conveyed at the protests. While the Illinois law seeks to prevent disrespectful protests, the law is so broadly drafted that it would also prevent the Patriot Guard Riders, a group of motorcyclists who shield families from the offending protests, from appearing at funeral sites. The law also does not include an exception for cemetery or funeral workers. Because the law does not include those exceptions, arrests and prosecutions may become arbitrary, subjecting those who display offensive messages to a greater likelihood of being targeted. Third, the legislature passed that statute, in part, in response to the actions of a specific group of protesters conveying a specific message, and sought to prohibit the expression of offensive ideas that the group has conveyed.[194] The Court in *Johnson* emphasized that the government "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[195] Under *Johnson*, when challenged, this crime du jour will face tough constitutional scrutiny.

In addition to the constitutional problems that statute poses, the statute is also unnecessary because Illinois law already criminalizes disorderly conduct, intimidation, hate crime and trespass.[196] Depending upon the facts of the situation, a combination of those laws could be used to prosecute unruly protesters.

The CLEAR Commission should have recommended the repeal of the Flag Desecration Act, the Draft Card Mutilation Act,

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Act's possible infringement on free speech).

192. *See* Collins, *supra* note 190 (discussing the potential constitutional problems with funeral protest laws).

193. Frisby v. Schultz, 487 U.S. 474, 480 (1988).

194. Transcript of Ill. S. Debate, 94th Gen. Assembly (Apr. 5, 2006), at 29-30 (statement of Sen. Wilhelmi), *available at*, http://ilga.gov/senate/transcripts /strans94 /09400097.pdf.

195. *Johnson*, 491 U.S. at 414.

196. 720 ILL. COMP. STAT. 5/26-1 (2006) (disorderly conduct); 720 ILL. COMP. STAT. 5/12-6 (2006) (intimidation); 720 ILL. COMP. STAT. 5/12-7.1 (2006) (hate crime); 720 ILL. COMP. STAT. 5/21-3 (2006) (criminal trespass to real property).

the Violent Video Games Law, the Sexually Explicit Video Games Law and Disorderly Conduct at a Funeral or Memorial Service because all of the statutes violate the First Amendment. The legislature's passage and retention of unconstitutional legislation undermines the credibility of the Code. Defending unconstitutional legislation is costly and the purpose of the legislation – which is on shaky constitutional footing in the first place – is defeated when it cannot successfully be enforced. Those laws do not belong on the books and should be repealed.

IV. STATUTES SHOULD NOT BE CREATED TO CRIMINALIZE CONDUCT THAT IS UNLIKELY TO BE REPEATED OR IS BETTER REGULATED THROUGH CONSUMER PROTECTION STATUTES

Statutes that regulate consumer products do not belong in a criminal code, nor do statutes that are tailored to address single, notorious events that are not likely to be repeated. This section discusses several such statutes that the CLEAR Commission retained in its final recommendation and argues that their repeal would improve the Code.

Criminal laws are often created to protect the safety of the public, but there is a point where regulation is better left to consumer protection laws. Experience shows that legislators sometimes create criminal laws in response to a single incident that draws public outcry. Because those types of laws focus solely on very specific – often isolated – conduct, it is unlikely that the targeted conduct will be repeated. Promulgation and retention of those statutes needlessly complicates the Criminal Code. The Illinois Criminal Code contains several laws that would be better left to consumer product regulation, including the Sale of Maps Act, the Video Sales and Movie Rentals Act, Sale of Yo-Yo Waterballs, and the Abandoned Refrigerator Act. The CLEAR Commission should have recommended that those statutes be repealed.

In Illinois, if one is caught selling current Illinois publications or highway maps published by the Secretary of the State he or she could face up to six months of jail time.[197] Maps published by the Secretary of State are available free at state visitor centers.[198] Legislative history reveals that the legislature passed the Sale of

197. 720 ILL. COMP. STAT. 340/1-340/2 (2006); 730 ILL. COMP. STAT. 5/5-8-3 (2006).

198. Transcript of Ill. S. Debate, 80th Gen. Assembly, at 122 (May 17, 1977) (statement of Sen. Vadalabene), *available at* http://ilga.gov/senate/transcripts/strans80/STO51777.pdf

Maps Act to prohibit the for-profit sale of state publications.[199] While this Bill passed the Senate 52-1, Senator Knuppel remarked that it was unnecessary:

> Like so many bills we've acted on here today, this is a lot to do about nothing. I don't know where you're going to find a State's Attorney that's going to handle a case at the county's expense to prosecute somebody who sold two or three dollars worth of road maps. This is another law that we don't need anymore than what we just passed.[200]

Despite Senator Knuppel's wise objection to the bill, only he voted against its passage.[201] There have been no reported arrests or prosecutions under the statute since the law was passed in 1977 – just as Senator Knuppel predicted. The CLEAR Commission recommended that this statute be transferred into a miscellaneous offenses article within the Criminal Code. Instead, the Commission should have recommended repeal.

The Code also contains a provision that criminalizes the sale of yo-yo waterballs.[202] A yo-yo waterball is a soft, rubber-like ball that is filled with liquid and attached to a cord.[203] A violation of the statute is punishable by a fine of up to $1,001.[204] In 2006, Illinois was the first of two states to create a criminal law for the sale of the toy. The legislature created that statute in response to public outcry concerning the safety of the toy in light of reported strangulations and eye injuries to children.[205] Representative Coulson framed the statute as a means to prevent deaths and injuries.[206] The statute passed the Illinois House of Representatives by a vote of 108-3.[207] In the Senate, Senator Schoenberg appealed to those "interested in child safety" to obtain votes for the bill, describing how the toy easily wraps around a child's neck and noting that the liquid inside the toy is flammable.[208] The Bill passed the Illinois Senate with no

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199. *Id.*
200. *Id.* at 124 (statement of Sen. Knuppel).
201. *Id.* (statement of Sen. Rock)
202. 720 ILL. COMP. STAT. 5/12-21.7 (2006).
203. *Id.*
204. *Id.*
205. *See, e.g.*, Dangers of Water Yo-Yo's, http://www.dangersofwateryoyos.com (providing an example of this public outcry) (last visited Mar. 28, 2008).
206. Transcript of Ill. H.R. Debate, 94th Gen. Assembly, at 56 (May 5, 2005) (statement of Rep. Coulson), *available at* http://ilga.gov/house/transcripts/htrans94/09400047.pdf.
207. *Id.*
208. Transcript of Ill. S. Debate, 94th Gen. Assembly (Apr. 13, 2005) (statement of Sen. Schoenberg), *available at*, http://ilga.gov/senate/transcripts/

opposition.[209]

The CLEAR Commission decided to recommend that the statute be moved from the Criminal Code into Chapter 815, Business Transactions, but did not recommend its repeal. There are no other statutes in the Criminal Code that criminalize behavior with regard to children's toys, let alone specific toys. The CLEAR Commission's decision to move that statute outside of the Criminal Code was a step in the right direction, but did not go far enough.

In 1986, the legislature enacted the Video Sales and Movie Rental Act.[210] Under that Act, it is a crime in Illinois to sell or rent at retail a video movie without an official rating clearly displayed on the outside.[211] A violation of the statute is punishable by up to thirty days imprisonment, a fine of up to $1,500, or both.[212] Transcripts from the General Assembly proceedings reveal no debate on the Act.[213] The Act is yet another law that has existed for many years but never has been enforced.[214] Despite that, the CLEAR Commission recommended retaining the Act in the Criminal Offenses chapter.[215] The Act should be repealed.

Under the Illinois Abandoned Refrigerator Act, a person can be imprisoned for thirty days if he or she discards a refrigerator with an attached door in an area accessible to children.[216] An

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strans94/09400029.pdf.

209. *Id.* The votes cast for the Bill were 55 Yeas and 0 Nays. *Id.*

210. 720 ILL. COMP. STAT. 395/3 (2006).

211. *Id.* There is an exception to the law if the video movie has not been given an official rating. *Id.*

212. 730 ILL. COMP. STAT. 5/5-8-3 (2006); 730 ILL. COMP. STAT. 5/5-9-1(a)(3) (2006).

213. Legislators debated this Bill in the 84th General Assembly (1985-86). A review of the Senate and House of Representative Transcripts for House Bill 1270 showed no debate.

214. No case law exists discussing any reported enforcement of this law.

215. The Commission recommended that the Act be transferred into a miscellaneous offenses article. *See* CLEAR Commission, *supra* note 12, at 101.

216. 720 ILL. COMP. STAT. 505/1 (2006). The Abandoned Refrigerator Act criminalizes abandoning or discarding a refrigerator, icebox, or ice chest that has the capacity of at least one and one-half cubic feet in any place accessible to children, if the appliance has an attached lid or door that can be fastened. *Id.* Illinois is not the only state to punish that behavior; several other states, including Florida, Ohio, and Pennsylvania enacted similar laws in the 1950s. FLA. STAT. § 823.07 (2006); OHIO REV. CODE ANN. § 3767.29 (2006); 18 PA. CONS. STAT. § 6502 (2006). Some states have more expansive statutes prohibiting one from discarding any airtight container that meets certain criteria. *See* MO. REV. STAT. § 577.100 (LexisNexis 2007); N.Y. PENAL LAW § 270.10 (2000); OHIO REV. CODE ANN. § 3767.29.

owner or lessee of the property who knowingly permits that behavior can be penalized as well under the Act.[217] Legislators apparently designed that law to protect children from suffocating by climbing inside a discarded refrigerator (but not a washer, dishwasher or other appliance) and closing the door.[218] Although the Act went into effect in 1953, there is no recorded case law involving the statute, and the CLEAR Commission found no evidence that anyone has ever been prosecuted for violating it.[219]

While it makes sense to protect children from danger, the restriction of the statute to refrigerators is curiously narrow and imposing criminal sanction in this context seems severe. The CLEAR Commission did not consider repealing the Act; rather it expanded the law to include punishment for the improper disposal of "other airtight or semi-airtight containers."[220] The Commission should have recommended that the legislature repeal that never-before enforced Act.

The statutes discussed above are just a few examples of criminal laws that punish behavior better regulated through civil law, namely consumer protection statutes. There are more. For example, in Illinois, a person can face criminal charges for not installing the proper wattage light bulbs within a certain distance from an entryway on a multi-unit building,[221] for not including the price of tax in a gasoline advertisement,[222] or for using a trapeze or

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217. 720 ILL. COMP. STAT. 505/1 (2006).

218. No legislative transcripts discussing the debate of this law exist because legislative transcripts containing debate and discussion of laws passed in the House and Senate first became available for the 77th General Assembly (1971-72).

219. A search of Illinois periodicals and internet sources confirmed this conclusion.

220. The CLEAR Commission recommended the transfer of the statute into the same article as other nuisance provisions. CLEAR Commission, *supra* note 12, at 87. The CLEAR Commission also recommended the addition of the mental state "knowingly" to the statute, requiring that the offender knowingly discard the appliance in a place accessible to children. *Id.*

221. 720 ILL. COMP. STAT. 655/1 (2006). The Outdoor Lighting Installation Act requires the owner of a multiple dwelling to install and maintain lights in the entry way. *Id.* The Act requires certain wattage bulbs and a certain number of lights depending on the frontage of the building, and requires that the lights be kept on from sunset to sunrise. *Id.* A violation of that act is punishable by no more than thirty days imprisonment, a fine of up to $1500, or both. *Id.* 655/3. The CLEAR Commission recommended retaining that act within the Criminal Offenses Chapter; that mental states be added; and that it be transferred to the Public Nuisance Offenses Article. CLEAR Commission, *supra* note 12, at 87.

222. 720 ILL. COMP. STAT. 305/1 (2006). The Gasoline Price Advertising Act criminalizes advertising the price of gas upon any sign unless it includes all

tightrope without a safety net.[223] Neither the Legislature nor the public envisions prisons full of refrigerator disposers, yo-yo ball purveyors, video salespersons, and circus performers. As these examples demonstrate, the Criminal Code has been cluttered with laws criminalizing inherently non-criminal behavior for years. While many of these statutes seek to protect public safety, that goal can be achieved through the civil law — a criminal code should be reserved for the most serious offenses that warrant criminal sanction.[224]

While the CLEAR Commission could have gone further by recommending the repeal of these and other "flavor of the month" crimes, that would have been only part of the solution to the proliferation of crimes du jour. Legislators must be part of the solution as well. Legislators should scrutinize proposed criminal laws and determine whether the conduct at issue truly should be subject to criminal sanction, whether it is already prohibited under existing statutes, and whether consumer and public safety would be better protected through consumer product regulation. Legislators must be able to see past political expediency and reserve the Criminal Code for sanctioning conduct that truly endangers the public and is deserving of criminal sanction. Although the CLEAR Commission failed to provide a perfectly clean slate from which the legislature may work, its work can

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taxes and corresponds to the price appearing on the pump. *Id.* The identity of the product must also be included with the accurate price. *Id.* A violation of that statute is a petty offense, the punishment for which can include a fine of up to $1000. *Id.* 305/2. The statute's legislative history reveals that this law was passed to prevent gas stations from advertising the price of gas then putting the amount of tax in small print, and to prevent discrepancies between the price advertised on a sign and the price otherwise paid. Transcript of Ill. S. Debate, 80th Gen. Assembly, at 13 (June 28, 1977) (statement of Sen. Berman), *available at* http://ilga.gov/senate/transcripts/strans80/ST062877.pdf. The CLEAR Commission recommended that this statute be moved from the Criminal Offenses Chapter to the Business Transactions Chapter in the Illinois Compiled Statutes. CLEAR Commission, *supra* note 12, at 106.

223. 720 ILL. COMP. STAT. 530/1 (2006). The Aerial Exhibitors Safety Act prohibits the private exercise or public performance of certain aerial activities without a safety net if the performer is at risk to fall from a height of over twenty feet. *Id.* In addition to punishing the performer, the Act also provides for sanctions against the owner, agent, lessee, or other person in control of the operation. *Id.* 530/2. A violation of the Act is punishable by imprisonment for up to one year, a fine of up to $2,500, or both. *Id.* 530/3. The CLEAR Commission recommended that this law be retained in the Criminal Code, but transferred to the article on nuisance. CLEAR Commission, *supra* note 12, at 100.

224. Luna, *supra* note 5, at 1.

serve as a beginning for reform in this area.

V. CONCLUSION

A criminal code should be logical, easy to understand, and provide clear notice of the law. The CLEAR Commission was formed to ensure that the Illinois Criminal Code would do just that. While the CLEAR Commission took several steps in the right direction, the changes the Commission recommended could have reached farther and have brought more significant changes to the Illinois Criminal Code. A criminal code should be up to date with the times. A criminal code should not contain statutes that are never enforced, or statutes that have been held, or likely will be held, unconstitutional. A criminal code should be limited to the most serious offenses that society needs to deter. The CLEAR Commission failed to fully implement those ideals.

Archaic laws such as adultery and fornication should be removed from the Criminal Code. Statutes regulating the private, consensual, non-commercial sexual behavior between adults are likely unconstitutional and seek to impose criminal sanctions to enforce notions of morality. The CLEAR Commission should have stood its ground and recommended repeal of the adultery and fornication statutes in Illinois. Conversely, if Commissioners determined the repeal of those statutes would jeopardize the Criminal Code Bill as a whole, the Commission should have adopted separate recommendations to repeal those two statutes. The retention of archaic and unenforced statutes in a criminal code serves no purpose but to clutter the Code and lead to confusion.

Likewise, laws that infringe on free speech and cannot constitutionally be enforced do not belong in a criminal code. The CLEAR Commission should have recommended the repeal of the Flag Desecration Act, the Draft Card Mutilation Act, the video game laws and the disorderly conduct at a funeral service law. As discussed above, those statutes are rarely prosecuted and infringe on free speech.

Finally, the Code should have been scrubbed clean of "crimes du jour" that were created in response to specific events not likely to recur, are never prosecuted, and address conduct better regulated through consumer protection laws. Since the last revision of the Illinois Criminal Code in 1961, the legislature has passed several statutes regulating behavior that would better be the subject of consumer product regulation.[225] The regulation of

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225. *See supra* notes 198-224 and accompanying text (discussing criminal

dangerous toys, unrated movies or the sale of maps does not belong in the Criminal Code and leads to confusion as to the purpose of a criminal code. The CLEAR Commission should have recommended the repeal of more of those statutes. A criminal code should be aimed at punishing the most serious and reprehensible conduct that society seeks to deter and the behavior prohibited by those statutes is better regulated elsewhere.

The CLEAR Commission undertook a tough task to update the entire Criminal Code in Illinois and made many recommendations that will result in significant improvements to the Illinois Criminal Code. The work of the CLEAR Commission, spanning over two years, should be applauded. It is a significant step in the process of updating and clarifying the Illinois Criminal Code, but the Commission should have gone farther.

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statutes that regulate behavior, which would better be left solely controlled by consumer product regulation); *see also* Robinson, *supra* note 6, at 634-35 (providing a general discussion on "legislative hyperactivity").